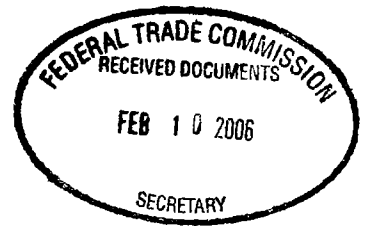


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



[REDACTED]

BASIC RESEARCH LLC

Docket No. 9318

A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DEMALOGIC

LABORATORIES LLC

[REDACTED]

BAN, L.L.C.
DENNIS GAY,
DANIEL B. MOWREY, and
MITCHELL K. FRIEDLANDER,

Respondents.

**RESPONDENT DANIEL B. MOWREY, Ph.D.'S PRE-HEARING BRIEF,
WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TABLE OF CONTENTS

Page

FACTUAL BACKGROUND 1

FINDINGS OF FACT AND CONCLUSIONS OF LAW 9

 I. FINDINGS OF FACT 9

 II. CONCLUSIONS OF LAW 17

LEGAL DISCUSSION 18

I. THE COMMISSION’S PROCESS IS UNFAIR AND UNCONSTITUTIONAL 18

II. DR. MOWREY HAS NO PERSONAL LIABILITY 20

 A. RESTITUTION 20

 B. INJUNCTIVE RELIEF 23

TABLE OF AUTHORITIES

Page

Cases:

*Commodity Futures Trading Commission v. British American Commodity
Options Corp.*, 560 F.2d 135 (2nd Cir. 1977) 23

FTC v. Atlantex Associates, 1987 WL 20384 (S.D. Fla. 1987)

aff'd 872 F.2d 966 (11th Cir. 1989) 23

FTC v. Garvey,
383 F.3d 891, 900 (9th Cir. 2004) 21, 22

FTC v. Publishing Clearing House, Inc.

In Re. Telebrands Corp.,
Docket No. 9313, Initial Decision (September 15, 2004) 21

United States v. W.T. Grant Co.,

Respondent Daniel B. Mowrey, Ph.D. ("Dr. Mowrey"), submits this pre-hearing brief, with proposed findings of fact and conclusions of law. Dr. Mowrey expressly adopts the arguments and proposed findings of fact and conclusions of law set forth in the pre-hearing briefs

FACTUAL BACKGROUND

One overriding fact which your Honor must keep in mind when considering this matter

for many drugs were and in some cases still are plant extracts. For example, aspirin was

and surfactant rheological technology, and where he also wrote operations and technical manuals.

Dr. Mowrey worked for Nova Corporation until 1986.

Although his work for Nova Corporation was not related to nutritional supplements, Dr.

alternative medicine. Thus, throughout his association with Nova Corporation, Dr. Mowrey

continued to spend large amounts of time studying the world's scientific literature that addressed

Published subsequently published Dr. Mowrey's third book, Herbal Tonic Therapies, which was

published in 1992. Dr. Mowrey's research on the medicinal properties of the plant, *Urtica dioica*, is

