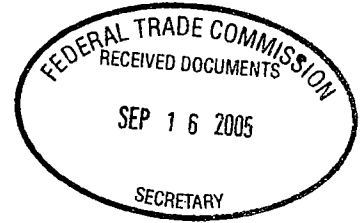


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



---

In the Matter of :  
: DOCKET NO. 9318  
BASIC RESEARCH, L.L.C., et al., :  
: Public Document  
Respondents. :  
:

---

**DECLARATION OF RONALD F. PRICE IN OPPOSITION TO COMPLAINT  
COUNSEL'S MOTION FOR SANCTIONS**

I, Ronald F. Price, under penalty of perjury, declare as follows:

1. I am an attorney with the law firm of PETERS SCOFIELD PRICE *A Professional Corporation*, and am counsel for Respondent Daniel B. Mowrey, Ph.D. I submit this declaration in response to Complaint Counsel's motion for *in camera* review and for sanctions, and as a supplement to my declaration dated 21 July 2005.

2. I have personal knowledge of the matters set forth in this declaration and if called to testify at a hearing in this matter would so state.

3. As set forth in Dr. Mowrey's accompanying declaration ("Mowrey Supp. Dec."), Dr. Mowrey has thus far produced almost one thousand pages of expert related documents. Dr. Mowrey has produced (a) documents which fully describe his background and qualifications, (b) all written/electronic communications with me, the other Respondents and the other Respondents' counsel concerning his role as an expert witness and his expert report, (c) all draft of this expert report/opinion, and (d) all documents which he read, reviewed, considered and/or relied upon in his capacity as an expert witness, and/or in connection with forming his expert report/opinion.

4. Pursuant to the Court's 9 August 2005 Order, Dr. Mowrey is required 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." Order at 3. The Order further provides that "[t]o the extent that Complaint Counsel's motion [to compel] 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." *Id.* The Court then directed Dr. Mowrey to produce documents within five (5) business days after 9 August 2005 -- i.e., on or before 16 August 2005.

5. On 16 August 2005, Dr. Mowrey produced to Complaint Counsel what Dr. Mowrey believed to be all documents required to be produced by the Order. Specifically, Dr. Mowrey produced to Complaint Counsel all remaining documents that he had read, considered, reviewed or relied upon in his capacity as an expert witness, including in connection with forming his expert report/opinion. Those documents consisted of thirty (30) pages of documents, twenty-six (26) of which had been listed on Dr. Mowrey's privilege log, and four (4) of which were documents which were created after the last date of documents identified on the privilege log.<sup>1</sup>

---

<sup>1</sup> Complaint Counsel make much ado in their Motion about the fact that four of the pages produced on 16 August 2005 were not listed on Dr. Mowrey's privilege log. However, as has previously been explained to Complaint Counsel, the privilege log only listed documents through 8 December 2004 because that is the date on which Respondents provided Dr. Mowrey's expert report, and Respondents' responses to the Second and Fourth Requests had been provided on 14 November 2004, and 1 December 2004, respectively. Accordingly, the latest date for documents identified on the privilege log was tied to the date of the discovery responses, and the date of Dr. Mowrey's report. Thus, there is no mystery to the fact that when Complaint Counsel provided their rebuttal reports on 27 December 2004, that such reports were forwarded by email to Dr. Mowrey.

6. In 16 August 2005 letter to Complaint Counsel, I stated that “[w]ith respect to attachments referenced in some of the emails, it is my understanding that those documents have been produced previously. Accordingly, they are not reproduced herewith. It is my understanding that Dr. Mowrey has now produced all documents which he has which relate to his capacity as an expert witness in this case.”

7. On 17 August 2005, Complaint Counsel sent a letter indicating, *inter alia*, that because the attachments to the recently produced emails had been produced separately (in January 2005), Complaint Counsel were unable to determine which attachments were associated with which specific email, and Complaint Counsel requested that I provide information which would allow Complaint Counsel to make that determination. In order to provide the requested assistance to Complaint Counsel, on 22 August 2005 I sent Complaint Counsel a letter wherein I specifically identified for Complaint Counsel which emails were associated with which attachments.

8. During this process of identifying for Complaint Counsel which attachments corresponded with which emails, I discovered, for the first time, that contrary to my prior belief, one of the attachments to one of the emails had inadvertently been omitted from the 10 January 2005 production. Specifically, I was learned that the attachment to an email from Dr. Mowrey to the on 9 November 2005 had inadvertently not been produced. This discovery was immediately disclosed to Complaint Counsel, and the inadvertently omitted attachment was produced.

