2011

Basic Research, LLC v. Admiral Insurance Company : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

BASIC RESEARCH, LLC, DYNAKOR PHARMACAL, LLC, THE CARTER-REED COMPANY, LLC, ZOLLER LABORATORIES, LLC, DENNIS GAY, DANIEL B. MOWREY and MITCHELL K. FRIEDLANDER, Plaintiffs/Appellants, v. ADMIRAL INSURANCE COMPANY, a Delaware corporation, Defendant/Appellee.	Case No. 20110556-SC Third District No. 110901154

OPENING BRIEF OF APPELLANTS BASIC RESEARCH, LLC, DYNAKOR PHARMACAL, LLC, THE CARTER-REED COMPANY, LLC, ZOLLER LABORATORIES, LLC, DENNIS GAY, DANIEL B. MOWREY AND MITCHELL K. FRIEDLANDER

On appeal from the final judgment of the Third Judicial District Court for Salt Lake County, Honorable L.A. Dever, District Judge

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JURISDICTIONAL STATEMENT

Jurisdiction of this Court is conferred by UTAH CODE ANN. § 78-2-2(3)(j).

ISSUES FOR REVIEW

Did the trial court err in granting summary judgment in favor of Admiral Insurance Company ("Admiral"), and against Basic Research, LLC, Dynakor Pharmacal, LLC, The Carter-Reed Company, LLC, Zoller Laboratories, LLC, Dennis Gay, Daniel B. Mowrey and Mitchell K. Friedlander (collectively, "Basic Research") on the following grounds:

1. Did the district court err by ignoring the broad rules of construction for insurance policies and, instead, interpreting the covered offense of "use of another's advertising idea" narrowly to encompass only claims involving misappropriation or the wrongful taking of another's advertising idea?

2. Did the district court err when it concluded that the conduct of which the plaintiffs in the underlying consumer lawsuits complain(ed) with respect to Basic Research did not implicate a misappropriation or wrongful taking so that: (a) those plaintiffs' claims do not potentially fall within one of the predicate offenses enumerated in the Admiral policies, triggering Admiral's duty to defend Basic Research?

3. Did the district court err when it concluded there must be a causal connection between the underlying consumer plaintiffs' injuries and Basic Research's advertising activities when the definition of "advertising injury" only requires "injury arising out of . . . use of another's advertising idea in your 'advertisement,'" so that misuse of another's advertising idea, as alleged here, potentially falls within the policy's

coverage?

4. Did the district court err when it concluded that the policy term "of another" could not be implicated where the conceded "advertising ideas" – "eat all you want and still lose weight" – was on the FTC's "Red Flag" list and was trademarked by other entities before Basic Research "used" this advertising idea?

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS

This is a coverage dispute about an Admiral policy provision insuring against third-party claims for "personal and advertising injury." In 2007-2009, consumers sued Basic Research in three separate class action lawsuits in Utah and California, alleging that Basic Research had falsely advertised and otherwise violated various consumer fraud statutes with respect to a diet product, Akävar 20/50." Basic Research tendered the claims to Admiral, seeking coverage under the "personal and advertising injury" provisions of two commercial general liability policies issued by Admiral to Basic Research for the relevant time period. Admiral initially agreed to defend Basic Research in one of those actions, but not in the other two. But Admiral ultimately failed to defend Basic Research in all three of them, leaving Basic Research to pay more than $4 million dollars in reasonable and necessary defense fees and expenses.

Basic Research initially sued Admiral for declaratory relief in the United States District Court, District of Utah. After filing summary judgment cross-motions, by agreement of the parties Basic Research dismissed the federal action and on January 14, 2011 re-filed it in the Utah District Court, Third Judicial District for Salt Lake County.

The parties them re-filed their summary judgment cross-motions with the state district court.

Basic Research contended there was a potential for coverage because the underlying Akävar lawsuits' consumer claimants alleged facts implicating Admiral's "personal and advertising injury" policy offense of "injury arising out of . . . use of another's advertising idea in [Basic Research's] advertisement" that had damaged the claimants. Thus, Admiral owed a duty of defense. Admiral contended that the underlying claims did not trigger a defense and that, even if it did, certain policy exclusions relieved Admiral of the defense duty.

Oral argument was held on March 24, 2011 before the Honorable L.A. Devers. On May 24, 2011, the district court denied Basic Research's motion for summary judgment and granted Admiral's motion. The court narrowly interpreted the policy offense — "use of another's advertising idea in your advertisement" – as if it were limited to the meaning of an earlier "misappropriation of advertising ideas" policy offense. Opinion, p. 14. Based on that understanding the district court held that the underlying plaintiffs had not alleged a "misappropriation" claim, so that Admiral had no duty to defend Basic Research. Opinion, pp. 14-15. Basic Research timely appealed the district court's ruling by filing a notice of appeal on June 21, 2011.

II. STATEMENT OF FACTS

A. Admiral's Insurance Policies

1. Two Consecutive Policy Periods Are Implicated

Admiral issued to Basic Research, LLC, as named insured, identical Commercial

General Liability insurance policies with successive terms from August 20, 2007 through August 20, 2008, then August 20, 2008 through August 20, 2009. [3rd District Court Record ("R") 29-30, 88-89] They provided continuous coverage with "general aggregate" and "personal and advertising injury" limits of $5,000,000 each. *Id.*

2. Appellants Are All Insureds

The policies provide coverage for Basic Research. [R 29, 88] A named insured endorsement to each policy includes Covarix, LLC and its subsidiaries as named insureds under the policies. [R 29-30, 54, 88-89, 124] Dynakor, Carter-Reed and Zoller Labs are all subsidiaries of Covarix, LLC. [R 670] Covarix, LLC does business as Basic Research, LLC. [R 29, 88] The policies also cover "any other person or organization qualifying as a Named Insured under this policy." [R 33, 92] Such insured "persons or organizations" include: (1) "members" of limited liability companies like Basic Research, but only with respect to the conduct of your business;" (2) "managers" of any "insured "with respect to their duties as managers;" and (3) "employees" of "insureds for "acts within the scope of their employment by you or while performing duties related to the conduct of your business." [R 40-41, 100-101] "Employee" is policy-defined to include "leased worker" (defined in turn as a "person leased to [an insured] by a labor leasing firm . . . to perform duties related to the conduct of your business." [R 45, 46, 105, 106]

Under Admiral's policies, each Appellant is an "insured:" Gay as a Basic Research "manager," Mowrey and Friedlander as "leased workers" from non-party Bydex Management, LLC to Basic Research; and Dynakor, Carter-Reed and Zoller as Covarix, LLC subsidiaries. [R 669-670] The underlying lawsuits alleged that their

alleged conduct occurred within the individuals' managerial duties and employment and, as to all of them, within the scope of business. [R 630-31] Admiral has never disputed these appellants' status as insureds.

3. Policies' Relevant Coverage

The policies' "Insuring Agreement" requires Admiral to: "pay those sums that the insured becomes legally obligated to pay as "damages because of 'personal and advertising injury'" to which this insurance applies," and provides that Admiral has the "right and duty to defend the insured against any 'suit' seeking those damages." [R 37, 97] "Personal and advertising injury" is defined to include: "injury . . . arising out of one or more of the following offenses: . . . f. The use of another's advertising idea in your 'advertisement.'" "Advertisement" is defined:

> 1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
>
> a. Notices that are published include material placed on the Internet or on similar electronic means of communications; . . . [R 45, 105]

4. Policies' Relevant Exclusions

Admiral's policies exclude coverage for:

> a. Knowing Violation of Rights of Another "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".
>
> b. Material Published With Knowledge of Falsity

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

. . .

g. Quality Or Performance of Goods — Failure to Conform to Statements
"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement". [R 37-38, 97-98]

B. The Underlying Lawsuits

1. The *Miller* Suit

On November 9, 2007, Pamela Miller, Randy Howard and Donna Patterson filed a putative class action complaint against Basic Research, Dynakor, Gay, Mowrey and Friedlander, among others, in a lawsuit styled as *Pamela Miller, et al. v. Basic Research, LLC et al.*, United States District Court, District of Utah, Central Division, Case No. 2:07-CV-00871 ("the *Miller* suit"). On May 23, 2008, the *Miller* suit plaintiffs filed a First Amended Complaint, alleging that the insureds ("Basic Research") violated Utah state law by making misleading claims in its advertisements of Akävar 20/50, a diet supplement ("Akävar") "through the U.S. mail, published in national magazines, posted on the Internet, displayed in retail stores across the county ("point-of-purchase"), and broadcast on television. . . ." [R 822]

The *Miller* suit alleged that Basic Research made these claims to promote Akävar as a product that enabled weight loss without diet or exercise, and that others (noted by the FTC) have made similar claims for other allegedly "prototypical fraudulent weight-loss product[s]." [R 815] The Akävar advertisements were repeatedly alleged to include:

"Eat All You Want And Still Lose Weight" and "And We Couldn't Say It in Print If It Wasn't True." [R 804, 808, 826]

The *Miller* plaintiffs also alleged they purchased Akävar "based on this advertising" and "these representations."

> Based upon this advertising disseminated by Defendants, Ms. Miller purchased a supply of Akävar through Defendants' Internet website, www.Akävar.net. [R 803-804]
>
> Based upon these representations made as part of Defendants' in-store advertising materials, Plaintiff Howard purchased two bottles of Akävar at the Wal-Mart store ... [R 804]
>
> Based upon this advertising by Defendants, Ms. Patterson purchased a supply of Akävar from a General Nutrition Center store located in Arlington, Virginia ... [R 805]

The *Miller* plaintiffs also alleged they "purchased Akävar and have suffered injury as a result." [R 828] They did **not** allege that they "suffered injury" because the product did not work as advertised.

2. The *Tompkins* Suit

On December 6, 2007, Mary Tompkins filed a putative class action complaint against Basic Research, Dynakor, Gay, Mowrey and Friedlander and among others styled as *Mary Tompkins et al. v. Basic Research, LLC et al.*, Superior Court of California for the County of Sacramento, Case No. 34-2007-00882581 ("the *Tompkins* suit"), later removed to the United States District Court, Eastern District of California and then transferred to the United States District Court, District of Utah, Central Division, where it was consolidated with the *Miller* suit. [R 670] The *Miller* and *Tompkins* suits are being litigated under the *Miller* suit case name and number ("*Miller/Tompkins* suits"). [R 670]

The *Tompkins* suit alleges that Basic Research made misleading weight loss

claims in its advertisements as alleged in the *Miller* suit to promote sales of Akävar, including the use of the slogans "Eat All You Want And Still Lose Weight" and "And We Couldn't Say It in Print If It Wasn't True," that these misleading claims were made to promote Akävar as a product that enables one to lose weight without diet or exercise, and that such claims are a widespread problem as others have made similar claims to advertise weight loss products. [R 909-10, 911, 914-16, 924-25]

The *Tompkins* plaintiffs alleged they purchased Akävar based on the misleading claims made by Basic Research:

> Based on Defendants' advertising, Ms. Tompkins purchased a supply of Akävar through a California retailer. [R 911]

The *Tompkins* plaintiffs further allege that they "purchased Akävar and ha[ve] suffered injury as a result," [R 919], and that they "suffered, and will continue to suffer, harm and damages as a result of defendants' unlawful and wrongful conduct." [R 921] They did **not** allege that they "suffered injury" because the product did not work as advertised.

The *Miller* and *Tompkins* cases were subsequently consolidated in the federal District of Utah. [R 670] By order entered March 2, 2011,[1] the *Miller/Tompkins* district court certified the following nationwide class: "Persons who purchased Akävar after seeing or hearing the marketing slogan "Eat all you want and still lose weight" during the relevant damages period." The class is not restricted to persons who contended they lost money because Akävar did not work as advertised. Only purchase of the product after

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[1] *Miller v. Basic Research, LLC*, No. 2:07-CV-871 TS, 2011 WL 818150, at *2 (D. Utah March 2, 2011).

exposure to the advertising is required.[2]

3. The *Forlenza* Suit

On May 26, 2009, Nicole Forlenza and Shaiden Monroe filed a putative class action complaint against Basic Research, Dynakor, Carter-Reed, Gay, Mowrey and Friedlander, among others, in a lawsuit styled: *Nicole Forlenza and Shaiden Monroe et al. v. Dynakor Pharmacal, LLC et al.*, United States District Court, Central District of California, Case No. 2:09-CV-03730 ("the *Forlenza* suit"). [R 671] On June 11, 2009, the *Forlenza* suit plaintiffs filed a First Amended Complaint, adding Zoller Laboratories, LLC as a defendant. [R 671] Subsequent second, third and fourth amended complaints were filed. [R 671] The suit was eventually dismissed without a settlement. [R 671]

The *Forlenza* suit alleged Basic Research used the same advertising tagline — "Eat all you want and still lose weight. We couldn't say it in print if it wasn't true" – and that Akävar enables one to lose weight without diet or exercise. [R 932, 1010-1013] The *Forlenza* suit also alleged that others have made similar claims to advertise weight loss products or "miracle pills," as the FDA confirmed, and that "Akävar is just one of those 'miracle pills' . . . . Defendants attempt to sell Akävar by convincing consumers that they can avoid the only proven and safe weight-loss method recognized by the FDA." [R 936]

The *Forlenza* claimants further allege that they purchased Akävar because they

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[2]By Request for Judicial Notice, Basic Research called this Order to the district court's attention five days after oral argument on March 28, 2011. [R 1466-77] The district court neither ruled on the Request nor referred to the *Miller/Tompkins* class certification order in its Opinion.

believed and relied on the representations:

> Plaintiffs…purchased Akävar products for their own personal use. In so doing, Plaintiffs…believed and relied specifically on the representations contained in the marketing materials for the products, which they had viewed on television, on the Internet, and in the premises of the Retailer Defendants where they purchased the product… [R 1026-27, 1032-33, 1035-36]

The *Forlenza* claimants further allege that they sustained injury because they purchased the product in reliance on the representations, and that they sustained injury for reasons that included the advertisements' untruth:

> Plaintiff Forlenza has thus suffered injury and damage because she purchased a product based on false advertising and because the product has not worked as advertised. [R 1014-15]. . .

C. Additional Facts about Advertising Ideas in Akävar Advertisements

Before the suits, the slogans "Eat All You Want And Still Lose Weight" and "And We Couldn't Say It in Print If It Wasn't True" were registered trademarks of Western Holdings, LLC, a separate and distinct corporate entity from Basic Research which is not a party to this coverage suit. [R 1207-12]

Persons and entities other than Basic Research used an almost identical slogan to advertise weight loss products long before the facts pled in the *Miller*, *Tompkins* and *Forlenza* suits are alleged to have commenced. For example, in 2004, the Federal Trade Commission filed an action against Natural Products, LLC, All Natural 4 U, LLC, and Ana M. Solkamans for using the slogan "Eat All You Want and Still Lose Weight (Pill Does All the Work)" to advertise Bio Trim™, a weight loss product. *FTC v. Natural Products, LLC et al.* (C.D. Cal. Case No. SACV 04-1279), Complaint for Permanent Injunction and Other Equitable Relief (filed 11/3/2004), p. 5, ¶ 12(d). [R 1208, 1222]

The FTC also referred to this slogan in a press release on the above lawsuit. *See* FTC Stops Bogus Ads for "Bio Trim" and Other Weight-Loss Products (FTC Press Release November 7, 2005), ¶2. [R 1208, 1235-36] The FTC further identified this slogan as a "Red Flag Claim" on its Red Flag | Bogus Weight Loss Claims Internet microsite. [R 1208, 1238] Extrinsic evidence of these facts was before the district court below. [R 1207-1212]

D. Admiral's Acceptance, then Dishonor of its Defense Duties

1. *Miller/Tompkins* suit defense duties denied

Basic Research gave written notice of the *Miller/Tompkins* suit to Admiral as early as January 31, 2008. [R 671, 1094] Admiral denied a defense for the *Miller/Tompkins* suit on June 6, 2008. [R 671, 1098]

2. *Forlenza* suit defense duties accepted, then dishonored

Basic Research gave written notice of the *Forlenza* suit to Admiral on or about June 4, 2009 and, on or about July 15, 2009, supplemental written notice of the *Forlenza* suit to Admiral including a copy of its First Amended Complaint. [R 671, 672, 1144] By letters dated June 25, 2009 and July 6, 2009, Admiral acknowledged receipt and agreed to defend Basic Research in the *Forlenza* suit subject to a reservation of rights under the second Admiral policy. [R 671-72, 1127, 1135]

On November 19, 2009, Basic Research e-mailed Admiral to express concern over Admiral's ongoing failure to actually defend it or to communicate with Basic Research. [R 1191, 1195] Admiral apologized, stating invoices for the incurred defense costs were being reviewed by counsel. [R 1191, 1196] On December 8, 2009, Basic Research again

e-mailed Admiral to request that it pay defense expenses. [R 1191, 1199] Admiral confirmed that it had accepted the defense under a reservation of rights and was still having the invoices reviewed by counsel. [R 1191, 1200]

By letter dated January 11, 2010, Admiral suddenly advised Basic Research that it had appointed "an associated counsel" for Basic Research who would also serve as "panel counsel" for Admiral. [R 1191, 1203] However, the appointed counsel never participated in the *Forlenza* suit defense. [R 1192]

On April 7, 2010, Admiral filed a motion for judgment on the pleadings in the coverage action, arguing for the first time that it had no duty to defend the *Forlenza* suit. [R 640] Admiral never previously asserted that the *Forlenza* suit allegations do not establish a potential for coverage under the second Admiral policy.

SUMMARY OF ARGUMENT

Admiral owes a duty to defend Basic Research in the underlying consumer lawsuits. Admiral's policies provide coverage for "personal and advertising injury" implicated by claims for "damages because of ['injury arising out of] . . . use of another's advertising idea in [Basic Research] 'advertisement.'" An "advertisement" includes "notice published . . . to specific market segments about your goods, products or services for the purpose of attracting customers or supporters."

Contrary to the district court conclusion in its May 24, 2011 Ruling, while "use" may include "misappropriation" or "wrongful taking" it is not limited to those definitions. Utah courts have deemed "use" to have a much **broader** meaning. As rules of insurance policy construction in coverage disputes require courts to construe policy

terms liberally and in favor of the insured, it was error for the district court to adopt a narrow interpretation of the term "use" that includes only "misappropriation/wrongful taking." No policy exclusion relieves Admiral from its duty to defend Basic Research.

Basic Research respectfully requests this Court to reverse the district court's decision that Admiral has no duty to defend Basic Research in the *Miller*, *Tompkins* and *Forlenza* lawsuits, and to hold that Admiral must reimburse Basic Research for its defense fees and expenses to date with prejudgment interest thereon from the date of each invoice, and must pay the defense fees and costs going forward until each of those underlying consumer lawsuits has been fully and finally resolved.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

Basic Research moved for summary judgment declaring that Admiral, under the terms of the insurance policies it issued to Basic Research, owes a duty to defend Basic Research in the underlying consumer lawsuits. Without regard or deference to the district court's prior ruling, this Court reviews Basic Research's and Admiral's cross-motions *de novo*. *Peterson v. The Sunrider Corp.*, 2002 UT 43, ¶ 13, 48 P.3d 918; *see also Swan Creek Vill. Homeowners Ass'n v. Warne*, 2006 UT 22, ¶ 16, 134 P.3d 1122. Utah law applies.[3]

Summary judgment is appropriate when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *Id.* (*Peterson*, *Swan*

[3]The district court so concluded on the ground that pursuant to the forum selection clause contained within the Admiral policies, Admiral agreed to the jurisdiction of Utah courts and to the application of Utah law. Opinion, pp. 2-3.

Creek). As an insurer's duty to defend is a question of law, summary judgment is the proper means by which to resolve this issue. *Ohio Cas. Inc. Co. v. Cloud Nine, LLC*, 464 F. Supp. 2d 1161, 1165 (D. Utah 2006) (citing Utah law).

A duty to defend exists when facts give rise to a **potential of liability** under the insurance policy. *Deseret Fed. Sav. & Loan Ass'n v. U.S. Fid. & Guar. Co.*, 714 P.2d 1143, 1146 (Utah 1986).[4] If the facts render coverage uncertain, the insurer has a duty to defend until those uncertainties have been clarified to reveal conclusively that there is no coverage. *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 22, 140 P.3d 1210 (Utah 2007) (so noting); *Equine Assisted Growth and Learning Ass'n ("EAGALA") v. Carolina Cas. Ins. Co.*, 2011 UT 49, ¶8, ____ P.3d ____, 2011 WL 3652331, at *2 (Aug. 19, 2011) (same, citing *Benjamin*). Where there is any doubt, the default conclusion is that the insurer must defend. *Id.* ("When in doubt, defend.") (quoting *Appleman on Insurance Law and Practice* § 136.2[C] (2d ed. 2006)); *see also Cloud Nine*, 464 F. Supp. 2d at 1166 (same).

"An insurer denying a duty to defend must establish that the claims fall outside the coverage of the policy or the claims are exempted from coverage." *Simmons v. Farmers Ins. Group*, 877 P.2d 1255, 1258, n.3 (Utah App. 1994). Policy provisions purporting to limit or exclude coverage are "strictly construed" against the insurer. *U.S. Fid. & Guar.*

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[4] *See also, Harris v. Zurich-Holding Co. of Am.*, No. 2:05-CV-482 TC, 2006 WL 120258, at *2 (D. Utah Jan. 17, 2006) (unpublished), citing and quoting *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 861 P.2d 1153, 1161 (Cal. 1992) ("[I]t is the insurer's burden to establish that the suits filed against [the insured] fall outside of the policy's coverage . . . . '**[T]he insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot.**' " (emphasis added)).

Co. v. Sandt, 854 P.2d 519, 523 (Utah 1993).

To determine Admiral's defense duty the Court begins "by comparing the language of the insurance policy with the allegations in the complaint." *Fire Ins. Exch. v. Estate of Therkelsen*, 2001 UT 48, ¶ 21, 27 P.3d 555. But the coverage analysis does not end there. As held in *EAGALA*, *supra*, 2011 UT 49, ¶18 (following *Therkelsen*, *supra*) (emphasis added):

> If the language found within the collective 'eight corners' of these documents **clearly and unambiguously** indicates that a duty to defend does or does not exist, the analysis is complete. However, if coverage is premised on information not contained the complaint, [this Court] must continue [its] inquiry to examine that information.

Thus, the Court's review of the complaint and the policy "does not end [the Court's] inquiry." *Therkelsen*, 2001 UT 48, ¶ 21 ("While the analysis always begins with an examination of the policy language and the complaint, it ends there only if the policy terms when compared with the allegations **definitively** indicate that there is or is not a duty to defend." *EAGALA*, 2011 UT 49, ¶11 (emphasis added)). Extrinsic evidence may be necessary to make a final determination as to whether a duty to defend exists. *Therkelsen,* 2001 UT 48, ¶ 25; *EAGALA*, 2011 UT 49, ¶ 19 (because the complaint did not allege facts clarifying whether the underlying claim triggered a policy exclusion, "the court's examination must go on to develop the facts relevant to answer the inquiry" — *i.e.*, "extrinsic evidence may be considered to make this determination"). *See also*, *DISH Network Corp. v. Arch Specialty Ins. Co.*, ___ F.3d ___, 2011 WL 4908108, at *4 (10th Cir. (Colo.) 2011) (recognizing exception to Colorado's "eight corners" rule (like Utah's) to allow judicial consideration of an "indisputable fact that is not an element of either the

[underlying] cause of action or a defense in the underlying litigation" as well as the policy and underlying complaint because "notice pleading does not contemplate detail and specificity" and the underlying complaint may " 'lack detail necessary to conclusively establish the duty.' ") *Id.*

II. ADMIRAL'S COVERAGE IS OFFENSE-BASED AND MUST BE ANALYZED ACCORDINGLY

A. A Three-Part Test Applies To Evaluate Potential Coverage under Admiral's Policy Language

Admiral promised to defend Basic Research "against any 'suit' seeking ... damages" "because of 'personal and advertising injury' to which this insurance applies," including "injury ... arising out of [the offense of] 'use of another's advertising idea in your "advertisement."'" [R 47, 107] The elements required to establish potential coverage under Admiral's policy are:

(1) "Damages because of 'personal and advertising injury' to which this insurance applies."

(2) "Injury . . . arising out of . . . an offense . . . ;" and

(3) "Use of another's advertising idea in your 'advertisement,'" with "advertisement" policy-defined as a "notice . . . published to . . . specific market segments about your goods . . . for the purpose of attracting customers or supporters." The "use of another's advertising idea in your 'advertisement'" offense has three principal elements: (1) "advertising idea" . . . "use;" (2) "of another's," and (3) in your "advertisement." *Ohio Cas. Ins. Co. v. Albers Medical, Inc.*, No. 03-1037-CV-W-ODS, 2005 WL 2319820, at *4 (W.D. Mo. Sept. 22, 2005).

B. Facts Pled in the Underlying Complaints, Not the Labels of their Causes of Action, Determine Potential Coverage

Contrary to the district court's analysis (Order, p. 29), the underlying actions need not "specify a cause of action covered by a particular policy." Not all elements of torts falling within the ambit of an enumerated policy offense need be found within the underlying complaint. Only potential coverage need be demonstrated. *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 135 (Utah 1997).

Other jurisdictions agree, including a seminal Missouri Supreme Court opinion. *McCormack Baron Mgmt. Servs., Inc. v. American Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 171 (Mo. 1999) ("The word 'offense' cannot be read to limit coverage only to a particular 'cause of action' or 'claim.' The word 'offense' simply does not have this meaning in either common usage or legal usage.").

Other courts have recognized this proposition when addressing "personal injury" coverage for defamation or disparagement, as well as when discussing the general character of offense-based coverage. *Bankwest v. Fidelity & Deposit Co. of Md.*, 63 F.3d 974, 981 (10th Cir. (Kan.) 1995) (dissemination of "other defamatory or disparaging material" evidences potential for defamation as well as disparagement based on inferences that claimants were not to be trusted to consummate real estate deals based on estoppel letters sent to their bank which harmed a legal interest that had "pecuniary value.").

The elements of "personal injury" and "advertising injury" are distinct from those for "bodily injury" or "property damage." Judge Croskey explained in *Atlantic Mut. Ins.*

Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1032, 1034 (2002) that construing an insurance policy focusing on the injury or damages, which need only arise out of the offense, is an erroneous approach.

> Under the personal injury policy provision, "[c]overage ... is triggered by the *offense*, not the injury or damage which a plaintiff suffers." . . . **The triggering event is the insured's *wrongful act*, not the resulting injury to the third party claimant.** . . . The scope of the duty does not depend on the labels given to the causes of action in the third party complaint; instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy. (original italics ; bold emphasis added)).

III. ADMIRAL MISSTATES THE ELEMENTS OF PROOF FOR POTENTIAL COVERAGE UNDER ITS APPLICABLE "ADVERTISING INJURY" POLICY COVERAGE LANGUAGE

A. The "Injury Arising Out Of" the Offense Is Alleged

"Personal and advertising injury" means "injury . . . arising out of [an] offense," with "arising out of" meaning "originating from," "growing out of," "flowing from," "incident to" or "connected with." *Durbano v. American Empire Ins.*, No. 91-4115, 91-4142, 1992 WL 112246, at *2 (10th Cir. (Utah) 1992) (unpublished) *citing Nat'l Farmers Union Prop. & Cas. Co. v. W. Cas. & Sur. Co.*, 577 P.2d 961, 963 (Utah 1978):

> The term "arising out of" has a broad meaning under Utah law. . . . The phrase is 'commonly understood to mean originating from, growing out of, or flowing from, and requires only that there be some causal relationship between the injury and the risk for which coverage is provided.' "

Admiral's policy requires no causal connection between the injury and the insured's advertising activity. *Novell, Inc. v. Fed. Ins. Co.*, 141 F.3d 983, 986 (10th Cir. 1998) (on which Admiral has relied) analyzed different coverage language for "advertising injury *caused by an offense* committed in the course of advertising [the

insureds] goods, products or services," without articulating the distinct "causal connection between injury and advertising activity" language in Admiral's policy. Potential coverage in *Novell* required only that the "advertising injury" offense be "committed in advertising your goods, products or services." That nexus was held to be satisfied where an "advertising idea" is allegedly used "in your 'advertisement.'" *Id.* Neither "advertising activity" nor the undefined term "advertisement" itself was an element of the *Novell* offense.

Admiral's policy's required causal nexus is set forth by the words "*in your* 'advertisement.'" The required connection is *not* between an "advertising activity" and an "injury," but between an "advertisement" and the "use of another's 'advertising idea'" offense. The claimant's "injury" need only "arise out of" an enumerated offense to satisfy this "injury"/"advertising injury" nexus. Only advertising that "materially contrasts to the offense" is required.[5]

Admiral has admitted that the underlying complaints allege **misleading advertising.** Admiral "does not dispute the fact that the *Forlenza* plaintiffs alleged that Basic Research made misleading claims in its advertisements . . ." [R 1258] "Admiral does not dispute that the *Miller* complaint alleges that Basic Research made . . . misleading claims in its advertisements of [Akävar]." [R 1249] Admiral "does not dispute that … others have made similar claims to advertise weight loss

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[5] *Central Mutual Ins. Co. v. StunFence, Inc.*, 292 F. Supp. 2d 1072, 1079 (N.D. Ill. 2003) ("Under a straightforward reading of the revised Primary Policy language, Central had a duty to defend StunFence if Gallagher claimed (as it did) that it suffered an injury that arose out of StunFence's *use* of its 'advertising idea.'").

products." [R 1256]

The underlying complaints allege the class members were injured or harmed by Basic Research's use of advertising phrases because consumers could be misled into buying Akävar. [R 828, 919, 921, 1014-15] They do not allege injury from the class members' failure to lose weight, but from their purchase of the product caused by the advertising.

The *Miller/Tompkins* Class Certification Order, 2011 WL 818150, at *2 [R 1466-77] indisputably confirms that the underlying claims are not premised on damages caused by Akävar's failure to perform as advertised instead of injury caused by Basic Research's advertising of the product. The certified class simply consists of:

> Persons who purchased Akävar after seeing or hearing the marketing slogan "Eat all you want and still lose weight" during the relevant damages period.

This Order is fully consistent with the allegations of the *Miller* and *Tompkins* complaints, in which the class members alleged injuries (parting with money) arising out of their purchases of Akävar after seeing or hearing Basic Research's advertisements containing the accused "advertising ideas" – **without regard to whether Akävar worked as advertised or whether they actually lost weight or even tried the product after buying it**. Contrary to the arguments Admiral raised to the district court and to that court's erroneous ruling, the requisite nexus alleged and now established is between "injury" and the covered "offense" of "use of another's advertising idea in your 'advertisement.'"

Any Admiral contention that some specific connection between the advertisement

and the advertising injury offense is required for potential coverage and a defense is error and should not be followed. *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1269 (9th Cir. (Cal.) 2010), evaluating a policy offense (infringement of slogan) that is not a tort, found a duty to defend a suit where the claimant NFL alleged the insured's sale of counterfeit football jerseys bearing the phrase "Steel Curtain" on their back:

> [I]t does not matter that the complaint never referred to "steel curtain' as a slogan and never listed slogan infringement as a cause of action. . . . The technical label on a cause of action does not dictate the duty to defend whether the claimed cause of action was omitted out of negligence or "for strategic adversarial reasons."

As long as the underlying plaintiffs' injury is alleged to arise out of or is connected with advertisements that use advertising ideas of another, the covered offense ("use of another's advertising idea in your 'advertisement' ") is complete.

B. Requirement of "Damages Because of 'Advertising Injury' " Is Satisfied

Admiral promised "to pay those sums that the insured becomes legally obligated to pay as "damages because of 'personal and advertising injury' . . ." [R 37, 97] The alleged wrongful act for which underlying damages are sought is misleading advertising. The damages thereby sought in each underlying complaint are because of an alleged "advertising injury."

Correctly understood, the "injury" (i.e., the conduct alleged) must "arise out of" (i.e., have some connection with) the "use of another's advertising idea in your 'advertisement,'" offense. This policy is offense-based, *not* injury- or damage-based.[6]

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[6] *Butler v. Clarendon Am. Ins. Co.*, 494 F. Supp. 2d 1112, 1132, 1132 n.10 (N.D. Cal. 2007) ("In commenting on this second type of insuring provision, California courts have

Admiral's policy requires no causal connection between the operative offense ("use of another's advertising idea in your 'advertisement'") and damages. It merely requires that a damage remedy exists for such claims triggering the offense.[7]

Here, the "damages because of" element is met. The *Miller* First Amended Complaint, at ¶181 alleges: "As a result of defendant's careless, unreasonable and negligent representations and omissions, as described herein, Plaintiffs and members of the class have been injured and have suffered loss of money and property, and they are entitled to recover *damages* from the Defendants." [R 851] The *Tompkins* Class Action Complaint, at ¶49 alleges, "Plaintiffs and class members have all suffered . . . harm and *damages*, as a result of Defendant's unlawful and wrongful conduct . . . ." [R 923] The *Forlenza* Second Amended Class Action Complaint, at ¶5 of its Prayer for Relief, alleges, "Plaintiffs and members of the class request that the Court enter an order or judgment against the Defendants as follows: . . . for compensatory and general damages according to proof . . . ." [R 1038]

Damages need not be expressly articulated under any specifically-labeled claim. *J. Lamb, Inc.*, 100 Cal. App. 4th at 1032 ("Coverage for [advertising injury] is not determined by the nature of the damages sought in the action against the insured, but by

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stated that '[i]n the world of liability insurance, personal injury coverage applies to injury which arises out of the commission of certain enumerated acts or offenses ... Coverage ... is triggered by the offense, not the injury or damage which a plaintiff suffers . . . .' The same provision also generally covers 'advertising injury liability.'").

[7] *Bank of the West v. Superior Court*, 833 P.2d 545, 551-53 (Cal. 1992) (indemnification for monies paid in settlement precluded where suit sought no money damages within policy's meaning but only the insured's disgorgement "of ill-gotten gains.").

the nature of the claims made against the insured in that action. . . . The triggering event [under "advertising injury" offense-based coverage] is the insured's *wrongful act*, not the resulting injury to the third party claimant"); *Syvertsen v. Great American Ins. Co.*, 700 N.Y.S.2d 289, 291-92 (N.Y. App. Div. 1999).[8]

"Damages because of 'advertising injury'" is satisfied since all requirements are met by the underlying complaints' fact allegations: the nature of the offense elements, that injury arising out of that offense, and that damages result from such injury arising out of that offense.

