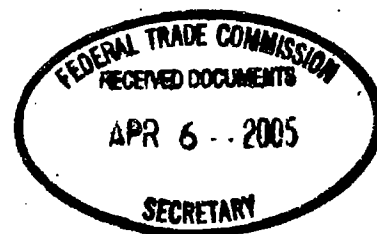


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)

BASIC RESEARCH, LLC)

A.G. WATERHOUSE, LLC)

KLEIN-BECKER USA, LLC)

NUTRASPORT, LLC)

SOVAGE DERMALOGIC LABORATORIES, LLC)

BAN, LLC d/b/a BASIC RESEARCH, LLC)

OLD BASIC RESEARCH, LLC,)

BASIC RESEARCH, A.G. WATERHOUSE,)

KLEIN-BECKER USA, NUTRA SPORT, and)

SOVAGE DERMALOGIC LABORATORIES)

DENNIS GAY)

DANIEL B. MOWREY d/b/a AMERICAN)

PHYTOTHERAPY RESEARCH LABORATORY, and)

MITCHELL K. FRIEDLANDER,)

Respondents:)

Docket No. 9318

ORDER CERTIFYING MOTIONS TO COMMISSION AND STAYING PROCEEDINGS

I. INTRODUCTION

A. Overview and Summary of Conclusions

This Order addresses three motions filed by Respondents which relate to the posting on the Commission's public website of Respondents' confidential information contained in five exhibits to Complaint Counsel's motion for partial summary decision, filed on January 31, 2005, and one exhibit to Complaint Counsel's motion to compel, filed on December 6, 2004. The three motions are: (1) Respondents' Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt ("contempt motion"); (2) Respondents' Emergency Motion Requiring the Commission to Provide Respondents with Electronic Files Showing Who Accessed Respondents' Confidential Information While it Was on the Commission's Website ("electronic files motion"); and (3) Respondents' Motion for Leave to Take Discovery Regarding Complaint Counsel's Violation of the Protective Order ("discovery motion").

Upon review of the pleadings and attachments, including sworn declarations, it is determined that Respondents' three motions must be certified to the Commission because: (1) the motions raise allegations, *inter alia*, requiring determination of matters beyond the merits of the violation of law charged in the Complaint; (2) the challenged conduct appears to involve components of the Commission and/or employees other than Complaint Counsel; and (3) the requested relief exceeds the authority delegated to the Administrative Law Judge ("ALJ"). 16 C.F.R. § 3.22(a). *See also* 16 C.F.R. §§ 3.42(c)(10), 3.42(h); *In re Drug Research Corp.*, 63 F.T.C. 998, 1963 FTC LEXIS 43, *36-37 (Oct. 3, 1963). For these same reasons, no recommendations on the appropriate disposition of the motions can be provided. Rather, the Commission is best suited to assess the public interest in this matter, to review the actions of Commission employees, and to determine the appropriate remedy to ensure industry confidence in the integrity of the Commission's policies, practices, and procedures that are designed to protect confidential information.

B. Procedural Background

On February 22, 2005, Respondents Basic Research, LLC ("Basic Research") and Ban, LLC ("Ban") filed the electronic files motion seeking expedited briefing and an order compelling the Commission to provide Respondents with electronic files showing who accessed Respondents' confidential information while it was posted on the Commission's public website.

On February 22, 2005, Complaint Counsel filed a partial response ("electronic files response") to Respondents' electronic files motion, requesting additional time to file a supplemental response. By Order dated February 22, 2005, Respondents' request for expedited briefing was granted and Complaint Counsel was ordered to file a supplemental response, including sworn statements, by February 25, 2005.

On February 25, 2005, Complaint Counsel filed its supplemental response to Respondents' motion, including sworn declarations ("electronic files supp. response").

On March 4, 2005, Respondents filed their reply ("electronic files reply").

On March 9, 2005, Basic Research, LLC; A.G. Waterhouse, LLC; Klein-Becker USA, LLC; Nutrasport, LLC; Sovage Dermalogic Laboratories, LLC; Ban, LLC; Dennis Gay; Daniel B. Mowrey; and Mitchell K. Friedlander ("Respondents") filed two motions – the contempt motion seeking an order to show cause why Complaint Counsel should not be held in contempt and the discovery motion seeking leave to take discovery regarding Complaint Counsel's violation of the Protective Order.

