

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**Commissioners: Deborah Platt Majoras, Chairman
 Orson Swindle
 Thomas B. Leary
 Pamela Jones Harbour
 Jon Leibowitz**

In the Matter of)	
)	
BASIC RESEARCH, L.L.C.,)	
a limited liability corporation,)	
A.G. WATERHOUSE, L.L.C.,)	
a limited liability corporation,)	
KLEIN-BECKER USA, L.L.C.,)	
a limited liability corporation,)	
NUTRASPORT, L.L.C.,)	
a limited liability corporation,)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,)	
a limited liability corporation,)	
BAN, L.L.C.,)	DOCKET NO. 9318
a limited liability corporation, also doing)	
business as BASIC RESEARCH, L.L.C.,)	
OLD BASIC RESEARCH, L.L.C.,)	
BASIC RESEARCH, A.G. WATERHOUSE,)	
KLEIN-BECKER USA, NUTRA SPORT, and)	
SOVAGE DERMALOGIC LABORATORIES,)	
DENNIS GAY,)	
individually and as an officer)	
of the limited liability corporations,)	
DANIEL B. MOWREY,)	
also doing business as)	
AMERICAN PHYTOTHERAPY RESEARCH)	
LABORATORY, and)	
MITCHELL K. FRIEDLANDER)	

ORDER

This matter comes before the Commission on the certification by Chief Administrative Law Judge Stephen J. McGuire (“ALJ”) of three procedural motions relating to Respondents’ allegation that Complaint Counsel’s disregard of the Commission’s rules regarding electronic

filings resulted in the posting and disclosure of Respondents' confidential documents on the Commission's public Web site. The Commission treats this allegation as a serious matter, and recognizes the public interest in ensuring that all reasonable measures be taken to safeguard confidential information from improper disclosure. Accordingly, as explained below, the Commission, after reviewing Respondents' arguments and Complaint Counsel's responses, has determined to dispose of the certified motions by: (1) imposing certain procedural restrictions on Complaint Counsel for the remainder of this proceeding to help prevent any recurrence of the posting of information designated confidential by Respondents or by any other submitter, but otherwise denying Respondents' motion for an order to show cause why Complaint Counsel should not be held in contempt, including Respondents' request for dismissal and monetary relief; (2) granting in part and denying in part Respondents' motion seeking access to certain internal agency electronic files by providing Respondents' with aggregate FTC Web server data; and (3) denying Respondents' motion for additional discovery.

I. Background

A. The Documents and Motions at Issue

The documents at issue consist of five exhibits contained in Complaint Counsel's Motion for Partial Summary Decision, filed January 31, 2005, and one exhibit contained in Complaint Counsel's Motion to Compel, filed December 6, 2004.¹ Respondents allege that these exhibits were subject to the ALJ's protective order issued August 11, 2004, and should not have been posted to the Web site. Nonetheless, as explained further below, the exhibits accompanying Complaint Counsel's January 31 motion were posted to the FTC's public Web site on February 15, 2005, and, when Complaint Counsel discovered this situation, the documents were removed from the Web site at Complaint Counsel's request on February 17, 2005. At the same time, the allegedly confidential exhibit contained in Complaint Counsel's December 6 motion, which had been previously posted, was also removed from the Web site.

After learning of these postings, Respondents filed an emergency motion, dated February 18, 2005, seeking production of the Commission's web server logs and any other relevant electronic files to determine who may have accessed these exhibits while they were publicly posted. *See* Respondents' Emergency Motion Requiring the Commission to Provide Respondents With Electronic Files Showing Who Accessed Respondents' Confidential Information While It Was on the Commission's Website—Expedited Briefing Requested (Feb.

¹ The five exhibits, or portions thereof, attached to Complaint Counsel's January 31 motion and at issue here are: Exhibit 11 (i.e., Exhibit A to Respondent's Response to Complaint Counsel's First Set of Interrogatories, containing product ingredients and ratios); Exhibit 15 (i.e., Exhibit A to Supplemental Answers and Answers to Complaint Counsel's First Set of Interrogatories, containing net gross revenue and advertising expenditures); Exhibit 36 (customer e-mail); Exhibit 42 (combined balance sheet and notes); and Exhibit 45 (advertising dissemination schedule). Also at issue is Exhibit R (gross sales figures) to Complaint Counsel's December 6, 2004, Motion to Compel.

