

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)
)
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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

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENTS' PRODUCTION OF PRIVILEGE LOGS
THAT COMPLY WITH RULE OF PRACTICE 3.38A**

Pursuant to RULES OF PRACTICE 3.22 and 3.38(a), Complaint Counsel respectfully move for an *Order* compelling the production of privilege logs related to Complaint Counsel's *First Request For Production of Documentary Materials and Tangible Things*, which were served on June 25, 2004. This motion is supported by the accompanying Memorandum of Law, RULE 3.22(f) Statement, and proposed *Order*.

Respectfully submitted,



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Joshua S. Millard (202) 326-2454
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Laura Schneider (202) 326-2604

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
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Washington, D.C. 20580
Counsel Supporting the Complaint

Dated: December 7, 2004

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

In the Matter of)
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**COMPLAINT COUNSEL’S MEMORANDUM IN SUPPORT OF MOTION
TO COMPEL PRODUCTION OF PRIVILEGE LOGS
THAT COMPLY WITH RULE OF PRACTICE 3.38A**

Complaint Counsel respectfully submit this *Memorandum* in support of our *Motion to Compel Production of Privilege Logs that Comply with Rule of Practice 3.38A*. The Court’s recent *Order* made clear that all parties to this litigation must produce privilege logs that “conform to the requirements of RULE 3.38A.” *See Order Granting Basic Research’s Fourth Motion To Compel* (Dec. 1, 2004). Nevertheless, despite document requests and interrogatories served upon all nine respondents, to date, only two corporate respondents have produced a privilege log describing the withheld materials. The single log produced suffers from severe deficiencies which Respondents have failed to remedy. Complaint Counsel has raised the absence of privilege logs and the deficiencies of the single privilege log with Respondents’ counsel. Nevertheless, after discussion, including references to the Court’s recent *Order*,

Respondents have flatly refused to either 1) provide the missing privilege logs or 2) conform the single, deficient log to the requirements set forth in RULE 3.38A. Respondents' continued failure to fully comply with their discovery obligations is wholly unjustified. For the reasons set forth below, this Court should issue an *Order* compelling each Respondent to issue privilege logs in compliance with RULE 3.38A.

BACKGROUND

On June 15, 2004, the Commission filed the *Complaint* in this matter, alleging, *inter alia*, that Basic Research LLC and other related individuals and companies (collectively, "Respondents") marketed certain dietary supplements with unsubstantiated claims for fat loss and/or weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"). On June 25, 2004, Complaint Counsel served discovery requests on Respondents. Our first requests consisted of a *First Request for Production of Documentary Materials and Tangible Things* ("*Document Request*"), and a *First Set of Interrogatories* ("*Interrogatories*") both attached as Exhibit 1. These initial requests included a detailed instruction directing Respondents to prepare a schedule of items withheld which states individually for each item withheld: (a) the type, title, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that the item is privileged." See *Document Request* at Instruction 10 and *Interrogatories* at Instruction 9. Respondents have taken many months to provide documents to Complaint Counsel producing materials on August 9th, August 18th, September 9th, October 27th, November 16th, and most recently, on November 18th. All of the produced documents have come from just

two Respondents—Basic Research LLC and BAN LLC. The remaining seven Respondents—A.G. Waterhouse, Klein-Becker USA, Nutrasport, Sovage Dermalogic Laboratories, Dennis Gay, Daniel Mowrey, and Mitchell K. Friedlander—have produced *no* documents whatsoever. The remaining Respondents have also failed to produce *any* privilege logs describing responsive documents withheld and the bases for withholding them.

On October 6, 2004, Respondents produced what was essentially a draft privilege log one admittedly “not prepared by [Respondent Counsel’s] office” which listed documents that Respondent’s counsel had yet to review. *See* October 6th 2004 letter transmitting Respondents’ Privilege Log attached as Exhibit 2. Respondents have not updated that log to include materials that may have been withheld from their three subsequent productions in late October and November. Complaint Counsel identified several serious concerns with that log, including its lack of sufficient detail in its document description, and its general descriptions of documents that appeared to fall outside the scope of recognizable privileges. *See October 15th, 2004 Letter from Mr. Millard to Mr. Feldman* attached as Exhibit 3.