By Order dated March 9, 2005, Respondents were ordered to show cause as to what confidential information was posted on the Commission's public website, and Complaint Counsel's motion for partial summary decision, at issue in Respondents' motions, was stayed.

On March 16, 2005, Respondents Basic Research and Ban filed a response to the order to show cause ("show cause response").

On March 21, 2005, Complaint Counsel filed a consolidated opposition to Respondents' contempt and discovery motions ("consolidated opposition").

On March 29, 2005, the parties were ordered to file amended pleadings which properly limited the facts, legal analysis, and arguments that were filed as "Subject to Protective Order" or "non-public document." The parties filed amended pleadings consistent with this Order on or before April 5, 2005.

The pleadings and attachments discussed in this Order are voluminous and are a part of the Commission's official record. Accordingly, they are not attached hereto.

C. Summary of the Parties' Positions

Respondents contend that from February 15, 2005 to February 17, 2005, the Federal Trade Commission (the "Commission"), in violation of the Protective Order Governing Discovery Material ("Protective Order"), the Commission's Rules of Practice ("Rules"), and Respondents' rights, posted Respondents' confidential and attorneys' eyes only information on the Commission's public website. Electronic files motion at 2; contempt motion at 3-4. As a result of this action, Respondents allege irreparable harm and argue that the only appropriate remedy for such injury is an order striking the Complaint and granting monetary sanctions. Contempt motion at 5-6, 23-35. Respondents also seek certain electronic files showing who accessed their confidential information while it was posted on the Commission's public website. Electronic files motion at 2-3. In addition, Respondents seek discovery including depositions of Complaint Counsel, deposition of a member of the Office of the Secretary, and documentary evidence. Discovery motion at 9-13.

Respondents state that there were six exhibits posted on the Commission's public website which contained confidential information: five exhibits to Complaint Counsel's motion for partial summary decision, which was filed on January 31, 2005, and one exhibit to Complaint Counsel's motion to compel production of documentary material and answers to interrogatories, which was filed on December 6, 2004. Show cause response at 7-14. According to Respondents, these six exhibits include: trade secrets in the form of product formulations for the products at issue in this litigation; Respondents' confidential business records; and a particular individual's private consumer email. Show cause response at 7-14 and attached sworn declaration of Respondent at ¶¶ 5-36.

Complaint Counsel acknowledges that the questioned exhibits to its motion for partial summary decision were posted on the Commission's public website. Electronic files response at 2. According to Complaint Counsel's sworn declaration, and the certificate of service, Complaint Counsel filed the non-public version of the motion for partial summary decision and

the exhibits thereto in hard copy, on diskette, and via email, and served the files on Respondents via email, "consistent with how Complaint Counsel filed and served non-public pleadings in this matter until February 17, 2005." Electronic files supp. response at attachment B (sworn declaration of Complaint Counsel), ¶ 13 and exhibit 1. These exhibits were identified by Complaint Counsel as being "Subject to Protective Order" and a redacted public version of the exhibits was filed on February 7, 2005. *Id.* at ¶¶ 4-16. Complaint Counsel alleges that the non-public version of the exhibits to its motion for partial summary decision was posted on the Commission's public website because an employee of the Office of the Secretary mistakenly deleted the electronic copy of the public version of the exhibits, because this employee believed them to be duplicates. *Id.* at ¶ 22.

Complaint Counsel argues that despite the error, Complaint Counsel did not act in bad faith; that Respondents have failed to establish harm; and that Respondents are not entitled to the demanded dismissal or monetary sanctions. Consolidated opposition at 21-66. Complaint Counsel further asserts that the release of the requested electronic files would violate the Commission's privacy policy and that Respondents' motion for leave to take discovery should be denied. Electronic files supp. response at 3-4; consolidated opposition at 66-71.

