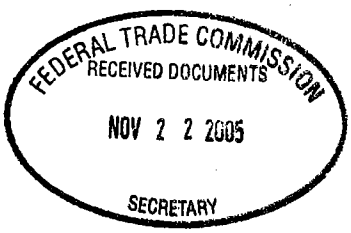
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	)	
BASIC RESEARCH, LLC A.G. WATERHOUSE, LLC KLEIN-BECKER USA, LLC NUTRASPORT, LLC SOVAGE DERMALOGIC LABORATORIES, LLC BAN, LLC d/b/a BASIC RESEARCH, LLC OLD BASIC RESEARCH, LLC, BASIC RESEARCH, A.G. WATERHOUSE, KLEIN-BECKER USA, NUTRA SPORT, and SOVAGE DERMALOGIC LABORATORIES DENNIS GAY DANIEL B. MOWREY d/b/a AMERICAN PHYTOTHERAPY RESEARCH LABORATORY, and MITCHELL K. FRIEDLANDER, Respondents.	)	Docket No. 9318

ORDER ON MOTIONS TO EXCLUDE A WITNESS, FOR SANCTIONS, OR FOR LEAVE TO REOPEN DISCOVERY FOR A LIMITED PURPOSE

I.

On October 7, 2005, Respondents Basic Research, LLC; A.G. Waterhouse LLC; Klein-Becker USA LLC; Nutrasport LLC; Sovage Dermalogic Laboratories, LLC; Ban, LLC; Dennis Gay; Daniel B. Mowrey d/b/a American Phytotherapy Research Laboratory; and Mitchell K. Friedlander (hereinafter "Respondents") filed their "Motion to Exclude a Witness and for Sanctions or, in the Alternative, for Sanctions and For Leave to Reopen Discovery for a Limited Purpose (hereinafter "Motion"). On October 20, 2005, Complaint Counsel filed its opposition to Respondents' Motion. For the reasons set forth below, Respondents' motion is **DENIED**.

On November 1, 2005, Respondents Daniel B. Mowrey and Dennis Gay filed their "Joinder in Respondents' Motion to Exclude a Witness and For Sanctions, and Correction of Complaint Counsel's False Statements" and "Additional Arguments Supporting, and Correction of Complaint Counsel's False Statements Concerning, the Motion for Sanctions" (hereinafter "Joinder/Additional Arguments"). On November 4, 2005, Complaint Counsel filed its opposition to Mowrey and Gay's Additional Arguments. The October 7, 2005 Motion states that

it was filed on behalf, Mowrey and Gay, among the other Respondents. Thus, joinder is inappropriate. To the extent that the Joinder/Additional Arguments can be considered a reply, as it does purport to correct Complaint Counsel's assertions, the filing fails to comply with the requirements of Rule 3.22(c). 16 C.F.R. § 3.22(c) ("The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission."). To the extent this filing is a motion, it is **DENIED**.

On November 16, 2005, Respondent Friedlander filed "Respondents', Mitchell Friedlander's, Combined Motion to Exclude a Witness, for Sanctions, and to Depose Both Complainant's Counsel and Complainant's Expert, Dr. Steven Heymsfield; and This Respondent's Joinder in the Motion by the other Respondents to Exclude a Witness and For Sanctions; and Also to Correct False Statements of Record That Were Made by Complainant's Counsel." ("Friedlander motion"). The October 7, 2005 Motion states that it was filed on behalf, Friedlander, among the other Respondents. To the extent that the Joinder/Additional Arguments can be considered a reply, as it does purport to correct Complaint Counsel's assertions, the filing fails to comply with the requirements of Rule 3.22(c). To the extent this filing is a motion, it is **DENIED**.

II.

The Scheduling Order entered in this case on August 11, 2004, requires that, at the time an expert is first listed as a witness by a party, the listing party shall provide to the other party materials fully describing or identifying the background qualifications of the expert witness, *a list of all publications*, and all prior cases in which the expert has testified or has been deposed. Respondents assert that Complaint Counsel's expert, Dr. Steven B. Heymsfield, did not list on his *curriculum vitae* six publications that Heymsfield co-authored with John Darsee. These six publications were based on fraudulent data and subsequently rescinded from publication due to the fraud, Respondents assert. Respondents argue that Heymsfield should have listed the six withdrawn studies and that Heymsfield's failure to do so is indicative of a general lack of candor.

