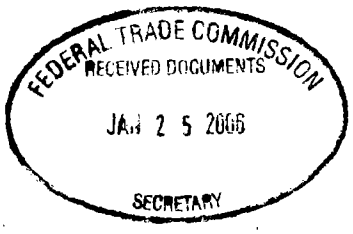
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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' REVISED MOTION FOR *IN CAMERA* TREATMENT OF DOCUMENTS LISTED ON PARTIES' EXHIBIT LISTS AND ON JOINT MOTION FOR ENLARGEMENT OF TIME TO SUBMIT PRETRIAL BRIEFS

I.

On January 17, 2006, Respondents filed a revised motion for *in camera* treatment of proposed trial exhibits. Complaint Counsel's opposition has not been filed and is not yet due. For the reasons set forth below, Respondents' motion is **DENIED WITHOUT PREJUDICE**.

On January 24, 2006, the parties filed a joint motion seeking a one week extension of time for the submission of pretrial briefs. In that motion, the parties represent that the "size of the factual record . . . is extraordinary and cannot reasonably be evaluated in its entirety by the present deadline" and that "[c]ounsel for both sides are still actively engaged in negotiating the reduction in the volume of exhibits and, so, the record upon which the findings will be drafted is uncertain." As set forth below, the joint motion for an extension of the pretrial briefs is **GRANTED**. However, additional deadlines are imposed to ensure that the factual record is reduced to a size that is manageable for the parties. Moreover, future requests for extensions will not be entertained. The March 7, 2006 trial date was established at their request by Scheduling Order dated August 4, 2005. The parties have had more than adequate time to prepare for trial.

II.

Respondents' revised motion for *in camera* treatment is their second attempt to comply with the Court's directives that Respondents must meet the Commission's strict requirements for *in camera* treatment of documents. Respondents have repeatedly been advised of the strict standards to be applied to motions for *in camera* treatment. *E.g.*, Protective Order Governing Discovery Material, ¶ 12 (August 11, 2004); Scheduling Order, ¶ 16 (August 11, 2004). In Respondents' first motion, filed November 23, 2005, Respondents sought *in camera* treatment for several boxes of documents. By Order dated December 5, 2005, Respondents were explicitly directed to the standard for *in camera* treatment and instructed to narrow their requests to seek only documents which meet that standard. *In re Basic Research*, Docket 9318, at 3 (Dec. 5, 2005).

Although ample time was given to the parties to narrow their proposed exhibit lists and to Respondents to narrow the scope of documents for which they seek *in camera* treatment, and though Respondents do represent in their revised motion that they have reduced the number of documents for which they seek *in camera* treatment, Respondents now seek *in camera* treatment for an even greater number of boxes of documents. Inexplicably, the volume of documents for which Respondents seek *in camera* treatment appears to have expanded, rather than contracted. Without delving into the documents individually, it is apparent that Respondents' second motion continues to massively overreach.

III.

It is not necessary to review each of these documents to make a determination that the exceptional circumstances under which *in camera* treatment may be granted are not present for all of these documents. 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. *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). The following are additional directives to guide Respondents.

Respondents sought *in camera* treatment for a number of depositions, taken both in this case and in other litigation. For many of these, Respondents sought *in camera* treatment of entire depositions. *In camera* treatment will not be granted to entire depositions. *In re Aspen Tech., Inc.*, 2004 FTC LEXIS 56, at *5-6 (May 5, 2004) ("Respondent's request for *in camera* treatment shall be made only for those pages of documents or of deposition transcripts that contain information that meets the *in camera* standard."). *See also In re Union Oil Co. of Calif.*, 2005 FTC LEXIS 9, at * 1 (Jan. 19, 2005) (granting *in camera* treatment where parties sought it only "for narrowly tailored portions of deposition testimony"). For others of these depositions, Respondents' description indicates they request *in camera* treatment for "excerpts"; however, upon examination, those "excerpts" appear to cover almost an entire deposition, and cannot be described as "narrowly tailored." *E.g.*, CX 334, excerpts from deposition, pages 4-8; 10-98; 106-115; 117-121.

Respondents also sought *in camera* treatment for the reports of experts in this case. It is hard to imagine that each expert's entire report (and entire testimony thereon) could be accorded *in camera* treatment. *In camera* treatment shall be sought for only those portions of the reports that meet the Commission's standard. *Aspen Tech.*, 2004 FTC LEXIS 56, at *5-6.

Similarly, Respondents sought *in camera* treatment for entire sets of answers to interrogatories. *In camera* treatment shall be sought for only those specific responses to interrogatories that meet the Commission's standard. *In re Union Oil Co. of Calif.*, 2004 FTC LEXIS 198, at *7 (Oct. 7, 2004).

Respondents represent that nearly 200 of the documents for which they seek *in camera* treatment contain private customer information, such as full names, addresses, or e-mail addresses. Motion at 15. Under the circumstances of this case, customers' identities will be protected. "Information concerning particular [consumers'] names or other [personal] data is not relevant and shall be redacted" by the party producing the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 20, at *5 (Feb. 5, 2004). The party seeking to introduce such documents shall submit a redacted version for the record. *See Union Oil Co. of Calif.*, 2005 FTC LEXIS 54, at *2. Once properly redacted, Respondents need not seek *in camera* protection for such documents.