As set forth in the attached RULE 3.22(f) Statement, Complaint Counsel attempted to negotiate with Respondents’ counsel and Mr. Friedlander regarding these issues. As to the Respondents who have yet to produce any log, they have refused to comply with their obligations under RULE 3.38A. As to the deficient log, Complaint Counsel has raised numerous serious concerns regarding the draft log in writing and over the course of several telephone conversations. Despite notifications that certain documents were not truly privileged and would be produced and assurances that the deficiencies in the privilege log would be remedied, Complaint Counsel has not received any further documents or a revised privilege log from

Respondents. On December 1, 2004, the Court issued an *Order* granting Basic Research's motion to compel a more complete privilege log. In that *Order*, the Court stated:

Provision of a complete privilege log may be time consuming for both parties. Indeed, Complaint counsel argues that Respondent's privilege log is deficient as well. To the extent the parties all agree to waive certain requirements that are not necessary to determine whether the document is entitled to the privilege claimed, the parties may do so. However, if the parties are unable to reach an agreement, the privilege logs must conform to the requirements of Rule 3.38A.

Order Granting Basic Research's Fourth Motion to Compel (Dec. 1, 2004). On December 2nd, Complaint Counsel attempted to reach an agreement on privilege log issues but was unable to do so. Accordingly, Complaint Counsel now moves to compel the production of privilege logs complying with RULE 3.38A from *all* Respondents.

DISCUSSION

I. Seven Respondents' Failure to Produce any Privilege Log Whatsoever Violates RULE 3.38A

RULE 3.38A clearly obligates parties holding materials responsive to document requests or written interrogatories to submit

a schedule of items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

Respondents should have produced a privilege log to support the objections based upon privilege set forth in their discovery responses. In responding to Complaint Counsel's interrogatories, the Corporate Respondents collectively raised objections asserting that the discovery sought was "protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of

privacy including financial privacy.” *See Response to Complaint Counsel’s First Set of Interrogatories* attached as Exhibit 4. In fact, the Respondents asserted these privileges with respect to each and every interrogatory specification propounded by Complaint Counsel. *Id.* The Individual Respondents, including Respondent Friedlander, also included assertions of privilege in their General Objections and specific objections and incorporated by reference the responses of the other Respondents. *See, e.g., Respondent Friedlander’s General Objections* attached as Exhibit 5. Similarly, in responding to Complaint Counsel’s document requests, the Corporate and Individual Respondents all asserted identical general objections based upon attorney client privilege, work product immunity “and/or any other privilege or immunity.” *See e.g., Respondent Basic Research and Respondent Gay’s General Objections* attached as Exhibit 6. Respondents’ subsequent responses to Complaint Counsel’s discovery requests all contain similar assertions of privilege without any underlying schedule of documents withheld to support these assertions.

Despite these assertions of privilege, despite moving to compel Complaint Counsel to produce a more detailed privilege log, *none* of the Respondents, save Basic Research and BAN, have produced a schedule of documents containing the information mandated under RULE 3.38A. As Respondents themselves argued in their *Motion to Compel Proper Privilege Log*, parties “must comply with the requirements of 16 C.F.R. § 3.38A and provide document specific, detailed information.” *See Respondent Basic Research, L.L.C.’s Motion to Compel Proper Privilege Log* at 3. Respondents cited to *MSC Software*, a case that also involved a situation where no privilege log was produced. *Id.* As in *MSC Software*, and consistent with the Court’s recent *Order*, Respondents “must submit a detailed privilege log of the items withheld from

[Respondents'] files." *MSC Software*, No. 9299 (Feb. 21, 2002) attached as Exhibit 7.

Respondents' logs should encompass not only the materials withheld in response to Complaint Counsel's first set of discovery requests, but *all* subsequent requests as well. This detailed log should include descriptions of *all* items withheld including, but not limited to attorney-to-attorney correspondence, electronic mail and work product. Having demanded compliance to the very last letter of RULE 3.38A by Complaint Counsel, Respondents are in no position to argue that they themselves are obligated to provide anything less. *See Complaint Counsel's Opposition to Basic Research's Motion to Compel Proper Privilege Log* at n. 4 ("In the interest of fairness and mutuality," if Complaint Counsel is required to go compile a privilege log of its own attorney files, "then every law firm that has been involved with representing Respondents should have to do the same for documents in its own files connected to its representation of Respondents").

II. Basic Research and BAN Have Unjustifiably Failed to Produce a Valid, Final Privilege Log

The privilege log produced by Basic Research and Ban ("Privilege Log") suffers from severe deficiencies. First, counsel for Respondents admits that he neither "prepared" the log nor "review[ed] the listed documents." As a result, Respondents' counsel was not in a position to assess and verify its accuracy. *See October 6, 2004 Letter from Jeff Feldman to Laureen Kapin* at Exhibit 2. Second, the log fails to identify the names addresses, positions and organizations of the authors and recipients. Many of the authors and recipients do not appear to be a lawyers, yet the documents are listed as privileged. Without this information, it is difficult to determine whether the documents are properly withheld. Third, the log fails to identify the withheld

