

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

FEDERAL TRADE COMMISSION
04 NOV 26 PM 4: 31
DOCUMENT PROCESSING

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 DOCUMENT

**COMPLAINT COUNSEL'S OPPOSITION
TO BASIC RESEARCH'S MOTION TO COMPEL PROPER PRIVILEGE LOG**

Complaint Counsel opposes Respondent Basic Research's *Motion To Compel Proper Privilege Log* that seeks to compel Complaint Counsel to "provide a privilege log with [sic] complies with the requirements of 16 C.F.R. § 3.38A." Mot. at 1. As set forth below, Respondent's *Motion* is without merit. First, the *Privilege Log* gives Respondents sufficient information about the documents so that Respondents have a full opportunity to assess privilege claims by categorizing the documents with a descriptive label clearly designating the types of documents. See Attachment A hereto. These categories demonstrate that the documents are protected by either the deliberative process privilege, the work product privilege, the law enforcement files privilege and the confidential informant privilege. Second, Respondent's *Motion* is an unnecessary and overly burdensome attempt to have Complaint Counsel engage in an enormous effort to catalog each and every document that otherwise falls within long

recognized privileges. Moreover, Respondent asks this Court to order Complaint Counsel to do what Respondents have thus far declined to do – provide a document by document list of those documents falling within the scope of attorney work product. Respondent should not be allowed to compel Complaint Counsel to do what Respondents themselves have failed to do.

BACKGROUND

Respondents have filed voluminous discovery, making far reaching requests, that, for example, seek information about everything from every weight loss case ever filed to all expert reports and appellate briefs that the FTC has filed in any part 3 and 13(b) proceeding. *See, e.g.,* Basic Research’s *Second Set of Requests For Production*, nos. 3, 6 & 8 (“3. All documents relating to submissions by the Federal Trade Commission in all prior weight loss cases.”; “6. All expert reports that the Federal Trade Commission has filed in other part three proceedings or proceedings under Section 13(b) of the FTC Act.”; and “8. All appellate briefs filed by the Federal Trade Commission in other part 3 proceedings or proceedings under Section 13(b) of the FTC Act.”) (Sept. 9, 2004).

On October 6, 2004, Respondents’ counsel, Jeffrey D. Feldman, sent a letter attaching Basic Research’s and Ban’s Privilege Log. Attachment B hereto. Respondents’ counsel’s letter stated that he has “yet to review the listed documents,” and that the log was being provided “with the express understanding that some of the documents on the log may not be privileged or privileged for reasons other than those asserted.” Attachment B, Ltr. at 1 (Oct. 6, 2004). Although Basic Research’s counsel has repeatedly represented that he will revise their log and supplement their document production with the documents that were not privileged, to date we have not received either a revised log or additional documents. None of the other seven

Respondents has provided a privilege log, despite our repeated requests.

By letter dated October 15, 2004, Complaint Counsel stated our concerns with the nature and scope of Respondents' Privilege Log. Attachment C hereto. Complaint Counsel's letter stated that Respondents' Privilege Log appeared to be "draft" (attachment C at 1-2), used bare assertions to invoke attorney client and work product privileges (attachment C at 2), and requested that Respondents identify "the specific subject matters of the withheld documents" (attachment C at 3). Complaint Counsel further noted that Respondents' Privilege Log did not "distinguish authors from recipients." Attachment C at 3. Complaint Counsel also attached a copy of our *Privilege Log* to this October 15, 2004, letter, in accordance with the objections provided in its responses to the requests for production of documents. *See* Attachment C at 1; Attachment A. Complaint Counsel's *Privilege Log* includes, for each category of documents, the following headings: "*Author, Recipient, Description, and Privilege(s).*" Attachment A at 3. The Log further identifies by name, position, and address, all staff and management who may have possession, custody or control of documents that may be responsive to the document requests. *See* Attachment A at 1-2.

Respondents' raised objections to Complaint Counsel's *Privilege Log* during the course of several telephone conversations. Complaint Counsel offered to try and resolve Respondents' concerns by offering to provide document by document information for those documents that Complaint Counsel has that were either received from or sent to third parties, however, Respondents rejected Complaint Counsel's attempts to compromise.¹ Respondents stated that

¹ Contrary to Respondent's assertion (Mot. at 6), the parties did not reach any agreement to provide further information. Although Complaint Counsel, Lauren Kapin and Robin Richardson, attempted to resolve this conflict by offering to provide document by

they would not accept anything less than a document by document index for each and every document contained on the *Privilege Log*. Respondents filed the instant *Motion* on November 18, 2004.²

ARGUMENT

I. **Complaint Counsel's *Privilege Log* Provides Sufficient Information And Identifying Privileged Documents By Categories Is Justified Under The Applicable Rules and Legal Standards.**

A. **The Rules Applicable to Asserting A Claim of Privilege.**

The RULES OF PRACTICE limit discovery to information “reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or to the defenses of any respondent.” RULE 3.31(c)(1); *FTC v. Anderson* 631 F.2d 741, 745 (D. C. Cir. 1979). With respect to claims of privilege, the RULES provide:

Any person withholding material responsive to . . . written interrogatories requested pursuant to § 3.35, a request for production or access pursuant to § 3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. **Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions,**

document information for those documents that Complaint Counsel has that were either received from or sent to third parties, Counsel for Respondent Daniel B. Mowrey, Ronald F. Price, expressly declined to reach any settlement of this issue. Indeed, Complaint Counsel asked whether the parties could reach any compromise short of providing information about each and every document on the *Privilege Log*. Mr. Price stated that Respondents would *not* agree to *any* compromise short of providing the requested information about each and every document listed by category in the *Privilege Log*. Shortly thereafter, Respondent Basic Research filed this *Motion*.

² Respondent filed and served this motion after the close of business on Friday, November 15, 2004. By email dated Monday November 18, 2004, Complaint Counsel informed Respondents that the filing would be treated as served on Monday, November 18.

and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

Rule 3.38A(a) (emphasis supplied). “Complaint counsel must comply with Rule 3.38A, by providing information sufficient to identify each item responsive . . . in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege.” *R.J. Reynolds Tobacco Co.*, No. 9285, 1998 FTC LEXIS 179, *2 (Sept. 24, 1998).

The Administrative Law Judge “retains the discretion to ease the requirements for privilege logs if a literal application of the rule would be unduly burdensome or if the Administrative Law Judge’s experience indicates that a description of a category of items (*e.g.*, staff memos to the Commission recommending issuance of a complaint) is sufficient.” *R.J. Reynolds Tobacco Co.*, *2-3 (citing Rule 3.42(c)). The Administrative Law Judge may limit discovery to preserve privileges. 16 C.F.R. 3.31(c)(2).

A party may file a motion “for an order compelling disclosure or discovery,” pursuant to RULE 3.38(a). The party making the objection has the burden of showing that the objection is justified. RULE 3.38(a)(1).

B. The Privilege Log Sufficiently Describes the Applicable Privileges.

Respondent recognizes that Complaint Counsel has provided a privilege log with descriptive categories. *See* Mot. at 2. Respondent argues that the Privilege Log “does not specifically identify any of the documents withheld under claim of privilege, does not identify any of the authors or recipients of the withheld documents (including persons outside the FTC), and does not identify the dates on which the withheld documents were created.” Mot. at 2. Respondents’ arguments are without merit.

First, Complaint Counsel's *Privilege Log* sufficiently identifies the type of documents withheld under claim of privilege by using a descriptive category, describing the nature of the documents covered and citing the applicable privilege. For example, the following is an excerpt of the first several items of the *Privilege Log*:

1.	BCP Staff	BCP Staff and Management	Memos re: discussions with expert about calcium and weight loss from February 2003 - March 2004 and Expert's draft/proprietary confidential study in another active investigation.	Work Product Deliberative Process
2.	BCP Staff	BCP Staff and Management	Email re: discussions with expert about calcium and weight loss from February 2003 - March 2004 and Expert's draft/proprietary confidential study in another active investigation.	Work Product Deliberative Process
3.	BCP Management	-	Attorney legal research includes selected pages of Rand Report with highlights and handwritten annotations showing mental impressions	Work Product Deliberative Process
4.	BCP Management	-	Attorney research memorandum describing or analyzing dietary supplement and weight loss cases by ingredients	Work Product Deliberative Process
5.	BCP Staff and NIH Staff	BCP Staff and Management and NIH Staff	Notes re: non-testifying expert re: Livieri study.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.

