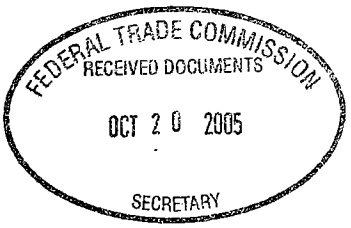
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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.,	)	**Docket No. 9318**
BAN, L.L.C.,	)	**PUBLIC DOCUMENT**
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	
	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' OMNIBUS MOTION TO EXCLUDE A WITNESS, SANCTION COUNSEL, AND REOPEN DISCOVERY

Complaint Counsel oppose Respondents' omnibus *Motion to Exclude a Witness and for Sanctions, or in the Alternative, Reopen Discovery*, filed October 6, 2005. Having sought to launch a late round of satellite litigation in their September 29th *Motion to Add an Expert Witness and to Reopen Discovery*, Respondents present a burgeoning list of demands in their present *Motion.* Respondents now demand that the Court sanction Complaint Counsel, preclude us from presenting expert testimony indisputably relevant to the merits of the Commission's *Complaint*, and reopen discovery on a collateral topic that Respondents have already explored in depth—the fabrication of data over twenty years ago, in papers that were largely withdrawn from publication, by a *colleague* of one of our expert witnesses.

Respondents' omnibus *Motion* rests on an infirm foundation of three false assertions. First, contrary to Respondents' assertion, Dr. Heymsfield has offered a *bona fide* explanation for not identifying Dr. Darsee's papers as published studies; he understood that the Darsee papers

had been withdrawn from publication, and he was advised by the Dean of his University that it was appropriate to withdraw those papers from his publication list.[1] Second, Complaint Counsel categorically did not withhold the Darsee papers from discovery; unlike Respondents' counsel, we were not aware of Dr. Darsee's papers before August 30th, or that any of his papers were submitted or withdrawn from publication, so we could not have withheld them from disclosure, and we were not required to disclose them.[2] Third, even if the papers could have been disclosed, and should have been disclosed, Respondents have *not* been genuinely prejudiced—they concede that they knew of the papers before Dr. Heymsfield's last deposition, and they have used their four hours to examine the witness as they saw fit, asking detailed questions concerning Dr. Darsee and even presenting an exhibit. Respondents then sat back for a full month after Dr. Heymsfield's deposition before crying prejudice, even though Corporate Respondents' new counsel personally explored the topic of Dr. Darsee with the expert witness.[3] Respondents have failed to articulate any concrete prejudice in two separate stabs at the subject.

As a matter of law, Respondents are not entitled to the measures that they demand, nor are they entitled to reshape these proceedings by shutting out relevant expert testimony and

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[1] Our previous filings referred to John Darsee as "Mr. Darsee." Since those filings, Complaint Counsel have been advised that Darsee was, in fact, a medical doctor enrolled at Emory University. Accordingly, we have modified our references to Darsee in this filing.

[2] *See* RULE 3.31(e)(1); *see also infra* pages 9 and 21 (noting that RULE 3.31 requires parties to supplement initial disclosures, including expert disclosures, only when they learn "that in some material respect the information disclosed is incomplete or incorrect and . . . . the additional or corrective information has not otherwise been made known to the other parties").

[3] Complaint Counsel note that only Corporate Respondents' counsel signed Respondents' omnibus *Motion*. Corporate Respondents' counsel does not expressly state that he represents the views of other Respondents with their permission, and no other Respondents have separately joined in the *Motion*.

conducting satellite litigation on extraneous, collateral issues. Respondents' omnibus *Motion* should be denied.

DISCUSSION

I. The Factual Background, and Setting the Record Straight

A. Background of this Dispute

Last year, Complaint Counsel named, as one of its testifying medical experts, Dr. Steven B. Heymsfield, M.D.—a prominent scientist and medical doctor with extensive experience in scientific research pertinent to weight loss and related topics. Dr. Heymsfield presently holds the title of Executive Director of Clinical Sciences at Merck Laboratories and continues to be affiliated with Columbia University. He previously served as Deputy Director of the New York Obesity Research Center at St. Luke's-Roosevelt Hospital and held the position of full Professor of Medicine at Columbia University.

When Complaint Counsel named Dr. Heymsfield as a testifying expert, we produced his extensive *curriculum vitae* to Respondents. Dr. Heymsfield had previously submitted this CV to Complaint Counsel in response to our request for information for purposes of expert discovery disclosures. *See* Ex. A to Compl. Counsel's Opp'n to Mot. to Add Expert Witness (letter dated Sept. 22, 2004, requesting, *inter alia*, list of all publications). Dr. Heymsfield's detailed, 47-page long *curriculum vitae* includes a lengthy list of publications, which itself runs over 40 single-spaced pages. Respondents have thrice presented Dr. Heymsfield's *curriculum vitae* to the Court in recent filings, ensuring that the general scope of Dr. Heymsfield's good faith effort to comply with the *Scheduling Order* is reasonably clear. *See, e.g.*, Resp'ts' Mot. to Add Expert Witness,

Ex. A (Heymsfield CV).[4]

The close of written discovery occurred on November 8, 2004. On November 8th, after the close of business, Respondents served Complaint Counsel with copies of subpoenas duces tecum directed to Dr. Heymsfield and other figures across the nation, demanding many documents unrelated to the claims and defenses in this case. These tardy, irrelevant, and burdensome discovery demands prompted Complaint Counsel to move to limit and/or quash Respondents' subpoenas. *See* Compl. Counsel's Mot. for Prot. Order at 5 (Nov. 18, 2004).[5] In granting our *Motion* for relief with respect to subpoenas served on Dr. Heymsfield and others, the Court reiterated the basic principle that expert discovery demands must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the respondent as required by Rule 3. 31(c)(1)." Order, Dec. 9, 2004, at 4 (indicating that demands for production of unrelated publications, presentations, studies, and patents of subpoena recipients sought "discovery beyond that permitted by the Rules, the

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[4] Respondents have criticized Dr. Heymsfield's CV for what they characterize as an unexplained omission that allegedly prejudiced them. In weighing these assertions, it is appropriate to note that, in expert discovery, Respondents produced a CV for their proposed expert witness, Respondent Mowrey, that 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) knew that it existed. *See* Ex. B to Compl. Counsel's Opp'n to Mot. to Add Expert Witness (Mowrey CV disclosed in October 2004, which failed to identify publication, followed by study citation). We learned of Dr. Mowrey's omission of this study only *after* the close of written discovery. Despite this clear (and still unexplained) omission by a named Respondent, Complaint Counsel declined to press for sanctions, because there was no prejudice—we learned of the previously-undisclosed publication and then had an opportunity to depose the witness. *See infra* Section V (discussing Respondents' deposition of Dr. Heymsfield and failure to establish prejudice).

[5] In their present *Motion*, Respondents allege that the filing referenced above was in furtherance of a nefarious plot to conceal the Darsee papers—ignoring the fact, discussed *infra*, that Complaint Counsel were unaware of those papers at the time. There is absolutely no factual support for Respondents' tale of Machiavellian intrigue.

Scheduling Order, and the *Dura Lube* case").[6]

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. Additionally, Complaint Counsel further supplemented its expert disclosures as additional information became available. 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.[7] After

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[6] Even though its terms were limited by the Court's *Order*, Dr. Heymsfield responded to Respondents' subpoena duces tecum by causing a large number of documents to be produced Two full archive boxes consisting of many hundreds of pages of documents were produced, with three CD-ROM discs containing hundreds of pages of additional documents.

[7] In their *Motion*, Respondents unfairly characterize our supplemental discovery disclosures as a prior "offenses" that reveal Dr. Heymsfield's supposed bad faith. *See* Resp'ts' Mot. to Excl. Witness, Sanction Counsel, and Reopen Discovery at 30 [hereinafter "Resp'ts' Omnibus Mot."]. However, the record in this matter indicates that Complaint Counsel have volunteered supplemental disclosures when discoverable information has come to the attention of our expert witness and ourselves, consistent with the RULES and the *Orders* of this Court. Respondents' severe criticism for our consistent practice of complying with these requirements is misplaced—surely they would not have preferred that counsel not supplement its disclosures at

lengthy motion practice, the Court allowed Respondents these additional four hours to depose Dr. Heymsfield and denied Respondents' request for reconsideration of that time limit. *See* Order, March 15, 2005 (ruling on Resp'ts' Mot. to Strike Expert Witnesses and for Sanctions and Other Relief); Order, Aug. 9, 2005 (ruling on Resp't Gay's Mot. for Recons.).

When Dr. Heymsfield's four-hour deposition commenced on August 30th, Respondent Friedlander asked Dr. Heymsfield about his list of publications, and Dr. Heymsfield affirmed: "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. A hereto (Heymsfield Dep., Aug. 30, 2005, at 451-52). Dr. Heymsfield volunteered that his list of publications would not have included papers that had been withdrawn from publication. *See id.* at 451-453, 655. The transcript indicates that Dr. Heymsfield volunteered this information, see *id.* at 451-453, 655, belying Respondents' contentions that Dr. Heymsfield testified "evasively."

