

EXHIBIT 1



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

Division of Enforcement

Laureen Kapin
Senior Attorney

Direct Dial
202-326-3237

June 25, 2004

VIA FEDERAL EXPRESS

Basic Research, L.L.C.
A.G. Waterhouse, L.L.C.
Klein-Becker USA, L.L.C.
Nutrasport, L.L.C.
Sovage Dermalogic Laboratories, L.L.C.
BAN, L.L.C.

Dennis Gay
Daniel B. Mowrey
Mitchell K. Friedlander

5742 W. Harold Gatty Dr.
Salt Lake City, UT 84116

RE: FTC v. Basic Research et al., Docket No. 9318.

To whom it may concern:

Enclosed is a copy of Complaint Counsel's Notice of Appearance, First Request for Production of Documentary Materials and Tangible Things, and First Set of Interrogatories. These materials have also been sent to Mr. Nagin and Ms. Azcuenaga, the attorneys who have previously represented Basic Research et al. in this matter. Please note that these discovery requests are directed to each of the Respondents in this matter and this package contains a copy for each Respondent. Thank you very much for your attention to this matter. If you have any questions, please have your counsel contact me at the number referenced above.

Sincerely,

Laureen Kapin
Laureen Kapin
Senior Counsel

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

In the Matter of)
)
)

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

Respondents.)
)
)

Docket No. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION
OF DOCUMENTARY MATERIALS AND TANGIBLE THINGS**

Pursuant to RULE OF PRACTICE 3.37(a), Complaint Counsel requests that Respondents produce the documentary materials and tangible things identified below for inspection and copying within 20 days at the Federal Trade Commission, 601 New Jersey Ave., N.W., Suite NJ-2122, Washington, D.C. 20001, or at such time and place as may be agreed upon by all counsel.

DEFINITIONS

- 1) "All documents" means each document, as defined below, which can be located, discovered or obtained by reasonable, diligent efforts, **including** without limitation all documents possessed by: (a) you or your counsel; or (b) any other person or entity from whom you can obtain such documents by request or which you have a legal right to bring within your possession by demand.

- 2) "Challenged products" means the products identified as Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean in the administrative **Complaint** issued by the Federal Trade Commission in the above-captioned matter, both individually and collectively.

- 3) **“Communication(s)”** includes, but is not limited to, any and all conversations, meetings, discussions and any other occasion for verbal exchange, whether in person, by telephone, or electronically, as well as all letters, memoranda, telegrams, cables, and other writings or **documents**.
- 4) **“Complaint”** means the administrative **Complaint** issued by the Federal Trade Commission, and any amendments thereto, in the above-captioned matter.
- 5) **“Corporate Respondents”** means Respondents Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker USA, L.L.C., Nutrasport, L.L.C., Sovage Dermalogic Laboratories, L.L.C., BAN, L.L.C., both individually and collectively, **including** all of their operations under assumed names. This term also includes the entity known as American Phytotherapy Research Laboratory identified in the administrative **Complaint** issued by the Federal Trade Commission.
- 6) **“Dissemination schedule”** includes, but is not limited to, the following: (a) for radio, audio, television, and video **promotional materials**, the date, time of day, location and station name; (b) for product packaging, the names of distributors and retailers to whom the packaging or other **promotional material** was transmitted, the date of transmittal, and the number of pieces transmitted; (c) for printed **promotional materials**, the name and date of the publication or place in which the **promotional material** appeared; and (d) for Internet materials, the date that the **promotional material** was first placed on the Internet, the date (if any) that it was removed from the Internet, and the number of “hits” that the advertisement registered.
- 7) **“Document”** means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, taped, recorded, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, **including** but not limited to any advertisement, book, pamphlet, periodical, contract, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, package insert, sticker, web page, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, data compilation, tests, reports, clinical studies, test reports, scientific literature, articles, expert opinions, handwritten notes, correspondence, **communications**, electronic mail, electronically stored data, computer (**including** handheld computer) material (**including** print-outs, cards, magnetic or electronic tapes, discs and such codes or instructions as will transform such computer materials into easily understandable form), and video and audio recordings.
- 8) **“Each”** and **“any”** include **“all,”** so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or **documents** that might otherwise be construed to be outside its scope.

- 9) “**Includes**” or “**including**” means “**including but not limited to,**” so as to avoid excluding any information that might otherwise be construed to be within the scope of any Specification.
- 10) “**Individual Respondents**” means Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively.
- 11) “**Interrogatories**” means any and all *Interrogatories* served on the **Respondents** in the above-captioned matter.
- 12) “**Market research**” means all information referring or relating to testing, measuring or assessing consumers’ or individuals’ interpretation of, understanding of or reaction to a draft, proposed, or final **promotional material**, proposed advertising text, copy or creative strategy or platform, product category, product, entity or information conveyed in an advertisement, **including** consumer perception tests, comprehension tests, recall tests, marketing or consumer surveys or reports, penetration tests, audience reaction tests, focus groups and media research.
- 13) “**Or**” includes “**and,**” and “**and**” includes “**or,**” so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information or **documents** that might otherwise be construed to be outside its scope.
- 14) “**Person**” or “**Persons**” means all natural persons, corporations, partnerships or other business associations, and all other legal entities, **including** all members, officers, predecessors, assigns, divisions, affiliates and subsidiaries.
- 15) “**Promotional material**” shall mean any written or oral statement, advertisement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether the same appears in a press release, video news release, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, sticker, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, instructional or education materials, packaging, package insert, package label, film, slide, radio or television broadcast or transmission, Internet or World Wide Web site, streaming video, electronic mail, audio program transmitted over a telephone system, script used to make oral solicitations to consumers, or publication or broadcast in any other medium.
- 16) “**Referring to**” or “**relating to**” means discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- 17) “**Respondent(s)**” means all **Corporate Respondents** and all **Individual Respondents**, both individually and collectively.
- 18) “**You**” or “**Your**” means the Respondents or Respondents’, both individually and collectively, unless otherwise noted.

- 19) The use of the singular includes the plural, and the plural includes the singular.
- 20) The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
- 21) The spelling of a name shall be construed to include all similar variants thereof.

INSTRUCTIONS

- 1) Unless otherwise specified, the time period covered by a Document Specification shall not be limited and all **documents** responsive to the Specification, regardless of dates or time periods involved, should be provided.
- 2) A complete copy of each **document** should be submitted even if only a portion of the **document** is within the terms of the Specification. The **document** shall not be edited, cut, or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.
- 3) All information submitted shall be clearly and precisely identified as to the Specification(s) or sub-Specification(s) to which it is responsive. Each page submitted should be marked with a unique "Bates" **document** tracking number.
- 4) **Documents** covered by these Specifications are those which are in your possession or under your actual or constructive custody or control, and in the case of **Corporate Respondents**, includes all of their operations under assumed names, whether or not such **documents** were received from or disseminated to any other **person** or entity **including** attorneys, accountants, directors, officers and employees.
- 5) All information submitted shall be clearly and precisely identified as to the **Respondent(s)** who produced the information. You shall do so by: (a) marking each submitted item with a notation identifying the **Respondent(s)** who produced that item; or (b) providing a separate list of submitted items, in numeric "Bates" **document** tracking number order, that identifies the **Respondent(s)** who produced each item.
- 6) **Documents** that may be responsive to more than one Specification need not be submitted more than once; however, your response should indicate, for each **document** submitted, each Specification to which the **document** is responsive. If any **documents** responsive to a Specification have been previously supplied to the Commission, you may comply with the Specification by identifying the **document(s)** previously provided and the date of submission; identification shall be by Bates number if the **document(s)** were so numbered when submitted, or by author and subject matter if not so numbered.

7) If any of the documentary materials requested in these Specifications are available in machine-readable form (such as floppy or hard disks, drums, core storage, magnetic tapes or punch cards), state the form in which it is available and describe the type of computer or other machinery required to read the record(s) involved. If the information requested is stored in a computer or a file or record generated by a computer, indicate whether you have an existing program that will print out the record in readable form and state the name, title, business address and telephone number of each **person** who is familiar with the program.

8) **Promotional materials** submitted in response to these Specifications shall be submitted in the following form(s) as follows: For **documents**, provide the original **promotional materials** if available, or, if not available, color copies thereof. For audio-only (or radio) materials, provide a tape cassette (or digitized recording, if in machine-readable form) and a script, as well as any audio out-takes. For video recordings, provide a DVD or VHS cassette and script or storyboard, as well as any video out-takes. For Internet or other online materials, provide a CD (if in machine-readable form) or a clear color printout of all screens displayed in the promotional materials and identify the site, forum, or address.

9) All objections to these Document Specifications, or to any individual Specification, must be raised in the initial response or are otherwise waived.

10) If any requested material is withheld based on a claim of privilege, submit together with such claim a schedule of the items withheld which states individually for each item withheld: (a) the type, title, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that the item is privileged. If only part of a responsive **document** is privileged, all non-privileged portions of the **document** must be submitted.

11) This First Request for Production of Documentary Materials and Tangible Things is continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery. Further instructions pertinent to a particular Document Specification appear in parentheses within or following that Specification.

SPECIFICATIONS

Demand is hereby made for the following documentary materials and tangible things:

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

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

- 9) **All documents relating to, referring to, or constituting a dissemination schedule for advertisements relating to the challenged products.**
- 10) All tax returns for **Respondents** for 2000 to present, **including** but not limited to all supporting **documents** and attachments, requests for extension for filing any tax return, and any statement(s) of the reasons for which any extension(s) were requested. (This request **includes** all returns and related information pertaining to the payment of payroll and unemployment taxes, social security taxes, medicare, and federal, state and local and sales, business, gross receipts, licensing, property, and income taxes.)
- 11) **All documents** relating to the corporate structure of each company for which any individual **Respondent** is an officer, director or significant shareholder (25% or more of total shares), including but not limited to Articles of Incorporation; By-laws; Board minutes; annual reports; information showing the date and place of the formation of the Company, and the form of organization of your Company (for example, corporation or partnership); parent organization, if any, and all subsidiaries and affiliates; annual or periodic filings with State or Federal authorities regulating corporations; the names of all directors; the name and title of all officers, supervisors, and managers; organizational charts; **Documents** showing the ownership interests of all owners; **Documents** describing the duties, responsibilities and authority of all officers, managers, directors, and supervisors employed by **you**; and any Documents delegating authority to engage in any act on behalf of **you** or act as agent for **you**.
- 12) Annually, from the date of the first sale of each of the **challenged products** to date, **all documents** that show net and gross sales figures and profit figures for each of the **challenged products**.
- 13) **All documents and communications** consulted or used in preparing your responses to Complaint Counsel's **interrogatories**.

