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

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

TABLE OF AUTHORITIES

CASES

RULES and STATUTES

MISC.

Pursuant to RULE OF PRACTICE 3.24, Complaint Counsel move for summary decision on the questions of commerce, common enterprise, advertising interpretation, and the materiality of the alleged claims in this matter. Based on the pleadings and other evidence in the case, there is no genuine dispute concerning the facts that are material to these questions. Therefore, we respectfully request summary decision on these questions.

BACKGROUND

On June 15, 2004, the Commission filed the *Complaint* in this matter, alleging, *inter alia*, that Basic Research LLC and other related individuals and companies (collectively, "Respondents") marketed numerous dietary supplements with unsubstantiated claims for fat loss and/or weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and (52). The facts pertinent to this *Motion for Summary Decision* are set forth in the attached *Statement of Material Facts as to which There is No Genuine Dispute*.

DISCUSSION

The uncontroverted evidence in this case reveals that Respondents, acting as a common business enterprise, advertised and sold topical "fat burning" gels ("Dermalin," "Cutting Gel," and "Tummy Flattening Gel"), weight loss pills containing, among other things, the now-banned dietary supplement ephedra ("Anorex" and "Leptoprin"), and weight loss pills targeted for consumption by children ("PediaLean"). Respondents sold these products (collectively, the "challenged products") in numerous states, and their advertisements for these products appeared throughout the United States. Respondents' advertisements for the three topical gels contained strongly implied claims that the gels cause rapid and visibly obvious fat loss in areas of the body to

supporting declarations, on any part of the issues subject to adjudication. RULE 3.24 closely follows *Federal Rule of Civil Procedure* 56, and the Commission looks to decisions interpreting *Federal Rule* 56 for guidance. *See, e.g.*, *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972); *In re Lehigh Portland Cement Co.*, 78 F.T.C. 1556, 1557 (1971). Summary judgment is appropriate when there are no genuine issues as to any material fact and the moving party is entitled to a decision as a matter of law. *See generally Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The party seeking summary decision has the burden of establishing the non-existence of any genuine issue of material fact concerning the issues on which summary decision is sought. *In re Hearst Corp.*, 80 F.T.C. at 1014.

Once a movant has made a satisfactory *prima facie* showing of the absence of a genuine issue of material fact, the opposing party bears the onus of resurrecting the possibility of a dispute concerning the material facts. Opponents are not entitled to hold back evidence that they would have relied on at trial, nor may they forestall summary decision by asserting immaterial facts or setting forth speculative arguments. *In re Kroger Co.*, 98 F.T.C. 639, 729 n.12 (1981). Rather, in this instance, Respondents "must set forth specific facts showing that there is a genuine issue of fact for trial." RULE 3.24(a)(3); *see Orkin Exterminating Co.*, 108 F.T.C. 263, 350 (1986); *cf. SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980) (noting that evidence offered in opposition must be "significantly probative" as to any fact claimed to be disputed).

Four questions are particularly ripe for summary decision at this time: (1) whether Respondents have engaged in acts affecting interstate commerce; (2) whether Respondents have operated a common business enterprise; (3) whether the claims alleged in the *Complaint* constitute one reasonable interpretation of Respondents' advertising for the challenged products; and (4)

[1] Section 4 of the FTC Act defines "commerce" to include "commerce among the several States or with foreign nations, or in any Territory of

No. 1107, 93d Cong., 2d Sess. 29-31 (1974)). Sections 5 and 12 of the FTC Act are not limited merely to acts or practices "in commerce"; they apply more broadly to acts or practices "affecting commerce" (Section 5) or "having an effect upon commerce" (Section 12). *See* 15 U.S.C. §§ 45(a), 52. When Congress amended the FTC Act to incorporate this broader language (the scope of the FTC Act had previously been limited to "in commerce"), it expanded the FTC's jurisdiction under Section 5 and 12 of the FTC Act and gave it a "clearer mandate" to regulate local businesses when their acts and practices have an impact on interstate commerce. *Am. Bldg. Maintenance Indus.*, 422 U.S. at 276-277 n.6. As the Supreme Court recently observed in *The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), the phrase "affecting commerce" represents "words of art that ordinarily signal the *broadest permissible exercise* of Congress' Commerce Clause power." *Id.* at 55 (emphasis added).

Nationwide advertising, marketing, or sales activity constitutes "commerce" under the FTC Act. *See, e.g., P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 272 (6th Cir. 1970). Moreover, it is well-settled that such commerce encompasses not merely advertising, marketing, promotion, and sales activities across state lines, but the actions, communications, and other acts or practices that are incident to those activities. *See, e.g., Ford Motor Co. v. FTC*, 120 F.2d 175, 183 (6th Cir. 1941) (citation omitted):

> Interstate commerce includes intercourse for the purpose of trade which results in the passage of property, persons or messages from within one state to within another state. All of those things which stimulate or decrease the flow of commerce, although not directly in its stream, are essential adjuncts thereto and the Congress has power to confer on the Federal Trade Commission their regulation.

Applying these precepts, the uncontroverted evidence in this matter readily satisfies the requirement of commerce alleged in the *Complaint*.

B. The Uncontroverted Evidence Clearly Demonstrates that Respondents Have Engaged in Acts Affecting Commerce

The uncontroverted record shows that Respondents have engaged in commerce or in acts affecting commerce by, *inter alia*, advertising, marketing, promoting, and selling the challenged products among the United States, or by personally taking actions, making decisions, and/or sending and receiving communications that are incident to these interstate commercial activities. As the undisputed facts recited below demonstrate, Respondents created the challenged products to be sold in commerce, created ads for these products, disseminated the ads throughout the United States to induce consumer purchases, received consumer solicitations to purchase the products, and sold the challenged products to consumers throughout the United States, directly through inbound calls and indirectly through other channels, such as department stores. Additionally, as discussed *infra* Section III, Respondents' acts were a part of a common business enterprise that advertised, marketed, promoted, and sold the challenged products in commerce. Below, we highlight the facts demonstrating that Respondents' acts and practices have been in, or affecting, commerce. Our discussion begins with Corporate Respondents' acts and practices.

1. Corporate Respondents

RULE OF PRACTICE 3.12(b)(1)(ii) provides that "[a]n answer in which the allegations of a complaint are contested shall contain . . . [s]pecific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted." Corporate Respondents' *Answers* to the commerce allegation of the *Complaint* do not comply with this RULE. Their partial denial is not an outright denial of the "commerce" allegation, but a denial

c. Tummy Flattening Gel: Acts and Practices in or Affecting Commerce of Respondents Basic Research, BAN, and Sovage

In their *Answers*, Respondents Basic Research, BAN, and Sovage admitted that they

e. Conclusion: Corporate Respondents' Acts and Practices Were in or Affecting Commerce

Although their principal place of business is Utah, the Corporate Respondents have transacted business in other states of the United States, establishing that commerce has occurred. *E.g.*, *RSE, Inc. v. Pennsy Supply Co.*, 489 F. Supp. 1227, 1232 (1980) (noting, in context of "in commerce" requirement of Section 2(a) of the Clayton Act, that business conducted across state lines constitutes interstate commerce).

[REDACTED]

Through the above acts and practices, Respondents have engaged in interstate commerce, or acts affecting such commerce.

2. Individual Respondents

The record also provides strong evidence showing that there is no genuine issue of material fact concerning the commerce allegation regarding the Individual Respondents.

a. Respondent Gay's Acts or Practices In or Affecting Commerce

The evidence clearly shows that Respondent Dennis Gay is the person ultimately responsible for placing the ads for the challenged products into the stream of commerce and for selling the challenged products in commerce. [REDACTED]

He is currently the chief executive of all of the Corporate Respondents, *i.e.*, Respondents Basic Research, AG Waterhouse, Klein-Becker usa, NutraSport, Sovage Dermalogic Laboratories, and BAN. Tab 17, Resp'ts' Resp. to Compl. Counsel's Req. for Admissions, Req. 1. His authority included final approval of the challenged products and ads for those products. Tab 11, Corporate Resp'ts Resp. to Compl. Counsel Interrog. 1. He has admitted disseminating advertising for Dermalin, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean. Tab 8, Answer, Resp't Gay ¶ 13, 27, 36. In addition, Respondent Gay is also involved in acts or practices that are incid

[REDACTED] Respondent Gay also makes the final

example, Exhibit I to the *Complaint* features Respondent Mowrey touting the efficacy of Leptoprin:

> **Leptoprin: The Result of an Extraordinary Collaboration**
> Leptoprin (or more correctly, its patent-protected core compound, Leptoprin) is the result of an extraordinary collaborative effort between Dr. Daniel B. Mowrey, Director of Scientific Affairs, APRL (American Phytotherapy Research Laboratory), Salt Lake City, Utah, and Dr. Edward G. Fey, University of Massachusetts Medical Center, Worcester, Massachusetts. Though working independently, both doctors were keenly aware of the growing body of evidence linking obesity to certain genetic 'markers.' In September of 1998, Drs. Mowrey and Fey discovered each had access to compatible patents for variant methods of regulating obesity. As they familiarized themselves with each others' work, it became clear that combining the patented formulations could overcome genetic anomalies responsible for significant overweight."
>
> **Leptoprin: Now Available in The United States Without A Prescription**
> In a report dated February 19, 2000, Dr. Mowrey stated 'Although Leptoprin is much too powerful for the 'casual dieter,' the ability of Leptoprin to help people overcome the genetic implications of obesity leads me to believe Leptoprin, and its base formulation Leptoprin, is the most effective means of providing considerable benefit to that vast population of American men and women who are significantly overweight. That is, until science develops a reliable means of altering the genetic code.'

