

**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.,  
    BASIC RESEARCH, A.G. WATERHOUSE,  
BAN, L.L.C.,  
    d/b/a KLEIN-BECKER USA, NUTRA SPORT, and  
    SOVAGE DERMALOGIC LABORATORIES,  
DENNIS GAY,  
DANIEL B. MOWREY,  
    d/b/a AMERICAN PHYTOTHERAPY RESEARCH  
    LABORATORY, and  
MITCHELL K. FRIEDLANDER

*Respondents.*

**DOCKET NO. 9318**

**RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S MOTION TO COMPEL  
PRIVILEGE LOG**

Respondents, Basic Research, LLC, Klein-Becker, USA, LLC, A.G. Waterhouse, LLC, NutraSport, LLC, Sövage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, Daniel B. Mowrey, Ph.D., and Mitchell K Friedlander respectfully submit this reply to Complaint Counsel's Motion to Compel Privilege Log. For the reasons discussed, chief among them that Respondents are already revising the Privilege Log at issue as Complaint Counsel well knew, this Court should deny the Order as being unnecessary. In support, Respondents state as follows:

## I. INTRODUCTION

On December 7, 2004, Complaint Counsel filed their *Motion to Compel Privilege Log*<sup>1</sup>. This Motion, filed in apparent retaliation to this Court Order's granting Basic Research L.L.C.'s *Motion to Compel Proper Privilege Log from Complaint Counsel*, seeks production of Privilege Logs in full compliance with Commission Rule of Practice 3.38A.

Previously, on October 6, 2004 Basic Research, L.L.C. served its Privilege Log identifying all documents that it was withholding from production based on privilege. The log identified dates of documents, Bates ranges, applicable privileges, from/to information and descriptions of the withheld documents. Ban L.L.C.'s Privilege Log<sup>2</sup>, served on August 12, 2004, provided the same information.

Subsequent to this Court's December 1, 2004 *Order*, Complaint Counsel raised the issue of Basic Research L.L.C.'s Privilege Log. The Privilege Log had been prepared by the client. Undersigned Counsel for Basic Research, L.L.C. informed Complaint Counsel that it would review the client's log to determine whether all documents listed were properly withheld and to correct any deficiencies on the log. When Complaint Counsel filed their Motion, they knew that this process was ongoing and knew that certain documents previously withheld were going to be produced and that a revised privilege log was forthcoming. Therefore, there was no need for the instant Motion because Complaint Counsel knew Respondents were already in the process of compiling the very information they now seek by way of the instant Motion

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<sup>1</sup> Through oversight, the undersigned counsel miscalendered this response date for December 18<sup>th</sup> rather than the 17<sup>th</sup>. But Respondents file this Reply to inform this Court of Respondents' intentions and ongoing efforts to obviate this issue.

<sup>2</sup> Ban L.L.C.'s Privilege Log identifies two pages withheld from production.

## II. RESPONDENTS ARE IN THE PROCESS OF REVISING THE PRIVILEGE LOG

Complaint Counsel have acknowledged Respondents' efforts in their own Motion. Respondents have already spent numerous hours going through the documents on that log as well as the descriptions on that log to ensure that the Commission Rules of Practice were complied with. They have done so at considerable effort and expense in an effort to address any concerns that Complaint Counsel raised. Indeed, Respondents have already produced in a Supplemental Production of documents well over one hundred previously withheld documents. As to the Privilege Log itself, as Complaint Counsel has known all along, Respondents are currently voluntarily and in good faith revising and supplementing the information to fully comply with Commission Rule of Practice 3.38A. Those revisions are nearly complete and will be forthcoming. In short, the substance of the relief Complaint Counsel has requested is relief Respondents have already agreed to.

## III. COMPLAINT COUNSEL SEEKS PRIVILEGE LOGS FROM PARTIES WITHHOLDING NO PRIVILEGED DOCUMENTS

Commission Rule of Practice 3.38A and interpreting case law requires that a party withholding documents produce, if directed to do so, a privilege log. *Commission Rule of Practice 3.38A; In re MSC Software Corp.*, Docket No. 9299, 2002 WL 31433929, F.T.C. (Feb. 21, 2002). Where a particular respondent has withheld from production no privileged documents, however, no privilege log need be nor can be produced.

