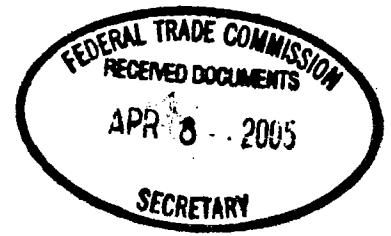


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

*Respondents.*

**PUBLIC DOCUMENT**

**(Amended Version)**

**DOCKET NO. 9318**

**RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE**

Respondents Basic Research, LLC and Ban, LLC (collectively "Respondents"), hereby provide this response to the Court's Order dated March 9, 2005 ("Order"), requiring Respondents to Show Cause, and in support thereof, respectfully state as follows:

**I. INTRODUCTION**

The Court's Order to Show Cause employs an incorrect standard in requiring Respondents to demonstrate a "clearly defined, serious injury" in order to protect their confidential information and obtain the relief requested in their motion. The standard being imposed on Respondents requires a showing that the specific "confidential" information unlawfully posted on the Commission's website meets the standard the ALJ should utilize to determine whether documents may maintain their "confidential" designation *at trial*. Order at p. 2. Respondents believe, and the relevant law is clear, that both their entitlement to the electronic files relating to the unlawful disclosures on the Commission's public website, and the ALJ's

obligation to certify Respondents' request for relief to the Commission, flows from Complaint Counsel's violation of federal law and breach of the Court's *Protective Order*, not from the nature of the information unlawfully disclosed by the Commission to the public. The ALJ has no discretion to deny the relief sought and refuse to certify the question to the Commission.

As discussed in detail in Respondents' Motion for an Order to Show Cause, Complaint Counsel's wrongful conduct is just as wrongful whether the Commission unlawfully disclosed the trade secret of Coca-Cola or the some other information disclosed to the Commission under terms of confidentiality and designated as "confidential" pursuant to a Protective Order. Complaint Counsel does *not* have a unilateral right to publicly disclose at trial information received under terms of confidentiality and designated as "confidential" pursuant to a Protective Order. Rather, that information must be relevant to an issue in dispute and listed as a potential trial exhibit before any burden would shift to a respondent to either bring a motion *in limine* on the ground that the information is irrelevant or unduly prejudicial, or establish the information as suitable for *in camera* treatment under a "clearly defined, serious injury" standard.

Complaint Counsel's wrongful conduct has deprived Respondents of the right to maintain the confidential nature of their information the Commission unlawfully disclosed by either motion *in limine* or motion to treat document as one suitable for *in camera* treatment. Respondents had the right to concede any disputed issue as to which Complaint Counsel threatened to use the information designated as "confidential" as evidence. In fact, taking Complaint Counsel's arguments at face value, the information would not have been relevant at

trial, because Complaint Counsel claims that they are entitled to summary judgment on the issues as to which the confidential information was allegedly relevant and material.<sup>1</sup>

The ALJ also has no discretion but to certify Respondents' Motion to the Commission, which seeks a remedy for the Commission's unlawful disclosure. Respondents submit that the ALJ must certify Respondents' Motion to the Commission because it involves issues that the ALJ has conceded it cannot resolve. According to the Order, the ALJ has already determined that "it does not have the authority to order the remedy sought by Respondents..." Order, p. 2. Under RULE OF PRACTICE 3.22, "[t]he Administrative Law Judge *shall certify* to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate." 16 C.F.R. §3.22 (emphasis added). Thus, the stated purpose of the Order, namely, to determine "whether certification is necessary" flies in the face of the clear language of RULE 3.22. The ALJ *does not have the discretion* to deny certification where he has no authority to decide the question at issue. Rather, the ALJ only authority is to make a "recommendation" to the Commission that he may deem appropriate.<sup>2</sup>

For the foregoing reasons, Respondents object to the ALJ's Order, and expressly reserve all of their rights in this matter, including their right to seek immediate relief if the ALJ does not promptly certify their Motion to the Commission but instead delays further the granting of the relief requested by Respondents' Motion. Respondents also incorporate by this referenced their Motion for an Order to Show Cause, which properly frames the issues before the Court.

---

<sup>1</sup> The reality is, the trade secret information and the financial details of Basic Research and Ban's business are not probative of the issues in dispute. The relevant inquiry is why Complaint Counsel included this information as part of their motion, not whether the information would have been entitled to *in camera* treatment at time of trial.

<sup>2</sup> There is simply no authority for the proposition that the ALJ can create a standard as to when certification is appropriate under RULE 3.22. Such a ruling would, in effect, do precisely what the ALJ is prohibited by law from doing—summarily adjudicate an issue as to which the ALJ has no authority to resolve, but which the ALJ is obligated to certify to the Commission.