II. Relevant Statutes, Orders, and Procedures

A. Relevant Statutes

Numerous statutes and rules prohibit and punish the unauthorized disclosure of confidential information obtained by the Commission. For example, 18 U.S.C. § 1905 imposes criminal sanctions on government employees who make unauthorized disclosure of certain classes of information submitted to a government agency, including trade secrets and confidential information. *Chrysler Corp. v. Brown*, 441 U.S. 281, 288-89 (1979). The Federal Trade Commission Act ("FTC Act") specifically forbids the release of trade secrets. 15 U.S.C. § 46(f). Moreover, the FTC Act provides that "[a]ny officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court." 15 U.S.C. § 50. This prohibition is incorporated in the Commission's Rules of Practice. 16 C.F.R. 4.10(c). Courts routinely order companies to provide confidential information to the Commission, noting the protections of statutes and rules that prohibit and punish the unauthorized disclosure of confidential information obtained by the Commission. *E.g.*, *FTC v. MacArthur*, 532 F.2d 1135, 1143 (7th Cir. 1976); *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 n.6 (D.C. Cir. 1980); *In re FTC Line of Business Report Litig.*, 595 F.2d 685, 706 n.129 (D.C. Cir. 1978).

B. Protective Order

The first paragraph of the Protective Order, issued by the ALJ in this case on August 11, 2004, states that: “[f]or the purpose of protecting the interests of the parties and third parties in the above captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter,” the Protective Order “shall govern the handling of all Discovery Material, as hereafter defined.” Protective Order at 1. The Protective Order defines “Confidential Discovery Material” to mean:

all Discovery Material that is designated by a Producing Party as confidential and that is covered by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2); or Section 26(c)(7) of the Federal Rules of Civil Procedure and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which to Respondents or Third Parties would cause substantial commercial harm or personal embarrassment to the disclosing party.

Protective Order at definitions ¶ 20. The nonexhaustive list of examples “of information that likely will qualify for treatment as Confidential Discovery Material” includes customer names, customer contact information, trade secrets, and proprietary financial data. Protective Order at definitions ¶ 20.

Pursuant to the Protective Order, information may be designated by the parties as “confidential” or “restricted confidential, attorney eyes only.” Protective Order at ¶ 2. The Protective Order requires that “Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose” and that “Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except to” a specific list of people directly involved in the proceedings. Protective Order at ¶¶ 1, 4. The Protective Order contemplates sanctions for violation of the Order. Indeed, the Protective Order requires experts retained in the matter to sign a Declaration Concerning Protective Order Governing Discovery Material which states that “I am fully aware that, pursuant to Section 3.42(h) of the Commission’s Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.” Protective Order attachment; *see also* exhibits D and E to Complaint Counsel’s Memorandum in Opposition to Respondents’ Motion to Strike Complaint Counsel’s Expert Witnesses and for Other Relief, filed Feb. 4, 2005 (executed declarations by Complaint Counsel’s experts).

C. Procedures for Filing Confidential Material in Pre-Trial Pleadings

The Commission's Rules of Practice outline the procedure for filing pre-trial motions that include information that is confidential, subject to a protective order. Pursuant to Rule 3.22(b), all written motions that include information subject to confidentiality protections pursuant to a protective order shall be filed in accordance with the procedures set forth in § 3.45(e). 16 C.F.R. § 3.22(b). Rule 3.45(e) states, in relevant part:

(e) *When . . . confidential information is included in briefs and other submissions.* If a party includes specific information that . . . is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file two versions of the document. A complete version shall be marked . . . "Subject to Protective Order," . . . , on the first page Submitters of . . . confidential material should mark any such material in the complete versions of their submissions in a conspicuous matter, such as with highlighting or bracketing. References to . . . confidential material must be supported by record citations to relevant evidentiary materials and associated ALJ . . . confidentiality rulings to confirm . . . confidential treatment is warranted for such material. . . . An expurgated version of the document, marked "Public Record" on the first page and omitting the . . . confidential information and attachment that appear in the complete version, shall be filed with the Secretary within five (5) days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise, and shall be served by the party on the other parties in accordance with the rules in this part. The expurgated version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the [complete] version.

16 C.F.R. § 3.45(e).

The Commission's Rules also mandate the format for filing pleadings with the Office of the Secretary that include confidential information. Pursuant to Rule 4.2(c)(3) regarding requirements as to form and filing of documents in an adjudicative proceeding, "the electronic copy of each . . . document containing . . . confidential material shall be placed on a diskette so labeled, which shall be physically attached to the paper original, and not transmitted by email." 16 C.F.R. § 4.2(c)(3) (emphasis added).