In sum, Respondent Mowrey is directly involved in the chain of events leading from product creation to dissemination of product claims to consumers, including claims challenged in the *Complaint*. There is no genuine question for trial concerning whether his acts and practices are in or affecting commerce within the meaning of the FTC Act.

c. Respondent Friedlander's Acts or Practices In or Affecting Commerce

Lastly, Respondent Friedlander engaged in acts or practices affecting commerce in connection with the challenged products.

[REDACTED]

[REDACTED]

He created the ad copy for Dermalin, Cutting Gel, Anorex, Leptoprin, and PediaLean. Tab 26, G. Gay Dep. at 57-58, 93, 106, 140. For the Cutting Gel box, Respondent Friedlander wrote the copy: "penetrating gel for the visible reduction of body fat." Tab 26, G. Gay Dep. at 82.

[REDACTED]

Based on these facts, it is clear that Respondent Friedlander's involvement in the acts and practices challenged in the *Complaint* was in or affecting commerce.

Based on the preceding evidence, there is no material dispute concerning whether Respondents engaged in acts or practices in or affecting commerce. The undisputed evidence discussed above establishes that they did. Additionally, the facts discussed below in Section III, which demonstrate that Respondents acted as a common enterprise, buttress the commerce

allegation. Accordingly, we request that the Court enter summary decision on the commerce allegation of the *Complaint*, obviating the need for an unnecessary trial on this discrete issue.

III. Respondents Operated a Common Business Enterprise as Alleged in the *Complaint*

The *Complaint* alleges that "Respondents have operated a common business enterprise while engaging in the deceptive acts and practices alleged [therein]." Tab 1, Compl.¶ 10. Respondents denied this allegation (see, for example, Answer of Resp't Basic Research at 3), but the record evidence establishes that Respondents have, in fact, operated a common enterprise. There are no material factual disputes concerning the facts pertaining to the common enterprise determination, as fully discussed below. We therefore request that the Court enter a summary decision with respect to this separate issue, streamlining the trial in this matter.

A. Legal Standard for Common Business Enterprise

A "common enterprise" exists when an enterprise transacts business through "a maze of interrelated companies," *i.e.*, when, as a whole, "the pattern or framework" of an enterprise indicates that the several companies are actually transacting the same or similar business. *See Delaware Watch v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964). Defendants found to be a common enterprise are held jointly and severally liable for their violations. *FTC v. J.K. Publications, Inc.*, 99 F. Supp.2d 1176, 1202 (C.D. Cal. 2000). Commission precedent over the past fifty years has identified many indicia of a common business enterprise. All, or very nearly all, of these indicia are present here. As a matter of law, applying Commission caselaw to the undisputed facts brought to light in Respondents' discovery responses and depositions of persons employed at Corporate Respondents' shared principal place of business, Respondents have indisputably operated a common business enterprise. Accordingly, summary decision on the common enterprise allegation

[REDACTED]

Marketing Department. Tab 26, G. Gay Dep. at 40 (designated as witness for Corporate Respondents).

[REDACTED]

As set forth above, common control is indisputably present here, in the form of one manager, DG Enterprises, personified by its President, Respondent Gay.

2. Common Office Space

Another indicia of a common enterprise established in Commission caselaw is the sharing of office space. *Sunshine Art Studios*, 481 F.2d at 1173; *P.F. Collier & Son*, 427 F.2d at 267; *J.K. Publications, Inc.*, 99 F. Supp. 2d at 1202; *FTC v. Marvin Wolf*, Civ. No. 94-8119, 1997-1 Trade Cas. (CCH) ¶ 71,713, 1996 U.S. Dist. LEXIS 1760, at *21 (S.D. Fla. Jan. 30, 1996) (citations omitted); *Investment Devs.*, 1989 U.S. Dist. LEXIS 6502, at *29-30; *U.S. Oil & Gas Corp.*, 1987 U.S. Dist. LEXIS 16137, at *59-64.

It is uncontroverted that Respondents' business enterprise share the same premises. All of the Corporate Respondents have the same principal place of business—5742 West Harold Gatty Drive, Salt Lake City, Utah 84116. Tab 2, Answer, Resp't Basic Research ¶ 1; Answer, Resp't A.G. Waterhouse ¶ 2; Tab 4, Answer, Resp't Klein-Becker usa ¶ 3; Tab 5, Answer, Resp't Nutrasport ¶ 4; Tab 6, Answer, Resp't Sovage Dermalogic Laboratories ¶ 5; Tab 7, Answer, Resp't

BAN ¶ 6. As further detailed below, the sworn deposition testimony of personnel employed at the above address confirm that Respondents use the same office space.

[REDACTED]

The Operations Department on the first floor of this building handles purchasing for product lines of Basic Research, including A.G. Waterhouse, Klein-Becker usa, and Nutrasport.

[REDACTED]

The evidence uniformly shows that Respondents use common office space in creating, marketing, selling, and shipping products to consumers.[2]

3. Common Employees or Personnel

Another indicia of a common business enterprise is present when employees or personnel are used interchangeably between companies. *Sunshine Art Studios, Inc.*, 481 F.2d at 1173; *J.K. Publications, Inc.*, 99 F. Supp. 2d at 1202; *Marvin Wolf*, 1996 U.S. Dist. LEXIS 1760, at *21; *U.S. Oil & Gas Corp.*, Civ. No. 83-1702, 1987 U.S. Dist. LEXIS 16137, at *59-64. The deposition testimony of Respondent Gay and other persons who perform work for Corporate Respondents conclusively establishes that Respondents have used employees or personnel interchangeably at their place of business.

[REDACTED]

[2] The Individual Respondents, Messrs. Gay, Mowrey, and Friedlander, also use this space. Respondent Dennis Gay's principal place of business is the same as that of the limited liability companies. Tab 2, Answer, Resp't Basic Research ¶ 7; Tab 8, Answer, Resp't Gay ¶ 7. According to Respondent Gay, Respondent Daniel B. Mowrey's principal office or place of business is located at that address. Tab 8, Answer, Resp't Gay ¶ 8.

[REDACTED]

Respondent Mitchell K. Friedlander has occupied office space provided by one or more of the other Respondents. Tab 10, Answer, Resp't Friedlander ¶ 9.

[REDACTED]

[REDACTED]

Today, a different firm provides employees to Respondents. Bydex Management is the current "paymaster" for all of the employees at Corporate Respondents' principal place of business.

[REDACTED]

In addition to human resource management functions, the product line companies share the same marketing department. Since Gina Gay moved to the Marketing Department in 1996 or 1997, she has done work for different product companies including A.G. Waterhouse, Klein-Becker usa, NutraSport, and Sovage Dermalogic Laboratories. Tab 26, G. Gay Dep. at 185-86. Today, Ms. Gay current holds the title of Marketing Director and supervises the Marketing Department, reporting to Respondent Gay. Tab 26, G. Gay Dep. at 39, 42 (designated as witness for Corporate Respondents). Her paycheck currently bears the name "Bydex." Tab 26, G. Gay Dep. at 39, 184.

[REDACTED]

[6] Tab 1, Compl. Ex. J; Resp. to Compl. Counsel's Req. for Admissions, p. 26-30 (acknowledging authenticity of *Complaint*

Respondents' actual intent, with respect to some advertisements for differently-named products, to convey the same impressions to consumers, Respondents have further admitted that several Respondents have, in fact, advertised the same products. Ads for the challenged products refer to a variety of Respondents—A.G. Waterhouse for Leptoprin, Klein-Becker usa for Dermalin, Anorex, and PediaLean, Nutrasport for Cutting Gel, and Sovage Dermalogic Laboratories for Tummy Flattening Gel. *E.g.*, Tab 1, Compl. Exs. A, D, F, J, I, K. Each of these Respondents has admitted disseminating product advertisements in which they are mentioned. Answer, Resp't A.G. Waterhouse ¶ 27; Tab 4, Answer, Resp't Klein-Becker usa ¶¶ 13, 27, 36; Tab 5, Answer, Resp't Nutrasport ¶ 13; Tab 6, Answer, Resp't Sovage Dermalogic Laboratories ¶ 13. However, Respondents BAN and Basic Research have admitted disseminated advertisements for *all* of these products. Tab 2, Answer, Resp't Basic Research ¶¶ 13, 27, 36; Tab 7, Answer, Resp't BAN ¶¶ 13, 27, 36. These facts also establish another, related indicia of common enterprise—product continuity. *See Investment Devs., Inc.*, 1989 U.S. Dist. LEXIS 6502, at *29-30; *U.S. Oil & Gas Corp.*, Civ. No. 83-1702, 1987 U.S. Dist. LEXIS 16137, at *59-64.