## Response To The ALJ's Order

Notwithstanding the foregoing, Respondents hereby provide the precise information requested in the ALJ's Order. The highly confidential documents that were unlawfully disclosed by the Commission were attached as Exhibits 11, 15, 36, 42 and 45 to Complaint Counsel's Motion for Partial Summary Decision and Exhibit R to Complaint Counsel's Motion to Compel Production of Documentary Material and Answers to Interrogatories. The confidential information contained in these documents that, once disclosed, would result in a clearly defined, serious injury, include:

- (1) Trade secrets, such as *secret formulas*;
- (2) Commercial information, such as *advertising dissemination schedules*; and
- (3) Financial information, such as *advertising expenditures and revenue figures*.<sup>3</sup>

This information is considered "non-public material" under the Commission's Rule of Practice, and is sufficiently secret, and sufficiently material to Respondents' business, that its disclosure constitutes a serious competitive injury under prevailing Commission law.

Respondents' position is supported both by intrinsic and extrinsic evidence. In the case of trade secrets, such as secret formulas, the confidential nature of the information may be inferred from the nature of the documents themselves. Nonetheless, all of the findings herein, including the conclusions relating to the confidential nature of the information at issue, are fully supported by the sworn statement of corporate employee Carla Fobbs.

Respondents have also included Table I as an attachment for the Court's convenience in identifying the documents in question, the designations thereof, and explanations as to the nature

---

<sup>3</sup> Respondents' current analysis using the "clearly defined, serious injury" standard does not alter the fact that Complaint Counsel's wrongful public dissemination of these materials resulted in harm that was *irreparable*.

and scope of the harm that would result in the event of public dissemination. In light of this support, and the arguments advanced below, Respondents respectfully submit that they have shown cause as to why the public disclosure of their confidential information would result in a clearly defined, serious injury.

## **II. BACKGROUND**

### **A. Brief Procedural Background**

The facts that gave rise to this response are contained in the Court's Order, and may be summarized as follows. On February 18, 2005, Respondents sought an order compelling the Commission to provide certain electronic files relating to the Commission's public website ("Motion"). On February 18, 2005, Complaint Counsel filed a partial response to Respondents' Motion. On February 22, 2005, the Court granted Respondents' request for expedited briefing. On February 25, 2005, Complaint Counsel filed a supplemental response to Respondents' Motion. On March 4, 2005, Respondents' filed a reply in support of their Motion. On March 9, 2005, the ALJ issued an Order for Respondents to Show Cause.

### **B. The ALJ's Order**

The Administrative Law Judge ("ALJ") has asked Respondents to show cause "as to what specific information was posted on the Commission's website that was, in fact, confidential information, the disclosure of which would result in a clearly defined, serious injury to Respondents." Order at p. 2. According to the Order, Respondents should support their arguments, where appropriate, with sworn statements or declarations of a person within the company or companies which had information posted. *Id.* Respondents were also ordered not to limit their response to exhibits to Complaint Counsel's Motion for Partial Summary Decision. *Id.*

### III. ARGUMENT

#### A. The Clearly Defined, Serious Injury Standard

Under prevailing Commission law, a showing of a “clearly defined, serious injury” can be made by establishing that the documents are “sufficiently secret and sufficiently material to [Respondents’] business that disclosure constitutes a serious competitive injury.” *In re Evanston Northwestern Healthcare Corporation, et al.*, Docket No. 9315, Order on Parties Motions for *In Camera* Treatment, at \*1 (Feb. 9, 2005) (citing, *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961)).

It is appropriate for parties to rely on extrinsic evidence, such as affidavits or declarations, to make this showing. *Id.* at 2 (citing, *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at \*2-3 (Apr. 23, 2004). It has also been observed, however, that a finding that a clearly defined serious injury would result from public disclosure may, in certain situations, be inferred from the nature of the documents themselves, such as in the case of certain trade secrets. *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

Several factors are to be weighed in considering both “secrecy” and “materiality.” These factors include: (a) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the company and competitors (with a lesser degree of protection to old information); (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Bristol-Myers Company, et al.*, 90 F.T.C. 455, 456 (1977).

