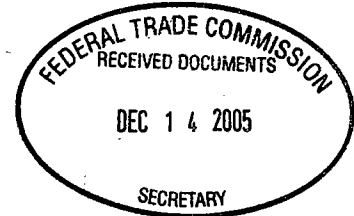


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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 COMPLAINT COUNSEL'S OBJECTIONS TO
LATE DISCLOSED WITNESSES AND EXHIBIT**

I.

On November 23, 2005, Complaint Counsel filed a motion objecting to Respondents' late disclosure of eight expert witnesses and one piece of evidence ("Motion"). On December 2, 2005, Respondents filed an opposition ("Opposition").

On November 30, 2005, Complaint Counsel filed an unopposed motion for leave to substitute the motion with a non-public version. Complaint Counsel's motion for leave is **GRANTED**.

II.

Complaint Counsel argues that Respondents' late designation of eight expert witnesses violates the Scheduling Order and the Federal Trade Commission ("Commission") Rules of Practice; Respondents cannot show good cause for adding eight expert witnesses at this late date; and precedent supports exclusion of Respondents' eight new expert witnesses based on

violations of pretrial notice requirements and prejudice. Motion at 8-18. Complaint Counsel also asserts that the Court should exclude Respondents' late disclosure of alleged substantiation. Motion at 18-20.

Respondents contend that there is no violation of the Scheduling Order; the exclusion of rebuttal expert witnesses who are not presenting cumulative evidence is an abuse of discretion; precedent does not support the exclusion of the eight witnesses; and permitting Respondents' rebuttal expert witnesses will not prejudice Complaint Counsel.¹ Opposition at 5-13. Respondents also claim that exhibit RX 807 should not be precluded because there is no harm or prejudice to Complaint Counsel. Opposition at 13-14.

III.

A.

The Complaint in this matter was issued on June 15, 2004. After a prehearing conference and input from the parties, a Scheduling Order was issued on August 11, 2004. The Scheduling Order set October 13, 2004 as Respondents' deadline for filing an expert witness list and November 29, 2004 as the deadline for Respondents to provide expert witness reports. Complaint Counsel was required to identify rebuttal experts and serve rebuttal expert reports by December 13, 2004, provided that:

Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).

Scheduling Order at 2. The Scheduling Order set a trial date of March 28, 2005, so that the Initial Decision could be filed within one year of the filing of the Complaint, as required by Commission Rule 3.51(a). 16 C.F.R. § 3.51(a).

On March 7, 2005, the parties were notified that the trial would be rescheduled and on March 24, 2005, a Revised Scheduling Order was issued. Prior to the continuance of the case, discovery had closed, final witness lists had been exchanged, and motions for summary decision, motions *in limine*, and motions to strike had been filed. *See* Scheduling Order.

On April 6, 2005, the matter was certified to the Commission and stayed. Following the

¹ Respondents quote an opposition to a motion to strike filed in *In re Schering-Plough Corp.*, 2001 FTC LEXIS 194, at *7 (Dec. 26, 2001), and attribute the quote to the court. Opposition at 12. Counsel are admonished to cite to court orders properly and not to confuse them with pleadings filed by parties.

lift of the stay, the Second Revised Scheduling Order was issued on August 4, 2005. The Second Revised Scheduling Order states that Respondents' counsel asserted a "genuine unavailability to prepare and present this matter at a trial scheduled prior to the end of February [2006] due to immovable conflicts," that Complaint Counsel did not object, and that due to "the unique facts of this case, the parties' joint request is not unreasonable." Second Revised Scheduling Order at 1. Therefore, at the request of Respondents, the trial was delayed by six months.

The Second Revised Scheduling Order set November 8, 2005 as the deadline for parties to exchange final proposed witness and exhibit lists. On November 8, 2005, Respondents identified, for the first time, eight new expert witnesses, to be called "should the Complaint Counsel's experts' testimony mirror that of their deposition testimony" and indicating that the experts were "not a part of Respondents' case in chief." Motion, Exhibit 6 at 8. Complaint Counsel contends that no expert reports have been provided from these eight expert witnesses, in violation of Commission Rule 3.31(b)(3). Motion at 6, 10.

Among the factors which a court should take into consideration in determining whether to exclude evidence are the explanation, if any, for the failure to name the witness; the importance of the testimony of the witness; the need for time to prepare to meet the testimony; and whether a continuance would be useful. *Patterson v. F.W. Woolworth Co.*, 786 F.2d 874, 879 (8th Cir. 1986); *Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232, 235 (5th Cir. 1981). In assessing whether to exclude trial testimony, courts have considered:

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the district court's [scheduling] order.