[REDACTED]

Over the past four years, in advertising their wares, as elsewhere, Respondents have effectively operated as one business—a common business enterprise.

5. Common Accounting, Payroll, and Record-Keeping

Additionally, Commission caselaw holds that centralized accounting, payroll, or record-

keeping systems, among others, are other indicia of a common business enterprise. *Sunshine Art Studios, Inc.*, 481 F.2d at 1173; *FTC v. Jordan Ashley*, 1994-1 Trade Cases (CCH) ¶ 70,570 at 72,094, 72,095, 1994 U.S. Dist. LEXIS 7494, at *1 (S.D. Fla. Apr. 5, 1994); *see also U.S. Oil & Gas Corp.*, Civ. No. 83-1702, 1987 U.S. Dist. LEXIS 16137, at *59-64 (observing that mere fact that accounting results may be reported separately does not outweigh other factors). Respondents' common enterprise does have centralized accounting, payroll, and record-keeping functions.

[REDACTED]

[REDACTED]

As previously noted, Marketing Director Gina Gay's paycheck once bore the name Majestic Enterprises, and currently bears the name, Bydex. Tab 26, G. Gay Dep. at 39, 184.

Aside from the uncontroverted evidence concerning Corporate Respondents' centralized accounting and payroll functions, Corporate Respondents also maintain several centralized record-keeping systems. The fact that internal documents relating to several companies are intermingled, or distributed to different corporations in the same building, has been cited as another indicia of a common enterprise. *See FTC v. Jordan Ashley*, 1994 U.S. Dist. LEXIS 7494, at *1.

[REDACTED]

These centralized systems doubtless contribute to the efficiency of Respondents' common enterprise.

6. Routine Transfers or Commingling of Funds

Still another indicia of a common business enterprise is the routine transfer or commingling of funds among entities comprising the enterprise. *Sunshine Art Studios, Inc.*, 481 F.2d at 1173; *J.K. Publications, Inc.*, 99 F. Supp. 2d at 1202; *Marvin Wolf*, , 1996 U.S. Dist. LEXIS 1760, at *21. The testimony of Covarix Chief Financial Officer Val Weight, formerly the Controller of Basic Research through mid-June 2003, confirms that Respondents' common b

[REDACTED]

This routine activity again demonstrates that Respondents have operated as a common business enterprise.

7. Use of Goodwill: "The Basic Research Family of Companies"

A final indicia of common enterprise is the use of goodwill. In the *P.F. Collier & Son* case, the court noted that the use of a firm's name and goodwill (in that case, the relationship between parent Crowell Collier and subsidiary P.F. Collier & Son) was another factor in the common enterprise determination. *See* 427 F.2d at 267. Here, Respondents have used the goodwill of Basic Research by holding themselves out to the public as the "Basic Research family of companies." The Marketing Department created a coupon for the products of companies listed as the "Basic Research family of companies." Tab 26, G. Gay Dep. at 188 & Ex. 20. Among these companies are Respondents Klein-Becker usa, Nutrasport, and Sovage.

[REDACTED]

[REDACTED]

C. Conclusion

[REDACTED]

IV. Respondents Made the Claims Challenged in the *Complaint*

A. Legal Standard for Summary Decision on the Claims Made by Respondents

To prevail, Complaint Counsel must establish that consumers, acting reasonably under the circumstances, would likely interpret a message of the advertisement to have conveyed the alleged claims. *See Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000); *Telebrands Corp.*, Docket No. 9313, 2004 FTC LEXIS 154, at *76-77 (Initial Decision Sept. 15,

2004). The Administrative Law Judge has the authority to grant summary decision as to the conveyed meaning of ads and promotional materials based on a facial analysis of those ads or promotional materials. *Automative Breakthrough Sciences, Inc*., Docket Nos. 9275-77, 1996 FTC LEXIS 252, at *43, (Partial Summary Decision May 22, 1996) (citing *Kroger Co.*, 98 F.T.C. at 726, 729 n.12; *Ford Motor Co.*, 87 F.T.C. 756, 794-97 (1976)). This is true even when the message conveyed by the ad is disputed, so long as the alleged meaning is one reasonable interpretation. *Kroger*, 98 F.T.C. 729 n.11; *Kraft, Inc.*, 114 F.T.C. 40, 120 n.8. (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1254 (1993); *Automotive Breakthrough Sciences*, 1996 FTC LEXIS 252 at *43. Complaint Counsel discharges its burden of establishing that there are no genuine issues of material fact regarding the existence of implied claims by demonstrating that the claims are clear enough to satisfy the Commission's standards for finding the existence of implied claims through a facial analysis. "Where such certainty exists, the movant has fully discharged its burden of proof under RULE 3.24." *Kroger*, 98 F.T.C. at 729.

The Commission's facial analysis standard is whether, after examining all the elements of an ad and the interaction between them, the Commission can conclude with confidence that an ad can reasonably be read to contain that claim. *Stouffer Foods Corp.*, 118 F.T.C. 746, 798-99 (1994) (citing *Kraft*, 114 F.T.C. at 120-21, and *Thompson Medical*, 104 F.T.C. 648, 789-90 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)). "The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself." *Kraft*, 114 F.T.C. at 121. Thus, the first step in the facial analysis is to identify the claims by looking at the ads themselves. *See, e.g., Stouffer*, 118 F.T.C. at 798. The Commission or the Administrative Law Judge also may conclude that an ad contains an implied claim, without

reviewing extrinsic evidence, by evaluating the content of the ad and the circumstances surrounding it. *Kraft*, 114 F.T.C. at 121 (citing *Thompson Medical*, 104 F.T.C. at 789). This technique is primarily useful in evaluating ads with language or depictions clear enough, after examining all of the elements, that they convey the implied claim to reasonable consumers.

[8] "Opinions not so supported may easily be contradicted by the contrary opinions of opposing experts and thus may be of little value in resolving the issue." *Id.* A necessary corollary is that the court may consider the lack of any contrary opinions when assessing whether an expert's opinion is adequately supported.

charges of false and unsubstantiated claims. Otherwise, allowing a seller to rely on a refund policy as a defense "would make the false advertising prohibitions of the [FTC] Act a nullity. Anything might then be advertised as long as unsatisfied customers were returned their money." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th

[REDACTED]

C. The Uncontroverted Evidence Demonstrates that Respondents Made the Challenged Claims

The *Complaint* alleges that Respondents made unsubstantiated efficacy claims and false

establishment claims for each of the challenged products. Although Respondents have denied making these claims, the uncontroverted evidence conclusively establishes that the alleged claims are a reasonable interpretation of the challenged advertising. This evidence consists of a facial analysis of the advertisements which includes the content of the ad itself and the context in which they were developed and disseminated. This evidence is established by the documents and sworn deposition testimony offered by Respondents and the personnel employed at their place of business. Additionally, expert analysis of Respondents' advertising, such as that provided in the attached Expert Reports of Michael B. Mazis, Ph.D, Professor of Marketing at American University, and supplemented by the Expert Report of Geoffrey Nunberg, Ph.D, Professor of Linguistics at Stanford University, submitted with accompanying declarations adopting the contents of those reports under oath, and further supported by Respondents' only report on the advertising, from Lawrence Solan,[9] further confirms that the allegations of the *Complaint* constitute one reasonable interpretation of the challenged advertising claims.

This Section discusses the efficacy and establishment claims that Respondents made for the challenged products. Our discussion begins with Respondents' "fat loss" gels, specifically, the efficacy claims made for those products.

