

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

In the Matter of

BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,
 d/b/a BASIC RESEARCH, L.L.C.,
 OLD BASIC RESEARCH, L.L.C.,
 BASIC RESEARCH, A.G. WATERHOUSE,
BAN, L.L.C.,
 d/b/a KLEIN-BECKER USA, NUTRA SPORT, and
 SOVAGE DERMALOGIC LABORATORIES,
DENNIS GAY,
DANIEL B. MOWREY,
 d/b/a AMERICAN PHYTOTHERAPY RESEARCH
 LABORATORY, and
MITCHELL K. FRIEDLANDER,

Respondents.

DOCKET NO. 9318

BASIC RESEARCH, LLC'S SECOND MOTION TO COMPEL

Respondent Basic Research, LLC ("Basic Research" or "Respondent"), by and through undersigned counsel and pursuant to 16 C.F.R. §3.38, seeks an order compelling the Federal Trade Commission ("FTC") to provide complete responses to Basic Research's Second Request for Production of Documents ("Second Document Requests"), and in support thereof state as follows:

I. BACKGROUND

On June 15, 2004, the FTC filed an administrative complaint against Respondent alleging that certain of its dietary supplement advertising violated Sections 5 and 12 of the FTC Act ("FTC's Complaint"). On September 9, 2004, Respondent served its Second Document

Requests, attached hereto as Exhibit 1, to obtain, *inter alia*, documents relating to the FTC's operative allegations and the way in which the FTC has conducted similar cases. Specifically, the Second Document Requests properly sought documents pertaining to (1) previous FTC proceedings similar to the instant case, including expert testimony and reports; (2) communications with other government agencies regarding the Respondents or the Challenged Products; (3) documents relating to a specific rulemaking request involving the dietary and weight loss industry; (4) communications with authors of studies and publications that the Corporate Respondents submitted to the FTC; and (5) documents relating to the substantiation standard(s) applicable in this case.

On September 24, 2004,¹ Complaint Counsel served its responses to the Second Document Requests, which are attached hereto as Exhibit 2 ("Complaint Counsel's Responses"). Complaint Counsel's Responses, however, obstruct discovery, are evasive, and otherwise rely on blanket objections to avoid providing the information requested. In an effort to resolve the disputes surrounding Complaint Counsel's Responses, counsel for Basic Research, LLC and Complaint Counsel engaged in discussions and were able to resolve several issues.

Regarding Requests Nos. 6 and 7, Complaint Counsel agreed to provide a list of all part III and judicial weight loss cases brought by the FTC since January 1, 1994 and otherwise stood on the asserted objections. Complaint Counsel asserted that all non-privileged documents responsive to Requests Nos. 10 and 11 had been produced and all documents over which Complaint Counsel asserted a privilege would be included on a privilege log. Regarding

¹ The Certificate of Service on Complaint Counsel's Responses to the Second Document Requests state that the responses were served on August 16, 2004. Respondent assumes this is a scrivener's error. The date of service reflected in this Motion is the date upon which Respondent received the responses to the Second Document Request.

Request No. 13, Complaint Counsel stood on its objections and agreed to list all documents withheld on a claim of privilege on a privilege log.

Regarding Request No. 15, Complaint Counsel asserted that all non-privileged responsive documents have been produced and all documents withheld on a claim of privilege would be included on a privilege log. Complaint Counsel asserted that there are no non-privileged documents to Request No. 16 and agreed to include on a privilege log all documents withheld on a claim of privilege. Respondent and Complaint Counsel agreed to amend Request No. 27, as reflected below. Complaint Counsel stood on its objections regarding the amended Request No. 27.

Respondent limited Request No. 29 according to its understanding that Request No. 29 applied to post-order requests as part of the compliance process; Complaint Counsel thereafter stood on its objections regarding Request No. 29. Regarding Requests Nos. 32 and 33, Complaint Counsel agreed to perform another inquiry to determine if responsive documents existed. Complaint Counsel also agreed to list on a privilege log all documents responsive to Requests Nos. 32 and 33 that were withheld from production on a claim of privilege. Respondent and Complaint Counsel agreed to amend Request No. 37, as reflected below, and Complaint Counsel agreed to produce the documents identified in footnote 37 of the Commission's December of 2003 publication entitled "Deception in Weight Loss Advertising Workshop: Seizing Opportunities to Build Partnerships to Stop Weight Loss Fraud." Complaint Counsel further agreed to perform a reasonable search to determine if there are any similar documents that would be responsive. Complaint Counsel otherwise stood on the asserted objections regarding Request No. 37.

Complaint Counsel agreed to provide a privilege log on October 12, 2004, however, as of the date of this filing, Respondent has not received a privilege log. The remaining objections on which Complaint Counsel relies are misplaced and are not grounds for the withholding of responsive documents. Accordingly, Respondent's seek an order compelling the FTC to provide complete responses to the Second Document Requests.

II. ARGUMENT

A. Complaint Counsel Must Provide Documents In Response To Respondent's Second Requests

The Commission's Rule of Practice 3.34 states "any party may serve on another party a request: to produce and permit the party making the request...to inspect and copy any designated documents, as defined in §3.34(b). According to that provision, "[a] party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." 16 C.F.R. §3.34(b). As the following discussion demonstrates, however, Complaint Counsel has failed to make such documents available in response to Respondent's Second Document Requests.

1. Requests for Production Nos. 6 and 7²

Complaint Counsel must produce documents in response to Requests for Production Nos. 6 and 7³. Request for Production No. 6 reads as follows:

Request No. 6

All expert reports that the Federal Trade Commission has filed in other part three proceedings or proceedings under Section 13(b) of the FTC Act.

² All document requests are referred to using their original numbering.

³ Requests Nos. 6 and 7 involve similar requests, and Complaint Counsel's responses thereto are also similar, and as such, these Requests are discussed together.

Complaint Counsel responded to Request No. 6 as follows:

Response to Request No. 6

Complaint Counsel object to the extent that this Request is overbroad, unduly burdensome and harassing, and irrelevant in that it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. All expert reports filed by the FTC in other cases are not readily available, nor are they in the possession, custody, or control of Complaint Counsel. Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request for Production No. 7 reads as follows:

Request No. 7

All depositions taken of the Federal Trade Commission substantiation experts in any weight loss cases.

Complaint Counsel responded to Request No. 7 as follows:

Response to Request No. 7

Complaint Counsel object to the extent that this Request is vague, overbroad, unduly burdensome and harassing, and irrelevant in that it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. All depositions taken of FTC substantiation experts are not readily available, nor are they in the possession, custody, or control of Complaint Counsel. Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

In sum, Requests for Production Nos. 6 and 7 requires Complaint Counsel to produce expert reports filed in proceedings similar to the instant case and depositions taken of experts in other weight loss cases. Throughout the course of this proceeding, Complaint Counsel has been reticent about the specific substantiation standards that are applicable to this case, and what would constitute "competent, reliable evidence" regarding the challenged advertising. In response to this refusal to provide specific standards, Respondent has sought access to the reports

and depositions of testifying experts that the FTC has used or filed in other, similar cases. Without either specific information as to the substantiation standards applicable in the instant case, or general information as to the substantiation standards applied in other cases, which could be gleaned from the reports and depositions of testifying experts, Respondent is at a loss as to the meaning of the allegations of the complaint, the propriety of the requested relief, or how to conduct its defense. Therefore, this document request is reasonably expected to yield information relevant to these proceedings.

Further, even assuming, *arguendo*, that Complaint Counsel does not have immediate access to all of the requested documents, Complaint Counsel has not asserted a lack of access to *any* responsive documents. To the contrary, Complaint Counsel is in the best position to provide the responsive information. Thus, at the very least, Complaint Counsel should be compelled to produce responsive documents that are within Complaint Counsel's possession, custody, or control, and those responsive documents that could easily be located upon a reasonable search by Complaint Counsel.

