

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

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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**

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**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**

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## **INTRODUCTION**

Complaint Counsel commenced this action against Basic Research, L.L.C., five other companies and three individuals, including Respondent Dennis Gay (“Gay”). The Complaint charges that Gay committed serious violations of the law and seeks broad injunctive relief against him. Gay retained separate counsel to represent him in defending against the numerous charges against him. On August 11, 2004, a Scheduling Order was entered by the court providing that “*each party*” is limited to propounding 60 interrogatories, 60 document requests and 60 requests for admissions. On October 29, 2004, in accordance with the order, Gay’s counsel propounded 27 interrogatories, 11 document requests and 54 requests for admissions.

Complaint Counsel does not deny that the discovery sought by Gay is highly relevant to the charges made against him. Nevertheless, Complaint Counsel 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. It is respectfully submitted that such an order would seriously prejudice Gay and that the motion for protective order should be denied.

## **ARGUMENT**

Complaint Counsel argues that their understanding of the Scheduling Order is that “each side” is limited to 60 of each type of discovery requests. However, the order clearly provides otherwise. Paragraph 6 of the Additional Provisions of the Scheduling

Order provides that “*each party* is limited to a total of 60 document requests, 60 interrogatories, and 60 requests for admissions . . . .” [Emphasis Added] This provision is not ambiguous. The draft order that the court prepared prior to the scheduling conference contained the language “the parties” with respect to the discovery limitations. During the conference, the court agreed that *each* Respondent had certain rights relating to discovery and should not be disadvantaged and that “each party should have some limit” on the number of discovery requests that party could propound. [Transcript of August 10, 2004 hearing at 30-31 attached hereto as Exhibit A.] Thereafter, in the final order the court advisedly gave “each party” 60 of each type of discovery request.

It would be unfair and prejudicial to impose a discovery limitation on Respondents collectively rather than giving each Respondent a limitation as the court has done in the existing Scheduling Order. Although the Respondents obviously have some common interests and issues, they also have separate and distinct interests and defenses. For example, separate issues with respect to Gay include whether he had any actual knowledge that any of the advertisements contained a representation that was either false or misleading, whether he was recklessly indifferent to the truth of any representation in the advertisements or was aware that fraud was highly probable and intentionally avoided the truth, whether he directly participated in the dissemination of each advertisement, and

whether he had the authority to control the dissemination. *See Federal Trade Commission v. Garvey*, 383 F.3d 891 (9<sup>th</sup> Cir. 2004).<sup>1</sup>

Complaint Counsel chose to name Gay individually as a Respondent. Gay should have the right to reasonably determine what discovery is necessary to protect his own individual interests rather than being lumped together as a member of a group. If the 60 discovery request limitation is for all the Respondents collectively, how are the Respondents to jointly determine what specific requests to propound? Gay may very well want to propound different discovery requests that relate to his specific issues and defenses rather than the discovery requests that other Respondents want to propound. It is simply unworkable to have one limitation for all Respondents. That is undoubtedly why the court correctly limited the discovery requests to 60 for “each party.”<sup>2</sup>

The discovery requests that Gay has propounded are highly relevant to the charges made against him and the issues in this case. Complaint Counsel does not

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<sup>1</sup> Complaint Counsel complains that Respondents previously objected to interrogatories served upon them on the basis that they exceeded the number of interrogatories permitted by the court. This, of course, is an entirely separate matter. The objections were raised because had Respondents selectively answered interrogatories rather than refusing to respond to the interrogatories they would have waived their objection to Complaint Counsel exceeding the permitted number of interrogatories. *See Herdlein Technologies, Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 104-105 (W.D. N.C. 1993). However, if Complaint Counsel believes the objections are inappropriate and declines to limit the interrogatories to the number permitted by the court, Compliant Counsel can raise that issue with the court by appropriate motion.

<sup>2</sup> In this regard, Complaint Counsel complains that discovery propounded by the various Respondents is to some extent duplicative. However, to the extent Respondents seek the same information and documents it is a simple matter for Complaint Counsel to simply repeat the

contend otherwise. Complaint Counsel should be required to respond to the discovery requests. If Complaint Counsel has any specific objections to any specific discovery requests, Complaint Counsel can state those objections and, if the parties cannot resolve their disputes, the court can determine the objections upon appropriate motion.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that Complaint Counsel's motion for a protective order should be denied.

DATED this 15<sup>th</sup> day of November, 2004.

BURBIDGE & MITCHELL

By   
Stephen B. Mitchell  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was provided to the following parties on the 15<sup>th</sup> day of November, 2004 as follows:

Laureen Kapin  
Joshua S. Millard  
Laura Schneider  
Bureau of Consumer Protection  
Federal Trade Commission, Suite NJ-2122  
600 Pennsylvania Avenue, N.W.,  
Washington, D.C. 20580

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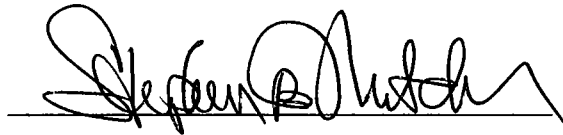
answers already provided or to simply refer to specific answers to another Respondent's discovery request and to produce the documents requested by more than one Respondent.

Stephen Nagin, Esq.  
Nagin Gallop & Figueredo  
3225 Aviation Avenue, Suite 301  
Miami, Florida 33131

Ronald F. Price  
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Miami, Florida 33131

Mitchell K. Friedlander  
5742 West Harold Gatty Drive  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Stephen P. Hatch", is written over a horizontal line. The signature is stylized and cursive.

P:\JGlines\Clients\BASIC RESEARCH\REPLY MEMO RE. PROTECTIVE ORDER.wpd

**EXHIBIT A**

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UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

In the Matter of: )  
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 BASIC RESEARCH, LLC; )  
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 A.G. WATERHOUSE, LLC; )  
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 KLEIN-BECKER USA, LLC; )  
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 NUTRASPORT, LLC; )  
 )  
 SOVAGE DERMALOGIC LABORATORIES, LLC; )  
 )  
 BAN, LLC d/b/a BASIC RESEARCH, LLC; ) Docket No. 9318  
 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. )  
 -----)

Tuesday, August 10, 2004

Room 532  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

The above-entitled matter came on for  
prehearing conference, pursuant to notice, at 11:32 a.m.

BEFORE THE HONORABLE STEPHEN J. McGUIRE  
For The Record, Inc.

Waldorf, Maryland  
(301) 870-8025





1 is 25 and no limit on other forms of written discovery.  
2 And I'd like to reserve all my rights --

3 JUDGE McGUIRE: Well, you're -- that's not a  
4 problem.

5 All right. We'll take a look at that one as  
6 well and we'll determine how to account for the several  
7 respondents in this proceeding.

8 MR. FELDMAN: And then I had one other issue,  
9 Judge, and I think this is more logistical.

10 In item 17, you anticipate that the respondent  
11 will mark the exhibits "R-", but we have multiple  
12 respondents in the case, so we'd just need to come up  
13 with a different protocol for that.

14 JUDGE McGUIRE: Yeah. I'm perfectly open on  
15 that. We could mark it RXA, RXB, like RXA 1, RXB 1,  
16 whatever is easiest for the parties.

17 MR. FELDMAN: We'll take that up as part of  
18 our --

19 JUDGE McGUIRE: You can take that up, and at the  
20 time we start trial, you can advise the court how you  
21 wish to proceed on that. I just think we should --

22 MR. FELDMAN: That's it.

23 JUDGE McGUIRE: -- we should have the clear RX  
24 for the respondents, and then how you further subset it  
25 is fine with me.

For The Record, Inc.

Waldorf, Maryland  
(301) 870-8025