1. Respondents' Claimed that their "Fat Loss" Gels -- Dermalin, Cutting Gel, and Tummy Flattening Gel -- Cause Rapid and Visibly Obvious Fat Loss in Areas of the Body to which it is Applied

[9] Although Respondents had originally identified an expert to address the marketing issues raised by this matter, Respondents withdrew their designated marketing expert on the day that his report was due to Complaint Counsel, shortly before his scheduled deposition. Complaint Counsel is continuing to pursue outstanding document discovery issues related to Respondents' withdrawn testifying expert.

a. Respondents' Promotions Textually and Orally Imply the Challenged Efficacy Claims for "Fat Loss" Gels

Respondents' ads for the three gels contain strongly implied claims that the gels cause rapid and visibly obvious fat loss to the area of the human body to which they are applied. The advertisements for all three topical gels are essentially variations on a theme that incorporates the challenged claims. Respondent Friedlander indicated that the aminophylline gel products were essentially an identical product targeted to three distinct audiences, women concerned with fat around their thighs and buttocks (Dermalin) or fat around their abdomen (Tummy Flattening Gel), and fitness enthusiasts and body-builders (Cutting Gel). Tab 26, G. Gay Dep. at 91-93, 97-98 (designated as witness for Corporate Respondents). **Redacted**

Promotional material for the gels contain provocative headlines proclaiming that the gel "**Emulsifies Fat On Contact"** (Tab 1, Compl. Ex. A), "**Reduces Tummy Fat**" (Tab 1, Compl. Ex. F), and acts as a "**Muscle Defining Compound"** (Tab 1, Compl. Ex. D). As previously noted *supra* Section II, Respondents' gel advertisements are quite similar. They contain three component concepts—the concepts of "rapid", "visibly obvious", and targeted or "spot" weight loss ("in areas of the body to which it is applied"). For example, the topical gel advertisements focus on fat reduction that can quickly be discerned by consumers "within a matter of days" (Dermalin), in "about ten days" (Cutting Gel), or "in approximately 19 days" (Tummy Flattening Gel). Tab 1, Compl. ¶ 13, Exs. A-B (Dermalin); *id.* Exs. D-E (Cutting Gel); *id.* Exs. F-G (Tummy Flattening Gel). In addition, the gel promotional materials include statements such as "watch them [waist and

abdomen] shrink in size within a matter of days" (Tab 1, Compl. Ex. A), "fat literally melts away" ((Tab 1, Compl. Exs. D-E), "penetrating gel for visible reduction of surface body fat" (Tab 1, Compl. Ex. C), and "spot-reducing gel" (Tab 1, Compl. Ex. F)). Also, the names Cutting Gel and Tummy Flattening Gel, especially in combination with the use of visual images, such as slim models and models with well-defined muscles, further strengthen the express statements in the ads. *Cf. Telebrands*, 2004 FTC LEXIS 154 at *82-83 (noting that visual images of thin models showing off their waists or well-defined abdominal muscles "strongly convey the impression that the Ab Force is designed to provide health, weight loss, fitness, or exercise benefits"); *id.* at *81-82 ("While the name Ab Force, alone, would not be sufficient to imply a claim, in combination with the visual images and words used, it contributes to the overall net impression that the use of the Ab Force confers health, weight loss, exercise, or fitness benefits.").

The efficacy claims alleged in the *Complaint* are reasonable interpretations of the advertising for each of the three "fat loss" gels. We discuss the efficacy claims for each of these products, Dermalin, Cutting Gel, and Tummy Flattening Gel, *seriatim* below.

i. Dermalin

Facial review of undisputed, documentary evidence, in the form of Dermalin advertisements and the surrounding facts and circumstances, establishes that Dermalin ads convey the net impression that Dermalin causes rapid and visibly obvious fat loss in areas of the body to which it is applied.

(A) Respondents' Ads Strongly Imply Dermalin Causes Rapid Fat Loss.

The text of the Dermalin ads strongly implies that the product causes rapid fat loss in several ways. First, the headline of the ads proclaim in large bold text that this "Penetrating Gel Emulsifies Fat On Contact." *E.g.*, Tab 1, Compl. Ex. B. The phrase "On Contact" expresses the concept of an immediate impact, almost like a pest control product. **Redacted**

Second, the ads declare "Just apply Dermalin-APg's transdermal gel to your waist and tummy and watch them shrink in size *within a matter of days*." *E.g.*, Tab 1, Compl. Ex. B (emphasis added). In the context of fat loss, the phrase "within a matter of days" connotes a rapid result. **Redacted**

Next, Respondents' ads state that it took seven years to develop a base formula for Dermalin that would enable it to "work *quickly* on all parts of the body"—strongly implying that the gel formulation enables the product to work quickly on all parts of the body. Tab 1, Compl. Ex. A. "Rapid" and "quick" are synonyms. *The New Roget's Thesaurus In Dictionary Form* (1986).

Additionally, in a statement attributed to "Dr. Daniel B. Mowrey, Director of Scientific Affairs, Klein-Becker usa," the Dermalin ads also describe a "scientific" experiment: "'Put Dermalin-APg in a culture dish with fat cells and you can *literally watch them deflate - similar to sticking a pin into a balloon*.'" Tab 1, Compl. Ex. A (emphasis added). This description, emblazoned across a slender model's bare buttocks, strongly implies that Dermalin-APg acts in a similar manner when applied topically—fat cells start to deflate instantly. Further, a retail

brochure answering the question, "[w]hen can I expect to see results?," informs consumers as follows: "You will begin to see an improvement within ten days. After 30 days, you can expect substantial results." Tab 32, R0012259 (dated Nov. 2001); Tab 17, Resp. to Compl. Counsel's Req. for Admissions, p. 23, Req. 5 (acknowledging authenticity of document). All of these many examples establish that reasonable consumers would be likely to perceive claims for rapid fat loss in Dermalin advertising.

(B) Respondents' Ads Strongly Imply Dermalin Causes Visibly Obvious Fat Loss.

The text and visual images of advertisements for Dermalin also strongly imply that use of the product causes visibly obvious fat loss. One full-page portion of an ad displays the rear of a slender, nude, female torso with strategically placed text connected to arrow-like dots pointing to the problem areas that Dermalinin is intended to address. *See* Tab 1, Compl. Ex. A. For example, the provocatively-placed text promises that Dermalinin "*reduces* the accumulation of 'age-related' body fat around your waist and abdomen," and "not only helps reduce dimpled appearance of your cellulite-afflicted areas: but also has the distinct ability to actually *reduce the size* of 'saddlebag' thighs." Tab 1, Compl. Ex. A (emphasis added).

Even Dermalin packaging indicates that the product will "reduce appearance of problem area fat accumulation and visible cellulite deposits." Tab 32, R009255. In fact the ads characterize the promised reduction of stored body fat as "dramatic," further emphasizing the demonstrable magnitude of the fat loss. *See* Tab 1, Compl. Ex. A & B. Each of these representations and visual elements reinforce the net impression that Dermalin users will plainly see the product's results. The depictions of slim female models in Dermalin advertisements also

convey the impression that use of the product leads to visibly obvious fat loss.

(C) Respondents' Ads Strongly Imply Dermalin Works In Areas of the Body to Which It is Applied.

Dermalin advertisements strongly imply that the rapid and visibly obvious fat loss specifically occurs in the areas to which the gel is applied. Gina Gay testified that Dermalin was marketed to women for use on the thig

Redacted

There is ample uncontroverted evidence to conclude that the Dermalin advertisements contain the challenged claim.

Based on this uncontroverted evidence, the Complaint's allegation that Respondents represented Dermalin as causing rapid and visibly obvious fat loss in areas of the body to which it is applied," Compl. ¶ 14 , indisputably constitutes one reasonable interpretation of the challenged advertising. No trial of the issue is necessary to draw this conclusion. Summary decision is appropriate here.

ii. Tummy Flattening Gel

A facial review of the Tummy Flattening Gel advertisements establishes that the challenged ads convey the net impression that Tummy Flattening Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied. The undisputed contents of the advertisements themselves and the surrounding circumstances support this conclusion. The product was targeted to women for use on the "tummy." **Redacted**; Tab 26, G. Gay Dep. at 97-98. Indeed, the very name of the product emphasizes its efficacy as a product that purportedly causes spot fat reduction.

(A) Respondents' Ads Strongly Imply Tummy Flattening Gel Causes Rapid Fat Loss.

Echoing the ad campaign for Dermalin, Tummy Flattening Gel ads strongly imply that the gel causes rapid fat loss. Tummy Flattening Gel contains "Epidril", a trademark for the gel employed by Respondents in their advertisements. Like the Dermalin promotional materials, the Tummy Flattening Gel ads and packaging flatly state that "Epidril-containing gels have been

proven to emulsify fat *on contact*." Tab 1, Compl. Exs. F, G (emphasis added). As discussed above, this phrase emphasizes the immediate impact of the product on fat.

The ads also declare that "when beta adrenergic stimulants such as Epidril are added to a culture dish with adipose (fat) cells, the cells *deflate* as they release their stored fat—very *similar to the way a balloon deflates when stuck with a pin*." Tab 1, Compl. Exs. F & G (emphasis added). Like the text employed in the Dermalin and Cutting Gel ads, this description strongly implies that Tummy Flattening Gel, which contains Epidril, starts working quickly when applied topically, as quickly as a balloon pops when stuck with a pin. A Tummy Flattening Gel ad refers to the product as a "fat burning paste." Tab 34, R0035673.

Additionally, Tummy Flattening Gel promotional materials promise in bold letters that users will "see dramatic, visible results in approximately 19 days." Tab 1, Compl. Exs. F & G. Based on these and other statements, reasonable consumers reading ads for Tummy Flattening Gel would be likely to "take away" the message that use of the gel results in rapid fat loss.

