

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

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In the Matter of

BASIC RESEARCH, L.L.C., et al.,

Respondents.

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Docket No. 9318

Public Document

**RESPONDENT BASIC RESEARCH, L.L.C.'S**  
**MOTION TO COMPEL PROPER PRIVILEGE LOG**

Respondent Basic Research, LLC, (“Basic Research” or “Respondent”), through the undersigned counsel and pursuant to 16 C.F.R. § 3.38 hereby seeks and moves the Court for an order compelling the Federal Trade Commission (“FTC”) to provide a privilege log with complies with the requirements of 16 C.F.R. § 3.38A.

**I. BACKGROUND**

On July 23, 2004, Basic Research served its first set of Interrogatories (“Interrogatories”) and first Request for Production of Documents (the “First Requests”). On September 9, 2004, Basic Research served its second Request for Production of Documents (the “Second Requests”).<sup>1</sup> The Discovery Requests provide, *inter alia*, “Responsive documents that are not produced because you claim a privilege must be identified on a privilege log. The log must identify the grounds for withholding the document, the date of the document, type (e.g., letter, meeting, notes, memo), nature and subject mater of the document, the authors or originators, and the addressees/recipients. Each author or recipient who is an attorney should be noted as such. If only a part of a responsive document is privileged, all non-privileged portions of the document

must be provided.” *See, e.g.*, Interrogatories, Instructions ¶ 7; First Requests, Instructions, ¶ 6; Second Requests, Instructions, ¶ 7.

On October 15, 2004, the FTC produced its privilege log, a copy of which is attached hereto as Exhibit A. The FTC’s privilege log falls far short of complying with the mandatory requirements of Rule 3.38A. In particular, the FTC’s privilege log does not specifically identify any of the documents withheld under claim of privilege, does not identify any of the authors or recipients of the withheld documents (including the identify of persons outside the FTC), and does not identify the dates on which the withheld documents were created.. *See, e.g.*, 16 C.F.R. § 3.38A. Instead, the FTC has simply listed broad categories of documents, and failed to provide any of the identifying information required by 16 C.F.R. § 3.38A that is necessary to allow a determination of whether the documents are truly ones subject to a claim of privilege. This Court should order that the FTC immediately provide a privilege log that comports with the requirements of 16 C.F.R. § 3.38A.

## **II. ARGUMENT**

16 C.F.R. § 3.38A provides, in part, that a party withholding documents on the basis of privilege “shall, if so directed, ... submit, together with such claim a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.” 16 C.F.R. § 3.38A. This rule applies to Complaint Counsel just as it applies to respondents in FTC proceedings. *See, e.g., In re MSC.Software Corp.*, Docket No. 9299, 2002 WL 31433929, F.T.C. (Feb. 21, 2002)

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<sup>1</sup> The Interrogatories, First Requests and Second Requests are sometimes collectively referred to as the “Discovery Requests”, and copies are attached hereto as Exhibit A.

(stating that Complaint Counsel is a party to the litigation, and ordering Complaint Counsel to provide a privilege log which complies with the requirements of Rule 3.38A).

It is especially clear that with respect to documents located within Complaint Counsel's office (as opposed to documents located within the offices of members of the Commission or other departments of the FTC), Complaint Counsel must comply with the requirements of 16 C.F.R. § 3.38A and provide document specific, detailed information. The *MSC.Software* case is particularly instructive because in that case, Complaint Counsel provided a privilege log virtually identical in form to the one it has produced in this matter.

In *MSC.Software*, complaint counsel asserted in response to respondent's motion to compel that they needed to provide a privilege log that only set forth generalized, categorical information and omitted detailed specification as to specific documents withheld. The *MSC.Software* court, however, rejected the FTC's position, stating:

MSC's Definitions and Instructions in its Interrogatories and in its Document Requests did direct Complaint Counsel to provide a privilege log. Complaint Counsel has improperly refused to provide a privilege log, as is required by Commission Rule 3.38A. The cases upon which Complaint Counsel relies to argue that it may assert privilege by general category and need not include detailed specifications of each document are inapposite. *In re Great Atlantic & Pacific Tea Co.*, 82 F.T.C. 1860, 1973 FTC LEXIS 224 (June 27, 1973) and *In re Chock Full O'Nuts Corp., Inc.*, 82 F.T.C. 747, 1973 FTC LEXIS 219 (March 2, 1973) were both decided before the Commission added Rule 3.38A to its Rules of Practice. Trade Regulation Rulemaking Procedures, 44 Fed. Reg. 54,042 (Sept. 18, 1979). In the cases relied upon by Complaint Counsel that were decided subsequent to the adoption of Rule 3.38A, the Administrative Law Judges addressed situations where the respondents sought documents located in the files of offices of the Commission other than those of complaint counsel. Privileges may be generally asserted for documents that are located in offices of the Commission other than those of Complaint Counsel. *In re R.J. Reynolds*, 1998 FTC LEXIS 179 (Sept. 24, 1998) ("Other offices of the Commission, being third parties to this litigation, and not parties, need not be specific in describing items withheld for privilege."); *In re Flowers Indus., Inc.*, 1981 FTC LEXIS 117 (Sept. 11, 1981) (Subpoenas for documents in the files located in offices of the Federal Trade Commission other than those of Complaint Counsel are quashed upon

general assertion of privileges.); In *re Champion Spark Plug Co.*, 1980 FTC LEXIS 200 (Dec. 16, 1980) ("Since an application under Rule 3.36 for documents in files of offices at the Federal Trade Commission other than those of counsel supporting the complaint is, in effect, a demand directed at a third party, the general description of the documents by category and a broad ruling on privileges would be sufficient."). But, where, as here, it appears that the documents Complaint Counsel is withholding are located in the files of Complaint Counsel, Complaint Counsel may not rely on a general assertion of privilege.