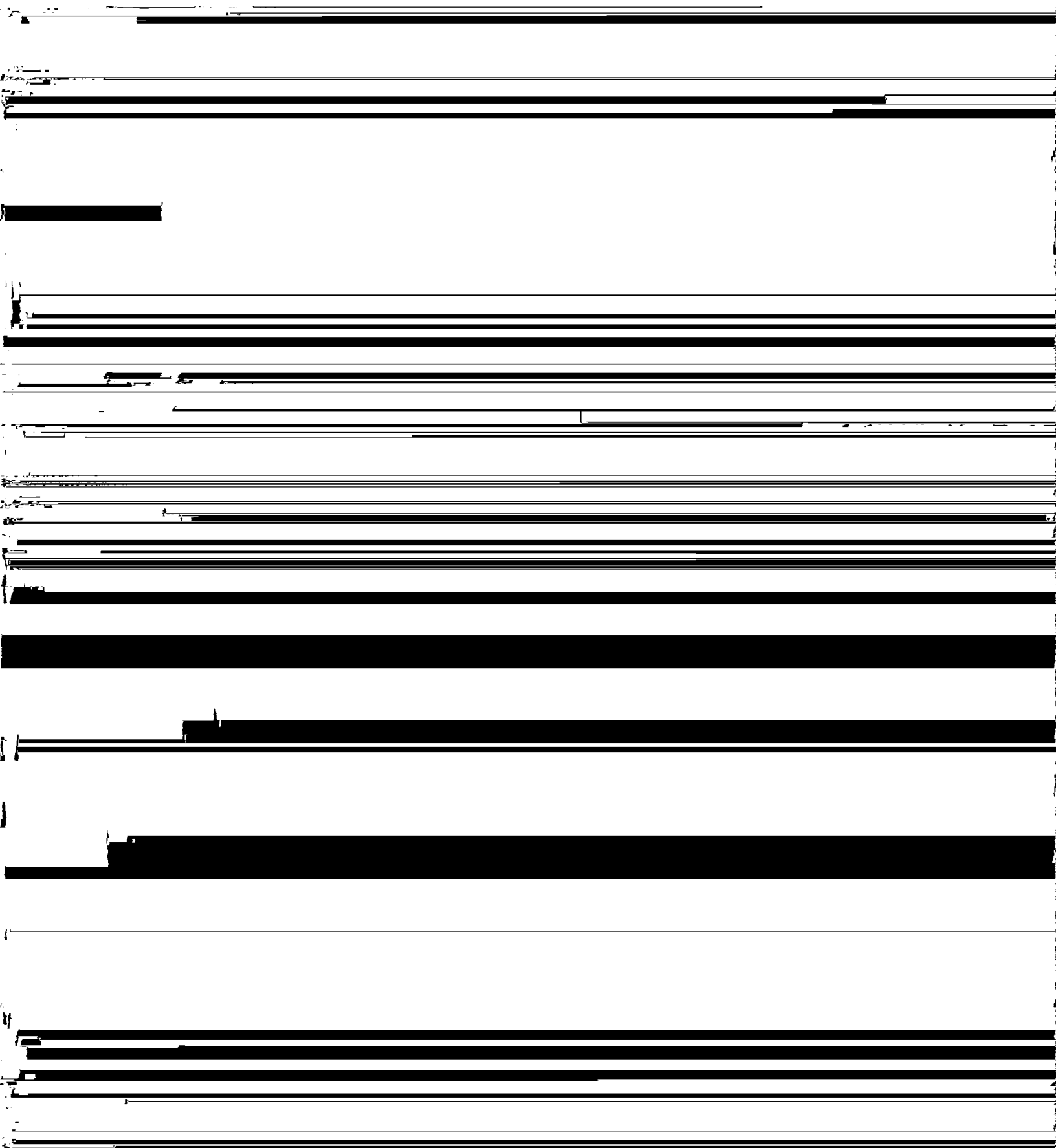
[REDACTED]

The Thermogenic Factor.

One of the things Dr. Mowrey learned early on in his study of medicinal plants was that

[REDACTED]

communicated with many of the lead investigators of studies relating to the challenged products, including Dr. Astup, Dr. Blackburn, Dr. Bray, Dr. Breum, Dr. Colker, Dr. Daly, Dr. Frome, Dr.



corporation.

ADDENDUM TO THE ADDITIONAL INFORMATION

consulting business, his continued archival research and study of the word's scientific literature on medicinal plants, and was working on writing his third book. Dr. Mowrey also began to provide independent consulting services to the old Basic Research, LLC, as well continuing to

Basic Research, LLC was but one of Dr. Mowrey's many clients.

By about the end of the 1990's, the consulting services requested by old Basic Research, LLC had reached a point that Dr. Mowrey, through APRL, had begun to devote full time to consulting with old Basic Research, LLC. Time simply did not permit Dr. Mowrey to continue to consult with other nutritional supplement companies.

As Dr. Mowrey, through APRL, consulted with old Basic Research, LLC, Dr. Mowrey

concluded that one of the most talented individuals which Mr. C... possessed was the ability to develop a...
[REDACTED]

company concerning whether it should or should not proceed with selling a particular product,

though still very much a final decision as to whether the ad should be run and the reader should be aware

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

and involves an understanding of physiology and biochemistry.

5. Dr. Mowrey's course work included training in biochemistry, biology, anatomy,

and anatomy.

6. Dr. Mowrey wrote his thesis on the anti-nausea effects of ginger root, which was later published as a paper titled "Motion Sickness, Ginger and Pyschophysics," in The Lancet, March 20, 1982, 655-657.

7. During the time frame of 1973 through approximately 1979, Dr. Mowrey was a part-time faculty member at Brigham Young University, where he taught courses in experimental

they have been used across the decades, or centuries, how different cultures evolved the same or very similar applications for the same or similar species of plants. how different forms of

versus the East, and how old concepts of health and disease translate into the discoveries of modern science. The placebo-controlled, double-blind, randomized scientific experiment is just one part of the study of medicinal plants.

13. Dr. Mowrey regularly reads The International Journal of Obesity, Obesity Research, The New England Journal of Medicine, Journal of the American Medical Association, Metabolism, Cell, The Lancet, Phytomedicine, The Clinical Endocrinology of Metabolism, and

Neuro and Science, among others

and selling nutritional supplements.

20. As an independent consultant, Dr. Mowrey consulted with nutritional supplement companies providing a variety of consulting services including the formulation of products

archival research on ingredients that often included published written summaries, coordinating basic and clinical research on products at neighboring universities, authoring a newsletter on

Guaranteed Potency herbs (The Herb Plus), writing columns and articles for trade magazines

LLC ("Basic Research"), and which had recently been formed by Mr. Gay and Mr. Bybee.

