

**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.,

9318

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.

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO
COMPEL PRODUCTION OF DOCUMENTS AND ANSWERS TO
INTERROGATORIES**

Respondents, Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, and Daniel B. Mowrey, Ph.D (collectively "Respondents")¹, submit this Opposition to Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories ("Motion") and in support state as follows:

¹ Respondent Mitchell Friedlander is not a party to this Opposition because Complaint Counsel's Motion was expressly not directed against him.

I. Introduction

Over the past five months, Basic Research, L.L.C. and Ban, L.L.C., have produced over fifty thousand pages of documents in response to Complaint Counsel's discovery requests. These documents are in addition to thousands of documents previously produced in response to the FTC's pre-complaint civil investigation demands ("CID"). The Respondents' ability to produce further documents has reached an endpoint. Except for documents that are being withheld pursuant to an asserted privilege or timely-filed objections, Respondents have no further documents to produce in response to Complaint Counsel's First Request for Productions. A comprehensive search has been done and complete compliance has occurred. Simply put, there are no additional documents to produce that respond to the Request for Production.

Despite this, Complaint Counsel remain unsatisfied and have moved to compel production of documents to their First Request for Production and answers to their First Set of Interrogatories. In doing so at this late date, Complaint Counsel essentially ask this Court to ignore the history of these discovery requests. That history includes extensive discussions and negotiations concerning both discovery requests, including agreements for extensions that have benefited both parties and agreed-upon procedures for handling production and objections. Most significantly, that history establishes that the parties reached impasse over two months ago on the issues now raised in the Motion to Compel. In filing this Motion, Complaint Counsel ignore the scheduling order of this Court on August 11, 2004 that requires that "[a]ny motion to compel responses to discovery requests shall be filed within 5 days of impasse if the parties are negotiating on good faith and are not able to resolve their dispute." (Order, Ex. A).

Indeed, Complaint Counsel and Respondents exchanged letters on September 22, 2004 (Ex. B) and October 8, 2004 (Ex. C)². In the period between those letters, Complaint Counsel and Respondents endeavored to reach an agreement on specific discovery issues. Complaint Counsel memorialized their disputes with Respondents' discovery position in their September 22nd letter, which was followed by hours of discussions between counsel as to the parties' respective positions. Respondents' counsel's letter of October 8th memorialized all areas of agreement and those areas in which no agreement could be reached. Respondents stood on their remaining objections and the issues were ripe for the Court's determination. Contrary to Complaint Counsel's attempt to ignore this reality, there is absolutely no ambiguity that an impasse as to the discovery issues existed as of the October 8th letter. In fact, the letters between counsel reflect that the parties reached impasse on October 8, 2004 on the identical issues presented in the Motion to Compel and that the instant Motion was filed long past the date established by this Court and therefore is barred.

Nevertheless, Complaint Counsel now files this late Motion to Compel. In forty pages of deliberate distortions of the agreements, discussions and dealings between Complaint Counsel and counsel for the Respondents, Complaint Counsel insists that this Court should enter an Order compelling the production of documents pursuant to their First Request for Production and answers to their First Set of Interrogatories.

But stubborn facts stand in the way of the relief Complaint Counsel seeks. Put simply, Respondents cannot produce documents that they do not possess. Nor should

² While the October 8th letter is signed by Jeff Feldman, counsel for Respondents Mowrey and Gay were also participants in the negotiations. The letter reflected their positions as well.

Complaint Counsel be allowed to rewrite history and raise these issues long after they reached impasse and have passed from ripeness to rot.

II. Respondents have made Herculean Efforts to Produce Responsive Documents as Promptly as Practicable and Have Produced All Responsive Documents At This Juncture.

On June 25, 2004 Complaint Counsel issued its First Request for Production (Exhibit D). As is standard practice, Respondents raised appropriate objections to the discovery requests but began assembling documents for production (Exhibit E). Over the past several months, Respondents Basic Research, L.L.C. and Ban, L.L.C. have produced tens of thousands of documents on an agreed-to staggered schedule. Despite this express understanding that Respondents' productions would be done on a rolling basis, Complaint Counsel now feign ignorance of this agreement and falsely paint Respondents as acting in dilatory manner when, in reality, the staggered production of thousands of documents rendered the productions and review thereof manageable and reasonable.

Indeed, Respondents possessed extensive documents responsive to the Request of Complaint Counsel. Early on in this litigation, Counsel for all parties recognized this, and in July and August 2004 entered into a series of discussions concerning how to structure the production of documents and responses to discovery. Because the discovery served with the Complaint was extensive, Respondents and Complaint Counsel agreed to an extension, which this Court entered on July 16, 2004. Responses to the Request for Production were served on August 3rd, 2004 and production commenced in August and continued into September. Responses to the Interrogatories were served on August 16, 2004, pursuant to an additional agreed extension.

In addition to these extensions, Complaint Counsel and Respondents discussed the logistics of the discovery, to which Respondents followed up with correspondence addressing many of the parties' concerns on August 27th, 2004 (Ex. F). First and foremost, the litigants agreed that there would be a rolling production of documents whereby documents would be produced as they were assembled and reviewed. Complaint Counsel themselves took the lead role in this process and identified which documents they wanted first and which were of lower priority. Ironically, the rolling production was proposed by Complaint Counsel themselves, notwithstanding their present position on the issue in their Motion. On August 10, 2004, product samples were provided to Complaint Counsel. Later, in mid-August and then in early September, Respondents produced more than an additional 40,000 documents. At no time through this process of the rolling production did Complaint Counsel complain that this was unacceptable, since indeed it reflected the parties' agreement.

While Complaint Counsel's "understanding" of this production now has changed, at the time they understood that the first production represented an initial production and that additional responsive documents would be forthcoming. Those subsequent productions took place over the following weeks and the production was completed on November 18 when the "bin documents", discussed below, maintained by Respondents were produced. During every step of this process, Complaint Counsel were well aware of the steps that were being taken. While Complaint Counsel now charges that Respondents were acting in a dilatory fashion, that is merely an after the fact revision in order to justify their own tardiness in filing this Motion to Compel. The fact is that during these

transactions, Complaint Counsel fully understood and agreed to the steps Respondent took.

On August 23, 2004 during a teleconference and subsequently in the August 27th letter (Ex. F), the parties began to consider and address the production of the bin documents, a history which Complaint Counsel now rewrites. Basic Research made clear to Complaint Counsel that it possessed thousands of documents in a series of garbage dumpster sized bins at Basic Research's headquarters in Utah. The bins were maintained pursuant to the CID requests by FTC attorney Walter Gross. The inspection of the bin document was a major undertaking, which posed a tremendous financial and logistic burden, requiring hundreds of manpower hours. Basis Research objected to bearing the burden and expense of this inspection, given that the FTC's retention request was broader than the Complaint that was ultimately brought. Thus, to cull from the bins only those documents that were responsive to the pending discovery request entailed far more work than that which would have otherwise been required had the retention request been more narrowly tailored. Basic Research suggested to the FTC that the parties spilt the cost for hiring contract legal staff to conduct the inspection of the bins. Complaint Counsel considered this proposal for a period of time, but ultimately rejected it and suggested that the inspection be conducted by FTC staff with the understanding that non-responsive and privileged documents would be returned to the Respondents. This protocol was clearly unacceptable and left the Respondents no alternative but to bear the burden and expense of the inspection themselves. Respondents advised Complaint Counsel that they were commencing the inspection of the bins at their own cost, but that responsive documents could not be produced until late October at the earliest. Complaint

Counsel raised no objection to this. However, because of the enormity of the task, the documents were not ready until Nov 18, and again Complaint Counsel did not object.

As explained above, by mid-September Complaint Counsel was already addressing the responses, objections and the production made by Respondents. Complaint Counsel by letter dated September 22, 2004 (Ex. B) raised the very issues now raised in the Motion to Compel. Respondents addressed Complaint Counsel's issues by letter dated October 8, 2004 and the parties' disputes over the Respondents' responses and objections to discovery were framed and finalized. Accordingly, Complaint Counsel's current attempt to paint a picture of Respondents' delay and references to the bin documents are a red herring. To cut through all the rhetoric, Complaint Counsel delayed in filing this motion, which should have been filed by October 13, 2004 and instead point fingers at Respondents for Complaint Counsel's own delay. Ultimately and most importantly, Respondents have produced all responsive documents responsive during the agreed-upon schedule and in a manner that was, at least prior to the their Motion to Compel, acceptable to Complaint Counsel.

II. Respondent's Search has Exceeded the Requirements of Applicable Law

Complaint Counsel has mischaracterized Respondents search as limited and have suggested, despite the volume of documents that have been produced, that Respondents have not been sufficiently thorough in looking for responsive documents. The standards governing a litigant's obligation to seek responsive documents are well established. A recipient of a production request has a duty to undertake a comprehensive search for

documents and produce all documents in its possession, custody and control 16 C.F.R. §3.37.

Complaint Counsel attempt to make much of the fact that Respondents' Objections asserted the limits of their obligations, i.e. that they would carry out a reasonable search for documents in all areas where responsive documents were likely to be found. On this issue, the Objections cited by Complaint Counsel and filed by Respondents prior to resolution of the bin document issue are no longer applicable and are irrelevant. Respondents have conducted a comprehensive search and have searched every location where documents might be stored. What responsive, non-privileged and non-objectionable documents exist in the possession, custody and control of Respondents, they have been produced to Complaint Counsel. See Affidavit of Carla Fobbs (Exhibit H). Complaint Counsel cannot demand production of documents that do not exist. Accordingly, the motion to compel should be denied because all documents have been produced.

III. Complaint Counsel's Assertion Regarding the Resubmission of Documents is Misleading and Ignores the Reality of Respondents' Efforts to Produce Over Fifty Thousand Documents.