Through these filing rules, materials that have been labeled by a party or non-party as confidential are protected from disclosure to the public through public pleadings, even if the producing party has not yet had the opportunity to file for *in camera* treatment. Through the interim rules with requests for comments, dated April 3, 2001, the Commission amended Rule 3.22(b) to allow motions that seek pre-trial or procedural rulings and that contain confidential matter to be labeled "subject to protective order." 66 Fed. Reg. 17622 (Apr. 3, 2001). Prior to

the change in the Rules, parties were required to seek *in camera* treatment for exhibits to motions for summary decision because there was no provision for filing the documents as “subject to protective order.” See *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Trans Union Corp.*, 1993 FTC LEXIS 310 (Nov. 3, 1993). *Dura Lube* and *Trans Union*, both cited by the parties, were decided prior to the 2001 amendments to the Commission’s Rules.

The 2001 amendments were designed to clarify the rules regarding the treatment of confidential information, noting that:

[p]arties have . . . incorrectly asserted *in camera* status for pre-trial motions or other documents that are not being ‘offered into evidence.’ The *in camera* rules do not apply to such documents. See Rule 3.45(b). Motions that seek pretrial or procedural rulings, and that contain confidential matter, should be handled under the procedures for protective orders.

66 Fed. Reg. at 17624. See also *In re Rambus Inc.*, 2003 FTC LEXIS 27, at *2 (Feb. 26, 2003). “The amended rule further provides that an electronic copy of each public filing in an adjudicative proceeding shall be submitted to the Commission by e-mail, while an electronic copy of an *in camera* or otherwise confidential filing shall be submitted to the Commission on a diskette attached to the paper original of the filing.” 66 Fed. Reg. at 17624.

Thus, parties filing confidential material as part of motions for summary decision and other pre-trial motions are specifically prohibited from emailing such pleadings, and must identify the pleading as subject to a protective order on the first page, must bracket and highlight or bold the confidential material in the pleading, and must file a redacted public version of the pleading. Pursuant to the 2001 rule amendments, parties shall not file a motion for *in camera* treatment for confidential material included in pre-trial motions.

III. ANALYSIS

A. Contempt Motion

Complaint Counsel violated Rule 4.2(c)(3) by transmitting through email exhibits that are subject to the Protective Order on at least two separate occasions. See electronic files supp. response at attachment B (sworn declaration of Complaint Counsel), ¶ 13 (practice of serving motions by email); consolidated opposition at 6-7. This inappropriate conduct facilitated the violation of the ALJ’s Protective Order through the posting of Respondents’ confidential material on the Commission’s public website. Based on these violations of the Protective Order and Commission Rules, Respondents seek a finding of contempt, dismissal of the Complaint, and monetary sanctions. Contempt motion at 5-6. While the ultimate determination of Respondents’ contempt motion is certified to the Commission, the parties’ arguments which relate to these proceedings, including arguments regarding the Protective Order and the documents posted on the Commission’s public website, are set forth below.

1. Analysis of the Parties' Arguments

Respondents contend that Complaint Counsel's duty to maintain Respondents' confidential information is inviolate; that Complaint Counsel knowingly violated a legal duty owed to Respondents; that protective orders play a vital role in litigation; that Complaint Counsel's obligations under the Protective Order are clear and unmistakable; that Complaint Counsel previously violated this Court's Orders; that Complaint Counsel's instant violation of the Protective Order is egregious and demonstrates bad faith; and that there is a severe risk of irreparable harm caused by Complaint Counsel's violation of this Court's Orders, the Commission's Rules of Practice, and Respondents' rights. Contempt motion at 7-23. Complaint Counsel asserts that Respondents' contempt motion should be denied; that Respondents fail to meet their burden of proof under applicable legal standards; that Complaint Counsel did not act in bad faith; that Respondents have failed to establish harm; and that Respondents are not entitled to the demanded dismissal or monetary sanctions. Consolidated opposition at 7-66.