Attachment A at 3. This excerpt demonstrates that the *Privilege Log* clearly identifies the subject matter with sufficient clarity, describing with specificity the subject matter of the covered

documents. Respondent's bald assertion that the *Privilege Log* contains only "broad categories of documents," (*see* Mot. at 2), is thus simply wrong. A review of Complaint Counsel's *Privilege Log* shows that the categories include specific details about the documents included, such as: (a) the involvement of non-testifying experts; (b) the names of referenced studies; and (c) content descriptions of e-mails. *See Privilege Log* excerpts *supra* at 6; *see, also*, Attachment A. Complaint Counsel's meaty descriptions stand in contrast to the one and two word labels that Respondents used in its *Privilege Log*. *See*, Attachment B.

Second, Complaint Counsel's *Privilege Log* clearly identifies the staff and management at the Bureau of Consumer Protection, detailing each person's position, as well as similarly identifying the staff and management at the Bureau of Economics. *See* Attachment A at 1-2. The *Privilege Log* identifies by name each of the attorneys and non-attorneys. *Id.* This identification is provided as an overarching definition to the *Privilege Log*, because of the way that Bureau engages in the decision-making process: This process entails numerous pre-decisional discussions of the relevant legal issues and arguments. *See, e.g.*, Attachment A at 4 (Nos. 11-14, 16). Documents are exchanged between various staff as part of the administrative process to sift through, analyze and evaluate issues prior to reaching a decision. Like many other enforcement actions, this case involved Complaint Counsel's investigation, deliberations among staff and the Commission regarding investigational and enforcement related decisions, consultations with staff and non-testifying experts regarding the nature of the substantiation and advertising issues, and various attorney research and strategy discussions. Complaint Counsel has been involved with deliberations with other staff, as well as other offices at the Bureau of Consumer Protection and the Commission in reaching the determination to issue a Complaint.

In addition, the *Privilege Log* expressly provides the names, addresses, positions and organizations of all involved authors and recipients. See Attachment A at 1-2. Respondent's protestations aside, these descriptions clearly demonstrate that these documents are protected by privilege. For example, the documents contained in the category specifying "[a]ttorney notes and memoranda in preparation for briefing, litigation, and preparation for filing complaint," (attachment A at 4, no. 10) and the category specifying "internal memoranda regarding scope of the complaint allegations," (attachment A at 6, no. 38) are entitled to protection by the deliberative process privilege and constitute work product. As such, no need exists for Complaint Counsel to provide additional information about these documents. *R.J. Reynolds Tobacco Co.*, No. 9285, 1998 FTC LEXIS 179, *3 & Appendix.

The ruling in *R.J. Reynolds Tobacco* is consistent with a long line of cases in which Administrative Law Judges and the Commission have rejected Respondents' demands for an overly detailed document by document index more specific than that which we have provided Respondents.³ For example, in *In re Great Atlantic & Pacific Tea Co.*, 82 F.T.C. 1860, 1862 (1973), the Commission quashed a subpoena provision requiring that documents deemed privileged by complaint counsel be specifically identified; the Commission concluded that the Administrative Law Judge's previous ruling "makes it clear precisely what types of documents respondent has been denied discovery of, namely internal Commission communications and staff

³ See, e.g., *In re Automatic Data Processing, Inc.*, No. 9282, Order, 1997 FTC LEXIS 77 (March 24, 1997) (Administrative Law Judge, among other things, denied respondent's request that complaint counsel be required to provide a more detailed privilege log listing each document individually). See also *In re Abbott Laboratories*, No. 9253, 1992 FTC LEXIS 296 (Dec. 15, 1992) (striking respondent's subpoena instruction that would have otherwise required Complaint Counsel to produce a privileged document list, noting that it was not contemplated under the Commission's Rules and it is unnecessary and unduly burdensome).

work product.” *Id.* Three years later, an administrative law judge relied on that decision in rejecting the respondents’ assertion that complaint counsel should be required to identify and describe each document for which they claimed work product privilege:

In this case, as in *A&P*, [my initial order] made clear the types of documents being excluded, namely documents comprising “the Commission’s or its staff’s view, policy considerations, analyses, interpretations or evaluations related to any consumer survey or scientific study.”

In re Bristol-Myers Co., No. 8917, Order Denying Respondents’ Motion for Reconsideration of Order Ruling on Application for Issuance of Subpoena Duces Tecum to the Federal Trade Commission, 1976 FTC LEXIS 400, *1-2, (April 13, 1976). Here, Respondent seeks to have Complaint Counsel provide this very detailed information about the very same type of documents.⁴

Respondent’s reliance on *MSC.Software*, No. 9299, 2002 WL 31433929 (Feb. 21, 2002), is misplaced. In *MSC.Software*, Complaint Counsel relied on a “general assertion of privilege” (slip op. at 3), and did not produce a privilege log at all. (Slip op. at 4) (noting “Complaint Counsel has improperly refused to provide a privilege log, as is required by Commission Rule 3.38A”). Here, in contrast, Complaint Counsel has not asserted any privilege “by general category” (*id.*), but rather have provided a detailed privilege log that has included specifications for the documents involved and the privileges asserted for those documents. As detailed above,

⁴ This burdensome task that Respondent seeks to impose on Complaint Counsel is the same as requiring Respondents’ counsel to go through its own attorney files (*i.e.*, not Basic Research’s) and prepare a privilege log for every document therein. Respondents have not provided such information in their Privilege Log. *See* Attachment B. In the interest of fairness and mutuality, if Complaint Counsel is required to compile such a privilege log, every law firm that has been involved with representing Respondents should have to do the same for documents in its own files connected to its representation of Respondents.

these specifications are more than sufficient to fully appraise opposing counsel of the basis for assessing the privilege claim. No more is required, especially in this case where, as detailed below, the level of burden associated with Respondent's demand for a privilege log is undue and unreasonable.⁵

C. The Privilege Log Demanded by Respondent Is Unduly Burdensome And The Motion Should Be Denied On That Basis Alone.

The log demanded by Respondent is also unduly burdensome. The law is clear that the Administrative Law Judge has discretion to deny a request for such burdensome privilege log where the burden outweighs the likely probative value of the log demanded. *R.J. Reynolds Tobacco Co.*, No 9285, 1998 FTC LEXIS 179, *3.

The magnitude of the task would be enormous: Individually cataloguing every privileged document would take a team of paralegals and attorneys literally months to accomplish.⁶ At the end of the day, no purpose would have been accomplished. Such an effort would place an inordinate stress on the limited resources available to Complaint Counsel in this case and thus can only substantially interfere in the ability of Complaint Counsel to prepare for trial. As detailed below, all this expense and effort is simply wasted because the privileges are obvious

⁵ We note that *MSC Software* incorrectly purports to distinguish *R.J. Reynolds Tobacco* as involving the situation where respondents were requesting documents that were located "in offices of the Commission other than those of Complaint Counsel." (Slip op. at 4). *R.J. Reynolds Tobacco* in fact involved "[d]ocuments in complaint counsel's files," noting that Rule 3.38A of the Commission's rules were applicable only to such documents. See *R.J. Reynolds Tobacco Co.*, 1998 FTC Lexus at 179 & n.1). *R.J. Reynolds* is thus directly on point.

