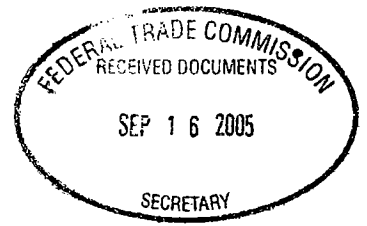


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



_____ :
In the Matter of :

BASIC RESEARCH, L.L.C., et al., :

Respondents. :
_____ :

DOCKET NO. 9318

Public Document

**DECLARATION OF DANIEL B. MOWREY, PH.D. IN OPPOSITION TO COMPLAINT
COUNSEL'S MOTION FOR SANCTIONS**

I, Daniel B. Mowrey, under penalty of perjury, testify as follows:

1. I have personal knowledge of the matters set forth in this declaration and, if called testify at a hearing or trial in this matter, would so state.

2. I submit this declaration in response to Complaint Counsel's motion for *in camera* review and for sanctions, and as a supplement to my declaration dated 21 July 2005.

3. As an initial matter, I am aware that on about August 9, 2005, the Court issued an order (the "Order") directing me to produce to Complaint Counsel all documents relating to my capacity as an expert witness. I understand that this Order requires me to produce documents which fully describe my background and qualifications, and all documents which I created, read, reviewed, considered or relied upon in connection with forming my expert report/opinion in this matter.

4. I believe I have fully complied with the Order. For example, my CV was provided to Complaint Counsel in October 2004. Additionally, my expert report contains an approximately 12 page long description of my background. Thus, I have produced to Complaint Counsel documents which fully describe my background and qualifications.

5. Contemporaneous with the production of my expert report to Complaint Counsel, I also produced to Complaint Counsel more than seven hundred (700) pages of documents which I read, reviewed, considered and relied upon in forming my expert report/opinion. Thus, any assertion by Complaint Counsel that I have only produced only a few expert related documents is absolutely false.

6. In addition to the more than 700 pages of documents produced to Complaint Counsel in December 2004, and as the Court is aware, in January 2005 I produced to Complaint Counsel approximately 185 pages of documents which were various “drafts” of my expert report.

7. Furthermore, after the Court entered its Order, through my counsel I produced to Complaint Counsel another 37 pages of documents which relate to my capacity as an expert witnesses. Those documents include all of the written/electronic communications I had with my counsel, the other Respondents, and the other Respondents’ counsel relating to my capacity as an expert witness and my expert report.

8. Taken together, I have produced to Complaint Counsel almost one thousand pages of expert related documents. Furthermore, as of 22 August 2005, and to the best of my information, knowledge and belief, I have produced to Complaint Counsel all documents which I created, read, reviewed, considered and/or relied upon in my capacity as an expert witness, including all documents which I created, read, reviewed, considered and/or relied upon in forming my expert report/opinion.

9. On August 22, 2005, I produced a 7 page document which was an early draft of my expert report addressing the PediaLean product at issue in this case. Complaint Counsel point to this fact as evidence that I have deliberately failed to produce documents. That simply is

not true. Prior to January 10, 2005, my counsel asked me print out and provide to him copies of all “drafts” of my expert report so that he could produce them to Complaint Counsel. (In reality, there were not really separate “drafts,” inasmuch as I always worked on the same documents(s), and did not save different “drafts” of the report. However, on a number of occasions I emailed, via email attachments, partial versions of my report to my counsel. It is these email attachments that are referred to as the “drafts” of my report). Pursuant to my counsel’s request, I proceed to print out the various email attachment “drafts” of my report, and I then provided them to my counsel. In printing out these email attachments, I attempted to make sure that I printed out and provided to my counsel all of the email attachment drafts. However, I learned, for the first time, in the latter part of August 2005, that I apparently failed to print out and deliver to my counsel one of the email attachment drafts. That omission was completely inadvertent, and was not part of any attempt to hide documents from Complaint Counsel. It was an innocent mistake on my part. I thought I had printed out and provided to my counsel all of the email attachment drafts. I apparently had not, for which I apologize. In any event, once my counsel and I learned of the mistake, my attorney immediately notified Complaint Counsel, and immediately produced to Complaint Counsel the inadvertently omitted email attachment draft.