Dr. Heymsfield raised the topic of John Darsee, an individual who performed research at the University of Notre Dame, Emory University and later went to Harvard University. *Id.* at 452-61, 618-36, 641-46, 655-60. Around twenty-five years ago, Dr. Heymsfield participated in some research with Dr. Darsee at Emory. Dr. Heymsfield was not, however, privy to all of the

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all. Respondents' criticism seems particularly misplaced in light of the record, which shows that Respondents failed to disclose their advertising agencies and other third parties with relevant documents, and their affirmative disclosures contained a serious error that they corrected for the news media but never mentioned to Complaint Counsel. *See* Robert Gehrke, *2d Congressional District Candidate Says Basic Research's Legal Filing Must Be a Mistake, Salt Lake Tribune* at A1 (Sept. 4, 2004) ("Dave Owen, a spokesman for Basic Research, said the company reviewed its records after the FTC filing and they do not reflect Swallow working on ad preparation.").

research data. Dr. Darsee was not his employee and Dr. Heymsfield was not Darsee's supervisor. did not supervise, evaluate, or grade him. *Id.* at 455, 461. At Harvard, it was discovered that Dr. Darsee had fabricated data in his academic career at Notre Dame, Emory, and Harvard. Consequently, papers involving Dr. 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 withdrawn were several papers in which Dr. Heymsfield had been listed as one of Dr. Darsee's co-authors.[8] Dr. Heymsfield was one of numerous scientists listed as co-authors on papers authored by Dr. Darsee. *Id.* at 453; *see also* Resp'ts' Omnibus Mot. at 10 (identifying eight other co-authors listed on one or more papers on which Dr. Heymsfield was listed). After Dr. Darsee's 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 statement of the Dean at Emory, Dr. Heymsfield has not treated the papers as published studies, and has not identified papers withdrawn from publication as publications in his CV.

As Dr. Heymsfield testified at the end of his four-hour deposition, he informed the FTC staff about Dr. Darsee's fabrication of data in general, but he did not inform the staff that this

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[8] Dr. Heymsfield testified that he thought that all or nearly all of Dr. Darsee's work had been withdrawn from publication. Ex. A, Heymsfield Dep. at 646. In their present *Motion*, Respondents affirm Dr. Heymsfield's testimony, averring that all papers bearing Dr. Darsee's name, with Dr. Heymsfield listed as a co-author, were withdrawn from publication. *See, e.g.*, Resp'ts' Omnibus Mot. at 11. In their *Reply* to our *Opposition* to the *Motion to Add an Expert Witness*, Respondents represented that two of those papers were not retracted. Resp'ts' Reply to Opp'n at 1. However, our review indicates that only one of these papers was not retracted. *See* Compl. Counsel's Opp'n to Pet., Oct. 20, 2005. In any event, the cited testimony establishes that Dr. Heymsfield did not identify Darsee papers as publications based on an honestly-held belief that they had been withdrawn from publication.

data was in papers submitted to journals and subsequently retracted. *Id.* at 665-660; *see infra* Section III (discussing and presenting record in full). Before August 30th, we were not aware that Dr. Darsee's fabricated data had been submitted or withdrawn from publication.

Respondents were aware of the Darsee papers before the deposition took place, however, and had a four-hour opportunity to depose Dr. Heymsfield on the topics of their choice, including the topic of Dr. Darsee. These conclusions find ample support in the record and circumstances of Dr. Heymsfield's August deposition.[9] As previously noted, Respondent Friedlander opened that deposition by eliciting testimony from Dr. Heymsfield concerning Dr. Darsee, his papers, and his fabricated data. Ex. A, Heymsfield Dep. at 451-61. After obtaining this testimony, Respondents moved onto other topics for much of the allotted four hours. Later in the deposition, however, Respondent Gay's counsel questioned Dr. Heymsfield about Dr. Darsee and his papers, see *id.* at 626-30, and counsel produced an exhibit, a printed web page referencing Dr. Darsee's fabrication of data and purporting to quote Dr. Heymsfield. The bottom right-hand corner of this exhibit bore the print date of April 2, 2005—"4/02/05." *See* Ex. 20 to Heymsfield Dep. (attached hereto at end of Ex. A). Respondent Gay's counsel then questioned Dr. Heymsfield concerning this web page printed last April. Ex. A, Heymsfield Dep. at 630-36. And yet again, near the end of the four hour deposition, Corporate Respondents' new counsel twice visited the topic of Dr. Darsee and his papers. *See id.* at 644-646, 655-60. These circumstances evidence that Respondents were aware of the Darsee papers before the deposition took place, and that they used a four hour opportunity to depose him on that topic and others as they saw fit.

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[9] *See also infra* page 26 (discussing additional grounds for conclusion that Respondents were aware of papers before the deposition took place).

B. Setting the Record Straight

Respondents' Motion is a baseless attack on the integrity of counsel supporting the *Complaint*. To respond to Respondents' *Motion*, it is necessary to set the record straight. Respondents' omnibus *Motion to Exclude a Witness and for Sanctions, or in the Alternative, Reopen Discovery* alleges that Dr. Heymsfield acted without justification in not identifying, as publications, papers that had been withdrawn from publication; that Complaint Counsel knew of the Darsee papers before August 30th and plotted, over a year ago, not to disclose them to Respondents; and that Respondents have been seriously prejudiced by a prior non-identification. These allegations have no basis in fact.

In their omnibus *Motion*, Respondents attempt to prove these baseless allegations by purporting to quote the record—that is, the August 30th deposition testimony of Dr. Heymsfield. By our count, however, there are at least twenty (20) instances in Respondents' *Motion* in which Corporate Respondents' counsel has inserted ellipses in transcribed statements with the evident aim of coloring the record, depicting the witness' testimony as "halting" and unreliable, and most unjustifiably, removing contemporaneous objections by Complaint Counsel that are relevant to an understanding of the questions that Respondents posed and the answers that they elicited. *See* Resp'ts' Omnibus Mot. at 12-23; *see also* Section IV.A (presenting five cited pages of deposition transcript in unexpurgated form, in double-indented block quotes, framed by our argument).

This Court should not rely on Respondents' slanted reproduction of the record. For the convenience of the Court, Complaint Counsel have attached all of the transcript pages submitted in the briefing to date on Respondents' omnibus *Motion*, and their previous *Motion to Add an Expert Witness and to Reopen Discovery*. *See* Ex. A (Heymsfield Dep., Aug. 30, 2005).

We discuss the pertinent portions of the deposition transcript below, to confirm three points: (1) Dr. Heymsfield has acted in good faith and has offered a reasonable explanation for not identifying scientific papers withdrawn from publication as scientific publications; (2) Complaint Counsel did not refrain from disclosing the papers to Respondents, we were unaware of the papers or that they had been submitted or withdrawn from publication, and consequently we were both unable to disclose them and not required to do so; and (3) even if the Darsee papers could and should have been identified in the expert disclosures, Respondents have *not* been genuinely prejudiced, and they are not entitled to the measures that they demand.

Lastly, lest Respondents' unfounded accusations of wrongdoing continue to linger, Complaint Counsel and Dr. Heymsfield have submitted the attached declarations of fact to extinguish Respondents' innuendos and accusations, and set the record straight. *See* Ex. B hereto (Heymsfield Decl.); Ex. C hereto (Compl. Counsel Decl.).

II. Legal Standards Governing Respondents' Omnibus *Motion*

As Respondents contend that Complaint Counsel withheld information and thereby declined to supplement the expert disclosures required by the *Scheduling Order*, a review of the relevant RULES is in order. RULE 3.31 states:

> A party who has made an initial disclosure under § 3.31(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:
>
> (1) A party is under a duty to supplement at appropriate intervals its initial disclosures under § 3.31(b) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.
>
> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns

that the response is in some material respect incomplete or incorrect.

RULE 3.31(e). This RULE requires parties to supplement initial disclosures "if the party learns that in some material respect the information disclosed is incomplete or incorrect," and the additional information has not otherwise been made known to the other parties. *Id.* § 3.31(e)(1) (emphasis added). As this provision makes clear, the duty to supplement discovery disclosures arises once counsel actually learns additional facts, facts not known to the other parties.

With this background, we turn to the standards applicable to Respondents' demands. Respondents demand in their present *Motion* that the Court sanction Complaint Counsel, preclude us from presenting certain expert testimony relevant to the merits of the *Complaint*, and reopen discovery on a collateral topic that Respondents have already explored in great depth.

Respondents' first two demands may be analyzed under RULE 3.38, which states that if a party fails to comply with an order, including an order compelling discovery, "the Administrative Law Judge . . . for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just." RULE 3.38(b). Sanctions include, but are not limited to, "an order that matters sought to be discovered will be taken as inferred or established, a preclusion order, the striking of the pleadings, the right to introduce secondary evidence without objection, and such other orders as are just." *In re Grand Union Co.*, 102 F.T.C. 812, 1087 (1983).

"The Commission has developed some more specific principles to help determine when one or more of these sanctions should be applied." *In re ITT Corp.*, 104 F.T.C. 280, 448 (1984):

> [S]anctions under Rule 3.38 should be imposed only if (1) production of the requested material has been mandated by a subpoena or specific discovery order issued by an ALJ or the Commission and directed at the party (or its officer or

> agent) from whom the material is sought; (2) the party's failure to comply is unjustified; and (3) the sanction imposed "is reasonable in light of the material withheld and the purposes of Rule 3.38(b)."