⁶ Respondents' document requests are broad and far reaching, including covering other ongoing law enforcement actions. These other ongoing actions, which do not involve Respondents or the challenged products, involve documents which were largely produced in response to compulsory process and which number well into the thousands.

from the description provided by Complaint Counsel. Requiring the privilege log demanded by Respondent is thus simply senseless and is thus not required. *See, e.g., R.R. Donnelley & Sons Co.*, 1992 FTC LEXIS 265, No. 9243, Order Denying Respondent's Motion to Compel the Production of Privilege Log (noting first that the documents are not responsive or relevant but that "even if the documents were responsive and relevant, they are subject to the deliberative process privilege and therefore, are not discoverable"); *Tower Loan of Mississippi, Inc.*, 1991 FTC LEXIS 24, No. 9241, Order Denying Tower Loan's Amended Motion to Compel ("Since there is no warrant for overturning the privileges claimed by complaint counsel, requiring them to list those documents, see § 3.38A, Rules of Practice, would be senseless"); *In re TK-7 & Moshe Tal*, No. 9224, 1990 FTC LEXIS 20, (March 9, 1990) (rejecting argument that complaint counsel failed to comply with Rule 3.38A; complaint counsel stated specific grounds for invoking privilege for each interrogatory and 3.38A requires no more; requirement that the party responding to interrogatories furnish a schedule of documents that may underlie the privileged information being withheld would serve no useful purpose and needlessly risk disclosure of privileged information); *In re Safeway Stores, Inc.*, No. 9053, Order Ruling on Respondent's Motion for Issuance of a Subpoena for Production of Records of the Federal Trade Commission, 1976 FTC LEXIS 78 (Nov. 8, 1976) (rejecting respondent's contention that complaint counsel's claims of privilege could not be decided until they identified each document for which they claimed privilege); *In re Sterling Drug, Inc.*, No. 8919, Order Modifying and Granting Respondents' Application for Issuance of Subpoenas Duces Tecum to Federal Trade Commission, 1976 FTC LEXIS 460, *7, (March 17, 1976) ("respondents' proposed requirement that complaint counsel identify and list all documents as to which privilege is claimed is rejected

for imposition of such substantial burden upon complaint counsel in these circumstances would not serve any useful purpose and is not justified”) (citing *Great Atlantic & Pacific Tea Co.*, 82 F.T.C. at 1860-1862 (1973)).

D. Even if Complaint Counsel were to provide a More Elaborate Privilege Log, The Documents Are Protected by Longstanding Privileges.

The RULES limit discovery to information reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent. RULE 3.31(c)(1). The pre-complaint investigative deliberations are not relevant and are beyond the reach of Respondent’s discovery. *See, e.g., In the Matter of Exxon Corp.*, No. 8934, 1981 FTC LEXIS 113 (Jan. 19, 1981) (Once the Commission has issued a complaint, “the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.”); *Order Denying Basic Research’s Motion to Compel*, at 5 (Nov. 4, 2004). Finally, the documents listed on the *Privilege Log* include attorney communications, regarding research and strategy in the instant case.

Moreover, Respondents do not argue, nor could they, that they would even be entitled to the documents. Instead Respondents flatly assert the conclusion that it is “impossible” to tell from the *Privilege Log*. *See* Mot. at 4. This argument is without merit. As discussed *supra*, a cursory review of Complaint Counsel’s *Privilege Log* demonstrates that these are the very type of documents that have been long protected from disclosure vis-a-vis deliberative process and attorney work product privileges. Likewise, documents falling within the work product

privilege, including those involving non-testifying experts, the law enforcement files privilege and the confidential informant privilege are similarly protected.

CONCLUSION

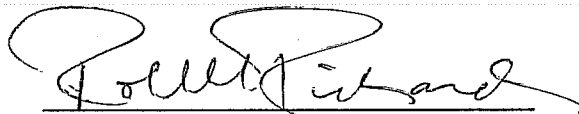
This Court should reject Respondent's cursory arguments to provide a more detailed privilege log. Even if more information were provided, these documents, as described by the categories, all fall well within work product, law enforcement files, confidential informant, and deliberative process privileges. "To ignore these privileges would seriously interfere with the free flow of ideas and information at the Commission." *Flowers Industries, Inc.*, No. 9148, 1981 FTC LEXIS 117, at *2 (Sept. 11, 1981).

In any event, at the end of the day, Respondent's arguments ring hollow. The *Privilege Log* provides sufficient information about the enumerated categories to enable Respondents to voice any objections to the asserted privileges. Here, Respondent has not, nor could they, done so. Further, the descriptive categories amply demonstrate that the sought after documents are beyond Respondent's reach. Having Complaint Counsel engage in what would be an enormous effort to provide document by document specifics is unwarranted and overly burdensome. Importantly, it is clear that many of these categories contain documents that are not even relevant (*e.g.*, the pre-decisional documents assessing the determination to file a complaint). Finally, and most tellingly, even if Complaint Counsel does engage in this arduous task, none of the documents listed are subject to production as they all, as indicated by the category or information contained, fall well within longstanding privileges. Here, Respondent has not, nor can it, provided any basis that would warrant intrusion on these privileges.

Respondent's *Motion* is a but another attempt to pierce longstanding privileges coupled with an unfortunate attempt to keep Complaint Counsel running in circles. This Court has already recognized that many of these documents are simply not relevant in denying Respondent's Motion to Compel. These documents are simply beyond the reach of Respondents. Complaint Counsel's *Privilege Log* is sufficient. This Court should reject Respondent's empty arguments and deny this *Motion*.

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's *Motion to Compel*.

Respectfully submitted,



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Bureau of Consumer Protection
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Complaint Counsel
Division of Enforcement
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November 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2004, I caused *Complaint Counsel's Opposition to Basic Research's Motion to Compel Proper Privilege Log and Attachments* and to be served and filed 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
Administrative Law Judge
600 Penn. Ave., N.W., Room H-113
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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COMPLAINT COUNSEL

Attachment A

**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

COMPLAINT COUNSEL'S PRIVILEGE LOG

Complaint Counsel hereby submits the attached *Privilege Log* in accordance with RULE OF PRACTICE 3.38A(a). We reserve the right to supplement the *Privilege Log* as additional information becomes available.

DEFINITIONS

The Federal Trade Commission's Bureau of Consumer Protection ("BCP") staff includes the following persons: Laureen Kapin, Esq., Walter C. Gross, Esq., Joshua S. Millard, Esq., Laura Schneider, Esq., and Robin M. Richardson, Esq. In addition to searching Complaint Counsel's own files, in making a reasonable search for relevant documents and materials, Complaint Counsel consulted with and/or reviewed the files of the following staff in the Division of Enforcement: Jock Chung, Esq., Louise Jung, Esq., Hampton Newsome, Esq., Carol Jennings, Esq., Angela Floyd, Esq., Joel Brewer, Esq., Adam Fine, Esq., Lemuel Dowdy, Esq., Laura Koss, Esq., Edwin Rodriguez, Esq., Roger Alvarez, who was formerly employed as an intern, Leslie Lewis, who is a legal technician, and Jonathan Cowen, Esq., who was formerly employed at the Division of Enforcement.

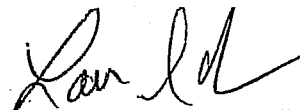
Complaint Counsel has also reviewed the files and/or consulted with Rebecca Hughes, an honors paralegal in BCP, Susan Braman, who is an economist in the Bureau of Economics ("BE"), and Karen Jagielski, Esq., who is an Attorney-Advisor in the Office of the Director of BCP. Complaint Counsel reviewed the files of the following persons at BCP's Division of Advertising Practices: Matthew Daynard, Esq., Michelle Rusk, Esq., and David Koehler, Esq.

The BCP and BE management involved in this matter includes the following persons: Elaine Kolish, Esq., the Associate Director of the FTC's Division of Enforcement, Reilly Dolan, an Assistant Director in the Division of Enforcement, Joni Lupovitz, an Assistant Director in the Division of Enforcement, Mary Engle, the Associate Director of BCP's Division of Advertising Practices, Heather Hipsley, an Assistant Director of BCP's Division of Advertising Practices, Richard Cleland, an Assistant Director in BCP's Division of Advertising Practices, Gerald Butters, the Associate Director of BE, Lee Peeler, the Deputy Director of BCP, Lydia Parnes, the Acting Director of BCP, and J. Howard Beales, who was formerly the Director of BCP.

The Federal Trade Commission is headquartered at 600 Pennsylvania Ave., N.W., Washington, D.C. 20580., and has a satellite office at 601 New Jersey Ave., N.W., Washington, D.C. 20580.

