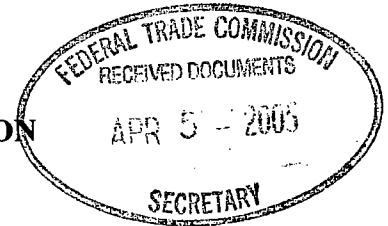


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)

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

Respondents.)
)

Docket No. 9318

PUBLIC VERSION

**COMPLAINT COUNSEL'S AMENDED CONSOLIDATED OPPOSITION
TO RESPONDENTS' MOTION FOR ORDER TO SHOW CAUSE WHY
COMPLAINT COUNSEL SHOULD NOT BE HELD IN CONTEMPT
AND RESPONDENTS' MOTION FOR LEAVE TO TAKE DISCOVERY**

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April 5, 2005

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INTRODUCTION

Complaint Counsel respectfully submit this consolidated *Opposition* to Respondents' *Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt* and their *Motion for Leave to Take Discovery*. Respondents' *Motion for Order to Show Cause* relies on gross assumptions, strident invective, material omissions of fact, and flawed legal argument. Their *Motion for Leave to Take Discovery* employs the preceding *Motion* as a springboard, proposing an unnecessary and unwarranted inquisition of the Commission staff that would divert the parties from the real issues in this matter. Respondents' effort to turn the inadvertent posting of Complaint Counsel's exhibits to their own strategic advantage should be repudiated. The relief that Respondents seek in their *Motions* is wholly without merit, and should be denied.

I. Statement of Facts

A. The Facts Surrounding this Dispute

The present dispute arises from the unintended posting of certain documents on the FTC's website, and the factual circumstances surrounding the posting. The documents posted on the website consisted of evidence submitted as exhibits to Complaint Counsel's *Motion for Partial Summary Decision*, including documents that Respondents had previously designated as "confidential" or "restricted confidential, attorney eyes only," without ever moving for *in camera* treatment of those documents. The factual circumstances surrounding the posting of these designated non-public documents are recounted in the *Declarations* appended to Complaint Counsel's *Supplemental Response to Respondents' Emergency Motion*, filed February 25, 2005. Briefly summarized, Complaint Counsel filed and served, via email and other means, exhibits marked as "SUBJECT TO PROTECTIVE ORDER" that were not intended for

posting on the FTC's website. Despite marking the documents as such, and taking other precautions, fifteen days later, Complaint Counsel's emailing of these materials regrettably culminated in the posting of the exhibits for several days. Once we discovered the posting, we acted immediately to request the removal of designated non-public documents and to preserve the record.

Respondents have not identified any material dispute concerning the facts.¹ Nor have they adduced additional evidence relating to the posting of our *Motion* exhibits in the form of declarations relating to their own acts or omissions.

We have previously stated, and we reiterate, that we deeply regret that this incident occurred. Notwithstanding Respondents' accusations to the contrary, we are not attempting to shift to the Respondents accountability for our conduct. Respondents' conduct, however, is relevant to the extent of injury and the propriety of the requested relief, and accordingly is pertinent to their pending *Motions*, as explained below.

Respondents' effort to turn the posting of Complaint Counsel's exhibits to their own strategic advantage, to avoid defending the merits of this matter, should be repudiated.

B. The Protective Order

The Court's *Protective Order* in this matter "governs the disclosure of information

¹Respondents contended in their *Motion for Leave to Take Discovery* that discovery is necessary "to resolve factual disputes," see Resp'ts' Mot. for Leave to Conduct Discovery at 5 (Mar. 8, 2005) (hereinafter "Resp'ts' Disc. Mot."), but they failed to identify any factual dispute in their *Motion*. Elsewhere, Respondents clarified that they seek "evidence to ascertain the truthfulness" of Complaint Counsel's sworn statements (*id.* at 8) —*i.e.*, evidence that might give rise to a factual dispute, where none presently exists. Moreover, Respondents' statements contravene the presumption of good faith that attaches to government affidavits such as those submitted by Complaint Counsel. See *infra* pages 21-22, 69-70.

during the course of discovery.” Protective Order at 10, ¶ 11. By its express terms, it “does not constitute an *in camera* order as provided in Section 3.45 of the Commission’s Rules of Practice, 16 C.F.R. § 3.45.” *Id.* The *Protective Order* states that any party may request *in camera* treatment as follows:

An application for *in camera* treatment must meet the standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999) and *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000) and must be supported by a declaration or affidavit by a person qualified to explain the nature of the documents.

Protective Order at 10, ¶ 12. This provision parallels a provision in the Court’s *Scheduling Order*. See *Scheduling Order* at 6, ¶ 16 (Aug. 11, 2004) (referring to “strict standards” under law for *in camera* treatment).

The *Protective Order* established two categories of document designations, “confidential” and “restricted confidential, attorney eyes only,” for use by the parties as notations on documents disclosed in discovery. *Id.* at 4, ¶ 2(a); *id.* at 5, ¶ 2(b). The first category, “confidential,” requires (and thereafter must reflect) a good faith representation by the attorney affixing the notation that the noted document constitutes or contains “confidential discovery material,” *id.* at 4, ¶ 2(a), which “shall include non-public commercial information, the disclosure of which . . . would cause substantial commercial harm or personal embarrassment to the disclosing party.” *Id.* at 3, ¶ 20. Under the *Order*, the second category, “restricted confidential, attorney eyes only,” applies to “a limited number of documents that contain highly sensitive commercial information.” *Id.* at 5, ¶ 2(b). As this designation also employs the “confidential” designation, it also reflects, and requires, a good faith designation by counsel. The *Order* states:

It is anticipated that documents to be designated Restricted Confidential, Attorney Eyes Only may include certain marketing plans, sales forecasts, revenue and profit data, business plans, distribution arrangements and agreements, the financial terms of contracts, operating plans, pricing and cost data, price terms, analyses of pricing or competition information, and limited proprietary personnel information; and that *this particularly restrictive designation is to be utilized for a limited number of documents.*

Id. (emphasis added). The *Protective Order* further requires that documents designated as “restricted confidential” bear “such legend *on each page* of the document.” *Id.* (emphasis added).

C. Respondents Made Widespread Confidentiality Designations and Have Not Moved for an *In Camera* Order

Notwithstanding the above provisions, Respondents designated as “confidential” or “restricted confidential, attorney eyes only,” quite literally tens of thousands of pages produced to Complaint Counsel in response to document requests.² Respondents produced an approximate total of 55,246 pages of documents in discovery. According to our review of these documents, an astounding *fifty-three thousand, eight hundred and five* (53,805) pages of documents were marked by Corporate Respondents as “RESTRICTED, CONFIDENTIAL - FTC DOCKET NO. 9318.”³ Approximately 752 pages of documents were marked as “confidential,” leaving a mere 689 pages not subject to any claim of confidentiality under the *Protective Order*. All told, Respondents designated approximately 97.39% of their document production as “restricted confidential” and

²The parties are continuing to negotiate disputes related to Respondents’ responses to Complaint Counsel’s discovery requests.

³The above numbers are approximate only because Respondents submitted some documents (formerly-undisclosed attachments to emails) with the same Bates numbers as previously-disclosed documents (the emails themselves), simply adding a suffix, in the form of an alphabetical letter, to the previous Bates number. We have excluded these documents from the calculations above due to the difficulty in counting these non-consecutively numbered documents by hand. All of these documents were marked as “restricted confidential.”

an additional 1.36% or “confidential,” meaning that Corporate Respondents designated 98.75% of their document production as subject to the *Protective Order*. These documents included published studies that Respondents cited in their advertisements and many other documents facially not worthy of such designations.

Despite their widespread use (and in our view, abuse) of the “confidential” and “restricted confidential, attorney eyes only” designations, Respondents have never moved in this matter for *in camera* treatment of documents, including the documents submitted as evidence in connection with Complaint Counsel’s *Motion for Partial Summary Decision* or their own motions for partial summary decision. Respondents have submitted several “notices” of *in camera* treatment for selected documents, but these “notices” are not actual applications for *in camera* treatment and do not meet the standards set forth in the Court’s *Orders* and RULE OF PRACTICE 3.45(b). There has been no judicial determination, informed by motions subjected to the adversary process, that any of the tens of thousands of documents designated by Respondents as “confidential” or “restricted confidential” are actually confidential materials or are entitled to *in camera* treatment.

D. Respondents’ Pending *Motions* and *Response to Order to Show Cause*

Well after the close of business on March 8, 2005,⁴ Respondents served the pending *Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt* and *Motion for Leave to Take Discovery Regarding Complaint Counsel’s Violation of the Protective Order* on Complaint Counsel. On the following day, this Court entered an *Order for Respondents to Show Cause*, observing that, “[i]n reviewing the exhibits identified by Complaint Counsel

⁴Respondents’ late service of the pending *Motions* resulted in an effective service date of March 9, 2005. Today, March 21, 2005, is the resulting response date, as the tenth day following the service of Respondents’ *Motions* fell on a Saturday. See RULE 4.3.

which were posted and which were marked 'Subject to Protective Order' it is clear that confidential material was not disclosed in many of the exhibits." Order at 2 (Mar. 9, 2005). This Court directed Respondents to identify "what specific information was posted on the Commission's website that was, in fact, confidential information, the disclosure of which would result in a clearly defined, serious injury to Respondents," supported by sworn statements. *Id.* Respondents served Complaint Counsel with their *Response to Order to Show Cause* after the close of business on March 15, 2005. In this *Response*, Respondents defended their "confidential" or "restricted confidential" designations of documents in five exhibits to our *Motion for Partial Summary Decision*, and one exhibit to our December *Motion to Compel*. See Resp'ts' Resp. to Order to Show Cause at 4, 8 (marked Mar. 15, 2005). By identifying only those six exhibits pursuant to the Court's *Order* instructing them to show cause what specific information posted on the website was confidential information, the disclosure of which would result in a clearly defined, serious injury to Respondents, Respondents now have identified the universe of documents at issue in the instant *Motion*, and Complaint Counsel will address each of those documents below. We do not need to address the other exhibits Respondents point to in their *Motions* but did not identify pursuant to the Court's March 9th *Order to Show Cause*.

E. Additional Submission Not Previously Identified By Respondents

In their *Response*, Respondents also identified one additional submission, marked "SUBJECT TO PROTECTIVE ORDER" by Complaint Counsel, that appeared on the FTC's website. This submission was our *Motion to Compel Production of Documentary Materials and Answers to Interrogatories*, filed on December 6, 2004. As with the *Motion for Partial Summary Decision*, Complaint Counsel sent a public version and a non-public version of this submission in

an email addressed both to Respondents' counsel and to the Office of the Secretary, without objection or comment from them. *See* Compl. Counsel's Supp. Resp., Attach. B (Millard Decl.) at ¶ 13. After the Office of the Secretary had asked Respondents to review the online docket for designated non-public information, see *id.* Attach. C (Dolan Decl.) at ¶ 4, 10, and at the time of the Court's recent *Order*, more than four months after the filing of the *Motion to Compel*, Respondents still had not brought this posting to our attention or that of the Court. Respondents' pending *Motions* do not cite the posting as grounds for relief.⁵

DISCUSSION AND LEGAL ARGUMENT

Respondents have wielded the *Protective Order* in this matter as a shield and sword. Under the cover of the Court's *Order*, Respondents have improperly designated mountains of documents as "confidential" or "restricted confidential," casting an unwarranted shadow of secrecy over these proceedings as well as the widely-known facts concerning the formulation, promotion, and sale of the challenged products. Throughout these proceedings, Complaint Counsel have expressed frustration with Respondents' widespread designation of materials as "confidential" or "restricted confidential," but we have elected to focus on the merits of this matter rather than pursue ancillary issues that would have been more properly addressed if Respondents had ever properly sought *in camera* treatment. Despite our frustration, we have striven to comply, in good faith, with the requirements of the *Protective Order* and the RULES OF

⁵In their *Response*, Respondents defended the designation of a single-page exhibit to the *Motion to Compel*. Respondents do not advance this exhibit as a basis for their *Motions*, but we address this exhibit with Exhibit 15 to our *Motion for Partial Summary Decision*, *infra* pages 48-51. As Respondents made certain assertions in their *Response* relating to their *Motions*, we address some of those assertions here. In so doing, we reserve the right to respond to Respondents' assertions in further pleadings as appropriate.

PRACTICE. Nonetheless, seizing on what this Court has since ruled was an unreasonable reading of the *Protective Order*,⁶ and Complaint Counsel's good faith belief concerning the method of filing designated non-public material, Respondents have brandished the *Protective Order* as a sword, enmeshing this Court and Complaint Counsel in a series of resource-consuming disputes⁷ intended solely to punish Complaint Counsel⁸ and avoid defending the merits of this matter. Presently, as a result of events that we inadvertently precipitated, events that were not solely within our control, Respondents seek to try Complaint Counsel for criminal contempt.

In their *Motion for Order to Show Cause*, Respondents baldly accuse Complaint Counsel of obvious bad faith in handling some of the many mountains of documents that Respondents designated as "confidential" or "restricted confidential," because exhibit volumes that we marked as "**SUBJECT TO PROTECTIVE ORDER**" were posted without our knowledge, contrary to our intent. In their accompanying *Motion for Leave to Take Discovery*, filed concurrently with their contempt motion seeking to dismiss the *Complaint*, Respondents propose an unnecessary and unwarranted inquisition of the staff, and the production of statutorily-protected government employee personnel files and other information concerning Commission staff, among many other documents. In asking this Court to dismiss the *Complaint* and order further discovery,

⁶See Order on Resp'ts' Mot. to Strike Expert Witnesses and for Sanctions and Other Relief at 4 (Mar. 15, 2005).

⁷The parties submitted seven filings alone on the matters related to Respondents' *Motion to Strike* Complaint Counsel's scientific experts for purported violations of the *Protective Order*, which this Court denied on March 15, 2005.

⁸See Resp'ts' Mot. for Order to Show Cause at 29, 34 (Mar. 8, 2005) (asking for "punishment" and discussing "meaningful punishment") (hereinafter "Resp'ts' Mot."); Resp'ts' Mot. to Strike (Jan. 26, 2005).

Respondents admit through their actions that they wish to “shoot first and ask questions later.”⁹

II. Respondents’ *Motion for Order to Show Cause* Should Be Denied

Respondents’ *Motion for Order to Show Cause* is without merit. Respondents do not clearly articulate the legal standards applicable to their *Motion*, which have profound effects on the standard of proof applicable here, and the relevance of evidence of intent. *See infra* pages 10-21. Respondents fail to identify a factual dispute in Complaint Counsel’s *Declarations*, and then assume, without any supporting facts, that Complaint Counsel intended to publicly post designated non-public materials and purposefully instructed the Secretary to post those materials. Ignoring the presumption of good faith that attaches to the actions of agency officers and to their affidavits, Respondents ask this Court, in essence, to ignore our statements and rely on their conjecture in holding that we acted in bad faith and in contempt of the Commission. *See infra* pages 14-26. Further ignoring the presumption in favor of public hearings and their heavy burden of establishing entitlement to *in camera* treatment, Respondents’ *Motion* assumes that the affected documents are confidential, and fails to establish prejudice by showing that the documents at issue would clearly have been withheld from the public record. *See infra* pages 32-61.¹⁰ Respondents also fail to acknowledge undisputed facts indicating that they could have taken steps to prevent

⁹Complaint Counsel has marked segments of our consolidated *Opposition* pursuant to RULE 3.45(e) and the March 15, 2005 Order of the Court. The extensive number of markings is attributable to Respondents’ marking their entire submission as confidential, with open and closed brackets at the beginning and end of their pleadings. We have attempted, in good faith, to mark citation references and other descriptions (rather than our characterizations) of Respondents’ *Motions* as confidential. This consolidated *Opposition* is also marked as confidential on the cover page.

¹⁰Respondents omit to mention many material facts concerning their own improperly marked, apparently inaccurate, and at times, conflicting, designation of documents as “confidential” or “public.” *See infra* 44-57.

the possibility of disclosure in the fifteen days preceding the website posting.¹¹ In short, through assumptions, invective, material omissions of fact, and flawed legal argument, Respondents' *Motion* seeks to inflame the Court with rhetoric instead of seeking to inform its judgment with reasoned analysis. Respondents' *Motion* should be denied.

A. Legal Standards Governing Respondents' *Motion for Order to Show Cause*

Respondents' *Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt* proposes an *Order* instituting contempt proceedings and requiring Complaint Counsel to state why contempt is not appropriate under RULE OF PRACTICE 3.42(h). As discussed below, Respondents' *Motion* does not acknowledge the heavy burden of proof that Respondents must carry, as it raises the spectre of criminal contempt and civil contempt. Moreover, by framing their *Motion* as a *Motion for Order to Show Cause*, Respondents seek to improperly shift the burden of proof and persuasion from themselves to Complaint Counsel.

1. General Standards for *Orders to Show Cause* and Contempt of the Commission

Respondents state in their *Motion* that they have met the requirements for an *Order to*

¹¹See *infra* pages 25, 28-29. In assessing whether it is appropriate to dismiss a complaint as a sanction, courts often balance the following factors: (1) the degree of personal responsibility of the plaintiff; (2) the amount of prejudice caused the defendant; (3) the existence of a history of deliberately proceeding in a dilatory fashion; and (4) the existence of a sanction less drastic than dismissal. *Herbert v. Saffell*, 877 F.2d 267, 269-70 (4th Cir. 1989); *Coleman v. American Red Cross*, 145 F.R.D. 422, 427 (E.D. Mich. 1993) ("other factors considered relevant in reviewing dismissal ... [include] whether the adversary party was prejudiced by the dismissed party's failure to cooperate in discovery, . . . whether the dismissed party was warned that failure to cooperate could lead to dismissal, . . . and whether less drastic sanctions were imposed or considered before dismissal was ordered."). Courts often balance the degree of personal responsibility of the plaintiff and the amount of prejudice caused the defendant. A defendant's own conduct clearly goes to the amount of prejudice caused to the defendant.

