

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

... "reasonable basis" that substantiated those

[REDACTED]

3. 12. 2011 - Motion for Definite Statement and Motion to Dismiss for Lack of Definiteness ("Order").

[The remainder of the page is heavily redacted with thick black horizontal bars.]

its contentions not simply issue general objections, defer to third parties, or cite documents

... citing *Large Poultry Foods Co.* 1970

1. Interrogatory No. 1(a)-(c)⁶

Interrogatory No. 1, subparts (a), (b) and (c), reads as follows:

1. With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:
 - (a) state whether you contend that the representation was express or implied;
 - (b) identify the person or persons who interpreted the Promotional Material in question and determined what representations it conveyed;
 - (c) describe all extrinsic evidence (that is, anything other than Promotional Material itself) that was relied upon in determining what representations were conveyed;

... Complaint Counsel to specify the nature of the challenged

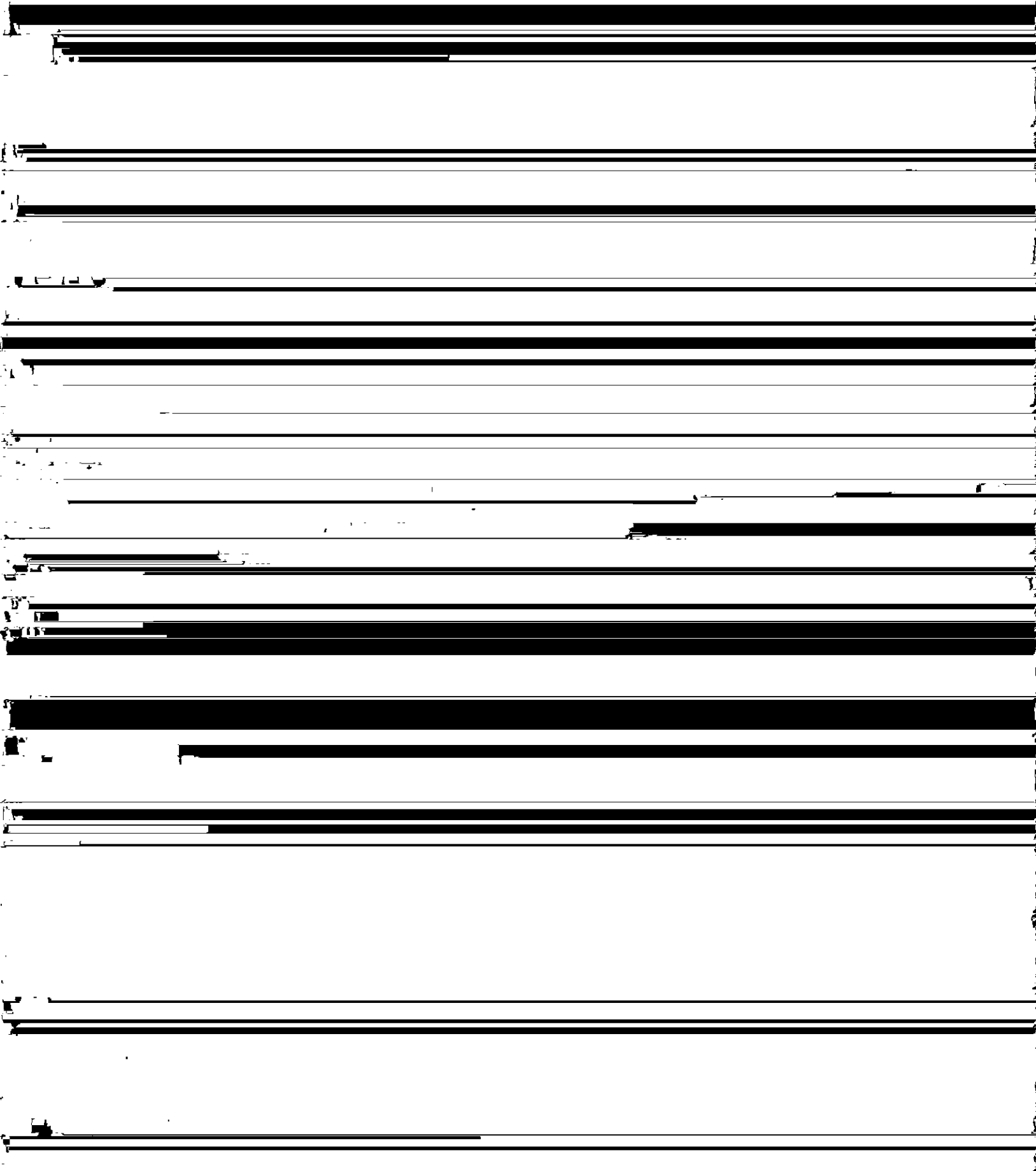
claims, by whom they were interpreted, and how. Complaint Counsel responded to Interrogatory

No. 1 (a)-(c) as follows⁷.

