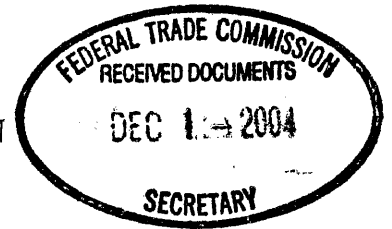


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)
)
)
BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
SOVAGE DERMALOGIC)
LABORATORIES, L.L.C.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)
)
Respondents.)

Docket No. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT DENNIS GAY'S REQUESTS FOR ADMISSIONS**

Pursuant to RULE OF PRACTICE 3.32, Complaint Counsel serve the following answers to *Respondent Dennis Gay's First Set of Requests For Admissions* ("requests for admissions").

Complaint Counsel's provision of a response to any request for admission shall not constitute a waiver of any applicable objection, privilege, or other right. Where required in order to respond to these *Requests For Admissions*, Complaint Counsel represents that it has undertaken good faith efforts to identify the information that would allow it to admit or deny such requests.

GENERAL OBJECTIONS

1. Complaint Counsel object to Respondent's requests for admissions to the extent they fail to seek an admission of the truth of matters relevant to the pending proceedings. RULE 3.32.
2. Complaint Counsel object to Respondent's requests for admissions to the extent they fail to relate to statements or opinions of fact or of the application of law to fact and thereby exceed the scope of RULE 3.32 admissions.

3. Complaint Counsel object to Respondent's requests for admissions to the extent they seek information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel or Complaint Counsel's consultants or agents, on the grounds that such information is protected from disclosure by the attorney work product privilege and the provisions of RULE 3.31(c)(3). *See In re Stouffer Foods Corp.*, Docket No. 9250, Order Ruling on Application for an Order Requiring the Production of Documents (Feb. 11, 1992); *In re Kraft, Inc.*, Docket No. 9208, Order Ruling on Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).
4. Complaint Counsel object to Respondent's requests for admissions to the extent they seek information protected from disclosure by the deliberative process privilege. *See In re Stouffer Foods Corp.*, Docket No. 9250, Order Ruling on Application for an Order Requiring the Production of Documents (Feb. 11, 1992); *In re Kraft, Inc.*, Docket No. 9208, Order Ruling on Motion for Documents in the Possession of Complaint Counsel (July 10, 1987); *see also* RULE 4.10(a)(3).
5. Complaint Counsel object to Respondent's requests for admissions to the extent that they seek information relating to non-testifying expert witnesses because Respondent has not made the proper demonstration that he is entitled to such information pursuant to RULE 3.31(c)(4)(ii). *See In re Schering Corp.*, Docket No. 9232, Order Denying Discovery and Testimony by Expert Witness (Mar. 23, 1990); *In re Telebrands Corp.*, Docket No. 9313, Order Denying Respondents' Motion To Compel The Production of Consumer Survey Information (Dec. 23, 2003).
6. Complaint Counsel object to Respondent's requests for admissions to the extent that they seek information obtained from or provided to other law enforcement agencies, and to the extent that they seek information obtained in the course of investigating other marketers of dietary supplements and weight loss products, on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest.
7. Complaint Counsel object to Respondent's requests for admissions to the extent that, when read with the definitions and instructions, they are so vague, broad, general, and all-inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive.
8. Complaint Counsel object to the Instructions and Definitions to the extent that they impose an obligation greater than that imposed by the Commission's RULES OF PRACTICE and the provisions of the pretrial *Scheduling Order*.
9. Complaint Counsel object to Respondent's requests for admissions to the extent that they seek information ascertained from or the identity of confidential informants as disclosure of such information would be contrary to the public interest.

10. Complaint Counsel object to Respondent's requests for admissions to the extent they fail to distinguish between the "Federal Trade Commission" and Complaint Counsel and thereby seek information in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information in contravention of RULE 3.35(a)(1) because such documents are not in the possession, custody or control of Complaint Counsel.
11. Complaint Counsel object to Respondent's requests for admissions to the extent that Respondent has employed requests to establish facts that are obviously in dispute or to answer questions of law. *See In re Basic Research LLC*, Docket No. 9318 (Nov. 30, 2004) (citing *Kosta v. Connolly*, 709 F. Supp. 592, 594 (E.D. Pa. 1989)).
12. Complaint Counsel object to Respondent's requests for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made.

GENERAL RESPONSES

1. Complaint Counsel's responses are made subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility, and any and all other objections and grounds that would require the exclusion of any statement contained herein if any requests were asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of the hearing.
2. The fact that Complaint Counsel have responded to any request for admission in whole or in part is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any request for admission.
3. Complaint Counsel have not completed their investigation in this case, and additional facts may be discovered that are responsive to Respondent's requests for admissions. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.
4. As used herein, "Respondents" shall mean all Respondents named in the Complaint.
5. As used herein, "Respondent's requests for admission" shall mean the requests for admission and all applicable instructions and definitions as set forth in Respondent's *Requests For Admissions*.

RESPONSES TO REQUESTS FOR ADMISSION

1. [1] Admit that the advertisements for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel referenced in the Complaint contain caveats (the "Caveats") representing that exercise . . . is essential in order to achieve any reduction in fat.

Response: Complaint Counsel object to Respondent's requests for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made.¹ Complaint Counsel object to this request as ambiguous to the extent that it refers to "advertisements . . . referenced in the Complaint" without clarifying whether this phrase is limited to advertisements attached as Exhibits, or includes other types of advertisements disseminated by Respondents that were generally described in the *Complaint*. Complaint Counsel further object to this request as vague to the extent that it refers to "caveats" in advertisements for multiple products without quoting or otherwise identifying those statements with specificity.

Response as to Dermalin-APg

Subject to and without waiving the above objections, Complaint Counsel admit that an advertisement for Dermalin-APg attached to the *Complaint* contains the following statements:

While Dermalin-APg forces the fat out of adipose tissue cells and into the blood stream to be used as energy, the fat doesn't just disappear. You have to help by increasing physical activity or decreasing caloric intake so the fat isn't redeposited.

Secondly, you can't rub Dermalin-APg all over your body at the same time. There is simply no way for your body to utilize all the newly released fat. Therefore, "choose your most problematic area first," suggests Dr. Bruce Frome, a member of the Bray-Greenway team and co-administrator of the patented active formula. "Use the product until you get the desired results, then move on, one problem area at a time, until you've literally melted the fat and molded your body to a more pleasing shape."

¹ This objection applies to all instances identified in Complaint Counsel's responses, below, in which Respondent improperly posed multiple requests for admissions within a single request. Complaint Counsel's *Response* numbers Respondent's requests for admissions according to the actual number of matters for which Respondent has requested an admission.

Unlike Respondents' own discovery responses, which deleted text from our original requests and added text not appearing in our original requests *without* indicating how the original requests had been altered, this *Response* identifies alterations with ellipses and brackets. Our responses also identifies the number originally assigned to that request by Respondent in brackets.

Compl. Ex. A. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Dermalin-APg. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without additional physical activity.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that exercising will *help* burn off fat. The requested admission is otherwise denied. The requested admission is specifically denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer' processing of the message. The requested admission is further specifically denied to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. See *In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

Response as to Cutting Gel

Subject to and without waiving the above objections, Complaint Counsel admit that an advertisement for Cutting Gel attached to the *Complaint* contains the following statements:

First, because Cutting Gel releases stored fat into the bloodstream to be used as energy, you have to help burn that released fat by exercising or reducing caloric intake so that free fat isn't redeposited. Second, you can't rub Cutting Gel all over your body at the same time. There is simply no way for your body to deal with that much newly released fat. So start with the one area you think needs the most help, and use Cutting Gel until you get the desired results (usually about ten days). Then move on, one target area at a time, until you get that cut, rock-hard, attention-grabbing look you want and deserve!

