

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**COMPLAINT COUNSEL'S RESPONSE TO
DANIEL B. MOWREY'S FIRST REQUEST FOR ADMISSIONS**

Pursuant to Rule 3.32 of the Commission's Rules of Practice, Complaint Counsel serve the following answers to Respondent Basic Research LLC's First Request For Admissions ("Respondent's Admissions"). Complaint Counsel's provision of a response to any request for admission shall not constitute a waiver of any applicable objection, privilege, or other right. Where required in order to respond to these Requests For Admissions, Complaint Counsel represents that it has undertaken good faith efforts to identify the information that would allow it to admit or deny such requests.

GENERAL OBJECTIONS

1. Complaint Counsel object to Respondent's requests for admissions to the extent they fail to seek an admission of the truth of matters relevant to the pending proceedings. Rule 3.32, Admissions.

2. Complaint Counsel object to Respondent's requests for admissions to the extent they fail to relate to statements or opinions of fact or of the application of law to fact and thereby exceed the scope of Rule 3.32 Admissions.
3. Complaint Counsel object to Respondent's requests for admission to the extent they seek information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel or Complaint Counsel's consultants or agents, on the grounds that such information is protected from disclosure by the attorney work product privilege and the provisions of Rule 3.31(c)(3). *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).
4. Complaint Counsel object to Respondent's requests for admission to the extent they seek information protected from disclosure by the deliberative process privilege. *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987); *see also* Rule 4.10(a)(3).
5. Complaint Counsel object to Respondent's requests for admission to the extent that they seek information relating to non-testifying expert witnesses because Respondent has not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii). *Schering Corp.*, No. 9232, Order Denying Discovery and Testimony by Expert Witness (Mar. 23, 1990); *Telebrands Corp.*, No. 9313, Order Denying Respondents' Motion To Compel The Production of Consumer Survey Information, (Dec. 23, 2003).
6. Complaint Counsel object to Respondent's requests for admission to the extent that they seek information obtained from or provided to other law enforcement agencies, and to the extent that they seek information obtained in the course of investigating other marketers of dietary supplements and weight loss products, on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest.
7. Complaint Counsel object to Respondent's requests for admission to the extent that, when read with the definitions and instructions, are so vague, broad, general, and all inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive.
8. Complaint Counsel object to the Instructions and Definitions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of any Pretrial Scheduling Order.

9. Complaint Counsel object to Respondent's Complaint Counsel object to Respondent's Requests for Admissions to the extent they fail to distinguish between the "Federal Trade Commission" and Complaint Counsel and thereby seek information in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information in contravention of Rule 3.35(a)(1) because such documents are not in the possession, custody or control of Complaint Counsel.
10. Complaint Counsel object to the extent that in Respondent Mowrey's Request for Admissions, Respondent began its numbering of Admissions with #1, when in fact, Respondent Basic Research has previously made 47 Requests for Admissions. Complaint Counsel's interpretation of the Scheduling Order is that each side has 60 admissions. Complaint Counsel has sought clarification of this issue in its October 28, 2004 filing. Complaint Counsel's responses are numbered according to the actual total number of admissions posed. Accordingly, Complaint Counsel have renumbered the Admissions with Respondent's original number in brackets.

GENERAL RESPONSES

1. Complaint Counsel's responses are made subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility, and any and all other objections and grounds that would require the exclusion of any statement contained herein if any requests were asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of the hearing.
2. The fact that Complaint Counsel have responded to any request for admission in whole or in part is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any request for admission.
3. Complaint Counsel have not completed their investigation in this case, and additional facts may be discovered that are responsive to Respondent's interrogatories. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.
4. As used herein, "Respondents" shall mean all Respondents named in the Complaint.
5. As used herein, "Respondent's requests for admission" shall mean the requests for admission and all applicable instructions and definitions as set forth in Basic Research, LLC's First Request For Admissions.

Requests For Admission and Responses

48. [1] Admit that, with respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, and as that phrase is applied to cases involving nutraceutical weight loss products, the FTC has not established any specific threshold level of expertise, credentials, experience or background a person must possess in order to be qualified as a "professional in the relevant area."