The Commission has also acknowledged that the showing of a serious injury does not necessarily require a specific demonstration of the manner in which other companies would use material to the disadvantage of the company whose information is at issue. *In re E.I. DuPont de Nemours & Co.*, Docket 9108, Order Extending In Camera Treatment, Interlocutory Order, at \*1 (Jan. 21, 1981). Rather, “it is proper to infer that disclosure of allegedly sensitive information would seriously affect a [company’s] commercial position.” *Id.* (citing, *General Foods Corporation*, Docket. No. 9085, at \*1-2 (August 1, 1980)). As such, a general concern for the seriousness of injury to a company’s commercial or competitive position underlies the analysis. *Id.*

**B. Respondents’ Documents Meet The Clearly Defined Injury Standard**

Respondents can easily demonstrate that several of the documents posted by Complaint Counsel to the Commission’s website contained information that meets the “clearly defined, serious injury” standard. The documents in question involve, but are not limited to, the Exhibits to Complaint Counsel’s Motion for Partial Summary Decision. These documents were designated “Confidential” and/or “Restricted Confidential—Attorneys Eyes Only” under the Protective Order, and included:

- (1) Exhibit No. 11—Exhibit “A” to Respondents’ Response to Complaint Counsel’s First Set of Interrogatories;
- (2) Exhibit No. 15—Exhibit “A” to Respondents’ Supplemental Response to Complaint Counsel’s First Set of Interrogatories;
- (3) Exhibit No. 36—Customer e-mail;
- (4) Exhibit No. 42—Combined balance sheet; and
- (5) Exhibit No. 45—Advertising dissemination schedule.

The documents in question also include:

- (6) Exhibit R to Complaint Counsel’s Motion to Compel Production of Documentary Material and Answers to Interrogatories.

This document was designated “Confidential Proprietary” and “Restricted Confidential—Attorneys Eyes Only” under the Protective Order.

The information contained in these documents is sufficiently secret, and sufficiently material to Respondents’ business, that disclosure constitutes a serious competitive injury under prevailing Commission law, as they contained: *(a) trade secrets, such as secret formulas for the challenged products; (b) confidential commercial information, such as advertising dissemination schedules; and (c) confidential financial information, such as advertising expenditures and revenue figures for the challenged products.*

The general sensitivity of these categories is well-recognized. For example, under 16 C.F.R. § 4.10, “trade secret, commercial and financial information” is considered “non-public material” that is not required to be made public (“The following records [] are not required to be made public pursuant to 5 U.S.C. 552: (2) Trade secrets and commercial or financial information obtained from a person and privileged or confidential”). Thus, these documents, once made public, would result in a clearly defined, serious injury to Respondents.

1. **Exhibit 11—Respondents’ Response to Complaint Counsel’s First Set of Interrogatories**

{REDACTED}



**{REDACTED}**

Even Complaint Counsel has acknowledged the confidential nature of this information in subsequent filings with the Commission. Specifically, in Complaint Counsel's Motion to Compel Production of Documentary Material and Answers to Interrogatories, Complaint Counsel omitted Exhibit "A" from Respondents' Response to Complaint Counsel's First Set of Interrogatories, notwithstanding the inclusion of the responses themselves. Accordingly, Respondents have established that the information contained in Respondents' Response to Complaint Counsel's First Set of Interrogatories is sufficiently secret, and sufficiently material to Respondents' business, that a clearly defined, serious injury would result in the event of public disclosure. Fobbs Dec., ¶11.

**2. Exhibit 15—Respondents' Supplemental Response to Complaint Counsel's First Set of Interrogatories**

Respondents' Supplemental Response to Complaint Counsel's First Set of Interrogatories contains information that is highly confidential. For example, Exhibit "A" to Respondents'

Supplemental Response contains net gross revenue by year and advertising expenditures by year for all six challenged products. *See*, Fobbs Dec., ¶12, *citing*, Attachment 2. This information is extremely sensitive because, *inter alia*, its release may “enable [] competitors to construct an accurate financial model of [Respondents’] business, to its detriment.” *In re E.I. DuPont de Nemours & Co.*, Docket 9108, Order Extending In Camera Treatment, Interlocutory Order, at \*1 (Jan. 21, 1981) (*in camera* status extended to “investment, earnings, profit, operative return and cost information”); *see also*, *In re North Texas Specialty Physicians*, Docket No. 9312, Order on Non-Parties’ Motions for In Camera Treatment of Documents Listed on Parties’ Exhibit Lists (Apr. 23, 2004) (“total revenues” satisfied clearly defined, serious injury standard); *In re Evanston Northwestern Healthcare Corporation, et al.*, Docket No. 9315, Order on Parties Motions for In Camera Treatment, at \*1 (Feb. 9, 2005) (*in camera* treatment given to a “financial and cost data”); *see also*, Fobbs Dec., ¶18.

