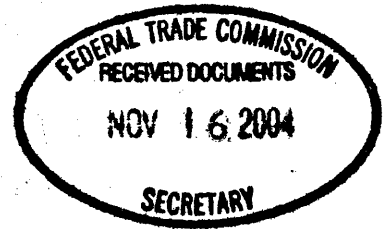


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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.,)
 dba BASIC RESEARCH, L.L.C.,)
 OLD BASIC RESEARCH, L.L.C.,)
 BASIC RESEARCH, A.G.)
 WATERHOUSE, BAN, L.L.C.,)
 dba KLEIN, BECKER, USA,)
 NUTRASPORT, and SOVAGE)
 DERMALOGIC LABORATORIES,)
DENNIS GAY,)
DANIEL B. MOWREY,)
 dba AMERICAN PHYTOTHERAPY)
 RESEARCH LABORATORY, and)
MITCHELL K. FRIEDLANDER,)
)
Respondents.)

DOCKET NO. 9318

RESPONDENTS, BASIC RESEARCH, L.L.C., A.G. WATERHOUSE, L.L.C., KLEIN-BECKER USA L.L.C., NUTRASPORT, L.L.C. AND SOVAGE DERMALOGIC LABORATORIES, L.L.C.'S NOTICE OF ADOPTION OF RESPONDENTS DENNIS GAY AND DANIEL MOWREY'S RESPECTIVE RESPONSES TO COMPLAINT COUNSEL'S MOTION FOR PROTECTIVE ORDER TO LIMIT RESPONDENTS' DISCOVERY OR, IN THE ALTERNATIVE, TO CLARIFY SCHEDULING ORDER

INTRODUCTION

Complaint Counsel commenced this action against Basic Research, L.L.C., four other companies and three individuals. On August 11, 2004, a Scheduling Order was entered by the court providing that “*each party*” was limited to propounding 60 interrogatories, 60 document requests and 60 requests for admissions. On October 29, 2004, counsel for party Dennis Gay propounded 27 interrogatories, 11 document requests and 54 requests for admissions. Complaint Counsel, however, has refused to respond to any of the discovery requests and has instead asked that the court change its order to limit Respondents collectively to 60 of each type of discovery requests, rather than per party.

Because the position adopted by Complaint Counsel threatens to prejudice the rights of each party to this litigation, Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker usa, NutraSport, L.L.C., and Sovage Dermalogic Laboratories, L.L.C. file this response. Each of the corporate Respondents, Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker usa, NutraSport, L.L.C., and Sovage Dermalogic Laboratories, L.L.C., adopts the arguments raised in Respondent Dennis Gay’s Reply Memorandum in Opposition to Complaint Counsel’s Motion for Protective Order to Limit Respondent’s Discovery or, in the Alternative, to Clarify Scheduling Order and Respondent Daniel B. Mowrey’s Response to Complaint Counsel’s Motion for Protective Order to Limit Respondent’s Discovery or, in the Alternative, to Clarify Scheduling Order. Accordingly, for the sake of brevity, the arguments made by those Respondents will not be repeated. But corporate Respondents raise the following additional points for this Court’s consideration.

ADDITIONAL ARGUMENT

First, it is fundamentally unfair for Complaint Counsel to ask this Court to construe the Scheduling Order to limit discovery requests to each side despite the Scheduling Order's plain language at this juncture now that written discovery has closed. Complaint Counsel has been aware of this issue since at least August 14, 2004 when this Court promulgated its Scheduling Order. Following review of this Court's Draft Proposed Scheduling Order, the specific challenge now made by Complaint Counsel, i.e. whether discovery requests were allotted on a per party or per side basis, was discussed at this Court's hearing of August 10, 2004. The Scheduling Order of this Court, dated August 11, 2004, effectively resolved that dispute and clearly granted "each party" the right to propound up to "a total of 60 document requests, 60 interrogatories, and 60 requests for admissions". Had Complaint Counsel any question as to the meaning of this Court's Scheduling Order, Complaint Counsel could have raised it in a timely fashion. As it stands, by waiting until cutoff for written discovery to raise this challenge, Complaint Counsel is attempting to gain an unfair advantage and to prejudice all Respondents' discovery efforts.

The language of the Scheduling Order is plain and unambiguous. As such, the parties were entitled to rely upon its clear and unambiguous provisions. See e.g. *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 337 F.Supp.2d 862, 871 n.11 (N.D. Tex. 2004). Indeed, Complaint Counsel can point to no ambiguity lending credence to its interpretation. All Complaint Counsel does is cite an incomplete and therefore misleading reference in the transcript of the hearing. The full transcript, set forth in Respondent Daniel B. Mowreys' Response clarifies that the issue of whether discovery requests should be limited to party or side

was one squarely presented to this Court for resolution. Because the Order is clear and clearly addressed the issue now raised, Respondents who are parties to that Order were entitled to rely on the language of the Order in fashioning their respective plans for discovery. *Id.*

In specific, under the plain language of the Scheduling Order, provided that each Respondent was entitled to promulgate separate discovery requests. Now that each has done so, Complaint Counsel argues that they should not have relied on the language of the Scheduling Order and should now suffer the inability to conduct the discovery each has planned. Consideration of the so-called “interests-of-justice factors”, however, weighs decidedly against Complaint Counsel’s position. See e.g. *U.S. v. Roberts*, 978 F.2d 17, 22 (1st Cir. 1992) (identifying seven nonexclusive factors as being helpful for courts to consider in exercise of discretion as including “(1) the nature of the case, (2) the degree of tardiness, (3) the reasons underlying the tardiness, (4) the character of the omission, (5) the existence *vel non* of cognizable prejudice to the nonmovant in consequence of the omission, (6) the effect of granting (or denying) the motion on the administration of justice, and (7) whether the belated filing would, in any event, be more than an empty exercise.”)