Id. at 449 (citing *In re Grand Union Co.*, 102 F.T.C. at 1087). Assuming that the expert disclosure requirements of RULE 3.31 and the *Scheduling Order* may constitute a "specific discovery order" within the ambit of RULE 3.38, see *ITT Corp.*, 104 F.T.C. at 449,[10] the Court must decide whether twenty-year old papers largely withdrawn from publication fall within the ambit of the publication disclosures required by the *Scheduling Order*, whether Dr. Heymsfield and Complaint Counsel have no justification for not identifying those papers before August 30th, and whether the proposed sanctions of striking an expert witness and condemning counsel *in personam* are reasonable, just, and appropriate under the circumstances.[11]

Respondents' last demand, that discovery be reopened, requires a demonstration of good cause under Paragraph 6 of the *Scheduling Order* and RULE 3.21(c)(2). As the Court has often

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[10] RULE 3.38 does not expressly refer to orders requiring disclosure, but authorizes sanctions for failure to comply with orders compelling discovery. *See* RULE 3.38(b) (referring to alleged "failure to comply with a subpoena or with an order including but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories or requests for admissions or an order of the Administrative Law Judge").

[11] RULE 3.38(b)'s analogue in the *Federal Rules* is FED. R. CIV. P. 37, which deals with parties' alleged failures to cooperate in discovery. *See In re Grand Union Co.*, 102 F.T.C. at 1090 (recognizing close relationship between RULE 3.38(b) and FED. R. CIV. P. 37). *Federal Rule* 37 states, in pertinent part:

> A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

FED. R. CIV. P. 37(c)(1). *Federal Rule* 37 asks whether the party had "substantial justification" for a non-disclosure, rather than requiring the movant to show that the party's failure to disclose information was "unjustified." *Compare id.* with *ITT Corp.*, 104 F.T.C. at 448.

observed, however, discovery sought in a Commission proceeding must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." RULE 3.31(c)(1); *see* Order on Compl. Counsel's Mot. to Strike Resp'ts' Add'l Def., Nov. 4, 2004 (citing RULE 3.31(c)(1) for same proposition and reminding parties that defense allegations are "not an open invitation to needlessly confuse and compound the issues, increase the scope of discovery, or prolong these proceedings"). Moreover, parties must promptly raise requests to conduct discovery out of time; such requests may be denied for unexplained delay. *See* Order on Compl. Counsel's Mot. to Serve Subpoena, Apr. 5, 2005, at 2.

III. Dr. Heymsfield Has Acted in Good Faith and Has Offered a Reasonable Explanation for Not Identifying the Darsee Papers In His *Curriculum Vitae*

There is abundant evidence that Dr. Heymsfield has made good faith efforts to comply with the publication disclosure requirement of the Court's *Scheduling Order*, and Dr. Heymsfield has articulated a reasonable, *bona fide* explanation for not identifying papers that he understood to be withdrawn from publication as published studies. Nevertheless, Respondents allege in their omnibus *Motion* that Dr. Heymsfield withheld material evidence from Respondents, and purposefully refused to identify papers that were withdrawn from publication around 20 years ago, in willful defiance of the disclosure requirements of the Court's *Scheduling Order*. *See* Resp'ts' Omnibus Mot. at 4, 5. These unproven assertions could not be further from the truth. Respondents flatly presume bad faith where there is abundant evidence of good faith efforts to comply with the Court's *Order*, and a reasonable explanation for any previous non-identification.

First, Dr. Heymsfield made a substantial, good faith effort to disclose all of his professional publications, as Complaint Counsel requested in a letter dated September 22, 2004.

See Ex. A to Compl. Counsel's Opp'n to Mot. to Add Expert Witness (letter dated Sept. 22, 2004, requesting, *inter alia*, list of all publications). Dr. Heymsfield gave to Complaint Counsel, and Complaint Counsel produced to Respondents, a lengthy and thorough list of his publications, which runs over 40 single-spaced pages. *See* Resp'ts' Mot. to Add Expert Witness, Ex. A (Heymsfield CV). Additionally, the time scope of Dr. Heymsfield's publication list provides additional evidence of his efforts to comply with the *Scheduling Order*. The publication list stretches well over a decade, in fact, back to the early 1970s. The scope of this list specifically complies with the *Scheduling Order*, which contains no time limit on the date of publications, unlike RULE 3.31(b)(3). *See id.* at 30, 61, 71 (listing publications dating back twenty years, thirty years, and more). With respect to published medical journal articles, Dr. Heymsfield's *curriculum vitae* is markedly more complete than the CV produced by Respondents' proposed expert witness, Respondent Mowrey, even though Dr. Heymsfield has many more studies and publications to his credit. *See supra* n.4. From the 40 pages produced by Dr. Heymsfield, our expert witness' good faith effort to comply with the Court's *Order* in producing a list of publications is reasonably evident.

Second, Dr. Heymsfield has articulated a reasonable explanation for why the Darsee papers were not identified as publications in his *curriculum vitae*. It was Dr. Heymsfield's understanding that all or most of the Darsee papers were withdrawn from publication, he does not identify withdrawn papers as published medical journal articles, and he was previously advised at his school that it was appropriate to withdraw the Darsee papers from his own list of publications. *See* Ex. A, Heymsfield Dep. at 646 ("I think everything Darsee did was withdrawn as a blanket, including all of the work he did at Harvard, Emory and Notre Dame. All of those

papers were clouded by suspicion and therefore, mainly withdrawn. Certainly the major ones were withdrawn."); *see id.* at 655. The transcript indicates that Dr. Heymsfield volunteered that his list of publications would not have included papers that had been withdrawn from publication, see *id.* at 451-453, 655, which belies Respondents' contentions that Dr. Heymsfield testified "evasively."[12] Dr. Heymsfield testified that, after the Darsee papers were withdrawn from publication, he was advised by the Dean of his medical school that it was appropriate to withdraw those papers from his own list of publications. Respondents elicited this information at Dr. Heymsfield's August 30th deposition:

> Q: Returning for a moment to your CV, what was the reason you had for not including any of the Darsee studies on your CV?
> A: I talked to the Dean at Emory at the time and I said is it appropriate for me to remove these as publications, and he said yes.

Ex. A, Heymsfield Dep. at 655. Dr. Heymsfield's failure to identify withdrawn papers as published medical journal articles is not unjustified.

This Court presumably would not expect the advocates who come before it to cite and identify *withdrawn* judicial opinions as *published* cases. *Cf. Kawitt v. United States*, 842 F.2d 951, 954 (7th Cir. 1988) (concluding that persistent citation of vacated case warranted sanctions

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[12] Respondents characterize as "evasive" the testimony of Dr. Heymsfield that he could confirm or deny the authenticity of a web page, possibly a magazine article from the 1980s, that purported to quote him on the subject of Dr. Darsee. *See* Resp'ts' Omnibus Mot. at 5. It is hardly surprising that a witness (particularly a prominent scientific authority such as Dr. Heymsfield) might not recall statements attributed to him nearly two decades ago.

Respondents' argument that they are entitled to have Dr. Heymsfield stricken because they found his deposition testimony or demeanor to be incredible is fanciful at best, and at worst, it invades the province of this Court to evaluate and observe such matters. *See* RULE 0.14. It also recalls Respondents' similarly unfounded claim that they were entitled to veto power over who we could employ as a testifying expert to review their substantiation, a claim this Court soundly rejected. *See* Order on Resp'ts' Mot. to Strike Expert Witnesses, Mar. 15, 2005, at 4.

against attorney on appeal). Similarly, Dr. Heymsfield does not regard papers that have been retracted and withdrawn from publication to be published studies. Errors and waste of resources could result if researchers cited and relied on withdrawn papers. *See* Ex. B hereto (Heymsfield Decl.). It is plain that when Complaint Counsel asked Dr. Heymsfield to produce a list of all of his publications, it honestly did not occur to him, as a scientist and medical practitioner, to disclose, as "publications," papers that he genuinely and reasonably believed had been withdrawn from publication more than twenty years ago, for the grounds previously stated.

In their *Motion*, Respondents do not acknowledge the deposition testimony quoted on the previous page, or even attempt to address the reason that Dr. Heymsfield actually articulated for why the Darsee papers were not identified as publications in his *curriculum vitae*. They do not discuss inconvenient facts. Instead, they simply make reference to the fact that the withdrawn Darsee papers were not identified as publications and then create a "straw man," inventing what they describe as a "self serving" argument, which they then attribute to Dr. Heymsfield, that the "material sought would not have been of value to the requesting party." *See* Resp'ts' Omnibus Mot. at 29. Respondents have failed to offer a transcript citation to prove that this bogus "straw man" actually exists.

There is absolutely no factual basis for a finding that Dr. Heymsfield acted in bad faith and withheld evidence from Respondents, in willful defiance of this Court's *Order*. Respondents have flatly dismissed Dr. Heymsfield's testimony and have blindly deemed his actions to be a deliberate and unjustified refusal to comply with the disclosure requirements of the *Scheduling Order*, despite abundant evidence of extensive, good faith disclosures, and a reasonable, *bona fide* justification for the prior non-identification. Unlike Respondent Mowrey, who has ventured

no explanation whatsoever for omitting his only published study from his CV, Dr. Heymsfield has offered a legitimate explanation for his actions. Respondents' accusations to the contrary fall of their own weight.