Although Respondents believe the injury flowing from disclosure of their financial information may be inferred from the nature of the documents themselves, this conclusion is further supported by the “secrecy” and “materiality” factors set forth above and addressed in detail in the Declaration of Carla Fobbs. Fobbs Dec., ¶13 to ¶17. Accordingly, Respondents have established that the information contained in Respondents’ Supplemental Response to Complaint Counsel’s First Set of Interrogatories is sufficiently secret, and sufficiently material to Respondents’ business, that a clearly defined, serious injury would result in the event of public disclosure. Fobbs Dec., ¶18.

### **3. Exhibit No. 36—Customer E-Mail**

Exhibit 36 contains information that is sensitive to both Respondents and their customers. Exhibit No. 36 is an electronic mail (“e-mail”) from a customer inquiring about the challenged

product Leptoprin. Fobbs Dec., ¶33, *citing*, Attachment 6. Respondents are extremely vigilant about respecting the privacy rights of their customers, particularly when it comes to matters of health. Fobbs Dec., ¶34. Accordingly, Respondents' have instituted a formal privacy policy, pursuant to which customer information and communications are not to be disclosed to the public. Fobbs Dec., ¶34.

Complaint Counsel's public disclosure of this e-mail violated Respondents' internal privacy policy, negatively affected Respondents' reputation in this regard, and compromised the privacy rights of Respondents' customers, who do not expect that their names, addresses, or communications will be publicly broadcast. Fobbs Dec., ¶35 and ¶36. That such information is sufficiently confidential to warrant protection from public disclosure is fully supported by Commission authority on the sensitivity of patient information. Fobbs Dec., ¶36 to ¶37; *see also*, *Evanston Northwestern Healthcare*, at \*2 (*in camera* treatment given to a "patient demographic, diagnostic and payment information"); *In re North Texas Specialty Physicians*, at \*2 ("patient information" satisfied clearly defined, serious injury standard.).

#### **4. Exhibit No. 42—Combined Balance Sheet**

Exhibit No. 42 contains information that is highly confidential. Exhibit No. 42 is a combined balance sheet, which includes financial notes. Fobbs Dec., ¶22, *citing*, Attachment 4. For reasons similar to those presented above regarding Respondents' financial information, this information is highly confidential because its release may enable competitors to capitalize on Respondents' finances and corporate structure. *Evanston Northwestern Healthcare*, at \*3 (*in camera* treatment given to a "recent financial audit."); *E.I. DuPont de Nemours*, at \*1 (*in camera* status extended to "investment, earnings, profit, operative return and cost information."); *see also*, Fobbs Dec., ¶24. This conclusion is supported by the face of the document as well as the

“secrecy” and “materiality” factors. Fobbs Dec., ¶23. Accordingly, Respondents have established that the information contained in the combined balance sheet is sufficiently secret, and sufficiently material to Respondents’ business, that a clearly defined, serious injury would result in the event of public disclosure. Fobbs Dec., ¶24.

**5. Exhibit 45—Dissemination Schedule**

**{REDACTED}**

{REDACTED}

**6. Exhibit R to Complaint Counsel's Motion to Compel Production of Documentary Material and Answers to Interrogatories**

Respondents were ordered not to limit their response to the Exhibits to Complaint Counsel's Motion for Partial Summary Decision. Order, p. 2. Upon a further review of the Commission's website, Respondents discovered that Complaint Counsel posted highly sensitive and confidential information in a purported "non-public" version of its Motion to Compel Production of Documentary Material and Answers to Interrogatories.

The "non-public" version of Complaint Counsel's Motion was filed with the Commission on December 6, 2004. Fobbs Dec., ¶19, *citing*, Attachment 3. The cover page reflected that the information contained therein was "Subject to Protective Order." *See*, Attachment 3 to Fobbs Dec. However, Exhibit R (one of the many exhibits attached) comprised Respondents' confidential gross sales figures for all six (6) challenged products, by year. Fobbs Dec., ¶19 to ¶20. This document was aptly designated by Respondents as "Confidential—Attorneys Eyes Only." *See*, Attachment 3 to Fobbs Dec.

The reason this information was erroneously posted to the Commission's public website was Complaint Counsel's pattern and practice of forwarding non-public information to the

Commission via e-mail in direct contravention of the Rules of Practice. *Compare*, Attachment 3, Certificate of Service (“one electronic copy via e-mail”) with 16 C.F.R. 4.2 (c)(3) (the electronic copy of each such document containing...confidential material shall be placed on a diskette so labeled...and *not transmitted by e-mail.*”) (emphasis added). It is clear that this erroneous procedure was followed notwithstanding Complaint Counsel’s recognition of the sensitivity of the information, because this information was properly omitted from the later filed “Public Version” of the Motion.