2. Requests for Production Nos. 10 and 11

Complaint Counsel must produce documents in response to Requests for Production Nos. 10 and 11.⁴ Request No. 10 reads as follows:

Request No. 10

All communications with the National Institute of Health (NIH) relating to the Respondents or Challenged Products.

Complaint Counsel responded to Request No. 10 as follows:

⁴ Requests Nos. 10 and 11 involve similar requests, and Complaint Counsel's responses thereto are also similar, and as such, these Requests are discussed together.

Response to Request No. 10

Complaint Counsel object to this Request because certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in Respondent's possession, custody or control. Complaint Counsel further object to this Request because certain documents are protected from disclosure as attorney work product (General Objection 2). Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request No. 11 reads as follows:

Request No. 11

All communications with the Food and Drug Administration (FDA) relating to the Respondents or Challenged Products.

Complaint Counsel responded to Request No. 11 as follows:

Response to Request No. 11

Complaint Counsel object to this Request because certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in Respondent's possession, custody or control. Complaint Counsel further object to this Request because certain documents are protected from disclosure as attorney work product (General Objection 2). Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5) and documents that are protected from disclosure by the law enforcement evidentiary files privilege (General Objection 7). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Requests Nos. 10 and 11 seek communications with the NIH and the FDA regarding the Respondents and/or the Challenged Products. Complaint Counsel's objection based on Respondent's possession of responsive documents is misplaced. In "Instruction 5" of Respondent's Document Request, Respondent specifically excluded all documents provided to Complaint Counsel by any of the Corporate Respondents.⁵ Further, Complaint Counsel has not established that the NIH, the FDA, or any employees or representatives of either agency possess the requisite training, education, and/or experience to be qualified as an "expert."

Complaint Counsel also alleges that documents responsive to Requests Nos. 10 and 11 are protected from disclosure by the attorney work product privilege. In order to successfully withhold documents on a claim of work product privilege, Complaint Counsel must establish all of the essential elements of work product. *See Johnson v. Gmeinder*, Nos. CIV. A. 98-2556-GTV, CIV. A. 98-2585-GTV, 2000 WL 133434 (D. Kan. Jan. 20, 2000). Further, Complaint Counsel must establish the elements of work product privilege on a "document by document basis." *Household Commercial Financial Services, Inc. v. Schottenstein*, No. 90 C 720, 1991 WL 222069, at *1 (N.D. Ill. Oct. 24, 1991) (quoting *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *see also* 16 C.F.R. §3.38A. In order to satisfy this burden, Complaint Counsel must present facts that are sufficiently detailed to support a judicial determination that the elements of work-product privilege have been met for each document. Complaint Counsel has not yet provided a privilege log, and has therefore waived the asserted privileges. *See Petition of Hoechst Marion Roussel, Inc., to Quash Subpoena Duces Tecum*, 124 F.T.C. 649, 659-660 (Oct. 17, 1997) (stating that the Petitioner's failure to provide a proper assertion of privilege

⁵ "Instruction 5" reads as follows: "This Request does not seek documents that were provided to you by the Corporate Respondents in response to formal investigative demands."

describing the nature of allegedly privileged documents or communication at a specified time amounted to a waiver of privilege).

The conclusory assertions on which Complaint Counsel now relies are insufficient to establish the privilege. *SmithKline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 1310669, at *5 (N.D. Ill. Sept. 13, 2000) (requiring the proponent of the work product privilege to present “objective facts” to establish work product protection for documents in a privilege log). Further, Complaint Counsel has utterly failed to establish how communications with the NIH and/or the FDA regarding the Respondents or the Challenged Products were prepared in anticipation of litigation. Accordingly, Complaint Counsel should not be permitted to rest on its unsupported assertions that documents responsive to Requests Nos. 10 and 11 are protected by the work product privilege.

Complaint Counsel also objects to the production of communications with the NIH and the FDA on the grounds of the “law enforcement evidentiary privilege” otherwise known as the law enforcement investigatory files privilege. Such privileges are intended to protect disclosure of law enforcement techniques or sources. *See In re Hoechst Marion Roussel, Inc.*, No. 9293, 2000 WL 33944048 (FTC Oct. 31, 2000). A related privilege, the informer’s privilege, is designed to protect the identity of confidential informers who participate in law enforcement investigations. *Id.* In order to successfully use the law enforcement investigatory files privilege as a shield from production of documents, Complaint Counsel, as “[t]he claiming official must have seen and considered the contents of the documents and himself have formed the view that, on grounds of public interest, they ought not be produced and state with specificity the rationale of the claimed privilege.” *Id.* Complaint Counsel’s blanket assertion of the law enforcement investigatory files privilege does not comply with the requirements to establish this privilege as a

bar to production of documents. Complaint Counsel has not established that all of the procedural requirements of this privilege have been met and therefore cannot use it as a shield from production of documents.

3. Request for Production No. 13

Complaint Counsel must produce documents in response to Request for Production No.

13. Request for Production No. 13 reads as follows:

Request No. 13

All documents relating to any request for rulemaking submitted to the Federal Trade Commission by Jonathon W. Emord, Esq.

Complaint Counsel responded to Request No. 13 as follows:

Response to Request No. 13

Complaint Counsel object to this Request on the grounds that it seeks irrelevant materials in that any such correspondence does not relate to any of the challenged products and is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Complaint Counsel further object to this Request because any documents are protected from disclosure as attorney work product (General Objection 2) and by the deliberative process privilege (General Objection 3). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents.

Request No. 13 is directly relevant to the allegations of the complaint, the proposed relief, and/or the defenses of the Respondents. One rulemaking request submitted by Mr. Emord—denied by the Commission—pertains to the FTC's rules of practice and procedure for investigating false or misleading health-related claims in food, drug, and dietary supplement advertising. One of the defenses raised by Respondent is that the FTC's rules of practice and procedure for investigating advertisements like the ones at issue in this case lack sufficient definiteness to provide advertisers, such as Respondent, with sufficient notice as to what conduct

is prohibited. Therefore, Complaint Counsel cannot withhold responsive documents based on a claim of irrelevance.

Complaint Counsel also alleges that documents responsive to Request No. 13 are protected from disclosure by the attorney work product privilege. As previously discussed, Complaint Counsel must establish all of the essential elements of work product, with supporting facts, on a document by document basis in order to successfully withhold documents on a claim of the privilege. *See* 16 C.F.R. §3.38A; *Johnson v. Gmeinder*, 2000 WL 133434 (D. Kan. Jan. 20, 2000). Complaint Counsel has failed to establish how documents related to Mr. Emord's petition for rulemaking could have been prepared in anticipation of litigation. Complaint Counsel should not be permitted to rest on its unsupported assertions that documents responsive to Request No. 13 are protected by the work product privilege.

Complaint Counsel also asserts that documents responsive to Request No. 13 are protected by the deliberative process privilege. However, in order the "deliberative process privilege" to form a basis for withholding a document from production, the document must be pre-decisional and deliberative, reflecting the advisory and consultative process by which decisions and policies are formulated. *See, e.g., Army Times Publ'g Co. v. Department of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993). Complaint Counsel's blanket assertion of the deliberative process privilege is insufficient to establish that the privilege is applicable. Moreover, governmental privileges are to be narrowly construed. *Id.*; *see also Price v. County of San Diego*, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (the deliberative process privilege "is to be narrowly applied").

Significantly, Complaint Counsel has previously produced Mr. Emord's petition and the FTC's order denying the petition, yet now, refuses to produce related documents. This "pick and

choose" approach to production is evasive and incongruent, particularly absent sufficient justification for withholding such documents. Further, Complaint Counsel has completely failed to produce a privilege log specifying what documents have been withheld, and has therefore waived the asserted privileges. *See Petition of Hoechst Marion Roussel, Inc., to Quash Subpoena Duces Tecum*, 124 F.T.C. 649, 659-660 (Oct. 17, 1997) (stating that the Petitioner's failure to provide a proper assertion of privilege describing the nature of allegedly privileged documents or communication at a specified time amounted to a waiver of privilege). Under such circumstances, Complaint Counsel should be compelled to produce all responsive documents.

