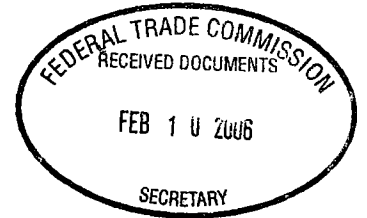


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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., )  
    dba BASIC RESEARCH, L.L.C., )  
    OLD BASIC RESEARCH, L.L.C., )  
    BASIC RESEARCH, A.G. )  
    WATERHOUSE, BAN, L.L.C., )  
    dba KLEIN, BECKER, USA, )  
    NUTRASPORT, and SOVAGE )  
    DERMALOGIC LABORATORIES, )  
DENNIS GAY, )  
DANIEL B. MOWREY, )  
    dba AMERICAN PHYTOTHERAPY )  
    RESEARCH LABORATORY, and )  
MITCHELL K. FRIEDLANDER, )  
)  
Respondents. )

**PUBLIC VERSION**

**DOCKET NO. 9318**

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**TRIAL BRIEF OF DENNIS GAY**

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Respondent Dennis Gay (“Mr. Gay”) sets forth in this trial brief certain of the evidence relevant to the claims asserted against him in this case by the Federal Trade Commission (“FTC” or “Commission”) and discusses certain legal issues with respect to those claims that Mr. Gay anticipates will arise at trial. Basic Research; L.L.C. (“Basic Research”) and the other entity Respondents will file their trial brief which will contain a

more comprehensive discussion of the evidence that will be presented by Respondents at trial and the applicable legal principles. Mr. Gay will not here duplicate that discussion, though he expressly adopts the arguments and proposed findings of fact and conclusions of law set forth in the pretrial brief submitted by the entity Respondents. Mr. Gay specifically focuses here on his personal involvement in the relevant transactions. Proposed findings of fact and conclusions of law are respectfully submitted herewith.

### **FACTUAL BACKGROUND**

Mr. Gay was raised in Payson, Utah. He attended Brigham Young University in Provo, Utah, and received his B.S. degree in computer-aided design drafting with a manufacturing engineering minor in 1969. After graduating, Mr. Gay went to work for McDonald-Douglas in Long Beach, California as a computer-aided drafting machine operator. He held various engineering positions with McDonald-Douglas in the aircraft and ship building industries during the next three years.

In 1972, Mr. Gay decided to return to Utah and obtained employment at Sperry Univac as an industrial engineer. He was responsible for creating and developing time standards and work sample studies for the work place and measuring performance efficiencies of manufacturing personnel building layouts. It was here that Mr. Gay acquired hands-on experience with business processes and controls, and developed specialization in overseeing their design and implementation in a business setting.

In 1974, Mr. Gay took a position with National Semiconductor as an industrial engineer. He later became the engineering manager at National Semiconductor. Mr. Gay

further developed and refined his skills developing and implementing business processes while at National Semiconductor. When National Semiconductor decided to move all of its consumer electronics to Southeast Asia, Mr. Gay decided to go into business for himself.

In 1976 or 1977 Mr. Gay purchased a lumber hardware building supply store in his hometown of Payson, Utah. Mr. Gay operated his lumber business until 1982 when he was forced out of business by an arsonist who hit three times in ten days, forcing Mr. Gay to sell out.

After doing some real estate development and consulting for a construction law firm, Mr. Gay went into partnership with an acquaintance with whom he had worked at National Semiconductor, selling diamond bits and diamond segments for drilling projects and doing some real estate developments. Mr. Gay was primarily responsible for the real estate development side of the business which did such projects as constructing buildings for the United States General Services Administration and leasing the buildings to the GSA, as well as constructing buildings for other governmental entities.

Mr. Gay met Dr. Daniel Mowrey in approximately 1985 or 1986. Dr. Mowrey was writing books, giving seminars and doing radio and TV programs on herbal remedies, herbal medicine and the use of herbs for wellness. Dr. Mowrey had been working out of his home. Mr. Gay allowed Dr. Mowrey to use a spare office at the business. That association ultimately led to Mr. Gay exploring aspects of the herbal business and thereafter, in approximately 1992, forming Basic Research, L.L.C., which was a predecessor of the current Basic Research entity.