October 15, 2004

Respectfully submitted by:



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COUNSEL SUPPORTING THE COMPLAINT

Complaint Counsel's Privilege Log as of October 15, 2004

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
1.	BCP Staff	BCP Staff and Management	Memos re: discussions with expert about calcium and weight loss from February 2003 - March 2004 and Expert's draft/proprietary confidential study in another active investigation.	Work Product Deliberative Process
2.	BCP Staff	BCP Staff and Management	Email re: discussions with expert about calcium and weight loss from February 2003 - March 2004 and Expert's draft/proprietary confidential study in another active investigation.	Work Product Deliberative Process
3.	BCP Management	-	Attorney legal research includes selected pages of Rand Report with highlights and handwritten annotations showing mental impressions	Work Product Deliberative Process
4.	BCP Management	-	Attorney research memorandum describing or analyzing dietary supplement and weight loss cases by ingredients	Work Product Deliberative Process
5.	BCP Staff and NIH Staff	BCP Staff and Management and NIH Staff	Notes re: non-testifying expert re: Livieri study.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.
6.	BCP Staff and NIH Staff	BCP Staff and Management and NIH Staff	Emails re: non-testifying expert re: Livieri study.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.
7.	BCP Staff and BCP Management	BCP Staff and BCP Management	Attorney notes regarding mental impressions re: numerous open investigations, conferences, meetings or other discussions with experts.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.

8.	BCP Staff and BCP Management	BCP Staff and BCP Management	E-mails and communications regarding mental impressions re: numerous open investigations, conferences, meetings or other discussions with experts.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.
9.	BCP Management	-	Report of Ephedra Working Group with handwritten notes reflecting mental processes (Copy without handwritten notes provided to Respondents during discovery).	Work Product Deliberative Process
10.	BCP Staff and Management	Commission Attorneys and/or other Commission Staff	Attorney notes and memoranda in preparation for briefing, litigation, and preparation for filing complaint.	Work Product Deliberative Process
11.	BCP Staff and Management	BCP Management	Memoranda and related internal documents concerning the internal recommendation to enter into consent negotiations.	Work Product Deliberative Process
12.	BCP Staff and Management	BCP Staff and Management	E-mails and other communications regarding scope of the complaint allegations.	Work Product Deliberative Process
13.	BCP Staff and Management	BCP Staff and Management	Internal memoranda and notes regarding scope of the complaint allegations.	Work Product Deliberative Process
14.	BCP Staff and Management	BCP Management	Memoranda, notes, and other related internal documents concerning the mental processes of attorneys and recommendation to issue a complaint.	Work Product Deliberative Process
15.	BCP Staff and Management	BCP Management	Memoranda and other internal documents concerning discussions with non-testifying experts and expert studies.	Work Product Deliberative Process
16.	BCP Staff and Management	BCP Staff and Management	Memoranda, notes and other communications concerning settlement negotiations.	Work Product Deliberative Process
17.	BCP Management	-	Research memoranda, cases and commission memos regarding individual liability.	Work Product Deliberative Process

18.	BCP Staff and Management	BCP Staff and Management	Notes, memoranda, and other communication re: filing of Complaint.	Work Product Deliberative Process
19.	BCP Staff and Management	BCP Staff and Management	Handwritten attorney notes re: ephedra and Rand report reflecting mental impressions and processes.	Work Product Deliberative Process
20.	BCP Staff and Management	BCP Staff and Management	Attorney memo re: FTC cases containing ephedra and the sample claims and ingredients.	Work Product Deliberative Process
21.	BCP Staff and Management	BCP Staff and Management and Commission	Attorney notes and mental impressions re: 2 other Division of Advertising Practices cases not related to Respondents.	Work Product Deliberative Process
22.	BCP Staff and Management	BCP Staff and Management and Commission	Draft complaint re: 2 other Division of Advertising Practices cases not related to Respondents.	Work Product Deliberative Process
23.	BCP Staff and Management	BCP Staff and Management and Commission	Draft orders re: 2 other Division of Advertising Practices cases not related to Respondents.	Work Product Deliberative Process
24.	BCP Staff and Management	BCP Staff and Management and Commission	Recommendation to Commission in 2 other Division of Advertising Practices cases not related to Respondents.	Work Product Deliberative Process
25.	BE Staff and Management	BE and BCP Staff and Management	Drafts of complaints in this matter.	Work Product Deliberative Process
26.	BE Staff and Management	BE and BCP Staff and Management	Staff memoranda and drafts of memoranda re: case strategy.	Work Product Deliberative Process
27.	BE Staff and Management	BE and BCP Staff and Management	Notes re: case strategy.	Work Product Deliberative Process
28.	BE Staff and Management	BE and BCP Staff and Management	Emails re: case strategy	Work Product Deliberative Process

29.	BE Staff and Management	BE and BCP Staff and Management	Copies of published journal articles with handwritten annotations reflecting mental impressions and thought processes.	Work Product Deliberative Process
30.	BE Staff and Management	BE and BCP Staff and Management	Notes from consultations with staff re: investigation/case progress.	Work Product Deliberative Process
31.	BE Staff and Management	BE and BCP Staff and Management	Notes from meetings with Basic Research counsel reflecting mental impressions and conclusions.	Work Product Deliberative Process
32.	BCP Staff	BCP Staff, Management	Staff notes and memoranda regarding one open investigation, and two closed cases, not related to Respondents, which involved glucomannan, ephedra, and/or other ingredients.	Work Product Deliberative Process
33.	BCP Staff and Management	BCP Staff and Management	Memoranda, notes and other communications concerning settlement negotiations in Basic Research.	Work Product Deliberative Process
34.	BCP Staff and Management	-	Handwritten notes containing personal observations and mental impressions re: Congressional hearing on dietary supplements for overweight children.	Work Product Deliberative Process
35.	BCP Staff and Management	Commission Attorneys and/or other Commission Staff	Notes re: preparation for litigation, preparation for filing complaint.	Work Product Deliberative Process
36.	BCP Staff and Management	Commission Attorneys and/or other Commission Staff	Memoranda re: preparation for litigation, preparation for filing complaint.	Work Product Deliberative Process
37.	BCP Staff and Management	BCP Staff and Management	E-mails and other communication regarding scope of the complaint allegations.	Work Product Deliberative Process
38.	BCP Staff and Management	BCP Staff and Management	Internal memoranda regarding scope of the complaint allegations.	Work Product Deliberative Process
39.	BCP Staff and Management	BCP Staff and Management	Notes regarding scope of the complaint allegations.	Work Product Deliberative Process

40.	BCP Staff and Management	-	Handwritten notes in preparation for nonpublic briefing for U.S. House of Representatives Committee on Energy and Commerce.	Work Product Deliberative Process Law enforcement evidentiary Privilege
41.	BE Staff	BCP Management	Memorandum analyzing issues in reviewing scientific studies. Prepared April 1997.	Deliberative Process
42.	BCP Staff and enforcement target	BCP Staff and Management	Draft complaints and related memoranda, notes, and charts regarding progress and status of investigation.	Work Product Deliberative Process Law enforcement evidentiary Privilege
43.	BCP Staff	BCP Staff and Management	Documents relating to unrelated calcium pyruvate investigation, including the target's website, not related to Respondents.	Work Product Deliberative Process Law enforcement evidentiary Privilege
44.	BCP Staff	BCP Staff and Management	With regard to an unrelated closed investigation, attorney notes and mental impressions re: consultation with non-testifying expert.	Work Product Deliberative Process Law enforcement evidentiary privilege
45.	BCP Staff	BCP Staff and Management	With regard to an unrelated closed investigation, consulting expert's draft document.	Work Product Deliberative Process Law enforcement evidentiary privilege
46.	BCP Staff	BCP Staff and Management	With regard to an unrelated closed investigation, attorney notes re: ephedra, aspirin, calcium, and caffeine.	Work Product Deliberative Process Law enforcement evidentiary privilege
47.	Confidential Informants	BCP Staff	Complaints and email from confidential informants.	Confidential Informant
48.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: investigation progress and status.	Work Product

49.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: consultation with non-testifying experts.	Work Product
50.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: testifying experts.	Work Product
51.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: Congressional testimony.	Work Product
52.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: document review.	Work Product
53.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: legal research.	Work Product
54.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: case strategy.	Work Product
55.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: investigation progress and status.	Work Product
56.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: consultation with non-testifying experts.	Work Product
57.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: testifying experts.	Work Product
58.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: Congressional testimony.	Work Product
59.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: document review.	Work Product
60.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: legal research.	Work Product
61.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: case strategy.	Work Product
62.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: investigation status and progress.	Work Product