Response:

Complaint Counsel object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical" and is vague and ambiguous with respect to the term "qualified." Subject to and without waiving these objections, Complaint Counsel admit this request to the extent that the FTC has not established a one-size fits all threshold level of expertise, credentials, experience or background a person must possess in order to be a professional with expertise in the area of weight loss. Complaint Counsel deny this request to the extent that the FTC's published and publicly available caselaw in health, weight loss, dietary supplements and other areas, particularly its administrative initial decisions, often contain descriptions of the experts testifying on behalf of the FTC and on behalf of Respondents. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. *See e.g., Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

49. [2] Admit that, with respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, and as that phrase is applied to cases involving nutraceutical weight loss products, the FTC has not published or otherwise publicly identified any specific threshold level of expertise, credentials, experience or background a person must possess in order to be qualified as a "professional in the relevant area."

Response:

Complaint Counsel object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical" and is vague and ambiguous with respect to the term "qualified." Subject to and without waiving these objections, Complaint Counsel admit this request to the extent that the FTC has not published or otherwise identified a one-size fits all threshold level of expertise, credentials, experience or background a person must possess in order to be a professional with

expertise in the area of weight loss. Complaint Counsel deny this request to the extent that the FTC's published and publicly available caselaw in health, weight loss, dietary supplements and other areas, particularly its administrative initial decisions, often contain descriptions of the experts testifying on behalf of the FTC and on behalf of Respondents. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. See e.g., *Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

50. [3] Admit that, with respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, and as that phrase is applied to cases involving nutraceutical weight loss products, the FTC has not published any specific guidelines which describe, identify or set forth the level of expertise, credentials, experience or background a person must possess in order to be qualified as a "professional in the relevant area."

Response:

Complaint Counsel object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical" and is vague and ambiguous with respect to the term "qualified." Subject to and without waiving these objections, Complaint Counsel admit this request to the extent that the FTC has not published a one-size fits all description of the level of expertise, credentials, experience or background a person must possess in order to be a professional with expertise in the area of weight loss. Complaint Counsel deny this request to the extent that the FTC's published and publicly available caselaw in health, weight loss, dietary supplements and other areas, particularly its administrative initial decisions, often contain descriptions of the experts testifying on behalf of the FTC and on behalf of Respondents. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. See e.g., *Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

51. [4] Admit that, with respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, and as that phrase is applied to this case, the FTC has not established any specific threshold level of expertise, credentials, experience or background a person must possess in order to be qualified as a "professional in the relevant area."

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical" and is vague and ambiguous with respect to the term "qualified." Subject to and without waiving these objections, Complaint Counsel admit this request to the extent that "as applied to this case," the FTC has not established a specific threshold level of expertise, credentials, experience or background a person must possess in order to be a professional with expertise in the area of weight loss. Complaint Counsel deny this request to the extent that the FTC's published and publicly available caselaw in health, weight loss, dietary supplements and other areas, particularly its administrative initial decisions, often contain descriptions of the experts testifying on behalf of the FTC and on behalf of Respondents. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. *See e.g., Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

52. [5] Admit that, with respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, and as that phrase is applied to this case, the FTC has not published or otherwise publicly identified any specific threshold level of expertise, credentials, experience or background a person must possess in order to be qualified as a "professional in the relevant area."

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical" and is vague and ambiguous with respect to the term "qualified." Subject to and without waiving these objections, Complaint Counsel admit this request to the extent that "as applied to this case," the FTC has not published or otherwise identified a specific threshold level of expertise, credentials, experience or background a person must possess in order to be a professional with expertise in the area of weight loss. Complaint Counsel deny this request to the extent that the FTC's published and publicly available caselaw in health, weight loss, dietary supplements and other areas, particularly its administrative initial decisions, often contain descriptions of the experts testifying on behalf of the FTC and on behalf of Respondents. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. *See e.g., Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication

Dietary Supplements: An Advertising Guide for Industry, the FTC states it “gives great weight to accepted norms in the relevant fields of research” and looks to “procedures generally accepted in the profession to yield accurate and reliable results.” *Guide* at 9.

53. [6] Admit that, with respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, and as that phrase is applied to this case, the FTC has not published any specific guidelines which describe, identify or set forth the level of expertise, credentials, experience or background a person must possess in order to be qualified as a "professional in the relevant area."