IV. THE *MILLER*, *TOMPKINS* AND *FORLENZA* CONSUMER CLAIMS TRIGGER ADMIRAL'S DUTY TO DEFEND UNDER THE "USE OF ANOTHER'S ADVERTISING IDEA IN YOUR ADVERTISEMENT" DEFINITION OF "PERSONAL AND ADVERTISING INJURY"

A. "Advertising Idea Use," Which Replaced "Misappropriation of Advertising Ideas," is Factually Implicated Here

1. The District Court Narrowly Construed "Advertising Idea Use" as if Limited to the Misappropriation or Wrongful Taking of Another's Advertising Idea, Thereby Misstating Applicable Law

The district court supported its erroneous and limited interpretation of "use of another's advertising idea" to mean the "wrongful taking of another's advertising idea" by repeatedly citing and heavily relying on *DISH Network Corp. v. Arch Specialty Ins. Co.*, 734 F.Supp.2d 1173 (D. Colo. 2010) [Opinion, pp. 14-17] **which the Tenth Circuit recently reversed** in a published opinion authored by Chief Judge Briscoe. *DISH*, 2011 WL 4908108, at *10. The "misappropriation of advertising ideas" policy offense was held to be implicated, requiring a defense:

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[8] *StunFence, Inc.*, 292 F. Supp. 2d at 1079 ("[Analyzing the same policy language], Central had a duty to defend StunFence if Gallagher claimed (as it did) that it suffered an

> [I]nsurers concede that some of [the underlying claims for infringement of automated wireless telecommunications services and related financial services and call processing] explicitly claim the technology's capacity for advertising [and] 'the patented technology could theoretically be used for advertising purposes." . . . The functions patented by [claimant] conceivably allow Dish not only to sell the product a consumer calls up to purchase, but also to make up-sell offers[fn] tailored to the specific caller. When the technology's patented advertising capabilities are considered in conjunction with the vague factual assertions made in the complaint, the allegations are sufficiently broad to encompass "distribution of promotional materials," [or to fall within any variant definition of 'advertising ideas.'] (footnote omitted)).

Flatly rejecting the district court's reasoning that "DISH cannot have misappropriated advertising ideas because it did not incorporate patented technologies as a substantive element of its communications and interactions with customers. . . ." the Tenth Circuit found it sufficient that DISH allegedly misappropriated "a means of conveying content to and tailoring its interactions with its customers." *Id.* at *11." The court specifically declined to follow other cases where courts too narrowly construed the potential for coverage by applying an indemnity standard. *Id.* at *15.

Other cases that Admiral has cited are similarly inapposite and unpersuasive. For example, in *Superformance, International v. Hartford Cas. Ins.*, 203 F. Supp. 2d 587 (E.D. Va. 2002), the district court was confronted with "personal and advertising injury" policy-defined as "[c]opying, in your 'advertisement', a person's or organization's 'advertising idea' or style of 'advertisement' . . . ." – not the offense here at issue. *Applied Bolting Tech. Prods. v. U.S. Fid. & Guar. Co.*, 942 F. Supp. 1029 (E.D. Pa. 1996) dealt with "personal and advertising injury" defined as the "misappropriation of

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injury that arose out of StunFence's *use* of its 'advertising idea.'").

advertising ideas" – again, not the "use of" offense here at issue and, contrary to the District Court's view, not "comparable" to "use of" which lacks "misappropriation's" wrongful taking component. As the policy language in *Superformance* and *Applied Bolting* distinctly differs from Admiral's, these cases provide no guidance.

2. The Predecessor "Misappropriation of Advertising Ideas" Offense is Not Limited to Common Law Misappropriation

Under Utah law, trademarked slogans are "advertising ideas." *Cloud Nine*, 464 F. Supp. 2d at 1167. Admiral has never disputed this [R 1243], nor did the district court reach the issue. The salient issue is whether the facts pled by the underlying claimants implicated "advertising ideas," bringing their claims potentially within Admiral's policies "use of another's advertising idea in your 'advertisement'" offense.

No genuine issue of material fact exists with respect to the "advertising ideas" alleged in those complaints. "Eat All You Want and Still Lose Weight" and "And We Couldn't Say It If It Wasn't True" are slogans that were registered as trademarks. [R 1215-16]. In light of these undisputed facts, the "advertising idea" element of the specific type of personal and advertising injury under which Basic Research seeks coverage is easily met.

"Misappropriation of advertising ideas" is not limited to common law situations. *AMCO Ins. Co. v. Lauren-Spencer, Inc.*, 500 F. Supp. 2d 721, 730 (S.D. Ohio 2007) ("Much of the rationale of *Advance Watch* [the Sixth Circuit's ruling limiting the 'misappropriation' policy offense to claims based on common law misappropriation] has often been severely criticized by other courts and represents the minority view. *See Pizza*

Magia Int'l, LLC v. Assurance Co. of Am., 447 F.Supp.2d 766, 772 (W.D.Ky.2006) (summarizing criticism of *Advance Watch* and declining to apply its holding). Notably, "Michigan courts have wholly rejected the Sixth Circuit's *Advance Watch* construction of Michigan law . . . ." *Lauren-Spencer, Inc.*, 500 F.Supp.2d at 730.

Admiral itself conceded this point. [R 1281] Nevertheless, Admiral has sought by implication to inconsistently limit the offense's scope to that of common law misappropriation, urging adoption of the reasoning of two readily distinguishable trial-level cases, *Sorbee Int'l Ltd. v. Chubb Custom Ins. Co.*, 735 A.2d 712, 714 (Pa. Super. Ct. 1999) and *Armament Sys. & Procedures v. Northland Fishing Tackle*, No. 01-C-1122, 2006 WL 2519225 (E.D. Wis. Aug. 28, 2006). Neither is persuasive. *Sorbee*, applying distinct Pennsylvania law, substituted the requirements for pleading the tort of common law misappropriation that would require the "advertising idea" to be "novel," "new" or "concrete." *Riese v. QVC, Inc.*, No. CIV. A. 97-40068, 1999 WL 178545, at *3 (E.D. Pa. Mar. 30, 1999). But nothing in Admiral's policy supported this limit on "misappropriation's" scope. Moreover, it is not the operative offense here. *See DISH*, 2011 WL 4908108, at *5 ("We note though, that in spite of their broad language, many of the cases insurers cite focus on [distinct] policy terms.").

Armament Systems assumed that "misappropriation" means "wrongful taking," and then further limited coverage by claiming that the idea was too general to be possessed by the party using it. Like *Sorbee*, *Armament Systems* adopted a common law "misappropriation" standard to limit the word's meaning in the policy, albeit without acknowledging that it had done so.

This approach is analogous to that used by federal courts to determine the legal sufficiency of pleadings under Fed. R. Civ. P. 12(b)(6), which does not test whether there is a possibility of coverage but whether a valid claim is stated upon which relief can be granted. Each case improperly looked to the merits of the underlying action to evaluate whether that suit could pass muster as a common law misappropriation claim.[9] This approach is inconsistent with Utah law, which requires the interpretation of undefined policy terms like "misappropriation" in favor of coverage. *Benjamin*, 2006 UT 37, ¶ 22.

These arguments are like those rejected by the 10th Circuit in *DISH*, 2011 WL 4908108, at *11:

> [W]e reject the district court's reasoning that Dish cannot have misappropriated advertising ideas because it did not incorporate patented technologies as a substantive element of its communications and interactions with customers.

3. Even the Predecessor Coverage for "Misappropriation" is Ambiguous Because It Can Mean "Misuse" As Well As "Wrongful Taking"

"Advertising idea" is ambiguous because it is susceptible of more than one reasonable interpretation. The district court acknowledged Basic Research's contention that "Eat All You Want and Still Lose Weight" and "And We Couldn't Say It If It Wasn't True" are "advertising ideas" within the meaning of Admiral's policy (which does not define the term). (Opinion, pp. 11-12) The district court then approvingly cited *Cloud Nine*, 464 F. Supp.2d at 1166, which explained that an "advertising idea" is an "idea for

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[9] *Davis H. Elliott Co. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176, 1182 (6th Cir. 1975).

calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage." (Opinion, p. 15) But the district court did not decide whether these slogans fell within the definition. (Opinion, pp. 15-17).

As held in *Westfield Ins. Co. v. Factfinder Marketing Research, Inc.*, 860 N.E.2d 145, 152 (Ohio App. 2006):

> Some courts have defined "advertising idea" to mean "any idea or concept related to the promotion of a product to the public." . . . [*Advance Watch*'s] restrictive holding [limiting the 'misappropriation' offense to the common law tort of misappropriation] has been criticized as ignoring the ordinary meaning of the term "misappropriation." . . . [W]e resolve this ambiguity in the provision in favor of insurance coverage[.]

There is no single meaning to these terms because "[t]here is nothing about the terms . . . neither of which constitutes a recognized tort, which compels [the court] to conclude one way or the other as to just how broadly or narrowly they should be read." *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group*, 50 Cal. App. 4th 548, 565, 59 Cal. Rptr. 2d 36, 46 (1996).

Basic Research agrees that common law misappropriation claims potentially fall within the scope of the "misappropriation" offense because the term is ambiguous. "Misappropriation" includes both wrongful taking *and* misuse.[10] Dictionary definitions also support construing "misappropriation" to include "misuse." BLACK'S LAW DICTIONARY 1998 (6th ed. 1990) ("Misappropriation: the unauthorized, improper or unlawful use of funds or other property for purposes other than that for which intended . .

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[10] *Winklevoss Consultants, Inc. v. Federal Ins. Co.*, 991 F. Supp. 1024, 1037 (N.D. Ill. 1998) ("[The plaintiff] maintains that the phrase 'misappropriation of advertising ideas or style of doing business' is ambiguous . . . . This Court agrees that the language is

. . The term may also embrace the taking or use of another's property for the sole purpose of capitalizing unfairly on the goodwill and reputation of property owner."). RANDOM HOUSE UNABRIDGED DICTIONARY 1228 (2d ed. 1993) ("Misappropriate" means "to put to a wrong use; to apply wrongfully or dishonestly, as funds entrusted to one's care.").

Numerous courts have found "misappropriation" includes misuse and false advertising. *Cincinnati Ins. Co. v. American Hardware Mfrs. Ass'n*, 898 N.E.2d 216, 236 (Ill. App. 2008) (allegations that the insured deceptively advertised its trade show by suggesting that it was the continuation of the trade show to which claimants claimed exclusive rights implicated both "misappropriation of advertising ideas or style of doing business" and "use of another's advertising idea in your 'advertisement' " under two policies); *American Simmental Ass'n v. Coregis Ins. Co.*, 282 F.3d 582 (8th Cir. (Neb.) 2002) (insured's alleged misuse of "fullblood" to describe cattle that did not meet the term's requirements met the offense); *Flodine v. State Farm Ins. Co.*, No. 99 C 7466, 2001 WL 204786, at *3, 11 (N.D. Ill. Mar. 1, 2001) ("[M]isuse of an advertising idea" included the insured's alleged labeling its products with descriptive tags that "falsely suggest[ed] that they were produced by North American Indians. . . . Capitalizing upon the goodwill associated with Indian-made products is a marketing idea concerned with how to persuade consumers to buy certain goods. The wrongful use of these ideas, or ways of marketing 'Southwestern style' arts and crafts, are 'advertising injuries' under the policy."); *DecisionOne Corp. v. ITT Hartford Ins. Group*, 942 F. Supp. 1038 (E.D.

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susceptible of more than one reasonable interpretation.").

Pa. 1996) (duty to defend when the underlying plaintiff alleged the insured falsely designated the source of its ability to maintain the plaintiff's equipment and falsely advertised that it could maintain the plaintiff's equipment, all in violation of the Lanham Act); *Applied Bolting Tech. Prods., Inc. v. United States Fid. & Guar. Co.*, 942 F. Supp. 1029, 1032 (E.D. Pa. 1996) ("misuse" held a preferred dictionary definition for "misappropriation" that a layperson would use); *Atlapac Trading Co., Inc. v. American Motorists Ins. Co.*, No. CV 97-0781 CBM, 1997 WL 1941512, at *7 (C.D. Cal. Sept. 19, 1997) (mislabeling mixed olive/canola oil as olive oil **is a misuse** that injures the public as well as competitors whose pricing may be disadvantageously undercut).

Admiral's policy language does not require that the "advertising idea" have been previously owned or used by another (much less by a competitor), nor that the "advertising idea" be wrongfully taken. Basic Research's advertising activities need only misuse an "advertising idea." As long as injury "arises out of" the advertising, the policy language is satisfied.

4. "Use" Means More Than "Misappropriation;" It Includes "Employment Of"

Utah has not defined the precise scope of Admiral's policy term "use" within the "use of another's advertising idea" offense. Admiral has attempted to fill in the gaps with out of state case law supporting the notion that "use" must mean "misappropriation" or "wrongful taking." [R 1279-81]

Confusion as to the source of goods has readily been found to support a defense

where the advertising idea was not "wrongfully taken" but merely "misused."[11] Limiting "misappropriation" to a "wrongful taking" adds words of limitation not in the policy, rewriting the policy for the insurer's benefit in direct contravention of Utah law. *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1275 (Utah 1993).

B. The "Of Another" Element is Met

1. "Of Another" Merely Means "Does Not Originate With the Insured"

Under Utah law, the phrase "of another" in the "use of another's advertising idea in your 'advertisement'" offense is ambiguous. *Quaid v. U.S. Healthcare, Inc.*, 158 P.3d 525, 528 (Utah 2007) ("Insurance policy language is considered ambiguous if it is 'unclear, it omits terms, or the terms used to express the intentions of the parties may be understood to have two or more plausible meanings.' "). It is undisputed that "ambiguities" in an insurance contract are construed against the insurer. *Novell, Inc. v. Federal Ins. Co.*, 141 F.3d 983, 985 (10th Cir. (Utah) 1998).

As the Ninth Circuit apropos the narrower predecessor offense of "misappropriation" expressly ruling that it did not require any wrongful taking of a **competitor's** advertising idea: "Nor can we discern any contextual, public-policy, or logical significance to who owns the legal rights to the advertising idea in question." *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 600 F.3d 1092, 1101 (9th Cir. 2010). Nor does Utah's law of insurance policy interpretation permit any

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[11] *CAT Internet Services v. Providence Washington Ins. Co.*, 333 F.3d 138, 142 (3d Cir. (Pa.) 2003) ("We now hold that when a complaint alleges that an insured misappropriates and uses . . . ideas in connection with marketing and sales and for the purpose of gaining customers, the conduct constitutes 'misappropriation of an advertising

narrower construction. *Benjamin,* 2006 UT 37, ¶ 24 (" '[I]nsurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance.' "). Any other result would be in derogation of the principle that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. *DISH*, 2011 WL 49081088, at *8.

The "of another" can be reasonably understood to include an entity other than Basic Research for **five** distinct reasons:

First, consistent with dictionary definitions, "of another" means "a different one." Random House Unabridged Dictionary 84 and 1343 (2d ed. 1993). *Draughon v. CUNA Mutual Ins. Soc'y*, 771 P.2d 1105, 1108 (Utah App. 1989) (When interpreting insurance contract court should construe policy as it "would be understood by the average, reasonable purchaser of insurance."). *Cyprus Plateau Min. Corp. v. Commonwealth Ins. Co.*, 972 F. Supp. 1379, 1384 (D. Utah 1997) ("Ordinarily, a dictionary is a valuable resource for interpretation."). Critically, Admiral did not specifically contest this definition "of another" on summary judgment and is not expected to do so here. [R 1243] Nor did the district court address this issue in its summary judgment motion.

Second, the policy's language does not inform a lay policyholder that "of another's" means only "of an underlying claimant that may sue you one day." Indeed, Admiral's policy language contains no definitional or contextual limit (i.e., restructuring

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idea . . . .' ").

"of another" to "of" a "different" underlying claimant or "of" someone else.). Had Admiral meant "of another" to refer only to "of an underlying claimant" it could have said so in its policy. *Dish*, 2011 WL 4908108, at *16.

Third, exclusion (g), which eliminates certain forms of "false advertising" for "failure to conform to representations of quality or performance" reveals that coverage for some forms of false advertising are contemplated.

Fourth, construing the phrase "of another" to mean "advertising ideas" that were not originated by the insured poses a lesser actuarial risk to insurers who need not insure against newly created advertising concepts, whose originality may generate litigation disputes, as is true of those in the "advertising" business falling within exclusion (j)(1).

Fifth, fact allegations of false advertising satisfy the "of another" provision where an "advertising idea" misuse engenders consumer confusion: *General Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 579 (Minn. 2009) ("Hobbit Travel," used by insured, was not a phrase owned by claimant heirs of JRR Tolkien). *Cloud Nine*, 464 F. Supp. 2d at 1167 (consumer confusion over source and origination of product names, not their ownership).

2. Admiral's Overly Restrictive Construction of the "Of Another" Policy Language Is Inconsistent with Utah Law

Had Admiral intended, it could easily have clarified by definition that the "other" in its coverage had to be the underlying plaintiffs. *Alf*, 850 P.2d at 1275 ("[A] court may not rewrite an insurance contract for the parties if the language is clear and unambiguous . . . ."). But Admiral did not. Its failure to do so when it could have created

an ambiguity about "of another's" meaning within the policy, requiring interpretation and application on behalf of Basic Research because "of another," reasonably understood to mean "any other," brings the *Miller*, *Tompkins* and *Forlenza* fact allegations **potentially** within Admiral's coverage. *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 133 (Utah 1997).

Speaking to an analogous defense based coverage scenario, the Tenth Circuit advised in *Dish*, 2011 WL 4908108, at *10:

> It is not clear from the complaint whether or not Dish is alleged to have infringed advertising-related claims in RAKTL's patents by conveying promotional information. Nonetheless, Insurers have not met their "heavy burden" of proving that "the underlying claim [cannot] fall within policy coverage."

Admiral could avoid its defense duty if there are words of limitation specifically expressing the limited meaning of "of another" that Admiral argues. But there are none, and Utah law prohibits courts from ferreting out such a restrictive meaning when the insurer had not expressed it. *Simmons v. Farmers Ins. Group*, 877 P.2d 1255, 1258 (Utah App. 1994) ("Language limiting an insurer's duty to defend an insured must be clear, unambiguous, and sufficiently conspicuous in order to give proper notice to the insured of the limitations on the duty to defend."). The district court erred by disregarding this law and finding "of another" limited to underlying claimants where Admiral did not express that limit.

3. "Others" Previously Used the Accused Slogans to Advertise Weight Loss Products Before Basic Research Did

The "advertising idea" of others embodied in the slogans was well known and was available to Admiral when Basic Research tendered the *Miller*, *Tompkins* and *Forlenza*

Suits for a defense. Both the *Miller* and *Tompkins* complaints allege that "fraudulent weight-loss products" have been nationally advertised "as making it easy to lose weight or allowing one to lose weight without diet or exercise." [R 814-15, 913] The *Forlenza* complaints similarly compare Akävar advertising to "miracle pills" advertised as allowing consumers to "lose weight effortlessly" without diet or exercise. [R 935]

The Federal Trade Commission has sued other defendants than Basic Research for misusing this "advertising idea" and it established guidelines for its use. In 2004, the FTC sued another company for using the slogan "Eat All You Want and Still Lose Weight (Pill Does All the Work)" to advertise Bio Trim, a weight loss product. *FTC v. Natural Products, LLC* (C.D. Cal. Case No. SACV 04-1279). [R 1208, 1218, 1235-36] The FTC identified the advertising idea "Eat all the foods you love, and still lose weight (pill does all the work)" as a "Red Flag Claim" in its Red Flag | Bogus Weight Loss Claims microsite (http://www.ftc.gov/bcp/edu/microsites/redflag/falseclaim2.html). [R 1208, 1238] This is an "advertising idea" others used for other products.

4. Western Holdings, LLC, an Entity Distinct from Basic Research, Owns the Trademarked Slogans at Issue Herein

The "of another" component of the policy language is also readily met because, as Admiral concedes, "other entities may have used similar slogans and statements which Basic Research is using." [R 1261] Non-party Western Holdings, LLC applied on April 18, 2007 to register with the United States Patent & Trademark Office ("USPTO") the trademark "Eat All You Want and Still Lose Weight," claiming that the mark was first used in commerce on January 26, 2007. [R 1208, 1215] Western Holdings also applied

to register the trademark "And We Couldn't Say It In Print If It Wasn't True" on April 27, 2007, claiming this trademark was first used in commerce on January 26, 2007. [R 1208, 1216] Both trademark registrations were issued on June 3, 2008. [R 1208, 1215-16]

These dates were before the commencement dates of all three underlying lawsuits, as well as the inception of both Admiral policies. [R 669-71] Western Holdings is not a party to this case and seeks no defense. [R 1-24] If Western Holdings was not an entity distinct from Basic Research there would be no point in its acquiring its own equal rights under Admiral's policy as an "additional insured."[12]

Collective action among Western Holdings and Basic Research (as Admiral has argued) [R 1260] does not change the coverage analysis. Such action instead proves the reverse – that the entities are "different from" one another. Western Holdings is owned separately from the Plaintiff insureds and has an arms-length informal license agreement with Basic Research and Dynakor permiting their use of its trademarked slogans in their advertisements. [R 670, 808]

Admiral provided no evidence to disprove that Western Holdings and Plaintiff insureds are distinct entities. *Deseret Fed.*, 714 P.2d at 1147. Also, since Western Holdings and the Plaintiff insureds are distinct from the FTC defendants who earlier used the accused phrases, Admiral cannot avoid its defense duties. *Cloud Nine, LLC,* 464 F. Supp. 2d at 1168:

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[12] *Travelers Ins. Cos. v. Dickey*, 799 P.2d 625, 628 (Okla. 1990) ("An insurer's undertaking *cannot* be altered or modified by an insured's agreement with a third party in

> Even if the court were to find that [the underlying] Complaint presents factual questions or an uncertainty regarding whether an advertising injury is alleged, the insurers still have a duty to defend until those uncertainties are resolved. **'Where factual questions render coverage uncertain, . . . the insurer must defend until those uncertainties can be resolved against coverage. "When in doubt, defend."** ' " (emphasis added))

Under the commonly accepted dictionary definition of "another", there is no genuine issue of fact that the slogans touting Akävar, about which the plaintiffs in the underlying consumer lawsuits have complained, belong to "another," not to Basic Research. "Eat All You Want And Still Lose Weight" and "And We Couldn't Say It In Print If It Wasn't True" are Western Holdings' registered trademarks. [R 1208, 1215-16] Western Holdings is distinct from Basic Research, LLC and all of the other appellant insureds herein. [R 670]

Other third parties also previously used slogans and phrases substantially similar to those trademarked by Western Holdings and sued upon here. For example, Natural Products, LLC — the manufacturer and distributor of a weight loss product called BioTrim — was using the slogan "Eat All You Want and Still Lose Weight (Pill Does All the Work) when it was sued in 2004 by the Federal Trade Commission. [R 1208, 1218, 1235-36] The FTC identified other similar claims/slogans/sayings used by other unidentified third parties on its Red Flag|Bogus Weight Loss Claims Internet microsite as well.[13] [R 1208, 1238] Consequently, the "of another" portion of the offense is satisfied.

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the absence of the insurer's consent.").

[13]Although Utah is a "four corners" state in which coverage disputes are typically resolved with reference to the policy and the underlying complaint, extrinsic evidence (e.g. of Western Holding's trademark application or registration, or of the FTC's prior enforcement actions) can be considered as "undisputable facts" that are " 'not an element

5. Cases Narrowly Defining "Of Another" Deviate From Utah Law

Cases in which "use of another's advertising idea" was at issue in which "misappropriation/wrongful taking" was equated to "use" cannot be used to limit the meaning of "use" within Admiral's policy. Utah requires: "'[I]nsurance policies should be construed liberally in favor of the insured…so as to promote and not defeat the purposes of insurance.'" *Benjamin*, 2006 UT 37, ¶ 24 (quoting *United States Fid. & Guar. Co. v. Sandt*, 854 P.2d 519, 521 (Utah 1993) and *Farmers Ins. Exch. v. Versaw*, 2004 UT 73, ¶ 24, 99 P.3d 796).

In *Cloud Nine*, 464 F. Supp. 2d 1161, the only reported case in which "use of another's advertising injury" has been analyzed under Utah law, the District of Utah followed Utah's liberal construction rules. One of the salient issues was whether the facts pled in that allegedly violated statute governing false advertising could constitute a predicate offense. The policy defined "personal and advertising injury" as "use of another's advertising idea in your advertisement" – the same offense here at issue. *Cloud Nine*, 464 F. Supp. 2d 1161.

Cloud Nine rejected arguments premised on cases narrowly construing the coverage for the prior offense of "misappropriation of advertising ideas," as the Cloud Nine policy insured against "use of another's advertising ideas." This fact was determinative as "use is broader than 'misappropriation.'" *Id.* at 1168, n.8. As Judge Campbell observed, at 1168:

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of either the [underlying] cause of action [against Basic Research], or a defense in the underlying litigation.' " *DISH*, 2011 WL 4908108, at *4.

> Edizone alleges a claim under the Utah Truth in Advertising Act, which specifically requires allegations of deceptive trade practices occurring in advertising. "The purpose of [the Utah Truth in Advertising Act] is to prevent deceptive, misleading, and false advertising practices and forms in Utah." Utah Code Ann. § 13-11a-1. Clearly, the crux of a cause of action for violation of the Utah Truth in Advertising Act is advertising.

The Court should undertake the well-accepted approach of interpreting the meaning of "use of another's advertising idea" through the use of a dictionary. *See, e.g., Cyprus Plateau Min. Corp. v. Commonwealth Ins. Co.*, 972 F. Supp. 1379, 1384 (D. Utah 1997) ("Dictionaries . . . are general guides to common usage. Ordinarily, a dictionary is a valuable resource for [insurance policy] interpretation."). Webster's Encyclopedic Unabridged Dictionary of The English Language at 2097 (Random House Value Publishing, Inc. 1996) defines "use" as "to employ for some purpose; put into service." Under this definition, the underlying consumer lawsuits claim injury from "use." The plaintiffs in those cases alleged that Basic Research employed the slogans "Eat All You Want And Still Lose Weight" and "And We Couldn't Say It If It Wasn't True" in the Akävar marketing and packaging upon which they relied and by which they were purportedly damaged. Thus, the allegations in the underlying consumer lawsuits complain of a "use" and, by extension, personal and advertising injury fall within the Admiral policies.

C. "Advertising Ideas" Are Set Forth In Basic Research's "Advertisement" to Meet the "In Your 'Advertisement'" Element

1. Admiral Conceded the "Advertisement" Component Is Satisfied

The term "advertisement" is expressly defined in Admiral's policies as "a notice that is broadcast or published to the general public or specific market segments about

your goods, products or services for the purpose of attracting customers or supporters." [R 45, 105] Underlying claimants alleged that Basic Research's statements about Akävar appeared in television commercials, on Internet websites, in point-of-purchase advertisements and in national magazine advertisements that the claimants read/heard/relied upon and which injured them. [R 822, 911, 1010-13] There is no dispute that such items constitute "notices . . . broadcast or published to the general public or specific market segments" about Basic Research's "products . . . for the purpose of attracting customers or supporters." Admiral has not contended otherwise. So, the "in your advertisement" element of the personal and advertising injury is satisfied.

2. Injury Need Only "Arise Out Of," That Is, Be Connected With Offense (f) and Offense (f) Must Occur "In Your 'Advertisement'"

Admiral has argued that there can be a causal connection between the alleged "injury" and the "use of another's advertising idea in your advertisement" offense only if the underlying plaintiffs have alleged a misappropriation or wrongful taking of that plaintiff's own "advertising idea." [R 1280-82] But this argument assumes a flawed interpretation of Admiral's policy that is at odds with Utah's liberal policy construction rules.[14] As explained above, Admiral's construction of the predicate offense is far too limited and is not conclusively supported by Utah law.

The district court erred by granting Admiral's summary judgment motion and denying Basic Research's on that sole basis. (Opinion, pp. 14-17) The district court

[14] *See* § IIIA & § IVA(4).

erred in stating that "the basis of the claim against [Basic Research] is the failed promise of weight loss without any behavior or lifestyle changes and not the use of the phrases 'Eat All You Want & Still Lose Weight' and 'And We Couldn't Say It In Print If It Wasn't True' to advertise Akävar.'" (Opinion at 14).

But holding that it could find no causal connection between the advertising and the injury, the district court articulated a definition of "use" limited to "misappropriation" or "wrongful taking." (Opinion at 14-15) It also assumed that a causal nexus must exist between injury and advertising activity even though Admiral's policy language does not support such a policy construction.

This was error on both fronts as "use" is not so narrowly defined by any dictionary or Utah judicial decision, nor by Admiral's policy itself and injury need only be "connected with" offense (f) not an "advertisement," as defined in the policy. The focus of the "in your 'advertisement'" policy language is satisfied where the defined class is persons who purchased Akävar in response to the marketing slogans whether or not they never used the product.

Admiral's contention and the district court's ruling against potential coverage on the grounds that underlying claimants' damages resulted not from Basic Research's advertising but from Akävar's failure to perform as advertised is further refuted by the *Miller/Tompkins* court's Class Certification Order[15] (of which Basic Research requested the district court below to take judicial notice).[16] [R 1466-77] There, the certified

[15] *Miller v. Basic Research, LLC*, 2011 WL 818150, at *2 (D. Utah, March 2, 2011).

[16] The district court did not rule on the Request for Judicial Notice, nor did it mention

plaintiff class broadly consists of "[p]ersons who purchased Akävar after seeing or hearing the marketing slogan 'Eat all you want and still lose weight' during the relevant damages period."

This means a claimant need not have used Akävar without losing weight to recover from Basic Research. Such persons may be among the class members, provided that they purchased the product after exposure to the advertising. The latter is required for class membership; the former is not. The Order demolishes any contrary Admiral contention, as well as any merit to the district court's contrary conclusion.

Broadly construing "use" as required leads to the reverse result. This Court should correct the district court's error.

3. Although Not Required by Admiral's Policy, There Is a Causal Connection Between The Injuries Alleged By The Underlying Claimants And The Predicate Offense at Issue

Although Admiral's policies do not require that the fact allegations of the underlying lawsuits include a causal connection between the underlying plaintiffs' injuries and the insured's advertising activities, here that connection is pled. The *Miller*, *Tompkins* and *Forlenza* plaintiffs allege that Basic Research's advertisements caused them to purchase Akävar to their financial detriment. [R 803-804, 828, 911, 919, 921, 1014-15, 1026-27] Alleged damages include money spent on purchases, among other requested remedies that include an injunction prohibiting Basic Research from making such statements in advertising and marketing Akävar. [R 852-53, 919, 921, 1014-15] If the plaintiffs' injuries were not causally connected to Basic Research's advertising,

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the request or the certification order in its Opinion.

plaintiffs would not request an injunction against it.

V. CASES CITED BY ADMIRAL BELOW THAT ANALYZE PRICE FIXING ANTITRUST COVERAGE DO NOT PRECLUDE FINDING POTENTIAL COVERAGE HERE

Admiral cited to the district court several antitrust coverage cases factually distinguishable from the case. And they avoided coverage for antitrust suits by applying improperly narrow policy interpretations. *Champion Labs., Inc. v. American Home Assur. Co.*, No. 09 C 7251, 2010 WL 2649848, at *5 (N.D. Ill. June 30, 2010) substituted the term "advertising" for the term "published" within the definition of "advertising." That court then adopted a restricted definition of "advertising idea," formulated to assert policyholder interpretive provisions, that emphasized why the "misappropriation of advertising ideas" language could encompass trademark infringement lawsuits. But to encompass is not to exhaust, and nothing in *Champion* states or suggests that interpretation was intended to exhaust the offense's definitional parameters.[17]

Champion also redefined the policy offense there at issue to require "the wrongful taking of the manner by which another advertises its goods or services," then finding that definition not satisfied where the insured only provided a customer with a spreadsheet, including outdated input costs intended to justify price increases. Ultimately no coverage was found because "[this] communication … was directed at one private label customer- not to the general public or a specific market segment as required by the relevant insurance policies." *Id.* at *5. But here, Basic Research's widespread promotional

[17] *See, J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553, 557 (W.D.N.Y. 1993).

activity is alleged.

Rose Acre Farms, Inc. v. Columbia Cas. Co., 772 F. Supp. 2d 994 (S.D. Ind. Feb. 18, 2011) found no "advertisement" alleged in an underlying antitrust case because of the absence of any references to Rose Acre's "website nor any other broadcast or publication making use of any animal welfare advertising idea is referenced in the Underlying Complaints." *Id.* at 1002. Concerned that the offense's "of another" component could not be satisfied by allegations against a co-defendant, *Rose Acre* presumed that the policy required a "wrongful taking," even though the offense implied no such language.

The *Rose Acre* court's explanation that it was "hard-pressed" to find "of another" satisfied where the claimant's "advertising idea" was not being used was consistent with its finding of potential liability under applicable Indiana law, compelling a defense. Contrary to Indiana law, *Rose Acre* failed to understand or assess the ambiguity of "of another" within the "use of another's advertising idea in your advertisement" offense.

The underlying cases here make no antitrust claims but repeatedly complain about Basic Research's advertising of Akävar using another's advertising idea, an earlier, allegedly misleading, idea to promote weight loss products about which the FTC had issued a "red flag" warning. *Rose Acre* is factually inapposite. It misinterpreted the policy and minimized advertising claims in order to avoid coverage for antitrust cases.