4. Requests for Production Nos. 15 and 16

Complaint Counsel must produce documents in response to Requests Nos. 15 and 16.⁶

Request No. 15 reads as follows:

Request No. 15

All communications with authors of any studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.

Complaint Counsel responded to Request No. 15 as follows:

Response to Request No. 15

Complaint Counsel object to this Request on the ground that it is overbroad to the extent that the request is not limited to the Challenged Products. To the extent that this request calls for attorney notes and internal memoranda, these documents are protected from disclosure as attorney work product, as more fully set forth in General Objection 2. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents and will continue to supplement as necessary.

Request No. 16 reads as follows:

⁶ Requests Nos. 15 and 16 involve similar requests, and Complaint Counsel's responses thereto are also similar, and as such, these Requests are discussed together.

Request No. 16

All notes of conversations with authors of studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.

Complaint Counsel responded to Request No. 16 as follows:

Response to Request No. 16

Complaint Counsel object to this Request on the grounds that it is overbroad to the extent that the request is not limited to the Challenged Products. To the extent that this request calls for attorney notes and internal memoranda, these documents are protected from disclosure as attorney work product, as more fully set forth in General Objection 2.

Request No. 15 seeks communications between the FTC and authors of studies or publications that the Corporate Respondents submitted to the FTC. Similarly, Request No. 16 seeks documents related to conversations between the FTC and these parties. With respect to Complaint Counsel's objections, Requests Nos. 15 and 16 are not overbroad. Respondent is not aware of any studies or publications submitted to the FTC that did not relate to the Challenged Products or to the instant case. Therefore, Respondent requests that Complaint Counsel produce any documents that were withheld on the basis of Complaint Counsel's overbreadth objection.

Complaint Counsel also objects to Requests Nos. 15 and 16 on the grounds of the attorney work product privilege. However, as stated previously, Complaint Counsel's blanket assertion of work product privilege is insufficient to establish the existence of the privilege. Complaint Counsel must present specific facts on a document-by-document basis that are sufficient to determine whether the documents are privileged. *See* 16 C.F.R. §3.38A; *Johnson v. Gmeinder*, 2000 WL 133434 (D. Kan. Jan. 20, 2000). Complaint Counsel has failed to do so. Thus, Complaint Counsel's assertion of the privilege is an insufficient basis for withholding responsive documents.

5. Request for Production No. 27

Complaint Counsel must produce documents in response to Request No. 27. Request No.

27 reads as follows:

Request No. 27

All documents relating to requests by advertisers *of dietary weight loss products seeking* clarification on the substantiation standards applicable in this case.⁷

Complaint Counsel responded to Request No. 27 as follows:

Response to Request No. 27

Complaint Counsel object to this Request on the grounds that it is overbroad, unduly burdensome, harassing, inconsistent with Complaint Counsel's obligations under the Rules of Practice, and not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in the opening paragraph of the General Objections and in General Objections 8 and 9.

Request No. 27 seeks documents relating to advertisers of products similar to the Challenged Products. Such documents will provide, *inter alia*, clarification as to what substantiation standards are being applied in this case. As discussed, *supra*, Complaint Counsel has repeatedly refused to specifically state what standards of substantiation are applicable to this case. In response to this refusal, Respondent seeks access to the requests of similar advertisers who have sought clarification of the substantiation standard(s). Again, without specific information as to what the substantiation standards are, Respondent is at a loss as to the meaning of the allegations of the complaint, the propriety of the requested relief, or how to conduct its defense. Further, one of Respondent's defenses in this case is that the substantiation standard

⁷ The text in italics above reflects an amendment made by Respondent's counsel as a result of a teleconference with Complaint Counsel on October 7-8, 2004.

applied against advertisers in the dietary weight loss industry is so vague that advertisers cannot reasonably determine what conduct is prohibited. Therefore, this document request is reasonably expected to yield information relevant to these proceedings.

Complaint Counsel also alleges that Request No. 27 is overbroad, unduly burdensome, harassing, and inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel has neither specifically stated nor estimated the number of documents that would be responsive to this request. It is therefore impossible to determine whether Request No. 27 is overbroad or whether responding to Request No. 27 would truly be unduly burdensome or harassing. Further, Complaint Counsel has not stated in what way providing documents relating to third parties seeking clarification of the substantiation standard applicable in this case exceeds Complaint Counsel's obligations under the Rules of Practice. Therefore, Complaint Counsel's objections to Request No. 27 are unsupported and Respondent's Motion to Compel should be granted.

6. Request for Production No. 29

Complaint Counsel must produce documents in response to Request No. 29. Request No. 29 reads as follows:

Request No. 29

All documents relating to requests made to the Federal Trade Commission by advertisers seeking approval of advertising prior to dissemination.

Complaint Counsel responded to Request No. 29 as follows:

Response to Request No. 29

Complaint Counsel object to this Request on the grounds that it is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel also object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any

respondent as more fully set forth in General Objection 9. In addition, such Request may include materials prohibited from being disclosed under Section 21 of the FTC Act (15 U.S.C. 21 § 57b-2).

Respondent intended Request No. 29 to include, but not be limited to requests by advertisers made after the FTC issued an order and/or requests to ensure compliance with an FTC order. The blanket objections raised by Complaint Counsel in response to Request No. 29 (including vagueness, overbreadth, and undue burden) fail to explain why Request No. 29 is objectionable. Request No. 29 is reasonably expected to yield information relevant to, among other things, one of the defenses alleged by Respondent, namely, that the procedure for obtaining approval by the FTC for advertising prior to disseminating that advertising attempts to restrict, restrain and/or prohibit protected commercial speech. Complaint Counsel has not provided any facts supporting its assertion that responsive documents “may include material prohibited from being disclosed under Section 21 of the FTC Act....” Thus, Complaint Counsel cannot be permitted to rely upon the mere assertion that *some* responsive documents *may* be prohibited from disclosure as a basis for withholding production of responsive documents *in toto*.

7. Requests for Production Nos. 32 and 33

Complaint Counsel must produce documents in response to Request Nos. 32 and 33.⁸

Request No. 32 reads as follows:

Request No. 32

All documents which define or explain the meaning of “competent and reliable scientific evidence.”

Complaint Counsel responded to Request No. 32 as follows:

⁸ Requests Nos. 32 and 33 involve similar requests, and Complaint Counsel’s responses thereto are also similar, and as such, these Requests are discussed together.

Response to Request No. 32

Complaint Counsel object to this Request on the grounds that it is overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel further object to this Request on the grounds that such materials are publicly available in the FTC Reporters, online at the FTC website, or through Lexis and/or Westlaw. Complaint Counsel are not obliged to conduct Respondents' legal research for them. Complaint Counsel further state that certain documents responsive to this request are documents that the Complaint Counsel have previously provided to Respondents.

Request No. 33 reads as follows:

Request No. 33

All documents which purport to establish what constitutes "competent and reliable evidence" for purposes of supporting efficacy claims of weight loss products.

Complaint Counsel's response to Request No. 33 reads as follows:

Response to Request No. 33

Complaint Counsel object to the extent that this Request is overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel further object to this request on the grounds that such materials are publicly available in the FTC Reporters, online at the FTC website, or through Lexis and/or Westlaw. Complaint Counsel are not obliged to conduct Respondents' legal research for them. Complaint Counsel further state that certain documents responsive to this request are documents that the Complaint Counsel have previously provided to Respondents.