Respondents also seek to shield from disclosure documents they describe as their compilation of substantiation materials. Motion at 11. The crux of this case is whether Respondents had a reasonable basis that substantiated the representations Respondents made. To answer that question, an evaluation of the substantiation accumulated by Respondents is critical. In determining whether to grant *in camera* treatment, the Administrative Law Judge must balance the competitive injury to the applicant against the importance of the information in explaining the rationale of Commission decisions. *In re Basic Research*, Docket 9318, at 1 (Dec. 5, 2005) (*citing 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)). 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 Basic Research*, Docket 9318, at 1 (Dec. 5, 2005) (*citing 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.")).

In some instances, Respondents state they "spent time, money and effort gathering" information and developing documents. Motion at 12. Respondents also state disclosing certain information would allow Respondents' rivals to benefit from Respondents' work-product and feedback. Motion at 12. This may not be sufficient. For example, in *General Foods*, the Commission upheld the ALJ's denial of *in camera* treatment to a number of charts prepared by an expert witness which showed profits, breakdowns of various costs, sales, and assets relating to several brands of respondent's products. 95 F.T.C. at 353-54. The Commission rejected the respondent's argument that the data was compiled at great expense and would give competitors

significant insights into respondent's strengths and weaknesses. *Id.* "[D]ocuments should not be sealed simply because an applicant asserts that its competitors would like to possess the information the documents contain." *Bristol Myers Co.*, 90 F.T.C. at 455.

Attempts to shield settlement documents from disclosure have also been rejected by the Commission. For example, in *In re Textron, Inc.*, 1990 FTC LEXIS 282 (July 17, 1990), the Commission stated, "[t]he Commission is not persuaded that disclosure of the identity of the assets that [respondent] proposed to divest in connection with a possible settlement would cause the kind of clearly defined and serious injury that would warrant retention of the Exhibit *in camera*. Nor is it convinced that disclosure of the rest of the Exhibit, which essentially summarizes the proposed consent agreement rejected by the Commission and suggests a contingent proposal, threatens sufficiently serious and defined commercial harm to [respondent] to warrant the protection sought." *Id.* at *7.

A number of the documents for which Respondents seek *in camera* treatment are many years old. (*E.g.*, CX 645, described as a series of e-mail dated August 21, 2001, related to the hiring of consultants). "There is a presumption 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). The Commission places "a greater burden on a respondent when the information is old" and "has usually denied *in camera* treatment for data [more than three years old]." *In re General Foods Corp.*, 95 F.T.C. at 353-54 (*citing Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1715 (1967) (two and a half to six year old sales data denied *in camera* treatment); *Columbia Broadcasting Sys., Inc.*, 72 F.T.C. 27, 177-80, 334-35 (1967) (*in camera* treatment for sales data, especially five year old data, criticized by the Commission); *Reuben H. Donnelley Corp.*, Docket 9079 (Order Oct. 25, 1977) (*in camera* treatment of relevant two year old revenue data denied)).

These are but a few of the examples of categories of documents for which *in camera* treatment may be inappropriate. The burden on Respondents is to narrow their request in accordance with the Commission's standards and not merely delete those documents used as examples in this order. *See In re Basic Research*, Docket 9318, at 2 (Dec. 5, 2005) (*citing Hood*, 58 F.T.C. at 1188) ("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*."). Respondents are again cautioned that *in camera* treatment will not be granted if they fail to meet their burden of demonstrating that the information for which *in camera* treatment is sought meets the Commission's requirements.

IV.

The parties' joint request for an extension of time to file their pretrial briefs is based, in part, on the size of the factual record. Reducing the factual record to a manageable size is a necessary predicate for filing a proper *in camera* treatment motion as well as for preparing the pretrial briefs. In the December 5, 2005 Order on Respondents' first *in camera* motion, the parties were explicitly directed to reduce the number of exhibits proposed for admission at trial

and directed to resolve their objections to exhibits. The parties were provided ample time to accomplish this task. However, the same problems remain and trial is now less than six weeks away. The parties will have one final opportunity to reduce their exhibit lists to relevant and admissible documents, to resolve objections to trial exhibits, and to submit a properly revised *in camera* motion.

V.

For reasons set forth above, Respondents' revised motion for *in camera* treatment is **DENIED WITHOUT PREJUDICE.**

For reasons set forth above, the joint motion seeking a one week extension of time to file the pretrial briefs is **GRANTED.**

The parties shall provide the Court with revised exhibit lists and revised lists of exhibits to which there is no objection by February 1, 2006. The pretrial briefs shall be filed by February 10, 2006.

Respondents' revised motion for *in camera* treatment shall be filed by February 3, 2006. Complaint Counsel's response to Respondents' *in camera* motion shall be filed by February 17, 2006.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: January 25, 2006