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 DENYING BASIC RESEARCH'S MOTION TO COMPEL

I.

On September 10, 2004, Respondent Basic Research, L.L.C. ("Respondent") filed a motion to compel ("Motion"). On September 16, 2004, Respondent filed a Notice of Correction withdrawing one section of its Motion. On September 23, 2004, Complaint Counsel filed an unopposed motion for extension of time to file its opposition seeking an extension from September 27, 2004 to October 4, 2004. On October 4, 2004, Complaint Counsel filed its opposition to the Motion ("Opposition").

Complaint Counsel's motion for an extension is **GRANTED**. Upon consideration of the briefs and attachments, and for the reasons set forth below, Respondent's motion to compel is **DENIED**.

II.

Respondent seeks an order compelling Complaint Counsel to provide more complete answers to Respondent's First Set of Interrogatories. Motion at 1. Respondent identifies six interrogatories that it contends have not been answered completely and argues that Complaint Counsel's general objections are insufficient. Motion at 5-15. Complaint Counsel contends that it fully responded to each of the interrogatories and that Respondent has failed to demonstrate the circumstances necessary to breach the various privileges asserted. Opposition at 7-22.

III.

A.

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

Commission Rule 3.31(c)(4)(ii) provides that a party may discover facts known or opinions held by an expert who is not expected to be called as a witness "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." 16 C.F.R. § 3.31(c)(4)(ii). The party seeking discovery from a non-testifying retained expert faces a heavy burden. *Hoover v. Dep't of Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980). Mere assertion that exceptional circumstances exist, without providing any facts in support of this contention, is not sufficient to compel the disclosure of nondiscoverable documents. *Martin v. Valley Nat'l Bank of Arizona*, 1992 U.S. Dist. LEXIS 11571, *13 (S.D.N.Y. 1992).

The well recognized rule of *Hickman v. Taylor*, 329 U.S. 495, 510 (1947), protects the work product of lawyers from discovery unless a substantial showing of necessity or justification is made. Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3). Work product that reveals attorney client communications or the attorneys' mental processes in evaluating the communications "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981).

The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-152 (1975). This privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated. *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Assertion of the deliberative process privileges requires: (1) a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege. *Hoechst Marion Roussel*, 2000 FTC LEXIS 134, at *9; *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). The deliberative process privilege is a qualified privilege and can be overcome where there is a sufficient showing of need. *In re Sealed Case,* 121 F.3d 729, 737 (D.C. Cir. 1997); *U.S. v. Farley*, 11 F.3d 1385, 1386 (7th Cir. 1993).

B.

Interrogatory 1(b) seeks information regarding "who interpreted the [p]romotional [m]aterial in question" and interrogatory 1(c) seeks information regarding "all extrinsic evidence . . . that was relied upon in determining what representations were conveyed." Motion at 5. Complaint Counsel argues that these persons fall within the deliberative process, non-testifying expert, and work product privileges, and that testifying experts will be identified as provided in the Scheduling Order. Opposition at 9-10. Respondent has not identified any basis to overcome the privileges claimed to this overly broad interrogatory. Moreover, use of an interrogatory to undermine the schedule established for the production of expert reports is not appropriate.

Interrogatory 1(d) seeks information regarding the substantiation that Complaint Counsel contends Respondents needed to have a reasonable basis for their representations. Motion at 6-7. Complaint Counsel contends that it answered this question by outlining specific sources of industry guidance, including specific reference to agency statements, Commission Policy Statements, caselaw and other information, including prior orders. Opposition at 11. Complaint Counsel further argues that the interrogatory requires speculation and that Complaint Counsel properly objected, asserting privilege with respect to information involving non-testifying experts, deliberative process, and work product. *Id.* Upon review of Complaint Counsel's Answer it is clear that Complaint Counsel provided an adequate response to the question asked. Complaint Counsel will not be required to provide a more speculative response.