Request No. 32 seeks documents relating to the meaning of "competent and reliable scientific evidence," as the FTC has used that phrase. Similarly, Request No. 33 seeks documents that explain the meaning of the phrase as it is used to support efficacy claims of weight loss products. Requests Nos. 32 and 33 are sufficiently specific and narrow to require Complaint Counsel's full response and production of responsive documents. Complaint Counsel has stated in their Motion to Strike that, at the hearing in this matter, it will introduce evidence to show that "competent and reliable evidence" was needed to establish a reasonable basis for the

claims in challenged advertising. *See*, Complaint Counsel's Motion to Strike, page 7. However, Complaint Counsel has refused to identify which, if any, of the multitude of documents produced according to its response to Respondent's First Request for Production of Documents may explain what constitutes "competent and reliable evidence" in this case.

Complaint Counsel cannot keep repeating this mantra and simultaneously expect to shield itself from producing documents that explain what "competent and reliable evidence" under the auspices that such a request is "overbroad." Indeed, the fact that Complaint Counsel finds such a request overbroad supports Respondent's contention that this standard used against Respondent is vague and illusory. If "competent and reliable evidence" was a specific and narrow standard, producing responsive documents that explain this standard would not be unduly burdensome, nor would such a production request be overbroad. Nonetheless, Complaint Counsel continues to use this phrase as both a sword and a shield. Complaint Counsel should therefore be compelled to produce responsive documents to Requests Nos. 32 and 33.

8. Request for Production No. 37

Complaint Counsel must produce documents in response to Request No. 37. Request No. 37 reads as follows:

Request No. 37

All documents *in the FTC's custody and control* which reflect the meaning of the words "Rapid" and "Substantial" *as charged or used in the Complaint.*⁹

Complaint Counsel responded to Request No. 37 as follows:

⁹ The text in italics above reflects the amendment made by Respondent's counsel as a result of a teleconference with Complaint Counsel on October 7-8, 2004.

Response to Request No. 37

Complaint Counsel object to the extent that this Request is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will produce responsive documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request No. 37 seeks documents that explain the meaning of the words "rapid" and "substantial" as those terms are used in the complaint. These terms formed, in part, the basis of Respondent's motion for a more definite statement filed on June 28, 2004. In its Opposition to the Motion for More Definite Statement ("Opposition"), Complaint Counsel argued that the lack of specificity in these terms could be "remedied easily by discovery." *See*, Opposition, page 4. Complaint Counsel further relied upon several cases standing for the proposition that notice pleading relies on liberal discovery rules to provide information not contained in the complaint. *Id.* at page 5, *citing*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) ("notice pleading relies on liberal discovery rules...to define disputed facts").

However, now that Respondents' have fashioned an appropriate request to probe this issue, Complaint Counsel has refused to comply, relying instead on blanket objections and stalling techniques. Contrary to Complaint Counsel's objections in its response, Request No. 37 is narrowly and specifically addressed to documents that explain the meaning of the words "rapid" and "substantial" as Complaint Counsel used those words. Therefore, Request No. 37 is not vague, unduly burdensome, overbroad, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice.

Further, Complaint Counsel's assurances that the responsive documents will be produced during expert discovery provide little comfort. To the contrary, this aspect of the response is particularly troublesome given the fact that the FTC must have had an understanding of its interpretations of the words "rapid" and "substantial" prior to the filing of the FTC's Complaint. Thus, the fact that expert discovery may eventually take place should not hinder Complaint Counsel's ability to respond. Even if it did, the Rules of Practice allow responses to requests for production to be supplemented if Complaint Counsel learns that the responses are in some material respect incomplete or incorrect. 16 C.F.R. §3.31(e)(2). Depriving Respondent of adequate responses and responsive documents, by comparison, forces Respondent to engage in wasteful discovery and hinders its ability to determine whom to depose, from whom to subpoena documents, which defenses to pursue, how to prepare witnesses, and how to respond to certain discovery. In its Order Denying Motions for a More Definite Statement And Motion to Dismiss the Complaint for Lack of Definiteness ("Order"), this Court stated, "[a]ny necessary clarification of these terms may be obtained during the normal course of discovery." *See* Order, at p. 4. Complaint Counsel has refused to provide the clarification that this Court anticipated would be forthcoming during discovery. Thus, Complaint Counsel must fully respond to Request No. 37.

B. Complaint Counsel's General Objections Are Insufficient

Complaint Counsel's responses are prefaced with eleven (11) overbroad, sweeping general objections and responses. *See*, Exhibit 2, pages 1 to 3. These general objections and responses are then asserted, in various combinations, to the specific document requests. These objections and responses are nothing more than transparent attempts to mask deficiencies in the responses by either avoiding or deflecting the responsibility for providing the requested

documents. Even assuming, *arguendo*, that certain objections are applicable, the manner in which they are asserted by Complaint Counsel is not specific, fails to provide detailed explanation of why the document request is objectionable, and lacks the information necessary to assess the applicability of asserted protections and/or privileges.

Objections to requests for production of documents must be specific in order for the responding party to avoid the requested production. *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985). Similarly, if an objection is made on the basis of privilege, the party resisting discovery has the burden of establishing the existence of the privilege. *National Union Fire Insurance Company of Pittsburgh v. Midland Bancor, Inc.*, 159 F.R.D. 562, 567 (D.Kan.1994); Fed.R.Civ.P. 26(b)(5). To do so, the party objecting must provide sufficient information to assess the applicability of that privilege or protection, without revealing the information that is privileged or protected. *See* 16 C.F.R. §3.38A; *see e.g., Omega Eng'g, Inc. v. Omega, S.A.*, No. Civ. 398CV2464AVC, 2001 WL 173765, at *4 (D. Conn. Feb. 6, 2001), citing *Burns v. Imagine Film Entm't, Inc.*, 164 F.R.D. 589, 593 (W.D.N.Y. 1996). “Blanket assertions of privilege”—such as those asserted by Complaint Counsel—“do not satisfy this burden.” *Id.*

All of Complaint Counsel's responses operate under the false assumption that Respondent has the burden of proving that Complaint Counsel's documents are not privileged. In truth, it is Complaint Counsel that must establish the legitimacy of its privileges. *See, e.g., In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir. 1998); *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 806 (D.D.C. 1977). Accordingly, unless Complaint Counsel can specifically justify the application of the privilege(s) asserted, the documents at issue should be produced.

Such justification is unlikely. For example, Complaint Counsel cannot summarily deny Respondent all documents used to support the charges in the Complaint under the auspices that it

was “prepared in anticipation of litigation.” Further, in order for a document to be protected by the “deliberative process privilege,” it must be pre-decisional and deliberative, reflecting the advisory and consultative process by which decisions and policies are formulated. *See, e.g., Army Times Publ'g Co. v. Department of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993). There has been no such showing. Moreover, governmental privileges are to be narrowly construed. *Id.*; *see also Price v. County of San Diego*, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (the deliberative process privilege “is to be narrowly applied”).

The remaining assertions of privilege, specifically those relating to experts, are equally misplaced. Complaint Counsel has not provided any guidance as to what information is held by testifying or non-testifying experts, much less establish that Respondents would be *per se* barred from discovering it.¹⁰ In fact, Complaint Counsel has not provided a privilege log for any of the documents it has withheld any of the multiple claims of privilege, and has therefore waived the asserted privileges. *See* 16 C.F.R. §3.38A; *Petition of Hoechst Marion Roussel, Inc., to Quash Subpoena Duces Tecum*, 124 F.T.C. 649, 659-660 (Oct. 17, 1997) (stating that the Petitioner’s failure to provide a proper assertion of privilege describing the nature of allegedly privileged documents or communication at a specified time amounted to a waiver of privilege). Under such circumstances, Complaint Counsel’s objections cannot be sustained.