Compl. Ex. D. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Cutting Gel. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without additional physical activity.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that exercising will *help* burn off fat. The requested admission is otherwise denied. The requested admission is specifically denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer' processing of the message. The requested admission is further specifically denied to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. See *In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

Response as to Tummy Flattening Gel

Subject to and without waiving the above objections, Complaint Counsel admit that an advertisement for Tummy Flattening Gel attached to the *Complaint* contains the following statements:

As with all Epidril formulations, there are two caveats. First, because Sovage Tummy Flattening Gel works by forcing stored fat out of abdominal fat cells and into the bloodstream to be burned as energy, you have to help burn off the released fat by exercising or decreasing caloric intake so circulating fat is not redeposited. Second, you might be tempted to use more than the recommended dosage of Sovage Tummy Flattening Gel. Don't...there is simply no way for your body to deal with that much released fat.

Compl. Ex. F. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Tummy Flattening Gel. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without additional physical activity.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that exercising will *help* burn off fat. The requested admission is otherwise denied. The requested admission is specifically denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer' processing of the message. The requested admission is further specifically denied to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. See *In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

2. [1] Admit that the advertisements for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel referenced in the Complaint contain caveats (the "Caveats") representing that . . . a decrease in caloric intake is essential in order to achieve any reduction in fat.

Response: Complaint Counsel object to Respondent's requests for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel object to this request as ambiguous to the extent that it refers to "advertisements . . . referenced in the Complaint" without clarifying whether this phrase is limited to advertisements attached as Exhibits, or includes other types of advertisements disseminated by Respondents that were generally described in the *Complaint*. Complaint Counsel further object to this request as vague to the extent that it refers to "caveats"

in advertisements for multiple products without quoting or otherwise identifying those statements with specificity.

Response as to Dermalin-APg

Subject to and without waiving the above objections, Complaint Counsel admit that an advertisement for Dermalin-APg attached to the *Complaint* contains the following statements:

While Dermalin-APg forces the fat out of adipose tissue cells and into the blood stream to be used as energy, the fat doesn't just disappear. You have to help by increasing physical activity or decreasing caloric intake so the fat isn't redeposited.

Secondly, you can't rub Dermalin-APg all over your body at the same time. There is simply no way for your body to utilize all the newly released fat. Therefore, "choose your most problematic area first," suggests Dr. Bruce Frome, a member of the Bray-Greenway team and co-administrator of the patented active formula. "Use the product until you get the desired results, then move on, one problem area at a time, until you've literally melted the fat and molded your body to a more pleasing shape."

Compl. Ex. A. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Dermalin-APg. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without reduced caloric intake.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that decreasing caloric intake will *help* burn off fat. The requested admission is otherwise denied. The requested admission is specifically denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer' processing of the message. The requested admission is further specifically denied to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. *See In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

Response as to Cutting Gel

Subject to and without waiving the above objections, Complaint Counsel admit that an advertisement for Cutting Gel attached to the *Complaint* contains the following statements:

First, because Cutting Gel releases stored fat into the bloodstream to be used as energy, you have to help burn that released fat by exercising or reducing caloric intake so that free fat isn't redeposited. Second, you can't rub Cutting Gel all over your body at the same time. There is simply no way for your body to deal with that much newly released fat. So start with the one area you think needs the most help, and use Cutting Gel until you get the desired results (usually

about ten days). Then move on, one target area at a time, until you get that cut, rock-hard, attention-grabbing look you want and deserve!

Compl. Ex. D. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Cutting Gel. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without reduced caloric intake.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that decreasing caloric intake will *help* burn off fat. The requested admission is otherwise denied. The requested admission is specifically denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer' processing of the message. The requested admission is further specifically denied to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. See *In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

Response as to Tummy Flattening Gel

Subject to and without waiving the above objections, Complaint Counsel admit that an advertisement for Tummy Flattening Gel attached to the *Complaint* contains the following statements:

As with all Epidril formulations, there are two caveats. First, because Sovage Tummy Flattening Gel works by forcing stored fat out of abdominal fat cells and into the bloodstream to be burned as energy, you have to help burn off the released fat by exercising or decreasing caloric intake so circulating fat is not redeposited. Second, you might be tempted to use more than the recommended dosage of Sovage Tummy Flattening Gel. Don't...there is simply no way for your body to deal with that much released fat.

Compl. Ex. F. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Tummy Flattening Gel. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without reduced caloric intake.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that decreasing caloric intake will *help* burn off fat. The requested admission is otherwise denied. The requested admission is specifically denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer' processing of the message. The requested admission is further specifically denied

to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. See *In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

3. [2] Admit that the Caveats would be material to a reasonable purchaser of Dermalin-APg, Cutting Gel, and Tummy Flattening Gel.

Response: Complaint Counsel object to this request as vague to the extent that it refers to “caveats” in multiple advertisements without quoting or otherwise identifying those statements with specificity.

Response as to Dermalin-APg

Subject to and without waiving the above objection, Complaint Counsel admit that an advertisement for Dermalin-APg attached to the *Complaint* contains the following statements:

While Dermalin-APg forces the fat out of adipose tissue cells and into the blood stream to be used as energy, the fat doesn’t just disappear. You have to help by increasing physical activity or decreasing caloric intake so the fat isn’t redeposited.

Secondly, you can’t rub Dermalin-APg all over your body at the same time. There is simply no way for your body to utilize all the newly released fat. Therefore, “choose your most problematic area first,” suggests Dr. Bruce Frome, a member of the Bray-Greenway team and co-administrator of the patented active formula. “Use the product until you get the desired results, then move on, one problem area at a time, until you’ve literally melted the fat and molded your body to a more pleasing shape.”

Compl. Ex. A. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Tummy Flattening Gel. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without additional physical activity or reduced caloric intake.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that exercising or decreasing caloric intake will *help* burn off fat. The requested admission is otherwise denied. The requested admission is further denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer’ processing of the message. The requested admission is further specifically denied to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. See *In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

Response as to Cutting Gel

Subject to and without waiving the above objection, Complaint Counsel admit that an advertisement for Cutting Gel attached to the *Complaint* contains the following statements:

First, because Cutting Gel releases stored fat into the bloodstream to be used as energy, you have to help burn that released fat by exercising or reducing caloric intake so that free fat isn't redeposited. Second, you can't rub Cutting Gel all over your body at the same time. There is simply no way for your body to deal with that much newly released fat. So start with the one area you think needs the most help, and use Cutting Gel until you get the desired results (usually about ten days). Then move on, one target area at a time, until you get that cut, rock-hard, attention-grabbing look you want and deserve!

Compl. Ex. D. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Tummy Flattening Gel. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without additional physical activity or reduced caloric intake.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that exercising or decreasing caloric intake will *help* burn off fat. The requested admission is otherwise denied. The requested admission is further denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer' processing of the message. The requested admission is further specifically denied to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. See *In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

Response as to Tummy Flattening Gel

Subject to and without waiving the above objections, Complaint Counsel admit that an advertisement for Tummy Flattening Gel attached to the *Complaint* contains the following statements:

As with all Epidril formulations, there are two caveats. First, because Sovage Tummy Flattening Gel works by forcing stored fat out of abdominal fat cells and into the bloodstream to be burned as energy, you have to help burn off the released fat by exercising or decreasing caloric intake so circulating fat is not redeposited. Second, you might be tempted to use more than the recommended dosage of Sovage Tummy Flattening Gel. Don't...there is simply no way for your body to deal with that much released fat.