Show Cause, citing RULE 3.38. However, RULE 3.38 relates to non-compliance with orders requiring discovery, such as instances in which “a party fails to comply with a subpoena or to respond to an order requiring answers to interrogatories.” *In re R.J. Reynolds Tobacco Co.*, 111 F.T.C. 584, 586 (1989). The correct citation should be to RULE 3.42. This RULE provides that Administrative Law Judges have the authority “[t]o regulate . . . the conduct of the parties and their counsel,” and “[t]o consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding.” RULE 3.42(c)(6), (c)(8).

In evaluating whether the Court should issue the requested *Order to Show Cause*, a review of the standards applicable to contempt, and the types of contempt, is most appropriate.

RULE 3.42(h) provides the standard for contempt of the Commission. It states as follows:

Any party who refuses or fails to comply with a lawfully issued order or direction of an Administrative Law Judge may be considered to be in contempt of the Commission. The circumstances of any such neglect, refusal, or failure, together with a recommendation for appropriate action, shall be promptly certified by the Administrative Law Judge to the Commission. The Commission may make such orders in regard thereto as the circumstances may warrant.

RULE 3.42(h).¹² Respondents do not discuss the burden of proof applicable to their *Motion*.¹³

¹²RULE 3.42(h) provides that a contempt of the Commission must be certified to the Commission with a recommendation for appropriate action. RULE 3.42(h). If there is no contempt, the Administrative Law Judge does not have to certify the circumstances to the Commission.

¹³Respondents’ *Motion* contains an amorphous amalgam of demands. Respondents ostensibly seek an *Order to Show Cause*, and then argue in their *Motion* that it is already clear that Complaint Counsel have acted in contempt of the *Protective Order*, and then demand the dismissal of the *Complaint* in this matter, further accompanied by monetary sanctions. *E.g.*, Resp’ts’ Mot. at 1 (requesting *Order to Show Cause*); *id.* at 17 (“Complaint Counsel’s Instant Violation of the Protective Order Is The Most Egregious, And Demonstrates Bad Faith.”); *id.* at 25 (“The Appropriate Remedy is An Order Striking Complaint Counsel’s Pleading Under the Circumstances of This Case.”).

We are unable to locate any precedent under RULE 3.42(h) discussing this issue. Accordingly, the Court may look to similar federal court precedent.

Federal court precedent suggests that the first question for the Court to consider is whether the alleged contempt is a criminal contempt, or a civil contempt. *See Kuykendall v. FTC*, 371 F.3d 745, 751 (10th Cir. 2004) (discussing proper classification of contempt before addressing issues of contempt liability and contempt sanctions). A recent federal court decision involving the Commission indicates that the burden of proof applicable to a *Motion for Order to Show Cause* is no different than that for the alleged contempt itself. *See FTC v. Mercury Mkt'g, Inc.*, Civ. No. A00-3281, 2004 WL 2677177 (E.D. Pa. Nov. 22, 2004) (evaluating Commission's *Motion For An Order to Show Cause* seeking civil contempt sanctions in the form of consumer redress and injunctive relief, and the rest of record, under "clear and convincing evidence" standard applicable to civil contempt allegations).

It is well-established that the purpose of criminal contempt is to punish past conduct, while the purpose of civil contempt is coercive or remedial. *See generally* 3A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROC. Crim.3d § 704 ("the purpose of civil contempt is remedial, while criminal contempt is punitive"); *see also United Mine Workers v. Bagwell*, 512 U.S. 821, 827-30 (1994) (stating that a contempt sanction is considered civil if it either coerces the alleged contemnor into compliance with the court's order or compensates the complainant for losses sustained; a contempt sanction is criminal if it punishes for the purpose of vindicating the court's authority); *Shillitani v. United States*, 384 U.S. 364, 370 (1966) (stating that orders intended "to coerce, rather than punish . . . relate to civil contempt"); *Kuykendall*, 371 F.3d at 752 (10th Cir. 2004) ("[a] contempt sanction is considered civil if it is remedial") (citation

omitted); *Cobell v. Norton*, 334 F.3d 1128, 1147 (D.C. Cir. 2003) (“Although one may be held in civil contempt for refusing to comply with a court order, a sanction for one’s past failure to comply with an order is criminal in nature.”) (emphasis added).

2. Respondents Seek Criminal Contempt Sanctions

Respondents repeatedly state in their *Motion* that they intend to seek an *Order* dismissing the Commission’s *Complaint* as “punishment” for allegedly contumacious conduct. *See* Resp’ts’ Mot. at 29 (“[Respondents] *are seeking fair punishment for a wrong*”) (emphasis in original); *id.* at 34 (demanding “meaningful punishment”). According to Respondents, the bell has rung, see Resp’ts’ Mot. at 2, “the foul is the harm,” *id.* at 27, and “the only real issue before the Court is the determination of the appropriate sanction,” *id.* at 23. Respondents demand what they themselves characterize as an “extreme remedy.” *Id.* at 25. Respondents expressly request a punitive sanction, rather than a coercive or otherwise remedial measure, so it is clear that Respondents seek to hold Complaint Counsel in criminal contempt. *See, e.g., Cobell*, 334 F.3d at 1147.

Notably, Respondents have not established that criminal contempt sanctions are even within the authority of the Court. *Cf. ICC v. Brimson*, 154 U.S. 447, 485 (1894) (holding that administrative agencies cannot compel obedience to compulsory process by imposing fines or imprisonment), *overruled on other grounds, Bloom v. Illinois*, 391 U.S. 194, 198-200 (1968) (overruling previous rule that no right to jury trial attaches to criminal contempt). Yet they have demanded punitive, criminal contempt sanctions against Complaint Counsel.

3. Respondents Fail to Meet Their Burden of Proof for Criminal Contempt Sanctions

Respondents' criminal contempt proposal has profound effects on the standard of proof applicable here, and the relevance of evidence of intent, among other considerations. Criminal contempt must be proven beyond a reasonable doubt. *See Taberer v. Armstrong Word Indus., Inc.*, 954 F.2d 888, 908 (3d Cir. 1992); *Smith v. Sullivan*, 611 F.2d 1050, 1052 (5th Cir. 1980) (distinguishing burden of proof from "clear and convincing evidence" standard applied to civil contempt) (citations omitted); *see also F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1138-39, 1141 (9th Cir. 2001) (stating standard of proof and legal protection due to accused, including right to jury trial).

Moreover, "a finding of criminal contempt requires *both* a contemptuous act and a wrongful state of mind." *Cobell*, 334 F.3d at 1147; *see Taberer*, 954 F.2d at 908 ("Willfulness is an element of criminal contempt that must be proved beyond a reasonable doubt."); *United States v. Baker*, 641 F.2d 1311 (9th Cir. 1981) ("criminal contempt requires a contemnor to know of an order and willfully disobey it"). "The mere failure to comply with a court's order, without more, is not sufficient to sustain a conviction for contempt." *Taberer*, 954 F.2d at 908.

Respondents, however, introduce no evidence of such willfulness, much less evidence that meets the "beyond a reasonable doubt" burden of proof. Instead, Respondents attempt to "gin up" evidence of bad faith by arguing that the posting of the non-public exhibits constitutes part of a pattern of violations of the *Protective Order*. First, they point to previous disputes in which they moved to strike Complaint Counsel's scientific experts for purported violations of the *Protective Order* and criticized our good faith efforts to forward an expert's previous trial

testimony as soon as we learned of it. The Court has determined that Respondents' interpretation of the *Order* was unreasonable and that allowing Respondents additional time to depose Dr. Heymsfield remedies any harm caused by belated disclosures of prior testimony. *See Order on Resp'ts' Mot. to Strike Expert Witnesses and for Sanctions and Other Relief* at 4-5 (Mar. 15, 2005) (ruling that Complaint Counsel complied with terms of *Protective Order* by advising experts of its existence and obtaining and maintaining experts' acknowledgment, and that Complaint Counsel was not required to give Respondents advance notice so that they could veto Complaint Counsel' experts). Second, Respondents contend that Complaint Counsel included designated non-public exhibits as part of the *Motion* exhibit volumes without using them, and did so in bad faith, a statement and inference clearly unsupported by the record. *See infra* pages 45-58. Next, Respondents argue that we engaged in bad faith by not identifying Exhibit 11 to our *Motion for Partial Summary Decision* as "confidential" material, when Respondents themselves precipitated the lack of an identification by conspicuously marking the front page of this document as follows: "**PUBLIC DOCUMENT.**" *See infra* pages 45-48 (further discussing Exhibit 11). Lastly, Respondents point to Complaint Counsel's method of filing documents in a prior case as proof of bad faith. The filing of pleadings in another matter is irrelevant, particularly so when the pleadings are public documents. Indeed, unlike Respondents here, who designated nearly their entire document production as "restricted confidential," the respondents in *Telebrands* marked very few documents as confidential, so there is no evidence of an insidious pattern, as Respondents strangely suggest. None of this is evidence of willfulness. Respondents' arguments simply evidence the lack of factual support for any allegations of bad faith on our part.

Likely realizing they have not met their stringent burden of proof for the punitive sanction they seek, Respondents disingenuously rely on cases involving civil contempt to support their proposed criminal contempt sanction. Respondents argue at length that Complaint Counsel should be punished for contempt even in the absence of any proof of “bad faith or willful disobedience,” because “gross negligence or callous disregard,” or even “the nature of violation itself,” may warrant such an *Order*. See Resp’ts’ Mot. at 26-27; *id.* at 28-29 (proposing “should have known” intent standard for liability). What Respondents do not disclose in their *Motion*, however, is that inadvertence can only expose an alleged contemnor to civil contempt—*i.e.*, sanctions that are *remedial* in nature—not criminal contempt. See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (“Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.”).¹⁴

Respondents also mischaracterize cases involving the Trade Secrets Act, 18 U.S.C. § 1905, a criminal statute dealing with the unauthorized disclosure of confidential information, to support their proposed criminal contempt sanction. Respondents represent to this Court that the Trade Secrets Act makes government officials “criminally accountable based only upon a showing that they knew the disclosed information was confidential.” Resp’ts’ Mot. at at 8 (citing *United States v. Wallington*, 889 F.2d 573, 577-78 (5th Cir. 1989)). This proposition is misleading and inaccurate. The *Wallington* case, cited and discussed in detail by Respondents, explicitly *rejected* the notion that this statute created “strict criminal liability even for innocent

¹⁴Respondents’ *Motion for Leave to Take Discovery* cites *McComb* with respect to civil contempt, without acknowledging that the purpose of Respondents’ proposed contempt sanction and proceedings is, in their own words, punishment. See Resp’ts Disc. Mot. at 6.

disclosures of information.” *Wallington*, 889 F.2d at 577-78 (“We do not believe that Congress intended to create strict criminal liability and impose prison sentences of up to one year for innocent disclosures of information”). The *Wallington* court recognized that the “requirement of *mens rea* for criminal liability is a fundamental principle of Anglo-American common law.” *Id.* at 578.¹⁵ The Court read an requirement of a high level of *mens rea* into the statute based upon the legislative history and the recognition of the principle described above.

Respondents’ assertions and quotes regarding *Wallington* are misleading and out of context. Respondents’ parenthetical explanation and partial quote from *Wallington* stated that “the *mens rea* required to violate FTSA is general ‘knowledge that the [released] information is confidential in the sense that its disclosure is forbidden by agency official policy (or by regulation or law).’” Resp’ts’ Mot. at 8 (citing *Wallington*, 889 F.2d at 578). Nothing in *Wallington*, however, says that the *only* fact to establish *mens rea* is knowledge that the information is confidential. Rather, the *Wallington* court recognized that knowledge that the information is confidential is the starting point of the appropriate culpability required. For example, the court emphasized throughout its opinions that it did “not believe that Congress intended to create strict liability and impose prison sentences of up to one year for *innocent disclosures* of information,” *id.* at 578 (emphasis added), and was construing “the statute to prohibit only *knowing disclosures* by federal employees of confidential information.” *Id.* (emphasis added); *see also id.* at 579 (referring to “the requirement that government employees refrain from *knowingly disclosing* confidential information”) (emphasis added). Thus, there are two elements to prove: (1) the

¹⁵ *Mens rea* is defined as “A guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness.” BLACK’S LAW DICTIONARY 889 (5th Ed. 1979).

employee knew he was disclosing information, and (2) the employee knew the information was confidential. The *Wallington* court, however, did not need to discuss whether the government employee knew he was disclosing the information because he clearly did—he was intentionally running criminal background checks and providing the information to a friend. In contrast, as evidenced by Complaint Counsel’s *Declarations*, Complaint Counsel responsible for emailing the Exhibits in question did not know he was disclosing information; he sought to mark the documents so that they would not be posted.

Respondents’ misleading citations do not end with *Wallington*. Later in their brief, in order to justify the severe sanctions they contend are warranted, Respondents appear to cite another case, the *Garrett* case, for the seeming proposition that this statute carries a negligence standard for criminal liability. Resp’ts’ Mot. at 28. A full quote of Respondents’ language reveals their misleading omission of words from cited decisions:

In *U.S. v. Garrett*, 984 F.2d 1402 (5th Cir. 1993), a case where the Court implied a negligence standard for criminal liability (not a general knowledge *mens rea*), the Fifth Circuit characterized its prior holding in *Wallington* under the Federal Trade Secret Act as ‘somewhat anomalous’ in that implied a high level of culpability to a Class A misdemeanor

Resp’ts’ Mot. at 28. One might reasonably presume from Respondents’ language that *Garrett*, like *Wallington*, concerned the Trade Secrets Act, and accordingly was suggesting *Wallington*’s requirement for a high level of *mens rea* was no longer good law. The *Garrett* case, however, addressed an entirely different statute—one prohibiting the boarding of an aircraft with a concealed, dangerous weapon. *Garrett*, 984 F.2d at 1405. This situation is hardly analogous to

the present dispute.¹⁶ Respondents' juxtaposition of language conveys the misleading impression that the *Garrett* court applied a negligence standard for criminal liability under Trade Secrets Act. In fact, the *Garrett* court recognized that "the *Wallington* court believed a high level of *mens rea* was required for section 1905." *Garrett*, 984 F.2d at 1413 (emphasis added). Respondents' omission of words and juxtaposition of arguments illustrates the lengths to which Respondents will stretch to gain a dismissal of this action, one not related to its merits.

4. Respondents Fail to Meet Their Burden of Proof Even for Civil Contempt Sanctions

Respondents' brief discussion of the law does not appear to recognize, much less discuss, the difference between criminal and civil contempt, or the specific legal standards applicable to each. See Resp'ts' Mot. at 25. Although it is clear that Respondents seek contempt sanctions that are punitive, not remedial, in nature,¹⁷ we briefly discuss the burden of proof and defenses applicable to civil contempt.

If Respondents had pursued a civil contempt remedial or coercive sanction, they would have had to establish that Complaint Counsel violated a specific order by "clear and convincing evidence," not merely a preponderance of the evidence. *E.g., Go-Video, Inc. v. The Motion*

¹⁶In *Garrett*, the court was considering the safety of other airline passengers, and in *Wallington*, the court was balancing the defendant's *First Amendment* rights. Respondents value those rights greatly themselves, but dismiss the *Wallington* court's discussion of those rights as applied to government employees.

¹⁷ As previously noted, Respondents demand that "punishment," *id.* at 29, "meaningful punishment," *id.* at 34, be meted out to Complaint Counsel. *Id.* at 34. These statements and others in Respondents' *Motion* make clear that Respondents view the alleged contempt as a criminal contempt, and an opportunity to press for a punitive *Order*.

Picture Ass'n of America, 10 F.3d 693, 695 (9th Cir. 1993);¹⁸ *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir.1982); *see FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). Additionally, Respondents would also have had to overcome potentially meritorious defenses. For one, substantial compliance with an order is a valid defense to civil contempt. *See Go-Video*, 10 F.3d at 695 (“‘Substantial compliance’ with the court order is a defense to civil contempt, and is not vitiated by ‘a few technical violations’ where every reasonable effort has been made to comply.”) (citations omitted); *Vertex Distrib., Inc.*, 689 F.2d at 891-92 (“It is clear that substantial compliance with the terms of a consent judgment is a valid defense to a charge of criminal contempt, and it appears to be a defense to a finding of civil contempt as well.”) (citations omitted); *United States Steel Corp. v. United Mine Workers*, 598 F.2d 363, 368 (5th Cir.1979) (recognizing substantial compliance defense to civil contempt); *WMATA v. Amalgamated Transit Union*, 531 F.2d 617, 621 (D.C. Cir. 1976) (acknowledging defense to civil contempt, and further noting that good faith efforts to comply “should also be considered in mitigation of penalty”).

Respondents also do not disclose that even under a civil contempt standard, dismissal of the complaint as a sanction must be due to “willfulness, bad faith, or any [other] fault” on the part of the alleged contemnor. *Societe Internationale v. Rogers*, 357 U.S. 197, 211-12 (1958); *Coleman*, 145 F.R.D. at 427. Accordingly, Respondents cannot disregard evidence tending to

¹⁸The defendants in *Go-Video* filed a motion for civil contempt, but did not appear to seek coercive or remedial relief, instead engaging in a “spare-no-expense punitive expedition.” *Go-Video*, 10 F.3d at 696. Because *Go-Video* substantially complied with a reasonable interpretation of the protective order and because the Motion Picture Association was not seeking relief to remedy financial prejudice caused by *Go-Video*’s conduct, the appellate court vacated the judgment of civil contempt. *Id.*

show good faith on the part of Complaint Counsel—they must prove the requisite scienter.

B. Complaint Counsel Did Not Act in Bad Faith

This dispute concerns a website posting that occurred despite Complaint Counsel’s many precautions and sincere, good-faith efforts to comply with the RULES OF PRACTICE. The record contains no evidence of bad faith or malice, or willful non-compliance with the *Protective Order* and RULES, let alone sufficient evidence to establish such bad faith beyond a reasonable doubt or by clear and convincing evidence. Respondents’ *Motion* relies on assumptions and invective. It does not present proof of contempt or provide valid grounds for contempt proceedings.