Respectfully submitted,

Laureen Kapin

Laureen Kapin (202) 326-3237
Joshua S. Millard (202) 326-2454
Laura Schneider (202) 326-2604

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

Dated: June 25, 2004

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

In the Matter of

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

Respondents.

Docket No. 9318

PUBLIC DOCUMENT

COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES

Pursuant to RULE OF PRACTICE 3.35, Complaint Counsel requests that Respondents respond to these Interrogatories within 30 days and furnish the requested information to Complaint Counsel at the Federal Trade Commission, 601 New Jersey Ave., N.W., Suite NJ-2122, Washington, D.C. 20001, or at such time and place as may be agreed upon by all counsel.

DEFINITIONS

- 1) **"Challenged products"** means the products identified as Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean in the administrative complaint issued by the Federal Trade Commission in the above-captioned matter, both individually and collectively.
- 2) **"Communication(s)"** includes, but is not limited to, any and all conversations, meetings, discussions and any other occasion for verbal exchange, whether in person, by telephone, or electronically, as well as all letters, memoranda, telegrams, cables, and other writings or documents.
- 3) **"Corporate Respondents"** means Respondents Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker USA, L.L.C., Nutrasport, L.L.C., Sovage Dermalogic

Laboratories, L.L.C., BAN, L.L.C., both individually and collectively, and **including** all of their operations under assumed names. This term also includes the entity known as American Phytotherapy Research Laboratory identified in the administrative complaint issued by the Federal Trade Commission.

4) **“Describe”** or **“disclose”** mean to offer a comprehensive, complete, accurate and detailed description, explanation or listing of the matter into which the Interrogatory inquires.

5) **“Dissemination schedule”** includes, but is not limited to, the following: (a) for radio, audio, television, and video **promotional materials**, the date, time of day, location and station name; (b) for product packaging, the names of distributors and retailers to whom the packaging or other **promotional material** was transmitted, the date of transmittal, and the number of pieces transmitted; (c) for printed **promotional materials**, the name and date of the publication or place in which the **promotional material** appeared; and (d) for Internet materials, the date that the **promotional material** was first placed on the Internet, the date (if any) that it was removed from the Internet, and the number of “hits” that the advertisement registered.

6) **“Document”** means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, taped, recorded, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, package insert, sticker, web page, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, data compilation, tests, reports, clinical studies, test reports, scientific literature, articles, expert opinions, handwritten notes, correspondence, **communications**, electronic mail, electronically stored data, computer (including handheld computer) material (including print-outs, cards, magnetic or electronic tapes, discs and such codes or instructions as will transform such computer materials into easily understandable form), and video and audio recordings.

7) **“Each”** and **“any”** include **“all,”** so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or **documents** that might otherwise be construed to be outside its scope.

8) **“Identify”** or **“identification”** means:

(a) when referring to a natural **person**, state the full name, present business address and telephone number, or if a present business affiliation or business address is not known, by the last known business and home addresses and business and home telephone numbers;

(b) when referring to any other entity, such as a business or organization, state

the legal name as well as any other names under which the entity has done business, address, telephone number and contact person, if applicable for that entity; and

©) when referring to a **document** or **communication**, state the full name(s) of the author(s) or preparer(s), the full name of the recipient(s), addressee(s), and/or person(s) designated to receive copies, the title or subject line of the **document** or **communication**, a brief description of the subject matter of the **document** or **communication**, the date it was prepared, its present location, and its present custodian.

9) **"Includes"** or **"including"** means **"including but not limited to,"** so as to avoid excluding any information that might otherwise be construed to be within the scope of any Specification.

10) **"Individual Respondents"** means Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively.

11) **"Or"** includes **"and,"** and **"and"** includes **"or,"** so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information or documents that might otherwise be construed to be outside its scope.

12) **"Person"** or **"Persons"** means all natural persons; corporations, partnerships or other business associations, and all other legal entities, including all members, officers, predecessors, assigns, divisions, affiliates and subsidiaries.

13) **"Promotional material"** shall mean any written or oral statement, advertisement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether the same appears in a press release, video news release, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, stickers, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, instructional or education materials, packaging, package insert, package label, film, slide, radio or television broadcast or transmission, Internet or World Wide Web site, streaming video, electronic mail, audio program transmitted over a telephone system, script used to make oral solicitations to consumers, or publication or broadcast in any other medium.

14) **"Referring to"** or **"relating to"** means discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

15) **"Requests for Production"** means any and all *Requests for Production of Documentary Materials and Tangible Things* directed to the **Respondents** in the above-captioned matter.

- 16) “**Respondent(s)**” means all **Corporate Respondents** and all **Individual Respondents**, both individually and collectively.
- 17) “**Substantially similar product**” means any product that is substantially similar in ingredients, composition, and properties.
- 18) “**You**” or “**Your**” means the Respondents or Respondents’, both individually and collectively, unless otherwise noted.
- 19) The use of the singular includes the plural, and the plural includes the singular.
- 20) The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
- 21) The spelling of a name shall be construed to include all similar variants thereof.

INSTRUCTIONS

- 1) Unless otherwise specified, the time period covered by an Interrogatory shall not be limited and all information responsive to the Interrogatory, regardless of dates or time periods involved, shall be provided.
- 2) Each Interrogatory should be set forth in full preceding the answer to it and should be answered separately and fully in writing, under oath.
- 3) All answers shall be served within 30 days after service of these Interrogatories.
- 4) Information covered by these Interrogatories is that which is in your knowledge or possession, or under your actual or constructive custody or control, whether or not such information is located in the files of, or possessed by your individual officers, directors or employees, and whether or not such information is received from or disseminated to any other **person** or entity including attorneys, accountants, directors, officers or employees.
- 5) All information submitted in response to these Interrogatories shall be clearly and precisely identified as to the **Respondent(s)** who produced the information.
- 6) Where an Interrogatory requests an answer or portion of an answer that has already been supplied in response to another Interrogatory, the answer or portion of the answer need not be supplied a second time. It is sufficient to specify the responses that contain the answer, and supply any additional information necessary to answer the Interrogatory.
- 7) All objections to these Interrogatories, or to any individual Interrogatory, must be raised in the initial response or are otherwise waived.

8) If you object to any Interrogatory or a part of any Interrogatory, state the Interrogatory or part to which you object, state the exact nature of the objection, and describe in detail the facts upon which you base your objection. If any Interrogatory cannot be answered in full, it shall be answered to the fullest extent possible and the reasons for the inability to answer fully shall be provided. If you object to any Interrogatory on the grounds of relevance or overbreadth, you shall provide all responsive information that is concededly relevant to the parties' claims or defenses or the requested relief. For each Interrogatory that cannot be answered in full, you shall describe the efforts made to locate information needed for such answer.

9) If any **documents** or **communications** are not identified in response to an Interrogatory on grounds of privilege, submit together with such claim a schedule of the items withheld which states individually for each item withheld: (a) the type, title, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that the item is privileged. If only part of a responsive **document** or **communication** is privileged, all non-privileged portions of the item must be identified.

10) These Interrogatories are continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery. Further instructions pertinent to a particular Interrogatory appear in parentheses within or following that Interrogatory.

INTERROGATORIES

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**.)

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

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.)

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.

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

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 for all payments. For consumer sales, it is not necessary to disclose names, addresses, or telephone numbers.)

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**).

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

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 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.)

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.

Respectfully submitted,

Laureen Kapin

Laureen Kapin	(202) 326-3237
Joshua S. Millard	(202) 326-2454
Laura Schneider	(202) 326-2604

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

Dated: June 25, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this ^{25th} day of June, 2004, I caused *Complaint Counsel's First Set of Interrogatories* to be served as follows:

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

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

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

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

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



Joshua S. Millard

EXHIBIT 2

FELDMANGALE

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

MIAMI CENTER, 19TH FLOOR
201 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-4332
TEL: 305.358.5001
FAX: 305.358.3309

PROMENADE WEST, SUITE 315
880 WEST FIRST STREET
LOS ANGELES, CALIFORNIA 90012
TEL: 213.625.5992
FAX: 213.625.5993

www.FeldmanGale.com

REPLY TO: MIAMI OFFICE

E-MAIL: JFeldman@FeldmanGale.com

October 6, 2004

Via email lkapin@ftc.gov
Laureen Kapin, Sr. Counsel
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

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

Dear Ms. Kapin:

Please find enclosed Basic Research, L.L.C. and Ban, L.L.C.'s Privilege Log. The log was not prepared by my office and I have yet to review the listed documents. I will attempt to do this next week. I am therefore providing the log with the express understanding that some of the documents on the log may not be privileged or privileged for reasons other than those asserted.

Sincerely,



Jeffrey D. Feldman

JDF/mr

Enclosure

CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042731	07/27/04	H. Sprik	N. Chevreau	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042732 – R0042734	07/27/04	C. Fobbs	H. Sprik	Email	Attorney-Client; Atty. Work Product	Tummy Flattening Gel Information
R0042735 – R0042736	07/07/04	N. Chevreau	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042737	07/07/04	N. Chevreau	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042738	06/18/04	H. Sprik	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042739	06/14/04	C. Fobbs	H. Sprik	Email	Attorney-Client	PediaLean Information
R0042740 – R0042741	06/11/04	C. Fobbs	A. Roth; P. Hatch	Email	Attorney-Client	PediaLean Information
R0042742 – R0042744	06/09/04	K. Jones	H. Sprik	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042745 – R0042746	06/03/04	C. Fobbs	K. Jones	Email	Attorney-Client	Cutting Gel Information
R0042747 – R0042749	06/02/04	C. Fobbs	M. Azcuenaga	Email	Attorney-Client	PediaLean Information
R0042750 –	05/26/04	C. Fobbs	P. Hatch	Email	Attorney-Client	PediaLean Information

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042751						
R0042752 – R0042753	05/13/04	S. Snavelly	C. Fobbs	Email	Attorney-Client; Atty Work Product	PediaLean Congressional Inquiry
R0042754	05/13/04	K. Jones	Sales	Email	Attorney-Client	PediaLean Information
R0042755 – R0042763	05/05/04	C. Fobbs	N. Chevreau; D. Mowrey; Azzurri	Email	Attorney-Client	Anorex/Cutting Gel Review
R0042764 – R0042767	05/03/04	C. Fobbs	IT	Email	Attorney-Client	PediaLean Information
R0042768	05/03/04	K. Jones	QC	Email	Attorney-Client	PediaLean Information
R0042769 – R0042780	04/21/04	C. Fobbs	IT	Email	Attorney-Client	PediaLean Information
R0042781 – R0042782	04/21/04	C. Fobbs	S. Nagin	Email	Attorney-Client; Work Product	PediaLean Information
R0042783 – R0042794	04/21/04	C. Fobbs	IT	Email	Attorney-Client	PediaLean Information
R0042795 – R0042797	04/01/04	C. Fobbs	Marketing	Email	Attorney-Client	PediaLean Information
R0042798 – R0042800	03/31/04	C. Fobbs	Operations	Email	Attorney-Client	PediaLean Information
R0042801 – R0042802	03/31/04	S. Posey	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042803 – R0042806	03/31/04	C. Pitts	C. Fobbs	Email	Attorney-Client; Atty. Work	PediaLean Information