Basic Research, L.L.C. was formed to create dietary supplements and sell wholesale to health food stores. Dr. Mowrey had his own company, American Phytotherapy Research Laboratories ("APRL"). Dr. Mowrey became a consultant for Basic Research, L.L.C. He created the formula for Basic Research's first product, Thermadrene, that Basic Research sold to chiropractors and through chiropractic offices. Thereafter, Basic Research sold other dietary supplements that had been created by Dr. Mowrey. They sold their products through health food stores, chiropractors and some medical doctors. Mr. Gay's duties related primarily to the manufacturing and business administration side of the business.

As detailed more fully in his pretrial brief, Dr. Mowrey had extensive experience and expertise in the area of herbs. Dr. Mowrey had obtained a Ph.D. in experimental psychology from Brigham Young University with an emphasis on psychopharmacology, which is the study of the relationship between drugs and behavior and involved an understanding of physiology and biochemistry. Dr. Mowrey had written his thesis on the effects of herbs on the central nervous system and had been writing books and researching for years the effects of herbs and what they could do. Dr. Mowrey wrote a book entitled Scientific Validation of Herbs that Mr. Gay understood was widely regarded as the bible in the industry. Numerous people in the health food industry and the health industry, including medical doctors, would call Dr. Mowrey for advice. Dr. Mowrey also conducted research and authored articles on the use of ginger for motion sickness, which use has now become common knowledge.

Mr. Gay was only involved part time with Basic Research, L.L.C., until approximately 1996 when he began devoting himself full-time to the business. Mr. Gay was the CEO in charge of running the day-to-day operations of the business on the administrative side. Early-on in the life of Basic Research, L.L.C., Mr. Gay, based upon his prior engineering and employment experience, determined that there must be a rigorous process in place to attempt to ensure that in the manufacturing and marketing of its products Basic Research, L.L.C. met all applicable FDA, FTC and other laws and regulations before the company even decided to go forward with a new product or marketing.

As a businessman with an engineering background, Mr. Gay decided he needed to involve in the process others who had the expertise he lacked personally with the medical/scientific, marketing and legal issues associated with new product development and marketing. The process Mr. Gay established required that before any product or advertising release: Dr. Mowrey (and later other affiliated scientists), marketing and legal counsel all had to approve the product and/or advertising to ensure that there was a reasonable basis for believing that the product worked, that the claims about the product were true and that all laws and regulations had been fully complied with by the company. In the established process, anyone involved could veto any product or advertising. In fact, Mr. Gay relied upon those in the process with the expertise he lacked to exercise their professional judgment when reviewing products and advertising to do exactly that—veto a product—if it failed to meet the required legal and regulatory standards, including the FTC's

“competent and reliable scientific evidence” standard, as those standards were then understood by Basic Research’s lawyers.

Basic Research’s research and development team, headed by Dr. Mowrey, did ongoing research identifying substances that may have some application for products based on research that had been reported in the scientific literature and related sources, including pharmaceutical companies that had conducted research that could be applied in a nutraceutical format. Dr. Mowrey’s research was extraordinarily expansive. He reviewed information about countless substances, carefully selecting only those with rigorous scientific support for further examination. As part of this process, Dr. Mowrey necessarily rejected the notion of developing products for countless substances he believed were lacking in scientific support despite their widespread use by other of Basic Research’s competitors.

As the research was gathered, the creative team would review the science with the research team to determine whether any of the science appeared to have potential for a beneficial, commercially feasible product. If so, the creative team would begin working on a product concept and a product marketing concept with the scientific research. Through a collaborative process, the marketing and research and development people would develop a product with a proposed marketing campaign. The marketing materials would then go back to the research and development group for review to ensure any claims were supported by the scientific information. If it was not, research and development would send the marketing material back to the creative team with feedback used to limit the marketing to

only those claims that were adequately supported. This part of the process continued until both research and development, and marketing, were satisfied that the product and any marketing were properly supported.