For reasons similar to those presented above regarding Respondents’ financial information, the information in Exhibit R is highly confidential, should not have been publicly disclosed, and satisfies the clearly defined, serious injury standard. *Evanston Northwestern Healthcare*, at \*1; *E.I. DuPont de Nemours*, at \*1; *see also*, the “secrecy” and “materiality” factors discussed in Fobbs Dec., ¶20.

Accordingly, Respondents have established that the information contained in Exhibit R to Complaint Counsel’s Motion to Compel Production is sufficiently secret, and sufficiently material to Respondents’ business, that a clearly defined, serious injury would result in the event of public disclosure. Fobbs Dec., ¶21.

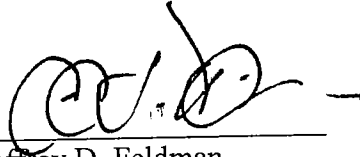
#### IV. CONCLUSION

The nature of the confidential information discussed, *supra*, is set forth in detail in the sworn statement of Carla Fobbs. Also attached hereto, for the Court’s convenience, is Table I, which identifies the documents in question, the designations thereof, and summaries of the sworn testimony as to the confidential nature of the information and the harm that would result in the event of public dissemination thereof.

In light of the support offered, and the arguments and authority presented herein,

Respondents respectfully submit that they have shown cause as to why the public disclosure of their confidential information would result in a clearly defined, serious injury to Respondents.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Feldman', written over a horizontal line.

Jeffrey D. Feldman  
Todd M. Malynn  
Gregory L. Hillyer  
Christopher P. Demetriades

Feldman Gale, P.A.  
Miami Center, 19<sup>th</sup> Floor  
201 South Biscayne Blvd.  
Miami, Florida 33131  
Tel: (305) 358-5001  
Fax: (305) 358-3309

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

## 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 two (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](mailto: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](mailto:lkapin@ftc.gov), [jmillard@ftc.gov](mailto:jmillard@ftc.gov); [rrichardson@ftc.gov](mailto:rrichardson@ftc.gov); [lschneider@ftc.gov](mailto: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 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.

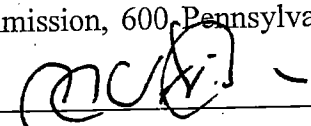
  
\_\_\_\_\_



TABLE I

Document Description	Document Designation	Type of Information	Why Public Disclosure Would Cause Clearly Defined, Serious Injury
<p><b>PRODUCT FORMULATION DATA FOR ALL SIX CHALLENGED PRODUCTS</b></p> <p>(Respondents' Response to Complaint Counsel's First Set of Interrogatories and corresponding Exhibit A - Exhibit 11 to Complaint Counsel's Motion for Partial Summary Decision)</p>	<p>RESTRICTED CONFIDENTIAL - ATTORNEYS EYES ONLY</p>	<p>Trade Secrets</p>	<p>a) The product formulation is not known outside Respondents' business, except to manufacturers who have executed confidentiality agreements.</p> <p>b) The product formulation is only known to those employees whose job duties require that they have such information.</p> <p>c) The product formulation is closely guarded and only disclosed as set forth above.</p> <p>d) The product formulation would be extremely valuable to competitors, who could use it to manufacture and market competing products.</p> <p>e) The product formulation was diligently developed over time at great expense.</p> <p>f) The product formulation could not be easily acquired by proper means.</p>
<p><b>NET GROSS REVENUE AND ADVERTISING EXPENDITURES BY YEAR FOR ALL SIX CHALLENGED PRODUCTS</b></p> <p>(Respondents' Supplemental Response to Complaint Counsel's First Set of Interrogatories and</p>	<p>ATTORNEYS EYES ONLY</p>	<p>Financial Information</p>	<p>a) The net gross revenue and advertising expenditures are not known outside Respondents' business.</p> <p>b) The net gross revenue and advertising expenditures are only known by the few employees whose job duties require that they have such information.</p> <p>c) The net gross revenue and advertising expenditures are closely guarded and only disclosed as set forth above.</p> <p>d) The net gross revenue and advertising expenditures would be valuable to competitors, who could use them</p>