...Complaint Counsel state that its Complaint alleges that Respondents have represented the claims at issue "expressly or by implication" and that

At present, Complaint Counsel has not provided an adequate answer. Complaint Counsel

unsuccessfully emphasized that the requirements for advertising substantiation "depend on the



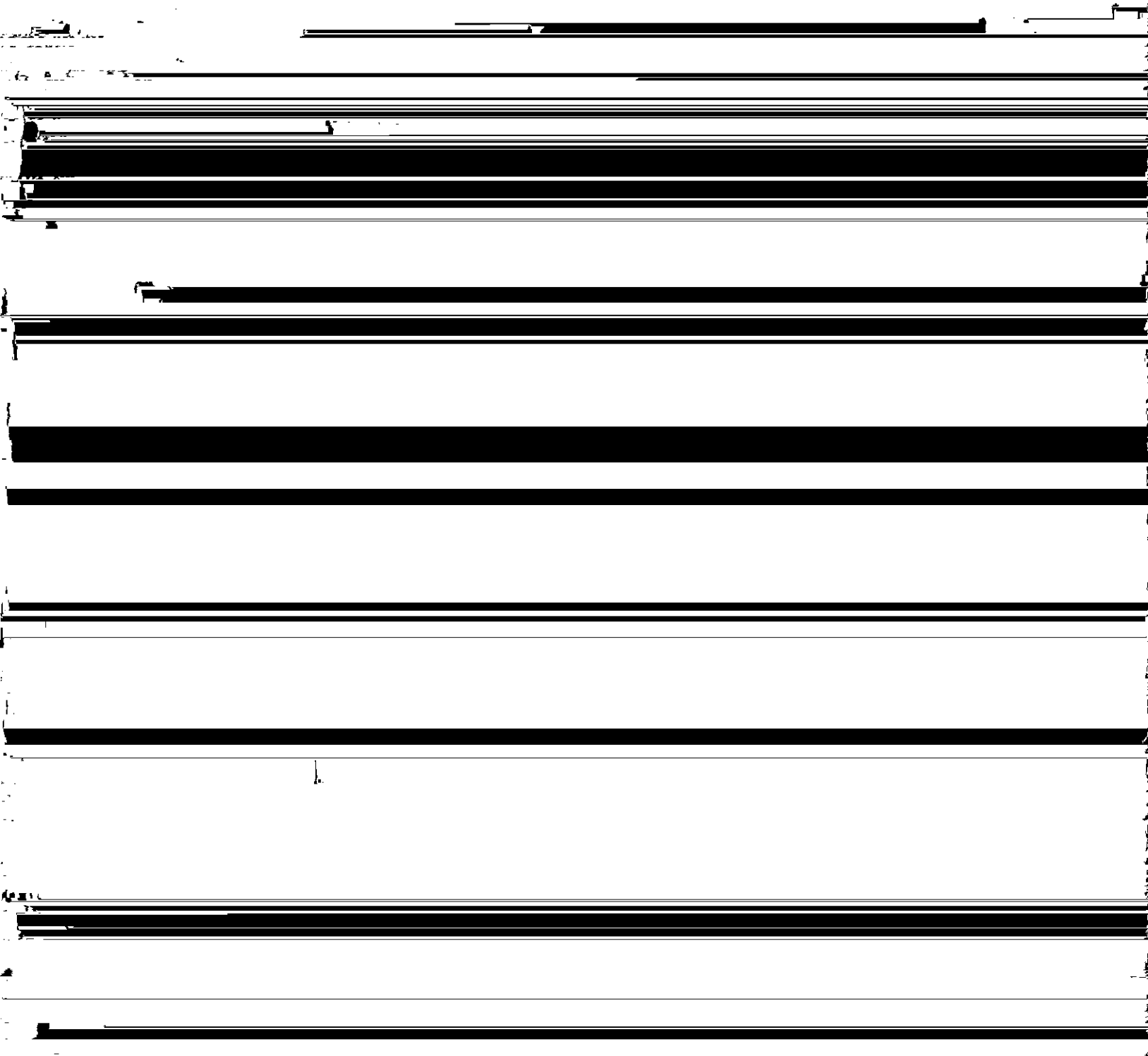
This interrogatory calls for the level of substantiation Respondent needed for the claims made in the challenged advertisements.⁸ Complaint Counsel responded to Interrogatory No. 1(d) as follows.