10. I am informed that Complaint Counsel are asking the Court to compel me to produce approximately 40 pages of documents that are listed on the privilege log which I previously provided in this matter. With respect to the documents which Complaint Counsel have identified in their motion, I did not read, review, consider or rely upon any of them in my capacity as an expert witness in this case, and did not read, review, consider or rely upon any of

them in connection with forming my expert report/opinion in this matter. I will address each specific document below.

11. Document Bates No. 91. This document is an email string consisting of an email on 27 September 2004 from Nicole Slatter, a paralegal with the law firm of Burbidge & Mitchell, to Carla Fobbs (head of the Corporate Respondents' compliance department), my attorney, and Jeff Feldman (the Corporate Respondents' prior counsel), which email was forwarded by Ms. Fobbs on 27 September 2004 to, among other persons, me. The email itself does not identify the witnesses who were interviewed, although the original email from Ms. Slatter included attachments which were notes of interviews of fact witnesses conducted by the law firm representing Respondent Gay. The email also identifies other potential fact witnesses who Respondent Gay's counsel was attempting to interview. When the Ms. Slatter's email was forwarded to me, that attachments to Ms. Slatter's original email were included as attachments to the forwarded email which I received. However, documents such as notes of interviews conducted of potential are not the types of documents which I ordinarily open and read. And, in fact, that is the case with the attachments to Ms. Slatter's email. As of the date of this declaration, I have never opened, read, considered, or otherwise reviewed the interview notes which were attached to Ms. Slatter's email.

12. Document Bates No. 94. This is an email dated September 29, 2004 (more than two weeks *before* I was designated as an expert witness), which I received and read solely in my capacity as a Respondent in this case. Specifically, I briefly read this email on or about September 29, 2004, the date on which it was sent to me. After reading this email on about September 29, 2004, I did not subsequently go back and reread the email. Thus, at no time did I

read, review or consider this email after I had been designated as an expert witness, and at no time did I ever read, consider, review or rely upon this document in connection with preparing my expert report/opinion. At no time did I ever read, review or consider this document in my capacity as an expert witness.

13. Document Bates Nos. 166-167. This is an email dated November 22, 2004. The email identifies a number of potential expert witness which the Respondents and our counsel were considering designating in this matter. None of the persons identified in this document is an author of any of the scientific studies mentioned in my expert report. Furthermore, the document does not mention or refer to my expert report. Furthermore, I received and read this email solely in my capacity as a Respondent in this case. I did not read, consider, review or rely upon this document in my capacity as an expert witness, or in connection with my expert report/opinion.

14. Documents Bate Nos. 26-32. These documents are a series of emails on August 9, 2004 (more than two months before I was ever designated as an expert witness in this case) between my counsel and Ms. Fobbs (and copied to me). I received and reviewed these documents on about August 9, 2004, and solely in my capacity as a Respondent in this case. Furthermore, I did not subsequently go back and reread these documents. Moreover, at no time after having been designated as an expert witness did I ever read, consider, review or rely upon these documents, and at no time did I ever read, consider, review or rely upon these documents in my capacity as an expert witness, or in connection with my expert report/opinion.

15. Document Bates Nos. 54-55. This is an email dated 21 August 2004 (more than six weeks before I was designated as an expert witness) from Respondent Friedlander to me, and

to Luigi Rinaldo, a person who is an employee of the Corporate Respondents. This email has a subject listed as “placebo,” and consists of a copy of a scientific study relating to placebos. The specific scientific study referenced in this email is not cited in my expert report. Furthermore, I received and reviewed this email solely in his capacity as a Respondent in this case. Moreover, I did not read, consider, review or rely upon this particular email after having been designated as an expert witness, and did not read, consider, review or rely upon this particular email in my capacity as an expert witness, or in connection with my expert opinion/report.