Complaint Counsel argues, incorrectly, that Respondents should have filed motions for *in camera* treatment. Electronic files supp. response at 4-7. This position represents a fundamental misunderstanding of the procedure for handling protected information during the pre-trial phase of a Part III proceeding. As discussed above, Respondents were not required to move for *in camera* treatment of exhibits to Complaint Counsel's motion for partial summary decision and Complaint Counsel's motion to compel because the exhibits were not being offered in evidence at trial. 16 C.F.R. § 3.45(b). See *In re Piedmont Health Alliance, Inc.*, 2004 FTC LEXIS 60, *7 (Mar. 16, 2004).

Complaint Counsel's arguments that the Protective Order does not protect information after the close of discovery or when Respondents over use the confidentiality designations are similarly without merit. See electronic files supp. response at 4-7. Section 14 of the Protective Order states: "The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter." Protective Order at ¶ 14. If the Protective Order is binding after the conclusion of the matter, it is certainly binding during the pendency of the matter. There is no question that the Protective Order applies to the exhibits at issue, as properly indicated by Complaint Counsel when filing the exhibits. Moreover, the Protective Order itself provides a procedure for challenging confidentiality designations which includes a provision that while such an application to challenge is pending "the Parties shall maintain the pre-application status of the Confidential Discovery Material." Protective Order ¶ 6. Complaint Counsel did not utilize this provision.

Complaint Counsel also makes the argument that Respondents have not suffered harm because the posted exhibits do not actually contain confidential information. Consolidated opposition at 26-60. Respondents, however, contend that they do not need to demonstrate harm. Show cause response at 1-2. Without engaging in a detailed analysis of the arguments presented,

which will be conducted when and if the exhibits are offered as exhibits at trial, it does appear that a number of the exhibits contain confidential information that is entitled to *in camera* treatment under the Commission's Rules and precedent. Even if some of the exhibits do not contain information rising to the level needed to merit *in camera* protection, Complaint Counsel has, nevertheless, violated Rule 4.2(c)(3) and the Protective Order by facilitating the dissemination to the public of material subject to the Protective Order. A review of the six challenged exhibits follows.

Exhibit 15 to Complaint Counsel's motion for partial summary decision ("Exhibit 15") and Exhibit R to Complaint Counsel's motion to compel ("Exhibit R") both contain net gross revenue and advertising expenditures by year for all six challenged products. Show cause response at 9-10, 13-14, and attached sworn declaration at ¶¶ 12-21. Although Complaint Counsel points to public information about the finances of Respondents, none of the examples cited by Complaint Counsel identify net gross revenue by product and year. Consolidated opposition at 47-51. Exhibit 45 of Complaint Counsel's motion for partial summary decision ("Exhibit 45") includes an advertising dissemination schedule. Show cause response at 12-13, and attached sworn declaration at ¶¶ 25-32. Exhibit 15, Exhibit R, and parts of Exhibit 45 meet the standards for *in camera* treatment as confidential business records because Respondents have demonstrated by sworn declaration that disclosure of this information would result in a clearly defined, serious competitive injury to Respondents.

Exhibit 42 of Complaint Counsel's motion for partial summary decision is a balance sheet for Basic Research, which has since been renamed Ban, combined with three other firms. Show cause response at 11-12, and attached sworn declaration at ¶¶ 22-24. Respondents argue that this is confidential information and "would be valuable to Respondents' competitors because it would allow the competitors to construct an accurate financial model of Respondents' business to Respondents' detriment." Show cause response, attached declaration at ¶ 23. Complaint Counsel argues that the document is outdated and that Respondents' corporate structure has changed dramatically since this document was created. Consolidated opposition at 53-56. A review by the Court indicates that this document is over two years old and refers to the balance sheet of a company that has since been significantly restructured. As such, it does not meet the standards for *in camera* treatment.

Exhibit 36 to Complaint Counsel's motion for partial summary decision includes an email from an individual consumer which includes the consumer's name, email address, and personal health information. Show cause response at 10-11, and attached sworn declaration at ¶¶ 33-36. This personal information is not relevant to these proceedings and should have been redacted by the parties. This consumer's personal information should not have been posted on the Commission's public website in clear violation of this consumer's reasonable expectation of privacy.