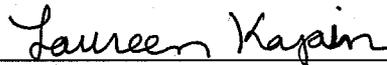
documents with sufficient specificity as to title and specific subject matter. Instead, the log identifies broad topics such as “PediaLean Information” or “Cutting Gel Information” – topics that are facially relevant and non-privileged. *See Privilege Log* at Exhibit 2. As Respondents argued in their own motion, “absent the requested specificity it is impossible for [Complaint Counsel] to determine whether the documents at issue are in fact subject to an available privilege.” *See Respondent Basic Research, L.L.C.’s Motion to Compel Proper Privilege Log* at 4. Fourth, the log does not include the internal attorney-to-attorney correspondence and work product described above regarding the Corporate Respondents. Finally, the log does not appear to include documents that Respondents would have generated during the pre-complaint investigation of this matter which took place prior to 2003. The vast majority of documents on the Privilege Log are dated during 2003 and 2004.

Complaint Counsel expressed its concerns regarding the “draft” nature of the log both orally and in writing. *See, e.g., October 15th, 2004 Letter from Mr. Millard to Mr. Feldman* attached as Exhibit 3. Respondents’ counsel subsequently admitted that certain documents were not properly withheld but have yet to provide them to us, notwithstanding our repeated inquiries and the start of depositions in this matter. This recalcitrance in complying with discovery obligations is consistent with Respondents’ strategy to delay and/or avoid the disgorgement of relevant information and prejudice Complaint Counsel’s ability to gather evidence in support of its case in chief. Having rebuffed Complaint Counsel’s attempts to negotiate a mutually agreeable resolution to privilege log issues and having demanded slavish compliance with RULE 3.38A, fairness compels the conclusion that Respondents must produce a log that complies with the same exacting standards.

CONCLUSION

Respondents have failed to produce a privilege log that complies with the standards that RULE 3.38A requires. They seek such a log from Complaint Counsel, yet even in the face of an *Order* signaling the parties' mutual obligations on this issue, they refuse to voluntarily provide such a log. Respondents' recalcitrance should not be rewarded. Complaint Counsel respectfully requests an order requiring that Respondents' privilege logs comply with RULE 3.38A and requiring that such logs be produced on the same date as Complaint Counsel.

Respectfully submitted,



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Division of Enforcement

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601 Pennsylvania Ave., N.W.

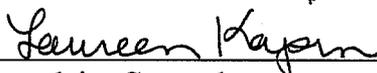
Washington, D.C. 20580

Dated: December 7, 2004

Counsel Supporting the Complaint

STATEMENT PURSUANT TO RULE 3.22(f)

I HEREBY CERTIFY that Complaint Counsel conferred with opposing counsel and attempted to confer with Respondent Friedlander in an effort in good faith to resolve by agreement the issues raised in this motion to compel. On October 6, 2004, Complaint Counsel wrote to all Respondents' counsel setting forth several concerns regarding the Privilege Log produced by Basic Research and Ban. Complaint Counsel also discussed its concerns with Respondents' counsel during the course of several telephone conversations during October and November. In addition, Complaint Counsel addressed its concerns over the absence of privilege logs with the individual respondents' counsel. These conversations took place during late October with Respondent Mowrey's counsel and during early December with Respondent Gay's counsel. On December 2, 2004, Complaint Counsel attempted to reach Respondent Friedlander regarding these issues by leaving a detailed telephone message but Respondent Friedlander never returned our call. On December 2, 2004 the Corporate Respondents' counsel indicated they would not be providing privilege logs that complied with R. 3.38A and the individual Respondents' counsel refused to provide privilege logs at all. As a result, Complaint Counsel informed Respondents that an impasse existed with regard to the issues set forth in the instant Motion.



Complaint Counsel

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**ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION
OF DOCUMENTARY MATERIALS AND ANSWERS TO INTERROGATORIES**

Upon consideration of Complaint Counsel's Motion to Compel Production of Documentary Materials And Tangible Things and Answers to Interrogatories, and all related papers and arguments of the parties, it is hereby

ORDERED that Complaint Counsel's Motion To Compel is GRANTED, and it is further ORDERED that, no later than 10 (ten) business days after entry of this Order, both Respondents and Complaint Counsel shall produce privilege logs conforming to R. 3.38A

Stephen J. McGuire
Chief Administrative Law Judge

Dated: December __, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2004, I caused *Complaint Counsel's Motion to Compel Production of Privilege Logs that Comply with Rule of Practice 3.38A* to be served and filed as follows:

- (1) the original, and one paper copy filed by hand delivery 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:

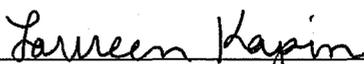
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COMPLAINT COUNSEL