(B) Respondents' Ads Strongly Imply Tummy Flattening Gel Causes Visibly Obvious Fat Loss.

Tummy Flattening Gel ads also strongly imply that use of the product causes visibly obvious fat loss. Indeed, the name "Tummy Flattening Gel" itself strongly implies that the product produces visibly obvious effects, in the form of a reduction of "tummy" fat, and a correspondingly flattened midsection. The headline of certain advertisements proclaim "Patented Topical Gel Reduces Tummy Fat!" Tab 1, Compl. Exs. F & G. In a prominently placed sub-heading, the advertisements for Tummy Flattening Gel declare in a statement attributed to Dr. Nathalie Chevreau, PhD, RD: "This new, highly concentrated formula allows for precise, targeted

delivery...making it the first true spot-reducing gel capable of effective reduction of dense abdominal fat." *Id.*

Tummy Flattening Gel ads also promise "dramatic, visible results in approximately 19 days" and refer to a "perfectly sculpted midsection." *Id.* Respondents compare the effects of the gel to "liposuction surgery," advising consumers to "use Sovage Tummy Flattening Gel first, as a kind of 'test drive.'" Tab 1, Compl. Ex. F. Slender, "perfectly sculpted" midsections are prominently display

98; **Redacted** (both testifying as designated witnesses for the Corporate Respondents). The product packaging states that "ordinary transdermal products are simply not powerful enough to precisely target resistant abdominal fat," reiterating that Tummy Flattening Gel "selectively accelerat[es] the breakdown of regional fat cells." Tab 34, R0035673, 37255. Based on these and other express statements, reasonable consumers would be likely to perceive that ads for Tummy Flattening Gel convey that use of the gel will cause the rapid and visibly obvious fat loss to occur in the areas of the body to which it is applied. The Complaint's allegation represents one reasonable interpretation of the challenged advertising. No trial of the issue is necessary to draw this conclusion. Summary decision is appropriate here.

iii. Cutting Gel

Facial review of documentary evidence, in the form of Cutting Gel promotional materials, similarly establishes that the challenged ads convey the net impression that Cutting Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied. This conclusion is reinforced by the text and visual elements of the advertisements and the surrounding facts and circumstances, as discussed below.

(A) Respondents' Ads Strongly Imply Tummy Flattening Gel Causes Rapid Fat Loss.

The text of the Cutting Gel ads strongly implies that the product causes rapid fat loss. First, like the other promotions for the topical gels, these ads assert that Cutting Gel "dissolves stubborn body fat on contact" and/or "Dissolves Surface Body Fat On Contact!" *E.g.*, Tab 1, Compl. Ex. D; Tabs 32 and 39 (Dermalin promotional materials). The former phrase is underlined in a paragraph headlined as "**FACT CUTTING GEL Gets Rid of Surface Body Fat!**." Tab 1, Compl. Ex. D.

"cut" muscles.

Equally important, promotional materials for Cutting Gel boldly assert: "You will see the difference (and so will everyone else)!" (Tab 33, R006724), and "Cutting Gel reduces Surface Fat and Exposes the Toned Muscle Beneath!" Tab 1, Compl. Ex. E. Further, following a paragraph emblazoned with the term, "**FACT**," the Cutting Gel ads promise that the product leaves "pure, ripped muscle behind!" Tab 1, Compl. Exs. D & E. The Cutting Gel ads apply adjectives such as "ripped" and "tighter" to parts of the body, such as "abs," "thighs," and "glutes," clearly conveying the impression that the product reduces fat and that the reduction in fat is obvious to the eye.

This message is reinforced through the various images of muscular models presenting bodybuilder-like physiques that are prominently presented in the promotional materials. Tab 1, Compl. Exs. D & E. The depictions of well-muscled male models and "tight" female models in Cutting Gel advertisements convey the impression that use of the product causes visibly obvious fat loss. Also, Cutting Gel packaging states that the product is a "Penetrating Gel for the *Visible Reduction of Surface Body Fat*," Tab 1, Compl. Ex. C (emphasis added). **Redacted**

These undisputed representations, depictions, and testimony all reinforce the impression that Cutting Gel causes visibly obvious fat loss.

(C) Respondents' Ads Strongly Imply Cutting Gel Works In Areas of the Body to Which It is Applied.

Additionally, Cutting Gel advertisements strongly imply that the rapid and visibly obvious fat loss specifically occurs in the areas to which the gel is applied. Advertisements state that "**FACT CUTTING GEL Goes to Work <u>Directly</u> on Your Abs, Biceps, Glutes, Pecs, or Anywhere Else You Rub it in!**" Tab 1, Compl. Exs. D and E. The Cutting Gel package directs users to "[f]ocus on one *targeted area* at a time (*i.e.*, abs, quads, triceps, etc.) until you achieve desired results," and suggests that users "apply Cutting Gel topically, directly to the specific areas that need extra definition." Tab 1, Compl. Ex. C (emphasis added). The ads also encourage users to "start with the one area you think needs the most help." Tab 1, Compl. Exs. D & E.

Redacted

Taken as a whole, the text of the advertisements, the product names, the visual images, and Respondents' own testimony lead to the conclusion that reasonable consumers would be likely to perceive that ads for Cutting Gel convey that use of the gel will cause the rapid and visibly obvious

fat loss to occur in the areas of the body to which it is applied. The *Complaint* allegation represents one reasonable interpretation of the challenged advertising. Again, no trial of the issue is necessary to draw this conclusion. Summary decision is appropriate on this issue.

iv. Respondents' Purported "Disclaimers" Do Not Dispel the Alleged Claims.

Lastly, a facial analysis of the challenged advertising debunks any suggestion that certain parts of some of Respondents' ads for the topical gels removes the clear message that the product causes rapid and visibly obvious fat loss. To the contrary, the alleged "fine print" actually reinforces the efficacy claims made in the advertisements for the topical fat loss gels.

Many of the advertisements for Dermalin, Cutting Gel, and Tummy Flattening Gel include a section entitled "So What's The Catch?," or "The 'Fine Print,'" with "two caveats." The first part of this section advises consumers that the advertised gel releases fat into the blood stream and that they have to "help" bum off the fat by increasing physical activity or decreasing caloric activity to prevent the fat from being redeposited. *See e.g.*, Tab 1, Compl. Exs. A, D, F. The second part of this section cautions consumers to avoid using the advertised product "all over your body at the same time"—because there is "simply no way for your body to utilize all the newly released fat." *See e.g.*, Tab 1, Exh. D. Reasonable consumers would be likely to perceive these artfully-written "caveats" as confusing at best, or as more language reinforcing Respondents' powerful efficacy claims, preserving the net impression that the product causes rapid and visibly obvious fat loss.

As a threshold matter, the "caveats" are much less prominent than the provocative headlines on the advertisements, such as "Penetrating Gel Emulsifies Fat on Contact" (Dermalin), "Ripped Abs Ripped Pecs Ripped Glutes Ripped Everything" (Cutting Gel), or "Reduces Tummy

Fat" (Tummy Flattening Gel). Respondents' retail brochure for Dermalin indicates that Dermalin will "work faster" with an increase in physical activity, a decrease in caloric intake, or use of a dietary supplement. Reasonable consumers reading this brochure would be likely to conclude that the advertised product will still be effective without additional exercise or reduced calorie consumption.

In addition, the second "caveat" conflicts, in part, with the first "caveat." Although Respondents argue that the first caveat conveys a limitation on the potential efficacy of the gel by mentioning the benefits of increased exercise or reduced caloric intake, the second "caveat" *reinforces* the gel's efficacy by trumpeting, "there is simply no wall for your body to deal with that much released fat.'" Again, reasonable consumers would be likely to perceive these artfully-written "caveats" as confusing at best, or as additional language reinforcing the efficacy claims in the ads. This conclusion applies to the "caveats" stated in advertisements for Dermalin as well as those suggested in advertisements for Cutting Gel and Tummy Flattening Gel.

b. Respondents Ads Strongly Imply Establishment Claims for Cutting Gel and Tummy Flattening Gel

The *Complaint* challenges, as false, additional claims for Cutting Gel and Tummy Flattening Gel, namely that "published, clinical testing proves that [each product] causes rapid and visibly obvious fat loss in areas of the body to which it is applied." Compl. ¶¶ 23-26. Respondents denied making this claim with respect to each of these "fat loss" gels. *See, e.g.*, Tab 2, Resp't Basic Research, Answer at 4-7. However, a facial analysis reveals that this claim is strongly implied in the ads for these gels.