1. Complaint Counsel is Entitled to a Presumption of Good Faith

First, Respondents have failed to produce evidence to disturb the presumption of regularity and good faith on the part of Complaint Counsel. *See NARA v. Favish*, 541 U.S. 157, 124 S. Ct. 1570, 1581-82 (2003) (recognizing presumption of legitimacy or regularity; and stating that “the [movant] must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred”); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting presumption applies “in the absence of clear evidence” of impropriety); *Dep’t of State v. Ray*, 502 U.S. 164, 179 (1991) (“We generally accord Government records and official conduct a presumption of legitimacy”). Respondents must satisfy a “well nigh irrefragable standard” of proof to overcome this presumption. “In the cases where the court has considered allegations of bad faith, the necessary ‘irrefragable proof’ has been equated with evidence of some specific intent to injure the plaintiff.” *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238-40 (Fed. Cir. 2002) (“for almost 50 years this court and its predecessor have repeated that we are ‘loath to find the contrary of [good faith], and

it takes, and should take, well-nigh irrefragable proof to induce us to do so”); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995) (reiterating the principle that presumption of good faith may be overcome only by evidence “that the government had a specific intent to injure” plaintiff).

Respondents have characterized Complaint Counsel’s *Declarations* as improbable or dubious, but these affidavits were submitted by public officers under oath and they are entitled to respect, in the form of the legal presumption of good faith. *See Ray*, 502 U.S. at 179;; *Manchester v. DEA*, 823 F. Supp. 1259, 1271 (E.D. Pa. 1993) (“Merely speculative claims will not overcome the presumption of good faith to which the government’s affidavits are entitled.”); *Albuquerque Pub. Co. v. United States*, 726 F. Supp. 851, 860 (D.D.C. 1989) (“Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents.”) (citations omitted). Respondents’ brooding distrust of Complaint Counsel is insufficient to establish grounds for contempt, or contempt proceedings.

2. Respondents Fail To Establish that Complaint Counsel Acted in Bad Faith

Respondents cannot prove their baseless accusations of bad faith. As previously noted, “a finding of criminal contempt requires both a contemptuous act and a wrongful state of mind.” *Cobell*, 334 F.3d at 1147; *see Taberer*, 954 F.2d at 908 (“The mere failure to comply with a court’s order, without more, is not sufficient to sustain a conviction for contempt.”). Even with respect to civil contempt, “it is appropriate for a [trial judge] to consider the willfulness of the [alleged] violation when deciding how to proceed.” *Forrest Creek Assocs., Ltd. v. McLean Sav.*

& *Loan Ass'n*, 831 F.2d 1238 (4th Cir. 1987) (affirming trial court's decision not to institute civil contempt proceedings against plaintiff's counsel). "In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some specific intent to injure the plaintiff." *See Am-Pro Protective Agency Inc.*, 281 F.3d at 1238-1240. The undisputed record offers absolutely no support for a finding of a willful *Order* violation or a specific intent to injure Respondents. *See supra* pages 14-19 (discussing Respondents' accusations of bad faith).

3. **Complaint Counsel, In Fact, Acted in Good Faith**

To the contrary, the undisputed record evidences that Complaint Counsel acted in good faith. These facts are fully detailed in the *Declaration* accompanying our *Supplemental Response*, which are incorporated herein by reference, and briefly summarized as follows.

Complaint Counsel filed and served the non-public version of the *Motion for Partial Summary Decision* and its exhibits to Respondents and the Office of the Secretary in hard copies and via email. *See* Compl. Counsel's Supp. Resp., Attach. B at ¶ 3, 6-9. Complaint Counsel employed this manner of filing and service previously without any objection or comment from Respondents or the Secretary. *Id.* at ¶ 13. The fact that the same manner of service was used here provides clear assurance of regularity and the absence of malicious intent.

We very clearly advised the Secretary and Respondents of the manner of service in our *Certificates of Service* and emails. *Id.* at ¶ 1, 9-10, 12. This fact clearly evidences our good faith. If there had been a nefarious plot to post non-public material online, the plotters would hardly have been expected to immediately broadcast this plot to the opposing party and the Secretary by sending them simultaneous emails and *Certificates* announcing the plot.

Complaint Counsel submitted the filing to the Secretary in CD-ROM format as well, as required by RULE 4.2(c)(3). *Id.* at ¶ 5. This clearly evidences that Complaint Counsel sought to comply with the RULES.

Complaint Counsel took many reasonable precautions to comply with legal requirements and prevent the inadvertent disclosure of designated non-public material. Complaint Counsel marked the hard copy of the *Motion*, each bound volume of exhibits thereto, and the statement of facts accompanying the *Motion*, as “SUBJECT TO PROTECTIVE ORDER” by typing this legend on those documents’ respective cover pages. *Id.* at ¶ 4; *see also* RULE 3.45(e). As with the hard copies, the electronic files of the *Motion*, each exhibit volume cover page, and the statement, were marked “SUBJECT TO PROTECTIVE ORDER.” Compl. Counsel’s Supp. Resp., Attach. B at ¶ 7. The electronic files of the six exhibit volume cover pages bearing this notation were attached to separate emails containing one or more exhibits from that particular volume. *Id.* at ¶ 7. These emails were transmitted at approximately the same time. *See id.* at Ex. 3 (showing time of transmission as approximately 4:44pm EST). The text of all of the emails identified the nature of the *Motion*, stated that the exhibits were attached in separate electronic files, stated that these documents were submitted for filing with the Secretary, and further identified the attached electronic files by exhibit volume, number, and/or name. *Id.* at ¶ 8. These facts further evidence that Complaint Counsel transmitted these materials as a set, identified them as non-public, and sought to comply with the RULES and respect the non-public designations of documents, irrespective of the merits of those widespread designations.

Additional facts relating to Complaint Counsel’s *Motion for Partial Summary Decision* evidence our good faith. Before the website posting occurred, we prepared a public version of

the *Motion* and its exhibits, and served this version upon Respondents, and filed it with the Secretary, both electronically and in hard copies. *Id.* at ¶15-17. These facts again illustrate our good faith compliance with the RULES pertaining to documents containing designated non-public material. The record is replete with other instances in which Complaint Counsel, including the person responsible for the filing of the *Motion* exhibits, have redacted information and documents designated as non-public by the parties and filed public versions of filings with the Secretary.

During this time, over a period of fifteen days, Respondents did not contact Complaint Counsel concerning the emailing of non-public documents to the Secretary or move for an *in camera Order*. *Id.* at ¶ 14.

Thereafter, in mid-February, two weeks after the service of our non-public *Motion* and exhibits, the Secretary's Office posted the non-public versions of the exhibits, having deleted the public versions. Compl. Counsel's Supp. Resp., Attach. B at ¶ 22. Respondents have attributed these acts to Complaint Counsel with rhetorical flourishes, but the record does not support their empty rhetoric or their suggestions that the *Motion* exhibits were intentionally posted at the specific direction of Complaint Counsel. Complaint Counsel discovered the website posting on February 17, 2005, at around 2:45pm. *Id.* at ¶ 19.

Complaint Counsel acted promptly to request removal of the non-public documents from the web site and to preserve evidence related to the posting once it realized the posting had occurred. On his own initiative, a member of Complaint Counsel reviewed the online docket, saw the website posting of exhibits, and immediately called the Secretary's Office to express concern that designated non-public materials appeared to be present on the website. *Id.* at ¶ 20.

Complaint Counsel requested the removal of the designated non-public materials. *Id.* at ¶ 21. Complaint Counsel told the Assistant Director of the FTC Division of Enforcement of this web posting before that supervisor conveyed that he had been advised that the posting had occurred. *Id.* at ¶ 23; *id.* Attach. C at ¶ 7. Complaint Counsel and staff took immediate action to preserve evidence pertinent to the website posting. Compl. Counsel’s Supp. Resp., Attach. A (Kapin Decl.) at ¶ 10, 12, 17; Attach. B at ¶ 25, 30-32; Attach. C at ¶ 11-13. All of these actions evidence the good faith intent of Complaint Counsel to honor the confidential designation of documents rather than some nefarious plot to publish those documents.

The record evidence amply demonstrates that Complaint Counsel acted openly and in good faith. We handled the electronic filing and service of the *Motion* and its exhibits in the manner previously employed in this matter without any previous or contemporaneous objection or comment from Respondents or the Secretary’s Office. Complaint Counsel found the website posting and acted promptly to remove posted material and preserve the record. The facts show that Complaint Counsel took numerous steps to comply with the RULES OF PRACTICE and to guard against inadvertent disclosure of information, steps that regrettably were not successful. The undisputed facts do not demonstrate willful defiance of the RULES or this Court. Nor do they establish the “callous disregard of a party’s obligations” that Respondents argue is present here.

C. Respondents Have Failed to Establish Harm

Respondents have the burden to establish some harm that can be cured or compensated. They do not, however, even attempt to meet their burden, relying on an unfounded supposition that “the foul is the harm.” Resp’ts’ Mot. at 27. This supposition does not establish specific injuries due to Complaint Counsel’s conduct that may be compensated or harm that otherwise

may be cured. *See Go-Video*, 10 F.3d at 695 (vacating civil contempt order because complainants failed to establish actual loss for injuries resulting from non-compliance with protective order).¹⁹ Moreover, as a threshold issue, and as a predicate to proving contempt, Respondents must establish that Complaint Counsel failed to comply with a clear, specific, definite *Order* of the Court. *See United States v. Ramirez*, No. 02-50538, 2004 WL 500992, at *1 (9th Cir. Mar. 12, 2004) (stating that “a clear and definite order” is required for criminal contempt); *see also In re Dyer*, 322 F.3d 1178, 1190-91 (9th Cir. 2003) (“The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.”) (civil contempt). Pursuant to Commission precedent, the Rules governing *in camera* treatment, and not the provisions of the *Protective Order*, apply to the offering of evidence in motions for summary decision or in administrative hearings. Accordingly, the proper inquiry regarding whether Respondents have established the harm caused by the website posting requires a determination concerning whether those documents would have ultimately become part of the public record after summary decision or trial.

As discussed below, because of the presumption in favor of public hearings and Respondents’ heavy burden to establish entitlement to *in camera* treatment, Respondents have failed to establish that the documents at issue would have been withheld from the public record. As such, they have failed to show that a clear and specific *Order* of the Court has been violated or that they have actual loss for injuries resulting from the alleged noncompliance.

¹⁹Further, as discussed below, Respondents’ submission of a declaration that recites phrases from *in camera* treatment cases without adequate supporting facts or even a showing of personal knowledge on the part of the declarant, does not establish harm. *See infra* pages 32-60.

1. The *Protective Order* Does Not Clearly Govern Documents “Offered Into Evidence”

The Court’s *Protective Order* in this matter “governs the disclosure of information during the course of discovery.” *Protective Order* at 10, ¶ 11. Discovery closed in this matter before the events that gave rise to this dispute. The posting of the information at issue was not “during the course of discovery.” It occurred weeks after Complaint Counsel served and filed its *Motion for Partial Summary Decision* and exhibits thereto, offering those materials in evidence in support of its dispositive summary decision motion.

Commission precedent holds that information or documents included in or attached to motions for summary decision are “offered in evidence” and accordingly no longer subject to the *Protective Order*. As explained by the Commission, “[t]he use of confidential information or documents in filings related to a ruling on the merits of the case is the same as offering them in evidence, because any documents or information so used may be relied on in deciding the case.” *In re Trans Union Corp.*, Docket No. 9255, 1993 FTC LEXIS 310, at *4 (Nov. 3, 1993). As a result, the Commission concluded that the respondent in *Trans Union* “should have sought *in camera* treatment with appropriate justification when it filed, designated as confidential, its memorandum opposing summary decision and related materials.” *Id.* at *5. Pursuant to *Trans Union*, when Complaint Counsel served the non-public version of its *Motion for Partial Summary Decision* and supporting exhibits via email on January 31st, marked as subject to the *Protective Order* as required by RULE 3.45(e), Complaint Counsel placed Respondents on notice that it was “offering into evidence” numerous documents Respondents previously had marked as

confidential for purposes of discovery. As documents “offered into evidence” are presumed to be public unless the party seeking confidentiality establishes that the documents meet the more stringent *in camera* treatment, *infra* pages 32-34, Respondents had a responsibility to file a motion for *in camera* treatment promptly to ensure the confidentiality was maintained.²⁰ *See, e.g., In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *9 (instructing Respondents to file motion); *In re Trans Union*, 1993 FTC LEXIS 310, at *4-5.

The *Protective Order*, on the other hand, clearly does not apply to the offering of evidence. By its express terms, this *Order* “does not constitute an *in camera* order as provided in Section 3.45 of the Commission’s Rules of Practice, 16 C.F.R. § 3.45.” *Protective Order* at 10, ¶ 11. And, generally, in Commission cases, protective orders do not regulate the submission of evidence. *See, e.g., Detroit Auto Dealers Ass’n, Inc.*, Docket No. 9189, 1985 FTC LEXIS 90, at *3 n.5 (June 7, 1985) (removing confidential designation from documents, and stating: “The stringent standard for obtaining *in camera* treatment is set forth in *Bristol-Meyers Co.*, 90 F.T.C. 455, 456-57 (1977). A pretrial protective order, by contrast, is primarily used to encourage production of documents during discovery . . . its main purpose is to insure confidentiality of lawyers’ litigation files . . .”). The *Protective Order* in this matter was entered to guard “against

²⁰Thus, *Trans Union* does not obviate RULE OF PRACTICE 3.45(e) or the *Protective Order* itself, as Respondents suggest. Rather, RULE 3.45(e) is designed to give the parties notice, by marking documents as subject to the protective order, that information covered by the protective order is being used as evidence and will lose its confidential status absent an order for *in camera* treatment. The marking then provides the other party the opportunity to seek *in camera* treatment within a reasonable period of time. In this case, *fifteen days* passed before the materials were posted on the website, providing a sufficiently-reasonable time for Respondents to seek *in camera* treatment. In contrast, RULE 3.45(b) provides that a third party whose confidential materials are being used must receive 10 days notice the materials are being “offered into evidence” so that the third party may seek *in camera* treatment.

improper use and disclosure of confidential information,”and therefore provides that “[d]iscovery [m]aterial . . . shall be used solely by the [p]arties for the purposes of this [m]atter, and shall not be used for any other purpose, including without limitation any business or commercial purpose.” Protective Order at 1 (preamble), 4 ¶ 1. There is absolutely no evidence in the record that the exhibits were used for any improper purpose, such as commercial advantage, by Complaint Counsel. We used the documents for a clearly authorized purpose, as evidence supporting a motion for summary decision, and sent the documents to Respondents and the Office of the Secretary. Two weeks later, regrettably, the website posting occurred.²¹ Our submission of these documents does not provide the necessary factual predicate for contempt because the *Protective Order* does not clearly apply to the offering of evidence.

2. There is a Presumption in Favor Of Public Hearings

Respondents’ *Motion* further relies on an assumption of secrecy that sharply conflicts with the presumption of open administrative proceedings. FTC adjudicative proceedings should be open and on the public record. The rule of open proceedings and public records in FTC administrative adjudication—which holds that papers filed in a matter, and upon which the matter is resolved, shall be open to all for inspection, unless covered by an *in camera* order—is one of long standing. *See generally Griffith Hughes, Inc. v. FTC*, 63 F.2d 362, 363 (D.C. Cir. 1933); *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1967 FTC LEXIS 128 (1967); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (1961).

²¹As discussed *supra*, there is ample evidence in the record that this posting did not occur as the result of Complaint Counsel’s bad faith, or solely due to acts performed by, or at the direction of, Complaint Counsel.

In fact, the Commission has recognized that “there are peculiarly pressing reasons for holding all aspects of adjudicative hearings open to the public gaze.” *In re H.P. Hood & Sons*, 58 F.T.C. 1184, 1961 FTC LEXIS 368, at *6. These reasons involve “the deterrent effect of public proceeding upon potential violators.” *Id.* More important, however, is “the fact that the public record of past proceedings serves as a guide to the Bar and other professions who are called upon to advise the business community of this country in trade regulation matters.” *Id.* at *6-7; *see also In re Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1967 FTC LEXIS 128, at *2 (stating principle that “those seeking instruction and guidance should have access to the testimonial and documentary evidence upon which our decisions rest”).

As a result, there is a strong presumption that the public should have access to the record underlying the Commission’s adjudicative proceedings. *See id.*; *see also In re Detroit Auto Dealers Ass’n, Inc.*, 1985 FTC LEXIS 90, at *3. This presumption extends “to any document filed in the record of an adjudicative proceeding, including not only the evidentiary record of documents admitted in evidence and the trial transcript but also pleadings, motions, orders, prehearing conference transcripts, and briefs.” *Detroit Auto Dealers Ass’n, Inc.*, 1985 FTC LEXIS 90, at *3 (removing Respondents’ designation of documents as confidential).

Respondents’ assumption of secrecy stands in sharp contrast to the nature of the affected documents, discussed in detail below, and the long-established public nature of administrative proceedings such as these. Respondents’ zeal for secrecy, reflected in their designation of nearly their entire document production as “restricted confidential,” must be weighed against not only the evidence underlying this dispute, but the public’s right to know.

3. Respondents Fail to Demonstrate the Documents at Issue Meet the Standards for *In Camera* Treatment

Given the presumptions in favor of holding all aspects of adjudicative hearings, including the evidence considered, open to public examination, the Commission has set forth stringent standards and required litigants to satisfy a heavy burden in order to shield evidence from the public record. *See, e.g., In re Hoechst Marion Roussel, Inc.*, Docket No. 9293, 2000 FTC LEXIS 157 (Nov. 22, 2000); *In re General Foods Corp.*, 95 F.T.C. 352, 353 (1980). RULE 3.45(b) governing *in camera* orders states that evidence may be placed *in camera* “only after a finding that its public disclosure will likely result in a clearly defined, serious injury” to the party requesting *in camera* treatment. RULE 3.45 states that this finding shall be based upon the standard articulated in *H.P. Hood*, and *Bristol Meyers Co.*, as modified by *General Foods*.