Complaint Counsel willfully ignores the history of production in its argument concerning the resubmission of documents. Because Complaint Counsel's Request for Production encompassed documents the FTC had initially received pursuant to the FTC's pre-complaint CID requests, some duplication naturally and predictably occurred. Complaint Counsel should have anticipated that it would have received redundant copies of documents when it drafted requests that repeated categories in their CID requests. Yet they now complain about it and insinuate improper purposes. Complaint Counsel bury in

their footnote 5 the fact that Respondents were permitted, but not required to produce previously produced documents. (See Motion at 6, n.5) Although Complaint Counsel phrase this in the negative – “Complaint Counsel advised Respondents that they **were not required** to resubmit documents previously produced” [emphasis added]—it is clear that Complaint Counsel did not require nor request that Respondents omit previously produced material. Had they done so, Respondents most assuredly would have objected, as this procedure would have entailed significant additional work. It would have been impractical, expensive and time consuming for Respondents to have rechecked their production against previously produced documents to ensure that no documents were produced more than once. That would have further delayed the production as the parties outlined. If Complaint Counsel had any legitimate concerns with the approach that Respondents adopted concerning duplicate production, they could have and should have raised the issues in a timely fashion.

IV. The Motion is Untimely.

Not only is Complaint Counsel’s Motion baseless because Respondents have produced all responsive documents, but the Motion is over two months too late under the Court’s Scheduling Order. Every issue concerning the First Request for Production and First Set of Interrogatories, which Complaint Counsel discusses in its Motion to Compel, was extensively briefed in a letter from Complaint Counsel to Respondents’ counsel over three months ago on September 22, 2004. In that letter, Complaint Counsel requested the opportunity to meet and confer with Respondents’ counsel to resolve the issues “without the need for Complaint Counsel to seek judicial intervention.” Those issues were the subject of intense and protracted discussions over the following two weeks most

particularly during a several hours of phone conversations on September 30 and October 1st between counsel. The purpose of that meeting, as threatened in Complaint Counsel's letter, was to ripen the issues related to Respondents discovery responses for purposes of filing a Motion to Compel.

This Court's Scheduling Order provides in pertinent part that where parties reach impasse, a Motion to Compel discovery must be filed within five days of the impasse. Scheduling Order, August 14, 2004 paragraph 5. An Administrative Law Judge has the power to enforce its Scheduling Order. *In the Matter of Kellogg*, 86 F.T.C. 650 (Sept. 16, 1975) (noting that an ALJ possesses broad power controlling an adjudicative proceeding). In enforcing that power, a Court may refuse to consider untimely Motions to Compel. *Philadelphia Nat. Bank v. Dow Chem. Corp.*, 106 F.R.D. 342 (D.C.Pa. 1984) (rejecting notion that a party may alter the time frame for considering a motion to compel by merely repeating that no impasse has been reached); *cf. Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456 (D.Kan. 1999) (in observing that the parties had not engaged in meaningful negotiations over discovery, the court observed that had they done so, the issues raised in a motion to compel would have been ripe). To the extent that a party in an Administrative Proceeding believes it needs an extension of time within which to file a Motion to Compel discovery, Commission Rule of Practice §3.21 also provides that an Administrative Law Judge may grant that relief. 16 C.F.R. §3.21.

VI. Complaint Counsel's Motion to Compel Seeks the Identical Relief Sought Over Two Months Ago.

Complaint Counsel's instant Motion expressly challenges the adequacy of Respondents responses and Objections to Specification 2, 3, 6, 7, and 11 and implicitly raises Specification 5. To conclude that these issues were ripe months ago, one need only review Complaint Counsel's September 22nd letter. On September 22nd, Complaint Counsel wrote with the concern regarding Specification 2 that "[y]our clients pledged to produce responsive documents. Respondents did submit print ads and point-of-purchase promotional materials, but they clearly did not produce *all* final or draft promotional materials." The letter continued by mentioning final TV advertisements, radio advertisements, telephone marketing materials, final internet material, draft advertisements and miscellaneous category. Three months later, in the Motion to Compel, Complaint Counsel raise the same laundry list of items and again argue that "[r]espondents pledged to produce responsive documents." *Motion to Compel Production of Documentary Materials and Answers to Interrogatories*, page 9. The same applies with regard to Specifications 3, 6, 7 and 11. Specification 5 is not expressly raised in the Motion but the contents of it are. The simple fact is that no new issue has been raised by the December 6th Motion to Compel that was not raised by the September 22nd letter and definitively addressed in the October 8th letter.

The October 8th letter represented the conclusion of negotiations on the Objections, Responses and Productions of the Respondents in answer to Complaint Counsels first round of discovery. Nothing has changed with respect to the issues Complaint Counsel has now raised. In the instant Motion, Complaint Counsel have asked for final television and radio ads. The October 8th letter reflects that DVDs of those materials were being produced to the FTC on that day. If Complaint Counsel

believed that the production was inadequate and called for a Motion to Compel, no one could seriously contend that the issue was not ripe at that time. The Motion to Compel also seeks Internet content concerning the Challenged Products, another issue raised in the September and October letters. Respondents confirmed that they were in possession of no responsive non-privileged, non-objectionable documents. Again, as far as negotiations were concerned, Complaint Counsel were aware of Respondents' position as of October 8th. Any Motion to Compel should have been filed then. The same is true with respect to the issues raised concerning Respondent's emails raised in the Motion and the September 22nd letter. The October 8th letter confirmed a search and that no others were located. As to draft advertisements, Respondents confirmed that if any more existed, they were in the bins and would be produced. Basic Research abided by that agreement. Again, if Complaint Counsel believed that Respondents' position entitled them to a Motion to Compel, they should have filed when the Objections were made. Most notably, Complaint Counsel's Motion virtually concedes impasse when addressing Specification 11. While Respondents offered a narrower category of production, Complaint Counsel responded "[h]owever, we did not agree to limit our *Document Request* to these documents". (See Motion at 25). Negotiations were complete. Complaint Counsel should have moved then.

Complaint Counsel has also moved to compel production of documents responsive to Specification 6, documents that Respondents do not possess. The materials consist of data from a pre-litigation copy test concerning Dermalin conducted by Mr. Popper. In an effort to distract this Court from their failure to timely raise this issue, Complaint Counsel engages in an elaborate and wholly unnecessary discourse concerning

Mr. Popper's current status as opposed to his status at the time any data may have been generated³. The real issue, is clearly stated in Complaint Counsel's September 22nd letter, is that Complaint Counsel believed Respondents were withholding the data. Whether Complaint Counsel has some other recourse to seek that data from Mr. Popper is irrelevant to this Motion. To the extent that the Respondents' production or Objections purportedly failed to satisfy Complaint Counsel as apparently they had in September, they should have moved to compel in accordance with the Scheduling Order when impasse was reached in October.

Not only, however, has Complaint Counsel filed its Motion to Compel discovery long after they should have, it is clear that Complaint Counsel under the guise of their Motion to Compel, are seeking written discovery long after the written discovery cut-off date of November 1, 2004 in this case. Scheduling Order August 14, 2004. Complaint Counsel has moved to compel production of all communications and emails with Respondents' endorsers. The specification, however, seeks only documents referring or relating to the endorsers. Similarly, now for the first time Complaint Counsel is asking for "streaming content" presumably, as above in an effort to justify their late filing. But more egregiously, at this late date, more than a month after the close of discovery, Complaint Counsel are attempting to expand the scope of the discovery previously served. And doing so under the guise of a Motion they should have filed two months ago.

V. Interrogatories

³ The first time Respondents received any of the underlying data was this week. Complaint Counsel did issue a subpoena to Ed Popper and Respondents are in the process of reviewing that material. This Subpoena and these issues should be the subject of a different motion.

Complaint Counsel have also moved to compel answers to certain Interrogatories which they contend were not properly answered. The Interrogatories were first served on June 25, 2004. (Exhibit D). Respondents provided responses and Objections on August 3, 2004 and supplemented later. But as above with the production of documents, Complaint Counsel ignore the fact that the issues were ripe for a Motion to Compel in October. Complaint Counsel first expressed concerns with the responses and Objections in letter dated September 2, 2004 (Exhibit G). Like the requests to produce, the responses and Objections were extensively negotiated. An impasse was reached on October 8th.

Their conduct in this area is even more transparent. Most egregiously, with respect to Interrogatory 2 Complaint Counsel failed to inform this Court in this Motion that Respondents in the October 8th letter itself provided the Supplemental Response they seek in this Motion to Compel. If that answer had failed to satisfy Complaint Counsel, the time to raise the issue was then and not eight weeks later. Similarly, Respondents did agree to Supplement their Response to Interrogatory 1 and did so. But they did so subject to the Objections they previously raised. Complaint Counsel have lost the opportunity to now challenge those objections by failing to move when impasse occurred.

Complaint Counsel are in an even worse position with respect to Interrogatory 6 which they raised by letter on September 2, 2004 three weeks prior to the September 22nd letter. In that letter, Complaint Counsel offered to revise the Interrogatory. When Respondents did not accept the revision and sat on their Objections, Complaint Counsel did nothing. The September 22nd letter again raises the issue. And again Complaint Counsel did nothing. Like Interrogatory 6, with respect to Interrogatory 9, Complaint

Counsel first raised the issue of Respondents' Objections and responses on September 2, 2004 and again three weeks later. And as before, when Respondents rested on their objections, Complaint Counsel took no further actions. By waiting nearly three months since these issues have been ripe, Complaint Counsel have lost the opportunity to raise those challenges now. In short, as with the Request for Production, nothing intervened to justify Complaint Counsel's failure to move when the issues were ripe.

VII. Conclusion

Virtually every discussion referred in complaint Counsel's 3.2.2(f) Statement presents the October 8th letter. In attempting to conjure an excuse for later filing, Complaint Counsel points to a series of post October 8th unilateral attempts on their part to resurrect these disputes for the sole and improper purpose of filing this belated Motion to Compel. See *Philadelphia Natl. Bank v. Dow Chem Co.* supra. A party cannot preclude impasse by unilaterally declaring it so. *Id.* When the parties reached impasse, they should have filed their Motion. Through delay they have waived the ability to do so now.

