

[REDACTED]

Basic Research, L.L.C. was formed to create dietary supplements and sell wholesale to health food stores. Dr. Mowrey had his own company, American Phytotherapy Research Laboratories ("APRL"). Dr. Mowrey became a consultant for Basic

Research, L.L.C. He created the formula for Basic Research's first product, [REDACTED]

that Basic Research sold to chiropractors and through chiropractic offices. Thereafter,

Basic Research sold other dietary supplements that had been created by Dr. M [REDACTED]

approximately 1996 when he began devoting himself full-time to the business. Mr. Gay

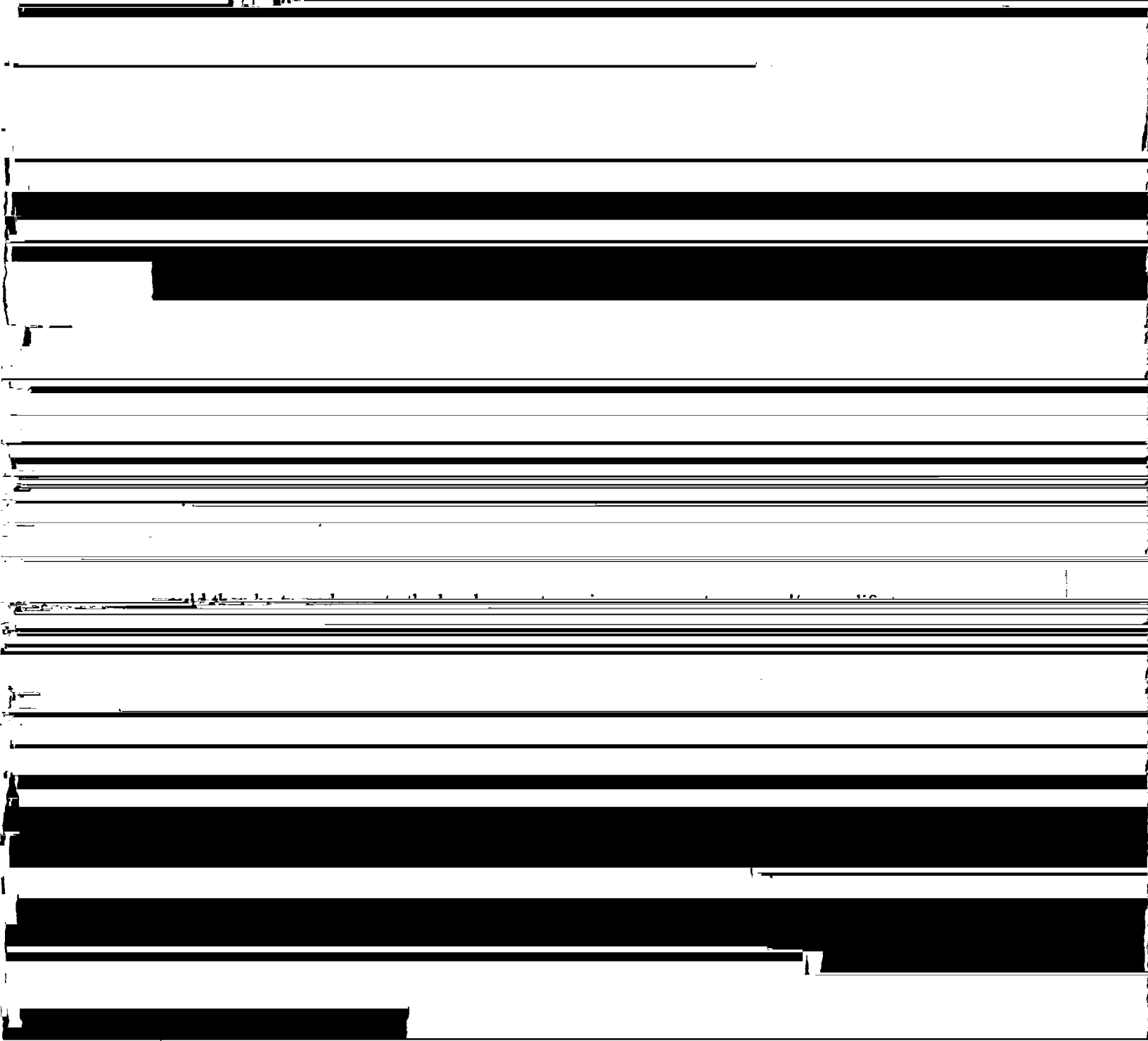
“competent and reliable scientific evidence” standard as those standards were then

understood by Basic Research’s lawyers.

Basic Research’s research and development team, headed by Dr. Mowrey, did ongoing research identifying substances that may have some application for products based on research that had been reported in the scientific literature and related sources, including pharmaceutical companies that had conducted research that could be applied in a

only those claims that were adequately supported. This part of the process continued until both research and development, and marketing, were satisfied that the product and any marketing were properly supported.