These cases and their progeny establish many important principles. First, proponents must establish that the information concerned is “sufficiently secret” and “sufficiently material” to its business that disclosure would result in “serious competitive injury.” *In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *5-6. In *Bristol-Myers*, the Commission outlined six factors to be weighed when determining materiality and secrecy: (1) the extent to which the information is known outside the applicant’s business; (2) the extent to which the information is known by employees and others involved in the applicant’s business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Bristol-Meyers*, 90 F.T.C. at 456-57.

Under Commission caselaw, “the phrase ‘trade secrets’ is primarily limited to *secret* formulas, processes, and other *secret* technical information.” *In re General Foods Corp.*, 95 F.T.C. at 352 (emphasis added). The caselaw distinguishes between these secrets and “ordinary business records,” stating that motions to apply *in camera* treatment to “secret formulas” should be considered “sympathetically” while the latter should be “looked upon with disfavor. *See In re H.P. Hood & Sons*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 at *13. Examples of ordinary business records include “customer names, prices to certain customers, costs of doing business and profits.” *Id.* Significantly, the Commission has recognized that businesses might want to keep this information confidential, but has concluded that “the probability of a concrete injury resulting from the disclosure of these documents cannot be inferred from the nature of their content nor from the mere fact that respondent prefers to keep them confidential.” *Id.* In fact, the Commission has emphasized that requests to seal relevant evidence of this type should only be granted “in exceptional circumstances upon a clear showing that an irreparable injury will result from disclosure.” *Id.* at *13-14.

Movants may not justify *in camera* treatment based upon “mere embarrassment” or because competitors are “extremely desirous” to possess the information for business reasons. *Id.* at *14. The Commission has recognized that if the information at issue is already publicly available, then disclosure does not result in a competitive disadvantage. *See In re Textron Inc.*, Docket No. 9226, 1990 FTC LEXIS 282, at *6-7 (July 17, 1990). The Commission has declined to grant *in camera* status to information that is older than two and half years old and there is a presumption against granting *in camera* status to information that is three or more years old. *See, e.g., In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *9; *In re General Foods Corp.*, 95 F.T.C.

at 353; *In re Crown Cork & Seal Co.*, 71 F.T.C. at 1715.

Finally, an applicant may not rely upon conclusory statements or general averments in order to carry their heavy burden to keep information from the public record. *See In re Hoechst Marion Roussel*, 2000 FTC LEXIS 157 at *2-3. Instead, the person seeking to justify *in camera* treatment must have personal knowledge of the facts and issues discussed and must use the most specific information available rather than speculative inferences. *See id.*; *In re Bristol-Myers*, 90 F.T.C. at 457. Declarations couched in general terms or of a mere “precatory character” are insufficient. *See Hoechst Marion Roussel*, 2000 FTC LEXIS 157 at *3-4.

Respondents fail to sustain their heavy burden in justifying withholding information from the public record. As discussed in detail below, Respondents present superficial conclusions, omit material facts, misstate the nature of certain information at issue, and assert that information is sensitive, notwithstanding the publicly-available nature of much information, or its age. Moreover, as further discussed below, Respondents’ declaration and conclusory chart, submitted with their *Response to Order to Show Cause*, simply parrot the Commission standards for *in camera* treatment, and present superficial conclusions that the information at issue is confidential and that its disclosure would result in clearly defined, serious injury. Respondents do not explain how and why these standards apply to the precise facts relating to the information at issue.²²

²²As Respondents maintain that the exhibits discussed in the following Sections are properly designated as “restricted confidential” or “confidential,” and marked their *Motions* in their entirety with brackets, out of an abundance of caution, we are marking many portions of the following Sections with braces and bold font. In so doing, we do not intend to represent that these materials were properly designated as non-public; we merely denote these Section as being subject to Respondents’ designations.

**a. Posting of Exhibit 11 Cannot Result
in a Clearly Defined, Serious Injury**

Exhibit 11 to Complaint Counsel's *Motion for Partial Summary Decision*²³ is Corporate Respondents' *Response to Complaint Counsel's First Set of Interrogatories*, which contains information concerning the formulation of the challenged products. This document does not warrant *in camera* treatment because the contents and origins of the challenged products are not secret, as Respondents maintain. Aside from the very large volume of information available to the public concerning the formulations for the challenged products, Respondents have failed to protect their formulations in this case. This document was not properly marked as "restricted confidential," as indicated by the external marking on the document, Respondents have attached numerous product formulations as exhibits to an undesignated deposition transcript, and Respondents failed to timely object to the disclosure of Exhibit 11 on the public record.

**i. Respondents' Product Formulations Are
Not Secret or Fully Confidential**

With respect to the actual content of the product formulation information for the challenged products, Respondents have failed to show that these formulations are entitled to *in camera* treatment. Respondents did not even attempt to address this issue in their *Motion*, which simply assumes that these formulation are secret. Respondents' *Response to Order to Show Cause* does little more. It presents a sworn declaration averring that "the product formulation information is not known outside of Respondents' business, except by the companies [that] manufacture the products," and argues that the Court should infer a clearly defined, serious injury

²³Citations to the exhibits submitted with Complaint Counsel's *Motion for Partial Summary Decision* are identified herein with the following citation form: "MSD Ex."

from “the nature of the documents themselves.” *See* Resp’ts’ Resp. to Order to Show Cause at 6 & Fobbs Decl. at ¶ 6. As discussed below, the fact that **REDACTED**

// does not make it so.

Respondents’ “top secret” formulations are not fully secret and their contentions and arguments concerning the supposed secrecy of these formulations are not fully accurate, to put it mildly. A review of the information that is available to the public reveals that a great deal of information regarding the origins and content of the product formulations may be gained from public sources, including Respondents’ product labels, advertisements, publicly-available documents (including scientific studies and an undesignated deposition transcript exhibit), or through examination of the products themselves.

Respondents argue that “[i]t is difficult to imagine information more ‘secret’” than their product formulations. *See id.* at 8. This is hyperbole, not fact. Consider, first, Respondents’ “restricted confidential, attorney eyes only” formulation for PediaLean, which appears in the Interrogatory *Response* exhibit as follows:

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According to Respondents, this is “top secret,” “highly sensitive commercial information.” Under the terms of the *Protective Order*, counsel for Corporate Respondents was required to certify this information as “confidential” in good faith, see *Protective Order* at 5, ¶ 2(b), and Respondents did put a “restricted confidential” notation on this page, which was part of an Interrogatory *Response* stamped “PUBLIC DOCUMENT.” Leaving aside Respondents’ improper designation of their discovery response, which we discuss *infra* pages 45-47,

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The PediaLean package contains the

following data:

Supplement Facts

Ages 6-10

Serving Size: 2 capsules

Servings Per Container: 60

Ages 11-16

Serving Size: 3 capsules

Serving Per Container: 40

	Amount Per Capsule	% Daily Value
Pediatropin	500mg	†
Proteinophallus Rivieri / Araceae (tuber) extract		
† Daily value not established		

Other Ingredients: rice flour

See Ex. A hereto (product packaging). Simply put, Respondents’ vaunted “trade secret” for PediaLean, their purportedly “top secret,” “highly sensitive commercial information,” consists of

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Respondents have gravely

abused the *Protective Order* in this matter by marking the product formulation as “restricted confidential.” They have compounded their offense by repeatedly advising the Court that this information was highly confidential—most recently, in response to the Court’s recent *Order for Respondents to Show Cause*—**REDACTED** No PediaLean

“trade secret” was disclosed on the FTC website. That Respondents would hurl accusations of bad faith at Complaint Counsel based on such an improper “good faith” designation defies comprehension.

Much information concerning Respondents’ other purported “trade secrets” is likewise available to the public. With respect to the “fat burning” topical products, Dermalin, Cutting Gel, and Tummy Flattening Gel, as discussed below, Respondents have disclosed substantial information regarding the product formulation while retreating behind the cover of the *Protective Order* in this litigation.

Respondents’ packaging and promotional materials for the topical products do not stop at general references to “clinical trials” or scientific substantiation; rather, they widely advertise and specifically identify: (1) the patent numbers of the publicly-available patents that purportedly apply to these products; (2) the authors of studies purportedly underlying the products; (3) the time period in which those studies appeared; and/or (4) most remarkably, in some instances, the *precise citation references* to the scientific substantiation referenced in their ads. *See* Compl. Ex. A (Dermalin ad identifying the study authors, their professional affiliations, and the time that the study appeared); Compl. Ex. C (Cutting Gel packaging disclosing U.S. Patent Nos. 4,525,359 and 4,588,724); Compl. Ex. F (Tummy Flattening Gel ad referencing clinical studies with precise citations to studies: “Clin. Ther. Vol. 9 No. 6 1987: 663-69, Obes. Res. Vol. 3 Suppl. 4 Nov.

1995: 561S-568S”); MSD Ex. 34, R0035673 (another advertisement with precise citations to studies), R0037255 (Tummy Flattening Gel ad referencing U.S. Patent Nos. 4,525,359 and 4,588,724); MSD Ex. 33, R0006724 & MSD Ex. 32, R0009256 (Cutting Gel and Dermalin ads disclosing U.S. Patent Nos. 4,525,359 and 4,588,724).

Even more information is available to the public. For example, the product packaging for the topical products clearly identify the product ingredients in the exact, descending order of their weight in the product. *See, e.g.*, Compl. Ex. C (Cutting Gel packaging).

Additionally, Respondents have made additional information relating to the topical product formulations available to the public during discovery in this proceeding. In examining Complaint Counsel’s medical experts during depositions in this matter, Respondents used copies of these medical doctors’ expert reports as deposition exhibits. Included in these reports, and attached as exhibits to the transcripts, were many studies relied upon by Respondents, even including a summary of aminophylline gel absorption studies that was written by Respondent Mowrey himself. Significantly, there is no indication in the record that Respondents instructed the court reporters to restrict access to the deposition transcripts, with their appended exhibits.²⁴ If Respondents had properly safeguarded the information relating to their product formulations, they would have fully designated the depositions and their exhibits as non-public information. *Cf. In re Hoechst Marion Roussel*, 2000 FTC LEXIS 138, at *6 (Sept. 19, 2000) (citations omitted) (noting that extent of measures taken to guard secrecy of information is relevant to *in*

²⁴Respondents asserted that entire depositions of their fact witnesses were confidential, yet they failed to apply this designation to depositions of our medical experts.

camera determination). They did not.²⁵ With this information, the other information that Respondents have chosen to advertise to the public, and other publicly-available documents relied upon by Respondents as substantiation that are indisputably available to researchers, the public has a great deal of information concerning the formulation of these challenged products. The formulations are not “secret”; Respondents have given the public a clear road map to them. Indeed, with respect to several other challenged products, the actual formulation documents at issue were attached to a deposition transcript not designated as subject to the *Protective Order*. See *infra* pages 42-43.²⁶

The cynical approach that Respondents have taken in designating information relating to the topical product formulations as “restricted confidential” in this matter is evident from how Respondents have treated the studies cited as substantiation for these products. In advertising their products to consumers, Respondents have advertised studies and have specifically identified where they may be found. See Compl. Ex. F; MSD Ex. 34, R0035673. Yet, when it came time to produce these studies to Complaint Counsel, Respondents marked them as “RESTRICTED CONFIDENTIAL - ATTORNEY EYES ONLY - FTC DOCKET NO. 9318.” See Ex. B hereto

²⁵Indeed, while Respondents pilloried Complaint Counsel’s medical experts, decrying their purportedly improper use of designated non-public information, they even placed the transcripts of those experts’ depositions on the public record. See *supra* pages 14-15 (discussing prior *Protective Order* disputes). Although the transcripts do not specify the product formulations, information concerning the formulations are exhibits to the non-designated transcripts, which are not subject to the *Protective Order* and thus are available to the public.

²⁶From these publicly-available and/or publicly-touted sources, the product labeling, and physical examination of the products themselves, it is reasonable to conclude that competitors, private laboratories, consumer labs such as ConsumerLab.com, or other third parties can ascertain the formulation. As for Respondents’ statements relating to “irreparable harm,” Respondents deliberately overlook the fact that the law affords remedies for the unlawful commercial exploitation of intellectual property rights.

(front pages of designated non-public studies cited in ads, accompanied by illustrative ad containing citations to those studies in the lower left hand corner) (arrows added). Here, in these proceedings, Respondents insist that their product information is secret—because they say so. As Exhibit B illustrates, Respondents are employing a double standard, designating their publicly-touted product information as “highly confidential,” “secret” information. This double standard typifies Respondents’ cynical use of the *Protective Order* as shield and sword against Complaint Counsel. As discussed above, Respondents’ open and widespread disclosure of substantial, specific information relating to the formulation for the topical products establishes that Respondents have not maintained their product information as secret information.

Finally, Respondents’ formulations for Anorex and Leptoprin are not, in fact, secret. As discussed below, the material portions of these formulations have been widely disclosed to the public, Respondents have failed to mark deposition transcripts containing the formulation documents for these products as non-public or subject to the *Protective Order*, and the information is not “highly sensitive commercial information.”

The active ingredients of Anorex and Leptoprin are acetylsalicylic acid, caffeine, and ephedra. The packaging for these ephedra-based products publicly identifies these ingredients as the active ingredients, and specifically and publicly identifies the precise amount of each active ingredient that is contained in each capsule of the product—324mg of acetylsalicylic acid, 200mg of caffeine, and 20mg of ephedra. The product packaging also specifically and publicly identifies the amounts of other, inactive, ingredients, such as calcium (264mg) and Vitamin B6 (25mg). A few inactive ingredients are not specifically identified by weight, but the total weight of those

ingredients (445mg) is readily apparent once the active ingredients are subtracted.²⁷

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// *See* MSD Ex. 11, Ex. A. The weight of a few inactive ingredients is not “highly sensitive commercial information”; indeed, DSHEA does not even require that this information be disclosed to consumers, who actually ingest the substances.

Furthermore, as previously noted, the product formulations for Anorex and Leptoprin, indeed, the very documents at issue here, are included as part of an exhibit to a expert deposition that Respondents conducted and failed to designate as non-public. Due to the acts of Respondents’ counsel, who caused the documents to be included as a deposition exhibit, Respondents have made the very documents at issue here with respect to PediaLean, Anorex, and Leptoprin, available to the public. The public can access the product formulation information through the simple expedient of obtaining the deposition transcript and its exhibits, which were not designated as non-public or otherwise subject to the *Protective Order*. The formulations for Anorex and Leptoprin are hardly “top secret,” as Respondents maintain.

The formulations for Anorex and Leptoprin are also not “highly confidential,” “highly sensitive commercial information” for another reason—the U.S. Food and Drug Administration has determined that dietary supplements containing ephedrine alkaloids present an unreasonable

²⁷Federal law requires that the ingredients be listed in the exact, descending order of their weight in the product. *See* 16 C.F.R. § 101.36(b)(3)(iv)(c)(2) (imposing requirement that dietary supplement ingredients be clearly disclosed in this fashion). **REDACTED**

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risk of illness or injury, and has instituted a ban on sales of dietary supplements containing ephedra.²⁸ According to their discovery responses, **REDACTED**

See MSD Ex. 11 at 9. This presumably would include the ephedra-based versions of Anorex and Leptoprin that are challenged in this matter.

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// *See* MSD Ex. 15 at 5. **REDACTED**

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// *See id.* Under Commission precedent, Respondents must make a clear showing that “the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.” *In re Volkswagen, Inc.*, 103 F.T.C. 536, 538 (1984). Respondents cannot lawfully sell these products in the United States,²⁹ and they cannot suffer clearly defined, serious injury from the disclosure of their formulations, which are already accessible to the public.³⁰

²⁸*See generally* Sales of Supplements Containing Ephedrine Alkaloids (Ephedra) Prohibited, *available at* <http://www.fda.gov/oc/initiatives/ephedra/february2004> (publishing text of final rule, final rule summary, press release, and documents related to regulatory action).

²⁹Respondents’ recent *Response to Order to Show Cause* states that **REDACTED** **REDACTED** but this appears to be inconsistent with the statements in their own Interrogatory *Response* relating to their **REDACTED** **REDACTED**

// *See* MSD Ex. 11 at 9.

³⁰Respondents might argue that the FDA’s determination may be subject to change in the future, but the mere possibility that FDA would reconsider the ephedra ban provides only speculative, inadequate grounds for concluding that ephedra-based formulations are “highly sensitive commercial information.” A Lanham Act case involving Respondent Friedlander illustrates this principle. *Cf. PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1112 (3d Cir. 1997)

ii. Respondents Have Not Guarded the Formulations In This Matter

Aside from the public disclosures of product formulation documents, many studies and other substantiation underlying the product, and the precise quantities of ingredients and the order of ingredient concentrations, Respondents have further failed to guard their product formulations as “secret” in this matter, by marking Exhibit 11 as a public document and failing to timely object to its disclosure on the public record.

As discussed *supra* page 15, Respondents argue that Complaint Counsel improperly omitted to identify this document in our *Supplemental Response* as having been designated as “restricted confidential,” and that the lack of an identification was, by itself, contemptuous conduct. *See* Resp’ts’ Mot. at 18-19. This is a pernicious half-truth. It is true that Complaint Counsel did not identify Exhibit 11 as a non-public document—for the very simple reason that Exhibit 11 bears, quite prominently, on its cover page, the following notation in boldface, capital letters: “**PUBLIC DOCUMENT.**” *See* MSD Ex. 11 at 1. Respondents did not disclose this fact in their *Motion*, for tactical reasons known only to them. *See* Resp’ts’ Mot. at 19.