The Eleventh Circuit asserted in *Trailer Bridge, Inc. v. Illinois National Ins. Co.*, ___ F. 3d __, 2011 WL 4346579 (11th Cir. (Fla.) Sept. 19, 2011)[18] that "the underlying

[18]Petition for Rehearing *En Banc*, *Trailer Bridge, Inc. v. Illinois National Ins. Co.*, U.S.C.A. Eleventh Circuit, No. 10-13913, filed September 27, 2011.

plaintiffs could not have recovered *damages* [for advertising injury] because the allegedly misappropriated 'advertising idea' was not that of the underlying plaintiffs, but rather was alleged to have been the advertising idea of other parties altogether." But a damages remedy is not necessary to be pled in the underlying complaint as a claim for "false advertising" since "[u]nder Florida law, 'tort law principles do *not* control judicial construction of insurance contracts.'" *Creative Hospitality Ventures, Inc. v. United States Liab. Ins.* Co., 655 F. Supp. 2d 1316, 1329 (S.D. Fla. 2009).

VI. EXCLUSION "G" DOES NOT APPLY TO RELIEVE ADMIRAL FROM ITS DUTY TO DEFEND

A. The "Failure to Conform" Exclusion Only Bars Limited Forms Of False Advertising Where Specific Representations As To "Quality" or "Performance" Are At Issue

Admiral also contended that its policy's Exclusion "g" bars a defense in the underlying consumer lawsuits. [R 1282] Admiral bears the burden of proving applicability of any exclusion, as they are strictly construed against the insurer, and in favor of the insured. *LDS Hosp., a Div. of Intermountain Health Care, Inc. v. Capitol Life Ins. Co.*, 765 P.2d 857, 859 (Utah 1988); *Sandt*, 854 P.2d at 523. Any ambiguity in the exclusion's language is construed as a matter of law in favor of coverage. *Cyprus Plateau*, 972 F. Supp. at 1382 (citing *Alf*, 850 P.2d at 1274). Unless coverage is "clearly excluded," the presumption is that coverage is available to the insured. *LDS Hosp.*, 765 P.2d at 859. Exclusions are "construed most strictly against the insurer." *Id.*

Admiral's exclusion "g" bars coverage for "'[p]ersonal and advertising injury' arising out of the failure of goods, products or services to conform with any statement of quality or performance made in [Basic Research's] 'advertisement'." [R 38, 98]

Admiral's policies do not define "quality" or "performance." But "quality" is dictionary-defined as "an essential or distinctive characteristic, property or attribute" and "high grade; superiority; excellence." WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 1579 (2001). "Performance" is dictionary-defined as: "the manner in which or the efficacy with which something reacts or fulfills its intended purpose." *Id.* at 1439.

The exclusion can therefore reasonably be read to exclude coverage only where there is an underlying claim that a product: (1) lacks the essential or distinctive characteristic, property or attribute advertised; (2) is not of a high grade, superior or excellent, despite advertisements so declaring; and, (3) does not react or fulfill its intended purpose in the manner or with the efficacy advertised.

The advertising statements of which the underlying plaintiffs complain are: "Eat All You Want And Still Lose Weight" and "And We Couldn't Say It In Print If It Wasn't True." Neither statement provides information about "the essential or distinctive characteristic, property or attribute" of Akävar. Neither speaks to the grade, superiority or excellence of Akävar. Neither addresses the manner or efficacy, or how Akävar "reacts or fulfills its intended purpose." Thus, the underlying claims do not fit within Exclusion "g's" definitional limits.

Admiral has never provided a reasonable competing interpretation of "quality" and "performance" that would invalidate this plain meaning of its exclusionary language or these arguments against its application. Admiral simply asserted below that the exclusion should be read to exclude coverage for claims alleging the product at issue did not live up

to what its advertisements stated about what "the product can be expected to do and/or how it will perform." [R 1283-84]

Admiral's interpretation is unreasonable because it adds restrictions not present in the policy language. The exclusion must be construed against Admiral. *LDS Hosp.*, 765 P.2d at 859; *Sandt*, 854 P.2d at 523. Even if Admiral's overbroad suggested meaning of Exclusion "g" were thought reasonable, Admiral would succeed only in revealing an ambiguity that, once judicially acknowledged, must be resolved under Utah law in favor of coverage. *Cyprus Plateau*, 972 F. Supp. at 1382. Under either scenario coverage is not "clearly excluded," requiring Admiral to defend. *LDS Hosp.*, 765 P.2d at 859.

B. Cases Admiral Relies Upon Are Distinguishable

Admiral cited *Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 203 F. Supp. 2d 587 (E.D. Va. 2002) ("*Superformance I*") and *Total Call Int'l., Inc. v. Peerless Ins. Co.*, 181 Cal. App. 4th 161,172 (2010) to the district court to argue that "[Admiral's] non-conformity exclusion precluded coverage" for a manufacturer's false advertising claims where the manufacturer used a competitor's name in marketing materials. [R 1288] Such arguments are of no moment here because no competitor's name is at issue. *Superformance* and *Total Call* were lawsuits by the insured's competitors, alleging that the insured's advertisements induced customers who might have purchased their goods or services to instead purchase the insured's goods or services. The narrow issue of the goods' or services' "failure to conform" to the insured's advertised statements was not at issue in either case.

Even if the underlying facts were apposite to those here, a Utah court would not

follow *Superformance* and *Total Call*. Neither case followed Utah's requirements of narrow policy exclusion construction. Neither found that the insurer's preferred meaning of the exclusion was the only one possible.

There is a significant difference between making "misleading statements" and making "false statements." Only the latter could possibly implicate the exclusion; e.g., where the insured's "advertisement" misrepresents the service a customer can expect (i.e., the number of call minutes consumers would receive for a certain cost, as in *Total Call*). In contrast, here Basic Research's statements in the accused advertisements do not rise to the level of accusations of actual falsity. What is pled is **not** that the product did not work when tried, but that it cannot work and therefore the advertising improperly separated claimants from their money. [R 804, 808, 815, 826, 909-10, 911, 914-16, 924-25, 1014-15, 1026-27] Admiral's non-conformity exclusion is ambiguous where there are two or more possible contextually viable interpretations of the exclusionary language and only one of them can trigger its application.

C. Other Cases Have Found the Exclusion Does Not Apply

What matters here is that there is more than one reasonable meaning for the exclusion. Since that is so, Admiral bears the burden of proving that its preferred meaning of the exclusion is the only one in all possible worlds. *LDS Hosp.*, 765 P.2d at 859 (" '[T]hat which is not clearly excluded from the operation of [an insurance] contract is included in the operation thereof.' ").

Admiral's exclusion has been found reasonably susceptible to more than one meaning. *Elcom Techs Co. v. Hartford Ins. Co. of the Midwest*, 991 F. Supp. 1294, 1298

(D. Utah 1997) (applying Pennsylvania law) ("Because Phoenex's false advertising claim does not allege that Elcom's product failed to rise to the level advertised, the failure to conform exclusion does not apply to that claim.")

Applying Utah law, *Jewelers Mut. Ins. v. Milne Jewelry Co.*, No. 2:06-CV-243 TS, 2006 WL 3716112, at *3 (D. Utah Dec. 14, 2006) similarly held that where there is only a possibility that an exclusion may apply it cannot bar a defense. In *Milne*, a defense was required where the underlying claimant alleged the insured's fake public assertions that its goods were "Indian Made." The allegations were deemed a false advertising claim. The insurer's policy's exclusion for failure to conform to statements of quality of the goods did not bar a defense because the statements were not of "quality:"

> Defendant replies that the term 'quality' in the policy relates not to a characteristic, such as Native American authenticity, but rather, to the fitness of the product. The term 'quality' as written in the policy is reasonably susceptible to more than one meaning, and therefore, must be construed against Plaintiff. Accordingly, the policy's quality exclusion does not preclude coverage.

Here too, the term "quality" in Admiral's exclusion is "reasonably susceptible to more than one meaning and, as such, should be construed against enforcement.

The most recent decision addressing related exclusions for "knowledge of falsity" from the Eighth Circuit, applying Minnesota law,[19] reversed the district court for reasons equally germane here:

> 3M's complaint alleged that ITI committed unfair advertising under the Lanham Act in two separate regards . . . [But] [t]he district court . . . focused on some of the conduct alleged to prove the claim rather than the global claim itself. . . . .

[19] *AMCO Ins. Co. v. Inspired Technologies, Inc.*, 648 F.3d 875, 882-83 (8th Cir. 2011) (italics added).

> [because] AMCO failed to satisfy its burden of demonstrating as a matter of law that *every* claim in 3M's complaint fell *clearly outside* the Policy's coverage.

VII. CONCLUSION

Admiral should not be permitted to continue evading its duty to defend Basic Research in the *Miller*, *Tompkins* and/or *Forlenza* lawsuits. Basic Research respectfully requests the Court (a) reverse the trial court's May 24, 2011 Ruling on the parties' cross-motions for summary judgment and (b) grant its motion for summary judgment here, (1) declaring that Admiral has a duty to defend Basic Research in the underlying *Miller*, *Tompkins*, and *Forlenza* lawsuits and ordering Admiral to honor that continuing duty with respect to the consolidated *Miller* and *Tompkins* suits, which continue to be litigated, (2) finding that Admiral breached the insurance policies at issue when it failed to defend Basic Research in those actions, (3) ordering Admiral to reimburse Appellants for all attorneys' fees and costs incurred in defending those lawsuits, plus prejudgment interest at the legal rate from the date of invoice, and (4) remanding this case to the district court for further proceedings to determine the amount of defense fees and expenses Admiral must reimburse Basic Research.

Dated: November 4, 2011

By: _____

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The undersigned hereby certifies that on November 4, 2011 a true and accurate copy of the foregoing document was served, via First Class U.S. Mail, postage prepaid, upon the following:

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IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

BASIC RESEARCH, LLC, et al, Plaintiffs, vs. ADMIRAL INSURANCE COMPANY, Defendant.	**RULING** Case No. 110901154 Judge: L.A. DEVER

The above entitled matter is before the Court on the Plaintiffs' and Defendant's Cross-Motions for Summary Judgment. Having reviewed the related Motions and Oppositions, and having heard oral arguments on the matter on March 24, 2011, the Court makes the following Ruling.

Background

The entitled matter stems from an alleged breach of breach of contract, specifically the Commercial Lines Policy entered into between the named parties. Plaintiffs' causes of action include: (1) Declaratory Relief - Duty to Defend, Miller Suit, (2) Breach of Contract, Miller Suit, (3) Declaratory Relief - Duty to Defend, Tompkins Suit, (4) Breach of Contract, Tompkins Suit, (4) Declaratory Relief - Duty to Defend, Forlenza Suit, and (5) Breach of Contract, Forlenza Suit.

Plaintiffs' claims arose after parties and other unnamed class members, relied on Plaintiffs' claims that their product would result in weight loss without altering lifestyle.

Plaintiffs maintain that pursuant to the terms of the insurance policy, Defendant has a duty to defend Plaintiffs.

Defendant asserts that because the suits against Plaintiffs are the result of Plaintiffs' false claims regarding their product, such a duty is specifically excluded under the terms of the insurance policy.

Legal Discussion/Analysis

Choice of Law

Although noted, neither party presents an argument as to which forum's law is applicable in the entitled matter. Defendant's maintain that California law is the applicable law of choice, while Plaintiffs claim Utah law is the appropriate choice.

Regardless, the forum selection clause, "Service of Suit," unambiguously provides:

> In the event of our failure to pay any amount claimed to be due, we, at your request, will submit to the jurisdiction of *any court* of competent jurisdiction within the United States of America or Canada and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

(Price Decl. Ex. 1, p. 59) (emphasis added).

In addressing choice of law matters, the Utah Supreme Court explained:

> When interpreting a contract, we begin by looking within the four corners of the contract to determine the parties' intentions, which are controlling. If the language within the four corners of the contract is

> unambiguous, . . . a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law.

Innerlight, Inc. v. Matrix Group, LLC, 2009 UT 31, ¶14, 214 P.3d 854 (quotations and citations omitted);see also Id. 2009 UT at ¶16, n.5 ("A forum-selection clause is understood not merely as a contract provision, but as a distinct contract in and of itself--that is, an agreement between the parties to settle disputes in a particular forum--that is separate from the obligations the parties owe to each other under the remainder of the contract." (citation omitted)); compare Morris v. Health Net of California, Inc., 1999 UT 95, ¶8[1], 988 P.2d 940.

Accordingly, Utah serves as the appropriate jurisdiction for the entitled matter.

Summary Judgment, Generally

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 589-90 (10th Cir. 1999) (quotations and citation omitted).

A disputed fact is "material" if it might affect the outcome of the suit under the

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[1]"In the absence of an effective choice of law by the parties . . ., the contacts to be taken into account in applying the principles of Restatement (Second) Conflict of Laws § 6 to determine the law applicable to an issue include:(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." (citing Restatement (Second) Conflict of Laws § 188 (1971)).

governing law, and the dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Schutz v. Thorne, 415 F.3d 1128, 1132 (10th Cir. 2005). In applying the summary judgment standard, a court views the evidence and draws reasonable inferences therefrom in the light most favorable to the nonmoving party. Id; see also DISH Network Corp. v. Arch Specialty Ins. Co., 734 F. Supp. 2d 1173, 1177 (D. Colo. 2010) (explaining that in a summary judgment, a court does not weigh the evidence in deciding whether the movant has carried its burden, rather a court draws all reasonable inferences from it in the light most favorable to the nonmovant).

Interpretation of Insurance Contracts

Although this issue was not briefed before the hearing, it is an important consideration for appropriate analysis of the specific matters presented to the Court.

"Utah law provides that insurance contracts are interpreted under general contract principles and that interpretation of such contracts is a question of law to be determined by the courts." Ohio Cas. Ins. Co. v. Cloud Nine, LLC, 464 F. Supp. 2d 1161, 1165 (D. Utah 2006)(citations and quotations omitted); see also Id. ("When the existence of a contract and the identity of the parties are not in issue and when the contract provisions are clear and complete, the meaning of the contract can appropriately be resolved by the court on summary judgment." (citation omitted)).

When interpreting a contract, a court is to look within the four corners of the contract to determine the parties' intentions, which are controlling. Innerlight, Inc. v. Matrix Group, LLC, 2009 UT 31, ¶14, 214 P.3d 854 (citation and quotations omitted). "If the language within the four corners of the contract is unambiguous, a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law." Id. (citation omitted). See LDS Hosp. v. Capitol Life Ins. Co., 765 P.2d 857, 858-59 (Utah 1988) (explaining that insurance policy language is not ambiguous if it is "plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual meaning of the words, and in the light of existing circumstances, including the purpose of the policy.")

> A contractual term or provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies. Contractual ambiguity can occur when (1) there is facial ambiguity with regard to the language of the contract and (2) when there is ambiguity with regard to the intent of the contracting parties. The first situation presents a question of law to be determined by the judge. The second situation presents a question of fact where, if the judge determines that the contract is facially ambiguous, parol evidence of the parties' intentions should be admitted.

City of Grantsville v. Redevelopment Agency of Tooele City, 2010 UT 38, ¶30, 233 P.3d 461 (citations and quotations omitted).

Additionally, the fact that the parties do not agree upon the meaning of certain terms does not prove contractual ambiguity. Hartford Fire Ins. Co. v. P & H Cattle Co.,

248 Fed. Appx. 942, 947 (10th Cir. Kan. 2007) (citation omitted).

A court must construe each section of the contract in the context of and consistent with the entire agreement, rather than critically analyzing a single provision. Id. at 948 (citation omitted). "A court's job is to use common sense and not to strain to create an ambiguity in a written instrument when one does not exist." Id. (citation omitted); see also Nature's Sunshine Prods., Inc. v. Watson, 2007 UT App 383, ¶18, 174 P.3d 647(explaining that a contract should be interpreted as a whole to harmonize all of its provisions (citation omitted)).

In regards to insurance contracts, ambiguities in it are generally construed against the insurer. Allstate Ins. Co. v. Worthington, 46 F.3d 1005, 1008 (10th Cir. 1995). Moreover, under Utah law, courts strictly construe against the insurer provisions that limit or exclude coverage. See United States Fid. & Guar. Co. v. Sandt, 854 P.2d 519, 523 (Utah 1993).

Duty to Defend

In Utah, as a general rule, an insurer's duty to defend is determined by comparing the language of the insurance policy with the allegations of the complaint. Ohio Cas. Ins. Co. v. Cloud Nine, LLC, 464 F. Supp. 2d 1161, 1165 (D. Utah 2006) (citing Fire Ins. Exch. v. Estate of Therkelsen, 2001 UT 48, ¶21, 27 P.3d 555 (Utah 2001) (quotations omitted)); see also Benjamin v. Amica Mut. Ins. Co., 2006 UT 37,

¶16, 140 P.3d 1210 ("When we engage in a duty-to-defend analysis, we focus on two documents: the insurance policy and the complaint. An insurer's duty to defend is determined by comparing the language of the insurance policy with the allegations of the complaint." (citations and quotations omitted)).

> A duty to defend arises "when the insurer ascertains facts giving rise to potential liability under the insurance policy." Sharon Steel Corp. v. Aetna Cas. & Sur., 931 P.2d 127, 133 (Utah 1997). When the allegations, if proven, show "there is no potential liability [under the policy], then there is no duty to defend." Deseret Fed. Sav. v. U.S. Fid. & Guar., 714 P.2d 1143, 1147 (Utah 1986). . . . If one claim or allegation triggers the duty to defend, the insurer must defend all claims (that is, covered and non-covered claims), at least until the suit is limited to the non-covered claims. Id. at 1216. Finally, and perhaps most important: "'When in doubt, defend.'" Id. at 1215 (quoting Appleman on Ins. Law & Practice § 136.2[C] (2d ed. 2006)).

Id. at 166; see also Benjamin, 2006 UT at ¶17 ("Because the duty to defend is contractual, our starting point must always be the underlying policy." (citation omitted)).

Moreover:

> Where an insurance policy obligates an insurer to defend claims of *unintentional injury*, the insurer is obligated to do so until those claims are either dismissed or otherwise resolved in a manner inconsistent with coverage. Even where the complaint details egregious, intentional conduct, an expected injury exclusion like the one found in the Homeowners Policy does not relieve an insurer of its duty to defend claims of *unintentional injury*. Inferences and assumptions about an insured's *intent* to injure are improper and inconsistent both with the well-accepted practice of alternative pleading and with our oft-repeated instruction that "insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance."

Benjamin, 2006 UT at ¶24 (citation omitted)(emphasis added).

"An insurer denying a duty to defend must establish that the claims fall outside the coverage of the policy or the claims are exempted from coverage." Simmons v. Farmers Ins. Group, 877 P.2d 1255, 1258 (Utah Ct. App. 1994). Any language limiting the duty to defend, "must be clear, unambiguous, and sufficiently conspicuous" to give the appropriate notice to the insured of the limitations. Id. (citation omitted).

Advertising Idea

The relevant portion of the Commercial Lines Policy ("Policy") provides:

> Section I - Coverages. . .
>
> B1. . . a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal advertising injury[.]". . . [W]e *will have no duty to defend* the insured against any "suit" *seeking damages* for "personal and advertising injury" to which this insurance *does not apply*. . .
>
> 2. *Exclusions*. . .
>
> a. Knowing Violation of Rights of Another. . .
>
> b. Material Published With Knowledge of Falsity. . .
>
> g. Quality or Performance of Goods - *Failure to Conform to Statements*
>
> "Personal and advertising injury" arising out of the failure of goods, products or services *to conform* with any statement of quality or performance made in your "advertisement.". . .
>
> Section VI - Definitions. . .
>
> 1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. . . .

> 14. . . f. The use of another's advertising idea in your advertisement[.]

(Price Decl. Ex. 1, pp. 11, 12, 19, 21)(emphasis added).

1 Underlying Class Action Suits

Plaintiffs maintain that because of their use of another's[2] advertising slogans "Eat All You Want And Still Lose Weight" and "And We Couldn't Say It in Print If it Wasn't True," several suits, including class actions suits have been filed against them. Plaintiffs claim that they are entitled to insurance coverage by Defendant because the suite arose out of Plaintiffs' use of another's advertising ideas.

The Miller Complaint was initially filed in the U.S. District Court in Utah on November 9, 2007. An Amended Complaint[3] was filed May 23, 2008. Miller's causes

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[2]The slogans are registered trademarks of Western Holding, LLC. The slogans were *not* registered until June 3, 2008, the Miller complaint was filed against Plaintiffs and others, in the U.S. District Court in Utah on November 9, 2007, and the Tompkins complaint was filed in California state court on December 6, 2007. The Policies were issued from August 20, 2007, to August 20, 2008, number CA000011665-01, and August 20, 2008, to August 20, 2009, number CA000011665-02. Section I(B)(1)(b) provides that the "insurance policy applies to 'personal and advertising injury' caused by an offense . . . if the offense was not committed before the Retroactive Date of August 20, 2002[.]"

[3]Provides in relevant part:

> 1. This nationwide class action seeks to redress the pervasive pattern of fraudulent, deceptive and otherwise improper advertising, sales and marketing practices that Defendants [in the matter before this Court, includes in-part, Plaintiffs] have engaged in, and are currently engaged in, with respect to weight-loss dietary supplement products; specifically, Akävar 20/50. . . . 7. As part of their pervasive pattern of wrongful conduct, during the Class period Defendants have utilized (and continue to utilize) the U.S. mail and interstate wire facilities, including television, Internet, point-of-purchase advertisements and advertisements published in national print publications (such as *Parade* magazine) to advertise, label, offer for sale, sell and distribute Akävar by falsely claiming that Akävar is a "New! European Weight-Loss Breakthrough" product that offers

of action include: (1) Violations fo Section 1962(c),(d) of RICO, (2) Violations fo Section 1962(c),(d) of RICO, (3) Violations of Section 76-10-1603(3), (4) of the Utah Pattern of Unlawful Activity Act, (4) Violations of Section 76-10-1603(3), (4) of the Utah Pattern of Unlawful Activity Act, (5) Fraud, (6)Violation of the Utah Consumer Services Protection Act and Other Consumer Protection Statutes, (7) Unjust Enrichment, and (8) Negligent Misrepresentation.

The Tompkins Complaint[4] was filed on or around December 21, 2007, in the California Superior Court, Sacramento County. Tompkins' causes of action include: (1) Violations of the Unfair Competition Law, the Deceptive, False and Misleading

---

a "foolproof" alternative to weight loss with "guaranteed success and "WITHOUT GRUELING DIET AND EXERCISE REGIMENS!". . . . Defendants' advertisements for Akävar falsely and misleadingly state that "Studies have provide a virtual 100% success rate among the participants," and that by taking the product the consumer will see excess fat "PULLED FROM BULGING PARTS OF YOUR BODY."

(Price Decl. Ex. 3, p. 2, 7).

[4]Claims in relevant part:

Defendants [includes Plaintiffs in-part, in the entitled matter] have used television, the internet, and national publication to advertise Akävar as a product that offer "foolproof" alternative to weight loss with "guaranteed success" and "WITHOUT GRUELING DIET AND EXERCISE REGIMENS!" These advertisements also falsely state that "Studies have proved a virtual 100% success rate among the participants," and that by using the product the consumer will see excess fat "PULLED FROM BULGING PARTS OF YOUR BODY." Defendants also falsely allege that the results are "scientific fact, documented by published medical findings" and that "a team of doctors working in a recognized medical university discovered the caloric-restricting qualities" of Akävar. However, in truth, Akävar is not a foolproof alternative to weight loss with guaranteed success, and the product has not been subjected to clinical trials.

(Price Decl. Ex. 4, pp.2-3, no. 3).

Advertising Statutes, and (2) Violations of Consumer Legal Remedies Act.

The Forlenza Complaint[5] was filed on May 26, 2009, in the U.S. District Court Central District of California. Forlenza's causes of action include: (1) Violation of California Legal Remedies Act, (2) Unjust Enrichment, (3) Fraud, (4) Violation of California Business and Professions Code Sections 1700 et seq, and (5) Breach of Warranty.

2 Plaintiffs' Legal Argument

Plaintiffs' primary argument for coverage is pursuant to the terms of "advertising injury." Specifically, Plaintiffs maintain that because they used the advertising ideas of another, that is Western Holding, LLC, they are entitled to coverage pursuant to Section VI(14)(f), which provides in relevant part, "'Personal and advertising injury'" means *injury* including consequential 'bodily injury' arising out of one or more of the following offenses. . . [t]he use of another's advertising idea in your 'advertisement[.]'" (Price

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[5]Asserts in relevant part:

> Akävar claims to be the "fastest, easiest weight loss ever." It purports to allow consumers to "eat all you want and lose weight." Defendants [includes Plaintiffs in-part, in the entitled matter] claim that Akävar makes weight loss "effortless" by "automatically reduc[ing] caloric intake. . .and eliminating traditional dieting, calorie counting, strenuous exercise, fad diets, supermarket 'miracle' pills, Japanese wonder diets, rubber suits, belts, creams or anything else you have ever tried before." However, Akävar is use one of those "miracle pills" it derides. Defendants attempt to sell Akävar by convincing consumers that they can avoid the only proven and safe weight-loss method recognized by the FDA.
>
> (Price Decl. Ex. 5, p. 6, no. 21).

Decl. Ex. 1, p. 21)(emphasis added).

The two specific "advertising ideas" that Plaintiffs maintain fall into the coverage provision are: (1) primarily, "Eat All You Want & Still Lose Weight" and, (2) "And We Couldn't Say It In Print If It Wasn't True." Plaintiffs' reliance on case law and the causes of action of the class action complaints against Plaintiffs is *misplaced*.

For example, Plaintiffs rely on the two-part test set out in Novell, Inc. v. Fed. Ins. Co., 141 F.3d 983, 989 (10th Cir. Utah 1998), to determine an advertising injury. The test requires a (1) predicate offense and (2) a causal connection. Id. The Novell court explained that the "predicate offense" is that which is specifically listed in the definition of "advertising injury." Id. at 986. Additionally, the "advertising injury must have a causal connection with the insured's advertising activities before there can be coverage." Id. at 989 (citation and quotations omitted).

The predicate offenses as unambiguously provided in Defendant's Policy provides:

> "Personal and advertising injury" means injury including consequential "bodily injury" arising out of one or more of the following offenses:
>
> a. False arrest, detention, or imprisonment;
> b. Malicious prosecution;
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that person occupies, committed by or on behalf of its owner, landlord, or lessor;
> d. Oral or written publication in any manner of material that

slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. *The use of another's advertising idea in your "advertisement";* or

g. Infringing upon another's copyright trade dress or slogan in your "advertisement."

(Price Decl. Ex. 1, p. 21, no. 14) (emphasis added).

While Plaintiffs maintain that the class action suits were the result of their use of the noted slogans, upon review of the complaints it is apparent that the basis of the claim against Plaintiffs is the *failed promise of weight loss* without any behavior or lifestyle changes and *not* the *use* of the phrases "Eat All You Want & Still Lose Weight" and "And We Couldn't Say It In Print If It Wasn't True" to advertise Akävar. Supra nn. 3-5 (emphasis added).

Plaintiffs also rely on unpublished cases and cases in other jurisdictions for support of their argument of an "advertising idea." (Pls' Mem. In Supp. fn. 18-25); see McLaughlin v. Schenk, 2009 UT 64, ¶17, 220 P.3d 146 (explaining that in the absence of Utah [i.e. jurisdictional] precedent, the court looks to Utah statutes and case law from other jurisdictions for guidance (citation omitted)); see also generally Husley v. Astreue, 280 Fed. Appx. 756, 2008 U.S. App. LEXIS 12006 (10th Cir. 2008) (explaining that while an unpublished decision is not precedential it could be cited for its persuasive value consistent with 10th Cir. R. 32.1, although the case relied on by the lower court was

found to have little persuasive value because it was materially distinguishable from the case at hand)(unpublished).

However, a tenth circuit court has recently issued a decision in which "advertising injury" is clearly defined. DISH Network Corp. v. Arch Specialty Ins. Co., 734 F. Supp. 2d 1173, 1183 (D. Colo. 2010). Although this is not the verbatim language of Defendant's Policy, it is comparable i.e., misappropriation[6] versus use[7]. See Warburton v. Virginia Beach Fed. S & L Ass'n, 899 P.2d 779, 782 (Utah Ct. App. 1995) (holding that ordinary meaning of contract terms are often best determined through standard dictionaries). The court in DISH Network explained:

> Most courts hold that "misappropriation of advertising ideas" means the "wrongful taking of the manner by which another advertises its goods or services" or the "wrongful taking of an idea about the solicitation of business." The misappropriation of advertising ideas *must* occur "*in the elements of the advertising itself, in its text, form, logo, or pictures, rather than in the product being advertised.*"

734 F. Supp. 2d at 1183 (citations omitted)(emphasis added). The latter sentence is enlightening as it applies in the matter before this Court.

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[6]Defined as: "to appropriate wrongly[.]" Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/misappropriate.

[7] Defined as: "the act or practice of employing something; the fact or state of being used; a method or manner of employing or applying something[.]" Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/use.

To clarify, the Ohio Casualty court provided a definition of "advertising idea[8]." The court explained that "[a]n 'advertising idea' is an *idea* for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage." 464 F. Supp. 2d at 1166 (citations and quotations omitted). This definition is parallel to the Policy definition of "advertisement." See supra 8.

Based upon the foregoing, the "advertising injury" from the "use" of an "advertising idea" must arise "*in the elements of the advertising itself, in its text, form, logo, or pictures, rather than in the product being advertised.*" DISH Network Inc., 734 F. Supp. 2d at 1183 (citations omitted)(emphasis added). As is apparent from review of the class action complaints, the claims against Plaintiffs stem from the *failed promise of the performance* of the supplement i.e., the promise to cause weight loss without any changes in lifestyle. See supra nn. 3-5 (emphasis added). While there are references to the trademarked slogans of "Eat all You Want & Still Lose Weight" and, "And We Couldn't Say It In Print If It Wasn't True," this is not the basis of the complaints. See supra nn. 3-5.

Accordingly, coverage is excluded pursuant to Policy Section I(B)(2). (Price Decl. Ex. 1, p. 11-12); see Ohio Casualty Ins. Co., 464 F. Supp. 2d at ("[I]n Utah, as a

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[8]Defendant's Policy does not provide a definition for "advertising idea," rather it provides a definition for "advertisement"as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." (Price Decl. Ex. 1, p. 19, no. 1).

general rule, an insurer's duty to defend is determined by comparing the language of the insurance policy with the allegations of the complaint. . . . [T]the allegations, if proven, show there is no potential liability [under the policy], then there is no duty to defend." (citations and quotations omitted)).

The relevant jurisdictional cases as cited by Plaintiffs, are factually distinguishable and therefore, not persuasive. Compare Novell, Inc., 141 F.3d at 985 (party asserting claim against plaintiff, that plaintiff "effectively appropriated and usurped his research, development, and marketing efforts, and undermined his ability to market and license his product"); DISH Network Corp., 734 F. Supp. 2d at 1176 (explaining that plaintiff insured, cable television providers, sued for a declaratory judgment that defendant insurers were obligated to defend them in a suit wherein a patent holder alleged patent infringement from the insureds' use of automated telephone systems, that allowed customers to perform pay-per-view ordering and customer service functions over the telephone); Ohio Casualty Ins. Co., 464 F. Supp. 2d at 1164 ("According to Unigard, Edizone's Complaint triggers a duty to defend under the 'advertising injury' portion of the Policy because it alleges that the Cloud Nine Defendants used Edizone's 'advertising ideas' (the trade names GellyComb, Gelastic, and Intelli-Gel) in their advertisement, all to Edizone's detriment."); Jewelers Mut. Ins. v.

Milne Jewelry Co., 2006 U.S. Dist. LEXIS 90551, *9-10 (D. Utah, Dec. 14, 2006) ("Plaintiff argues that the term 'quality' refers to a certain characteristic, and that being of Native American origin is a quality contemplated by the policy. Defendant replies that the term 'quality' in the policy relates not to a characteristic, such as Native American authenticity, but rather, to the fitness of the product[.]"); (Elcom Techs., Inc. v. Hartford Ins. Co., 991 F. Supp. 1294, 1295 (D. Utah 1997) ("Phoenex Corporation filed a lawsuit (the underlying action) against Elcom sometime in November of 1995. In the underlying action, Phoenex alleged that Elcom willfully and deliberately infringed upon Phoenex's patents by manufacturing and selling a product known as the ezPHONE. Phoenex also asserted that Elcom falsely claimed in its advertising brochures that the ezPHONE is based upon patented technology."); (Tynan's Nissan, Inc. v. Am. Hardware Mut. Ins., 917 P.2d 321, 325 (Colo Ct. App. 1995) ("We agree with the trial court's interpretation of the policy here that a generic style of doing business not related to advertising activities is not covered under the policy.")

Conclusion

Because Plaintiffs failed to show that as a matter of law they are entitled to coverage pursuant to the unambiguous terms of the Policy, Plaintiffs' Motion for Summary Judgment is DENIED.

Furthermore, because Defendant established that pursuant to the unambiguous exclusion provision of the Policy that Plaintiff's claims are claims premised upon Akävar's "performance" and *not* the use of the slogans "Eat All You Want & Still Lose Weight" and "And We Couldn't Say It In Print If It Wasn't True," Defendant's Motion is GRANTED.

The following Ruling stands as the Order of the Court. No further order is required.

Dated this 24th day of May, 2011.

BY THE COURT:

L.A. DEVER
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing RULING dated this 24th day of May, 2011, postage prepaid, to the following:

Phillip S. Ferguson
Rebecca L. Hill
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, UT 84101

David J. Garthe
BOORNAZIAN JENSEN & GARTHE
555 12th Street, Suite 1800
Oakland, CA 94607

Alan C. Bradshaw
Aaron C. Garrett
MANNING, CURTIS, BRADSHAW & BEDNAR, LLC
170 South Main Street, Suite 900
Salt Lake City, UT 84101

David A. Gauntlett
James A. Lowe
Andrew M. Sussman
GAUNTLETT & ASSOCIATES
18400 Von Karman, Suite 300
Irvine, CA 92612

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CLERK OF COURT

ADMIRAL INSURANCE COMPANY

A STOCK COMPANY
(herein called "the Company")

COMMON POLICY DECLARATIONS

Policy No.: CA000011665-01 **Renewal/Rewrite of:** NEW

Named Insured and Mailing Address

COVARIX LLC
DBA: BASIC RESEARCH LLC
5742 W HAROLD GATTY DRIVE
SALT LAKE CITY, UT 84116

Policy Period: From 08/20/2007 To 08/20/2008 At 12:01 A.M. Standard Time at the address of the Named Insured as stated herein

THE NAMED INSURED IS: ☐ Individual; ☐ Partnership; ☐ Corporation; ☐ Joint Venture; ☑ Other

BUSINESS DESCRIPTION: VITAMINS, HERBAL & NATURAL SUPPLEMENTS

AUDIT PERIOD: ☑ Annual; ☐ Other

IN RETURN FOR THE PAYMENT OF THE PREMIUM AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGES FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

NOTICE
Except to such extent as may otherwise be provided herein, the coverage in this policy is limited generally to liability for only those claims that are first made against the insured while policy is in force. Please review the policy carefully and discuss the coverage thereunder with your insurance agent or broker.