9. The attachment to the 9 November 2005 email was not deliberately withheld from Complaint Counsel. Rather, when Dr. Mowrey provided me with a copy of the “drafts” of his expert report so they could be produced to Complaint Counsel, Dr. Mowrey thought he had

printed out and provided to me all of the “drafts.” *See, e.g.*, Mowrey Supp. Dec. I then had the documents which Dr. Mowrey had delivered to me produced to Complaint Counsel.<sup>2</sup> Dr. Mowrey’s inadvertent failure to print out this particular attached was simply the result of an innocent mistake, a mistake which I immediately brought to Complaint Counsel’s attention upon its discovery.

10. Through their Motion, Complaint Counsel seek production of approximately 40 pages of additional documents, which are discussed below.

11. Document Bates No. 91. This is a document which relates solely to notes of interviews which Respondent Gay’s counsel conducted with a number of potential fact witnesses, none of which was Dr. Mowrey. The document is an email string consisting of an email on 27 September 2004 from Nicole Slatter, a paralegal with the law firm of Burbidge & Mitchell, to Carla Fobbs (head of the Corporate Respondents’ compliance department), Jeff Feldman (the Corporate Respondents’ prior counsel), and me, which email was forwarded by Ms. Fobbs on 27 September 2004 to Respondents Dr. Mowrey, Gay & Friedlander, and to Dan Watson, a paralegal with the Corporate Respondents’ compliance department. The email itself does not identify the witnesses who were interviewed, although the original email from Ms. Slatter included attachments which were notes of interviews of fact witnesses conducted by the law firm representing Respondent Gay. The email also identifies other potential fact witnesses who Respondent Gay’s counsel was attempting to interview. The notes are notes of counsel’s interviews with three potential fact witnesses (not Dr. Mowrey) who are not authors of any

---

<sup>2</sup> At the time the documents were produced to Complaint Counsel, I was out of the office traveling to New York City for Dr. Heymsfield’s deposition.

scientific study of any kind, and with one potential fact witness who is an author of a scientific study discussed in Dr. Mowrey's report. Complaint Counsel concede in their motion that notes of interviews with non-authors are discoverable. *See, e.g.*, Motion at n.8. Thus, of these attorney interview notes, it appears that the only notes which Complaint Counsel would claim they are entitled to obtain are notes of Mr. Gay's counsel's interview with a study author. However, Dr. Mowrey testifies that he never opened, read, reviewed or otherwise considered any of these witness interview notes, including the notes of the interview with a study author.

12. Document Bates No. 94. This is an email dated 29 September 2004 (more than two weeks *before* Dr. Mowrey was designated as an expert witness) from me to the Corporate Respondents' prior counsel, Respondent Gay's counsel, Ms. Slatter, Ms. Fobbs, Mr. Watson, and Respondents Friedlander and Dr. Mowrey. This document relates solely to a telephone conference which I had with a potential fact witness. That potential witness was not Dr. Mowrey, and was not an author of any scientific study mentioned in Dr. Mowrey's report or in any of Complaint Counsel's experts' reports.

13. Documents Bates Nos. 166-167. This document is an email dated 22 November 2004, from Mr. Watson to Ms. Fobbs, and to Respondents Friedlander and Dr. Mowrey. During the 22 November 2004 time frame, Respondents and their various counsel had discussions concerning the possibility of designating additional expert witnesses. Document Bates Nos. 166-167 identifies certain potential expert witnesses which Respondents were considering, but did not designate in this case. None of the persons identified in this document is an author of any of the scientific studies mentioned in Dr. Mowrey's expert report. Because Complaint Counsel have conceded, in footnote no. 8 of their Motion, that they do not seek production of this document if

the persons mentioned in the document are not authors of any of the scientific studies referenced in Dr. Mowrey's expert report, this document is not subject to production.

14. Documents Bate Nos. 26-32. These documents are a series of emails on 9 August 2004 between Ms. Fobbs and me (and copied to Dr. Mowrey). The emails relate solely to efforts to arrange a meeting between Dr. Mowrey and the Corporate Respondent's prior counsel, and contain no substantive information. The meeting which we were trying to arrange in early August 2004 did not occur.

15. Document Bates Nos. 54-55. Dr. Mowrey addresses this document in his declaration.

16. Documents Bates Nos. 84, 86-87. These documents are a series of three emails dated 16 September 2004 (from Ms. Fobbs to Dr. Mowrey), 20 September 2004 (from Dr. Mowrey to Ms. Fobbs), and 20 September 2004 (from Dr. Mowrey to Ms. Fobbs), respectively, relating to certain potential fact witnesses (not Dr. Mowrey). The documents contain absolutely no substantive information concerning the potential fact witnesses identified in the documents. Rather, they simply identify certain potential fact witnesses and their contact information.