Exhibit 11 to Complaint Counsel's motion for partial summary decision ("Exhibit 11") includes product formulations for all six products at issue. Show cause response at 8-9, and

attached sworn declaration at ¶¶ 5-11. Exhibit 11 is Respondents' response to Complaint Counsel's first set of interrogatories. *Id.* The interrogatories were marked by Respondents as a "Public Document" on the cover but marked as "Restricted, Confidential – Attorneys Eyes Only" on the attached product formulations. Consolidated opposition at 35-47. Thus, trade secrets that were attached by Respondents to interrogatory responses have been made public by Complaint Counsel. Complaint Counsel is on notice that the product formulations in Exhibit 11 are subject to the Protective Order and Complaint Counsel shall treat them as such in the future.

2. Certification of Contempt Motion

Respondents seek an order to show cause why Complaint Counsel should not be held in contempt for violation of the ALJ's Protective Order and the Commissions' Rules. Contempt motion at 23-25. Contempt proceedings are authorized by Commission Rule 3.42(h) which states:

(h) Failure to comply with Administrative Law Judge's directions. 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.

16 C.F.R. § 3.42(h). In addition, pursuant to Commission Rule 3.22(a), "[t]he Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule." 16 C.F.R. § 3.22(a); *see also* Commission Rule 3.42(c)(10) stating that Administrative Law Judges have the authority to "certify questions to the Commission for its determination." 16 C.F.R. § 3.42(c)(10).

Here, the information that was disclosed to the public through the Commission's public website was clearly subject to the Protective Order and entitled to protection under the Protective Order. Therefore, Complaint Counsel's conduct, which violated Commission Rule 4.2(c)(3), resulted in a violation of the Protective Order. Respondents' Contempt motion must be certified to the Commission pursuant to Rule 3.42(h) because Complaint Counsel failed to comply with the Commission's Rules and the ALJ's Protective Order, regardless of fault, as detailed above and further described in the pleadings and sworn declarations of the parties. As a result, Respondents' trade secrets and confidential business records, as well as the personal information of an individual consumer, were posted on the Commission's public website. Thus, Complaint Counsel may well be in contempt of the Commission under the circumstances presented. Therefore, certification of the question pursuant to Rule 3.42(h) is appropriate.

Furthermore, Respondents' request to dismiss the Complaint may not be inappropriate given the facts established thus far. However, that determination, as well as Respondents'

request for monetary sanctions, are certified to the Commission as these sanctions are beyond the authority of the ALJ. 16 C.F.R. § 3.22(a); *Drug Research Corp.*, 1963 FTC LEXIS 43, at *36-37. Respondents contend that there is evidence of a “systemic [agency] problem that transcends this proceeding” and Complaint Counsel, through its sworn declarations, implicates other employees and components of the Commission. Electronic files supp. response, attachment B (sworn declaration of Complaint Counsel), ¶¶ 13, 22; contempt motion at 5-6; consolidated opposition at 30 n.21 (stating that the posting did not occur “solely due to acts performed by, or at the direction of, Complaint Counsel”). Indeed, it appears that violations of the Commission’s Rules and the ALJ’s Protective Order may well extend beyond Complaint Counsel. Therefore, certification to the Commission is required pursuant to Rules 3.22(a) and 3.42(c)(10). 16 C.F.R. §§ 3.22(a), 3.42(c)(10).

B. Electronic Files Motion

Respondents Basic Research and Ban filed a motion seeking an order requiring the Commission to provide Respondents with electronic files showing who accessed Respondents’ confidential information while it was on the Commission’s public website. Electronic files motion at 1-4. Respondents requested the electronic files to determine who accessed Respondents’ confidential information; to contact all such persons and notify them that the disclosure of Respondents’ trade secrets was inadvertent; to attempt to have all such persons execute a non-disclosure agreement; and to seek injunctive relief against all persons who accessed Respondents’ trade secrets and other highly confidential information and who refuse to execute a non-disclosure agreement. Electronic files motion at 3. Respondents seek all web server files, including without limitation the transfer log, access log, error log, and referrer log; the system security log, “wtmp” file, “utmp” file, and “failedlogin” file; and a copy of the electronic mirror. Electronic files motion at 2-3.