Once that part of the process concluded, the product and/or marketing information



and still believes that the challenged ads were truthful, that they complied with all applicable laws and regulations and that there was a reasonable basis for the claims made in the ads based on the rigorous approval process the ads went through before being published.

approved the ads.

In short, no ads were published until Mr. Gay was confident that those ads were truthful and met all legal requirements and that the products worked as advertised. In fact,

1. Restitution.

In order to impose restitution liability upon Mr. Gay, the Commission is required to prove that he participated directly in the alleged wrongful acts or had the authority to

misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation,

The Respondent companies did not go forward with the manufacturing and/or marketing of any product until the scientific group, the marketing group and legal counsel all approved the product. This same process was employed to insure that the ads placed by

the Respondent companies were proper. Mr. Gav relied upon the expertise, investigation

and work of these qualified experts in reviewing the ads. He relied upon Dr. M...

restitution because he had no actual knowledge of any alleged material misrepresentations concerning the product and that he had relied, among other things, upon booklets and a study furnished to him by the company. The Ninth Circuit concluded that it was reasonable for Mr. Garvey to have believed that the information supported the representations he made

and that he was not recklessly indifferent to the truth of his statements or aware that fraud was highly probable and intentionally avoided the truth

Mr. Coe did not know of any misrepresentations. He was not reckless and he did

violations of the FTCA by Mr. Gay. *United States v. W.T. Grant Co.* 345 U.S. 620, 622

(1953); *Commodity Futures Trading Commission v. British American Commodity*

Options Corp., 560 F.2d 135 (2nd Cir. 1977); *FTC v. Atlantex Associates*, 1987 WL

20384 *13 (S.D. Fla. 1987), *aff'd* 872 F.2d 966 (11th Cir. 1989). The Commission cannot

Mr. Gay purchased a lumber business building materials in 1978

of Payson, Utah, which he operated until 1982 when he was forced out of
business by an arsonist who hit three times in ten days. *Id.* at 13-34.

- (4) Mr. Gay subsequently went into partnership with an associate with whom he
had worked at National Semi-Conductor doing real estate developments and

rolling diamonds and hits and diamond segments for drilling projects. Mr. Gay

Thermadrene, that Basic Research sold to chiropractors and to chiropractors'

Thereafter, Basic Research sold other dietary supplements that had

been created by Dr. Murray. Basic Research sold its products through

health food stores, chiropractors, and some medical doctors. *Id.* at 52-59.

(10) Mr. Gay was only involved part-time with Basic Research, LLC until

68.

(11) When Basic Research, LLC began developing products, Mr. Gay, based on his engineering and previous employment experience, determined that there needed to be a rigorous process in place to substantiate the products developed by the company and to ensure that in manufacturing and marketing

involved in this process could veto any product. *See generally, Id.* at 52-202.

significant advertising. When it later began advertising, Mr. Gay already had in place the same rigorous process described above to attempt to ensure that the ads were truthful, that there was a reasonable basis for any claims made in the ads and that all laws and regulations had been complied with by the company. *Id.*

(13) As Mr. Gay formed new companies to manufacture and/or market new

products this same process was put into place by Mr. Gay and followed by

each company. No product was ever manufactured or marketed and no ad

ultimate authority to determine whether the ads would be published, in making his judgments he reasonably relied on the fact that scientific, marketing and legal all had approved the ads. Mr. Gay approved the ads in good faith believing that the ads were truthful that they complied with all

applicable laws and regulations, and that there was a reasonable basis for the claims made in the ads based on the rigorous approval process the ads went through before being published, together with Mr. Gav's confidence in the

competence and integrity of the individuals who approved the ads from each of the groups involved in the process. *Id.*

- (16) The Commission has failed to show that there is a reasonable apprehension of future violations of the Federal Trade Commission Act ("FTCA") by Mr.

Gay.

CONCLUSIONS OF LAW

A. Mr. Gav is not individually liable for restitution because he acted reasonably

and in good faith in approving the ads published by the limited liability

B. No injunctive relief would be appropriate against Mr. Gay because there is no reasonable apprehension of future violations of the FTCA by him.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2006, I caused the foregoing TRIAL BRIEF OF DENNIS GAY to be filed and served as follows:

- (1) an original and one paper copy send via hand delivery. One electronic copy in PDF format emailed to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

- (2) three paper copies and one electronic copy in PDF format on two CD-Roms filed

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Pennsylvania Avenue, NW, Room H-112
Washington, D.C. 20580

- (3) one paper copy by first class U.S. Mail to

James Kohm

(5) one paper copy by first class U.S. mail:

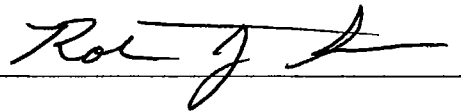
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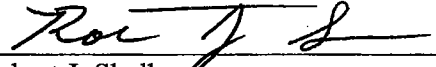
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5742 West Harold Gatty Drive
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A handwritten signature in black ink, appearing to read "Ron F. Price", is written over a horizontal line.

DATED this 10 day of February, 2006.

BURBIDGE & MITCHELL



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