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042807	03/30/04	S. Ferguson	Marketing	Email	Product	LeptoPrin Information
R0042808	03/29/04	S. Posey	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042809 – R0042811	03/25/04	S. Erickson	K. McDonough	Email	Attorney-Client	LeptoPrin Information
R0042812 – R0042813	03/25/04	V. Hoang	B. Gay	Email	Attorney-Client	LeptoPrin Information
R0042814 – R0042815	03/26/04	S. Posey	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042816 – R0042818	03/25/04	V. Hoang	B. Gay	Email	Attorney-Client	LeptoPrin Information
R0042819	03/26/04	C. Fobbs	D. Gay	Email	Attorney-Client	PediaLean Information
R0042820 – R0042821	03/25/04	V. Hoang	G. Sandberg & B. Gay	Email	Attorney-Client	LeptoPrin Information
R0042822 – R0042823	03/24/04	K. Jones	Acctg	Email	Attorney-Client	PediaLean Information
R0042824 – R0042825	03/08/04	K. Jones	Sales	Email	Attorney-Client	Cutting Gel Information
R0042826	03/16/04	N. Chevreau	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042827 – R0042829	03/08/04	K. Jones	Sales	Email	Attorney-Client	Cutting Gel Information
R0042830 –	03/11/04	C. Fobbs	R&D	Email	Attorney-Client;	Tummy Flattening Gel

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042839					Atty. Work Product	Information
R0042840 – R0042841	03/09/04	C. Fobbs	S. Nagin	Email	Attorney-Client	PediaLean Information
R0042842	03/08/04	K. Jones	Sales	Email	Attorney-Client	Cutting Gel Information
R0042843 – R0042844	03/08/04	C. Fobbs	K. Jones	Email	Attorney-Client; Atty Work Product	Anorex Information
R0042845 – R0042846	03/04/04	H. Sprik	C. Fobbs	Email	Attorney-Client; Atty Work Product	PediaLean Information
R0042847 – R0042848	03/04/04	K. Jones	Sales	Email	Attorney-Client	Cutting Gel Information
R0042849	03/04/04	C. Fobbs	S. Nagin	Email	Attorney-Client	PediaLean Information
R0042850 – R0042851	03/03/04	J. Davis	C. Fobbs	Email	Attorney-Client; Atty Work Product	LeptoPrin Information
R0042852 – R0042853	03/02/04	C. Fobbs	H. Sprik	Email	Attorney-Client	PediaLean Information
R0042854	03/01/04	C. Fobbs	H. Sprik	Email	Attorney-Client	PediaLean Information
R0042855 – R0042856	02/26/04	C. Fobbs	S. Nagin	Email	Attorney-Client	LeptoPrin Information
R0042857 – R0042858	02/26/04	H. Gay	Operations	Email	Attorney-Client	LeptoPrin Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042859	02/26/04	C. Fobbs	M. Meade	Email	Attorney-Client	PediaLean Information
R0042860	02/12/04	K. Jones	B. Mowrey	Email	Attorney-Client	Cutting Gel Information
R0042861 – R0042876	01/27/04	L. Jacobus	G. Sandberg; D. Gay; C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0042877 – R0042882	02/03/04	K. Andrews	S. Nagin	Email	Attorney-Client	PediaLean Congressional Inquiry
R0042883	02/03/04	G. Sandberg	PR Firm	Email	Attorney-Client	LeptoPrin Information
R0042884 – R0042885	01/30/04	S. Nagin	K. McDonough	Email	Attorney-Client	LeptoPrin Information
R0042886 – R0042888	01/20/04	C. Fobbs	S. Nagin	Email	Attorney-Client	LeptoPrin Information
R0042889 – R0042890	01/06/04	S. Erickson	D. Atkinson	Email	Attorney-Client	LeptoPrin Information
R0042891 – R0042892	01/16/04	R&D	C. Fobbs	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0042893 – R0042894	01/14/04	K. Jones	IT	Email	Attorney-Client	PediaLean Congressional Inquiry
R0042895	01/13/04	K. Jones	S. Nagin	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry
R0042896	01/12/04	K. Jones	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry

CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042897	01/09/04	G. Sandberg	S. Posey	Email	Attorney-Client	LeptoPrin Information
R0042898	01/07/04	J. Ostler	S. Posey	Email	Attorney-Client	LeptoPrin Information
R0042899	01/07/04	H. Sprik	K. Jones	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry
R0042900	01/07/04	J. Ostler	S. Posey	Email	Attorney-Client	LeptoPrin Information
R0042901 – R0042902	01/07/04	K. Jones	H. Sprik	Email	Attorney-Client	PediaLean Congressional Inquiry
R0042903 – R0042904	01/07/04	H. Sprik	K. Jones	Email	Attorney-Client	PediaLean Congressional Inquiry
R0042905	01/07/04	H. Sprik	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042906	01/07/04	H. Sprik	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042907 – R0042911	01/07/04	K. Andrews	K. Jones	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry
R0042912	01/07/04	H. Sprik	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry
R0042913	01/06/04	C. Fobbs	R&D	Email	Attorney-Client	PediaLean Information
R0042914 – R0042915	01/06/04	C. Fobbs	S. Nagin	Email	Attorney-Client	PediaLean SBIR Information
R0042916 – R0042925	01/06/04	C. Fobbs	R&D	Email	Attorney-Client	PediaLean Information
R0042926 –	01/05/04	K. Andrews	S. Nagin	Email	Attorney-Client	PediaLean Congressional

CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042929						Inquiry
R0042930 – R0042934	01/02/04	S. Erickson	D. Atkinson	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0042935 – R0042944	01/02/04	C. Fobbs	R&D	Email	Attorney-Client	PediaLean Information
R0042945 – R0042948	12/22/03	N. Chevreau	M. Goran; C. Fobbs	Email	Attorney-Client	PediaLean SBIR Information
R0042949	12/11/03	K. Jones	J. Julander	Email	Attorney-Client	PediaLean Information
R0042950 – R0042956	12/11/03	K. Jones	B. Mowrey	Email	Attorney-Client	PediaLean/Cutting Gel Information
R0042957	12/05/03	S. Erickson	S. Nagin	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0042958	12/05/03	S. Erickson	S. Nagin	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0042959 – R0042965	12/03/03	J. Magleby	D. Gay, M. Friedlander, C. Fobbs, S. Erickson, S. Nagin	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0042966	11/28/03	Thomasabr	Testimonials	Email	Attorney-Client	Anorex Information
R0042967 –	11/28/03	J. Magleby	S. Erickson	Email	Attorney-Client;	LeptoPrin/Dermalin/Cutting Gel

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042972					Atty. Work Product	Information
R0042973	11/17/03	S. Erickson	M. Meade; D. Atkinson; G. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0042974 - R0042975	11/25/03	J. Ostler	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0042976 - R0042991	11/25/03	M. Hahn	K. Jones; S. Nagin; C. Fobbs	Email	Attorney-Client	LeptoPrin/Anorex Information
R0042992 - R0043007	11/24/03	K. Andrews	S. Nagin	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043008 - R0043010	11/24/03	K. Jones	M. Hahn	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043011	11/21/03	G. Sandberg	PR Firm	Email	Attorney-Client	LeptoPrin Information
R0043012 - R0043024	11/19/03	K. Jones	M. Hahn	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043025 - R0043026	11/17/03	S. Erickson	M. Meade; D. Atkinson; G. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043027 - R0043037	11/18/03	J. Magleby	S. Erickson	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043038 - R0043039	11/17/03	S. Erickson	M. Meade; D. Atkinson; G. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043040	11/17/03	J. Sadaka	Leptoprinsupport	Email	Attorney-Client	LeptoPrin Information
R0043041 -	11/11/03	P. Hiett	J. Davis	Email	Attorney-Client	LeptoPrin Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043043						
R0043044 – R0043045	11/11/03	P. Hiatt	J. Davis	Email	Attorney-Client	Anorex Information
R0043046	11/11/03	P. Hiatt	J. Davis	Email	Attorney-Client	Dermalin Information
R0043047	11/10/03	Carlabd	Leptoprinsupport	Email	Attorney-Client	LeptoPrin Information
R0043048 – R0043050	11/10/03	S. Erickson	C. Fobbs	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043051 – R0043053	11/07/03	S. Erickson	C. Fobbs	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0043054 – R0043062	11/05/03	C. Fobbs	J. Magleby; B. Miller	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0043063 – R0043065	10/31/03	Azzurri	M. Meade; S. Martinez; N. Chevreau; D. Mowrey; C. Fobbs; B. Hiatt; G. Gay	Email	Attorney-Client	Cutting Gel/Tummy Flattening Gel Information
R0043066 – R0043067	10/30/03	T. Foss	Customerservice	Email	Attorney-Client	Anorex Information
R0043068 – R0043071	10/28/03	C. Fobbs	S. Erickson	Email	Attorney-Client; Atty. Work	LeptoPrin Information

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043072 – R0043088	10/27/03	S. Nagin	C. Fobbs	Email	Product Attorney-Client	FTC Investigation
R0043089 – R0043090	10/27/03	S. Erickson	D. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043091 – R0043098	10/24/03	S. Nagin	C. Fobbs	Email	Attorney-Client	FTC Investigation
R0043099 – R0043102	10/23/03	S. Erickson	D. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043103 – R0043130	10/16/03	N. Chevreau	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0043131	10/14/03	K. Jones	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043132	10/14/03	C. Fobbs	Operations	Email	Attorney-Client	LeptoPrin Information
R0043133 – R0043138	10/08/03	H. Gay	B. Hiatt; M. Meade; S. Martinez	Email	Attorney-Client	LeptoPrin Information
R0043139	10/07/03	H. Sprik	K. Jones	Email	Attorney-Client	Tummy Flattening Gel Information
R0043140 – R0043142	10/08/03	H. Gay	B. Hiatt; M. Meade; S. Martinez	Email	Attorney-Client	LeptoPrin Information
R0043143 – R0043145	10/07/03	H. Sprik	K. Jones	Email	Attorney-Client	Tummy Flattening Gel Information
R0043146	10/07/03	K. Jones	D. Gay	Email	Attorney-Client	Dermalin Information