Once that part of the process concluded, the product and/or marketing information would then be turned over to the legal group to review, comment upon and/or modify to further ensure compliance with the legal and regulatory standards as they were understood by the lawyers. No product or marketing material was released in the marketplace unless and until each part of the review process was completed and each group was satisfied that the standards had been met. A complete consensus was thus required. Mr. Gay designated an in-house legal compliance officer, Carla Fobbs, to execute and oversee the process, and to ensure that each step was met before any product or marketing was released. Ms. Fobbs reported directly to Mr. Gay.

The process worked. Research and development rejected for lack of sufficient scientific support product ideas for many substances, including for example hoodia and garcinia cambogia, despite their use in commercial products available from Basic Research's competitors. The legal team rejected proposed marketing materials on the basis that it failed to adequately satisfy the legal and regulatory standards that applied.

During the early years, Basic Research did not engage in much advertising. When it later began substantial advertising, the process described above was already in force to attempt to ensure that all ads were truthful, that there was a reasonable basis for any claims made in the ads and that all laws and regulations had been fully complied with by the

company. Mr. Gay was informed and reasonably believes the substantiation for all the claims of all products was assembled and maintained by Basic Research.

Mr. Gay was not directly involved in creating any of the ads published by the entity Respondents, including the ads that are challenged in this action. His role as CEO was primarily administrative and as a process supervisor. He set up the processes, oversaw the hiring of qualified individuals to participate in the process, and made sure that the processes were followed so that no ad was placed until it had been approved by scientific, marketing and legal.

No product was ever manufactured or marketed and no ad was published by Basic Research, L.L.C. or any of the companies later formed with respect to specific products, including the entity Respondents in this action, unless scientific, marketing and legal had all approved the product or ad.

Although Mr. Gay had the ultimate say on whether an ad would be published, he did not have the technical or legal expertise to make the judgments described above on his own. Where it was necessary for him to be personally involved in the process due to disagreement between one or more of the groups assessing a product or advertisement, Mr. Gay worked with his team to facilitate further discussion until a complete consensus was achieved.

Mr. Gay ultimately approved the ads in good faith, and in reasonable reliance on the fact that scientific, marketing and legal groups had all approved the ads and were satisfied that the standards were met. Mr. Gay believed at the times the ads were published



and still believes that the challenged ads were truthful, that they complied with all applicable laws and regulations and that there was a reasonable basis for the claims made in the ads based on the rigorous approval process the ads went through before being published, together with Mr. Gay's confidence in the competence and integrity of the individuals who approved the ads.

In short, no ads were published until Mr. Gay was confident that those ads were truthful and met all legal requirements and that the products worked as advertised. In fact, to further assure customer satisfaction, Basic Research offered and fully backed a 100% money back guaranty on all of its products. It was and remains to this day Mr. Gay's intention and desire to ensure that Basic Research and its related entities fully comply at all times with its legal obligations, including FTC regulations.

#### **DISCUSSION**

**A. MR. GAY HAS NO DIRECT PARTICIPANT LIABILITY BECAUSE HE ACTED REASONABLY AND IN GOOD FAITH IN APPROVING THE CHALLENGED ADS.**

Respondents intend to prove at trial that there was a reasonable basis for all of the challenged ads and that those ads did not violate the Federal Trade Commission Act (the "FTCA"). However, even if it is wrongly assumed for argument that one or more of the ads violated the FTCA, the evidence will demonstrate that Mr. Gay is not individually liable for restitution and that no injunctive relief should be granted against Mr. Gay.