63.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: consultation with non-testifying experts.	Work Product
64.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: document review.	Work Product
65.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: legal research.	Work Product
66.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: case strategy.	Work Product
67.	BCP Staff		Notes re: non-testifying expert.	Work Product
68.	BCP Staff		Notes, memoranda, drafts re: ongoing investigation of caffeine and aspirin products.	Work Product Law enforcement evidentiary hearing
69.	BCP Staff		Notes re: closed investigation	Work Product
70.	BCP Staff	BCP Staff	E-mails and correspondence re: ephedra investigation of entity unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege
71.	BCP Staff and enforcement target	-	Notes, drafts, and documents received in law enforcement investigation of di-calcium phosphate unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege
72.	BCP Staff and enforcement target	-	Notes re: consultations with non-testifying experts in law enforcement investigation unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege
73.	BCP Staff and enforcement target	-	Notes and documents received pursuant to process re: closed guarana law enforcement investigation unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege
74.	BCP Staff and enforcement target	BCP Staff and Management	Notes, memoranda, and documents received pursuant to process in closed law enforcement investigation involving a calcium pyruvate ingredient. Investigation unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege, deliberative process

75.	Enforcement target	BCP Staff	Documents received in closed ephedra law enforcement investigation unrelated to Respondents.	Law enforcement, evidentiary privilege
76.	BCP Staff	BCP Staff	Notes re: 2 open law enforcement investigations unrelated to Respondents involving ephedra products.	Work Product, Law enforcement, evidentiary privilege deliberative process
77.	BCP Staff	BCP Staff	Memoranda re: 2 open law enforcement investigations unrelated to Respondents involving ephedra products.	Work Product, Law enforcement, evidentiary privilege deliberative process
78.	BCP Staff and enforcement target	BCP Staff	Documents responsive to agency subpoenas re: 2 open law enforcement investigations unrelated to Respondents involving ephedra products.	Work Product, Law enforcement, evidentiary privilege deliberative process
79.	BCP Staff	BCP Staff	E-mails, memoranda, and notes re: consultations with non-testifying experts regarding Basic Research, re: confidential informants, investigation, legal research, settlement, case strategy, development of the complaint allegations, and internal deliberations.	Work Product, Law enforcement, evidentiary privilege deliberative process

Attachment B

FELDMAN GALE

A T T O R N E Y S A T L A W

MIAMI CENTER, 19TH FLOOR
201 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-4332
TEL: 305.358.5001
FAX: 305.358.3309

PROMENADE WEST, SUITE 315
880 WEST FIRST STREET
LOS ANGELES, CALIFORNIA 90012
TEL: 213.625.5992
FAX: 213.625.5993

www.FeldmanGale.com

REPLY TO: MIAMI OFFICE

E-MAIL: JFeldman@FeldmanGale.com

October 6, 2004

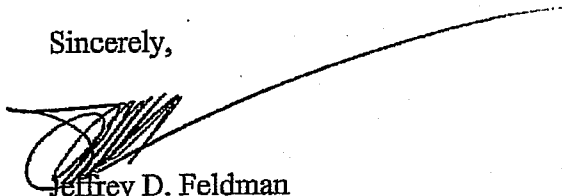
Via email lkapin@ftc.gov
Laureen Kapin, Sr. Counsel
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

*In the Matter of: 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; Docket
No.: 9318*

Dear Ms. Kapin:

Please find enclosed Basic Research, L.L.C. and Ban, L.L.C.'s Privilege Log. The log was not prepared by my office and I have yet to review the listed documents. I will attempt to do this next week. I am therefore providing the log with the express understanding that some of the documents on the log may not be privileged or privileged for reasons other than those asserted.

Sincerely,



Jeffrey D. Feldman
JDF/mr
Enclosure

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042731	07/27/04	H. Sprik	N. Chevreau	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042732 – R0042734	07/27/04	C. Fobbs	H. Sprik	Email	Attorney-Client; Atty. Work Product	Tummy Flattening Gel Information
R0042735 – R0042736	07/07/04	N. Chevreau	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042737	07/07/04	N. Chevreau	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042738	06/18/04	H. Sprik	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042739	06/14/04	C. Fobbs	H. Sprik	Email	Attorney-Client	PediaLean Information
R0042740 – R0042741	06/11/04	C. Fobbs	A. Roth; P. Hatch	Email	Attorney-Client	PediaLean Information
R0042742 – R0042744	06/09/04	K. Jones	H. Sprik	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042745 – R0042746	06/03/04	C. Fobbs	K. Jones	Email	Attorney-Client	Cutting Gel Information
R0042747 – R0042749	06/02/04	C. Fobbs	M. Azcuenaga	Email	Attorney-Client	PediaLean Information
R0042750 –	05/26/04	C. Fobbs	P. Hatch	Email	Attorney-Client	PediaLean Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042751						
R0042752 – R0042753	05/13/04	S. Snavely	C. Fobbs	Email	Attorney-Client; Atty Work Product	PediaLean Congressional Inquiry
R0042754	05/13/04	K. Jones	Sales	Email	Attorney-Client	PediaLean Information
R0042755 – R0042763	05/05/04	C. Fobbs	N. Chevreau; D. Mowrey; Azzurri	Email	Attorney-Client	Anorex/Cutting Gel Review
R0042764 – R0042767	05/03/04	C. Fobbs	IT	Email	Attorney-Client	PediaLean Information
R0042768	05/03/04	K. Jones	QC	Email	Attorney-Client	PediaLean Information
R0042769 – R0042780	04/21/04	C. Fobbs	IT	Email	Attorney-Client	PediaLean Information
R0042781 – R0042782	04/21/04	C. Fobbs	S. Nagin	Email	Attorney-Client; Work Product	PediaLean Information
R0042783 – R0042794	04/21/04	C. Fobbs	IT	Email	Attorney-Client	PediaLean Information
R0042795 – R0042797	04/01/04	C. Fobbs	Marketing	Email	Attorney-Client	PediaLean Information
R0042798 – R0042800	03/31/04	C. Fobbs	Operations	Email	Attorney-Client	PediaLean Information
R0042801 – R0042802	03/31/04	S. Posey	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042803 – R0042806	03/31/04	C. Pitts	C. Fobbs	Email	Attorney-Client; Atty. Work	PediaLean Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
					Product	
R0042807	03/30/04	S. Ferguson	Marketing	Email	Attorney-Client	LeptoPrin Information
R0042808	03/29/04	S. Posey	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Information
R0042809 – R0042811	03/25/04	S. Erickson	K. McDonough	Email	Attorney-Client	LeptoPrin Information
R0042812 – R0042813	03/25/04	V. Hoang	B. Gay	Email	Attorney-Client	LeptoPrin Information
R0042814 – R0042815	03/26/04	S. Posey	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042816 – R0042818	03/25/04	V. Hoang	B. Gay	Email	Attorney-Client	LeptoPrin Information
R0042819	03/26/04	C. Fobbs	D. Gay	Email	Attorney-Client	PediaLean Information
R0042820 – R0042821	03/25/04	V. Hoang	G. Sandberg & B. Gay	Email	Attorney-Client	LeptoPrin Information
R0042822 – R0042823	03/24/04	K. Jones	Acctg	Email	Attorney-Client	PediaLean Information
R0042824 – R0042825	03/08/04	K. Jones	Sales	Email	Attorney-Client	Cutting Gel Information
R0042826	03/16/04	N. Chevreau	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042827 – R0042829	03/08/04	K. Jones	Sales	Email	Attorney-Client	Cutting Gel Information
R0042830 –	03/11/04	C. Fobbs	R&D	Email	Attorney-Client;	Tummy Flattening Gel