¹⁰ Ironically, Complaint Counsel objects to this and other requests for production on the basis that they may be inconsistent with certain obligations under the Rules of Practice. The Rules of Practice obligate Complaint Counsel to provide adequate responses to Respondents’ requests for production. *See* 16 C.F.R. §3.37.

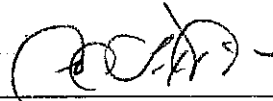
III. CONCLUSION

In light of the foregoing, Respondent respectfully submits that its Second Motion to Compel should be granted.

IV. CERTIFICATE OF COMPLIANCE

Pursuant to Section 3.22(f) of the Commission's Rules of Practice, Respondent has conferred with Complaint Counsel in a good faith effort to discuss the deficiencies with Complaint Counsel's responses to Document Requests Nos. 6, 7, 10, 11, 13, 15, 16, 17, 27, 29, 32, 33, and 33. The parties were unable to reach an agreement with regard to these Document Requests and reached an impasse on Thursday, October 7, 2004.

Respectfully submitted,



Jeffrey D. Feldman
Gregory L. Hillyer
Christopher P. Demetriades
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Miami, Florida 33131
Tel: (305) 358-5001
Fax: (305) 358-3309

Attorneys for Respondents Basic Research, LLC,
A.G. Waterhouse, LLC, Klein-Becker USA, LLC,
Nutrasport, LLC, Söavage Dermalogic Laboratories,
LLC and Ban, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 13th day of October, 2004 as follows:

(1) One (1) original and one (1) copy by Federal Express to Donald S. Clark, Secretary, Federal Trade Commission, Room H-159, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) electronic copy via e-mail attachment in Adobe® “.pdf” format to the Secretary of the FTC at Secretary@ftc.gov;

(3) Two (2) copies by Federal Express to Administrative Law Judge Stephen J. McGuire, Federal Trade Commission, Room H-104, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580;

(4) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; r-richardson@ftc.gov; lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

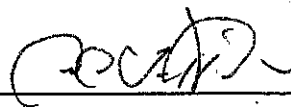
(5) One (1) copy via U. S. Postal Service to Elaine Kolish, Associate Director in the Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580

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

(7) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

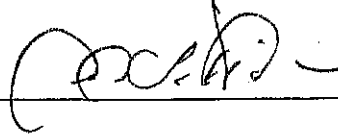
(8) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(9) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, Pro Se.



CERTIFICATION FOR ELECTRONIC FILING

I HEREBY CERTIFY that the electronic version of the foregoing is a true and correct copy of the original document being filed this same day of October 13, 2004 via Federal Express with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.



A handwritten signature in black ink, appearing to be "C. A. ...", is written over a solid horizontal line.

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

In the Matter of

BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,
d/b/a BASIC RESEARCH, L.L.C.,
OLD BASIC RESEARCH, L.L.C.,
BASIC RESEARCH, A.G. WATERHOUSE,
BAN, L.L.C.,
d/b/a KLEIN-BECKER USA, NUTRA SPORT, and
SOVAGE DERMALOGIC LABORATORIES,
DENNIS GAY,
DANIEL B. MOWREY,
d/b/a AMERICAN PHYTOTHERAPY RESEARCH
LABORATORY, and
MITCHELL K. FRIEDLANDER

Respondents.

DOCKET NO. 9318

**BASIC RESEARCH, LLC'S SECOND REQUEST FOR PRODUCTION OF
DOCUMENTS**

Respondent, Basic Research, L.L.C., by and through its undersigned counsel, and pursuant to 16 CFR §3.37(a), hereby requests Complaint Counsel to produce the documentary material and tangible things identified below for inspection and copying within fifteen (15) days at FeldmanGale, P.A., Miami Center, 19th Floor, 201 South Biscayne Blvd., Miami, Florida 33131, or such time and place as may be agreed upon by all counsel.



DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used in these Requests for Production is intended to have the broadest meaning permitted under the Federal Trade Commission's Rule of Practice.

1. "Challenged Products" shall mean each product referred to in the Complaint, including: Dermalin-APg, Cutting Gel, Tummy Flattening gel, Leptroprin, Anorex, and PediaLean, both individually and collectively.

2. "Commission," "you," and "your" shall mean the Federal Trade Commission, its employees, agents, attorneys, consultants, representatives, officers, and all other persons acting or purporting to act on its behalf.

3. "Communications(s)" shall mean the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form.

4. "Complaint" shall mean the administrative complaint issued by the Federal Trade Commission and any amendments to that Complaint, in the above-captioned matter.

5. "Corporate Respondents" shall mean the following Respondents: Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker, usa, LLC, Nutrasport, LLC, Söavage Dermalogic Laboratories, LLC and BAN, LLC, both individually and collectively as defined in the Complaint, including all of their operations under any trade names.

6. "Document" should be interpreted in the broadest sense permitted under the Federal Trade Commission's Rules of Practice, including but not limited to writings, drawings, graphs, charts, photographs, audio recordings, transcripts, videotapes, electronic mail, and other data compilations from which information can be obtained. The term "document" includes originals and all non-identical copies.

7. "Communication" or "communications" mean the act or fact of transmitting information, whether by correspondence, telephone line, computer media, meeting or any occasion of joint or mutual presence, as well as the transmittal of any document from one person to another.

8. "Each" and "any" shall mean and shall include the word "all" so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or document(s) that otherwise might be construed to be outside its scope.

9. "Efficacy" shall mean the ability of the product to achieve the results for which it is advertised.

10. "Individual Respondents" shall mean: Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively, unless otherwise stated.

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

12. "Person" or "Persons" shall mean: all natural persons, corporations, partnerships or other business associations, and each and every other legal entity, including all members, officers, predecessors, assigns, divisions, branches, departments, 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, 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(s) used to make oral solicitations to consumers, or publications or broadcast in any other medium.

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

15. "Respondent(s)" shall mean" all Corporate Respondents and all Individual Respondents, both individually and collectively, unless otherwise stated.

16. "Safety" shall mean the ability of the product to be used without risk or adverse health consequences for the user.

INSTRUCTIONS

1. Unless otherwise specified, the time period covered by these document production requests shall not be limited. All documents and tangible things responsive to the request – regardless of dates or time periods involved – must be provided.

2. Each document production request shall operate and be construed independently. Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

3. All documents that in their original form were stapled, clipped, or otherwise attached to other documents should be produced in such form. A complete copy of each document should be submitted even if only a portion of the document is within the scope of the Request. Each page produced should be marked with a unique Bates tracking number.

4. Documents covered by this Request are those which are in your possession or under your actual or constructive custody or control.

5. This Request does not seek documents that were provided to you by the Corporate Respondents in response to formal investigative demands.

6. Responsive documents that are not produced because you claim a privilege must be identified on a privilege log. The log must identify the grounds for withholding the document, the date of the document, type (e.g., letter, meeting, notes, memo), nature and subject matter of the document, the author or originators, and the addressees/recipients. Each author or recipient who is an attorney should be noted as such. If only a part of a responsive document is privilege, all non-privileged portions of the document must be provided.

7. The First Request for Production 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.

8. The use of the singular includes the plural, and the plural includes the singular.

9. The use of a verb in any tense shall be construed to include all other tenses.

10. The spelling of a name shall be construed to include all similar variants of such name.

DOCUMENT REQUESTS

1. All transcripts of or relating to the Respondents.

2. All documents listed in Complaint Counsel's Initial Disclosures.

3. All documents relating to submissions by the Federal Trade Commission in all prior weight loss cases.

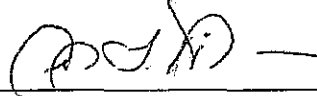
4. All consent orders issued by the Federal Trade Commission in weight loss cases.

5. All documents relating to the contention that clinical testing does not support the representations made in the advertising of the Challenged Products.