**1. Restitution.**

In order to impose restitution liability upon Mr. Gay, the Commission is required to prove that he participated directly in the alleged wrongful acts or had the authority to control them and, in addition, that Mr. Gay “had actual knowledge of the material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.” *FTC v. Garvey*, 383 F.3d 891, 900 (9<sup>th</sup> Cir. 2004). *See also FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9<sup>th</sup> Cir. 1997).<sup>1</sup>

Mr. Gay has no liability for restitution because the evidence will demonstrate that he did not have any actual knowledge of any material misrepresentations nor was he recklessly indifferent to the truth or falsity of a misrepresentation, nor did he have an awareness of a high probability of fraud and intentionally avoid the truth. Mr. Gay had little or no direct participation in creating the ads. Because Mr. Gay did not have the scientific expertise to personally evaluate the efficacy of the products, the validity of studies that had been done by others or whether the ads complied with the law, he set up a specific process within the Respondent companies for attempting to ensure that the ads were truthful, that there was a reasonable basis for the claims made in the ads and that the ads complied with all FDA, FTC and other applicable laws and regulations.

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<sup>1</sup> In this regard, the Commission has alleged a common enterprise theory in this case. However, the common enterprise theory only applies to corporate respondents and not to individuals. *In Re. Telebrands Corp.*, Docket No. 9313, Initial Decision (September 15, 2004).

The Respondent companies did not go forward with the manufacturing and/or marketing of any product until the scientific group, the marketing group and legal counsel all approved the product. This same process was employed to insure that the ads placed by the Respondent companies were proper. Mr. Gay relied upon the expertise, investigation and work of these qualified people in approving the ads. He relied upon Dr. Mowrey and the other scientists to ensure there was a reasonable basis for believing that the products worked, i.e., that used in accordance with the directions and in conjunction with exercise and/or reduced caloric intake, that the products would assist in weight loss. He relied upon Dr. Mowrey and the other scientists to ensure any studies referred to in ads were valid scientific studies that supported claims made in the ads. He relied upon lawyers for the companies to review the ads and the product labeling to ensure compliance with applicable laws and regulations, including those of the FTC. Only after this rigorous process was complete did Mr. Gay approve the ads based upon his reasonable, good faith belief that the ads were proper.

There is no evidence that Mr. Gay possessed actual knowledge that any of the challenged ads violated the law or were otherwise false or misleading or that there was no reasonable basis for the claims made in the ads. Indeed, Mr. Gay knew that the Respondent companies received a large volume of letters, e-mails and other communications from its customers praising the products and recounting customer successes with the products.

In *FTC v. Garvey, supra*, Mr. Garvey had been a media spokesman for various weight loss products. The Ninth Circuit held that he had no individual liability for

restitution because he had no actual knowledge of any alleged material misrepresentations concerning the product and that he had relied, among other things, upon booklets and a study furnished to him by the company. The Ninth Circuit concluded that it was reasonable for Mr. Garvey to have believed that the information supported the representations he made and that he was not recklessly indifferent to the truth of his statements or aware that fraud was highly probable and intentionally avoided the truth.

Mr. Gay did not know of any misrepresentations, he was not reckless and he did not intentionally avoid the truth. Instead, based on his training as an engineer and his previous work experience with business controls and processes, he set up a process that he fully believed would ensure that any advertising was proper and legal. Mr. Gay had no scientific training; he had no experience with herbs; he had no legal training; Mr. Gay believed in the products, believed in the competency and integrity of the individuals who participated in the rigorous process he created, and who developed the ads and determined they satisfied the legal standards, and he only approved the ads on that basis.

## **2. Injunctive Relief.**

No injunctive relief would be appropriate against Mr. Gay even if the Commission could prove that the ads violated the law (which the Commission cannot do).

Mr. Gay did not participate directly in the creation of the ads, although he gave ultimate approval to them and had the authority to control their release. Nevertheless, injunctive relief against Mr. Gay would be inappropriate. In order to obtain injunctive relief, the Commission is required to show that there is a reasonable apprehension of future

violations of the FTCA by Mr. Gay. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 560 F.2d 135 (2<sup>nd</sup> Cir. 1977); *FTC v. Atlantex Associates*, 1987 WL 20384 \*13 (S.D. Fla. 1987), *aff'd* 872 F.2d 966 (11<sup>th</sup> Cir. 1989). The Commission cannot satisfy that prerequisite. As demonstrated at length above, Mr. Gay acted in good faith and reasonably in giving ultimate approval for the ads. He did not act fraudulently or deceptively or recklessly in approving the ads. He set up a detailed process in the companies that he believed would ensure the ads were proper and legal. There is no need for an injunction against Mr. Gay; it would serve no valid public purpose.