For two primary reasons, this Court should deny Complaint Counsel's Motion to Compel. First and foremost, Respondents have already produced all responsive documents to Complaint Counsel. There is nothing left to produce that is not privileged or not properly objected to. Second, Complaint Counsel have filed this Motion too late. Every issue Complaint Counsel has raised in their Motion was ripe in October. This Court's Scheduling Order required Complaint Counsel to move to compel 5 days after impasse was reached not, as they have done, two months later.

Respectfully submitted,

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USA, LLC, Nutrasport, LLC, Sövage
Dermalogic Laboratories, LLC and Ban,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 27th day of Nov, 2004 as follows:

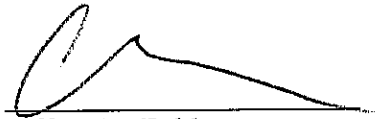
(1) One (1) original and two (2) copies by Federal Express to Donald S. Clark, Secretary, Federal Trade Commission, Room H-159, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

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

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

(4) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jeffrey D. Feldman', written over a horizontal line.

Jeffrey D. Feldman

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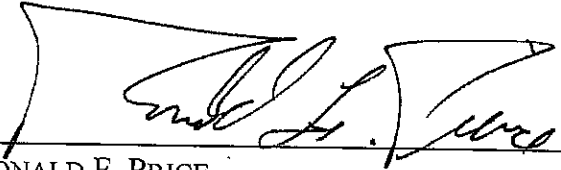
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USA, LLC, Nutrasport, LLC, Söavage
Dermalogic Laboratories, LLC and Ban,
LLC

DATED this 23rd day of December, 2004.

~~BURBIDGE & MITCHELL~~

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

Richard D. Burbidge
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Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; rrichardson@ftc.gov; lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

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

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

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

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

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

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 Dec 23rd, 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.


CHRISTOPHER P. DEMETRIADES

- November 29, 2004 - Respondents provide expert witness reports.
- December 13, 2004 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).
- January 10, 2005 - Deadline for all depositions.
- January 21, 2005 - Deadline for filing motions for summary decision.
- February 4, 2005 - Deadline for filing responses to motions for summary decision.
- February 8, 2005 - Parties exchange final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the testimony of each witness.

Parties serve courtesy copies on ALJ of their final proposed witness and exhibit lists and a brief summary of the testimony of each witness.
- February 15, 2005 - Parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
- February 22, 2005 - Deadline for filing motions *in limine* and motions to strike.
- February 28, 2005 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- March 11, 2005 - Parties file pretrial briefs, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citation and/or deposition citations. Conclusions of law shall be supported by legal authority.
- March 14, 2005 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.

- March 14, 2005 - Exchange proposed stipulations of law, facts, and authenticity.
- March 18, 2005 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.
- March 24, 2005 - Final prehearing conference to be held at 9:30 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.
- March 28, 2005 - Commencement of Hearing, to begin at 9:30 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

ADDITIONAL PROVISIONS

1. Pursuant to Rule 3.21(c)(2), extensions or modifications to these deadlines will be made only upon a showing of good cause.
2. Service of all papers filed with the Commission shall be made on opposing parties and two courtesy copies to the Administrative Law Judge by 5:00 p.m. on the designated date. Unless requested, the parties shall not serve courtesy copies on the ALJ of any papers (including discovery requests and responses) that are not required to be filed with the Office of the Secretary.
3. Service on the parties shall be by electronic mail (formatted in WordPerfect or Word) and shall be followed promptly by delivery of an original by hand, by overnight delivery service, or by U.S. mail, first class postage prepaid, to the following addresses:

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Pro se

4. All pleadings that cite to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

5. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off, that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 5 days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute.

6. Each party is limited to a total of 60 document requests, 60 interrogatories, and 60 requests for admissions, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Additional discovery may be permitted only for good cause upon application to and approval by the Administrative Law Judge. Responses and objections to document requests, interrogatories, and requests for admission shall be due within 15 days of service.

7. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition.

8. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. Counsel scheduling depositions shall immediately notify all other counsel that a deposition has been scheduled.

Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within five business days of receiving the documents.

9. The preliminary and final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause.

10. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by order of the Administrative Law Judge upon a showing of good cause.

11. At the time an expert is first listed as a witness by a party, the listing party will provide to the other party:

- (a) materials fully describing or identifying the background and qualifications of the expert, list of all publications, and all prior cases in which the expert has testified or has been deposed; and
- (b) transcripts of such testimony in the possession, custody or control of the listing party or the expert.

At the time an expert report is produced, the listing party will provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case.

Each expert report shall include the subject matter on which the expert is expected to testify and the substance of the facts and opinion to which the expert is expected to testify and a summary of the grounds of each opinion.

12. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the adjudicative hearing must comply with 16 C.F.R. § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel.

13. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

14. Fact witnesses shall not be allowed to provide expert opinions.

15. Properly admitted deposition testimony is part of the record and may not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court.

16. Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000) and must be supported by a declaration or affidavit by a person qualified to explain the nature of the documents.


17. The procedure for marking of exhibits referred to in the adjudicative proceeding shall be as follows: both parties shall number their exhibits with a single series of consecutive numbers. Complaint Counsel's exhibits shall bear the designation CX and Respondents' exhibits shall bear the designation RX. (For example, the first exhibit shall be marked CX 1 for Complaint Counsel.) When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number.

18. The parties shall provide one another, and the Administrative Law Judge, no later than 72 hours in advance, a schedule that identifies by day the party's best estimate of the witnesses to be called to testify during the upcoming week of the hearing. The parties further shall provide one another with copies of any demonstrative exhibits 24 hours before they are used with a witness.

19. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. Counsel will also be required to give *the originals* of exhibits to the court reporter, which the court reporter will keep.

ORDERED:

August 11, 2004


Stephen J. McGuire
Chief Administrative Law Judge





UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Joshua S. Millard
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September 22, 2004

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VIA EMAIL AND U.S. MAIL

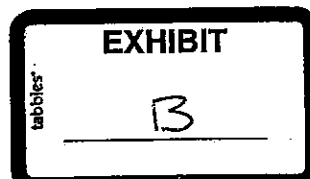
Re: *Basic Research et al.*, Docket No. 9318

Dear Gentlemen:

We have serious concerns with your clients' response to our *First Request for Production of Documentary Materials and Tangible Things* ("Document Requests"). We have identified many discrete categories (and, in some cases, titles) of relevant and responsive documents that Respondents have failed to produce in compliance with our *Document Requests* and the Commission's RULES OF PRACTICE. We hope to resolve these issues with your cooperation by the end of this month.

As you are aware, we served our *Document Requests* nearly three months ago, shortly after the commencement of this case, on June 25, 2004. As you know, it is our view that the *Requests* seek documents and other tangible things that are highly relevant and crucial to this matter. We have served no other requests for documents on your clients in this litigation to date.¹

¹ The staff of the Enforcement Division received documents from Basic Research LLC in response to *Civil Investigative Demands* in 2001 and again in April, 2002, and the company volunteered other documents in 2003. Some of these documents pertain to the allegations of the *Complaint*, but others do not. The most recent of the relevant documents produced in advance of this litigation are now many months old.



Although Complaint Counsel has extended your clients the courtesy of stipulating to multiple extensions of time to comply with the *Document Requests*, at this late date, it is still unclear whether Respondents have completed their response. We received product samples on or about August 9th, and seven boxes of documents on or about August 18th. When we initially raised questions about the scope of the production during our August 23rd teleconference, Mr. Feldman advised us, for the first time, that the production was not complete and that other boxes would be forthcoming. We received two boxes on September 9th. Last week, we asked Mr. Feldman whether more documents would be forthcoming, but we have received no response. Hence, it remains unclear whether Respondents have completed their response.

The staff has completed its initial review of documents that Respondents have produced to date in response to our June 25th *Document Request*. Although we received many consumer refund documents (over 5,000 pages submitted in lieu of answering our Interrogatory 10) and much previously-submitted substantiation (many thousands of pages that were resubmitted not once, but multiple times, despite our request that you not do so), at this point, it is clear that your clients have not fully complied with our *Document Requests*.

Respondents' document production quite literally leaves much to be desired. As discussed below, multiple categories of highly relevant and responsive documents either do not appear in the production, or appear to have been omitted. And we still await your privilege log.

I. Missing Final and Draft Promotional Materials

First, consider Specification 2, which sought production of "all promotional materials for the challenged products, whether in draft or final form." Your clients pledged to produce responsive documents. Respondents did submit print ads and point-of-purchase promotional materials, but they clearly did not produce *all* final or draft promotional materials.

Your clients have not provided the following materials in response to our *Document Requests*:

- A. Final television advertisements.** We have ample reason to believe that Respondents have marketed one or more of the challenged products via television, in multiple versions of 60 or 120-second television spots or in other television appearances. Respondents submitted no video materials whatsoever.² All final television advertisements should be produced.
- B. Final radio advertisements.** We have ample reason to believe that Respondents have marketed one or more of the challenged products via radio, either in short spots or in program-length radio commercials. Respondents submitted no audio materials whatsoever. Final radio or audio advertisements should be produced.
- C. Final telephone marketing materials.** We have ample reason to believe that Respondents have marketed and sold the challenged products to consumers via telephone or inbound telemarketing from your clients' business premises. Respondents submitted no telephone marketing materials. These materials should be produced.

² We are particularly baffled that your clients have failed to produce the direct response television commercials for Leptoprin that contributed to that product's gross sales in the tens of millions.