With respect to the scientific study contained in this email, I acknowledge that that study is related to the following scientific study which is identified in my expert report: Hrobjartsson, A and Gotzsche, PC, “Is the placebo powerless? An analysis of clinical trials comparing placebos with no treatment.” NEJM, 334[sic](21):1594-1602, (2001) (the correct cite is NEJM, 344(21):1594-1602, (2001)) (the “Placebo Study”). However, in formulating my expert opinion in this matter, I relied upon the Placebo Study, and not the particular study identified in the email at issue.

16. Documents Bates Nos. 84, 86-87. These documents are a series of three emails dated 16 September 2004 (from Ms. Fobbs to me), 20 September 2004 (from me to Ms. Fobbs), and 20 September 2004 (from me to Ms. Fobbs), respectively, relating to certain potential fact witnesses (not me). The documents contain absolutely no substantive information concerning the potential fact witnesses identified in the documents. Rather, they simply identify certain potential fact witnesses and their contact information. I received and reviewed (or in the case of the emails from me, created) these documents solely in my capacity as a Respondent in this case. I did not read, consider, review or rely upon these documents after having been designated as an

expert witness, and at no time did I ever read, consider, review or rely upon these documents in my capacity as an expert witness, or in connection with my expert opinion/report.

17. Document Bates Nos. 92-93. These documents are an email string consisting of (i) an email dated September 27, 2004, from Ms. Fobbs to Respondent Gay's counsel and his paralegal (and copied to my counsel and the Corporate Respondents' counsel), (ii) an email dated September 27, 2004, from my counsel to Ms. Fobbs, and (iii) an email dated September 27, 2004, from Ms. Fobbs to my counsel (and copied to me). There were no attachments to this email string and thus, the email string to me did not include a copy of my CV. Furthermore, I received and reviewed these documents on or about September 27, 2004, and solely in my capacity as a Respondent in this case. I did not subsequently go back and reread these documents. Thus, I did not read, consider, review or rely upon these documents after having been designated as an expert witness in this case, and I did not read, consider, review or rely upon these documents in my capacity as an expert witness, or in connection with my expert opinion/report.

18. Document Bates No. 96. This is an email from Ms. Fobbs to me dated October 4, 2004 (before I was ever designated as an expert witness), with the subject line "luminaries," and consists of a single phrase request. No further information can be provided concerning the specific request without divulging the request itself. However, I never provided a written/electronic response to the request and, to the best of my recollection, I did never provided any substantive response to the request. Furthermore, the document was received, read and reviewed by me solely in my capacity as a Respondent in this case. I did not subsequently go back and reread the document, and I did read, consider or review this document after having been

designated as an expert witness. Moreover, I did not read, consider, review or rely upon this document in my capacity as an expert witness, or in connection with forming my expert opinion/report.

19. Documents Bates No. 100, 106-107, 109-114. These documents consist of a series of the following emails: (i) Ms. Fobbs to me dated October 7, 2004, (ii) me to Ms. Fobbs dated October 7, 2004, (iii) Ms. Fobbs to me dated October 12, 2004, (iv) me to Ms. Fobbs, dated October 12, 2004, (v) Ms. Fobbs to me, dated October 12, 2004, (vi) me to Ms. Fobbs, dated October 12, 2004, and (vii) Ms. Fobbs to me, dated October 12, 2004. These documents relate to a request from Ms. Fobbs concerning whether I had copies of certain documents, none of which documents are mentioned, addressed or discussed in my expert report. Price Supp. Dec. at ¶ _____. Furthermore, these emails were received and reviewed (and in the case of my emails, created) by me before Respondents ever discussed or determined to identify me as an expert witness. Additionally, the documents referenced in the emails are not documents that were created by me. Moreover, I received, read and reviewed these emails solely in my capacity as a Respondent in this case. I did not read, consider or review these emails after having been designated as an expert witness, and I did not read, consider, review or rely upon these emails in my capacity as an expert witness, or in connection with forming my expert opinion/report.