#### **FINDINGS OF FACT**

- (1) At all relevant times, Respondent Dennis Gay ("Mr. Gay") has been the Chief Executive Officer of each of the limited liability company Respondents. In that capacity, he is responsible for supervising the daily operations of the companies. His duties are basically administrative. See January 7, 2005, Deposition of Dennis Gay, at 134.
- (2) Mr. Gay received a B.S. degree in computer-aided design drafting with a manufacturing/engineering minor from Brigham Young University in Provo, Utah in 1969. *Id.* at 10.
- (3) After graduating, Mr. Gay held various engineering positions with McDonnell-Douglas, Sperry Univac and National Semi-Conductor until approximately 1976 or 1977 when he decided to go into business for himself. At that time,

Mr. Gay purchased a lumber hardware building supply store in his hometown of Payson, Utah, which he operated until 1982 when he was forced out of business by an arsonist who hit three times in ten days. *Id.* at 13-34.

- (4) Mr. Gay subsequently went into partnership with an associate with whom he had worked at National Semi-Conductor, doing real estate developments and selling diamond bits and diamond segments for drilling projects. Mr. Gay was responsible for the real estate development side of the business. *Id.* at 40-44.
- (5) In approximately 1985 or 1986, Mr. Gay met Dr. Daniel Mowrey (“Dr. Mowrey”). Dr. Mowrey was writing books, giving seminars and doing radio and television programs on herbal remedies, herbal medicine, and the use of herbs for wellness. Dr. Mowrey had been working out of his home. Mr. Gay allowed Dr. Mowrey to use a spare office at the business. This association ultimately led to Mr. Gay going into the herbal business and, in approximately 1992, forming Basic Research, LLC, which was a predecessor of Respondent Basic Research, LLC (“Basic Research”). *Id.* at 46-49.
- (6) The original Basic Research, LLC was formed to create dictary supplements and sell wholesale to health food stores. *Id.* at 52, 58.
- (7) Dr. Mowrey, through his company, American Phytotherapy Research Laboratories (“APRL”) became a consultant for Basic Research. Dr. Mowrey created the formula for Basic Research’s first product,

Thermadrene, that Basic Research sold to chiropractors and to chiropractors' offices. Thereafter, Basic Research sold other dietary supplements that had been created by Dr. Mowrey. Basic Research sold its products through health food stores, chiropractors, and some medical doctors. *Id.* at 52-59.

- (8) Mr. Gay's duties with Basic Research, LLC were principally on the manufacturing and business administration side of the business. Dr. Mowrey, as a consultant, researched, investigated and created new products. *Id.* at 58-62.
- (9) Dr. Mowrey had extensive experience and expertise in the area of herbs. He had obtained a Ph.D. in experimental psychology from Brigham Young University with an emphasis on psychopharmacology, which is the study of the relationship between drugs and behavior and involves an understanding of physiology and biochemistry. Dr. Mowrey had written his thesis on the effect of herbs on the central nervous system and had been writing books and researching the effects of herbs and what they could do. Dr. Mowrey wrote a book entitled "Scientific Validation of Herbs" that Mr. Gay understood was like a bible in the industry. Dr. Mowrey had done research and wrote articles on the use of ginger for motion sickness, which use has now become common knowledge. Numerous people in the health food industry and the health industry, including medical doctors, sought advice from Dr. Mowrey concerning the use and effects of herbs. *Id.* at 64-67.