IV. Complaint Counsel Were Not Previously Aware of Dr. Darsee's Papers, We Did Not Withhold Them from Disclosure, and We Were Not Required to Disclose Them Under RULE 3.31

Complaint Counsel could not have withheld the Darsee papers from disclosure, we did not withhold them from disclosure, and we could not have been required to disclose them as Respondents mistakenly suggest.[13] There is no basis in fact for Respondents' contention that Complaint Counsel concealed or otherwise withheld discoverable information. Respondents' contention is false and cannot be condemned strongly enough. As discussed below, a careful review of the deposition transcript establishes that Respondents' contention is untrue and relies on mischaracterization of the witness' statements.

Respondents' *Motion* repeatedly asserts that Dr. Heymsfield "informed Complaint Counsel of the existence of the six fraudulent studies and his involvement in them when first retained by Complaint Counsel in this case, as well as in prior cases." Resp'ts' Omnibus Mot. at 4 (citing Heymsfield Dep. at 655-60); *see id.* at 3, 11, 21-24 (citing same pages). Yet, closer examination of the cited testimony reveals that Dr. Heymsfield *never* testified that he advised Complaint Counsel that Dr. Darsee's fabricated data appeared in papers that were submitted and

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[13] In their *Motion*, Respondents demand that Complaint Counsel identify, by name, "each counsel aware of the six fraudulent Darsee studies before August 30, 2005, the time each became aware, and how each became aware." Resp'ts' Omnibus Mot. at 33-34. Leaving our discussion of Respondents' discovery demands for the next Section, we note that none of Complaint Counsel were aware of the referenced papers before August 30, 2005; we became aware of those papers during the deposition on August 30th, and we advised Respondents of these facts *before* they filed their *Motion* seeking "discovery" of those facts on October 6th.

subsequently withdrawn from publication and his list of publications. We demonstrate this point below first by reviewing all five pages of deposition testimony cited by Respondents, sentence by sentence—with our timely objections noted, not omitted.

A. The Record Establishes that Complaint Counsel Were Not Aware of Dr. Darsee's Papers, and Did Not Withhold Them from Disclosure

At the start of the cited transcript exchange, which occurred just before the conclusion of Dr. Heymsfield's deposition, around the four-hour mark, Corporate Respondents' counsel asked:

> Q. Did you inform the Federal Trade Commission counsel in advance of your expert report that you would not include the Darsee studies on your CV?
> A. I informed the Federal Trade Commission to the best of my recollection, *about the Darsee matter* and other matters that are in the past, that often come up in trials that, you know, where I -- for people trying to discredit me for one reason or another. So I brought that up with them a priority.

Heymsfield Dep. at 655 (emphasis added). Dr. Heymsfield testified here that he told Complaint Counsel about the Darsee *matter*—the fact that he participated in some research with Dr. Darsee at Emory, and that Darsee had fabricated data without Dr. Heymsfield's knowledge. He did not inform counsel that the data was used in studies that were submitted and later withdrawn from publication. Complaint Counsel promptly objected to the contrary inference drawn by Respondents' counsel in the following question.

> Q. And you were not told to reveal that information to opposing counsel in this case?
> MS. KAPIN: Objection. You are 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.

Id. at 655-56. This deposition testimony is correct, and it dispels Respondents' allegations that Complaint Counsel supposedly concealed or otherwise withheld discoverable information, or connived to do so. Respondents certainly have not explained how Dr. Heymsfield's denial supports their allegations.

At the deposition, however, Corporate Respondents' drew a completely inaccurate conclusion from the previous exchange. Complaint Counsel therefore repeated its objection to Respondents' mischaracterization of the testimony:

> 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.

Id. at 656. This is the clearest exchange in the cited transcript, and it again directly contradicts Respondents' allegation that Complaint Counsel somehow concealed or otherwise withheld discoverable information. Indeed, before the filing of the present *Motion*, we advised Corporate Respondents' counsel that these lines of testimony flatly contradicted his allegations.

Dr. Heymsfield gave Respondents the accurate facts, but Respondents appeared to be dissatisfied with his testimony. As the next exchange shows, Respondents' counsel suggested to the witness that his testimony was inaccurate and pressed the same question on him. In response, Dr. Heymsfield noted that he was being asked the same question again and reiterated that he informed Complaint Counsel about Dr. Darsee in general.

> 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. I'll answer it again.
> Q. Please.
> A. I informed the FTC of all of the matters that I considered issues that come

> up in trials where attempts were made to discredit me one way or the other, the Darsee was part of it, and the papers are such an insignificant part of that. They are public record, you can go on to PubMed and find them. And I have long since put that to bed in terms of my career, so there was never -- there are hundreds of small aspects to the Darsee thing that I haven't revealed because I wasn't asked.

Id. at 656-57. This testimony is consistent with Dr. Heymsfield's previous testimony; he testified that he informed the staff of "the matters that he considered issues." *Id.* at 656. He did not mention the papers as an issue, only Dr. Darsee's fabrication of data. *See id.* at 656-57.

Thereafter, Complaint Counsel advised Respondents that they had reached the four-hour time limit for the deposition as set in the Court's *Orders*; indeed, the videographer employed by Respondents noted that she had reached the end of the second tape. Complaint Counsel then agreed to resume the deposition for two minutes because the videographer indicated, off the record, that the tape might have stopped two minutes early. As the next exchange indicates, Corporate Respondents' counsel persisted in mischaracterizing the witness' testimony and incorrectly assuming that Dr. Heymsfield had testified that he told informed Complaint Counsel that Dr. Darsee's data appeared in published studies.

> MS. KAPIN: I think time is up, gentleman.
> MR. EMORD: Well, I have a few more questions.
> MS. KAPIN: Four hours according to the court's order.
> MR. FRIEDLANDER: Are we at four hours or do we need a tape change?
> MS. KAPIN: The tapes are two hours a piece, Mitch.
> MS. VIDEOGRAPHER: The time is 1:58 and we're reached the end of tape number two.
> MS. KAPIN: We are at the end of the four hours, that is what the court has ordered.
> (Recess taken.)
> MS. VIDEOGRAPHER: The time is now 2:02. This is tape number three and we are back on the record.
> Q. Dr. Heymsfield, who among FTC counsel did you inform about the Darsee studies?

MS. KAPIN: Objection, characterization as to "Darsee studies."
A. I informed the FTC *about Darsee in general*, but I can't remember specifically who that was. I've interacted with several people at the FTC so I don't remember exactly who that was.

Id. at 657-58 (emphasis added). Once more, we objected to Respondents' mischaracterization of the testimony, and Dr. Heymsfield reaffirmed that he told the FTC about Dr. Darsee in general.

The rest of the cited testimony adds nothing further. At the final conclusion of the four-hour deposition, Corporate Respondents' counsel asked Dr. Heymsfield a set of questions using the word "it" or "the disclosure" to refer to the subject matter identified by the witness, *i.e.*, "Darsee in general." *Id.* at 658. Respondents suggest in their *Motion* that the witness' testimony actually referred to the specific topic of Dr. Darsee's papers, and the specific fact that the papers withdrawn from publication were not listed as publications on Dr. Heymsfield's *curriculum vitae*—but the record below shows that they did *not* ask those speeific questions. *Id.* at 658-60:

Q. Did you discuss it with the lawyers sitting in this room?
A. You know honestly I don't recall it's been oh, over a year.
Q. But it was with lawyers for the Federal Trade Commission?
MS. KAPIN: Jeff , would you like to ask the questions.
Q. Let him answer that question?
A. Yes.
Q. You said, yes, sir I'm sorry I missed it?
A. I always inform people who retain me as an expert about that, yes.
Q. And when did you inform them to the best of your recollection , before or after you produced the expert report in this case?
A. Keep in mind that I've worked with the FTC for a number of years, even prior to this case. I've been an expert on several occasions, and I've always let people know it so does that answer your question?[14]
Q. No. When did you make the disclosure, to the best of your recollection;

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[14] Respondents cite this testimony as proof of their allegation that Dr. Heymsfield specifically informed Complaint Counsel about the Darsee papers, in the context of other cases. This allegation is incorrect; indeed, this is the first case in which the FTC staff in this matter have retained Dr. Heymsfield as a witness. *See* Ex. C (Compl. Counsel Decl.). Moreover, as noted above, the cited testimony does not refer to the Darsee papers.

was it before or after your expert report was prepared?
A. I'm going by recollection and it's always when people first call me and ask me to be an expert for them.
Q. All right. So it was when you were first retained in this case?
A. More than likely.
Q. Thank you, very much. One more question. This is what happens with multiple lawyers, I apologize?
MS. KAPIN: Actually your time is up.

The cited testimony from the conclusion of the four-hour deposition, the contents of which are reproduced above, plainly do not support Respondents' assertion that Complaint Counsel concealed or otherwise withheld discoverable information.

When reproduced in their entirety, the cited testimony does demonstrate that Complaint Counsel repeatedly objected to the manner in which Respondents attempted to mislead the witness and get him to adopt statements that he did not actually offer, by consistently misstating or mischaracterizing his testimony.[15] Contrary to Respondents' assertions, Dr. Heymsfield did not testify that he advised us that Dr. Darsee's fabricated data appeared in papers, and were subsequently withdrawn from publication.

Lest Respondents' baseless attack on the integrity of Complaint Counsel linger in any fashion, the attached declarations of Complaint Counsel and Dr. Heymsfield confirm that Complaint Counsel did not engage in any of the improprieties alleged. *See* Ex. B hereto (Heymsfield Decl.); Ex. C hereto (Compl. Counsel Decl.).

