

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

---

In the Matter of )

BASIC RESEARCH, LLC )

A.G. WATERHOUSE, LLC )

KLEIN-BECKER USA, LLC )

NUTRASPORT, LLC )

SOVAGE DERMALOGIC LABORATORIES, LLC )

BAN, LLC d/b/a BASIC RESEARCH, LLC )

    OLD BASIC RESEARCH, LLC, )

    BASIC RESEARCH, A.G. WATERHOUSE, )

    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

**ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL  
PRODUCTION OF DR. MOWREY'S EXPERT-RELATED DOCUMENTS**

**I.**

On April 5, 2005, Complaint Counsel filed a Motion to Compel Production of Dr. Mowrey's Expert-Related Documents. On April 6, 2005, by Order these proceedings were stayed. After the stay was lifted, Respondent Daniel B. Mowrey, on July 22, 2005, filed his opposition.

On August 4, 2005, Complaint Counsel filed a motion for leave to submit a reply. Pursuant to Rule 3.22(c), "[t]he moving party shall have no right to reply except as permitted by the Administrative Law Judge or Commission." 16 C.F.R. § 3.22(c). Respondent raised new allegations and legal issues in its opposition. Therefore, Complaint Counsel's motion for leave to file a reply is **GRANTED**. For the reasons set forth below, Complaint Counsel's motion to compel production of documents is **GRANTED IN PART**.

## II.

Dr. Daniel B. Mowrey, who is a named Respondent in this proceeding, has been designated by Respondents as a testifying expert in this matter. Complaint Counsel asserts that Respondent Mowrey produced a privilege log to Complaint Counsel on March 2, 2005, which identified 191 documents that had been withheld from production. Complaint Counsel urges that Respondent should be compelled to produce the withheld documents if Dr. Mowrey considered the information in formulating his expert report and because the documents are responsive to Complaint Counsel's document requests.

Complaint Counsel further asks that, because these documents were not produced prior to the deposition of Dr. Mowrey, if a review of Dr. Mowrey's expert file raises additional questions that Complaint Counsel was not able to explore in Dr. Mowrey's deposition, then the deposition of Dr. Mowrey should be reopened for further questioning on the withheld documents.

Respondent Mowrey asserts that many of the documents for which Complaint Counsel seeks an order compelling production do not relate to Dr. Mowrey's capacity as an expert witness. With respect to documents which do relate to Dr. Mowrey's capacity as an expert and his expert report, Respondent asserts that those documents are all communications between Dr. Mowrey and his attorney, and are thus privileged attorney-client communications.

## III.

By a previous Order issued in this case, the parties have already been directed that, "[f]or each expert expected to testify at trial, the parties must exchange all documents reviewed, consulted, or examined by the expert in connection with forming his or her opinion on the subject on which he or she is expected to testify, regardless of the source of the document . . . ." *In re Basic Research*, 2005 FTC LEXIS 8, \*2-3 (Jan. 19, 2005) (citing *Dura Lube*, 1999 FTC LEXIS 254, at \*6-7; *In re Shell Oil Refinery*, 1992 U.S. Dist. LEXIS 4896, at \*2 (E.D. La. 1992)). The scope of discovery is not limited to documents relied on by the expert in support of his or her opinions, but extends to documents considered but rejected by the testifying expert in reaching those opinions. *Id.* (citing *United States v. City of Torrance*, 163 F.R.D. 590, 593-94 (C.D. Cal. 1995)). Any document considered by an expert in forming an opinion, whether or not such document constitutes work product or is privileged, is discoverable. *Id.* (citing *Dura Lube*, 1999 FTC LEXIS, 254 at \*8; *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *Karn v. Rand Ingersoll*, 168 F.R.D. 633, 639 (N.D. Ind. 1996)). *Accord In re Telebrands Corp.*, 2003 WL 23208989 (Dec. 23, 2003).