Commercial Property Coverage	$	
Commercial General Liability Coverage	$	$687,000.00
Products/Completed Operations Liability Coverage	$	
Equipment Breakdown Coverage	$	
_____ Coverage	$	
PREMIUM:	$	$687,000.00
TERRORISM PREMIUM:	$	
TOTAL PREMIUM:	$	$687,000.00

Form(s) and Endorsement(s) made a part of this policy at inception:
REFER TO SCHEDULE OF FORMS, AI 00 18 03 98

This policy is not binding unless countersigned by Admiral Insurance Company or it's authorized representative.

Countersigned On: 10/10/07

At: Seattle, WA

By: James S. Carey
Authorized Representative

THESE COMMON POLICY DECLARATIONS AND, IF APPLICABLE, THE COMMERCIAL PROPERTY COVERAGE, THE COMMERCIAL GENERAL LIABILITY DECLARATIONS TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE PART(S), FORM(S) AND ENDORSEMENTS, IF ANY, ISSUES TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBER POLICY.

DE 20 01 07 00

INSURED'S COPY

DECLARATIONS

Policy No.: CA000011665-01 **Effective Date:** 08/20/2007 12:01 A. M., Standard Time

LIMITS OF INSURANCE

General Aggregate Limit (Other Than Products- Completed Operations)	$	5,000,000	
Products - Completed Operations Aggregate Limit	$	5,000,000	
Personal and Advertising Injury Limit	$	5,000,000	
Each Occurrence Limit	$	5,000,000	
Damage To Premises Rented To You Limit	$	50,000	Any One Premises
Medical Expense Limit	$	EXCLUDED	Any One Person

RETROACTIVE DATES

Coverages A and B of this insurance does not apply to "bodily injury", "personal injury", "property damage" or "advertising injury" which occurs before the Retroactive Date, if any, shown here: 08/20/2002

(Enter Date or "None" if no Retroactive Date Applies)

PREMIUM

Classification	Code No.	Premium Basis		Rate	Per	Advance Premium
OPERATIONS RATED AS: VITAMINS, HERBAL & NATURAL SUPPLEMENTS	52343	$106,860,840 Cosmectics	(3)	$1.580	$1,000	$168,840.00
		$101,139,158 Ingestables	(3)	$3.790	$1,000	$383,317.00
		$52,000,000 Foreign	(3)	$2.593	$1,000	$134,843.00
					Total Advanced Premium	$687,000.00
					Minimum Term Premium	$618,300.00

ADDITIONAL DECLARATIONS

When used as a Premium basis:

(1) "remuneration" means the entire remuneration earned during the policy period by proprietors and by all employees of the Named Insured other than chauffeurs (except operators of mobile equipment) and aircraft pilots and co-pilots, subject to any overtime earnings or limitation or remuneration rule applicable in accordance with the manuals in use by the Company;

(2) "cost" means the total cost to the Named Insured with respect to operations performed for the Named Insured during the policy period by independent contractors of all work let or sub-let in connection with each specific project, including the cost of all labor, materials and equipment furnished, used or delivered for use in the execution of such work, whether furnished by the owner, contractor or sub-contractor, including all fees, allowances, bonuses or commissions made, paid or due.

(3) "sales" means the gross amount of money charged by the Named Insured, his concessionaires, and others trading under his name, for goods and products sold or distributed, operations performed (installation, repair or servicing), dues or fees and rentals during the policy term, and includes taxes, other than taxes which the Named Insured and such others collect as a separate item and remit directly to a governmental division.

THESE DECLARATIONS ARE PART OF THE POLICY DECLARATIONS CONTAINING THE NAME OF THE INSURED AND THE POLICY PERIOD

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

COVERAGES A AND B PROVIDE CLAIMS-MADE COVERAGE
PLEASE READ THE ENTIRE FORM CAREFULLY

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section VI – Definitions.

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and

(3) A claim for damages because of the "bodily injury" or "property damage" is first made against any insured, in accordance with Paragraph c. below, during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Periods.

c. A claim by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:

(1) When notice of such claim is received and recorded by any insured or by us, whichever comes first; or

(2) When we make settlement in accordance with Paragraph 1.a. above.

All claims for damages because of "bodily injury" to the same person, including damages claimed by any person or organization for care, loss of services, or death resulting at any time from the "bodily injury", will be deemed to have been made at the time the first of those claims is made against any insured.

All claims for damages because of "property damage" causing loss to the same person or organization will be deemed to have been made at the time the first of those claims is made against any insured.

2. Exclusions

This insurance does not apply to:

a. **Expected Or Intended Injury**

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. **Contractual Liability**

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. **Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. **Personal And Advertising Injury**

"Bodily injury" arising out of "personal and advertising injury".

p. **Electronic Data**

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits Of Insurance.

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. **Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business, but only if:

(1) The offense was committed in the "coverage territory";

(2) The offense was not committed before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and

(3) A claim for damages because of the "personal and advertising injury" is first made against any insured, in accordance with Paragraph c. below, during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Periods.

c. A claim made by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:

(1) When notice of such claim is received and recorded by any insured or by us, whichever comes first; or

(2) When we make settlement in accordance with Paragraph 1.a. above.

All claims for damages because of "personal and advertising injury" to the same person or organization as a result of an offense will be deemed to have been made at the time the first of those claims is made against any insured.

2. **Exclusions**

This insurance does not apply to:

a. **Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. **Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the dire

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the Retroactive Date, if any, shown in the Declarations.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods – Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content or web-sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b.** and **c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-Related

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I – Coverage A – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when:

a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or

b. The conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by,

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker") or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage B does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage C;

b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages under Coverage B.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

a. Damages under Coverage A; and

b. Medical expenses under Coverage C

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

7. Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

tal Extended Reporting Period, including a provision to the effect that the insurance afforded for claims first received during such period is excess over any other valid and collectible insurance available under policies in force after the Supplemental Extended Reporting Period starts.

6. If the Supplemental Extended Reporting Period is in effect, we will provide the supplemental aggregate limits of insurance described below, but only for claims first received and recorded during the Supplemental Extended Reporting Period.

   The supplemental aggregate limits of insurance will be equal to the dollar amount shown in the Declarations in effect at the end of the policy period for such of the following limits of insurance for which a dollar amount has been entered:

   General Aggregate Limit

   Products-Completed Operations Aggregate Limit

   Paragraphs **2.** and **3.** of Section III – Limits Of Insurance will be amended accordingly. The Personal and Advertising Injury Limit, the Each Occurrence Limit and the Damage To Premises Rented To You Limit shown in the Declarations will then continue to apply, as set forth in Paragraphs **4.**, **5.** and **6.** of that Section.

SECTION VI – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
   a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
   b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
2. "Auto" means:
   a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
   b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

   However, "auto" does not include "mobile equipment".
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
   a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
   b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in a. above; or
   c. All other parts of the world if the injury or damage arises out of:
      (1) Goods or products made or sold by you in the territory described in a. above;
      (2) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; or
      (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

   provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
   a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
   b. You have failed to fulfill the terms of a contract or agreement;

   if such property can be restored to use by:
   a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
   b. Your fulfilling the terms of the contract or agreement.
9. "Insured contract" means:
   a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from, computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

Policy Number: CA000011665-01 CG 20 26 07 04

Effective Date: 08/20/2007

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)
AS REQUIRED BY WRITTEN CONTRACT PRIOR TO AN "OCCURRENCE" OR LOSS
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

A. In the performance of your ongoing operations; or

B. In connection with your premises owned by or rented to you.

ADMIRAL INSURANCE COMPANY

A STOCK COMPANY
(herein called "the Company")

COMMON POLICY DECLARATIONS

Policy No.: CA000011665-02 **Renewal/Rewrite of:** CA000011665-01

Named Insured and Mailing Address

COVARIX LLC
DBA BASIC RESEARCH LLC;
See Named Insured Schedule AD 0785
5742 W HAROLD GATTY DRIVE
SALT LAKE CITY, UT 84116

"The insurer issuing this policy does not hold a certificate of authority to do business in this state and thus is not fully subject to regulation by the Utah Insurance Commissioner. This policy receives no protection from any of the guaranty associations created under Chapter 28, Title 31A (UC31A-15-103 (8))".
Worldwide Facilities, Inc. - License #91434

Policy Period: From 08/20/2008 To 08/20/2009 At 12:01 A.M. Standard Time at the address of the Named Insured as stated herein

THE NAMED INSURED IS: ☐ Individual; ☐ Partnership; ☐ Corporation; ☐ Joint Venture; ☑ Other

BUSINESS DESCRIPTION: VITAMINS, HERBAL & NATURAL SUPPLEMENTS

AUDIT PERIOD: ☑ Annual; ☐ Other

IN RETURN FOR THE PAYMENT OF THE PREMIUM AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGES FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

Commercial Property Coverage		$	
Commercial General Liability Coverage		$	$475,000.00
Products/Completed Operations Liability Coverage	BROKER FEE $10,000.00	$	
Equipment Breakdown Coverage		$	
_____ Coverage		$	
	PREMIUM:	$	$475,000.00
	TERRORISM PREMIUM:	$	
	TOTAL PREMIUM:	$	$475,000.00

Form(s) and Endorsement(s) made a part of this policy at inception:
REFER TO SCHEDULE OF FORMS, AI 00 18 03 08

NOTICE
Except to such extent as may otherwise be provided herein, the coverage of this policy is limited generally to liability for only those claims that are first made against the insured while the policy is in force. Please review the policy carefully and discuss the coverage thereunder with your insurance agent or broker

This policy is not binding unless countersigned by Admiral Insurance Company or it's authorized representative.

Countersigned On: 09/30/08

At: Seattle, WA

By: James S. Carey
Authorized Representative

THESE COMMON POLICY DECLARATIONS AND, IF APPLICABLE, THE COMMERCIAL PROPERTY COVERAGE, THE COMMERCIAL GENERAL LIABILITY DECLARATIONS TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE PART(S), FORM(S) AND ENDORSEMENTS, IF ANY, ISSUES TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBER POLICY.

DE 20 01 07 00

COMMERCIAL GENERAL LIABILITY COVERAGE PART

DECLARATIONS

Policy No.: CA000011665-02 Effective Date: 08/20/2008 12:01 A. M., Standard Time

LIMITS OF INSURANCE

General Aggregate Limit (Other Than Products- Completed Operations)	$	5,000,000	
Products - Completed Operations Aggregate Limit	$	5,000,000	
Personal and Advertising Injury Limit	$	5,000,000	
Each Occurrence Limit	$	5,000,000	
Damage To Premises Rented To You Limit	$	50,000	Any One Premises
Medical Expense Limit	$	EXCLUDED	Any One Person

RETROACTIVE DATES

Coverages A and B of this insurance does not apply to "bodily injury", "personal injury", "property damage" or "advertising injury" which occurs before the Retroactive Date, if any, shown here: 08/02/2002

(Enter Date or "None" if no Retroactive Date Applies)

PREMIUM

Classification	Code No.	Premium Basis	Rate	Per	Advance Premium
OPERATIONS RATED AS: VITAMINS, HERBAL & NATURAL SUPPLEMENTS	52343	$263,498,136(3)	$1.800	$1,000	$475,000.00

Total Advanced Premium	$475,000.00
Minimum Term Premium	$427,500.00

ADDITIONAL DECLARATIONS

When used as a Premium basis:

(1) "remuneration" means the entire remuneration earned during the policy period by proprietors and by all employees of the Named Insured other than chauffeurs (except operators of mobile equipment) and aircraft pilots and co-pilots, subject to any overtime earnings or limitation or remuneration rule applicable in accordance with the manuals in use by the Company;

(2) "cost" means the total cost to the Named Insured with respect to operations performed for the Named Insured during the policy period by independent contractors of all work let or sub-let in connection with each specific project, including the cost of all labor, materials and equipment furnished, used or delivered for use in the execution of such work, whether furnished by the owner, contractor or sub-contractor, including all fees, allowances, bonuses or commissions made, paid or due.

(3) "sales" means the gross amount of money charged by the Named Insured, his concessionaires, and others trading under his name, for goods and products sold or distributed, operations performed (installation, repair or servicing), dues or fees and rentals during the policy term, and includes taxes, other than taxes which the Named Insured and such others collect as a separate item and remit directly to a governmental division.

THESE DECLARATIONS ARE PART OF THE POLICY DECLARATIONS CONTAINING THE NAME OF THE INSURED AND THE POLICY PERIOD

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

COVERAGES A AND B PROVIDE CLAIMS-MADE COVERAGE
PLEASE READ THE ENTIRE FORM CAREFULLY

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section VI – Definitions.

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and

(3) A claim for damages because of the "bodily injury" or "property damage" is first made against any insured, in accordance with Paragraph c. below, during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Periods.

c. A claim by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:

(1) When notice of such claim is received and recorded by any insured or by us, whichever comes first; or

(2) When we make settlement in accordance with Paragraph a. above.

All claims for damages because of "bodily injury" to the same person, including damages claimed by any person or organization for care, loss of services, or death resulting at any time from the "bodily injury", will be deemed to have been made at the time the first of those claims is made against any insured.

All claims for damages because of "property damage" causing loss to the same person or organization will be deemed to have been made at the time the first of those claims is made against any insured.

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

(3) A claim for damages because of the "personal and advertising injury" is first made against any insured, in accordance with Paragraph c. below, during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Periods.

c. A claim made by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:

(1) When notice of such claim is received and recorded by any insured or by us, whichever comes first; or

(2) When we make settlement in accordance with Paragraph a. above.

All claims for damages because of "personal and advertising injury" to the same person or organization as a result of an offense will be deemed to have been made at the time the first of those claims is made against any insured.

2. **Exclusions**

This insurance does not apply to:

a. **Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. **Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. **Material Published Prior To Policy Period**

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the Retroactive Date, if any, shown in the Declarations.

d. **Criminal Acts**

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. **Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. **Breach Of Contract**

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. **Quality Or Performance Of Goods – Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. **Wrong Description Of Prices**

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. **Infringement Of Copyright, Patent, Trademark Or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. **Insureds In Media And Internet Type Businesses**

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content or web-sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs 14.a., b. and c. of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. **Electronic Chatrooms Or Bulletin Boards**

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. **Unauthorized Use Of Another's Name Or Product**

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. **Pollution**

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. **Pollution-Related**

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. **War**

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. **Distribution Of Material In Violation Of Statutes**

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

COVERAGE C MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. **Any Insured**

To any insured, except "volunteer workers".

b. **Hired Person**

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. **Injury On Normally Occupied Premises**

To a person injured on that part of premises you own or rent that the person normally occupies.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:
   a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
   b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
   c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
   d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
   e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
   a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
      (1) "Bodily injury" or "personal and advertising injury":
         (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
         (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (a) above;
         (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (a) or (b) above; or
         (d) Arising out of his or her providing or failing to provide professional health care services.
      (2) "Property damage" to property:
         (a) Owned, occupied or used by,
         (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by

      you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
   b. Any person (other than your "employee" or "volunteer worker") or any organization while acting as your real estate manager.
   c. Any person or organization having proper temporary custody of your property if you die, but only:
      (1) With respect to liability arising out of the maintenance or use of that property; and
      (2) Until your legal representative has been appointed.
   d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
   a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
   b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
   c. Coverage B does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
   a. Insureds;
   b. Claims made or "suits" brought; or
   c. Persons or organizations making claims or bringing "suits".
2. The General Aggregate Limit is the most we will pay for the sum of:
   a. Medical expenses under Coverage C;
   b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
   c. Damages under Coverage B.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
   a. Damages under Coverage A; and
   b. Medical expenses under Coverage C

   because of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. **Bankruptcy**

   Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. **Duties In The Event Of Occurrence, Offense, Claim Or Suit**
   a. You must see to it that we are notified as soon as practicable of an "occurrence" or offense which may result in a claim. To the extent possible, notice should include:
      (1) How, when and where the "occurrence" or offense took place;
      (2) The names and addresses of any injured persons and witnesses; and
      (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

      Notice of an "occurrence" or offense is not notice of a claim.
   b. If a claim is received by any insured, you must:
      (1) Immediately record the specifics of the claim and the date received; and
      (2) Notify us as soon as practicable.

      You must see to it that we receive written notice of the claim as soon as practicable.
   c. You and any other involved insured must:

6. If the Supplemental Extended Reporting Period is in effect, we will provide the supplemental aggregate limits of insurance described below, but only for claims first received and recorded during the Supplemental Extended Reporting Period.

   The supplemental aggregate limits of insurance will be equal to the dollar amount shown in the Declarations in effect at the end of the policy period for such of the following limits of insurance for which a dollar amount has been entered:

   General Aggregate Limit
   Products-Completed Operations Aggregate Limit

   Paragraphs 2. and 3. of Section III – Limits Of Insurance will be amended accordingly. The Personal and Advertising Injury Limit, the Each Occurrence Limit and the Damage To Premises Rented To You Limit shown in the Declarations will then continue to apply, as set forth in Paragraphs 4., 5. and 6. of that Section.

SECTION VI – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
   a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
   b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
2. "Auto" means:
   a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
   b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

   However, "auto" does not include "mobile equipment".
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
   a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
   b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
   c. All other parts of the world if the injury or damage arises out of:
      (1) Goods or products made or sold by you in the territory described in Paragraph a. above;
      (2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
      (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

   provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
   a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
   b. You have failed to fulfill the terms of a contract or agreement;

   if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.
9. "Insured contract" means:
   a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
   b. A sidetrack agreement;
   c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
   d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
   e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in Paragraph (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from, computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

Policy Number: CA000011665-02 AD 07 85 01 95

Issued Date: 10/17/2008 Effective Date: 08/20/2008

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NAMED INSURED ENDORSEMENT

This endorsement modifies insurance provided under the following:
COMMERICAL GENERAL LIABILITY COVERAGE PART
It is agreed the Named Insured as shown on the Common Policy Declarations is as follows:

COVARIX LLC
DBA: BASIC RESEARCH LLC;
COVARIX, LLC AND SUBSIDIARIES;
WESTERN HOLDINGS, LLC AND SUBSIDIARIES;
COMMAND ENTERPRISE, LLC AND SUBSIDIARIES;
PC MANAGEMENT AND SUBSIDIARIES;
5742 HOLDINGS LLC

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employment by you or while performing duties related to the conduct of your business.

...

SECTION VI – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

   a. Notices that are published include material placed on the Internet or on similar electronic means of communications; ...

5. "Employee" includes a "leased worker." ...

...

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business.

...

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

   ...

   f. **The use of another's advertising idea in your "advertisement"** [emphasis added] [*Id.* at ¶¶ 2 & 3, **Exhs. "1" & "2."**]

8. The named insured under the Admiral Policies, Basic Research, is designated as a limited liability company in the declarations pages of the policies. [*Id.*] Dennis Gay is the manager of Basic Research. [*Id.* at ¶ 5.]

9. Gay, Mowrey, and Friedlander are each employed by Bydex Management, LLC, an employee management and labor leasing company. [*Id.* at ¶ 6.] Each provides services to Basic Research pursuant to an agreement between Bydex and Basic Research. [*Id.*] The Admiral Policies provide coverage for Basic Research "employees," including "leased workers." [*Id.* at ¶¶ 2 & 3, **Exhs. "1" & "2."**] The conduct of Gay, Mowrey, and Friedlander as alleged in the

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underlying lawsuits concerns their duties as Basic Research "employees":

> Defendants Gay, Mowrey and Friedlander have knowingly engaged in a deliberate pattern of wrongful, illegal and fraudulent practices in conducting the affairs of Defendants Basic Research[, *et al.*] [*Id.* at ¶ 8, **Exh. "3"** (*Miller* Amended Complaint), ¶ 1.]
>
> Defendant Gay is an officer and a principal shareholder of, among other companies, Defendants Basic Research and Dynakor . . . [and] directs, controls, or participates in the acts or practices of Defendants, including Basic Research and Dynakor. . . . Defendant Mowrey is a principal shareholder of, and the Director of Scientific Affairs at, Defendant Basic Research . . . [and] serves as a consultant for Defendant Dynakor . . . Defendant Friedlander, the self-proclaimed marketing guru of Basic Research . . . is a marketing consultant to, among others . . . Basic Research and Dynakor. [*Id.* at ¶ 9, **Exh. "4"** (*Tompkins* Complaint), ¶¶ 12, 13 and 14.]
>
> DENNIS GAY ('Gay') is an individual and an owner and operator of Dynakor and Basic Research. . . . DANIEL B. MOWREY . . . ("Mowrey") is the director of scientific affairs at Defendant Basic Research, serves as a consultant to Defendant Dynakor, and owns and operates . . . a business organization used by Defendants as an instrumentality of the Defendants to develop, market, endorse and promote products for Defendants Basic Research and Dynakor. . . . MITCHELL K. FRIEDLANDER is an individual who controls and operates Defendants. [*Id.* at ¶ 13, **Exh. "5"** (*Forlenza* Complaint), ¶¶ 12, 13 and 14.]

10. A named insured endorsement to each Admiral policy includes Covarix, LLC and its subsidiaries as named insureds under the policy. [*Id.* at ¶¶ 2 & 3, **Exhs. "1" and "2."**] Dynakor, Carter-Reed and Zoller Labs are all subsidiaries of Covarix, LLC. [*Id.* at ¶ 7.] Covarix, LLC does business as Basic Research, LLC. [*Id.*]

11. Collectively, Basic Research, LLC, Dynakor Pharmaceutical, LLC, The Carter-Reed Company, LLC, Zoller Laboratories, LLC, Dennis Gay, Daniel B. Mowrey and Mitchell K. Friedlander are insureds under Admiral's Policy (the "Plaintiffs").

B. The Underlying Suits

1. The *Miller* Suit

12. On November 9, 2007, Pamela Miller, Randy Howard and Donna Patterson filed a putative class action complaint against Basic Research, Dynakor, Gay, Mowrey and Friedlander, among others, in a lawsuit styled as *Pamela Miller, Randy Howard and Donna*

44. On December 8, 2009, counsel for Basic Research again e-mailed Admiral to request that it honor its acknowledged defense obligations. In its response, Admiral confirmed that it has accepted the defense of Basic Research under a reservation of rights and that it was having the invoices for the incurred defense costs reviewed by counsel. [*Id.* at ¶¶ 5 & 6 & **Exh. "20."**]

45. By letter dated January 11, 2010, Admiral belatedly advised Basic Research it had appointed "an associated counsel" for Basic Research who would also serve as "panel counsel" for Admiral. [*Id.* at ¶ 7 & **Exh. "21."**] However, the appointed counsel did not participate in the defense of Basic Research in the *Forlenza* Suit. [*Id.* at ¶ 8.]

46. On April 7, 2010, Admiral filed a motion for judgment on the pleadings in this action, arguing for the very first time that it has no duty to defend the *Forlenza* Suit. [Admiral's Motion for Judgment on the Pleadings [Docket. No. 20].] Admiral never previously asserted that the allegations in the *Forlenza* Suit do not establish a potential for coverage under the second Admiral policy.

DECLARATION OF RONALD F. PRICE

1. I am an Associate General Counsel for Basic Research, LLC. The facts set forth in this declaration are true and correct based on my personal knowledge thereof and, if called to testify, I could and would testify competently thereto. Part of my duties as Associate General Counsel for Basic Research involves overseeing each of the lawsuits which is identified below, including reviewing all of the invoices which are received from the law firms which have been retained to represent the defendants in those cases. My duties also include overseeing the tender of the defense of those lawsuits to Admiral Insurance Company.

DEFENDANT ADMIRAL AND THE ADMIRAL POLICIES

2. Admiral Insurance Company ("Admiral") issued to named insured and Plaintiff Basic Research, LLC ("Basic Research") a commercial general liability (CGL) insurance policy (policy no. CA000011665-01) with a policy period from August 20, 2007 - August 20, 2008. A copy is attached as **Exhibit "1"** ("2007-2008 Policy").

3. Admiral subsequently issued to named insured and Basic Research, a CGL insurance policy (policy no. CA000011665-02) with a policy period from August 20, 2008 - August 20, 2009. A copy is attached as **Exhibit "2"** ("2008-2009 Policy").

4. Both Policies were issued in Utah. Payments for both Policies' premiums were also made from Utah.

DEFENDANTS IN THE UNDERLYING LITIGATION

5. Dennis Gay serves as the manager of Basic Research.

6. Dennis Gay, Daniel B. Mowrey and Mitchell K. Friedlander are each employed by Bydex Management, LLC, an employee management and labor leasing company whose employees provide services to other companies, including Basic Research. Each individual

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provides services to Basic Research pursuant to an agreement between Bydex and Basic Research.

7. Dynakor, Carter-Reed and Zoller Labs are all distinct, separate corporate entities, and are all subsidiaries of Covarix, LLC. Western Holdings, LLC is a separate and distinct corporate entity from Basic Research and the other plaintiffs in this action. Until June of 2009, Western Holdings was a Wyoming limited liability company. In May of 2009, Western Holdings was merged into a Nevada limited liability company named Western Holdings, LLC with its primary place of business in Nevada.

THE UNDERLYING *MILLER/TOMPKINS* CONSOLIDATED CLASS ACTION SUIT

8. On November 9, 2007, a lawsuit styled as *Pamela Miller, Randy Howard and Donna Patterson, et al. v. Basic Research, LLC, et al.*, (the "*Miller* suit") was filed in the District of Utah against Plaintiffs (herein). On May 23, 2008, the underlying claimants filed a First Amended Class Action Complaint ("*Miller* Amended Complaint"), attached here as **Exhibit "3."**

9. On December 6, 2007, a class action lawsuit styled as *Mary Tompkins, et al. v. Basic Research, LLC, et al.*, (the "*Tompkins* suit") was filed in California State Superior Court against Plaintiffs (herein). A copy of the *Tompkins* Complaint is attached here as **Exhibit "4."**

10. Subsequently, the *Tompkins* suit was removed to the United States District Court, Eastern District of California and then ordered transferred to the United States District Court, District of Utah, Central Division. The "Notice of Transfer" order is attached as **Exhibit "28."**

11. Thereafter, the *Tompkins* suit was ordered consolidated with the *Miller* suit, under the case name and case number as the *Miller* suit ("*Miller/Tompkins* suit.") The Order granting consolidation of the *Miller* and *Tompkins* suits is attached here as **Exhibit "29."**

PLAINTIFFS' CLAIM FOR COVERAGE FOR THE *MILLER/TOMPKINS* SUIT AND ADMIRAL'S DENIAL

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12. Basic Research gave notice to Admiral, its commercial general liability insurer, of both the original complaint and the *Miller* Amended Complaint as early as January 31, 2008 and, subsequently, the *Tompkins* Complaint. Basic Research's January 31, 2008 tender letter is attached here as **Exhibit "9."** Admiral subsequently denied a defense for the *Miller/Tompkins* suit on June 6, 2008. Admiral's denial letter is attached here as **Exhibit "10."**

THE UNDERLYING *FORLENZA* SUIT

13. On May 26, 2009, a class action law suit styled as *Nicole Forlenza, et al. v. Dynakor Pharmacal, LLC, et al.*, (the "*Forlenza* suit") was filed against the *Forlenza* Insureds. A copy of that complaint ("*Forlenza* Complaint") is attached as **Exhibit "5."**

14. On June 11, 2009, Nicole Forlenza and Shaiden Monroe filed a first amended complaint in the *Forlenza* suit, and is attached here as **Exhibit "6."**

15. On August 10. 2009, a second amended class action complaint ("*Forlenza* second amended complaint") was filed in the *Forlenza* suit, and is attached here as **Exhibit "7."**

16. On October 28. 2009, a third amended class action complaint ("*Forlenza* third amended complaint") was filed in the *Forlenza* suit, and is attached here as **Exhibit "8."**

17. On January 4, 2010, a fourth amended class action complaint ("*Forlenza* fourth amended complaint") was filed in the *Forlenza* suit, and is attached here as **Exhibit "18.**

NOTICE OF *FORLENZA* SUIT AND ADMIRAL'S RESPONSE

18. Basic Research provided written notice of the *Forlenza* suit along with a copy of the *Forlenza* Complaint to Admiral on or about June 4, 2009, and requested that Admiral respond and defend the suit.

19. By letter dated June 25, 2009, Admiral acknowledged notice of the *Forlenza* suit and agreed to defend under a reservation of rights. A copy is attached here as **Exhibit "11."**

20. By letter dated July 6, 2009, Admiral further acknowledged receiving notice of

the *Forlenza* suit and agreed to defend under a reservation of rights. A copy of the letter is attached as **Exhibit "12."**

21. By letter dated July 15, 2009, Basic Research gave Admiral notice of the *Forlenza* first amended complaint, and that the underlying defendants they had retained counsel to defend them. Admiral did not respond, nor participate in the defense. A copy of the letter is attached as **Exhibit "13."**

22. By letter dated August 11, 2009, Basic Research gave Admiral notice of the *Forlenza* second amended complaint and confirmed it was proceeding with the defense. Admiral did not respond, nor did it participate in the defense. A copy of the letter is attached as **Exhibit "14."**

23. To date, Plaintiffs have incurred significant expenses defending themselves and in securing counsel to enforce their rights under the insurance policies issued by Admiral.

I declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Executed at Salt Lake City, Utah on June 21, 2010.

RONALD F. PRICE

8. As part of their pervasive pattern of wrongful conduct, during the Class Period Defendants have utilized (and continue to utilize) the U.S. mail and interstate wire facilities, including telephones, facsimile machines and Internet to receive consumer solicitations to purchase Defendants' products, and Defendants' business activities have affected interstate commerce.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this nationwide class action pursuant to 28 U.S.C. § 1331, relating to federal question jurisdiction; Section 1964(c) of RICO, 18 U.S.C. § 1964(c); and Rule 23 of the Federal Rules of Civil Procedure. Venue is properly laid in this District pursuant to 28 U.S.C. § 1391 and Section 1965 of RICO, 18 U.S.C. § 1965.

PARTIES

Plaintiffs

10. Plaintiff, Pamela Miller, is a resident of Gilbert, Arizona. During the Summer of 2007, while conducting an Internet search on nutrition, Ms. Miller observed an advertisement for Akävar which, upon information and belief, was designed, sponsored and maintained by Defendants. This Internet advertisement, adorned with a picture of the product box and prominent yellow and orange colors, represented that Akävar was scientifically proven that it was a "EUROPEAN WEIGHT LOSS BREAKTHROUGH," and professed in bold print that the user could "**EAT ALL YOU WANT & STILL LOSE WEIGHT…**" Based upon this advertising disseminated by Defendants, Ms. Miller purchased a supply of Akävar through Defendants' Internet website, www.Akävar.net. After

25 days of taking Akävar as directed on the package labeling, Ms. Miller gained 10 pounds, and she ceased taking the product. Thereafter, Ms. Miller sent several e-mail inquiries concerning Akävar to Defendant Dynakor and she also made several interstate telephone calls, leaving messages on telephone answering machines maintained by Defendants, but she received no response to her e-mail or voicemail messages.

11. Plaintiff, Randy Howard, is a resident of Morton, Illinois. In or around October 2007, Mr. Howard observed an Akävar cardboard point-of-purchase advertising display while shopping at a Wal-Mart store located in Morton, Illinois. Upon information and belief, the point-of-purchase display that Mr. Howard saw was designed and produced by Defendants and supplied by Defendants to the Wal-Mart store. This display, which stood about five feet tall and was approximately 30 inches wide, with a light-colored background and the figure of a person on it, was positioned in the middle of an aisle. The advertising display represented that users of Akävar could "**Eat All You Want and Still Lose Weight**...," and stressed that users could lose weight without changing eating habits. The advertising display also represented that the product was something new from Europe that would work. (A copy of an advertisement similar to the advertisement observed by Mr. Howard is attached hereto as Exhibit A). Based upon these representations made as part of Defendants' in-store advertising materials, Plaintiff Howard purchased two bottles of Akävar at the Wal-Mart store at a cost of approximately $40 per bottle. After two weeks of taking Akävar as directed on the package labeling, without changing his eating habits, Mr. Howard had gained five or six pounds and he ceased taking Akävar.

21. Defendant Western Holdings is a limited liability company established under the laws of the State of Utah with its principal place of business located at 1821 Logan Avenue, Cheyenne, Wyoming 82001.

22. Defendant Western Holdings, an affiliate of Defendant Basic Research, is used by Basic Research and the other Defendants for the sole purpose of registering creative (or trade) names with the U.S. Patent and Trademark Office for licensing to Defendants in furtherance of their collective illegal activity.

23. Western Holdings customarily licenses such trademarks or trade names to Defendant Basic Research for the development and manufacturing of cosmetics, nutritional supplements and dietary supplements. The phrases or slogans "Dynakor Pharmacal," "Basic Research," "Eat All You Want & Still Lose Weight," "and we couldn't say it in print" and "and we couldn't say it in print if it wasn't true" are registered trademarks of Western Holdings. Defendant Western Holdings has licensed these various registered trademarks to Defendants for use in Defendants' scheme or artifice to defraud Plaintiffs and Class members.

Defendant Bydex

24. Bydex is a limited liability company established under the laws of the State of Utah with its principal place of business located at 5742 Harold Gatty Drive, Salt Lake City, Utah, 84116-3762.