Respondents chose to label their *Response to Complaint Counsel’s First Set of Interrogatories* as a “**PUBLIC DOCUMENT.**” The RULES OF PRACTICE, which do provide for the labeling of documents, do not require that parties file responses to Interrogatories, unlike responses to Requests for Admissions. *Compare* RULE 3.32(b) *with* RULE 3.35(a)(2).

(concluding that appellee Friedlander had no standing to sue appellant, a retailer, under Lanham Act’s false advertising provision because he did not presently sell a product that competed with appellant’s products: “Although a future ‘potential for a commercial or competitive injury’ can establish standing . . . Friedlander’s hopes of eventually obtaining FDA approval and selling a retail weight loss product are too remote at this stage to confer standing . . .”).

However, it reasonably appears from the face of this document that Respondents labeled their *Response* to provide guidance concerning whether it may be placed on the public record.

Complaint Counsel submitted this *Response* on the public record as part of the public version of our exhibit volumes, as Respondents' cover page notation "**PUBLIC DOCUMENT**" reasonably contemplated.

Review of the *Response*, stamped as a "**PUBLIC DOCUMENT**," reveals that Corporate Respondents placed an inconspicuous, un-bolded designation of "Restricted Confidential, Attorney Eyes Only" inside the document, next to their answer to Interrogatory 3, which requested a description of the composition of the challenged products. *See* MSD Ex. 11 at 5. An exhibit in Corporate Respondents' *Response* containing the product formulations was marked as restricted confidential material, *see id.* Ex. A, but the staff did not note these internal designations when the *Motion* exhibits were prepared and filed.³¹ We relied on the "**PUBLIC DOCUMENT**" notation present on the cover page of Corporate Respondents' *Response*. Both the *Protective Order* and the RULES OF PRACTICE indicate that the parties may rely on the designations placed on the cover page of a document, such as that appearing on Respondents' Interrogatory *Response*. *See* RULE 4.2(c)(2) ("The first page of the paper original of each

³¹ Respondents briefly observe in their *Response to Order to Show Cause* that our *Motion to Compel* omitted product formulation information. This observation is irrelevant. Our actions do not bring Respondents' Interrogatory *Response* into compliance with the provisions of RULE 4.2 or the *Protective Order*. *See* RULE 4.2(c)(2) ("The first page of the paper original of each document shall be clearly labeled either public . . . or confidential."); *Protective Order* at 5, ¶ 2(b) (requiring that "restricted confidential" documents must bear "such legend on each page of the document"). The *Motion to Compel* involved far fewer pages of exhibits than the *Motion for Partial Summary Decision*. As the latter *Motion* was potentially issue-dispositive, we presented Respondents' *Answers* and discovery responses in their entirety, to avoid any inference that we were relying on an incomplete record—as Respondents have done in claiming that Exhibit 11 was designated as non-public.

document shall be clearly labeled either public . . . or confidential.”); *see also* Protective Order at 5, ¶ 2(b) (requiring that “restricted confidential” documents must bear “such legend on each page of the document”). If this document was truly “highly confidential,” it should not have borne the “**PUBLIC DOCUMENT**” notation.

It is no defense that Corporate Respondents marked internal portions of their *Response* as “restricted confidential,” because the RULES OF PRACTICE and the Court’s *Protective Order* do not contemplate or authorize “mix-and-match” documents in which non-public information is contained in public documents. If Corporate Respondents had properly prepared a public version of their *Response* to avoid disclosure of their product formulation information, they would have redacted the product formulation information entirely—submitting a blank Exhibit A in lieu of the submitted formulation information—and submitting a separate, non-public version of that pleading as well. *See* RULE 4.2(c)(2). Corporate Respondents did not follow that procedure, and their angry, belated effort to attribute their own failings to Complaint Counsel is unjustified. The staff reasonably relied on Respondents’ designation of their Interrogatory response as a “**PUBLIC DOCUMENT**” in the filing of Exhibit 11.

Exhibit 11 is the only exhibit that Respondents now characterize as “restricted confidential” that Complaint Counsel attached to the public version of the exhibits to the *Motion for Partial Summary Decision*. As previously discussed, Complaint Counsel reasonably relied on Corporate Respondents’ cover designation of their Interrogatory response as a “**PUBLIC DOCUMENT**” in the filing of Exhibit 11. *See* RULE 4.2(c)(2); *see also* Protective Order at 5, ¶ 2(b). Respondents did not timely object to the fact that this material was presented in a document for public filing. Leaving aside the facts that Corporate

Respondents' *Response* was marked as public, was not properly redacted, and was not marked as "restricted confidential" on each page, Respondents' failure to object at the time they first received our public filing, over five weeks ago, constitutes a thorough waiver of any objection.³²

From the unambiguous external marking on the document, Respondents' failure to timely object to its disclosure on the public record, and the indisputable facts indicating that a great deal of information relating to the purportedly "top secret" formulations of the challenged products is public and that Respondents have made even more formulation information available to the public during discovery in this matter, Exhibit 11 is not entitled to *in camera* treatment and is not properly designated as subject to the *Protective Order*. Its posting does not provide grounds for holding Complaint Counsel in contempt.³³

b. Posting of Exhibit 15 Cannot Result in a Clearly Defined, Serious Injury

Exhibit 15 to Complaint Counsel's *Motion for Partial Summary Decision* consists of Respondents' *Supplemental Answers and Answers to Complaint Counsel's First Set of*

³²To the extent that documents warrant confidential treatment, Respondents can waive, through their conduct, that designation just as they can waive attorney-client privilege through conduct. Subjective intent to waive privilege is not necessary for a waiver to occur; what is key is the conduct of the privilege holder. *See, e.g.,* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:19 at 43-44. "The relevant time for rectifying any error begins when a party discovered or with reasonable diligence should have discovered the inadvertent disclosure." *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 577 (D. Kan. 1997). Respondents' conduct shows that they did not properly mark their materials, rectify those markings, or timely object to our public version exhibits, choosing instead to seek belated sanctions for contempt.

³³Additionally, we wish to clarify for the record that Exhibit 11 was cited in our *Motion for Partial Summary Decision* papers numerous times. *See* MSD at 11, 12, 14, 36.

Interrogatories. Respondents direct their arguments to Exhibit A of their *Supplemental Answers*, which is a chart of net gross revenue for the challenged products and REDACTED advertising expenditures for those products REDACTED. The net gross revenue portion of Exhibit A is essentially an updated version of the document previously appended as Exhibit R to Complaint Counsel's *Motion to Compel*, which also consists of gross sales of the challenged products REDACTED. Respondents have failed to establish that placing these documents on the public record would result in a clearly defined, serious injury.

Respondents' assertions concerning these documents are simply insufficient to establish "clearly defined, serious injury." Assuming arguendo that this information is as closely guarded as Ms. Fobbs states in the *Declaration* submitted by Respondents with their *Response to Order to Show Cause*, Ms. Fobbs' *Declaration* fails to explain how disclosure would result in a clearly defined, serious injury. She parrots a phrase from the *Dupont* matter asserting that the release of this information "would allow the competitors to construct an accurate financial model of Respondents' business to Respondents' detriment." Fobbs Decl. ¶ 16. What she fails to do is explain how this information would actually allow competitors to be able to construct such a model and how that would be detrimental to Respondents. The exhibits in question relate to six products in a large portfolio of products sold by the Basic Research family of companies. During the staff's pre-*Complaint* investigation, Respondents produced advertisements, product packaging, substantiation, sales data, and/or other documents for many products not referenced in the *Complaint*, including but not limited to the following: Aprinol, Breast Augmentation Serum, CarboLean, Glucostart, Lip Plumper, Lipopeptide-Y,

Luprinol, MetaBolics Plus, Oxy Caps, Rapid Weight Loss System, Testroge1, ThermAdril, ThermoGenics Plus Stimulant Free, ThermoGenics Plus Zhi Shi, and Thyrostart. See Compl. Counsel's Mot. to Compel (Dec. 6, 2004) at 3 n.2. Other products that may be the subject of evidence at hearing to establish the need for broad product coverage in the requested cease-and-desist *Order*, include Zantrex 3, Relacor, Estrin-D, Oxydrene, Somnabol, NitroVarin, Strivectin, Sovage Lip Plumper, and the ephredra-free versions of Anorex and Leptoprin. Because the sales information at issue only relates to a small number of products, it is extremely unlikely that disclosure of this information would allow a competitor to construct any model of Respondents' business. Disclosure of this sales information, and Respondents' REDACTED advertising expenditures REDACTED, for the small group of products challenged in the *Complaint*, cannot cause the injury that Respondents allege.³⁴

Additionally, the financial information contained inside Exhibit 15 and Exhibit R is not properly characterized as "highly sensitive commercial information," for numerous reasons.

First, information regarding Respondents' sales volume is, in fact, publicly available. See Ex C

³⁴Respondents argue, as part of their strained "bad faith" argument, that the financial information in Exhibit 15 was not relevant to any disputed issue in the *Motion for Partial Summary Decision*. See Resp'ts' Mot. at 19. Respondents deliberately ignore the relevance of these sales to the issues of commerce and common enterprise, as well as the marketing of the challenged products. See MSD at 10, 25, 36. They also ignore the fact that other parts of Exhibit 15 were relevant to these issues. *Id.* at 13, 14. (Exhibit R, similarly, was submitted as part of the Motion to Compel because it was relevant to Respondents' marketing activity and the likelihood that Respondents possessed written marketing materials. See Mot. to Compel at 21 n.20.)

To the extent that Respondents' characterization of the relevance of our *Motion* exhibits improperly bears on the merits of our *Motion* pending before the Court, we note that, in their *Opposition*, Respondents completely failed to controvert the evidence and arguments presented on the issues of common enterprise or commerce.

hereto (Dun & Bradstreet summary reports identifying annual sales volumes); *see also id.* (printed page from Flyingpointmedia.com, an ad agency that Respondents failed to disclose in their *Initial Disclosures*, stating that Basic Research has “grown to a \$350 million company,” that “[f]or every \$1 spent on marketing, Basic Research is generating \$4 in retail sales,” and providing graph showing return on investment for Internet marketing). Second, as indicated above, the information regarding advertising expenditures **REDACTED**

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MSD Ex. 15 (Ex. A n.2). **REDACTED** regarding Respondents’ past advertising expenditures is not “highly sensitive commercial information,” or even information whose disclosure “would cause substantial commercial harm or personal embarrassment to the disclosing party.” Protective Order at 3, ¶ 20. Third, much information contained in Exhibit 15 and Exhibit R consists of information that is more than three years old and hence is not entitled to confidential treatment. *See In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *9; *In re General Foods Corp.*, 95 F.T.C. at 353; *In re Crown Cork & Seal Co.*, 71 F.T.C. at 1715. Moreover, this information is more akin to ordinary business records than a trade secret. *See In re Union Oil Co.*, Docket No. 9305, 2004 FTC LEXIS 229, at *2 (Dec. 1, 2004) (identifying “sales documents” as example of “ordinary business records”).

Also, Exhibit 15 bears the notation “**PUBLIC DOCUMENT**,” again in boldface type, in all capital letters, on the front page. *See* MSD Ex. 15. At the bottom of the page, the document bears a conflicting, italicized notation, “*ATTORNEY EYES ONLY*,” which also appears at the bottom of other pages. *See id.* Respondents later submitted an amended version purporting to

correct the designation. Complaint Counsel exercised caution in deciding to redact Exhibit 15 from the public *Motion* exhibits, notwithstanding the fact that Respondents' initial designation did not comply with the *Protective Order* or RULES OF PRACTICE. Even if Respondents' initial designation is not viewed as a waiver, it is unjust to hold Complaint Counsel in contempt for disclosure of material that Respondents ambiguously marked "both ways" in the first place.

For the foregoing reasons, including the paucity of Respondents' asserted grounds for confidentiality, the limited scope of the financial disclosure, the **REDACTED** nature of many of the figures, the age of the information, other publicly-available information concerning Respondents' sales, and the conflicting nature of the designations on the document, Respondents should not be permitted to use Exhibit 15 as a weapon in a campaign to try Complaint Counsel for contempt.

**c. Posting of Exhibit 36 Cannot Result
in a Clearly Defined, Serious Injury**

Exhibit 36 to our *Motion for Partial Summary Decision* was an email from a potential customer produced by Respondents, in which the consumer inquires about the results that he or she could expect from Leptoprin, with a response from a Customer Service employee. The email appears to state the questioner's name or pseudonym **REDACTED** and email address. It does not reveal the address or telephone number of the questioner. This email is an example of Respondents' promotional activities via email. It is not entitled to *in camera* treatment.

Respondents argue, first, that disclosure of this information violates its "formal" privacy policy, but then appear to backtrack, by stating the posting violated its "internal" privacy policy.

As they do not attach the privacy policy that was disclosed to people submitting questions on the AG Waterhouse web site during September of 2003, it is impossible to assess what policy was in fact in place, whether this was a policy disclosed to consumers or an internal policy, and how consistently Respondents complied with their own policies (as Respondents contacted consumers to obtain testimonials for their products).

Respondents also liken the information in the email chain to “patient information.” This comparison is stretched to say the least. The granting of *in camera* treatment in *North Texas Specialty Physicians* was premised upon the fact that the information at issue contained “personal financial information” of a medical insurance company’s customers. *In re North Texas Specialty Physicians*, Docket No. 9312, 2004 FTC LEXIS 109, at *6 (Apr. 23, 2004). The information at issue in *Evanston* related to “patient demographic, diagnostic, and payment information” obtained from non-parties. *In re Evanston N.W. Healthcare Corp.*, Docket No. 9315, 2005 FTC LEXIS 27 (Feb. 9, 2005). No such personal information is revealed by Exhibit 36. **REDACTED**

// Respondents are not physicians, they do not sell products requiring a prescription, and certainly they do not have a confidential physician/patient relationship with consumers seeking information about their products. Respondents’ comparison is ludicrous. This short email chain is more in the nature of a promotional material containing a customer name or pseudonym. The Commission has held that even documents revealing *entire lists* of customer names are ordinary business records and hence *in camera* treatment is disfavored. See *In re H.P. Hood & Sons*, 58 F.T.C. 1184, 1961 FTC

LEXIS 368 at *13.

**d. Posting of Exhibit 42 Cannot Result
in a Clearly Defined, Serious Injury**

Exhibit 42 to our *Motion for Partial Summary Decision* was a single-page balance sheet

REDACTED with four pages of notes. The balance sheet reports **REDACTED**

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See MSD Ex.

42 at 1-2. The accompanying notes remark on **REDACTED**

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among other less-

consequential matters. Exhibit 42 is not entitled to *in camera* treatment, it was not properly

designated as confidential for purposes of this matter, and its posting provides no grounds to

hold Complaint Counsel in contempt or to enter the punitive contempt sanctions that

Respondents eagerly seek.

Respondents assumed for purposes of their *Motions* that Exhibit 42 is properly designated as “confidential” and subject to the *Protective Order*. Such assumptions do not provide the proper factual predicate for Respondents’ *Motions*.

More recently, Respondents have argued that Exhibit 42 is “highly confidential because its release may enable competitors to capitalize on Respondents’ finances and corporate structure.” Resp’ts’ Resp. to Order for Resp’ts to Show Cause at 11. Respondents insist that “[t]he combined balance sheet would be valuable to competitors who could use it to create an

accurate financial model of Respondents' business." *Id.* chart at 3.³⁵ This statement is materially misleading because it omits material facts relating to corporate changes **REDACTED**

Exhibit 42 is a **REDACTED** time capsule. **REDACTED**

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³⁶ It

certainly does *not* reflect their current corporate structure—**REDACTED**

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, as discussed in detail in our *Motion for*

Partial Summary Decision, and discussed briefly below.

REDACTED

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³⁵ Respondents also argue that “[t]he information on the combine balance sheet represents the time, energy, and money spent by Respondents in developing, marketing, and promoting the challenged products.” *Id.* Just about any document produced by Respondents could be said to evidence the expenditure of time, energy, and money. These are not grounds for *in camera* treatment.

³⁶ As our statement of facts accompanying the *Motion for Partial Summary Decision* indicates, Exhibit 42 was submitted as evidence of how Respondents operated as a common business enterprise in the past, **REDACTED** during the time period in which the challenged products were marketed and sold. See MSD Statement at 3, ¶ 16.

REDACTED

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None of the companies identified in Exhibit 42 are even still known by the same names.

REDACTED

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the purposes of

the companies identified in Exhibit 42 have completely changed as well.

Respondents' characterization of Exhibit 42, and the likely effect of any disclosure on their business, not only omits to mention these dramatic changes in corporate structure and purpose, but it also fails to disclose the dramatic change in Respondents' sales of dietary supplements, and thus the size and nature of their assets and liabilities. Respondents' sales of the challenged products have exceeded **REDACTED** See MSD at 10. Publicly-available information suggests that Respondents' enterprise is now a \$350 million company. See Ex. C

hereto (printed page from Flyingpointmedia.com).

Exhibit 42 is a faded photograph of **REDACTED**

REDACTED of firms that have different names and different functions today.

Respondents do not explain how other entities could capitalize on this information. Certainly, any insight they would have into Respondents' business enterprise would be incredibly dated.

As for Respondents' contention that "[t]he combined balance sheet would be valuable to competitors who could use it to create an accurate financial model of Respondents' business," we are left to speculate why such a model would be desirable—desirability itself being insufficient to establish grounds for *in camera* treatment, see *H.P. Hood & Sons*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 at *14—and how such an accurate model could be built off of a single-page summary of assets and liabilities of companies that no longer exist in the same form, a summary balance sheet that does not even appear to segregate or identify particular assets as belonging to particular entities.