Document Description	Document Designation	Type of Information	Why Public Disclosure Would Cause Clearly Defined, Serious Injury to create an accurate financial model of Respondents' business.
<p>corresponding Exhibit A – Exhibit 15 to Complaint Counsel’s Motion for Partial Summary Decision)</p>			<p>to create an accurate financial model of Respondents' business.</p> <ul style="list-style-type: none"> <li>e) The net gross revenue and advertising expenditures represent the time, energy, and money spent by Respondents in developing, marketing, and promoting the challenged products.</li> <li>f) The net gross revenue and advertising expenditures could not be acquired by third parties using proper means.</li> </ul>
<p><b>CUSTOMER EMAIL INQUIRY INCLUDING CUSTOMER’S NAME AND EMAIL ADDRESS</b></p> <p>(Exhibit 36 to Complaint Counsel’s Motion for Partial Summary Decision)</p>	<p>RESTRICTED CONFIDENTIAL – ATTORNEYS EYES ONLY</p>	<p>Commercial Information</p>	<ul style="list-style-type: none"> <li>a) The identity and address of Respondents’ customers is not known outside Respondents’ business.</li> <li>b) The identity and address of Respondents’ customers is known only by select employees who screen, respond to, and analyze customer inquiries.</li> <li>c) The identity and address of Respondents’ customers is protected by Respondents’ corporate privacy policy, which pledges not to disclose certain customer communications and information.</li> <li>d) Respondents and their customers have a privacy interest in maintaining confidentiality of customer identity and communications to prevent a chilling effect on customer inquiries and feedback and maintain integrity of Respondents’ privacy policy. Also, the identity and address of Respondents’ customers would be valuable to Respondents’ competitors because it would allow them to market competing products to these customers.</li> </ul>

Document Description	Document Designation	Type of Information	Why Public Disclosure Would Cause Clearly Defined, Serious Injury
			<ul style="list-style-type: none"> <li>e) Customer feedback is incorporated in Respondents' ongoing product development, marketing, and business strategies.</li> <li>f) Respondents' customers have a reasonable expectation of privacy in their health inquiries, identities, and addresses.</li> </ul>
<p><b>COMBINED BALANCE SHEET</b> (Exhibit 42 to Complaint Counsel's Motion for Partial Summary Decision)</p>	<p>CONFIDENTIAL AND PROPRIETARY INFORMATION</p>	<p>Financial Information</p>	<ul style="list-style-type: none"> <li>a) The combined balance sheet is only known outside Respondents' business to professionals (accountants, attorneys, etc.) under a duty of confidentiality.</li> <li>b) The combined balance sheet is known only by the few employees within Respondents' business whose job duties require them to have such knowledge.</li> <li>c) The combined balance sheet is closely guarded and only disclosed as set forth above.</li> <li>d) The combined balance sheet would be valuable to competitors who could use it to create an accurate financial model of Respondents' business.</li> <li>e) The information on the combined balance sheet represents the time, energy, and money spent by Respondents in developing, marketing, and promoting the challenged products.</li> <li>f) The combined balance sheet could not be acquired by third parties using proper means.</li> </ul>

Document Description	Document Designation	Type of Information	Why Public Disclosure Would Cause Clearly Defined, Serious Injury
<p><b>ADVERTISING DISSEMINATION SCHEDULE</b>                      (Exhibit 45 to Complaint Counsel's Motion for Partial Summary Decision)</p>	<p>RESTRICTED CONFIDENTIAL – ATTORNEYS EYES ONLY</p>	<p>Commercial Information</p>	<p>a) The advertising dissemination schedule is not known or available outside Respondents' business, except by those under a duty of confidentiality to Respondents.                      b) The advertising dissemination schedule is known only by the very few employees whose job duties require them to have such knowledge.                      c) The advertising dissemination schedule is closely guarded and not disseminated. It is protected from third party dissemination under confidentiality agreements.                      d) The advertising dissemination schedule is an extremely valuable blue print for competitor advertisers who could readily discern and unfairly profit from Respondents' advertising model.                      e) The advertising dissemination schedule was developed over thirteen years after refining and modifying results from prior advertising campaigns and expenditure of millions of dollars.                      f) The advertising dissemination schedule could not be obtained by third parties using proper means.</p>

Document Description	Document Designation	Type of Information	Why Public Disclosure Would Cause Clearly Defined, Serious Injury
<p><b>GROSS SALES FIGURES FOR ALL SIX CHALLENGED PRODUCTS</b>                      (Exhibit R to Complaint Counsel's Motion to Compel Production of Documentary Materials and Answers to Interrogatories)</p>	<p>RESTRICTED                      CONFIDENTIAL                      ATTORNEY                      EYES ONLY</p>	<p>Financial Information</p>	<p>a) The gross sales figures are not known outside Respondents' business.                      b) The gross sales figures are only known to those few employees within Respondents' business whose job duties require them to have such knowledge.                      c) The gross sales figures are closely guarded and are only disclosed as explained in the paragraphs above.                      d) The gross sales figures would be valuable to Respondents' competitors because it would allow them to create an accurate financial model of Respondents' business.                      e) The gross sales figures represent the time, energy, and money spent by Respondents in developing, marketing, and promoting the challenged products.                      f) The gross sales figures could not be replicated or acquired by any third parties by proper means.</p>