- D. Final Internet content.** We have ample reason to believe that Respondents have marketed the challenged products to consumers via Internet websites, email, and/or streaming online content. Respondents submitted no such materials. These materials should be produced.
- E. Draft advertisements.** We have ample reason to believe that Respondents' promotional materials went through a process of creation and review prior to dissemination, and were thereafter revised and re-released in some cases. Respondents produced no draft promotional materials, save for two or three pages of one draft radio advertisement. The absence of draft advertisements in the document production raises serious and disquieting questions concerning your clients' compliance with our previous instructions regarding the retention of documents.³ We request that you address this issue by immediately producing all drafts of promotional materials.
- F. Other examples.** All materials responsive to Specification 2 should be produced. We also specifically ask that your clients produce the following promotional materials that were omitted from, but referenced in, the small sample of emails produced: (1) "Leptoprin explained" attached to R41193; (2) Pedialean supplements fact sheet, R41271; (3) "Leptoprin original ingredients" and drafts thereof attached to R41312, R41467; (4) radio transcript referenced in R42645; (5) Leptoprin call prompts referenced in R42649; (5) Pedialean abstract referenced in R42637; and (6) variations of Leptroprin call-to-actions as referenced in R41156.⁴

II. Missing Materials Re: Final and Draft Promotional Materials

Next, consider Specification 3, which sought "all documents and communications referring or relating to draft or final promotional materials for the challenged products." As noted in our *Requests*, 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 in any draft or final promotional material(s)."

Respondents pledged to produce responsive documents, but they produced only a small sample of documents and communications relating to final promotional materials. Respondents produced almost no documents referring or relating to draft ads (other than a set of emails relating to gel ads in Mexico).

³ As you may recall, during the investigation leading up to this action, the staff corresponded with Respondents' counsel, Mr. Nagin, about your clients' obligation to retain documents relating to the investigation. In response to your clients' concerns, we provided instructions concerning the specific types of documents that your clients were required to retain. Before the commencement of this case, we strongly emphasized that your clients must not dispose of Marketing Department materials, including draft advertisements. (Copies of the correspondence between Mr. Nagin and Enforcement Division Associate Director Elaine D. Kolish are attached for your convenience.)

⁴ If you contend that these documents were not promotional materials, then they are documents or communications referring to promotional materials, or to the marketing of the challenged products in general, and are thus responsive to *Document Request Specifications* 3 and 6, discussed *infra*.

Your clients have not provided all of the following materials in response to our *Document Requests*:

- A. Relevant Emails and Communications.** We have reason to believe, based on the small sample of internal email produced, that Respondents extensively use the Microsoft Outlook program for business email. However, the emails produced to date are from a very limited time period, from August 4, 2003, through July 1, 2004. As you are aware, *all* of the challenged products were marketed before August 2003, in some instances, years before that date. All responsive emails and other communications before and after August 2003 should be produced.
- B. Emails and Communications from Respondents Gay and Friedlander.** The small sample of emails contains almost no emails from Respondents Gay and Friedlander. We have reason to believe that these persons have engaged in the marketing of the challenged products, and/or have overseen such marketing. All of their responsive emails and other communications should be produced.⁵ You should also produce all other documents referring or relating to these persons if they are otherwise responsive to Specification 2.
- C. Training Materials.** We have reason to believe, based on the small sample of emails already produced, that Respondents have internal training materials used to instruct telephone operators in marketing or selling the challenged products. All of these responsive documents and communications should be produced.
- D. Public Relations Communications.** We have reason to believe that Respondents have employed an outside public relations firm to communicate with the public regarding their promotional materials and challenged products. All of these responsive documents and communications should be produced.
- E. Other Examples.** All materials responsive to Specification 3 should be produced. We also specifically ask that your clients produce the following copies of promotional materials, which were referenced in the small sample of emails produced, but omitted from the document production: (1) the TV reports referenced in R42347; (2) the production schedule attached or referenced in R0041627; (3) Pedialean reports referenced in R0040953; (4) reports on traffic referenced in R0040918.⁶

III. Missing Materials Re: Respondents' Duties, Responsibilities, and Work

- Complaint Counsel believe that your clients have not produced documents responsive to Specification 5, particularly with respect to Respondents Gay and Friedlander. Specification 5 sought "[a]ll documents and communications referring or relating to the duties, responsibilities, and work performed by each of the Respondents with respect to the advertising, marketing, promotion, and sale of

⁵ Additionally, based on the small sample of emails produced, Respondent Gay appears to have employed the "task" feature of Microsoft Outlook to communicate with employees. All responsive communications using this feature should also be produced.

⁶ These examples are for illustrative purposes. The RULES do not contemplate putting Complaint Counsel in the position of having to repeatedly point Respondents to their own documents in order to obtain those documents through discovery. We seek production of all responsive documents.

each of the challenged products." Your clients initially pledged to produce responsive documents, but Mr. Feldman's August 27th letter suggested that there were no documents responsive to Specification 5. Complaint Counsel believes that Respondents have maintained documents concerning their respective duties, responsibilities, and work with respect to the advertising and sale of the challenged products in the ordinary course of business. You should produce all responsive documents. If you state that you have produced documents responsive to Specification 5, please identify the documents by Bates number.

IV. Missing Marketing Materials

Additionally, we believe that your clients have failed to comply with Specification 6, which sought "all documents and communications referring or relating to the marketing of each of the challenged products." As noted in the *Document Requests*, 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 copy tests, marketing or consumer surveys and reports, penetration tests, target audiences, recall tests, audience reaction tests, communications tests, consumer perception of any promotional materials for any of the challenged products."

Your clients pledged to produce documents responsive to Specification 6, but we have been unable to locate them in the document production. If you state that you have produced documents responsive to this Specification, please identify the responsive documents by Bates number.

We have reason to believe that Respondents prepared marketing plans, reports, and forecasts in connection with the marketing of the challenged products. Examples here include (1) the forecast referenced in R42680; and (2) the Leptoprin forecast binder referenced in R41784. We are also aware that Respondents have engaged in copy testing. All documents and communications responsive to Specification 6 should be produced.

V. Missing Materials Re: Product Endorsers and Testimonialists

Respondents have not fully complied with Specification 7, which sought "all documents and communications referring or relating to persons who are depicted, named, or quoted in promotional materials for each of the challenged products." As noted in the *Document Requests*, this request "includes but is not limited to documents and communications referencing endorsers and testimonialists and documents identifying the contact information for all persons depicted, named, or quoted in those promotional materials."

Your clients pledged to produce documents responsive to Specification 7, but Respondents did not produce documents and communications referring or relating to all of the endorsers depicted, named, or quoted in promotional materials. We have previously corresponded with you concerning Respondent Mowrey's objections, to clarify that he need produce only those documents referring or relating to his participation or appearance in promotional materials for the challenged products. You should produce all documents responsive to Specification 7. If you state that you have produced all documents responsive to this Specification, please identify the responsive documents by Bates number.

VI. Missing Materials Re: Complaints

Respondents have not fully complied with Specification 8, which sought "all documents and communications referring or relating to complaints or investigations of any of the challenged products or

their promotional materials." As noted in the *Document Requests*, this request "includes but is not limited to documents and communications relating to lawsuits, demand letters, refund requests, warranty or guarantee claims, and complaints or inquiries by local, state, or federal regulators . . . or other persons (including but not limited to consumers, competitors, and entities such as the Better Business Bureau or the National Advertising Division)."

Your clients pledged to produce documents responsive to Specification 8, but we have reason to believe that Respondents did not produce all consumer complaints, particularly those relating to promotional materials for the challenged products. Respondents also redacted last names and contact information from many consumer complaints, contrary to our express instructions regarding redactions. You should produce all documents responsive to Specification 8 (including unredacted versions of previously-submitted documents), or state that you have already done so.

VII. Missing Corporate Documents

Respondents have not complied with Specification 11, which sought "all documents relating to the corporate structure of each company for which any individual Respondent is an officer, director or significant shareholder." As noted in the *Document Requests*, this request included, among other things, articles of incorporation, documents showing the form of organization for each Corporate Respondent and all subsidiaries and affiliates, organizational charts, and documents describing the duties, responsibilities and authority of all Respondents' officers, managers, directors, and supervisors.

Your clients pledged to produce a narrower category of materials—company formation documents, by-laws, and annual reports and filings limited to documents that pertain to the company structure of Corporate Respondents, not their affiliates,⁷ that were created on or after January 1, 2000, and are located during your limited search for documents. We also recall that Respondent Gay had not taken a definite position with respect to this Specification. However, we are unable to verify that your clients produced any documents at all in response to Specification 11. You should produce all responsive documents. If you state that you have produced documents responsive to Specification 11, please identify the responsive documents by Bates number.

VII. Other Issues with Your Clients' Response to the *Document Requests*

Complaint Counsel has other serious issues with your clients' response to Complaint Counsel's *Document Request*. We hope to quickly resolve this issues with your assistance.

A. First, Respondents have yet to produce a privilege log, or even a date on which a privilege log might be produced. We were surprised at Mr. Feldman's early assertion that there would be no privilege log accompanying your initial production, which included print ads and substantiation. Your *Initial Disclosures* indicated that Mr. Nagin was responsible for reviewing product substantiation, and that another attorney, Mr. Swallow, was responsible for reviewing ad copy. The *Initial Disclosures* also

⁷ If your clients take the position that they have produced all responsive documents in response to our *Document Requests*, and their other responsive documents lie within the sole possession, custody, or control of Respondents' affiliates or other business entities related to them, then their refusal to provide documents and information relating to those affiliates in response to Specification 11 may well be impeding our search for relevant evidence.

identified other counsel and law firms. Accordingly, we expected that counsel had at least generated and retained *some* identifiable attorney work product in the course of reviewing substantiation and ad copy, and that you would identify privileged materials in compliance with RULE OF PRACTICE 3.38(A).

Complaint Counsel have repeatedly asked for Respondents' privilege log. Mr. Feldman has indicated that he will reconsider his earlier assertion. We sent *Document Requests* to your clients nearly three months ago—almost a full month in advance of Respondents' discovery requests.⁸ We ask that you produce your privilege log now.

□ B. Next, we are concerned that Respondents have arbitrarily limited the scope of their search for documents responsive to our *Document Requests*. Your clients raised a generic objection that our discovery requests were unduly burdensome. During our August 23rd teleconference, we asked you to explain the nature of this burden, or to state facts supporting the assertion that our discovery requests are unduly burdensome. You flatly refused to explain this statement then, and you have not done so since. We again insist that you explain the grounds for your objection, and conduct a complete search.