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[15] Respondents' tactics (waiting for the end of the deposition, repeating the same question, expressing doubt at his testimony, and mischaracterizing the previous testimony) are like those that Respondent employed to wring testimony from Dr. Heymsfield in support of their baseless allegation that Dr. Heymsfield had somehow failed to complete his acknowledgment of the *Protective Order* in this matter. *See* Compl. Counsel's Opp'n to Resp'ts' Mot. to Strike, Feb. 8, 2005; *see also* Order on Resp'ts' Mot. to Strike, Mar. 15, 2005 (noting that Dr. Heymsfield had, in fact, completed that acknowledgment, Respondents' argument notwithstanding).

B. Complaint Counsel Were Not Required to Disclose Dr. Darsee's Papers Under RULE OF PRACTICE 3.31

Additionally, there are no grounds for a finding that Complaint Counsel declined to supplement the expert disclosures required by the *Scheduling Order*. Even if this Court were to determine that papers withdrawn from publication are "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.

RULE 3.31(e) requires parties to supplement their initial disclosures "if the party learns that in some material respect the information disclosed is incomplete or incorrect," and the additional information has not otherwise been made known to the other parties. RULE 3.31(e)(1). Under this RULE, the duty to supplement discovery disclosures arises once counsel actually learns additional facts not known to the other parties. As discussed above, Complaint Counsel did not learn of the withdrawn Darsee papers until August 30th. Applying RULE 3.31 to the facts, and further assuming (contrary to the evidence) that Respondents were previously unaware of the Darsee papers, we could not have been required to disclose those papers before August 30th. Moreover, Respondents allege that the papers were disclosed by the witness on August 30th, see Resp'ts' Omnibus Mot. at 10, the date that we first became aware of them through the deposition testimony, so there are no grounds for a finding that Complaint Counsel unjustifiably declined to supplement the expert disclosures required by the *Scheduling Order*.

V. Respondents Have Failed to Demonstrate Actual Prejudice and Are Not Legally Entitled to the Measures Demanded

Respondents have failed to articulate, much less demonstrate, actual prejudice stemming from the non-identification of the Darsee papers, so as a matter of law, this Court must reject

their demands for the imposition of sanctions against Complaint Counsel, the preclusion of Dr. Heymsfield's testimony, and renewed discovery into a collateral topic that Respondents have already explored in depth. Respondents have *not* been genuinely prejudiced.

Assuming, for purposes of argument, that withdrawn papers are published studies, and that Dr. Heymsfield and Complaint Counsel both had no legitimate explanation for not disclosing the withdrawn papers before August 30th, Respondents must show that sanctions are reasonable, just, and appropriate under the circumstances present here. *See* RULE 3.38(b); *In re Grand Union Co.*, 102 F.T.C. at 1087 (stating that sanctions must be "reasonable in light of the material withheld and the purposes of Rule 3.38(b)"); *cf.* FED. R. CIV. P. 37 (stating that harmless failure to disclose information required by Rule 26(a) is not grounds for sanction). Respondents cannot satisfy this requirement.

A. Respondents Have Failed to Articulate Concrete Prejudice

First, Respondents have failed to articulate any actual, concrete prejudice. Their *Motion* contains a header alleging that Respondents have been prejudiced, but the 3½ pages that follow do not explain how this is so. Only the introduction and the conclusion to their argument contain any allegations, and those bare allegations are unsupported in fact and law.

Respondents summarily allege, in their introduction, that the timing of Dr. Heymsfield's testimony concerning Dr. Darsee "prejudices the Respondents' preparation," and "effectively prevented before the close of discovery a full and fair opportunity for Respondents to use all tools of discovery to expose the full extent of the fraud." Resp'ts' Omnibus Mot. at 29. In the conclusion of their argument, Respondents flatly reassert that they "would be irreparably prejudiced if denied the opportunity to review, rebut, and adduce information concerning the

newly discovered facts." *Id.* at 32. These assertions cannot allege actual, concrete prejudice for two basic reasons. First, the RULES OF PRACTICE, not the actions of Complaint Counsel, preclude Respondents from using the discovery mechanisms of the Commission to investigate subjects unrelated to the parties' claims and defenses, and the scope of relief. *See* RULE 3.31(c)(1). Respondents are not entitled to use the Commission's powers in aid of an investigation into collateral matters. The Court's previous *Order* limiting and quashing Respondents' subpoenas duces tecum speaks directly to this point. Even if all parties to this litigation had been aware of the Darsee papers last year, Respondents' far-ranging demands for information would not have fallen within the scope of proper discovery. *See* Order, Dec. 9, 2004, at 4 (indicating that demands for publications and other materials belonging to subpoena recipients sought "discovery beyond that permitted by the Rules, the Scheduling Order, and the *Dura Lube* case").

Second, Respondents have not explained how the timing of Dr. Heymsfield's testimony concerning Dr. Darsee "prejudices the Respondents' preparation," as the Darsee matter is a discrete topic, unrelated to other factual or legal issues, clearly unrelated to the relevant facts concerning the parties' claims and defenses, and hardly central to the hearing in this matter. Moreover, the record of these proceedings evidences that Respondents have had access to all of the tools of discovery to explore the matters that are subject to discovery under the RULES. As for Respondents' bare assertion that they have lacked the opportunity to review and rebut "newly discovered facts," we have previously noted that Respondents were aware of the Darsee papers before August 30th, and they obtained testimony from Dr. Heymsfield on that date. We further discuss Respondents' assertion of surprise in Section V.B, *infra.*

Respondents' bare assertions of prejudice are not grounds for sanctions. *See generally*

Lohrenz v. Donnelly, 223 F. Supp. 2d 25, 33 (D.D.C. 2002) (declining to impose sanctions, even though plaintiff's expert failed to disclose all publications, and plaintiff offered no substantial justification for such failure, because defendant failed to aver actual prejudice); *Currier v. United Techs. Corp.*, 213 F.R.D. 87, 88 (D. Me. 2003) (concluding that plaintiff's failure to list past cases in which his experts provided testimony did not warrant preclusion of expert testimony, where defendant failed to explain what prejudice actually arose from the omission).

B. Respondents Have Failed to Show Actual Prejudice

Respondents have also failed to demonstrate actual prejudice. They knew of the Darsee papers in advance of Dr. Heymsfield's August 30th deposition and were prepared to depose the witness. They used four hours to examine the expert witness as they saw fit, asking detailed questions concerning Dr. Darsee and a related exhibit, and then sat back for a full month after the deposition before crying prejudice.

The record does not show that Respondents first discovered the facts concerning Dr. Darsee's papers on August 30, 2005. Respondents' counsel have represented to Complaint Counsel that Respondents knew of the Darsee papers before Dr. Heymsfield's August deposition. *See* Compl. Counsel's Opp'n to Mot. to Add Expert Witness at 2 n.1 (recalling assertion by Corporate Respondents' counsel); *see also* Resp'ts' Reply to Opp'n to Mot. to Add Expert Witness (submitting proposed *Reply* ostensibly to correct incorrect statements contained in *Opposition*, *without* disputing statement in *Opposition* that Respondents knew of the Darsee papers before Dr. Heymsfield's August deposition). Moreover, there is substantial evidence that Respondents were aware of the Darsee papers well in advance of the August 30th deposition of Dr. Heymsfield. *See supra* Section I.A, p. 8 (setting forth supporting circumstances). Notably,

during that deposition, Respondent Gay's counsel produced a printed exhibit referencing Dr. Darsee's fabrication of data. The bottom right-hand corner of this printed web page bore the print date of April 2, 2005—"4/02/05." *See* Ex. 20 to Heymsfield Dep (attached hereto at the end of Ex. A). This evidence casts serious doubt on Respondents' repeated and conflicting assertions of surprise.[16]

The fact that Respondents knew of the Darsee papers before the expert's deposition clearly weighs against a conclusion that they were prejudiced by any previous non-identification. *See Roberts v. Galen, Inc.*, 325 F.3d 776, 782-83 (6th Cir. 2003); *id.* at 783 ("The fact that Roberts knew of the lack of disclosures and Galen apparently did not may suggest that these violations should be considered substantially justified or harmless.").

Based on the foregoing, it is clear that Respondents have had a full and fair opportunity to conduct the discovery permitted by the RULES, and they cannot show any prejudice from any previous non-identification. Respondents asked Dr. Heymsfield detailed questions concerning the topic of Dr. Darsee. They then waited a full month after the deposition before crying prejudice, a delay not attributable to Corporate Respondents' change of counsel, for Corporate Respondents' new counsel was present at the deposition and explored the topic. In a strikingly

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[16] *Compare id.* (exhibit with April 2005 print date) *with* Resp'ts' Omnibus Mot. at 10 (claiming that the "facts were first revealed" to Respondents "at the August 30, 2005 deposition"); *see also* Compl. Counsel's Opp'n to Mot. to Add Expert Witness at 2 n.1 (recalling assertion by Corporate Respondents' counsel that Respondent Friedlander knew of the issues "before the deposition").

