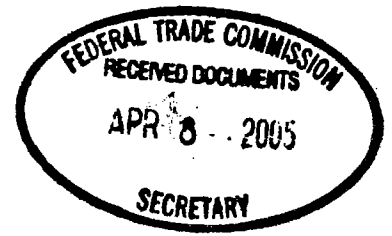


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

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.

Respondents claim that they are entitled to summary judgment on the issues

The ALJ also has no discretion but to certify Respondents' Motion to the Commission,



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 \_\_\_\_\_ 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

### III. ARGUMENT

1. Standard Injury Standard

2. “Unidentified serious injury” can

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* Docket No. 0095 at \*12 (August 1, 1980)). As such, a general concern for the

[REDACTED]

CONFIDENTIAL - INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE AS BEING CLASSIFIED "CONFIDENTIAL PROPRIETARY" AND "RESTRICTED CONFIDENTIAL"

[REDACTED]



{REDACTED}

Even Complaint Counsel has acknowledged the confidential nature of this information in

Complaint Counsel's Motion to

Supplemental Response contains net gross revenue by year and advertising expenditures by year

[REDACTED]

[REDACTED]

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

[REDACTED]

“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.

**Exhibit 45 - Dissemination Schedule**

{REDACTED}

**Exhibit D to Complaint Counsel's Motion to Compel Production of**

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

Commission via e-mail in direct contravention of the Rules of Practice. Compare, Attachment 3,

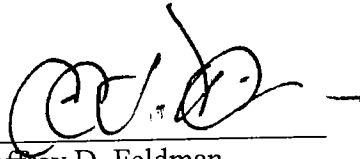
Certificates of Service (“one electronic copy via e-mail”) with 16 C.F.R. 4.2 (c)(3) (the electronic

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.

“... Defendants’ financial

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,



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

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**Attorneys for Respondents Basic Research, LLC,  
A.G. Waterhouse, LLC, Klein-Becker USA,  
LLC, Nutrasport, LLC, Söavage 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  
[REDACTED] [FTC\\_Secretary@ftc.gov](mailto:FTC_Secretary@ftc.gov)

[REDACTED] Administrative Law Judge Stephen I



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**What Would Cause  
Serious Injury**

Legal model of Respondents'

advertising expenditures  
and money spent by  
marketing, and promoting

advertising expenditures  
third parties using proper

Respondents' customers is  
clients' business.

Respondents' customers is  
employees who screen, respond  
inquiries.

Respondents' customers is  
corporate privacy policy,  
use certain customer  
nation.

Customers have a privacy  
confidentiality of customer  
information to prevent a chilling  
effect and feedback and  
Respondents' privacy policy.

Loss of Respondents'  
ability to Respondents'  
would allow them to market  
these customers.

TENT

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*In the Matter of*

BASIC RESEARCH, L.L.C,

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PUBLIC DOCUMENT

4. Based on my review of the documents posted on the FTC website docket, and in

... that require confidential treatment include trade

product in order to include that information in an advertisement, but that person would not be

In contrast on

[The remainder of the page is almost entirely obscured by heavy black redaction bars and horizontal scan artifacts.]



1. [REDACTED] of the product formulation information would cause a clearly

[REDACTED]

2. [REDACTED] [REDACTED] because such disclosure would provide an unfair

[REDACTED]

[REDACTED]

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~~

~~and promoting the challenged products.~~

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.

**REDACTED** Motion for Partial Summary Decision

{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.

\_\_\_\_\_ only known to those

[REDACTED]

{REDACTED}

It would be virtually impossible for the advertising dissemination schedules to be

\_\_\_\_\_ by \_\_\_\_\_ means

[REDACTED]

cause a clearly defined, serious injury.

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

*Ag... ..*

# ATTACHMENT 1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

# ATTACHMENT 2

REDACTED





# **ATTACHMENT 3**

**{REDACTED}**

# **ATTACHMENT 4**

**{REDACTED}**

# **ATTACHMENT 5**

**{REDACTED}**

# **ATTACHMENT 6**

**{REDACTED}**