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042839					Atty. Work Product	Information
R0042840 – R0042841	03/09/04	C. Fobbs	S. Nagin	Email	Attorney-Client	PediaLean Information
R0042842	03/08/04	K. Jones	Sales	Email	Attorney-Client	Cutting Gel Information
R0042843 – R0042844	03/08/04	C. Fobbs	K. Jones	Email	Attorney-Client; Atty Work Product	Anorex Information
R0042845 – R0042846	03/04/04	H. Sprik	C. Fobbs	Email	Attorney-Client; Atty Work Product	PediaLean Information
R0042847 – R0042848	03/04/04	K. Jones	Sales	Email	Attorney-Client	Cutting Gel Information
R0042849	03/04/04	C. Fobbs	S. Nagin	Email	Attorney-Client	PediaLean Information
R0042850 – R0042851	03/03/04	J. Davis	C. Fobbs	Email	Attorney-Client; Atty Work Product	LeptoPrin Information
R0042852 – R0042853	03/02/04	C. Fobbs	H. Sprik	Email	Attorney-Client	PediaLean Information
R0042854	03/01/04	C. Fobbs	H. Sprik	Email	Attorney-Client	PediaLean Information
R0042855 – R0042856	02/26/04	C. Fobbs	S. Nagin	Email	Attorney-Client	LeptoPrin Information
R0042857 – R0042858	02/26/04	H. Gay	Operations	Email	Attorney-Client	LeptoPrin Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042859	02/26/04	C. Fobbs	M. Meade	Email	Attorney-Client	PediaLean Information
R0042860	02/12/04	K. Jones	B. Mowrey	Email	Attorney-Client	Cutting Gel Information
R0042861 – R0042876	01/27/04	L. Jacobus	G. Sandberg; D. Gay; C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0042877 – R0042882	02/03/04	K. Andrews	S. Nagin	Email	Attorney-Client	PediaLean Congressional Inquiry
R0042883	02/03/04	G. Sandberg	PR Firm	Email	Attorney-Client	LeptoPrin Information
R0042884 – R0042885	01/30/04	S. Nagin	K. McDonough	Email	Attorney-Client	LeptoPrin Information
R0042886 – R0042888	01/20/04	C. Fobbs	S. Nagin	Email	Attorney-Client	LeptoPrin Information
R0042889 – R0042890	01/06/04	S. Erickson	D. Atkinson	Email	Attorney-Client	LeptoPrin Information
R0042891 – R0042892	01/16/04	R&D	C. Fobbs	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0042893 – R0042894	01/14/04	K. Jones	IT	Email	Attorney-Client	PediaLean Congressional Inquiry
R0042895	01/13/04	K. Jones	S. Nagin	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry
R0042896	01/12/04	K. Jones	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042897	01/09/04	G. Sandberg	S. Posey	Email	Attorney-Client	LeptoPrin Information
R0042898	01/07/04	J. Ostler	S. Posey	Email	Attorney-Client	LeptoPrin Information
R0042899	01/07/04	H. Sprik	K. Jones	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry
R0042900	01/07/04	J. Ostler	S. Posey	Email	Attorney-Client	LeptoPrin Information
R0042901 – R0042902	01/07/04	K. Jones	H. Sprik	Email	Attorney-Client	PediaLean Congressional Inquiry
R0042903 – R0042904	01/07/04	H. Sprik	K. Jones	Email	Attorney-Client	PediaLean Congressional Inquiry
R0042905	01/07/04	H. Sprik	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042906	01/07/04	H. Sprik	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0042907 – R0042911	01/07/04	K. Andrews	K. Jones	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry
R0042912	01/07/04	H. Sprik	C. Fobbs	Email	Attorney-Client; Atty. Work Product	PediaLean Congressional Inquiry
R0042913	01/06/04	C. Fobbs	R&D	Email	Attorney-Client	PediaLean Information
R0042914 – R0042915	01/06/04	C. Fobbs	S. Nagin	Email	Attorney-Client	PediaLean SBIR Information
R0042916 – R0042925	01/06/04	C. Fobbs	R&D	Email	Attorney-Client	PediaLean Information
R0042926 –	01/05/04	K. Andrews	S. Nagin	Email	Attorney-Client	PediaLean Congressional

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042929						Inquiry
R0042930 – R0042934	01/02/04	S. Erickson	D. Atkinson	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0042935 – R0042944	01/02/04	C. Fobbs	R&D	Email	Attorney-Client	PediaLean Information
R0042945 – R0042948	12/22/03	N. Chevreau	M. Goran; C. Fobbs	Email	Attorney-Client	PediaLean SBIR Information
R0042949	12/11/03	K. Jones	J. Julander	Email	Attorney-Client	PediaLean Information
R0042950 – R0042956	12/11/03	K. Jones	B. Mowrey	Email	Attorney-Client	PediaLean/Cutting Gel Information
R0042957	12/05/03	S. Erickson	S. Nagin	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0042958	12/05/03	S. Erickson	S. Nagin	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0042959 – R0042965	12/03/03	J. Magleby	D. Gay, M. Friedlander, C. Fobbs, S. Erickson, S. Nagin	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0042966	11/28/03	Thomascbr	Testimonials	Email	Attorney-Client	Anorex Information
R0042967 –	11/28/03	J. Magleby	S. Erickson	Email	Attorney-Client;	LeptoPrin/Dermalin/Cutting Gel

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0042972					Atty. Work Product	Information
R0042973	11/17/03	S. Erickson	M. Meade; D. Atkinson; G. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0042974 – R0042975	11/25/03	J. Ostler	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0042976 – R0042991	11/25/03	M. Hahn	K. Jones; S. Nagin; C. Fobbs	Email	Attorney-Client	LeptoPrin/Anorex Information
R0042992 – R0043007	11/24/03	K. Andrews	S. Nagin	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043008 – R0043010	11/24/03	K. Jones	M. Hahn	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043011	11/21/03	G. Sandberg	PR Firm	Email	Attorney-Client	LeptoPrin Information
R0043012 – R0043024	11/19/03	K. Jones	M. Hahn	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043025 – R0043026	11/17/03	S. Erickson	M. Meade; D. Atkinson; G. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043027 – R0043037	11/18/03	J. Magleby	S. Erickson	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043038 – R0043039	11/17/03	S. Erickson	M. Meade; D. Atkinson; G. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043040	11/17/03	J. Sadaka	Leptoprinsupport	Email	Attorney-Client	LeptoPrin Information
R0043041 –	11/11/03	P. Hiatt	J. Davis	Email	Attorney-Client	LeptoPrin Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043043						
R0043044 – R0043045	11/11/03	P. Hiatt	J. Davis	Email	Attorney-Client	Anorex Information
R0043046	11/11/03	P. Hiatt	J. Davis	Email	Attorney-Client	Dermalin Information
R0043047	11/10/03	Carlabd	Leptoprinsupport	Email	Attorney-Client	LeptoPrin Information
R0043048 – R0043050	11/10/03	S. Erickson	C. Fobbs	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043051 – R0043053	11/07/03	S. Erickson	C. Fobbs	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0043054 – R0043062	11/05/03	C. Fobbs	J. Magleby; B. Miller	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0043063 – R0043065	10/31/03	Azzurri	M. Meade; S. Martinez; N. Chevreau; D. Mowrey; C. Fobbs; B. Hiatt; G. Gay	Email	Attorney-Client	Cutting Gel/Tummy Flattening Gel Information
R0043066 – R0043067	10/30/03	T. Foss	Customerservice	Email	Attorney-Client	Anorex Information
R0043068 – R0043071	10/28/03	C. Fobbs	S. Erickson	Email	Attorney-Client; Atty. Work	LeptoPrin Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
					Product	
R0043072 – R0043088	10/27/03	S. Nagin	C. Fobbs	Email	Attorney-Client	FTC Investigation
R0043089 – R0043090	10/27/03	S. Erickson	D. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043091 – R0043098	10/24/03	S. Nagin	C. Fobbs	Email	Attorney-Client	FTC Investigation
R0043099 – R0043102	10/23/03	S. Erickson	D. Gay	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043103 – R0043130	10/16/03	N. Chevreau	C. Fobbs	Email	Attorney-Client	PediaLean Information
R0043131	10/14/03	K. Jones	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043132	10/14/03	C. Fobbs	Operations	Email	Attorney-Client	LeptoPrin Information
R0043133 – R0043138	10/08/03	H. Gay	B. Hiatt; M. Meade; S. Martinez	Email	Attorney-Client	LeptoPrin Information
R0043139	10/07/03	H. Sprik	K. Jones	Email	Attorney-Client	Tummy Flattening Gel Information
R0043140 – R0043142	10/08/03	H. Gay	B. Hiatt; M. Meade; S. Martinez	Email	Attorney-Client	LeptoPrin Information
R0043143 – R0043145	10/07/03	H. Sprik	K. Jones	Email	Attorney-Client	Tummy Flattening Gel Information
R0043146	10/07/03	K. Jones	D. Gay	Email	Attorney-Client	Dermalin Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043147	10/08/03	C. Fobbs	Operations	Email	Attorney-Client	LeptoPrin Information
R0043148 – R0043149	10/07/03	H. Sprik	K. Jones	Email	Attorney-Client	Tummy Flattening Gel Information
R0043150	10/08/03	C. Fobbs	Operations	Email	Attorney-Client	LeptoPrin Information
R0043151 – R0043160	10/08/03	B. Miller	C. Fobbs	Email	Attorney-Client; Atty. Work Product	FTC Investigation
R0043161	10/07/03	H. Sprik	K. Jones	Email	Attorney-Client	Tummy Flattening Gel Information
R0043162	10/07/03	K. Jones	D. Gay	Email	Attorney-Client	Dermalin Information
R0043163 – R0043164	09/30/03	K. Jones	Azzurri	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043165 – R0043186	09/24/03	C. Fobbs	Azzurri	Email	Attorney-Client	Tummy Flattening Gel Information
R0043187 – R0043192	09/23/03	K. Jones	C. Fobbs	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043193 – R0043202	09/09/03	K. Jones	D. Mowrey	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043203 – R0043207	09/19/03	K. Jones	D. Mowrey	Email	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043208	09/09/03	K. Jones	D. Mowrey	Email	Attorney-Client;	LeptoPrin/Anorex Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
					Atty. Work Product	
R0043209 – R0043213	09/19/03	D. Gay	C. Fobbs	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0043214 – R0043218	09/19/03	K. Jones	D. Mowrey	Email	Attorney-Client; Atty. Work Product	LeptoPrin/Anorex Information
R0043219 – R0043221	09/19/03	D. Gay	C. Fobbs	Email	Attorney-Client; Atty. Work Product	Dermalin Information
R0043222 – R0043226	09/19/03	P. Hiatt	C. Fobbs; Operations	Email	Attorney-Client	Cutting Gel Information
R0043227	09/18/03	C. Fobbs	G. Sandberg	Email	Attorney-Client	LeptoPrin Information
R0043228 – R0043232	09/19/03	C. Fobbs	Operations	Email	Attorney-Client	Cutting Gel Information
R0043233 – R0043234	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	Anorex Information
R0043235 – R0043237	09/18/03	C. Fobbs	Operation	Email	Attorney-Client	LeptoPrin Information
R0043238	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	Anorex Information
R0043239	09/18/03	C. Fobbs	G. Sandberg	Email	Attorney-Client	LeptoPrin Information
R0043240 – R0043241	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	Anorex Information