Indeed, in submitting documents with their omnibus *Motion*, it appears that Respondents have attempted to cover their tracks. Instead of simply reproducing and submitting the actual deposition exhibit, which clearly bore a April print date, Respondents elected to submit a newer printout of that web page, with a newer print date. *See* Resp'ts' Omnibus Mot., Ex. 3 (replacing original exhibit printed in April 2005 with copy of same article printed on Sept. 27, 2005).

similar situation, Complaint Counsel was not prejudiced by Respondent Mowrey's failure to timely disclose his own publication prior to the close of written discovery, because we learned of the previously-undisclosed publication and had a subsequent opportunity to depose the witness. *See supra* note 3. Respondents have not been prejudiced here.

C. Respondents Are Not Legally Entitled to the Measures Demanded

Lastly, under the facts present here, Respondents are not entitled to the demanded sanctions and discovery. Respondents' stated goals are to strike and discredit Dr. Heymsfield as an expert. Considering the circumstances present here, and the genuine possibility that Dr. Heymsfield's truthful and relevant testimony may establish that the widely-disseminated claims alleged for three challenged products were unsubstantiated, the requested sanction is manifestly unjust and improper under RULE 3.38. Dr. Heymsfield has not been accused of withholding information that is directly relevant to the opinions he will offer at trial. This dispute is thus unlike federal court cases in which the serious sanction of witness exclusion has been applied. *See, e.g., Roberts*, 325 F.3d at 783; *see also Barta v. Sears, Roebuck & Co.*, 307 F. Supp.2d 773, 783 (E.D. Va. 2004) (striking expert for whom party provided no information, but not experts for whom party initially sent incomplete information, because those experts substantially complied with disclosure requirements, opposing party had opportunity to fully depose those experts and explore full nature of their opinions and qualifications, and had not been prejudiced by delays experienced in receiving that information).

Federal court typically preclude expert opinion testimony only in cases where an expert refuses to disclose materials in callous disregard of legal requirements. *DiPirro v. United States*, 43 F. Supp.2d 327, 340 (W.D.N.Y. 1999). Based on the record, there are no factual grounds for

such a finding here. Complaint Counsel asked Dr. Heymsfield for a list of all publications, and he returned a comprehensive list, in good faith. As previously discussed, papers withdrawn from publication are not publications as Dr. Heymsfield uses and understands the term. Complaint Counsel were unaware of the withdrawn papers and thus had no grounds to suggest otherwise. Respondents were aware of the withdrawn papers, and when they asked the witness a simple, open-ended question concerning his publication list, the expert witness promptly volunteered the existence of those papers as well. These circumstances are not redolent of bad faith; to the contrary, the record shows that the previous non-identification occurred for entirely reasonable and understandable reasons, and these facts provide no grounds for a finding of bad faith. As one court has noted, the official commentary to *Federal Rule* 37(c)(1) strongly suggests that a harmless violation involves an honest mistake on the part of one party coupled with sufficient knowledge on the part of the opposing parties. *See Vaughn v. City of Lebanon*, 18 Fed. Appx. 252, 264 (6th Cir. 2001) (discussing commentary); FED. CIV. JUD. PROC. & RULES at 199 (Thompson West rev. ed. 2005) (reproducing advisory committee notes on Fed. R. Civ. P. 37(c)).

Respondents' next proposed sanction, an *Order* disparaging each of Complaint Counsel individually, by name, serves no remedial purpose at all. The proposed sanction is manifestly unjust. It would pointlessly flog counsel who have promptly supplemented expert discovery disclosures when appropriate pursuant to RULE 3.31(e) and had no reason to believe that those disclosures were lacking under the circumstances present here.

Respondents briefly suggest that some sort of adverse evidentiary inference might be appropriate. *See* Resp'ts' Omnibus Mot. at 27. To render adverse inferences, the Court must examine whether: (1) the party had an obligation to preserve or produce certain evidence; (2) the

party had a culpable state of mind, and (3) the withheld or destroyed evidence is relevant to the moving party's claim or defense such that a reasonable fact-finder could find that the missing evidence would support that claim or defense. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002); *Creative Res. Group of N.J., Inc. v. Creative Res. Group, Inc.*, 212 F.R.D. 94, 105 (E.D.N.Y. 2002). As these elements make clear, adverse inferences are designed to compensate for the continued withholding or destruction of material evidence, and not appropriately applied to information produced. Respondents suggest that this sanction may be appropriate because of the witness' supposedly "halting" answers, but they did not even submit their video recording of the deposition to back up their uncharitable characterizations. Respondents' arguments are highly improper. *See Lohrenz*, 223 F. Supp. 2d at 33 ("A motion to strike is not an appropriate vehicle through which to contest the credibility of a witness . . . ."). This Court can and should draw its own conclusions regarding Dr. Heymsfield's credibility and reliability as an expert at trial, without the suggested inferences.

Respondents' last demand, that discovery be reopened, simply reiterates the grounds set forth in their previous *Motion to Add an Expert Witness and to Reopen Discovery*, and belatedly demands the right to: (1) depose Dr. Heymsfield, yet again, for another seven hours (bringing his total deposition testimony to an oppressive 22 hours); (2) serve a subpoena duces tecum, yet again, on Dr. Heymsfield for documents plainly unrelated to the parties' claims or defenses, and also compel him to answer interrogatories; and (3) authorize Respondents to use agency subpoenas to obtain documents and deposition testimony concerning an immaterial, collateral topic, *i.e.*, the fabrication of data by a colleague of one of Complaint Counsel's expert witnesses over twenty years ago. *See* Resp'ts' Omnibus Mot. at 33.

The proposed discovery is not "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." RULE 3.31(c)(1). Moreover, Respondents' demands are untimely, and reopening discovery will cause additional delay. *See* Compl. Counsel's Opp'n to Mot. to Add Expert Witness at 13-19. There is no disputing the fact that Respondents have had the opportunity to examine Dr. Heymsfield at length concerning the topic of Dr. Darsee. Respondents' demands for additional discovery should be denied for all of these reasons.

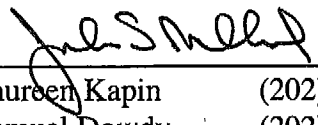
CONCLUSION

Respondents' *Motion* is a baseless attack on the integrity of counsel supporting the *Complaint*, predicated on an infirm foundation of false assertions. After review of the full, unexpurgated record, including Complaint Counsel's documented request for all publications pursuant to the *Scheduling Order*, the forty pages of publications stretching back several decades that Dr. Heymsfield submitted in good faith in response to that *Order*, the deposition testimony of Dr. Heymsfield, the attached declarations, and the rest of the record, we submit that there are absolutely no grounds to conclude that Dr. Heymsfield acted without justification and in bad faith by not identifying papers that had been withdrawn from publication as published studies, or that Complaint Counsel knew of those papers before August 30th and plotted with the witness, long ago, to withhold them. Complaint Counsel and Dr. Heymsfield have submitted the attached declarations to extinguish Respondents' innuendos and accusations, and set the record straight. And, despite multiple attempts, Respondents have failed to allege and establish any prejudice.

Respondents' proposed sanctions and discovery demands are not required to "maintain the integrity of the hearing process," *ITT Corp.*, 104 F.T.C. 448. The integrity of that process is

not at stake here. What is at stake is the scope of these proceedings. Respondents' *Motion* threatens an unreasonable and unwarranted reshaping of the hearing process itself—away from relevant and admissible testimony, toward collateral issues and inadmissible documents, and into satellite discovery and litigation on topics not related to the *Complaint* that Respondents have already explored at length. Respondents' *Motion* clearly marks the resumption of Respondents' campaign to "try the prosecutor." These topics are not the proper subject matter of these proceedings. "[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. Respondents' omnibus *Motion* is wholly without merit, and should be denied.

Respectfully submitted,



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

Dated: October 20, 2005

CERTIFICATION OF REVIEWING OFFICIAL

I certify that I have reviewed the attached public filing, *Complaint Counsel's Opposition to Respondents' Omnibus Motion to Exclude a Witness, Sanction Counsel, and Reopen Discovery*, 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.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2005, I caused *Complaint Counsel's Opposition to Respondents' Omnibus Motion* 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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COMPLAINT COUNSEL

EXHIBIT A

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

HEYMSFIELD

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

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

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

MS. KAPIN: Laureen Kapin on behalf of the Federal Trade Commission.

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

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

MS. KAPIN: We have one more.

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

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

EXAMINATION BY

MR. FRIEDLANDER:

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

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

A. Okay.

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

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

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

Q. Anything that's published?

A. Yes.

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

A. Sure.

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

A. 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, for 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.

Q. What papers are those?

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

Q. Can you tell us what that was about?

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

All of the papers at Harvard and at

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

Q. What was his name?

A. Darsee, John Darsee.

Q. You were a co-author?

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

Q. That were all on the same paper?

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

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

A. About ten.

Q. On each paper?

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

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

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

A. Sure. Just go on to PubMed and

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

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

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

Q. Yes.

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

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

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

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

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

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

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

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

Q. So you were privy to all the data?

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

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

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

Q. Okay.

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

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

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

A. Yes.

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

A. Yes, yes.

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

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

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

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

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

A. Yes.

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

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

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

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

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

Q. What do you mean by "fraud"?

MS. KAPIN: Objection, relevance.

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

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

HEYMSFIELD

A. Well --

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

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

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

(Record read.)

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

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

A. Well, I told you.

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

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

(Record read.)

Q. Was there fraud involved in the

Darsee studies?

