

DOCKET NO. 9318

Order”), the Code of Federal Regulations (“C.F.R”), and the Federal Trade Commission Act (“FTC Act”). Respondents Basic Research, LLC and Ban, LLC (collectively, “Respondents”) produced the information unlawfully disclosed to the public in this matter under terms of confidentiality imposed by statute, rule and Court order. Because the issues raised in this motion are universally applicable, all Respondents jointly file this Motion and accompanying memorandum of law, and state as follows:

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MEMORANDUM OF LAW

I. INTRODUCTION

Respondents' biggest fear in disclosing confidential information to the Federal Trade Commission has been realized: The Commission publicly disclosed Respondents' confidences, including valuable trade secrets, and put Respondents' business in jeopardy. Respondents' trade secrets are no longer secret. Respondents' financial records are no longer private. Respondents' confidential information is no longer confidential.¹

If Commission's counsel do not respect and perform their duty to maintain the confidences of adverse parties, the general public and parties subject to regulation face a far greater risk than whatever monetary risk the public supposedly faces when dietary supplements are allegedly promoted with "unsubstantiated" claims.

Federal law is clear that there is no excuse for the Commission's breach of confidence. There also is no downplaying the significance of the rule of law violated by the Commission, or the severity of the risk of harm caused by Complaint Counsel's unlawful conduct. In fact, the risk of harm could hardly be more severe. *See* Declaration of Carla Fobbs ("Fobbs Decl.") ¶¶ 7, 10, 15-16. The Commission's violation of law must be met with appropriate sanctions.

¹ Respondents conduct business in highly competitive markets, and are in litigation across the country. While Respondents are trying to take steps to mitigate the injury caused, and to maintain the trade secret and confidential nature of the information the Commission unlawfully released, the proverbial bell cannot be un-rung. Even if the Commission stops obstructing Respondents' efforts to identify the persons and entities that accessed Respondents' highly confidential information, it will be virtually impossible to retrieve information and to prevent competitors and adversaries from taking advantage of it. It is inevitable that some party or person will undetectably use this information or disclose it to other interested parties, and possibly offer it for sale as Respondents' advertising strategies, alone, are very valuable and would be widely applicable. It is wrong and unlawful that Respondents, now, face this jeopardy, and that their private, confidential information and trade secrets have been freely dispensed by the Commission to anyone who, with a mere click of a mouse, received unfettered electronic access.

Three factors determine the appropriate sanction for the Commission's violation of federal law: (1) the nature of the rule of law violated and severity of the risk of harm caused; (2) Complaint Counsel's degree of culpability in causing the harm; and (3) the public interest, if any, in proceeding with this case.

This Court's task is unenviable, but necessary. It must investigate how the Commission's breach of confidence occurred. It must evaluate Complaint Counsel's credibility as witnesses. It must determine the significance of the Commission's breach of confidence, and provide justice in a manner that is blind and that will function to restore and preserve the public's faith in the Commission's integrity and the integrity of this Court.

II. SUMMARY OF MOTION

Complaint Counsel make a living swinging the prosecutor's ax. By necessity, they must be held to the highest possible standard of public trust. Each encroachment by a prosecutor on the boundaries of fair play undermines public confidence in our government. In this case, the government has not pushed the boundaries of fair play; it has obliterated them.

Indeed, the only thing clear from the declarations/argument submitted by Complaint Counsel is that they deny wrongdoing, they shift the blame to others, and they are not being forthright with this Court. In response to this Court's Order requiring them to account for the Commission's public disclosure of non-public documents, Complaint Counsel withheld material information, misrepresented the rules of law governing their conduct, and demonstrated disregard for their responsibilities and the rule of law.

This Motion addresses Complaint Counsel's violations of the Protective Order and the Commission's RULES OF PRACTICE, which Complaint Counsel directly violated. It discusses how the Commission's instant violation of the Protective Order is not an isolated incident, but the fourth violation of this Court's Orders designed to protect the rights of the Respondents in

this matter. Finally, this Motion establishes Complaint Counsel's culpability. While Complaint Counsel would have this Court believe they acted naively, and innocently, even the limited facts known to date do not corroborate such a recital.

Complaint Counsel demanded and compelled from Respondents production of their product formulas, financial information, and advertising schedules. These documents reflect years of negotiation, experimentation and market research making them classic non-public information that Complaint Counsel has an affirmative obligation to safeguard under the Federal Trade Commission Act (15 U.S.C. §§ 46(f), 57b-2(f)), the Commission's RULES OF PRACTICE (16 C.F.R. § 4.10(a)), and the Court's Protective Order (Definitions ¶ 20; Terms and Conditions of Protective Order ¶ 2(b)). As they were required to do to maintain the confidentiality of the materials, Respondents produced these documents to the Commission, clearly marked as "Confidential" or "Attorney's Eyes Only" materials. Complaint Counsel then included these materials among the Exhibits to Complaint Counsel's Motion for Partial Summary Decision. When Complaint Counsel filed these documents with the Court, Complaint Counsel understood them to be confidential because they were filed "Subject to Protective Order." Notwithstanding this acknowledgment of confidentiality, Complaint Counsel now argues that they somehow had a right to unilaterally reveal Respondents' confidential information to the public as "evidence."²

Putting aside for a moment that Complaint Counsel's proffered interpretation of their obligations under this Court's Protective Order and the Commission's RULES OF PRACTICE is without basis, *Complaint Counsel did not cite Exhibit 45, Respondents' confidential advertising*

² Complaint Counsel's Supplemental Response to Respondents' Emergency Motion Requiring the Commission to Provide Respondents with Electronic Files ("Supplemental Response") at 4-5 ("the Protective Order itself merely 'governs the disclosure of information during the course of **discovery**.' . . . Discovery has closed in this matter. The posting of the information at issue was not 'during the course of discovery,' it was in connection with Complaint Counsel's Motion for Partial Summary Decision." And "information or documents included or attached to motions for summary decision are 'offered in evidence.'").

dissemination schedule, once in their motion. It was not submitted for filing as “evidence” of any proffered argument!

Rather, in direct violation of the Commission’s RULES OF PRACTICE, Complaint Counsel bundled Respondents’ trade secret and financial information with the evidence in support of their motion, and then chose to transmit this confidential information to the Secretary’s Office in a manner authorized only for “public documents.” The Certificates of Service for the non-public versions of Complaint Counsel’s Motion for Partial Summary Decision and Statement of Material Facts verify that, in direct violation of 16 C.F.R. § 4.2(c)(3), Complaint Counsel transmitted Respondents’ non-public documents to the Secretary of the Commission by “electronic copy via e-mail.” *See* Certificates of Service, attached as Exhibit “1.” Moreover, the emails to the Secretary of the Commission “stated that the exhibits were attached in separate electronic files, stated that these documents were submitted for filing with the Secretary of the Commission, and further identified the attached electronic files by exhibit volume, number and/or name.” Declaration of Joshua S. Millard (“Millard Decl.”) ¶ 8. In other words, Respondents’ confidential documents and trade secret information were transmitted in direct violation of the Rules of Practice and in such a way that essentially ensured the Secretary’s Office would “confuse” confidential material as “public documents” and to display them on the FTC’s Website for public scrutiny.

Although the Court ordered Complaint Counsel to account for what happened, Complaint Counsel has offered no explanation why they chose to unnecessarily include Respondents’ trade secrets as part of their motion.³ Complaint Counsel’s response also lacks any viable explanation

³ Complaint Counsel’s “good faith estimate” of what was publicly disclosed omits *any* reference to Respondents’ product formulas, which were attached at Exhibit 11 to their motion, *see* Millard Decl. ¶ 28, and fails to disclose the material fact that, though characterized as being “offered in evidence,” Respondents’ product formulas and marketing strategies (attached at

as to why financial details regarding Respondents' business were relevant to their motion. It likewise failed to address why some, but not all, of the non-public documents unlawfully transmitted by email to the Secretary's Office were displayed on the docket and posted on the FTC's Website in violation of federal law and the Protective Order. The non-public versions of Complaint Counsel's Motion for Partial Summary Decision and Statement of Material Facts were not posted, *only the Exhibits which included Respondents' trade secrets were posted.*⁴

The more troubling issue is the position Complaint Counsel have taken in response to this Court's Order. If Complaint Counsel do *not* actually believe the arguments they are making to this Court to avoid responsibility for their wrongful conduct, and they have withheld material information, they are being less than candid with the Court. If Complaint Counsel actually believe their arguments about their obligations under the Protective Order and the Commission's RULES OF PRACTICE and believe they have made a full disclosure, then a message must be sent to Complaint Counsel that only a court can send: Their behavior is unacceptable.

Either way, there is only one appropriate sanction: An Order striking their Complaint.

Complaint Counsel's all-hands effort to deny wrongdoing, to shift the blame to others (including the Secretary's office), and to explain their violation of 16 C.F.R. § 4.2(c)(3) as some sort of "practice" of Complaint Counsel, is evidence of a systemic problem that transcends this

Exhibit 45) were *not* cited a single time by Complaint Counsel. See Complaint Counsel's Supplement Response to Respondents' Emergency Motion Requiring the Commission to Provide Respondents with Electronic Files ("Supplemental Response") at 5.

⁴ It comes as no surprise, then, that Complaint Counsel Joshua S. Millard declares that, three days after his misconduct was carried out and/or consummated by the Secretary's Office, he "discovered" the disclosure of non-public documents essentially about *the same time* someone in the Office of Administrative Law Judges discovered the results of his filing, *i.e., minutes before* Don Clark, Secretary for the Commission, notified Assistant Director James Reilly Dolan that "someone in the Office of Administrative Law Judges had noticed that there might be non-public information posted on the *Basic Research* docket located on the agency website." Declaration of James Reilly Dolan ("Dolan Decl.") ¶ 4; Millard ¶ 19.

proceeding. From top to bottom, Complaint Counsel acted contrary to federal law, and this cannot be brushed aside as excusable inadvertence. Complaint Counsel made deliberate choices not to respect and preserve the integrity of Respondents' confidential documents and trade secret information—from the decision concerning which Exhibits to attach to their motion and the decision to transmit non-public records by email to the Secretary's Office, to the supervision of Mr. Millard's handling of highly confidential information after repeated objections had been raised about unauthorized disclosures in this very case, and the training of Complaint Counsel (or lack thereof) as to the importance of honoring and adhering to the Commission's confidentiality obligations.

The Commission's violation of federal law is far more egregious than the alleged misconduct that is the subject matter of this case. In no uncertain terms Congress has directed the Commission to maintain inviolate the confidences of citizens and businesses under investigation and prosecution. Protective orders are also vital to the Commission's ability to function as a law enforcement agency. The Commission has now violated the public trust and threatened the integrity of this Court by committing the very class of wrong Complaint Counsel prosecutes others for allegedly committing: Causing an untenable risk of injury arising from an unlawful utterance.

An Order striking the Commission's pleading is the necessary and appropriate sanction to deter such callous disregard of Respondents' rights, and to hold the Commission to its obligations in the future. The Commission should also be ordered to pay monetary sanctions in an amount sufficient to compensate Respondents for all of the attorney time and expenses they have already incurred, and will likely incur in the future, trying to rectify Complaint Counsel's wrongful conduct and mitigate the harm caused by the Commission's breach of confidence.

III. THE SIGNIFICANCE OF THE COMMISSION'S BREACH OF CONFIDENCE

To underscore the seriousness of Complaint Counsel's violation of the Protective Order and the Commission's obligations to properly handle confidential information obtained through Civil Investigation Demands or through discovery in Adjudicatory Proceedings, the Federal Trade Secrets Act (the "FTSA") makes it criminal for the Commission to publicly disclose confidential information, including trade secrets:

Whoever, being an officer or employee of the United States or of any department or agency thereof, . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (emphasis added).⁵

The relevance of the FTSA to this proceeding and this motion is twofold: First, it recognizes the level of importance Congress attached to Complaint Counsel's transgression. Congress deemed the federal government's obligation to protect the privacy rights and to maintain the confidences of citizens and businesses under investigation or prosecution so important that: (a) the FTSA prohibits unauthorized disclosure of *any* information that is confidential "in the sense that it is the official policy of the agency in question (or is otherwise required by statute or regulation) that the information *not* be released"; and (b) the FTSA

⁵ *Accord* 15 U.S.C. § 50 ("Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.").

mandates severe sanctions. Congress dictates the violation “shall” result in imprisonment or a fine, or both, and “shall” result in a removal from office or termination of employment. 18 U.S.C. § 1905; *U.S. v. Wallington*, 880 F.2d 573, 577-78 (5th Cir. 1989) (upholding a conviction under FTSA for unauthorized release of background information of suspected drug traffickers).

Second, the FTSA reflects Congressional appreciation and concern for the undeniable, undue, and incurable risk of irreparable harm that Complaint Counsel has wreaked upon Respondents. Congress deemed the violation of law at issue here so important to the functioning of a fair and impartial investigation, prosecution, and trial of any person or business in the United States, the FTSA makes both government agencies and officials criminally accountable based only upon a showing that they knew that the disclosed information was confidential. *Wallington*, 880 F.2d at 577-78 (the FTSA is neither a strict liability nor a specific intent crime; rather the *mens rea* required to violate FTSA is general “knowledge that the [released] information is confidential in the sense that its disclosure is forbidden by agency official policy (or by regulation or law).”).

Here, there is no question that Complaint Counsel *knew* that the information released on the FTC’s Website was confidential, and that the disclosure was forbidden by law. Each Volume of Exhibits that Complaint Counsel submitted to the Secretary’s Office plainly states, “Subject to Protective Order.” Moreover, each Exhibit that was publicly disclosed in violation of the Protective Order and federal law is clearly marked, “Confidential Proprietary Information,” “Restricted Confidential, Attorney of Record Eyes Only,” or “Restricted Confidential, Attorneys Eyes Only – FTC Docket No. 9318.”

A. Complaint Counsel's Duty To Maintain Respondents' Confidential Information Is Inviolable.

There is no question that the Commission owes a duty to maintain Respondents' confidential information inviolate. The FTC Act is clear that the Commission has no right to disclose confidential information—let alone to broadcast highly confidential information over the Internet. *See* 15 U.S.C. § 46(f) (“[T]he Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential”); 15 U.S.C. § 57b-2(f) (“Any material which is received by the Commission in any investigation . . . , and which is provided pursuant to any compulsory process under this subchapter or which is provided voluntarily in place of such compulsory process shall be exempt from disclosure under section 552 of Title 5.”).