Compl. Ex. F. The requested admission is denied to the extent that it implies that such statements appeared in all promotional materials for Tummy Flattening Gel. The requested admission is also denied to the extent that it implies that promotional materials for the challenged product do not represent that the product is still effective without additional physical activity or reduced caloric intake.

Complaint Counsel further admit that the above-quoted statement may be interpreted as a representation that exercising or decreasing caloric intake will *help* burn off fat. The requested admission is otherwise denied. The requested admission is further denied to the extent that it implies that its interpretation represents the net impression of the advertisements. The above-quoted statement is insufficiently prominent relative to the rest of the advertisement to have an impact on consumer' processing of the message. The requested admission is further specifically denied to the extent that it implies that consumers understand the confusing usage of the terms set forth in the above-quoted statement.

A respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. See *In re Stouffer Foods Corp.*, 118 F.T.C. at 799; *In re Kraft, Inc.*, 114 F.T.C. at 120-21 n.8; *In re Thompson Medical Co.*, 104 F.T.C. at 789 n.7.

4. [3] Admit that, taken as a whole, and considering the Caveats, the advertisements for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel referenced in the Complaint do not claim that these products by themselves cause rapid . . . fat loss to the areas of the body to which they are applied.

Response: Complaint Counsel object to Respondent's request for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel object to this request to the extent that Respondent seeks to establish facts that are obviously in dispute. Complaint Counsel object to this request as ambiguous to the extent that it refers to "advertisements . . . referenced in the Complaint" without clarifying whether this phrase is limited to advertisements attached as Exhibits, or includes other types of advertisements disseminated by Respondents that were generally described in the *Complaint*. Subject to and without waiving these objections, the request for admission is denied.

5. [3] Admit that, taken as a whole, and considering the Caveats, the advertisements for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel referenced in the Complaint do not claim that these products by themselves cause . . . visibly obvious fat loss to the areas of the body to which they are applied.

Response: Complaint Counsel object to Respondent's request for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel object to this request to the extent that Respondent seeks to establish facts that are obviously in dispute. Complaint Counsel object to

this request as ambiguous to the extent that it refers to “advertisements . . . referenced in the Complaint” without clarifying whether this phrase is limited to advertisements attached as Exhibits, or includes other types of advertisements disseminated by Respondents that were generally described in the *Complaint*. Subject to and without waiving these objections, the request for admission is denied.

6. [4] Admit that, Dr. Greenway . . . [is a] “professional[] in the relevant area” of weight loss . . . using topical aminophylline compounds.

Response: Complaint Counsel object to Respondent’s request for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel are without sufficient information to fully admit or deny the requested admission. Complaint Counsel admit that, based on the information available to and obtained by Complaint Counsel, Dr. Greenway reportedly has appeared as one of several authors of small studies involving the use of aminophylline cream in research.

As Respondents are aware, the Commission has addressed the qualifications, credentials, experience, and background of experts on a case-specific basis. *See, e.g., In re Thompson Medical Co.*, 104 F.T.C. 648 (1984); *In re Porter & Dietsch*, 90 F.T.C. 770 (1977); *In re Nat’l Comm’n on Egg Nutrition*, 88 F.T.C. 191 (1976). Based on the information available to Complaint Counsel, Dr. Greenway has not been proffered or accepted as a weight loss expert in any cases before the Commission, or otherwise involving the Commission’s advertising substantiation requirements.

7. [4] Admit that, Dr. Greenway . . . [is a] “professional[] in the relevant area” of . . . fat reduction using topical aminophylline compounds.

Response: Complaint Counsel object to Respondent’s request for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel are without sufficient information to admit or deny the requested admission. Complaint Counsel admit that, based on the information available to and obtained by Complaint Counsel, Dr. Greenway reportedly has appeared as one of several authors of small studies involving the use of aminophylline cream in research.

As Respondents are aware, the Commission has addressed the qualifications, credentials, experience, and background of experts on a case-specific basis. *See, e.g., In re Thompson Medical Co.*, 104 F.T.C. 648 (1984); *In re Porter & Dietsch*, 90 F.T.C. 770 (1977); *In re Nat’l Comm’n on Egg Nutrition*, 88 F.T.C. 191 (1976). Based on the information available to Complaint Counsel, Dr. Greenway has not been proffered or accepted as a fat reduction expert in any cases before the Commission, or otherwise involving the Commission’s advertising substantiation requirements.

8. [4] Admit that, Dr. Bray . . .[is a] “professional[] in the relevant area” of weight loss . . . using topical aminophylline compounds.

Response: Complaint Counsel object to Respondent’s request for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel are without sufficient information to admit or deny the requested admission. Complaint Counsel admit that, based on the information available to and obtained by Complaint Counsel, Dr. Bray reportedly has appeared as one of several authors of small studies involving the use of aminophylline cream in research.

As Respondents are aware, the Commission has addressed the qualifications, credentials, experience, and background of experts on a case-specific basis. *See, e.g., In re Thompson Medical Co.*, 104 F.T.C. 648 (1984); *In re Porter & Dietsch*, 90 F.T.C. 770 (1977); *In re Nat’l Comm’n on Egg Nutrition*, 88 F.T.C. 191 (1976). Based on the information available to Complaint Counsel, Dr. Bray has not been proffered or accepted as a weight loss expert in any cases before the Commission, or otherwise involving the Commission’s advertising substantiation requirements.

9. [4] Admit that, Dr. Bray . . .[is a] “professional[] in the relevant area” of . . . fat reduction using topical aminophylline compounds.

Response: Complaint Counsel object to Respondent’s request for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel are without sufficient information to admit or deny the requested admission. Complaint Counsel admit that, based on the information available to and obtained by Complaint Counsel, Dr. Bray reportedly has appeared as one of several authors of small studies involving the use of aminophylline cream in research.

As Respondents are aware, the Commission has addressed the qualifications, credentials, experience, and background of experts on a case-specific basis. *See, e.g., In re Thompson Medical Co.*, 104 F.T.C. 648 (1984); *In re Porter & Dietsch*, 90 F.T.C. 770 (1977); *In re Nat’l Comm’n on Egg Nutrition*, 88 F.T.C. 191 (1976). Based on the information available to Complaint Counsel, Dr. Bray has not been proffered or accepted as a fat reduction expert in any cases before the Commission, or otherwise involving the Commission’s advertising substantiation requirements.

10. [4] Admit that, Dr. Heber . . .[is a] “professional[] in the relevant area” of weight loss . . . using topical aminophylline compounds.

Response: Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel are without sufficient information to admit or deny the requested admission. Complaint Counsel admit that, based on the information available to and obtained by Complaint Counsel, Dr. Heber reportedly has appeared as one of several authors of small studies involving the use of aminophylline cream in research.

As Respondents are aware, the Commission has addressed the qualifications, credentials, experience, and background of experts on a case-specific basis. *See, e.g., In re Thompson Medical Co.*, 104 F.T.C. 648 (1984); *In re Porter & Dietsch*, 90 F.T.C. 770 (1977); *In re Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Based on the information available to Complaint Counsel, Dr. Heber has not been proffered or accepted as a weight loss expert in any cases before the Commission, or otherwise involving the Commission's advertising substantiation requirements.