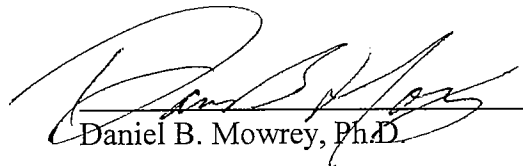
20. Document Bates Nos. 135-141, 151-152, 184. These documents consist of the following emails: (i) my counsel to Ms. Fobbs (copied to me) dated 11/01/04, (ii) Ms. Fobbs to my counsel dated 11/01/04, (iii) my counsel to Ms. Fobbs dated 11/01/04, (iv) Ms. Fobbs to Heather Sprik, dated 11/01/04, (v) Ms. Sprik to me dated 11/01/04, (vi) Ms. Sprik to me dated 11/03/04, (vii) Ms. Fobbs to Ms. Sprik dated 11/11/04, (viii) Ms. Sprik to me dated 11/11/04,

and (ix) Ms. Sprik to me dated 12/03/04. These emails all relate to a request by my counsel for copies of certain documents. Specifically, the emails concern a request for assistance in locating copies of materials previously published by me (my publications are identified on my CV). I received, read and reviewed these emails solely in my capacity as a Respondent in this case. I did not read, consider, review or rely upon these emails in my capacity as an expert witness, or in connection with forming my expert opinion/report.

21. Document Bates Nos.165, 168. These documents consist of the following: (i) Document Bates No. 165 is an email from my counsel to me dated November 22, 2004; and (ii) Document Bates No. 168 is an email string consisting of the following emails: (1) my counsel to Ms. Fobbs and Mr. Watson (copied to the Corporate Respondents' counsel Mr. Feldman & Mr. Nagin, Mr. Gay's counsel Mr. Burbidge & Mr. Shelby, and Respondents Dr. Mowrey & Friedlander), dated November 22, 2004, and (2) me to my counsel, dated November 22, 2004. I received, read and reviewed these documents solely in my capacity as a Respondent in this case. I did not read, consider, review or rely upon these documents in my capacity as an expert witness, or in connection with forming my expert opinion/report.

I declare under penalty of perjury that, to the best of my information, knowledge and belief, the foregoing is true and correct.

Executed: September 15, 2005.


Daniel B. Mowrey, Ph.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **DECLARATION OF DANIEL B. MOWREY, PH.D. IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SANCTIONS** was provided to the following as follows:

(1) on ~~15th~~ September 2005, the original and two (2) paper copies sent via Federal Express overnight delivery, and on ~~14th~~ September 2005 one (1) electronic copy via email attachment in Adobe® “.pdf” format, to: Donald S. Clark, Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room H-159, Washington, D.C. 20580.

(2) on ~~15th~~ September 2005, two (2) paper copies sent via Federal Express overnight delivery to: The Honorable Stephen J. McGuire, Chief Administrative Law Judge, 600 Pennsylvania Avenue, N.W., Room H-104, Washington, D.C. 20580.

And to the following on ~~14th~~ September 2005 as follows:

(3) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, Laura Schneider, Walter C. Gross III, and Edwin Rodriguez all care of lkapin@ftc.gov, jmillard@ftc.gov, lschneider@ftc.gov, wgross@ftc.gov, and erodriguez@ftc.gov, with one (1) paper 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, facsimile no. (202) 326-2558.

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

(5) 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.

(6) One (1) copy via United States Postal Service to Jonathan W. Emord, Emord & Associates, 1800 Alexander Bell Drive, Suite 200, Reston, Virginia, 20191, Counsel for Respondents A. G. Waterhouse, L.L. C., Klein-Becker, L.L. C., Nutrasport, L.L. C., Sovage, Dermalogic Laboratories, L.L. C., and BAN, L.L. C.

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