In re Kreta Shipping, S.A., 181 F.R.D. 273, 277 (S.D.N.Y. 1998) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 791 (3d Cir. 1994)); see also *Praxair, Inc v. ATMI, Inc.*, ___ F.R.D. ___, 2005 WL 2994539, at *5 (D. Del. 2005); *Dunn v. Zimmer, Inc.*, 2005 WL 563095, at *1 (D. Conn. 2005). This inquiry is necessarily fact intensive.

In this case, the factors identified above weigh against allowing the testimony. Complaint Counsel is prejudiced by the disclosure of these eight expert witnesses after the close of discovery and after the deadlines for filing motions for summary decision, motions *in limine*, and motions to strike. The prejudice to Complaint Counsel is serious and difficult to cure without severe disruption of the case. See *Softel, Inc. v. Dragon Medical and Scientific Comm., Inc.*, 118 F.3d 955, 961 (2d Cir. 1997); *Dunn*, 2005 WL 563095, at *2; *Praxair*, 2005 WL 2994539, at *5. Merely allowing for depositions of these eight expert witnesses would not be sufficient to cure the prejudice – Complaint Counsel may need an opportunity to conduct additional discovery, confer with its own experts, revise its trial strategy, identify rebuttal experts, and file additional

motions. *See* Motion at 17. Therefore, the eight additional expert witness being named at this late date would require reopening discovery and would likely disrupt the orderly and efficient trial of the case. Finally, after thorough review of Respondents' Opposition, the Court finds that Respondents have not provided any legitimate justification for the delay in identifying the eight expert witnesses at issue.

Respondents state that the eight expert witnesses "are not designated as case-in-chief witnesses; nor are they designated to rebut the expert reports of Complaint Counsel's experts." Opposition at 5. Respondents state that the eight expert "witnesses will not be called on to testify in Respondents' case-in-chief" and that their proposed testimony is not sur-rebuttal because it "will not rebut the rebuttal testimony of Complaint Counsel's witnesses." Opposition at 6. Thus, Respondents can not credibly claim that this testimony is essential to their case. Respondents arguments are similar to those found insufficient in *Dunn*, where the "[p]laintiffs offer[ed] no explanation for the late disclosure of [an expert] beyond an assertion that they [were] entitled to use rebuttal experts." *Dunn*, 2005 WL 563095, at *2. In *Dunn*, the court noted that it did "not question the right to use rebuttal experts, but that right is not unlimited." *Dunn*, 2005 WL 563095, at *2. Respondents; here, have similarly not demonstrated good cause for the delayed identification of these eight expert witnesses.

The Court is aware that the "remedy of exclusion is considered 'drastic' and should not be imposed where it could frustrate the overarching objective of the [Federal] Rules, which is to provide substantial justice for litigants." *Dunn*, 2005 WL 563095, at *1. Case law is clear, however, that courts are authorized to exclude evidence proffered by a party in disregard of scheduling orders. *Applewood Landscape & Nursery Co., Inc. v. Hollingsworth*, 884 F.2d 1502, 1507 (1st Cir. 1989); *Praxair*, 2005 WL 2994539, at *5; *see also Uniguard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 369 (9th Cir. 1992) (exclusion based on court's inherent powers). For these reasons, the eight witnesses at issue will not be permitted to testify at the trial of this matter.

B.

Complaint Counsel also objects to the late disclosure of RX 807, a newly disclosed report. Motion at 18-20. Respondents contend that the document is dated March 15, 2005 and was not in existence at the January 10, 2005 close of discovery or when Respondents provided their exhibit list in February 2005. Opposition at 13. Respondents acknowledge a duty to supplement timely, but contend that there was no duty while the case was stayed and that the document was only identified recently. Opposition at 13-14. Respondents further contend that Complaint Counsel is not prejudiced by the late identification of the document. Opposition at 13-14.


Had Respondents identified the document shortly after its creation on March 15, 2005 or shortly after the stay was lifted from the case on June 17, 2005, their arguments might be persuasive. However, eight months later, these arguments are not as effective. The prejudice from the late production of this document to Complaint Counsel is similar to the prejudice

discussed above regarding the late identification of eight expert witnesses and the document will be excluded for the same reasons.

IV.

Accordingly, Complaint Counsel's motion is **GRANTED**. Respondents will not be permitted to call the eight rebuttal witnesses first identified on November 8, 2005. In addition, exhibit RX 807 will be excluded.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: December 14, 2005