11. [4] Admit that, Dr. Heber . . . [is a] "professional[] in the relevant area" of . . . fat reduction using topical aminophylline compounds.

Response: Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel are without sufficient information to admit or deny the requested admission. Complaint Counsel admit that, based on the information available to Complaint Counsel, Dr. Heber reportedly has appeared as one of several authors of small studies involving the use of aminophylline cream in research.

As Respondents are aware, the Commission has addressed the qualifications, credentials, experience, and background of experts on a case-specific basis. *See, e.g., In re Thompson Medical Co.*, 104 F.T.C. 648 (1984); *In re Porter & Dietsch*, 90 F.T.C. 770 (1977); *In re Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Based on the information available to Complaint Counsel, Dr. Heber has not been proffered or accepted as a fat reduction expert in any cases before the Commission, or otherwise involving the Commission's advertising substantiation requirements.

12. [5] Admit that Dennis Gay could reasonably rely on representations made in the GREENWAY/BRAY/HEBER PUBLISHED STUDIES.

Response: Complaint Counsel object to this request as vague, ambiguous, open-ended, and overbroad, as it pertains to a set of publications, and fails to identify with any specificity at all the particular representations in question. Complaint Counsel object to this request to the extent that Respondent seeks to establish facts that are obviously in dispute. Subject to and without waiving these objections, Complaint Counsel deny the requested admission to the extent

that it implies that any person may reasonably rely on published studies simply because the studies exist and are published. The requested admission is further denied to the extent that it implies that the identified studies constitute competent and reliable scientific evidence for the claims at issue in the *Complaint*.

13. [6] Admit that the GREENWAY/BRAY/HEBER PUBLISHED STUDIES provide a reasonable basis to substantiate a representation that when aminophylline is applied in the manner described in the GREENWAY/BRAY/HEBER PUBLISHED STUDIES, it causes a rapid fat . . . loss in women's thighs.

Response: Complaint Counsel object to this request as overbroad and multiplicitous. Complaint Counsel object to this request to the extent that Respondent seeks to establish facts that are obviously in dispute. Complaint Counsel further object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving these objections, the request for admission is denied. The requested admission is further denied to the extent that it implies that the identified studies constitute competent and reliable scientific evidence for the claims at issue in the *Complaint*.

14. [6] Admit that the GREENWAY/BRAY/HEBER PUBLISHED STUDIES provide a reasonable basis to substantiate a representation that when aminophylline is applied in the manner described in the GREENWAY/BRAY/HEBER PUBLISHED STUDIES, it causes a . . . visibly obvious [fat] loss in women's thighs.

Response: Complaint Counsel object to this request as overbroad and multiplicitous. Complaint Counsel object to this request to the extent that Respondent seeks to establish facts that are obviously in dispute. Complaint Counsel further object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, the request for admission is denied. The requested admission is further denied to the extent that it implies that the identified studies constitute competent and reliable scientific evidence for the claims at issue in the *Complaint*.

15. [7] Admit that the Topical Fat Reduction Study involved a series of clinical trials using one thigh as a double-blind control.

Response: Admitted that the Topical Fat Reduction Study reportedly involved some trials using one thigh as a double-blind control. Denied to the extent that the requested admission implies that all of the trials were double-blinded (the first study is expressly identified as a single-blind study). Denied to the extent that the requested admission implies that the Topical Fat Reduction Study reported the results of a new series of trials only. The Topical

Fat Reduction Study appears to re-report the results of the Regional Fat Loss Study (described as studies 1, 2, and 3) before reporting the results of new trials (studies 4, 5, and 6).

16. [8] Admit that the five subjects treated with aminophylline in the third clinical trial in the Topical Fat Reduction Study all lost weight

Response: Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, it is admitted that the Topical Fat Reduction Study reported that five subjects treated with aminophylline cream lost weight. Denied to the extent that the requested admission implies that only five subjects were treated with aminophylline—five other subjects dropped out. Denied to the extent that the requested admission implies that the subjects reportedly lost weight solely because they were treated with aminophylline. The subjects were also reportedly placed on a 800 Kcal/day diet and encouraged to engage in a walking program during the trial. Further denied to the extent that the request admission implies that this trial actually took place as part of the Topical Fat Reduction Study. This trial appears to be the very same trial previously reported in the Regional Fat Loss Study. The Topical Fat Reduction Study apparently re-reported these results.

17. [8] Admit that the five subjects treated with aminophylline in the third clinical trial in the Topical Fat Reduction Study . . . lost on average 1.5 centimeters more girth on the treated thigh than on the control thigh.

Response: Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, it is admitted that the Topical Fat Reduction Study reported that five subjects treated with aminophylline lost on average 1.5 ± 0.77 centimeters more girth in circumference on the treated thigh than on the control thigh. Denied to the extent that the requested admission implies that only five subjects were treated with aminophylline—five other subjects dropped out. Denied to the extent that the requested admission implies that the five subjects lost girth in circumference solely because they were treated with aminophylline. The subjects were also reportedly placed on a 800 Kcal/day diet and encouraged to engage in a walking program during the trial. Further denied to the extent that the request admission implies that this trial actually took place as part of the Topical Fat Reduction Study. This trial appears to be the very same trial previously reported in the Regional Fat Loss Study. The Topical Fat Reduction Study apparently re-reported these results.

18. [9] Admit that the average loss of girth in the third clinical trial in the Topical Fat Reduction Study would be visible to the naked eye.

Response: Complaint Counsel object to this request as vague and ambiguous. The requested admission does not permit a proper or reasonable response. Complaint Counsel further object to this request as speculative. Complaint Counsel object to this request to the extent that it fails to relate to facts that may be personally ascertained by Complaint Counsel. Subject to and without waiving these objections, the request for admission is denied to the extent that it implies that the Topical Fat Reduction Study assessed whether the reported average loss of girth in circumference “would be visible to the naked eye.” Further denied to the extent that the request admission implies that the “third clinical trial in the Topical Fat Reduction Study” actually took place as part of the Topical Fat Reduction Study. This trial appears to be the very same trial previously reported in the Regional Fat Loss Study. The Topical Fat Reduction Study apparently re-reported these results.

19. [10] Admit that the fourth clinical trial in the Topical Fat Reduction Study was double blinded

Response: Complaint Counsel object to Respondent’s request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel admits that the fourth clinical trial in the Topical Fat Reduction Study, the first new trial reported in that Study, was reportedly double blinded.

20. [10] Admit that the fourth clinical trial in the Topical Fat Reduction Study was . . . counter balanced

Response: Complaint Counsel object to Respondent’s request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel admits that the fourth clinical trial in the Topical Fat Reduction Study, the first new trial reported in that Study, was reportedly “counterbalanced so that 50% of the subjects had active ointment to the right thigh and 50% to the left.”

21. [10] Admit that the fourth clinical trial in the Topical Fat Reduction Study was . . . a clinical study.

Response: Complaint Counsel object to Respondent’s request for admissions to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, Complaint Counsel admits that the fourth clinical trial in the Topical Fat Reduction Study was reportedly a clinical study.

22. [11] Admit the subjects in the fourth clinical trial in the Topical Fat Reduction Study lost more girth in the thigh treated with aminophylline than the control thigh.