6. All expert reports that the Federal Trade Commission has filed in other part three proceedings or proceedings under Section 13(b) of the FTC Act.
7. All depositions taken of the Federal Trade Commission substantiation experts in any weight loss cases.
8. All appellate briefs filed by the Federal Trade Commission in other part 3 proceedings or proceedings under Section 13(b) of the FTC Act.
9. All complaints relating to the Challenged Products, including consumer and non-consumer complaints.
10. All communications with the National Institute of Health (NIH) relating to the Respondents or Challenged Products.
11. All communications with the Food and Drug Administration (FDA) relating to the Respondents or Challenged Products.
12. All communications with or to Cytodyne Technologies, Inc., its agents, officers, employees, Brian Molloy, Steve Stern, Brian Benevento, or Mel Rich.
13. All documents relating to any request for rulemaking submitted to the Federal Trade Commission by Jonathon W. Emord, Esq.
14. All communications with or to former employees of the Corporate Respondents.
15. All communications with authors of any studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.
16. All notes of conversations with authors of studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.
17. All communications to or with consumers relating to the Challenged Products.

18. All communications to or with consumers relating to competitors of the Challenged Products.
19. All documents relating to the interpretations of the advertisements of the Challenged Products.
20. All documents relating to the expertise and training of the FTC Commissioners in advertising interpretation.
21. All documents relating to the expertise and training of the FTC Commissioners in the interpretation of scientific or medical studies.
22. All documents relating to studies contradicting or undermining the express or implied interpretations of the advertisements for the Challenged Products.
23. All Federal Trade Commission publications which set forth the substantiation standard applicable in this case.
24. All reported cases which set forth the substantiation standard applicable in this case.
25. All internal memorandums which set forth the substantiation standard applicable in this case.
26. All request for rulemaking relating to the substantiation standard applicable in this case.
27. All documents relating to requests by advertisers for clarification on the substantiation standards applicable in this case.
28. All documents relating to requests made by advertisers pursuant to 16 C.F.R. §1.1.

29. All documents relating to requests made to the Federal Trade Commission by advertisers seeking approval of advertising prior to dissemination.
30. All studies reviewed by the Federal Trade Commission relating to the Challenged Products.
31. All consumer surveys conducted by the Federal Trade Commission relating to the Challenged Products.
32. All documents which define or explain the meaning of "competent and reliable scientific evidence."
33. All documents which purport to establish what constitutes competent and reliable evidence for purposes of supporting efficacy claims of weight loss products.
34. All correspondence to or with the individuals who served on the panel of "Deception in Weight Loss Advertising: A Workshop," held on November 19, 2002.
35. All documents that reflect the Federal Trade Commission's understanding of what the Federal Trade Commission needs to have a "reason to believe."
36. All documents which support the Federal Trade Commission's analysis of the meaning of the claims made by Respondents about the Challenged Products.
37. All documents which reflect the meaning of the words "Rapid" and "Substantial."
38. All drafts or versions of any expert reports.
39. All document and things considered and/or relied upon by any expert in connection with his or her services in this action.
40. All documents and things generated by any expert in connection with his or her services in the instant action, including but not limited to, any videos, photographs, tests, test results, notes and memoranda.



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Miami, Florida 33131
Telephone: (305) 358-5001
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**Counsel for 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. and Ban, L.L.C**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 9th day of September, 2004 as follows:

(1) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Lauren Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; r-richardson@ftc.gov; lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Postal Service 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 United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(3) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

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



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT
BASIC RESEARCH LLC'S SECOND REQUEST FOR PRODUCTION OF
DOCUMENTS**

Pursuant to Rules 3.31(c) and 3.37(b) of the Commission's Rules of Practice, Complaint Counsel serve the following responses and objections to Respondent Basic Research LLC's Second Set of Requests for Production.

GENERAL OBJECTIONS - DOCUMENT REQUESTS

Respondent's Document Requests unreasonably seek to expand the scope of this proceeding by attempting to put on trial the Federal Trade Commission's procedures and decision-making processes. Respondent's unreasonable requests include demands as burdensome and overbroad as "all expert reports that the Federal Trade Commission has filed in other part three proceedings under Section 13(b) of the FTC Act," (Request 21 [Respondent's Request 6]) and "all documents relating to submissions by the Federal Trade Commission in all prior weight loss cases" (Request 18 [Respondent's Request 3]). Respondent also continues to propound requests that are not reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or properly-asserted defenses. To the extent that these Requests seek documents and materials that are irrelevant, overbroad, and unduly burdensome, Complaint Counsel objects. This excessively overbroad and overreaching Document Request is tantamount to harassment in that it is obviously designed to waste Complaint Counsel's time and resources. To the extent that the Requests seek publicly available



rulings, decisions, opinions, and other related materials that are publicly available through any law library, Complaint Counsel does not consider it their obligation to perform Respondent's counsel's legal research. See the General Objections and Responses set forth below and the responses to each Document Request for specific objections.

1. Complaint Counsel object to Respondent's requests for documents in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information in contravention of Rule 3.35(a)(1) because such documents are not in the possession, custody or control of Complaint Counsel.
2. Complaint Counsel object to Respondent's requests for documents prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel or Complaint Counsel's consultant or agent, on the grounds that such information is protected from disclosure by the attorney work product privilege and the provisions of Rule 3.31(c)(3). *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).
3. Complaint Counsel object to Respondent's requests for documents protected from disclosure by the deliberative process privilege. *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (February 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987); *see also* Rule 4.10(a)(3).
4. Complaint Counsel object to Respondent's requests for documents relating to the expert witnesses that Complaint Counsel intend to use at the hearing on the ground that the timing for identification of such witnesses and discovery relating to their opinions and testimony is established in the Scheduling Order dated August 11, 2004. *Schering Corp.*, No. 9232, Order re Interrogatories and Request for Production of Documents (Feb. 6, 1990); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).
5. Complaint Counsel object to Respondent's requests for documents relating to non-testifying expert witnesses because Respondent has not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii). *Schering Corp.*, No. 9232, Order Denying Discovery and Testimony by Expert Witness (Mar. 23, 1990); *Telebrands Corp.*, No. 9313, Order Denying Respondents' Motion To Compel The Production of Consumer Survey Information, (Dec. 23, 2003).
6. Complaint Counsel object to Respondent's requests for documents received by FTC staff

from Respondents during this investigation or this proceeding, or documents already possessed by Respondents, their representatives, attorneys, officers, employees, or agents, on the ground that production of such documents would be unduly burdensome, unnecessary and duplicative.

7. Complaint Counsel object to Respondent's requests for documents to the extent that they seek documents obtained in the course of investigating other dietary supplement and weight loss marketers on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest. *Hoechst Marion Rousell, Inc.*, No. 9293, Order on Motions to Compel Discovery From Complaint Counsel filed by Andrix and Aventis (Aug. 18, 2000).
8. Complaint Counsel object to each of Respondent's document requests that, when read with the definitions and instructions, are so vague, broad, general, and all inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive.
9. Complaint Counsel object to each of Respondent's document requests that seek information that is not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any Respondent, in violation of the limits of discovery set by Rule 3.31(c)(1) of the Commission's Rules of Practice.
10. Complaint Counsel object to the Definitions and General Instructions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of the Pretrial Scheduling Order.
11. Complaint Counsel object to the extent that in this Second Request for Production of Documents, Respondent began its numbering of Document Requests with #1, when in fact, Respondent has previously made 15 Document Requests. Complaint Counsel's responses are numbered according to the actual total number of interrogatories posed. Accordingly, Complaint Counsel have renumbered the Interrogatories with Respondent's original number in brackets.

GENERAL RESPONSES

1. Complaint Counsel's responses are made subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility and any and all other objections and grounds that would require the exclusion of any statement contained herein if any requests were asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are

reserved and may be interposed at the time of the hearing.

2. The fact that Complaint Counsel have answered or objected to any document request or part thereof should not be taken as an admission that Complaint Counsel accept or admit the existence of any facts or documents set forth in or assumed by such request or that such answer or objection constitutes admissible evidence. The fact that Complaint Counsel have responded to any request is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any request.

