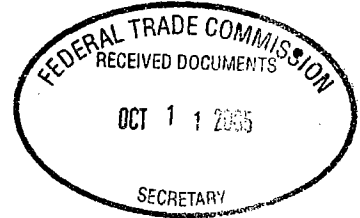


**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**



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.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)
Respondents.)

Docket No. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION
TO ADD AN EXPERT WITNESS AND TO REOPEN DISCOVERY**

Complaint Counsel oppose Respondents’ belated *Motion to Add an Expert Witness and to Reopen Discovery*. In their *Motion*, Respondents seek to launch a late round of satellite litigation on issues not related to the merits of the Commission’s *Complaint*. Respondents assert the right to call a new expert and reopen discovery *not* on the parties’ claims and defenses, but on the supposed ethical or professional ramifications of the fabrication of data by a *colleague* of one of Complaint Counsel’s expert witnesses, in papers that were retracted and withdrawn from publication, over twenty years ago. Respondents’ purported line of questions is more fitting for inquiry during cross examination and Respondents’ *Motion* provides no valid justification to add expert testimony and reopen discovery. This Court should reject Respondents’ tardy effort to pursue peripheral issues through 11th hour discovery and expert testimony that they have already pursued during Dr. Heymsfield’s lengthy thrice-continued deposition and may pursue further

during cross-examination at trial.¹

BACKGROUND

On June 15, 2004, the Commission filed the *Complaint* in this matter, alleging that, *inter alia*, Basic Research LLC and other related persons 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”). Expert discovery in this matter commenced over a year ago.

Last October, the parties exchanged expert witness lists and made their expert witness disclosures in accordance with Court’s August 11, 2004, *Scheduling Order* and RULE 3.31. On October 6, 2004, Complaint Counsel named, as one of its testifying expert witnesses, Dr. Steven B. Heymsfield, M.D. Dr. Heymsfield is a distinguished scientist and medical practitioner whose academic and professional career spans five decades. For years, Dr. Heymsfield served as Deputy Director of the New York Obesity Research Center at St. Luke’s-Roosevelt Hospital and also as a full Professor of Medicine at Columbia University. He now holds the title of Executive Director of Clinical Sciences at Merck Laboratories and continues to be affiliated with Columbia

¹ Respondents have deposed Dr. Heymsfield for more than 15 hours over a period of three days – on January 11, February 4, and August 30, 2005. Respondents own deposition exhibit indicates that Respondents were aware of the issues raised in their *Motion* almost five months before the August 30th deposition. Counsel for Respondents, Jonathan Emord, stated to Complaint Counsel that Mr. Friedlander knew of the issues at the heart of Respondents’ *Motion* “shortly before” the deposition. Tellingly, however, Exhibit 20, which Respondent’s counsel attached to Dr. Heymsfield’s deposition, bears the print date of “4/2/05” indicating that one or more of Respondents and/or their counsel knew of these issues as early as April 2005. Respondents may have known about this issue far earlier, and their motion is silent as to when Respondents and/or their counsel first learned of this issues.

University. When Complaint Counsel named Dr. Heymsfield as a testifying expert last October, we simultaneously produced his detailed *curriculum vitae* to Respondents. Dr. Heymsfield previously submitted his *curriculum vitae* to Complaint Counsel in response to a request for information for discovery disclosures, which included a request for his list of publications. *See* Ex. A hereto (copy of correspondence dated Sept. 22, 2004). Dr. Heymsfield's *curriculum vitae* runs 47 single-spaced pages. It includes his list of publications (which itself runs over 40 single-spaced pages), and further describes, in detail, his professional background and qualifications.² Complaint Counsel has further supplemented its expert disclosures as additional information has become available. One week after Complaint Counsel made its initial RULE 3.31(b)(3) disclosures pursuant to the *Scheduling Order*, on October 13, 2004, Respondents named Daniel B. Mowrey, Ph.D, an experimental psychologist and named Respondent, as one of their designated expert witnesses.³ Thereafter, Respondents discussed the possibility of designating additional expert witnesses to testify at the hearing in this matter. *See* Resp't's Opp'n to Mot. for In Camera Rev., Sept. 15, 2005, at 14. Respondents did not move to add other testifying experts, however, until

² Dr. Heymsfield's *curriculum vitae* is already part of the record; it accounts for most of the pages in Respondents' recent submission. *See* Resp'ts' Mot. to Add Expert Witness, Ex. A (Heymsfield CV) [hereinafter "Resp'ts' Mot."].

³ Respondents produced a *curriculum vitae* for Respondent Mowrey that curiously omitted the only study published in a medical journal that we know to be attributed to him, even though Respondents (Mowrey, at the very least) obviously knew that it existed. *See* Ex. B (Mowrey CV disclosed on October 13, 2004, which *failed* to identify publication, followed by PubMed search result identifying study citation, and disclosing fact that Dr. Mowrey had a *co-author* on his only published study). Complaint Counsel do not claim prejudice from Respondent Mowrey's failure to timely disclose his publication, because we later learned of the previously-undisclosed publication and had an opportunity to depose the witness. *Cf. infra* pages 4-6 (discussing Respondents' opportunity to depose Dr. Heymsfield concerning papers withdrawn from publication).

the filing of their pending *Motion*.

After Respondents made their expert witness designations last October, Complaint Counsel sent subpoenas duces tecum to Respondents' testifying experts. During the course of written discovery, Complaint Counsel also propounded discovery requests upon Respondents relating to their testifying experts. The close of written discovery occurred on November 8, 2004. Complaint Counsel timely provided Respondents with copies of Dr. Heymsfield's *Expert Report* and *Rebuttal Report*. The *Scheduling Order* set the close of depositions for mid-January 2005, and by agreement, the parties held the depositions of Dr. Heymsfield and Respondent Mowrey in the week commencing January 10th.

On January 11, 2005, Complaint Counsel made Dr. Heymsfield available for deposition. Complaint Counsel recessed Dr. Heymsfield's deposition after more than 9½ hours and 7 full hours of testimony, and agreed to continue the deposition for four hours on another day, even though Respondents provided no prior notice that they intended to take more than one day of testimony. *See* Compl. Counsel's Opp'n to Resp'ts' Mot. to Strike, Feb. 8, 2005, at 11-12. After that second deposition, which extended Dr. Heymsfield's testimony to eleven hours, Complaint Counsel came into possession of trial testimony of Dr. Heymsfield in another matter, promptly produced that testimony, and offered to make the witness available for four more hours. *See* Compl. Counsel's Notice, Feb. 15, 2005. After lengthy motion practice in which Respondents' pressed the Court to strike Dr. Heymsfield, the Court allowed Respondents an additional four hours to depose Dr. Heymsfield and denied Respondents' request for reconsideration of that time limit. *See* March 15, 2005 Order denying *Respondents' Motion to Strike Expert Witnesses and For Sanctions and Other Relief* and August 9, 2005 Order denying *Respondent Gay's Motion for*

Reconsideration.

On August 30, 2005, Respondent Friedlander started Dr. Heymsfield's deposition by asking him about publications.⁴ In reference to Dr. Heymsfield's list of publications, Respondent Friedlander stated that he was "assuming that the list of publications contain every publication you've ever published in a journal." Dr. Heymsfield corrected Respondent Friedlander's assumption: "To the best of my administrator's ability they are all in there. There might be something, something I've published that's not there for, you know, reasons of error, but not to omit anything. If a paper, for example, there were several papers that were retracted a number of years ago, those papers are not on my CV." Ex. D (Heymsfield Dep., Aug. 30, 2005, at 451-52 (transcript not marked as confidential)). Dr. Heymsfield indicated that his list of publications would not have included papers that had been withdrawn from publication. *See id.* at 451-453, 655.

Dr. Heymsfield discussed the subject of John Darsee. *Id.* at 452-61, 618-636, 641-46, 655-660. Mr. Darsee performed research at the University of Notre Dame, Emory University and later went to Harvard University. *Id.* at 452, 646. Approximately twenty-five years ago, Dr.

⁴ Respondents had the opportunity to spend as much as the four hours as they wished on the topics of their choice. Indeed, they elicited more than 40 pages of testimony on this topic during the course of questioning on behalf of three separate Respondents. Respondent Friedlander started the deposition with the issue of Dr. Heymsfield's publications, elicited certain testimony, and then moved on to other topics for the lion's share of his allotted time. Similar to the tactics favored by Respondents during Dr. Heymsfield's last deposition, however, as their four hours drew to a close, they once again protested that they did not have sufficient time to explore the issues. The response to Respondents' well-rehearsed plea is twofold: first, three separate questioners pointedly explored these issues with Dr. Heymsfield. Second, Respondents could have spent the entire four hours on Dr. Heymsfield's colleague, testimony in other matters, or other topics. But they allotted their time as they wished and hence they have expended their opportunity to address these issues.

Heymsfield participated in some research with Mr. Darsee at Emory. Dr. Heymsfield was not, however, privy to all of the research data. Mr. Darsee was not his employee and Dr. Heymsfield did not supervise, evaluate, or grade him. *Id.* at 455, 461. At Harvard, it was discovered that Mr. Darsee had fabricated data in his academic career at Notre Dame, Emory, and Harvard. Consequently, papers involving Mr. Darsee's fabrications were retracted from medical journals and withdrawn from publication. *Id.* at 452-53, 646. Among the many papers and abstracts that were retracted and withdrawn were several papers in which Dr. Heymsfield had been listed as one of Mr. Darsee's co-authors. After these papers were withdrawn from publication, the Dean of Emory University advised Dr. Heymsfield that it was appropriate to remove the Darsee papers from his list of publications. *Id.* at 655. Based on the medical journals' withdrawal of the Darsee papers from publication, and the foregoing statement of the Dean of Emory University, Dr. Heymsfield has not treated the retracted Darsee papers as published studies, and he has not identified these papers withdrawn from publication as publications in his *curriculum vitae*.