Advertisements for Cutting Gel assert that the gel is a "clinically proven, patented

formula," and that "published clinical trials prove Cutting Gel's power." Tab 1, Compl. Exs. D &

banned dietary supplement, ephedra, and other ingredients, the *Complaint* challenges, as unsubstantiated, the claim that each product causes weight loss of more than 20 pounds in significantly overweight users (including, in the case of Leptoprin, as much as 50, 60, or 147 pounds). Tab 1, Compl. ¶ 28-29, 33-34. The *Complaint* also challenges, as unsubstantiated, the claim that each product "causes loss of substantial, excess *fat* in significantly overweight users." *Id.* (emphasis added). Respondents Basic Research, BAN, Klein-Becker, and Gay acknowledged disseminating advertising for Anorex, and Respondents Basic Research, BAN, A.G. Waterhouse, and Gay acknowledged disseminating advertising for L

(A) Respondents' Ads Strongly Imply Substantial Weight Loss in Significantly Overweight Users.

Both the Anorex and Leptoprin advertisements strongly imply that the product causes substantial weight loss in significantly overweight users. Gina Gay, testifying as a designated witness on behalf of Corporate Respondents, testified that Leptoprin was targeted towards the obese. G. Gay Dep. 107. The ads expressly state that Anorex/Leptoprin was developed for "significantly overweight" persons, and clearly imply that the product causes substantial weight loss. *See, e.g.*, Tab 1, Compl. Exs. I & J. According to the Anorex/Leptoprin ads, "significantly overweight" persons need to lose "20 or more pounds" or "more than 30 pounds of excess body weight." *E.g.*, Compl. Exs. I & J.

The Anorex and Leptoprin ads purport to differentiate between the "significantly overweight" and those persons merely worried about "about five or six vanity pounds"—for example, the Leptoprin television commercial states that "Leptoprin is much too expensive and much too powerful for the casual dieter." Tab 1, Compl. Ex. H-1, at 5. **Redacted**

Significantly, commercials for Leptoprin contained testimonials from persons who claim to have lost 31 pounds, 38 pounds, 50 pounds, 60 pounds, 80 pounds, 147 pounds, and 216 pounds using Leptoprin. Tab 1, Compl. Ex. H-1 (television); Tab 36 (Leptoprin radio commercial script).

The visual elements in the print ads for both Anorex and Leptoprin also reinforce the advertisements' message of substantial weight loss in significantly overweight users. For example, an Anorex advertisement features a picture of an overweight woman proudly holding out the waist of a pair of jeans that are not too large for her with a quoted exclamation: "It's working! Finally, a diet pill strong enough for me!" Tab 1, Compl. Ex. J. The Leptoprin commercial uses "before" photos of testimonialists juxtaposed with their "after" images in connection with their statements claiming the loss of 50, 60 and 147 pounds. Tab 1, Compl. Exs. H & H1. **Redacted**

However, the name of the product is not "Anorec"—it is "Anorex." This name brings to mind the condition of anorexia nervosa, a medical condition characterized by self-induced starvation and obsession with weight loss that is widely known to the public. Indeed, according to the *American Heritage Dictionary*, "anorectic" means: "1. Marked by loss of appetite. 2. Suppressing or causing loss of appetite. 3. Of or affected with anorexia nervosa." *American Heritage Dictionary* (4th Ed. 2004). Based on these and other statements and undisputed facts, reasonable consumers would be likely to perceive that ads for Anorex and Leptoprin convey that use of the product will cause substantial weight loss in significantly overweight users.

(B) Respondents' Ads Strongly Imply Substantial, Excess Fat Loss in Significantly Overweight Users.

Anorex and Leptoprin ads also strongly imply that use of the product causes substantial fat loss in significantly overweight adults. The phrases "significantly overweight" and "substantial, excess fat" are taken directly from the Anorex and Leptoprin ads themselves. Tab 1, Compl. Exs. I and J. Other text elements in the ads make clear that the Anorex/Leptoprin formulations are "extremely powerful anorectic agent[s]" causing the loss of "substantial, excess fat" from "significantly overweight" persons. Tab 1, Compl. Exs. I & J. For example, ads state that "if substantial, excess body fat is adversely affecting your health and self-esteem, then it's time for you to discover Leptoprin—the first comprehensive weight-loss compound designed specifically to overcome your genetic predisposition." Tab 1, Compl. Ex. I; *see id.* at Ex. J (identical ad copy for Anorex).

These ads go on to state that Anorex/Leptoprin "'mobilizes' stored fat, moving it out of the fat cell and thereby reducing the size of the fat cell mass." Compl. Exs I & J. These statements appear near the headline text asserting that the product "Helps Overcome Genetic Link to Obesity." *Id.* Based on these representations, reasonable consumers are likely to perceive that ads for Anorex and Leptoprin convey that use of the product will cause substantial fat loss in significantly overweight users. Taken together, along with other elements in the ads, these depictions and statements convey and reinforce the impression that the product will cause the loss of substantial excess fat.

b. Respondents Ads Strongly Imply Establishment Claims for Leptoprin

The *Complaint* challenges, as false, two establishment claims for L

interpretation of the challenged advertising.

As noted earlier, references to medical literature convey to consumers that the seller's efficacy claims are scientifically based. *See American Home Products*, 98 F.T.C. at 375 & n. 28. The *Complaint* allegations concerning establishment claims for Anorex and Leptoprin represent a

suffered by "more than 11 million *overweight and obese school-aged children* in the United States." *See* Tab 1, Compl. Exs. K and L (emphasis added). **Redacted**

PediaLean ads indicate that the product is intended for seriously overweight children whose problem cannot he redressed by diet and exercise alone. This is strongly implied in headlines stating, "When your child needs more than diet or exercise." Tab 1, Compl. Ex. L; see also Tab 37 (PediaLean promotional materials).

PediaLean advertisements offer the "hope" of substantial weight loss, not a modest weight loss. This impression is conveyed first by the name of the product itself, PediaLean, which connotes children ("pedia," as in pediatrician) who are thin, slim, or slender ("lean"), not overweight or obese. This impression is also forcefully implied by the text of the product ads, which emphasize that, in testing, use of PediaLean has "resulted in significant weight loss in virtually every child studied." *See, e.g.*, Tab 1, Compl. Ex. L, Tab 37 (PediaLean materials); Tab 41 (5050004, 5050007, 5050009, 5050011, 5050021). The ads generally characterize PediaLean as "effective" and as a "solution" for the problems of children who are substantially overweight ("fat" or "obese"), from which it can only follow that the product will cause substantial loss of weight.

The *Complaint* allegation that Respondents represented PediaLean as causing substantial weight loss in overweight or obese children represents one entirely reasonable interpretation of the challenged advertising. No trial of the issue is necessary to draw this conclusion. Summary decision is appropriate here.

b. Respondents' Ads Strongly Imply the Establishment Claim for PediaLean

Lastly, the Complaint challenges, as false, the claim that "clinical testing proves that PediaLean causes substantial weight loss in overweight or obese children." Compl. ¶ 40-41. Again, Respondents denied making this claim, but facial analysis establishes that the claim is strongly implied in advertising for the product. PediaLean advertisements almost universally refer to a clinical trial: "Published Medical Studies Don't Lie. . . Clinically Proven Safe and Effective" Tab 1, Compl. Exs. K and L; Tabs 37 and 41 (PediaLean materials). Numerous PediaLean ads depict what appears to be a published or printed study, sometimes accompanied by a complex discussion of study results, whose very complexity or sophistication would seem calculated to reinforce the establishment claim itself.

PediaLean advertising includes express phrases and statements such as "clinically proven," "clinically proven safe and effective," "clinically proven solution," "published medical studies don't lie...clinically proven safe and effective," and "well-controlled double-blind clinical trial." All of these references appear in conjunction with the discussion of PediaLean's efficacy.

Redacted

PediaLean ads strongly communicate to consumers that clinical testing proves that the product causes substantial weight loss in overweight or obese children.

Under Commission precedent, the use of words such as "clinically proven" and "published medical studies" and reference to medical literature convey that Respondents' efficacy claims are scientifically established. *See Removatron*, 111 F.T.C. at 297; *Thompson Medical*, 104 F.T.C. at

814. Summary decision is appropriate here.

4. Expert Testimony Corroborates the Facial Analysis of the Promotional Materials for the Challenged Weight and Fat Loss Products

with academic literature. As a result of Professor Mazis's knowledge, experience, education and training, Complaint Counsel intends to offer Professor Mazis as an expert in consumer response to advertising and other promotional materials, and in measuring advertising deception.

Regarding the efficacy claims for the fat loss gels, Professor Mazis concluded in his report:

> advertising for the topical products (Dermalin-APg, Cutting Gel, and Tummy Flattening Gel) revealed that the advertising and product packaging strongly implies that using these products results in (1) rapid fat loss, (2) visibly obvious fat loss, and (3) rapid and visibly obvious fat loss in the areas to which the products are applied. Ads for these products include statements such as "watch them [waist and abdomen] shrink in size within a matter of days," "fat literally melts away," "penetrating gel for visible reduction of surface body fat," "targeted fat loss," and "spot-reducing gel." Also, the names Cutting Gel and Tummy Flattening Gel strongly suggest that use of the products produces visibly obvious fat loss. Moreover, the use of visual images, such as slim models and models with well-defined muscles, further strengthens the verbal statements made in the advertising.