Your clients' responses state that their search for documents will be "limited to those locations and files where Respondents deem it reasonably likely that responsive documents will be found without undue burden, for documents responsive to those Specifications to which Respondents do not object." We ask your clients to reconsider their position. They cannot reasonably refuse to search the bins full of documents that they have generated and retained.⁹

As we discussed last month, we object that your clients are refusing to produce documents that are within their actual or constructive possession, custody, or control. If you are aware of any non-privileged, responsive documents at Respondents' business premises that you have not produced, we demand that you inform us of that fact immediately and explain why the documents have not been produced.

□ C. Next, we again reiterate our request that Respondents comply with Instruction 5 of our *Document Request*, which stated as follows: "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." During our August 23rd teleconference, Mr. Feldman initially stated that Respondents would *not* identify from whose files their documents were produced. However, he advised us by letter on August 27th that Respondents will, in fact, comply with Instruction 5. The two boxes submitted on September 9th were not identified as to the producing party, as Mr. Feldman had promised in his letter. We are still waiting for your clients to comply with Instruction 5.

D. We note that with respect to Specification 12, your clients have declined to produce net sales figures for the challenged products. Respondents objected that net sales figures "have no

⁸ Although Complaint Counsel has had less time in which to work, we are working to compile a privilege log for Respondents as we have previously discussed.

⁹ As you will recall, we have offered to search Respondents' bins for responsive documents and negotiate a "claw-back" agreement to handle privileged materials.

relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter." We understand this objection to mean that Respondents are withholding net sales figures on the grounds that they are irrelevant to this action. If our understanding conflicts with yours, please advise us immediately so that we can discuss.

- E. Also, we ask that you confirm that you have completed your response to Specs 4 and 9.

VIII. Outstanding Issues with Your Clients' Responses to the *Interrogatories*

Several weeks ago, on September 2nd, my colleague Laureen Kapin sent you a letter addressing issues concerning Respondents' objections and responses to our *Interrogatories*. You will recall that Ms. Kapin sent this letter at Mr. Feldman's suggestion following our September 1st teleconference.¹⁰ You have not responded to her letter in the intervening three weeks.

A. One of the most important issues addressed in Ms. Kapin's September 2nd letter is the fact that Respondents failed to submit a complete response to Interrogatories 1 and 2. The first Interrogatory sought information with respect to Respondents' respective "duties, responsibilities, or work" on "promotional materials for each of the challenged products." Your answers did not specify the advertisements and the challenged products for which each listed person performed duties, responsibilities, or work. The second Interrogatory sought information about the "creation, development, evaluation, approval and manufacture of the challenged products." Your clients objected and referenced their answer to Interrogatory 1, which was unresponsive, as the first Interrogatory related primarily to advertising and substantiation, not the development of the challenged products themselves.

Your objections that these two Interrogatories seek irrelevant information, are vague or unduly burdensome, invade your rights of privacy, and so forth, are unpersuasive. Your clients have not fairly answered these Interrogatories. They should do so now.

B. Another important issue addressed in Ms. Kapin's letter relates to your clients' objections to Complaint Counsel's Interrogatories 5 and 6 and the incomplete response to our Interrogatory 9. We took the trouble to clarify Interrogatory 5, revise Interrogatory 6, and note the gap in the responses to Interrogatory 9, all in writing, at Mr. Feldman's request, after the September 1st teleconference. We request that your clients now answer these Interrogatories as we discussed.

Your clients have had several weeks to consider Ms. Kapin's September 2nd letter. We now request the courtesy of a response to that letter, and we ask that your clients finally and fully answer our *Interrogatories*.

IX. Other Outstanding Matters

As you are well aware, Complaint Counsel is still waiting for certain non-parties to produce subpoenaed "documents sufficient to show all compensation, distributions, payments, royalties, and all

¹⁰ A copy of Ms. Kapin's September 2nd letter is attached for your convenience. Please see that letter for a full discussion of pending issues with your clients' *Interrogatory* responses.

other benefits in any form that each of the Respondents has made to [them], or to others on [their] behalf, in connection with the formulation, development, manufacture, testing, advertising, marketing, promotion, or sale of each of the challenged products." The subpoena recipients we refer to are George Evan Bybee, Majestic Enterprises, Inc., Nathalie Chevreau, Michael Meade, D.G. Enterprises, Inc., Western Holdings, LLC, Winterhawk Enterprises, LLC, and Winterfox, LLC. We can demonstrate that each of these recipients has some ownership, control, or employment relationship to Respondents.

The Administrative Law Judge's *Order* on your *Motion to Quash* granted these eight subpoena recipients until August 28, 2004, to comply and produce the requested discovery. None of these entities has complied to date.

Mr. Feldman advised us in writing on August 27th that these subpoena recipients "will respond directly to Judge McGuire's order." He told us that he expected we "will soon receive correspondence from counsel engaged to represent these parties." We believe that Mr. Feldman's statements were based on the statements of his clients, who own, control, or employ (either directly or indirectly) these subpoena recipients. However, Complaint Counsel have not heard from these subpoena recipients. Despite our repeated requests, Mr. Feldman has not identified their counsel.

We will communicate directly with these subpoena recipients one last time to request their immediate compliance. Absent their compliance, Complaint Counsel will present the facts of these entities' violation of the Administrative Law Judge's *Order* to the Court.

X. Conclusion

Lastly, please note that the concerns expressed in this letter are based on our review of the Respondents' document production and interrogatory responses to date. We have tried to make this letter as comprehensive as possible, but as we continue to examine the discovery responses, we may have other issues that we will bring to your attention.

We hope that the parties can resolve these serious issues by the end of this month without the need for Complaint Counsel to seek judicial intervention. We will call Mr. Feldman this afternoon to arrange a teleconference on these issues. Thank you for your attention.

Sincerely,



Joshua S. Millard
Attorney, Division of Enforcement

cc: Mitchell K. Friedlander, *pro se*
5742 West Harold Gatty Dr.
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enclosure (seven pages)



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October 8, 2004

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

*Re: Basic Research et al., adv. FTC
Docket No. 9318*

Dear Ms. Kapin:

This letter memorializes our recent conversations relating to Joshua Millard's September 22, 2004 discovery letter and the subpoena that you served on Potter, Katz, Postal and Ferguson, P.A. (PKPF)

PKPF:

As we discussed, PKPF possesses financial reports that include revenue information relating to products other than the Challenged Products. My clients provided this information to PKPF under an express promise of confidentiality. I disclosed to you last week that PKPF possesses revenue information for various non-challenged products and requested agreement that PKPF be permitted to redact this information from the materials that it was preparing to provide in response to your subpoena. Last Thursday, September 30, 2004, we agreed that PKPF would forward all non-objected to materials to the FTC as soon as possible. As to the disputed reports, we agreed that PKPF would redact the disputed information and provide a redacted copy of the reports to the FTC. You reserved your right to ultimately seek un-redacted versions of these reports. You indicated that you want to review the general nature of the documents and then decide whether to continue your demand for un-redacted copies. We agreed to revisit this issue once you have reviewed the redacted reports.

EXHIBIT

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C

Laureen Kapin, Esq.
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
10/8/2004
Page 2

MILLARD'S SEPTEMBER 22, 2004 LETTER:

With regard to Mr. Millard's September 22nd letter, we have agreed as follows:

1. We will provide DVD's of all final TV and radio spots relating to the challenged products and we will also provide DVD's of the documents that Basic Research, LLC and Ban, LLC have provided in response to your requests for production. These DVD's are being mailed to you today.
2. We reported that all available documents responsive to following categories have been provided:
 - a. Final internet content
 - b. Emails
3. With respect to your request for documents relating to the duties, responsibilities and work performed by each of the Respondents with respect to the advertising, marketing, promotion and sale of each of the challenged products, we advised that no responsive documents exist. Further, we explained that we understood this request to call for documents that set forth what work each Respondent performed in relation to the Challenged Products, e.g., corporate hierarchy charts. You argued that the request calls for a broader range of materials. We disagreed and re-asserted our over breath objection and suggested that you re-write the request.
4. We originally reported that if draft advertisements exist, they are in the bins that you and I have previously discussed. We still believe that this information may be in those containers. However, since our conversations last week, we have located some draft packaging relating to the challenged products and this information will be forwarded on to you. As an aside, Mr. Nagin has listed some draft advertisements on his privilege log.
5. Regarding the bin inspection, I advised that we are hiring independent contractors to conduct this inspection and that responsive documents from these bins should be produced to you by month's end. We will confirm this date with you as they proceed with the inspection.
6. Regarding Mr. Millard's request for documents listed under the caption of "Other Examples," I advised that we would look for these documents and produce them if found.

7. Regarding Mr. Millard's request for final telephone marketing materials and training materials, we anticipate providing some additional material by next week. We are also checking to see if we have additional public relations communications.
8. Regarding Mr. Millard's request for additional marketing materials, please be advised that no additional market research, marketing plans, surveys, penetration tests, target audiences, recall tests, audience reaction tests, communication tests or consumer perception studies have been located for the challenged products.
9. Ronald Price reported that Dan Mowry has nothing responsive to your request for endorsements documents. I advised that all responsive endorsement documents from the Corporate Respondents have been provided.
10. During our conversation on September 30, 2004, Mr. Millard asked whether all documents relating to complaints about the efficacy and/or advertising of the challenged products have been disclosed. He reported that he has received copies of only two product liability lawsuits. I advised that I would check again for additional responsive materials.
11. With regard to customer complaints, Mr. Millard again requested un-redacted copies of customer complaint records. We previously advised you that un-redacted copies of these documents are not available; however, I agreed to make a new inquiry. This inquiry has been made and there is no access to un-redacted originals of consumer inquiries and complaints.
12. You inquired about Specification 11, which seeks corporate organizational documents for those companies for which any of the individual Respondents is an officer, director or significant shareholder. You advised that the phrase "individual Respondents" refers to Mitchell Freidlander, Dan Mowry and Dennis Gay. As a result of this clarification, we agreed that this request is inapplicable to the Corporate Respondents.
13. Regarding specification 12, we agreed that Respondents do not have to provide profit numbers for the challenged products. The request was limited by agreement to gross and net sales of the challenged products. Nets sales are gross sales adjusted for returns and adjustments. There was uncertainty as to whether these net numbers have been provided and we agreed to follow up on this. We have done this and net sales numbers are not available.