As Dr. Heymsfield testified at the end of his four-hour deposition, he informed the staff about Mr. Darsee's fabrication of data in general, but he did not inform the staff that this data was in papers submitted to journals and subsequently retracted. *Id.* at 665-660. Accordingly, Complaint Counsel were unaware that Mr. Darsee's fabricated data had been submitted or withdrawn from publication.⁵

⁵ Respondents have no basis for the contention that Complaint Counsel concealed or withheld discoverable information. Notwithstanding Dr. Heymsfield's testimony, Corporate Respondents' new counsel has threatened us with sanctions for failing to disclose papers that were indisputably both withdrawn from publication and not previously known to us. Even if this Court were to determine that papers *withdrawn* from publication are still "publications" within the meaning of RULE 3.31, that RULE unambiguously provides that counsel is not obliged to supplement discovery responses that it does not know to be incomplete. *See* RULE 3.31(e)(1).

Some four weeks and two days after the conclusion of Dr. Heymsfield's deposition, Respondents filed their *Motion for Leave to Add An Expert Witness and to Reopen Discovery*, prompting this response.

DISCUSSION

Respondents' pending *Motion* claims the right to offer expert testimony to attempt to discredit him on collateral issues unrelated to the parties' claims and defenses. Respondents' cursory *Motion* should be denied. As discussed in Section I below, the subjects of Respondents' proposed expert testimony are fit for cross-examination at best, and are clearly irrelevant and inadmissible as topics for expert testimony at trial. Respondents have failed to justify their demands and the introduction of these subjects as topics for expert testimony would serve only to needlessly compound and confuse the issues at trial. Additionally, as discussed in Section II below, Respondents' *Motion* to add an expert witness at this stage of the litigation is clearly untimely, and the discovery proposed would seriously impinge on Complaint Counsel's rights and interfere with the efficient pretrial administration of this matter. We discuss these points *seriatim* below.

I. Respondents' Proposed Expert Testimony and Discovery is Irrelevant, Immaterial, and Inadmissible

We opened this *Opposition* by observing that Respondents seek to launch a late round of expert discovery and satellite litigation unrelated to the merits of the Commission's *Complaint*. A brief review of Respondents' list of proposed topics for expert testimony and discovery confirms this conclusion. According to Respondents, the proposed expert would testify concerning:

- (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 supervisorial [sic] 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.

Resp'ts' Mot. at 4. None of these topics relate even remotely to the parties' claims and defenses.

Each of the proposed topics for expert testimony and discovery relates to a discrete topic—the fabrication of data by a colleague of one of Complaint Counsel's expert witnesses over twenty years ago. Our expert witness testified concerning this person's fabrication of data at his deposition. Dr. Heymsfield made clear that he did not participate in Mr. Darsee's fabrications, he did not supervise, evaluate, or grade Mr. Darsee, and at his school, he was advised that, with respect to papers withdrawn from publication, it was appropriate to withdraw those papers from his list of publications.⁶ Respondents seek to present expert testimony in order to controvert this factual testimony and impeach Dr. Heymsfield. As discussed below, this is not a proper use of expert testimony; the proposed testimony is irrelevant and immaterial, and inadmissible, even as impeachment evidence.

A. The Proposed Expert Testimony is Immaterial and Inadmissible

Respondents' proposed testimony is immaterial and would be inadmissible at trial. As Respondents propose to produce additional expert testimony in discovery and at trial, a brief review of the Commission's discovery and evidence rules is appropriate. Under RULE 3.31, “[p]arties may obtain discovery to the extent that it may be reasonably related to the allegations of

⁶See *supra* pages 4-6. As for Dr. Heymsfield's integrity and reliability, his professional career and accomplishments in the past two decades speak volumes and need not be reiterated here. See *generally* Resp'ts' Mot., Ex. A.

the Complaint, to the proposed relief, or to the defenses of any respondent.” RULE 3.31(c)(1).

Discovery is “reasonably related” to these subjects “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Additionally, RULE 3.43 provides that “[i]rrelevant, immaterial, and unreliable evidence shall be excluded” from trial, and “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” RULE 3.43(b).

The RULES cited above act as a bulwark against the intrusion of irrelevant expert testimony such as that pressed by Respondents. The “generally accepted standards for listing of publications,” the “ethical responsibility of a co-author . . . for fraudulent data,” and “the supervisory [sic] responsibility of a senior scientist” in an academic setting are not relevant issues for trial in this proceeding. “[T]he issue to be litigated at the trial in this matter is whether Respondents violated the FTC Act’s prohibition against false and misleading advertising.” Order on Complaint Counsel’s Motion to Strike Respondents’ Additional Defenses, Nov. 4, 2004, at 8.

Under the *Federal Rules of Evidence*, expert testimony is permitted to “assist the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702.

Respondents’ requested expert testimony and discovery does not address the scientific matters at issue in this case. Moreover, the parties cannot use extrinsic evidence for purposes of impeachment on collateral matters.⁷ FED. R. EVID. 608(b). A matter is collateral if “the matter

⁷ Although the Federal Rules of Evidence are not binding in these administrative proceedings, they provide useful guidance and have been cited with approval in other administrative matters. See *South Carolina State Board of Dentistry*, No. 9311, 2004 FTC

itself is not relevant in the litigation to establish a fact of consequence, *i.e.*, not relevant for a purpose other than mere contradiction of the in-court testimony of the witness.” *United States v. Beauchamp*, 986 F.2d 1, 3 (1st Cir. 1993) (citing 1 MCCORMICK ON EVIDENCE § 45, at 169).

Respondents seek to present expert testimony merely to challenge and discredit Dr. Heymsfield’s testimony on a plainly collateral issue—the fabrication of data by a student over 20 years ago.

The proposed testimony is immaterial and inadmissible.

B. Respondents’ Cursory Arguments Have No Merit

Respondents’ *Motion* is largely devoid of legal argument, and the few legal arguments that they advance should be dispatched. In their *Motion*, Respondents assert that their demands for an additional expert witness and the renewal of expert discovery must be met to ensure “a fair opportunity to challenge the credibility of the witness.” Mot. at 5. This assertion is unsupported by any reference to authority, and it is incorrect for the most obvious of reasons. Respondents will have a fair opportunity to challenge the credibility of the witness via cross-examination at the hearing in this matter. *See* RULE 3.41(c); *cf. Mobil Oil Corp. v. Federal Power Comm’n*, 483 F.2d 1238, 1263 (D.C. Cir. 1973) (recognizing cross-examination as traditional and appropriate means for method of testing evidence). If Respondents believe that the assistance of an expert on the topics identified in their *Motion* would be necessary, then they remain free to employ that expert in a consulting, non-testifying capacity. *Cf.* RULE 3.31(c)(3). Respondents have advanced no reason why the traditional method of assessing credibility in American courts would be insufficient when applied to this testifying expert.

LEXIS 134 (Aug. 9, 2004)(citing FED. R. EVID. 702); *Herbert R. Gibson*, No. 9016, 1978 FTC LEXIS 324 (May 19, 1978)(citing FED. R. EVID. 608(b)).

Respondents also state that “[e]xpert witnesses are essential for a party to defend its case against charges of false advertising under the [FTC] Act.” Mot. at 2. This appears to be a fragmentary argument and in any event, there is no authority for the view that parties are entitled, as of right, to introduce all experts and expert testimony of their choosing; expert testimony must be relevant, and experts may be precluded from testifying on grounds of relevance or materiality. RULE 3.43(b); *see generally In re Telebrands Corp.*, Docket No. 9313, 2005 WL 2395791, slip op. at 22-23 & n.32 (Sept. 23, 2005) (citing RULE 3.43(b) in context of determining admissibility of expert testimony); *see also United States v. Kandiel*, 865 F.2d 967, 971 (8th Cir. 1989) (noting that trial court’s decision to exclude expert testimony would be accorded broad discretion, and would be upheld unless it was manifestly erroneous).

Next, Respondents suggest that any failure to grant their demands would deprive them of testimony necessary to defend the case. *See* Mot. at 3. Respondents have not even attempted to argue how this is true, and how the proposed testimony is purportedly directed to “elements of proof necessary to defend [the] case,” or “evidence crucial to building the defense,” as they seem to suggest. *See id.* The criminal cases cited by Respondents, *United States v. Cavin*, 39 F.3d 1299, 1308 (5th Cir. 1994), and *United States v. Van Dyke*, 14 F.3d 415, 422-23 (5th Cir. 1994), were cases in which courts excluded expert testimony that was, in fact, clearly relevant to the elements of the charged offenses and alleged defenses. In *Cavin*, a prosecution that required the government to show fraudulent intent, the trial court excluded expert testimony offered to show the defendant’s good faith, and state of mind. *See* 39 F.3d at 1307. Similarly, in *Van Dyke*, the court excluded testimony explaining, to the jury, the defendant’s reasons for asserting that he had not violated a complex financial regulation. *See* 14 F.3d at 422. Neither of these situations is

remotely comparable to the present situation.

Here, the proposed testimony is clearly not directed to the elements of proof of any claim or defense; it is targeted at Dr. Heymsfield, who is not even a named party to this action. Under RULE 3.43(b), this Court has the power to “[p]rotect witnesses from harassment,” and Respondents’ campaign to present expert testimony on the supposed ethical ramifications of the fabrication of data by a *colleague* of Dr. Heymsfield is tantamount to harassment. It is one thing to cross-examine an independent witness, and it is quite another thing altogether to prosecute a mini-trial on selected episodes in a testifying expert’s career with extrinsic expert testimony.

Additionally, Respondents briefly suggest in their *Motion* that any exclusion of their proposed expert testimony would rise to the level of a Constitutional violation and would violate the *First Amendment* itself. *See* Mot. at 5. We are aware of no authority that supports this contention. “Without question, the Government has a legitimate interest in excluding evidence which is not relevant or is confusing.” *United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996) (stating that “[t]he Constitutional right to testify is not absolute,” and recognizing that U.S. Supreme Court has described this guarantee as the right to present *relevant* testimony). Not surprisingly, Respondents have adduced no legal authority to support their contention. This is simply another unsubstantiated claim.