There is no question that the Commission's RULES OF PRACTICE impose the same duty on Complaint Counsel to maintain Respondents' confidential information inviolate. *See* 16 C.F.R. § 4.10(a) (non-public material includes: “(2) Trade secrets and commercial or financial information obtained from a person and privileged or confidential. As provided in section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), this exemption applies to competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest.”).

There is no question that the Commissions' RULES OF PRACTICE likewise impose a duty on Complaint Counsel to take affirmative measures to prevent the disclosure of non-public documents. For example, RULE OF PRACTICE § 4.2, subdivision (c), expressly forbids Complaint Counsel from transmitting confidential information to the Secretary's Office by email:

(c) Paper and electronic copies of and service of filings before the Commission, and of filings before an ALJ in adjudicative proceedings. (1) Except as otherwise

provided, each document filed before the Commission, whether in an adjudicative or a nonadjudicative proceeding, shall be filed with Secretary of the Commission, and shall include a paper original, twelve (12) paper copies, and an electronic copy (in ASCII format, WordPerfect, or Microsoft Word). **Except as otherwise provided**, each document filed by a party in an adjudicative proceeding before an ALJ shall be filed with the Secretary of the Commission, and shall include a paper original, one (1) paper copy and an electronic copy (in ASCII format, WordPerfect, or Microsoft Word)

* * *

(3) The electronic copy of each such public document shall be filed by e-mail, as the Secretary shall direct, in a manner that is consistent with technical standards, if any, that the Judicial Conference of the United States establishes, **except that the electronic copy of each such document containing *in camera* or otherwise confidential material shall be placed on a diskette so labeled, which shall be physically attached to the paper original, and *not* transmitted by e-mail.** The electronic copy of all documents shall include a certification by the filing party that the copy is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

16 C.F.R. 4.2(c)(3) (emphasis in bold added).

B. Complaint Counsel Knowingly Violated A Legal Duty Owed To Respondents.

There is no question that Complaint Counsel knowingly transmitted non-public documents by email to the Secretary's Office, and violated their legal duty to protect Respondents' confidential information, including trade secrets. *See* Exhibit "1" hereto. Complaint Counsel transmitted Respondents' confidential documents and trade secret information to the Secretary's Office as though they were "public documents," *with the implicit instructions pursuant to 16 C.F.R. § 4.2(c) for posting on the FTC's Website.*⁶

⁶ Of course, Complaint Counsel's knowing violation of 16 C.F.R. § 4.2(c)(3) does not exonerate the Secretary of the Commission from adhering to the requirements of the law and ensuring, for itself, that Complaint Counsel has not violated their legal duties to respondents. The Secretary's Office owes its own legal duties to Respondents to maintain their confidential information inviolate. What the Commission's RULES OF PRACTICE essentially ensure is that any public display of confidential information must have resulted from bad faith or gross negligence.

C. The Importance Of Protective Orders In Federal Prosecutions.

Federal courts have stressed the importance of protective orders and the vital role they play in litigation. *See Beam Sys., Inc. v. Checkpoint Sys.*, 1997 WL 364081, *2 (C.D. Cal. 1997). Without such orders, litigants would be forced to choose between fully presenting their claims and/or defenses or forgoing such claims and/or defenses in order to keep sensitive commercial information confidential. *Id.* Protective orders also prevent confidential materials obtained in discovery from being bantered about and used as a sword by threatening a producing party with disclosure of its confidential information. *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

Whether the violation of a protective order was merely careless or willful is immaterial to a finding of contempt, as “carelessness cannot be tolerated when dealing with protective orders and confidential information.” *In re Baycol Prods. Litig.*, 2004 WL 1052968 (D. Minn. 2004); *Marrocco v. General Motors Corp.*, 966 F.2d 220, 224-225 (7th Cir. 1992) (citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976), and stating that “the Supreme Court has expressly stated that sanctions may be appropriate in any one of three instances—where the noncomplying party acted *either* with willfulness, bad faith *or* fault”). Parties “*must* comply with the terms of [a] protective order or subject themselves to possible sanctions.” *American National Bank & Trust Co. of Chicago v. AXA Client Solutions, LLC*, 2002 WL 1067696, *3 (N.D. Ill. 2002) (emphasis added).

In litigation against the federal government, protective orders assume an even more significant purpose, both in terms of fundamental fairness and preservation of the public trust. Unlike in civil litigation against private parties, where litigants have a choice to forgo claims or defenses if they do not want to risk the disclosure of confidential information, parties being prosecuted by the Federal Trade Commission have no such choice, but must disclose their confidences. *See* 15 U.S.C. § 50 (“Any person who shall neglect or refuse . . . to produce any

documentary evidence, if in his power to do so, in obedience to [a] . . . lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.”) (emphasis added).

Respondents entered into the Protective Order for specific and definite reasons—to protect their privacy rights and their trade secrets from being revealed to competitors, and to avoid the risk of losing hard-earned competitive advantages in the highly competitive markets in which they conduct business. The Commission retains immense power to gather proprietary information and to use it in adjudicatory proceedings, and as such is charged with adherence to strict protocols governing the handling and use of such information, including the issuance of Protective Orders and the filing of documents *in camera*. See, e.g., RULES OF PRACTICE §§ 3.22, 3.45(e), 4.2(c), 4.10. Complaint Counsel’s actions in disclosing Respondents’ confidential materials to the entire world completely disregarded the purpose and intent of this or any Protective Order, and Complaint Counsel’s obligations thereunder. It cannot be taken lightly. “[I]t is essential that protective orders be respected.” *Beam Sys.*, 1997 WL 364081, *2.

D. Complaint Counsel’s Obligations Under The Protective Order Are Clear And Unambiguous.

On August 11, 2004, the Administrative Law Judge (“ALJ”) entered the Protective Order. The purpose of the Protective Order was to protect “the interests of the parties and third parties in the above captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter.” Protective Order at 1 (emphasis added). The purpose of the Order was not limited to protecting Respondents from unlawful disclosures of their confidential information just “during discovery,” as now

represented by Complaint Counsel. *See* Supplemental Response at 4 (“the Protective Order itself merely ‘governs the disclosure of information during the course of discovery.’”).

The Protective Order applies to all documents designated as “Confidential,” or “Restricted Confidential, Attorneys Eyes Only.” *Id.* at 4, ¶ 2(a)-(b). Here, all of the documents at issue bore these designations, including “Restricted Confidential, Attorneys Eyes Only – FTC Docket No. 9318.” The “Attorney Eyes Only” designations were intended by the Court to provide extra protection for documents that contained highly sensitive commercial information, so as to permit Complaint Counsel access to Respondents’ proprietary information, which Complaint Counsel claimed they “needed” in order prosecute this case, and at the same time protect Respondents’ privacy rights and ability to conduct business. *Id.* at 5, ¶ 2(b).

The Protective Order regulates Complaint Counsel’s disclosure of confidential material. Among other safeguards, the parties agreed to a pre-notification requirement if Complaint Counsel elected to disclose highly confidential information to any witness or deponent, including any expert or consultant, at trial or deposition. *Id.* at 5, ¶ 2(c) (“*the disclosing Party shall notify the Producing Party of its desire to disclosure such material.*”) (emphasis added).⁷

In addition to prohibiting the disclosure of confidential information, and regulating the disclosure to witnesses and deponents in this proceeding (*see* Protective Order at 7-10, ¶¶ 4, 5, 14), the Protective Order regulates the filing of documents during discovery and through trial. Up until trial or the deadline adopted by the Scheduling Order, it is the obligation of the party either to challenge the designation of a document marked confidential, thereby providing notice and an opportunity for the Producing Party to justify its designation, or to respect the designation

⁷ At the August 6, 2004 pre-hearing conference, Complaint Counsel announced that the parties had reached agreement on a draft protective order that expressly applied the pre-disclosure notification requirements of the Protective Order to *all* witnesses.

and file the document *in camera*. *See id.* at 8, ¶ 6(a) (“If any Party seeks to challenge Producing Party’s designation of material as Confidential Discovery Material or any other restriction contained within this Protective Order, the challenging Party shall notify the Producing Party and all Parties to this action of the challenge to such designation.”). Within five business days of receiving the notice specified by the Protective Order to challenge a designation, the Producing Party may preserve its designation “by providing the challenging Party and all Parties to this action with a written statement of the reasons for the designation.”⁸ *Id.* There is no legal basis for a party to unilaterally ignore a designation assigned by another party, regardless of the intent in doing so.

The Commission’s RULE OF PRACTICE § 3.22 specifically prohibits the Commission from engaging in conduct that is the subject matter of this motion, *i.e.*, from publicly filing documents that include information that *either* (a) has been granted *in camera* treatment by the Court, *or* (b) has been designated as confidential pursuant to a protective order. *See* 16 C.F.R. § 3.22 (“If a party includes in a motion information that has been granted *in camera* status pursuant to §3.45(b) *or* is subject to confidentiality protections pursuant to a protective order, *the party shall file two versions of the motion in accordance with the procedures set forth in §3.45(e).*”) (emphasis added). The Commission’s RULE OF PRACTICE § 3.45(e) provides the filing procedures for Complaint Counsel to follow “[w]hen *in camera or* confidential information is included in briefs and other submissions.” 16 C.F.R. § 3.45(e) (emphasis in original).

The Protective Order specifically states that “[n]othing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade

⁸ At trial, pursuant to the terms of the Court’s Scheduling Order, the burden shifts to the Producing Party to bring a motion for *in camera* treatment under 16 C.F.R. § 3.45(b), so as to preserve the confidentiality of any document submitted as an exhibit for trial.

Commission Act, 15 U.S.C. §§ 46, 50, 57-2, or with Rules 3.22, 3.45 or 4.11(b)-(e), 16 C.F.R. §§ 3.22, 3.45 and 4.11(b)(e).” Protective Order at 10, ¶ 12. Moreover, Complaint Counsel’s statutory obligations under the Protective Order do not end, but continue even after this proceeding terminates. *Id.* at 10, ¶ 14 (“The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, *continue to be binding after the conclusion of this Matter.*”) (emphasis added).

E. Complaint Counsel’s Previous Violations Of This Court’s Orders.

The Commission’s transgression of publicly disclosing highly confidential information, unfortunately, is not an isolated incident. Complaint Counsel has previously violated this Court’s orders at least three times in this case. First, Complaint Counsel violated the Protective Order when they disclosed Respondents’ highly sensitive confidential information, including product formulations, to their experts, Dr. Eckel and Dr. Heymsfield. Following Dr. Heymsfield’s January 11, 2005 deposition, Respondents reiterated and made it absolutely clear to Complaint Counsel that no third-party disclosures of confidential material is permitted absent a legitimate purpose and prior notice to Respondents. Unprotected disclosure of Respondents’ proprietary information not only violates Respondents’ rights of privacy, but it also threatens their ability to conduct business. Respondents brought this violation to the attention of the Court on January 27, 2005 with the filing and service of Respondents’ Emergency Motion to Exclude Drs. Robert Eckel and Steven Heymsfield as Expert Witnesses and for Sanctions and Other Relief.⁹

⁹ In an attempt to defend the disclosure of Respondents’ highly confidential information to their experts, which includes the Director of Scientific Affairs for a competitor of Respondents, Complaint Counsel first denied that they had agreed that no such disclosure would occur without prior notice to Respondents. After that representation to the Court turned out to be *incorrect*, and

Second, Complaint Counsel violated this Court's Scheduling Order, dated August 11, 2004, with disclosure of Dr. Heymsfield's additional experience as a testifying expert witness on February 3, 2005, one day prior to the continuation of his deposition. That disclosure occurred *four months* after the October 6, 2004 deadline set forth in the Scheduling Order for the disclosure of the identity of, and provision of information relating to, the parties' testifying expert witnesses. Further, this late disclosure occurred nearly three months after Respondents' lost the ability to issue subpoenas *duces tecum* to third parties to obtain information relating to the cases included in the belated disclosure. Respondents brought this violation and the unfair prejudice it has caused to their defense to the Court's attention on February 9, 2005, in Respondents' Reply to Complaint Counsel's Opposition to Respondents' Motion to Exclude.¹⁰

Third, Complaint Counsel violated this Court's Scheduling Order with the dilatory disclosure of a transcript of Dr. Heymsfield's testimony on behalf of the FTC in the *SlimAmerica* case on February 14, 2005. The Scheduling Order required Complaint Counsel to produce this transcript to Respondents with its Expert Witness Disclosure on October 6, 2004, but Complaint Counsel again failed to produce this critical information until *four months* later. Not only was Dr. Heymsfield aware of this transcript and his testimony in *SlimAmerica*, but the transcript also was in the possession of another FTC attorney *throughout this proceeding*. Complaint Counsel's

despite Complaint Counsel's announcement at the August 6, 2004 pre-hearing conference that the parties had reached agreement which expressly applied the notification requirements of the Protective Order to *all* witnesses, Complaint Counsel disingenuously asserted that they did not *intend* to agree that the notification requirements would apply to expert witnesses.

¹⁰ In an attempt to defend this violation, Complaint Counsel asserted that they provided the late disclosure to Respondents as soon as they received it from Dr. Heymsfield. However, it is each party's responsibility to ensure, and to take steps to ensure, that its experts comply with all applicable orders and court rules. A fair trial can occur no other way.

proffered explanation for this violation confirmed Complaint Counsel's utter disregard of Respondents' rights, and downright refusal to take responsibility for their wrongful conduct.¹¹

F. Complaint Counsel's Instant Violation Of The Protective Order Is The Most Egregious, And Demonstrates Bad Faith.

On January 31, 2005, without notice to Respondents, without any challenge to the designations of documents marked confidential, and without this Court's approval, the Commission publicly disclosed on the FTC's Website non-public documents marked "Subject to Protective Order" and/or designated "Confidential," "Confidential Proprietary Information," "Restricted Confidential, Attorneys Eyes Only," or "Restricted Confidential, Attorneys Eyes Only – FTC Docket No. 9318." A print out of the pleadings index of Docket No. 9318, as it appeared on the FTC's Website on February 17, 2004, is attached as Exhibit "2."