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

**PUBLIC DOCUMENT**

**(Amended version)**

**DOCKET NO. 9318**

**DECLARATION OF CARLA FOBBS**

1. I am Carla Fobbs and I am employed as the Legal Administrator for Basic Research, LLC.
2. This Declaration is submitted in support of Respondents' Response to the Order to Show Cause dated March 9, 2005. I have personal knowledge of the facts set forth in this Declaration.
3. I have reviewed the documents posted on the FTC's website docket as it existed on February 17, 2005, including but not limited to the exhibits to Complaint Counsel's Motion for Partial Summary Decision ("Complaint Counsel's Motion") and Exhibit R to Complaint Counsel's Motion to Compel Production of Documentary Materials and Answers to Interrogatories. This review was conducted for the purposes of determining which documents posted on the FTC's website contain confidential information, the disclosure of which would cause clearly defined, serious injury. Based on my job responsibilities in the Compliance

Department, I am familiar with the documents of Basic Research, LLC, and Ban, LLC, and the level of confidentiality associated with the subject matter contained therein.

4. Based on my review of the documents posted on the FTC website docket, and in light of the foregoing, the types of documents that require confidential treatment include trade secrets, financial information, and various types of commercial information. Each is reviewed in turn below and, for convenience, summarized in Table 1 to Respondents' Response to the Order to Show Cause.

### **PRODUCT FORMULATION**

#### **Exhibit 11 to Complaint Counsel's Motion—Respondents' Response to Complaint Counsel's First Set of Interrogatories**

5. Exhibit 11 to Complaint Counsel's Motion consists of a copy of Respondents' Response to Complaint Counsel's First Set of Interrogatories and corresponding Exhibit A. Exhibit A contains product formulation data,

**{REDACTED}**

A copy of Exhibit A is attached to this declaration as Attachment 1.

6. The product formulation information is not known outside of Respondents' business, except by the companies who manufacture the products. Respondents have maintained confidentiality agreements with each manufacturer in order to protect the secrecy of the product formulation.

7. Product formulation information is only provided to those employees within Respondents' business whose job duties require them to have such knowledge. Further, the employees are only provided the amount of information necessary for them to perform their job duties. For example, an employee in marketing may know the name of the active ingredient of a

product in order to include that information in an advertisement, but that person would not be provided with information {REDACTED} In contrast, an employee in the research and development department would have information about the exact formulation of a product, {REDACTED} because the research and development department would have been involved in creating and/or researching the product formulation.

8. Respondents guard their product formulation information very closely. All of Respondents' employees who receive such information understand that this information is highly confidential and cannot be disclosed to any person, even within Respondents' business, who does not need to know it. All manufacturers who have product formulation information have executed confidentiality agreements with Respondents.

9. Respondents' competitors would place great value on the product formulation information. With such information, competitors could easily market identical products in direct competition with Respondents without having to expend the time, energy, and money that Respondents spent developing these products. Even the product formulation for the discontinued products, Anorex and Leptoprin, would be valuable to Respondents' competitors because these products are still being sold in other countries where sale of such products is allowed.

Competitors could easily {REDACTED} if they had access to Respondents' product formulation data.

10. Respondents expended {REDACTED} in research and development for PediaLean, LeptoPrin, Anorex, Tummy Flattening Gel, Cutting Gel, and Dermalin-APg.



11. Public disclosure of the product formulation information would cause a clearly defined, serious injury to Respondents because such disclosure would provide an unfair competitive edge to Respondents' competitors and would destroy Respondents' market share for their products in this country and in other countries.

### **FINANCIAL INFORMATION**

#### **Exhibit 15 to Complaint Counsel's Motion—Respondents' Supplemental Response to Complaint Counsel's First Set of Interrogatories**

12. Respondents' Supplemental Response to Complaint Counsel's First Set of Interrogatories and corresponding Exhibit A were posted on the FTC's website as Exhibit 15 to Complaint Counsel's Motion. Exhibit A contains net gross revenue by year and advertising expenditure by year for all six challenged products. {REDACTED}

A copy of Exhibit A is attached to this declaration as Attachment 2.

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

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

15. Respondents protect their financial information very closely. All of Respondents' employees who receive such information understand that this information is highly confidential

and cannot be disclosed to any person, even within Respondents' business, who does not need to know it. Further, this information is not disclosed outside the company, except to those professionals who have a duty to maintain such information in confidence.

