

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

In the Matter of )

BASIC RESEARCH, LLC )

A.G. WATERHOUSE, LLC )

KLEIN-BECKER USA, LLC )

NUTRASPORT, LLC )

SOVAGE DERMALOGIC LABORATORIES, LLC )

BAN, LLC d/b/a BASIC RESEARCH, LLC )

OLD BASIC RESEARCH, LLC, )

BASIC RESEARCH, A.G. WATERHOUSE, )

KLEIN-BECKER USA, NUTRA SPORT, and )

SOVAGE DERMALOGIC LABORATORIES )

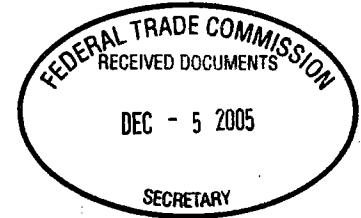
DENNIS GAY )

DANIEL B. MOWREY d/b/a AMERICAN )

PHYTOTHERAPY RESEARCH LABORATORY, and )

MITCHELL K. FRIEDLANDER, )

Respondents. )



Docket No. 9318

**ORDER ON RESPONDENTS' MOTION FOR *IN CAMERA* TREATMENT  
OF DOCUMENTS LISTED ON PARTIES' EXHIBIT LISTS**

**I.**

Pursuant to Commission Rule 3.45(b) and the Scheduling Orders entered in this litigation, Respondents filed a motion seeking *in camera* treatment for eight boxes of documents on November 23, 2005. The opposition to the motion is not yet due and, as explained below, the due date is extended. On November 28, 2005, Respondents filed a motion for leave to supplement the motion. Respondents' motion for leave is **GRANTED**.

**II.**

In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977).

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 Coca-Cola Co.*, 1990 FTC LEXIS 364, at \*6-7 (Oct. 17, 1990). Examples of documents meriting indefinite *in camera* treatment are trade secrets, such as secret formulas, processes, and other secret technical information, and information that is privileged. *See Hood*, 58 F.T.C. at 1189; *In re R.R. Donnelley & Sons Co.*, 1993 FTC LEXIS 32, at \*3 (Feb. 18, 1993); *In re Textron, Inc.*, 1991 FTC LEXIS 135, at \*1 (Apr. 26, 1991). Where *in camera* treatment is granted for ordinary business records, such as business plans, marketing plans, or sales documents, it is typically extended for two to five years. *E.g.*, *In re E.I. Dupont de Nemours & Co.*, 97 F.T.C. 116, 118 (1981); *In re Int’l Ass. of Conf. Interpreters*, 1996 FTC LEXIS 298, \*13-14 (June 26, 1996).

The Federal Trade Commission strongly favors making available to the public the full record of its adjudicative proceedings to permit public evaluation of the fairness of the Commission’s work and to provide guidance to persons affected by its actions. *In re Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); *Hood*, 58 F.T.C. at 1186 (“[T]here is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.”). A heavy burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Hood*, 58 F.T.C. at 1188. Further, requests for indefinite *in camera* treatment must include evidence to justify why the document should be withheld from the public’s purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. *See DuPont*, 97 F.T.C. at 117. Thus, in order to sustain the heavy burden for withholding documents from the public record, an affidavit or declaration demonstrating that a document is sufficiently secret and material to the applicant’s business that disclosure would result in serious competitive injury is required. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at \*2-3 (Apr. 23, 2004). The parties and non-parties have been advised of these requirements. Scheduling Order, Additional Provisions, ¶ 16; Protective Order, ¶ 12.

### III.

As described by Carla Fobbs, Legal Administrator in the Compliance Department of Basic Research, LLC, public disclosure of the documents at issue would cause a clearly defined, serious injury to Respondents. Fobbs states that “[t]he sheer volume of exhibits designated for trial by both Respondents and Complaint Counsel preclude any one person from conducting the entire review” and therefore her declaration is based upon a review by employees and agents. Declaration at 2.

The time period for which Respondents seek *in camera* treatment for each particular document is not clear, although there are time periods requested for broad categories of documents. Respondents must specify the time period for which *in camera* treatment is sought for each individual document.


A review of the documents submitted with the motion reveals that many of the documents do not meet the standards for *in camera* treatment. For example, RX 3 (FTC letter) and CX 617 (NIH, "The Practical Guide: Identification, Evaluation and Treatment of Overweight and Obesity in Adults") appear to have been publicly disseminated by government agencies. Indeed, RX 3 is a document for which Respondents have requested official notice because it appears on the FTC's public website. In addition, a large number of documents are articles that have been published in journals or other publications which have been publicly disseminated including: CX 509, CX 535, CX 536, CX 537, CX 538, CX 539, CX 540, CX 541, CX 542, CX 543, CX 544, CX 545, CX 546, CX 547, CX 548, CX 549, CX 550, CX 551, CX 552, CX 553, CX 554, CX 555, CX 557, CX 558, CX 559, CX 560, CX 561, CX 562, CX 563, CX 564, CX 565, CX 566, CX 567, CX 568, CX 569, CX 570, CX 572, CX 573, CX 574, CX 575, CX 576, CX 577, CX 578, CX 579, CX 580, CX 581, CX 582, CX 583, CX 584, CX 585, CX 586, CX 587, CX 588, CX 589, CX 590, CX 591, CX 592, CX 593, CX 594, CX 595, CX 596, CX 597, CX 598, CX 599, CX 600, CX 601, CX 602, CX 603, CX 604, CX 605, CX 606, CX 607, and CX 608.

A motion for *in camera* treatment must be narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material. The inclusion of such a large number of documents which are obviously public demonstrates that Respondents have clearly not conducted an adequate review of the documents. Accordingly, Respondents' motion is **DENIED WITHOUT PREJUDICE**.

In addition, the declaration fails to discuss each exhibit individually. This may be a result of what Fobbs described as "[t]he sheer volume of exhibits designated for trial by both Respondents and Complaint Counsel." Declaration at 2. The parties recently submitted final proposed exhibit lists and objections to each other's final proposed exhibit lists. It is clear that the parties have designated an excessive number of exhibits for trial. In addition, the parties appear to have objections to the vast majority of each other's exhibits. In the interests of efficiency, the parties shall reduce the number of exhibits proposed for admission at trial and shall attempt to resolve their objections to exhibits. To the extent that the parties do not agree on which exhibits to admit, they will be required to address each exhibit individually at the prehearing conference.

After consultation with each other, the parties shall exchange revised exhibit lists by December 22, 2005. The parties shall exchange revised objections to exhibit lists by January 4, 2006. The parties shall also exchange a list of the exhibits to which there is no objection on January 4, 2006. The Office of Administrative Law Judges shall be provided a courtesy copy of each of these lists. Respondents have until January 13, 2006 to file a renewed motion for *in camera* treatment, based on the revised exhibit lists, that is more narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material and which addresses each document individually. Complaint Counsel's opposition to Respondents' revised *in camera* treatment motion shall be filed by January 27, 2006.

ORDERED:

  
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Stephen J. McGuire  
Chief Administrative Law Judge

Date: December 5, 2005