Response: Admitted to the extent that, on average, the subjects who completed the fourth clinical trial (*i.e.*, the first new trial) in the Topical Fat Reduction Study reportedly lost more girth in circumference in the thigh treated with aminophylline (0.77 ± 0.66 cm for the lower measurement, and 0.78 ± 0.89 cm for the upper measurement) than the control thigh. Denied to the extent that the requested admission implies that all subjects experienced the same results; the requested admission fails to acknowledge that the Study reported mean results for the subjects. Denied to the extent that the requested admission implies that all subjects completed this study, as the requested admission fails to distinguish between persons who reportedly completed the trial and those who did not (and 7 of the 30 initial subjects reportedly dropped out). Denied to the extent that the requested admission may imply that the subjects were not placed on a diet (they were reportedly placed on a 900-1,100 Kcal/day diet).

23. [12] Admit that the average loss of girth in the fourth clinical trial in the Topical Fat Reduction Study would be visible to the naked eye.

Response: Complaint Counsel object to this request as vague and ambiguous. The requested admission does not permit a proper or reasonable response. Complaint Counsel further object to this request as speculative. Complaint Counsel object to this request to the extent that it fails to relate to facts that may be personally ascertained by Complaint Counsel. Subject to and without waiving these objections, the request for admission is denied to the extent that it implies that the Topical Fat Reduction Study assessed whether the reported average loss of girth in circumference “would be visible to the naked eye.” The request for admission is further denied to the extent that the request admission implies that the “fourth clinical trial in the “Topical Fat Reduction Study” actually was the fourth trial that took place during that Study. This trial was the first new trial conducted during the Topical Fat Reduction Study. The Topical Fat Reduction Study apparently re-reported the results of three older studies before reporting new results.

24. [13] Admit that the weight of the subjects in the fourth clinical trial in the Topical Fat Reduction Study declined by an average of 3.3 kilograms.

Response: Admitted to the extent that the weight of the subjects who completed the fourth clinical trial (*i.e.*, the first new trial) in the Topical Fat Reduction Study reportedly declined by an average of 3.3 ± 2.2 kilograms. Denied to the extent that the requested admission implies that the five subjects reportedly lost weight solely because they were treated with aminophylline. The subjects were also reportedly placed on a 900-1,100 Kcal/day diet. Denied to the extent that the requested admission implies that all subjects experienced such results, as the requested admission fails to distinguish between persons who completed the trial and those who did not (and 7 of the 30 initial subjects reportedly dropped out). Further denied to the extent that the requested admission implies that any of the subjects were men. Reportedly, none of the subjects were men.

25. [14] Admit that the fifth clinical trial in the Topical Fat Reduction Study tested the efficacy of a 2% concentration of aminophylline.

Response: Complaint Counsel object to this request as vague and ambiguous to the extent that the request does not state what “efficacy” the trial tested. Subject to and without waiving this objection, the requested admission is admitted to the extent that 11 of the 12 subjects in this trial used a 2% concentration of aminophylline in a cream base. Denied to the extent that 1 subject in this trial was tested with a 0.5% concentration of aminophylline in a cream base. Further denied to the extent that the requested admission implies that any of the challenged products contained a 2% concentration of aminophylline, or a cream base.

26. [15] Admit that the subjects in the fifth clinical trial in the Topical Fat Reduction Study were placed on no specific diet.

Response: Admitted to the extent that the Topical Fat Reduction Study reported that “no specific diet was recommended” for the subjects in “study 5” (i.e., the second new study reported in the Topical Fat Reduction Study). Denied to the extent that any other facts are suggested.

27. [16] Admit that the fifth clinical trial in the Topical Fat Reduction Study was double blinded.

Response: Complaint Counsel object to Respondent’s request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, it is admitted that “study 5” (i.e., the second new study reported in the Topical Fat Reduction Study) was reportedly double blinded.

28. [16] Admit that the fifth clinical trial in the Topical Fat Reduction Study was . . . conducted in a counter-balanced fashion.

Response: Complaint Counsel object to Respondent’s request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Subject to and without waiving this objection, it is admitted that the fifth clinical trial in the Topical Fat Reduction Study was reportedly conducted in a counter-balanced fashion.

29. [17] Admit that 10 of the 11 subjects who completed the fifth clinical trial in the Topical Fat Reduction Study lost more girth on the thigh treated with aminophylline than on the controlled thigh.

Response: Admitted that 10 of the 11 subjects who completed the “fifth study” in the Topical Fat Reduction Study (i.e., the second new study not previously reported in the Regional Fat Loss Study) reportedly lost more girth in circumference on the thigh treated with aminophylline (1.21 ± 0.31 cm) than on the controlled thigh.

30. [18] Admit that the average loss of girth reported in the fifth clinical trial in the Topical

Fat Reduction Study would be visible to the naked eye.

Response: Complaint Counsel object to this request as vague and ambiguous. The requested admission does not permit a proper or reasonable response. Complaint Counsel further object to this request as speculative. Complaint Counsel also object to this request to the extent that it fails to relate to facts that may be personally ascertained by Complaint Counsel. Subject to and without waiving these objections, the request for admission is denied to the extent that it implies that the Topical Fat Reduction Study assessed whether the reported average loss of girth in circumference "would be visible to the naked eye." The request for admission is further denied to the extent that the request admission implies that the "fifth clinical trial in the "Topical Fat Reduction Study" actually was the fifth trial that took place during that Study. This trial was only the second trial conducted during the Topical Fat Reduction Study. The Topical Fat Reduction Study apparently re-reported the results of three older studies (studies one, two, and three) before reporting the results of three additional studies.

31. [19] Admit that the fifth clinical trial in the Topical Fat Reduction Study was a "clinical study" or "clinical trial."

Response: Complaint Counsel admits that "study 5" in the Topical Fat Reduction Study was reportedly a "clinical study" or "clinical trial." The request for admission is further denied to the extent that the request admission implies that the "fifth clinical trial in the "Topical Fat Reduction Study" actually was the fifth trial that took place during that Study. This trial was only the second trial conducted during the Topical Fat Reduction Study. The Topical Fat Reduction Study apparently re-reported the results of three older studies (studies one, two, and three) before reporting the results of three additional studies.

32. [20] Admit that the subjects in the sixth clinical trial in the Topical Fat Reduction Study were treated with 0.5% aminophylline.

Response: Admitted that the subjects in "study 6" were reportedly treated with a 0.5% aminophylline cream. Denied to the extent that the requested admission implies that any of the challenged products contained a 0.5% concentration of aminophylline, or a cream base. Further denied to the extent that any other facts are suggested. The request for admission is further denied to the extent that the request admission implies that the "sixth clinical trial in the "Topical Fat Reduction Study" actually was the sixth trial that took place during that Study. This trial was only the third trial conducted during the Topical Fat Reduction Study. The Topical Fat Reduction Study apparently re-reported the results of three older studies (studies one, two, and three) before reporting the results of three additional studies.

33. [21] Admit that the sixth clinical trial in the Topical Fat Reduction Study included six women who had one thigh treated with aminophylline and the other thigh treated with a control in a double-blind fashion.

Response: Admitted to the extent that the Topical Fat Reduction Study represents that “study 6” reportedly “used the same methodology as Study 5,” which was reportedly double-blinded. The Topical Fat Reduction Study does not appear to state that study 6 was double-blinded. The request for admission is further denied to the extent that the request admission implies that the “sixth clinical trial in the “Topical Fat Reduction Study” actually was the sixth trial that took place during that Study. This trial was only the third trial conducted during the Topical Fat Reduction Study. The Topical Fat Reduction Study apparently re-reported the results of three older studies (studies one, two, and three) before reporting the results of three additional studies.

