

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

In the Matter of)
BASIC RESEARCH, LLC,)
 a limited liability company;)
A.G. WATERHOUSE, LLC,)
 a limited liability corporation;)
KLEIN-BECKER USA, LLC,)
 a limited liability company;)
NUTRASPORT, LLC,)
 a limited liability company;)
SÖVAGE DERMALOGIC LABORATORIES, LLC,)
 a limited liability company;)
BAN, LLC,)
 a limited liability corporation, also doing)
 business as BASIC RESEARCH, L.L.C.,)
 OLD BASIC RESEARCH, L.L.C.,)
 BASIC RESEARCH, A.G. WATERHOUSE,)
 KLEIN-BECKER USA, NUTRA SPORT, and)
 SOVAGE DERMALOGIC LABORATORIES,)
DENNIS GAY,)
 individually and as an officer of the)
 limited liability corporations,)
DANIEL B. MOWREY, Ph.D.,)
 Also doing business as AMERICAN)
 PHYTOTHERAPY RESEARCH)
 LABORATORY, and)
MITCHELL K. FRIEDLANDER,)
 Respondents.)

Docket No. 9318
PUBLIC DOCUMENT

**RESPONSE OF RESPONDENT DENNIS GAY TO COMPLAINT COUNSEL’S FIRST
SET OF INTERROGATORIES**

Pursuant to Rule 3.35 of the Federal Trade Commission’s Rules of Practice, Respondent Dennis Gay (“Respondent”) objects and responds to Complaint Counsel’s First Set of Interrogatories (“Request”) as follows:

General Objections

A. Respondent objects to the Interrogatories as overbroad and unduly burdensome on the grounds and to the extent that they call for responses that are neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

B. Respondent objects to the Interrogatories on the grounds and to the extent that it seeks responses that are subject to (i) the attorney-client privilege; (ii) the attorney and/or party work product immunity, and (iii) any other privilege or immunity, including common law and constitutional right of privacy and/or trade secret protection. Respondent hereby claims such privileges and immunities. Any disclosure of any such privileged or immunized information is inadvertent and is not, and is not intended, as a waiver of those privileges and immunities.

C. Respondent objects to the Interrogatories and to the Definitions and Instructions on the grounds and to the extent that they are overbroad, unduly burdensome and oppressive, and purport to impose obligations on Respondent that are beyond the scope of the Rules of Practice or other applicable law.

D. Respondent objects to the Interrogatories on the grounds and to the extent that they are vague, ambiguous and unintelligible, particularly in light of the inherent vagueness and ambiguity in the standards employed by the Commission as well as in the charges that have been levied in this matter, which is the subject of Respondent's pending motion for an interlocutory appeal and more definite statement by the Commission.

E. Respondent incorporates by this reference Respondent's Motion to Quash in Part and to Limit Subpoenas on Non-Parties and each response, objection and basis therefore in the motion, and further objects to each Interrogatory on those grounds.

F. Respondent's objections and responses to the Interrogatories are not intended to waive or prejudice any objections that Respondent may assert now or in the future, including, without limitation, objections as to the relevance of the subject matter of any interrogatory, or of the admissibility of any response or document or category of responses or documents, at hearing,

trial or any other time. Respondent expressly reserves 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 Respondent 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.

Specific Objections and Responses

Based on, subject to, and without waiving its General Objections, Respondent specifically and additionally responds to each of the Specifications contained in Complaint Counsel's Interrogatories as follows:

Interrogatory No. 1:

Identify and describe in detail the current and former duties, responsibilities, or work performed by each **person relating to the promotional materials** for each of the **challenged products**. (This request **includes**, but is not limited to, the creation, development, evaluation, approval, modification, and dissemination of **promotional materials**.)

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence; (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy. Based on, subject to, and without waiving the foregoing responses and objections, Respondent responds as follows: Respondent refers Complaint Counsel to the Corporate Respondent's response to this interrogatory.

Interrogatory No. 2:

Identify and describe in detail the current and former duties, responsibilities, or work performed by each **person** consulted by you, or upon whose advise, opinion, or expertise you relied in the production of each of the **challenged products**. (This request **includes**, but it not limited to, the creation, development, evaluation, approval, and manufacture of the **challenged products**.)

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence; (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy

Interrogatory No. 3:

Describe in detail the composition of each of the **challenged products**. (This request **includes**, but is not limited to, the identity of each ingredient and the amount of each ingredient contained in a single capsule, application, and serving. If any **challenged product** has been reformulated, provide a separate answer for each version of the product that has been marketed and sold, **identifying** the time period(s) in which each version was marketed and sold.

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege and/or work product doctrine; and (c) it seeks confidential, proprietary and/or trade secret information.

Interrogatory No. 4:

Disclose the total amount of sales, in terms of units and dollars, that each Respondent has achieved for each of the **challenged products** for each year from 2001 to the present.