Lastly, Respondents strenuously argue that an additional expert witness is necessary to “guard against a miscarriage of justice,” and “discern . . . the gravity of the malfeasance committed by . . . Dr. Heymsfield.” These arguments are rhetoric only. Respondents’ use of the phrase, “the gravity of the malfeasance committed by . . . Dr. Heymsfield,” levels a pernicious accusation of scientific fraud at a distinguished scientist, with no perceptible basis in fact.

“It is often said that when a witness testifies to a collateral matter, the examiner ‘must take [the] answer,’ *i.e.*, the examiner may not disprove the answer by extrinsic evidence.” *Beauchamp*, 986 F.2d at 4 (citation omitted). *Accord Herbert R. Gibson*, No. 9016, 1978 FTC LEXIS 324 (May 19, 1978). In discovery, Respondents have elicited the testimony of Dr. Heymsfield with respect to collateral topics. Respondents may be disappointed with the answers, but they must take them. They are not entitled to conduct an expedition, in discovery or at bar, into irrelevant topics that needlessly confuse the issues in this matter.

II. Respondents’ Proposed Expert Testimony and Discovery is Untimely, Unnecessary, and Will Interfere with the Efficient Administration of these Proceedings

Respondents’ *Motion* is not merely a ticket to expert discovery into collateral matters. It is also untimely, and if granted, would set arbitrary and improper limits on the scope of the resulting expert discovery, and interfere with the efficient administration of these pretrial proceedings.

A. Respondents’ *Motion* is Not Timely

Corporate Respondents’ counsel suggests in the pending *Motion* that Respondents’ demands are timely because they were filed within 30 days of the disclosure of proposed expert opinions pursuant to RULE 3.31(b)(3). *See* Mot. at 2. The cited RULE provides that

... the parties shall disclose to each other the identity of any person who may be used at trial to present evidence as an expert. Except as otherwise stipulated or directed by the Administrative Law Judge, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. *The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other*

cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. These disclosures shall be made at the times and in the sequence directed by the Administrative Law Judge. In the absence of other directions from the Administrative Law Judge or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut proposed expert testimony on the same subject matter identified by another party under this paragraph, within 30 days after the disclosure made by the other party.

RULE 3.31(b)(3) (emphases added). Respondents claimed to quote this provision “in pertinent part” in their *Motion*, by *omitting* the third sentence—the most pertinent part—which states that the *Expert Report* must contain a complete statement of the expert’s opinions. *See* Mot. at 2.

In his *Reports* submitted last year, Dr. Heymsfield did not opine on the specific topics identified by Respondents, and Respondents do not contend otherwise. Furthermore, Respondents have failed to point to testimony offered by Dr. Heymsfield that supplements his expert report with additional opinion on the claims at issue in the Complaint. If Respondents believed that these topics were necessary to rebut Dr. Heymsfield’s opinions in this case, they should have timely designated a rebuttal expert by the deadline set in the Court’s *Scheduling Order* for identifying expert witnesses. *See* RULE 3.31(b)(3) (stating that expert witnesses shall be identified “at the times and in the sequence directed by the Administrative Law Judge”). RULE 3.31 states that the 30-day window for the disclosure of rebuttal experts cited by Respondents applies only “in the absence of other directions from the Administrative Law Judge.” *Id.*

In their *Motion*, Respondents try to reopen expert discovery by citing RULE 3.31(b)(3) and answers to deposition questions that they chose to ask Dr. Heymsfield. Dr. Heymsfield’s testimony is not part of his *Expert Report*, and the facts that he related at his deposition are not subject to expert rebuttal. RULE 3.31(b)(3) was not intended to provide an extension of time for

identifying rebuttal experts based on the answers to deposition questions. *See id.* (limiting rebuttal to “the same subject matter identified by another party under this paragraph,” *i.e.*, the topics of the written *Expert Report*).

Even if Respondents correctly read RULE 3.31(b)(3) to provide a 30-day window for parties to identify expert rebuttal witnesses to deposition testimony on collateral topics raising no material issues for expert analysis, Respondents’ *Motion* remains untimely because Respondents have failed to disclose the identity of the expert and provide a written report and other information. Moreover, Respondents cannot argue that, in withdrawing papers that were withdrawn from publication from his own list of publications, Dr. Heymsfield somehow deprived them of an opportunity to timely designate an expert witness. Leaving aside the fact that Mr. Darsee is a collateral topic not related to the merits of the *Complaint*, it is clear from the circumstances of Dr. Heymsfield’s deposition that Respondents were aware of Darsee’s withdrawn papers before the expert deposition. *See supra* pages 6-7 & n.6. On October 6th, Corporate Respondents’ counsel confirmed to Complaint Counsel that Respondents were aware of the Darsee papers before that deposition. The exhibit Respondent’s counsel attached to the deposition bears a date of “4/02/05.” Accordingly, if expert testimony concerning Mr. Darsee’s conduct was at all appropriate, then Respondents should have moved for leave to offer additional expert testimony well before they filed their pending *Motion* at the end of September 2005, almost a full year after the inception of expert discovery and nearly six months after the date they apparently knew of these issues as indicated by the print-out date of the exhibit used during Dr. Heymsfield’s August 30, 2005 deposition.

Respondents have also failed to offer any justification for why they waited an entire month

to seek leave to conduct the requested expert discovery. Unexplained delay is a consideration that the Court has weighed, and found dispositive, in ruling on the previous application to conduct discovery out of time in this case. *See* Order on Compl. Counsel's Mot. to Serve Subpoena, April 5, 2005, at 2. In that instance, Complaint Counsel sought relief because Respondents failed to disclose in their *Initial Disclosures* the identity of a firm whose existence and function is relevant to the question of whether Respondents have operated a common business enterprise as alleged in the *Complaint*. Respondents' failure to disclose this firm prevented Complaint Counsel from serving timely written discovery on that firm. *See generally* Compl. Counsel's Mot. for Leave to Serve Subpoena, Feb. 9, 2005. This Court denied our *Motion* for additional discovery, however, for the reason that Complaint Counsel had not demonstrated good cause for not seeking leave to serve the subpoena in a more timely fashion. Respondents have similarly failed to explain why they waited an entire month to seek leave to conduct the requested expert discovery here. Corporate Respondents' change of counsel cannot explain the delay, for their new counsel attended the August 30th deposition, and Corporate Respondents have other counsel who have continuously appeared in this matter since the summer of 2004. Moreover, RULE 3.31 states that the parties must *identify* rebuttal witness within 30 days, and Respondents have failed to disclose the identity of their proffered witness within 30 days of Dr. Heymsfield's deposition. *See* RULE 3.31(b)(3) ("In the absence of other directions . . . the disclosures shall be made . . . within 30 days after the disclosure made by the other party."). Accordingly, the criterion of unexplained delay considered by the Court in ruling on our previous application to conduct discovery out of time weighs against granting Respondents' *Motion* here as well.

B. Respondents Already Had An Opportunity to Depose Dr. Heymsfield on the Central Issues Raised in their *Motion*

Dr. Heymsfield's deposition clearly indicates that Respondents were aware of the Darsee papers before the deposition took place, and had a full opportunity to depose Dr. Heymsfield on the subject of Mr. Darsee and his fabrication of data. Respondent Friedlander opened the deposition and elicited around fifteen pages of testimony concerning Mr. Darsee and his fabricated data. Respondents then moved onto other topics for most of the allotted four hours. Late in the deposition, Respondent Gay's counsel produced a printed exhibit, a web page, referencing Mr. Darsee's fabrication of data and purporting to quote Dr. Heymsfield. Respondent Gay's counsel then questioned Dr. Heymsfield concerning this web page referencing Mr. Darsee. *Id.* at 634. Respondent Gay elicited around 18 pages of testimony. After that, Respondent Gay, like Respondent Friedlander, moved on to other topics.

Once more, at the very end of the deposition, Corporate Respondents' new counsel briefly revisited the subject of Mr. Darsee only to protest that, notwithstanding the Court's previous *Orders* setting a four hour limit for the deposition and denying reconsideration of that time limit, it was somehow improper to conclude the deposition after four hours. These circumstances make clear that Respondents were prepared to depose Dr. Heymsfield on the subject of Mr. Darsee, and indisputably used up their opportunity to depose him on the topic.⁸

⁸Additionally, in a teleconference with Complaint Counsel on October 6, 2005, Corporate Respondents' counsel Mr. Emord acknowledged that Respondent Friedlander was, in fact, aware of the Darsee papers that were withdrawn from publication *before* Dr. Heymsfield's deposition in August.

C. Respondents' Motion Proposes Arbitrary and Improper Limits on the Scope of the Proposed Expert Discovery, and Granting the Motion will Require Further Revision of the Pretrial and Trial Calendar

Respondents grudgingly concede that Complaint Counsel has a right to expert discovery if they present an additional expert witness, and have proposed arbitrary and improper limits on the scope of expert discovery. The evident purpose of these limits is to forestall the obvious need for further revisions to the pretrial deadlines and trial dates, to accommodate the proposed expansion of this case.

Respondents suggest reopening expert discovery for purposes of providing an expert report and permitting their expert to be deposed for only two hours. *See* Mot., Proposed Order at 2. Respondents characterize their proposal as reopening discovery “for a limited purpose,” Mot. at 6, and apparently exclude from consideration Complaint Counsel’s pre-existing discovery requests addressed at expert issues and other mechanisms and forms of discovery permitted by the RULES. Respondents’ arbitrary proposal will prejudice Complaint Counsel and interfere with the efficient administration of these proceedings.