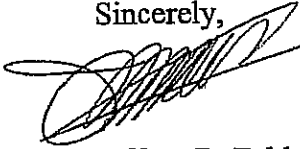
14. Mr. Millard also wanted to know if any affiliate of the Respondents is holding documents responsive to the FTC's document requests. We agreed to make an inquiry on this issue. That inquiry has been made and all responsive documents, to the extent that they are in the care, custody or control of Corporate Respondents, have been produced or with held for privilege.
15. I advised that all documents in our first production were BAN, LLC materials. With respect to the September 7, 2004 production, I advised that all documents dated through December 2002 emanate from BAN, LLC's and documents from Jan. 1, 2003 emanate from Basic Research, LLC.
16. I agreed to provide Ban and Basic's privilege log to FTC by Wednesday, October 6, 2003, which, in fact, occurred. You agreed to provide your privilege log with respect to Basic Research's first request for production by Tuesday, October 12, 2004.
17. Finally, we addressed Judge McGuire's order compelling production of certain financial information relating to the challenged products. I agreed to make inquiry about how you should contact these individuals and entities relating to this order. Unfortunately, I have not had much success in this regard and I would suggest that you directly contact these third parties.
18. Regarding your letter of September 2, 2004, I agreed that the Corporate Respondents would respond to interrogatory 5 as amended in your letter. In that regard, please be advised that the only "substantially similar products," as you have defined that term, are the following:
 - a. Products substantially similar to Anorex and Leptoprin:
 - i. ECA Stack
 - ii. Thermogenics Plus Original, and
 - iii. Themrmogenics Plus Quick Start
 - b. Products substantially similar to the Challenged Gels:
 - i. Ripping Gel
19. With regard to interrogatory 2, we agreed to identify individuals who manufacture and/or oversee the manufacture of the challenged products. In that regard, please be advised that Michael Meade oversees manufacturing for Basic Research, LLC. BPI, Inc. has provided manufacturing services for Cutting Gel, Dermalin-APg, and Tummy Flattening Gel. Allure Cosmetic provided manufacturing services for Tummy Flattening Gel. NutraStar and Basic Research, LLC have provided manufacturing services for LeptoPrin and PediaLean.

Laureen Kapin, Esq.
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
10/8/2004
Page 5

20. Finally, as to interrogatory 1, we agreed to provide a supplemental answer that identifies individuals who have done particular promotional work in relation to the challenged products. You agreed to provide a list of the particular promotional materials that you seek information about. Once this list is received, we will forward responsive information to you.

I trust that this letter accurately summarizes the various agreements that we have reached with respect to the stated products. If you believe that I am in error in any respect, I would appreciate a prompt written response.

Sincerely,



Jeffrey D. Feldman
JDF/mr



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

In the Matter of)
)
)

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

Respondents.)
)
)

Docket No. 9318

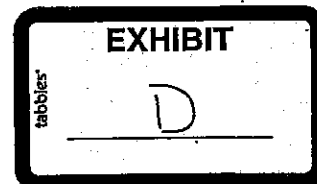
PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S FIRST 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 20 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.
- 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 the Respondents or Respondents', both individually and collectively, 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) **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.

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 First Request for Production of Documentary Materials and Tangible Things 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) Two complete packages, **including** the product contained therein, of each of the **challenged products**. (If any product has been reformulated, provide two complete packages, **including** the product contained therein and all packaging inserts, of each version of the product that has been marketed and sold).

- 2) All promotional materials for the challenged products, whether in draft or final form.
- 3) All documents and communications referring or relating to draft or final promotional materials for 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 in any draft or final promotional material(s).)
- 4) All documents and communications referring or relating to the efficacy of the challenged products or their ingredients (including but not limited to tests, reports, studies, scientific literature, written opinions, and any other documents referring or relating to the amount, type, or quality of testing or substantiation) that are relied upon as substantiation of efficacy claims or that tend to refute efficacy claims in promotional materials for any of the challenged products, including the claims alleged in the Complaint (¶¶ 14, 17, 20, 23, 25, 28, 31, 33, 37, 40, and 42) regardless of whether you contest that those claims were made.
- 5) All documents and communications referring or relating to the duties, responsibilities, and work performed by each of the Respondents with respect to the advertising, marketing, promotion, and sale of each of the challenged products.
- 6) 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 copy tests, marketing or consumer surveys and reports, penetration tests, target audiences, recall tests, audience reaction tests, communications tests, consumer perception of any promotional materials for any of the challenged products.)
- 7) All documents and communications referring or relating to persons who are depicted, named, or quoted in promotional materials for each of the challenged products. (This request includes but is not limited to documents and communications referencing endorsers and testimonialists and documents identifying the contact information for all persons depicted, named, or quoted in those promotional materials.)
- 8) All documents and communications referring or relating to complaints or investigations of any of the challenged products or their promotional materials. (This request includes but is not limited to documents and communications relating to lawsuits, demand letters, refund requests, warranty or guarantee claims, and complaints or inquiries by local, state, or federal regulators (including the U.S. Food and Drug Administration) or other persons (including but not limited to consumers, competitors, and entities such as the Better Business Bureau or the National Advertising Division).

9) All documents relating to, referring to, or constituting a dissemination schedule for advertisements relating to the challenged products.

10) All tax returns for Respondents for 2000 to present, including but not limited to all supporting documents and attachments, requests for extension for filing any tax return, and any statement(s) of the reasons for which any extension(s) were requested. (This request includes all returns and related information pertaining to the payment of payroll and unemployment taxes, social security taxes, medicare, and federal, state and local and sales, business, gross receipts, licensing, property, and income taxes.)

11) All documents relating to the corporate structure of each company for which any individual Respondent is an officer, director or significant shareholder (25% or more of total shares), including but not limited to Articles of Incorporation; By-laws; Board minutes; annual reports; information showing the date and place of the formation of the Company, and the form of organization of your Company (for example, corporation or partnership); parent organization, if any, and all subsidiaries and affiliates; annual or periodic filings with State or Federal authorities regulating corporations; the names of all directors; the name and title of all officers, supervisors, and managers; organizational charts; Documents showing the ownership interests of all owners; Documents describing the duties, responsibilities and authority of all officers, managers, directors, and supervisors employed by you; and any Documents delegating authority to engage in any act on behalf of you or act as agent for you.

12) Annually, from the date of the first sale of each of the challenged products to date, all documents that show net and gross sales figures and profit figures for each of the challenged products.

13) All documents and communications consulted or used in preparing your responses to Complaint Counsel's interrogatories.

Respectfully submitted,

Laureen Kapin

Laureen Kapin (202) 326-3237
Joshua S. Millard (202) 326-2454
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: June 25, 2004

CERTIFICATE OF SERVICE

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

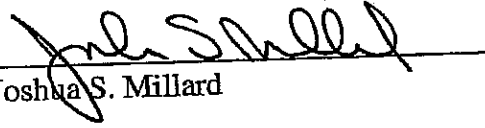
- (1) one (1) electronic copy via email and one (1) copy via first class U.S. Mail to:

Mary L. Azcuenaga, Esq.
Heller, Ehrman, White & McAuliffe, L.L.P.
1666 K Street, N.W., Suite 300
Washington, D.C. 20006
mazcuenaga@hewm.com

Stephen E. Nagin, Esq.
Nagin Gallop Figuerdo P.A.
3225 Aviation Ave.
Miami, FL 33133
snagin@ngf-law.com

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

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


Joshua S. Millard

**UNITED STATES OF AMERICA
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

**RESPONSE OF CERTAIN RESPONDENTS
TO COMPLAINT COUNSEL'S REQUEST FOR
PRODUCTION OF DOCUMENTARY MATERIALS AND TANGIBLE THINGS**

Pursuant to Rules 3.31(c) and 3.37(b) of the Federal Trade Commission's Rules of Practice, Respondents Basic Research, LLC., A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, and BAN, LLC (collectively, "Respondents") object and respond to Complaint Counsel's Request for Production of Documentary Materials and Tangible Things ("Request") as follows:

General Objections

A. Respondents object to the Request as overbroad and unduly burdensome on the grounds and to the extent that it calls for the production of documents that are neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence.



B. Respondents object to the Request on the grounds and to the extent that it is overbroad and unduly burdensome. Respondents will conduct a reasonable search, limited to those locations and files where Respondents deem it reasonably likely that responsive documents will be found without undue burden, for documents responsive to those Specifications to which Respondents do not object.

C. Respondents object to the Request on the grounds and to the extent that it seeks production of documents that are (i) subject to the attorney-client privilege; (ii) subject to attorney and/or party work product immunity; and/or (iii) subject to any other privilege or immunity. Respondents hereby claim such privileges and immunities to the extent implicated by each Specification, and exclude privileged and protected information from its responses. Any disclosure of such privileged or immunized information is inadvertent and is not intended to waive those privileges and immunities.

D. Respondents object to the Request on the grounds and to the extent that it seeks production of confidential, proprietary, or trade secret information. Respondents will produce such material only after an order providing protection to confidential information has been entered in this matter.

E. Respondents object to the Request, and to the Definitions and Instructions therein, on the grounds and to the extent that it purports to impose any obligation on Respondents that is beyond the scope of the Rules of Practice or other applicable law.

F. Respondents object to the Request and the definition of "All documents" (Definition (1) of the Request) on the grounds and to the extent that it purports to require Respondents to search for and produce, or to identify, documents that are not in Respondents' possession, custody, or control.

G. Respondents' objections and responses to the Request, including any production of documents, are not intended to waive or prejudice any objections Respondents may assert now or in the future, including, without limitation, objections as to the relevance of the subject matter of any request, or of the admissibility of any response or document or category of responses or documents, at hearing, trial or any other time. Respondents expressly reserve any and all rights and privileges under the Rules of Practice, applicable evidentiary rules, and any other law or rule, and the failure to assert such rights and privileges or the inadvertent disclosure by Respondents of information protected by such rights or privileges shall not constitute a waiver thereof, either with respect to these responses or with respect to any future discovery responses or objections.