Below is a description of the non-public documents unlawfully disclosed to the public:

- {REDACTED}
- {REDACTED}
- Exhibits 20-25, 27-29, 31: Excerpts of deposition testimony;
- Exhibit 36 (Pages R0042305-06): Consumer email inquiry;
- Exhibit 37 (Page R0034328): Draft PediaLean advertisement;
- Exhibit 42: Balance sheet for Respondent Basic Research LLC as combined with three third parties NutraPharma, Inc., American Phytotherapy Laboratories Corporation, and Majestic Enterprises, Inc. (7 total pages);
- Exhibit 44: Bullet summary containing cross-references to substantiation for express claims for each of the 6 challenged products (6 total pages);
- {REDACTED}

¹¹ In an attempt to defend their third violation of this Court's orders, Complaint Counsel asserted that they did not know that the other attorney employed by the FTC had a copy of the transcript in his possession, as if the *SlimAmerica* case and Dr. Heymsfield's involvement therein was unknown to Complaint Counsel. Remarkably, although unduly prejudicing Respondents' defense with the belated Dr. Heymsfield disclosures, Complaint Counsel unilaterally ended Dr. Heymsfield's deposition and prohibited any further cross-examination of him.

{REDACTED}

Fobbs Decl. ¶ 4.

When this description of the non-public documents is compared to the so-called “good faith estimate” provided by Complaint Counsel (*see* Millard Decl. ¶ 28), four material omissions are immediately apparent and evidence that Complaint Counsel are *not* being forthright. First, while “any material” obtained in confidence by the Commission is a non-public document, 15 U.S.C. § 57b-2(f), Mr. Millard omits any reference to the three types of proprietary information (*product formulas, financial information, and marketing strategies*) that were publicly disclosed, and that by statute, rule and court order lie at the heart of the Commission’s obligation to maintain inviolate the confidences of any respondents under investigation and/or prosecution. *See* 15 U.S.C. § 46(f) (“the Commission shall not have any authority to make public any *trade secret* or any *commercial* or *financial* information which is obtained from any person and which is privileged or confidential”) (emphasis added); 16 C.F.R. § 4.10(a)(2) (“this exemption applies to *competitively sensitive information*, such as *costs* or *various types of sales statistics* . . . [and] *trade secrets* in the nature of *formulas*”) (emphasis added); Protective Order, Definitions ¶ 20 (“The following is a nonexhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: . . . *strategic plans* (involving . . . *marketing*, . . .) . . . ; *trade secrets*; . . . *proprietary technical* . . . *information*; *proprietary or personal financial data* . . . ; and . . . *market research or analysis applicable to current or future market conditions*”) (emphasis added).

Second, Complaint Counsel omits any reference to Exhibit 11—which publicly revealed Respondents’ trade secret product formulas. This omitted reference to unlawfully disclosed trade secret information is especially significant for two reasons: (1) Complaint Counsel

gallingly deny in their Supplemental Response the confidential nature of the information the Commission unlawfully disclosed to the public;¹² and (2) unlike with respect to Exhibits 20-25, 27-29, and 31, as to which Mr. Millard declares he submitted in connection with “the issues of commerce, common enterprise, and advertising addressed in the *Motion*,” Millard Decl. ¶ 28, Mr. Millard conceals the material fact that Respondents’ product formulas have nothing whatsoever to do with the issues of interstate commerce, common enterprise, and ad interpretation Complaint Counsel sought to adjudicate in their motion. Complaint Counsel’s *inclusion* of Respondents’ trade secret product formulas as part of the record in support of a motion, which does not cite to them, Complaint Counsel’s representation to the Court in their Supplemental Response that all of the confidential information was submitted as “evidence,” and Complaint Counsel’s *omission* of any reference to Respondents’ trade secret product formulas or Exhibit 11 in response to this Court’s Order, *is contemptuous*.

Third, in his description of Exhibits 15 and 42, Mr. Millard omits any reference to the net gross revenue, advertising expenditures, and other financial data that the Commission posted on the FTC Website in violation of federal law. Though the details of Respondents’ financial information also had nothing to do with issues raised in Complaint Counsel’s motion, Complaint Counsel bantered about gross revenue figures and other financial data in connection with their motion, to which Respondents expressly objected. Yet, when ordered by the Court to account for *all* of the confidential information that was unlawfully made part of the public record, Complaint Counsel cannot seem to remember that *financial information* is a recognized category

¹² See Supplemental Response at 4 (“Respondents’ motion also presumes that the information posted was truly ‘highly confidential’ as that term is used in the Protective Order and under the Rules of Practice governing *in camera* treatment.”).

of highly confidential information, which, by law, cannot be publicly disclosed, or that Complaint Counsel discussed Respondents' financial data *throughout their motion*.

Fourth, Mr. Millard omits any discussion as to Exhibit 45, which publicly disclosed Respondents'

{REDACTED}

Fobbs Decl. ¶¶ 8, 12-13. Obviously, this highly valuable, proprietary information had nothing whatsoever to do with Complaint Counsel's motion, which is borne out by the fact that Complaint Counsel's motion does not cite to Exhibit 45. The inclusion of these materials without there actually being use in Complaint Counsel's brief evidences the highest degree of carelessness and indifference. Millard Decl. ¶ 28.

Further, Complaint Counsel ignore their obligations under the Protective Order and the Commission's RULES OF PRACTICE. Complaint Counsel argue they did nothing wrong because "discovery has closed in this matter," and because "Respondents have not taken the steps that are necessary to attain the status *in camera* treatment for their confidential information." Supplemental Response at 5. Now, according to Complaint Counsel, so long as confidential material is "offered in evidence," after "discovery has closed," the Commission has the right to ignore its obligations under 15 U.S.C. §§ 46(f), 57b-2(f). It has the right to publicly disclose confidential information in violation of the Federal Trade Secrets Act (18 U.S.C. § 1905). It may

publicly disclose documents designated as confidential, without notice and court approval as required by a protective order (*see, e.g.*, Protective Order ¶¶ 4, 6, and 12). It may do these things notwithstanding the Commission's RULES OF PRACTICE §§ 3.22, 3.45(e), which expressly prohibit such disclosure. *See* Supplemental Response at 5 (in support of their concocted argument, Complaint Counsel cites RULE OF PRACTICE § 3.45, *In re Trans Union Corp.*, No. 9255, 1993 F.T.C. LEXIS 310, at *4 (Nov. 3, 1993), and *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255 (Dec. 23, 1999)).

What is troubling about Complaint Counsel's position is that one of two things must be true: First, and the far more likely explanation, is that Complaint Counsel has not made a full disclosure to this Court. Notwithstanding their legal and ethical obligation of candor to this Court, which prohibits them from making arguments that have no legal or factual support, Complaint Counsel has made an argument to justify their wrongful conduct that they, themselves, cannot possibly believe. *See* Declaration of Laureen Kapin ("Kapin Decl.") ¶ 18 ("To date Respondents have not moved, as required by 16 C.F.R. § 3.45, and noted in the Protective Order, for *in camera* treatment of any of the materials designated by them as Confidential that were attached . . . [to] Complaint Counsel's Motions"). Mr. Millard goes so far as to suggest that it is Complaint Counsel's "practice" to violate the Commission's RULES OF PRACTICE. *See* Millard Decl. ¶ 13 (no one "communicated with me, or any other Complaint Counsel to my knowledge, regarding the practice of emailing non-public filings to the Secretary before that date.").¹³

¹³ The reality is, Mr. Millard has no such "practice." Respondents have reviewed the FTC's Website and have found Certificates of Service for "public documents" executed by Mr. Millard in other cases. They show that Mr. Millard has hand delivered even public documents to the Secretary's Office for filing, even when those documents were emailed to respondents. Attached as Exhibit "3" are copies of a variety Certificates of Service executed by Mr. Millard. These documents reveal that Mr. Millard makes decisions on a case-by-case, or document-by-

Second, and the far less likely explanation, is that Complaint Counsel actually believe their articulated position because they lack sufficient understanding of the Rules of Practice. The Commission's RULE OF PRACTICE § 3.45, *Trans Union Corp.* and *Dura Lube Corp.* do not remotely stand for the proposition that Complaint Counsel can unilaterally attach confidential trade secret information to a motion, after discovery has closed, but before trial and before the time for designating trial exhibits and the filing of motions for *in camera* treatment has expired, and simply refer to that material as "evidence" (even when it is not cited in the motion) to avoid violating the law. While that factually may be what happened, Complaint Counsel had to realize it was unlawful. Federal law is clear that the information does not even have to be confidential to warrant severe sanctions, so long as "it is the official policy of the agency in question (or is otherwise required by statute or regulation) that the information *not* be released." 18 U.S.C. § 1905. In this case, the Protective Order and Commission's RULES OF PRACTICE §§ 3.22, 3.45(e) specifically prohibited the public release of the documents at issue here, which were prominently designated confidential.

G. The Severe Risk Of Irreparable Harm Caused By Complaint Counsel's Disregard Of This Court's Orders, And Violation Of The Commission's RULE OF PRACTICE And Respondents' Rights In This Proceeding.

The harm to Respondents caused by the Commission's violation of the Protective Order is immeasurable, and incalculable. Complaint Counsel have seemingly conceded that there were "hits" on the FTC's Website accessing Respondents' highly confidential information, though they won't tell Respondents how many hits. *See* Kapin Decl. ¶¶ 16, 17. They also concede that it may be impossible for Complaint Counsel to identify the persons or entities that now possess

document, basis on how to transmit documents to the Secretary's Office. Mr. Millard apparently declared that it is his "practice" to violate 16 C.F.R. § 4.2(c), because otherwise, it would be obvious he made a conscious decision in this case to do so.

Respondents' trade secrets. *See* Supplemental Response at 3 (apparently, "the Commission's electronic files would not necessarily identify an individual, they may merely identify an IP address of an internet service provider such as America Online or MSN. Moreover, it is Complaint Counsel's understanding that internet service providers maintain a large number of IP addresses that are randomly assigned. In other words, a user may have different IP addresses to them each and every time they log on.").

The risk of harm to Respondents is difficult to understate. The Commission disclosed Respondents' confidential information, including trade secrets, over the World Wide Web. In doing so, the Commission made Respondents' sensitive information available to Respondents' actual and potential competitors, litigation adversaries, trade associations, various industry watch-dog groups, and every other person who is interested in or who closely monitors this proceeding or any adjudicatory proceeding. The likelihood of such a disclosure, and the fact that Respondents' confidential information can now be used and disclosed to Respondents' detriment, is significant. Respondents have specifically been told that competitors and adverse parties in other cases are closely monitoring this case. Fobbs Decl. ¶ 15.

In other words, Respondents' trade secrets, including product formulas and marketing strategies, could be lost forever. Respondents' financial information about each challenged product, including their profit margins, is no longer private. Finally, Respondents' confidential information may not be recoverable, leaving Respondents with no acceptable recourse.

IV. AN ORDER TO SHOW CAUSE WHY COMPLAINT COUNSEL SHOULD NOT BE HELD IN COMTEMPT AND WHY THEIR PLEADING SHOULD NOT BE STRICKEN SHOULD ISSUE.

An Order to Show Cause must issue. If Complaint Counsel can compel the production of confidential documents under the promise of a protective order and then unlawfully disclose

them on the Internet without punishment, then there is no justice. The harm and appearance of impropriety are too real, too damning.

The only real issue before the Court is the determination of the appropriate sanction. In this regard, there are only three relevant factors for the Court's consideration: (a) the nature and risk of harm caused by the violation; (b) the degree of culpability for the violation(s); and (c) the public interest, if any, in continuing this proceeding.

A. The Requirements For An Order to Show Cause Are Met.

The ALJ has the power to investigate violations of a protective order and to take such actions as are just under the circumstances, including striking a pleading or barring evidence in the proceeding. The Commission's RULES OF PRACTICE § 3.38(b) provides:

If a party or an officer or agent of a party fails to comply . . . with an order including but not limited to, an order...of the Administrative Law Judge, . . . the Administrative Law Judge or the Commission, or both . . . may take such action in regard thereto as is just, including but not limited to the following:

* * *

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

* * *

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

As the Protective Order violated by Complaint Counsel is a Protective Order *Governing Discovery Material*, it is clearly a discovery order, making 16 C.F.R. § 3.38(b) applicable. Failure to comply with an ALJ's order also subjects the violating party to a finding of contempt by the Commission. 16 C.F.R. § 3.42(h). The ALJ has wide latitude in determining whether there has been contemptuous behavior and the Commission has wide latitude in determining

proper sanctions, including striking a pleading and dismissing an action as to *all* respondents (which is particularly appropriate where the charges are premised on a common enterprise). *See id.*; *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984); *Payne v. Exxon Corp.*, 121 F.3d 503, 509 (9th Cir. 1997) (dismissal of *all* defendants affected by discovery violation).

As discussed above, there is no question that the Commission violated a properly entered order. There also is no question that the Protective Order is clear and unambiguous, and provides strict guidelines for the handling of confidential material.

The ALJ must issue an Order to Show Cause why Complaint Counsel should not be held in contempt. The ALJ must also investigate the appropriate sanction. The instant violation comes at the heels of prior violations of court orders in an aggressively disputed matter where Complaint Counsel has done little, if anything, but publicly tarnish Respondents' reputation.

B. The Appropriate Remedy is An Order Striking Complaint Counsel's Pleading Under the Circumstances of This Case.

Dismissal of a party's pleadings is an extreme remedy. *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996). Nevertheless, even a single violation of an order can warrant striking the violating party's pleading. *See Valley Engineers, Inc. v. Electric Eng. Co.*, 158 F.3d 1051, 1056 (9th Cir. 1998) (dishonest concealment of critical evidence justified dismissal).