...the Commission and its staff have provided guidance to the industry about

See Exhibit 2 page 5. Complaint Counsel then presents what appears to be a form paragraph

F.R.D. 590, 594 (N.D. Ind. 2000), *citing, Smith v. Logansport Cmty. Sch. Corp.*, 139 F.R.D. 637, 650 (N.D. Ind. 1991) (motion to compel granted).⁹

It is not sufficient to simply invite Respondent to “figure it out.” Even if Respondent was inclined to engage in this exercise, the FTC will likely interpret the cited materials differently, leading to a war of interpretation. Respondent should not be required to guess. Respondent is



accusation of "outright discovery" it is the core accusation made in the FTC's Complaint. The

FTC presumably had sufficient facts to make this accusation. Accordingly, requiring Complaint

This response provides nothing more than what is set forth in the Complaint, does not "state facts," or "elaborate on legal contentions," and is otherwise inadequate for the similar

_____ 16) Complaint Counsel also

1

_____ 14) 14) "is underhand" See Exhibit 2 pages 6 to 7 The

11

Complaint Counsel's citation to, and anticipated reliance on, *Telebrands Corp.*, No. 9313 (Dec. 23, 2003), is misplaced. *Telebrands Corp.* dealt with a document request for consumer

identification of market research, not the opinions, notes, or statements of experts in light of these

Instead, Complaint Counsel cites to various decisional law in an attempt to explain the manner in which the Commission would go about interpreting the challenged advertising. *See,*

points out that the Commission may rely on extrinsic evidence, such as "tests, surveys, or any

on its understanding of the challenged advertising—as Complaint Counsel has repeatedly

13

7. **Interrogatory No. 5**

Interrogatory No. 5 reads as follows.

Identify all documents or other materials provided by Respondents to the Commission during the pre-complaint investigative stage of the above-captioned case which the Commission has disclosed or otherwise provided to persons unaffiliated with the Commission (including but not limited to persons working

for, on behalf of, or otherwise affiliated with the United States House of Representatives) and identify the persons to whom they were given.

This interrogatory is relevant to the Commission's coordination of the filing of the

Representatives Committee on Energy and Commerce Subcommittee on
Oversight and Investigations

See, Exhibit 2, page 11.

This answer is incomplete. Interrogatory No. 5 requires Complaint Counsel to “identify the persons.” It is unclear from the response to whom these materials were shown. Moreover, based on Complaint Counsel’s general objections, it is unclear whether Complaint Counsel has

B. Complaint Counsel's General Objections Are Insufficient

Complaint Counsel's responses are prefaced with phrases (11) and (12) and are

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 interrogatories. These objections and responses are nothing more than transparent attempts to mask deficiencies in the answers by either avoiding, or deflecting the responsibility for providing the requested

information. These responses are not responsive to the questions and are

All of Complaint Counsel's responses operate under the false assumption that

Defendant has the burden of proving that Complaint Counsel's documents are not qualified

III. CONCLUSION

In light of the foregoing Respondent respectfully submits that its Motion to Compel

should be granted.

CERTIFICATE OF SERVICE

[REDACTED]

CERTIFICATION FOR ELECTRONIC FILING

I HEREBY CERTIFY that the electronic version of the foregoing is a true and correct

UNITED STATES OF AMERICA

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,

Docket No. 9318

NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC
LABORATORIES, L.L.C.,
BAN, L.L.C.,
DENNIS GAY,
DANIEL B. MOWREY, and
MITCHELL K. FRIEDLANDER,

Respondents.

1. "Challenged Products" shall mean each product referred to in the Complaint

including: Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, 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

description, explanation or listing of the matter into which the Interrogatory inquires.