A. Yes.

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

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

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

A. Yes.

Q. And was Darsee under your supervision?

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

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

A. No, he was not under my direct

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

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

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

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

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

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

A. Sure.

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

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

MS. KAPIN: Objection, relevance, overbroad.

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

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

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

Q. Really?

A. Yes.

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

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

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

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

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

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

MS. KAPIN: That's all right. Go ahead.

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

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

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

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

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

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

A. Yes.

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

MS. KAPIN: Objection, relevance.

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

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

Q. I appreciate that.

A. I would be happy to do that.

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

MS. KAPIN: Objection, argumentative, mischaracterizes.

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

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

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

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

MS. KAPIN: Objection, overbroad, ambiguous.

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

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

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

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

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

MS. KAPIN: Objection, relevance, overbroad.

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

Q. How would I find them?

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

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

A. Probably, yes.

MR. BURBIDGE: Let's look at this.

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

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

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

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

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

Do you see that?

A. Yes.

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

A. Yes.

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

"Authorship credit should be based on:

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

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

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

Do you agree with those?

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

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

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

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

Q. Do you disagree with any of them?

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

A. I would have to see, for example,

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

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

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

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

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

A. Yes.

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

A. Yes.

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

done and said, fair?

A. No.

Q. None?

A. Not necessarily.

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

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

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

Q. See if you can answer that question.

A. You are talking --

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

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

Q. I didn't, you did.

A. No.

Q. Let me just ask the straightforward question.

A. Yes.

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

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

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

A. Yes.

Q. What?

A. The raw data.

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

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

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

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

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

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

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

MS. KAPIN: Objection, mischaracterizing.

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

events in my life. It was one of many.

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

MS. KAPIN: Objection, argumentative, mischaracterizing.

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

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

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

A. Yes.

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

A. Yes.

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

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

That's what you told the reporter, right?

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

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

A. This is a newspaper article.

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

A. Yes, yes.

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

HEYMSFIELD

(Record read.)

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

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

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

MS. KAPIN: Objection, mischaracterizing.

Q. Right, you are not denying it?

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

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

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

Q. But if you don't recall what you

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

MS. KAPIN: Objection, argumentative, mischaracterizing.

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

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

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

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

MS. KAPIN: Objection, argumentative.

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

know that Emory never asked me to leave.

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

MS. KAPIN: Objection, argumentative, harassing.

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

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

A. Yes.

Q. Were you tenured?

A. Yes.

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

MS. KAPIN: Objection.

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

MS. KAPIN: Argumentative.

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

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

MS. KAPIN: Objection, argumentative, harassing.

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

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

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

Q. Still not my question.

A. I think I answered it though.

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

HEYMSFIELD

That was my question.

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

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

MS. KAPIN: Great.

MR. BURBIDGE: Thanks.

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

(Recess taken.)

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

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

A. I have.

Q. So what do I refer to as sort of

HEYMSFIELD

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

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

Would you like to switch.

(Off-the-record discussion held.)

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

MR. EMORD: Yes.

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

MR. EMORD: That's correct.

EXAMINATION BY

MR. EMORD:

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

A. Hi.

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

Have you ever had an instance in

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

MS. KAPIN: Objection, relevance.

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

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

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

Q. Right.

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

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

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

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

MS. KAPIN: Objection, overbroad.

Q. If that's possible?

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

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

MS. KAPIN: Objection, relevance, overbroad.

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

Q. Right.

A. But not for necessarily reading it entirely.

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

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

MS. KAPIN: Objection, relevance, overbroad.

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

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

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

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

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

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

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

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

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

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

Q. Let me rephrase the question for you.

A. Yeah, yeah.

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

A. Sure, absolutely.

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

correct?

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

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

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

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

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

conduct weight loss trials.

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

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

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

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

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

MS. KAPIN: Objection. You are

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.

HEYMSFIELD

I'll answer it again.

Q. Please.

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

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

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

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

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

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

MS. KAPIN: The tapes are two hours

HEYMSFIELD

a piece, Mitch.

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

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

(Recess taken.)

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

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

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

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

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

A. You know honestly I don't recall

it's been oh, over a year.

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

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

Q. Let him answer that question?

A. Yes.

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

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

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

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

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

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

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

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

A. More than likely.

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

MS. KAPIN: Actually your time is up.

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

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

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

have fulfilled that obligation.

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

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

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

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

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

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

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

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Fraudulent Papers Stain Co-Authors

By Rex Dalton

SAN DIEGO—Young scientists unwittingly caught up in scandals over fraudulent research have found the experience to be a drain on their emotions and a stain on their professional careers.
Interviews with nearly a dozen researchers whose, names have been linked to some of the best-known cases of fraud revealed that the practice of "gift authorship" has sidetracked academic careers, put federal research grants beyond reach and thrown into question other legitimate studies they have published. It has even limited their opportunities to practice medicine privately.

The young researchers appear to have been exploited in part because of their naiveté, which was as glaring as their eagerness to receive credit for published research. Although none has been accused of participating knowingly in the scientific misconduct, their careers have become clouded by the specter of dishonesty.

Jeffrey J. Brown, now 31, was a radiology fellow in the early 1980s when he came into contact with Robert A. Slutsky, a former member of the departments of medicine and radiology at the University of California at San Diego who last year was found to have produced 13 fraudulent papers and 55 others that a special review committee termed "questionable." Brown is listed as a co-author with Slutsky on three fraudulent papers and four others that have been withdrawn.

"I'm planning to stay in academics," said Brown, who has remained a researcher at the medical school. "I am not going to let it deter me. But I worry that it will hurt me in looking for a job or applying for grants. There are certain people on the faculty that think less of me for my association with Slutsky."

'Foolish' Candor

Steve B. Heymsfield's bitterest memories relate to the reactions of his superiors when they learned he had been touched by allegations of research fraud by a co-author.
Heymsfield was a young assistant professor of medicine in the late 1970s at Emory University in Atlanta. While there he co-authored papers with John Darsee, a resident and research fellow. In 1983 it was determined Darsee had fabricated data in dozens of cases. Darsee lost his Harvard fellowship and was banned from receiving NIH funds for a decade.

"Like a fool, I was open, honest and straightforward," Heymsfield said. "Whatever investigating committee came through, I told them how I felt; any suspicion I had, any observations I had made.

"The response was that Emory asked me to leave; my grants dried up. I was tenured, so they couldn't fire me. But they definitely considered me an eyesore. I was set aside—taken off the ladder to the sky. It was obvious there would be no promotions or opportunities."

Heymsfield now heads the weight control and body composition laboratory at St. Luke's Roosevelt Medical Center in

New York. He has been nominated for a faculty position at Columbia University.

"If I don't get it," Heymsfield said, "there will be one reason: Darsee."

John Mancini also knows the anguish of being associated with a researcher whose work has been questioned. "It has been a soul-wrenching experience for those of us who were junior researchers," said Mancini, 34, now a cardiologist at the Veterans Administration Medical Center in Ann Arbor, Mich. "Basically, three years of effort were wiped out. It has an effect on my brain, my psyche and my soul."

Mancini came in contact with Slutsky as a research fellow from 1980 to '83 at the University of California at San Diego. He is listed as a co-author on one fraudulent paper and seven questionable reports in which Slutsky was the lead author.

'Is Your Work Real?'

Mancini remembers vividly the call from a university official that was his first indication of a problem with Slutsky's work. The inquiry came two years after he had left San Diego.
"He said, 'You wrote such and such paper. Was that study performed?' " Mancini recalled. "It was like: 'Hello, how are you? Is this study real?' I said, of course I did it."

But the question started him thinking. "It really knocked me for a loop, psychologically. I didn't know what to do but cooperate," said Mancini. "I had to reevaluate my whole experience in San Diego. But that was my research experience."

Gideon Strich, completing a residency in radiology at the University of California at Irvine, became embroiled in the Slutsky affair when he was given "gift authorship" for two published articles. Both articles were subsequently determined to be fraudulent by a university committee that investigated the allegations.

"I wasn't involved in the research," Strich said, recalling that his signature was forged on documents giving permission for his name to be used as a co-author. Noting that "everyone shared authorship" for group projects, Strich thought at the time that Slutsky was simply paying him back for his dedicated work in the lab. Strich left UC San Diego before the two reports were published.

"I thought, 'Isn't this nice.' I wrote papers he had little to do with, but his name appeared on them. I thought he was recognizing that I did a lot of work for him. I didn't realize what a favor he had done me—landing me in a great hole of mud," said Strich.

Despite the stain, Strich has been accepted for a radiology fellowship. But he expects eventually to enter private practice.

Revising His CV

Psychologist Salvatore Cullari is co-author of a half-dozen research papers with Stephen E. Breuning. The papers date from 1979-80, when both men were staff psychologists at the Coidwater Regional Center for Developmental Disabilities in Michigan.
A draft report in March prepared by a panel assembled by the National Institute of Mental Health alleges Breuning never performed some studies he wrote up and published in the early 1980s on how drug treatments affect retarded children. Breuning, now an administrator at a facility in western Pennsylvania, has denied any impropriety.

Cullari said the allegations have prompted him to remove from his vita two questioned studies he did with Breuning. "I

pulled them until this mess is cleared up. I've testified that I didn't do anything wrong: I still don't know if he did," said Cullari, 35, now an assistant professor of psychology at Lebanon Valley College in Pennsylvania.