The sanctions made available under 16 C.F.R. § 3.38(b) for violations of discovery orders provide guidance for the ALJ and Commission in determining exactly what sanction would be appropriate here. The Commission's RULES OF PRACTICE § 3.38(b)(5) is "modeled closely after Rules 37 and 55(b) of the Federal Rules of Civil Procedure."¹⁴ *In re Automotive Breakthrough*

¹⁴ Under FRCP Rules 37 and 55(b), district courts are vested with broad discretion to fashion appropriate sanctions for violations of discovery orders, including the striking of pleadings. *Malatuea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993). Such sanctions are designed to prevent unfair prejudice to the litigants and insure the integrity of the

Sciences, Inc., Docket Nos. 9275-9277, 1996 WL 33399817 (Oct. 16, 1996). Thus, in *Automotive Breakthrough Sciences*, the Commission relied on federal cases interpreting FRCP Rule 37 and 55(b) to enter a default judgment against two respondents in that action. *Id.*

Courts often rely on a finding of “bad faith” or “willful” disobedience when striking a pleading. *See, e.g., Exxon Valdez*, 102 F.3d at 432. Bad faith or willful conduct has been defined as “disobedient conduct not shown to be outside the control of the litigant.” *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 948 (9th Cir. 1993) (delay and failure to appear as a result of party being out of town due to alleged “misunderstandings” with own counsel are not outside party’s control, and therefore supported finding of bad faith or willful misconduct).¹⁵

Given the difficulties in proving subjective intent, courts also rely on objective criteria and strike pleadings based on a showing of gross negligence or callous disregard of a party’s obligations to another party or the Court.¹⁶ *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990) (affirming trial court’s order striking a party’s pleading, finding it proper when the party “demonstrates flagrant bad faith and callous disregard

judicial process, including in discovery. *Gratton v. Great American Communications*, 178 F.3d 1373, 1374 (11th Cir. 1999).

¹⁵ In *Henry*, the plaintiff argued that his complaint was improperly dismissed for violations of discovery orders, because he had no control over the death of a defendant—the sole witness to the conversations that formed the basis of his claims. *See* 983 F.2d at 948. The court rejected this argument, noting that plaintiff had complete control over his multiple refusals to engage in discovery prior to the point where the defendant’s illness prevented him from participating in the litigation. *See id.* The court held that “disobedient conduct not shown to be outside the control of the litigant’ is all that is required to demonstrate willfulness, bad faith, or fault.” *Id.*

¹⁶ For example, in *T.E. Quinn Truck Lines, Ltd. v. Boyd, Weir & Sewell, Inc.*, 91 F.R.D. 176, 177-78 (W.D.N.Y. 1981), the defendant failed to comply with court orders compelling proper discovery responses. The defendant blamed its failure to fully respond to discovery on a “misunderstanding” between its primary counsel and its local counsel. *See id.* at 179. The court rejected this excuse, finding that defendant’s failure to respond to discovery was due to “bad faith or gross negligence,” and entered a default judgment. *See id.* at 178. *Similarly here, the ALJ should reject any attempt by Complaint Counsel and the Secretary of the Commission to claim a “misunderstanding” and point fingers at each other—both failed in performing the Commission’s legal obligations to protect Respondents’ confidences from public disclosure.*

of its responsibilities”); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir. 1977) (approving striking a party’s pleading when the party’s “conduct represents . . . flagrant bad faith and callous disregard of the party’s obligation under the Rules”); *T.E. Quinn Truck Lines, Ltd. v. Boyd, Weir & Sewell, Inc.*, 91 F.R.D. 176, 178 (W.D.N.Y. 1981) (striking a party’s pleading is appropriate when the party’s “failure to provide court-ordered discovery results from bad faith or gross negligence”); *see also Burks v. Eagan Real Estate Inc.*, 742 F. Supp. 49, 51 (N.D.N.Y. 1990) (“A court should not impose such a drastic remedy unless the party’s failure to provide court-ordered discovery results from bad faith or gross negligence.”).

Federal law is clear that the nature of a violation, by itself, or in light of other factors, may warrant striking a pleading. *See FDIC v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994). For example, substantial prejudice can justify striking a pleading without consideration of lesser sanctions. *See, e.g., U.S. v. DiMucci*, 879 F.2d 1488, 1494-95 (9th Cir. 1989); *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 947 (9th Cir. 1993) (discovery violation that prejudiced defense).

1. The Nature of Harm Inflicted Warrants Sanctions.

Congress could not have been any clearer about the importance of maintaining, in confidence, trade secrets, financial records, and other confidential information obtained by the Commission through civil investigation demand and the adjudicatory process. *See* 15 U.S.C. §§ 46(f), 57b-2(f). When Congress enacted the Federal Trade Secrets Act (18 U.S.C. § 1905), Congress informed all federal agencies and government officials that they shall be punished and removed from office just based on a showing that they publicly disclosed confidential information, and that they knew that the documents they disclosed were confidential. Here, it is impossible for Complaint Counsel to deny that knowledge. The documents say confidential right on their face. The cover pages FTC appended to these documents say “subject to protective order.”

Federal law is clear, “Oops, I’m sorry,” is no answer. Nor is there any such thing as “no harm, no foul” when dealing with confidential information. *The foul is the harm, and in this case, could hardly be more damaging!*

Complaint Counsel’s sworn response to this Court’s February 22, 2005 Order substantiates Respondents’ biggest fear.

{REDACTED}

The violation of law at issue here warrants severe sanctions, even if Complaint Counsel and the Secretary’s Office were somehow able to demonstrate that they believed documents plainly marked “Subject to Protective Order,” “Confidential” and/or “Restricted—Attorneys’ Eyes Only” were not confidential. It is enough that they “should have known” not to publicly disclose those documents; that they “should have known” not to needlessly and recklessly attach them to motions; that they “should not” have transmitted those documents by email; and that they “should have” actually reviewed those documents for content before posting them (assuming, of course, the malfeasance wasn’t intentional).

In *U.S. v. Garrett*, 984 F.2d 1402 (5th Cir. 1993), a case where the Court implied a negligence standard for criminal liability (not a general knowledge *mens rea*), the Fifth Circuit characterized its prior holding in *Wallington* under the Federal Trade Secret Act as “somewhat anomalous” in that it implied a high level of culpability to a Class A misdemeanor:

The outcome of *Wallington* may appear somewhat anomalous when compared to *Delahoussaye*, *Anderson*, and our decision today [where we implied a criminal

negligence standard to a Class A misdemeanor]. In *Wallington*, the statute at issue, 18 U.S.C. § 1905, prohibited government agents from disclosing confidential information acquired during the performance of their duties. As here, the crime was a Class A misdemeanor with a one year maximum sentence. Nevertheless, we construed section 1905 as requiring knowledge on the part of its violators that the information was confidential. What distinguishes *Wallington*, we think, *is that it was a First Amendment case*. The defendant in *Wallington* had argued that the statute was impermissibly overbroad in that it would punish even innocent disclosures of information. We gave the statute a narrow construction to avoid a serious First Amendment question:

“At least in a substantial number of cases, the requirement that government employees refrain from knowingly disclosing confidential information contained in government files or collected in the scope of their official duties will strike a permissible balance between the First Amendment and the practical necessities of public service.” *Wallington*, 889 F.2d at 579 (emphasis added).

It seems apparent that the *Wallington* court believed a high level of *mens rea* was required for section 1905 in order to avoid serious questions of the law’s validity under the First Amendment. . . . Thus, *Wallington* was concerned that a serious First Amendment problem might attend any attempt to attach criminal sanctions to a public employee who in good faith, albeit negligently, believed the information disclosed was not confidential. In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court held that a public school teacher may not be dismissed for sending to a local newspaper a letter critical of the board of education “absent proof of false statements knowingly or recklessly made by him.” *Id.* at 574, 88 S.Ct. at 1738 (emphasis added); *id.* at 582, 88 S.Ct. at 1742 (White, J., dissenting in part) (“The Court holds that truthful statements by a school teacher critical of the school board are within the ambit of the First Amendment. So also are false statements innocently or negligently made.”) (emphasis added). . . . In short, *Wallington* demanded a high level of *mens rea* in the context of a statute that raised serious First Amendment concerns. *That is not the case here.*

Garrett, 984 F.2d at 1412-13 (citations omitted, emphasis added).

The First Amendment concerns in *Wallington* are not present here, as they were not present in *Delahoussaye*, *Anderson* or *Garrett*. Unlike in *Wallington*, Respondents are not seeking sanctions under 18 U.S.C. § 1905, or trying to imprison anyone, remove anyone from office, or terminate anybody’s employment. *They are seeking fair punishment for a wrong caused by the malice, neglect and/or indifference of people who are charged by law with the duty of protecting Respondents’ privacy!* Therefore, as recognized in *Garrett*, it is enough that the

party violating the law “should have known” what he was doing. 984 F.2d at 1412. Here, without question, Complaint Counsel knew better, but did not care.

2. Complaint Counsel’s Degree of Culpability Is High

Complaint Counsel acted with the requisite degree of culpability to warrant striking Complaint Counsel’s pleading. Their public disclosure of documents marked “Confidential” or “Restricted Confidential, Attorneys Eyes Only” demonstrates bad faith, a callous disregard of Respondents’ rights, and/or gross negligence in discharging the Commission’s obligations to protect confidences obtained through privileged, official proceedings.

Just like the conduct of the disobedient parties in *Henry* and *T.E. Quinn Truck Lines*, the Commission’s disobedient conduct was solely within its control. First, Complaint Counsel demanded and received proprietary information in response to Civil Investigation Demands under promises of confidentiality. Complaint Counsel then demanded and, over Respondents’ objection, received further confidential and trade secret information under the Protective Order. Complaint Counsel then chose to rely on this highly confidential information in support of their Motion for Partial Summary Decision, even though Respondents’ confidential information had little, if anything, to do with the merits of Complaint Counsel’s motion. Complaint Counsel then chose to unlawfully transmit Respondents’ confidential information to the Secretary’s Office by email, a practice expressly prohibited by Commission Rule and one which Mr. Millard has expressly avoided in other cases. The Secretary’s Office then supposedly posted these documents on the FTC’s website without first looking at them. Given this chronology, we beg to differ with Complaint Counsel’s characterization of what occurred here. These events do not muster up thoughts of “good faith” and “inadvertence.”

Moreover, Complaint Counsel have repeatedly demonstrated an indifference for Respondents’ rights. Initially, the animus took the form of hindering Respondents’ ability to

answer and mount a defense to the charges levied against them. However, Complaint Counsel's *modus operandi* became most apparent in connection with the depositions of their expert witnesses. First, Complaint Counsel refused to concede that experts in this case are not permitted to receive Attorneys Eyes Only information unless advance notice is given to the producing party. Even when Respondents demonstrated that Complaint Counsel had negotiated a draft Protective Order that applied pre-disclosure requirements to experts, something that Complaint Counsel initially denied, Complaint Counsel insisted that the pre-disclosure requirements were inapplicable to their experts because Complaint Counsel did not *intend* the language they had agreed to.

Second, instead of trying to mitigate the prejudice arising from Dr. Heymsfield's late disclosure of his prior expert appearances, Complaint Counsel unilaterally terminated Dr. Heymsfield's continued deposition thereby allowing Dr. Heymsfield to avoid answering questions about why he had not disclosed this information months earlier. Third, after escorting Dr. Heymsfield from the deposition room, Complaint Counsel then had the nerve to serve Respondents with an FTC transcript of Dr. Heymsfield's testimony as an FTC expert witness in a 1997 FTC case in which Dr. Heymsfield gave testimony about a medical study that is also at issue in this case. Collectively, these events paint a picture of lawyers who have taken strides to protect their case at all costs, even at the expense of Respondents' most fundamental rights.

Now it's "*de-já-vu* all over again." Upon discovery of the instant and more egregious violation of the Protective Order, Respondents' counsel demanded that Complaint Counsel remove their Confidential Materials from the public record, preserve all evidence related to Complaint Counsel's violation of federal law, and immediately investigate who had accessed Respondents' confidential information. *See* Exhibit "4," Letter to Laureen Kapin from Jeffrey D

Feldman dated February 17, 2005. In response, Complaint Counsel downplayed the significance of their wrongful conduct, deflected blame, and attempted to make this about Respondents. See Exhibit "5," Letter from Laureen Kapin to Jeffrey Feldman dated February 18, 2005.

Complaint Counsel first argued that the confidential materials were publicly displayed for only 2½ days, from {REDACTED} *That is more than ample time for widespread dissemination of trade secret information to occur over the Internet, and certainly long enough for irreparable harm to have occurred.* Nor would the seriousness of the wrongful conduct be any less if Complaint Counsel were just little bit pregnant.

Complaint Counsel also suggested that there were not many "hits" to their Website over the course of the 2½ day period. First, it is uncertain how many times Internet users "hit" on Respondents' information. See Kapin Decl. ¶ 17. Besides, the number of "hits" is meaningless. No party can predict the injury caused to Respondents from one hit, let alone multiple ones. Accordingly, Complaint Counsel should not be able to take refuge in the fact that further harm has been avoided because only 2½ days of misconduct occurred here.

Complaint Counsel's effort to attack the nature of the information they chose to include as part of their motion, and then transmitted for public display to the entire world in violation of federal law, simply demonstrates Complaint Counsel's inability to take responsibility for their wrongful conduct, and callous disregard of Respondents' rights. Under federal law, the nature of the wrong here is the same whether Complaint Counsel disclosed the trade secret formula for Coke, or any other information designated as confidential, because the "official policy of the agency in question" prohibited such disclosure. *Wallington*, 880 F.2d at 577-78.

Finally, Complaint Counsel's willful violation of the Protective Order is demonstrated by the fact that Complaint Counsel had notice of Respondents' concern about the disclosure of their confidential information from the beginning of this case when Respondents and Complaint Counsel negotiated and entered into the Protective Order. Complaint Counsel received further notice that improper disclosure of Respondents' highly sensitive information would not be tolerated when Respondents filed their Motion to Exclude Dr. Eckel and Dr. Heymsfield. In sum, Complaint Counsel have been repeatedly reminded, time and again, of the need to maintain Respondents' confidences in this proceeding. *See, e.g.*, Respondents' Reply, Supplement, and Second Supplement to the Motion to Exclude Dr. Eckel and Dr. Heymsfield.

Despite the overwhelmingly clear notice of the need to maintain Respondents' confidences, Complaint Counsel selected Respondents' trade secrets among thousands of pages of documents, attached them to their Motion for Partial Summary Decision without citing to them once, and unlawfully transmitted them via email to the Secretary's Office, providing the clear impression that they were "public documents." Complaint Counsel's callous disregard of Respondents' rights and their obligations under the Protective Order is egregious and inexcusable.