Complaint Counsel, as a party to this litigation, is required by Commission Rule 3.38A to submit a detailed privilege log of the items withheld from Complaint Counsel's files, if so directed by MSC. Because MSC has demanded a privilege log, Complaint Counsel must comply with 16 C.F.R. § 3.38A. In this respect, MSC's motion is GRANTED. Complaint Counsel shall provide a privilege log by February 28, 2002.

*MSC.Software.*

Complaint Counsel may assert that there is no need to provide the specificity requested by Respondent. However, absent the requested specificity it is impossible for Respondent to determine whether the documents at issue are in fact subject to an available privilege. That is the reason for the specificity required by the 16 C.F.R. § 3.38A. For example, Complaint Counsel has not identified third parties to whom documents were provided thus it is impossible to determine the applicability of the privileges claimed. Similarly, given the cursory information reflected on the log, it is impossible to tell whether any of the documents relate to consumer perception of the challenged advertisements, as determined through methods such as consumer surveys or pretests, documents that would be properly discoverable.

Complaint Counsel's Privilege Log is also deficient with respect to identifying documents withheld for privilege that are located in other offices of the FTC as well. The Privilege Log fails to identify any such documents even by general category or broad objection.

Because of this failure, Respondent is unable to determine which of those documents has been withheld and for what privilege. Respondent does not even know if any have been.

Complaint Counsel may refer the Court to the case of *In re R.J. Reynolds*, No. 9285, 1998 FTC LEXIS 179 (Sept. 24, 1998) as support for the proposition that Complaint Counsel need only provide the type of generalized information which appears in the subject privilege log.<sup>2</sup> However, *R.J. Reynolds* is inapposite to the documents located in Complaint Counsel's office because in that case, the documents at issue were located in other offices of the FTC not complaint counsel's. Indeed, application of *R.J. Reynolds* to this exact issue was expressly rejected in *MSC.Software*. This Court should similarly reject application of *R.J. Reynolds* for the same reasons the court did in *MSC.Software* -- a review of Complaint Counsel's privilege log reveals that all of the documents identified (albeit are only identified in a very generalized fashion) are located in Complaint Counsel's office. Thus, the discretionary rule espoused in *R.J. Reynolds* (even assuming *arguendo* that the ruling in *R.J. Reynolds* was correct), and which applies only to documents located in offices other than Complaint Counsel's, is simply not applicable. Significantly, with respect to the withheld documents in other offices of the FTC, *R.J. Reynolds* supports Respondent not Complaint Counsel. *R.J. Reynolds* holds that at a minimum those documents should be identified by category and privilege. Complaint Counsel has failed to do even this.

### III. CONCLUSION

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<sup>2</sup> Indeed, *R.J. Reynolds* is the case Complaint Counsel has already referred Respondent to as support for their position.

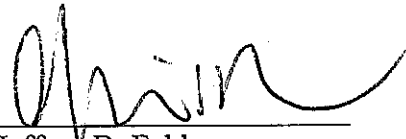
For the foregoing reasons, the motion to compel should be granted. Complaint Counsel should be ordered to immediately provide a privilege log which complies with the requirements of 16 C.F.R. § 3.38A.

#### **IV. CERTIFICATE OF COMPLIANCE**

Pursuant to Section 3.22(f) of the Commission's Rules of Practice, Respondent has conferred with Complaint Counsel in a good faith effort to discuss the deficiencies with Complaint Counsel's privilege log. The parties were able to reach agreement with respect to only one narrow issue. Complaint Counsel agreed to provide specificity and detail with respect only to documents sent from Complaint Counsel's office to third parties. The parties were unable to reach an agreement with regard any other issue surrounding the privilege log.

Dated: Nov. 12, 2004

Respectfully submitted,



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LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 12<sup>th</sup> day of November, 2004 as follows:

(1) One (1) original and two (2) copies by Federal Express to Donald S. Clark, Secretary, Federal Trade Commission, Room H-159, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) electronic copy via e-mail attachment in Adobe® “.pdf” format to the Secretary of the FTC at [Secretary@ftc.gov](mailto:Secretary@ftc.gov);

(3) Two (2) copies by Federal Express to Administrative Law Judge Stephen J. McGuire, Federal Trade Commission, Room H-104, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580;

(4) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of [lkapin@ftc.gov](mailto:lkapin@ftc.gov), [jmillard@ftc.gov](mailto:jmillard@ftc.gov), [rrichardson@ftc.gov](mailto:rrichardson@ftc.gov), [lschneider@ftc.gov](mailto:lschneider@ftc.gov) with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(5) One (1) copy via U. S. Postal Service to Elaine Kolish, Associate Director in the Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580

(6) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(7) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

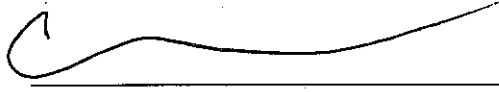
(8) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(9) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, *Pro Se*.



**CERTIFICATION FOR ELECTRONIC FILING**

I HEREBY CERTIFY that the electronic version of the foregoing is a true and correct copy of the original document being filed this same day of November 12<sup>th</sup>, 2004 via Federal Express with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.



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