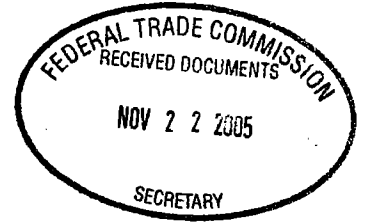


**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**



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 DENYING RESPONDENTS’ MOTION FOR LEAVE TO ADD AN EXPERT
WITNESS AND TO REOPEN DISCOVERY FOR A LIMITED PURPOSE**

On September 29, 2005, Respondents filed a motion seeking leave to add an expert rebuttal witness and to reopen discovery for the limited purpose of preparing and exchanging an expert report and providing Complaint Counsel an opportunity to depose the expert (“Motion”). On October 4, 2005, Respondent Dennis Gay filed a joinder in Respondents’ Motion. On October 11, 2005, Complaint Counsel filed an opposition to the motion (“Opposition”).

On October 13, 2005, Respondents filed a petition for leave to file a reply and on that same date filed a reply. On October 20, 2005, Complaint Counsel filed an opposition to the petition for leave to file a reply. Respondents’ petition for leave to file a reply is **GRANTED**.

Respondents allege that one of Complaint Counsel’s expert witnesses, Dr. Heymsfield, was a co-author of studies which were retracted from publication because of the discovery of fraudulent data from another co-author. Motion at 3. Respondents seek to add an expert witness and to reopen discovery for the:

limited purpose of allowing Respondents the opportunity to identify and present an expert on (1) the generally accepted standards for listing of publications on a scientist's curriculum vitae; (2) the ethical responsibility of a co-author of scientific works for fraudulent data in those works; (3) the supervisory responsibility of a senior scientist co-author (here, Heymsfield) for a junior scientist co-author's (here, Darsee's) work; and (4) the extent to which Heymsfield's August 30th testimony raises questions of his scientific integrity, reliability, and independence that may impugn the competence and reliability of his scientific opinion.

Motion at 4.


Complaint Counsel asserts that Respondents' proposed expert testimony and discovery are irrelevant, immaterial, and inadmissible; and that Respondents' proposed expert testimony and discovery are untimely, unnecessary, and will interfere with the efficient administration of these proceedings. Opposition at 7-19.

A matter is considered collateral if it is not relevant in the litigation to establish a fact of consequence. *United States v. Beauchamp*, 986 F.2d 1, 4 (1st Cir. 1993); *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992). It is well established that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter. *Beauchamp*, 986 F.2d at 3; Fed. R. Evid. 608(b). The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters. *Martz*, 964 F.2d at 789; *Carter v. Hewitt*, 617 F.2d 961, 971 (3d Cir. 1980).

The expert witness proposed by Respondents would testify on the collateral matter of Dr. Heymsfield's reactions to or responsibility for a co-author's fraudulent actions. Extrinsic evidence on this collateral issue will not be permitted as it is not relevant to establish a fact of consequence to this matter. *Beauchamp*, 986 F.2d at 4; *Martz*, 964 F.2d at 789. Moreover, the proposed discovery and testimony is not reasonably related to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent, as required by Rule 3.31(c)(1) of the Federal Trade Commission's Rules of Practice.

Accordingly, Respondents' motion for leave to add an expert witness and to reopen discovery for a limited purpose is **DENIED**.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: November 22, 2005