34. [22] Admit that the Topical Fat Reduction Study represents that the sixth clinical trial was a "clinical trial."

Response: Admitted. The Topical Fat Reduction Study also describes this trial as a “study.” The request for admission is further denied to the extent that the request admission implies that the “sixth clinical trial in the “Topical Fat Reduction Study” actually was the sixth trial that took place during that Study. This trial was only the third trial conducted during the Topical Fat Reduction Study. The Topical Fat Reduction Study apparently re-reported the results of three older studies (studies one, two, and three) before reporting the results of three additional studies.

35. [23] Admit that in the sixth clinical trial in the Topical Fat Reduction Study all 12 subjects lost more girth on the treated thigh than on the control thigh at the end of the five week study.

Response: Admitted to the extent that “study 6,” also described as a “clinical trial” in the Topical Fat Reduction Study, reported that all 12 subjects lost more girth in circumference on the treated thigh (3.08 ± 0.27 cm) than on the control thigh “at 5 weeks of treatment.” Complaint Counsel are without sufficient information to admit that the study was a “five week study.” The Topical Fat Reduction Study reported that this study employed the same methodology as the fifth study, and the fifth study was six weeks in duration. The request for admission is further denied to the extent that the request admission implies that the “sixth clinical trial in the “Topical Fat Reduction Study” actually was the sixth trial that took place during that Study. This trial was only the third trial conducted during the Topical Fat Reduction Study. The Topical Fat Reduction Study apparently re-reported the results of three older studies (studies one, two, and three) before reporting the results of three additional studies.

36. [24] Admit that the average loss of girth reported in the sixth clinical trial in the Topical Fat Reduction Study would be visible to the naked eye.

Response: Complaint Counsel object to this request as vague and ambiguous. The requested admission does not permit a proper or reasonable response. Complaint Counsel further object to this request as speculative. Complaint Counsel object to this request to the extent that it

fails to relate to facts that may be personally ascertained by Complaint Counsel. Subject to and without waiving these objections, the request for admission is denied to the extent that it implies that the Topical Fat Reduction Study assessed whether the reported average loss of girth in circumference "would be visible to the naked eye." The request for admission is further denied to the extent that the request admission implies that the "sixth clinical trial in the "Topical Fat Reduction Study" actually was the sixth trial that took place during that Study. This trial was only the third trial conducted during the Topical Fat Reduction Study. The Topical Fat Reduction Study apparently re-reported the results of three older studies (studies one, two, and three) before reporting the results of three additional studies.

37. [25] Admit that, in the concluding statement in the Topical Fat Reduction study, the authors reported "now there is an effective method to achieve local fat reduction topically."

Response: Admitted that, in the concluding statement in the Topical Fat Reduction study, the authors asserted that "now there is an effective method to achieve local fat reduction topically by manipulating the lipolytic mechanism and obviating the need for more risky surgical intervention." Denied to the extent that the requested admission implies that this statement is accurate or reliable. Denied to the extent that the requested admission implies that the Regional Fat Loss Study related to *gels* such as Dermalin-APg, Cutting Gel, or Tummy Flattening Gel, rather than the topical *creams* reportedly studied in the Topical Fat Reduction study. Further denied to the extent that the requested admission implies that any of the challenged products contained the same concentrations of aminophylline reportedly used in the Topical Fat Reduction Study. Further denied to the extent that the requested admission implies that some subjects were not reportedly placed on diets and encouraged to exercise during trials. Further denied to the extent that the requested admission implies any other facts not stated.

38. [26] Admit that the authors of the Regional Fat Loss Study were medical doctors.

Response: Admitted.

39. [27] Admit that all the trials in the Regional Fat Loss Study involved women subjects who were more than 20% above their desirable body weight.

Response: Admitted that the study reported that all the studies in the Regional Fat Loss Study involved women subjects who were more than 20% above their "desirable" body weight.

40. [28] Admit that all the trials in the Regional Fat Loss Study employed a double-blind design.

Response: Admitted that the Regional Fat Loss Study reported that all the trials in the Regional Fat Loss Study employed a "double-blind design." Denied to the extent that the Topical Fat Reduction Study reports that study 1 in the Regional Fat Loss Study was "single-blinded."

41. [29] Admit that all the trials in the Regional Fat Loss Study were clinical trials.

Response: Admitted that all the trials in the Regional Fat Loss Study were reportedly clinical trials.

42. [30] Admit that in one of the trials in the Regional Fat Loss Study, aminophylline was applied to human subjects.

Response: Admitted to the extent that the Regional Fat Loss Study represented that a cream containing colforsin (forskolin), aminophylline, and yohimbine was applied to 5 human subjects, and an aminophylline cream was applied to 6 human subjects. Denied to the extent that the requested admission implies that this was the only measure applied to human subjects. The subjects were also reportedly placed on either a 600 Kcal/day diet or a 800 Kcal/day diet and encouraged to engage in a walking program during the trial. Further denied to the extent that the requested admission suggests any other facts.

43. [31] Admit that the Regional Fat Loss Study represented that all subjects who completed four weeks of treatment with aminophylline lost weight.

Response: Admitted in part and denied in part. Admitted that the Regional Fat Loss Study represented that all five subjects who completed four weeks of treatment with aminophylline alone lost weight. Denied to the extent that the Regional Fat Loss Study represented that not all subjects who completed four weeks of treatment with a cream containing aminophylline, colforsin (forskolin), and yohimbine lost weight. Further denied to the extent that the requested admission implies that the subjects reportedly lost weight solely because they were treated with aminophylline. The subjects were also reportedly placed on either a 600 Kcal/day diet or a 800 Kcal/day diet and encouraged to engage in a walking program during the trial.

44. [32] Admit that the Regional Fat Loss Study represented that all five subjects who completed the four weeks of treatment with aminophylline lost a mean of 1.5 centimeters more girth in a thigh treated with aminophylline as compared to the subject's control thigh.

Response: Admitted that the Regional Fat Loss Study represented that all five subjects who completed the four weeks of treatment with aminophylline lost a mean of 1.5 ± 0.77 centimeters more girth in circumference in a thigh treated with aminophylline as compared to the subject's control thigh. Denied to the extent that the requested admission implies that the subjects reportedly lost girth in circumference solely because they were treated with aminophylline. The subjects were also reportedly placed on either a 600 Kcal/day diet or a 800 Kcal/day diet and encouraged to engage in a walking program during the trial.

45. [33] Admit that the Regional Fat Loss Study concluded that all the clinical studies

described therein, including the study involving aminophylline, demonstrate that local fat can be reduced with topical treatments both safely and effectively.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding” to the extent that it seeks an admission related to the safety of aminophylline. Subject to and without waiving this objection, the requested admission is admitted in part and denied in part. Admitted that the Regional Fat Loss Study stated that the studies described therein, including a study involving aminophylline, demonstrate that local fat can be reduced with “a cream” both safely and effectively. Denied to the extent that the requested admission implies that this statement is accurate or reliable. Denied to the extent that the requested admission implies that no side effects were reported in a study involving aminophylline (pruritic rash was reported). Further denied to the extent that the requested admission implies that the Regional Fat Loss Study findings related to topical *gels* such as Dermalin-APg, Cutting Gel, or Tummy Flattening Gel, rather than the topical *creams* actually studied in the Regional Fat Loss Study.

46. [34] Admit that the the Regional Fat Loss Study represented that thigh fat is more difficult to mobilize than abdominal fat.