The production to Complaint Counsel in this matter has been enormous, encompassing tens of thousands of documents. Where documents were privileged and withheld as they were with Basic Research, L.L.C.'s documents and Ban, L.L.C.'s documents, those documents were

identified on the Privilege Logs previously served. To the extent that Complaint Counsel has raised the sufficiency of those Logs, as discussed above, those issues are being addressed. With respect to the other Corporate Respondents, however, because none withheld any documents from production, no privilege logs could be or were prepared.

#### IV. MISCELLANEOUS

Although Complaint Counsel has not specifically raised this issue as relief and it is premature, Complaint Counsel has suggested that correspondence among Respondents' counsel be listed on Respondents' Privilege Log. But from the brief allusion, Complaint Counsel appears to fundamentally misinterpret the role of lawyers representing respondents in litigation. Complaint Counsel is the petitioner in this litigation and is a party<sup>3</sup>. Respondents' litigation counsel, however are not parties to this litigation. Therefore, while it makes sense that Complaint Counsel list their withheld documents on their Privilege Log, no similar logic applies to the result Complaint Counsel suggests. Thus correspondence among Respondents are beyond the scope of discovery and need not be identified on any privilege log.

Finally, with respect to Respondents Gay and Mowery, counsel are in the process of determining whether any attorney client correspondence falls within the scope of the production requests. To the extent that any does, Gay and Mowery will produce Privilege Logs in compliance with Commission Rule of Practice 3.38A.

#### IV. CONCLUSION

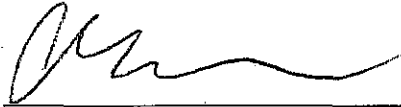
Respondents, and in particular Basic Research, L.L.C. have been engaged in an ongoing effort to produce a revised Privilege Log and address issues of privilege generally. Those considerable efforts have already resulted in further production of previously withheld

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<sup>3</sup> Indeed, Complaint Counsel has recognized such in its Opposition to Basic Research's *Motion to Compel Proper Privilege Log*.

documents to Complaint Counsel and the agreement of counsel to produce a revised Privilege Log. Respondents, voluntarily and in good faith are continuing this process which will shortly be completed. The relief sought by Complaint Counsel is therefore unnecessary and premature. This Court should accordingly decline to enter the relief requested by Complaint Counsel.

Respectfully submitted



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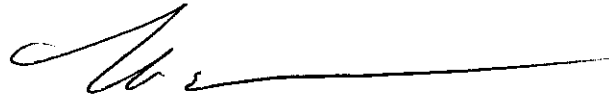
**Counsel for Respondents Basic Research, L.L.C.,  
A.G. Waterhouse, L.L.C., Klein-Becker USA,  
L.L.C., Nutrasport, L.L.C., Sovage Dermalogic  
Laboratories, L.L.C. and Ban, L.L.C**

DATED this 20 day of December, 2004.

BURBIDGE & MITCHELL

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Richard D. Burbidge  
Attorneys for Respondent Dennis Gay

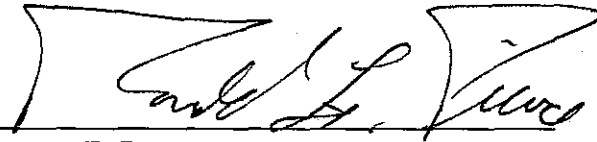


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A handwritten signature in black ink, appearing to read "Ronald F. Price", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 20<sup>th</sup> day of December, 2004 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, Lauren Kapin, Joshua S. Millard, and Laura Schneider, all care of [lkapin@ftc.gov](mailto:lkapin@ftc.gov), [jmillard@ftc.gov](mailto:jmillard@ftc.gov); [richardson@ftc.gov](mailto:richardson@ftc.gov); [lschneider@ftc.gov](mailto:lschneider@ftc.gov) with one (1) paper courtesy copy via U. S. Postal Service to Lauren 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 20th day of December, 2004 via Federal Express with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