25. Defendant Bydex serves as the employer of the principals and other employees who operate Defendants Basic Research and Dynakor. Bydex shares the same business

48. Previously, Defendant Friedlander has been the subject of "Cease and Desist" Orders and "False Representation" Orders issued by the U.S. Postal Service in connection with his activities concerning the marketing and sale of weight-loss dietary supplements called "Intercal-SX" and "Metabolite-2050," both of which were falsely advertised as causing weight loss in virtually all users, as causing weight loss without willpower or caloric restricting diets or exercise, as preventing foods from being converted into stored fat, as being supported by scientifically sound clinical studies, and as allowing obese persons to lose weight while continuing to eat all the food that such persons wanted. *In the Matter of the Complaint Against W.G. Charles Company, Customer Service Distribution Center, Inc., Mitchell K. Friedlander, Harris Friedlander, and Michael Meade,* U.S. Postal Service Docket No. 19/10 (Sept. 10, 1985) & *In the Matter of the Complaint Against The Robertson-Taylor Company, Intra-Medic Formulations, Inc., Customer Service Distribution Center, Inc., Mitchell K. Friedlander, Harris Friedlander, and Michael Meade,* U.S. Postal Service Docket Nos. 19/104 and 19/162 (Sept. 10, 1985). (A copy of the September 10, 1985 Order is attached hereto as Exhibit D).

Doe Defendants

49. Doe Defendant Nos. 1-50 are other individuals and entities who are part of, or have aided and abetted, the fraudulent activities and conspiracy alleged in this FAC. The identities of Does Defendant Nos. 1-50 are unknown to Plaintiffs at this time.

STATEMENT OF FACTS

50. Fraudulent weight loss products are an enormous problem in the United States. In an October 2007 Federal Trade Commission ("FTC") study entitled *Consumer Fraud in the United States: The Second FTC Survey* (the "FTC Study"), the FTC stated that an estimated

2.1% of all consumers nationwide - representing a total of 4.8 million U.S. adults - purchased and used fraudulent weight-loss products during the preceding year. The FTC Study found that "[m]ore consumers were victims of fraudulent weight-loss products than of any of the other specific frauds covered in the survey." The FTC study describes the prototypical fraudulent weight-loss claim as products that were promoted "as making it easy to lose weight or allowing one to lose weight without diet or exercise." As alleged in this FAC, the Akävar dietary supplement marketed, advertised and sold by Defendants during the Class Period is a prototypical fraudulent weight-loss product.

History of Defendants' Enterprises

51. Defendants are all well experienced in the promotion, marketing and sale of alleged weight-loss products through false and deceptive advertising. As alleged in ¶ 17 of this FAC, Defendants Gay, Mowrey and Friedlander are each the subject of the FTC Injunction. These Defendants' activities with regard to the marketing, advertising and sales of Akävar during the class period constitute a violation of the FTC Injunction, and such violation is evidence of Defendants' scheme or artifice to defraud Plaintiffs and Class members. As a result, every act that each of the Defendants undertook, or caused the other Defendants to undertake, to market, advertise and sell Akävar in the United States was part of a scheme or artifice to defraud Plaintiffs and Class members.

52. At the center of Defendants' interrelated business enterprises lies Basic Research, which was created to capitalize on the above-referenced obesity and overweight epidemic and resulting interest in weight-loss products. It is reportedly one of the largest nutraceutical companies in the U.S. with over $50 million in annual sales revenues. Basic Research

throughout the United States. Such sales of the product to consumers have continued to date.

72. Since May 2007, Defendants have caused false and misleading advertisements for Akävar to be sent through the U.S. mail, published in national magazines, posted on the Internet, displayed in retail stores across the country ("point-of-purchase"), and broadcast on television. The acts and practices of Defendants as alleged have been in or affecting interstate commerce. (Copies of certain of the print and Internet advertisements disseminated by Defendants are attached hereto as Exhibit E.)

73. Defendants' marketing blitz, engineered by Defendant Friedlander and approved and endorsed by Defendants Gay, Mowrey, Basic Research and Dynakor, was designed to saturate television, Internet, point-of-purchase and print media with Defendants' false and misleading claims concerning Akävar.

74. The core of Defendants' fraudulent representations regarding Akävar consists of the following statements which were presented in most, if not all, of Defendants' television, Internet, point-of-purchase and print advertisements, including those advertisements viewed by Plaintiffs:

"Eat all you want & still lose weight."

"European Weight-Loss Breakthrough"

"Automatic Caloric Restriction"

75. Defendants' false and misleading advertising for Akävar also asserts a number of other so-called "facts," including the following:

Akävar-20/50 ***literally causes excess fat to be pulled from bulging parts of your body!***

February 7, 2007, Defendants intentionally misled consumers as to the evaluation and testing of the product, claiming that Defendant Mowrey (a psychologist) had "reviewed the substantiation for [Akävar's claims]" on behalf of Defendant Dynakor. In the same interview/press release for Business Wire, Defendants presented Mowrey as an "independent reviewer" who was not involved with the development of the product. To falsely portray Mowrey as "independent," Mowrey was even presented as questioning the "flamboyant" advertising for Akävar, even though he personally approved the advertisement(s) in question. In addition to falsely presenting Mowrey as an "independent reviewer" and someone "not involved with the development of the product," Defendants purposefully misled consumers who saw the interview/press release by presenting Mowrey as a "Doctor."

83. In fact, Defendant Mowrey is not a medical doctor. Nor is he even remotely "independent." As previously alleged, Mowrey is a principal shareholder of Defendant Basic Research, he is a paid "consultant" to Defendant Dynakor, and is a key figure in Defendants' illegal enterprise.

84. The above-referenced interview/press release quoted Mowrey, who was speaking on behalf of all Defendants, as saying:

> Frankly I don't like the way the ad looks, either, and I certainly wouldn't be as flamboyant with the headlines. . . . But forget about the way the ad looks. The real question is whether or not a diet pill can really let you eat all you want and still lose weight? In regards to Akävar-20/50, the facts are the facts and scientific documentation has confirmed that virtually everyone in the study who used Akävar's active compound -- 23 out of 24 participants, to be exact -- lost weight. That's the bottom line."

85. The February 7, 2007 press release goes on to quote "Dr. Mowrey" as saying that after the supposed first "study" of Akävar: "I suggested a second clinical trial, which has yet

records maintained by, and in the possession and control of, Defendants, they have acknowledged that as of January 25, 20008: (a) sales of Akävar in the State of California exceeded $2 million; (b) more than $10 million of product inventory was located on retail store shelves throughout the country; (c) Defendants had spent over $5 million on Akävar print advertising; and (d) in California alone, Defendants had spent over $450,000 on television advertising. Accordingly, the Class consists of many thousands of Class members.

90. The claims of the representative Plaintiffs are typical of the claims of the Class because the representative Plaintiffs, like all Class members, purchased Akävar and have suffered injury as a result.

91. Moreover, the factual bases of Defendants' misconduct are common to all Class members, and Defendants' misrepresentations, omissions and acts of concealment resulted in injury to all members of the Class.

92. There are numerous questions of law and fact common to all Class members and those questions predominate over any questions that may affect only individual Class members, including, but not limited to the following:

a. Whether Defendants engaged in a pattern of fraudulent, deceptive and misleading conduct targeting the public through their marketing, advertising, promotion and sale of Akävar;

b. Whether Defendants misrepresented the efficacy of Akävar;

c. Whether the acts and omissions of Defendants violated RICO;

d. Whether the acts and omissions of Defendants violated Section 76-10-1603(3) and (4) of UPUAA, Utah Code Ann. § 76-10(3) and (4);

e. Whether Defendants should be enjoined from the continued unlawful marketing, advertising, promotion, distribution and sale of Akävar;

were in a superior position than Plaintiffs and the members of the Class to know the material facts.

177. In their marketing, advertising and promoting of Akävar and in making the careless, unreasonable and negligent misrepresentations and omissions alleged herein, including the representations made to Plaintiffs and the members of the Class, Defendants should have reasonably foreseen that Plaintiffs and members of the Class were likely to rely upon the misrepresentations.

178. Defendants' careless, unreasonable and negligent misrepresentations and omissions, as set forth in this FAC, are material in that they relate to matters to which reasonable persons, including Plaintiffs and the members of the Class, would attach importance in their purchasing decisions or conduct regarding the purchase of Akävar.

179. Under the circumstances, Defendants had a duty to disclose material, truthful information that they omitted in their careless, unreasonable and negligent misrepresentations and omissions, as set forth in this FAC.

180. As alleged in this FAC, Plaintiffs and the members of the Class uniformly relied on Defendants' careless, unreasonable and negligent misrepresentations and omissions, and under the circumstances described above such reliance was reasonable and justifiable.

181. As a result of Defendants' careless, unreasonable and negligent statements and omissions as described herein, Plaintiffs and the members of the Class have been injured and have suffered loss of money and property, and they are entitled to recover damages from Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for judgment against Defendants as follows:

A. An order certifying a Class pursuant to Rule 23 of the Federal Rules of Civil Procedure, certifying Plaintiffs as the representatives of the Class, and designating their counsel as counsel for the Class;

B. On the First Cause of Action, against Defendants jointly and severally in an amount equal to treble the amount of damages suffered by Plaintiffs and members of the Class as proven at trial plus interest and attorneys' fees and expenses;

C. On the Second Cause of Action, against Defendants jointly and severally in an amount equal to treble the amount of damages suffered by Plaintiffs and members of the Class as proven at trial plus interest and attorneys' fees and expenses;

D. On the Third Cause of Action, against Defendants jointly and severally in an amount equal to two times the amount of damages suffered by Plaintiffs and members of the Class as proven at trial plus interest and attorneys' fees and expenses;

E. On the Fourth Cause of Action, against Defendants jointly and severally in an amount equal to two times the amount of damages suffered by Plaintiffs and members of the Class as proven at trial plus interest and attorneys' fees and expenses;

F. On the Fifth Cause of Action, against Defendants jointly and severally, in an amount equal to the actual damages suffered by Plaintiffs and members of the Class as proven at trial plus interest, as well as punitive damages in an amount sufficient to punish Defendants and deter similar future conduct;

G. On the Sixth Cause of Action, against Defendants jointly and severally, in an amount equal to the actual damages suffered by Plaintiffs and members of the Class as proven at trial plus interest, together with all allowable penalties and damage multipliers available under the UCSPA and other state consumer protection laws, and attorneys' fees and expenses;

H. On the Seventh Cause of Action, against Defendants jointly and severally, for disgorgement of Defendants' unjust enrichment and/or imposition of a constructive trust upon Defendants' ill-gotten monies, freezing Defendants' assets, and requiring Defendants to pay restitution to Plaintiffs and the Class and to restore all funds acquired by means of any act or practice declared by this Court to be unlawful, deceptive, fraudulent or unfair, and/or a violation of laws, statutes or regulations;

I. On all Causes of Action, such other civil penalties and punitive damages to the fullest extent permitted by applicable law;

J. An order requiring Defendants to immediately cease their wrongful conduct as set forth above, as well as enjoining Defendants from continuing to falsely market and advertise, conceal material information and conduct business via the unlawful and unfair business acts and practices complained of herein; an order requiring Defendants to engage in a corrective notice campaign; and an order requiring Defendants to refund to Plaintiffs and all members of the Class the funds paid to Defendants for their fraudulent, defective product;

K. For the reasonable attorneys' fees and the costs of prosecuting this action;

Defendants Basic Research, L.L.C. ("Basic Research"), Dynakor Pharmacal, L.L.C. ("Dynakor"), Western Holdings, L.L.C. ("Western Holdings"), Dennis Gay ("Gay"), Daniel B. Mowrey ("Mowrey") d/b/a American Phytotherapy Research Laboratory, and Mitchell K. Friedlander ("Friedlander") (collectively, the "Defendants).

NATURE OF THE CLASS ACTION

1. Defendants manufactured, advertised, marketed and sold the dietary supplement Akavar 20150 ("Akävar") that is the subject of this action. During the Class Period, Defendants have knowingly engaged in a deliberate campaign of widespread fraud and deception intended to dupe unsuspecting consumers, including Plaintiff and the members of the Class, into purchasing millions of dollars worth of Akavar, purportedly designed to cause weight loss and improve bodily appearance, which is manufactured, marketed, advertised and sold by Defendants. Plaintiff, on behalf of herself and the members of the Class (as defined in Paragraph 43 of this Complaint), assert claims against Defendants for violations of California's Unfair Competition Act (Bus. & Prof. Code § 17200) ("UCL"); False Advertising Act (Bus. & Prof. Code § 17500) ("FAL"), and Consumer Legal Remedies Act (Civil Code § 1780) ("CRLA").

2. With regard to Akavar and numerous other alleged dietary supplements, Defendants have perpetrated their schemes to defraud through a web of interrelated, closely-held limited liability companies that oversee the "research," publication, manufacturing, marketing, sales and distribution of Akävar. During the Class Period, Defendants have operated a common business enterprise while engaging in the deceptive acts and practices alleged in this Complaint and are, therefore, jointly and severally liable for such acts and practices.

3. Defendants have used television, the internet and national publications to advertise Akävar as a product that offers a "foolproof' alternative to weight loss with "guaranteed success" and "WITHOUT GRUELING DIET AND EXERCISE REGIMENS!" These advertisements also falsely

and

state that "Studies have proved a virtual 100% success rate among the participants," and that by using the product the consumer will see excess fat "PULLED FROM **BULGING** PARTS OF **YOUR BODY.**" Defendants also falsely allege that the results are "scientific fact, documented by published medical findings" and that "a team of doctors working in a recognized medical university discovered the potent caloric-restricting qualities" of Akävar. However, in truth, Akävar is not a foolproof alternative to weight loss with guaranteed success, and the product has not been subjected to clinical trials.

JURISDICTION AND VENUE

4. This Complaint is filed, and these proceeding instituted, pursuant to California Business and Professions Code §§ 17203 and 17204 and California Civil Code § 1780. Plaintiff seeks to recover, inter alia, restitution of lost monies suffered by Plaintiff and members of the Class due to Defendants' violations of UCL, the FAL, and the CLRA. Plaintiff also seeks injunctive relief. The Court has jurisdiction over this action pursuant to Code of Civil Proc. § 410.10.

5. The Court may apply California law to all class members who are California residents. Further, Defendants' false advertising and deceptive marketing partially occurred in California and was directed toward California residents.

6. Venue is proper in this Court pursuant to Code of Civil Procedure § 393, 395(a), and 395.5 and Civil Code § 1780(c), because (a) injuries to property described herein occurred in this county; (b) acts and transactions described herein occurred within this county; and (c) Defendants did business in this county by marketing, advertising and selling Akavar in this country.

7. No portion of this Complaint is brought pursuant to federal law. Plaintiff states and intends to state causes of action solely under state law and expressly denies any attempt to state a cause of action under federal law or a cause of action in excess of $74,999 for the Plaintiff and each individual Class member. The individual claims of Plaintiff and Class members are worth less than

$75,000 and cannot possible exceed this amount given the cost of refunding individual purchases of Akävar; the proportionally limited amount of punitive damages allowable under controlling authority, and the relatively modest individual value of other compensatory damages incurred and recoverable by Plaintiff and each Class member.

PARTIES

8. Plaintiff, Mary Tompkins, is a citizen of Sacramento, California. Based on Defendants' advertising, Ms. Tompkins purchased a supply of Akävar through a California retailer. After approximately 2 weeks of taking Akavar as directed on the package labeling, Ms. Tompkins had not lost any weight. She ceased taking the product.

9. Defendant Basic Research is a limited liability company established under the laws of the State of Utah with its principal place of business located at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116. Basic Research is one of the largest nutraceutical companies in the United States with annual sales revenues in excess of $50 million. Basic Research develops and manufacturers scores of cosmetics, nutritional supplements and dietary supplements that are marketed under the names of nearly a dozen companies. Defendant Basic Research is the subject of a permanent injunction by the United States Federal Trade Commission for the marketing and sale of products promising weight loss without diet or exercise.

10. Defendant Dynakor is a limited liability company established under the laws of the State of Utah with its principal place of business located at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116. Dynakor, an affiliate of Defendant Basic Research, markets and sells certain the products developed by Defendant Basic Research, including Akavar.

11. Defendant Western Holdings is a limited liability company established under the laws of the State of Utah with its principal place of business located at 1821 Logan Avenue, Cheyenne Wyoming 82001. Western Holdings, an affiliate of Defendant Basic Research, licenses its

14. Defendant Friedlander, the self-proclaimed marketing guru of Basic Research, is a citizen and resident of the State of Utah with a place of business located at 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116. Defendant Friedlander is a marketing consultant to, among others, Defendants Gay, Basic Research and Dynakor. Defendant Friedlander develops and endorses products marketed by Defendants Basic Research and Dynakor. Although not an employee of either Basic Research or Dynakor, Defendant Friedlander maintains his offices at Defendant Basic Research. Defendant Friedlander is the subject of a permanent injunction by the United States Federal Trade Commission for the marketing and sale of products promising weight loss without diet or exercise.

15. Akavar is advertised, marketed and sold in California. Each Defendant, through its associations with the manufacture, marketing and sale of Akavar, is qualified to do and is doing business in California.

STATEMENT OF FACTS

16. Fraudulent weight loss products are an enormous problem in the United States. In an October 2007 Federal Trade Commission study, "Consumer Fraud *in the United* States. The Second *FTC* Survey," the FTC notes that an estimated 2.1% of all consumers nationwide - - - representing a total of 4.8 million U.S. adults - - -purchased and used fraudulent weight-loss products during the year prior to the survey. The Study found that "[M]ore consumers were victims of fraudulent weight-loss products than of any of the other specific frauds covered in the survey." The report describes the prototype fraudulent weight-loss claim as involving products that were promoted "as making it easy to lose weight or allowing one to lose weight without diet or exercise."

17. Basic Research was created to capitalize on the fraudulent weight loss product epidemic. It is one of the largest nutraceutical companies in the U.S., with over $50 million in annual sales revenues. Basic Research puts out scores of products, which are marketed under the names of

nearly a dozen companies a practice that Defendant Gay has stated is intended to confuse competitors and "protect our brands in the Wild West atmosphere that exists today in the supplement industry."

18. Defendant Dynakor was created by Defendants with the intent to mislead consumers into believing there was a real, independent "lab" behind Akävar 20/50. This fiction was openly acknowledged in internal meetings by Basic Research and its management, including Gay, Mowrey, and Friedlander.

19. The web of interlocking entities created to "confuse competitors" is, not coincidentally, equally confusing to consumers.

DEFENDANTS' FALSE AND MISLEADING ADVERTISING

20. On December 12, 2006, the United States Patent and Trademark Office ("USPTO") listed an application for the trademark "Akavar 20/50" to Defendant Dynakor Pharmacal IP Holdings. Subsequently, on May 3, 2007, the USPTO listed a trademark application for Akävar to Defendant Dynakor. Starting on or about this date, Defendants began marketing Akavar throughout the United States.

21. In advertising, Defendants claim that Akävar is the "European weight-loss breakthrough." In fact, Akavar was not available in Europe prior to its U.S. introduction and was created by Defendants in Utah, at their headquarters.

22. Defendants' marketing blitz, engineered by Friedlander, was designed to saturate the television, internet, and print media with Defendants' claims – including "infomercials," created by Friedlander, used to promote Akavar to the public.

23. The core of Defendants' fraudulent representations regarding Akavar is summarized in Defendants' slogan: "Eat all you want and still lose weight." The phrase "Eat all you want and still lose weight" is a registered trademark of Defendant Western Holdings.

24. In support of their claims that Akāvar allows you to "Eat all you want and still lose weight," Defendants' advertising asserts a number of facts, including the following:

> Akāvar-20/50 *literally causes excessfat to be pulledfrom* ***bulging parts of your*** *body!*
>
> As Akāvar-20/50 restricts caloric intake to below your daily caloric requirement, you literally pull excess fat from all over your body, including your waist, hips, thighs and buttocks. . . leaving your body thinner, trimmer and sexier than you ever thought possible. Akāvar-20/50 *helps draw* ***out*** *bulging pockets of fat* ***and prevents*** *the further conversion and storage of excessfat all over your body.* This remarkably effective formula works so fast and is so easy to use that before you have time to be discouraged you will have lost pounds and inches of ugly, hard-to-get-at, figure-destroying fat. (emphasis added).
>
> Akāvar-20/50 will produce an extraordinary, unparalleled loss of body weight! Akāvar–20/50 is the perfect weight-loss compound for tough weight-loss problems. This amazing ***formulation*** *is the* ***result of years of*** *intensive research and scientific* ***evaluation.*** *Not one, but a team of doctors working in a recognized* ***medical*** *university discovered the potent caloric-restricting qualities* of the Akāvar-20/50 formulation, and the research team at Dynakor Pharmacal is proud to have played a major role in bringing this new generation of fast-acting caloric restrictors to the general public. . . at an affordable price. (emphasis added)
>
> Tests prove virtually 100% success.
> That's right. While no diet pill can possibly work for everybody (that's why there's a money-back guarantee), scientific documentation has confirmed that virtually everyone in the study who used Akāvar-20/50's active compound (23 out of 24 participants, to be exact) lost weight. The research results are staggering. In a *controlled, randomized* ***clinical*** *trial* (the only type of proof accepted by both scientific and medical communities), doctors tested a group of overweight patients. And among those who took the active, patented Akāvar-20/50 compound, 23 out of 24 people lost a substantial amount of weight. But there's more! Not one of the subjects who continued taking the active Akāvar-20/50 weight-loss compound for a period of one full year experienced rebound weight gain. Not one! In other words, ***Akāvar-20/50*** *caused easy, automatic weight* ***loss*** *without* ***calorie*** *counting and* ***without*** *diet rebound* (emphasis added).
>
> An entirely new generation of "diet pills"
> An entirely *new generation of powerful, foolproof, bio-active weight-loss compounds that automatically reduce caloric intake. . .* eliminating traditional dieting, calorie counting, strenuous exercise, fad diets, supermarket "miracle" pills, Japanese wonder diets, rubber suits, belts, creams or anything else you have ever tried before. (emphasis added).
>
> *The only* ***thing*** *you have to do is remember to take your easy-to-swallow* ***Akāvar-20/50 tablets*** *each and every day. That's it!*
>
> ***Akāvar-20/50*** *is the only weight-loss compound* ***that*** *works* ***automatically.*** There is absolutely no need to count calories, no need to consciously lower your caloric intake, no need for expensive, pre-measured meals. . . and no need to give up your favorite

foods! Why? Because Akāvar-20/50 reduces caloric intake. . . automatically. (emphasis added).

25. Consumers *can* purchase Akavar directly **from** Defendants through Defendants' **websites:** www.dynakorpharmacal.com and **www.AKAVAR2050.com,** or by calling **1-800-235-8715.**

26. Through their **websites** and toll-free number, Defendants sell a "full 60-capsule supply" of Akavar for $39.99. Alternatively, consumers *can* purchase two bottles for $79.98 and receive a third bottle free. **Akāvar** is also available in stores and on-line through third-party distributors such as General Nutrition Center (GNC), Rite-Aide, **Walgreens** and *WalMart.*

27. As part of their advertising campaign for **Akāvar,** Defendants use the phrases "and we couldn't say it in print" and "and we couldn't say it in print if it wasn't true", both registered trademark phrases of Defendant Western Holdings.

28. In fact, Defendants' **advertising** claims are false, misleading, deceptive and inaccurate. Contrary to Defendants' advertising claims, **Akāvar's** formulation is not the result of years of intensive research. Nor is **Akāvar** a new generation of powerful, foolproof, bio-active weight-toss compound.

29. Although tbe ingredients of Akavar are not listed in the advertising, and are not **available** on the **website,** the product packaging claims that **Akāvar-20/50** is "A Proprietary Blend Containing:"

- Yerba **Mate** (Leaf) SE
- Trimethylxanthine **(li.e.** Caffeine)
- **Guarana** (Seed) SE
- Damiana (Leaf, Seed) SE
- Green Tea (Leaf) SE
- Ginger (Root)
- Kola Nut SE
- **Schinsandra** (Fruit)
- **Scutellaria** (Root) SE
- Tibetan Ginseng (Root) SE
- Cocoa Nut SE

m. Whether the defendants should be declared financially responsible for notifying all Class members of the true nature of Akävar and for the costs and expenses of a recall or buy-back.

n. Whether plaintiff and Class members are entitled to compensatory damages, and the amount of such damages; and

o. Whether defendants should be ordered to disgorge, for the benefit of the Class and the general public, all or part of their ill-gotten profits received from the sale of Akāvar, and whether defendants should be ordered to make full restitution to plaintiffs and Class members.

47. Plaintiff will fairly and adequately represent and protect the interests of the Class members. Plaintiff has retained California counsel who have substantial experience in prosecuting consumer class actions under the laws of this state. Plaintiff and her counsel are committed to vigorously prosecuting this action on behalf of the Class in this Court, and they have the financial resources to do so. Neither plaintiffs nor her counsel have any interests adverse to those of the Class.

48. Plaintiff and the members of the Class suffered, and will continue to suffer, harm as a result of Defendants' unlawful and wrongful conduct. A class action brought by California plaintiff: under California law in a California state court is superior to other available methods for the fair and efficient adjudication of the controversy. Absent a class action, most members of the Class likely would find the cost of litigating their damages claims to be prohibitive, and will have no effective remedy at law. Because of the relatively small size of individual Class member's claims, few Class members likely could afford to seek legal redress on an individual basis for defendants' misconduct. Absent a class action, Class members will continue to incur damages and be at risk of irreparable harm and defendants' misconduct will proceed without remedy. Class action treatment of common

questions of law or fact is also superior to multiple individual actions or piecemeal litigation because it conserves the resources of the litigants, and promotes consistency and efficiency of adjudication.

49. Plaintiff and Class members have all suffered, and will continue to suffer, harm and damages as a result of defendants' unlawful and wrongful conduct, and have been and are at risk of irreparable harm. Additionally, the prosecution of separate actions by individual Class members against defendants would create a risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards for defendants and would create a risk of adjudications with respect to individual Class members that would, as a practical matter, be dispositive of the interests of other Class members or substantially impair or impede their ability lo protect their interests, thereby making class certification appropriate.

50. Defendants have acted and failed to act on grounds generally applicable to plaintiffs and Class members, thereby making appropriate final injunctive, declaratory, or other equitable relief as to the Class as a whole.

FIRST CAUSE OF ACTION

Violations of the Unfair Competition Law, the Deceptive, False and Misleading Advertising Statutes

51. The preceding paragraphs of this Complaint are realleged and incorporated by reference. This cause of action, which alleges violations of the UCL, FAL, and the CLRA, is asserted against all of the defendants.

52. Under Bus. & Prof. Code §§ 17204 and 17535, and Civ. Code § 1780, plaintiffs have standing to assert these claims on behalf of themselves, the members of the Class, and the general

53. In violation of the UCL, the FAL, and the CLRA, defendants committed and/or aided and abetted unlawful, unfair and deceptive business acts and practices, thereby obtaining unlawful

profits and injuring plaintiffs, Class members and the general public, through the dissemination of advertising other representations that consumption of Akävar according to its directions would cause weight loss without diet and exercise.

54. As a direct and proximate result of defendants' unlawful, unfair and deceptive business acts or practices, pursuant to the UCL, the FAL, and the CLRA, plaintiffs, Class members and the general public are entitled to (a) injunctive relief in the form of recall or buy-back of the Akavar; (b) restitution of defendants' unjust enrichment and/or disgorgement of defendants' improperly gained profits; (c) recovery of compensatory damages; and (d) recovery of punitive or exemplary damages as provided by statute. Pursuant to Civ. Code § 1780 and Code Civ. Proc. § 1021.5, plaintiffs are also entitled to recover reasonable attorney's fees and the costs of bringing this action.

SECOND CAUSE OF ACTION

(Violation of Consumer Legal Remedies **Act, *Civil Code* §§ 1750, *et. seq.*)**

55. Plaintiff incorporates each and every preceding paragraph stated above, inclusive, as though the same were fully set forth hereafter.

56. Defendants are "persons" as defined by Cal. Civil Code section 1761(c).

57. Plaintiff and Class members are "consumers" as that terms is defined under the CLRA.

58. Through their own actions, and those of their employees, agents and servants, Defendants engaged in unlawful conduct in violation of the CLRA by engaging, inter alia, in the following conduct, while actively concealing and failing to disclose the material information in its possession regarding the quality and characteristics of Akavar:

i. representing that Akavar caused weight loss without diet and exercise,

ii. representing that Akävar caused weight loss while consumers could "eat all you want",

iii. representing that Akävar had been scientifically tested and proven to cause weight loss in controlled, clinical trials,

iv. representing that Defendants' could not make its representations concerning Akāvar "unless their were true" and that Akävar is a "European weight loss breakthrough."

plaintiff requests that this Court enter such orders and judgments as may be necessary to restore to any person in interest any money and profits which may have been acquired by defendants by means of aforementioned wrongful business practices and acts and to prevent future wrongdoing by injunction, as provided by Bus. & Prof. Code §§ 17203 and 17535 and Civ. Code § 1780.

59. Plaintiffand the Class seek restitution in the full amount of the Akāvar purchased and/or disgorgement of Defendants' profits reasonably attributable to its unjust enrichment as a result of the misconduct alleged herein, and any other relief which the court deems proper.

60. Plaintiff and the Class further intend to seek compensatory damages and, in light of Defendants' willful and conscious disregard for the rights and safety of the Plaintiff, the Class and the public, and Defendants' intentional and fraudulent concealment of material facts, Plaintiff and the members of the Class also intend to seek an award of punitive damages. Pursuant to Civil Code § 1782(a), Plaintiff sewed Defendants with notice of its alleged violations of the CLRA by certified mail return receipt requested. Defendants have failed to provide appropriate relief for its violation of the CLRA. Plaintiff seeks monetary (both compensatory and punitive) damages under the CLRA.

WHEREFORE, Plaintiffs and the Class pray for relief as set forth below, including reasonable attorneys' fees and costs of suit.

company n entity of unknown origin; JOSEPH BODE, an individual; SHEILA ERICKSON, an individual; WALGREEN COMPANY dba WALGREENS, an Illinois corporation; GENERAL NUTRITION CORPORATION, dba GNC, a Pennsylvania corporation; DRUGSTORE.COM, a Washington corporation; WESTERN HOLDINGS, LLC, a limited liability company of unknown origin; DENNIS GAY, an individual; DANIEL B. MOWREY dba AMERICAN PHYTOTHERAPY RESEARCH LABORATORY; MITCHELL K. FRIEDLANDER, an individual; and DOE DEFENDANTS 1-10, Inclusive,

Defendants.

I. INTRODUCTION

Defendants are defrauding hundreds of thousands of unwary consumers by selling a diet pill ("Akävar") with a simple (and absolutely false) tagline: "Eat all you want and still lose weight. We couldn't say it in print if it wasn't true." Defendants also claim that, by using Akävar, consumers will experience "clinically proven weight loss of up to 1603%" without changing eating or exercise habits."

These claims are absolutely false. Plaintiffs bring this lawsuit to enjoin these lies and to recover the many millions of dollars generated by Defendants via the false and misleading claims.

II. THE PARTIES

1. Plaintiffs Nicole Forlenza and Shaiden Monroe are residents of California and have purchased Akävar from Walgreen's or GNC.

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of the DOE Defendants is in some manner legally responsible for the damages suffered by Plaintiffs and the members of the class as alleged herein. Plaintiffs will amend this complaint to set forth the true names and capacities of these Defendants when they have been ascertained, along with appropriate charging allegations, as may be necessary.

III. JURISDICTION AND VENUE

16. This Court has jurisdiction over all causes of action asserted herein.

17. Venue is proper in this Court because Plaintiffs purchased Akävar in this Judicial District and because Defendants received substantial compensation from sales in this Judicial District.

18. Defendants and other out-of-state participants can be brought before this Court pursuant to state and federal law.

IV. FACTS

19. The weight-loss industry is a multi-billion-dollar industry in the United States. Hundreds of new products appear on the market every year, many of them claiming to be a quick and easy solution to the weight loss problem. In an effort to promote real weight loss and to prevent Americans from being defrauded by "miracle pills." The U.S. Food and Drug Administration ("FDA") instructs that "[a]ny claims that you can lose weight effortlessly are false. The only proven way to lose weight is either to reduce the number of calories you eat or to increase the number of calories you burn off through exercise. Most experts recommend combination of both."[1]

[1] U.S. Food and Drug Administration, *The Facts About Weight Loss Products and Programs*, FDA/FTC/NAAG Brochure*: 1992. Available at: http://www.cfsan.fda.gov/~dms/wgtloss.html; *See also* Linda Bren, *Losing Weight: Start By Counting Calories*, FDA CONSUMER Jan./Feb. 2002. Available at: http://www.fda.gov/fdac/features/2002/102_fat.html

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20. Akävar is a dietary supplement marketed by Defendant as a weight loss product. Its key ingredients are yerba maté, caffeine, and green tea. Attached as Exhibit A hereto are true and correct copies of the false claims.

21. Akävar claims to be the "fastest, easiest weight loss ever." It purports to allow consumers to "eat all you want and still lose weight." Defendants claim that Akävar makes weight loss "effortless" by "automatically reduc[ing] caloric intake . . . [and] eliminating traditional dieting, calorie counting, strenuous exercise, fad diets, supermarket 'miracle' pills, Japanese wonder diets, rubber suits, belts, creams or anything else you have ever tried before." However, Akävar is just one of those "miracle pills" it derides. Defendants attempt to sell Akävar by convincing consumers that they can avoid the only proven and safe weight-loss method recognized by the FDA.

22. Defendants claim that Akävar "cause[s] easy, automatic, permanent weight loss" all "within a few short weeks." To prove this assertion Defendants claim that a group that used Akävar experienced **1603%** more weight loss over a six-week period than those who did not use their product—and that group never had to exercise or diet. Defendants further claim "thousands of men and women . . . [have] experienced a fantastic and incredible loss of weight without ever dieting" by using Akävar. These false claims mislead consumers to believe that they can achieve the same results.