Respondents’ motion, if granted would delay and impede the orderly disposition of these proceedings. Respondents have already sought and received a bountiful enlargement of time to try this matter based in part on the scheduling conflicts of a law firm it has now elected to replace. Allowing an additional expert at this late stage would interfere with the already delayed deadlines in place for pre-trial motions, briefs and identification of exhibits. Furthermore, if the Court were to allow an additional expert, than Complaint Counsel would be entitled to assert the full panoply of discovery tools in relation to that expert including subpoenas for documents, interrogatories and admissions. Moreover, if Respondents are permitted to present such

testimony, than Rule 3.31(b)(3) would permit Complaint Counsel to present evidence in rebuttal.

Simply put, Respondents' requested relief would lead to a cascade of further discovery and additional testimony and rebuttal at trial. Respondents' *Motion* is untimely. More problematic, Respondents propose arbitrary limits on discovery and rebuttal testimony to prejudice their adversary, and even if such discovery is granted, it is certain to further delay the hearing in this matter.

CONCLUSION

In yet another iteration of their "try the prosecutor and its experts" theme, Respondents seek to create an entire mini-discovery and trial on peripheral issues.⁹ Nearly one year after they designated their testifying experts in this matter, Respondents now demand the right to present an additional expert and reopen discovery, all to pursue satellite litigation that bears no connection to the claims and defenses at issue in this case. Respondents' motion is untimely, unfounded and unrelated to the Complaint and this Court should deny Respondents' *Motion*.

⁹ On October 7, 2005, Respondents filed a lengthier version of the instant motion based upon the same operative facts but seeking to exclude Dr. Heymsfield as a witness and sanctions against Complaint Counsel. We will file a separate opposition to Respondents' frivolous and repetitive motion.

Respectfully submitted,

Laureen Kapin

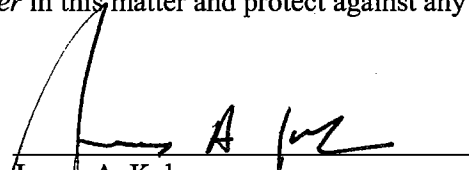
Laureen Kapin (202) 326-3237
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Joshua S. Millard (202) 326-2454
Edwin Rodriguez (202) 326-3147
Laura Schneider (202) 326-2604

Division of Enforcement
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: October 11, 2005

CERTIFICATION OF REVIEWING OFFICIAL

I certify that I have reviewed the attached public filing prior to its filing to ensure the proper use and redaction of materials subject to the *Protective Order* in this matter and protect against any violation of that *Order* or applicable RULE OF PRACTICE.

A handwritten signature in black ink, appearing to read 'James A. Kohm', is written over a horizontal line. The signature is stylized and somewhat cursive.

James A. Kohm
Associate Director, Division of Enforcement
Bureau of Consumer Protection

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2005, I caused *Complaint Counsel's Opposition to Respondents' Motion to Add an Expert Witness and Reopen Discovery* to be served and filed as follows:

(1) the original, two (2) paper copies 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-135
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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For Respondent Mowrey

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For Respondents
Klein-Becker USA, LLC,
A.G. Waterhouse, LLC,
Basic Research, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
LLC, and BAN, LLC



COMPLAINT COUNSEL

EXHIBIT A



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Joshua S. Millard
Attorney

Direct Dial:
(202) 326-2454

September 22, 2004

Dr. Steven B. Heymsfield
St. Luke's-Roosevelt Hospital
Obesity Center
1090 Amsterdam Ave. #14C
New York, NY 10025

VIA FEDERAL EXPRESS

Re: *Basic Research, LLC, et al.*, Docket No. 9318

Dear Dr. Heymsfield:

Pursuant to the Court's *Scheduling Order* and Rule of Practice 3.31(b)(3), we are required to provide Respondents with your CV, a list of all publications authored by you and a list of all cases in which you testified as an expert at trial or by deposition. If you have any transcripts of these trial or deposition testimonies, we are required to provide copies of those transcripts, as well. Based on the Court's deadline in the *Scheduling Order*, we are requesting that you provide us with the above information by October 1st.

As a reminder, when drafting the expert report, please take note of everything that was used in forming your opinion. Pursuant to Rule of Practice 3.31(b)(3), "the report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions." Therefore, please include an index which cites everything that you have relied upon in forming your opinion.

Also, please find enclosed three documents relating to the ingredients for Leptoprin, Anorex, and Pediallean. We have received your completed acknowledgment of the *Protective Order* in this matter. Thank you again for your time and assistance.

Sincerely,

Joshua S. Millard

enclosures

Attorney, Division of Enforcement

EXHIBIT B

CURRICULUM VITAE

Daniel B. Mowrey, Ph.D.

EDUCATION:

1978 Ph.D. Experimental Psychology: Brigham Young University, Provo, Utah. Emphasis in Psychopharmacology. Related fields of graduate study: Biochemistry, biology, botany, neurology, anatomy.

PROFESSIONAL:

- 1991-Present President, American Phytotherapy Research Laboratory. This entity researches the needs of the herb community. Basic and archival research geared toward proprietary products as well as generic materials. Clinical and pre-clinical *in vivo* research is combined with *in vitro* investigation. Publication of findings in peer-reviewed journals is sought but not necessarily required.
- 1986-Present Author, Lecturer and Consultant in the area of herbal medicine. Activities include development of new products, market surveys, basic experimental research, technical writing and import/export consultation. Of particular importance are the authoring of books on scientific herbalism, the development of the "guaranteed-potency-herb" concept in America and the creation of whole lines of herbal combinations. This has given me an opportunity to educate consumers, industry and policymakers in herbal medicine benefits and risks. I have appeared nationally and internationally in health and trade publications and radio and television.
- 1978-Present Compiled herbal database that became the basis for the 350 page The Scientific Validation of Herbal Medicine (and subsequent books). The database was also used to write the herb sections of Nutri Health Data, a comprehensive alternative health care database for professionals and health stores. Updates to this database are ongoing.
- 1977-1991 Director, Mountainwest Institute of Herbal Sciences. The main vehicle through which private corporations have contributed to the only research entity in the United States dedicated to the validation of wholistic herbal medicine.
- 1978-1996 Director, Behavior Change Agent Training Institute. This small, informal group of psychologists serves the community by developing behavior change programs for counselors, group homes, foster homes, as well as, individual families, and by training key individuals in the use of behavior change and principles.
- 1978-1986 Director of Research and Development, Nova Corporation, Salt Lake City, Utah. Handled the development of new fluid systems based on polymer and surfactant theological technology. Concurrently wrote operations and technical manuals that have become industry standards.
-

- 1973-1979 Instructor, Brigham University, Department of Psychology. Courses taught: experimental psychology, psychopharmacology, physiological psychology, sensation, cognition and statistics.
- 1977-1978 Member, Utah State Committee for Investigation of Unproven Health Practices.
- 1975-1978 Director, Research & Development for Nature's Sunshine Products. Work included toxicological studies on popular herbs, development of herbal blends, efficacy tests on numerous herbs and herbal products.

BOOK PUBLICATIONS: Author: Daniel B. Mowrey, Ph.D.

The Scientific Validation of Herbal Medicine. Keats Publishing, New Canaan, CT. 1990 (1986). This book is currently being used as a textbook in many college level courses on herbal medicine.

Herbal Tonic Therapies. Keats Publishing, New Canaan, CT. 1993. Revitalizes the concept of a tonic in light of modern research.

Fat Management! The Thermogenic Factor. Victory Publications, Lehi, Utah. 1994.

Natural Relaxants: Freedom From Prescription Drugs. American Research Institute, Scottsville, KY. 1990.

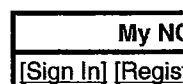
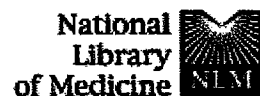
Proven Herbal Blends. Keats Publishing, New Canaan, CT. 1990, (1987).

Cayenne: Volume One of the Scientific Validation of Medicinal Foods Monographs. Cormorant Books, Lehi, UT. 1987.

Guaranteed Potency Herbs: Next Generation Herbal Medicine. Keats Publishing, New Canaan, CT. 1990 (1988). This is the first book to introduce guaranteed potency herbs to the American public.

Herbal Medicine and Your Immune System. Keats Publishing, New Canaan, CT. 1991 (in Press).

Echinacea. How An Amazing Herb Supports & Stimulates Your Immune System. Keats Publishing, New Canaan, CT. 1991



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ClinicalTrials.gov
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All: 1 Review: 0

1: Mowrey DB. Clayson DE.

[Related Articles, Links](#)

Motion sickness, ginger, and psychophysics.
Lancet. 1982 Mar 20;1(8273):655-7. No abstract available.
PMID: 6121968 [PubMed - indexed for MEDLINE]

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Sep 27 2005 04:32:41

EXHIBIT C

1
2 specific. The paper that you've provided me
3 here, I think whichever one this is, this
4 might be number 3, to my way of thinking this
5 is a competent paper. Reliable, I'm not sure
6 that's a reasonable judgment, but, I mean,
7 I'll just say that this study was done with
8 acceptable scientific criteria.

9 Q. What about the other study that you
10 were -- of an ephedra product that you were
11 involved with with Dr. Boozer? Was that also
12 a competent scientific study?

13 MS. RICHARDSON: Objection, vague,
14 goes to foundation.

15 A. Keep in mind that I am not an author
16 on that paper. I was acknowledged on that
17 paper. I am not an author and I didn't review
18 that paper for publication. So it's a little
19 outside the scope of my testimony today
20 whether or not that's a competent reliable
21 study and a paper.

22 Q. With respect to the published study
23 on the Metabolife product why is it -- or let
24 me ask it this way. You indicated you don't
25 know that it's necessarily a reliable study.

1
2 context of your question is. I think you're
3 asking it -- I am telling you in a scientific
4 manner why -- my opinion about that paper and
5 why I'm not an author on it, but reliability,
6 I have already answered to you my general idea
7 of what reliability is.