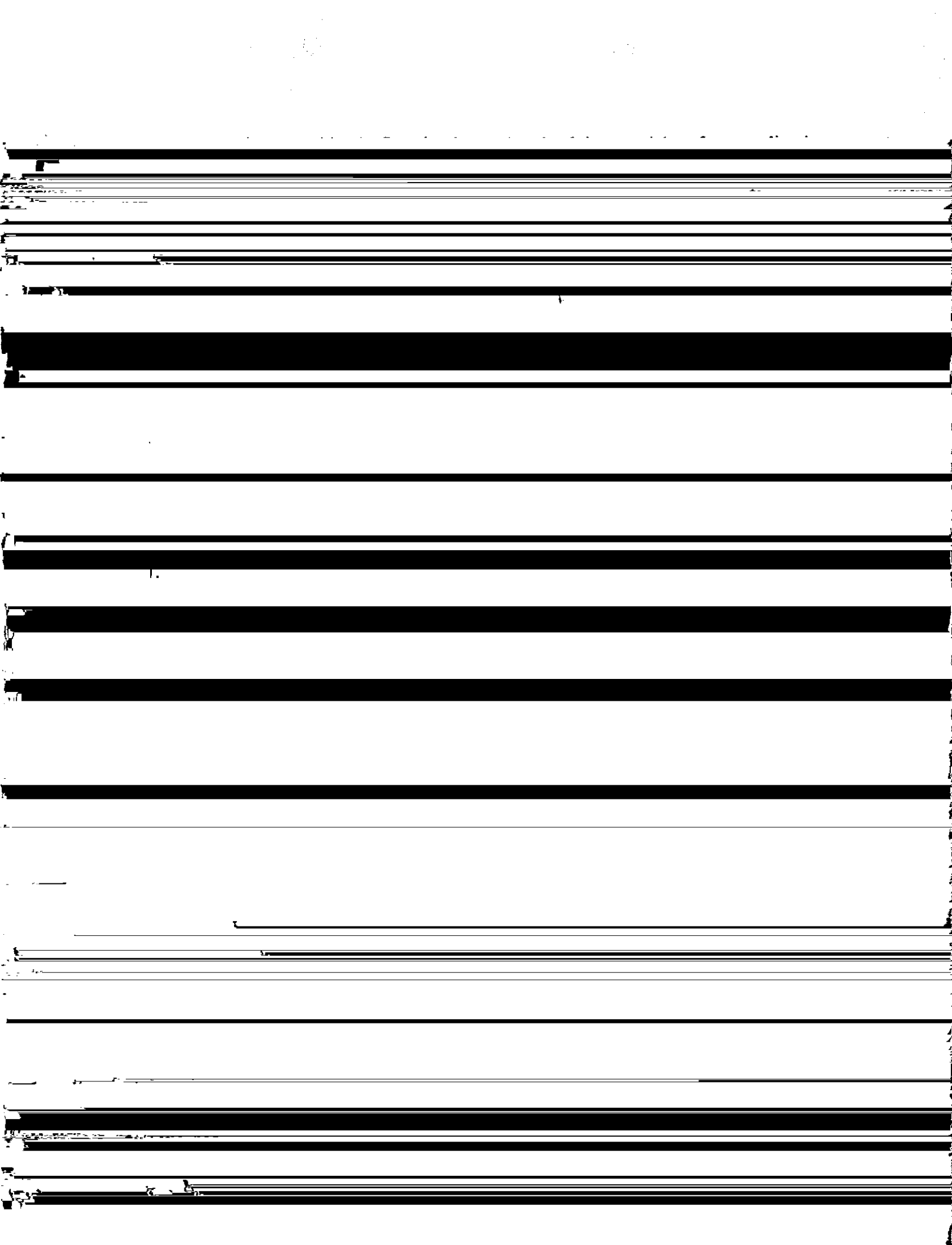
9. "Document" should be interpreted in the broadest sense permitted under the Federal Trade Commission's Rules of Practice, including but not limited to writings, drawings, graphs, reports, photographs, audio recordings, videotapes, electronic mail, and other data compilations.