Response: Admitted in part and denied in part. Admitted that the Regional Fat Loss Study stated that “[i]t has been generally believed for some time that thigh fat in women is hard to mobilize.” Admitted that the Regional Fat Loss Study stated that “[i]n vitro work, however, has suggested that the adrenergic thresholds to lipolysis are indeed different in different sites, and that thigh fat is more difficult to mobilize than abdomen fat.” Denied to the extent that the Regional Fat Loss Study acknowledges that “[o]thers, however, have been reluctant to accept this concept, believing that all fat cells are metabolically the same.” Denied to the extent that the requested admission implies that the Regional Fat Loss Study actually studied whether thigh fat is more difficult to mobilize than abdominal fat. The requested admission is denied to the extent that it suggests any other facts.

47. [35] Admit that the First Fiber Study was an eight-week, double-blind clinical study.

Response: Admitted that the First Fiber Study was reportedly an eight-week, double-blind clinical study.

48. [36] Admit that the First Fiber Study's objective was to determine the effect of glucomannan as a weight reduction aid in obese patients.

Response: Admitted that one of the First Fiber Study's reported objectives was to determine the effect of glucomannan as a weight reduction aid in obese patients. The requested admission is denied to the extent that it suggests that this was the sole objective of the First Fiber Study. The requested admission is further denied to the extent that it suggests any other facts.

49. [37] Admit that the First Fiber Study involved 20 obese subjects.

Response: Admitted that the trial reportedly involved 20 obese women. Denied to the extent that the requested admission suggests that any of the subjects were children. None of the subjects were children, according to the First Fiber Study.

50. [38] Admit that the subjects in the First Fiber Study lost an average of 5.5 lbs. at the end of eight weeks.

Response: Admitted that 10 subjects reportedly lost an average of 5.5 pounds at the end of eight weeks. Denied to the extent that the requested admission suggests any other facts.

51. [39] Admit that the Second Fiber Study was a clinical study involving children.

Response: Admitted that the Second Fiber Study was reportedly a clinical study involving children.

52. [40] Admit that the Second Fiber Study reported that the 23 children who had regularly taken the P. Rivieri capsules showed a drop in "excess body weight" from 51 % to 41 %.

Response: Admitted that the study reported that 23 children completed the project. Admitted that the study employed the term "excess body weight," an intangible measure of adiposity. Admitted that the study reported a ten percent change in this measure from 51% to 41%. Denied to the extent that the requested admission suggests that only 23 children regularly took the P. Rivieri capsules during the course of the study. 5 children reportedly stopped taking the capsules because they complained of abdominal pain or because they had not noticed any reduction in appetite. 9 other children reportedly dropped out of the study as well. Further denied to the extent that the requested admission implies that the subjects reportedly showed a drop in "excess body weight" solely because they took P. Rivieri capsules. The subjects were also reportedly advised to exercise and to follow a normocaloric diet during the trial.

53. [41] Admit that the Ephedrine Study was a double-blind clinical study.

Response: Complaint Counsel admit that the Ephedrine Study reports that it was a double-blind clinical study.

54. [42] Admit that the subjects in the Ephedrine Study lost an average of 8.3 kilograms.

Response:

Complaint Counsel admit the requested admission to the extent that 38 subjects who completed the ephedrine/caffeine portion of the study reportedly lost an average of 8.3 ± 5.2 kg ($P=0.12$). Complaint Counsel deny the requested admission to the extent that the requested admission fails to distinguish between subjects in the Ephedrine Study who received

dexfenfluramine versus ephedrine. Complaint Counsel further deny the requested admission to the extent that the requested admission fails to distinguish between persons who reportedly completed the study and the 20% of subjects who reportedly dropped out. The requested admission is also denied to the extent that it may imply that the subjects did not receive dietary instruction and encouragement to exercise as part of the study. The Ephedrine Study reports that the subjects received dietary instruction and encouragement to exercise.

55. [43] Admit that one subgroup of subjects in the Ephedrine Study consist[ed] of significantly obese subjects

Response: Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel object to this request for admission as vague and ambiguous. Subject to and without waiving these objections, Complaint Counsel admit that two subgroups of subjects in the Ephedrine Study reportedly consisted of subjects who were composed of subjects with BMI ≥ 30 kg/m². The requested admission is denied to the extent that any other facts are suggested.

56. [43] Admit that one subgroup of subjects in the Ephedrine Study . . . lost an average of 9 kilograms.

Response: Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel further object to the requested admission to the extent that it fails to distinguish between persons who reportedly completed the study and subjects who reportedly dropped out. Complaint Counsel are without sufficient information to admit or deny whether subjects who reportedly dropped out lost the weight claimed. Subject to and without waiving these objections, it is admitted that one subgroup of subjects in the Ephedrine Study reportedly lost an average of 9 kilograms. The requested admission is denied to the extent that it may imply that the subjects did not receive dietary instruction and encouragement to exercise as part of the study. The Ephedrine Study reports that the subjects received dietary instruction and encouragement to exercise.

57. [44] Admit that in the context of substantiation claims in cases involving nutraceutical weight loss products, the FTC has not published or otherwise publicly identified any specific, objective threshold level of science against which the reasonableness of one's reliance may be measured.

Response: Complaint Counsel object to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Complaint Counsel further object to this request as duplicative of previous discovery requests

that Respondents have served. Additionally, Complaint Counsel object to this request to the extent that Respondent has failed to define the term “nutraceutical,” particularly as we have previously stated an objection with respect to the ambiguity of this undefined term. Subject to and without waiving these objections, Complaint Counsel denies this request to the extent that the Commission’s published and publicly available caselaw address the evidence that constitutes competent and reliable scientific evidence on a case-specific basis, see, for example, *In re Schering Corp.*, 118 F.T.C. 1046 (1991); *Thompson Medical Co.*, 98 F.T.C. 136 (1981); *In re Bristol-Myers*, 102 F.T.C. 21 (1983), as well as to the extent that the FTC’s publication, “Dietary Supplements: An Advertising Guide for Industry” specifically addresses this issue.

58. [45] With respect to the repeated assertions by the FTC in the instant Complaint that Respondents “did not possess and rely upon a reasonable basis that substantiated the representations,” admit that the FTC has not published or otherwise publicly identified any guidelines or standards that describe, define or even discuss the objective threshold science necessary for one’s reliance to be “reasonable” in cases involving nutraceutical weight loss products.

Response: Complaint Counsel object to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” RULE 3.32. Complaint Counsel also object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical,” and employs the undefined term “objective threshold science.” We further object to this request as duplicative of previous discovery requests that Respondents have served. Subject to and without waiving these objections, Complaint Counsel denies this request to the extent that the Commission’s published and publicly available caselaw address the evidence that constitutes competent and reliable scientific evidence on a case-specific basis, see, for example, *In re Schering Corp.*, 118 F.T.C. 1046 (1991); *Thompson Medical Co.*, 98 F.T.C. 136 (1981); *In re Bristol-Myers*, 102 F.T.C. 21 (1983), as well as to the extent that the FTC’s publication, “Dietary Supplements: An Advertising Guide for Industry” specifically addresses this issue.

59. [46] Admit that the FTC has not adopted, published or otherwise publicly identified any objective standard to which a developer, manufacturer, marketer or seller contemplating substantiation claims in the context of nutraceutical weight loss products can look for guidance concerning the threshold level of science that must be satisfied in order for its reliance thereon to be “reasonable,” as that terms is used by the FTC in its Complaint in this case.