18, 2005) (“Electronic Files Motion”).² By subsequent motion, Respondents further sought an order to show cause why Complaint Counsel should not be held in contempt of the ALJ’s protective order. *See* Respondents’ Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt (March 8, 2005) (“Contempt Motion”). Finally, Respondents moved for leave to take additional discovery regarding Complaint Counsel’s alleged violation of the protective order. *See* Respondents’ Motion for Leave to Take Discovery Regarding Complaint Counsel’s Violation of the Protective Order (March 8, 2005) (“Discovery Motion”).³

B. Respondent’s Arguments and Complaint Counsel’s Responses

Respondents assert that the exhibits in question contain, *inter alia*, business records and other confidential information, and, in one instance, a consumer’s e-mail address and other personal information. Respondents assert that these exhibits containing this information were designated “confidential” pursuant to the ALJ’s protective order, as noted earlier, and that Complaint Counsel violated the protective order by using e-mail for filings containing confidential material, in violation of Commission Rule 4.2(c)(3), 16 C.F.R. § 4.2(c)(3) (prohibiting the use of e-mail to transmit nonpublic filings to the Office of the Secretary). Respondents assert that Complaint Counsel’s use of e-mail to transmit such confidential materials to other FTC document processing staff led to their erroneous posting on the FTC Web site by such staff, and constituted contempt of the protective order. Respondents assert that the posting of the materials caused them irreparable harm, and that the only appropriate remedy is dismissal of the complaint and monetary relief, including attorney costs. *See* Contempt Motion at 5-6, 23-35. Further, Respondents argue that production of certain electronic files is necessary to show who may have accessed the documents in question while they were posted on the Commission’s Web site. *See* Electronic Files Motion at 2-3. Finally, Respondents seek additional discovery, including depositions of Complaint Counsel and other FTC staff, as well as documentary material relating to Complaint Counsel’s alleged violation of the protective order. *See* Discovery Motion at 9-13.

² Complaint Counsel filed a partial response to the Electronic Files Motion, requesting additional time for a supplemental response. *See* Complaint Counsel’s Partial Response to Respondents’ Emergency Motion (Feb. 18, 2005). By order dated February 22, 2005, ALJ McGuire granted Respondents’ request in its Electronic Files Motion for expedited briefing and ordered Complaint Counsel to file its supplemental response by February 25, 2005. *See* Complaint Counsel’s Supplemental Response to Respondents’ Emergency Motion (Feb. 25, 2005) (“Electronic Files Supplemental Response”); *see also* Reply to Complaint Counsel’s Partial & Supplementary Responses to Respondent’s Emergency Motion (Mar. 4, 2005); Order for Respondents to Show Cause (Mar. 9, 2005) (requiring respondents to show cause what information posted to the Web site was, in fact, confidential); Respondents’ Response to Order to Show Cause (Mar. 16, 2005).

³ *See also* Complaint Counsel’s Consolidated Opposition to Respondents’ Motion For Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt and Respondents’ Motion for Leave to Take Discovery (Mar. 21, 2005) (“Consolidated Opposition”).

Complaint Counsel have acknowledged that they used e-mail to transmit both the public and non-public versions of their January 31 motion and exhibits to the Commission's document processing staff. Complaint Counsel argue, however, that Respondents were fully aware of Complaint Counsel's ongoing use of e-mail to transmit electronic copies of non-public filings, that Respondents had failed to raise any objections to this practice, and that, in any event, the posting of the non-public version of the exhibits at issue resulted from an error once they were received by document processing staff, and not because the exhibits had been transmitted by e-mail. *See* Electronic Files Supplemental Response, Att. B, ¶¶ 14, 22.