3. Striking Complaint Counsel's Complaint is in the Public Interest.

The greater good in this case requires the striking of the FTC's pleadings. When government acts in violation of the law, even when it is in furtherance of its efforts to enforce the law, the Court must hold the government accountable. There is no one else to do it. What value is a Protective Order if the Federal Trade Commission can violate it with impunity? What incentive does the Commission have to avoid future misconduct if it suffers no consequence under the facts of this case? If the Commission walks in this case with an apology and a promise

to do better in the future, why should others who are compelled to disclose confidential information to the Commission have any confidence that their privacy will be respected?

Complaint Counsel's denials cannot obfuscate the truth.¹⁷ As a result of Complaint Counsel's most recent "errors," Respondents trade secret information has now been disseminated beyond Dr. Heymsfield's desk and onto the Worldwide Web. For several days, product formulation, marketing strategies, financial records, and other confidential information were available for anyone, including Respondents' competitors, to access and use to Respondents' direct detriment. Some of Respondents' most valuable trade secrets and other confidential information are no longer secret, and Respondents' financial earnings with respect to the challenged products are no longer private, because of Complaint Counsel's indefensible violation of the Protective Order. Complaint Counsel's behavior requires a meaningful response, one that only this Court can deliver—that the Commission may not compel private documents under a promise of privacy, breach obligations specifically designed to preserve their confidentiality, and openly display confidential documents to the entire world without consequence.

No doubt, the striking of Complaint Counsel's pleading might appear harsh, but allowing Complaint Counsel to escape without meaningful punishment under the current facts would be

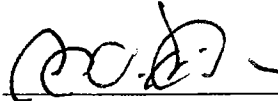
¹⁷ Indeed, the correct message must be sent even in the very unlikely event that Complaint Counsel is able to prove that, though there is "smoke," there is no "fire." Complaint Counsel Joshua Millard makes the remarkable statement that it is Complaint Counsel's "practice" to violate the very legal obligation at issue—one that they owe to every respondent in every adjudicatory proceeding—that is, to take the most fundamental step required by the Commission to protect confidential information from being unlawfully disclosed, 16 C.F.R. § 4.2(c), which expressly forbids emailing "non-public" documents to the Secretary of the Commission. See Millard Decl. ¶ 13 ("Neither the Secretary's Office nor Respondents' counsel communicated with me, any other Complaint Counsel to my knowledge, *regarding the practice of emailing non-public filings to the Secretary before that date.*") (emphasis added). Mr. Millard declares that everyone apparently in Complaint Counsel's office, including "Laureen Kapin . . . , Walter C. Gross, . . . Robin Richardson . . . , Edwin Rodriguez . . . , Laura Schneider . . . , and Leslie Lewis," knew, or had notice, that they were violating the Commission's RULES OF PRACTICE per "the practice" *and did absolutely nothing!* See Millard Decl. ¶ 10 (listing the "[o]ther persons identified as 'carbon copy' recipients of the [unlawful] 23 emails").

even harsher. It is only fair that Complaint Counsel be ordered to show cause why their Complaint should not be stricken.

V. CONCLUSION

Complaint Counsel violated the plain, unambiguous language of the Protective Order. Accordingly, Respondents ask the Court for an order requiring Complaint Counsel to show cause why they should not be held in contempt and why their Complaint should not be stricken. In addition, Respondents request that the Commission be ordered to pay monetary sanctions in an amount sufficient to compensate Respondents for all of the attorney time and expenses they have already incurred, and will likely incur in the future, trying to rectify Complaint Counsel's wrongful conduct and mitigate the harm caused by the Commission's breach of confidence. Respondents further request all other relief the Court finds just and appropriate.

Respectfully submitted,



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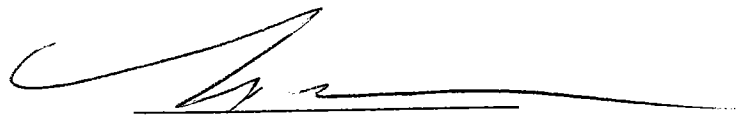
Attorneys for Respondents Basic Research, LLC,
A.G. Waterhouse, LLC, Klein-Becker USA, LLC,
Nutrasport, LLC, Sövage Dermalogic Laboratories,
LLC and Ban, LLC

DATED this 7th day of April, 2005.

BURBIDGE & MITCHELL

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Richard D. Burbidge
Attorneys for Respondent Dennis Gay



Mitchell K. Friedlander
5742 W. Harold Gatty Dr.
Salt Lake City, UT 84116
Telephone: (801) 414-1800
Facsimile: (801) 517-7108
Pro Se Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 7th day of April, 2005 as follows:

(1) One (1) original and one (2) copies by Federal Express to Donald S. Clark, Secretary, Federal Trade Commission, Room H-159, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) electronic copy via e-mail attachment in Adobe® “.pdf” format to the Secretary of the FTC at Secretary@ftc.gov;

(3) Two (2) copies by Federal Express to Administrative Law Judge Stephen J. McGuire, Federal Trade Commission, Room H-104, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580;

(4) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; rrichardson@ftc.gov; lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(5) One (1) copy via U. S. Postal Service to Elaine Kolish, Associate Director in the Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580

(6) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(7) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(8) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(9) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, Pro Se.

CERTIFICATION FOR ELECTRONIC FILING

I HEREBY CERTIFY that the electronic version of the foregoing is a true and correct copy of the original document being filed this same day of April 7, 2005 via Federal Express with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.



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

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.,)
d/b/a BASIC RESEARCH, L.L.C.,)
OLD BASIC RESEARCH, L.L.C.,) PUBLIC
BASIC RESEARCH, A.G. WATERHOUSE,) DOCUMENT
BAN, L.L.C.,)
d/b/a KLEIN-BECKER USA, NUTRA SPORT, and) DOCKET NO. 9318
SOVAGE DERMALOGIC LABORATORIES,)
DENNIS GAY,) (Amended version)
DANIEL B. MOWREY,)
d/b/a AMERICAN PHYTOTHERAPY RESEARCH)
LABORATORY, and)
MITCHELL K. FRIEDLANDER)
)

DECLARATION OF CARLA FOBBS

1. I am Carla Fobbs and I am employed as the Legal Administrator for Basic Research, L.L.C. ("Basic Research").
2. I have personal knowledge of the facts set forth in this Declaration.
3. I reviewed a printout of the docket in this matter posted on the FTC's website on February 17, 2005. Attached as Exhibit "1" is a copy of that printout.
4. I have reviewed the Exhibits to Complaint Counsel's Motion for Partial Summary Decision identified in that printout. Below is a summary of the documents that

were posted on the FTC's website as matters of public record, and that were subject to the Protective Order in this matter and designated as "Confidential" or "Confidential Attorneys Eyes Only," or with a similar designation:

- a. Exhibit 11: Response to Interrogatory No. 3 and Attachments of product formulations for each of the 6 challenged products (6 total pages);
- b. Exhibit 15: Supplemental Answers to Interrogatories-providing net gross revenue by year for each challenged product, together with advertising expenditures by year for each challenged product (9 total pages);
- c. Exhibits 20-25, 27-29, 31: Excerpts of deposition testimony;
- d. Exhibit 36 (Pages R0042305-06): Consumer email inquiry;
- e. Exhibit 37 (Page R0034328): Draft PediaLean advertisement;
- f. Exhibit 42: Balance sheet for Respondent Basic Research LLC as combined with three third parties NutraPharma, Inc., American Phytotherapy Laboratories Corporation, and Majestic Enterprises, Inc. (7 total pages);
- g. Exhibit 44: Bullet summary containing cross-references to substantiation for express claims for each of the 6 challenged products (6 total pages);
- h. Exhibit 45: Print advertisement dissemination schedules for 5 of the 6 challenged products and TV advertisement dissemination schedules for LeptoPrin **{REDACTED}** (15 total pages).

5. I have reviewed and am familiar with the documents listed above. As evidenced by this list of confidential documents, as part of the Commission's Motion for

Partial Summary Decision, the Commission located, selected, and transmitted electronically like a “public document” highly confidential information, including: (a) the precise formula for each challenged product (Exhibit 11); (b) financial data including sales revenue and expenditure figures for each challenged product (Exhibits 15, 42); and (c) **{REDACTED}**

6. In sum, Complaint Counsel transmitted to the Secretary’s Office electronically as “public documents” proprietary trade secret information, including product formulas; profit margins; and marketing strategies.

7. Basic Research has realized tremendous value through the use of this information, and also through maintaining its confidentiality and depriving competitors of the significant advantage the information would provide to them.

8. The confidential information publicly disclosed in Exhibit 45, which consists of Advertising Dissemination Schedules for each product,

{REDACTED}

9. Through the legal compliance department, Basic Research tightly controls access to the confidential information that Complaint Counsel posted on the FTC’s website. Access to such information is controlled by separate passwords to ensure that only authorized personnel are able to view the material. All employees agree to maintain confidentiality, including the information Complaint Counsel disclosed, as a condition of their continued employment. They are prohibited from disclosing any confidential

information unless duly authorized by supervisors and managers. No one is authorized to release confidential information unless adequate safeguards including nondisclosure agreements and protective orders are in place.

10. Access to product formulations is limited to personnel within Respondents' Research and Development Department. Very few personnel have had access to formulation information both historically and at present. Product formulations are never publicly disclosed. Respondents expend considerable resources and employ a strict confidentiality protocol in an effort to safeguard their trade secrets including the product formulations. The confidential formulations continue to constitute viable products and valuable assets of Respondents that may, for example, be licensed or sold to others.

11. Access to financial data is similarly strictly controlled. As with product formulations, only a select few personnel have access to the financial material that was publicly disclosed. This information, in part, allows Respondents to track and evaluate the commercial viability of Respondents' Challenged Products. Thus, by posting the confidential information, Complaint Counsel have allowed competitors access to information allowing them to more economically target given markets with given products and product types.

12. I have reviewed the Declaration of Joshua Millard. Mr. Millard omits any reference to Exhibit 11, which included product formulations. Mr. Millard does not acknowledge posting of highly sensitive market research data on the FTC website included in Exhibit 45.

13. Access to the marketing data and information within Exhibit 45 is limited to select few personnel within the company who report to company directors. As mentioned, above, it took Respondents {REDACTED}

The advertising schedules,

{REDACTED}

14. Absent a nondisclosure agreement or court order, product formulas, financial data, and marketing strategies found in Exhibits 11, 15, 42 and 45 will not be disclosed.

15. One of the Commission's designated "expert" witnesses works for a pharmaceutical company in direct competition with Respondents, and in my capacity as Legal Administrator, I have learned that competitors and adverse parties in other litigation are monitoring this case.

16. The confidential information listed above constitutes valuable trade secret information of Respondents. The information is pivotal to the Respondents' business success. Accordingly, Respondents take the significant measure described herein to prevent improper disclosure to competitors.

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

Executed: March 7th, 2005.

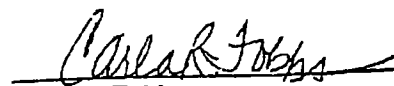

Carla Fobbs

Exhibit 1

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

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.

Docket No. 9318

SUBJECT TO
PROTECTIVE ORDER

COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

Respectfully submitted,

Laureen Kapin (202) 326-3237
Joshua S. Millard (202) 326-2454
Robin M. Richardson (202) 326-2798
Laura Schneider (202) 326-2604

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.

COMPLAINT COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January 2005, I caused *Complaint Counsel's Motion for Partial Summary Decision* to be served and filed:

- (1) the original, one paper copy, and one CD-ROM copy filed by hand delivery and one (1) additional electronic copy via email, to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

- (2) two (2) paper copies served by hand delivery to:

The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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For Respondent Gay

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Klein-Becker USA, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
LLC, and BAN, LLC

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For Respondent Mowrey

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Salt Lake City, UT 84116
(801) 517-7000
(801) 517-7108 (fax)
Respondent Pro Se
mcf555@msn.com


COMPLAINT COUNSEL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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,

Docket No. 9318

SUBJECT TO
PROTECTIVE ORDER

Respondents:

**COMPLAINT COUNSEL'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to RULE OF PRACTICE 3.24, and in support of their *Motion for Summary Decision*, Complaint Counsel submit this separate *Statement of Material Facts as to which There is No Genuine Dispute*.

I. CORPORATE RESPONDENTS

1. Respondent Basic Research, LLC, is a Utah limited liability company with its principal office or place of business at 5742 W. Harold Gatty Dr., Salt Lake City, Utah 84116. Tab 2, Answer, Resp't Basic Research ¶ 1.
2. Respondent A.G. Waterhouse, LLC, is a Wyoming limited liability company with its principal office or place of business at 5742 W. Harold Gatty Dr., Salt Lake City, Utah 84116. Tab 2, Answer, Resp't Basic Research ¶ 2; Tab 3, Answer, Resp't A.G. Waterhouse ¶ 2.
3. Respondent Klein-Becker usa, LLC, is a Utah limited liability company with its principal office or place of business at 5742 W. Harold Gatty Dr., Salt Lake City, Utah 84116. Tab 2, Answer, Resp't Basic Research ¶ 3; Tab 4, Answer, Resp't Klein-Becker usa ¶ 3.
4. Respondent Nutrasport, LLC, is a Utah limited liability company with its principal office or place of business at 5742 W. Harold Gatty Dr., Salt Lake City, Utah 84116. Tab 2, Answer, Resp't Basic Research ¶ 4; Tab 5, Answer, Resp't Nutrasport ¶ 4.