23. Defendants assert that Akävar "reduces caloric intake automatically" so that you will never have to "consciously change your diet or exercise habits!" Defendants promise that those who take Akävar can eat what they want because it alters your desire to overeat. Defendants' description of how this results in weight loss is false and misleading to consumers. First, Akävar cannot automatically reduce caloric intake; individuals may reduce the number of calories ingested by choosing to eat less or to eat

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(c) Even if the stimulants in Zantrex-3 increased energy levels (and presumably physical activity), such an increase would be vastly insufficient to produce 546% more weight loss than the leading ephedrine-based diet pill.

(d) Any permanent weight loss program includes a long-term change in eating and exercise habits, the very practices Zantrex-3 suggests can be avoided.

(e) Zantrex-3 Insta-Shot has no effect on male potency.

28. Plaintiffs Batiz and Winzen thus are informed and believe, in summary, that Defendants' claims regarding Zantrex-3 are false because (A) permanent weight loss cannot occur automatically without a change in caloric intake or increased physical activity; (B) a short term decrease in appetite and increase in energy from ingesting stimulants contained in Zantrex-3 does not correspond with the permanent weight loss Defendants promise; and (C) the testing results advertised by Defendants are spurious and of no practical significance.

29. On information and belief, Defendants knew that Zantrex-3 did not have the properties Defendants claimed, and that it was defective as set forth above, but nevertheless manufactured and marketed the product as set forth above.

30. Defendants sell Zantrex-3 at prices often exceeding $40.00 per package based on the preceding false claims. As a result, Defendants have wrongfully made tens of millions of dollars in profits from California consumers.

2. Akävar 20/50 and Akävar Slimming Gel

31. Akävar 20/50, and Akävar Slimming Gel are dietary supplements and topical creams marketed by Defendants as weight loss products. Their key ingredients are yerba maté, caffeine, and green tea. Defendants make the following claims for the Akävar products:

(a) "'Eat What You Want And Still Lose Weight'.... They're the eight most provocative words in the English language (at least for those of

us who've tried diet after diet and failed)." Effectively, Defendants claim that no change in diet or behavior is required to lose weight while taking Akävar 20/50. A true and correct copy of Defendants' online claim on this point is attached hereto as Exhibit 6.

(b) "Akävar 20/50 literally causes excess fat to be pulled from bulging parts of your body! As Akävar 20/50 restricts caloric intake to below your daily caloric requirement, you literally pull excess fat from all over your body, including your waist, hips, thighs and buttocks (the body's natural fat storage sites) ... leaving your body thinner, trimmer and sexier than you ever thought possible." A true and correct copy of Defendants' online claim on this point is attached hereto as Exhibit 7.

(c) "Clinical trial shows success. That's right. While no diet pill can possibly work for everyone (that's why there's a money-back guarantee), the peer-reviewed clinical trial revealed that virtually everyone in the study who used Akävar 20/50's active compound (23 out of 24 participants, to be exact) lost a significant amount of weight." A true and correct copy of Defendants' online claim on this point is included in Exhibit 7.

(d) "It might sound too good to be true, but no less than the famed *Washington Post* dubbed Akävar Slimming Gel's functional compound 'The Dream Cream.' Akävar Slimming Gel's remarkable topical formula permits you to reduce the appearance of bulging pockets of unsightly fat wherever they appear... including around your behind. Got 'saddlebags'? Wobbly thighs? Use Slimming Gel to slim down the appearance of bulges where you don't want them and accentuate the sexy curves where you do want them. Wherever you've got those unsightly lumps and bumps, there's nothing better

for bulges than topically applied Akävar Slimming Gel... 'The Dream Cream.'" A true and correct copy of Defendants' online claim on this point is attached hereto as Exhibit 8.

32. Plaintiffs Forlenza, Monroe and I. Bodor are informed and believe that Defendants' claims for Akävar 20/50 and Akävar Slimming Gel are false and misleading for the following reasons:

(a) Akävar 20/50 cannot automatically reduce caloric intake; individuals may reduce the number of calories ingested by choosing to eat less or to eat healthier foods. No supplement can ever control caloric intake "automatically."

(b) Even if Akävar 20/50 could suppress appetite and reduce the number of calories consumed, that decrease would have to be coupled with an increase in physical activity in order to lose weight.

(c) Even if the stimulants in Akävar 20/50 increased energy levels (and presumably physical activity), such an increase would be vastly insufficient to produce the drop in weight Defendants claim.

(d) The *Washington Post* has not dubbed Akävar Slimming Gel's functional compound "The Dream Cream." Moreover, Akävar Slimming Gel does not permit a user to "reduce the appearance of bulging pockets of unsightly fat wherever they appear," nor does it "slim down the appearance of bulges where you don't want them and accentuate the sexy curves where you do want them."

33. Plaintiffs Forlenza, Monroe and I. Bodor are informed and believe, in summary, that Defendants' claims regarding Akävar 20/50 and Akävar Slimming Gel are false because (A) permanent weight loss cannot occur "automatically" without a change in caloric intake or increased physical activity; (B) a short term decrease in appetite and increase in energy from ingesting stimulants contained in Akävar 20/50 does not correspond with the permanent weight loss Defendants promise; (C) the testing

results advertised by Defendants are spurious and of no practical significance because the sample population (twenty-four subjects) tested was insufficient to create a basis upon which to reject the null hypothesis; and (D) Akävar Slimming Gel has no pharmaceutical value.

34. On information and belief, Defendants knew that Akävar 20/50 and Akävar Slimming Gel did not have the properties Defendants claimed, and that it was defective as set forth above, but nevertheless manufactured and marketed the product as set forth above.

35. Defendants sell Akävar 20/50 and Akävar Slimming Gel at prices up to $40.00 per package based on the preceding false claims. As a result, Defendants have wrongfully made tens of millions of dollars in profits from California consumers.

3. Relacore

36. Defendants Carter-Reed and Basic Research manufacture Relacore under the names "Relacore Extra," "Relacore PM," "Relacore Stress Reducer/Mood Elevator," "Relacore Cortisol Control," and other names. Defendants make the following claims for Relacore products:

(a) Relacore is an agent that targets "belly fat" and controls nervous binge eating and anxiety.

(b) Relacore "...reduce[s] tummy bulge by controlling the Cortisol increase generated by diet-related stress and anxiety that can lead to stubborn belly fat retention ... not to mention ... that all time diet killer 'Nervous Binge Eating.'" A true and correct copy of Defendants' online claims on these points is attached hereto as Exhibit 9.

37. Plaintiff M. Bodor is informed and believes that the claims for Relacore are false and misleading for the following reasons:

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(a) Relacore in fact does not reduce or eliminate "belly fat" or cause the "thinner waist and "flatter tummy" that Defendants contend it produces.

(b) Relacore in fact does not reduce nervous anxiety or the "nervous binge eating" that such anxiety engenders.

38. Plaintiff M. Bodor is informed and believes that Defendants make each of these spurious claims to entice Plaintiff M. Bodor and others to purchase Relacore in its various incarnations with the hope that the fat around their waists will be reduced and their diet-related fears and anxieties will be alleviated.

39. On information and belief, Defendants knew that Relacore did not have the properties Defendants claimed, and that it was defective as set forth above, but nevertheless manufactured and marketed the product as set forth above.

40. Defendants sell Relacore at prices up to about $35.00 per package based on the preceding false claims. As a result, Defendants have wrongfully made tens of millions of dollars in profits from California consumers.

D. Plaintiffs' Purchase Of Defendants' Products In Reliance On Defendants' Claims

41. Prior to the filing of this action, on numerous occasions since 2008, and continuing through June or July of 2009, Plaintiff Forlenza purchased Akävar 20/50 from Walgreens and/or GNC in the Central District of California for her own personal use. In so doing, Plaintiff Forlenza believed and relied specifically on the representations contained in the marketing materials for the product, which were present at and displayed by the Walgreens and/or GNC where she purchased the product. Those representations explicitly state that a consumer need not change his or her diet and exercise routine in order to lose weight because the product produces weight loss "automatically." Plaintiff Forlenza has consumed Akävar 20/50, but the product has not worked as advertised. Specifically, Plaintiff Forlenza has found that she has not lost any weight as a consequence of using the product, and in fact has not lost any weight

without changing diet or exercise. Plaintiff Forlenza has thus suffered injury and damage because she purchased a product based on false advertising and because the product has not worked as advertised.

42. Prior to the filing of this action, on numerous occasions since 2008, and continuing through June or July of 2009, Plaintiff Monroe purchased Akävar 20/50 from Walgreens and/or GNC in the Central District of California for her own personal use. In so doing, Plaintiff Monroe believed and relied specifically on the representations contained in the marketing materials for the product, which were present at and displayed by the Walgreens and/or GNC where she purchased the product. Those representations explicitly state that a consumer need not change his or her diet and exercise routine in order to lose weight because the product produces weight loss "automatically." Plaintiff Monroe has consumed Akävar 20/50, but the product has not worked as advertised. Specifically, Plaintiff Monroe has found that she has not lost any weight as a consequence of using the product, and in fact has not lost any weight without changing diet or exercise. Plaintiff Monroe has thus suffered injury and damage because she purchased a product based on false advertising and because the product has not worked as advertised.

43. Prior to the filing of this action, on numerous occasions since 2008, and continuing through June or July of 2009, Plaintiff Batiz purchased Zantrex-3 and/or Zantrex-3 Insta-Shot from Walgreens, GNC, Wal-Mart, CVS, and/or Target in the Central District of California for her own personal use. In so doing, Plaintiff Batiz believed and relied specifically on the representations contained in the marketing materials for the product, which were present at and displayed by the Walgreens, GNC, Wal-Mart, CVS, and/or Target where she purchased the product. Those representations explicitly state that Zantrex-3 will cause 546% more weight loss than the leading ephedrine-based diet pill, that the weight loss will be rapid due to the fast acting product and would also be long lasting, and that the product would cause a very high energy boost. Plaintiff Batiz has consumed Zantrex-3, but the product has not worked as

representations concerning Akävar products and purchased the product based on those representations.

72. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in handling complex class action litigation, as detailed above.

73. Plaintiff and the members of the Class suffered, and will continue to suffer, harm as a result of Defendants' unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy for the reasons stated above.

74. Adjudication of individual class members' claims with respect to the Defendants would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication, and could substantially impair or impede the ability of other class members to protect their interests.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT

(By Plaintiffs Forlenza and Monroe, and On Behalf of the Zantrex-3, Relacore, and Akävar Classes)

75. Plaintiffs incorporate by this reference the preceding allegations as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.

76. As alleged hereinabove, Plaintiffs have standing to pursue this claim as Plaintiffs have suffered injury in fact and have lost money or property as a result of Defendants' actions as set forth herein. Specifically:

(a) Prior to the filing of this action, Plaintiffs Forlenza, Monroe and I. Bodor purchased Akävar products for their own personal use. In so doing, Plaintiffs Forlenza, Monroe and I. Bodor believed and relied specifically on the representations contained in the marketing materials for the products, which they had viewed on television, on

the Internet, and in the premises of the Retailer Defendants where they purchased the product, and which explicitly state that a consumer need not change his or her diet and exercise routine in order to lose weight with the product, and that Akävar 20/50 automatically reduces caloric intake and causes weight loss accordingly. Plaintiffs Forlenza, Monroe and I. Bodor have used Akävar 20/50 and Akävar Slimming Gel, but the products have not worked as advertised. Specifically, they have not experienced weight loss without the need for change in diet and exercise routines, Akävar 20/50 did not automatically reduce their caloric intake and cause weight loss, and Akävar Slimming Gel did not make them appear thinner. Plaintiffs Forlenza, Monroe and I. Bodor thus have suffered significant injury and damage because they purchased a product based on false advertising and because the product has not worked as advertised.

(b) Prior to the filing of this action, Plaintiffs Batiz and Winzen purchased Zantrex-3 products for their own personal use. In so doing, Plaintiffs Batiz and Winzen believed and relied specifically on the representations contained in the marketing materials for the products, which they had viewed on television, on the Internet, and in the premises of the Retailer Defendants where they purchased the product, and which explicitly state that Zantrex-3 will cause 546% more weight loss than the leading ephedrine-based diet pill, that the weight loss will be rapid due to the fast acting product and would also be long lasting, and that the product would cause a very high energy boost and increase potency. Plaintiffs Batiz and Winzen have consumed Zantrex-3, but the product has not worked as advertised. Specifically, Plaintiffs have not experienced rapid

rights of Plaintiffs and the Classes, and did so with fraud, oppression, and malice. Therefore, Plaintiffs and the Classes are also entitled to punitive damages against Defendants in an amount that will be shown by proof at trial.

FOURTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17200 ET SEQ.

(By Plaintiffs Forlenza and Monroe, and On Behalf of the Zantrex-3, Relacore, and Akävar Classes)

92. Plaintiffs incorporate by this reference the preceding allegations as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.

93. As alleged hereinabove, Plaintiffs have standing to pursue this claim as Plaintiffs have suffered injury in fact and have lost money or property as a result of Defendants' actions as set forth herein. Specifically:

(a) Prior to the filing of this action, Plaintiffs Forlenza, Monroe and I. Bodor purchased Akävar products for their own personal use. In so doing, Plaintiffs Forlenza, Monroe and I. Bodor believed and relied specifically on the representations contained in the marketing materials for the products, which they had viewed on television, on the Internet, and in the premises of the Retailer Defendants where they purchased the product, and which explicitly state that a consumer need not change his or her diet and exercise routine in order to lose weight with the product, and that Akävar 20/50 automatically reduces caloric intake and causes weight loss accordingly. Plaintiffs Forlenza, Monroe and I. Bodor have consumed Akävar 20/50, but the product has not worked as advertised. Specifically, they have not experienced weight loss without the need for change in diet and exercise routines, and the Akävar products did not automatically reduce their caloric intake

and cause weight loss, nor did it create any of the "slimming" results claimed. Plaintiffs Forlenza, Monroe and I. Bodor thus have suffered significant injury and damage because they purchased a product based on false advertising and because the product has not worked as advertised.

(b) Prior to the filing of this action, Plaintiffs Batiz and Winzen purchased Zantrex-3 products for their own personal use. In so doing, Plaintiffs Batiz and Winzen believed and relied specifically on the representations contained in the marketing materials for the products, which they had viewed on television, on the Internet, and in the premises of the Retailer Defendants where they purchased the product, and which explicitly state that Zantrex-3 products will cause 546% more weight loss than the leading ephedrine-based diet pill, that the weight loss will be rapid due to the fast acting product and would also be long lasting, and that the product would cause a very high energy boost and increase potency. Plaintiffs Batiz and Winzen have consumed Zantrex-3 products, but they have not worked as advertised. Specifically, Plaintiffs have not experienced rapid weight loss, or any weight loss at all as a consequence of consuming Zantrex-3 products, and have experienced no energy boost or any of the other results claimed for the product. Plaintiffs Batiz and Winzen thus have suffered significant injury and damage because they purchased a product based on false advertising and because the product has not worked as advertised.

(c) Prior to the filing of this action, Plaintiff M. Bodor purchased Relacore for her own personal use. In so doing, Plaintiff M. Bodor believed and relied specifically on the representations contained in the marketing materials for the products, which she had viewed on

98. Defendants' wrongful business practices constituted, and constitute, a continuing course of conduct of unfair competition since Defendants are marketing and selling their products in a manner likely to deceive the public.

99. Defendants' wrongful business practices have caused injury to Plaintiffs and the Classes.

100. Pursuant to section 17203 of the California Business and Professions Code, Plaintiffs and the Classes seek an order of this court enjoining Defendants from continuing to engage in unlawful, unfair, or deceptive business practices and any other act prohibited by law, including those set forth in the complaint. Plaintiffs and the Classes also seek an order requiring Defendants to make full restitution of all moneys it wrongfully obtained from Plaintiffs and the Classes.

FIFTH CAUSE OF ACTION

BREACH OF WARRANTY

(By Plaintiffs Forlenza and Monroe, and On Behalf of the Zantrex-3, Relacore, and Akävar Classes)

101. Plaintiffs incorporate by this reference the preceding allegations as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.

102. As alleged hereinabove, Plaintiffs have standing to pursue this claim as Plaintiffs have suffered injury in fact and have lost money or property as a result of Defendants' actions as set forth herein. Specifically:

(a) Prior to the filing of this action, Plaintiffs Forlenza, Monroe and I. Bodor purchased Akävar products for their own personal use. In so doing, Plaintiffs Forlenza, Monroe and I. Bodor believed and relied specifically on the representations contained in the marketing materials for the products, which they had viewed on television, on the Internet, and in the premises of the Retailer Defendants where they purchased the product, and which explicitly state that a consumer need not change his or her diet and exercise routine in

order to lose weight with the product, and that Akävar 20/50 automatically reduces caloric intake and causes weight loss accordingly. Plaintiffs Forlenza, Monroe and I. Bodor have consumed Akävar 20/50 and applied Akävar Slimming Gel, but the products have not worked as advertised. Specifically, they have not experienced weight loss without the need for change in diet and exercise routines, and Akävar 20/50 did not automatically reduce their caloric intake and cause weight loss. Plaintiffs Forlenza, Monroe and I. Bodor thus have suffered significant injury and damage because they purchased a product based on false advertising and because the product has not worked as advertised.

(b) Prior to the filing of this action, Plaintiffs Batiz and Winzen purchased Zantrex-3 products for their own personal use. In so doing, Plaintiffs Batiz and Winzen believed and relied specifically on the representations contained in the marketing materials for the products, which they had viewed on television, on the Internet, and in the premises of the Retailer Defendants where they purchased the product, and which explicitly state that Zantrex-3 products will cause 546% more weight loss than the leading ephedrine-based diet pill, that the weight loss will be rapid due to the fast acting product and would also be long lasting, and that the product would cause a very high energy boost and increase potency. Plaintiffs Batiz and Winzen have consumed Zantrex-3 products, but the products have not worked as advertised. Specifically, Plaintiffs have not experienced rapid weight loss, or any weight loss at all as a consequence of consuming Zantrex-3 products, and have experienced no energy boost or any of the other results claimed for the product. Plaintiffs Batiz and Winzen thus have suffered

2. Adjudge and decree that Defendants have engaged in the conduct alleged herein;
3. For restitution and disgorgement on certain causes of action;
4. For an injunction ordering Defendants to cease and desist from engaging in the unfair, unlawful, and/or fraudulent practices alleged in the Second Amended Complaint;
5. For compensatory and general damages according to proof on certain causes of action;
6. For both pre and post-judgment interest at the maximum allowable rate on any amounts awarded;
7. Costs of the proceedings herein;
8. Reasonable attorneys' fees as allowed by statute; and
9. Any and all such other and further relief that this Court may deem just and proper, including but not limited to punitive damages.

Dated: August 10, 2009

CALL, JENSEN & FERRELL
A Professional Corporation
Scott J. Ferrell
Lisa A. Wegner
Scot D. Wilson
Roger E. Borg

By: _____
Scott J. Ferrell

Attorneys for Plaintiffs and the Classes

128

BASIC RESEARCH

5742 West Harold Gatty Drive
Salt Lake City, UT 84116
phone (801) 517-7000
fax (801) 517-7001
website www.BasicResearch.org

January 31, 2008

(VIA FEDERAL EXPRESS AND ELECTRONIC MAIL)

Admiral Insurance Company
1255 Caldwell Road
Cherry Hill, NJ 08034
Attn: Claims Department
E-Mail: admclaims@admiralins.com

Re: Tender of Claims -- Admiral Insurance Company Policy No. CA00001165-01
Insured: Covarix, LLC D/B/A: Basic Research, LLC; Covarix, LLC and Subsidiaries; Western Holdings, LLC and Subsidiaries, etc.

To Whom It May Concern:

Covarix, LLC dba Basic Research, LLC ("Basic Research") and Subsidiaries, and Western Holdings, LLC and Subsidiaries, among others (collectively the "Insureds"), are the named insureds under Admiral Insurance Company Police No. CA00001165-01. The Insureds hereby provide notice, and tender the defense, of the following lawsuits and claims asserted against, *inter alia*, Basic Research, LLC, Dynakor Pharmacal, LLC, and Western Holdings, LLC:

1. *Miller v. Basic Research, LLC, et al.*, United States District Court, District of Utah, Civil No. 2:07-CV-00872; and

2. *Tompkins v. Basic Research, LLC, et al.*, Superior Court of the State of California, Sacramento
County, Civil No. 34-2007-000882591.

For your reference, copies of the complaints filed in both cases are enclosed herewith, together with copies of all other papers which have been filed in each case as of the date of this letter. The Insureds first received a copy of the complaint in the *Miller* case on about November 10, 2007. The Insureds first received a copy of the complaint in the *Tompkins* case on about December 10, 2007. The named plaintiff in the *Tompkins* case is Mary Tompkins. The named plaintiffs in the *Miller* case are: Pamela Miller, Randy Howard, and Donna Patterson.

Each of these cases purports to be brought as class actions, and purports to assert false advertising claims relating to the marketing and sales of a product known as Akävar®-20/50 ("Akävar"). In essence, the plaintiffs in both cases assert that the named defendants made false advertising claims concerning, *inter alia*, the efficacy of the Akävar product. In the *Miller* case, the plaintiffs seek class certification for a purported nationwide class of consumers who have,

EXHIBIT 9

WALSH & FURCOLO LLP
SYMPHONY TOWERS
750 B STREET, SUITE 2740
SAN DIEGO, CA 92101-8129
TELEPHONE: (619) 232-8486
FACSIMILE: (619) 232-2691
www.wafulaw.com

PARTNERS
John H. Walsh
Dinah McKean

OF COUNSEL
Foster Furcolo Jr.

NEVADA OFFICE
1645 VILLAGE CENTER CIRCLE
SUITE 271
LAS VEGAS, NV 89134
TELEPHONE: (702) 362-4747
FACSIMILE: (702) 362-7518

E-mail: *jwalsh@wafulaw.com*

June 6, 2008

DENIAL OF COVERAGE

VIA CERTIFIED MAIL/
RETURN RECEIPT REQUESTED
Ronald F. Price, Esq.
BASIC RESEARCH, LLC
5742 West Harold Gatty Drive
Salt Lake City, UT 84116

Re: PAMELA MILLER, et al. v. BASIC RESEARCH, LLC, et al.
U.S. District Court, District of Utah, Civil No. 2:07-CV-00872;
MARY TOMPKINS v. BASIC RESEARCH, LLC, et al.
U.S. District Court, District of Utah, Civil No. 2:08-CV-00313

Insureds	:	Covarix, LLC dba Basic Research, LLC, et al.
Claim No.	:	C129036
Policy No.	:	CA000011665-01 (8/20/07 – 8/20/08)
Our File No.	:	ADM.08701-1/17

Dear Mr. Price:

As you know from our previous correspondence, this office has been retained by Admiral Insurance Company ("Admiral") to investigate and evaluate the coverage issues present in this matter under the above referenced policy issued to Covarix, LLC dba Basic Research, LLC, *et al.* ("Basic Research" and/or "Insured"). This letter shall serve as a response to your tenders to Admiral of defense and indemnity of the above-referenced lawsuits on behalf of Basic Research, Western Holdings, LLC ("Western Holdings" and/or "Insured") and Dynakor Pharmacal, LLC ("Dynakor").[1] We have carefully considered all of the information and coverage arguments

[1] Your initial tender was on behalf of Basic Research and Western Holdings, but was ambiguous regarding the individuals named as defendants or Dynakor and clarification was requested. In response, you indicated tender was made for Dynakor and Basic Research.

AU001462

EXHIBIT 10

1 of 8

1255 Caldwell Road
P.O. Box 5725
Cherry Hill, NJ 08034-3220
Fax (856) 429-3630
Phone (856) 429-9200

DATE: 06/25/2009

COVARIX LLC
5742 W HAROLD GATTY DRIVE
SALT LAKE CITY, UT 84116
Att: Douglas Carp

INSURED:	COVARIX LLC DBA BASIC RESEARCH LLC
POLICY NO:	CA000011665-02
CLAIM NO:	C137310
CLMT NAME:	Nicole Forienza
D/E:	05/29/2009

Dear Mr. Carp:

We are in receipt of the lawsuit you forwarded entitled Nicole Forienza and Shaiden Monroe, individually and on behalf of all others similarly situated vs Dynakor Pharmacal, LLC, et al, which is pending in United States District Court, Central District of California under case number CV09-3730 MMM (Ssx).

The complaint served as Admiral's first notice of this loss. The complaint contains counts for Violation of California Legal Remedies Act (wrongful business practices), unjust enrichment (profit from alleged misrepresentation), Fraud, Violation of CA business and Professions code 17200 and Breach of Warranty. The complaint seeks a certification as a class action suit, a ruling of the court that the alleged conduct did occur, restitution, injunction, compensatory and general damages, pre and post judgment interest, costs and fees as well as punitive damages.

Basically the complaint alleges that the defendants, who include Basic Research, LLC, knowingly made false representations in their advertisement of the product Akavar.

This letter shall serve as a Reservation of Rights available to Admiral pursuant to the terms of the relevant Admiral policies as will be discussed in further detail below. Please note that Admiral's investigation remains ongoing and thus, this reservation is subject to change as additional information is received.

Admiral Insurance Company provides Claims-Made Commercial General Liability coverage (CGL) to Covarix dba Basic Research, LLC under policy CA00001 1665-02, which has liability limits of $1million, an aggregate limit of $2million and a $100,000 deductible. Coverage applies in the following manner:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

EXHIBIT 11

1255 Caldwell Road
P.O. Box 5725
Cherry Hill, NJ 08034-3220
Fax (856) 429-3630
Phone (856) 429-9200

Date: 07/06/2009

COVARIX LLC
5742 W HAROLD GATTY DRIVE
SALT LAKE CITY, UT 84116
Att: Douglas Carp

RE:	Insured:	COVARIX LLC DBA BASIC RESEARCH LLC
	Claimant:	Nicole Forlenza
	Admiral Policy No:	CA000011665-02
	Admiral Claim No:	C137310

Dear Mr. Carp:

We are in receipt of the lawsuit you forwarded entitled Nicole Forlenza and Shaiden Monroe, individually and on behalf of all others similarly situated vs Dynakor Pharmacal, LLC, et al, which is pending in United States District Court, Central District of California under case number CV09-3730 MMM (Ssx).

The complaint served as Admiral's first notice of this loss. The complaint contains counts for Violation of California Legal Remedies Act (wrongful business practices), unjust enrichment (profit from alleged misrepresentation), Fraud, Violation of CA business and Professions code 17200 and Breach of Warranty. The complaint seeks a certification as a class action suit, a ruling of the court that the alleged conduct did occur, restitution, injunction, compensatory and general damages, pre and post judgment interest, costs and fees as well as punitive damages.

Basically the complaint alleges that the defendants, who include Basic Research, LLC, knowingly made false representations in their advertisement of the product Aktivar.

This letter shall serve as a Reservation of Rights available to Admiral pursuant to the terms of the relevant Admiral policies as will be discussed in further detail below. Please note that Admiral's investigation remains ongoing and thus, this reservation is subject to change as additional information is received.

Admiral Insurance Company provides Claims-Made Commercial General Liability coverage (CGL) to Covarix dba Basic Research, LLC under policy CA000011665-02, which has liability limits of $1million, an aggregate limit of $2million and a $100,000 deductible. Coverage applies in the following manner:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

EXHIBIT 12

1125

GAUNTLETT & ASSOCIATES
ATTORNEYS AT LAW
18400 Von Karman, Suite 300
Irvine, California 92612
Phone: (949) 553-1010 • Facsimile: (949) 553-2050
Email: info@gauntlettlaw.com
Website: www.gauntlettlaw.com

Our File Number:
10448-014

July 15, 2009

VIA EMAIL & UPS OVERNIGHT
d.kagen@admiralins.com

Dawn Kagen
ADMIRAL INSURANCE COMPANY
Claims Superintendent
1255 Caldwell Road
P. O. Box 5725
Cherry Hill, NJ 08034-3220

Re: ***Forlenza, et al. v. Basic Research, LLC, et al.***
U.S.D.C., Central District of California, Southern Division (Santa Ana),
Case No. CV 09-03730-AG (SSx) (the "*Forlenza* suit")
Insured: **Covarix, LLC dba Basic Research, LLC**
Claimant: **Nicole Forlenza, Shaiden Monroe, E. Batiz and J. Boschen**
Admiral Policy Nos.: **CA000011665-01 and CA000011665-02**
Admiral Claim No.: **C137310**

Dear Ms. Kagen:

We are counsel along with Howrey, LLP for Admiral's insured, Covarix, LLC, dba Basic Research, LLC in the above-captioned lawsuit. We write to update Admiral about certain developments in the litigation that your July 6, 2009 letter does not mention.

On June 11, 2009 the First Amended Complaint was filed in the Forlenza suit and previously sent to Admiral. The FAC differs from the Complaint previously tendered for defense in that: (1) Plaintiffs Nicole Forlenza and Shaiden Monroe have abandoned their class action allegations and now sue as individuals, alleging defendants' false advertising of weight-loss supplement Akävar in violation of California's Unfair Competition Law ("UCL") and California Legal Remedies Act ("CLRA"); (2) new Plaintiff "E. Batiz" alleges class claims based on defendants' purported misleading advertising of Zantrex-3, a different weight loss supplement; and (3) new Plaintiff "J. Boschen" alleges class claims based on defendants' purported misleading advertising of Relacore, a different weight loss supplement. Admiral's insureds request coverage and a defense of these additional claims as well as those of Forlenza and Monroe.

Defendants have retained both our firm and Howrey, LLP as co-counsel in this case.

DECLARATION OF ANDREW M. SUSSMAN

I, ANDREW M. SUSSMAN, declare:

1. The facts set forth herein are within my personal knowledge and, if sworn as a witness, I could and would testify competently thereto under oath.

2. I am an attorney with Gauntlett & Associates and one of the attorneys for Basic Research, LLC ("Basic Research"), the Plaintiff in this insurance coverage lawsuit against Admiral Insurance Company ("Admiral").

3. On or about November 19, 2009, I sent an email to Admiral Claims Superintendent Dawn Kagan. This email followed up on a letter I sent to Ms. Kagan on September 30, 2009. Attached hereto as **Exhibit "19"** is a true and correct copy of my November 19, 2009 email.

4. On or about November 19, 2009, I received an email from Ms. Kagan responding to my email of the same date. Attached hereto as part of **Exhibit "19"** is a true and correct copy of the email I received from Ms. Kagan.

5. On or about December 8, 2009, I sent an another email to Ms. Kagan following up on my September 30, 2009 letter. Attached hereto as **Exhibit "20"** is a true and correct copy of my December 8, 2009 email.

6. On or about December 8, 2009, I received an email from Ms. Kagan responding to my email of the same date. Attached hereto as part of **Exhibit "20"** is a true and correct copy of the email I received from Ms. Kagan.

7. On or about January 11, 2010, Ms. Kagan sent a letter and email to my colleague at Gauntlett & Associates, James A. Lowe, advising Basic Research that Admiral had appointed "an associated counsel" for Basic Research who would also serve as "panel counsel" for Admiral in the *Forlenza* suit. Attached hereto as **Exhibit "21"** is a true and correct copy of Ms. Kagan's January 11, 2010 communication.

1161

8. The associated/panel counsel Admiral identified in its January 11, 2010 communication did not participate in the defense of Basic Research in the *Forlenza* suit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Irvine, California on this 6th day of July, 2010.

ANDREW M. SUSSMAN

Murray, Peggy A.

From: Sussman, Andrew M.
Sent: Thursday, November 19, 2009 11:07 AM
To: dkagan@admiralins.com
Cc: Karen A. Knokey; Murray, Peggy A.; Lowe, James A.
Subject: Admiral Insurance Claim No. C137310 on Behalf of Insured Covarix, Inc., dba Basic Research, LLC
Attachments: 09-09-30 ltr to D.Kagan (request for pymt of Forlenza suit defense expenses).PDF

Dear Ms. Kagan:

We have had no response to our letter to you of September 30, 2009 (a copy of which is attached) which: (1) confirmed your representation on Admiral Insurance's behalf that Admiral would defend its insureds in the *Forlenza, et al v. Basic Research, LLC et al* lawsuit; (2) provided copies of the insureds' defense counsels' invoices for legal fees and expenses incurred in the defense as of the invoices' dates; and (3) explained why the expenses were reasonable and necessary to the defense and therefore immediately due and payable by Admiral.

Since then, the insureds have accrued additional defense expenses. The invoices reflecting them will be provided to you in the very near future. Meanwhile, Admiral's insureds are being seriously prejudiced by its ongoing failure to honor its acknowledged defense obligations and to communicate.

I phoned you yesterday and today to inquire but there has been no response. Please contact me today to advise when the insureds will be reimbursed for their previously-submitted defense expenses, and to confirm that Admiral will promptly reimburse their additional *Forlenza* suit defense expenses as they are incurred.

Very truly yours,

Andrew M. Sussman, Esq.
Gauntlett & Associates

(949) 553-1010

(949) 553-2050 FAX

EXHIBIT 19

Murray, Peggy A.

From: Sussman, Andrew M.
Sent: Thursday, November 19, 2009 11:15 AM
To: Karen A. Knokey; Murray, Peggy A.; Lowe, James A.
Subject: FW: Admiral Insurance Claim No. C137310 on Behalf of Insured Covarix, Inc., dba Basic Research, LLC

David and Jim:

FYI--

AMS

From: DKagan@admiralins.com [mailto:DKagan@admiralins.com]
Sent: Thursday, November 19, 2009 11:09 AM
To: Sussman, Andrew M.
Subject: Re: Admiral Insurance Claim No. C137310 on Behalf of Insured Covarix, Inc., dba Basic Research, LLC

Dear Mr. Sussman-

I apologize for the delay. We are having the rates and legal bills reviewed by counsel. I followed up with them yesterday and hope to hear from them in the immediate future.