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BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043242 – R0043243	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	LeptoPrin Information
R0043244 – R0043246	09/18/03	C. Fobbs	G. Sandberg	Email	Attorney-Client	LeptoPrin Information
R0043247	09/18/03	C. Fobbs	M. Friedlander	Email	Attorney-Client	Cutting Gel Information
R0043248 – R0043250	09/18/03	C. Fobbs	Operations	Email	Attorney-Client	Dermalin Information
R0043251 – R0043254	09/17/03	K. Humpherys	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043255	09/15/03	K. Jones	D. Mowrey	Email	Attorney-Client	Tummy Flattening Gel Information
R0043256	09/09/03	K. Jones	D. Mowrey	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043257 – R0043263	09/04/03	K. Jones	C. Fobbs	Email	Attorney-Client	Dermalin Information
R0043264 – R0043265	08/27/03	K. Clark	C. Fobbs	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043266 – R0043267	08/22/03	S. Posey	C. Fobbs	Email	Attorney-Client	LeptoPrin/Anorex Information
R0043268 – R0043269	08/21/03	H. Gay	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043270 – R0043272	08/21/03	H. Gay	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043273 – R0043274	08/20/03	N. Rusk	K. Jones	Email	Attorney-Client	Anorex Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043275	08/20/03	C. Fobbs	K. Jones	Email	Attorney-Client; Atty. Work Product	FTC Investigation
R0043276 – R0043279	08/20/03	B. Madsen	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043280 – R0043281	08/15/03	N. Chevreau	C. Fobbs	Email	Attorney-Client	PediaLean SBIR Information
R0043282 – R0043287	08/14/03	C. Fobbs	K. Johnson	Email	Attorney-Client	PediaLean SBIR Information
R0043288 – R0043289	08/14/03	K. Johnson	C. Fobbs	Email	Attorney-Client	PediaLean SBIR Information
R0043290	08/08/03	K. Braithwaite	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043291 – R0043293	07/30/03	C. Fobbs	Azzurri	Email	Attorney-Client	Anorex Information
R0043294	07/28/03	K. Jones	S. Nagin	Email	Attorney-Client	PediaLean Information
R0043295	07/21/03	S. Nagin	C. Fobbs	Email	Attorney-Client	PediaLean SBIR Information
R0043296 – R0043303	07/21/03	K. Humpherys	C. Fobbs	Email	Attorney-Client	LeptoPrin Information
R0043304	07/18/03	N. Chevreau	B. Mowrey	Email	Attorney-Client	PediaLean Information
R0043305 – R0043307	07/16/03	K. Jones	S. Nagin	Email	Attorney-Client; Atty. Work Product	FTC Investigation
R0043308	07/16/03	N. Chevreau	S. Nagin	Email	Attorney-Client	PediaLean SBIR Information

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BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043309	07/15/03	S. Nagin	K. Andrews	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043310	07/15/03	K. Jones	N. Chevreau	Email	Attorney-Client	PediaLean SBIR Information
R0043311 – R0043312	07/01/03	Dan	Customerservice	Email	Attorney-Client	LeptoPrin Information
R0043313	07/09/03	J. Lang	G. Sandberg	Email	Attorney-Client	LeptoPrin Information
R0043314	07/09/03	K. Jones	S. Nagin	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043315	07/09/03	K. Jones	S. Nagin	Email	Attorney-Client	PediaLean Congressional Inquiry
R0043316 – R0043317	07/01/03	Dan	Customerservice	Email	Attorney-Client	LeptoPrin Information
R0043318 – R0043322	08/04	S. Erickson	C. Fobbs	Chart	Attorney-Client; Atty. Work Product	LeptoPrin/Cutting Gel/Anorex Information
R0043323 – R0043345	11/07/03 – 01/23/04	S. Erickson	K. Boyle	Correspondence	Attorney-Client; Atty. Work Product	Dermalin Information
R0043346 – R0043353	12/13/01 – 10/14/02	C. Fobbs	M. Hahn	Correspondence	Attorney-Client	Dermalin/LeptoPrin Information
R0043354 – R0043379	06/06/03 – 07/22/04	C. Fobbs; K. McDonough ; J. Levy	E. Ammar; C. Fobbs; S. Nagin; J. Levy; K.	Correspondence	Attorney-Client	LeptoPrin Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
			Sleeker;			
R0043380 – R0043405	03/19/04 – 07/30/04	C. Johnson; K. Jacobsen; B. Eldridge	S. Nagin; K. McDonough; P. Nager; K. Jacobsen	Correspondence	Attorney-Client	LeptoPrin Information
R0043406 – R0043412	08/19/99 – 05/30/00	S. Bialecki; M. Kimber	C. Fobbs	Correspondence	Attorney-Client; Atty. Work Product	LeptoPrin/Anorex Information
R0043413 – R0043418	04/25/03	S. Nagin	A. Levine	Correspondence	Attorney-Client	PediaLean Information
R0043419 – R0043423	06/20/03	D. Mallen	S. Nagin	Correspondence	Attorney-Client	PediaLean Information
R0043424 – R0043625	03/25/03 – 06/07/04	B. Tauzin; C. Fobbs; K. Jones; S. Nagin; P. Hatch; K. Andrews; N. Chevreau	D. Gay; K. Andrews; K. Jones; N. Chevreau; C. Fobbs; S. Nagin; D. Nelson; D. Gay; M. Friedlander	Correspondence	Attorney-Client	PediaLean Congressional Inquiry
R0043626 – R0043763	04/21/03 – 06/09/04	P. Ffiett; S. Nagin; L. Figueredo; C. Fobbs; M.	C. Fobbs; S. Nagin; P. Hatch; Chairman Greenwood; D.	Correspondence	Attorney-Client	PediaLean Congressional Inquiry