H. Respondents object to the first sentence of Instruction (3) and to Instruction (6) as unduly burdensome and as imposing an obligation beyond what is required by the Rules of Practice with respect to requests for production. Respondents will produce documents as they have been kept in the Respondents' usual course of business.

I. Respondents object to Instruction (7) as unduly burdensome and as imposing an obligation beyond what the Rules of Practice require with respect to requests for production.

J. Respondents object to Instruction (8) in that it seeks submission of certain "originals" in contravention of the Rules of Practice. Respondents will either produce copies or make originals available for inspection; Respondents will not submit originals to Complaint Counsel.

K. Respondents object to Instruction (9) in that it attempts improperly to impose a legal conclusion that can only be reached by the Administrative Law Judge.

Specific Objections and Responses

Subject to, without waiver of, and in addition to the foregoing General Objections, Respondents respond to each of the Specifications contained in Complaint Counsel's Request as follows:

- 1) Two complete packages, **including** the product contained therein, of each of the **challenged products**. (If any product has been reformulated, provide two complete packages, **including** the product contained therein and all packaging inserts, of each version of the product that has been marketed and sold).

RESPONSE:

Respondents will produce the requested material to the extent it exists.

- 2) All **promotional materials** for the **challenged products**, whether in draft or final form.

RESPONSE:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

- 3) All **documents and communications referring or relating to draft or final promotional materials** for 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 in any draft or final **promotional material(s)**.)

RESPONSE:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of

Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

4) **All documents and communications referring or relating to the efficacy of the challenged products or their ingredients (including but not limited to tests, reports, studies, scientific literature, written opinions, and any other documents referring or relating to the amount, type, or quality of testing or substantiation) that are relied upon as substantiation of efficacy claims or that tend to refute efficacy claims in promotional materials for any of the challenged products, including the claims alleged in the Complaint (§ 14, 17, 20, 23, 25, 28, 31, 33, 37, 40, and 42) regardless of whether you contest that those claims were made.**

RESPONSE:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

5) **All documents and communications referring or relating to the duties, responsibilities, and work performed by each of the Respondents with respect to the advertising, marketing, promotion, and sale of each of the challenged products.**

RESPONSE:

Respondents object to the extent that this request is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

6) **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 copy tests, marketing or consumer surveys and reports, penetration tests, target**

audiences, recall tests, audience reaction tests, communications tests, consumer perception of any **promotional materials** for any of the **challenged products**.)

RESPONSE:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

7) **All documents and communications referring or relating to persons** who are depicted, named, or quoted in **promotional materials** for each of the **challenged products**. (This request **includes** but is not limited to **documents and communications** referencing endorsers and testimonialists and **documents** identifying the contact information for all **persons** depicted, named, or quoted in those **promotional materials**.)

RESPONSE:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

8) **All documents and communications referring or relating to complaints or investigations of any of the challenged products or their promotional materials**. (This request **includes** but is not limited to **documents and communications relating to lawsuits, demand letters, refund requests, warranty or guarantee claims, and complaints or inquiries by local, state, or federal regulators (including the U.S. Food and Drug Administration) or other persons (including but not limited to consumers, competitors, and entities such as the Better Business Bureau or the National Advertising Division)**.)

RESPONSE:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of

Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

9) **All documents relating to, referring to, or constituting a dissemination schedule for advertisements relating to the challenged products.**

RESPONSE:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

10) All tax returns for **Respondents** for 2000 to present, **including** but not limited to all supporting **documents** and attachments, requests for extension for filing any tax return, and any statement(s) of the reasons for which any extension(s) were requested. (This request **includes** all returns and related information pertaining to the payment of payroll and unemployment taxes, social security taxes, medicare, and federal, state and local and sales, business, gross receipts, licensing, property, and income taxes.)

RESPONSE:

In addition to the General Objections stated above, Respondents object to this Specification because it requests information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Tax returns have no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter.

11) **All documents** relating to the corporate structure of each company for which any individual **Respondent** is an officer, director or significant shareholder (25% or more of total shares), including but not limited to Articles of Incorporation; By-laws; Board minutes; annual reports; information showing the date and place of the formation of the Company, and the form of organization of your Company (for example, corporation or partnership); parent organization, if any, and all subsidiaries and affiliates; annual or periodic filings with State or Federal authorities regulating corporations; the names of all directors; the name and title of all officers, supervisors, and managers; organizational charts; **Documents** showing the ownership interests of all owners; **Documents** describing the duties, responsibilities and authority of all officers,

managers, directors, and supervisors employed by you; and any Documents delegating authority to engage in any act on behalf of you or act as agent for you.

RESPONSE:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of Practice. In addition, Respondents object to this Specification to the extent that it requests documents relating to companies that are not Respondents here because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Respondents further object to this Specification as vague and ambiguous because (a) the relationship between the term "individual Respondent" in the Specification and "Individual Respondents" as that term is defined in Definition (10) is not clear and (b) the Specification interchangeably and inconsistently uses the terms "corporate," "company," "incorporation," and "Company." Subject to and without waiving these objections or the General Objections stated above, Respondents will produce company formation documents (Articles of Organization), by-laws, and annual reports or filings (there are no board minutes), limited to documents that (a) pertain to the company structure of Respondents (defined as Basic Research, LLC., A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, and BAN, LLC), (b) were created on or after January 1, 2000, and (c) are located after a reasonable search (see general objection (B)).

12) Annually, from the date of the first sale of each of the **challenged products** to date, **all documents** that show net and gross sales figures and profit figures for each of the **challenged products**.

RESPONSE:

In a telephone conference with Complaint Counsel on July 21, 2004, Complaint Counsel amended this Specification to eliminate the portion requesting profit figures. In addition

to the General Objections stated above, Respondents object to this Specification because it requests information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. The net and gross sales figures of the challenged products have no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter.

13) **All documents and communications** consulted or used in preparing your responses to Complaint Counsel's **interrogatories**.

RESPONSE:

In addition to the General Objections stated above, Respondents object to this Specification to the extent that it seeks information protected by the attorney client privilege and the attorney and party work product immunity doctrines. Respondents further object to this Specification as duplicative and unnecessary and thus unduly burdensome because, to the extent the interrogatories seek discoverable information that is also requested by prior Specifications, the documents requested in this Specification are duplicative of prior Specifications. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents.

Respectfully submitted,



Larry A. Breuer

Jay T. Smith

Covington & Burling

1201 Pennsylvania Avenue, NW

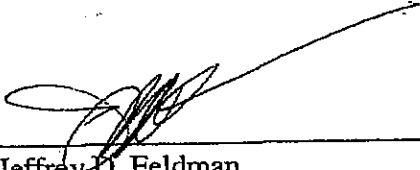
Washington, DC 20004

Tel: (202) 662-5614

Fax: (202) 662-6290

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

Dated: August 3, 2004



Jeffrey D. Feldman
FELDMANGALE, P.A.
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**Counsel for Defendants A.G. Waterhouse,
L.L.C., Klein-Becker USA, L.L.C.,
Nutrasport, L.L.C., Sovage Dermalogic
Laboratories, L.L.C., and Ban, L.L.C**

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2004, I caused the Response of Certain Respondents to Complaint Counsel's Request for Production of Documentary Materials and Tangible Things to be served as follows:

- (1) one copy by first class U.S. mail and one copy by electronic mail to:

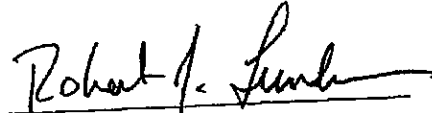
Laureen Kapin
Joshua S. Millard
Robin F. Richardson
Laura Schneider
Walter C. Gross III
Federal Trade Commission
600 Pennsylvania Avenue, NW, Suite NJ-2122
Washington, DC 20580
email: lkapin@ftc.gov
jmillard@ftc.gov
rrichardson@ftc.gov
lschneider@ftc.gov

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

Ronald F. Price
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310 Broadway Centre
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Counsel for Respondent Daniel B. Mowrey

Richard D. Burbidge
BURBIDGE & MITCHELL
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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


Robert J. Lundman



FELDMANGALE

A T T O R N E Y S A T L A W

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www.FeldmanGale.com

REPLY TO: MIAMI OFFICE

E-MAIL: JFeldman@FeldmanGale.com

August 27, 2004

Laureen Kapin, Sr. Counsel
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

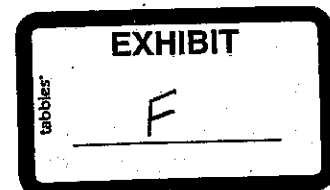
In the Matter of: Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker usa, LLC, Nutrasport, LLC, Sovage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander; Docket No.: 9318

Dear Ms. Kapin:

I am responding on behalf of the corporate respondents to various issues that were left pending following our conference call last Monday, August 23, 2004.

First, the corporate respondents will agree to produce responsive documents to specification 12 of the FTC's First Request for Production and interrogatory 4 of the FTC's First Set of Interrogatories. These requests seek gross sales information about the challenged products. This production is being done in recognition of Judge McGuire's ruling on the Respondents' Motion to Quash. Our production is a compromise. That is, we have agreed to produce gross sales documents in order to avoid re-litigating the issues that Judge McGuire resolved in his Order on Respondents' Motion to Quash. The Respondents are therefore producing the gross sales information under an express understanding that their previously asserted objections are preserved.

Second, the corporate respondents will not be producing documents responsive to specification 10 of the FTC's First Request for Production. This request sought Respondents' tax records. Given Judge McGuire's order that financial information be limited to just that concerning the challenged products, the tax returns are clearly off limits as they address a broader scope of information:



Laureen Kapin, Sr. Counsel
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
August 27, 2004
Page 2

Third, the Respondents will designate which entity produced the documents you received in response to your First Request for Production and will henceforth designate in the bates stamping the identity of the producing entity. However, we request that future document requests be addressed to individual respondents so as to avoid a recurrence of this issue.