Respondents stamped the document appended to our *Motion* as "confidential" **REDACTED** during the course of the pre-*Complaint* investigation. Today, in the context of the current proceeding, there is no grounds to maintain the confidentiality of this long-discarded corporate organization, one that merely evidences the manner in which Respondents organized their common enterprise in the past, during an earlier time period in which the challenged products were also marketed and sold. Respondents cannot meet the exacting standards required for *in camera* treatment of this exhibit, and therefore cannot demonstrate that its inadvertent posting, in the course of submitting the exhibit into evidence, resulted in any injury, let alone a clearly defined, serious injury, that provides a predicate for holding *Complaint*

Counsel in contempt of the Commission or this Court.

**e. Posting of Exhibit 45 Cannot Result
in a Clearly Defined, Serious Injury**

Lastly, Respondents contend that the disclosure of Exhibit 45 to our *Motion for Partial Summary Decision* would cause clearly defined, serious injury to Respondents and that the website posting of Exhibit 45 is grounds to hold Complaint Counsel in contempt. Respondents' argument is based on their unwarranted and inaccurate **REDACTED**

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// These characterizations are inconsistent with the common sense principle that Respondents' public marketing activity is public knowledge, and the deposition testimony of Respondents' own personnel concerning the nature of the documents. Posting of the documents submitted as Exhibit 45 cannot result in a clearly defined, serious injury, and provides no grounds to hold Complaint Counsel in contempt.

First, Exhibit 45 contains rudimentary information about publicly-disseminated advertising. This information was available to the public, including Respondents' competitors. While the parties have referred to the documents in Exhibit 45 by the phrase, "dissemination schedule," this term is a shorthand phrase and does not fully describe the document. Exhibit 45 actually consists of *two* documents, previously identified as deposition exhibits 24 and 25 to the deposition of Gary Sandberg, an individual employed to work at Respondents' marketing department. With respect to the first part of the exhibit, deposition exhibit 24, **REDACTED**

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See MSD Ex. 45; MSD Ex. 29, Sandberg Dep. at 116-

17. REDACTED

// MSD Ex. 29,

Sandberg Dep. at 117.³⁷ REDACTED

// —another advertising agency that Respondents

failed to disclose in their *Initial Disclosures*— REDACTED

// See MSD Ex. 29, Sandberg Dep. 22, 117. REDACTED

// and consisted of information, including old

information dating back to REDACTED

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Information REDACTED

// is available to members of the public who watch television. Moreover, during the time in which the challenged products were marketed and sold, direct response television commercials were tracked by industry firms that collect data about airings of commercials and infomercials. See *In re Telebrands Corp.*, 2004 FTC LEXIS 154, at *33-36 (Sept. 15, 2004).

There is evidence that direct response television industry firms have followed Leptoprin advertising. See Ex. D hereto (printed pages from Infomercial Monitoring Service ranking

³⁷Mr. Sandberg's testimony, and the nature of the submitted documents themselves, make clear why Exhibit 45 was submitted as an exhibit to our *Motion for Partial Summary Decision*. It was submitted to show interstate commerce, which numerous Respondents denied in their *Answers*. Our *Motion* and its accompanying statement of facts refer to the dissemination of advertising across the country for the challenged products. See, e.g., MSD at 6-10, 35. We included Exhibit 45 as evidence proving REDACTED REDACTED Our oversight in neglecting to include the cite to the proffered exhibit in our brief is not proof of bad faith. The *Motion* and statement clearly referenced the commerce evidenced in Exhibit 45, establishing a good faith basis for the inclusion of that exhibit.

Leptoprin television commercial as the “most frequently seen direct response spot[] on stations monitored” for three of four weeks in August 2003).

As to the second part of Exhibit 45, Sandberg deposition exhibit 25, this document consists of publicly-available **REDACTED**

// The documents **REDACTED**

// Again, this information is publicly available, albeit in a less convenient form, in numerous public libraries which carry back issue of magazines, including the Library of Congress. Respondents’ suggestion that this information is commercially sensitive, non-public information is overreaching. Moreover, it is unreasonable to assume, as Respondents have, that Respondents’ competitors are unaware of where Respondents’ print advertising appears.

Second, **REDACTED**

// is unsupported. Respondents’ declarant, Ms. Fobbs, is the legal administrator for Basic Research, not a member of the marketing staff. Her statements in this entire portion of the *Declaration* do not appear to be based upon her own personal knowledge and expertise. **REDACTED**

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Although **REDACTED**

she does not include specific information to

support her conclusion. Much of the data in the exhibits dates back to **REDACTED** or earlier and hence legal presumptions operate against *in camera* treatment. See, e.g., *In re General Foods Corp.*, 95 F.T.C. at 353; *In re Crown Cork & Seal Co.*, 71 F.T.C. at 1715. This information is already in the public domain by virtue of the fact that the information involves advertisements, information which by its very nature is disclosed to the public. Most importantly, however, the information is simply too fragmented and incomplete to constitute the comprehensive data that would cause a clearly defined, serious injury to Respondents.

Evidence pertaining to Respondents' conspicuous, public advertising of the challenged products in the past is not entitled to *in camera* treatment, and is not properly designated as "restricted confidential." Its submission into evidence and unintended posting provides no valid grounds to hold Complaint Counsel in contempt or to enter the punitive sanctions sought here.

D. Conclusion

Respondents have not proven the factual predicates for relief. They cannot establish, under any applicable evidentiary burden of proof, that their documents were properly designated as confidential, that the *Protective Order* clearly proscribed the submission of evidence, that there was bad faith on the part of Complaint Counsel, that their own inaction did not contribute to the alleged injury underlying their demands, and that previous *Protective Order* disputes between the parties have any relation to this discrete dispute. Their arguments pertaining to criminal liability are misleading and inapposite. There are no valid grounds to institute contempt proceedings here. Respondents' application for an *Order to Show Cause* should be denied.

III. Respondents Are Not Entitled to the Demanded Dismissal or Monetary Sanctions

After indulging in gross assumptions, material omissions, invective, and flawed legal argument, and still failing to establish the factual predicates for relief, Respondents devote much of their *Motion* to the question of relief, and arrive at their usual answer, namely, dismissal of this matter. Respondents are not entitled to dismissal of the Commission's *Complaint*. Involuntary dismissal is improper under the RULES OF PRACTICE and Respondents' cited authorities. Dismissal is wholly inappropriate under the circumstances present here, and disserves the public interest—another salient consideration that affects the Court's authority to dismiss this matter as Respondents demand. Respondents' proposed monetary sanctions are likewise improper. Having failed to establish the predicates for contempt sanctions, Respondents are not entitled to the punitive measures that they so vehemently demand and do not deserve.

A. Dismissal of the Complaint is Improper

1. RULE 3.38 Does Not Provide for Dismissal of this Matter

As a threshold matter, RULE 3.38 does not apply to Respondents' *Motion for Order to Show Case*. As we previously noted in the context of identifying the Court's authority to rule on the Motion, RULE 3.38 authorizes sanctions relating to non-compliance with orders compelling disclosure or discovery. *See supra* page 11; *see also* RULE 3.38(b) (referring to "failure to comply with a subpoena or with an order including but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories or requests for admissions or an order of the Administrative Law Judge"). Moreover, the federal

court decisions applying Rule 3.38(b)'s analogue, *Federal Rule of Civil Procedure 37*,³⁸ also deal with discovery violations such as parties' failures to conduct or cooperate in discovery. As a result, the sanctions listed in RULE 3.38, particularly that a pleading be stricken, are not applicable to this matter. Indeed, the Commission's *Complaint* is not even a pleading filed or signed by Complaint Counsel. *See* Compl. at 23 (stating that Commission has caused Complaint to be signed and its official seal affixed, and bearing signature of Acting Secretary C. Landis Plummer). Nor is the *Complaint* (or Complaint Counsel's *Motions*, for that matter) "a pleading . . . concerning which the order was issued." RULE 3.38(b)(5). The Court's *Protective Order* in this matter "governs the disclosure of information during the course of discovery," *Protective Order* at 10, ¶ 11, not matters alleged in the *Complaint*. As noted *supra* page 11, the Court's undisputed authority to resolve the pending *Motions* extends from RULE OF PRACTICE 3.42. RULE 3.38 does not provide authority for the dismissal of this matter.

2. Respondents' Cited Authorities Do Not Authorize Dismissal of this Matter

Respondents' own cited authorities, *Federal Rule 37* decisions involving violations of discovery orders, recognize that "[v]iolation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 default judgment or dismissal." *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993) (citing *EEOC v. Troy State Univ.*, 693 F.2d 1353, 1357 (11th Cir. 1982) (reversing district court's dismissal because noncompliance resulted from confusion and misunderstanding rather than bad faith)). Moreover, the requirement of a "just" sanction set forth in both FED. R. CIV. P. 37

³⁸*See In re Grand Union Co.*, 102 F.T.C. 812, 1090 (1983) (recognizing FED. R. CIV. P. 37 as "substantially similar in both purpose and language to RULE 3.38(b)").

and RULE OF PRACTICE 3.38 carries with it a “general due process restriction[] on the court’s discretion.” *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); see *In re Grand Union Co.*, 102 F.T.C. at 1090 (recognizing close relationship between RULE 3.38(b) and *Federal Rule 37*). The severe sanction of a dismissal or default judgment is appropriate only as a last resort, when less drastic sanctions would not ensure compliance with the court’s orders. *Malautea*, 987 F.2d at 1542; *Navarro v. Cohan*, 856 F.2d 141, 142 (11th Cir. 1988); *Troy State*, 693 F.2d at 1354; *EEOC v. First Nat’l Bank*, 614 F.2d 1004, 1007 (5th Cir. 1980); *Emerick v. Fenick Indus. Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976).

Dismissal is generally proper only if the plaintiff acted willfully in violating an order. See *Rogers*, 357 U.S. at 212; *Troy State*, 693 F.2d at 1354; *Strain v. Turner*, 580 F.2d 819, 822 (5th Cir. 1978). “The draconian remedy of dismissal” is upheld only in suitably “extreme circumstances.” *Marshall v. Segona*, 621 F.2d 763, 767 (5th Cir. 1980); see *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1063 (9th Cir. 2004); see also *Jones v. Louisiana State Bar Ass’n*, 602 F.2d 94 (5th Cir. 1979) (dismissal where plaintiff deliberately refused two orders to produce tape recording and notes); *Bonaventure v. Butler*, 593 F.2d 625, 626 (5th Cir. 1979) (dismissal affirmed where plaintiff refused to appear for deposition three times).

3. Dismissal is Improper Under the Circumstances of this Matter

Respondents have utterly failed to demonstrate that the circumstances underlying this dispute warrant the dismissal of the *Complaint*. Respondents seek the drastic remedy of dismissal for the unintended, temporary posting of certain documents. Because there is no evidence of bad faith or willful misconduct, they presume that bad faith is present, relying on invective and speculation punctuated with calls for discovery. The undisputed circumstances

surrounding the posting do not justify such harsh relief. *See supra* pages 23-26.

Dismissal as a sanction has been upheld for the dual purpose of punishing the offending party for misconduct, and deterring similar misconduct by future litigants. *See Taylor v. Medtronics, Inc.* 861 F.2d 980, 986 (6th Cir. 1988). Neither of these purposes are served under these facts because Complaint Counsel did not act intentionally to disregard the Court's *Order*.

4. Dismissal of this Matter Disserves the Public Interest and is Therefore Beyond the Authority of the Court

Dismissal of an action focused upon deceptive trade practices adversely affects not only Complaint Counsel, but the public interest, because the public has an interest in enforcement of the Commission's laws protecting consumers from unfair and deceptive trade practices. "[C]omplaint counsel represents the public interest in effective law enforcement." *In re Novartis Corp.*, 128 F.T.C. 233, 1999 FTC LEXIS 211, at *7 (Aug. 5, 1999); *cf. Litton Sys. Inc. v. AT&T*, 91 F.R.D. 574, 577 (S.D.N.Y. 1981) (recognizing public interest in prosecution of private antitrust litigation). Notwithstanding the unintended website posting, the *Complaint* in this matter was issued to protect the public from Respondents' deceptive conduct. The alleged harm is unrelated to protecting the public from Respondents' false and deceptive advertising practices.

Similarly, the alleged harm has not prejudiced Respondents in this litigation. The Sixth Circuit has held that it was an abuse of discretion to dismiss a case for even *intentional* violations of a protective order in the absence of a showing of how the disclosure worked a prejudice to the litigation at issue. *See Coleman*, 23 F.3d at 1095. The Commission's *Complaint* addresses Respondents' deceptive advertising practices regarding the advertising

and sale of “fat burning” gels, ephedra-based weight loss pills, and pills targeted at children. Glaringly absent from Respondents’ *Motion* is a discussion of any harm connected to the instant litigation. Respondents have not articulated, nor can they articulate, any harm or prejudice that has resulted from the website posting that relates to the merits of the *Complaint*. As a result, dismissal of this action is neither justified nor in the public interest.

If Respondents’ *Motion* seeking the outright dismissal of this action establishes a contempt, and the Court believes that this matter may be subject to dismissal as a contempt sanction, then the Court is without authority to rule further, not only under RULE 3.42(h)’s requirement of certifications of contempts to the Commission, but because the issue of whether continued litigation would be in the public interest is beyond the authority of the Court. *See In re H.J. Heinz Co.*, 2001 FTC LEXIS 96, at *1 (June 6, 2001); *In re Columbia Hosp. Corp.*, 1993 FTC LEXIS 180 (July 28, 1993).

B. Respondents Are Not Entitled to Monetary Sanctions

Respondents have not cited any authority supporting their assumption that the Administrative Law Judge is authorized to grant monetary relief. Even assuming, for purposes of argument, that such authority exists, Respondents have failed to articulate any actual harm or loss for injuries resulting from the website posting, and are thus not entitled to monetary relief. The *Go-Video* case is directly on point. *See* 10 F.3d 693. In that case, Go-Video’s counsel “used” information subject to a protective order to advance discovery in another case. The Motion Picture Association moved for contempt for violation of the protective order, asserting that their harm was the use of the information itself for purposes unrelated to the current case, and sought \$10,000 for costs to pursue the contempt motion. The Ninth Circuit overturned the

district court's contempt order, ruling that Go-Video committed harmless technical violations, and thus was in substantial compliance with the protective order. *Id.* at 695. The court then noted that the only other injury the complainant claimed was the cost to pursue the contempt motion. The court vacated the contempt judgment for those costs, holding "the award to [complainants] must be limited to their 'actual loss' for 'injuries which result from the noncompliance.' [Complainants'] only claimed injuries were self-inflicted, by their own spare-no-expense punitive expedition, not by Go-Video's use of discovery from the first lawsuit in the second." *Id.* at 696. Similarly, here, Respondents claim no actual loss for injuries resulting from alleged noncompliance, and they are on their own punitive expedition. Therefore, there is no basis for the monetary contempt sanctions demanded by Respondents.

IV. Respondents' Motion for Leave to Take Discovery Should Be Denied

Throughout these proceedings, Respondents have engaged in various tactics to divert the attention of Complaint Counsel and the Court from the merits of the *Complaint*. Most notably, they included numerous specious affirmative defenses in their answers, obstructed and failed to cooperate in discovery,³⁹ filed numerous motions based upon the supposed infirmity of the Commission's longstanding substantiation requirements and Complaint Counsel's presumed violations of the *Protective Order*, and now, in the pinnacle of their bullying tactics, accuse the government of malice, gross misconduct, and violation of criminal statutes. They seek to subject three members of the litigation team and at least one employee of the Office of

³⁹*See, e.g.*, Compl. Counsel's Mot. to Compel at 38-39 (Dec. 6, 2004) (summarizing Respondents' pervasive, abusive discovery tactics as of that date); Compl. Counsel's Mot. for Leave to Serve Subpoena Duces Tecum on Covarix (Feb. 9, 2005) (seeking relief for Respondents' failure to timely disclose their common corporate holding company).

the Secretary to probing cross examination and production of personnel files, which are confidential under law, for supposed evidence regarding Complaint Counsel's candor in its sworn *Declarations*. The Court should rebuff Respondents' attempts to intimidate Complaint Counsel and engage in satellite discovery and additional litigation unrelated to merits of the *Complaint*.

First and foremost, RULE 3.31(c) generally governs the scope of discovery in this matter. The RULE permits discovery "to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses." RULE 3.31(c). Though the legal scope of discovery is broad, it "does have ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citation omitted). Requests for production of personnel files, in particular, raise serious legal issues and privacy concerns. Because of the "extremely private nature of personnel files," a court will not order production of such files except upon a compelling showing of relevance by the requesting party. *Blackmond v. UT Med. Group Inc.*, No. 02-2890, 2004 U.S. Dist. LEXIS 27197, at *3-4 (W.D. Tenn. Nov. 4, 2004); see *Mangels v. Peña*, 789 F.2d 836 (10th Cir. 1986) ("Due process thus implies an assurance of confidentiality with respect to certain forms of personal information possessed by the state."); *Miller v. Federal Express Corp.*, 186 F.R.D. 376, 384 (W.D. Tenn. 1999). To make a compelling showing of relevance, the requesting party must demonstrate that the value of the information that will be obtained outweighs the privacy interests of the affected parties. See generally *Onwuka v. Federal Express Corp.*, 178 F.R.D. 508, 517 (D. Minn. 1997).