17. Documents Bates Nos. 92-93. These documents are an email string consisting of (i) an email dated 27 September 2004 from Ms. Fobbs to Respondent Gay's counsel and his paralegal (and copied to the Corporate Respondents' prior counsel and me), (ii) an email dated 27 September 2004 from me to Ms. Fobbs, and (iii) an email dated 27 September 2004 from Ms. Fobbs to me (and copied to Dr. Mowrey). These emails relate to Respondent Gay's counsel's investigation of the facts and background of potential witnesses in this case --- in this instance, Dr. Mowrey, and involves a request by Mr. Gay's counsel for a copy of Dr. Mowrey's CV, which

Mr. Gay's counsel was seeking as part of his investigation of the facts and fact witnesses in this case. These emails relating to Dr. Mowrey's CV relate solely to Respondents' counsels' investigation concerning the facts and background of the case, and the potential fact witnesses in the case -- in this case, Dr. Mowrey. It had nothing to do with Dr. Mowrey's role as an expert witness. Indeed, Respondents did not even discuss or determine to call Dr. Mowrey as an expert witness until well after these documents were created. I also note that Respondents provided Dr. Mowrey's CV to Complaint Counsel in October 2004.

18. Document Bates No. 96. This is an email from Ms. Fobbs to Dr. Mowrey dated 4 October 2004, with the subject line "luminaries," and consists of a single phrase request. No further information can be provided concerning the specific request without divulging the request itself. However, the document was received, read and reviewed by Dr. Mowrey before Respondents ever discussed or determined to identify Dr. Mowrey as an expert witness.

19. Documents Bates No. 100, 106-107, 109-114. These documents consist of a series of the following emails: (i) Ms. Fobbs to Dr. Mowrey dated 7 October 2004, (ii) Dr. Mowrey to Ms. Fobbs dated 7 October 2004, (iii) Ms. Fobbs to Dr. Mowrey dated 12 October 2004, (iv) Dr. Mowrey to Ms. Fobbs, dated 12 October 2004, (v) Ms. Fobbs to Dr. Mowrey, dated 12 October 2004, (vi) Dr. Mowrey to Ms. Fobbs, dated 12 October 2004, and (vii) Ms. Fobbs to Dr. Mowrey, dated 12 October 2004. These documents relate to a request by Ms. Fobbs as to whether Dr. Mowrey had copies of certain documents, none of which documents are mentioned, addressed or discussed in Dr. Mowrey's expert report.

20. Documents Bates Nos. 135-141, 151-152, 184. These documents consist of the following emails: (i) me to Ms. Fobbs (copied to Dr. Mowrey) dated 11/01/04, (ii) Ms. Fobbs to

me dated 11/01/04, (iii) me to Ms. Fobbs dated 11/01/04, (iv) Ms. Fobbs to Heather Sprik (with the Corporate Respondents' Compliance Department) dated 11/01/04, (v) Ms. Sprik to Dr. Mowrey dated 11/01/04, (vi) Ms. Sprik to Dr. Mowrey dated 11/03/04, (vii) Ms. Fobbs to Ms. Sprik dated 11/11/04, (viii) Ms. Sprik to Dr. Mowrey dated 11/11/04, and (ix) Ms. Sprik to Dr. Mowrey dated 12/03/04. These emails all relate to a request by me for assistance in locating materials previously published by Dr. Mowrey (all of which are identified on Dr. Mowrey's CV). Other than identifying the documents requested by me, these emails contain no substantive information concerning the requested materials.

21. Documents Bates Nos.165, 168. These documents consist of the following: (i) Document Bates No. 165 is an email from me to Dr. Mowrey dated 22 November 2004; and (ii) Document Bates No. 168 is an email string consisting of the following email: (1) me to Ms. Fobbs and Mr. Watson (copied to the Corporate Respondents' counsel Mr. Feldman & Mr. Nagin, Mr. Gay's counsel, Mr. Burbidge & Mr. Shelby, and Respondents Dr. Mowrey & Friedlander), dated 22 November 2004, and (2) Dr. Mowrey to his counsel, dated 22 November 2004. During this time frame, Respondents and their counsel were engaged in discussions concerning the possibility of deposing certain fact witnesses. These documents relate solely to those discussions, and are unrelated to Dr. Mowrey's capacity as an expert witness.