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043147	10/08/03	C. Fobbs	Operations	Email	Attorney-Client	LeptoPrin Information
R0043148 – R0043149	10/07/03	H. Sprik	K. Jones	Email	Attorney-Client	Tummy Flattening Gel Information
R0043150	10/08/03	C. Fobbs	Operations	Email	Attorney-Client	LeptoPrin Information
R0043151 – R0043160	10/08/03	B. Miller	C. Fobbs	Email	Attorney-Client; Atty. Work Product	FTC Investigation
R0043161	10/07/03	H. Sprik	K. Jones	Email	Attorney-Client	Tummy Flattening Gel Information
R0043162	10/07/03	K. Jones	D. Gay	Email	Attorney-Client	Dermalin Information
R0043163 – R0043164	09/30/03	K. Jones	Azzurri	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043165 – R0043186	09/24/03	C. Fobbs	Azzurri	Email	Attorney-Client	Tummy Flattening Gel Information
R0043187 – R0043192	09/23/03	K. Jones	C. Fobbs	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043193 – R0043202	09/09/03	K. Jones	D. Mowrey	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043203 – R0043207	09/19/03	K. Jones	D. Mowrey	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043208	09/09/03	K. Jones	D. Mowrey	Email	Attorney-Client;	LeptoPrin/Anorex Information

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043209 – R0043213	09/19/03	D. Gay	C. Fobbs	Email	Atty. Work Product Attorney-Client; Atty. Work Product	Dermalin Information
R0043214 – R0043218	09/19/03	K. Jones	D. Mowrey	Email	Attorney-Client; Atty. Work Product	LeptoPrin/Anorex Information
R0043219 – R0043221	09/19/03	D. Gay	C. Fobbs	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0043222 – R0043226	09/19/03	P. Hiett	C. Fobbs; Operations	Email	Attorney-Client	Cutting Gel Information
R0043227	09/18/03	C. Fobbs	G. Sandberg	Email	Attorney-Client	LeptoPrin Information
R0043228 – R0043232	09/19/03	C. Fobbs	Operations	Email	Attorney-Client	Cutting Gel Information
R0043233 – R0043234	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	Anorex Information
R0043235 – R0043237	09/18/03	C. Fobbs	Operation	Email	Attorney-Client	LeptoPrin Information
R0043238	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	Anorex Information
R0043239	09/18/03	C. Fobbs	G. Sandberg	Email	Attorney-Client	LeptoPrin Information
R0043240 – R0043241	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	Anorex Information

CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043242 – R0043243	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	LeptoPrin Information
R0043244 – R0043246	09/18/03	C. Fobbs	G. Sandberg	Email	Attorney-Client	LeptoPrin Information
R0043247	09/18/03	C. Fobbs	M. Friedlander	Email	Attorney-Client	Cutting Gel Information
R0043248 – R0043250	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	Dermalin Information
R0043251 – R0043254	09/17/03	K. Humpherys	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043255	09/15/03	K. Jones	D. Mowrey	Email	Attorney-Client	Tummy Flattening Gel Information
R0043256	09/09/03	K. Jones	D. Mowrey	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043257 – R0043263	09/04/03	K. Jones	C. Fobbs	Email	Attorney-Client	Dermalin Information
R0043264 – R0043265	08/27/03	K. Clark	C. Fobbs	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043266 – R0043267	08/22/03	S. Posey	C. Fobbs	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043268 – R0043269	08/21/03	H. Gay	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043270 – R0043272	08/21/03	H. Gay	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043273 – R0043274	08/20/03	N. Rusk	K. Jones	Email	Attorney-Client	Anorex Information

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043275	08/20/03	C. Fobbs	K. Jones	Email	Attorney-Client; Atty. Work Product	FTC Investigation
R0043276 – R0043279	08/20/03	B. Madsen	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043280 – R0043281	08/15/03	N. Chevreau	C. Fobbs	Email	Attorney-Client	PediaLean SBIR Information
R0043282 – R0043287	08/14/03	C. Fobbs	K. Johnson	Email	Attorney-Client	PediaLean SBIR Information
R0043288 – R0043289	08/14/03	K. Johnson	C. Fobbs	Email	Attorney-Client	PediaLean SBIR Information
R0043290	08/08/03	K. Braithwaite	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043291 – R0043293	07/30/03	C. Fobbs	Azzurri	Email	Attorney-Client	Anorex Information
R0043294	07/28/03	K. Jones	S. Nagin	Email	Attorney-Client	PediaLean Information
R0043295	07/21/03	S. Nagin	C. Fobbs	Email	Attorney-Client	PediaLean SBIR Information
R0043296 – R0043303	07/21/03	K. Humpherys	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043304	07/18/03	N. Chevreau	B. Mowrey	Email	Attorney-Client	PediaLean Information
R0043305 – R0043307	07/16/03	K. Jones	S. Nagin	Email	Attorney-Client; Atty. Work Product	FTC Investigation
R0043308	07/16/03	N. Chevreau	S. Nagin	Email	Attorney-Client	PediaLean SBIR Information

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043309	07/15/03	S. Nagin	K. Andrews	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043310	07/15/03	K. Jones	N. Chevreau	Email	Attorney-Client	PediaLean SBIR Information
R0043311 - R0043312	07/01/03	Dan	Customerservice	Email	Attorney-Client	LeptoPrin Information
R0043313	07/09/03	J. Lang	G. Sandberg	Email	Attorney-Client	LeptoPrin Information
R0043314	07/09/03	K. Jones	S. Nagin	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043315	07/09/03	K. Jones	S. Nagin	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043316 - R0043317	07/01/03	Dan	Customerservice	Email	Attorney-Client	LeptoPrin Information
R0043318 - R0043322	08/04	S. Erickson	C. Fobbs	Chart	Attorney-Client; Atty. Work Product	LeptoPrin/Cutting Gel/Anorex Information
R0043323 - R0043345	11/07/03 - 01/23/04	S. Erickson	K. Boyle	Correspondence	Attorney-Client; Atty. Work Product	Dermalin Information
R0043346 - R0043353	12/13/01 - 10/14/02	C. Fobbs	M. Hahn	Correspondence	Attorney-Client	Dermalin/LeptoPrin Information
R0043354 - R0043379	06/06/03 - 07/22/04	C. Fobbs; K. McDonough ; J. Levy	E. Ammar; C. Fobbs; S. Nagin; J. Levy; K.	Correspondence	Attorney-Client	LeptoPrin Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043380 – R0043405	03/19/04 – 07/30/04	C. Johnson; K. Jacobsen; B. Eldridge	Sleeker; S. Nagin; K. McDonough; P. Nager; K. Jacobsen	Correspondence	Attorney-Client	LeptoPrin Information
R0043406 – R0043412	08/19/99 – 05/30/00	S. Bialecki; M. Kimber	C. Fobbs	Correspondence	Attorney-Client; Atty. Work Product	LeptoPrin/Anorex Information
R0043413 – R0043418	04/25/03	S. Nagin	A. Levine	Correspondence	Attorney-Client	PediaLean Information
R0043419 – R0043423	06/20/03	D. Mallen	S. Nagin	Correspondence	Attorney-Client	PediaLean Information
R0043424 – R0043625	03/25/03 – 06/07/04	B. Tautzin; C. Fobbs; K. Jones; S. Nagin; P. Hatch; K. Andrews; N. Chevreau	D. Gay; K. Andrews; K. Jones; N. Chevreau; C. Fobbs; S. Nagin; D. Nelson; D. Gay; M. Friedlander	Correspondence	Attorney-Client	PediaLean Congressional Inquiry
R0043626 – R0043763	04/21/03 – 06/09/04	P. Hiett; S. Nagin; L. Figueredo; C. Fobbs; M.	C. Fobbs; S. Nagin; P. Hatch; Chairman Greenwood; D.	Correspondence	Attorney-Client	PediaLean Congressional Inquiry

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043764 – R0043803		Azcuenaga; P. Hatch; Committee on Energy & Commerce; K. Jones	Mattoon; D. Gay; K. Johnson; K. Jones; M. Friedlander; K. Clark			
R0043804 – R0043823	03/04	D. Jones & Associates	Miller Magleby & Guymon	Correspondence	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043824 – R0043830	03/04	D. Jones & Associates	Miller Magleby & Guymon	Correspondence	Attorney-Client; Atty. Work Product	Research
R0043831 – R0043834	03/14/02	N. Chevreau	K. Krahnstoever Davison;	Email	Attorney-Client	PediaLean/weightlossforchildren .com Advisory Board Information
R0043835 – R0043837	02/14/02	N. Chevreau	K. Krahnstoever Davison	Email	Attorney-Client	PediaLean/weightlossforchildren .com Advisory Board Information
R0043838	02/01/02	N. Chevreau	K. Krahnstoever Davison	Email	Attorney-Client	PediaLean/weightlossforchildren .com Advisory Board Information
	04/04/02	D. Anderson	H. Beachell	Email	Attorney-Client	PediaLean/weightlossforchildren .com Advisory Board Information

**CONFIDENTIAL PRIVILEGE LOG
BASIC RESEARCH, L.L.C. AND BAN, L.L.C.**

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043839 – R0043849	01/17/02	N. Chevreau	M. Faith	Email	Attorney-Client	PediaLean/weightlossforchildren .com Advisory Board Information
R0043850	01/15/02	N. Chevreau	C. Fobbs	Email	Attorney-Client	PediaLean/weightlossforchildren .com Advisory Board Information
R0043851 – R0043870	12/11/02	N. Chevreau	A. Pietrobelli	Email	Attorney-Client	PediaLean/weightlossforchildren .com Advisory Board Information

EXHIBIT 3



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

Bureau of Consumer Protection
Division of Enforcement

Joshua S. Millard
Attorney

Direct Dial:
(202) 326-2454

October 15, 2004

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Nagin, Gallop &
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Miami, FL 33133-4741
snagin@ngf-law.com

VIA EMAIL AND U.S. MAIL

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

Dear Mr. Feldman:

We write to identify significant issues with the privilege log submitted for Basic Research LLC and BAN LLC, in the hope that we may discuss and resolve these issues.

As you will recall, we served our *First Request for Production of Documentary Materials and Tangible Things* ("Document Requests") on June 25, 2004. In our September 22nd letter, we observed that Respondents had yet to produce a privilege log, and we expressed surprise at your earlier statement that there would be no privilege log accompanying your production.