8 Q. Are there any other reasons that you
9 were not an author on that paper?

10 MS. RICHARDSON: Objection, form,
11 ambiguous.

12 Q. Aside from what you testified?

13 A. I think the reason that I'm giving
14 you is a very important one, and that is that
15 I disagreed with the conclusions of the paper,
16 and there are many other reasons that are part
17 of my rationale for not being on that paper,
18 but that really is the main one.

19 Q. What were the other rationales?

20 MS. RICHARDSON: Objection. This
21 witness has already told you he doesn't
22 have a copy of the paper. He has
23 testified with regard to this paper.
24 Unless you have a copy of the paper,
25 unless this is absolutely going

1

2 Can you explain to me what the other
3 reasons were for you not wanting to be an
4 author on that study?

5 A. I think you have, you know, you have
6 to get much more specific with me because the
7 study itself was the subject of great
8 controversy and discussion both internally at
9 St. Luke's and Columbia University and at the
10 FDA, and also in terms of the publication.
11 You probably know that there was mixup between
12 the placebo tablets and the active agents,
13 that Dr. Boozer inadvertently gave subjects
14 placebo, which had active ingredient in it.
15 And there was a very strong effort to retract
16 that paper from the scientific literature by a
17 number of people.

18 Q. So given what you've testified to
19 about that study, does that mean that it's not
20 a competent and reliable study?

21 A. I don't think I am in a position to
22 judge the competency and reliability based on
23 what I've just told you because of the placebo
24 active ingredients mixup.

25 To the extent that say a jury would

EXHIBIT D

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UNITED STATES OF AMERICA
BEFORE THE 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.,
BAN, L.L.C., DENNIS GAY, DANIEL B. MOWREY
and MITCHELL K. FRIEDLANDER,

Respondents.

-----)

CONTINUED DEPOSITION OF STEVEN HEYMSFIELD, MD
New York, New York
Tuesday, August 30, 2005

Reported by:
Toni Allegrucci
JOB NO. 176743

COPY

1 HEYMSFIELD

2 MR. EMORD: Jonathan Emord on
3 behalf of Klein Becker USA.

4 MR. PRICE: Ron Price on behalf of
5 respondent Daniel Mowrey.

6 MR. FELDMAN: Jeff Feldman on
7 behalf of corporate respondents.

8 MS. KAPIN: Lauren Kapin on behalf
9 of the Federal Trade Commission.

10 MR. MILLARD: Josh Samuel Millard,
11 counsel supporting the complaint.

12 MS. VIDEOGRAPHER: Will the
13 Court Reporter please swear --

14 MS. KAPIN: We have one more.

15 MR. DOWDY: Lemuel Dowdy, counsel
16 supporting the complaint.

17 S T E V E N H E Y S M F I E L D, called as a
18 witness, having been duly sworn by a Notary
19 Public, was examined and testified as
20 follows:

21 EXAMINATION BY

22 MR. FRIEDLANDER:

23 Q. Dr. Heymsfield, I'm going to ask
24 you some questions about your original expert
25 report. I think it's Exhibit 7. It's right

1 HEYMSFIELD

2 before you. It's the one sticking out I
3 think.

4 A. Okay.

5 Q. Before we get back to where we left
6 off the last time, it's been a number of
7 months since we met the last time.

8 Have you had any published --
9 papers published since the time we last met?

10 A. I've had papers published, but
11 nothing related to this case that I'm aware
12 of, but yes.

13 Q. Anything that's published?

14 A. Yes.

15 Q. Would you kindly supply and update
16 your list of publications?

17 A. Sure.

18 Q. Now, except for the new
19 publications I'm assuming that the list of
20 publications contain every publication you've
21 ever published in a journal?

22 A. To the best of my administrator's
23 ability they are all in there. There might
24 be something, something I've published that's
25 not there for, you know, for reasons of

1 HEYMSFIELD

2 error, but not to omit anything. If a paper,
3 for example, there were several papers that
4 were retracted a number of years ago, those
5 papers are not on my CV.

6 Q. What papers are those?

7 A. There was a set of papers written
8 by a student at Emory University, where I was
9 a professor, and some of the information then
10 was later found to be falsified. That group
11 of papers was retracted from the journals and
12 they are not on my CV.

13 Q. Can you tell us what that was
14 about?

15 A. Sure. I think this has come up
16 already in our discussions if I recall
17 correctly, but there was a student at
18 Emory University who did research and later
19 went to Harvard, and while he was at Harvard
20 it was discovered he had fabricated some data
21 at Harvard, and when an investigative
22 committee was set up it was found that some
23 of the data he worked on while he was at
24 Emory also was fabricated.

25 All of the papers at Harvard and at

1 HEYMSFIELD

2 Emory that involved any fabrication were
3 retracted from the medical journals.

4 Q. What was his name?

5 A. Darsee, John Darsee.

6 Q. You were a co-author?

7 A. Yes, me and about 25 other people,
8 25 or 30.

9 Q. That were all on the same paper?

10 A. On all of his papers that were
11 retracted, yes.

12 Q. What about the ones that you were
13 involved in, how many other co-authors were
14 there?

15 A. About ten.

16 Q. On each paper?

17 A. Probably it ranged, it varied.
18 Several. Is there a reason you are asking me
19 that? I can't give you the exact number.

20 I have 400 or 500 publications in
21 my career and I can't tell you the exact
22 author count on each one.

23 Q. Do you know where I can find copies
24 of those?

25 A. Sure. Just go on to PubMed and

1 HEYMSFIELD

2 more than likely you will be able to find if
3 you type in Darsee, D-A-R-S-E-E, you should
4 be able to pull up those papers. Even though
5 they are retracted they are still more than
6 likely in electronic form on the internet.

7 Q. Pardon the question, but what's the
8 role of a co-author?

9 A. What is the role of a co-author?

10 Q. Yes.

11 A. It's actually fairly
12 well-described. There's criteria for
13 co-authorship that's published by each
14 journal and so you can see it there, but
15 there's a criteria for co-authorship and
16 there are a number of different functions a
17 co-author has. It doesn't -- it may not
18 necessarily be one function. It can be three
19 or four different functions.

20 Q. Does a co-author have any
21 responsibility in regards to how a study is
22 published, a review of the data, things like
23 that?

24 A. I'm not sure, you know, exactly
25 what the question is you are asking. Of

1 HEYMSFIELD

2 course that, you know, people who are
3 co-authors share certain responsibilities for
4 the data.

5 Q. So did you share any responsibility
6 in the fraudulent data being supplied by
7 Darsee?

8 A. You mean, are you asking me if I
9 was involved in the fraud?

10 Q. I'm asking you what your
11 involvement was in the study?

12 A. I was a colleague and I
13 participated in the research with him. I saw
14 some of the patients that were in the study
15 and I helped him prepare the manuscript,
16 manuscripts, several.

17 Q. So you were privy to all the data?

18 A. No. "All of the data," no. I
19 rarely see all the data in any study, except
20 in studies which I'm the primary author of
21 the paper.

22 Q. So when you are a co-author you see
23 less of the data and take less
24 responsibility; is that what you are saying?

25 A. No, that's what you are saying.

1 HEYMSFIELD

2 Q. Okay.

3 A. You know, co-authorship, as I
4 mentioned, can be based on any set of
5 criteria. There are ten different things you
6 do when you are a co-author. You have to
7 meet usually two or three of those different
8 things to be a co-author, so a part of it
9 could be getting the funds to the study,
10 helping to prepare the manuscript, analyzing
11 the data, designing the studies.

12 It's a rather long list. So
13 co-authorship is very variable depending on
14 specific study.

15 Q. So in your list of publications,
16 many of them list you as a co-author?

17 A. Yes.

18 Q. We would have to go through each
19 and every one of those studies to find out
20 what your participation is, has been?

21 A. Yes, yes.

22 Q. And in some of them you list it
23 could have been minimal, like just getting
24 the funding; is that correct?

25 A. Not necessary -- you know, that's

1 HEYMSFIELD

2 what you are saying. The contribution on a
3 paper could have involved, as I said, there
4 are about ten different criteria. Usually
5 most journals require two to three of those
6 criteria, so it could be any one of those two
7 combination, those two or three.

8 If you get the money for a study
9 that usually means you had the idea and wrote
10 the grant, as in academia, and so that
11 already commutes a lot of responsibility in
12 terms of conception of the ideas and so on.

13 Q. And how do you determine, when you
14 put your name on a study as a co-author and
15 you don't have the ultimate responsibility as
16 being the lead author --

17 A. Yes.

18 Q. -- how do you determine that all of
19 the data that they are providing you to
20 review is correct?

21 A. It's called trust and integrity.
22 And if somebody lies to you then they
23 violated that trust and it's just like in any
24 business, in any relationship, people can be
25 either honest or dishonest. And so there's a

1 HEYMSFIELD

2 certain level of trust that you have and if
3 they violate it then, you know, there's
4 nothing you can do to test someone's
5 honestly, including lie detector tests or
6 whatever so, you know, so you have to depend
7 on integrity. And that's what science is
8 based on and it doesn't always work
9 perfectly, but it works most of the time.

10 Q. You used the word "fraud" when I
11 asked you a question and you answered me
12 back, are you accusing me of fraud; is that
13 correct?

14 A. Well, I think you used the word to
15 begin with. We can read it back. I was
16 just --

17 Q. What do you mean by "fraud"?

18 MS. KAPIN: Objection, relevance.

19 A. I'm not sure why you are asking me
20 this or what it has to do with what we're
21 discussing. "Fraud" is a word and you'd have
22 to give me a context to put it in into.

23 Q. Well, you just used the word --
24 could you find that in the transcript where
25 he used the word fraud?

1 HEYMSFIELD

2 A. Well --

3 MR. FELDMAN: He asked if you were
4 accusing him of participating in fraud,
5 that was the question of Dr. Heymsfield
6 to you.

7 Q. What do you mean when you use the
8 word "fraud"?

9 A. What was the sentence that I was
10 responding to when I asked that, can I get
11 that from you?

12 (Record read.)