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical” and is vague and ambiguous with respect to the term “qualified.” Subject to and without waiving these objections, Complaint Counsel admit this request to the extent that “as applied to this case,” the FTC has not published formal Industry Guides as published in the C.F.R. or Trade Practice or Trade Regulation Rule describing the level of expertise, credentials, experience or background a person must possess in order to be a professional with expertise in the area of weight loss. Complaint Counsel deny this request to the extent that the FTC’s published and publicly available caselaw in health, weight loss, dietary supplements and other areas, particularly its administrative initial decisions, often contain descriptions of the experts testifying on behalf of the FTC and on behalf of Respondents. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. *See e.g., Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat’l Comm’n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC’s publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it “gives great weight to accepted norms in the relevant fields of research” and looks to “procedures generally accepted in the profession to yield accurate and reliable results.” *Guide* at 9.

54. [7] Admit that, with respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, and as that phrase is applied to this case, Dr. Mowrey is a "professional in the relevant area."

Response: Complaint Counsel object to this request to the extent it is premature because Complaint Counsel has yet to receive Dr. Mowrey’s expert report, and depose Dr. Mowrey on his report, expertise, and background. Further Respondent s have yet to complete their responses to Complaint Counsel’s discovery. Complaint Counsel reserves the right to supplement as necessary this response as Respondents’ complete their discovery obligations and Complaint Counsel completes its depositions. To date, Respondents have provided insufficient information to establish that Dr. Mowrey is a professional in the relevant area “as applied to this case.”

55. [8] Admit that Dr. Mowrey is qualified to determine whether a scientific study is competent and reliable scientific evidence.

Response: Complaint Counsel object to this request to the extent it is premature because Complaint Counsel has yet to receive Dr. Mowrey's expert report, and depose Dr. Mowrey on his report, expertise, and background. Further Respondents have yet to complete their responses to Complaint Counsel's discovery. Complaint Counsel reserves the right to supplement as necessary this response as Respondents' complete their discovery obligations and Complaint Counsel completes its depositions and review of the evidence. To date, Respondents have provided insufficient information to establish that Dr. Mowrey is a professional in the relevant area "as applied to this case."

56. [9] Admit that the FTC has not defined the phrase "expertise of professionals in the relevant area," as that phrase is applied to cases involving nutraceutical weight loss products, as requiring that a person possess any specific level of expertise, credentials, experience or background in order to be qualified as a "professional in the relevant area."

Response: Complaint Counsel object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical" and is vague and ambiguous with respect to the term "qualified." Subject to and without waiving these objections, Complaint Counsel admit this request to the extent that the FTC has not defined the phrase "expertise of professionals in the relevant area," as that phrase is applied to cases involving weight loss products, as requiring that a person possess any specific level of expertise, credentials, experience or background in order to be qualified as a "professional in the relevant area" because each case presents distinct advertising claims, products and pertinent areas of science and there is no one-size fits all approach to the level of expertise, credentials, experience or background a person must possess in order to be a professional with expertise in the area of weight loss. Complaint Counsel deny this request to the extent that the FTC's published and publicly available caselaw in health, weight loss, dietary supplements and other areas, particularly its administrative initial decisions, often contain descriptions of the experts testifying on behalf of the FTC and on behalf of Respondents. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. See e.g., *Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

57. [10] Admit that the FTC has not defined the phrase "expertise of professionals in the relevant area," as that phrase is applied to this case, as requiring that a person possess any specific level of expertise, credentials, experience or background in order to be qualified as a "professional in the relevant area."

Response: Complaint Counsel object to this request as vague and ambiguous with respect to the term "qualified." Subject to and without waiving this objection, Complaint Counsel admit this request to the extent that the FTC has not defined the phrase "expertise of professionals in the relevant area," as that phrase is applied to cases involving weight loss products, as requiring that a person possess any specific level of expertise, credentials, experience or background in order to be qualified as a "professional in the relevant area" because each case presents distinct advertising claims, products and pertinent areas of science and there is no one-size fits all approach to the level of expertise, credentials, experience or background a person must possess in order to be a professional with expertise in the area of weight loss. Complaint Counsel deny this request to the extent that the FTC's published and publicly available caselaw in health, weight loss, dietary supplements and other areas, particularly its administrative initial decisions, often contain descriptions of the experts testifying on behalf of the FTC and on behalf of Respondents. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. *See e.g., Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

58. [11] Admit that the FTC must defer to the opinions of "professionals in the relevant area" in order for the FTC to determine whether a scientific study constitutes competent and reliable scientific evidence upon which a company can base product efficacy claims.