Review of the factors significant to this matter demonstrates that Complaint Counsel has waived its right to bring this Motion because of the prejudice Respondents would suffer. First, Complaint Counsel has provided no justification for delaying until the conclusion of discovery to bring its Motion. As discussed above, Complaint Counsel was certainly aware of this issue as of August 11, 2004, the date of the Scheduling Order. The admittedly tight discovery schedule with a written discovery cutoff of November 8, 2004 rendered any dispute over the Scheduling Order’s language or scope time sensitive. Despite this, Complaint Counsel

waited nearly three months to raise this issue with the Court. Complaint Counsel has been amply aware that from the inception of the discovery phase of this litigation Respondents have been propounding discovery requests on a per party basis as the Scheduling Order allowed. Complaint Counsel's Motion for Protective Order stays as moot. Yet Complaint Counsel took no steps to clarify or raise the issue until it would be too late for Respondents to reformulate their discovery requests should the Court grant Complaint Counsel's request. For that reason alone, this Court should deny Complaint Counsel's Motion for Protective Order or alternatively "clarification". See *Brown and Williamson v. Pataki*, 152 F.Supp.2d 276 (S.D.N.Y. 2001) (noting that where litigants are operating under tight scheduling order, delay of one party in seeking particular relief leading to prejudice of others constitutes a waiver of relief sought). Thus while no cognizable prejudice accrues to Complaint Counsel should this Court deny its untimely Motion, each Respondent who relied on this Court Scheduling Order would be forced to proceed to Hearing without the full opportunity to conduct required and relevant discovery should this Court grant Complaint Counsel's belated motion.

Second, as noted in Respondent Daniel B. Mowrey's Response, Complaint Counsel mis-cites the transcript of this Court's hearing of August 10, 2004 in its effort to convince this Court that its current "interpretation" of the Scheduling Order was understood by all Respondents. The language itself set out in Daniel B. Mowrey's Response, and in particular, Mr. Friedlander's objections clarify that at the conclusion of the August 10, 2004 hearing, whether discovery requests would be allocated on a per side or per party basis was a matter that this Court has yet to decide. The Scheduling Order unambiguously resolved that matter by clear language granting each party allotted discovery requests. Complaint Counsel's studious

avoidance of that language from the hearing is similar to their silence on the issue for the past three months of discovery. This Court should not sanction Complaint Counsel's silent ambush in failing to timely raise this issue by allowing it to now ignore its discovery obligation once it is too late for each Respondent to reformulate its discovery plan.

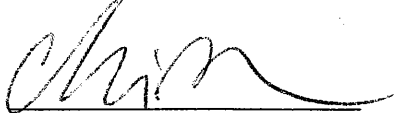
Finally, Complaint Counsel's disingenuous argument is underscored by its earlier attempt to schedule "a brief status conference" referenced in its Motion. There is no provision for such a meeting in the Commission Rules of Practice and the intent of the Status Conference is clear, to avoid having to directly raise this issue in the face of the unambiguous language of the Scheduling Order. In an effort to avoid seeking relief directly from this Court after its inexcusable delay in raising the issue of discovery allotments, Complaint Counsel attempted to recast the issue as a brief matter of clarification rather than a request for reconsideration. The effort also appears to have been a way to avoid briefing the issue for presentation to this Court. As discussed above, Complaint Counsel seeks nothing other than a fundamental reconsideration of this Court's Scheduling Order. What is even more egregious, Complaint Counsel makes its request at a time most calculated to hamper and prejudice Respondents respective efforts to prepare this case for trial. By waiting until the close of discovery, Complaint Counsel has attempted to ensure that Respondents would not have the opportunity to fashion any appropriate response to the relief it has requested. Complaint Counsel's delay should not go rewarded. More significantly, Respondents should not be required to forego legitimate relevant discovery when their requests were promulgated in accordance with the clear language of this Court's Scheduling Order.

CONCLUSION

For the foregoing arguments, as well as those incorporated herein, it is respectfully submitted that Complaint Counsel's motion for a protective order should be denied.

DATED this 15th day of November, 2004.

Respectfully submitted,



Jeffrey D. Feldman
Gregory L. Hillyer
Christopher P. Demetriades
FeldmanGale, P.A.
Miami Center, 19th Floor
201 South Biscayne Blvd.
Miami, Florida 33131
Tel: (305) 358-5001
Fax: (305) 358-3309

Attorneys for Respondents Basic Research, LLC,
A.G. Waterhouse, LLC, Klein-Becker USA, LLC,
Nutrasport, LLC, Söavage Dermalogic Laboratories,
LLC and Ban, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 15th day of November, 2004 as follows:

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

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

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

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

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

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

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

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

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

CERTIFICATION FOR ELECTRONIC FILING

I HEREBY CERTIFY that the electronic version of the foregoing is a true and correct copy of the original document being filed this same day of November 15, 2004 via Federal Express with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.


CHRISTOPHER P. DEMETRIADES

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