13 A. So I'm just responding back to your
14 use of the word "fraudulent."

15 Q. Well, what did you mean by the use
16 of the word "fraud"?

17 A. Well, I told you.

18 MS. KAPIN: I'm going to renew my
19 objection.

20 MR. FELDMAN: Can we get that
21 colloquy read back, the three, four
22 sentences that led up to the comment
23 that Dr. Heymsfield made.

24 (Record read.)

25 Q. Was there fraud involved in the

1 HEYMSFIELD

2 Darsee studies?

3 A. Yes.

4 Q. What do you mean by the word
5 "fraud" in that context?

6 A. Darsee made up data that was
7 eventually put into the papers. He
8 fabricated the data. He claims to have
9 evaluated patients that actually were not
10 able to be found later. I'm not sure Darsee
11 ever admitted to it, but there was a
12 committee formed that established that the
13 patients who were in some of his papers could
14 not be identified.

15 Q. When you talk about the "student"
16 that student was Darsee; is that correct?

17 A. Yes.

18 Q. And was Darsee under your
19 supervision?

20 A. Not at the time he was caught for
21 his fabrication, no, he was at Harvard at
22 that point.

23 Q. The time he committed the fraud was
24 he under your supervision?

25 A. No, he was not under my direct

1 HEYMSFIELD

2 supervision. He was working as a medical
3 resident, in fact, he was chief resident at
4 Emory University. He is under the direct
5 supervision of the chief of medicine,
6 Willis Hearst (phonetic).

7 Q. Was he under your supervision in
8 any way; direct, indirect?

9 A. I don't think so, I mean other than
10 I had a higher rank than he did. I was
11 probably an assistant professor and he was
12 still in training and, therefore, our ranks
13 were different, but I didn't supervise him.
14 And in the world I live in today, the word
15 "supervision" has very specific meaning.

16 No, he was not an employee of mine,
17 nor did I evaluate him or grade him in any
18 way.

19 Q. Did you write to the peer review
20 journals that published the studies and ask
21 for retraction of the studies?

22 A. Well, I think that there were
23 retraction letters and I believe that I did
24 sign some of them. I would have to go back.
25 My memory on this is not impeccable, but

1 HEYMSFIELD

2 A. Sure.

3 Q. Co-authorship is a subject that I
4 want to -- and I know Mr. Friedlander went
5 into that. I want to ask just a couple more
6 questions.

7 I take it it would just not be
8 ethical to just lend your name to a study
9 that you weren't familiar with, fair?

10 MS. KAPIN: Objection, relevance,
11 overbroad.

12 A. Yeah, I -- "lend your name," you
13 mean being a co-author on a study that you
14 are not familiar with, is that --

15 Q. Right on the money. We're starting
16 to just -- we're on the same sheet of music.

17 A. You would have to give me a
18 specific example for me to answer yes or no.

19 Q. Really?

20 A. Yes.

21 Q. So if somebody came up to you and
22 said Dr. Heymsfield, you have a great
23 reputation in the weight loss area. I've
24 didn't a study, it's going to be published in
25 the New England Journal of Medicine. I want

1 HEYMSFIELD

2 to put your name on it, even though you have
3 not and will not have anything to do with the
4 study, will you agree to do that for me?

5 A. You know, you use my name, but that
6 doesn't meet the criteria for co-authorship.
7 If what you said is true, in other words, the
8 person had nothing to do with the study
9 whatsoever and they put their name on it,
10 that doesn't meet the requirements for
11 co-authorship.

12 Q. Exactly. So you would say "no"
13 right, in that instance?

14 MS. KAPIN: Objection, calls for
15 speculation, relevance.

16 A. The person had ---I'm sorry.

17 MS. KAPIN: That's all right.

18 Go ahead.

19 A. The person had nothing to do with
20 the study, doesn't meet the requirements for
21 co-authorship, period, then they wouldn't be
22 on the paper. Because you have to signoff
23 for the journals whether or not you meet the
24 criteria for co-authorship.

25 Q. Okay, and are there -- again, are

1 HEYMSFIELD

2 there published standards that I can look to
3 and say, look, if somebody signed on as a
4 co-author this is the standard that they had
5 to meet?

6 MS. KAPIN: Objection, overbroad,
7 ambiguous, relevance.

8 A. The standards for co-authorship
9 have changed over time. Now the standards
10 for co-authorship are very serious. You have
11 to sign a statement saying that you meet the
12 criteria for co-authorship. That's only been
13 in place for several years. I can't tell you
14 the exact number of years, but when we go
15 back, say 1950, no such standards existed.

16 Q. Well, let's just take your career.
17 That's something you are familiar with.

18 A. Yes.

19 Q. In your career have you personally
20 adopted a certain standard that I'm not
21 lending my name, I'm not putting my name on a
22 study unless I have this minimum involvement?

23 MS. KAPIN: Objection, relevance.

24 A. Again, you know, I can't really
25 answer that out of context. If you gave

1 HEYMSFIELD

2 me -- you can go through my CV or whatever
3 publications you can find and I can tell you
4 what my role specifically in that study was.

5 Q. I appreciate that.

6 A. I would be happy to do that.

7 Q. The fact that you can't tell me,
8 maybe that's the answer to the question. But
9 I take it you have never embraced for
10 yourself, this is my minimal standard of
11 involvement before I'll put my name on a
12 study?

13 MS. KAPIN: Objection,
14 argumentative, mischaracterizes.

15 A. You know, again, I would have to
16 see a specific example. But getting back to
17 what you said, if someone has no involvement,
18 no, zero involvement in the study and they
19 are approached -- and I'll be specific for
20 myself -- that if I had no involvement
21 whatsoever in the study and I was approached
22 to be a co-author on the study, I wouldn't
23 put my name on that study if I had no
24 involvement in any aspect of that trial,
25 beginning from inception to completion of the

1 HEYMSFIELD

2 paper and revision of the paper. That would
3 be very unusual for me to ever have done
4 that. I would have to see specific examples.

5 Q. That was a question I'd actually
6 asked sometime ago, and you had answered and
7 I'm onto a different question. It may be
8 it's yes or no, if you did or you didn't.

9 In your career, have you in your
10 own mind said this is my standard for
11 co-authorship, I have to have this much
12 involvement? Have you ever done that?

13 MS. KAPIN: Objection, overbroad,
14 ambiguous.

15 A. I use whatever the standards are at
16 the time, that's what I use.

17 Q. Where did you find the standards?
18 That's what I'm trying to figure out.

19 A. Well, I told you before that right
20 now there's a published set of standards. If
21 you go to New England Journal, if you go to
22 the American Journal of Nutrition, if you go
23 to JAMA, any of these articles, you pick up
24 the second page and you will see the
25 standards for co-authorship, or authorship,

1 HEYMSFIELD

2 and there's a checklist. And you go down the
3 checklist and if you meet two out of the ten
4 criteria you can be a co-author, and you have
5 to check it off and you sign it.

6 Q. But before these were published
7 what did you use?

8 MS. KAPIN: Objection, relevance,
9 overbroad.

10 A. Whatever the morays were at the
11 time, that's what I used.

12 Q. How would I find them?

13 A. I've already told you that they've
14 only recently been published, recently being,
15 I don't know, maybe a decade or more.

16 Q. So these are word of mouth morays
17 that you followed before?

18 A. Probably, yes.

19 MR. BURBIDGE: Let's look at this.

20 (Respondents' Exhibit 19, document,
21 marked for identification, as of this
22 date.)

23 Q. Dr. Heymsfield, let me hand you
24 Exhibit 19. I'll ask you is this -- and take
25 all the time you need to. Is this an example

1 HEYMSFIELD

2 of a learned text that sets forth appropriate
3 requirements for drafting and co-authoring of
4 medical publications?

5 A. This is one set. I don't know
6 who -- I don't know exactly "ICMJE," I'm not
7 sure who that is but, yes, this is one set of
8 requirements, dated 2004.

9 Q. I appreciate that. And look at --
10 let me have you turn to the second page, and
11 there is a reference to, it's Roman Numeral
12 II, "Ethical Considerations in the Conduct of
13 Reporting on Research."

14 Do you see that?

15 A. Yes.

16 Q. There's an indent down that starts
17 "Authorship Credit." Do you see that?
18 There's an indentation with a bullet point.

19 A. Yes.

20 Q. Your finger is almost on it. I'm
21 going to read it into the record.

22 "Authorship credit should be based on:

23 One, substantial contributions to
24 conception and design, or acquisition of data
25 or analysis and interpretation of data.

1 HEYMSFIELD

2 Two, drafting the article or
3 revising it critically for important
4 intellectual conduct.

5 Three, final approval of the
6 version to be published authors should meet
7 conditions one, two and three."

8 Do you agree with those?

9 A. This is one set, dated 2004 and, as
10 I said, if I submitted a paper to a journal
11 that adheres to these guidelines, then I
12 accept it.

13 Q. I'm asking you in general, as you
14 sit here today, are those appropriate
15 standards that you endorse?

16 MS. KAPIN: Objection, overbroad,
17 ambiguous, relevance.

18 A. I have to see the context. This is
19 not the format that an investigator would be
20 given. These are general -- these are
21 guidelines.

22 Q. Do you disagree with any of them?

23 MS. KAPIN: If you could not
24 interrupt him. Go ahead.

25 A. I would have to see, for example,

1 HEYMSFIELD

2 if you gave me New England Journal and I
3 could see their signature page, then I could
4 tell you -- I mean I don't disagree with
5 these necessarily.

6 Q. Okay. Would you have disagreed
7 with these at any time in your academic
8 career?

9 MS. KAPIN: Objection, vague,
10 overbroad, ambiguous, relevance.

11 A. I would have to see the context but
12 you are asking me -- these are standards that
13 have evolved over a hundred years of
14 scientific research and so the standards that
15 existed in 1920 were not the same as the
16 standards today. These standards have
17 evolved over time.