Response: Complaint Counsel object to this request as vague to the extent it fails to define a specific factual context for the question (*e.g.*, during what stage of proceedings?) and hence presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request. Complaint Counsel admit this request to the extent that FTC staff in conjunction with its consulting and testifying experts determine whether a scientific study constitutes competent and reliable scientific evidence upon which a company can base product efficacy claims.

59. [12] Admit that a person who is not a medical doctor can be a "professional in the relevant area," as that phrase is used in the FTC's Advertising Guide, for purposes of determining whether a scientific study is competent and reliable scientific evidence.

Response: Complaint Counsel objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request. The answer to this question would depend upon a variety of factors including what claims are being made, the type of product, the related area of science etc. For example, a person who is not a medical doctor could nevertheless be considered a professional in the relevant area of engine additives, depending that person's background, experience, credentials etc.

60. [13] Admit that a person who holds a Ph.D. in psychology can be a "professional in the relevant area," as that phrase is used in the FTC's Advertising Guide, for purposes of determining whether a scientific study is competent and reliable scientific evidence.

Response: Complaint Counsel objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request. The answer to this question would depend upon a variety of factors including what claims are being made, the type of product, the related area of science etc.. Complaint Counsel admits this request to the extent that under certain circumstances a person who holds a Ph.d in psychology can be a "professional in the relevant area," as that phrase is used in the FTC's Advertising Guide, for purposes of determining whether a scientific study is competent and reliable scientific evidence especially if the relevant area is psychology.

61. [14] Admit that Dr. Mowrey did not disseminate any of the advertisements referenced in the Complaint.

Response: Complaint Counsel object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. See e.g., *Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint Counsel further object to this request to the extent it is premature because Complaint Counsel has yet to depose Dr. Mowrey and other witnesses regarding Dr. Mowreys' responsibilities and activities with regard to the Challenged Products. Further Respondents have yet to complete their responses to Complaint Counsel's discovery. Complaint Counsel reserves the right to supplement this response as necessary once Respondents' complete their discovery obligations and Complaint Counsel completes its depositions and review of the evidence. Complaint Counsel denies this request to the extent that

Dr. Mowrey acted in concert with any of Respondents to disseminate any of the advertisements challenged in the Complaint.

62. [15] Admit that Dr. Mowrey did not cause of [sic] the advertisements referenced in the Complaint to be disseminated.

Response: Complaint Counsel object to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. *See e.g., Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint Counsel further object to this request to the extent it is premature because Complaint Counsel has yet to depose Dr. Mowrey and other witnesses regarding Dr. Mowreys’ responsibilities and activities with regard to the Challenged Products. Further Respondents have yet to complete their responses to Complaint Counsel’s discovery. Complaint Counsel reserves the right to supplement as necessary this response once Respondents’ complete their discovery obligations and Complaint Counsel completes its depositions and review of the evidence. Complaint Counsel denies this request to the extent that Dr. Mowrey acted in concert with any of Respondents to cause any of the advertisements challenged in the Complaint to be disseminated.

63. [16] Admit that Dr. Mowrey did not control any of the Corporate Respondents at the time the advertisements referenced in the Complaint were disseminated.

Response: Complaint Counsel object to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. *See e.g., Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint Counsel further object to this request to the extent it is premature because Complaint Counsel has yet to depose Dr. Mowrey and other witnesses regarding Dr. Mowreys’ responsibilities and activities with regard to the Challenged Products. Further Respondents have yet to complete their responses to Complaint Counsel’s discovery. Complaint Counsel reserves the right to supplement as necessary this response once Respondents’ complete their discovery obligations and Complaint Counsel completes its depositions and review of the evidence.

64. [17] Admit that Dr. Mowrey did not have the authority to control any of the Corporate Respondents at the time the advertisements referenced in the Complaint were disseminated.

