

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

[REDACTED]

Upon review of the pleadings and attachments, including sworn declarations, it is determined that Respondents' three motions must be certified to the Commission because: (1) the motions raise allegations, *inter alia*, requiring determination of matters beyond the merits of the violation of law charged in the Complaint; (2) the challenged conduct appears to involve ~~officers of the Commission and/or employees other than Complaint Counsel;~~ and (3) the

requested relief exceeds the authority delegated to the Administrative Law Judge ("ALJ"). 16 C.F.R. § 3.22(a). See also 16 C.F.R. §§ 3.42(c)(10), 3.42(h); *In re Drug Research Corp.*, 63 F.T.R. 102 (1962), 63 F.T.R. 103 (1962). For that same reason, the

...determining on the appropriate disposition of the motions can be provided. Rather, the

On March 16, 2005, Respondents Basic Research and Ban filed a response to the order to show cause ("show cause response").

On March 21, 2005, Respondents Basic Research and Ban filed a response to the order to show cause ("show cause response").

contempt and discovery motions ("consolidated opposition").

On March 29, 2005, the parties were ordered to file amended pleadings which properly

limited the facts and conclusions to those supported by the evidence. ("Consolidated Opposition")

the exhibits thereto in hard copy as a draft and via email and served the File as Demandant

via email "consistent with how Complaint Counsel filed and served non public pleadings in this

matter until February 17, 2005." Electronic File as response of attachment D (copy)

B. Protective Order

The first paragraph of the Protective Order issued by the AF Education Committee is as follows:

[REDACTED]

the change in the Rules, parties were required to seek *in camera* treatment for exhibits to motions

1. Analysis of the Parties' Arguments

Respondents contend that Complaint Counsel's duty to maintain Respondents'

confidential information in issue is that Complaint Counsel imposed a legal duty

owed to Respondents that protective orders which vital role in litigation that Complaint

which will be conducted when and if the exhibits are offered as exhibits at trial, it does appear that a number of the exhibits contain confidential information that is entitled to *in camera* treatment under the Commission's Rules and precedent. Even if some of the exhibits do not contain information rising to the level needed to merit *in camera* protection, Complaint Counsel

has, nevertheless, violated Rule 4.2(c)(3) and the Protective Order by facilitating the dissemination to the public of material subject to the Protective Order. A review of the six challenged exhibits follows.

Exhibit 15 to Complaint Counsel's motion for partial summary decision ("Exhibit 15") and Exhibit D to Complaint Counsel's motion to compel ("Exhibit D") both contain not more

Counsel's first set of interrogatories. *Id.* The interrogatories were marked by Respondents as a "Public Document" on the cover but marked as "Restricted, Confidential – Attorneys Eyes Only" on the attached product formulations. Consolidated opposition at 35-47. Thus, trade secrets that were attached by Respondents to interrogatory responses have been made public by Complaint Counsel. Complaint Counsel is on notice that the product formulations in Exhibit 11 are subject to the Protective Order and Complaint Counsel shall treat them as such in the future.

2. Certification of Contempt Motion

Respondents seek an order to show cause why Complaint Counsel should not be held in contempt for violation of the ALJ's Protective Order and the Commissions' Rules. Contempt motion at 23-25. Contempt proceedings are authorized by Commission Rule 3.42(h) which states:

(h) *Failure to comply with Administrative Law Judge's directions.* Any

request for monetary sanctions, are certified to the Commission as these sanctions are beyond the authority of the ALJ. 16 C.F.R. § 3.22(a); *Drug Research Corp.*, 1963 FTC LEXIS 43, at *36-

this proceeding" and Complaint Counsel through its

However, the release of the electronic files may violate the Commission's privacy policy. Electronic files supp. response at 3-4. Respondents have provided no basis to suggest that issuance of an order granting such release is within the authority of the Administrative Law

disclose information from Commission records not currently available to the public. 16 C.F.R. §

Commissioner's public website and (2) seeking additional disclosures. ~~CONFIDENTIAL~~ 4

Commission for resolution without recommendation.

The Commission is best suited to decide Respondents' three motions and to investigate and determine, as necessary, the extent of further discovery address requested by the