18 Q. When you were involved in the
19 Darsee studies --

20 A. Yes.

21 Q. -- that were fraudulent, you were a
22 co-author, right?

23 A. Yes.

24 Q. So you understood you had certain
25 responsibilities to verify what was being

1 HEYMSFIELD

2 done and said, fair?

3 A. No.

4 Q. None?

5 A. Not necessarily.

6 MS. KAPIN: Okay. Let me pose my
7 objections, gentleman. Go ahead.

8 Q. Did you believe you had any duties
9 and responsibilities to the medical community
10 to verify any of the data in the Darsee
11 study?

12 A. Now we're talking about apples and
13 oranges.

14 Q. See if you can answer that
15 question.

16 A. You are talking --

17 MS. KAPIN: Well, again, I will ask
18 you not to interrupt him.

19 A. You are talking about verification
20 of experimental data, and we just came from
21 discussing rules for co-authorships. Now,
22 let's keep in mind you're conflating two
23 different things.

24 Q. I didn't, you did.

25 A. No.

1 HEYMSFIELD

2 Q. Let me just ask the straightforward
3 question.

4 A. Yes.

5 Q. With regard to the Darsee studies
6 what, if any, duties and responsibilities did
7 you believe you had as co-author?

8 A. I worked on the design of some of
9 the studies, I worked on their conception
10 design, I worked on review of the data,
11 "data" being the summary data, and I worked
12 on writing the manuscripts and helping to
13 revise them for publication.

14 Q. Did you have access to -- strike
15 that. Was there any data involved in that
16 study to which you did not have access?

17 A. Yes.

18 Q. What?

19 A. The raw data.

20 Q. Did you ask to have access and were
21 foreclosed?

22 A. I never asked for the raw data
23 because that's something exceptionally rare
24 among co-investigators, to ask for the source
25 information. What I saw and worked with was

1 HEYMSFIELD
2 the summary information. In other words, the
3 patient gives samples, the samples are
4 analyzed by the lab, there's data, the data
5 goes into a computer -- at the time there
6 were no computers -- and put into tables and
7 charts and then created into summary
8 statistics for a paper.

9 So there's a long chain going from
10 the patient to the paper where data gets
11 moved along. And investigators who are
12 co-authors, with colleagues who collect it at
13 a very early stage, at the patient stage,
14 very, very, very rarely ask for the source
15 information.

16 Q. My question to you was really
17 simple. Did you -- were you foreclosed from
18 access to the raw data; yes or no?

19 A. I was not foreclosed, nor did I ask
20 or have interest in the source data.

21 Q. All right. Now, this was a major
22 event in your life, correct?

23 MS. KAPIN: Objection,
24 mischaracterizing.

25 A. You know, I've had a lot of major

1 HEYMSFIELD

2 events in my life. It was one of many.

3 Q. Well, the bottom line is that you
4 were asked to leave Emory University as a
5 result, fair?

6 MS. KAPIN: Objection,
7 argumentative, mischaracterizing.

8 A. If you can find that written
9 anyplace, anywhere in any reliable document
10 I'd be happy to affirm its validity.

11 (Respondents' Exhibit 20, document,
12 marked for identification, as of this
13 date.)

14 Q. Let me show you what's been marked
15 as Exhibit 20, correct. Are you familiar
16 with a publication "the scientist"?

17 A. Yes.

18 Q. This is Volume One, Issue 13,
19 May 18, '87.

20 A. Yes.

21 Q. Down at the bottom, last full
22 paragraph it says, and quoting you, "The
23 response was that Emory asked me to leave; my
24 grants dried up. I was tenured, so they
25 couldn't fire me. But they definitely

1 HEYMSFIELD

2 considered me an eyesore. I was set
3 aside-taken off the ladder to the sky. It
4 was obvious there would be no promotions or
5 opportunities."

6 That's what you told the reporter,
7 right?

8 A. This is a newspaper article and I'm
9 not sure what the quote context I gave this
10 quote, but if you can find anything
11 objective, and I don't mean a newspaper
12 article, from Emory University, written to me
13 in any document, and you can go to the dean,
14 you can get all the files, that asked me to
15 leave I would be very shocked.

16 Q. Get my question back. I didn't ask
17 that question.

18 A. This is a newspaper article.

19 MS. KAPIN: Doctor, you don't have
20 to throw out challenges to opposing
21 question.

22 A. Yes, yes.

23 Q. And likely will take you up, but
24 that wasn't the question. Can you read the
25 question and we'll take a break.

1 HEYMSFIELD

2 (Record read.)

3 Q. That's the question. Did you tell
4 that to the reporter?

5 A. I don't remember specifically what
6 I told the reporter. This is 1987 that this
7 was written, but I'm telling you that
8 whatever context this was in, I'm not sure
9 what specifically was said to him at the
10 time.

11 Q. But you are not denying that you
12 said this?

13 MS. KAPIN: Objection,
14 mischaracterizing.

15 Q. Right, you are not denying it?

16 A. I don't know what I said to the
17 reporter, but I don't, you know, I'm telling
18 you objectively that the statement you made
19 earlier, that I was -- or you asked me was I
20 ever asked, maybe we could go back to that
21 statement.

22 Q. I'll do it in just a second.

23 A. But whatever the implications of
24 this are are not accurate.

25 Q. But if you don't recall what you

1 HEYMSFIELD

2 said I take it you can't deny saying what's
3 quoted here, right?

4 MS. KAPIN: Objection,
5 argumentative, mischaracterizing.

6 A. This is a -- this is a newspaper
7 article --

8 MS. KAPIN: And you can take the
9 time to read this if you like,
10 Dr. Heymsfield, to get the context.

11 A. No, I'm just at the telling you
12 that.

13 Q. You are off my question. My
14 question is very simple. I take it that if
15 you don't recall what you said you can't deny
16 that you said this, fair?

17 MS. KAPIN: Objection,
18 argumentative.

19 A. I'm going to tell you what I see
20 here. There's a quote from me here, and we
21 know what it says. I'll read it. "The
22 response was that Emory asked me to leave,"
23 and I told you I don't remember exactly what
24 I said. This is many years ago. I don't
25 know how accurate this quote is, but I do

1 HEYMSFIELD

2 know that Emory never asked me to leave.

3 Q. As you sit here today and you are
4 under oath, can you deny that you said what
5 this reporter quotes?

6 MS. KAPIN: Objection,
7 argumentative, harassing.

8 A. I don't know whether or not this is
9 an accurate quote or not. I'm just telling
10 you the facts.

11 Q. Let me ask you this. Did you get
12 anymore grants at Emory University after the
13 Darsee fraud was disclosed?

14 A. Yes.

15 Q. Were you tenured?

16 A. Yes.

17 Q. And it would not be fair to say,
18 would it, that you left Emory solely because
19 you had better opportunities?

20 MS. KAPIN: Objection.

21 Q. That wouldn't be fair, would it?

22 MS. KAPIN: Argumentative.

23 A. I'm not sure. It's sort of a
24 double negative, but I left Emory University
25 because I had much better opportunities.

1 HEYMSFIELD

2 Q. Based on the fact that your
3 reputation at Emory had essentially been
4 destroyed, fair?

5 MS. KAPIN: Objection,
6 argumentative, harassing.

7 A. You are saying that. I went to an
8 Ivy League School, a top tier Ivy League
9 School to leave what's considered a second
10 tier school.

11 Q. After the Darsee study the fraud
12 became public, did you receive grants at
13 Emory?

14 A. I always -- I've had grants
15 throughout my career, from the day I started
16 and I would have had grants that continued.
17 Nor I was never taken off any grants. I
18 continued to get grants throughout my entire
19 year.

20 Q. Still not my question.

21 A. I think I answered it though.

22 Q. Maybe you remember, maybe you
23 don't. At Emory University, while you still
24 remained there after Darsee fraud was
25 disclosed, did you get any new grants?

1 HEYMSFIELD

2 That was my question.

3 A. I can't answer that specifically
4 because I've always had a flow of grants,
5 that's how I've supported myself my whole
6 life.

7 MR. BURBIDGE: We'll go off the
8 record and take a break.

9 MS. KAPIN: Great.

10 MR. BURBIDGE: Thanks.

11 MS. VIDEOGRAPHER: The time is now
12 1:15 and we're off the record.

13 (Recess taken.)

14 MS. VIDEOGRAPHER: The time is now
15 1:30 and we are back on the record.

16 Q. Okay. Back on the record. I'm
17 going to finish up a couple questions and
18 then I'll turn the time over to Jonathan.
19 Just earlier when I was asking about
20 metaanalysis you indicated there were some
21 standards and you said give me a minute and
22 I'll think about it, and I bet you've done
23 that.

24 A. I have.

25 Q. So what do I refer to as sort of

1 HEYMSFIELD

2 A. Supports some weight loss with
3 timeframes, also no studies longer than six
4 months and so on.

5 MR. BURBIDGE: Thank you. I'm
6 going to turn my microphone over.

7 Would you like to switch.

8 (Off-the-record discussion held.)

9 MS. KAPIN: Just to verify,
10 Mr. Emord, yesterday you filed an entry
11 of appearance with the court and served
12 it on complaint counsel --

13 MR. EMORD: Yes.

14 MS. KAPIN: -- regarding your
15 appearance in this matter?

16 MR. EMORD: That's correct.

17 EXAMINATION BY

18 MR. EMORD:

19 Q. All right. Dr. Heymsfield,
20 Jonathan Emord. Please to meet you.

21 A. Hi.

22 Q. I'm the attorney for Klein-Becker
23 in this proceeding. I have just a few
24 questions for you.

25 Have you ever had an instance in

1 HEYMSFIELD

2 which you have submitted a article for
3 publication or have been listed as a
4 co-author upon the article that you did not
5 read in its entirety?