Complaint Counsel assert that they have not acted in bad faith, and that when they discovered that the non-public version of the exhibits were publicly posted, they took immediate steps to have them removed from the public FTC Web site and to preserve the related electronic files. *See* Consolidated Opposition at 21-66. Further, Complaint Counsel argue that Respondents have failed to demonstrate, as a threshold matter, that the exhibits meet relevant standards for *in camera* treatment; that the Respondents had failed to designate certain exhibits properly in order for them to be subject to the protective order; and that no harm has been demonstrated from the posting of any of the exhibits on the FTC's Web site. *Id.* at 4-5; Electronic Files Supplemental Response at 4-6. Complaint Counsel argue that Respondents are not entitled either to dismissal of the complaint on the merits or monetary sanctions, that their Motion for discovery of electronic files cannot be granted without violating the Commission's privacy policy, and that their request for additional discovery should also be denied. *See* Electronic Files Supplemental Response at 3-4; Consolidated Opposition at 66-71.

C. The ALJ's Certifying Order

On April 6, 2005, after reviewing the Respondents' arguments and Complaint Counsel's responses, Judge McGuire issued an order certifying the Respondents' three motions to the Commission (*i.e.*, Electronic Files Motion, Contempt Motion, and Discovery Motion). *See* Order Certifying Motions to Commission and Staying Proceedings ("Certifying Order"). In his order, Judge McGuire concluded that Complaint Counsel violated Rule 4.2(c)(3) by e-mailing nonpublic filings, that all but one of the exhibits that were e-mailed appeared to contain information that is entitled to *in camera* treatment under the Commission's rules and precedent, and that the exhibits disclosed on the FTC's Web site were subject to the protective order applicable in this proceeding. Certifying Order at 7-10.

Judge McGuire nevertheless determined that the three motions must ultimately be certified to the Commission because: "(1) the motions raise allegations, inter alia, requiring determination of matters beyond the merits of the violation of law charged in the Complaint; (2) the challenged conduct appears to involve components of the Commission and/or employees other than Complaint Counsel; and (3) the requested relief exceeds the authority delegated to the Administrative Law Judge." Order at 2; *see also id.* at 10.

Accordingly, the Respondents' three motions now are presented to the Commission for resolution. As described below, this Order: denies the Contempt Motion but grants appropriate

alternative relief; grants in part and denies in part the Electronic Files Motion; and denies the Discovery Motion.

II. Discussion

The Commission addresses the Contempt Motion first, because the other two motions, which relate to discovery, turn upon the disposition of the Contempt Motion.

A. Contempt Motion

Respondents' Contempt Motion seeks dismissal of the Commission's complaint, asserting that such a remedy is appropriate when it is shown that a party has acted willfully or in bad faith in violating an order of an ALJ. We reject this request. While intent is a relevant factor on the issue of dismissal, it is not determinative. The Commission must also consider the strong public policy favoring disposition of cases on their merits, the potential availability of less drastic alternatives, and, most important, whether the Respondents have suffered any actual prejudice in the litigation itself as a result of the alleged violations. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002) (factors relevant to whether dismissal is warranted under Fed. R. Civ. P. 41); *Bowling v. Hasbro, Inc.*, No. 04-1364, 2005 U.S. App. LEXIS 5867 (Fed. Cir. Apr. 11, 2005).

Here, we observe that the Commission's complaint is brought in the public interest, that dismissal would not be the only available or feasible remedy, and that Respondents have failed to allege or demonstrate how the posting of the documents on the FTC Web site has prejudiced the Respondents with respect to the merits of the proceeding. Accordingly, even assuming *arguendo* that Respondents could demonstrate that Complaint Counsel's actions constituted an intentional or willful violation of the ALJ's protective order, the extraordinary remedy of dismissal is not justified. *See, e.g., Coleman v. American Red Cross*, 23 F.3d 1091, 1095-96 (6th Cir. 1994) (although attorney intentionally violated a protective order, it was an abuse of discretion to dismiss the case on that ground unless moving party could show how it had been prejudiced in the litigation).

While Respondents note that Commission Rule 3.38 authorizes the striking of a pleading, motion or other submission as a sanction for violations of an ALJ discovery order, nothing in that Rule compels dismissal of the complaint here. These discovery sanctions are designed as potential compensation for an improper denial of access to testimony, documents, or other evidence resulting from a party's failure to comply with discovery. *See* 16 C.F.R. § 3.38(c). Although the protective order was undoubtedly issued in connection with discovery, the posting of the exhibits on the FTC's Web site has not deprived or interfered with the Respondents' access to any relevant testimony, document, or other necessary evidence. Likewise, Respondents' allegation of serious competitive business harm from the alleged improper disclosure, even if proven to be true, would not constitute prejudice to any substantive claims or defenses that might be a factor in this litigation.