Tab 18, Mazis Expert Report at 5. Regarding the establishment claims for the gels, Professor Mazis opined that phrases such as "a double-blind clinical trial" and "clinically proven," strongly suggest to consumers that claims in the ads are supported by published, clinical testing. *Id.* at 5. As to the "two caveats," contained in the advertisements for the gels, Professor Mazis concluded that to the extent that have an impact on consumers, they reinforce the gel's effectiveness by focusing on the idea that "there is simply no way for your body to deal with that much released fat." *Id.* at 12.

Regarding the efficacy claims for Leptoprin and Anorex, Professor Mazis concluded:

> ads for these products strongly implied that product use results in substantial weight loss and fat loss in significantly overweight adult users. Ads stated that these products were developed for "significantly overweight" individuals who need to lose at least 20 or 30 pounds. Ads also provided reports from testimonialists who reported losing between 31 and 216 pounds using Leptoprin. Retail brochures also

> strongly suggest that diet and exercise are unnecessary for the products to achieve claimed results.

Id. at 5-6. In addition, references to "two published clinical trials" strongly suggest to consumers that the claims in the ads for Leptoprin are supported by published, clinical testing. *Id.* at 5-6. Professor Mazis observes in his *Expert Report* that academic research has shown that consumers associate higher prices with higher quality products. *Id.* at 15. Respondents repeatedly used this tactic to their advantage in promoting several of the challenged products, none more conspicuously than Anorex and Leptoprin. Advertising for both Anorex and Leptoprin highlighted the products' high price (as much as $153 a bottle). The ads directly posed the question to consumers nationwid

loss" exist, but those interpretations would confuse many reasonable consumers. Scientific studies may refer to "statistically significant" results, but many consumers are unfamiliar with statistical concepts. Unless the reader understands the statistical concept of significance, reasonable consumers would be likely to equate the "significant weight loss" described in the PediaLean ads with a substantial, extensive, or considerable weight loss. *See id.* at 16-17. As Professor Mazis concludes in his expert facial analysis, PediaLean advertising likely communicates to consumers that clinical testing proves that the product causes substantial weight loss in overweight or obese children. *See id.* at 17.

b. Professor Nunberg's Expert Opinion Supports that the Promotional Materials for PediaLean Convey the Claims Challenged in the Complaint.

Professor Nunberg holds a Ph.D. in Linguistics and is currently a Senior Research Fellow at the Center for Study for the Study of Language and Information at Stanford University. He is also a Consulting Full Professor in the Department of Linguistics at Stanford where he has taught courses in semantics and pragmatics, lexicography, the structure of written language, and other language related areas. He serves as usage editor and Chair of the Usage Panel of the *American Heritage Dictionary* and has for many years acted as a consultant to the dictionary regarding matters of definition usage. He has published numerous papers in peer-reviewed journals and served as an expert witness in a number of cases regarding word meaning. Rpt. 1-2.

In rendering his expert opinion in this matter, Professor Nunberg relied on his experience, gleaned from years of research, teaching, consulting and familiarity with academic literature. As a result of Professor Nunberg's knowledge, experience, education and training, Complaint Counsel intends to offer Professor Nunberg as an expert in linguistics, the meaning and use of words,

including common word usage, and lexicography. As an expert in these subjects, including common word usage, Professor Nunberg's opinion constitutes extrinsic evidence of how Respondents' ads might reasonably be interpreted by consumers. *See Kraft*, 114 F.T.C. at 121-22.

Professor Nunberg drew several conclusions supporting the view that Respondents' promotional materials for PediaLean convey the claim that the product causes substantial weight loss in overweight or obese children and the claim that clinical testing proves that PediaLean causes substantial weight loss in overweight or obese children. Based upon his review of Respondents' promotional materials and his other analyses of how the terms used in Respondents' advertisements are used in press stories and the internet, he concluded:

> The Advertisements represent that PediaLean is an effective weight-loss product for fat or obese children, which will lead to "significant weight loss" for the consumer's child.
>
> The Advertisements represent that the consumer can expect results like those in the

percentage threshold that a change in value must cross before it can be described as "significant" in common parlance, this word, like the word "substantial," is applied to changes in value or amount that suggest an important qualitative difference. *See* Nunberg Expert Report at 40.[11] The testimony of Respondents' own expert, Mr. Solan, provides additional support for this view, as he testified that the word "significant" means enough to care about and important and that the term "significant weight loss is enough weight loss that it matters to whoever uses the expression." Solan 86, 91-97.

The occasional use of the word "excess" in relation to weight loss does not dispel the impression that PediaLean causes substantial weight loss in overweight or obese children. PediaLean ads indicate that "[c]hildren who used PediaLean along with a healthy, but not calorie-reduced diet and modest exercise lost an incredible 20% of their excess body weight." Tab 1, Compl. Ex. K. The use of the word "incredible" emphasizes that users will lose a substantial amount of weight. And as Professor Mazis observes in his *Report*, many consumers have fairly rudimentary levels of numerical literacy; they would be unlikely to note that the

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[11] "Substantial" and "significant" are "cognitive synonyms" in the conventional, "quantity" sense of each word. *Id.* ¶ 35. The words may differ slightly in connotation or emphasis, but each word entails the other—if a reduction in a value can be described as "substantial," it can also be "significant," and vice-versa. *Id.* (noting dictionaries' tendency to interdefine these terms); *id.* at 38 (noting, on basis of linguistic analysis of other media, that overall range of percentages that are described as "significant" is not systematically different from the percentage range of reductions that are described as "substantial"). "In actual usage, which the basis for dictionary definitions of words like these, significant and substantial have the same quantitative implications." *Id.* at ¶ 36. Hence, based on the text of the PediaLean advertisements, facial analysis of the advertisements, extrinsic evidence in the form of expert opinion and linguistic analysis of the use of terms in other media, reasonable consumers would be likely to equate the express words "significant weight loss" described in the PediaLean ads with substantial weight loss.

aforementioned 20% refers to "excess body weight," an unfamiliar scientific term not measured in pounds, rather than overall body weight. Tab 18, Mazis Expert Report at 16-17. The term "excess" often appears amidst a complex discussion of study results. This scientific discussion reports, for example, that "children showed a drop of excess body weight from 51 ±16% to 41.3 15% ($p<0.0005$)." As Professor Mazis notes, most consumers would be unable to decipher the meaning of this statistical information. The data presented are particularly confusing because the number values are not expressed in pounds. Accordingly, the occasional use of the word "excess" in relation to weight loss does not dispel the impression that PediaLean causes substantial weight loss in overweight or obese children. *See id.*

Professor Nunberg, applying his expertise in the field of linguistics to the text of the PediaLean advertisements, also supports the facial analysis of the PediaLean establishment claims. He notes that the ads represent that PediaLean is an effective weight-loss product proven in clinical trials, expressly described as "compound proven to cause significant, effortless weight loss in actual clinical trials," and "the first and only clinically proven, safe, and effective weight-control compound designed for overweight children and adolescents." *See, e.g.*, Tab 41, 5050059 (PediaLean ad); Tab 19, Nunberg Expert Report at ¶ 21.c. The advertisements indicate that the results of the clinical trial prove PediaLean's efficacy: "Does PediaLean work? You bet it does! In a well- controlled double-blind clinical trial, each and every child who used PediaLean as directed lost a significant amount of excess body weight...a success rate of 100%" *See, e.g.*, Tab 1, Compl. Ex. K; Tab 41, 5050054, 5050058; 505066 (PediaLean ads); Tab 19, Nunberg Expert Report at 21.d. Headlines in PediaLean advertisements proclaim, "Published Medical Studies Don't Lie...Clinically Proven Safe and Effective." *See, e.g.*, Tab 1, Compl. Exs. K & L; Tab 41, 5050027

(PediaLean ad). As Professor Nunberg notes, these statements "draw a close connection between the results of the clinical trial and the results promised to PediaLean customers." *See* Tab 19, Nunberg Expert Report at 22 (discussing interplay of text elements). These claims also appear on PediaLean packaging, which states that "There is nothing more effective than PediaLean in helping your child lose weight. European research confirms it and medical studies don't lie." Tab 41, 5050001 (PediaLean packaging). As a result, there is ample support for the conclusion that the PediaLean advertisements convey the establishment claim set forth in the *Complaint*.

5. Implied Representation Concerning Respondent Mowrey's Expertise

The very last allegation of the *Complaint* relates to how Respondents chose to convey Respondent Mowrey's expertise to consumers. The Complaint alleges that Respondents have represented expressly or by implication that respondent Mowrey is a medical doctor. Compl. ¶ 42. Respondents' denied this allegation, but an examination of Respondents' promotional materials and other evidence concerning the surrounding circumstances of their promotional campaigns establishes that Respondents have misrepresented Respondent Mowrey's expertise.