26. Dr. Mowrey had no ownership interest in the original Basic Research, LLC, and was not an employee of the original Basic Research, LLC.

27. The original Basic Research, LLC was only one of Dr. Mowrey's many clients, and Dr. Mowrey continued to consult, as an independent consultant, with his other clients.

28. Prior to 1992, Dr. Mowrey had performed his independent consulting services under the dba Mountain West Institute of Herbal Sciences, and subsequently under the dba American Phytotherapy Research Laboratory.

29. In the latter part of 1992, Dr. Mowrey registered American Phytotherapy Research

Laboratory ("APRL") with the Utah Department of Commerce, as a non-profit corporation. Shortly thereafter it became apparent that it was not feasible for APRL to operate as a non-profit corporation and, therefore, its status was changed to a for profit corporation. At all times subsequent thereto, APRL, now known as DBM Enterprises, Inc., has been registered as a for profit corporation with the State of Utah

30. After 1992, through APRL, Dr. Mowrey continued to provide independent

services were provided to Basic Research, LLC through APRI

33. Dr. Mowrey has never written ad copy.

34. At no time did Dr. Mowrey disseminate, or cause to be disseminated, any advertisements for the Challenged Products in "commerce" as that term is defined by section 4 of the Federal Trade Commission Act ("FTCA")

35. Dr. Mowrey has never sold any of the challenged products.

36. Dr. Mowrey does not have, and has never had, any control over any of the Company Respondents.

37. Dr. Mowrey does not have, and has never had, any decision making authority for any of the Company Respondents.

38. Dr. Mowrey does not have, and has never had, any decision making authority for any of the Company Respondents.

effective in promoting weight loss.

42. Thus during 1980's Dr Mowrey's consulting services including providing advice

concerning the use of ephedra, and ephedra and caffeine for weight loss.

43. During the early 1990's, Dr. Mowrey became familiar with research which demonstrated that the combination of ephedra, caffeine and aspirin was particularly effective in

effective in promoting weight loss.

42. Thus, during 1980's, Dr. Mowrey's consulting services including providing advice concerning the use of ephedra, and ephedra and caffeine for weight loss.

43. During the early 1990's Dr. Mowrey became familiar with research which

16 In connection with his extensive and continuous review of the available medical

and scientific literature, Dr. M... .. contacts its authors of published scientific research.

ask questions concerning the studies, to obtain additional information concerning the studies

51. Dr. Mowrey has and had, as at all relevant times, a reasonable basis to believe that the claims made in the promotional materials for the challenged products are true.

52. The consulting services provided by Dr. Mowrey have been of a purely local nature, and do not constitute engagement or participation in interstate commerce.

53. The Commission's counsel have failed to show that there is a reasonable apprehension of future violations of the FTCA by Dr. Mowrey.

LEGAL DISCUSSION

I. THE COMMISSION'S PROCESS IS UNFAIR AND UNCONSTITUTIONAL

Commission thinks the advertisements imply.

There is something (indeed many things) fundamentally wrong, unfair and

rule making it has long sought to enforce its de facto "competent and reliable scientific

what level of scientific substantiation they need to have to make claims. but says they must have

“professionals in the relevant area” conduct or evaluate “tests, analyses, research, studies, or

“evaluated in an objective manner by persons qualified to do so” in order to make claims. Then,

knowledge of the material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along

2004) See also *FTC v. Publishing Clearing House, Inc.* 104 F.3d 1168, 1171 (9th Cir.

Mowrey, although an independent consultant, relied upon lawyers for the companies to review the ads and the product labeling to insure compliance with applicable laws and regulations.

Furthermore, there is no evidence that Dr. Mowrey possessed actual knowledge that any of the challenged ads violated the law or were otherwise false or misleading or that there was no reasonable basis for the claims made in the ads. On the contrary, Dr. Mowrey has spent some

years of experience and the available evidence, Dr. Mowrey concluded that the challenged products would be effective in promoting weight and/or fat loss. These conclusions are absolutely correct, as the evidence will clearly demonstrate that the challenged products in fact

not intentionally avoid the truth. On the contrary, he correctly concluded that the products work

Furthermore, he knew that (a) Timothy Muris, the Commission's former chair, had opined that a single study was sufficient to support advertising claims, (b) a federal judge had ruled that the specific study which was at issue when Mr. Muris rendered his opinion (a study which the Commission's expert in this case criticizes) is a competent and reliable scientific study, and (c) another federal judge had ruled that the company had a reasonable basis for advertising claims made in support of another ECA product. There simply is no basis for the Commission to seek

to prove constitutionality. *Habitat for Humanity v. Department of Housing and Urban Development*, 401 U.S. 852 (1971).

P [REDACTED] IMPROPER DELIVER

Further, even if the Commission could prove that the challenged advertisements violated

the scientific claims made in the advertisements were supported by the available

evidence. He did not act fraudulently, deceptively or recklessly. He relied on prior

RECEIVED BY THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION