

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

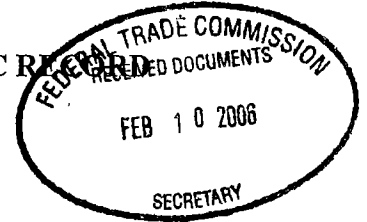
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*In the Matter of*

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.,  
BAN, L.L.C.,  
DENNIS GAY,  
DANIEL B. MOWREY, and  
MITCHELL K. FRIEDLANDER

*Respondents.*

PUBLIC RECORDS



[ORAL ARGUMENT  
REQUESTED]

DOCKET NO. 9318

**RESPONDENTS' SECOND REVISED MOTION FOR *IN CAMERA* TREATMENT OF  
TRIAL EXHIBITS**

**INTRODUCTION AND PROCEDURAL HISTORY**

In response to the Chief Administrative Law Judge's ("ALJ") January 25, 2006 Order on Respondents' Revised Motion for *In Camera* Treatment (the "January 25<sup>th</sup> Order"), Respondents' have: 1) conducted multiple reviews of 61,000 pages of documents to reduce the total number and the specific portions of exhibits for which Respondents seek *in camera* treatment; 2) identified and redacted confidential customer information from hundreds of exhibits; 3) supplemented witness declarations with over 150 pages of exhibit specific analysis; and 4) obtained additional factual declarations from Respondents' employees. Respondents' have reduced by 65% the total number of exhibits for which they seek *in camera* treatment.

Literally tens of thousands of pages of documents obtained by the Commission through compulsory process are unrelated to the products and advertisements that form the basis of the Commission's claims against Respondents in this proceeding.<sup>1</sup> Respondents respectfully submit the Commission has included in its designation of hearing exhibits hundreds of documents so obtained that are wholly unrelated to the claims, defenses and issues in this case. Moreover, the Commission has designated some documents as exhibits with multiple exhibit numbers. Indeed, in one instance, the Commission has designated the same document as an exhibit with four different numbers<sup>2</sup> unnecessarily increasing the total number of hearing exhibits. Once listed as potential exhibits, however, Respondents are obliged to move the ALJ for *in camera* treatment of all exhibits so deserving despite their voluminous or redundant nature.

Accordingly, on November 23, 2005, Respondents jointly moved the ALJ for an order granting *in camera* treatment of various trial exhibits designated by Respondents and the Commission (the "Original Motion"). Respondents moved on an admittedly large number of exhibits constituting Respondents' trade secrets, proprietary commercial information and highly confidential financial information. On November 28, 2005, Respondents filed a motion seeking leave to supplement the Original Motion.

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<sup>1</sup> The Commission has employed its compulsory process to reach without limitation: highly confidential financial information, business organization documents, secret product formulations, license agreements, consulting agreements, hundreds (if not thousands) of customer inquiries and other communications, proprietary advertising and marketing documents, confidential internal e-mail and correspondence, confidential communications with third-parties, employee development notes, work-product, private party litigation materials, non-disclose agreements, various business contracts, grant applications, interview notes, and countless other types of documents. In addition to the documents and materials obtained from Respondents, the Commission has also engaged in extensive third-party discovery, and voluminous expert witness discovery, together likely accounting for several thousand additional pages of documents.

<sup>2</sup> October 23, 2001 deposition of Daniel Mowrey taken in Cytodyne Technologies, Inc. v. Basic Research, L.L.C., marked as Exhibit No(s). CX-904, CX-917, CX-934 and CX-937; *see also* October 23, 2001 deposition of Mitchell Friedlander in Cytodyne Technologies, Inc. v. Basic Research, L.L.C., marked as Exhibit No(s). CX-919, CX-932 and CX-939; October 22, 2001 deposition of Dennis Gay taken in Cytodyne Technologies, Inc. v. Basic Research, L.L.C., marked as Exhibit No(s). CX-903 and CX-936; September 12, 2000 deposition of Mitchell Friedlander taken in Cytodyne Technologies, Inc. v. Silver Sage, et al., marked as Exhibit No(s). CX-920 and CX-921.

By Order dated December 5, 2005 (the “December 5<sup>th</sup> Order”), the ALJ denied without prejudice Respondents’ request for leave to supplement the November 23 filing. The ALJ explained that Respondents’ were obliged to identify individually (instead of by category, as was done in the Original Motion) each exhibit for which Respondents sought *in camera* treatment, together with a statement specifically identifying the requested time period for which *in camera* treatment was sought for each exhibit. The ALJ further explained that “Respondents must significantly reduce the number of documents for which they seek *in camera* treatment to only those documents which are sufficiently secret and material to their business that disclosure would result in serious competitive injury.” January 25<sup>th</sup> Order at 2.

Pursuant to the December 5<sup>th</sup> Order, on January 13, 2006, Respondents submitted their Revised Motion for *In Camera* Treatment of Trial Exhibits (the “First Revised Motion”). That submission included a careful review of each and every exhibit that was the subject of the Original Motion and included: 1) a declaration of Carla Fobbs providing an exhibit-by-exhibit *in camera* analysis and a statement specifically identifying the requested time period for which *in camera* treatment is sought for each individual exhibit;<sup>3</sup> and excluded 2) approximately 400 exhibits that Respondents had requested be given *in camera* treatment in their Original Motion.

However, by order dated January 25, 2006 (the “January 25<sup>th</sup> Order”), the ALJ denied without prejudice Respondents’ First Revised Motion. Specifically, the ALJ advised, *inter alia*, that Respondents needed to: 1) “narrowly tailor” their *in camera* requests for portions of depositions, discovery responses and expert reports; 2) redact all customer information from documents thereby obviating the need to move for *in camera* treatment on these documents; and 3) be aware of the presumption under Commission precedent that *in camera* treatment will not

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<sup>3</sup> Notably, this exercise increased the length of Ms. Fobbs’ declaration from 17 pages to 248 pages.

be provided to information that is three or more years old. *See* January 25, 2006 Order, pp. 2-4.<sup>4</sup>

Accordingly, pursuant to 16 C.F.R. § 3.45 and the December 5<sup>th</sup> and January 25<sup>th</sup> Orders, Respondents' respectfully submit this Second Revised Motion for *In Camera* Treatment of Trial exhibits. In this submission we have: 1) carefully re-reviewed all deposition transcripts, discovery responses and expert reports and further "narrowly tailored" Respondents' requests for *in camera* treatment of these exhibits through precise redaction wherever possible; 2) redacted all customer information from exhibits for which Respondents' previously sought *in camera* treatment thereby eliminating Attachment 8 "Customer Information" from the Motion; 3) provided additional legal and factual authority supporting Respondents' arguments; and 4) obtained an additional declaration supporting the motion from Respondents' employee Gina Gay. Respondents hereby request oral argument on the instant motion.

### ARGUMENT

Respondents here move the ALJ for an order granting *in camera* treatment for Respondents' and Complaint Counsel's trial exhibits containing Respondents' trade secrets, commercial and financial information fairly meeting the standards set forth in the cases cited below. The confidential information contained in these exhibits that, once disclosed, would result in a clearly defined, serious injury to Respondents, include, among other things:

- (1) Trade secrets, such as *secret formulas, the results of third-party testing, compilations of substantiation materials, confidential internal research and development; and*

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<sup>4</sup> The ALJ also noted that the number of boxes of documents for which Respondents sought *in camera* treatment inexplicably increased from the Original Motion to the First Revised Motion. January 25<sup>th</sup> Order at 2. By way of explanation, Respondents inadvertently omitted several pages of their substantiation compilations in the Original Motion. In the Revised Motion, Respondents added the previously omitted pages of substantiation which, as a result of the sheer volume of materials Respondents' compiled to support their advertising claims, increased the number of boxes of documents. However, the number of exhibits for which Respondents sought *in camera* treatment in the Revised Motion actually decreased by approximately 400 exhibits.

- (2) Commercial information, such as *marketing strategies, confidential consulting and license arrangements, advertising dissemination schedules*; and
- (3) Financial information, such as *advertising expenditures and gross revenue figures, profits and revenue balance sheets, royalty and licensing agreements, and confidential business organization materials*.

Virtually all of the exhibits and information subject to Respondents' instant motion are part of this proceeding solely as a result of the Commission's extraordinarily broad and sweeping compulsory process. These documents and information are considered "non-public material" under 16 C.F.R. § 4.10, and are sufficiently secret and material to Respondents' business, that public disclosure would necessarily result in a serious competitive injury to Respondents under prevailing Commission law.

Respondents' position is supported both by intrinsic and extrinsic evidence. In the case of certain trade secrets, such as secret proprietary formulas, the confidential nature of the information may be inferred from the nature of the documents themselves. Nonetheless, all of the findings herein, including the conclusions relating to the confidential nature of the information at issue, are fully supported by the sworn statement of Carla Fobbs, Legal Administrator in the Basic Research, L.L.C., Compliance Department.

Respondents seek both indefinite and temporary *in camera* treatment of sensitive documents, depending on the unique nature of each discreet document. In conformance with the December 5<sup>th</sup> Order, the time period Respondents seek such treatment is identified on a document by document basis in Ms. Fobbs' declaration. As the ALJ noted in his December 5<sup>th</sup> Order, indefinite *in camera* treatment is granted "only in those 'unusual' cases where the competitive sensitivity or the proprietary value of the information will not diminish with the

passage of time.” *In re Evanston Northwestern Healthcare Corp., et al.*, 2005 F.T.C. LEXIS 27, at \*2 (Feb. 9, 2005); *In re Coca Cola Co.*, 1990 F.T.C. LEXIS 364, at \*7 (Oct. 17, 1990). The ALJ further noted in his January 25<sup>th</sup> Order the presumption under Commission law that *in camera* treatment will not be provided to information that is three or more years old. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157, at \*5 (Nov. 22, 2000). However, administrative courts have granted indefinite *in camera* status for “trade secrets, such as secret formulas, processes, and other secret technical information, and information that is privileged.” *Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at \*2; *see In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1189 (1961); *In re R.R. Donnelley & Sons Co.*, 1993 F.T.C. LEXIS 32 (Feb. 18, 1993); *In re Textron, Inc.*, 1991 F.T.C. LEXIS 135 (Apr. 26, 1991). Moreover, the Commission has provided *in camera* treatment of information more than five years old which has never been made available to the public and whose public disclosure would result in serious injury. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984).

Unlike trade secret information, the administrative courts typically limit *in camera* treatment for “business records,” like “ordinary business plans, marketing plans, or sales documents,” to between two and five years. *Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at \*2; *see also, In re E.I. Dupont de Nemours & Co.*, 1981 F.T.C. LEXIS 91 (Jan. 21, 1981); *In re Int’l Ass. of Conf. Interpreters*, 1996 F.T.C. LEXIS 298 (June 26, 1996).

As reflected in Ms. Fobbs’ declaration, Respondents request the ALJ extend indefinite *in camera* status only to the documents that fall within the following commonly recognized highly confidential categories: product formulations, third-party testing, secret compilations and grant applications. The sensitivity of information in these categories will not lessen with the passage of time. *See Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at \*2. In

contrast, Respondents request only temporary *in camera* status from two to five years, depending on the importance of each document, for those documents falling within the following categories: gross revenues and advertising expenditures, profits and revenue balance sheets, royalty and licensing agreements, marketing strategies, settlement documents, and dissemination schedules.

### **I. The Clearly Defined, Serious Injury Standard**

A showing of a “clearly defined, serious injury” is made by establishing the documents at issue are “sufficiently secret and sufficiently material to [Respondents’] business that disclosure constitutes a serious competitive injury.” *Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at \*1 (citing, *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984); *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188). Parties may rely on extrinsic evidence, such as affidavits or declarations, to make this showing. *Id.* at \*2 (citing, *In re North Texas Specialty Physicians*, 2004 F.T.C. LEXIS 109, at \*2-3 (Apr. 23, 2004)). In addition, a finding that a clearly defined serious injury would result from public disclosure may, in certain situations, be inferred from the nature of the documents themselves, such as in the case of certain trade secrets. *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188.

In *Bristol-Myers Company, et al.*, 90 F.T.C. 455, 456 (1977), the Commission outlined six factors bearing both on “secrecy” and “materiality”: (1) the extent to which the information is known outside the applicant’s business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the

information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

The Commission has acknowledged that the showing of a serious injury does not necessarily require a specific demonstration of the manner in which other companies would use material to the disadvantage of the company whose information is at issue. *E.I. DuPont de Nemours & Co.*, 1981 F.T.C. LEXIS 91, at \*3. Rather, “it is proper to infer that disclosure of allegedly sensitive information would seriously affect a [company’s] commercial position.” *Id.* (citing, *General Foods Corporation*, Docket. No. 9085, at \*1-2 (August 1, 1980)). Thus, a general concern for the seriousness of injury to a company’s commercial or competitive position underlies the analysis. *Id.*

## **II. Respondents’ Documents Meet The Clearly Defined Serious Injury Standard**

Respondents’ and Complaint Counsel’s trial exhibits contain information that meets the “clearly defined, serious injury” standard. The documents fall within twelve distinct categories:

- (1) Attachment 1—Product Formulation;
- (2) Attachment 2—Third-Party Testing;
- (3) Attachment 3—Substantiation Compilations;
- (4) Attachment 4—Grant Applications;
- (5) Attachment 5—Gross Revenue and Advertisement Expenditures;
- (6) Attachment 6—Profits, Revenue Balance Sheets and Confidential Corp. Info.;
- (7) Attachment 7—Royalty and Licensing Agreements;
- (8) Attachment 8—Customer Information (no longer used);
- (9) Attachment 9—Advertising Dissemination Schedules;
- (10) Attachment 10—Marketing Strategy;



- (11) Attachment 11—Settlement Documents; and
- (12) Attachment 12—Those Documents that Merit Coverage Under More than One of the Other Categories.<sup>5</sup>

The documents contained in each of these categories contain information sufficiently secret, and sufficiently material to Respondents’ business, that disclosure constitutes a serious competitive injury under prevailing Commission law, as they contain: *(a) trade secrets (b) confidential commercial information, and (c) confidential financial information*. A complete list of exhibits included in this Motion, in numerical order, is attached hereto at Table 1. The Table identifies each exhibit by exhibit number and contains a brief description of each exhibit, bates number (where appropriate) and applicable category.

**A. Attachment 1: Product Formulation**

Respondents’ and Complaint Counsel’s trial exhibits contain highly confidential product formulation information. For example, documents in “Attachment 1” contain product formulation data—*i.e., a complete list of ingredients and ratios of amounts*—for all six challenged products. *See* Fobbs Dec., ¶ 10, *citing*, Attachment 1. It is difficult to imagine information more “secret” and “material.” Indeed, “the disclosure of a secret formula will almost invariably result in injury...” *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188 (“the impact of disclosure of a “trade secret,” as distinguished from other records, would almost certainly be productive of injury...”);<sup>6</sup> Fobbs Dec., ¶¶ 17-18.

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<sup>5</sup> Pursuant to 16 U.S.C. § 3.45(b), Respondents attach each page of each exhibit in which *in camera* or confidential material appears in Attachments 1-12 hereto in electronic form on enclosed CDs. For the convenience of the Court, each Attachment includes a table of the exhibits in the Attachment and references to paragraphs in the Declaration of Carla Fobbs supporting the Attachments’ *in camera* status. For further convenience of the Court, Respondents’ have also included an index of all of the exhibits for which Respondents’ seek *in camera* treatment in Table 1 attached hereto.

<sup>6</sup> Significantly, this Court previously acknowledged that Respondents’ product formulations constituted protected trade secrets. *In re Basic Research, et al.*, Docket No. 9318, Order Certifying Motions to Commission and

These documents contain lists or descriptions of the ingredients and ratios of amounts for each of the challenged products. Fobbs Dec., ¶ 10, *citing*, Attachment 1. Accordingly, the injury flowing from disclosure of these documents may be inferred from the nature of the documents themselves. *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188. Nonetheless, the injury is also apparent in light of the “secrecy” and “materiality” factors set forth above and further addressed in the Fobbs Dec., ¶¶ 11-16.

Complaint Counsel has acknowledged the confidential nature of this information in subsequent filings with the Commission. Specifically, in Complaint Counsel’s Motion to Compel Production of Documentary Material and Answers to Interrogatories, Complaint Counsel omitted Exhibit “A” from Respondents’ Response to Complaint Counsel’s First Set of Interrogatories, notwithstanding the inclusion of the responses themselves. Accordingly, Respondents have established that the information contained in Attachment 1 is sufficiently secret, and sufficiently material to Respondents’ business, that a clearly defined, serious injury would result in the event of public disclosure.<sup>7</sup> Fobbs Dec., ¶ 18.

#### **B. Attachment 2: Third-Party Testing**

Respondents’ trial exhibits also contain highly confidential third-party testing. For example, “Attachment 2” to this Motion consists of confidential scientific testing results generated by private independent laboratories commissioned by Respondents to test their products. *See*, Fobbs Dec., ¶ 19, *citing*, Attachment 2. The results of those third-party tests of Respondents’ products disclose highly secret, non-public technical information. Fobbs Dec, ¶¶ 20-21. Trade secret protection has been extended to include “secret formulas, research or

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Staying Proceedings, 9 (Apr. 6, 2005). Thus, disclosure of Respondents’ product formulations would invariably result in injury.

<sup>7</sup> Of course, Respondents address each such document individually in Ms. Fobbs’ declaration, per the December 5<sup>th</sup> Order, as is the case with each category of documents described herein.

processes” when the dissemination of the information would cause harm to the possessor company. *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1189. For example, *in camera* treatment has been granted to protect “batch data for CARB summertime gasoline.” *In re Union Oil Co. of California*, 2004 F.T.C. LEXIS 197, at \*7 (Oct. 7, 2004). Like in *Union Oil*, the batch data gathered from the third-party testing of Respondents’ gels requires *in camera* protection. *See id.*

The results of the Respondents’ third-party testing of their gels is also non-public trade secret research, which if revealed, would provide rivals a significant competitive advantage in creating competing products. Fobbs Dec., ¶ 22. If such information was disclosed, competitors would be able to bring to market products that compete directly with Respondents’ products while at the same time avoiding the considerable time, money, and effort involved in researching similar products with the same active ingredients. *Id.* To prevent such disclosure, the Respondents go to great lengths to protect their research and testing material, even limiting access internally to only those who need it to carryout the duties of their employment. Fobbs Dec., ¶ 21.

### **C. Attachment 3: Substantiation Compilations**

As an initial matter, the Commission’s lawyers have informed Respondents’ counsel that the Commission generally objects to the bulk of Respondents’ substantiation compilations on the basis of relevance. The Commission apparently intends to seek exclusion at the Hearing of much or all of Respondents’ substantiation compilations. Thus, the ALJ need not presently reach the question whether Respondents’ substantiation compilations are deserving of *in camera* treatment. Respondents respectfully submit the ALJ should refrain from ruling on this issue until the threshold issue of relevancy is determined, possibly at the final pre-Hearing conference, where the ALJ will have the benefit of oral argument from the parties.

Respondents' trial exhibits contain secret compilations of substantiation materials the Respondents accumulated during the development of their products to support their advertising claims and to confirm the effectiveness of specific forms, amounts and modes of administration of the active ingredients. *See* "Attachment 3" to Fobbs Dec.; *see also* Declaration of Gina Gay ("Gay Dec."). During its investigation of Respondents, the Commission requested that Respondents provide the materials that they relied on to support their advertising claims. [

**REDACTED**

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] Therefore, despite the presence of publicly available information in the compilations, they constitute trade secrets which, if revealed to Respondents' competitors, would result in a clearly defined and serious competitive injury to Respondents. Fobbs Dec., ¶ 30.

**1. The Substantiation Compilations are Trade Secrets**

"The fact that some or all of the components of the trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual

elements.” *Penalty Kick Management LTD. v. Coca Cola Co.*, 318 F.3d 1284, 1291 (11 Cir. 2003) (citing *Essex Group, Inc. v. Southwire Co.*, 501 S.E.2d 501, 503 (Ga. 1998) (quoting *Restatement 3d of Unfair Competition* § 39(f) (1995))). Indeed, “[b]oth the Uniform Trade Secrets Act and the courts agree that information may be classified as a trade secret, regardless of its presence in the public domain.” *Crane Helicopter Services, Inc. v. U.S.*, 56 Fed.Cl. 313, 324 (2003); UTSA § 1(4) cmt.; *Rivendell Forest Products v. Georgia-Pacific Corp.*, 28 F.3d 1042, 1046 (10<sup>th</sup> Cir. 1994) (recognizing that a trade secret can include an integration of elements in the public domain); *Water Services, Inc. v. Tesco Chemicals, Inc.*, 410 F.2d 163, 173 (5<sup>th</sup> Cir. 1969) (“a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but...which in unique combination, affords a competitive advantage and is a protectible [sic] secret”); *Capital Asset Research Corp. v. Finnegan*, 160 F.3d 683, 686 (11<sup>th</sup> Cir. 1998) (“[e]ven if all of the information is publicly available, a unique compilation of that information, which adds value to the information, also may qualify as a trade secret”).

Compilations similar to the Respondents’ have regularly been protected as trade secrets. *See Unistar Corp. v. Child*, 415 So.2d 733 (Fla.3d DCA 1982). For example, in *Unistar Corp.*, the plaintiff corporation compiled a list of gem dealers over a three-year period. *Id.* at 734. The plaintiff initially screened 12,000 potential sellers to ascertain their interest in being gem dealers for the plaintiff’s jewels. *Id.* The initial list was narrowed to 4,200 parties who expressed interest in selling the plaintiffs gems. *Id.* Of those expressing interest, only 1,800 people signed contracts with the plaintiff. *Id.* The plaintiff spent \$800,000 in mailings, solicitations, advertisements, and training seminars to cultivate interest in its product and create its list of dealers. *Id.* The plaintiff also periodically updated its list, destroying its outdated one. *Id.*

Employees having access to the list were instructed to keep it at their desk and were prohibited from removing the list from the office. *Unistar Corp.*, 415 So.2d at 734. The court held that the list was a trade secret and could not be used by two former employees to compete against the plaintiff. *Id.* The court reasoned that the list of dealers was a result of “considerable effort, knowledge, time, and expense on the part of the plaintiff.” *Id.*

Respondents’ substantiation compilations are protected trade secrets deserving of *in camera* treatment. The Respondents, similar to *Unistar*, have expended an extraordinary amount of time and resources accumulating and compiling the information to support their products safety and efficacy determinations, product forms, dose amounts and modes of administration. *See* Fobbs Dec., ¶ 31; *Unistar Corp.*, 415 So.2d at 734. The compilations are unique to Respondents and provide them with a competitive advantage. *See* Fobbs Dec., ¶¶ 27-32; *Water Services, Inc.*, 410 F.2d at 173. The compilations are not publicly available and Respondents have guarded against disclosing them to the public and its own employees who do not require the information in an effort to protect the competitive advantage provided by the compilations. *See* Fobbs Dec., ¶¶ 27-28; *Unistar Corp.*, 415 So.2d at 734. [

**REDACTED**

] *Unistar Corp.*, 415 So.2d at 734.

[

**REDACTED**

] *see Salsbury Laboratories, Inc.*, 735 F. Supp.

at 1569.

**2. The Commission's Interest in Public Disclosure of Respondents' Substantiation Compilations is Outweighed by the Clearly Defined and Serious Competitive Injury to Respondents That Would Result**

The Commission's interest in public disclosure of information in its adjudicative proceedings must yield when a party demonstrates that public disclosure would result in a clearly defined, serious injury. *See* 16 C.F.R. § 3.45(b); *see also In re Textron Inc.*, 1990 FTC LEXIS 282 at \*5 (July 17, 1990) (“[i]n camera treatment of certain relevant information may be appropriate where the prospective injury from disclosure outweighs the public interest in full knowledge”). Trade secrets such as Respondents' substantiation compilations are examples of the type of documents deserving of in camera treatment because their public disclosure would

result in a clearly defined, serious injury. *See In re Aspen Tech., Inc.*, 2004 FTC LEXIS 56 at \*2 (May 5, 2004) (emphasis added) (“[e]xamples of documents meriting indefinite in camera treatment are trade secrets, such as secret...processes”).<sup>8</sup>

As established in Section II.C.1. *supra*, Respondents’ substantiation compilations are closely guarded trade secrets. There are a large number of competitors who desire to copy Respondents’ product line, marketing strategy and business plan. Gay Dec., ¶ 7. These competitors lie in wait and use every piece of information they can acquire in their efforts to create “knock-offs” or copies of Respondents’ products, which compete head-to-head with Respondents’ products in the same market. Gay Dec., ¶ 8. [

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<sup>8</sup> Federal appellate courts have consistently held that the presence of trade secrets in court records weighs against the public’s right of access. *See Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 166 (3d Cir. 1993); *see also U.S. v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (stating that public has been excluded temporarily or permanently from the records of court proceedings to protect trade secrets).



**REDACTED**

] Although the Commission has an interest in public disclosure of Respondents' substantiation compilations to explain its decision, this interest is clearly outweighed by the likelihood of the clearly defined and serious competitive injury to Respondents that would result. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984).

**D. Attachement 4: Grant Applications**

Respondents' trial exhibits contain highly confidential grant applications. For example, "Attachment 4" to this motion contains grant applications for small businesses regarding Respondents proposed study to further test the efficacy of their weight loss program. *See Fobbs Dec.*, ¶ 34, *citing*, Attachment 4. Methodologies used to make business decisions have been provided *in camera* protection. *North Texas Specialty Physicians*, 2004 F.T.C. LEXIS 109, at \*19-20. The Respondents' study employs a unique methodology, which tests the integration of many aspects involved in weight loss. *See Fobbs Dec.*, ¶ 35; *North Texas Specialty Physicians*, 2004 F.T.C. LEXIS 109, at \*19-20.

Respondents' grant applications, much like its third-party testing and substantiation compilations, are also protected trade secrets. Trade secret protection extends to "research or processes," the dissemination of which would harm the company possessing the information. *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1189. Respondents' grant proposals for a weight loss plan involving the use of its products constitutes "research and processes" deserving of *in camera* treatment. *See id.* Respondents spent time, money, and effort gathering qualified personnel to

administer the study, developing a comprehensive testing methodology, and incorporating comments from the grant review board. *See* Fobbs Dec., ¶ 39. Disclosing grant information would allow Respondents' competitors to benefit from Respondents' work-product and feedback, giving them an advantage when competing for limited grant funding. *See* Fobbs Dec., ¶¶ 38-39.

**E. Attachment 5: Net Gross Revenue and Advertising Expenditures**

Respondents' trial exhibits contain highly confidential financial information. For example, "Attachment 5" to this Motion contains net gross revenue and advertising expenditures for Respondents' companies. Specifically, these documents detail the amount of money Respondents spent on advertising for the challenged products and the total yearly revenue earned from sales of the challenged products. *See* Fobbs Dec., ¶ 42, *citing*, Attachment 5. This information is extremely sensitive for many reasons, including the fact that its release may "enable...competitors to construct an accurate financial model of [Respondents'] business, to its detriment." *E.I. Dupont de Nemours & Co.*, 1981 F.T.C. LEXIS 91, at \*4 (*in camera* status extended to "investment, earnings, profit, operative return and cost information"); *see also*, *North Texas Specialty Physicians*, 2004 F.T.C. LEXIS 109, at \*8-9 ("total revenues" satisfied clearly defined, serious injury standard); *Evanston Northwestern Healthcare Corporation*, 2005 F.T.C. LEXIS 27, at \*6 (*in camera* treatment given to a "financial and cost data"); *see also*, Fobbs Dec., ¶ 46.

Although Respondents believe the injury flowing from disclosure of their confidential financial information may be inferred from the nature of the documents themselves, this conclusion is further supported by the "secrecy" and "materiality" factors set forth above and further addressed in the Fobbs Dec., ¶¶ 43-48. Additionally, this Court previously determined

that these documents “meet the standards for in camera treatment as confidential business records” because “disclosure of this information would result in a clearly defined serious competitive injury to Respondents.” *In re Basic Research, et al.*, Docket No. 9318, Order Certifying Motions to Commission and Staying Proceedings, 9 (Apr. 6, 2005). The effects of disclosing this sensitive business information have not changed since the issuance of the Court’s April 6<sup>th</sup> Order. Accordingly, Respondents have established that the information contained in Attachment 5 is sufficiently secret, and sufficiently material to Respondents’ business, that a clearly defined, serious injury would result in the event of public disclosure. Fobbs Dec., ¶ 49. Respondents request in camera treatment of these exhibits for a period of five years. *See* Fobbs Dec., Attachment 5.

**F. Attachment 6: Profits and Revenue Balance Sheets, and Other Confidential Corporate Information**

Respondents’ trial exhibits contain highly confidential financial information about its companies’ assets and liabilities. For example, “Attachment 6” to this Motion contains combined balance sheets for Basic Research, Nutrastar, Majestic Enterprises and American Phytotherapy Research Laboratory. *See* Fobbs Dec., ¶ 50, *citing*, Attachment 6. For reasons similar to those presented above regarding Respondents’ financial information, the information contained in these exhibits is highly confidential because its release may enable competitors to capitalize on Respondents’ highly confidential corporate structure. *Evanston Northwestern Healthcare*, 2005 F.T.C. LEXIS 27, at \*6 (*in camera* treatment given to a “recent financial audit.”); *E.I. DuPont de Nemours*, 1981 F.T.C. LEXIS 91, at \*4 (*in camera* status extended to “investment, earnings, profit, operative return and cost information.”); *see also*, Fobbs Dec., ¶ 51. This conclusion is supported both by the nature of the exhibits themselves as well as the “secrecy” and “materiality” factors. *See* Fobbs Dec., ¶ 51. Accordingly, Respondents have

established that the information contained in these exhibits is sufficiently secret, and sufficiently material to Respondents' business, that a clearly defined, serious injury would result in the event of public disclosure. Fobbs Dec., ¶ 52.

#### **G. Attachment 7: Royalty and Licensing Agreements**

Respondents' trial exhibits contain highly confidential contracts. "Attachment 7" to this Motion contains royalty and licensing agreements that Respondents entered into for the purpose of gaining an exclusive right to use proprietary information in creating the challenged products. *See* Fobbs Dec., ¶¶ 53-54, *citing*, Attachment 7. *In camera* status has been extended to contracts when those agreements have "secret, competitively sensitive [information], the disclosure of which could cause serious competitive injury" to respondents. *North Texas Specialty Physicians*, 2004 F.T.C. LEXIS 109, at \*3. Specifically, royalty and licensing agreements are among the types of commercial, financial, and trade secret information regularly afforded *in camera* protection. *Union Oil Co. of California*, 2004 F.T.C. LEXIS 198, at \*6.

Respondents' royalty and licensing agreements are kept in confidence within Respondents' organizations and hidden from competitors. *See* Fobbs Dec., ¶ 55. The royalty and licensing agreements are sensitive because the contracts disclose confidential payment amounts to third-party licensors and the terms under which the agreements are formed. *See id.* Respondents will be subject to serious competitive injury if the agreements are made available to the public because competitors would be able to review or reproduce the negotiated confidential royalty and licensing terms and payments to directly compete with Respondents. *See id.*

#### **H. Attachment 8: Customer Information**

Pursuant to the directives set forth in the ALJ's January 25<sup>th</sup> Order, Respondents are redacting all customer information from the hearing exhibits for which they originally sought in

camera treatment. Consequently, Respondents are no longer seeking in camera treatment on approximately 200 exhibits previously referenced in Attachment 8 and, thus, are intentionally leaving this section blank.

#### **I. Attachment 9: Advertising Dissemination Schedules**

Respondents' trial exhibits contain highly confidential advertising dissemination schedules. "Attachment 9" contains detailed schedules of print advertisements for all the challenged products (except PediaLean) and television advertising schedules for Leptoprin (collectively, "Dissemination Schedules"). Fobbs Dec., ¶ 61.

The Dissemination Schedules are far more than simple schedules of when and where Respondents ran certain advertising, although that information is also included. They are the cumulative result of numerous prior advertising campaigns (both successful and unsuccessful) that have been modified and refined after expending substantial amounts of money, time and effort over a thirteen-year period to discover how to run an effective advertising campaign. Fobbs Dec., ¶ 66. Thus, the Dissemination Schedules are extremely valuable both to Respondents and its competitors because it provides a "blue print" of strategic advertising that could easily be copied by Respondents' competitors to successfully market similar products. Fobbs Dec., ¶ 66.

In light of the usefulness of this information, the Dissemination Schedules are similar to customer lists, sales data, or any other important information that has been accumulated over time exclusively through the substantial efforts of a particular company. *North Texas Specialty Physicians*, 2004 F.T.C. LEXIS 109, at \*4 (customer base including "top ten customers" and "business strategic planning" satisfied clearly defined, serious injury standard); *Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. at 500 (extension of *in camera* treatment for documents detailing

sales of specific products). As such, it is appropriate to protect Respondents from companies unfairly trading upon this information to gain a competitive advantage. *See* Fobbs Dec., ¶ 65.

The sensitivity of this information is supported by the documents themselves and the “secrecy” and “materiality” factors. Fobbs Dec., ¶¶ 62-67. Additionally, this Court previously determined that the Dissemination Schedules in Attachment 9 qualified, at least in part, as *in camera* business information because the supporting affidavit demonstrated that “disclosure of this information would result in a clearly defined, serious competitive injury to Respondents.” *Basic Research, et al.*, Docket No. 9318, Order Certifying Motions to Commission and Staying Proceedings, 9 (Apr. 6, 2005). Accordingly, Respondents have established that the information contained in the Dissemination Schedules is sufficiently secret, and sufficiently material to Respondents’ business, that a clearly defined, serious injury would result in the event of public disclosure. Fobbs Dec., ¶ 68.

#### **J. Attachment 10: Marketing Strategy**

Respondents’ trial exhibits contain highly confidential marketing strategy information. “Attachment 10” to this Motion contains e-mails and reports disclosing how to effectively market the six challenged products. *See* Fobbs Dec., ¶ 69, *citing*, Attachment 10. Marketing research typically provided protection includes *in camera* information “used by companies to gain a sales edge over competitors.” *Int’l Ass. of Conf. Interpreters*, 1996 F.T.C. LEXIS 298, at \*20. Respondents’ reports assessing the take-away message in their advertising, internal e-mail about the positioning of their product information, and tip sheets aiding customer service in effectively marketing the products are all “sales strategies for overtaking competitors.” *See* Fobbs Dec., ¶¶ 73-74; *Int’l Ass. of Conf. Interpreters*, 1996 F.T.C. LEXIS 298, at \*12-13.

Business strategies and market assessments have been provided *in camera* status when

supporting declarations show the documents are “confidential” and their dissemination “would result in a clearly defined, serious injury.” *Evanston Northwestern Health Corp.*, 2005 F.T.C. LEXIS 27, at \*6. Respondents’ confidential marketing strategy information has uniformly been held in confidence both internally, limiting access to the information to only those who need it to complete their daily tasks, and externally from competitors. *See Fobbs Dec.*, ¶¶ 70-72. Allowing competitors access to Respondents’ secret marketing information would enable Respondents’ direct competitors to either develop a counter-marketing strategy or mimic Respondents’ successful business methods; and ultimately gain a greater share of Respondents’ market. *See Fobbs Dec.*, ¶¶ 73-74.

#### **K. Attachment 11: Settlement Documents**

Respondents’ trial exhibits contain highly confidential settlement documents. “Attachment 11” to this motion includes documents containing correspondence between the Commission and Respondents regarding settlement of this case. *See Fobbs Dec.*, ¶ 77, *citing*, Attachment 11.

*In camera* treatment is appropriate when “public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. at 500; *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188. Disclosing confidential settlement negotiations would result in a clearly defined, serious injury to Respondents. First, Respondents have closely guarded access to its correspondence with the Commission to prevent public disclosure. *See Fobbs Dec.* ¶¶ 78-79. Second, Respondents’ competitors would benefit from the time, money, and effort Respondents expended in attempting to resolve the case. *See Fobbs Dec.* ¶ 80. Third, the proposed consent orders contain Respondents’ confidential information that prevents the

agreements from being part of the public record in an adjudicatory proceeding unless and until the Commission accepts the agreement. *See* Fobbs Dec. ¶ 81. Finally, the public may misperceive Respondents' attempts to settle as an admission of guilt, thereby damaging Respondents' reputation and negatively affecting product sales. *See* Fobbs Dec. ¶ 82. Therefore, Public disclosure of settlement documents would cause a clearly defined, serious injury to Respondents. *See Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. at 500; *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188.

Although the Commission has rejected applications to grant *in camera* treatment of settlement documents in the past, Respondents' assert that the instant case is distinguishable. In *In re Textron, Inc.*, 1990 FTC LEXIS 282 at \*8 (July 17, 1990), the Commission denied *in camera* treatment of respondents' settlement documents. The Commission based its decision on an acknowledgement by the respondents that the damage that was likely to flow from disclosure was minimal and/or speculative. *Id.* at \*7. Conversely, in the instant action, Respondents have not acknowledged that the harm flowing from disclosure of its settlement documents would be minimal. *See* Fobbs Dec. ¶¶ 78-82. Indeed, Respondents have demonstrated just the opposite: the benefits Respondents' competitors would receive from saving the time, money and effort expended by Respondents to resolve the case coupled with the disclosure of Respondents' confidential information contained in the documents and the damage to Respondents' reputation by perceptions of guilt makes clear that the harm flowing from the disclosure of Respondents' settlement documents would be significant. *See id.*

#### **L. Attachment 12: Multiple Category Documents**

A number of exhibits incorporated into this Motion are deserving of *in camera* treatment under more than one of the categories described above. For the convenience of



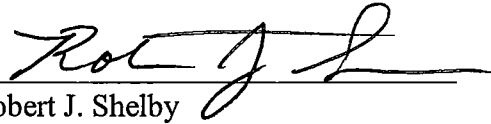
the ALJ, and to reduce the volume of material presented, those documents are not separately listed in each applicable category. They are, instead, compiled in a new Attachment 12, together with an individual description of each such exhibit explaining the bases that justify inclusion of the exhibit in the *in camera* motion.

### **CONCLUSION**

In light of the support offered, and the arguments and authority presented herein, Respondents respectfully submit that they have shown cause as to why the public disclosure of their confidential information would result in a clearly defined, serious injury to Respondents. Accordingly, the ALJ should enter an order granting *in camera* treatment of the exhibits identified in Attachments 1-12 and Ms. Fobbs' declaration for the time periods specified.

DATED this 9<sup>th</sup> day of February, 2006.

BURBIDGE & MITCHELL

A handwritten signature in black ink, appearing to read "Robert J. Shelby", written over a horizontal line.

Robert J. Shelby

BURBIDGE & MITCHELL

215 S. State Street, #920

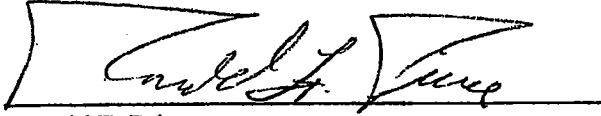
Salt Lake City, Utah 84111

Telephone: 801/355-6677

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Attorneys for Respondent Dennis Gay

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Ronald F. Price", is written over a horizontal line.

Ronald F. Price

**PETERS SCOFIELD PRICE**

*A Professional Corporation*

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111 East Broadway

Salt Lake City, Utah 84111

Telephone: (801) 322-2002

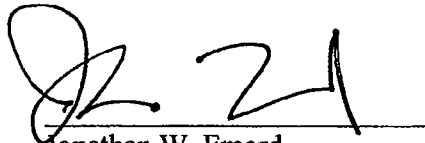
Facsimile: (801) 322-2003

E-mail: [rfp@psplawyers.com](mailto:rfp@psplawyers.com)

Attorneys for Respondent Daniel B. Mowrey

Dated this 3<sup>rd</sup> day of February, 2006

Respectfully submitted,

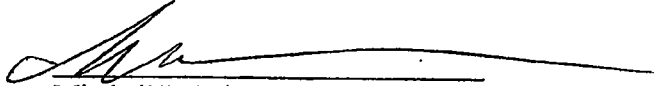


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Dated this 3<sup>rd</sup> day of February, 2006

Respectfully submitted,



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*Pro Se*

CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of February, 2006, I caused the foregoing **PUBLIC VERSION OF RESPONDENTS' SECOND REVISED MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS AND ORDER ON RESPONDENTS' REVISED MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS** to be filed and served as follows:

- (1) an original and one paper copy send via federal express. One electronic copy in PDF format emailed to:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW Room H-159  
Washington, DC 20580  
Email: [secretary@ftc.gov](mailto:secretary@ftc.gov)

- (2) two paper copies delivered by federal express to:

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
600 Pennsylvania Avenue, NW, Room H-112  
Washington, D.C. 20580

- (3) one paper copy by first class U.S. Mail to

James Kohm  
Associate Director, Enforcement  
U.S. Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20001

- (4) one paper copy by first class U.S. mail and electronic PDF copy by email:

Laureen Kapin  
Laura Schneider  
Joshua S. Millard  
Edwin Rodriquez  
Walter C. Gross III  
Lemuel W. Dowdy  
Edwin Rodriguez  
Federal Trade Commission  
600 Pennsylvania Ave, NW, Suite NJ-2122  
Washington, D.C. 20580

Email: [lkapin@ftc.gov](mailto:lkapin@ftc.gov)

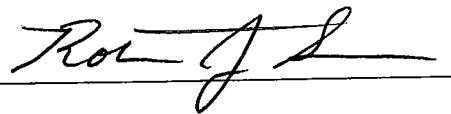
(5) one paper copy by first class U.S. mail:

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A handwritten signature in cursive script, appearing to read "Ron F. Price", is written over a horizontal line.

**Table 1**

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX023-A			1
CX-502			1
CX-787		R0041733	1
RX-045		N/A	1
RX-068		N/A	1
RX-144		N/A	1
RX-272	<b>REDACTED</b>	BPI000092 THRU BPI000093	1
RX-273		BPI000081 THRU BPI000091	1
RX-279		BPI000124 THRU BPI 000127	1
RX-303		NC00013 THRU  NC00016	1
RX-304		RE00241	1
RX-390		NC00017 THRU  NC00020	1
RX-391		RE00242	1
RX-393		NC00021	1
RX-555		R0041191 THRU R0041192	1
RX-635		FTC 4486 THRU 4494	1
RX-678		SH005180 THRU SH005197	1
RX-748		SH005205 THRU SH005206	1
RX-753		SH005045 THRU SH005047	1
RX-782		RE00243	1
CX-232			2
CX-698		R0054723- R0054727	2
CX-704		R0054714- R0054718	2
CX-705		R0054716- R0054718	2
CX-708		R0054719- R0054720	2
CX-709		R0054721- R0054722	2
RX-053		N/A	2



Table 1

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-280		SDT00484 THRU SDT00494	2
RX-281		SDT00500 THRU SDT00522	2
RX-282		SDT00470 THRU SDT000524	2
RX-283		SDT00525 THRU SDT000530	2
RX-284		SDT00533 THRU SDT000534	2
RX-285		SDT00495 THRU SDT000499	2
RX-286		SDT00531 THRU SDT000532	2
RX-287		SDT00416 THRU SDT00417	2
RX-288		LMS00662 THRU SDT00417	2
RX-290		SH004844 THRU SH004846	2
RX-292		SDT00867	2
RX-294		SDT00860 THRU SDT00866	2
RX-295		SDT00801 THRU SDT00859	2
RX-296		SDT00751 THRU SDT00752	2
RX-297		SDT00740 THRU SDT00745	2
RX-298		SDT00746 THRU SDT00750	2
RX-299		SDT00753 THRU SDT00796	2

**Table 1**

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-300		SDT00661 THRU SDT00739	2
RX-301		SDT00411 THRU SDT00423	2
RX-320		R0054714 THRU R0054715	2
RX-321		R0054716 THRU R0054718	2
RX-322		R0054719 THRU R0054720	2
RX-323		R0054721 THRU R0054722	2
RX-329		R006936 THRU R0007582	2
RX-415		R0009371 THRU 0010068	2
RX-706			2
RX-807			2
CX-166		R0000332	3
CX-167		R0007483	3
CX-168		R0009931 R0029913 R0035713	3
CX-169		R0015244	3
CX-370		R0009356	3
CX-374		R0044460- R0044466	3
CX-378		R0044468- R0044471	3
CX-379		R0044472- R0044474	3
CX-488			3
CX-498			3
CX-500			3
CX-518			3
CX-521			3
CX-531			3
CX-532			3
CX-533			3
CX-611			3
CX-627		PL000243- PL000253	3
CX-629		PL006252- PL006259	3

Table 1

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-632		R0015260- R0015265	3
CX-680		R0033488	3
CX-781		R0041966	3
CX-789		R0041578- R0041579	3
CX-808		R0054711	3
CX-809		R0054712- R0054713	3
CX-811		SDT00313- SDT00314	3
CX-862			3
CX-941			3
RX-181	<b>REDACTED</b>	LMS00358 THRU LMS00360	3
RX-221		R0000332 THRU R0004110	3
RX-268		R0007483	3
RX-316		R0009954 THRU R0009967	3
RX-455		R0015244	3
RX-592		R00124364 THRU R0015583	3
RX-708		NC11313 THRU NC11333	3
RX-720		LMS00556 THRU LMS00558	3
RX-727		R0029913 THRU 0032363	3
RX-779		R0035713	3
RX-788		R0035713 THRU R0036369	3
CX-109		NC11476- NC11498	4
CX-633		PL003131- PL003187	4
CX-634		PL003067- PL003082	4
CX-635		PL003083- PL003090	4
CX-636		NC11924- NC11984	4
CX-637		NC11419	4

**Table 1**

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-319		BPI000109 THRU BPI000123	4
RX-710		NC11476 THRU NC11498	4
RX-713		R0033392 THRU R0033394	4
RX-725	<b>REDACTED</b>	NC11201 THRU NC11202	4
RX-726		R0029913	4
CX-025			5
CX-026			5
RX-173		R0040774	5
CX-023			6
CX-185		2000001	6
CX-186		1000001- 1000002	6
CX-261			6
CX-288			6
CX-334			6
CX-617			6
CX-645		R0033909	6
CX-646		R0040761	6
CX-650		R00335196- R0035197	6
CX-682		R0040683	6
CX-738		R0035131	6
CX-750		PL003056	6
CX-759		R0033865	6
CX-823		R0040774	6
CX-830			6
CX-841		9010003- 9010005	6
CX-843		9000023	6
CX-844		900023	6
CX-845		9000022	6
CX-846		9000013- 9000021	6
CX-847		8000001- 8000026	6
CX-854		9000010- 9000012	6
CX-855		5037026-30	6
CX-899		5007539- 5007567	6
RX-043		N/A	6
RX-094		N/A	6
RX-095		N/A	6

Table 1

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-096		N/A	6
RX-097		N/A	6
RX-125		FTC4495 THRU FTC4523	6
CX-152	<b>REDACTED</b>	COINFO- 000001/94- COINFO 000001-107 (BASIC RESEARCH BATES: 8000001- 8000014)	7
CX-191	<b>REDACTED</b>	4000001- 4000008	7
CX-817		SDT00277- SDT00279	7
CX-821		SDT00160	7
CX-826		8000015	7
CX-829		5037698- 5037705	7
CX-848		8000015- 8000018-19	7
CX-851		4000017-22	7
CX-852		4000009- 4000016	7
RX-091		N/A	7
RX-093		4000001 THRU 4000008	7
RX-306		N/A	7
RX-307		FR000027	7
RX-308		N/A	7
RX-676		R0034016 THRU R0034018	7
RX-677		SH005164 THRU SH005165	7
CX-302		R0041166- R0041166-G	9
CX-313		JF35	9
CX-314			9
RX-386		R0044178	9
CX-448		5004217- 5004307	10
CX-027			10
CX-117		5032872- 5032962	10

**Table 1**

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-203		R0034370 (ALSO MARKED AS R0033185)	10
CX-209		R0033070	10
CX-210		R0035122	10
CX-211		R0035116	10
CX-214		R0035133	10
CX-215		R0035138- R0035139	10
CX-246		R0034752	10
CX-283		R0035127	10
CX-285		R0035113	10
CX-286		R0035111	10
CX-289			10
CX-290			10
CX-291			10
CX-292		R0041870	10
CX-293		F0007-F0008	10
CX-295			10
CX-297		F0897	10
CX-298		R0042098	10
CX-303		R0037371- R0037637	10
CX-304		F0010	10
CX-306		R0035119	10
CX-309		F0853-F0855	10
CX-310		R0041788	10
CX-311			10
CX-312		SF3-SF4	10
CX-315			10
CX-316			10
CX-317		RK8	10
CX-318			10
CX-319			10
CX-320		R0012331	10
CX-321			10
CX-322			10
CX-323			10
CX-371		R0044459	10
CX-372		R0044647- R0044648	10
CX-380		R0044493- R0044494	10
CX-381		R0044514	10
CX-382		R0044518	10
CX-383		R0044519	10
CX-451			10
CX-455			10
CX-456			10
CX-457			10

Table 1

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-459			10
CX-651		5004483	10
CX-676		R0032944- R0032945	10
CX-701		R0035355	10
CX-710		R0035123	10
CX-711		R0035121	10
CX-712		R0034074	10
CX-714		R0033693	10
CX-718		R0034454- R0034455	10
CX-721		R0035436- R0035437	10
CX-722		R0004901	10
CX-724		R0035109	10
CX-731		R0035134- R0035136	10
CX-754			10
CX-760		R0033463- R0033464	10
CX-764		R0034019- R0034020 (ALSO MARKED AS R0035414)	10
CX-772			10
CX-773		R0042680	10
CX-776		R0042372	10
CX-777		R0042331	10
CX-780		R0041966	10
CX-784			10
CX-785		R0041790- R0041791	10
CX-786		R0000306	10
CX-788		R0041630- R0041631	10
CX-795		R0041317- R0041317-J	10
CX-798			10
CX-799			10
CX-805		R0042732 (ALSO MARKED AS R0042733)	10
CX-807			10
CX-810		SDT00186- SDT00188	10
CX-818		SDT00389	10
CX-935		5041713- 5041747	10
CX-953			10

**Table 1**

<b><u>Exhibit No.</u></b>	<b><u>Title or Description</u></b>	<b><u>Bates No.</u></b>	<b><u>Categories</u></b>
RX-120		FC000062 THRU FC000081	10
RX-207		R0043238	10
RX-407		R0012283	10
RX-416		FTC4708 THRU FTC4740	10
RX-471		R0042045	10
RX-647	<b>REDACTED</b>	R0029786 THRU R0029896	10
RX-683		R0034002	10
RX-696		R0040296	10
CX-831			11
CX-869		FTC4442-4445	11
CX-870		FTC4446-4452, 4454	11
RX-098		FTC 4589 THRU FTC 4599	11
RX-099		FTC 4435 THRU FTC 4436	11
RX-100		FC000025 THRU FC000026	11
RX-103		FTC 4438 THRU FTC 4441	11
RX-105		FTC 4442 THRU FTC 4445	11
RX-106		FTC 4446 THRU FTC 4453	11
RX-110		FC000057 THRU FC000060	11
RX-111		FTC 4465 THRU FTC 4470	11
RX-115		FTC 4475 THRU FTC 4476	11
RX-126		FTC4524 THRU FTC 4561	11
RX-127		FC000187 THRU FC000232	11



Table 1

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-134		FTC 4566 THRU FTC 4571	11
RX-136		FC000290	11
RX-137		FTC 4572 THRU FTC 4576	11
RX-138		FTC 4577 THRU FTC 4585	11
RX-139	<b>REDACTED</b>	FTC 4586 THRU FTC 4587	11
CX-077			12
CX-089			12
CX-116			12
CX-134			12
CX-148			12
CX-149			12
CX-163			12
CX-182			12
CX-183			12
CX-196			12
CX-197			12
CX-198			12
CX-254			12
CX-255			12
CX-281			12
CX-299		R0041604	12
CX-801			12
CX-875		FTC4486-4494	12
CX-879		FTC4632-4639	12
CX-902		5012810- 5012855	12
CX-903		5033259- 5033283	12
CX-904		5033482- 5033509	12
CX-917		5033482- 5033509	12
CX-919		5033164- 5033207	12
CX-920		CYT0810- CYT1064	12
CX-921		5036691- 5036775	12
CX-932		5003164- 5033207	12
CX-934		5033482- 5033509	12

Table 1

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-936		5033259- 5033293	12
CX-937		5033482- 5033509	12
CX-939		5033164- 5033207	12
RX-038		N/A	12
RX-039		N/A	12
RX-040		N/A	12
RX-041		N/A	12
RX-042		N/A	12
RX-046		N/A	12
RX-047		N/A	12
RX-048		N/A	12
RX-051		N/A	12
RX-052		N/A	12
RX-054		N/A	12
RX-124		FC000147 THRU FC000155	12
RX-142		FTC 4632 THRU FTC 4639	12
RX-172		FTC 4632 THRU FTC 4639	12
RX-274		BPI000043 THRU BPI000045	12
RX-276		BPI000021 THRU BPI000024	12
RX-348		R0007011 THRU R0007064	12
RX-349		LMS00689 THRU LMS00700	12
RX-814		N/A	12

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

<i>In the Matter of</i>	)	
	)	
BASIC RESEARCH, L.L.C,	)	<b>PUBLIC RECORD</b>
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,	)	<b>DOCKET NO. 9318</b>
BAN, L.L.C.,	)	
DENNIS GAY,	)	
DANIEL B. MOWREY,	)	
MITCHELL K. FRIEDLANDER	)	

**DECLARATION OF CARLA FOBBS**

1. My name is Carla Fobbs. I am over twenty-one years of age, of sound mind, and fully competent and able to testify to the matters set forth herein. Unless otherwise indicated, I have personal knowledge of the facts set forth herein.

2. I am employed as the Legal Administrator in the Compliance Department of Basic Research, LLC. I am familiar with the documents of Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker usa, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC and Ban, LLC, and the level of confidentiality associated with the subject matter contained therein.

3. This Declaration is submitted in support of Respondents' Second Revised Motion for *In Camera* Treatment of Trial Exhibits.

4. A small number of agents acting at my direction assisted me in multiple reviews of each of the documents appearing on the Exhibit Lists of Respondents and Complaint Counsel.

These comprehensive reviews were conducted for purposes of determining which designated exhibits contain confidential information, the public disclosure of which would cause a clearly defined, serious injury to Respondents.

5. Following receipt of the Administrative Law Judge's ("ALJ") December 5, 2005 Order (the "December 5<sup>th</sup> Order") on our Original Motion, we conducted a second review of all of the documents that were the subject of our Original Motion pursuant to the directives set forth in the December 5<sup>th</sup> Order. Subsequently, following receipt of the ALJ's January 25, 2006 Order (the "January 25<sup>th</sup> Order") on our First Revised Motion, we conducted a third review of the documents subject of the First Revised Motion pursuant to the directives set forth in the January 25<sup>th</sup> Order.

6. In all three reviews, I employed a coordinated approach utilizing the assistance of a small number of agents working under my direction. These agents were instructed on the Commission's strict standards for *in camera* treatment of trial exhibits and were provided copies of the ALJ's December 5<sup>th</sup> and January 25<sup>th</sup> Orders for purposes of conducting the reviews.

7. I have personally received reports and updates concerning the nature and scope of the reviews conducted. I am personally informed of the content of individual documents and groups of documents that were reviewed, and the specific bases upon which Respondents are moving for *in camera* treatment of documents.

8. Based on our reviews, several hundred of Respondents' and Complaint Counsel's trial exhibits contain Respondents' confidential information which, if disclosed to the public, would cause a clearly defined, serious injury to Respondents. The types of documents that require confidential treatment include those containing trade secrets, financial information, and various types of commercial information. Each document is individually reviewed in turn below

and, for convenience's sake, organized and generally categorized in Attachments hereto as follows:

- (1) Attachment 1—Product Formulation;
- (2) Attachment 2—Third-Party Testing;
- (3) Attachment 3—Substantiation Compilations;
- (4) Attachment 4—Grant Applications;
- (5) Attachment 5—Gross Revenue and Advertisement Expenditures;
- (6) Attachment 6—Profits, Revenue Balance Sheets and Confidential Corp. Info.;
- (7) Attachment 7—Royalty and Licensing Agreements;
- (8) Attachment 8—Customer Information [NO LONGER USED];
- (9) Attachment 9—Advertising Dissemination Schedules;
- (10) Attachment 10—Marketing Strategy;
- (11) Attachment 11—Settlement Documents; and
- (12) Attachment 12—Those Documents that Merit Coverage Under More than One of the Other Categories.

The documents themselves are attached to the Second Revised Motion in both hard-copy and electronic form, and are arranged according to these categories.

9. For convenience sake, the subject documents are also summarized in Table 1, attached to Respondents' Motion for *In Camera* Treatment.

### **TRADE SECRETS**

#### **Attachment 1: Product Formulation**

10. Composite Attachment 1, attached hereto, contains documents revealing product formulation data for PediaLean, LeptoPrin, Anorex, Tummy Flattening Gel, Cutting Gel and Dermalin-APg (“Challenged Products”), including specific ingredients and their percent ratios.

11. The product formulation documents comprise charts, emails, faxes and other internal documents. The product formulation information is not known outside of Respondents' business, except by certain third-party companies who manufacture the products. In those instances, Respondents have maintained confidentiality agreements with each manufacturer in order to protect the secrecy of the information in question.

12. Product formulation information is closely guarded. Only those employees within Respondents' businesses whose job duties require them to have such knowledge are permitted access. Under such circumstances, the employees are only provided the amount of information necessary for them to perform their job duties. For example, an employee in marketing may know the name of the active ingredient of a product in order to include that information in an advertisement, but that person is not provided with information of all of the ingredients, their respective ratios, or other trade secret information about the proprietary blends. By contrast, an employee in the research and development department may have information about the exact formulation of a product, including the ratio of all of the ingredients, because the research and development department was involved in creating and/or researching the product formulation.

13. All of Respondents' employees who receive product formulation information understand that this information is highly confidential, proprietary, and cannot be disclosed to any person, even within Respondents' business, who does not need to know it.

14. Competitors place great value on obtaining Respondents' product formulation information. With such information, competitors can market identical products in direct competition with Respondents without having to expend the significant time, energy, and money that Respondents spent creating and developing these products. Even the product formulation for the discontinued products, Anorex and Leptoprin, would be valuable to Respondents'

competitors because ephedra-containing products may still be being sold in other countries where sale of such products is allowed. As such, competitors could easily save hundreds of thousands of dollars and years of research and development costs and time if they had access to Respondents' product formulation data.

15. Respondents expended literally hundreds of thousands of dollars and years researching and developing the Challenged Products.

16. It is extraordinarily difficult for a third party to acquire the product formulation for the Challenged Products. The only way that a third party could properly acquire this information would be to "reverse-engineer" one of the products that it purchased commercially. It is my understanding that this process involves obtaining a sample of one of the products and conducting numerous tests on it in an effort to determine its composition. It is also my understanding that this process is very expensive and time consuming, and in any event, it is extremely difficult to determine the exact ingredients since the proprietary compounds involved are chemically complex.

17. Public disclosure of the product formulation information would provide an unfair competitive edge to Respondents' competitors and, in turn, destroy Respondents' market share for their products in this and other countries. The individual documents included in this category are:

[

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

]

18. For all the foregoing reasons, public disclosure of Respondents' product formulation information would cause a clearly defined, serious injury to Respondents.

**Attachment 2: Third Party Testing**

19. Composite Attachment 2, attached hereto, contains third-party clinical and chemical testing of the Challenged Products and/or their ingredients. As such, the documents in question include the protocol for the studies, the results thereof, study agreement forms, and reports containing analyses of the results.

20. Respondents heavily restrict access to third-party testing information to employees of Respondents' companies. Only those individuals involved in the scientific research and development of the product are exposed to the results and methodologies contained in the third-party testing. The only other individuals who have access to this information are the third-parties conducting the actual testing, all of whom execute confidentiality agreements with Respondents.

21. Respondents guard their third-party testing information very closely as the results contain highly confidential information regarding the product's composition, impurities,

efficacy, absorption and other technical information. All of Respondents' employees who receive such information understand that this information is highly confidential and cannot be disclosed to anyone, even within Respondents' businesses, if such individuals do not need to know it.

22. Respondents' competitors place great value on obtaining the results of the third-party studies. These studies provide ingredient and composition information on the Challenged Products. The reports themselves typically include an analysis of the results and the performance of the product at issue. Competitors find such information useful in, among other things, the development of similar or derivative products. In many cases, competitors could market identical products in direct competition with Respondents' products armed solely with this information. Exposing competitors to this information would therefore give them an unfair advantage by saving them considerable research time, expense and effort.

23. Respondents have spent hundreds of thousands of dollars and years gathering accurate and comprehensive data on the Challenged Products. Furthermore, great effort was spent to carefully select appropriate third-parties with the requisite knowledge and skill to conduct the tests, and to develop an appropriate protocol.

24. Although a third party could duplicate certain of the tests performed on the Challenged Products, such an endeavor would be difficult without the protocol and methodology used in the testing itself. In this regard, each study is unique in that it entails carefully selected protocols, variables, and controls. The exhibits for which Respondents move for *in camera* treatment under this category are:

[

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

]

25. For all the foregoing reasons, public disclosure of Respondents' third-party testing would cause a clearly defined, serious injury to Respondents.

**Attachment 3: Substantiation Compilations**

26. Composite Attachment 3, attached hereto, contains compilations of materials substantiating Respondents advertising claims.

27. Access to the substantiation compilations is restricted even among employees of Respondents' businesses. Although access to each of the materials standing alone (e.g., a single published study contained within the compilation), is obviously not restricted to Respondents' businesses. It is the merger and compilation of such materials in their entirety that is valuable and confidential. The only other individuals possessing the substantiation compilations are those directly involved in the FTC investigation of Respondents' advertising claims.

28. Within Respondents' businesses, substantiation compilations are only available to those employees whose job duties require them to have such information. For example, an employee in the research and development department or the legal department would be exposed to such materials, whereas customer service employees are not.

29. Respondents protect their substantiation compilations very carefully. All of Respondents' employees who receive such information understand that selection and assembly of this information is highly confidential and may not be disclosed to any person, even within Respondents' businesses, who does not need to know it.

30. The substantiation compilations are invaluable and provide Respondents with a competitive advantage. During the development of their products, Respondents accumulated and compiled the substantiation materials to support their advertising claims and to confirm the effectiveness of specific forms, amounts and modes of administration of the key ingredients. The compilations were sent in response to a CID request from the Federal Trade Commission ("FTC") for Respondents to substantiate specific advertising claims. The methodology and procedures for complying with FTC requests have obvious value. Any competitor marketing similar products could use the compilations to justify their own or similar advertising claims.

[

**REDACTED**

] Therefore, disclosing the substantiation compilations to Respondents' competitors would result in a clearly defined, serious competitive injury to respondents.

31. Respondents have expended considerable time and resources carefully constructing these compilations. [

**REDACTED**

]

32. The combinations of materials in the substantiation compilations are unique. To Respondents' knowledge, they exist nowhere else. It is highly unlikely that a third party could duplicate the exact construction of these compilations without having access to them. Even attempting this process would be extremely expensive, time consuming, and difficult. Respondents move on the following specific exhibits under this category:

[

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

]

33. Public disclosure of the substantiation compilations would result in a clearly defined, serious injury to Respondents.

**Attachment 4: Grant Applications and Supporting Documentation**

34. Composite Attachment 4, attached hereto, contains Respondents' grant applications, comments, and revisions to the applications for the challenged products.

35. Respondents' applications for government grants are not known outside Respondents' business, except by hired consultants who are under an obligation to keep Respondents' information confidential.

36. The grant applications are only known to those individuals within Respondents' businesses whose job duties require them to have such knowledge. For example, Respondents' research and development department has information about the grant proposals because department members are involved in developing and writing the proposals, but other employees generally do not have knowledge of the grant applications.

37. Respondents protect their research information very closely. All of Respondents' employees who receive such information understand that this information is highly confidential and cannot be disclosed to any person, even within Respondents' businesses, who does not need to know it. Further, this information is not disclosed outside the company, except to those professional consultants who have a duty to maintain such information in confidence.

38. The grant applications for the challenged products are valuable to Respondents' competitors because it provides them an advantage in competing with Respondents' for limited grant funding. [

**REDACTED**

]

39. Respondents spent a considerable amount of time, effort, and money developing a scientific methodology for their studies and compiling appropriate information to complete the grant applications. [

**REDACTED**

]

40. The grant applications for the challenged products cannot be replicated or acquired by any unauthorized third parties by proper means. The following documents fall within this category:

[

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

]

41. Public disclosure of Respondents' grant applications would cause a clearly defined, serious injury to Respondents.

**FINANCIAL INFORMATION**

**Attachment 5: Gross Revenue and Ad Expenditures**

42. Composite Attachment 5, attached hereto, contains documents showing net gross revenues and advertising expenditures for all six challenged products. Net gross revenue is defined as "gross figures less promotional discounts."

43. Respondents' financial information, including but not limited to the net gross revenue figures and advertising expenditures for the challenged products, is not known outside Respondents' businesses to anyone other than professionals, such as accountants and attorneys, who are under a duty to maintain such information in strict confidence.

44. The net gross revenue and advertising expenditures for the challenged products is only known to those individuals within Respondents' businesses whose job duties require them to have such knowledge. For example, Respondents' corporate officers and supervisors in the advertising and accounting departments have access to such information, but other employees generally do not.

45. Respondents zealously protect their financial information. All of Respondents' employees who receive such information understand that this information is highly confidential and cannot be disclosed to any person, even within Respondents' businesses, who does not have

a need to know. Further, this information is not disclosed outside the company, except to those professionals who have a duty to maintain such information in confidence.

46. The net gross revenue and advertising expenditures for the challenged products are valuable to Respondents' competitors because it allows them to construct accurate financial models of Respondents' business to Respondents' detriment.

47. The net gross revenue figures were achieved based on the time, energy, and money spent by Respondents in developing, marketing, and promoting the challenged products. Respondents' efforts are also revealed, in part, by the amounts spent in advertising each of the challenged products.

48. The net gross revenue and advertising expenditures for the challenged products cannot be replicated or acquired by any third parties by proper means. There is simply no way to determine how many sales Respondents made of each product or how much Respondents spent in advertising each product. Respondents move the following documents for *in camera* treatment for the time periods specified:

[

**REDACTED**

**REDACTED**

**REDACTED**

]

49. Public disclosure of Respondents' net gross revenue and advertising expenditures would cause a clearly defined, serious injury to Respondents.

**Attachment 6: Profits and Revenue, and Other Confidential Corporate Information**

50. Composite Attachment 6, attached hereto, contains documents referring to the balance sheets for Basic Research, American Phyotherapy Research Laboratory, Nutrastar, and Majestic Enterprises, each detailing their total assets and liabilities.

51. Respondents' balance sheets analyzing their assets and liabilities contain highly confidential financial information for all the reasons detailed above regarding Respondents' net gross revenue and advertising expenditures. Respondents protect and limit access to their balance sheets containing their assets and liabilities in the same way that they protect and limit

access to their net gross revenue and advertising expenditure data. Respondents' balance sheets disclosing their assets and liabilities are valuable to Respondents' competitors because they allow the competitors to construct an accurate financial model of Respondents' business to Respondents' detriment. Additionally, the balance sheets revealing Respondents' assets and liabilities could not be replicated or acquired by any third parties by proper means. The Respondents' businesses are privately held, and disclosure of highly confidential information concerning ownership would be extraordinarily damaging. The following documents are entitled to *in camera* treatment under this category:

[

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

]

52. Public disclosure of the balance sheets detailing Respondents' assets and liabilities would cause a clearly defined, serious injury to Respondents, as would disclosure of other highly confidential corporate structure and ownership documentation.

**Attachment 7: Licensing and Royalty Agreements**

53. Composite Attachment 7, attached hereto, contains licensing and royalty agreements executed by Respondents.

54. Respondents' licensing and royalty agreements entitle Respondents to exclusive use of confidential information in developing their products. Respondents' licensing and royalty agreements also contain the rights and obligations of Respondents as the licensee and the owner of the information as the licensor. The agreements set forth the terms under which Respondents can use the confidential information and financial discloses regarding the percentage of royalties that Respondents pay to the licensor. These agreements also reveal an important, secret marketing strategy that forms a part of Respondents' confidential business model.

55. Respondents' licensing and royalty agreements are confidential financial information for all the reasons detailed above regarding Respondents' net gross revenue and advertising expenditures. Respondents protect and limit access to their licensing and royalty agreements in the same way that they protect and limit access to their net gross revenue and advertising expenditure data. Respondents' licensing and royalty agreements are valuable to Respondents' competitors because they reveal the amounts paid to the licensors for the right to use the information and the terms and conditions that Respondents rely upon when obtaining licenses. Upon obtaining Respondents' license and royalty agreements, corporate rivals could more effectively compete against Respondents for exclusive licenses. Additionally, Respondents have taken extreme measures to protect their identity as a licensee under these agreements and disclosure would harm Respondents. Finally, the licensing and royalty agreements could not be replicated or acquired by any third parties by proper means. These documents are:

[

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

]

56. Public disclosure of the licensing and royalty agreements would cause a clearly defined, serious injury to Respondents.

**COMMERCIAL INFORMATION**

**Composite Attachment 8: Customer Information**

57. Pursuant to the directives set forth in the ALJ's January 25<sup>th</sup> Order, Respondents are redacting all customer information from the hearing exhibits for which they originally sought in camera treatment. Consequently, Respondents are no longer seeking in camera treatment on approximately 200 exhibits previously referenced in Attachment 8 and, thus, are intentionally leaving this section blank.

58. Intentionally left blank.

59. Intentionally left blank.

60. Intentionally left blank.

**Attachment 9: Advertising Dissemination Schedules**

61. Composite Attachment 9, attached hereto, consists of advertising dissemination schedules detailing which of the challenged products were advertised in specifically identified media outlets.

62. Respondents' commercial information, including but not limited to the advertising dissemination schedules, is not known outside Respondents' business to anyone other than Respondents' advertising agency, which has executed a non-disclosure agreement requiring it to keep confidential Respondents' proprietary commercial information, including the highly secret information on the advertising dissemination schedules.

63. The details of the advertising dissemination schedules are only known to those individuals within Respondents' businesses whose job duties require them to have such knowledge. For example, Respondents' corporate officers and supervisors in the advertising and accounting departments have access to such information, but other employees generally do not have knowledge of the advertising dissemination schedules.

64. Respondents zealously protect their commercial advertising information. All of Respondents' employees who receive such information understand that this information is highly confidential and cannot be disclosed to any person, even within Respondents' businesses, who does not need to know it.

65. The advertising dissemination schedules are valuable to Respondents' competitors because they allow the competitors to mirror for their competing products Respondents' successful advertising campaigns. This would allow competitors to profit from the extraordinary time, energy, and money Respondents have spent in perfecting their complex marketing strategy.

66. The advertising dissemination schedules are essentially blue prints for how to successfully market various types of products. The advertising dissemination schedules are a result of the time, energy, and money spent by Respondents perfecting their marketing and promotional strategies for the challenged products over a thirteen-year period.

67. It would be virtually impossible for the advertising dissemination schedules to be replicated or acquired by any third parties by proper means. This would require a competitor to obtain every magazine and newspaper across the country to determine where Respondents advertised their products. Further, the competitor would have to monitor every minute of television program nationwide to discover when and how Respondents promote their products on television. Finally, the competitor would have to know which advertisements resulted in the

most sales—something captured by implication in Respondent’s advertising schedules but not otherwise available anywhere else. Those exhibits meeting this threshold are:

[

**REDACTED**

**REDACTED**

**REDACTED**

]

68. Public disclosure of the advertising dissemination schedules would cause a clearly defined, serious injury to Respondents.

**Attachment 10: Marketing Strategy**

69. Composite Attachment 10, attached hereto, contains Respondents' emails and other documents disclosing confidential marketing strategies.

70. Respondents' documents related to their marketing strategy, are not known outside Respondents' businesses to anyone other than those professionals who have a duty to maintain such information in confidence.

71. The details of the marketing strategies, like the advertising dissemination schedules, are only known to those individuals within Respondents' businesses whose job duties require them to have such knowledge. For example, Respondents' corporate officers and



supervisors in the marketing and customer service departments have access to such information, but other employees generally do not.

72. Respondents protect their commercial information very closely. All of Respondents' employees who receive such information understand that this information is highly confidential and cannot be disclosed to any person, even within Respondents' businesses, who does not need to know it.

73. Documents containing marketing strategies are valuable to Respondents' competitors because they allow the competitors to mirror Respondents' successful marketing for their competing products. This information would allow competitors to profit from the time, energy, and money Respondents have spent perfecting their marketing strategy.

74. The marketing strategy documents include independent research of the messages contained in the advertisements, phone scripts used to effectively market various products, and in-house sales tip sheets. The documentation containing marketing strategies are a result of the time, energy, and money spent by Respondents perfecting their promotion strategies for the challenged products.

75. It would be virtually impossible for the marketing strategy documents to be replicated or acquired by any third parties by proper means. The following exhibits are, therefore, entitled to *in camera* protection:

[

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

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**REDACTED**

]

76. Public disclosure of documents containing marketing strategy would cause a clearly defined, serious injury to Respondents.

**Attachment 11: Settlement Documents**

77. Composite Attachment 11, attached hereto, includes Respondents' correspondence with the FTC regarding pre-complaint settlement negotiations. The documents are letters or e-mails between Respondents' counsel and attorneys for the FTC. A copy of Composite Attachment 11 is attached to this declaration.

78. Correspondence related to the FTC's investigation of Respondents prior to the filing of the complaint and both parties' efforts to reach a settlement agreement is not known by anyone outside Respondents' businesses, and the FTC.

79. The details of the settlement negotiations are only known to those individuals within Respondents' businesses whose job duties require them to have such knowledge. For example, Respondents' corporate officers, legal counsel, and supervisors in the compliance department have access to such information, but other employees generally do not.



80. Disclosing the e-mails and letters exchanged during the pretrial investigation pertaining to settlement discussions would permit competitors and the public access to privileged and confidential communications made by Respondents' attorneys on its behalf. Competitors would also benefit from the time, effort, and money that Respondents put into resolving this case.

81. Some of the proposed consent orders contain language that prevents the agreements from being part of the public record in an adjudicatory proceeding unless and until the Commission accepts the agreement. All attempts at settlement to date have failed and the Commission has not accepted any settlement agreements involving any of Respondents in this case.

82. It is my understanding that Complaint Counsel has the burden of proving at an adjudicatory hearing that Respondents violated the Federal Trade Commission Act. Publicly disseminating Respondents' attempts to settle this case or communicate with the FTC may be misconstrued by the public as an admission of guilt, or used by the competitors in negative advertising.

83. It would be virtually impossible for the correspondence regarding settlement to be replicated or acquired by any third parties by proper means. These exhibits include:

[

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

]

84. Public disclosure of the communications between Respondents and the FTC would cause a clearly defined, serious injury to Respondents.

**Attachment 12: Multiple Category Documents**

85. The following exhibits are entitled to *in camera* treatment because they satisfy the criteria for more than one of the categories described in detail above:

[

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

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**REDACTED**

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86. Public disclosure of these documents would cause a clearly defined, serious injury to Respondents because they satisfy the criteria for more than one of the categories described in detail above.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

**REDACTED**

DATED this 3<sup>rd</sup> day of February, 2006.

Carla Fobbs  
Carla Fobbs



Public-Composite 1

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX023-A			1
CX-502			1
CX-787		R0041733	1
RX-045		N/A	1
RX-068		N/A	1
RX-144		N/A	1
RX-272		BPI000092 THRU BPI000093	1
RX-273		BPI000081 THRU BPI000091	1
RX-279	<b>REDACTED</b>	BPI000124 THRU BPI 000127	1
RX-303		NC00013 THRU NC00016	1
RX-304		RE00241	1
RX-390		NC00017 THRU NC00020	1
RX-391		RE00242	1
RX-393		NC00021	1
RX-555		R0041191 THRU R0041192	1
RX-635		FTC 4486 THRU 4494	1
RX-678		SH005180 THRU SH005197	1
RX-748		SH005205 THRU SH005206	1
RX-753		SH005045 THRU SH005047	1
RX-782		RE00243	1

Public-Composite 2

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-232			2
CX-698		R0054723-R0054727	2
CX-704		R0054714-R0054718	2
CX-705		R0054716-R0054718	2
CX-708		R0054719-R0054720	2
CX-709		R0054721-R0054722	2
RX-053		N/A	2
RX-280		SDT00484 THRU SDT00494	2
RX-281		SDT00500 THRU SDT00522	2
RX-282	<b>REDACTED</b>	SDT00470 THRU SDT000524	2
RX-283		SDT00525 THRU SDT000530	2
RX-284		SDT00533 THRU SDT000534	2
RX-285		SDT00495 THRU SDT000499	2
RX-286		SDT00531 THRU SDT000532	2
RX-287		SDT00416 THRU SDT00417	2
RX-288		LMS00662 THRU SDT00417	2
RX-290		SH004844 THRU SH004846	2
RX-292		SDT00867	2
RX-294		SDT00860 THRU SDT00866	2
RX-295		SDT00801 THRU SDT00859	2
RX-296		SDT00751 THRU SDT00752	2
RX-297		SDT00740 THRU SDT00745	2
RX-298		SDT00746 THRU SDT00750	2
RX-299		SDT00753 THRU SDT00796	2
RX-300		SDT00661 THRU SDT00739	2
RX-301		SDT00411 THRU SDT00423	2
RX-320		R0054714 THRU R0054715	2
RX-321		R0054716 THRU R0054718	2
RX-322		R0054719 THRU R0054720	2

Public-Composite 2

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-323		R0054721 THRU R0054722	2
RX-329		R006936 THRU R0007582	2
RX-415		R0009371 THRU 0010068	2
RX-706			2
RX-807			2

**REDACTED**

**Public-Composite 3**

<b><u>Exhibit No.</u></b>	<b><u>Title or Description</u></b>	<b><u>Bates No.</u></b>	<b><u>Categories</u></b>
CX-166		R0000332	3
CX-167		R0007483	3
CX-168		R0009931 R0029913 R0035713	3
CX-169		R0015244	3
CX-370		R0009356	3
CX-374		R0044460- R0044466	3
CX-378	<b>REDACTED</b>	R0044468- R0044471	3
CX-379		R0044472- R0044474	3
CX-488			3
CX-498			3
CX-500			3
CX-518			3
CX-521			3
CX-531			3
CX-532			3
CX-533			3
CX-611			3
CX-627		PL000243- PL000253	3
CX-629		PL006252- PL006259	3
CX-632		R0015260- R0015265	3
CX-680		R0033488	3
CX-781		R0041966	3
CX-789		R0041578- R0041579	3
CX-808		R0054711	3
CX-809		R0054712- R0054713	3
CX-811		SDT00313- SDT00314	3
CX-862			3
CX-941			3
RX-181		LMS00358 THRU LMS00360	3
RX-221		R0000332 THRU R0004110	3
RX-268		R0007483	3
RX-316		R0009954 THRU R0009967	3
RX-455		R0015244	3

Public-Composite 3

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-592		R00124364 THRU R0015583	3
RX-708		NC11313 THRU NC11333	3
RX-720		LMS00556 THRU LMS00558	3
RX-727		R0029913 THRU 0032363	3
RX-779		R0035713	3
RX-788		R0035713 THRU R0036369	3

**REDACTED**

**Public-Composite 4**

<b><u>Exhibit No.</u></b>	<b><u>Title or Description</u></b>	<b><u>Bates No.</u></b>	<b><u>Categories</u></b>
CX-109		NC11476- NC11498	4
CX-633		PL003131- PL003187	4
CX-634		PL003067- PL003082	4
CX-635		PL003083- PL003090	4
CX-636		NC11924- NC11984	4
CX-637		NC11419	4
RX-319		BPI000109 THRU BPI000123	4
RX-710		NC11476 THRU NC11498	4
RX-713		R0033392 THRU R0033394	4
RX-725		NC11201 THRU NC11202	4
RX-726		R0029913	4

**REDACTED**

Public-Composite 5

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-025			5
CX-026			5
RX-173		R0040774	5

**REDACTED**

**Public-Composite 6**

<b>Exhibit No.</b>	<b>Title or Description</b>	<b>Bates No.</b>	<b>Categories</b>
CX-023			6
CX-185		2000001	6
CX-186		1000001- 1000002	6
CX-261			6
CX-288			6
CX-334			6
CX-617			6
CX-645		R0033909	6
CX-646		R0040761	6
CX-650	<b>REDACTED</b>	R0033519 6- R0035197	6
CX-682		R0040683	6
CX-738		R0035131	6
CX-750		PL003056	6
CX-759		R0033865	6
CX-823		R0040774	6
CX-830			6
CX-841		9010003- 9010005	6
CX-843		9000023	6
CX-844		900023	6
CX-845	9000022	6	
CX-846	9000013- 9000021	6	
CX-847	8000001- 8000026	6	
CX-854	9000010- 9000012	6	
CX-855	5037026- 30	6	
CX-899	5007539- 5007567	6	
RX-043		N/A	6
RX-094		N/A	6
RX-095		N/A	6
RX-096		N/A	6
RX-097		N/A	6
RX-125		FTC4495 THRU FTC4523	6



Public-Composite 7

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-152		COINFO- 000001/94- COINFO 000001-107 (BASIC RESEARCH BATES: 8000001- 8000014)	7
CX-191		4000001- 4000008	7
CX-817		SDT00277- SDT00279	7
CX-821		SDT00160	7
CX-826		8000015	7
CX-829		5037698- 5037705	7
CX-848		8000015- 8000018-19	7
CX-851		4000017-22	7
CX-852		4000009- 4000016	7
RX-091		N/A	7
RX-093		4000001 THRU 4000008	7
RX-306		N/A	7
RX-307		FR000027	7
RX-308		N/A	7
RX-676		R0034016 THRU R0034018	7
RX-677		SH005164 THRU SH005165	7

**REDACTED**

Public-Composite 8

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Exhibit No.	Title or Description	Bates No.	Categories
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Public-Composite 9

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-302		R0041166- R0041166-G	9
CX-313		JF35	9
CX-314			9
RX-386		R0044178	9

**REDACTED**

Public-Composite 10

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-448		5004217- 5004307	10
CX-027			10
CX-117		5032872- 5032962	10
CX-203		R0034370 (ALSO MARKED AS R0033185)	10
CX-209		R0033070	10
CX-210		R0035122	10
CX-211		R0035116	10
CX-214		R0035133	10
CX-215		R0035138- R0035139	10
CX-246		R0034752	10
CX-283		R0035127	10
CX-285		R0035113	10
CX-286		R0035111	10
CX-289			10
CX-290			10
CX-291			10
CX-292		R0041870	10
CX-293		F0007-F0008	10
CX-295			10
CX-297		F0897	10
CX-298		R0042098	10
CX-303		R0037371- R0037637	10
CX-304		F0010	10
CX-306		R0035119	10
CX-309		F0853-F0855	10
CX-310		R0041788	10
CX-311			10
CX-312		SF3-SF4	10
CX-315			10
CX-316			10
CX-317		RK8	10
CX-318			10
CX-319			10
CX-320		R0012331	10
CX-321			10
CX-322			10
CX-323			10
CX-371		R0044459	10
CX-372		R0044647- R0044648	10
CX-380		R0044493- R0044494	10
CX-381		R0044514	10
CX-382		R0044518	10

**REDACTED**

**Public-Composite 10**

<b><u>Exhibit No.</u></b>	<b><u>Title or Description</u></b>	<b><u>Bates No.</u></b>	<b><u>Categories</u></b>
CX-383		R0044519	10
CX-451			10
CX-455			10
CX-456			10
CX-457			10
CX-459			10
CX-651		5004483	10
CX-676	<b>REDACTED</b>	R0032944- R0032945	10
CX-701		R0035355	10
CX-710		R0035123	10
CX-711		R0035121	10
CX-712		R0034074	10
CX-714		R0033693	10
CX-718		R0034454- R0034455	10
CX-721		R0035436- R0035437	10
CX-722		R0004901	10
CX-724		R0035109	10
CX-731		R0035134- R0035136	10
CX-754			10
CX-760		R0033463- R0033464	10
CX-764		R0034019- R0034020 (ALSO MARKED AS R0035414)	10
CX-772		10	
CX-773	R0042680	10	
CX-776	R0042372	10	
CX-777	R0042331	10	
CX-780	R0041966	10	
CX-784		10	
CX-785	R0041790- R0041791	10	
CX-786	R0000306	10	
CX-788	R0041630- R0041631	10	
CX-795	R0041317- R0041317-J	10	
CX-798		10	
CX-799		10	
CX-805	R0042732 (ALSO MARKED AS R0042733)	10	
CX-807		10	

Public-Composite 10

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-810		SDT00186- SDT00188	10
CX-818		SDT00389	10
CX-935		5041713- 5041747	10
CX-953			10
RX-120		FC000062 THRU FC000081	10
RX-207		R0043238	10
RX-407		R0012283	10
RX-416		FTC4708 THRU FTC4740	10
RX-471		R0042045	10
RX-647		R0029786 THRU R0029896	10
RX-683		R0034002	10
RX-696		R0040296	10

**REDACTED**

Public-Composite 11

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
CX-831			11
CX-869		FTC4442-4445	11
CX-870		FTC4446-4452, 4454	11
RX-098		FTC 4589 THRU FTC 4599	11
RX-099		FTC 4435 THRU FTC 4436	11
RX-100	<b>REDACTED</b>	FC000025 THRU FC000026	11
RX-103		FTC 4438 THRU FTC 4441	11
RX-105		FTC 4442 THRU FTC 4445	11
RX-106		FTC 4446 THRU FTC 4453	11
RX-110		FC000057 THRU FC000060	11
RX-111		FTC 4465 THRU FTC 4470	11
RX-115		FTC 4475 THRU FTC 4476	11
RX-126		FTC4524 THRU FTC 4561	11
RX-127		FC000187 THRU FC000232	11
RX-134		FTC 4566 THRU FTC 4571	11
RX-136		FC000290	11
RX-137		FTC 4572 THRU FTC 4576	11
RX-138		FTC 4577 THRU FTC 4585	11

Public-Composite 11

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-139		FTC 4586 THRU FTC 4587	11

**REDACTED**



**Public-Composite 12**

<b>Exhibit No.</b>	<b>Title or Description</b>	<b>Bates No.</b>	<b>Categories</b>
CX-077			12
CX-089			12
CX-116			12
CX-134			12
CX-148			12
CX-149			12
CX-163			12
CX-182			12
CX-183			12
CX-196			12
CX-197			12
CX-198			12
CX-254			12
CX-255			12
CX-281			12
CX-299		R0041604	12
CX-801			12
CX-875		FTC4486-4494	12
CX-879		FTC4632-4639	12
CX-902		5012810-5012855	12
CX-903		5033259-5033283	12
CX-904		5033482-5033509	12
CX-917		5033482-5033509	12
CX-919		5033164-5033207	12
CX-920		CYT0810-CYT1064	12
CX-921		5036691-5036775	12
CX-932		5003164-5033207	12
CX-934		5033482-5033509	12
CX-936		5033259-5033293	12
CX-937		5033482-5033509	12
CX-939		5033164-5033207	12
RX-038		N/A	12
RX-039		N/A	12
RX-040		N/A	12
RX-041		N/A	12
RX-042		N/A	12
RX-046		N/A	12

**REDACTED**

Public-Composite 12

<u>Exhibit No.</u>	<u>Title or Description</u>	<u>Bates No.</u>	<u>Categories</u>
RX-047		N/A	12
RX-048		N/A	12
RX-051		N/A	12
RX-052		N/A	12
RX-054		N/A	12
RX-124		FC000147 THRU FC000155	12
RX-142	<b>REDACTED</b>	FTC 4632 THRU FTC 4639	12
RX-172		FTC 4632 THRU FTC 4639	12
RX-274		BPI000043 THRU BPI000045	12
RX-276		BPI000021 THRU BPI000024	12
RX-348		R0007011 THRU R0007064	12
RX-349		LMS00689 THRU LMS00700	12
RX-814		N/A	12

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

---

<i>In the Matter of</i>	)	
	)	
	)	
BASIC RESEARCH, L.L.C.,	)	<b>PUBLIC RECORD</b>
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,	)	<b>DOCKET NO. 9318</b>
BAN, L.L.C.,	)	
DENNIS GAY,	)	
DANIEL B. MOWREY,	)	
MITCHELL K. FRIEDLANDER	)	

---

**DECLARATION OF GINA GAY**

1. My name is Gina Gay. I am over twenty-one years of age, of sound mind, and fully competent and able to testify to the matters set forth herein. I have personal knowledge of the facts set forth herein.

2. I am employed as a Marketing Director in the Marketing Department of Basic Research, LLC. I am familiar with Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker usa, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC and Ban, LLC, (the “Corporate Respondents”) and the substantiation documents for the six products at issue in this case, which have been made exhibits in the case and which are a part of the documents for which Respondents are seeking *In Camera* treatment (the “Substantiation Compilations”). I am also familiar with the uses that the Corporate Respondents make of the Substantiation Compilations and the level of confidentiality associated with the subject matter contained therein.

3. This Declaration is submitted in support of Respondents' Motion for *In Camera* Treatment of Trial Exhibits.

4. In the course of my work for the Corporate Respondents, I have become familiar with the business plan of the Corporate Respondents, especially as it relates to the marketing of Respondents' products.

5. The Corporate Respondents make extensive use of the Substantiation Compilations in carrying out the unique and successful business plan that they have formulated.

[

**REDACTED**

]

6. [

**REDACTED**

]

7. As part of developing and implementing the marketing strategy for each of the Corporate Respondents' products, I have become aware that there are a large number of competitors who seek to copy the Corporate Respondents' marketing strategy, business plan and the products themselves.

8. These competitors lie in wait and use every piece of information they can acquire in their efforts to create "knock-offs" or copies of the Corporate Respondents' products, which compete head-to-head with Corporate Respondents' products in the same market.

9. Public disclosure of the Substantiation Compilations filed in this case would give the Corporate Respondents' competitors access to confidential and proprietary business information that they cannot get elsewhere, [

**REDACTED**

]

10. The Corporate Respondents' competitors will use this valuable information to formulate or develop similar products to compete in the same markets as the Corporate Respondents' products.

11. [

**REDACTED**

**REDACTED**

]

12. Making these Substantiation Compilations available to such competitors would be severely damaging to the Corporate Respondents' legitimate business interests because it would

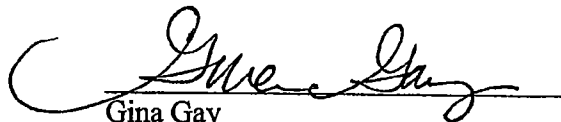
[

**REDACTED**

] This is extremely valuable business information, to which these competitors cannot otherwise gain access, and to which they are not entitled.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 3rd day of February, 2006.

  
Gina Gay