Complaint Counsel contends that it has provided Respondents with a copy of the electronic mirror and that, after consultation with the Commission’s General Counsel’s office, it has been advised that the Commission’s privacy policy prohibits disclosure of the requested electronic files. Electronic files supp. response at 3-4. As with the previous motions, Complaint Counsel argues that Respondents’ confidential information has not been granted *in camera* status. Electronic files supp. response at 3-7. As discussed above, this argument is misplaced and is rejected.

Complaint Counsel further argues that the electronic files may not indicate who accessed the information posted on the website, but may, instead, indicate only the identity of the service provider. Electronic files supp. response at 3-4. Respondents contend that they should not be denied the electronic files solely because the files may be incomplete. Electronic files reply at 8. The issue of whether the electronic files should be released to Respondents should not depend upon the content of the information found in those electronic files. Respondents should be permitted to take every reasonable and legal step necessary to protect their competitive position with respect to released trade secrets and confidential business documents.

However, the release of the electronic files may violate the Commission's privacy policy. Electronic files supp. response at 3-4. Respondents have provided no basis to suggest that issuance of an order granting such release is within the authority of the Administrative Law Judge. Pursuant to Rule 4.11(h), only the General Counsel may authorize Commission staff to disclose information from Commission records not currently available to the public. 16 C.F.R. § 4.11(h). As previously noted, Commission Rule 3.22(a) provides that "[t]he Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate." 16 C.F.R. § 3.22(a). *See also* 16 C.F.R. § 3.42(c)(10). Because proper resolution of these issues can be made only by the Commission, Respondents' electronic files motion requires certification to the Commission.

C. Discovery Motion

Respondents seek additional discovery on the issue of Complaint Counsel's violation of the Protective Order. Discovery motion at 1-2. Specifically, Respondents seek depositions of three members of Complaint Counsel, a member of the Office of the Secretary, and documentary evidence including: a personnel file; all communications regarding this incident; all policies, procedures, manuals, or similar concerning the handling of confidential materials; and all opinions, memoranda, or similar materials concerning the Commission's privacy policy. Discovery motion at 9-13.

Complaint Counsel contends that Respondents' request for discovery should be denied because Respondents' requested discovery is not material to the claims or defenses in this action and because Complaint Counsel has already provided detailed sworn statements. Consolidated opposition at 66-71.

Respondents' motion seeks discovery of members of Complaint Counsel and other Commission employees. Discovery motion at 9-13. Generally, requests for testimony, pursuant to compulsory process, of Commission employees in cases in which the Commission is not a party require notice to the General Counsel. 16 C.F.R. § 4.11(e). In addition, the issues raised by Respondents' discovery motion are intertwined with the other motions addressed in this Order which the Court has determined it has no authority to resolve pursuant to Commission Rule 3.22(a). 16 C.F.R. § 3.22(a). *See also* 16 C.F.R. § 3.42(c)(10). Accordingly, Respondents' motion for additional discovery is certified to the Commission.

IV. CONCLUSIONS


For the above stated reasons and pursuant to Commission Rules 3.22(a), 3.42(c)(10), and 3.42(h), it is hereby **ORDERED** that Respondents' three motions: (1) seeking a finding of contempt against Complaint Counsel, seeking dismissal of the Complaint, and seeking monetary sanctions; (2) seeking an order compelling the Commission to provide Respondents with electronic files showing who accessed Respondents' confidential information while it was on the

Commission's public website; and (3) seeking additional discovery are **CERTIFIED** to the Commission for resolution without recommendation.

The Commission is best suited to decide Respondents' three motions and to investigate and determine, as necessary, the extent of misconduct; address concerns regarding whether training, supervision, and procedures throughout the Commission are sufficient to safeguard confidential information; ensure compliance with the existing Rules; and promote confidence by the public and industry that confidential information will be properly safeguarded by Commission personnel. A strong message by the Commission regarding the sanctity of a firm's confidential information, the legal duty owed to respondents, and the substantial commercial harm that could result from the careless handling of confidential information, might be warranted to ensure the public trust and facilitate compliance with agency enforcement actions during both the initial investigation and the Part III processes.

The above captioned proceedings, including any new or pending motions, oppositions to motions, or discovery are hereby **STAYED** until these matters are addressed by the Commission. This Order does not constitute a ruling on the merits of the case.

ORDERED:


Stephen J. McGuire
Chief Administrative Law Judge

Date: April 6, 2005