3. Complaint Counsel have not completed their discovery in this case, and additional documents may be discovered that are responsive to Respondent's' request for documents. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.

DOCUMENT REQUESTS AND RESPONSES

Request 16 [Respondent's Request 1]

16. All transcripts of or relating to the Respondents.

Response:

Complaint Counsel object to this Request on the ground that it is overbroad and unduly burdensome and calls for documents that are already in respondent's possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents.

Request 17 [Respondent's Request 2]

17. All documents listed in Complaint Counsel's Initial Disclosures.

Response:

Complaint Counsel object to this Request on the ground that certain responsive documents are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence calls for documents that are already in respondent's possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents.

Request 18 [Respondent's Request 3]

18. All documents relating to submissions by the Federal Trade Commission in all prior weight loss cases.

Response:

Complaint Counsel object to this Request to the extent that it is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel further object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent to the extent that it may be construed to include documents that do not address the Challenged Products in the Complaint. Moreover, there have been approximately 200 weight loss cases brought by the Commission since 1927 and to compile and turn over every pleading, brief, etc, in every single case would be unduly burdensome, harrasing and irrelevant. Such files are not readily available in Complaint Counsel's custody and control. Decisions

issued in administrative actions are available publicly in FTC Reporters or online at the FTC website. In addition 13(b) orders are publicly available, some online at the FTC website and many through Lexis and Westlaw. Complaint Counsel are not obliged to conduct Respondents' legal research for them.

Request 19 [Respondent's Request 4]

19. All consent orders issued by the Federal Trade Commission in weight loss cases.

Response:

Complaint Counsel object to the extent that this Request is overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel further object to this Request, because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent to the extent that it may be construed to include documents that do not address the Challenged Products in the Complaint. Moreover, there have been approximately 200 cases brought by the Commission since 1927 and to compile and turn over every consent order in every single case would be unduly burdensome, harrasing and irrelevant. Such files are not readily available in Complaint Counsel's custody and control. Consent orders issued in administrative actions are available publicly in FTC Reporters or online at the FTC website. In addition 13b orders are publicly available, some online at the FTC Website and many through Lexis and Westlaw. Complaint Counsel are not obliged to conduct Respondents' legal research for them.

Request 20 [Respondent's Request 5]

20. All documents relating to the contention that clinical testing does not support the representations made in the advertising of the Challenged Products.

Response:

Complaint Counsel object to this Request as premature to the extent that this request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4) and information relating to non-testifying or consulting expert witnesses (General Objection 5). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents. Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 21 [Respondent's Request 6]

21. All expert reports that the Federal Trade Commission has filed in other part three proceedings or proceedings under Section 13(b) of the FTC Act.

Response:

Complaint Counsel object to the extent that this Request is overbroad, unduly burdensome and harassing, and irrelevant in that it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. All expert reports filed by the FTC in other cases are not readily available, nor are they in the possession, custody, or control of Complaint Counsel. Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 22 [Respondent's Request 7]

22. All depositions taken of the Federal Trade Commission substantiation experts in any weight loss cases.

Response to Request 22:

Complaint Counsel object to the extent that this Request is vague, overbroad, unduly burdensome and harassing, and irrelevant in that it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. All depositions taken of FTC substantiation experts are not readily available, nor are they in the possession, custody, or control of Complaint Counsel. Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Requests 23 [Respondent's Request 8]

23. All appellate briefs filed by the Federal Trade Commission other part 3 proceedings or proceedings under Section 13(b) of the FTC Act.

Response:

Complaint Counsel object to the extent that this Request is overbroad, unduly burdensome and harassing, and irrelevant as it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any

respondent. Moreover, such appellate briefs are not readily available nor are they in the possession, custody, or control of Complaint Counsel.

Request 24 [Respondent's Request 9]

24. All complaints relating to the Challenged Products, including consumer and non-consumer complaints.

Response:

Complaint Counsel object to the extent that this Request seeks documents that fall within the government informant's privilege. *Diran M. Seropian, M.D.*, Docket No. 9248, 1991 F.T.C. LEXIS 451 (Oct. 11, 1991). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 25 [Respondent's Request 10]

25. All communications with the National Institute of Health (NIH) relating to the Respondents or Challenged Products.

Response:

Complaint Counsel object to this Request because certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in Respondent's possession, custody or control. Complaint Counsel further object to this Request because certain documents are protected from disclosure as attorney work product (*General Objection 2*). Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (*General Objection 4*). Complaint Counsel further object to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (*General Objection 5*). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 26 [Respondent's Request 11]

26. All communications with the Food and Drug Administration (FDA) relating to the Respondents or Challenged Products.

Response:

Complaint Counsel object to this Request because certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in Respondent's possession, custody or control. Complaint Counsel further object to this Request because certain documents are protected from disclosure as attorney work product (General Objection 2). Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5) and documents that are protected from disclosure by the law enforcement evidentiary files privilege (General Objection 7). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 27 [Respondent's Request 12]

27. All communications with or to Cytodyne Technologies, Inc., its agents, officers, employees, Brian Molloy, Stever Stern, Brian Benevento, or Mel Rich.

Response:

Complaint Counsel object to this Request because to the extent that any such materials exist, this request asks for disclosure of nonpublic materials which is not required, and in some cases prohibited from being disclosed under the Rules of Practice Section 4.10, and Sections 6 and 21 of the FTC Act (15 U.S.C. §§ 46 and 57b-2). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents relevant to this case which do not fall within the protections described above.

Request 28 [Respondent's Request 13]

28. All documents relating to any request for rulemaking submitted to the Federal Trade Commission by Jonathon W. Emord, Esq.

Response:

Complaint Counsel object to this Request on the grounds that it seeks irrelevant materials in that any such correspondence does not relate to any of the challenged products and is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Complaint Counsel further object to this Request because any documents are protected from disclosure as attorney work product (General Objection 2) and by the deliberative process privilege (General Objection 3). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents.

Request 29 [Respondent's Request 14]

29. All communications with or to former employees of the Corporate Respondents.

Response:

Complaint Counsel have previously produced responsive documents and will continue to supplement as necessary.

Request 30 [Respondent's Request 15]

30. All communications with authors of any studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.

Response:

Complaint Counsel object to this Request on the ground that it is overbroad to the extent that the request is not limited to the Challenged Products. To the extent that this request calls for attorney notes and internal memoranda, these documents are protected from disclosure as attorney work product, as more fully set forth in General Objection 2. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents and will continue to supplement as necessary.

Request 31 [Respondent's Request 16]

31. All notes of conversations with authors of studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.

Response:

Complaint Counsel object to this Request on the grounds that it is overbroad to the extent that the request is not limited to the Challenged Products. To the extent that this request calls for attorney notes and internal memoranda, these documents are protected from disclosure as attorney work product, as more fully set forth in General Objection 2.

Request 32 [Respondent's Request 17]

32. All communications to or with consumers relating to the Challenged Products.

Response:

Complaint Counsel have no responsive documents.

Request 33 [Respondent's Request 18]

33. All communications to or with consumers relating to competitors of the Challenged Products.

Response:

Complaint Counsel object to this Request on the grounds that it is vague, overbroad, unduly burdensome, harassing, and irrelevant in that it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

Request 34 [Respondent's Request 19]

34. All documents relating to the interpretations of the advertisements of the Challenged Products.

Response:

Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5). Complaint Counsel further object to this Request because any documents are protected from disclosure as attorney work product (General Objection 2) or deliberative process (General Objection 3). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 35 [Respondent's Request 20]

35. All documents relating to the expertise and training of the FTC Commissioners in advertising interpretation.

Response:

Complaint Counsel object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in General Objection 9. Moreover, as a matter of law, the Commission as a body has expertise in advertising interpretation. *See Resort Car Rental Sys., Inc v. FTC*, 518 F.2d 962, 963 (9th Cir. 1975) (“The Federal Trade Commission has the expertise to determine whether advertisements have the capacity to deceive or mislead the public”); *Kraft, Inc.*, 970 F.2d 311, 319 (7th Cir. 1992) (“the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement”).