"This will probably affect me through my practice. Sure I want federal funding: that's where the action is. But I would say that it's unlikely that the federal government will ever fund me because of this." Cullari said he hasn't bothered to apply.

Psychologist Donald G. Ferguson has avoided research entirely because of fears about the effect of being a co-author with Breuning. Ferguson, 39, is now a county psychologist in Duluth, Minn. He had been a staff psychologist at Coldwater with Breuning in 1978-80.

"In many ways, it is very traumatic," he said. "Science operates as an honor system. You take the research of others at face value. When someone comes along and does something like this, you feel first like you have been betrayed, then suckered, then somewhat guilty that you didn't figure out what was going on. .

"I am now reluctant to conduct any research. In my current job, I have good access to a database; I could get a research appointment. But I am reluctant to put a lot of effort into research. I get the feeling that even if I did have a decent piece of research, I couldn't get it published in a journal."

Golden Protection

For most researchers, the knowledge that a senior colleague had acted improperly came as a complete surprise. But some admit they could have been more observant. Brown describes his reaction to his discovery, while still working with Slutsky, that he was being credited with authorship of articles for which he did no work.

"I resisted that, initially," he said. "I told him that if my name was on a paper, I had to do something. After that he'd let me chase down X-rays to be photographed. But the X-rays weren't included in the paper; he was just doing it to satisfy me.

"I realize now I should have said, 'This has got to stop.' But I didn't because he was the golden boy of the department.

The impact of a hint of fraud is not confined to academia. One researcher damaged by the Slutsky affair was surprised to learn the stain carried over into the private medical community.

The physician, who requested anonymity, said: "I had applied to a private group. It was a lucrative practice, but the doctors were really caring individuals. And they were interested in me.

"One day a partner called and said the group was concerned about Slutsky's name on my papers. I couldn't believe it. I knew it would hurt me in the academic world, but I never thought it would make a difference for a job.

"They didn't call me back," he went on. "When I saw this could hurt me to the tune of $250,000 per year, I realized it was no game."

Dalton is a staff writer on The San Diego Union.

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EXHIBIT B

Declaration of Steven B. Heymsfield, M.D.

I declare under penalty of perjury, pursuant to 28 U.S.C. Paragraph 1746, that, to the best of my recollection, the following is true and correct:

1. My name is Steven B. Heymsfield, M.D. Since November 1, 2004, I have served as Executive Director of Clinical Research, Metabolism, for Merck Research Laboratories. I also serve as a Visiting Scientist at St. Luke's-Roosevelt Hospital which is affiliated with Columbia University. Previously I served as Deputy Director of the New York Obesity Research Center and also held the positions of Professor of Medicine at Columbia University College of Physicians and Surgeons, and Doctor of Medicine, St. Luke's-Roosevelt Hospital.

2. I have been retained by Complaint Counsel as an expert to offer testimony in this case.

3. After I was retained as an expert, Complaint Counsel asked me verbally and by letter for a list of all of my publications. I gave Complaint Counsel my current *curriculum vitae*, which included my list of current publications to the best of my knowledge.

4. After I was retained as an expert, I met with several members of Complaint Counsel's team at St. Luke's-Roosevelt Hospital last fall. We discussed a number of issues including my professional background.

5. I was asked about whether there were issues that litigants in other cases had tried to use to discredit me. I told Complaint Counsel that, about twenty five years ago, before I came to Columbia University, I had participated in research at Emory University with a medical resident named John Darsee. I said that it was ultimately discovered that John Darsee had fabricated data, but that I did not participate in the fabrication or know about the fabrication at that time.

6. I mentioned the Darsee matter only generally and did not discuss it in further detail during this meeting.

7. As I have testified, it had been my understanding that all or most of the Darsee papers were withdrawn from publication and that the Darsee papers naming me as a co-author were withdrawn. I have since learned from Complaint Counsel that one of these articles regarding LeVeen shunt pulmonary edema has not been withdrawn and I intend to add that article to my list of publications on my CV.

8. While at Emory, I submitted my CV to the Dean of the Emory medical school every year as part of my annual performance review. After the Darsee papers were withdrawn from publication, I asked the Dean whether it was appropriate to remove these as publications from my CV and the Dean said that it was. Therefore, I believed it appropriate to withdraw all of the Darsee papers included on my own list of publications.

9. As a scientist and medical doctor in my field, I do not regard papers that have been retracted and withdrawn from publication to be published studies. Errors and waste of resources could result if medical researchers relied on withdrawn papers.

10. The Dean and the recruitment committee of the Columbia University College of Physicians and Surgeons reviewed my CV and professional qualifications as a matter of course prior to my receiving an appointment to the University. They were fully aware of the Darsee matter and the consequences thereof, including all of his many withdrawn papers. They did not question the absence of these papers on my CV.

11. Consequently, during the fall 2004 meeting with Complaint Counsel I did not mention that John Darsee reported the fabricated data in papers that were withdrawn from publication. I did not state that these papers were not listed on my CV because the question of whether the papers withdrawn from publication should have been listed on my *curriculum vitae* has not arisen in previous cases in which I have testified.

12. During the time I was at Emory, some twenty five years ago, I was a member of the medical faculty. John Darsee was a medical resident. He was not my employee and I was not his supervisor. Nor did I evaluate or grade him. Although I was sometimes privy to summaries of data that Darsee had collected, I was usually not privy to the underlying raw data and the manner in which it was collected. I never fabricated any data nor was I aware of Dr. Darsee's fabrication of data until years later.

13. Other than the fall 2004 meeting with Complaint Counsel, I recall no other communications about this topic in the presence of Complaint Counsel until August 30, 2005, when I was questioned about this topic at length during my last deposition.

10/20/2005
Date

Steve Heymsfield
Steven B. Heymsfield, M.D.

EXHIBIT C

DECLARATION OF LAUREEN KAPIN

I, LAUREEN KAPIN, hereby declare:

1. I am a Senior Attorney in the Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission. My business address is Federal Trade Commission, 600 Pennsylvania Avenue, N.W., NJ 2215, Washington DC 20580. I am lead litigation counsel in the Matter of Basic Research, No. 9318.

2. Mr. Lemuel Dowdy, Mr. Walter Gross, III, Mr. Joshua Millard, Mr. Edwin Rodriguez, and Ms. Laura Schneider are other attorneys who have entered appearances as counsel supporting the Complaint. Mr. Jonathan Cowen and Ms. Robin Richardson were also assigned to the Basic Research matter but they are not presently employed by the Federal Trade Commission.

3. Complaint Counsel has retained Dr. Steven Heymsfield as an expert to offer expert opinion in this matter. None of the attorneys listed in paragraph 2 have retained Dr. Heymsfield as an expert witness in any other matter.

4. In September 2004, Complaint Counsel asked Dr. Heymsfield verbally and in writing to provide a list of all publications.

5. In October of 2004, Complaint Counsel met with Dr. Heymsfield in New York to discuss his work as an expert witness in the Basic Research matter. During the course of that discussion we asked Dr. Heymsfield about his professional background. In that context, we asked about issues in his past that might be raised to discredit him.

6. Dr. Heymsfield indicated that while he was a faculty member at Emory University, approximately 25 years ago, he participated in research with a student who was ultimately found to have fabricated data. Dr. Heymsfield stated that he himself had not fabricated any data and that he only learned of the fabrications years later when an inquiry was convened.

7. We discussed this matter very generally. I do not recall whether he identified the student by name.

8. He never stated that the data in question appeared in published papers, that he was listed as one of several co-authors of these papers, or that these papers were subsequently withdrawn from publication or his CV.

9. As lead litigation counsel either I personally or one of my co-counsel under my supervision, asked the attorneys listed in paragraph 2 about the allegations raised in Respondents' recent submissions. I have also personally asked the former Associate Director, Elaine Kolish and Assistant Director, James Reilly Dolan about these issues.

10. I have been advised that none of the individuals mentioned in paragraph 2 recall any other communications with Dr. Heymsfield on the Darsee matter. Moreover, none of these individuals recall Dr. Heymsfield ever stating that the data in question appeared in published papers, that he was listed as one of several co-authors of these papers, or that these papers were subsequently withdrawn from publication or his CV. They also did not recall that he ever indicated to us that papers in which he had been listed as a co-author were not included in the list of publications that he provided to us. In addition, neither Ms. Kolish nor Mr. Dolan were aware of these issues until I raised them as part of my inquiries.

11. The first time either I or other members of the litigation team learned about the Darsee papers was when Respondents raised the issue during Dr. Heymsfield's third deposition on August 30, 2005.

12. Respondents have asserted in their *Motion to Exclude a Witness and for Sanctions* that Complaint Counsel's November 8, 2004 *Motion for Protective Order* was somehow part of a concerted plot to hide the Darsee matter and studies from Respondents. Respondents' assertion is totally false. Complaint Counsel was not aware that Dr. Heymsfield was listed as a co-author on the Darsee studies until August 30, 2005. Complaint Counsel filed its motion for a protective order for the reasons stated in that motion. Respondents' then-recently issued subpoenas suffered from a host of infirmities including the fact that they were overbroad, unduly burdensome and not reasonably expected to yield information relevant to the litigation.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on October 20th, 2005 in the City of Washington, District of Columbia.

Laureen Kapin

Laureen Kapin