Nonetheless, the Commission believes that there is a sufficient basis in the existing record of this proceeding to conclude that Complaint Counsel violated the terms of Commission Rule 4.2(c)(3), *supra*, which prohibits the filing of confidential exhibits by e-mail. Specifically, affidavits submitted by Complaint Counsel concede that e-mail was used to transmit an unredacted (non-public) version of their January 31 motion to FTC document processing staff.⁴ To the extent that Complaint Counsel's violation of this Rule contributed, in whole or part, to confusion by document processing staff about the nonpublic status of the exhibits at issue and resulted in their posting on the FTC Web site, the Commission believes that Complaint Counsel's Rule violation is enough to warrant remedies, irrespective of Complaint Counsel's alleged intent or any showing of actual harm by Respondents.⁵

The Commission has determined that an appropriate remedy, rather than dismissal, is to require that, for the remainder of the present proceeding, all future public filings by Complaint Counsel under Rule 4.2(c)(3) be reviewed and certified by the Associate Director for the Division of Enforcement, Bureau of Consumer Protection, to ensure that such public filings have been properly redacted, and that they contain no unredacted material that would violate the Rule. This remedy is intended to help avoid any future violations of the protective order and the Rule.

The Commission is cognizant that a remedy designed to prevent a future violation does not necessarily address a past violation. In that regard, Respondents' Contempt Motion asks the Commission for monetary relief to redress it for the time and expense it has incurred in pursuing this matter. The Commission, however, has no authority to grant such relief in the context of this proceeding.⁶

⁴ Complaint Counsel's admission obviates the need to determine whether Complaint Counsel's acts or omissions constituted contempt of the protective order, which would require the Commission to resolve numerous underlying factual and legal issues (*e.g.*, Complaint Counsel's alleged intent, the intervening responsibility or role, if any, of Commission staff other than Complaint Counsel in the posting of the documents on the Web site, and whether the documents at issue were properly subject to the protective order in this proceeding). Indeed, threshold issues might be raised about the possible overdesignation of confidential materials under the protective order; we note that Judge McGuire determined that at least one of the exhibits at issue would not satisfy the standards for *in camera* treatment. In any event, resolving such issues would require a show cause hearing to make additional factual or legal findings that ultimately are not necessary for the Commission to fashion appropriate relief.

⁵ The Chairman has already directed the Executive Director, in consultation with the Office of General Counsel, to examine whether any further action would be warranted, such as taking any additional safeguards or making other changes to the Commission's policies, procedures and practices for the handling of information designated confidential, in light of the violation in this proceeding.

⁶ Absent statutory authority, the Commission may not award attorney costs or other expenses allegedly incurred by Respondents as a result of Complaint Counsel's actions. *See, e.g.*, 67 Comp. Gen. 574, 576 (1988).

Accordingly, for the reasons stated above, the Commission grants the relief described above, but otherwise denies Respondents' motion for an order to show cause why Complaint Counsel should not be held in contempt, including Respondents' request for dismissal or monetary relief.

B. Electronic Files Motion

In addition to sanctions and monetary relief, Respondents have asked for the production of Web server log information that Respondents allege would reveal who may have accessed the exhibits at issue from the Commission's Web site. The Commission has determined to grant this motion in part by granting Respondents access to aggregate Web log data that reveal the Web domains from which requests to the exhibits in question were received. Disclosure of this information provides Respondents with information regarding the extent of the disclosures and may allow the Respondents to contact these domains to determine to what extent the domain operators themselves, or users of these domains, may have retrieved, stored, used, shared, or disclosed exhibits from the FTC's servers.⁷