Respondents' requested discovery is not material to the claims or defenses in this

action. Respondents themselves contend that the declarations already filed “eliminate any doubt as to the occurrence of the violation.” Resp’ts’ Disc. Mot. at 5. Nevertheless, Respondents seek to “challenge Complaint Counsel’s account.” Resp’ts’ Disc. Mot. at 4. These statements are contradictory and disingenuous. If the *Declarations* are clear regarding the violations, and the blatant bad faith that Respondents alleged in their *Motion for Order to Show Cause* is already evident, then no further discovery is necessary. The real reason behind Respondents’ discovery demands is their continued interest in vainly attempting to intimidate and bully Complaint Counsel. Respondents’ requests for personnel files and information regarding disciplinary matters are particularly outrageous. These requests are nothing more than a fishing expedition into areas “where privacy concerns are high and relevant material may or may not exist.” *Blackmond*, 2004 LEXIS 27197, at *4; *see also Gehring v. Case Corp.*, 43 F.3d 340, 342-43 (7th Cir.1994) (concluding that privacy interests were proper basis upon which to disallow counsel from “root[ing] through the personnel files”).⁴⁰

Respondents’ true motives are revealed by the overbreadth of their discovery requests. Though they profess “no desire to complicate this litigation any more than necessary,” Resp’ts’ Disc. Mot. at 13, Respondents seek the production, among other things, of Complaint Counsel’s “personnel file,” and cross-examination regarding Complaint Counsel’s assumed “previous discovery violations or other disciplinary matters,” agency training, and the agency’s general supervision of its employees. Respondents’ requests are not limited to this matter and

⁴⁰Regardless of the evidence that might be obtained from personnel files, Respondents would predictably contend that it supports their views. Respondents’ dark view of the undisputed factual circumstances surrounding this dispute suggests that even the most sterling record of agency work performance would be recast and characterized as support for their baseless inferences of malice and willfulness.

encompass a vast range of training, supervision, and policy matters. Clearly, Respondents' real desire is to complicate this matter as much as necessary to either extract a favorable settlement or distract Complaint Counsel from its hearing preparations and the prosecution of the *Complaint*.

In attempting to commence a mini-proceeding with discovery focused upon Complaint Counsel's good faith, Respondents ignore many of the well-established presumptions of good faith that operate in favor of government employees previously discussed. *See supra* pages 21-22; *see also Albuquerque Pub. Co.*, 726 F. Supp. at 860 ("Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents."). Respondents also ignore the well-established policies against subjecting government employees to discovery under analogous circumstances. Courts have discussed the policies against subjecting government officials to discovery in the context of qualified immunity. The Courts have recognized that substantial costs attend the litigation of the subjective good faith of government officials. *See Franklin Sav. Corp. v. FDIC*, 180 F.3d 1124, 1137 (10th Cir. 1999). As a result, the Courts have emphasized that suits based upon bare allegations of malice should be dismissed at "the earliest possible stage of the litigation" sparing officials not only from liability but "also from discovery and trial." *Franklin*, 180 F.3d at 1138. This policy arose out of the recognition and concern that inquiries of this kind can be particularly disruptive of effective government. *See Franklin*, 180 F.3d at 1138.

Respondents' broad and intrusive discovery requests pose the same concerns, as they will prove disruptive and distracting. Indeed, they appear calculated to do just that, as the

parties approach the hearing in this matter. Respondents' supposedly "necessary" discovery includes wide-ranging document production (Complaint Counsel's "personnel file; all communications concerning this incident" "All policies, procedure, manuals or similar concerning the handling of confidential materials") and depositions of Messrs. Dolan, Millard, and Shapiro on similarly broad and invasive topics (including any of Complaint Counsel's "previous discovery violations or other disciplinary matters," "how attorneys are generally supervised at the FTC," and "how the FTC trains attorneys, generally"). Resp'ts' Disc. Mot. at 10-13.

Respondents' citations to legal authority do not legitimize their unreasonable requests. Respondents' cases all deal with allegations of *civil* contempt related to a consent decree or injunction arising directly out of an original action, not allegations of criminal contempt wholly unrelated to the allegations in the case.⁴¹ See, e.g., *Patrick v. Ford Motor Co.*, 8 F.3d 455 (7th Cir. 1993) (reviewing case in which party moved for preliminary injunction and civil contempt arising under settlement agreement); *United States v. City of Northlake*, 942 F.2d 1164 (7th Cir. 1991) (reversing district court's denial of discovery regarding action for contempt of prior consent decree); *Wesley Jesson Corp. v. Bausch & Lomb, Inc.*, 256 F. Supp.2d 228 (D. Del. 2003) (granting discovery on *civil* contempt motion arising out of court-imposed injunction). In contrast, Respondents' intrusive discovery focuses on matters that are wholly peripheral to the matters raised in the Complaint and if unchecked, will threaten to overtake these

⁴¹ As discussed *supra* page 13, Respondents' *Motion for Order to Show Cause* demands that Complaint Counsel be punished, and does not seek to compel compliance with an order. Hence the cases cited in Respondents' *Motion for Leave to Take Discovery* are inapplicable because Respondents seek criminal contempt sanctions rather than civil contempt.

proceedings.⁴²


In response to an *Order* of this Court, Complaint Counsel provided detailed *Declarations* setting forth, in detail, the facts surrounding the unintended posting of material designated as non-public by the parties. Strangely, Respondents appear to be disappointed, not relieved, that these *Declarations* did not reveal a willful plot to harm Respondents. In any event, Respondents' intemperate accusations of bad faith cannot not overcome their failure to rebut well-established presumptions of good faith and policies disfavoring discovery against government employees. This Court should reject Respondents' thinly-veiled attempt to intimidate Complaint Counsel and run rampant with discovery that is completely tangential to the merits of the *Complaint*.

⁴²If Respondents are permitted to take discovery of Complaint Counsel, it is only reasonable to allow Complaint Counsel the same opportunity. As previously noted, Respondents have not addressed the facts concerning their own acts or omissions pertaining to this dispute.

CONCLUSION

For the reasons carefully delineated above, Complaint Counsel respectfully request that this Court deny Respondents' *Motion for Order to Show Cause* and their *Motion for Leave to Take Discovery*.

Respectfully submitted,



Laureen Kapin (202) 326-3237
Walter C. Gross III (202) 326-3319
Joshua S. Millard (202) 326-2454
Robin M. Richardson (202) 326-2798
Edwin Rodriguez (202) 326-3147
Laura Schneider (202) 326-2604

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

Dated: April 5, 2005

EXHIBIT A

EXHIBIT B

PATENTED TOPICAL GEL REDUCES TUMMY FAT!

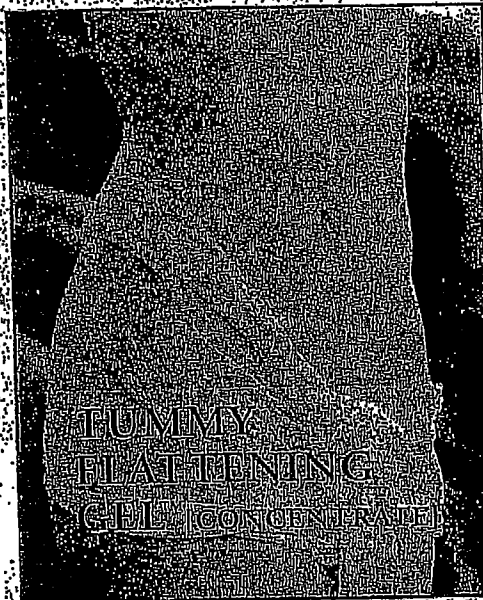
"This new, highly concentrated formula allows for precise, targeted delivery... making it the first true spot-reducing gel capable of effective reduction of dense abdominal fat."

Dr. Nathalie Chevreau, PhD, RD, Director of Women's Health, Söavage Dermalogic Laboratories™

No part of the female figure is sexier or more attractive than a flat, sculpted stomach. But maintaining a sleek, shapely midsection is easier said than done — particularly if you're over 26.

Don't blame yourself if your tummy has gotten suddenly out of proportion — blame the natural makeup of a woman's body. Beginning in your early 20's, or after pregnancy, nature conspires to redistribute adipose (fat) tissue... even if you exercise, diet, and maintain an ideal weight, your body shape changes.

Unfortunately, the first sign of the natural aging process happens in your midsection — that infuriating "tummy pooch" that utterly ruins your look, your wardrobe, and your confidence. But there's a beautiful solution — Söavage® Tummy Flattening Gel... the topically applied, deep-penetrating concentrate specifically designed to mobilize the persistent, stubborn fat that makes your tummy bulge.



the breakdown of regional fat cells. Söavage Tummy Flattening Gel is a quick-penetrating gel so thick, concentrated, and smooth some people call it a "fat burning paste"... everyone who's used it simply calls it a "miracle."

The "Fine Print"

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

See Visible Results in Approximately 19 Days, Guaranteed!

Use Söavage Tummy Flattening Gel as directed, and you will begin to see dramatic, visible results in approximately 19 days. Remember, nothing

builds more confidence than a youthful, flat, firm, trim tummy. Nothing. And the quickest way to capture a perfectly sculpted midsection is with the new, area-specific, clinically proven, super-concentrated Söavage Tummy Flattening Gel. Guaranteed to work for you or your money back... no questions asked.

Söavage Tummy Flattening Gel is available at select day spas and specialized cosmeceutical retailers, or call 1-800-917-8096 ext. TG165. Order today! Supplies are extremely limited.

CLINICALLY PROVEN!

How It Works — The Science

It is well documented that when beta-adrenergic stimulants such as Epidril are added to a culture dish with adipose (fat) cells, the cells deflate as they release their stored fat — very similar to the way a balloon deflates when stuck with a pin. The evidence is conclusive: Epidril has been verified by two published clinical trials and has been awarded a United States Patent (No. 4,825,357).

Although many Epidril formulations have successfully targeted fat cells in the thighs and buttocks, researchers have just discovered something most women have known for years: abdominal fat ("Tummy Pooch") is an "ordinary" fat... it's extremely difficult to target — in part because of its inherent structural density. So, although Epidril-containing gels have been proven to emulsify fat on contact, ordinary transdermal products are simply not powerful enough to precisely target resistant abdominal fat.

The Power of Söavage Tummy Flattening Gel

The ultimate power of Söavage Tummy Flattening Gel results from a patent-pending process that allows precise delivery of its ultra-concentrated Epidril base formulation to resistant abdominal fat — selectively accelerating

Söavage Tummy Flattening Gel... a formula you can trust, backed by an unconditional, money-back guarantee you can count on.

ORDER NOW!
24 HOURS/TOLL-FREE:
1-800-917-8096
EXT. TG165
\$119 USD
(four to six-week supply)

www.SOVAGE.COM

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*Clin Ther Vol 9 No 6 1987: 663-69; Obese Res Vol 3 Suppl 4 Nov 1995: 567S-568S
*All references to the term Söavage refer to the full trade name of Söavage Dermalogic Laboratories™

NOTE: Many of our clients who have considered liposuction surgery use Söavage Tummy Flattening Gel first, as a kind of "test-drive" before committing to a possibly dangerous surgical solution. If you are seriously considering liposuction, we strongly recommend that you consult a physician specializing and experienced in this surgical technique.

SÖAVAGE™
Dermalogic Laboratories
A Division of Klein-Boeker USA™

PAGE REDACTED

PAGE REDACTED

EXHIBIT C

Source: [News & Business](#) > [Company & Financial](#) > [Company Profiles & Directories](#) > [Individual Publications](#) > [Duns Market Identifiers Plus](#)

Terms: basic w/1 research w/1 llc ([Edit Search](#))

DMIP, September 14, 2004, Basic Research LLC

RETURN

Copyright 2005 Dun and Bradstreet, Inc.
Dun's Market Identifiers

Basic Research LLC

5742 Harold Gatty Dr
Salt Lake City, UT 84116-3762
United States
TELEPHONE: 801-517-7000

September 14, 2004

LENGTH: 176 words

Check availability of a D&B Business Information Report (Credit Report)

DUNS: 80-594-7405
COMPANY TYPE: Small Business; Corporation
COUNTY: SALT LAKE
MSA: Salt Lake City-Ogden, UT - 7160

YEAR STARTED: 1992

***** **SALES** *****

Sales Revision Date:	September 16, 2004
Annual Sales:	\$ 10,900,000 - Estimated
1-Yr-Ago:	\$ 28,000,000
3-Yr-Ago:	\$ 8,800,000
Sales Growth:	218%
Net Worth:	N/A

***** **BUSINESS DESCRIPTION** *****

Whol Drugs/Sundries

PRI-SIC:
5122 Drugs, proprietaries, and sundries
51220310 Vitamins and minerals

***** **EXECUTIVES** *****

MANAGER: Dennis Gay, Manager

SALES: Bodee Gay, Sales Executive
 DATA PROCESSING: Kermit McKinney, Dir It
 OTHER EXECUTIVE: Bodee Gay, Sales Executive
 MANAGEMENT: Kermit McKinney, Dir It

***** EMPLOYEES

Employees At This Location:	50 - Actual
1-Yr-Ago:	50
3-Yr-Ago:	25
Employment Growth:	100%
Employee Total:	50

***** OTHER INFORMATION

PROPERTY: Rents
 NUMBER OF ACCOUNTS: 20

CONGRESSIONAL DISTRICT: 1ST Congressional District

LANGUAGE: ENGLISH

LOAD-DATE: February 24, 2005

Source: [News & Business](#) > [Company & Financial](#) > [Company Profiles & Directories](#) > [Individual Publications](#) > [Duns Market Identifiers Plus](#) ③

Terms: basic w/1 research ([Edit Search](#))

Select for FOCUS™ or Delivery

DMIP, July 9, 2003, Basic Research LLC

RETURN

Copyright 2003 Dun and Bradstreet, Inc.
Dun's Market Identifiers

Basic Research LLC

5742 Harold Gatty Dr
Salt Lake City, UT 84116-3762
United States
TELEPHONE: 801-517-7000

July 9, 2003

LENGTH: 149 words

Check availability of a D&B Business Information Report (Credit Report)

DUNS: 80-594-7405
COMPANY TYPE: Small Business; Partnership
COUNTY: SALT LAKE
MSA: Salt Lake City-Ogden, UT - 7160

YEAR STARTED: 1992

***** **SALES** *****

Sales Revision Date:	June 10, 2003
Annual Sales:	\$ 28,000,000
1-Yr-Ago:	N/A
3-Yr-Ago:	N/A
Sales Growth:	N/A
Net Worth:	N/A

***** **BUSINESS DESCRIPTION** *****

Whol Drugs/Sundries

PRI-SIC:

5122	Drugs, proprietaries, and sundries
51220310	Vitamins and minerals

***** EXECUTIVES

MANAGER: Dennis Gay, Manager
CONTROLLER: Cal Pitts, Controller

***** EMPLOYEES

Employees At This Location:	50 - Actual
1-Yr-Ago:	50
3-Yr-Ago:	8
Employment Growth:	525%
Employee Total:	50

PROPERTY: Rents
NUMBER OF ACCOUNTS: 20

CONGRESSIONAL DISTRICT: 3D Congressional District

LANGUAGE: ENGLISH

LOAD-DATE: August 4, 2003



494 Eighth Avenue, Suite 400
New York, NY 10001
Phone: 212-629-4960

CASE STUDY: BASIC RESEARCH

"We knew the promise of online advertising, but we didn't have the experience or resources to be involved. The Flying Point Media team not only helped us realize this promise, but exceeded any expectations we ever had."

-Gary Sandberg, VP of Marketing, Basic Research

Company Background

Although largely unknown to the public and their consumers, Basic Research is the creative force behind some of the most popular and widely marketed health-related products. Driven to provide unique health supplements that address the specific needs of consumers - ranging from weight loss to bodybuilding, maternity, anti-aging, joint health and more - Basic Research's products are found anywhere from your local GNC to the window displays of Macy's and Bloomingdale's.

Challenge

Since it was founded in 1992, Basic Research has been an aggressive and successful direct marketer. With experience marketing through traditional media such as print, radio, TV, they have quickly grown to a \$350 million company. As the Internet was developing and the audience of online users began to grow rapidly, Basic Research recognized the potential and importance of the Web as a direct response medium. Lacking the knowledge, experience, and expertise in the new medium, they approached Flying Point Media to plan and execute their online marketing efforts.

Strategy

With our successful history generating cost-effective sales for direct marketers on the Web, Flying Point sought to transplant the success Basic Research had with traditional media into the online space. Utilizing our knowledge of generating cost-effective sales online, we assembled a marketing plan consisting entirely of media publishers who offered the key components to successful direct online marketing campaigns:

- ⊙ Ad targeting by demographic, content channel, or web-browsing activity
- ⊙ Bulk pricing - enabling our clients to receive the price breaks of our purchasing power
- ⊙ Multiple creative formats including large ad units and rich media
- ⊙ Ability to optimize campaigns daily
- ⊙ Flexible contract terms

Sample Creative

Our specific strategy for Basic Research was to utilize demographic information to identify and target the appropriate consumer for each product. For example, in the case of Estrin-D, a dietary supplement which is designed for women experiencing menopause, our media plan focused on delivering ads exclusively to a female audience, ages 40 and over. Using registration data from their respective user bases, the media publishers we chose were all capable of segmenting ad delivery to a demographic that perfectly matched the Estrin-D target audience. Additionally, we designed creatives that would instill a feeling of serenity and calm, as we understood that women experiencing menopause were going through a period of natural change.



We applied a similar strategy for each product in the entire product line. The result delivered was a highly efficient advertising program that accurately segmented each product's target market and delivered a strong ROI.

Results

Flying Point is now generating over \$5 million in annual sales revenue for Basic Research. In the year 2003, their Internet advertising matched or surpassed the ROI performance of TV, radio, or any other medium. Some other key statistics include:

- ⊙ For every \$1 spent on marketing, Basic Research is generating \$4 in retail sales
- ⊙ The net profit margin on Internet Sales is 20% higher than all other media due to lower overhead costs (no phone costs, customer service costs, limited overhead, etc.)
- ⊙ Online marketing is Basic Research's fastest growing direct to consumer sales segment
- ⊙ The ROI for Internet Marketing has increased every month for over 30 months in a row (see graph below)

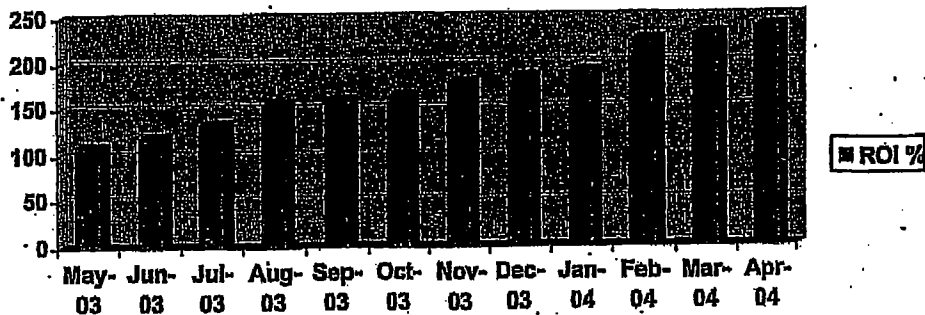


EXHIBIT D

IMS Logo indicates newly detected spot. The 50 most frequently seen direct response spots on stations monitored, ranked for the week ending: August 8, 2003

IMS Logo indicates newly detected spot.