Response: Complaint Counsel object to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” RULE 3.32. Complaint Counsel also object to this request as vague to the extent that Respondent has failed to define the term “nutraceutical,” and employs the undefined term “threshold level of science.” We further object to this request as duplicative of previous discovery requests that Respondents have served, including previous requests in Respondent Gay’s *Requests for Admissions*. Subject to and without waiving these objections, Complaint Counsel denies this request to the extent that

the Commission's published and publicly available caselaw address the evidence that constitutes competent and reliable scientific evidence on a case-specific basis, see, for example, *In re Schering Corp.*, 118 F.T.C. 1046 (1991); *Thompson Medical Co.*, 98 F.T.C. 136 (1981); *In re Bristol-Myers*, 102 F.T.C. 21 (1983), as well as to the extent that the FTC's publication, "Dietary Supplements: An Advertising Guide for Industry" specifically addresses this issue.

60. [47] Admit that there exists no objective FTC standard to which a developer, manufacturer, marketer or seller contemplating substantiation claims in the context of nutraceutical weight loss products can look for guidance concerning the threshold level of science that must be satisfied in order for its reliance thereon to be "reasonable," as that term is used by the FTC in its Complaint in this case.

Response: Complaint Counsel object to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Complaint Counsel also object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical," and employs the undefined term "threshold level of science." We further object to this request as duplicative of previous discovery requests that Respondents have served, including previous requests in Respondent Gay's *Requests for Admissions*. Subject to and without waiving these objections, Complaint Counsel denies this request to the extent that the Commission's published and publicly available caselaw address the evidence that constitutes competent and reliable scientific evidence on a case-specific basis, see, for example, *In re Schering Corp.*, 118 F.T.C. 1046 (1991); *Thompson Medical Co.*, 98 F.T.C. 136 (1981); *In re Bristol-Myers*, 102 F.T.C. 21 (1983), as well as to the extent that the FTC's publication, "Dietary Supplements: An Advertising Guide for Industry" specifically addresses this issue.

61. [48] Admit that there exists no objective FTC standard against which a judge and/or jury may measure whether a developer, manufacturer, marketer or seller that has made substantiation claims in the context of nutraceutical weight loss products satisfied the threshold level of science necessary for its reliance thereon to be "reasonable," as that term is used by the FTC in its Complaint in this case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Complaint Counsel also object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical," and employs the undefined term "threshold level of science." We further object to this request as duplicative of previous discovery requests that Respondents have served, including previous requests in Respondent Gay's *Requests for Admissions*.

62. [49] Admit that the amount of substantiation for the Advertisements equals or exceeds the amount of substantiation deemed adequate in the Garvey case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Complaint Counsel also object to the vagueness of the phrase "amount of substantiation," as it is unclear whether this term refers to the quality rather than the quantity of substantiation. Complaint Counsel also object to Respondent's request to the extent that it relates to other Commission actions. *See In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

63. [50] Admit that Garvey relied partly upon booklets ("Booklets") produced by the manufacturer of "Fat Trapper" and "Exercise in A Bottle" to substantiate the representations he made in the advertisements that were the subject of the Garvey case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Complaint Counsel also object to Respondent's request to the extent that it demands discovery regarding other Commission actions. *See In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

64. [51] Admit that the Garvey case noted that the booklet for "Exercise in A Bottle" pointed to findings that the active ingredient (pyruvate) of "Exercise in A Bottle" reduced fat accumulation in rats and pigs.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Complaint Counsel also object to Respondent's request to the extent that it demands discovery regarding other Commission actions. *See In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

65. [52] Admit that Garvey case noted that the booklet for "Fat Trapper" did not even mention the active ingredient of Fat Trapper (chitosan).

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*.

Complaint Counsel further object to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” RULE 3.32. Complaint Counsel also object to Respondent’s request to the extent that it demands discovery regarding other Commission actions. See *In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

66. [53] Admit that a person's reliance on the Topical Fat Reduction Study . . . as substantiation for the Advertisements would be at least as reasonable as Gamey's reliance on the Booklets as substantiation for the advertisements that were the subject of the Garvey case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” RULE 3.32. Additionally, Complaint Counsel object to Respondent’s request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel also object to Respondent’s request to the extent that it relates to other Commission actions. See *In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

67. [53] Admit that a person's reliance on the . . . Regional Fat Loss Study . . . as substantiation for the Advertisements would be at least as reasonable as Garvey's reliance on the Booklets as substantiation for the advertisements that were the subject of the Garvey case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” RULE 3.32. Additionally, Complaint Counsel object to Respondent’s request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel also object to Respondent’s request to the extent that it relates to other Commission actions. See *In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

68. [53] Admit that a person's reliance on the . . . GREENWAY/BRAY/HEBER PUBLISHED STUDIES . . . as substantiation for the Advertisements would be at least as

reasonable as Garvey's reliance on the Booklets as substantiation for the advertisements that were the subject of the Garvey case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Additionally, Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel also object to Respondent's request to the extent that it relates to other Commission actions. See *In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

69. [53] Admit that a person's reliance on the . . . First Fiber Study . . . as substantiation for the Advertisements would be at least as reasonable as Garvey's reliance on the Booklets as substantiation for the advertisements that were the subject of the Garvey case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Additionally, Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel also object to Respondent's request to the extent that it relates to other Commission actions. See *In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

70. [53] Admit that a person's reliance on the . . . Second Fiber Study . . . as substantiation for the Advertisements would be at least as reasonable as Garvey's reliance on the Booklets as substantiation for the advertisements that were the subject of the Garvey case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Additionally, Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without

the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel also object to Respondent's request to the extent that it relates to other Commission actions. See *In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

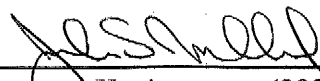
71. [53] Admit that a person's reliance on the . . . Ephedrine Study . . . as substantiation for the Advertisements would be at least as reasonable as Garvey's reliance on the Booklets as substantiation for the advertisements that were the subject of the Garvey case.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." RULE 3.32. Additionally, Complaint Counsel object to Respondent's request for admission to the extent that Respondent has improperly posed multiple requests for admissions within a single enumerated request, without the use of discrete subparts, thereby understating the total number of requests for admission actually made. Complaint Counsel also object to Respondent's request to the extent that it relates to other Commission actions. See *In re Sterling Drug, Inc.*, Docket No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976); *In re Kroger*, Docket No. 9102, 1977 FTC LEXIS 55 (Oct. 27, 1977); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976).

72. [54] Admit that if it desired to do so, the FTC is capable of adopting and publishing, through its rule making, policy decisions or otherwise, objective standard concerning the level, degree, quality or quantity of proof necessary for a test, analysis, research, study or other evidence to qualify as "competent and reliable scientific evidence," as that term is used by the FTC in the instant Complaint.

Response: Complaint Counsel object to this request for admission as Respondent Gay has exceeded the numeric limit on requests for admission established in the *Scheduling Order*. Complaint Counsel further object to this request as vague and ambiguous. The requested admission does not permit a proper or reasonable response. Complaint Counsel further object to this request as speculative. Additionally, Complaint Counsel object to the extent that this request fails to distinguish between the "Federal Trade Commission" and Complaint Counsel and thus seeks information in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information in contravention of RULE 3.35(a)(1) instead information in the possession, custody or control of Complaint Counsel. Lastly, Complaint Counsel object to this request as duplicative of many other discovery requests served by Respondents in this action.

Dated: December 1, 2004



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Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2004, I caused *Complaint Counsel's Response to Respondent Dennis Gay's First Set of Requests for Admissions* to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) 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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Respondent Pro Se



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