The Commission, however, denies Respondents' Electronic Files Motion to the extent that it seeks specific Internet Protocol (IP) addresses or other information that would personally identify any specific individual. The Commission acknowledges that such personally identifiable information might better serve Respondents' stated purpose to identify and contact specific individuals who may have accessed the exhibits at issue. Nonetheless, the disclosure of such personally identifiable information would violate the Privacy Act of 1974, 5 U.S.C. § 552a, to the extent, if any, that disclosure would constitute the improper establishment, retrieval, and disclosure from an agency system of records pertaining to an individual by name or other personal identifier (*e.g.*, a number or electronic address). The Act prohibits the retrieval and disclosure or use of such information without the individual's consent unless authorized by the Act. Retrieval and disclosure of such information under the present circumstances to the Respondents would neither be consensual nor for a purpose authorized by the Act.

Moreover, such disclosure would violate the FTC's Web privacy policy, which unequivocally states that Web server log information is used strictly as "aggregate" data and is not used to "track or record" information about individuals. The Commission believes that it would not serve the public interest for the Commission to compound Complaint Counsel's violation of Rule 4.2(c)(3) and make a disclosure of Web log information that could violate the privacy rights of other individuals who have been assured a certain degree of anonymity when visiting the FTC's Web site. In disclosing aggregate data, the Commission is making available as much information as possible to the Respondents while remaining consistent with applicable privacy laws and policy. As already discussed, disclosure of aggregate data would allow Respondents to contact the operators of the Web domains from which requests for the exhibits originated, and determine if those domains might assist in identifying, retrieving, or destroying

⁷ The Commission is unable to grant the Respondents' related request for any relevant "security logs," because the exhibits at issue were posted on public FTC servers (*i.e.*, no password or other security clearance must be submitted in order to access those servers).

any copies of the exhibits that may have been retained by users of those domains or by the domain operators themselves, without requiring that the Commission potentially violate privacy law and policy by disclosing personally identifying information (*e.g.*, IP addresses) to the Respondents.

C. Discovery Motion

In addition to seeking Web log information, the Respondents, through a separate Discovery Motion, also have sought additional internal FTC documents that they believe would shed light on the circumstances surrounding the posting of the exhibits at issue, including depositions of Complaint Counsel and other agency support staff, any relevant personnel or training files, and any other information concerning the agency's privacy policies and practices.

Discovery in Commission adjudicatory proceedings under Part 3 of the Commission's Rules is limited to matters that are relevant to the allegations of the Commission's complaint, to the relief proposed therein, or to the Respondents' defenses, none of which is at issue in this Discovery Motion. *See* 16 C.F.R. § 3.31. To the extent Respondents argue that such discovery is necessary regarding issues of Complaint Counsel's credibility and culpability for the posting of the exhibits, such discovery is unnecessary, given the relief granted by the Commission to address Complaint Counsel's violation of Rule 4.2(c)(3). Therefore, the Commission denies the Discovery Motion.

III. Conclusion

Accordingly, for the reasons stated above, the Commission:

(1) Orders Complaint Counsel for the remainder of this proceeding to obtain prior review and certification by the Associate Director of the Division of Enforcement, Bureau of Consumer Protection, or in the rare event that he or she is unavailable, the Bureau's Deputy Director, of any future public filings by Complaint Counsel to ensure the proper use and redaction of materials subject to the ALJ's protective order and protect against any violation of that order or applicable rule, but otherwise denies the Respondents' Contempt Motion, including the request for dismissal and monetary relief;

(2) Grants the Respondents' Electronic Files Motion in part, by ordering that the General Counsel release to the Respondents aggregate Web log data responsive to the Motion, and denies the Motion in part, to the extent it seeks access to specific IP addresses or any other personally identifiable information;

(3) Denies the Respondents' Discovery Motion; and

(4) Orders that the stay of this proceeding is hereby lifted, that the proceeding shall not be further stayed, except pursuant to the conditions and requirements set forth in Part 3 of the Commission's Rules, and that the proceeding shall remain subject to the time limits prescribed by Rule 3.51, 16 C.F.R. § 3.51, for the issuance of the Initial Decision, with an additional

allowance of time, if needed, equivalent to the number of business days that have elapsed between the date of the Certifying Order and the date of this Order.

By the Commission.

Donald S. Clark
Secretary

ISSUED: June 17, 2005