Complaint Counsel received a privilege log produced by Basic Research LLC and BAN LLC on October 6, 2004. This privilege log applies to those parties' responses to our *Document Requests* on September 9th and August 18th. You have represented that these documents were produced solely by Basic Research and/or BAN, and no other Respondents.

Complaint Counsel believe that we have been provided a *draft* privilege log. This conclusion is based, first, on the October 6th transmittal letter sent by Mr. Feldman, who represents Basic Research and BAN. This transmittal letter advised us that the log was not prepared by Mr. Feldman's office, and Mr. Feldman stated that he had not reviewed the withheld documents. Most important of all, Mr. Feldman stated that he was providing the log "*with the express understanding that some of the documents on the*

log may not be privileged," or with the express understanding that the listed documents are "privileged for reasons other than those asserted."

We understand your words of caution, and they are disturbing to us. Before receiving your transmittal letter, we anticipated receiving a product that was subject to your legal review and analysis—not a draft log produced by some other, unidentified person or entity.¹ We respectfully request that you provide us with a final privilege log.

Complaint Counsel have carefully reviewed the privilege log, and we have several concerns. First, the log does not describe the documents in sufficient detail to explain why you have declined to produce them. The descriptions of the withheld documents fall well short of what is required to permit us, or the Court, to determine whether a particular privilege was properly asserted.

Your clients have made bare assertions of attorney-client and/or work product privileges, followed by one (and in a few instances, two or three) of the following phrases:

- 1) "Dermalin Information"
- 2) "Cutting Gel Information"
- 3) "Tummy Gel Information"
- 4) "LeptoPrin Information"
- 5) "Anorex Information"
- 6) "PediaLean Information"
- 7) "PediaLean SBIR Information"
- 8) "FTC Investigation"
- 9) "PediaLean Congressional Inquiry"
- 10) "PediaLean/weightlossforchildren.com Advisory Board Information"

From these phrases, Complaint Counsel cannot reasonably discern why the identified documents have not been produced. Consider each example in turn:

We are entitled to product "information." According to your privilege log, these documents contain information concerning the six challenged products, and these documents are responsive to our *Document Requests*. You have given us no grounds to accept your assertion that documents bearing the first six "information" descriptions are privileged. If the first six descriptions are accurate, then all documents so described should be produced immediately.

We are also entitled to "Pedialean SBIR Information." Your log states that you have additional documents about Pedialean and the National Institute of Health's *Small Business Innovative Research* program. You have conceded that these documents are responsive to our *Document Requests*. They should be produced as well.

¹ We request that you identify who generated the privilege log that you sent to us. Additionally, Mr. Feldman's transmittal letter suggests that he has asserted no privileges on behalf of Basic Research and BAN with respect to company documents that may be currently in his possession. If this is not what was intended to be conveyed, please supplement the privilege log by listing those documents.

We do not understand why certain documents described as "FTC Investigation" or "PediaLean Congressional Inquiry" are privileged. These descriptions are too general to support the claims of privilege.²

Also, the phrase "PediaLean/weightlossforchildren.com Advisory Board Information" denotes information that is not a privileged attorney-client communication. This information is relevant and responsive to our *Document Requests*, and should be produced.

For all documents described with general terms, we ask that you promptly produce these documents. Alternatively, you should provide additional information sufficient to support your privilege assertions in compliance with RULE OF PRACTICE 3.38A, which requires identification of the specific subject matters of the withheld documents.

Next, we note that your privilege log does not distinguish authors from recipients. There are just two unmarked columns, with some names in them. Please clarify. Many of these names belong to persons employed by Respondents who are *not* attorneys for Respondents, at least to our knowledge.³ Again, you have given us no grounds to accept your assertion that such documents are privileged.

Also, we notice that all, or nearly all, of the listed documents are correspondence or emails. We ask that you confirm that no other types of privileged documents exist.

Additionally, we note that most of the listed documents are from 2003 and 2004. Given that your clients had dealings with the Federal Trade Commission previous to 2003, we ask that you confirm that all privileged documents have been identified. We also ask that you confirm that no other Respondents possess any privileged documents. If they have copies of privileged documents, they must be disclosed on a log.

As discussed above, we have many significant concerns with the privilege log. You did not review the log before sharing it with us, you have not vouched for it, you have cautioned us regarding its completeness or accuracy, and we cannot reasonably rely on it.

With this letter, Complaint Counsel forward their privilege log. Naturally, if you have any concerns regarding our log, we are prepared to listen. Our conversation should proceed, however, with the understanding that we have, at least, endeavored to give you a log sufficiently detailed so that you can reasonably discern why the identified documents have not been produced, and our assurance that, to the best of our knowledge, the log is accurate. We request that you provide us the same assurances.

Complaint Counsel believe that you may already have made efforts to correct this log, and we hope that you will take the necessary steps outlined in this letter to produce the documents or to generate

² We are, however, prepared to accept the one-word description, "research," provided for one document sent between law firms (R0043804), if you will represent that this was legal research.

³ If your clients had identified the positions or organizations to which the authors or recipients belonged, as RULE OF PRACTICE 3.38A specifically requires, we would have identified all of these documents in this letter.

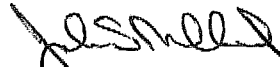
Letter to Respondents' Counsel

October 15, 2004

page 4

a final privilege log in response to our concerns. We will contact you on Monday to arrange a teleconference and, hopefully, to resolve this issue. Thank you for your attention.

Sincerely,



Joshua S. Millard
Attorney, Division of Enforcement

cc: Mitchell K. Friedlander, *pro se*
5742 West Harold Gatty Dr.
Salt Lake City, UT 84116
mkf555@msn.com
enclosure

EXHIBIT 4

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 TO COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES

Pursuant to Rule 3.35 of the Federal Trade Commission's Rules of Practice, Respondents
Basic Research, LLC, A.G. Waterhouse, LLC, Klein Becker usa, LLC, Nutrasport, LLC, Sovage

Dermalogic Laboratories, LLC, Ban, LLC (collectively, "Respondents") object and respond to Complaint Counsel's First Set of Interrogatories ("Request") as follows:

General Objections

A. Respondents object 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. Respondents object to the Interrogatories on the grounds and to the extent that they seek 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. Respondents hereby claim 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. Respondents object 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 Respondents that are beyond the scope of the Rules of Practice or other applicable law.

D. Respondents object 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 Respondents' pending motion for an interlocutory appeal and more definite statement by the Commission.

E. Respondents incorporate by this reference Respondents' 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. Respondents' objections and responses to the Interrogatories are not intended to waive or prejudice any objections that Respondents 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. Respondents expressly reserve any and all rights and privileges under the Rules of Practice, applicable evidentiary rules, and any other law or rule, and the failure to assert such rights and privileges or the inadvertent disclosure by Respondents of information protected by such rights or privileges shall not constitute a waiver thereof, either with respect to these responses or with respect to any future discovery responses or objections.

Specific Objections and Responses

Based on, subject to, and without waiving its General Objections, Respondents specifically and additionally respond 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:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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; and (d) 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, Respondents responds as follows:

Respondents interpret this interrogatory as requesting the identity of persons and descriptions of duties, responsibilities and work performed. In providing the following response,

Respondents do not discuss or imply, or intend to discuss or imply, any relationship between any of the parties and/or any of the persons identified below:

1. Dan Mowrey, Ph.D, researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation;
2. Mitch Friedlander, determined commercial viability of products, wrote copy, directed ad layout, and assisted with marketing;
3. Gina Gay, placed advertisements with media;
4. Jeff Davis, proof read advertisements;
5. Brett Madsen, assisted with copy layout;
6. Ned Simpson, assisted with copy layout;
7. John Swallow, reviewed ad copy;
8. Nathalie Chevreau, Ph.D., PediaLean project director; assisted with website development for PediaLean; performed PediaLean safety tests;
9. Carla Fobbs, facilitated and obtained substantiation review from outside counsel;
10. Dennis Gay, final approval of products and advertisements; and
11. Stephen Nagin, Esq., performed substantiation review.

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 who 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:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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; and (d) 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, Respondents respond by referring to their Response to Interrogatory No. 1, which includes the persons consulted.

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:

Respondents incorporate by reference each General Objection as set forth here in full. Based on, subject to, and without waiving the foregoing objections, Respondents refer to Attachment "A," which has been designated pursuant to the Protective Order as "Restricted Confidential, Attorney Eyes Only—FTC Docket No. 9318."

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:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Interrogatory No. 5:

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

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Interrogatory No. 6:

Disclose all payments that each **Respondent** has received, directly or indirectly, in connection with the advertising, marketing, promotion, and sale of ach 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:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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); and (d) 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:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

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:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

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:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Based on, subject to, and without waiving the foregoing responses and objections, Respondents state that during the first part of April 2004 Basic Research started the process of identifying all products that considered to be "adulterated" according to 21 CFR Part 119, which


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:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents 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); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Respectfully submitted this 16th day of August, 2004



JEFFREY D. FELDMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 16 day of August, 2004 as follows:

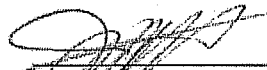
(1) One (1) copy via e-mail attachment in Word document format to Commission Complaint Counsel, Lauren Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; rrichardson@ftc.gov; lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Mail, First Class Postage Prepaid to Lauren Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) copy via U. S. Mail, First Class Postage Prepaid to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(3) One (1) copy via U. S. Mail, First Class Postage Prepaid to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(4) One (1) copy via U. S. Mail, First Class Postage Prepaid to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(5) One (1) copy via U. S. Mail, First Class Postage Prepaid to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116, Pro Se.



Jeffrey D. Feldman

VERIFICATION

I, Carla R. Fobbs, being duly authorized to execute the aforesaid Answers to Complaint Counsel's First Set of Interrogatories on behalf of Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker usa, LLC, Nutrasport, LLC, and Sovage Dermalogic Laboratories, LLC, having read and reviewed said answers, hereby state that foregoing answers are true and correct to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NAUGHT.

Carla R. Fobbs

CARLA R. FOBBS

STATE OF UTAH)

:ss.

COUNTY OF SALT LAKE)

SWORN TO AND SUBSCRIBED before me this 16th day of August, 2004 by CARLA R. FOBBS, who is personally known to me / has produced DRIVERS LICENSE as identification. # 146319375

O. H. Michaelis
Notary Public, State of Utah

My Commission Expires: 09/08/07

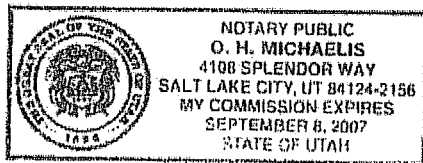


EXHIBIT 5

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

BASIC RESEARCH, LLC, et al.

DOCKET: 9318

ALJ: Stephen J. McGuire

PUBLIC DOCUMENT

**PRO SE RESPONDENT MITCHELL K. FRIEDLANDER'S OBJECTIONS AND
RESPONSES TO COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES**

Pursuant to the Rules of Practice for Adjudicative Proceedings, Rule 3.35, Respondent Mitchell K. Friedlander ("Friedlander") objects and responds to Complaint Counsel's First Set of Interrogatories.

General Objections

A. Friedlander 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. Friedlander 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. Friedlander 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. Friedlander 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 Friedlander that are beyond the scope of the Rules of Practice or other applicable law.

D. Friedlander 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 Respondents' pending motion for an interlocutory appeal and more definite statement by the Commission.

E. Friedlander incorporates by this reference Respondents' 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. Friedlander's objections and responses to the Interrogatories are not intended to waive or prejudice any objections that Friedlander 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. Friedlander 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 Friedlander 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

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 NO. 1: Friedlander objects to Interrogatory No. 1 to the extent it seeks production of information known to other persons and not to Friedlander, and on the grounds that the interrogatory is over broad and unduly burdensome, is vague and ambiguous, and seeks discovery of information which is not relevant and not calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections and the general objections above, and without them, and without implying any particular type of relationship, Friedlander is a consultant who writes advertising copy and assists in marketing. As to the current and former duties, responsibilities, or work performed by other persons relating to the promotional materials for each of the challenged products, Friedlander refers Complaint Counsel to the other Respondents' responses to Complaint Counsel's first set of interrogatories.

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

RESPONSE NO. 2: Friedlander objects to Interrogatory No. 2 to the extent it seeks production of information known to other persons and not to Friedlander, and on the grounds that the interrogatory is over broad and unduly burdensome, is vague and ambiguous, and seeks discovery of information which is not relevant and not calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections and the general objections above, and

without them, and without implying any particular type of relationship, Friedlander consulted with many persons who do not have, and have never had, any duties or responsibilities, and did not perform any work, in connection with the production of the challenged products.

Friedlander has consulted with Daniel B. Mowrey and Stephen E. Nagin, Esq. With respect to each of these persons, Friedlander refers Complaint Counsel to the other Respondents' responses to Complaint Counsel first set of interrogatories.

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 NO. 3: Friedlander objects to interrogatory no. 3 to the extent it seeks production of information known to other persons and not to Friedlander. Subject to the foregoing objections and the general objections above, and without waiving them, Friedlander refers Complaint Counsel to response to interrogatory no. 3 of the limited liability company Respondents' responses to Complaint Counsel's first set of interrogatories.

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 NO. 4: Friedlander objects to interrogatory no. 4 to the extent it seeks production of information known to other parties and not to Friedlander, because it requests information that is neither relevant nor reasonably calculated to lead to the discovery of relevant

information (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); and because 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. Furthermore, subject to the foregoing objections and the general objections above, and without waiving them, Friedlander does not manufacture, advertise, market, distribute or sell any of the challenged products and, therefore, Friedlander has not achieved any amount of sales of the challenged products.

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

RESPONSE NO. 5: Friedlander objects to interrogatory no. 5 to the extent it seeks production of information known to other persons and not to Friedlander. Additionally, Friedlander incorporates by reference each General Objection as set forth here in full. Friedlander 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.

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 for all payments. For consumer sales, it is not necessary to disclose names, addresses, or telephone numbers.)

RESPONSE NO. 6: Friedlander objects to interrogatory no. 6 to the extent it seeks production of information known to other persons and not to Friedlander. Additionally, Friedlander incorporates by reference each General Objection as set forth here in full. Friedlander 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.

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 NO. 7: Friedlander objects to interrogatory no. 7 to the extent it seeks production of information known to other persons and not to Friedlander. Additionally, Friedlander incorporates by reference each General Objection as set forth here in full. Friedlander 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. Subject to the foregoing objections and without waiving them, Friedlander does not manufacture, market, advertise, distribute or sell the challenged products, and Friedlander has not spent any money to advertise, market, or otherwise promote the challenged products.

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

RESPONSE NO. 8: Friedlander objects to interrogatory no. 8 to the extent it seeks production of information known to other persons and not to Friedlander. Friedlander has no such dissemination schedule, however that term may be defined. Additionally, Friedlander incorporates by reference each General Objection as set forth here in full. Friedlander 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

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,

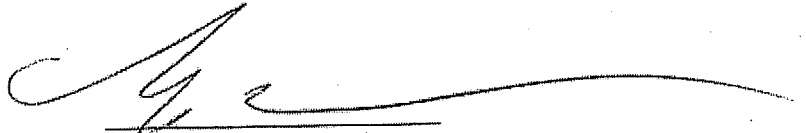
identification of any product formulations that have been created, modified, or removed from distribution, identification of any promotional materials that have been created, revised, or removed from dissemination, and the date(s) on which all of actions described in your answer took place; and how orders for Leptoprin or Anorex or in response to existing promotional materials Leptoprin or Anorex have been fulfilled.)

RESPONSE NO. 9: Friedlander objects to interrogatory no. 9 on the grounds that it seeks production of information not relevant to this proceeding, and which is not calculated to lead to the discovery of relevant or admissible evidence. Friedlander further objects to interrogatory no. 9 to the extent it seeks production of information known to other persons and not to Friedlander. Subject to the foregoing objections and without waiving them, Friedlander does not manufacture, market, advertise, distribute or sell any dietary supplements containing ephedrine alkaloids. As to the limited liability company Respondents, Friedlander refers Complaint Counsel to the limited liability company Respondents' responses to Complaint Counsel's first set of interrogatories, Response No. 9.

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 NO. 10: Friedlander objects to interrogatory no. 7 to the extent it seeks production of information known to other persons and not to Friedlander. Additionally, Friedlander incorporates by reference each General Objection as set forth here in full. Friedlander 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. Subject to the foregoing objections and without waiving them, Friedlander has not sold any of the challenged products to consumers and, therefore, Friedlander has not made any refunds to consumers for the challenged products.



Mitchell K. Friedlander
c/o Compliance Department
5742 West Harold Gatty Drive
Salt Lake City, Utah 84116
Telephone: (801) 414-1800
Facsimile: (801) 517-7108

Pro Se Respondent

VERIFICATION

I, Mitchell K. Friedlander, being duly authorized to execute the aforesaid Answers to Complaint Counsel's First Set of Interrogatories, having read and reviewed said answers, hereby states that foregoing answers are true and correct to the best of my knowledge and belief.


FURTHER AFFIANT SAYETH NAUGHT.



MITCHELL K. FRIEDLANDER

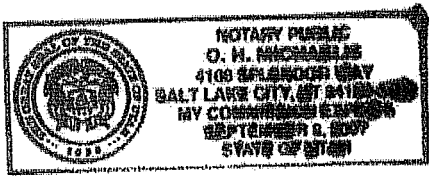
STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

SWORN TO AND SUBSCRIBED before me this 16th day of August, 2004 by Mitchell K. Friedlander, who is personally known to me / has produced DRIVERS LICENSE as identification. #167570229



Notary Public, State of Utah

My Commission Expires: 09/08/07



I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 16 day of August, 2004 as follows:

(1) One (1) copy via e-mail attachment in Word document format to Commission Counsel: Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov, richardson@ftc.gov, lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Mail, First Class Postage Prepaid to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580.

(2) One (1) copy via U. S. Mail, First Class Postage Prepaid to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(3) One (1) copy via U. S. Mail, First Class Postage Prepaid to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(4) One (1) copy via U. S. Mail, First Class Postage Prepaid to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(5) One (1) copy via U. S. Mail, First Class Postage Prepaid to Jeffrey Feldman, FELDMANGALE, 201 South Biscayne Blvd., Suite 1920, Miami, FL 33131.



Mitchell K. Friedlander, Pro Se

EXHIBIT 6

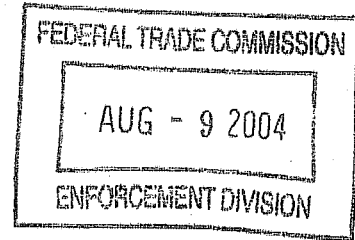
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

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

Respondents.

Docket No. 9318



**RESPONSE OF RESPONDENT DENNIS GAY
TO COMPLAINT COUNSEL'S REQUEST FOR
PRODUCTION OF DOCUMENTARY MATERIALS AND TANGIBLE THINGS**

Pursuant to Rules 3.31(c) and 3.37(b) of the Federal Trade Commission's Rules of Practice, Respondent Dennis Gay objects and responds to Complaint Counsel's Request for Production of Documentary Materials and Tangible Things ("Request") as follows:

General Objections

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

B. Respondent objects to the Request on the grounds and to the extent that it is overbroad and unduly burdensome. Respondent does not have responsive documents to which

objection has not been made. To the extent they are in the possession of the "Corporate Respondents," such documents will be produced by said "Corporate Respondents" in accordance with their respective objections and responses to the referenced Specification.

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

D. Respondent objects to the Request on the grounds and to the extent that it seeks production of confidential, proprietary, or trade secret information.

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

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

G. Respondent's objections and responses to the Request, including any production of documents, is not intended to waive or prejudice any objections Respondent may assert now or in the future, including, without limitation, objections as to the relevance of the subject matter of any request, or of the admissibility of any response or document or category of responses or

documents, at hearing, trial or any other time. 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.

H. Respondent objects to the first sentence of Instruction (3) and to Instruction (6) as unduly burdensome and as imposing an obligation beyond what is required by the Rules of Practice with respect to requests for production.

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

J. Respondent objects to Instruction (8) in that it seeks submission of certain "originals" in contravention of the Rules of Practice.

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

Specific Objections and Responses

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

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

RESPONSE:

Respondent does not have possession of the requested materials. To the extent they are in the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

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

RESPONSE:

Respondent does not have possession of the requested materials. To the extent they are in the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

3) All **documents and communications referring or relating to** draft or final **promotional materials** for the **challenged products**. (This request **includes** but is not limited to contracts, **documents**, and **communications** evidencing the creation, modification, approval, execution, evaluation, dissemination, clearance, or placement of **promotional materials**, and **documents referring or relating to** the contents of draft or final **promotional materials**, **including** but not limited to any claims, messages, or communication in any draft or final **promotional material(s)**.)

RESPONSE:

Respondent does not have possession of the requested materials. To the extent they are in the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

4) All **documents and communications referring or relating to** the efficacy of the **challenged products** or their ingredients (**including** but not limited to tests, reports, studies,

scientific literature, written opinions, and any other **documents referring or relating to the amount, type, or quality of testing or substantiation**) that are relied upon as substantiation of efficacy claims or that tend to refute efficacy claims in **promotional materials** for any of the **challenged products, including the claims alleged in the Complaint (¶ 14, 17, 20, 23, 25, 28, 31, 33, 37, 40, and 42) regardless of whether you contest that those claims were made.**

RESPONSE:

Respondent does not have possession of the requested materials. To the extent they are in the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

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

RESPONSE:

Respondent does not have possession of the requested materials. To the extent they are in the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

6) **All documents and communications referring or relating to the marketing of each of the challenged products. (This request includes but is not limited to market research, marketing plans or strategies, and all other document(s) and communications referring or relating to copy tests, marketing or consumer surveys and reports, penetration tests, target audiences, recall tests, audience reaction tests, communications tests, consumer perception of any promotional materials for any of the challenged products.)**

RESPONSE:

Respondent does not have possession of the requested materials. To the extent they are in the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

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

RESPONSE:

Respondent does not have possession of the requested materials. To the extent they are in the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

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

RESPONSE:

Respondent does not have possession of the requested materials. To the extent they are in the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

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

RESPONSE:

Respondent objects to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondent's obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondent does not have possession of the requested materials. To the extent they are in

the possession of the Corporate Respondents, said Respondents are producing documents and tangible things in accordance with their respective responses and objections to the within Specification.

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

RESPONSE:

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

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

RESPONSE:

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

In addition, the requested documents are not limited to companies with a relationship to the

challenged products. Respondent further requests to the extent that this Specification is vague and ambiguous because (a) the relationship between the term "individual **Respondent**" in the Specification and "**Individual Respondents**" as that term is defined in Definition (10) is not clear and (b) the Specification interchangeably and inconsistently uses the terms "corporate," "company," "incorporation," and "Company."

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

RESPONSE:

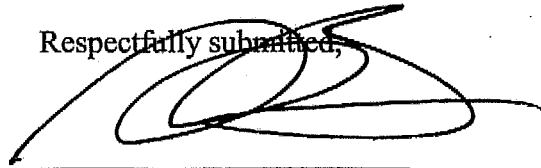
It is the understanding of Respondent that Complaint Counsel amended this Specification to eliminate the portion requesting profit figures. In addition to the General Objections stated above, Respondent objects to this Specification because it requests information that is neither relevant nor reasonably calculated to lead to the discovery of relevant information. The net and gross sales figures of the challenged products have no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter.

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

RESPONSE:

In addition to the General Objections stated above, Respondent objects to this Specification to the extent that it seeks information protected by the attorney client privilege and the attorney and party work product immunity doctrines. Respondent further objects to this Specification as duplicative and unnecessary and thus unduly burdensome because, to the extent the interrogatories seek discoverable information that is also requested by prior Specifications, the documents requested in this Specification are duplicative of prior Specifications.

Respectfully submitted,



Richard D. Burbidge
Burbidge & Mitchell
215 South State, Suite 920
Salt Lake City, Utah 84111
Tel: (801) 355-6677
Fax: (801) 355-2341

Counsel for Respondent Dennis Gay

Dated: August 3, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2004, I caused the foregoing **RESPONSE OF RESPONDENT DENNIS GAY TO COMPLAINT COUNSEL'S REQUEST FOR PRODUCTION OF DOCUMENTARY MATERIALS AND TANGIBLE THINGS** to be filed and served as follows:

- (1) 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

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

Elaine D. Kolish
Associate Director, Enforcement
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, D.C. 20580

Lanny A. Breuer
Jay T. Smith
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004

Jeffrey D. Feldman
Gregory L. Hillyer
Christopher P. Demetriades
FELDMANGALE, P.A.
201 S. Biscayne Boulevard
Miami, FL 33131

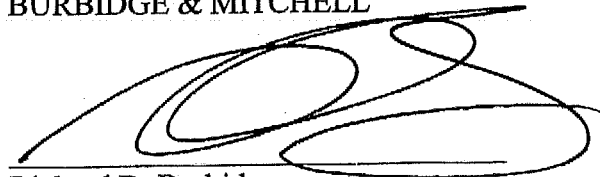
Ronald F. Price
PETERS SCOFIELD PRICE
111 E. Broadway Center #1100
Salt Lake City, Utah 84111

Mitchell K. Friedlander
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 3rd day of August, 2004.

BURBIDGE & MITCHELL

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

Richard D. Burbidge
Attorneys for Respondent Dennis Gay

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

In the Matter of

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

Respondents.

Docket No. 9318

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

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

General Objections

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

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

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

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

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

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

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

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

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

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

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

Specific Objections and Responses

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

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

RESPONSE:

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

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

RESPONSE:

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

- 3) All **documents and communications referring or relating to** draft or final **promotional materials** for the **challenged products**. (This request **includes** but is not limited to contracts, **documents**, and **communications** evidencing the creation, modification, approval, execution, evaluation, dissemination, clearance, or placement of **promotional materials**, and **documents referring or relating to** the contents of draft or final **promotional materials**, **including** but not limited to any claims, messages, or communication in any draft or final **promotional material(s)**.)

RESPONSE:

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

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

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

RESPONSE:

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

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

RESPONSE:

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

6) **All documents and communications referring or relating to the marketing of each of the challenged products. (This request includes but is not limited to market research, marketing plans or strategies, and all other document(s) and communications referring or relating to copy tests, marketing or consumer surveys and reports, penetration tests, target**

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

RESPONSE:

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

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

RESPONSE:

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

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

RESPONSE:

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

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

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

RESPONSE:

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

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

RESPONSE:

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

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

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

RESPONSE:

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

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

RESPONSE:

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

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

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

RESPONSE:

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

Respectfully submitted,



Larry A. Breuer

Jay T. Smith

Covington & Burling

1201 Pennsylvania Avenue, NW

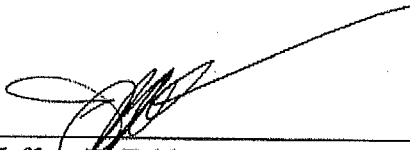
Washington, DC 20004

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Fax: (202) 662-6290

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

Dated: August 3, 2004



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

CERTIFICATE OF SERVICE

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

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

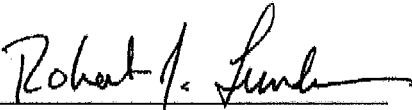
Laureen Kapin
Joshua S. Millard
Robin F. Richardson
Laura Schneider
Walter C. Gross III
Federal Trade Commission
600 Pennsylvania Avenue, NW, Suite NJ-2122
Washington, DC 20580
email: lkapin@ftc.gov
jmillard@ftc.gov
rrichardson@ftc.gov
lschneider@ftc.gov

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

Ronald F. Price
PETERS SCOFIELD PRICE
310 Broadway Centre
Salt Lake City, UT 84111
Counsel for Respondent Daniel B. Mowrey

Richard D. Burbidge
BURBIDGE & MITCHELL
215 South State Street, Suite 920
Salt Lake City, UT 84111
Counsel for Respondent Dennis Gay

Mitchell K. Friedlander
c/o Compliance Department
5742 West Harold Gatty Drive
Salt Lake City, UT 84116



Robert J. Lundman

EXHIBIT 7

Westlaw.

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FEDERAL TRADE COMMISSION (F.T.C.)
In the Matter of MSC.SOFTWARE CORPORATION, a corporation.
Docket No. 9299
February 21, 2002

**ORDER ON RESPONDENT MSC.SOFTWARE CORPORATION'S MOTION TO COMPEL
RESPONSES TO
WRITTEN DISCOVERY**

I.

On January 25, 2002, Respondent MSC.Software Corporation ("MSC") filed a motion to compel Complaint Counsel to respond to written discovery. MSC's motion seeks an order compelling Complaint Counsel to respond more fully to MSC's First Set of Interrogatories ("Interrogatories") and to MSC's First Set of Requests for the Production of Documents and Things ("Document Requests").

Also on January 25, 2002, Complaint Counsel served MSC with its Revised Responses and Objections to MSC's First Set of Interrogatories ("Revised Responses"). After receiving Complaint Counsel's Revised Responses, MSC filed a Supplemental Memorandum in support of its motion to compel, on January 30, 2002. Although MSC did not file a motion for leave to file the supplemental memorandum, its implicit request to file this supplement is GRANTED. Complaint Counsel filed its opposition to the motion to compel and the supplemental memorandum on February 5, 2002.

On February 8, 2002, Complaint Counsel filed a Request For Leave to File and Supplemental Memorandum in Opposition to the Motion to Compel. Complaint Counsel's request for leave to file a supplemental memorandum is DENIED. 16 C.F.R. § 3.22(c) ("The moving party shall have no right to reply, except as permitted by the Administrative Law Judge."). On February 20, 2002, MSC filed a Request For Leave to File Second Supplemental Memorandum In Support of Motion to Compel. MSC's request for leave to file a supplemental memorandum is DENIED. 16 C.F.R. § 3.22(c). Complaint Counsel's supplement of February 8, 2002, and MSC's supplement of February 20, 2002 will not be considered. Any unresolved issues raised in these supplements may be presented by separate motion.

For the reasons set forth below, MSC's motion to compel is GRANTED in part and DENIED in part.

II.

MSC seeks an order compelling Complaint Counsel to provide more complete responses to MSC's First Set of Interrogatories. MSC asserts that Complaint Counsel has failed to provide fully responsive answers and has improperly refused to answer contention interrogatories. Complaint Counsel responds that its Revised Responses contain substantial detail and adequately address MSC's contention interrogatories.

The Commission's Rule on interrogatories requires that each interrogatory be answered "fully." 16 C.F.R. § 3.35(a)(2). To answer MSC's interrogatories fully requires Complaint Counsel to provide MSC with facts supporting its contentions. See *In re TK-7 Corp.*, 1990 FTC LEXIS 20 (March 9, 1990); *In re Century 21 Commodore Plaza, Inc.*, 1977 FTC LEXIS 284 (Feb. 1, 1977). Upon review of the Revised Responses, it appears

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that, at this stage of the discovery period, Complaint Counsel has fully answered all but a few of MSC's interrogatories. Complaint Counsel's responses may not be complete where Complaint Counsel has used qualifying language, such as "the companies include," which indicates that Complaint Counsel could have additional information that it has not provided. For example, in Revised Response Number 6, Complaint Counsel states that it contends "that the following persons, among others, have switched between different advanced versions of Nastran[.]" In Revised Response Number 7, which asks Complaint Counsel to identify each person using an advanced version of Nastran who was discouraged from switching to other solvers, Complaint Counsel answers generally that users are not able to switch and identifies only one specific example of a customer who was discouraged from switching. Where Complaint Counsel has used qualifying language and if Complaint Counsel has additional information that is responsive to any of MSC's Requests, Complaint Counsel is ORDERED to provide that information to MSC by February 28, 2002. In addition, the parties are reminded of the continuing duty to supplement as soon as additional information becomes available. 16 C.F.R. § 3.31(e).

III.

MSC next asserts that Complaint Counsel has improperly referred to documents of MSC, without adequately identifying specific documents, in lieu of providing responsive answers. Complaint Counsel states that its Revised Responses provide adequate responses and also note that answers to many of the questions are ascertainable with equal, if not greater, ease by Respondent from its own information or from a review of the materials submitted in response to Respondent's document request.

Commission Rule 3.35(c) allows a party to specify records from which answers to interrogatories may be derived or ascertained if the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. 16 C.F.R. § 3.35(c). When the option to produce records is utilized in lieu of answering interrogatories, the specification shall include sufficient detail to permit the interrogating party to identify the individual documents from which the answer may be ascertained. 16 C.F.R. § 3.35(c). MSC charges that Complaint Counsel has not specifically identified documents responsive to various of its interrogatories. However, although Complaint Counsel's responses do state the information sought can be ascertained from sources such as MSC's own documents, current and former employees, licensees, and customers, that are more convenient, less burdensome, or less expensive for Respondent than for Complaint Counsel, Complaint Counsel does not appear to be invoking Rule 3.35(c) to avoid providing a responsive answer. Instead, Complaint Counsel has made general references to MSC's sources in addition to - not in lieu of - providing responsive answers. Accordingly, Complaint Counsel is not required to revise its answers with specific cites to documents at this time. In this respect, MSC's motion is DENIED.

IV.

MSC asserts that Complaint Counsel has improperly invoked privileges to refuse to answer the interrogatory seeking the names of all individuals that Complaint Counsel has communicated with concerning MSC's acquisitions. MSC states that Complaint Counsel has refused to disclose anyone it communicated with except those disclosed on Complaint Counsel's preliminary witness list. Complaint Counsel argues that the identity of persons who communicated with the government in the investigation may be withheld from disclosure on grounds of informant's privilege and the work product doctrine.

The informant's privilege is "the government's privilege to withhold from disclosure the identity of persons who provide information about violations of the law to law enforcement officials and others who render assistance that is necessary to effective law enforcement." In re Harper & Row, Publishers, Inc., 1990 FTC LEXIS 213, *8-9 (June 27, 1990). The privilege recognizes the public interest in the flow of information to the government concerning law violations, and by preserving the anonymity of the informants, encourages them to come forward. Id. at *9 (citing Roviario v. United States, 353 U.S. 53, 59 (1957)). "The privilege is not absolute but is qualified by

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the need of the respondents for the information to prepare their defense." Id. "The respondents have the burden of showing that the identity of the informants is essential to their defense." Id. "The party seeking disclosure must show that the privileged information sought is 'essential to a fair determination of' the issues." Id. at *12 (citations omitted).

Complaint Counsel has provided the identities of individuals it communicated with who are also on its preliminary witness list. MSC has not demonstrated substantial need to overcome the informer's privilege with respect to identities of any other individuals Complaint Counsel may have communicated with. Accordingly, MSC's motion to compel Complaint Counsel to respond to interrogatories seeking the names of individuals Complaint Counsel has communicated with is DENIED.

V.

MSC seeks an order compelling Complaint Counsel to produce "all exculpatory evidence in its possession, custody, or control." In its objections to MSC's interrogatories, Complaint Counsel has stated that it objects to the interrogatories to the extent they "seek identification of any exculpatory evidence. Such requests seek attorney work product materials and information that is protected by the informant's investigatory records, and governmental deliberative process privileges." MSC argues that this objection is improper and that Complaint Counsel is obligated to produce exculpatory evidence, pursuant to *United States v. Brady*, 373 U.S. 83, 87 (1963).

Complaint Counsel counters by asserting that the Commission and numerous decisions by Administrative Law Judges of the FTC have squarely held that *Brady* and its progeny requiring the government to provide exculpatory information in a criminal investigation were developed in the context of criminal charges involving capital offenses and do not apply in Commission administrative proceedings. Accordingly, Complaint Counsel argues it is not required to produce documents that MSC has characterized as exculpatory.

The Commission has consistently held that "the rulings of *Brady* and its progeny are inapplicable to administrative proceedings." *In re Amrep Corp.*, 102 F.T.C. 1362, 1983 FTC LEXIS 17, *566-67 (Nov. 2, 1983) (citing *Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969) (*Brady*, which involved suppression of evidence where the defendant was found guilty and sentenced to death, has little, if any direct relevance to administrative proceedings.)). Subsequent decisions by Administrative Law Judges have consistently held that Complaint Counsel is not required to produce documents in response to demands for exculpatory evidence. E.g. *In re College Football Assoc.*, 1991 FTC LEXIS 119 (April 16, 1991); *In re Textron, Inc.*, 1990 FTC LEXIS 549 (Jan. 16, 1990). The case upon which Respondent relies, *Olin*, Docket 9196, Nov. 26, 1985, which stated that officials of a law enforcement agency may not deliberately withhold a document which they believe to be exculpatory, was later held to be inconsistent with the Commission's decision in *Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969). *In re California Dental Assoc.*, 1994 FTC LEXIS 31 (Feb. 16, 1994).

Respondent does not contend that there is any particular exculpatory evidence that is being withheld by Complaint Counsel. Nor does Respondent point to any specific Request for Documents for which it feels Complaint Counsel's Response is deficient in this regard. Rather, MSC seeks generally an order compelling Complaint Counsel to produce any exculpatory evidence it might have. For the reasons stated above, Respondent's motion to compel Complaint Counsel to produce exculpatory documents is DENIED.

VI.

MSC seeks an order compelling Complaint Counsel to produce a **privilege log**, asserting that Complaint Counsel is required to comply with Commission Rule 3.38A. Complaint Counsel argues that demands for production of documents in the files of the Commission may be quashed upon general assertion of privilege, and that the description of documents for which the privileges are asserted may be made by general category and need not

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include detailed specifications of each document.

Commission Rule 3.38A states that any person withholding material responsive to written interrogatories requested pursuant to § 3.35 or a request for production pursuant to § 3.37 shall assert a claim of privilege not later than the date set for production of the material. 16 C.F.R. § 3.38A. "Such person shall, if so directed, ... submit, together with such claim a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged." 16 C.F.R. § 3.38A.

MSC's Definitions and Instructions in its Interrogatories and in its Document Requests did direct Complaint Counsel to provide a **privilege log**. Complaint Counsel has improperly refused to provide a **privilege log**, as is required by Commission Rule 3.38A. The cases upon which Complaint Counsel relies to argue that it may assert privilege by general category and need not include detailed specifications of each document are inapposite. In re Great Atlantic & Pacific Tea Co., 82 F.T.C. 1860, 1973 FTC LEXIS 224 (June 27, 1973) and In re Chock Full O'Nuts Corp., Inc., 82 F.T.C. 747, 1973 FTC LEXIS 219 (March 2, 1973) were both decided before the Commission added Rule 3.38A to its Rules of Practice. Trade Regulation Rulemaking Procedures, 44 Fed. Reg. 54,042 (Sept. 18, 1979). In the cases relied upon by Complaint Counsel that were decided subsequent to the adoption of Rule 3.38A, the Administrative Law Judges addressed situations where the respondents sought documents located in the files of offices of the Commission other than those of complaint counsel. Privileges may be generally asserted for documents that are located in offices of the Commission other than those of Complaint Counsel. In re R.J. Reynolds, 1998 FTC LEXIS 179 (Sept. 24, 1998) ("Other offices of the Commission, being third parties to this litigation, and not parties, need not be specific in describing items withheld for privilege."); In re Flowers Indus., Inc., 1981 FTC LEXIS 117 (Sept. 11, 1981) (Subpoenas for documents in the files located in offices of the Federal Trade Commission other than those of Complaint Counsel are quashed upon general assertion of privileges.); In re Champion Spark Plug Co., 1980 FTC LEXIS 200 (Dec. 16, 1980) ("Since an application under Rule 3.36 for documents in files of offices at the Federal Trade Commission other than those of counsel supporting the complaint is, in effect, a demand directed at a third party, the general description of the documents by category and a broad ruling on privileges would be sufficient."). But, where, as here, it appears that the documents Complaint Counsel is withholding are located in the files of Complaint Counsel, Complaint Counsel may not rely on a general assertion of privilege.

Complaint Counsel, as a party to this litigation, is required by Commission Rule 3.38A to submit a detailed **privilege log** of the items withheld from Complaint Counsel's files, if so directed by MSC. Because MSC has demanded a **privilege log**, Complaint Counsel must comply with 16 C.F.R. § 3.38A. In this respect, MSC's motion is GRANTED. Complaint Counsel shall provide a **privilege log** by February 28, 2002.

VII.

Finally, MSC asserts that Complaint Counsel has improperly designated each page of its responses to interrogatories as "Restricted Confidential, Attorney Eyes Only." Documents designated Restricted Confidential, Attorney Eyes Only may only be disclosed to persons specified in the Amended Protective Order Governing Discovery, entered in this matter on December 6, 2001 ("Protective Order"). Complaint Counsel asserts that its designation of its responses as "Restricted Confidential, Attorney Eyes Only," is appropriate because the information was prepared from a broad range of evidence and information obtained from numerous sources, including sources considered confidential by the originators of the information.

The Protective Order contemplates that the Restricted Confidential, Attorney Eyes Only designation is a "particularly restrictive designation ... to be utilized for a limited number of documents." A cursory review of the Responses reveals that much of the information designated by Complaint Counsel does not qualify for this higher standard of confidentiality. Complaint Counsel is hereby ORDERED to review its responses and make a determination on which, if any of the responses, meet the standards of Paragraph 2(b) of the Protective Order.

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Complaint Counsel shall redesignate its responses as appropriate by February 28, 2002. If MSC is not satisfied with Complaint Counsel's redesignations, it may follow the procedures in place in the Protective Order for challenging the designations.

VIII.

For the above stated reasons, MSC's motion to compel is GRANTED IN PART and DENIED IN PART.

ORDERED:

D. Michael Chappell

Administrative Law Judge

FTC

END OF DOCUMENT

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