[REDACTED]

document or communication, a brief description of the subject matter of the document or communication, the date it was prepared, its present location, and its

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

13. "Market Research" shall mean: all information referring or relating to testing, measuring or assessing consumers' or individuals' interpretation of, understanding of, or reaction to any draft, proposed, or final promotional material, proposed advertising text, copy or creative



4. Information covered by these Interrogatory Requests shall include all information

within your knowledge or possession, or under your actual or constructive custody or control

[REDACTED]

[REDACTED]

[REDACTED]

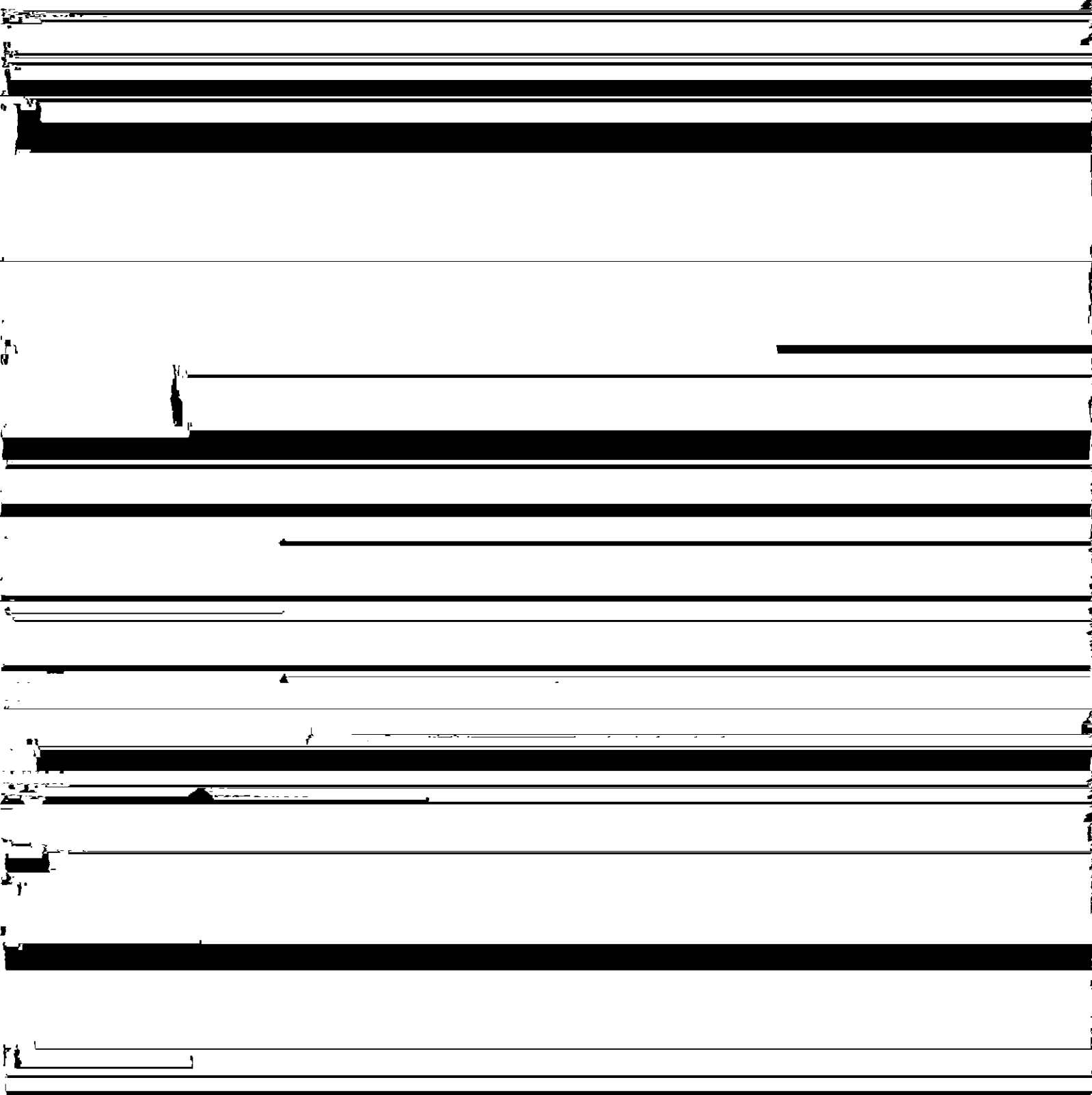
[REDACTED]

[REDACTED]

[REDACTED]

authors and recipients of the information; and (d) the specific grounds for claiming that the information is privileged or otherwise is withheld. If only part of the responsive information is privileged, all non-privileged portions of the information must be provided.