6 MS. KAPIN: Objection, relevance.

7 A. Did not read in its entirety? You
8 know, like I said, I have a couple of hundred
9 papers that I've written and worked on so I
10 can't answer it as specifically as you've
11 asked it. Again, I would have to have a
12 specific example.

13 Q. Well, can you conceive of an
14 instance where you would have allowed an
15 article to be published with your name on it
16 that you did not read?

17 A. An article with my name, that I
18 didn't read?

19 Q. Right.

20 MS. KAPIN: Let me just make my
21 objection, overbroad. Go ahead.

22 A. Unlikely, but again a specific
23 example would be helpful.

24 Q. But it could have happen that you
25 allowed an article to be published with your

1 HEYMSFIELD

2 name on it, that you didn't read in its
3 entirety?

4 MS. KAPIN: Objection, overbroad.

5 Q. If that's possible?

6 A. You said "entirety" this time, but
7 you didn't say "entirety" last time and so
8 "entirety" is very specific. So it's
9 possible, yes, that an article was written
10 with my name on it, that I didn't read
11 entirely because I'm fairly focused and I
12 would have contributed and read the sections
13 that were assigned to me.

14 Q. Now, is a co-author responsible for
15 the entire article in your judgment?

16 MS. KAPIN: Objection, relevance,
17 overbroad.

18 A. Well, when you put your name on as
19 an author you are generally responsible for
20 the content of the article.

21 Q. Right.

22 A. But not for necessarily reading it
23 entirely.

24 Q. Now, before an article is published
25 in a peer reviewed journal, you must actually

1 HEYMSFIELD

2 consent to its publication as a co-author;
3 isn't that correct?

4 MS. KAPIN: Objection, relevance,
5 overbroad.

6 A. In modern terms, yes, modern times,
7 yes, and we've discussed that before in the
8 uniform requirements. You have to sign a
9 statement to that affect, an attestation
10 statement. But I don't think that was in
11 place many years ago, I can't give you the
12 exact chronology of evolution of that.

13 But it's possible that there have
14 been articles written by people where names
15 were used fraudulently, where the
16 investigators didn't even know they were on
17 the articles, yes, it happens.

18 Q. Do you know of an instance where
19 your name appeared as a co-author on an
20 article that you did not consent to its
21 publication?

22 A. I'd have to have the specific
23 example to answer that.

24 Q. Did you fail to consent to the
25 publication of any of the Darsee studies?

1 HEYMSFIELD

2 A. Did I fail to consent, in other
3 words, I knew the article existed and I said
4 no, you can't publish it?

5 Q. You said no, you can't put my name
6 on that article?

7 A. Did I ever do that? Did I ever --

8 Q. In advance of a publication, did
9 you ever refuse in any of the Darsee studies
10 to allow your name to be listed as a
11 co-author?

12 A. I think you said did I ever allow
13 my name to be listed as a co-author on the
14 Darsee papers? I think we have to.

15 Q. Let me rephrase the question for
16 you.

17 A. Yeah, yeah.

18 Q. And unless I'm mistaken, you can
19 help me if I'm mistaken as to the facts and
20 circumstances here.

21 A. Sure, absolutely.

22 Q. But from the course of testimony
23 today I take it that you consented to the
24 publication of your name as a co-author on
25 each of the Darsee studies; is that not

1 HEYMSFIELD

2 have fulfilled that obligation.

3 MR. FELDMAN: Laureen, I want to
4 address this matter. There was an --

5 MS. KAPIN: No, Mr. Feldman, I'm
6 not done and, therefore, I will finish
7 what I'm saying.

8 MR. FELDMAN: There's an obligation
9 in the scheduling order --

10 MS. KAPIN: And the court reporter
11 can't get it down anyway because you
12 continue to interrupt me. I promise I
13 will give you your turn, Mr. Feldman.
14 Please allow me to take mine.

15 MR. FELDMAN: You can just called
16 me Feldman. Go ahead.

17 MS. KAPIN: Thanks, Feldman. So we
18 have fulfilled that obligation and, in
19 fact, this is something respondents
20 actually moved for its consideration on.
21 More than four hours was not granted.

22 So your opportunity to ask
23 questions is done. If you seek
24 additional time I would advise you to
25 take it to the court.

1 HEYMSFIELD

2 correct?

3 A. I can't recall specifics, but I was
4 a co-author on a number of Darsee studies.
5 To the extent I consented beyond them, you
6 know, that's a very specific question or if I
7 signed anything that went beyond them I can't
8 recall. We'd have to be specific.

9 Q. Now, you've listed or you've
10 mentioned a number of Darsee studies that
11 were published. How many Darsee studies were
12 published in which you were a co-author?

13 A. I don't remember the exact number
14 because this is not really what I've prepared
15 for today, but nevertheless, I would say it
16 could have been anywhere between five and
17 eight papers.

18 Q. And how many of those five to eight
19 papers were withdrawn?

20 A. I think everything Darsee did was
21 withdrawn as a blanket, including all of the
22 work he did at Harvard, Emory and Notre Dame.
23 All of those papers were clouded by suspicion
24 and, therefore, mainly withdrawn. Certainly
25 the major ones were withdrawn.

1 HEYMSFIELD

2 conduct weight loss trials.

3 Q. Returning to a moment to your CV,
4 what was the reason you had for not including
5 any of the Darsee studies on your CV?

6 A. I talked to the dean at Emory at
7 the time and I said is it appropriate for me
8 to remove these as publications, and he said
9 yes.

10 Q. Did you inform the Federal Trade
11 Commission counsel in advance of your expert
12 report that you would not include the Darsee
13 studies on your CV?

14 A. I informed the Federal Trade
15 Commission to the best of my recollection,
16 about the Darsee matter and other matters
17 that are in the past, that often come up in
18 trials that, you know, where I -- for people
19 trying to discredit me for one reason or
20 another. So I brought that up with them a
21 priority.

22 Q. And you were not told to reveal
23 that information to opposing counsel in this
24 case?

25 MS. KAPIN: Objection. You are

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HEYMSFIELD

talking about two different things, one is publications and the other is general subject matter. So I think your question and answer have been in cross purposes and you are making innuendoes.

A. So could you state that again having had this comment.

MR. EMORD: Okay. Can the court reporter please read the question.

(Record read.)

A. No, I was never told not to reveal any information as far as I'm aware of.

Q. So let me just get this straight. You imparted the information to FTC that you were on these Darsee studies and that you did not include them on your CV; is that correct?

MS. KAPIN: Objection, objection mischaracterizes.

A. No.

Q. What is the accurate story? Did you ever inform the FTC that you were on studies, the Darsee studies and that they were not included in your CV?

A. I've answered this several times.

1 HEYMSFIELD

2 I'll answer it again.

3 Q. Please.

4 A. I informed the FTC of all of the
5 matters that I considered issues that come up
6 in trials where attempts were made to
7 discredit me one way or the other, the Darsee
8 was part of it, and the papers are such an
9 insignificant part of that. They are public
10 record, you can go on to PubMed and find
11 them.

12 And I have long since put that to
13 bed in terms of my career, so there was
14 never -- there are hundreds of small aspects
15 to the Darsee thing that I haven't revealed
16 because I wasn't asked.

17 MS. KAPIN: I think time is up,
18 gentleman.

19 MR. EMORD: Well, I have a few more
20 questions.

21 MS. KAPIN: Four hours according to
22 the court's order.

23 MR. FRIEDLANDER: Are we at four
24 hours or do we need a tape change?

25 MS. KAPIN: The tapes are two hours

1 HEYMSFIELD

2 a piece, Mitch.

3 MS. VIDEOGRAPHER: The time is 1:58
4 and we're reached the end of tape number
5 two.

6 MS. KAPIN: We are at the end of
7 the four hours, that is what the court
8 has ordered.

9 (Recess taken.)

10 MS. VIDEOGRAPHER: The time is now
11 2:02. This is tape number three and we
12 are back on the record.

13 Q. Dr. Heymsfield, who among FTC
14 counsel did you inform about the Darsee
15 studies?

16 MS. KAPIN: Objection,
17 characterization as to "Darsee studies."

18 A. I informed the FTC about Darsee in
19 general, but I can't remember specifically
20 who that was. I've interacted with several
21 people at the FTC so I don't remember exactly
22 who that was.

23 Q. Did you discuss it with the lawyers
24 sitting in this room?

25 A. You know honestly I don't recall

1 HEYMSFIELD

2 it's been oh, over a year.

3 Q. But it was with lawyers for the
4 Federal Trade Commission?

5 MS. KAPIN: Jeff, would you like to
6 ask the questions.

7 Q. Let him answer that question?

8 A. Yes.

9 Q. You said, yes, sir I'm sorry I
10 missed it?

11 A. I always inform people who retain
12 me as an expert about that, yes.

13 Q. And when did you inform them to the
14 best of your recollection, before or after
15 you produced the expert report in this case?

16 A. Keep in mind that I've worked with
17 the FTC for a number of years, even prior to
18 this case. I've been an expert on several
19 occasions, and I've always let people know it
20 so does that answer your question?

21 Q. No. When did you make the
22 disclosure, to the best of your recollection;
23 was it before or after your expert report was
24 prepared?

25 A. I'm going by recollection and it's

1 HEYMSFIELD

2 always when people first call me and ask me
3 to be an expert for them.

4 Q. All right. So it was when you were
5 first retained in this case?

6 A. More than likely.

7 Q. Thank you, very much. One more
8 question. This is what happens with multiple
9 lawyers, I apologize?

10 MS. KAPIN: Actually your time is
11 up.

12 MR. EMORD: But this is a very
13 important issue that goes to the actions
14 taken by not only Dr. Heymsfield, but by
15 counsel and you don't want that to be
16 divulged on the record.

17 MS. KAPIN: I understand, and I
18 would say if it was that important I
19 would have asked it at the beginning of
20 the deposition. My position is my
21 position.

22 The court's order has granted that
23 complaint counsel make its expert,
24 Dr. Heymsfield, available for an
25 additional four hours of deposition. We