Dawn Kagan
Claims Superintendent
Admiral Insurance Company
1255 Caldwell Road
PO Box 5725
Cherry Hill, NJ 08034-3320
Phone: 856-429-9200 ext 360
Fax: 856-429-3630
E-mail: dkagan@admiralins.com

"Sussman, Andrew M." <AMS@gauntlettlaw.com>

11/19/2009 02:06 PM

To <dkagan@admiralins.com>
cc "Karen A. Knokey" <KAK@gauntlettlaw.com>, "Murray, Peggy A." <PAM@gauntlettlaw.com>, "Lowe, James A." <JAL@gauntlettlaw.com>
Subject Admiral Insurance Claim No. C137310 on Behalf of Insured Covarix, Inc., dba Basic Research, LLC

Dear Ms. Kagan:

We have had no response to our letter to you of September 30, 2009 (a copy of which is attached) which: (1) confirmed your representation on Admiral Insurance's behalf that Admiral would defend its insureds in the *Forlenza, et al v. Basic Research, LLC et al* lawsuit; (2) provided copies of the insureds' defense counsels' invoices for legal fees and expenses incurred in the defense as of the invoices' dates; and (3)

Murray, Peggy A.

From: Sussman, Andrew M.
Sent: Tuesday, December 08, 2009 9:42 AM
To: dkagan@admiralins.com
Cc: Lowe, James A.; Karen A. Knokey; Murray, Peggy A.
Subject: Admiral Insurance Claim No. C137310 On Behalf of Insured Covarix, Inc., dba Basic Research, Inc.
Importance: High

Dear Ms. Kagan:

On November 19, 2009 we spoke by telephone about Admiral's failure to substantively respond to our correspondence to you of September 30, 2009 and November 19, 2009. You acknowledged your previous representations on admiral's behalf that Admiral would defend its insureds in the *Forlenza, et al v. Basic Research, LLC et al* lawsuit. You also represented that the previously-submitted attorney billing statements for the defense up to the invoice dates had been turned over to outside counsel for review and that you expected to be able to respond shortly.

Since then we have not heard from you. More importantly, Admiral has not yet paid a dime of its insureds' defense expenses. The insureds are being seriously prejudiced by Admiral's ongoing dishonor of its promise and failure to pay its defense expenses as incurred -- or at all -- and by Admiral's failure to communicate.

Please contact me today to advise when the expenses will be paid, and to confirm that the ongoing defense expenses will be paid as they continue to be incurred.

Very truly yours,

Andrew M. Sussman, Esq.

Gauntlett & Associates

(949) 553-1010

(949) 553-2050 FAX

EXHIBIT 20

Murray, Peggy A.

From: Sussman, Andrew M.
Sent: Tuesday, December 08, 2009 11:11 AM
To: Murray, Peggy A.
Subject: FW: Admiral Insurance Claim No. C137310 On Behalf of Insured Covarix, Inc., dba Basic Research, Inc.

From: DKagan@admiralins.com [mailto:DKagan@admiralins.com]
Sent: Tuesday, December 08, 2009 11:07 AM
To: Sussman, Andrew M.
Subject: Re: Admiral Insurance Claim No. C137310 On Behalf of Insured Covarix, Inc., dba Basic Research, Inc.

Dear Mr. Sussman-

As you are aware, Admiral has accepted the defense of Basic Research under a Reservation of Rights. We are still awaiting counsel's review of your voluminous legal bills and will advise, as soon as possible, as to what will be paid.

Dawn Kagan
Claims Superintendent
Admiral Insurance Company
1255 Caldwell Road
PO Box 5725
Cherry Hill, NJ 08034-3320
Phone: 856-429-9200 ext 360
Fax: 856-429-3630
E-mail: dkagan@admiralins.com

"Sussman, Andrew M." <AMS@gauntlettlaw.com>

12/08/2009 12:41 PM

To <dkagan@admiralins.com>
cc "Lowe, James A." <JAL@gauntlettlaw.com>, "Karen A. Knokey" <KAK@gauntlettlaw.com>, "Murray, Peggy A." <PAM@gauntlettlaw.com>
Subject Admiral Insurance Claim No. C137310 On Behalf of Insured Covarix, Inc., dba Basic Research, Inc.

Dear Ms. Kagan:

On November 19, 2009 we spoke by telephone about Admiral's failure to substantively respond to our correspondence to you of September 30, 2009 and November 19, 2009. You acknowledged your previous representations on admiral's behalf that Admiral would defend its insureds in the *Forlenza, et al v. Basic Research, LLC et al*lawsuit. You also represented that the previously-submitted attorney billing statements for the defense up to the invoice dates had been turned over to outside counsel for review and that you expected to be able to respond shortly.

1255 Caldwell Road
P.O. Box 5725
Cherry Hill, NJ 08034-3220
Fax (856) 429-3630
Phone (856) 429-9200

Date: 01/11/2010

CERTIFIED MAIL RRR & REGULAR MAIL

Gauntlett & Associates
Att: James A Lowe, Esq.
18400 Von Karman Suite 300
Irvine, CA 92612

RE:	Insured:	COVARIX LLC DBA BASIC RESEARCH LLC
	Claimant:	Nicole Forlenza
	Admiral Policy No:	CA000011665-02
	Admiral Claim No:	C137310

Dear Mr. Lowe:

Please be advised that Admiral Insurance Company has assigned the following attorney as an associated counsel for the insured, as panel counsel for Admiral Insurance Company, pursuant to Admiral's right to do so under Civil Code 2860.

Alan Frederick, Esq.
Marrone, Robinson, Frederick & Foster
111 North 1st Street
Burbank, CA 99984
818-841-1144

Mr. Frederick will need immediate and complete access to your file, in order to bring Admiral up to date on this matter, due to the lack of reporting from either your office or The Howrey firm, thus far.

We wish to remind you that Admiral is providing a defense under a complete Reservation of Rights under all of the terms and conditions of the policy, including the right to withdraw from the defense and seek reimbursement for monies paid.

Should you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

Dawn Kagan
Cad

Dawn Kagan
Claims Superintendent
(856) 429-9200 x
dkagan@admiralins.com

CL 03 00 01 02

EXHIBIT 21

1 of 2

GAUNTLETT & ASSOCIATES
David A. Gauntlett *[Pro Hac Vice]*
Andrew M. Sussman *[Pro Hac Vice]*
18400 Von Karman, Suite 300
Irvine, California 92612
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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

BASIC RESEARCH, LLC, et al., Plaintiffs and Counterdefendants, vs. ADMIRAL INSURANCE COMPANY, a Delaware corporation, Defendant and Counterclaimant. AND RELATED COUNTERCLAIM	Civil No. 2:09-cv-00878 CW Judge: Clark Waddoups **PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY ON ADMIRAL INSURANCE COMPANY'S DUTY TO DEFEND *MILLER/TOMPKINS* AND *FORLENZA* LAWSUITS**

Pursuant to Rule 201 of the Federal Rules of Evidence and in support of its concurrently-filed motion for partial summary judgment, Plaintiffs respectfully request the Court take judicial notice of each of the following documents:

1. United States Trademark (Serial #77160070): "EAT ALL YOU WANT AND STILL LOSE WEIGHT;" Registered to Western Holdings, LLC (Registration # 3441872).

2. United States Trademark (Serial #77167925): "AND WE COULDN'T SAY IT IN PRINT IF IT WASN'T TRUE;" Registered to Western Holdings, LLC (Registration #3441894).

True and correct copies of the trademark certificates are attached hereto as **Group Exhibit "23."**

3. Federal Trade Commission Complaint regarding Bio Trim Product ("FTC Bio Trim Complaint") filed November 3, 2004 (United States District Court, Central District of California; *Federal Trade Commission v. Natural Products, LLC, et al*; Case Number SACV04-1279 AHS (MLGx)).

A true and correct copy of the FTC Bio Trim Complaint is attached hereto as **Exhibit "24."**

4. Federal Trade Commission Press Release regarding Bio Trim Product ("FTC Bio Trim Press Release") dated November 7, 2005 ("FTC Stops Bogus Ads for 'Bio Trim' and Other Weight-loss Products").

A true and correct copy of the Bio Trim Press Release is attached hereto as **Exhibit "25."**

5. Federal Trade Commission Red Flag Web Page ("FTC Red Flag Web Page") ("Red Flag Claim 2: Eat what you want! The more you eat, the more you lose and we'll show you how.").

A true and correct copy of the FTC Red Flag Web Page is attached hereto as **Exhibit "26."**

I. WESTERN HOLDINGS, LLC TRADEMARK CERTIFICATES

Under Rule 201(b) of the Federal Rules of Evidence, a court may take judicial notice of a fact "not subject to reasonable dispute in that it is... (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." A certified and sealed copy of United States trademark falls squarely within Rule 201(b). Such documents are produced by the United States Patent and Trademark Office, the United States governmental entity charged with the production, granting and maintenance of such documents.

Federal courts have held that the USPTO's accuracy as a source of trademark information cannot reasonably be questioned. In *Metro Pub., Ltd v. San Jose Mercury News*, 987 F.2d 637, 641 (9th Cir. (Cal) 1993) (*rev'd* on other grounds) judicial notice was taken certified copies of trademark registrations. In doing so, the court reasoned: "Rule 201(b)(2) of the Federal Rules of Evidence permits a federal court to take judicial notice of a fact that is not subject to 'reasonable dispute' because it is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Certified copies of trademark registrations from the principal register fall within this category." *Id.* at 641 n.3.

This court should also take judicial notice of the proffered trademark registrations as admissible under Federal Rule of Evidence 803(8), which excepts from the Hearsay Rule "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report" are not excluded by the hearsay rule. As held in *Fresenius Medical Care Holdings, Inc. v. Baxter Intern, Inc.*, 2006 WL 1330003 (N.D. Cal. 2006), the United States Patent and Trademark Office is a "public agency" that falls within the Rule: "[t]he United States Patent and Trademark Office ('PTO') is an agency of the United States, within the Department of Commerce, and thus falls squarely within the 'public offices or agencies' requirement of Rule 803(8)." *Id.* at *3. In rejecting a party's challenge to the admissibility of PTO documents related

to patents, the court noted that "courts regularly consider such documents." *Id.* As the United States Patent and Trademark Office is equally responsible for the issuance of patents *and* trademarks, the holding of *Fresenius* applies with equal force to the admissibility of trademarks.

Similarly, the trademarks fall under an exception to the hearsay rule as records of regularly-conducted activity by the PTO. Fed. R. Evid. 803(6).

These documents are also self-authenticating as domestic public documents not under seal (Fed. R. Evid. 902(2)) and as official publications (Fed. R. Evid. 902(5)).

The proffered trademarks contain evidence directly relevant to a dispositive issue in the case: whether the advertising idea at issue is that of "another" pursuant to the Admiral Insurance Policies at issue here. Accordingly, Plaintiffs respectfully request the Court take notice of the above-identified trademarks.

II. FEDERAL TRADE COMMISSION BIO TRIM COMPLAINT

This Court may take judicial notice of the FTC Bio Trim Complaint because it is a court record. *Fortune v. Patterson*, No. 04-377, 2009 WL 3166274, at *3 n.3 (W.D. Pa., September 28, 2009) ("[T]his Court examined the docket sheet for that case on the PACER system. . . . This Court hereby takes judicial notice of those documents, as well as that civil action's docket sheet"); *Deluna v. Curry*, No. 1:08-cv-00574, 2009 WL 2922990 (E.D.Cal., September 08, 2009) ("The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice may be taken of court records. . . . As such, the PACER website for the Ninth Circuit, containing that court's case management docket system, is subject to judicial notice."); *DCR Fund I, L.L.C. v. Tal Technologies, Inc.*, No. CIV-03-772-L, 2008 WL 2003798, at *1 n.2 (W.D.Okla., May 07, 2008) ("The court takes judicial notice of the Court of Appeals' docket sheets for the appeals in this case as well as those documents filed in the Court of Appeals that are accessible on PACER."); *Purdom v. Gettleman*, No. 08-CV-7-JMH, 2008 WL 695258, at *2 (E.D. Ky. March 12, 2008) ("[T]he Court has accessed the trial court docket

sheet by use of the PACER electronic system. The Court takes judicial notice of the information contained in the trial court docket sheet.").

The attached copy of the FTC Bio Trim Complaint is self-authenticating as a domestic public document not under seal (Fed. R. Evid. 902(2)) and an official publication (Fed. R. Evid. 902(5)). It also falls under exceptions to the hearsay rule as a record of regularly-conducted activity (Fed. R. Evid. 803(6)) and as a public record (Fed. R. Evid. 803(8)).

III. FEDERAL TRADE COMMISSION PRESS RELEASE AND RED FLAG PAGE

First, the Court may take judicial notice of the FTC Bio Trim Press Release and FTC Bio Trim Red Flag Web Page as records of regularly-conducted activity (Fed. R. Evid. 803(6) and as public records and reports (Fed. R. Evid. 803(8)). The documents also are self-authenticating as either domestic public documents not under seal (Fed. R. Evid. 902(2)) and as official publications (Fed. R. Evid. 902(5)).

Second, both the FTC Bio Trim Press Release and FTC Red Flag Web Page come from the FTC's website at www.ftc.gov. A court may take judicial notice of a public website and excerpts from the website. *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1084 n.2 (C.D. Cal. 2001) (stating that "[t]o the extent some of the descriptions about eBay's website are not in the record, the Court takes judicial notice of www.eBay.com and the information contained therein pursuant to Federal Rule of Evidence 201"); *id.* (noting that "eBay's own website describes itself as 'the world's largest online auction service' "); *Rearden LLC v. Rearden Commerce, Inc.*, 597 F. Supp. 2d 1006, 1014 n.3 (N.D. Cal. 2009) ("The court takes judicial notice of contents of this website and other websites cited herein pursuant to Federal Rule of Evidence 201."); *Energy Automation Systems, Inc. v. Saxton*, 618 F. Supp. 2d 807, 810 n.1 (M.D. Tenn. 2009) ("A court may take judicial notice of the contents of an Internet website."); *Wang v. Pataki*, 396 F. Supp. 2d 446, 458 n.2 (S.D.N.Y. 2005) ("The Court may take judicial notice of such internet

material."). Judicial notice is therefore proper and should be taken.

Dated: July 8, 2010

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1112

Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51, and 52

United States Patent and Trademark Office

Reg. No. 3,441,872
Registered June 3, 2008

TRADEMARK
PRINCIPAL REGISTER

EAT ALL YOU WANT AND STILL LOSE WEIGHT

WESTERN HOLDINGS, LLC. (WYOMING LTD LIAB CO)
1821 LOGAN AVENUE
CHEYENNE, WY 89701

FOR: DIETARY SUPPLEMENTS, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

FIRST USE 1-26-2007; IN COMMERCE 1-26-2007.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 77-160,070, FILED 4-18-2007.

JILL PRATER, EXAMINING ATTORNEY

EXHIBIT 23

Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51, and 52

United States Patent and Trademark Office

Reg. No. 3,441,894

Registered June 3, 2008

TRADEMARK
PRINCIPAL REGISTER

AND WE COULDN'T SAY IT IN PRINT IF IT WASN'T TRUE

WESTERN HOLDINGS, LLC (WYOMING LTD LIAB CO)
1821 LOGAN AVENUE
CHEYENNE, WY 82001

FOR: DIETARY SUPPLEMENTS, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

FIRST USE 1-26-2007; IN COMMERCE 1-26-2007.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 77-167,925, FILED 4-27-2007.

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Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, v. NATURAL PRODUCTS, LLC; ALL NATURAL 4 U, LLC; and ANA M. SOLKAMANS, Defendants.	SACV04-1279 AHS MLGx COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), through its undersigned attorneys, for its Complaint alleges:

1. Plaintiff FTC brings this action under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), to secure a permanent injunction, rescission of contracts and restitution, disgorgement of ill-gotten gains, and other equitable relief against the Defendants for engaging in deceptive acts or practices and false advertisements for food, drugs, devices, services or cosmetics, in or affecting commerce in connection with

compound so powerful, so effective, so relentless in its awesome attack on bulging fatty deposits that it has virtually eliminated the need to diet. . . The product is called Bio Trim and it's dynamite! In fact thousands of people are now trying Bio Trim and losing weight faster than ever before! FLUSHES CALORIES RIGHT OUT OF YOUR BODY!" Id. (capitalization in original). Adjacent to these statements are what purport to be before and after photos of Kelly B. The before picture has the caption "BEFORE 140 lbs." The after picture has the caption "AFTER 6 weeks - 103 lbs." Id.

c. "When a person ate a small amount of this unique plant extract they would miraculously lose weight! The researchers investigated this phenomenon discovered through sophisticated testing, that the plant extract did indeed cause the human body to bring about rapid weight-loss." Id.

d. "EAT ALL YOU WANT AND STILL LOSE WEIGHT (PILL DOES ALL THE WORK)" Id. (capitalization in original).

e. "You can continue to enjoy all those foods you love to eat. Bio Trim simply does not allow your body to consume and absorb excess calories . . . Period!" Id.

f. "Each day you'll notice absolute visible results as your unwanted pounds of fat flab and cellulite completely disappear. . . . Natural Products . . . [has] examined the clinical proof conducted on the Bio Trim ingredients thoroughly and [is] convinced that with Bio Trim you can achieve the body of your dreams. They don't care if

Federal Trade Commission
Protecting America's Consumers

For Release: November 7, 2005

FTC Stops Bogus Ads for "Bio Trim" and Other Weight-loss Products

Under the terms of a consent agreement approved by the Federal Trade Commission and announced today, Tustin, California based Natural Products, LLC, All Natural 4 U, LLC and their owner, Ana M. Solkamans, are permanently prohibited from making false and misleading claims about weight-loss products, including a dietary supplement they marketed as "Bio Trim," "Body-Trim/Bio-Trim," and "Body-Trim."

In a complaint filed in November 2004, the FTC alleged that the defendants made false and unsubstantiated claims in advertising on their Web sites and in magazines and newspapers around the country. They claimed, for example, that Bio Trim "guarantee[d] rapid weight loss" and its users could "eat all [they] want and still lose weight (pill does all the work)."

"If you see an ad for a weight-loss product making fantastic claims, keep your money in your pocket," said Lydia Parnes, Director of the FTC's Bureau of Consumer Protection. "It's just that – a fantasy. The claims made for Bio Trim were simply not possible. There is no pill that lets you eat all you want and still lose weight."

The Commission's complaint alleged that the defendants' sales pitches were false, unsubstantiated, and in violation of the FTC Act. Under the terms of the stipulated order settling the Commission's charges, the defendants can no longer claim that any weight-loss product: 1) causes users to lose substantial weight while eating unlimited amounts of food, 2) causes substantial weight loss by blocking the absorption of fat or calories, or 3) works for all overweight users.

The order also prohibits the defendants from making any claims that any health-related service or program, weight-loss product, dietary supplement, food, drug or device causes weight loss, or about their health benefits, performance, efficacy, safety, or side effects, unless, at the time a claim is made, the defendants have competent and reliable scientific evidence that substantiates the truth of the claim. They are also prohibited from profiting from, or disclosing, personal information about their customers or prospective customers in connection with commerce in weight-loss products.

A judgment of more than $2.1 million, representing the amount of consumer injury, will be suspended due to defendants' inability to pay. The judgment will be imposed if they are found to have misrepresented their financial condition.

The stipulated final order stopping the defendants' allegedly illegal conduct was a result of "Operation Big Fat Lie," the Commission's November 2004, multi-agency crackdown on false weight-loss advertising. The Commission vote approving the consent agreement was 4-0. The FTC filed the proposed stipulated final order in the U. S. District Court for the Central District of California, Southern Division, on October 28, 2005. The order was signed and filed on November 2, 2005 by District Judge Alicemarie H. Stotler.

"Operation Big Fat Lie" identified "Seven Red Flag Bogus Weight-Loss Claims" that the FTC has advised publications and broadcasters to avoid. These "red flags" include the following: a claim is too good to be true if it says the product will 1) cause weight loss of two pounds or more a week for a month or more without dieting or exercise; 2) cause substantial weight loss no matter what or how much you eat; 3) cause permanent weight loss (even when you stop using the product); 4) block the absorption of fat or calories to enable you to lose substantial weight; 5) safely enable you to lose more than three pounds per week for more than four weeks; 6) cause substantial weight loss for all users; or 7) cause substantial weight loss by wearing it on the body or rubbing it into the skin.

Challenged ads in the "Operation Big Fat Lie" sweep ran in nationally-known publications. For example, ads for defendants' products ran in national magazines, including Woman's Own magazine. The Red Flag Reference Guide for Media on Bogus Weight Loss Claim Detection is available to assist media in detecting false weight-loss claims. The FTC also uses "teaser" websites such as http://wemarket4u.net/fatfoe/ to educate consumers about weight loss scams.

NOTE: The stipulated final order is for settlement purposes only and does not constitute an admission by the defendants of a law violation. A stipulated final order requires approval by the court and has the force of law when signed by the judge.

Copies of the complaint and stipulated final order are available from the FTC's Web site at http://www.ftc.gov and also from

EXHIBIT 25

the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint in English or Spanish (bilingual counselors are available to take complaints), or to get free information on any of 150 consumer topics, call toll-free, 1-877-FTC-HELP (1-877-382-4357), or use the complaint form at http://www.ftc.gov. The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

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202-326-2161

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(FTC File No. X050005)

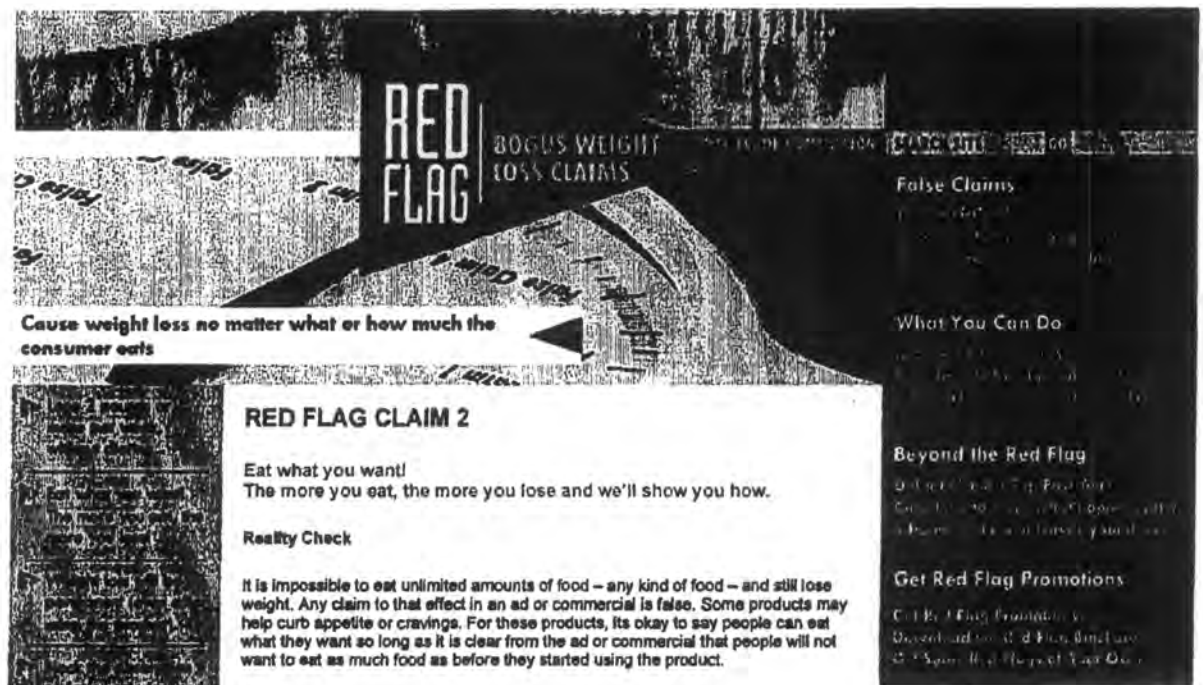
E-mail this News Release
If you send this link to someone else, the FTC will not collect any personal information about you or the recipient.

Related Documents:

Federal Trade Commission, Plaintiff, V. Natural Products, LLC; All Natural 4 U, LLC; and Ana M. Solkamans, United States District Court, Central District of California
FTC File No.: 032 3238
Civil Action No. SACV04-1279 AHS MLGx

The Red Flag Reference Guide for Media on Bogus Weight Loss Claim Detection

Last Modified: Monday, November 10, 2008



RED FLAG CLAIM 2

Eat what you want!
The more you eat, the more you lose and we'll show you how.

Reality Check

It is impossible to eat unlimited amounts of food – any kind of food – and still lose weight. Any claim to that effect in an ad or commercial is false. Some products may help curb appetite or cravings. For these products, its okay to say people can eat what they want so long as it is clear from the ad or commercial that people will not want to eat as much food as before they started using the product.

Variations

"This breakthrough ingredient has patients losing one full pound every 12 hours, two pounds or more each day, and all without counting calories, without missing a single meal and without giving up those delicious, mouthwatering foods they love the most."

"My 'formula for living' lets you eat: hamburgers, hot dogs, fries, steak, ice cream, sausage, bacon, eggs and cheeses! And STILL LOSE WEIGHT!"

"Eat all the foods you love, and still lose weight (pill does all the work)."

"I lost nine pounds during my first week eating just as I always do — going to parties, even eating gobs of vacation goodies, including my favorite food: ice cream. Four weeks later, I've lost another 27 pounds."

"Eat any mouthwatering food you want, and still blast away dress sizes and belt notches lightning fast."

EXHIBIT 26

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Attorneys for Admiral Insurance Company

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

BASIC RESEARCH, LLC, a Utah limited liability company; DYNAKOR PHRMACAL, LLC, a Utah limited liability company; THE CARTER-REED COMPANY, LLC, a Utah limited liability company; ZOLLER LABORATORIES, LLC, a Utah limited liability company; DENNIS GAY, an individual; DANIEL B. MOWREY, an individual; and MITCHELL K. FRIEDLANDER, an individual, Plaintiffs, v. ADMIRAL INSURANCE COMPANY, Defendant.	**ADMIRAL'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT** Civ. No. 09-CV-00878CW Judge Clark Waddoups

ADMIRAL'S RESPONSE: Admiral does not dispute that the *Tompkins* Suit alleges that Basic Research made misleading claims to promote Akävar as a product that enabled one to lose weight without diet or exercise. Admiral also does not dispute that such claims, according to *Tompkins* Plaintiffs, were a widespread problem, nor that others have made similar claims to advertise weight loss products. However, as with the *Miller* Complaint, Basic Research mischaracterizes the *Tompkins* Plaintiffs' statements. The *Tompkins* Plaintiffs' statement that fraudulent weight loss products are a widespread problem sets up its allegation that Basic Research took part in an "epidemic" of consumer fraud in the weight loss industry. *Id.* at ¶¶ 16-17. Basic Research misconstrues this statement as support for its contention that the *Tompkins* Plaintiffs have sued Basic Research in connection with its use of another's advertising ideas. However, the **Tompkins Plaintiffs are suing Basic Research not for injury due to use of another's advertising ideas, but for consumer fraud**. The *Tompkins* Complaint states:

> Fraudulent weight loss products are an enormous problem in the United States.... Basic Research was created to capitalize on the fraudulent weight loss product epidemic.

Tompkins Class Action Compl., ¶¶ 16-17. The *Tompkins* Plaintiffs point to the "widespread problem" of misleading claims about easy weight loss products as background for its allegations of fraud by Basic Research. They allege neither that Basic Research used another's advertising ideas, nor that they suffered any injury because of it.

BASIC RESEARCH'S FACT NOS. 25-26. For the purposes of this Motion, Admiral does not controvert the statements of fact in paragraphs 25-26.

(3) The *Forlenza* Suit

ADMIRAL'S RESPONSE: Admiral does not dispute that the *Tompkins* Suit alleges that Basic Research made misleading claims to promote Akävar as a product that enabled one to lose weight without diet or exercise. Admiral also does not dispute that such claims, according to *Tompkins* Plaintiffs, were a widespread problem, nor that others have made similar claims to advertise weight loss products. However, as with the *Miller* Complaint, Basic Research mischaracterizes the *Tompkins* Plaintiffs' statements. The *Tompkins* Plaintiffs' statement that fraudulent weight loss products are a widespread problem sets up its allegation that Basic Research took part in an "epidemic" of consumer fraud in the weight loss industry. *Id.* at ¶¶ 16-17. Basic Research misconstrues this statement as support for its contention that the *Tompkins* Plaintiffs have sued Basic Research in connection with its use of another's advertising ideas. However, the **Tompkins Plaintiffs are suing Basic Research not for injury due to use of another's advertising ideas, but for consumer fraud**. The *Tompkins* Complaint states:

> Fraudulent weight loss products are an enormous problem in the United States.... Basic Research was created to capitalize on the fraudulent weight loss product epidemic.

Tompkins Class Action Compl., ¶¶ 16-17. The *Tompkins* Plaintiffs point to the "widespread problem" of misleading claims about easy weight loss products as background for its allegations of fraud by Basic Research. They allege neither that Basic Research used another's advertising ideas, nor that they suffered any injury because of it.

BASIC RESEARCH'S FACT NOS. 25-26. For the purposes of this Motion, Admiral does not controvert the statements of fact in paragraphs 25-26.

(3) The *Forlenza* Suit

1951

BASIC RESEARCH'S FACT NO. 30. *The Forlenza Suit further alleges Basic Research made misleading claims in its advertisements that Akävar enables one to lose weight without diet or exercise.*

> *Defendants claim that Akävar "cause[s] easy, automatic, permanent weight loss" all "within a few short weeks." To prove this assertion Defendants claim that a group that used Akävar experienced 1604% more weight loss over a six-week period than those who did not use their product – and that group never had to exercise or diet. ... These false claims mislead consumers to believe that they can achieve the same results. [Id. at ¶ 13, **Exh. "5"** (Forlenza Complaint), ¶ 22.]*
>
> *Defendants make the following claims for the Akävar products: Eat What You Want And Still Lose Weight. ... Effectively, Defendants claim that no change in diet or behavior is required to lose weight while taking Akävar 20/50. A true and correct copy of Defendants' online claim on this point is attached hereto as Exhibit 6. [Id. at ¶ 15, **Exh. "7"** (Forlenza Second Amended Complaint), ¶ 31(a).]*

ADMIRAL'S RESPONSE: Admiral does not dispute the fact that the Forlenza plaintiffs alleged that Basic Research made misleading claims in its advertisements as set forth in this paragraph.

BASIC RESEARCH'S FACT NOS. 31-32.

31. *The Forlenza Suit also alleges that others have made similar claims to advertise weight loss products or "miracle pills."*

> *The weight-loss industry is a multi-billion-dollar industry in the United States. Hundreds of new products appear on the market every year, many of them claiming to be a quick and easy solution to the weight loss problem. In an effort to promote real weight loss and to prevent Americans from being defrauded by "miracle pills." The U.S. Food and Drug Administration ("FDA") instructs that "[a]ny claims that you can lose weight effortlessly are false. The only proven way to lose weight is either to reduce the number of calories you eat or to increase the number of calories you burn off through exercise. ..." [Id. at ¶ 13, **Exh. "5"** (Forlenza Complaint), ¶ 19.]*

ADMIRAL'S RESPONSE: Admiral does not controvert the statements of fact in paragraph 35. It notes, however, that the two phrases to which Basic Research points were each trademarked on June 2, 2008 – which is *after* the *Tompkins* and *Miller* complaints were filed. The *Tompkins* Complaint was filed on December 6, 2007, in California state court. (*See Tompkins* Class Action Compl.) The original *Miller* Complaint was filed in U.S District Court in Utah on November 9, 2007. (*See Miller* Proposed Class Action.) Nearly seven months later the trademark was registered with the U.S. Patent & Trademark Office. (Pl.'s Exh. "23".) The registration date also post-dates the inception date of the first of the two Admiral policies. (*See* Pl.'s Material Fact 1 and Pl.'s Exh. 1.)

Furthermore, while Western Holdings, LLC may be a separate and distinct entity from Basic Research, it is an affiliate and is a named insured along with Basic Research on the Admiral insurance policy at issue in this case. (*See* Pl.'s Exh. 10.)

BASIC RESEARCH'S FACT NO. 36. *Others have previously used an almost identical slogan to advertise weight loss products. For example, in 2004, the Federal Trade Commission filed an action against Natural Products, LLC, All Natural 4 U, LLC, and Ana M. Solkamans for using the slogan "Eat All You Want and Still Lose Weight (Pill Does All the Work)" to advertise Bio Trim™, a weight loss product. See FTC v. Natural Products, LLC et al. (C.D. Cal. Case no. SACV 04-1279), Complaint for Permanent Injunction and Other Equitable Relief (filed 11/3/2004), p. 5 ¶ 12(d). [RJN, Exh. "24" thereto.]*

ADMIRAL'S RESPONSE: Admiral does not dispute the statements of fact in paragraph 36. The Federal Trade Commission Action (FTC) demonstrates that the problem of consumer fraud in the weight loss industry is widespread (as alleged in the underlying lawsuits)

and not new. Furthermore, while other entities may have used similar slogans and statements which Basic Research is using, those entities are not the Underlying Plaintiffs in the *Miller, Tompkins* and *Forlenza* Suits, and neither they nor the Underlying Plaintiffs have alleged injury for the use of their advertising ideas.

BASIC RESEARCH'S FACT NOS. 37-38 Admiral does not dispute the statements of fact in paragraphs 37-38.

D. Admiral's Denial of Defense

BASIC RESEARCH'S FACT NOS. 39-41. Admiral does not dispute the statements of fact in Paragraphs 39-41 but would note that the terms of the letters speak for themselves.

BASIC RESEARCH'S FACT NOS. 42.-44.

42. *By letters dated June 25, 2009 and July 6, 2009 Admiral acknowledged notice of the Forlenza Suit and agreed to defend Basic Research in the Forlenza Suit subject to a reservation of rights under the second Admiral Policy [Id. At ¶¶ 19 & 20, and Exhibits "11" & "12."]*

43. *On November 19, 2009, counsel for Basic Research e-mailed Admiral to express concern over Admiral's ongoing failure to honor its acknowledged defense obligations and to communicate with basic Research. In its response, Admiral apologized for the delay and stated it was having invoices for the incurred defense costs reviewed by counsel. [Declaration of Andrew Sussman ("Sussman Decl.). ¶¶ 3&4 & Exh. "19"]*

44 *On December 8, 2009 counsel for Basic Research again emailed Admiral to request that it honor its acknowledged defense obligations. In its response, Admiral confirmed*

and not the covered offense of the use of another's advertising ideas in Basic Research's advertisements. The alleged use of Western Holdings's taglines[15] is merely factual background in the Underlying Complaints and does not trigger Admiral's duty to defend Basic Research against claims of advertising injury.