CERTIFICATE OF SERVICE

I certify that on January 31st, 2005, I caused the attached *Motion to Compel Answers to Proper Deposition Inquiries* to be served and filed as follows:

- (1) the original, and one paper copy filed by hand delivery (with one CDROM copy) and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580
- (3) one (1) electronic copy via email and one (1) paper copy, by first class mail to the following persons:

Stephen E. Nagin
Nagin Gallop Figueroa P.A.
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snagin@ngf-law.com
For Respondents

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(305) 358-3309 (fax)
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For Respondents
Waterhouse, LLC,
Klein-Becker USA, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
LLC, and BAN, LLC

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For Respondent Mowrey

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(801) 517-7108 (fax)
Respondent Pro Se
mkf555@msn.com

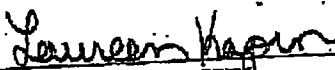

COMPLAINT COUNSEL

Exhibit 2

In the Matter of Basic Research



FEDERAL TRADE COMMISSION
FOR THE CONSUMER

HOME | CONSUMERS | BUSINESS | NEWSROOM | FORMAL | ANTITRUST | CONGRESSIONAL | ECONOMIC | LEGAL
Privacy Policy | About FTC | Commissioners | File a Complaint | HSR | FOIA | IG Office | En Español

Search:

In the Matter of Basic Research

File No. 002-3300, Docket No. 9318

February 9, 2005

- Order on Joint Motion for Enlargement of Time to Serve and File Oppositions to Pending Motions for Summary Decision [PDF 65K]

February 3, 2005

- Notice of Filing Responses to Discovery and Transcripts [PDF 217K]
 1. Complaint Counsel's Response to Respondents' First Set of Interrogatories [PDF 507K]
 2. Complaint Counsel's First Supplemental Response to Respondents' First Set of Interrogatories [PDF 161K]
 3. Complaint Counsel's Response to Basic Research, LLC's First Request for Admissions [PDF 2.16M]
 4. Complaint Counsel's Response to Daniel B. Mowrey's First Request for Admissions [PDF 717K]
 5. Complaint Counsel's Response to Daniel B. Mowrey's First Set of Interrogatories [PDF 1016K]
 6. Complaint Counsel's Response to Mitchell K. Friedlander's First Request for Admissions [PDF 403K]
 7. Complaint Counsel's Response to Dennis Gay's First Request for Admissions [PDF 1.52M]
 8. Deposition Transcript of Dr. Steven R. Heymsfield [PDF 7.17M]
 9. Deposition Transcript of Dr. Robert Eckel [PDF 2.81M]
 10. Deposition of Michael B. Mazis Ph.D [PDF 636K]
- Respondents' Motion to File Exhibits 28 and 29 to Motion for Partial Summary Decision and Separate Statement of Undisputed Fact as In Camera Exhibits [PDF 119K]

February 2, 2005

- Order on Complaint Counsel's Motion for Extension of Deadlines [PDF 81K]

January 31, 2005

- Complaint Counsel's Statement of Material Facts as to Which There Is No Genuine Dispute [PDF 180K]
- Complaint Counsel's Motion for Partial Summary Decision [PDF 303K]
 - o Exhibits to Complaint Counsel's Motion for Partial Summary Decision:
 - o Volume One [PDF 39K]

In the Matter of Basic Research

- Complaint (June 15, 2004) [PDF 1.15M]
- Answer and Grounds of Defense of Respondent Basic Research, LLC [PDF 578K]
- Answer and Grounds of Defense of Respondent A.G. Waterhouse, LLC [PDF 452K]
- Answer and Grounds of Defense of Respondent Klein-Becker USA LLC [PDF 468K]
- Answer and Grounds of Defense of Respondent Nutrasport LLC [PDF 418K]
- Answer and Grounds of Defense of Respondent Savage Dermalogic Laboratories, LLC [PDF 437K]
- Answer and Grounds of Defense of Respondent BAN, LLC [PDF 559K]
- Answer of Respondent Dennis Gay [PDF 301K]
- Answer of Respondent Daniel B. Mowrey [PDF 483K]
- Answer of Respondent Mitchell K. Friedlander [PDF 488K]
- Volume Two [PDF 31K]
 - Response to Complaint Counsel's First Set of Interrogatories [PDF 1.23M]
 - Response of Respondent Dennis Gay to Complaint Counsel's First Set of Interrogatories [PDF 427K]
 - Respondent Daniel B. Mowrey's Objections and Responses to Complaint Counsel's First Set of Interrogatories [PDF 450K]
 - Pro Se Respondent Mitchell K. Friedlander's Objections and Responses to Complaint Counsel's First Set of Interrogatories [PDF 438K]
 - Supplemental Answers and Answers to Complaint Counsel's First Set of Interrogatories [PDF 279K]
 - Complaint Counsel's Requests for Admissions [PDF 713K]
 - Response to Complaint Counsel's Request for Admissions [PDF 1.8M]
- Volume Three [PDF 23K]
 - Expert Report of Geoffrey Nunberg [PDF 2.51M]
 - Expert Report of Michael B. Mazis, Ph.D [PDF 3.91M]
- Volume Four [PDF 24K]
 - Atkinson Deposition [PDF 267K]
 - Chevreau Deposition [PDF 1.24M]
 - Davis Deposition [PDF 3.51M]
 - Fobbs Deposition [PDF 1.31M]
 - Friedlander Deposition [PDF 3.43M]
 - D. Gay Deposition [PDF 3.40M]
- Volume Five [PDF 24K]
 - G. Gay Deposition [PDF 2.20M]
 - Meade Deposition [PDF 1.18M]
 - Mowrey Deposition [PDF 3.59M]
 - Sandberg Deposition [PDF 2.23M]
 - Solan Deposition [PDF 1.43M]
 - Weight Deposition [PDF 1.72M]
- Volume Six [PDF 37K]

In the Matter of Basic Research

- Promotional Materials for Dermalin [PDF 4.28M]
- Promotional Materials for Cutting Gel [PDF 2.11M]
- Promotional Materials for Tummy Flattening Gel [PDF 964K]
- Promotional Materials for Anorex [PDF 4.32M]
- Promotional Materials for Leptoprin [PDF 2.19K]
- Promotional Materials for Pediatelean [PDF 3.63M]
- Declaration of Michael B. Mazis, Ph.D [PDF 23K]
- Documents Cited in Mazis Expert Report [PDF 10.73M]
- Declaration of Geoffrey Nunberg, Ph.D [PDF 21K]
- Documents Cited in Nunberg Expert Report [PDF 12.77M]
- Combined Balance Sheet and Notes (As of Dec. 28, 2002) [PDF 10.75M]
- Certified Copy of the Articles of Organization and Articles of Amendment for Covank LLC (Registered Dec. 27, 2002) [PDF 267K]
- Claim Substantiation Bullets [PDF 273]
- Dissemination Schedules [PDF 1.29M]
- Respondents' Separate Statement of Undisputed Facts In Support of Respondents' Motion for Partial Summary Decision Adverse to Petitioner on Any Count for Unfair Acts or Practices [PDF 313K]
- Respondents' Notice of Filing Stipulation and Agreement [PDF 233K]
- Respondents' Motion for Partial Summary Decision Adverse to Petitioner on Any Count for Unfair Acts or Practices (With Incorporated Memorandum of Law) [PDF 505K]
- Respondents' Motion to Strike Expert Report of Geoffrey Nunberg [PDF 521K]
 - Exhibit 1 - Nunberg Expert Report [PDF 2.4M]
 - Exhibit 2 - FTC Weight Loss Advertising Workshop [PDF 3.3M]
 - Exhibit 3 - Deposition of Dr. Steven R. Heymsfield [PDF 365K]
- Respondents' Motion to Strike Expert Report of Michael Mazis [PDF 472K]
- Respondents' Motion to Strike Expert Report [PDF 3M]
 - Exhibit 1 - Mazis Expert Report [PDF 636K]
 - Exhibit 2 - Deposition of Michael Mazis [PDF 129K]
- Motion in Limine to Preclude Reliance on Use of "Facial Analysis" to Prove Claims Allegedly Implied By the Advertisements at Issue in this Case [PDF 1.11M]
 - Exhibit 1 - Appendix One Building a Record on Advertising Meaning and Substantiation [PDF 340K]
 - Exhibit 2 - Deposition of Michael Mazis [PDF 129K]
 - Exhibit 3 - Mazis Expert Report [PDF 3M]
 - Exhibit 4 - FTC Weight Loss Advertising Workshop [PDF 3.3M]
 - Exhibit 5 - Nunberg Expert Report [PDF 2.4M]
 - Exhibit 6 - Deposition of Dr. Steven R. Heymsfield [PDF 365K]
 - Exhibit 7 - Complaint Counsel's First Request for Production of Documentary Materials and Tangible Things [PDF 277K]
 - Exhibit 8 - Enforcement Policy Statement on Food Advertising [PDF 1.1M]

In the Matter of Basic Research

- o Exhibit 9 - Explanatory Note for Electronic Version of this Report [PDF 3.23M]
- o Exhibit 10 - Dietary Supplement Guide [PDF 2.2M]

January 28, 2005

- Respondents' Motion for Partial Summary Decision Adverse to Petitioner with Regard to Every Allegation That Is Premised Upon, or Derives From, the Assertion That the Advertisements in Question Convey Claims of "Rapid" or "Substantial" Weight Loss [PDF 2.8M]
- Respondents Compendium of Exhibits in Support of Motion for Partial Summary Decision [PDF 116K]
- o Exhibit 1 - FTC Weight Loss Advertising Workshop [PDF 3.3M]
- o Exhibit 2 - Nunberg Expert Report [PDF 2.4M]
- o Exhibit 3 - Mazis Expert Report [PDF 3M]
- o Exhibit 4 - Deposition of Michael Mazis [PDF 129K]
- o Exhibit 5 - Appendix One Building a Record on Advertising Meaning and Substantiation [PDF 340K]
- o Exhibit 6 - Deposition of Dr. Steven R. Heymsfield [PDF 277K]
- o Exhibit 7 - Complaint Counsel's First Request for Production of Documentary Materials and Tangible Things [PDF 277K]
- o Exhibit 8 - Enforcement Policy Statement on Food Advertising [PDF 1.1M]
- o Exhibit 9 - Explanatory Note for Electronic Version of this Report [PDF 3.23M]
- o Exhibit 10 - Dietary Supplement Guide [PDF 2.2M]
- Concise Statement of Material Facts to Which Respondents Contend There Is No Genuine Issue [PDF 240K]
- Respondents' Separate Statement of Undisputed Facts in Support of Motion for Partial Summary Decision [PDF 558K]
- Respondents' Motion for Partial Summary Decision Adverse to Petitioner on Validity of Petitioner's "Competent & Reliable Scientific Evidence" Standard, or In the Alternative, For Certification to the Commission (with Incorporated Memorandum of Law) [PDF 4.7M]

January 27, 2005

- Respondents' Emergency Motion to Strike Dr. Robert Eckel and Dr. Steven Heymsfield as Petitioner's Expert Witnesses and for Sanctions and Other Relief - Expedited Briefing and Decision Requested [PDF 15.9M]

January 19, 2005

- Order on Complaint Counsel's Motion to Compel a Document from Respondents' Testifying Expert Solan [PDF 320K]
- Order Granting Joint Motion for Extension of Time to File Motions for Summary Decision and Responses to Motions for Summary Decision [PDF 60K]

January 18, 2005

In the Matter of Basic Research

- Complaint Counsel and Respondents' Joint Motion for Extension of Time to File Motions for Summary Decision and Responses to Motions for Summary Decision [PDF 240K]

January 6, 2005

- Respondent Dennis Gay's Memorandum in Opposition to Complaint Counsel's Motion to Compel [PDF 264K]

December 29, 2004

- Order on Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories [PDF 268KB]
- Order Granting Complaint Counsel's Motion to Compel Complete Privilege Logs and Granting Complaint Counsel's Unopposed Motion for Extension of Time to File a Complete Privilege Log [PDF 188KB]
- Respondents' Second Unopposed Motion to Extend Time to File Response to Complaint Counsel's Motion to Compel [PDF 399K]

December 27, 2004

- Respondents' Opposition to Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories (Corrected) [PDF 1.95M]
- Notice of Filing Corrected Opposition to Complaint Counsel's Motion to Compel Production of Documentary Materials and Answers to Interrogatories [PDF 95K]

December 23, 2004

- Respondents' Opposition to Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories [PDF 2.16M]

December 22, 2004

- Unopposed Motion to Extend Time to File Response to Complaint Counsel's Motion to Compel Production of Respondents' Testifying Expert Lawrence Solan's Documents [PDF 166K]

December 20, 2004

- Respondents' Reply to Complaint Counsel's Motion to Compel Privilege Log [PDF 174K]

December 16, 2004

- Respondents' Unopposed Amended Motion to Extend Time to File Response To Complaint Counsel's Motion to Compel [PDF

In the Matter of Basic Research

110K]

December 15, 2004

- Respondents' Unopposed Motion to Extend Time to File Response to Complaint Counsel's Motion to Compel [PDF 111K]

December 14, 2004

- Complaint Counsel's Unopposed Motion for Extension of Time To File a More Complete Privilege Log [PDF 138K]

December 13, 2004

- Complaint Counsel's Motion to Compel Production of Documentary Materials And Answers to Interrogatories [PDF 284K]
- Complaint Counsel's Motion to Compel Production of Respondents' Testifying Expert Lawrence Solar's Document [PDF 1.71M]

December 9, 2004

- Order on Complaint Counsel's Second Motion for Protective Order [PDF 492K]

December 7, 2004

- Complaint Counsel's Motion to Compel Respondents' Production of Privilege Logs That Comply with Rule of Practice 3.38A [PDF 400K]
 - o Exhibits [PDF 5.7M]

December 8, 2004

- Complaint Counsel's Motion to Compel Production of Documentary Materials and Answers to Interrogatories [PDF 3.99M]
 - o Exhibits D - K [PDF 5.08M]
 - o Exhibits L - P [PDF 2.41M]
 - o Exhibits Q - W [PDF 1.48M]

December 2, 2004

- Respondents' Opposition to Complaint Counsel's Motion For Protective Order [PDF 542K]