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
		Azcuenaga; P. Hatch; Committee on Energy & Commerce; K. Jones	Mattoon; D. Gay; K. Johnson; K. Jones; M. Friedlander; K. Clark			
R0043764 – R0043803	03/04	D. Jones & Associates	Miller Magleby & Guymon	Correspondence	Attorney-Client; Atty. Work Product	LeptoPrin Information
R0043804 – R0043823	03/04	D. Jones & Associates	Miller Magleby & Guymon	Correspondence	Attorney-Client; Atty. Work Product	Research
R0043824 – R0043830	03/14/02	N. Chevreau	K. Krahnstoever Davison;	Email	Attorney-Client	PediaLean/weightlossforchildren.com Advisory Board Information
R0043831 – R0043834	02/14/02	N. Chevreau	K. Krahnstoever Davison	Email	Attorney-Client	PediaLean/weightlossforchildren.com Advisory Board Information
R0043835 – R0043837	02/01/02	N. Chevreau	K. Krahnstoever Davison	Email	Attorney-Client	PediaLean/weightlossforchildren.com Advisory Board Information
R0043838	04/04/02	D. Anderson	H. Beachell	Email	Attorney-Client	PediaLean/weightlossforchildren.com Advisory Board Information

CONFIDENTIAL PRIVILEGE LOG

BASIC RESEARCH, L.L.C. AND BAN, L.L.C.

Bate Number Range	Date	From	To	Description	Privilege	Topic
R0043839 – R0043849	01/17/02	N. Chevreau	M. Faith	Email	Attorney-Client	PediaLean/weightlossforchildren.com Advisory Board Information
R0043850	01/15/02	N. Chevreau	C. Fobbs	Email	Attorney-Client	PediaLean/weightlossforchildren.com Advisory Board Information
R0043851 – R0043870	12/11/02	N. Chevreau	A. Pietrobelli	Email	Attorney-Client	PediaLean/weightlossforchildren.com Advisory Board Information

Attachment C



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Joshua S. Millard
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October 15, 2004

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VIA EMAIL AND U.S. MAIL

Re: *Basic Research et al.*, Docket No. 9318

Dear Mr. Feldman:

We write to identify significant issues with the privilege log submitted for Basic Research LLC and BAN LLC, in the hope that we may discuss and resolve these issues.

As you will recall, we served our *First Request for Production of Documentary Materials and Tangible Things* ("Document Requests") on June 25, 2004. In our September 22nd letter, we observed that Respondents had yet to produce a privilege log, and we expressed surprise at your earlier statement that there would be no privilege log accompanying your production.

Complaint Counsel received a privilege log produced by Basic Research LLC and BAN LLC on October 6, 2004. This privilege log applies to those parties' responses to our *Document Requests* on September 9th and August 18th. You have represented that these documents were produced solely by Basic Research and/or BAN, and no other Respondents.

Complaint Counsel believe that we have been provided a *draft* privilege log. This conclusion is based, first, on the October 6th transmittal letter sent by Mr. Feldman, who represents Basic Research and BAN. This transmittal letter advised us that the log was not prepared by Mr. Feldman's office, and Mr. Feldman stated that he had not reviewed the withheld documents. Most important of all, Mr. Feldman stated that he was providing the log "*with the express understanding that some of the documents on the*

log may not be privileged," or with the express understanding that the listed documents are "privileged for reasons other than those asserted."

We understand your words of caution, and they are disturbing to us. Before receiving your transmittal letter, we anticipated receiving a product that was subject to your legal review and analysis—not a draft log produced by some other, unidentified person or entity.¹ We respectfully request that you provide us with a final privilege log.

Complaint Counsel have carefully reviewed the privilege log, and we have several concerns. First, the log does not describe the documents in sufficient detail to explain why you have declined to produce them. The descriptions of the withheld documents fall well short of what is required to permit us, or the Court, to determine whether a particular privilege was properly asserted.

Your clients have made bare assertions of attorney-client and/or work product privileges, followed by one (and in a few instances, two or three) of the following phrases:

- 1) "Dermalin Information"
- 2) "Cutting Gel Information"
- 3) "Tummy Gel Information"
- 4) "LeptoPrin Information"
- 5) "Anorex Information"
- 6) "PediaLean Information"
- 7) "PediaLean SBIR Information"
- 8) "FTC Investigation"
- 9) "PediaLean Congressional Inquiry"
- 10) "PediaLean/weightlossforchildren.com Advisory Board Information"

From these phrases, Complaint Counsel cannot reasonably discern why the identified documents have not been produced. Consider each example in turn:

We are entitled to product "information." According to your privilege log, these documents contain information concerning the six challenged products, and these documents are responsive to our *Document Requests*. You have given us no grounds to accept your assertion that documents bearing the first six "information" descriptions are privileged. If the first six descriptions are accurate, then all documents so described should be produced immediately.

We are also entitled to "Pedialean SBIR Information." Your log states that you have additional documents about Pedialean and the National Institute of Health's *Small Business Innovative Research* program. You have conceded that these documents are responsive to our *Document Requests*. They should be produced as well.

¹ We request that you identify who generated the privilege log that you sent to us. Additionally, Mr. Feldman's transmittal letter suggests that he has asserted no privileges on behalf of Basic Research and BAN with respect to company documents that may be currently in his possession. If this is not what was intended to be conveyed, please supplement the privilege log by listing those documents.

We do not understand why certain documents described as "FTC Investigation" or "PediaLean Congressional Inquiry" are privileged. These descriptions are too general to support the claims of privilege.²

Also, the phrase "PediaLean/weightlossforchildren.com Advisory Board Information" denotes information that is not a privileged attorney-client communication. This information is relevant and responsive to our *Document Requests*, and should be produced.

For all documents described with general terms, we ask that you promptly produce these documents. Alternatively, you should provide additional information sufficient to support your privilege assertions in compliance with RULE OF PRACTICE 3.38A, which requires identification of the specific subject matters of the withheld documents.

Next, we note that your privilege log does not distinguish authors from recipients. There are just two unmarked columns, with some names in them. Please clarify. Many of these names belong to persons employed by Respondents who are *not* attorneys for Respondents, at least to our knowledge.³ Again, you have given us no grounds to accept your assertion that such documents are privileged.

Also, we notice that all, or nearly all, of the listed documents are correspondence or emails. We ask that you confirm that no other types of privileged documents exist.

Additionally, we note that most of the listed documents are from 2003 and 2004. Given that your clients had dealings with the Federal Trade Commission previous to 2003, we ask that you confirm that all privileged documents have been identified. We also ask that you confirm that no other Respondents possess any privileged documents. If they have copies of privileged documents, they must be disclosed on a log.

As discussed above, we have many significant concerns with the privilege log. You did not review the log before sharing it with us, you have not vouched for it, you have cautioned us regarding its completeness or accuracy, and we cannot reasonably rely on it.

With this letter, Complaint Counsel forward their privilege log. Naturally, if you have any concerns regarding our log, we are prepared to listen. Our conversation should proceed, however, with the understanding that we have, at least, endeavored to give you a log sufficiently detailed so that you can reasonably discern why the identified documents have not been produced, and our assurance that, to the best of our knowledge, the log is accurate. We request that you provide us the same assurances.

Complaint Counsel believe that you may already have made efforts to correct this log, and we hope that you will take the necessary steps outlined in this letter to produce the documents or to generate

² We are, however, prepared to accept the one-word description, "research," provided for one document sent between law firms (R0043804), if you will represent that this was legal research.

³ If your clients had identified the positions or organizations to which the authors or recipients belonged, as RULE OF PRACTICE 3.38A specifically requires, we would have identified all of these documents in this letter.

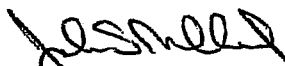
Letter to Respondents' Counsel

October 15, 2004

page 4

a final privilege log in response to our concerns. We will contact you on Monday to arrange a teleconference and, hopefully, to resolve this issue. Thank you for your attention.

Sincerely,



Joshua S. Millard

Attorney, Division of Enforcement

cc: Mitchell K. Friedlander, *pro se*
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enclosure