E. No Reasonable Interpretation of the Underlying Actions Leads to the Conclusion that Any of The Underlying Plaintiffs Assert the "Personal and Advertising Injury" Offense of "Use of Another's Advertising Idea."

1. The Only Reasonable Interpretation

The foundational premise of Basic Research's argument is that the policy covers false advertising so long as the insured employs false claims that were the brainchild of someone other than the insured. Accordingly, the argument goes, so long as the insured uses some straw-man as the "owner" of the false statement, there is coverage. There is no reasonable rationale for such a conclusion. What is the sense of covering false advertising that the insured paid for someone else to provide versus false advertising that the insured dreamed up? The answer is "none." What the policy clearly covers is the unauthorized taking and use of someone else's advertising idea.

2. Case Law Interprets Policy Language to Fall Outside of the Personal and Advertising Injury Coverage.

The case law is not prolific with respect to the particular offense in question. However, that which does exist views the coverage from the common sense perspective advocated by Admiral.

[15] Indeed, the facts of this case show that Western Holdings, the company that is supposedly the originator of the incriminated taglines, is actually a named insured under the Admiral policy. Moreover, as the trademark registrations offered into evidence by Basic Research are dated June 2, 2008. This registration post-dates 1) the filing of the *Miller* Suit; 2) the filing of the *Tompkins* Suit; and 3) the inception of the first Admiral policy.

In *Superformance Intern. v. Hartford Cas. Ins.*, 203 F.Supp.2d 587 (E.D.Va. 2002), the insured produced replica models of the Ford Cobra. The insured was sued by Carroll Shelby and Ford on various legal theories. From the bevy of allegations, the insured claimed that its insurer, Hartford, provided coverage under the "Personal and Advertising Injury" Coverage, and more particularly under the offense of "Copying, in your 'advertisement', a person's or organization's 'advertising idea' or style of 'advertisement'...." *Id.*

The Court held that while there were allegations in the underlying case that supported a claim for false advertising, "[t]he Policy does not explicitly provide coverage for false advertising and the claim cannot be read into any of the covered offenses. Thus, there is no coverage for false advertisement based on the plain meaning of the Policy's terms." *Id.* at 598.

In *Applied Bolting Tech. Prods. v. U.S. Fid. & Guar. Co.*, 942 F. Supp. 1029 (E.D. Pa., 1996), the insured's "Personal and Advertising Injury" coverage provided coverage for the covered offense of "misappropriation of advertising ideas." The insured was sued by a competitor who claimed that the insured's advertising falsely claimed that the insured's advertisements met a particular industry standard when they did not and that consumers, believing the false advertising, purchased the insured's inferior product to the detriment of the competitor. *Id. at 1031.*

Applying Vermont law with respect to policy interpretation and duty to defend, [16] the Court held that the use of the standard by the insured was not an "advertising idea." *Id.* at 1033. The court also noted that misappropriation of an advertising idea was the wrongful taking of the

[16] Vermont law is materially the same as that of Utah and California , with respect to the concepts of insurance contract interpretation and duty to defend. *See Applied Bolting Tech. Prods.*, 942 F.Supp.2d at 1032.

manner by which another advertises its goods or services or the wrongful taking of another's manner of advertising. *Id.*

In *Edwards Theatres, Inc. v. United National Ins. Co.*, 126 Fed.Appx. 831 (9th Cir. Cal. 2005),[17] the Underlying Plaintiff IMAX claimed that the insured Edwards Theatres used its trademark "IMAX" to apply to conventional films and that such use damaged IMAX's reputation. *Id.* at 832. The Court held that there was a duty to defend under the United National policy for "use of another's advertising idea" because a trademark is an advertising idea. *Id.* at 833. The case illustrates what Admiral contends is the proper interpretation of the offense: the insured has used the injured plaintiff's advertising idea and that plaintiff alleges that it sustained damage arising out of such use.

In the very recent opinion of *Champion Laboratories, Inc. v. American Home Assurance Company*, No. 09C7251, 2010 WL 2649848 (N.D. Ill. June 30, 2010) (slip opinion), the court addressed the scope of the coverage for "use of another's advertising idea." District Judge Amy J. St. Eve held:

> Under Illinois law, the use of another's advertising idea "occurs when a business wrongfully takes a competitor's idea about the solicitation of business." Put differently, the use of another's advertising idea concerns "the wrongful taking of the manner by which another advertises its goods or services."

Id. at *4 (internal citations omitted). Judge St. Eve got it right. The essence of the coverage is to address the insured's liability for wrongfully taking a competitor's advertising idea or the wrongful taking of the manner by which another advertises its goods or services.

The Underlying Plaintiffs, here, make no claim that they were injured by an "advertising idea". Their claims do not "arise out of" the use of an "advertising idea." Their claim is that

[17] Cited by Basic Research. *See* Basic Research's Initial Memorandum at 20, n. 68.

they were injured because the representations in the advertising *were misleading and false*. They have no concern as to whether the false advertising was the brain child of Basic Research, Western Holdings or someone else. **Their alleged injury arises out of the content of the advertising, not the manner of advertising.**

In light of the foregoing, it is clear that none of the Complaints filed in the *Miller, Tompkins or Forlenza* Suits allege facts that constitute the offense of "use of an another's advertising idea in your advertisement". Accordingly, the two-part test for establishing an advertising injury claim is not satisfied, and Admiral requests the Court to rule as a matter of law that it owes no duty to defend Basic Research in the *Miller, Tompkins or Forlenza* Suits.

F. Coverage is Precluded by Exclusion "g"

Basic Research goes to great lengths to avoid Exclusion "g", which provides a second and additional basis for the Court to rule that Admiral owes no duty to defend Basic Research in the *Miller, Tompkins or Forlenza* Suits. *See* Basic Research's Initial Memorandum at 16-25. Exclusion "g" provides that there is no coverage for personal or advertising injury "arising out of the failure of goods, products or services to conform with any statement of quality or performance made in [the insured's] 'advertisement'." Admiral Policy, Basic Research Exhibit 1; Documents 43-1, page 12 of 59; Basic Research Exhibit 2, Document 43-2, Page 12 of 65. None of the arguments made by Basic Research address the plain context of the Underlying Plaintiffs' claims: that each relied on false advertising that told him or her in no uncertain terms ("we couldn't say it if it wasn't true") that Akävar 20/50 worked such that a purchaser could "eat all you want and still lose weight." These statements go to the heart of the product's quality and performance and the alleged failure to conform to the advertised statement.

1. Statements of Quality or Performance

Basic Research asserts: "The *Florenza* claimants allege, in the disjunctive, damages arising out of their "purchase[s of] a product *based on false advertising* **and** *because the product has not worked as advertised.*" Basic Research's Initial Memorandum at 17 (emphasis in the original). Basic Research argues that while the second claim that the product has not worked as advertised could trigger the exclusion, the first claim of false advertising is not limited to claim of quality and performance and therefore does not trigger the exclusion . *See id.*

Perhaps we are missing something but each of the Underlying Plaintiffs' claim that the advertising is false in that Akävar 20/50 does not work as advertised. Clearly this claim arises out of the alleged failure of the product to conform with a statement of quality or performance and is, therefore, precluded from coverage.

2. Definitions of the Exclusion's Terms

Basic Research resorts to the familiar tactic of finding a dictionary definition of a word that, when substituted for the word in the policy, theoretically creates a meaning that supports the claim for coverage. From that exercise, Basic Research concludes that the exclusion applies only to statements about *how* the product fulfills its purpose of enabling users to "eat all you want and still lose weight." As Basic Research puts it: "But although this accused slogan indicates a result if the product is used, it does not say anything about how the product achieves the result." Basic Research's Initial Memorandum at 18.

There is nothing in the plain language of the exclusion or any reasonable interpretation thereof that indicates that the exclusion is limited as Basic Research suggests. Clearly the exclusion is designed to make the insured assume and endure the foreseeable risk of making

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statements in advertisements which misrepresent what the product can be expected to do and/or how it will perform. That is precisely what the Underlying Plaintiffs claim: Akāvar 20/50 does not allow one to eat all one wants and still lose weight.

Exclusion "g" is analogous to the category of exclusions contained in Coverage A's property damage exclusions 2(j) through 2(n),[18] known as the business risk exclusions. These exclusions are designed to preclude liability coverage for defective workmanship or services which are a foreseeable risk that the business needs to address. *See Grinnell Mut. Reinsurance Co. v. Lynne*, 686 N.W.2d 118, 123-24 (N.D. 2004) (The purpose of business risk exclusions is "to prevent policyholders from converting liability insurance into protection from foreseeable business risks. . . . Insurance companies theorize that a business risk, such as a cost resulting from improper performance of contract, should be built into the price of the product."). Courts explain the business risk doctrine in the following manner:

> The business risk doctrine is the expression of a public policy applied to insurance coverage provided under commercial general policies. **Reduced to its simplest terms, the risk that insured's product will not meet contractual standards is a business risk not covered by a general liability policy.** To ensure predictable and affordable insurance rates, the business risk doctrine limits an insurer's assumption of risk to those risks that are beyond the "effective control" of the insured.
>
> Business risks, then, are:

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[18] The Admiral Policy contains the Coverage A business risk exclusions and they are found at CG 00 02 12 04 at p. 4 of 16. *See* Basic Research Exhibit 1; Documents 43-1, Page 10-11 of 59; Basic Research Exhibit 2, Document 43-2, Pages 10-11 of 65. For instance Exclusion (2)(k) provides:

> **2. Exclusions**
> This insurance does not apply to:
> * * * *
> **k. Damage To Your Product**
> "Property damage" to "your product" arising out of it or any part of it.

> Finally, in *Superperformance Intern. v. Hartford Cas. Ins.* (E.D. Va. 2002) 203 F.Supp.2d 587, 589-590, a manufacturer of sports cars and related products sued the insured for marketing similar products improperly bearing the manufacturer's name. After the insurer declined to provide a defense in the action, the federal district court concluded that the nonconformity exclusion precluded coverage for the manufacturer's false advertising claims. (*Id.* at p. 598)
>
> TCI contends that the nonconformity exclusion is ambiguous, and can be reasonably understood as operating to bar coverage for claims by consumers, but not claims by competitors. Pointing to *Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal App.3d 232 [282 Ca. Rptr. 233. (*Aragon-Haas*), TCI argues that we are obliged to accept its proffered interpretation of the exclusion for purposes of assessing Peerless's demurrer. (fn omitted) As the nonconformity exclusion is not ambiguous, we reject TCI's contention.

Total Call Int'l, 181 Cal.App.4th at 172-173. As one can see, the foregoing cases and the courts' analyses of Exclusion "g" are persuasive and show that in the present case, the Underlying Plaintiffs' claims rely entirely on the allegation that Akävar 20/50 "[did] not live up to the promise of" being able to eat everything and still lose weight. Thus coverage for the claims is precluded under Exclusion "g."

5. Exclusion "g" Can Only Bar Indemnity But Not Defense

Basic Research claims that Exclusion "g" only operates to bar the duty to indemnify and not the duty to defend because ultimately Plaintiffs may not be able to prove their claim that Akävar 20/50 fails to conform to the advertised statements of quality and performance. *See* Basic Research's Initial Memorandum at 23. Basic Research ignores a fundamental tenet of insurance law, that the duty to defend is determined by a comparison of the allegations of the complaint, if proven true, with the insurance policy. If the allegations fall within a policy exclusion, there is no duty to defend. *See Deseret Fed. Co.*, 714 P.2d at 1147 (Utah 1986) ("Conversely, where there is no potential liability [due to the fact that the allegations fall within the scope of an

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IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

BASIC RESEARCH, LLC, et al., Plaintiffs, vs. ADMIRAL INSURANCE COMPANY, Defendant.	**PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE OF *MILLER* SUIT MEMORANDUM DECISION AND ORDER DATED MARCH 2, 2011, IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE DUTY TO DEFEND** Civil No. 110901154 Date: March 24, 2011 Time: 10:00 a.m. Judge: Dever

Pursuant to Rule 201 of the Utah Rules of Evidence, ("Plaintiffs")[1] respectfully request that the Court take judicial notice of the "Memorandum Decision And Order Granting Plaintiffs' Motion For Approval Of Nationwide Class Notice Program And Denying Defendants' Motion For Stay" (the "Order"), entered on March 2, 2011 (the "*Miller* suit").[2] A copy of the Order is attached as **Exhibit "27."** Judicial notice of orders entered in courts is appropriate[3] and is particularly appropriate here to refute Admiral's argument that the remedies sought by the *Miller* suit plaintiff class are restitutionary in character rather than damages[4] – an argument Admiral first raised at oral argument.

Plaintiffs had no prior opportunity or ability to bring this Order to this Court's attention.[5] The Order should be considered by this Court in connection with Plaintiffs' pending Motion For Partial summary Judgment on the same grounds asserted by Admiral in support of its March 21, 2011 **"Notice of Supplemental Authority"** in opposition to Plaintiff's Motion.

As now defined by the *Miller* Court, the *Miller* class includes all persons who **purchased** Akävar after seeing or hearing the "advertisement" at issue in this insurance coverage lawsuit

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[1]Basic Research, LLC; Dynakor Pharmacal, LLC; The Carter-Reed Company, LLC; PC MGMT, Inc.; Joseph Bode; Sheila Erickson; Dennis Gay; Daniel B. Mowrey; Mitchell K. Friedlander; and Zoller Laboratories, LLC.

[2]*Pamela Miller, et al. v. Basic Research, LLC, et al.*, United States District Court, District of Utah, Case No. 2:07-CV-871 TS.

[3]*State ex rel. A.S.*, 2008 UT App. 71, 2008 WL 601267, at *2 (Utah Ct. App. March 6, 2008) (court may take judicial notice of "legal documents . . . generated through court proceedings . . . .").

[4]*Limelight Productions, Inc. v. Limelite Studios*, 60 F.3d 767, 769 (11th Cir. (Fla.) 1995) held that measuring a plaintiff's monetary remedy as the amount of defendant's profits from alleged wrongdoing (in *Limelight*, for trademark infringement; here, for false advertising) does not change the remedy's character from "damages" to "restitution." ***Limelight*'s logic is underscored here** because any damages that ultimately may be awarded to the *Miller* plaintiff class would not be measured by adding up the individualized amounts paid by each class member for Akävar. The *Miller* complaint's damage claims (**Exhibit "3,"** p. 54) are not so limited.

[5]The Order was entered on March 2, 2011 – the **same date** on which (pursuant to this Court's order entered February 18, 2011) Plaintiffs and Defendant Admiral Insurance Company ("Admiral") filed their moving, opposition and reply papers in support of and in opposition to Plaintiffs' Motion For Partial Summary Judgment which was argued herein on March 24, 2011.

now before this Court, without regard to whether or not they lost weight, and whose injury would depend on the content of the first "advertisement."[6]

Contrary to Admiral's arguments at the March 24, 2011 hearing of Plaintiffs' motion, whether a person used Akävar but did not lose weight is irrelevant to whether that person is a member of the class as defined by the *Miller* Court. Although persons who claim that they purchased and **used** Akävar but failed to lose weight are members of the *Miller* class ***if, but only if,*** they heard or saw the slogan "eat all you want and still lose weight" before purchasing the product, the *Miller* class as defined by the *Miller* Court also includes persons who purchased Akävar and ***lost*** weight, so long as they saw or heard the "eat all you want and still lose weight" slogan before purchasing the product.[7]

Admiral abandoned its argument that the "f. use of another's advertising idea in your 'advertisement'" offense could never encompass false/misleading advertising claims[8] at oral argument. Yet it urges that these claims must be limited to allegations analogous to trademark infringement[9] or breach of warranty,[10] thereby assuring that coverage (f) would be eviscerated by express policy exclusions, rendering its coverage illusory and contrary to settled law, rejecting analogous arguments.[11] Admiral's policy construction "rests on an overly restrictive reading of

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[6]At page 2 of the Order, the *Miller* Court defined the certified plaintiff class in the underlying *Miller* class action lawsuit as: "Persons who **purchased** Akävar **after seeing or hearing the marketing slogan**: 'Eat all you want and still lose weight' during the relevant damages period." [Emphasis added.]

[7]Nowhere in the *Miller* First Amended Complaint do the *Miller* plaintiffs allege that the Akävar product is completely ineffective for causing weight loss, or that all of the members of the class used the product and did not lose weight. Whether a consumer "used" Akävar is irrelevant to whether he or she is a member of the class defined by the *Miller* Court.

[8]Admiral's Opposition/Summary Judgment Motion [Docket 51 in District Court action, filed Aug. 9, 2010 ("Admiral Opp./MSJ")], p. 34 and n. 12.

[9]Admiral Opp./MSJ, p. 39.

[10]*Id.* at p. 44.

[11]*McCormack Baron Mgmt. Servs., Inc. v. American Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 171-72 (Mo. 1999).

the complaint"[12] and is at odds with settled Utah law.[13]

The monetary damages sought by the *Miller* plaintiff class are alleged to be owed because the class members allegedly saw or heard advertisements before purchasing the product – **not** because they tried the product and it allegedly did not work.[14]

Miller's Sixth Cause of Action seeks monetary damages, not restitution, under the Utah Consumer Sales Practices Act (U.C.A. §13-11-1 *et seq.*).[15] These provisions mean a single consumer may seek "**actual damages**"[16] and "**money damages**" in a class action,[17] as here.

Dated: March 28, 2011

MANNING, CURTIS, BRADSHAW & BEDNAR LLC

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[12]*Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of Am.*, ___ F. Supp. 2d ___, 2011 WL 221658, at *6 (N.D. Cal. (S.F. Div.) 2011).

[13]*Harris v. Zurich Holding Co. of Am.*, No. 2:05-CV-482 TC, 2006 WL 120258, at *2 (D. Utah Jan. 17, 2006) (" '[T]he insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove that it *cannot*.' ").

[14]*See Miller* suit's First Amended Class Action Complaint (**Exhibit "3"** to Plaintiffs' Motion for Partial Summary Judgment herein), Prayer For Relief, pp. 53-54, ¶ "F" ("On the Sixth Cause of Action, against Defendants jointly and severally, in an amount equal to actual damages suffered by Plaintiffs and members of the Class as proven at trial plus interest . . . .").

[15]U.C.A. § 13-11-19(4)(a) ("A consumer who suffers a loss as a result of a violation of this chapter may bring a **class action for the actual damages** caused by an act or practice specified as violating this chapter . . . ." (emphasis added)).

[16]*Andreason v. Felsted*, 137 P.3d 1, 4 (Utah Ct. App. 2006) ("Under . . . 13-11-19 . . . a consumer who is able to prove **actual damages** . . . also proves that he has suffered a loss and . . . entitled to recover the value of his 'actual damages or $2,000, whichever is greater.' " (emphasis added)).

[17]*Miller v. Corinthian Colleges, Inc.*, No. 2:10-CV-999 TS, 2011 WL 652478 (D. Utah Feb. 15, 2011) ("Plaintiffs' claims for **money damages** may also be cognizable under the class action provision of the Act." (emphasis added)).

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2011, I caused a true and correct copy of the foregoing **PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE OF *MILLER* SUIT MEMORANDUM DECISION AND ORDER DATED MARCH 2, 2011, IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE DUTY TO DEFEND** to be delivered via hand delivery to local counsel and via overnight delivery to Oakland counsel, to the following:

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EXHIBIT 27

Miller v. Basic Research, LLC
United States District Court, D. Utah, Central Division. March 2, 2011 2011 WL 818150
Only the Westlaw citation is currently available.
Return to list 1 of 2,038 results

United States District Court,
D. Utah,
Central Division.

Pamela MILLER; Randy Howard; and Donna Patterson; on behalf of themselves and all others similarly situated, Plaintiffs,
v.
BASIC RESEARCH, LLC; Dynakor Pharmacal, LLC; Western Holdings, LLC; Dennis Gay; Daniel B. Mowrey, Ph.D; Mitchell K. Friedlander; and Does 1 through 50, Defendants.

No. 2:07-CV-871 TS. March 2, 2011.

Opinion

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR APPROVAL OF NATIONWIDE CLASS NOTICE PROGRAM AND DENYING DEFENDANTS' MOTION FOR STAY

TED STEWART, District Judge.

*1 Before the Court is Plaintiffs Pamela Miller, Randy Howard, and Donna Patterson's ("Plaintiffs") Motion for Approval of Nationwide Class Notice Program [1] and Defendants **Basic Research, LLC**, Dynakor Pharmacal, LLC, Dennis Gray, Daneil B. Morey, and Mitchell K. Friedlander's (collectively, "**Basic Research**" or "Defendants") Motion to Stay. [2] A hearing was held on these Motions on February 28, 2011. The Court took the Motions under advisement and now enters the following Order.

I. MOTION FOR APPROVAL OF CLASS NOTICE

On September 2, 2010, in the Court's Order certifying the class in this action, the Court "ORDERED that the parties meet and confer regarding notice and submit a proposed order within 60 days." [3] Although the parties met and conferred as ordered, the parties were unable to come to an agreement as to how to notify the class. On November 12, 2010, Plaintiff submitted to the Court the present Motion for Approval of Nationwide Class Notice Program, which seeks approval of Plaintiffs' proposed class notice program over **Basic Research's** objections.

Plaintiffs' proposed notice plan is allegedly based on the class definition provided by the Court in its September 2, 2010 Order, where the Court held that the class shall comprise "those persons who purchased Akävar in reliance of the slogan 'Eat all you want and still lose weight.' " [4] In Plaintiffs' proposed notice, under the heading of "Who is Included?", the notice states: "The Court decided that the Class includes: Everyone who purchased Akävar after seeing the marketing slogan 'Eat all you want and still lose weight.' " [5] Plaintiffs' notice plan proposes to disseminate this notice via the internet, radio, print, and television.

In **Basic Research's** opposition to this Motion, **Basic Research** notes that its objection stems not from the proposed notice plan per se, but rather this Court's definition of the certified class. **Basic Research** argues that the inclusion of the word "reliance" in the class definition renders it unworkable. As **Basic Research** explains, since a notified individual's class membership is generally presumed unless the notified individual opts-out, determining reliance at the class membership stage would necessarily rely upon either this Court making an individual assessment as to class membership, or leaving to the individual the determination of reliance before opting-out.

EXHIBIT 27

Basic Research's concerns were echoed by Judge Hartz of the Tenth Circuit, who noted in dissent of the Tenth Circuit's denial of Defendants' Petition for Panel Rehearing:

> It seems to me that there is a class-action issue in this case that should be explored on an interlocutory appeal. The district court's definition of the class is peculiar. The court's order granting certification of the class defines the class as "limited to those persons who purchased Akavar in reliance on the slogan 'Eat all you want and still lose weight.' " This is not the definition sought by Plaintiffs. They sought a class defined as "All persons in the United States who purchased, for consumption and not for resale or assignment, Akavar 50/50 from a retail sales establishment, directly from Defendants, or from a website controlled or operated by Defendants." They made good arguments justifying such a class, and it is not clear to me why the district court rejected that definition of the class and chose what it did. Indeed, the court said it would leave the issues of individual reliance for determination during the damages stage of the case if Plaintiffs established a violation during the class proceedings. But there would be no need to establish individual reliance for members of the class if one had to prove reliance even to be a member of the class.[5]

*2 Of course, **Basic Research** is careful not to endorse Judge Hartz's proposal to reconsider Plaintiffs' broader class definition. Instead, **Basic Research** merely suggested that the issue be discussed at a hearing.

Prior to the February 28, 2011 hearing, the Court ordered that the parties come prepared to propose alternate definitions to the certified class at the February 28, 2011 hearing. At the hearing, Plaintiffs renewed their request for the broader definition it initially requested in its motion for class certification. **Basic Research** declined to provide a specific alternative for the Court to consider. Instead, **Basic Research** requested the Court de-certify the class.

After reviewing the parties' respective arguments, Judge Hartz's dissent, and the case law concerning class definition and notification, the Court finds it necessary to modify its definition of the class. By including the word "reliance" in the class definition, the Court inadvertently created an ascertainability issue that it previously did not anticipate. In its own review of the case law, the Court finds the class definition provided by *In re New England Mutual Life Insurance Company Sales Practices Litigation* instructive and persuasive.[7] There, the district court faced claims by various Plaintiffs that the New England Life Insurance Company had used deceptive and manipulative sales tactics to encourage new and existing policyholders to purchase certain life insurance products. Like the present action, the plaintiffs argued that the class should be defined as all purchasers during the relevant damage period,[8] while the defendant argued, among other things, that a class should not be certified because of the need for individualized findings of reliance.[9] After considering several class definitions, the court decided to certify a class of persons who were "presented" with the allegedly deceptive and manipulative information and purchased certain life insurance products thereafter.[10] The court found that this avoided the overly broad definition proposed by the plaintiffs, while avoiding the defendant's concerns regarding reliance at the class notification stage.

The Court finds this reasoning instructive and applicable to the instant dispute. The Court therefore modifies its definition of the certified class to the following:

Persons who purchased Akāvar after seeing or hearing the marketing slogan "Eat all you want and still lose weight" during the relevant damages period.

In reviewing Plaintiffs' proposed class notification, the Court notes that Plaintiffs have presented several variations of this language, including "if you purchased Akāvar either partially or wholly because of the slogan 'Eat all you want and still lose weight,' you are a member of the Class."[11] Now that the Court has modified its definition, the Court expects all such references to the class definition in the class notification to conform to the specific language presented by the Court.

*3 The Court, therefore, approves Plaintiffs' class notification program-with the above stated modifications-and will grant Plaintiffs' Motion.

II. MOTION TO STAY

Basic Research moves the Court to stay these proceedings pending the outcome of an enforcement action which the Federal Trade Commission ("FTC") has filed against **Basic Research**, captioned *United States v.* ***Basic Research, LLC*** *et al.*, Case No. 2:09-CV-972 DB (the "FTC Action").

A. LEGAL STANDARD

As this Court has set forth previously, [12] the Court has inherent power to grant a stay pending the result of other proceedings. [13] The Supreme Court has described this power as "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." [14] To make this determination "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." [15] "Factors relevant to the court's decision are: (1) whether a stay would promote judicial economy; (2) whether a stay would avoid confusion and inconsistent results; and (3) whether a stay would unduly prejudice the parties or create undue hardship." [16]

The party seeking a *Landis* stay carries a heavy burden:

> [A party seeking] a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. [17]

B. RELEVANT BACKGROUND

In 2006, the FTC and **Basic Research** entered into a global settlement that resolved an administrative action filed against **Basic Research** by the FTC and a 2004 lawsuit filed in this District by a **Basic Research** entity challenging aspects of the FTC's scientific substantiation standards for advertising claims. As part of this settlement, the FTC and **Basic Research** entered into a Consent Agreement containing a provision that **Basic Research** alleges explicitly permits **Basic Research** to make weight-loss and fat-loss claims in its advertisements, so long as **Basic Research** has "competent and reliable scientific evidence" for such claims.

In September of 2006, **Basic Research** provided copies of advertisements for certain of its products, including Akävar 20/50 at issue in this case, along with scientific substantiation supporting its advertisement claims for these products. **Basic Research** alleges that over the next two years, it and the FTC engaged in extensive discussions concerning these materials.

In 2009, **Basic Research** brought a declaratory action against the FTC in this Court captioned ***Basic Research, LLC****, et. al. v. Federal Trade Commission, et al.*, Case No. 2:09-CV-779 CW. Two months later, the FTC filed in this Court the FTC Action against **Basic Research. Basic Research** alleges that the FTC action challenges the adequacy of the scientific substantiation **Basic Research** possesses in support of its advertising claims for Akävar. **Basic Research** has moved to consolidate these cases and the motion is currently under advisement with Judge Waddoups of this Court.

C. SUMMARY OF PARTIES' ARGUMENTS

*4 **Basic Research** argues the present action should be stayed pending resolution of the FTC Action. **Basic Research** argues that all three of the factors typically weighed by courts in determining a stay weigh in its favor.

1. Judicial Efficiency

As to judicial efficiency, **Basic Research** argues that the FTC litigation will necessarily resolve a key issue in this case. Here, in certifying the class, the Court noted that "the existence of a sufficient scientific basis [for **Basic Research**'s advertisements] is a dispositive issue, a determination on that issue will resolve one way or another all of

Plaintiffs' claims." [18] **Basic Research** alleges that the FTC litigation will address this very issue-namely, the interpretation of the "competent and reliable scientific evidence" term from the Consent Agreement and whether Basis Research had such reliable scientific evidence to substantiate its advertising claims for Akavar.

Basic Research argues that staying this case while the FTC Action resolves these issues will reduce unnecessary duplicative discovery requests, duplicative dispositive motions, and avoid wasting scarce judicial resources.

Plaintiffs argue that requiring **Basic Research** to defend a suit, in and of itself, is insufficient to warrant a stay. [19] Moreover, Plaintiffs note that Defendants are still proceeding in two cases related to the FTC Action concerning another **Basic Research** product, Relacore. [20] Thus, Plaintiffs argue that there is no hardship on Defendants in proceeding on the merits in this case as well.

2. Risk of Inconsistent Results and/or Conclusions

Basic Research argues that as the issue of whether **Basic Research** had adequate science to substantiate its advertising claims is a dispositive issue in both cases, proceeding with this action raises a significant risk of inconsistent or contradictory rulings.

Plaintiffs argue that any risk of inconsistent rulings is overstated by **Basic Research**. Plaintiffs assert that any ruling in the FTC Action will have no preclusive effect in the present matter. Moreover, Plaintiffs argue that its claims here-RICO, UPUAA, and state consumer fraud-are distinct from the claims involved in the FTC Action-the FTC Act and the Consent Decree. Thus, Plaintiffs argue that **Basic Research** could prevail in the FTC Action yet still be found liable here.

3. Prejudice to the Parties

Basic Research further argues that Plaintiffs will not be harmed by a stay of these proceedings. **Basic Research** asserts that should the FTC prevail in the FTC Action, Plaintiffs will likely be entitled to the benefit of that ruling here. On the other hand, if **Basic Research** prevails, then there is no violation of the Consent Agreement and Plaintiffs are spared the effort of proceeding on the merits with their claims. **Basic Research** also notes that the FTC seeks the same injunctive relief in the FTC Action as Plaintiffs do in the present action.

Finally, **Basic Research** notes that delay of these proceedings will not prejudice Plaintiffs. **Basic Research** notes that it is under a continuing obligation to preserve documents, therefore Plaintiffs' discovery efforts will not be harmed. Further, **Basic Research** alleges that the evidence in this matter is largely documentary, so there is little danger that Plaintiffs' case will be harmed by faded memories.

"5 Plaintiffs argue that **Basic Research** has severely understated the prejudice running to Plaintiffs in the event the Court awards the requested stay. Plaintiffs note that this case has already been proceeding for nearly three years, and predates the FTC Action by nearly two years. Plaintiffs argue that a stay would delay for years the prosecution of Plaintiffs' claims, including Plaintiffs' request for injunctive relief. Related to this concern, Plaintiffs argue that a stay would prevent Plaintiffs from conducting discovery on this matter, which raises a risk that witnesses' memories may fade or otherwise become unavailable and evidence may be lost. Moreover, Plaintiffs argue that a stay of these proceedings may eliminate its ability to recover on its claims should it prevail in this litigation.

D. DISCUSSION

In weighing the above stated arguments, the Court finds that **Basic Research** has failed to carry its heavy burden of justifying a stay. Although simultaneously pursuing litigation related to the same subject is inconvenient, this hardship does not outweigh the severe prejudice to Plaintiffs' claims in staying these proceedings. Plaintiffs' ability to gather evidence would be limited, if not eviscerated, by a stay of these proceedings. During the time the proposed stay would be in effect, there remains a high risk that evidence will be lost and witnesses' memories will fade or they may become unavailable. This risk is magnified by the fact that the FTC Action is in its early stages, and may take years to resolve.

Additionally, any supposed benefit of awaiting the outcome of the FTC Action is marginal at best. Even if **Basic Research** prevails in the FTC Action, Plaintiffs could still proceed on their claims because the FTC Action would likely have no preclusive effect upon Plaintiffs. And even if the FTC prevails in the FTC Action, whether that decision would have preclusive effect against **Basic Research** in this action is a question of law which need not be decided at this juncture. Thus, **Basic Research's** requested stay would require Plaintiffs to stand idle on their claims for years, based on the mere possibility that a decision against **Basic Research** could be used preclusively in this action. Such a possibility is insufficient to warrant a stay in these circumstances.

The Court, therefore, finds the requested stay unwarranted and will deny **Basic Research's** Motion to Stay.

III. CONCLUSION

It is therefore

ORDERED that Plaintiffs' Motion for Approval of Nationwide Class Notice Program (Docket No. 158) is GRANTED. It is further

ORDERED that Defendants' Motion to Stay (Docket No. 166) is DENIED.

Footnotes

1 Docket No. 158.

2 Docket No. 173.

3 Docket No. 151.

4 Docket No. 151, at 25-26.

5 Docket No. 161, Ex. 1, at Attachment A.

6 Docket No. 159, at 10 n. 6.

7 183 F.R.D. 33 (D.Mass.1998).

8 *Id.* at 37.

9 *Id.* at 43-44.

10 *Id.* at 37.

11 Docket No. 160-1 at 5, 14.

12 *Gale v. Brinker Int'l Payroll Co., L.P.*, 2010 WL 3835215, at *1 (D.Utah Sep. 29, 2010).

13 *Nederlandse ERTS-Tankersmaatchappij, N.V. v. Isbamdtsen Co.*, 339 F.2d 440, 441 (2d Cir.1964).

14 *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)

15 *Id.* at 254-55.

16 *Evergreen Holdings, Inc. v. Sequoia Global, Inc.*, 2008 WL 4723008, *2 (W.D.Okla.2008).

17 *Landis*, 299 U.S. at 255.

18 Docket No. 151, at 16.

19 *See* Docket No. 173, at 6 (quoting *Lockyer v. Mirant Corp .*, 398 F.3d 1098, 1112 (9th Cir.2005)).

20 *See* Docket No. 173, at 6.

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