December 1, 2004

In the Matter of Basic Research

- ALJ's Order Granting Complaint Counsel's Unopposed Motion for Extension of Time to File Responses to First Set of Interrogatories Propounded by Respondents Gay and Friedlander [PDF 47K]
 - ALJ's Order Granting Basic Research's Fourth Motion to Compel [PDF 114K]
 - Respondents' Second Unopposed Motion for Extension of Time To Provide Expert Report of Daniel B. Mowrey, Ph.D., and for Complaint Counsel to Identify Rebuttal Expert and Provide Rebuttal Expert Report Rebutting Matters Set Forth in the Expert Report of Daniel B. Mowrey, Ph.D. [PDF 151K]
 - Complaint Counsel's Response to Respondent Pro Se Respondent Friedlander's First Request for Production of Documents [PDF 439K]
 - Complaint Counsel's Response to Respondent Dennis Gay's First Set of Requests for Production [PDF 358K]
 - Complaint Counsel's Response to Respondent Dennis Gay's Requests for Admissions [PDF 2.9M]
- November 30, 2004**
- ALJ's Order Denying Basic Research's Third Motion to Compel [PDF 181K]
 - ALJ's Order on Respondents' Unopposed Motion for Extension of Time to Provide Expert Report of Daniel B. Mowrey, Ph.D. and for Complaint Counsel to Identify Rebuttal Expert and Provide Rebuttal Expert Report [PDF 51K]
 - Expert Report of Lawrence M. Solan [PDF 4.5M]
- November 29, 2004**
- Complaint Counsel's Unopposed Motion for Extension Of Time to File Responses to Respondent Gay's First Set of Interrogatories and Respondent Friedlander's First Set of Interrogatories [PDF 157K]
 - Revised Certificate of Service to Complaint Counsel's Opposition to Basic Research's Motion to Compel Proper Privilege Log [PDF 46K]
- November 26, 2004**
- Complaint Counsel's Opposition to Basic Research's Motion to Compel Proper Privilege Log [PDF 1.87M]
- November 24, 2004**
- Complaint Counsel's Opposition to Basic Research's Motion to Compel [PDF 1.86M]
 - Complaint Counsel's Supplemental Response to Basic Research's First Request for Admissions [PDF 122K]
- November 23, 2004**
- Respondents' Unopposed Motion for Extension of Time to Provide Expert Report of Daniel B. Mowrey, Ph.D., and for Complaint Counsel to Identify Rebuttal Expert and to Provide Rebuttal Expert Report Rebutting Matters Set Forth in the Expert Report of Daniel B. Mowrey, Ph.D. [PDF 171K]

In the Matter of Basic Research

November 22, 2004

- ALJ's Order on Complaint Counsel's Motions for Extension of Time To File Responses to Respondent Gay's Discovery Requests, Respondent Basic Research's Third Motion to Compel, and Respondent Friedlander's Discovery Requests [PDF 84K]
- ALJ's Order Denying Complaint Counsel's Motion for Protective Order To Limit Respondents' Discovery Or, in the Alternative To Clarify the Scheduling Order [PDF 182K]

November 19, 2004

- Complaint Counsel's Unopposed Motion for Extension of Time to Respond to Respondent Friedlander's Discovery Requests [PDF 149K]

November 18, 2004

- Complaint Counsel's Motion for Protective Order (and Exhibits) [PDF 9.3M]

November 16, 2004

- Pro Se Respondent Friedlander's Notice of Adoption of Respondents Basic Research, LLC, A.G. Waterhouse, LLC, Kleinbecker USA, LLC, Nutrasport, LLC, Savage Dermalogic Laboratories, LLC, Dennis Gay and Daniel Mowrey's Respective Responses to Complaint Counsel's Motion for Protective Order To Limit Respondents' Discovery Or, in the Alternative, to Clarify Scheduling Order [PDF 358K]
- Respondents' Opposition to Complaint Counsel's Motion For Extension of Time to File Responses to Respondent Dennis Gay's Discovery and To Respond to Basic Research's Motion To Compel [PDF 272K]
- Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker USA L.L.C., Nutrasport, L.L.C. and Savage Dermalogic Laboratories, L.L.C.'s Notice of Adoption of Respondents Dennis Gay and Daniel Mowrey's Respective Responses to Complaint Counsel's Motion for Protective Order to Limit Respondents' Discovery or, in the Alternative, To Clarify Scheduling Order [PDF 448K]

November 15, 2004

- Respondent Daniel B. Mowrey's Response to Complaint Counsel's Motion for Protective Order to Limit Respondents' Discovery Or, in the Alternative, to Clarify Scheduling Order [PDF 953K]
- Respondent Dennis Gay's Reply Memorandum In Opposition to Complaint Counsel's Motion for Protective Order to Limit Respondents' Discovery Or, in the Alternative, to Clarify Scheduling Order [PDF 213K]

November 12, 2004

- Respondent Basic Research LLC's Motion to Compel Proper Privilege Log [PDF 209K]
- Complaint Counsel's [Corrected] Motion for Extension of Time To File Responses to Respondent Dennis Gay's Discovery and To

In the Matter of Basic Research

Respondent Basic Research's Motion to Compel [PDF 172K]

November 10, 2004

- Complaint Counsel's Motion for Extension of Time To File Responses to Respondent Dennis Gay's Discovery and To Respondent Basic Research's Motion to Compel [PDF 149K]

November 9, 2004

- Order Requiring Expedited Response To Complaint Counsel's Motion For Protective Order To Limit Respondents' Discovery [PDF 118K]

November 8, 2004

- Order On Basic Research's Second Motion To Compel [PDF 118K]
- Complaint Counsel's Requests for Admissions [PDF 377K]
- Complaint Counsel's Motion for Protective Order to Limit Respondents' Discovery Or, in the Alternative, to Clarify Scheduling Order [PDF 5.4M]

November 4, 2004

- Respondent Dennis Gay's First Set of Interrogatories [PDF 392K]
- Order on Complaint Counsel's Motion to Strike Respondents' Additional Defenses [PDF 654K]
- Order Denying Basic Research's Motion to Compel [PDF 408K]
- Basic Research, LLC's Motion to Compel [PDF 2.7M]
- Response to Complaint Counsel's Second Set of Interrogatories [PDF 3.4M]

November 3, 2004

- Complaint Counsel's Memorandum in Opposition to Respondent Basic Research's Second Motion to Compel [PDF 4.3M]

October 29, 2004

- Complaint Counsel's Supplemental Brief in Support of Pending Motion to Strike Respondents' Additional Defenses [PDF 2.65M]
- Complaint Counsel's Response to Daniel B. Mowrey's First Request for Admissions [PDF 903K]

October 28, 2004

In the Matter of Basic Research

- Respondents' Supplemental Brief Opposing Complaint Counsel's Motion to Strike Respondents' Additional Defenses [PDF 2.1M]
- October 26, 2004**
 - Order on Complaint Counsel's Motion to Stay Response to Parts of Respondents' Second Motion to Compel and for Extension of Time to Respond to Respondents' Second Motion to Compel [PDF 78KB]
- October 25, 2004**
 - Basic Research, LLC's Opposition to Complaint Counsel's Motion to Stay Response to Parts of Respondents' Second Motion to Compel Related to Pending Motion to Strike Defenses, and Opposed Motion for Extension of Time to Respond to the Rest of the Second Motion to Compel [PDF 275K]
- October 21, 2004**
 - Complaint Counsel's Opposed Motion to Stay Response to Parts of Respondents' Second Motion to Compel Related to Pending Motion to Strike Defenses, and Opposed Motion for Extension of Time to Respond to the Rest of the Second Motion to Compel [PDF 260K]
- October 18, 2004**
 - ALJ's Order on Respondents' Request for Oral Argument Or, in the Alternative, for Permission to File a Sur-reply and Ordering Supplemental Briefing [PDF 93K]
 - ALJ's Order on Respondents' Motion for Enlargement of Time to Provide Transcribed Testimony [PDF 201K]
 - Notice of Appearance and Declaration of Todd M. Malynn [PDF 114K]
 - ALJ's Order Requiring Expedited Response [PDF 67K]
- October 15, 2004**
 - Request for Enlargement of Time to Provide Transcribed Testimony [PDF 396K]
 - Complaint Counsel's Unopposed Motion for Extension of Time to File Responses to Respondent Mowrey's Discovery [PDF 189K]
- October 14, 2004**
 - Notice of Filing of Proposed Order [PDF 99K]
- October 13, 2004**

In the Matter of Basic Research

- Basic Research, LLC's Second Motion to Compel [PDF 1.5M]

October 12, 2004

- ALJ's Order Granting Joint Motion for Enlargement of Time [PDF 61K]

October 4, 2004

- Complaint Counsel's Opposition to Basic Research's Motion to Compel [PDF 2.4M]

October 1, 2004

- Complaint Counsel's Opposition to Respondents' Request For Permission to File a Sur-Reply [PDF 140K]

September 29, 2004

- Respondents' Request for Oral Argument or, in the Alternative, for Permission to File a Sur-Reply [PDF 167K]

September 28, 2004

- Complaint Counsel's Reply to Respondents' Opposition to Motion to Strike Respondents' "Additional Defenses" [PDF 1.9M]

September 23, 2004

- Complaint Counsel's Unopposed Motion for Extension of Time to File Opposition to Motion to Compel [PDF 118K]

September 21, 2004

- Order Granting Complaint Counsel's Motion to Submit Reply to Respondents' Opposition to Pending Motion To Strike Respondents' Additional Defenses [PDF 44K]
- Stipulated Request For Enlargement of Time [PDF 478K]

September 16, 2004

- Notice of Non-Objection to Complaint Counsel's Motion to Submit Reply to Respondents' Opposition to Pending Motion to Strike Respondents' Additional Defenses [PDF 163K]
- Notice of Correction [PDF 405K]

In the Matter of Basic Research

- September 15, 2004
 - Order Requiring Expedited Response [PDF 42K]
- September 13, 2004
 - Complaint Counsel's Motion for Leave to Submit Reply to Respondents' Opposition to Pending Motion to Strike Respondents' "Additional Defenses" [PDF 543K]
- September 10, 2004
 - Respondent Basic Research, LLC's Notice of Correction [PDF 93K]
- September 9, 2004
 - Basic Research LLC's First Request for Admissions [PDF 222K]
 - Respondents' Opposition to Complaint Counsel's Motion to Strike Respondents' Additional Defenses [PDF 1.3M]
 - Basic Research, LLC's Motion to Compel [PDF 1.4M]
 - Respondents' Preliminary Witness List [PDF 224K]
- September 8, 2004
 - Order Granting Respondent's Second Motion for Extension of Time to File Response to Motion to Strike [PDF 44K]
- September 1, 2004
 - Agreed Motion to Extend Time to File Response to Complaint Counsel's Motion to Strike Respondents' Additional Defenses [PDF 101K]
- August 30, 2004
 - Order Granting Respondents' Motion for Extension of Time to File Response to Motion to Strike [PDF 41K]
 - Order Granting Respondent's Motion for Extension of Time to File Responses to Interrogatories [PDF 42K]
- August 27, 2004
 - Complaint Counsel's Response to Basic Research LLC's First Request for Admissions [PDF 330K]

In the Matter of Basic Research

- August 25, 2004**
 - Order Granting Complaint Counsel's Motion of Extension of Time to File Responses to Interrogatories [PDF 40K]
- August 23, 2004**
 - Complaint Counsel's Motion for Extension of Time To File Responses to Interrogatories [PDF 122K]
- August 20, 2004**
 - Complaint Counsel's Motion to Strike Respondents' "Additional Defenses" [PDF 1M]
 - Attachments to Motion [PDF 1M]
- August 18, 2004**
 - Order on Respondents' Motion to Quash in Part and to Limit Subpoenas to Non-Parties [PDF 147K]
- August 17, 2004**
 - Order Denying Motions for Interlocutory Appeal and Motion to Certify [PDF 281K]
- August 16, 2004**
 - Response of Respondent Dennis Gay to Complaint Counsel's First Set of Interrogatories [PDF 32K]
- August 12, 2004**
 - Respondents' Request for Enlargement of Time [PDF 120K]
- August 11, 2004**
 - Protective Order Governing Discovery Material [PDF 619K]
 - Scheduling Order [PDF 293K]
- August 10, 2004**
 - Respondents' Initial Disclosures [PDF 318K]

In the Matter of Basic Research

August 9, 2004

- Respondents' Initial Disclosures [PDF 138K]
- Respondent Mitchell K. Friedlander's Initial Disclosures [PDF 451K]
- Respondents' Notice of Appearance [PDF 228K]
- Respondents' Notice of Appearance [PDF 100K]
- Respondent Daniel B. Mowrey's Initial Disclosures [PDF 188K]

August 5, 2004

- Notice of Withdrawal of Appearance [PDF 75K]

August 3, 2004

- Complaint Counsel's Opposition to Respondents' Motions for Interlocutory Appeal and Pro Se Respondent Friedlander's Motion for Certification [PDF 43K]
 - o Exhibit 1 [PDF 295K]
 - o Exhibit 2 [PDF 789K]

August 2, 2004

- Order on Prehearing Conference [PDF 38K]

July 30, 2004

- Answer of Respondent Dennis Gay [PDF 352K]
- Answer and Grounds of Defense of Respondent Basic Research, LLC [PDF 452K]
- Answer and Grounds of Defense of Respondent A.G. Waterhouse, LLC [PDF 356K]
- Answer and Grounds of Defense of Respondent Savage Dermalogic Laboratories, LLC [PDF 347K]
- Answer and Grounds of Defense of Respondent Nutrasport, LLC [PDF 324K]
- Answer and Grounds of Defense of Respondent Klein-Becker USA, LLC [PDF 358K]
- Answer and Grounds of Defense of Respondent BAN, LLC [PDF 442K]
- Answer of Respondent Mitchell K. Friedlander [PDF 381K]
- Answer of Respondent Daniel B. Mowrey [PDF 370K]

July 28, 2004

In the Matter of Basic Research

- Order Reassigning Matter to Administrative Law Judge Stephen J. McGuire [PDF 40K]
- Respondents' Notice of Appearance [PDF 94K]

July 27, 2004

- Certain Respondents' Motion for Interlocutory Appeal [PDF 258K]
- Motion re Certification Or, Alternatively, for an Interlocutory Appeal [PDF 367K]

July 22, 2004

- Order Granting Motion for Extension in the matter of Basic Research [PDF 49K]

July 20, 2004

- Order Denying Motions for a More Definite Statement and Motion to Dismiss the Complaint for Lack of Definiteness [PDF 242K]
- Respondents' Notice of Appearance [PDF 138K]

July 19, 2004

- Complaint Counsel's Opposition to Respondents' Motions to Submit Replies [PDF 210K]
- Respondents' Notice of Appearance [PDF 119K]
- Respondents' Motion to Quash In Part and to Limit Subpoenas on Non-Parties [PDF 565K]

July 16, 2004

- Request for Enlargement of Time [PDF 108K]
- Respondents' Notice of Appearance [PDF 113K]

July 15, 2004

- Respondents' Notice of Appearance [PDF 132K]

July 13, 2004

- Respondent Mitchell K. Friedlander's Reply to Complaint Counsel's Opposition to Respondents' Motions for a More Definite Statement and Motion for Leave to File Same [PDF 214K]
- Respondents' Reply to Complaint Counsel's Opposition to Respondents' Motion for a More Definite Statement [PDF 58K]

In the Matter of Basic Research

Respondents' Motion to Submit Reply to Complaint Counsel's Opposition to Respondents' Motion for a More Definite Statement

- Respondents' Motion to Submit Reply to Complaint Counsel's Opposition to Respondents' Motion for a More Definite Statement [PDF 54K]

July 12, 2004

- Complaint Counsel's Notice of Appearance [PDF 58K]

July 8, 2004

- Complaint Counsel's Opposition to Respondents' Motions For a More Definite Statement [PDF 569K]
 - Attachment 1 [PDF 1.3M]
 - Attachment 2 [PDF 273K]
 - Attachment 3 [PDF 4.6M]

July 6, 2004

- Respondent Mitchell K. Friedlander's Motion to Dismiss Complaint for Lack of Definiteness [PDF 303K]
- Complaint Counsel's Notice of Appearance [PDF 34K]

June 28, 2004

- Respondent Mitchell K. Friedlander Joinder and Motion for a More Definite Statement [PDF 230K]
- Respondent Mitchell K. Friedlander Notice of Appearance [PDF 42K]
- Respondent's Motion for a More Definite Statement [PDF 29K]
- Respondent's Counsel Notice of Appearance [PDF 308K]

June 25, 2004

- Complaint Counsel's Notice of Appearance [PDF 36K]

June 23, 2004

- Order Designating Administrative Law Judge [PDF 38KB]

June 16, 2004

- Text of the Administrative Complaint [PDF 59KB]

In the Matter of Basic Research

- Exhibits A-L [PDF 3MB]
- News Release

Last Updated: Saturday, February 19, 2005

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Exhibit 3

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

In the Matter of)

TELEBRANDS CORP.,)
a corporation,)

TV SAVINGS, LLC,)
a limited liability company, and)

AJIT KHUBANI,)
individually and as president of)
Telebrands Corp. and sole member)
of TV Savings, LLC.)