In this case, Respondents made the decision to name Dr. Mowrey as a testifying expert. As a testifying expert, Mowrey must produce all documents that Dr. Mowrey reviewed in the course of forming his opinion on the subject on which he is expected to testify - even if such documents are covered by the attorney-client privilege or work product doctrine. *In re Pioneer*

*Hi-Bred Int'l Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (“litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed”); *TV-3, Inc. v. Royal Ins. Co. of Am.*, 194 F.R.D. 585, 589 (S.D. Miss. 2000) (correspondence between counsel and expert witness is discoverable). When Respondent Mowrey stepped into the shoes of an *expert*, the privilege governing communications between an attorney and his *client*, no longer applied to communications between Mowrey and Mowrey’s attorney relating to his role and opinions as an expert.

Many of the withheld documents, as described by the privilege log, fall well within the scope of discovery applicable to expert witnesses. For example, the log describes some of the entries as follows, “Daniel Mowrey CV,” “Resume,” “Expert Reports,” and “Dr. Mowrey qualifications.” Dr. Mowrey’s privilege log also lists a specific study that is specifically referenced in Dr. Mowrey’s expert report. Without question, Respondent must produce all documents relating to his capacity as an expert witness and studies referenced in his expert report. Further, the deposition transcript reveals that documents relating to the drafting of Dr. Mowrey’s expert report may have been withheld. Dr. Mowrey’s lawyer specifically instructed Dr. Mowrey, “to the extent the question would require you to disclose communications between you and myself, I would instruct you not to answer the question.” Mowrey, Tr. 294-95. Dr. Mowrey also testified that he received emails from his lawyer regarding serving as Respondents’ expert witness. Mowrey, Tr. 308. Complaint Counsel asserts that none of those documents have been produced to Complaint Counsel. All of these fall well within Respondent’s obligation to produce expert related documents and must be produced.

The Scheduling Order in this case, issued August 11, 2004, paragraph 11, requires the parties to provide all “materials fully describing or identifying the background or qualifications of the expert,” and produce “all documents and other written materials relied upon by the expert in formulating an opinion in this case.” Regardless of whether Complaint Counsel has exceeded the number of requests for production of documents, Respondent must produce materials fully describing or identifying the background and qualifications of the expert and all documents that Dr. Mowrey reviewed in the course of forming his opinion.

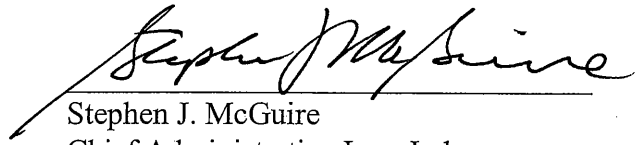
#### IV.

For the above-stated reasons, Complaint Counsel’s motion to compel is **GRANTED IN PART**. Respondent Mowrey is compelled to produce all documents that relate to his capacity as an expert witness, including communications with his attorney, the other Respondents, and the other Respondents’ attorneys. To the extent that Complaint Counsel’s motion is aimed at compelling production of documents from Dr. Mowrey that do not relate to his capacity as an expert or to the formation of his expert opinion in this case, Complaint Counsel’s motion is **DENIED IN PART**.

In the event that a reasonable review of these documents raises additional questions that Complaint Counsel was not able to meaningfully explore in the deposition of Dr. Mowrey without having had the documents underlying his expert opinion, the deposition of Dr. Mowrey shall be reopened. Consistent with this Order, Mowrey shall not be instructed to not answer questions about his communications with his attorney that relate to his role as an expert in this case.

Respondent Mowrey shall provide these documents to Complaint Counsel within five business days. Complaint Counsel shall then have five business days to review the documents and determine whether further deposition of Dr. Mowrey is necessary. The deposition shall be limited to questioning Mowrey in his capacity as an expert witness and on the newly disclosed documents. The deposition shall be no longer than four hours and shall be completed by September 9, 2005.

ORDERED:

  
Stephen J. McGuire  
Chief Administrative Law Judge

Date: August 9, 2005