Advertisements for Anorex and Leptoprin make a strongly implied representation through their words and visual images that Respondent Mowrey is a medical doctor. Respondent Mowrey appears in several of Respondents' advertisements wearing a white laboratory coat. *See, e.g.*, Tab 1, Compl. Ex. B (Dermalin); Tab 1, Compl. Ex. J (Anorex); Tab 36, R0029778 (Leptoprin). Respondents advertisements identify him as "Dr. Daniel B. Mowrey, Director of Scientific Affairs," at either American Phytotherapy Research Laboratory or Klein Becker usa, depending on the entity associated with the particular product. *See id.* Notably, certain advertisements for Leptoprin/Anorex contain the following text:

Leptoprin[/Anorex]: The Result of an Extraordinary Collaboration

> Leptoprin[/Anorex] (or more correctly, its patent-protected core compound, Leptoprin) [sic] is the result of an extraordinary collaborative effort between Dr. Daniel B. Mowrey, Director of Scientific Affairs, APRL (American Phytotherapy Research Laboratory), Salt Lake City, Utah, and Dr. Edward G. Fey, University of Massachusetts Medical Center, Worcester, Massachusetts. Though working independently, both doctors were keenly aware of the growing body of evidence linking obesity to certain genetic 'markers.' In September of 1998, Drs. Mowrey and Fey discovered each had access to compatible patents for variant methods of regulating obesity. As they familiarized themselves with each others' work, it became clear that combining the patented formulations could overcome genetic anomalies responsible for significant overweight.

Tab 1, Compl. Exs. I and J. The language of this advertisement juxtaposes the reference to Dr. Fey of the University of Massachusetts Medical Center, with Respondent Mowrey, and refers to the two men as "both doctors." *Id.* **Redacted**

With respect to each of these persons, Respondents' advertising purports purports to report their "extraordinary collaborative effort" with Respondent Mowrey on obesity and genetic markers. Tab 1, Compl. Exs. I and J; **Redacted**. The combined impact of this text with its references to medical issues and literature, its references to doctors in conjunction with medical centers or colleges of pharmacy and health sciences, and the visual image of a person in a white lab coat, combine to convey the impression that Respondent Mowrey is a medical doctor.

The challenged advertising does not identify Respondent Mowrey as an experimental psychologist, which would be accurate. Respondents' advertisements generally identify Respondent Mowrey as Dr. Daniel Mowrey, rather than Daniel Mowrey, Ph.D., reinforcing this impression. Elsewhere, however, Respondents' advertising takes pains to distinguish the

credentials of another Ph.D., Nathalie Chevreau. For example, Chevreau is identified as "Dr. Nathalie Chevreau, *PhD, RD,* Director of Women's Health, Sovage Dermalogic Laboratories" in an ad for Tummy Flattening gel, not merely as Dr. Chevreau, Director of Women's Health. Tab 1, Compl. Exs. F & G (emphasis added). Respondents' intent to mislead the consumer about the precise nature of Respondent Mowrey's credentials is revealed by their deliberate omission regarding Respondent Mowrey's actual credentials. It is further evidenced by an email referring to a white lab coat. A photograph of Dr. Julia Steinberger, M.D., wearing a white lab coat appears in an advertisement for PediaLean. Tab 37, 5050074. **Redacted**

Respondents anticipated that reasonable consumers might well perceive a person wearing a white lab coat in their advertising as a medical doctor.

A facial analysis of the text and visual images of Respondents' promotions and extrinsic evidence both demonstrate that Respondents have misrepresented Respondent Mowrey as a medical doctor. The implied representation that Respondent Mowrey is a medical doctor is false. Respondent Mowrey does not have a medical degree. He reportedly received a Ph.D degree in experimental psychology from BrighamYoung University in 1978. Answer, Resp't Mowrey ¶ 43; Resp't Basic Research ¶ 43; Tab 7, Answer, Resp't BAN ¶ 43; **Redacted**. The *Complaint* allegation that Respondents conveyed that Respondent Mowrey was a medical doctor is one reasonable interpretation of the challenged advertising. No trial of the issue is necessary to draw this conclusion. Summary decision is appropriate here.

V. The Respondents' Advertising Claims are Material to Consumers

"A "material" claim is one that involves information important to consumers and, therefore, is likely to affect the consumer's choice of, or conduct regarding, a product." [12] *Novartis*, 127 F.T.C. at 685. Although materiality is closely related to injury, in that when a consumer's choice is affected by a misrepresentation, the consumer, as well as competition, is injured, proof of actual injury is not required. *Id.*; *see also Kraft*, 114 F.T.C. at 134. The Commission and the Administrative Law Judge may presume materiality to certain types of claims: express claims and implied claims where there is evidence the respondent intended to make the claims; claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned; and claims pertaining to the ce

[12] A material claim is distinguishable from a "puffing" claim. Puffing claims are highly subjective and of the nature for which a consumer would not expect a seller to be able to support, such as "sexiest European sports car." *Removatron*, 111 F.T.C. at 296. Puffing claims do not contain affirmative information about a product's attributes, performance, or efficacy. *Id.*

fat loss claims significantly involve health. For example, the Leptoprin ads state "specifically developed for the significantly overweight." *See, e.g.* Tab 1, Compl. Ex. H. The Anorex ads proffer that "Although Anorex is much too powerful for the 'casual dieter' (someone concerned about losing 5 or 6 'vanity' pounds) its distinct ability to help overcome the genetic implications of obesity makes it the most effective means of providing considerable benef

Redacted

The facts set forth above further evidence that all of the challenged claims involve information that goes to the central purpose and efficacy of each of the products: do they products effectively cause visible fat loss quickly or substantial weight loss? Morever, for Cutting Gel, Tummy Flattening Gel, Leptoprin and PediaLean, the Respondents used phrases like "clinically proven," "published medical studies," "backed by ... two published clinical trials." As for Dr. Mowrey's purported medical expertise as a medical doctor, the Commission has stated in the past that use of figures dressed as a doctor or pharmacist reinforces that the claims rest on medical evidence or authority. *See, e.g., American Home Products*, 98 F.T.C. at 136 and n.28. Thus, Respondent Mowrey's use of a white lab coat **Redacted** pertains to the very purpose and efficacy of the product. Similarly, referring to Dr. Mowrey in Anorex materials as "Director of Scientific Affairs" for a research lab reinforces that the claims rest on medical evidence or authority. As such, these claims are important to consumers and likely to affect their choice of, or conduct regarding, a product.

Respondents have not produced any evidence during discovery that rebut the claim does not involve health or safety or that directly contradict the presumption of materiality. Therefore, if unsubstantiated or false, these claims would likely mislead reasonable consumers considering such a purchase.

The implied claims alleged in this case are apparent from a facial analysis of the challenged advertising, and it is well within the expertise and authority of this tribunal to enter summary decision on the representations made in that advertising. The ability of the Commission and its Administrative Law Judges to interpret ads on their face, without the need for extrinsic evidence,

[13] *E.g., Thompson Medical Co.*, 104 F.T.C. at 788-89; *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 563 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *American Home Products Corp. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982); *Simeon Mgm't Corp. v. FTC*, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); *National Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944).

[14] *Thompson Medical*, 791 F.2d at 197; *see, e.g., Removatron*, 884 F.2d at 1496; *American Home Prods.*, 695 F.2d at 688.

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children" appear in ads for PediaLean (cite); and the terms "X" appear in ads for Y (cite). All of the alleged claims clearly pertain to the central characteristics of the products—their efficacy for fat loss and/or weight loss. Additionally, even if Respondents profess not to have intended to make the alleged claims, it cannot be seriously disputed that the alleged claims relate to the health of the human body. Accordingly, the Court should enter summary decision that the challenged claims were material to consumers.

CONCLUSION

Summary decision is appropriate on the issues of advertising commerce, common enterprise, advertising interpretation, and materiality presented in this case. Complaint Counsel has presented uncontroverted evidence that Respondents made the alleged claims in commerce, acting as a common business enterprise. There is no genuine issue of material fact as to whether the material representations challenged in the *Complaint* are one reasonable interpretation of the challenged advertisements, or as to whether Respondents' common enterprise disseminated those claims to consumers nationwide. Accordingly, we respectfully request summary decision with respect to those questions. A proposed *Order* is attached.

Respectfully submitted,

/s/

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Dated: February 7, 2005

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

In the Matter of	)	
BASIC RESEARCH, L.L.C.,	)	
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,	)	**Docket No. 9318**
BAN, L.L.C.,	)	**PUBLIC DOCUMENT**
DENNIS GAY,	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2005, I caused a Public Record version of *Complaint Counsel's Motion for Partial Summary Decision* to be served and filed:

(1) the original, one paper copy, and one CD-ROM copy filed by hand delivery and one (1) additional electronic copy via email, to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery to:

The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

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

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