Product Name	Marketing Company	TRT	Price	Category	Product Name	Marketing Company	TRT	Price	Category
1 Leptoprin	PKFF Agency/Zoller Labs	:120	153.00	Health & Fitness	26 Singer Scissors	Merchant Media Corp.	:120	19.95	Crafts & Hobbies
2 Smoke Away	Council on Natural Health	:120	0.00	Health & Fitness	27 Topplik	Spencer Forest, Inc.	:120	19.95	Beauty
3 IGI/A Instant Cover	IGI/A	:120	0.00	Beauty	28 Load-N-Cut	National Express	:120	19.95	Household
4 Smart Cover-Up	Smart Cover Cosmetics	:120	19.95	Beauty	29 EuroBlaster	Best Buys Direct	:60	19.95	Household
5 Bowflex Six Week Challenge	The Nautilus Group	:60	0.00	Health & Fitness	30 Party Time Karaoke	Time Life Video	:120	24.99	Entertainment
6 Finishing Touch	IdeaVillage	:120	14.99	Beauty	31 AmeriP.O.S.	AmeriP.O.S.	:60	0.00	Business & Finance
7 Dell Dimension 2400	Dell Computer Corp.	:60	499.00	Comp. & Electronics	32 IGI/A Duolitta	IGI/A	:120	19.95	Kitchen
8 Pops-A-Dent	Direct to Retail Advertising	:60	19.95	Automotive	33 Ready Roller	IdeaVillage	:120	14.99	Household
9 Pool Devil	Media Solution Services	:60	19.99	Household	34 Personal Cooling System	The Sharper Image	:120	39.98	Personal
10 Bowflex Xtreme	The Nautilus Group	:60	0.00	Health & Fitness	35 Def Jam More All Stars	Time Life Video	:120	9.99	Entertainment
11 Clean Between Machine	Wellquest Intl	:120	19.95	Beauty	36 1933 Double Eagle Proof	National Collectors Mint	:60	19.95	Crafts & Hobbies
12 Contair Hair Removal System	Direct To Retail Advertising	:60	75.85	Beauty	37 Sand Air	Direct To Retail Advertising	:120	19.95	Crafts & Hobbies
13 Gold's Gym Powerflex	Icon Health & Fitness	:120	0.00	Health & Fitness	38 Conair Fabric Steamer	Direct to Retail Advertising	:60	119.80	Household
14 Cigaban	Synchronicity LLC	:120	9.95	Health & Fitness	39 Doo Wop Gold	Time Life Video	:120	9.99	Entertainment
15 Classic Country, Queens of	Time Life Music	:120	9.99	Entertainment	40 Video Professor	VPI Marketing	:120	0.00	Educ. & Self Help
16 Bebob Scooter	The Scooter Store Ltd.	:120	0.00	Personal	41 Classic Country 80s	Time Life Music	:120	19.99	Entertainment
17 Focus Factor	Vital Basics, Inc.	:60	0.00	Health & Fitness	42 Wiz Wax	Blue Magic Products, Inc.	:120	14.95	Automotive
18 Emerson Switchboard	GreatBuy USA	:60	39.90	Comp. & Electronics	43 Orange Glo Infl	Orange Glo Infl	:120	19.99	Household
19 Ding King	National Express	:120	19.95	Automotive	44 Quick N' Smooth	Wellquest Intl	:120	0.00	Beauty
20 Tri-Mega	Wellquest Intl	:60	0.00	Miscellaneous	45 Gold Kit	Lippincott, Inc.	:30	0.00	Miscellaneous
21 Klear Action	Thane International	:120	19.95	Beauty	46 IGI/A Air-O-Sage	IGI/A	:120	39.95	Personal
22 Tread Climber	The Nautilus Group	:60	0.00	Health & Fitness	47 Girls Gone Wild	Mantra Entertainment	:60	9.99	Entertainment
23 Live Links	Boulevard Media, Inc.	:30	0.00	Entertainment	48 HD Vision	IdeaVillage	:120	19.95	Fashion
24 Nathan's Grill	National Express	:120	19.95	Kitchen	49 LiftTight	Biologic Solutions	:120	29.95	Beauty
25 Contour Cloud Pillow	Comfort-Trac	:120	19.95	Household	50 Donut Express	Enson Corporation	:120	19.95	Kitchen

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 610-328-6902 • Fax 328-6791 • www.imstv.com



Logo indicates newly detected spot.

Product Name	Marketing Company	TRT	Price	Category	Product Name	Marketing Company	TRT	Price	Category
1 Leptopin	PKPF Agency/ZollerLabs	:120	153.00	Health & Fitness	26 DonutExpress	Emson Corporation	:120	19.95	Kitchen
2 SmokeAway	Council on Natural Health	:120	0.00	Health & Fitness	27 KlearAction	Thane International	:60	19.95	Beauty
3 IGI/A Instant Cover	IGI/A	:120	0.00	Beauty	28 IGI/A Duacetta	IGI/A	:120	19.95	Kitchen
4 Smart Cover-Up	Smart Cover Cosmetics	:120	19.95	Beauty	29 Live Links	Boulevard Media, Inc.	:30	0.00	Entertainment
5 Bowflex Xtreme	The Nautilus Group	:60	0.00	Health & Fitness	30 ContairHairRemovalSystem	DirectTo Retail-Advertising	:60	75.85	Beauty
6 Air Press	Telebrands	:120	39.99	Personal	31 One Scoop	Innovation X	:120	19.95	Household
7 Clean Between Machine	Wellquest Intl	:120	19.95	Beauty	32 Sony Vaio V605	Sony Corp.	:60	1449.00	Comp. & Electronics
8 Finishing Touch	Ideavillage	:120	14.99	Beauty	33 Personal Cooling System	The Sharper Image	:120	39.98	Personal
9 Focus Factor	Vital Basics, Inc.	:60	0.00	Health & Fitness	34 Toppik	Spencer Forrest, Inc.	:120	19.95	Beauty
10 Dell Dimension 2400	Dell Computer Corp.	:60	499.00	Comp. & Electronics	35 Emerson Switchboard	GreatBuy USA	:60	39.90	Comp. & Electronics
11 Bowflex Ultimate	The Nautilus Group	:60	0.00	Health & Fitness	36 IGI/A Air-O-Sage	IGI/A	:120	39.95	Personal
12 Star Scooter	Warren Direct	:120	999.00	Personal	37 Liftight	Biologic Solutions	:120	29.95	Beauty
13 Beavis and Butt-Head, Best of	Time Life Video	:60	29.99	Entertainment	38 Brew Station	Hamilton Beach	:120	59.98	Kitchen
14 Guitar Rock	Time Life Music	:120	12.49	Entertainment	39 Load-N-Cut	National Express	:120	19.95	Household
15 ...	Wellquest Intl	:120	0.00	Beauty	40 Ready Roller	Ideavillage	:120	14.99	Household
16 ...	Time Life Music	:120	9.99	Entertainment	41 Lynd Skynard	Castellan Music	:60	21.98	Entertainment
17 ...	Time Life Music	:60	0.00	Health & Fitness	42 IGI/A Pore Cleaner	IGI/A	:300	19.95	Beauty
18 ...	Direct To Retail Advertising	:120	19.95	Automotive	43 Ionic Breeze	The Sharper Image	:120	349.95	Household
19 ...	Time Media Group	:120	59.90	Health & Fitness	44 Total Gym XL	Total Gym Fitness, LLC	:60	0.00	Health & Fitness
20 ...	Iscan Health & Fitness	:120	0.00	Health & Fitness	45 Nathan's Grill	National Express	:120	19.95	Kitchen
21 ...	Time Life Music	:120	19.99	Entertainment	46 Doors: Legacy	Razor & Tie Direct	:120	24.98	Entertainment
22 ...	Time Life Music	:120	9.99	Entertainment	47 Frogg Toggs	Q Works Corp.	:120	69.90	Household
23 ...	Aero Products Intl	:60	99.00	Household	48 Handy Stitch	Ideavillage	:60	14.99	Crafts & Hobbies
24 Singer Scissors	Merchant Media Corp.	:120	19.95	Crafts & Hobbies	49 TriOmega	Wellquest Intl	:60	0.00	Miscellaneous
25 Def Jam More All Stars	Time Life Video	:120	9.99	Entertainment	50 EuroBlaster	Best Buys Direct	:60	19.95	Household

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Non-Monitored Spots

The 50 most frequently seen direct response spots on stations monitored, ranked for the week ending: August 22, 2003

IMS Logo indicates newly detected spot.

Product Name	Marketing Company	TRT	Price	Category	Product Name	Marketing Company	TRT	Price	Category
1 Smoke Away	Council on Natural Health	:120	0.00	Health & Fitness	26 Live Links	Boulevard Media, Inc.	:30	0.00	Entertainment
2 Leptoplin	PKPF Agency/Zoller Labs	:120	153.00	Health & Fitness	27 Auto Pilot	Media Solution Serv. 	:120	39.90	Automotive
3 IGVA Instant Cover	IGVA	:120	19.95	Beauty	28 Pasta Pro	Merchant Media Corp.	:120	19.95	Kitchen
4 Bowflex Xtreme	The Nautilus Group	:60	0.00	Health & Fitness	29 Handy Stitch	Ideavillage	:60	14.99	Crafts & Hobbies
5 Dell Dimension 2400	Dell Computer Corp.	:60	499.00	Comp. & Electronics	30 Ding King	National Express	:120	19.95	Automotive
6 Focus Factor	Vital Basics, Inc.	:60	0.00	Health & Fitness	31 Conair Hair Removal System	Direct To Retail Advertising	:60	75.85	Beauty
7 Singer Scissors	Merchant Media Corp.	:120	19.95	Crafts & Hobbies	32 Donut Express	Enson Corporation	:120	19.95	Kitchen
8 Avacor	Global Vision Products	:30	0.00	Beauty	33 White Brilliance	American Dental Supply LLC	:120	19.95	Beauty
9 Air Press	Telebrands	:120	39.99	Personal	34 Quick N' Smooth	Wellquest Intl	:120	0.00	Beauty
10 Finishing Touch	Ideavillage	:120	14.99	Beauty	35 Hit-A-Way	Pro Performance Sports	:120	29.95	Sports
11 Smart Cover-Up	Smart Cover Cosmetics	:120	19.95	Beauty	36 Veinish	Wellquest Intl	:120	0.00	Beauty
12 Oral-A-Dent	Direct To Retail Advertising	:60	19.95	Automotive	37 Personal Cooling System	The Sharper Image	:120	39.98	Personal
13 O-Clean	Orange Glo Intl	:120	19.99	Household	38 Cigaban	Synchronicity LLC	:120	9.95	Health & Fitness
14 Oral-B Between Machine	Gerovicap Pharm.	:120	19.95	Personal	39 Bowflex Ultimate	The Nautilus Group	:60	0.00	Health & Fitness
15 Oral-B Sage	Wellquest Intl	:120	19.95	Beauty	40 Load-N-Cut	National Express	:120	19.95	Household
16 Oral-B Switchboard	IGVA	:120	39.95	Personal	41 Star Scooter	Warren Direct	:120	999.00	Personal
17 Oral-B Gemini 80s	GreatBuy USA	:60	39.90	Comp. & Electronics	42 1933 Double Eagle Proof	National Collectors Mint	:60	19.95	Crafts & Hobbies
18 Oral-B Cloud Pillow	TimeLife Music	:120	19.99	Entertainment	43 IGVA Pore Cleanser	IGVA	:300	19.95	Beauty
19 Oral-B Cloud Pillow	Wellquest Intl	:60	0.00	Miscellaneous	44 UB40: Labour of Love	Castalian Music 	:60	24.98	Entertainment
20 Oral-B Cloud Pillow	Comfort-Trac	:120	19.95	Household	45 Yaffa Wrap N' Roll	Basic Line, Inc.	:60	19.95	Household
21 Oral-B Cloud Pillow	The Nautilus Group	:60	0.00	Health & Fitness	46 Ulii-Mitt	Matony Products 	:120	14.99	Beauty
22 Oral-B Cloud Pillow	Hamilton Beach	:120	59.98	Kitchen	47 Swiffer WetJet	Procter & Gamble Co.	:60	19.99	Household
23 Oral-B Cloud Pillow	Innovation X	:120	19.95	Household	48 Fired Up	Razor & Tie Direct	:60	26.99	Entertainment
24 Oral-B Cloud Pillow	Icon Health & Fitness	:120	0.00	Health & Fitness	49 Nathan's Grill	National Express	:120	19.95	Kitchen
25 Oral-B Cloud Pillow	Castalian Music	:60	21.98	Entertainment	50 Nail Dazzle	SAS Group, Inc.	:120	19.95	Beauty

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The 50 most frequently seen direct response spots on stations monitored, ranked for the week ending: August 29, 2003

IMS Logo indicates newly detected spot.

Product Name	Marketing Company	TRT	Price	Category	Product Name	Marketing Company	TRT	Price	Category
1 Leptofin	PKP Agency/Zollar Labs	:120	153.00	Health & Fitness	26 Frogg Toggs	Q Works Corp.	:120	69.70	Household
2 SmokeAway	Council on Natural Health	:120	0.00	Health & Fitness	27 EZ Hair	EZ Healthcare Products LLC	:120	29.95	Beauty
3 Bowflex Xtreme	The Nautilus Group	:60	0.00	Health & Fitness	28 Beavis and Butt-Head, Best of TimeLife Video	TimeLife Video	:60	29.99	Entertainment
4 IGI/A Instant Cover	IGI/A	:120	19.95	Beauty	29 EZ Quit	EZ Healthcare Products	IMS :120	0.00	Health & Fitness
5 Focus Factor	Vital Basics, Inc.	:60	0.00	Health & Fitness	30 IGI/A Air-O-Sage	IGI/A	:120	29.95	Personal
6 Dell Dimension 2400	Dell Computer Corp.	:60	499.00	Comp. & Electronics	31 OxiClean	Orange Glo Intl	:120	19.99	Household
7 Finishing Touch	Ideavillage	:120	14.99	Beauty	32 Radio Shack Universal Remote	Radio Shack	IMS :60	59.97	Comp. & Electronics
8 zMax	Oil Chem. Research Corp.	:120	39.95	Automotive	33 Star Scooter	Warren Direct	:120	992.00	Personal
9 Pops-A-Dent	Direct To Retail Advertising	:120	19.95	Automotive	34 Lynd Skynrd	Castalian Music	:60	21.98	Entertainment
10 Emerson Switchboard	GreatBuy USA	:60	39.90	Comp. & Electronics	35 Bowflex Ultimate	The Nautilus Group	:60	0.00	Health & Fitness
11 HandyStitch	Ideavillage	:60	14.99	Crafts & Hobbies	36 Robo Sweep	TV Products USA	IMS :120	39.90	Household
12 Avacor	Global Vision Products	:30	0.00	Beauty	37 Worship Together	Time Life Music	:120	9.99	Entertainment
13 AirPress	Telebrands	:120	39.99	Personal	38 Best of the Blues	Castalian Music	:120	18.98	Entertainment
14 NuDerma	Synchronicity LLC	:120	0.00	Beauty	39 Quick N' Smooth	Wellquest Intl	:120	0.00	Beauty
15 Brew Station	Hamilton Beach	:120	59.98	Kitchen	40 Bowflex PowerPro	The Nautilus Group	:300	0.00	Health & Fitness
16 TriMega	Wellquest Intl	:60	0.00	Miscellaneous	41 Smart Cover-Up	Smart Cover Cosmetics	:120	19.95	Beauty
17 Zone Pilates	Zone Pilates	IMS :120	29.95	Health & Fitness	42 Conair Hair Removal System	Direct To Retail Advertising	:60	75.95	Beauty
18 Nail Dazzle	SAS Group, Inc.	:120	19.95	Beauty	43 Tread Climber	The Nautilus Group	:60	0.00	Health & Fitness
19 AmeriP.O.S.	AmeriP.O.S.	:60	0.00	Business & Finance	44 Ready Roller	Ideavillage	:120	14.99	Household
20 Yazoplex	Gerovicap Pharm.	:120	19.95	Personal	45 Hang Magic	Hang Magic, LLC	IMS :120	19.95	Household
21 Cigaban	Synchronicity LLC	:120	9.95	Health & Fitness	46 Girls Gone Wild	Mantra Entertainment	:60	9.99	Entertainment
22 Home Depot: Toro Trimmer	Home Depot Direct	IMS :60	169.00	Household	47 Total Gym	Total Gym Fitness Ltd.	:60	0.00	Health & Fitness
23 Classic Country, Queens of	Time Life Music	:120	9.99	Entertainment	48 Load-N-Cut	National Express	:120	19.95	Household
24 Clean Between Machine	Wellquest Intl	:120	19.95	Beauty	49 Slice-Pro	Sears	IMS :120	19.99	Kitchen
25 Guitar Rock	Time Life Music	:120	12.49	Entertainment	50 Nathan's Grill	National Express	:120	19.95	Kitchen

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2005, I caused *Complaint Counsel's Amended Consolidated Opposition to Respondents' Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt and Respondents' Motion for Leave to Take Discovery [Public Version]* to be filed and served as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580
- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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