Interrogatory 1(e) seeks information regarding the basis of Complaint Counsel's contention that Respondents did not have a reasonable basis to substantiate their representations. Motion at 8. Complaint Counsel does not respond to this allegation in their Opposition. However, it is presumed that Complaint Counsel intended its general objections and arguments raised regarding similar interrogatories to apply to this interrogatory. In addition, in reviewing Complaint Counsel's response to this interrogatory, Complaint Counsel raises the objections that

the interrogatory seeks information prepared in anticipation of litigation; protected by the deliberative process privilege; protected by the non-testifying witness privilege; and that expert witness materials would be provided at the appropriate time. Opposition, Attachment A at 6. In addition, Complaint Counsel responds that "the evidence submitted by Respondents does not amount to competent and reliable scientific evidence . . . ." *Id.* Respondent has not identified any basis to overcome the privileges claimed to this overly broad interrogatory. Moreover, use of an interrogatory to undermine the schedule established for the production of expert reports is not appropriate.

Interrogatory 2 seeks information regarding Complaint Counsel's analysis of the substantiation provided by Respondent. Motion at 9. Complaint Counsel argues that this question seeks the identity and opinions rendered by non-testifying experts; seeks prematurely the identity and opinions of expert witnesses; seeks information prepared in anticipation of litigation and attorney work product; seeks information protected by the deliberative process privilege; and is unduly burdensome. Opposition at 14. Complaint Counsel represents that Respondent provided over 284 different studies, analyses, and tests for the ephedra products alone. *Id.* Respondent has not identified any basis to overcome the privileges claimed to this overly broad interrogatory. Moreover, use of an interrogatory to undermine the schedule established for the production of expert reports is not appropriate.

Interrogatory 3 seeks identification of all market research or other evidence that is potentially relevant to determining consumer perceptions of Respondent's advertising. Motion at 10. Complaint Counsel responds that this interrogatory calls for expert opinions; that information related to testifying experts will be disclosed as required under the scheduling order; and that Complaint Counsel is not aware of any market research at this time. Thus, it appears that Complaint Counsel has provided a full and complete response to this interrogatory. Respondent has not identified any basis to overcome the privileges claimed to this overly broad interrogatory. Moreover, use of an interrogatory to undermine the schedule established for the production of expert reports is not appropriate.

Interrogatory 4 seeks the Commission's definition of the terms: visibly obvious, rapid, substantial, and causes. Motion at 11. Complaint Counsel argues that Respondents are presumed to understand the meaning of the words used in their advertising; additional information will be provided when expert discovery is provided; and the more than two single-spaces pages of responses to the interrogatory are sufficient. Reviewing Complaint Counsel's response along with their objections, it is clear that Complaint Counsel provided a sufficient response, including general objections, general comments, and over a single-spaced page providing facts regarding these four terms. *See* Opposition, Attachment A at 9.

Interrogatory 5 seeks information about materials provided to persons unaffiliated with the Commission, including information provided to the United States House of Representatives. Motion at 13. Complaint Counsel answered the interrogatory, disclosing that copies of the advertisements and Livieri study were disclosed but not provided to the minority and majority

counsel of the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations. Motion at 13-14; Opposition at 18. Respondent argues that the response is incomplete because it fails to "identify the persons" to whom such information was provided. Motion at 14. This argument is without merit – the persons to whom the material was disclosed have been provided.

Interrogatory 6 seeks information regarding why the Complaint was not filed prior to June 16, 2004. Motion at 14. Complaint Counsel argues that this information is not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent. Respondent's defense regarding delay has been stricken and the interrogatory is not relevant to any pending issues in the case. Moreover, the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission's decision to file the Complaint. *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772 (D. Del. 1980); *In re Exxon Corp.*, 1981 FTC LEXIS 113 (Jan. 19, 1981).

IV.

For the above-stated reasons, Respondent's motion to compel is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: November 4, 2004