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy. Subject to the foregoing objections and the General Objections above, and without waiving them, Gay does not manufacture, advertise, market, distribute or sell any of the challenged products, and therefore, Gay has not achieved any amount of sales of the challenged product.

Interrogatory No. 5:

To the extent a **challenged product** is a **substantially similar product** to other products, identify each other product.

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the claims that Complaint Counsel pursues in this matter); (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege and/or work product doctrine.

Interrogatory No. 6:

Disclose all payments that each **Respondent** has received, directly or indirectly, in connection with the advertising, marketing, promotion, and sale of each of the **challenged products** for each year from 2001 to the present. (This request **includes** the total dollar amount and source of all payments. For consumer sales, it is not necessary to disclose names, addresses, or telephone numbers.)

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Interrogatory No. 7:

Disclose the total amount of dollars that each **Respondent** has spent to advertise, market or otherwise promote each of the **challenged products** for each year from 2001 to the present, broken down by each medium used (*i.e.*, television, print, internet, radio, or other means). (This request **includes**, but is not limited to, all expenditures attributable to the creation, development, evaluation, approval, modification, and dissemination of **promotional materials**).

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and

information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy. Subject to the foregoing objections and the General Objections above, and without waiving them, Gay has not spent any money to advertise, market, or otherwise promote the challenged product.

Interrogatory No. 8:

Provide a **dissemination schedule** that **describes** in detail how each item of **promotional materials** submitted in response to the **Requests for Production** was disseminated or otherwise exposed to consumers.

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad, unduly burdensome; and requests information from documents requested and/or produced; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence; (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege and/or work product doctrine, including a compilation of documents requested and/or produced.

Interrogatory No. 9:

Describe in detail the actions each **Respondent** has taken to comply with the U.S. Food and Drug Administration's prohibition on the sale of dietary supplements containing ephedrine alkaloids, effective April 12, 2004. (This request **includes**, but is not limited to, **identification** of any product formulations that have been created, modified, or removed from distribution, **identification** of any **promotional materials** that have been created, revised, or removed from

dissemination, and the date(s) on which all of the actions described in your answer took place; and how orders for Leptoprin or Anorex or in response to existing **promotional materials** Leptoprin or Anorex have been fulfilled.)

Response:

Respondent incorporates by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right to privacy. Subject to, and without waiving the foregoing objections, Respondent responds as follows: Respondent refers Corporate Counsel to the responses provide by the Corporate Respondents to this interrogatory.

Interrogatory No. 10:

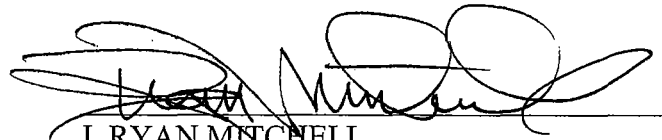
Disclose the total amount of refunds to consumers, in terms of units and dollars, that each Respondent has made for each of the **challenged products** for each year from 2001 to the present.

Response:

Respondent incorporate by reference each General Objection as set forth here in full. Respondent further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); (d) it seeks, or the extent that it seeks, information protected from disclosure by the attorney-client privilege, work product doctrine,

and/or right to privacy. Subject to the foregoing objections and the General Objections above, and without waiving them, Gay has not sold any of the challenged products to consumers and, therefore, Gay has not made any refunds to consumers for the challenged products.

Respectfully submitted this 16th day of August, 2004



J. RYAN MITCHELL
Attorneys for Respondent Dennis Gay

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2004, I caused the foregoing **RESPONSE OF RESPONDENT DENNIS GAY TO COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES** to be filed and served as follows:

- (1) an original and two paper copies filed by hand delivery and one electronic copy in PDF format filed by electronic mail to:

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

- (2) one paper copy served by hand delivery to:

The Honorable Stephen J. McGuire
Administrative Law Judge
600 Pennsylvania Avenue, NW, Room H-104
Washington, DC 20580

- (3) one paper copy by first class U.S. mail and one electronic copy in PDF format by electronic mail to:

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

- (4) one paper copy by first class U.S. mail

Elaine D. Kolish
Associate Director, Enforcement
Federal Trade Commission
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Washington, D.C. 20580

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Salt Lake City, Utah 84111

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c/o Compliance Department
5742 West Harold Gatty Drive
Salt Lake City, Utah 84116

I further certify that the electronic copies sent to the Secretary of the Commission are true and correct copies of the paper originals, and that paper copies with original signature are being filed with the Secretary of the Commission on the same day by other means.

DATED this 16th day of August, 2004.

BURBIDGE & MITCHELL



J. Ryan Mitchell
Attorneys for Respondent Dennis Gay

VERIFICATION

STATE OF UTAH)
 :ss.
COUNTY OF SALT LAKE)

Dennis Gay, is currently out of the country, upon his return we will forward his verification to his Responses to Complaint Counsel's First Set of Interrogatories.