Docket No. 9313

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S MOTION TO AMEND THEIR
TRIAL WITNESS LIST AND TO OBTAIN A SUBPOENA
AD TESTIFICANDUM FOR THE SUBSTITUTE WITNESS**

Pursuant To Paragraph 9 of the Court's November 5, 2003 *Scheduling Order*, and RULE 3.34(a)(2) of the Federal Trade Commission's RULES OF PRACTICE, Complaint Counsel respectfully request the Court's permission to amend their trial witness list and substitute Mark Golden for Jiezl Pineda as the identified testifying representative of Cyber City Teleservices, Ltd. We respectfully request that the Court issue a subpoena to Mr. Golden so that he may be called to testify in this matter.¹


Complaint Counsel's trial witness list identified Jiezl Pineda as the representative of Cyber City Teleservices, Ltd. who would testify at the hearing in this matter. In preparing to serve this Court's subpoena *ad testificandum* upon Cyber City Teleservices, Ltd., we have learned that Ms. Pineda now resides in the Phillipines. Complaint Counsel has ascertained from Mr. Golden that he resides in the United States and would be available to testify at the hearing.

¹ Respondents' counsel has not indicated whether they support this motion.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2004, I caused *Complaint Counsel's Motion to Amend their Trial Witness List and to Obtain a Subpoenas Ad Testificandum for the Substitute Witness*, including the proposed subpoena, to be filed and served as follows:

- (1) the original and one (1) paper copy filed by hand delivery to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W. Room H-112
Washington, D.C. 20580
- (3) one (1) paper copy by first class mail and one (1) electronic copy via email to:
Edward F. Glynn, Jr., Esq.
Theodore W. Atkinson, Esq.
VENABLE LLP
575 Seventh St., N.W.
Washington, D.C. 20004


JOSHUA S. MILLARD

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

In the Matter of

TELEBRANDS CORP.,
a corporation,

TV SAVINGS, LLC,
a limited liability company, and

AJIT KHUBANI,
individually and as president of
Telebrands Corp. and sole member
of TV Savings, LLC.

Docket No. 9313

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S MOTION TO RECONSIDER
ORDER DENYING COMPLAINT COUNSEL'S MOTION TO
COMPEL, OR TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL**

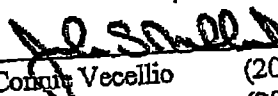
Complaint Counsel respectfully request that this Court reconsider its February 25, 2004 *Order Denying Complaint Counsel's Motion to Compel Production of Documents and Answers to Interrogatories*, and direct Respondents to produce the requested documents and information.

In the alternative, Complaint Counsel respectfully request that this Court determine that the aforementioned *Order* involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that subsequent review will be an inadequate remedy, and certify to the Commission, with justification, this application for appeal.

The grounds in support of this motion are set forth in the accompanying Memorandum.

Dated: March 3, 2004

Respectfully submitted,


Constance Vecellio (202) 326-2966
Walter Gross (202) 326-3319
Joshua S. Millard (202) 326-2454
Amy M. Lloyd (202) 326-2394
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2004, I caused *Complaint Counsel's Motion to Reconsider Order Denying Complaint Counsel's Motion to Compel, or to Certify Order for Interlocutory Appeal*, including the supporting memorandum, attachments, and proposed order, to be filed and served as follows:

- (1) the original and one (1) paper copy filed by hand delivery to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W. Room H-112
Washington, D.C. 20580
- (3) one (1) paper copy by first class mail and one (1) electronic copy via email to:
Edward F. Glynn, Jr., Esq.
Theodore W. Atkinson, Esq.
VENABLE LLP
575 Seventh St., N.W.
Washington, D.C. 20004



JOSHUA S. MILLARD

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)

TELEBRANDS CORP.,)
a corporation,)

TV SAVINGS, LLC,)
a limited liability company, and)

AJIT KHUBANI,)
individually and as president of)
Telebrands Corp. and sole member)
of TV Savings, LLC.)

Docket No. 9313

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S CURRENT ESTIMATE OF WITNESSES
TO BE CALLED DURING UPCOMING WEEK OF HEARING**

Pursuant to Paragraph 18 of the November 5, 2003 *Scheduling Order*, Complaint Counsel respectfully submit this current estimate of witnesses to be called during the upcoming week of the hearing, during our case-in-chief, based on our estimates for direct examination and some estimates provided by Respondents' counsel for cross-examination. Complaint Counsel reserve the right to call additional witnesses for rebuttal and to call witnesses listed on Respondents' witness list, if necessary.

WITNESSES EXPECTED TO BE CALLED ON TUESDAY, MAY 4, 2004

Complaint Counsel currently anticipate that they will need to call the following witnesses on Tuesday, May 4th. We will continue to communicate with Respondents' counsel in the hope of obtaining stipulations that will obviate the need for these witness' testimony.

1. John W. Kirby
eBrands Commerce Group, LLC
10880 Wilshire Blvd., Suite 1850
Los Angeles, CA 90024

Respectfully submitted,

/s/
Connie Vecellio (202) 326-2966
Walter C. Gross (202) 326-3319
Joshua S. Millard (202) 326-2454
Amy M. Lloyd (202) 326-2394
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: April 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2004, I caused *Complaint Counsel's Current Estimate of Witnesses to be Called During Upcoming Week of Hearing* to be filed and served as follows:

- (1) the original and one (1) paper copy filed by hand delivery to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W. Room H-112
Washington, D.C. 20580
- (3) one (1) paper copy by first class mail and one (1) electronic copy via email to:
Edward F. Glynn, Jr., Esq.
Theodore W. Atkinson, Esq.
VENABLE LLP
575 Seventh St., N.W.
Washington, D.C. 20004

/s/ J.S. Millard for
Connie Vecellio

Exhibit 4

FELDMAN GALE

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February 17, 2005

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Lauren Kapin, Esq.
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: *Basic Research et al., adv. FTC*
Docket No. 9318

Dear Ms. Kapin:

I am memorializing the telephone conversation we completed late this afternoon regarding the Commission's most recent, and most serious, violation of the Court's August 11, 2004 Protective Order Governing Discovery. This afternoon, while reviewing the FTC's on-line docket of the Basic Research case, my staff discovered that the Commission posted on the World Wide Web a number of my clients' attorney's-eyes only and confidential materials, including highly sensitive financial information. The Commission has already edited the web-index to these documents, an act that we deem an attempted spoliation; however, we kept a copy of the unedited index and it is quite clear from this document that a wholesale violation of the Protective Order has occurred. A copy of that pre-edit index is attached.

Laureen Kapin, Esq.
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
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I informed you that we do not want to act precipitously and deem it appropriate that we give the Commission a full opportunity to account for today's events. Accordingly, we request by close of business tomorrow the following information:

1. A full inventory of the confidential information that the Commission posted on the internet;
2. A representation as to how long said confidential information was on the Internet;
3. A full explanation as to how this confidential information came to be posted on the Commission's web site;
4. The identity of the individuals at the Commission who are responsible for this breach of the Protective Order and
5. A statement as to whether the Commission has previously posted on its web site other Respondent's confidential information that was under protective order and if so, how many times.

Additionally, in an effort to determine the identity of third parties who may have accessed or downloaded my clients' confidential information from the Commission's web site, we request that the Commission preserve and thereafter make available to us the following information:

- 1) All web server log files, including without limitation the transfer log, access log, error log and referrer log. These files will provide the IP address and/or DNS name of the computer requesting the information, the date and time of the request, the command requesting a web page (shown as "GET /stats/currentstats.html"), the protocol used (HTTP/1.1), the result code and the size of the file sent (eg. 17811 bytes), and
- 2) The system security log or wtmp file (which show who logged into the system and when—these files will allow us to identify users to find out exactly who pulled our clients' information off the FTC's system).

The requested information is very important and must be preserved immediately. It is common for these files to be rotated and dumped on a weekly basis, and for a high-volume web server like the FTC's, it might even be daily. That means if you do not take immediate action, your office will risk disappearance of the requested evidence and my clients will never be able to track the identity of third parties who may now wrongfully possess my clients' trade secret information. Therefore, to avoid greater harm to my clients, the Commission must immediately comply with these requests.

Laureen Kapin, Esq.
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
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I spoke with you this evening about my request for the referenced computer files and emphasized the need for immediate action. You told me that you would call you tech people this evening to request that they immediately preserve this information.

We also request that the Commission preserve a mirror copy of the on-line docket and document links in the Basic Research case, which existed before this afternoon's edits, so we may accurately demonstrate to Judge McGuire what was available to the general public on the Internet.

It goes without saying that the Commission has gravely damaged my clients. There is absolutely no justification for what has occurred here. We are simply shocked by the Commission's repeated and apparent indifference to the Court's Protective Order and its flippant handling of my clients' confidential information.

Needless to say, my clients reserve all claims and remedies they may have, both civil and/or administrative, against the Commission and its staff for all damages incurred.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Sincerely,

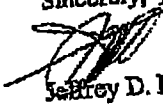

Jeffrey D. Feldman
JDF/mr

Exhibit 5



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Laura Kaplin
Senior Attorney

Direct Dial:
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February 18, 2005

Jeffrey D. Feldman
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Miami, FL 33141-4322

VIA EMAIL

Re: *Basic Research LLC et al.*, Docket No. 9318

Dear Mr. Feldman:

This letter responds to your letter of yesterday evening, February 17th, concerning the posting of materials to the online docket for the *Basic Research* matter.

My response is necessarily curtailed by the fact that you have filed a related motion today, which we have to answer, and the tight time interval (less than 24 hours) in which you requested that I respond. More information may be available shortly, after the federal holiday.

First, I will respond briefly to some of the assertions in the first page of your letter. The FTC staff from the Secretary's Office called your office yesterday afternoon to ask that Respondents review the online docket. As set forth in our response to your motion of today, by that time, Complaint Counsel recognized that certain materials were posted to the online docket and had requested that they be removed. These documents were removed shortly thereafter. You presume that an *Order* violation has occurred, but we do not know at present whether the material was, in fact, disclosed to any party not covered by the *Order*.

Your suggestion that our prompt efforts to remove documents from the website that should not have been posted constitutes attempted spoliation of evidence is unkind, to say the least—like you, we, too, printed a copy of the pre-existing index to preserve the record. Certainly you would not have preferred that the materials remain on-line for additional time.

Based on our inquiries, we have determined that the only non-public information posted on the FTC website consisted of non-public exhibits to Complaint Counsel's *Motion for Partial Summary Decision*. The actual *Motion* and *Statement of Facts* posted to the website were the public versions of those documents. Accordingly, the affected documents would be:

- Exhibit 15, which you marked both as a "public document" and "attorney's eyes only";
- Exhibit 16, our own request for admissions, which you responded to publicly;
- Exhibits 20-25, 27-29, and 31, which are deposition transcripts that we have reserved the right to challenge as improperly-designated material;
- pages R42095-96 from Exhibit 36, an email from your clients' place of business to a consumer;
- page R34328 from Exhibit 37, an advertisement or promotional material for PediaLean;
- Exhibit 42, a summary balance sheet from 2002;
- Exhibit 44, claim substantiation bullets that recite contents of the product advertisements; and
- Exhibit 45, dissemination schedules for publicly-advertised products.

In response to your questions, these materials were posted at approximately noon on February 15th, and removed on February 17th at approximately 4:50 pm. The materials were sent to the Secretary's Office on CD-ROM and via emails to Respondents on the Secretary on January 31st. On February 7th, Complaint Counsel served the public version of the *Motion* along with redacted exhibits. Shortly around noon on February 15th, the Office of the Secretary inadvertently posted the *Exhibits* from the non-public version of our *Motion* instead of the redacted *Exhibits* from the Public Version. As previously mentioned, this material was posted for a short amount of time, and was promptly withdrawn from the website once it came to our attention. We are aware of no evidence that FTC staff have posted any other information designated as non-public on the website.

As set forth in our response to your motion of today, Complaint Counsel has taken steps to preserve the evidentiary record and, to the fullest extent possible, determine the identity of third parties who may have accessed the material. FTC staff are engaged in doing this now.

We understand that you and your clients are distressed. Please understand that we are distressed at this turn of events as well. However, the facts, not your assumptions, control whether your clients have suffered the damage that you suggest. We will contact you on Tuesday to discuss what further steps may be taken to address this matter.

Sincerely,

Laureen Kapin
Laureen Kapin
Attorney, Division of Enforcement

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