16. The net gross revenue and advertising expenditures for the challenged products would be valuable to Respondents' competitors because it would allow the competitors to construct an accurate financial model of Respondents' business to Respondents' detriment.

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

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

**Exhibit R to Complaint Counsel's Motion to Compel Production of Documentary  
Materials and Answers to Interrogatories**

19. Exhibit R to Complaint Counsel's Motion to Compel Production of Documentary Materials and Answers to Interrogatories, dated December 6, 2004, consists of a table that provides the annual gross sales figures for all six challenged products from the beginning of their respective sales through August 13, 2004. A copy of Exhibit R is attached to this declaration as Attachment 3.

20. Respondents' gross sales figures are confidential financial information for all the reasons detailed above regarding Respondents' net gross revenue and advertising expenditures. Respondents protect and limit access to their gross sales figures in the same way that they protect their net gross revenue and advertising expenditure data. Respondents' gross sales figures would be valuable to Respondents' competitors because it would allow the competitors to construct an

accurate financial model of Respondents' business to Respondents' detriment. The gross sales figures could not be replicated or acquired by any third parties by proper means.

21. Public disclosure of Respondents' gross sales figures would cause a clearly defined, serious injury to Respondents.

**Exhibit 42 to Complaint Counsel's Motion for Partial Summary Decision**

22. A balance sheet detailing Respondents' assets and liabilities was posted on the FTC's website as Exhibit 42 to Complaint Counsel's Motion. A copy of the balance sheet is attached to this declaration as Attachment 4.

23. Respondents' balance sheet analyzing their assets and liabilities is confidential financial information for all the reasons detailed above regarding Respondents' net gross revenue and advertising expenditures and Respondents' gross sales figures. Respondents protect and limit access to their balance sheet containing their assets and liabilities in the same way that they protect and limit access to their gross sales figures, net gross revenue, and advertising expenditure data. Respondents' balance sheet disclosing their assets and liabilities would be valuable to Respondents' competitors because it would allow the competitors to construct an accurate financial model of Respondents' business to Respondents' detriment. Finally, the balance sheet revealing Respondents' assets and liabilities could not be replicated or acquired by any third parties by proper means.

24. Public disclosure of the balance sheet detailing Respondents' assets and liabilities, would cause a clearly defined, serious injury to Respondents.

**COMMERCIAL INFORMATION**

**Exhibit 45 to Complaint Counsel's Motion for Partial Summary Decision**

25. Exhibit 45 to Complaint Counsel's Motion consists of advertising dissemination schedules  
{REDACTED}

**{REDACTED}** A copy of the advertising dissemination schedules is attached to this declaration as Attachment 5.

26. Respondents' commercial information, including but not limited to the advertising dissemination schedules, is not known outside Respondents' business to anyone other than Respondents' advertising agency, which has executed a non-disclosure agreement with Respondents agreeing to keep confidential Respondents' commercial information, including the information on the advertising dissemination schedules.

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

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

29. The advertising dissemination schedules would be valuable to Respondents' competitors **{REDACTED}**

This would allow competitors to profit from the time, energy, and money Respondents have spent in perfecting their marketing strategy.

30. **{REDACTED}**

{REDACTED}

It would be virtually impossible for the advertising dissemination schedules to be replicated or acquired by any third parties by proper means.

{REDACTED}

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

**Exhibit 36 to Complaint Counsel's Motion for Partial Summary Decision**

33. Exhibit 36 to Complaint Counsel's Motion for Partial Summary Decision contains a two-page e-mail inquiry from a customer, whose name is not redacted. A copy of the email is attached to this declaration as Attachment 6.

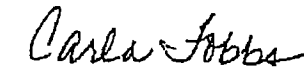
34. Respondents are extremely vigilant about respecting the privacy rights of their customers, particularly when it comes to matters of health. In order to protect customers' privacy rights, Respondents' have instituted a formal privacy policy, pursuant to which customer communications are not disclosed to the public.

35. Public disclosure of the customer's name and email address violated Respondents' internal privacy policy, negatively affects Respondents' reputation, and compromised the privacy rights of Respondents' customers, who do not expect that their names, addresses, and communications will be disclosed.

36. Public disclosure of Respondents' customer's name and email address would cause a clearly defined, serious injury.

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

Executed: March 15<sup>th</sup>, 2005.



---

CARLA FOBBS

# **ATTACHMENT 1**

**{REDACTED}**

# **ATTACHMENT 2**

**{REDACTED}**



# **ATTACHMENT 3**

**{REDACTED}**

# **ATTACHMENT 4**

**{REDACTED}**

# **ATTACHMENT 5**

**{REDACTED}**

# **ATTACHMENT 6**

**{REDACTED}**