- (10) Mr. Gay was only involved part-time with Basic Research, LLC until approximately 1996 when he began devoting full-time to the business. *Id.* at 68.
- (11) When Basic Research, LLC began developing products, Mr. Gay, based on his engineering and previous employment experience, determined that there needed to be a rigorous process in place to substantiate the products developed by the company and to ensure that in manufacturing and marketing its products, Basic Research met all applicable FDA, FTC and other laws and regulations before the company went forward with a new product or marketing. Dr. Mowrey, and later other scientists, would thoroughly investigate and research substances for possible use in products. Dr. Mowrey researched and declined to pursue numerous substances for use in new products because he believed them inadequately supported by science-- in many instances despite use of the same substances in products sold by Basic Research's competitors. Dr. Mowrey maintained voluminous substantiation evidencing his research and investigation. Before Basic Research would go forward with a new product, Dr. Mowrey had to approve the product, marketing had to approve the product, and legal counsel had to approve the product to ensure that there was a reasonable basis for believing the product worked, that the claims about the product were true, and that all laws and regulations had been complied with by the company. Anyone



involved in this process could veto any product. *See generally, Id.* at 52-202.

- (12) During the early years of its existence, Basic Research did not do any significant advertising. When it later began advertising, Mr. Gay already had in place the same rigorous process described above to attempt to ensure that the ads were truthful, that there was a reasonable basis for any claims made in the ads and that all laws and regulations had been complied with by the company. *Id.*
- (13) As Mr. Gay formed new companies to manufacture and/or market new products, this same process was put into place by Mr. Gay and followed by each company. No product was ever manufactured or marketed and no ad was ever published by Basic Research or any of the companies later formed, including the limited liability company Respondents, unless scientific, marketing and legal all had approved the product or ad. *Id.*
- (14) Mr. Gay was not directly involved in creating any of the ads published by the limited liability company Respondents, including the ads that are challenged in this action. He set up the processes and made sure that the processes were followed so that no ad was placed until it had been approved by scientific, marketing and legal. *Id.*
- (15) Mr. Gay did not have the scientific or legal expertise to evaluate the efficacy of the products or accuracy of the ads published. Although Mr. Gay had the

ultimate authority to determine whether the ads would be published, in making his judgments he reasonably relied on the fact that scientific, marketing and legal all had approved the ads. Mr. Gay approved the ads in good faith, believing that the ads were truthful, that they complied with all applicable laws and regulations, and that there was a reasonable basis for the claims made in the ads based on the rigorous approval process the ads went through before being published, together with Mr. Gay's confidence in the competence and integrity of the individuals who approved the ads from each of the groups involved in the process. *Id.*

- (16) The Commission has failed to show that there is a reasonable apprehension of future violations of the Federal Trade Commission Act ("FTCA") by Mr. Gay.

#### **CONCLUSIONS OF LAW**

- A. Mr. Gay is not individually liable for restitution because he acted reasonably and in good faith in approving the ads published by the limited liability company Respondents. Mr. Gay did not have actual knowledge of material misrepresentations nor was he recklessly indifferent to the truth or falsity of any misrepresentations, nor did he have an awareness of a high probability of fraud and intentionally avoid the truth.

B. No injunctive relief would be appropriate against Mr. Gay because there is no reasonable apprehension of future violations of the FTCA by him.

CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of February, 2006, I caused the foregoing **TRIAL BRIEF OF DENNIS GAY** to be filed and served as follows:

- (1) an original and one paper copy send via hand delivery. One electronic copy in PDF format emailed to:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW Room H-159  
Washington, DC 20580  
Email: [secretary@ftc.gov](mailto:secretary@ftc.gov)

- (2) three paper copies and one electronic copy in PDF format on two CD-Roms filed by hand delivery to:

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
600 Pennsylvania Avenue, NW, Room H-112  
Washington, D.C. 20580

- (3) one paper copy by first class U.S. Mail to

James Kohm  
Associate Director, Enforcement  
U.S. Federal Trade Commission  
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Washington, D.C. 20001

- (4) one paper copy by first class U.S. mail and electronic PDF copy by email:

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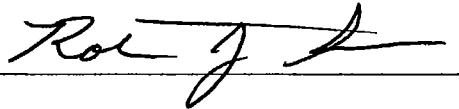
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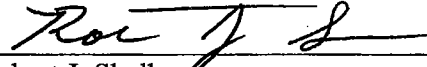
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A handwritten signature in black ink, appearing to read "Ron F. Price", is written over a horizontal line.

DATED this 10 day of February, 2006.

BURBIDGE & MITCHELL



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