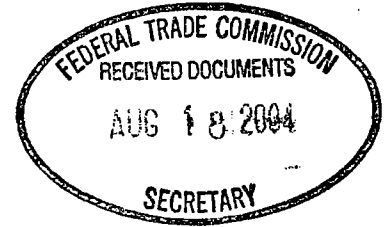


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)
BASIC RESEARCH, LLC)
A.G. WATERHOUSE, LLC)
KLEIN-BECKER USA, LLC)
NUTRASPORT, LLC)
SOVAGE DERMALOGIC LABORATORIES, LLC)
BAN, LLC d/b/a BASIC RESEARCH, LLC)
 OLD BASIC RESEARCH, LLC,)
 BASIC RESEARCH, A.G. WATERHOUSE,)
 KLEIN-BECKER USA, NUTRA SPORT, and)
 SOVAGE DERMALOGIC LABORATORIES)
DENNIS GAY)
DANIEL B. MOWREY d/b/a AMERICAN)
 PHYTOTHERAPY RESEARCH LABORATORY, and)
MITCHELL K. FRIEDLANDER,)
 Respondents.)
_____)

Docket No. 9318

**ORDER ON RESPONDENTS' MOTION TO QUASH
IN PART AND TO LIMIT SUBPOENAS TO NON-PARTIES**

I.

On July 19, 2004, Respondents Basic Research, L.L.C., et al. ("Respondents") filed a motion to quash in part and to limit the subpoenas *duces tecum* served on eight non-parties by Complaint Counsel ("Motion"). On July 29, 2004, Complaint Counsel filed its opposition to the Motion ("Opposition"). For reasons set forth below, the Motion is **GRANTED IN PART AND DENIED IN PART**.

II.

Respondents move to quash or limit the subpoenas *duces tecum* served by Complaint Counsel on or about July 8, 2004 on George Evan Bybee, Majestic Enterprises, Inc., Dr. Natalie Chevreau, Michael Meade, D.G. Enterprises, Inc., Western Holdings, L.L.C., Winterhawk Enterprises, L.L.C., and Winterfox, L.L.C. (the "Non-parties"). Respondents argue that the subpoenas seek, in part, confidential financial information of the Respondents that is irrelevant to the instant proceeding. Motion at 3.

Complaint Counsel asserts that its subpoenas seek relevant information and the subpoenas are not unduly burdensome. Opposition at 2. Complaint Counsel further asserts that the challenged financial discovery is reasonably calculated to lead to admissible evidence establishing a common enterprise, is reasonably calculated to lead to admissible evidence establishing who may be liable under the FTC Act, is reasonably calculated to lead to admissible evidence regarding the proposed injunctive relief, is not unduly burdensome, and does not relate solely to Section 19 relief. Opposition at 4-9.

III.

Discovery sought in a proceeding before the Commission must be “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent.” 16 C.F.R. § 3.31(c)(1); *see Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). However, discovery may be limited if the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive, or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(1). Further, the Administrative Law Judge may limit discovery to preserve privileges. 16 C.F.R. § 3.31(c)(2).

Complaint Counsel indicates that the subpoenas’ specifications request documents regarding the nature of the non-parties’ relationships with Respondents, including documents relating to the challenged products and their ingredients (specifications 1-2), substantiation of the challenged products (specifications 3-4), promotional materials of the challenged products (specifications 5-6), correspondence relating to the challenged products (specifications 7-8), financial arrangements between Respondents and non-parties (specification 9), and revenues and expenditures related to the challenged products (specifications 10). Opposition at 3 n.3. Complaint Counsel asserts that the information is necessary to untangle Respondents’ “web of corporate structures” and to fashion an appropriate remedy. Opposition at 5, 7.

Respondents object to requests that seek “financial information relating to the compensation received and expenditures made by the non-parties in relation to the Respondents.” Motion at 3. Specifically, Respondents object to specification 9 which requests, in pertinent part, “Documents sufficient to show all compensation, distributions, payments, royalties, and all other benefits in any form that each of the Respondents has made to you or others on your behalf” and specification 10 which reads, in pertinent part, “Documents sufficient to show the total amount, in dollars, of all revenues that you have received, and all expenditures that you have made, in connection with the formulation, development, manufacture, testing, advertising, marketing, promotion, or sale of each of the challenged products.” Motion at 2.

Corporate respondents acting in concert to further a common enterprise are each liable for the acts and practices of the others in furtherance of the enterprise. *See Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427, 431 (7th Cir. 1964); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964);

Zale Corp. and Corrigan-Republic, Inc. v. FTC, 473 F.2d 1317, 1320 (5th Cir. 1973). The requested non-party documents may lead to information about the relationships of the parties, which may be relevant to determining liability or drafting an appropriate remedy. The requests will be limited, however, to apply to those financial arrangements made in connection with the challenged products only. So limited, Specifications number 9 will read: "Documents sufficient to show all compensation, distributions, payments, royalties, and all other benefits in any form that each of the Respondents has made to you, or to others on your behalf in connection with the formulation, development, manufacture, testing, advertising, marketing, promotion, or sale of each of the challenged products." Respondents have not demonstrated that the requested discovery, as limited, is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent.


Moreover, the "fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971). "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977). "Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965) (denying motion to quash subpoenas served on competitors). Respondents have not demonstrated that the requested discovery, as limited, will cause an undue burden.

Pursuant to 16 C.F.R. § 3.31(d)(1), a protective order governing confidential information was issued in this case on August 11, 2004. The provisions of the Protective Order adequately protect the confidential documents of third parties through a number of safeguards. In addition, Respondents may file a motion for *in camera* treatment to prevent disclosure to the public of its confidential materials at the trial in this matter. Guidelines for filing applications for *in camera* treatment are set forth in the Protective Order.

IV.

Respondents' motion to quash and to limit subpoena *duces tecum* is **GRANTED IN PART AND DENIED IN PART**. The Non-parties shall have ten calendar days from the date of this order to produce the requested discovery.

ORDERED:


Stephen J. McGuire
Chief Administrative Law Judge

August 18, 2004