22. With respect to Document Bates No. 165, and with respect to the 22 November 2004 email from Dr. Mowrey to me which is part of Document Bates No. 168, I acknowledge that those two emails refer to the "Colker/Kalman paper." However, the emails related to Respondents' discussions concerning the topic of the possibility of deposing Dr. Colker and Mr. Kalman. They were unrelated to Dr. Mowrey's expert report/opinion, and these two emails



contain absolutely no substantive information concern the Colker/Kalman paper, or concerning Dr. Colker and Mr. Kalman. Furthermore, the “Colker/Kalman paper” referenced in these two emails has been produced to Complaint Counsel on at least two (2) separate occasions, long before the Court entered the 9 August 2005 Order.

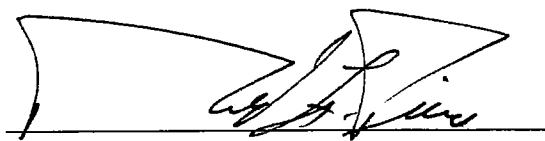
23. With respect to the 22 November 2004 email from me to Ms. Fobbs and Mr. Watson (copied to the Corporate Respondents’ counsel, Mr. Gay’s counsel, and Respondents Dr. Mowrey & Friedlander) which is part of Document Bates No. 168, that document relates solely to Respondents’ litigation strategy and potential discovery Respondents were considering undertaking. The document was not sent to Dr. Mowrey as an expert, and we were not consulting with Dr. Mowrey as an expert our litigation and discovery strategy. Rather, communications which involved Dr. Mowrey on this topics involved him solely in his capacity as a Respondent in this case.

24. Contrary to the requirements of the Court’s 9 August 2004 scheduling order, at the time Complaint Counsel provided Dr. Heymsfield’s expert report to Respondents on 21 October 2005, Complaint Counsel did not produce copies of all documents read, reviewed, considered or relied on by Dr. Heymsfield in connection with forming his expert report/opinion. For example, Dr. Heymsfield’s report, and the documents produced therewith, consisted of a total of approximately 135 pages. Those materials did not include any drafts of Dr. Heymsfield’s report (it is possible none exist), any communications between Dr. Heymsfield and Complaint Counsel (these clearly existed), or, other than approximately 65 pages of documents, did not include any of the literally thousands of pages of documents which Complaint Counsel had provided to Dr. Heymsfield in connection with his role as an expert witness in this case. *Id.*

Instead, Complaint Counsel and Dr. Heymsfield did not produce those documents until 14 December 2004 (they were received by me on 16 December 2004), and then they were produced only in response to a subpoena which I had caused to be served on Dr. Heymsfield after he had produced his report, but had failed to produce the majority of the documents he later produced.<sup>3</sup> And, even then, Dr. Heymsfield did not produce all the required documents, as he produced documents in January 2005, and again in February 2005.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: September 15, 2005.



Ronald F. Price

---

<sup>3</sup> Complaint Counsel's failure to provide documents as required by the scheduling order was not limited to Dr. Heymsfield, as their other experts likewise produced certain documents only in response to subpoenas.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **DECLARATION OF RONALD F. PRICE IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SANCTIONS** was provided to the following as follows:

(1) on 15<sup>th</sup> September 2005, the original and two (2) paper copies sent via Federal Express overnight delivery, and on 16 September 2005 one (1) electronic copy via email attachment in Adobe® “.pdf” format, to: Donald S. Clark, Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room H-159, Washington, D.C. 20580.

(2) on 15 September 2005, two (2) paper copies sent via Federal Express overnight delivery to: The Honorable Stephen J. McGuire, Chief Administrative Law Judge, 600 Pennsylvania Avenue, N.W., Room H-104, Washington, D.C. 20580.

And to the following on 16 September 2005 as follows:

(3) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, Laura Schneider, Walter C. Gross III, and Edwin Rodriguez all care of [lkapin@ftc.gov](mailto:lkapin@ftc.gov), [jmillard@ftc.gov](mailto:jmillard@ftc.gov), [lschneider@ftc.gov](mailto:lschneider@ftc.gov), [wgross@ftc.gov](mailto:wgross@ftc.gov), and [erodriguez@ftc.gov](mailto:erodriguez@ftc.gov), with one (1) paper copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580, facsimile no. (202) 326-2558.

(4) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(5) 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.

(6) One (1) copy via United States Postal Service to Jonathan W. Emord, Emord & Associates, 1800 Alexander Bell Drive, Suite 200, Reston, Virginia, 20191, Counsel for Respondents A. G. Waterhouse, L.L. C., Klein-Becker, L.L. C., Nutrasport, L.L. C., Sovage, Dermalogic Laboratories, L.L. C., and BAN, L.L. C.

(7) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, *pro se*.