9-7-2004 10:11:11 AM



investigation leading to the Complaint, please state whether you contend such study, analysis, research, or test does not constitute adequate substantiation for the representation for which it was asserted, and describe the basis and circumstances under which you made that determination, including without limitation the identity of the person who made the determination, when they made it, their qualifications to make such a determination, and the factual basis and reasoning underlying that determination.

3. Please identify all Market Research or other evidence or information of which you are aware that is relevant or potentially relevant to determining consumer reaction to, or consumer perception, comprehension, understanding, "take away" or recall of statements or

representations made by Respondents in Promotional Materials for the Challenged Products.

Respectfully submitted,

PTA-AA

Washington, DC 20004
Tel: (202) 662-5614
Fax: (202) 662-6290

Council for Democratic Basic Research

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2004, I caused Basic Research

LLC's First Set of Interrogatories to be served as follows:

- (1) one copy by hand delivery and one copy by electronic mail to:


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

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

Jeffrey D. Feldman
FELDMAN GALE P.A.

Miami Center - 19th Floor
201 S. Biscayne Boulevard
Miami, FL 33131

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


Brooks Mackintosh, Esq.

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)

BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
SOVAGE DERMALOGIC)

Docket No. 9318

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 interrogatories to the extent they seek information protected from disclosure by the deliberative process privilege. *Stouffer*

Food Corp., No. 9250, Order Ruling on Stouffer Foods' Application for an Order

Requiring the Production of Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987); *see also* Rule 4.10(a)(3).

4. Complaint Counsel object to Respondent's interrogatories to the extent they seek information relating to the expert witnesses that Complaint Counsel intend to use at the

9. Complaint Counsel object to the Instructions and Definitions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of any Pretrial Scheduling Order.

information ascertained from or the identity of confidential informants as disclosure of such information would be contrary to the public interest.

Interrogatories and Responses

INTERROGATORY NO. 1 [Respondent's Interrogatory No. 1a, b, and c]

1. With respect to each representation that you claim in your Complaint was made by one

or more Respondents in Promotional Materials for the Challenged Products, please:

- a) state whether you contend that the representation was express or implied;
- b) identify the person or persons who interpreted the Promotional Material in question and determined what representations it conveyed; and

c) describe all extrinsic evidence (that is, anything other than the Promotional

INTERROGATORY NO. 2 [Respondent's Interrogatory No. 1d]

With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:

~~1. List the nature, quantity, and type of substantiation that you contend~~

Respondents needed in order to possess and rely upon a reasonable basis to make the representation

Response:

Complaint Counsel object to the extent that Respondent has included as many as five

type and level of substantiation for the advertising claims challenged in the *Complaint*. These documents are available to the public in the official FTC reporter and/or the agency's website.

INTERROGATORY NO. 3 [Respondent's Interrogatory No. 1e]

more Respondents in Promotional Materials for the Challenged Products please:

object to this interpretation to the extent that it seeks to deprive the identities of end opinions

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Response:

Complaint Counsel object to this Interrogatory to the extent it seeks information which

Complaint Counsel object to this Interrogatory to the extent it seeks information which

This net impression is based, among other things, upon the language of the marketing materials and their depictions and visual elements. The ads superimpose images of lean and/or muscular models along with bold text conveying messages such as "Penetrating Gel Emulsifies Fat On

in a fast amount of time. All of these terms are used in their common sense parlance and are based on the representations made in Respondents' own promotional materials. Further
[REDACTED] documents information additional ads and draft ads for these

Subject to and without waiving these objections or the General Objections stated above,
Complaint Counsel state that, pursuant to Rule 4.11(b) of the Rules of Practice and Section 21 of
the PRC of the Province of Ontario and the Rules of Practice and Procedure of the Tribunal, the following

[REDACTED]

Certificate of Service

I hereby certify that on this 27th day of August, 2004, I caused *COMPLAINT COUNSEL'S RESPONSE*

filed as follows:

one (1) electronic copy via email and one (1) paper copy

Barbara A. McGill

From: Barbara A. McGill

Date: Tuesday, September 07, 2004 9:44 AM