Fourth, the documents you received on August 13th were responsive to specifications 1, 2, 4, 7, and portions of 8. The corporate respondents will be making a supplemental production responsive to specifications 3, 6, 8, 9, 11, and 12 by September 7. I do not believe that there are responsive documents to specification 5.

Fifth, in response to your inquiry about the current status of advertising for ephedra based Leptoprin® and Anorex®, please be advised that all advertising for these products has been withdrawn and that there is currently no advertising being done for these products.

Sixth, regarding redactions to documents 4145, 6081, and 36393, please be advised that no un-redacted copies of these documents exist.

Seventh, so that there is no confusion, the third parties who you subpoenaed to produce various financial documents will respond directly to Judge McGuire's order. The Respondents will not be answering on their behalf and I expect that you will soon receive correspondence from counsel engaged to represent these parties.

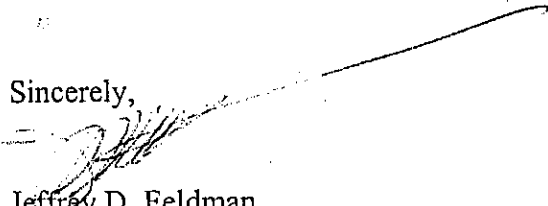
Finally, I wish to confirm several representations that you made to me during our call. You indicated that the FTC will be producing documents responsive to Basic Research's First Request for Production by August 31, 2004. Also included in this production will be all documents referenced on your initial disclosure.

Additionally, we have disclosed to you that one or more of the Respondents are in possession of several large bins that contain numerous documents that were saved at Walter Gross' request. The review of these bins will be incredibly time consuming and expensive and we have requested that you waive our inspection of the same. You indicated that you would continue to think about this issue and get back to us. Accordingly, we are making no effort at this time to determine whether any of these bins contain responsive materials.

Laureen Kapin, Sr. Counsel
Division of Enforcement
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I trust that my letter addresses all points that were left pending at the conclusion of our August 23, 2004 conference. Please feel free to call me if you wish to discuss any of the points that I have addressed.

Sincerely,



Jeffrey D. Feldman
JDF/mr



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Laureen Kapin
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September 2, 2004

Via Electronic Mail and First Class Mail

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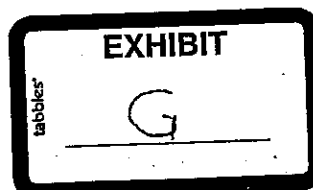
Re: *Basic Research et al.*, Docket No. 9318

Dear Gentlemen:

This letter is in reference to our telephone conferences on discovery that took place on August 23rd, August 31st, and September 1st. Our discussions addressed the parties' concerns about the other side's responses to document requests and interrogatories. This letter focuses primarily upon Complaint Counsel's concerns with Respondents' discovery responses.¹ As you will recall, Mr. Friedlander was not available for our conferences. However, I appreciate the progress we were able to make on a number of issues.

The staff raised a number of issues, including but not limited to Respondents' objections to Complaint Counsel's Interrogatories 5 and 6 and the incomplete response to our Interrogatory 9.

¹ We will enclose our supplemental response to Respondents' Interrogatory 1(a) along with this letter.



Pursuant to those discussions, Complaint Counsel agrees to the following regarding its Interrogatories 5, 6, and 9:

- Regarding Complaint Counsel Interrogatory 5, we explained that the interrogatory definition of “substantially similar product,” *i.e.*, “any product that is substantially similar in ingredients, composition and properties” refers to products that are substantially similar in ingredients and composition and properties to one or more of the challenged products. The definition requires substantial similarity with respect to all three of these components. This requirement dispels any suggestion that Interrogatory 5 is vague, overbroad, or not reasonably calculated to lead to the discovery of admissible evidence.
- Regarding Complaint Counsel Interrogatory 6, Complaint Counsel is willing to revise its interrogatory as follows: “Identify Respondents that have received any payment, compensation, or income in connection with the marketing, promotion, or sale of each of the **challenged products** for each year from 2001 to the present, disclosing the total dollar amount and source for all payments. (For consumer sales, it is not necessary to disclose names, addresses or telephone numbers.)” This revision dispenses with the need to separately disclose all payments received. We explained that this request would include salary information to the extent that a person’s job included the responsibilities with respect to marketing, promotion, or sale of the challenged product. We understand that the salary information may not include what portion of the salary related to the challenged products. Nevertheless, if a bonus, royalty or some other form of compensation does relate to the challenged products, that information is responsive.
- Regarding Complaint Counsel Interrogatory 9, we pointed out that we still have not received a response to the portion of our interrogatory that seeks “**identification of any promotional materials** that have been created, revised, or removed from dissemination” and the “dates” on which the actions in your answer took place. We request that Respondents respond to the rest of Interrogatory 9.

We also note that the Corporate Respondents’ answers to Complaint Counsel Interrogatories 1 and 2 are insufficient. Interrogatory 1 specifically requests information with regard to “promotional materials for each of the challenged products.” Other than the response relating to Ms. Chevreau, Respondents’ answers do not specify the promotional materials and the challenged products for which each person listed performed “duties, responsibilities, or work.” Interrogatory 2, which was not transcribed correctly in your response, seeks information concerning the “creation, development, evaluation, approval and manufacture of the challenged products.” Respondents objected and referenced their answer to Interrogatory 1. However, Respondents’ answer to Interrogatory 1 relates primarily to advertising and substantiation review responsibilities, not the creation, development, evaluation, approval and manufacture of the challenged products themselves. Consequently, we request a response to Interrogatory 2.

Regarding Complaint Counsel Interrogatory 10, you identified approximately 5,000 pages of documents that contain thousands of line items regarding refund information to individual consumers. Interspersed among these documents are but a few summary reports covering limited time periods. Large portions of some of these reports have been redacted. We think that Corporate

Respondents have access to summary information regarding total refund information for each product. We request either an answer to the Interrogatory as propounded or production of a single summary report showing the information requested in the Interrogatory.

As to Mr. Gay, I believe we still need Mr. Gay's signed verification for his interrogatory responses. To the extent, Mr. Gay intends to cross-reference the future answers of the corporate respondents, we offer the same accommodations and seek the same additional information from Mr. Gay discussed above as to Interrogatories 5,6, and 9.

As Mr. Gay incorporated the Corporate Respondents' answers to Interrogatory 1, we have the same issues described above with respect to his answers. We request that Mr. Gay provide a complete response to our request for information with regard to his "duties, responsibilities, or work" regarding "promotional materials for each of the challenged products," identifying what products and advertisements he approved, as well as any other related "duties, responsibilities, or work" that he performed. As to our Interrogatory 2, we seek the requested information from Mr. Gay's perspective. Mr. Gay objected and refused to answer this question. This question is clearly relevant and can be answered without disclosing privileged information. Regarding Complaint Counsel Document Request 11, we are still uncertain of Mr. Gay's position on this issue. I understand that he has been out of the country and request that you let me know what Mr. Gay intends to produce in response to this Request.

Similarly, for Dr. Mowrey, regarding Complaint Counsel Interrogatory 1, we request a complete response to our request for information with regard to his "duties, responsibilities, or work" regarding "promotional materials for each of the challenged products." For Interrogatory 2, we seek more a detailed response describing the "duties, responsibilities, and work" performed by the persons identified by Dr. Mowrey in his answer.

Regarding Dr. Mowrey's objection to Complaint Counsel Document Request 7, we emphasized in our discussion that this request is not seeking the holiday cards and personal financial information referenced in Dr. Mowrey's objection. Rather, our request is requesting those **documents and communications** relating to the persons depicted, named and quoted in **promotional materials** for the **challenged products**. To the extent that this Document Request seeks documents from Dr. Mowrey relating to himself, Complaint Counsel seek only those documents referring or relating to his participation or appearance (*i.e.*, depiction, naming, quoting, endorsement) in such promotional materials. Dr. Mowrey produced no documents responsive to this request and can reasonably determine what documents relate to the persons referenced in the promotional materials rather than personal information or correspondence he possesses.

We are continuing to explore the issue of how to search the bins of documents that Respondents have collected. These bins were retained during the course of the FTC's investigation in order to preserve potentially relevant evidence. The bins almost certainly contain material that is responsive to our discovery requests. Complaint Counsel has offered to search these bins for responsive documents and negotiate a "claw-back" agreement to handle privileged materials. We would like to discuss this issue further next week so that we can either resolve it or file an appropriate motion.

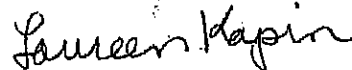
Mr. Feldman agreed to provide a "disc" copy of Respondents document production. Mr.

Nagin's prior productions during the investigation had been provided via a disc containing scanned copies of the documents. Mr. Feldman also agreed to get back to us on the issue of a privilege log for the first part of Respondents' document production.

Per Mr. Feldman's request, we are holding off on producing documents in light of the threatened hurricane. We will plan on producing the documents next week but will verify an exact date and place with Mr. Feldman to ensure that the documents are mailed to a suitable (and dry) location.

We appreciate your cooperation on these matters. If you have any questions or if your understanding differs from mine, please call me at 202-326-3237.

Sincerely yours,

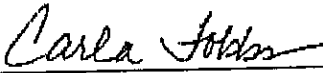


Laureen Kapin
Senior Attorney

cc: Mitchell K. Friedlander
5742 West Harold Gatty Dr.
Salt Lake City, UT 84116
Mkf55@msn.com

5. Corporate Respondents made a thorough and exhaustive search of all known locations where responsive documents were and are maintained.
6. The search included the locations where Corporate Respondents store documents, including their headquarters and on site storage facilities.
7. In the course of that search, all responsive documents that could be located were produced with the exception of certain documents that Corporate Respondents believed to be privileged and have listed on their Privilege Log and documents to which objections have been made.

Executed: December 23 2004.


Carla Fobbs