Respondents move, pursuant to Rule 3.38(a) for an order: (1) to exclude Heymsfield from testifying at trial; and (2) to impose sanctions against each Complaint Counsel individually for their complicity in withholding of information responsive to discovery. In the alternative, Respondents seek: (1) sanctions against Complaint Counsel; and (2) leave to reopen discovery relating to this issue.

Complaint Counsel responds that Heymsfield has offered a *bona fide* explanation for not identifying the studies co-authored with Darsee as published studies – that Heymsfield understood that these studies had been withdrawn from publication and that he believed it was appropriate to not list withdrawn studies. Complaint Counsel asserts that Complaint Counsel was not aware of the papers co-authored with Darsee until Respondents elicited testimony on the issue from Heymsfield in his August 30, 2005 deposition. Complaint Counsel further argues that

even if the papers should have been disclosed, Respondents have not been genuinely prejudiced by this omission.

Complaint Counsel argues that the sanctions sought by Respondents are not reasonable under these circumstances. Complaint Counsel further argues Respondents have not demonstrated good cause for opening discovery on this matter that is not reasonably expected to yield information relevant to the allegations of the complaint, to proposed relief, or to the defense of any respondent.

III.

A.

Rule 3.38 states that if a party fails to comply with an order, "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." 16 C.F.R. § 3.38(b). The Commission has developed specific principles to help determine when sanctions should be applied:

> [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 . . . ; (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)."

In re ITT Corp., 104 F.T.C. 280, 449 (1984) (quoting *In re Grand Union Co.*, 102 F.T.C. 812, 1087 (1983)). The Commission noted with respect to the third requirement that "[a]n adverse ruling is a severe sanction to be imposed only in extraordinary circumstances." *Id.*

Heymsfield, in a sworn declaration, has articulated a reasonable, *bona fide* explanation for not identifying studies that he understood to have been withdrawn from publication. The failure of Heymsfield to list on his *curriculum vitae* these studies, which he co-authored over twenty years ago, does not meet the Commission's standard for imposing sanctions. *See ITT Corp.*, 104 F.T.C. at 448-49. Even if Heymsfield's failure to list these studies was unjustified, the sanction of excluding Heymsfield from testifying at trial is not reasonable in light of the material withheld. *See Currier v. United Technologies, Corp.*, 213 F.R.D. 87, 88 (D. Me. 2003) (concluding that plaintiff's failure to list past cases in which its experts testified did not warrant preclusion of expert testimony where defendant failed to show any prejudice to it arising from the omission).

Complaint Counsel has provided a sworn declaration certifying that Complaint Counsel was not aware that Heymsfield was listed as a co-author on studies that had been published and

later withdrawn from publication. Moreover, Respondents have failed to demonstrate prejudice stemming from the non-identification of these papers. Thus, Respondents have not met the Commission's standards for the sanctions they seek to have imposed on Complaint Counsel. *See ITT Corp.*, 104 F.T.C. at 449 (adverse inferences against complaint counsel inappropriate where delay in furnishing information was a product of a misunderstanding).

B.

In the alternative, Respondents seek leave to reopen discovery for the limited purpose of investigating matters relevant to: (1) the failure of Complaint Counsel's witness to disclose to Respondents the six studies; (2) the standards for listing of publications on a scientist's curriculum vitae; (3) the ethical responsibility of a co-author of scientific works to disclose fraudulent data in those works; (4) the supervisory responsibility of a senior scientist co-author for a junior scientist co-author's work; and (5) the extent to which Heymsfield's August 30, 2005 testimony raises questions that may impugn the competence and reliability of his scientific opinion.

As set forth in a separate Order, also issued in this matter on November 22, 2005, such issues are extrinsic to this matter. The requested discovery will not be permitted as it is not reasonably related to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, as required by Rule 3.31(c)(1) of the Federal Trade Commission's Rules of Practice. Thus, Respondents have not met their burden of demonstrating good cause for reopening discovery.

IV.

For the reasons set forth above, Respondents' motion, Mowrey and Gay's Joinder/Additional Arguments, and the Friedlander motion are **DENIED.**

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: November 22, 2005