Request 36 [Respondent's Request 21]

36. All documents relating to the expertise and training of the FTC Commissioners in the interpretation of scientific or medical studies.

Response:

Complaint Counsel object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in General Objection 9.

Request 37 [Respondent's Request 22]

37. All documents relating to studies contradicting or undermining the express or implied interpretations of the advertisements for the Challenged Products.

Response:

Complaint Counsel object to this Request on the ground that it is vague. Moreover, and as more fully set forth in General Objections 2 and 3, Complaint Counsel object to this Request, because any documents are privileged from disclosure as attorney work product or deliberative process. Complaint Counsel also object to this Request to the extent that this Request seeks information provided by Complaint Counsel's testifying or consulting experts (General Objections 4 and 5). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will turn over documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 38 [Respondent's Request 23]

38. All Federal Trade Commission publications which set forth the substantiation standard applicable in this case.

Response:

Complaint Counsel object to this Request on the grounds that it is vague, unduly burdensome or otherwise inconsistent with Respondent's obligations under the Rules of Practice, as more fully set forth in General Objection 8. Moreover, all such materials are publicly available, including online at the FTC website. Complaint Counsel are not obliged to conduct Respondents' legal research for them. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents.

Request 39 [Respondent's Request 24]

39. All reported cases which set forth the substantiation standard applicable in this case.

Response:

Complaint Counsel object to the extent that this Request is unduly burdensome or otherwise inconsistent with Respondent's obligations under the Rules of Practice, as more fully set forth in General Objection 8. Moreover, all such materials are publicly available in the FTC Reporters, online at the FTC website, or through Lexis and/or Westlaw. Complaint Counsel are not obliged to conduct Respondents' legal research for them. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents.

Request 40 [Respondent's Request 25]

40. All internal memorandums which set forth the substantiation standard applicable in this case.

Response:

Complaint Counsel object to this Request on the grounds that any documents are protected from disclosure as attorney work product (General Objection 2) and by the deliberative process privilege (General Objection 3).

Request 41 [Respondent's Request 26]

41. All request for rulemaking relating to the substantiation standard applicable in this case.

Response:

Complaint Counsel object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and irrelevant in that it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will produce responsive documents that are located after a reasonable search.

Request 42 [Respondent's Request 27]

42. All documents relating to requests by advertisers for clarification on the substantiation standards applicable in this case.

Response:

Complaint Counsel object to this Request on the grounds that it is overbroad, unduly burdensome, harassing, inconsistent with Complaint Counsel's obligations under the Rules of Practice, and not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in the opening paragraph of the General Objections and in General Objections 8 and 9.

Request 43 [Respondent's Request 28]

43. All documents relating to requests made by advertisers pursuant to 16 C.F.R. §1.1.

Response:

Complaint Counsel object to this Request on the grounds that it is vague, overbroad, unduly burdensome, harassing, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel also object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in the opening paragraph of the General Objections and in General Objection 9. Moreover, any such documents are publicly available and are not in the possession, custody, or control of Complaint Counsel. To the extent Respondent wants to obtain such public record documents, there is a specific procedure that must be followed pursuant to Rule of Practice 4.9.

Request 44 [Respondent's Request 29]

44. All documents relating to requests made to the Federal Trade Commission by advertisers seeking approval of advertising prior to dissemination.

Response:

Complaint Counsel object to this Request on the grounds that it is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel also object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in General Objection 9. In addition, such Request may include materials prohibited from being disclosed under Section 21 of the FTC Act (15 U.S.C. 21§ 57b-2).

Request 45 [Respondent's Request 30]

45. All studies reviewed by the Federal Trade Commission relating to the Challenged Products.

Response:

Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5). Complaint Counsel further state that certain documents responsive to this request are documents that Respondent previously provided to Complaint Counsel and hence the request calls for documents that are already in Respondent's possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously provided responsive documents and will produce further responsive documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 46 [Respondent's Request 31]

46. All consumer surveys conducted by the Federal Trade Commission relating to the Challenged Products.

Response:

Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the

hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel currently have no responsive documents.

Request 47 [Respondent's Request 32]

47. All documents which define or explain the meaning of "competent and reliable scientific evidence."

Response:

Complaint Counsel object to this Request on the grounds that it is overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel further object to this Request on the grounds that such materials are publicly available in the FTC Reporters, online at the FTC website, or through Lexis and/or Westlaw. Complaint Counsel are not obliged to conduct Respondents' legal research for them. Complaint Counsel further state that certain documents responsive to this request are documents that the Complaint Counsel have previously provided to Respondents.

Request 48 [Respondent's Request 33]

48. All documents which purport to establish what constitutes "competent and reliable evidence for purposes of supporting efficacy claims of weight loss products.

Response:

Complaint Counsel object to the extent that this Request is overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel further object to this Request on the grounds that such materials are publicly available in the FTC Reporters, online at the FTC website, or through Lexis and/or Westlaw. Complaint Counsel are not obliged to conduct Respondents' legal research for them. Complaint Counsel further state that certain documents responsive to this request are documents that the Complaint Counsel have previously provided to Respondents.

Request 49 [Respondent's Request 34]

49. All correspondence to or with the individuals who served on the panel of "Deception in Weight Loss Advertising: A Workshop," held on November 19, 2002.

Response:

Complaint Counsel object to this Request on the grounds that it is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in General Objection 9.

Request 50 [Respondent's Request 35]

50. All documents that reflect the Federal Trade Commission's understanding of what the Federal Trade Commission needs to have a "reason to believe."

Response:

Complaint Counsel object to this Request on the grounds that it is vague, overbroad, unduly burdensome, harassing, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel also object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in General Objection 9. Complaint Counsel further object to this Request because it seeks documents which are not in the possession, custody or control of Complaint Counsel.

Request 51 [Respondent's Request 36]

51. All documents which support the Federal Trade Commission's analysis of the meaning of the claims made by Respondents about the Challenged Products.

Response:

Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5). Complaint Counsel further object to this Request because any documents are protected from disclosure as attorney work product (General Objection 2) or deliberative process (General

Objection 3). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will produce responsive documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 52 [Respondent's Request 37]

52. All documents which reflect the meaning of the words "Rapid" and "Substantial."

Response:

Complaint Counsel object to the extent that this Request is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will produce responsive documents relating to testifying experts as provided under the Rules and this Court in its Scheduling Order.

Request 53 [Respondent's Request 38]

53. All drafts or versions of any expert reports.

Response:

Complaint Counsel object to the extent that this Request is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel also object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent as more fully set forth in General Objection 9. Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will produce responsive documents relating to testifying experts in this case as provided under the Rules and this Court in its Scheduling Order.

Request 54 [Respondent's Request 39]

54. All documents and things considered and/or relied upon by any expert in connection with his or her services in this action.

Response:

Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5) Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will produce responsive documents relating to testifying experts in this case as provided under the Rules and this Court in its Scheduling Order.

Request 55 [Respondent's Request 40]

55. All documents and things generated by any expert in connection with his or her services in the instant action, including but not limited to, any videos, photographs, tests, test results, notes and memoranda.

Response:

Complaint Counsel object to this Request as premature to the extent that this Request seeks information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4). Complaint Counsel further object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 5) Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel will produce responsive documents relating to testifying experts in this case as provided under the Rules and this Court in its Scheduling Order.

Dated: September 24, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2004, I caused *Complaint Counsel's Response to Respondent Basic Research's First Request for Production of Documents* to be served and filed as follows:

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

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