Response: Complaint Counsel object to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. *See e.g., Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint Counsel further object to this request to the extent it is premature because Complaint Counsel has yet to depose Dr. Mowrey and other witnesses regarding Dr. Mowreys’ responsibilities and activities with regard to the Challenged Products. Further Respondents have yet to complete their responses to Complaint Counsel’s discovery. Complaint Counsel reserves the right to supplement as necessary this response once Respondents’ complete their discovery obligations and Complaint Counsel completes its depositions and review of the evidence.

65. [18] Admit that a scientific study can constitute competent and reliable scientific evidence even if the study contains errors or mistakes, or is otherwise not a "perfect" study.

Response: Complaint Counsel object to this request to the extent it presents a vague, hypothetical situation devoid of a specific context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request. Subject to and without waiving this objection, Complaint Counsel denies this request to the extent that the extent and scope of the errors and soundness of the methodology affect the level of reliability of the study.

66. [19] Admit that the FTC has not published or otherwise disseminated any specific guidelines and/or rules as to how many persons must participate in a scientific study in order for the study to constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Subject to and without waiving this objection, Complaint Counsel admits this request to the extent that there is no published FTC has not published formal Industry Guides as published in the C.F.R. or Trade Practice or Trade Regulation Rule setting forth a fixed formula for the number of persons that must participate in a scientific study in order for the study to constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a weight loss product. Complaint Counsel denies this request to the extent that its published and publicly available caselaw, particularly its initial decisions in the health, weight loss, and dietary supplement area, address scientific studies and sample size on a case specific basis. *See e.g., Schering Corp.*, 118 F.T.C. 1046 (1991); *Thompson Medical*, 98 F.T.C. 136 (1981); and *Bristol-Myers*, 102 F.T.C. 21 (1983). Further, Complaint Counsel denies this request to the extent that the FTC’s publication *Dietary Supplements: An Advertising Guide for Industry* addresses this issue. Moreover in the FTC’s publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it “gives great weight to accepted norms in the relevant fields of

research” and looks to “procedures generally accepted in the profession to yield accurate and reliable results.” *Guide* at 9.

67. [20] Admit that a scientific study which has 6 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

68. [21] Admit that a scientific study which has 10 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

69. [22] Admit that a scientific study which has 16 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

70. [23] Admit that a scientific study which has 18 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to

this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

71 [24] Admit that a scientific study which has 20 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

72. [25] Admit that a scientific study which has 24 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

73. [26] Admit that a scientific study which has 30 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

74. [27] Admit that a scientific study which has 53 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

75. [28] Admit that a scientific study which has 76 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

76. [29] Admit that a scientific study which has 103 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

77. [30] Admit that the FTC has not published or otherwise disseminated any specific guidelines and/or rules as to over what length of time a scientific study must be conducted in order for the study to constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical.” Subject to and without waiving this objection, Complaint Counsel admits this request to the extent that there is no published FTC has not published formal Industry Guides as published in the C.F.R. or Trade Practice or Trade Regulation Rule setting forth a fixed formula as to the length of time a scientific study must be conducted in order for the study to constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a weight loss product. Complaint Counsel denies this request to the extent that its published and publicly available caselaw,

particularly its initial decisions in the health, weight loss, and dietary supplement area, address scientific studies and study duration on a case specific basis. *See e.g., Schering Corp.*, 118 F.T.C. 1046 (1991). Further, Complaint Counsel denies this request to the extent that the FTC's publication *Dietary Supplements: An Advertising Guide for Industry* addresses this issue. Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

78. [31] Admit that a scientific study conducted over a period of 6 weeks can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical." Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

79. [32] Admit that a scientific study conducted over a period of 8 weeks can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical." Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

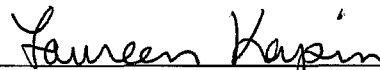
80. [33] Admit that a scientific study conducted over a period of 12 weeks can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical." Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

81. [34] Admit that a scientific study conducted over a period of 6 months can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response: Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical." Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request.

Dated: October 29, 2004



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

Certificate of Service

I hereby certify that on the 29th day of October, 2004, I caused *COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT DANIEL B. MOWREY'S FIRST REQUEST FOR ADMISSIONS* to be served and filed as follows:

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

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I hereby certify that on this 29th day of October, 2004, I caused *COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT DANIEL B. MOWREY'S FIRST REQUEST FOR ADMISSIONS* to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580


COMPLAINT COUNSEL