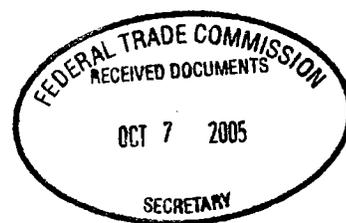


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.



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

PUBLIC

Docket No. 9318

RESPONDENTS' MOTION TO EXCLUDE A WITNESS AND FOR SANCTIONS
OR, IN THE ALTERNATIVE, FOR SANCTIONS AND FOR LEAVE TO
REOPEN DISCOVERY FOR A LIMITED PURPOSE

Pursuant to Rule 3.38(a) of the Commission's Rules of Practice, 16 C.F.R. § 3.38(a), 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 the "Respondents") respectfully move for an order: (1) to exclude Dr. Steven B. Heymsfield (hereinafter "Complaint Witness") for his testimonial lack of candor and willful non-disclosure of information responsive to discovery and (2) to impose sanctions (in the form of a formal reprimand) against each of Complaint

Counsel individually for their complicity in and condonation of the wrongful withholding of information responsive to discovery. If the Presiding Officer elects not to exclude the Complaint Witness, Respondents seek, in the alternative, (1) the aforementioned sanctions and (2) leave to reopen discovery for the limited purpose of investigating all matters germane to: (a) the failure of the Complaint Witness to disclose to Respondents the existence of six fraudulent studies co-authored by him; (b) the generally accepted standards for listing of publications on a scientist's curriculum vitae; (c) the ethical responsibility of a co-author of scientific works to disclose fraudulent data in those works; (d) the supervisory responsibility of a senior scientist co-author (here, Heymsfield) for a junior scientist co-author's (here, Darsee's) work; and (e) the extent to which Heymsfield's August 30, 2005 testimony raises questions of his scientific integrity, reliability, and independence that may impugn the competence and reliability of his scientific opinion.

In accordance with Commission Rule 3.22(f), 16 C.F.R. 3.22(f), Respondents' Counsel has conferred with opposing counsel in good faith in an effort to resolve via mutual agreement the issues raised by this motion and has been unable to reach such an agreement. A signed statement documenting the conference is attached as Exhibit 1. The grounds for this motion are set forth below.

I. PROCEDURAL HISTORY

The Presiding Officer entered a scheduling order on August 11, 2004. In paragraph 11 of that order he required:

At the time an expert is *first* listed as a witness by a party, the listing party will provide to the other party: (a) 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. (Emphasis added.)

Immediately preceding the second deposition of Heymsfield, he supplied a list presenting cases omitted from his initial case listing. That late disclosure led his Honor to issue an order requiring Heymsfield to appear for a third deposition. In his Honor's March 15, 2005 *Order on Respondents' Motion to Strike Expert Witnesses and for Sanctions and Other Relief*, the Presiding Officer found the Complaint Witness to have failed timely to list a number of cases in which he testified over the last thirty years. That March 15 Order reads in pertinent part:

After his first day of deposition testimony, Heymsfield reviewed his records and determined that he failed to list a number of cases that he had testified in over the last thirty years. Opposition at Ex. 6. An updated list was provided to Respondents immediately prior to this second deposition. Opposition at 24-25. Since his second deposition, Complaint Counsel has produced a copy of Heymsfield's trial testimony in connection with *FTC v. SlimAmerica*, 77 F. Supp.2d 1263 (S.D. Fl. 1997). Notice at 1. This information should have been provided to Respondents in a timely fashion. Complaint Counsel acknowledges the error and has offered to make Heymsfield available for an additional four hours of deposition testimony. Notice at 3. This should be more than enough time to allow all Respondents to complete their deposition of Heymsfield and to remedy any harm from the delayed disclosures.

At his August 30 deposition, Heymsfield begrudgingly admitted withholding additional information. Despite the August 11 Scheduling Order requirement that he provide Respondents "materials fully describing or identifying [his] background [...] and a list of all publications[...]," Heymsfield revealed for the first time on August 30, 2005 that he did not list on his *curriculum vitae* (and he did not otherwise give to Respondents) six publications he co-authored with John Darsee that were based on fraudulent data and were rescinded by the publications in question for the fraud. *See* Aug. 30, 2005 Depo. at 462-463, lines 24-25; 2-9. He admitted that he did not supply Respondents with any of

the six studies, Aug. 30 2005 Depo. at 462, lines 5-22. He also admitted that he 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. *See* Aug. 30, 2005 Depo. at 658-660, lines 13-25; 2-25; 2-6; 655- 657, lines 10-25; 2-25; 2-16.

II. ARGUMENT

FTC Rule of Practice 3.38 provides that “it shall be the duty of parties to seek, and Administrative Law Judges to grant, sanctions or other appropriate relief as may be sufficient to compensate for failure to disclose documents as ordered.” The facts arising in Heymsfield’s August 30, 2005 deposition amply justify sanctions against Heymsfield and Complaint Counsel along with additional relief. As explained in detail herein, Dr. Heymsfield intentionally withheld from Respondents for over a year the fact of his co-authorship of the six fraudulent studies in violation of the Presiding Officer’s August 11, 2004 Scheduling Order. Moreover, Complaint Counsel are complicit in and have condoned that wrongful withholding.

Heymsfield is a professional witness for Complaint Counsel. He has been retained by Complaint Counsel in numerous prior proceedings. Heymsfield testified that he informed Complaint Counsel of the six studies and the fraud at the time of his retention in this case. Indeed, according to Heymsfield, he apprised Complaint Counsel in prior cases as well. *See* Aug. 30, 2005 Depo. at 658-660, lines 13-25; 2-25; 2-6.

The wrongful withholding of the fraudulent studies is not an isolated event, but indicative of a general lack of candor. Heymsfield’s answers to many questions posed in the August 30, 2005 deposition are halting, evasive, and incomplete. The overall

misconduct warrants exclusion of this witness. The facts presented in detail *infra* also warrant the requested sanction of a reprimand by name of each of Complaint Counsel.

If exclusion is not ordered, Respondents seek the aforementioned sanctions along with a determination by the Presiding Officer that adverse inferences are warranted against Heymsfield for his wrongful withholding and lack of candor. In addition, Respondents ask that his Honor order discovery reopened for the limited purpose of affording Respondents: (1) the opportunity to depose Heymsfield for one day, not to exceed seven hours;¹ (2) the opportunity to depose and obtain documents from all other witnesses who have knowledge of Heymsfield's involvement in the co-authorship of the six fraudulent Darsee studies and of the truthfulness of his August 30, 2005 testimony; (3) the issuance of an order to Heymsfield compelling him under penalty of perjury to provide Respondents with a complete list of all materials in his files or under his control relating to his co-authorship of the six fraudulent Darsee studies.

As is shown by the deposition transcript that follows, Heymsfield has engaged in willful non-disclosure of information required to be supplied by the August 11, 2004 Scheduling Order and in halting and evasive testimony concerning his involvement in the six fraudulent studies, his subsequent statements to the press about the fraud, and his relationship with Emory University after the fraud was discovered. Those acts of non-disclosure and evasiveness reveal a lack of candor, if not outright mendacity, that renders him incapable of being relied upon to testify truthfully at hearing.

¹ The scope of that deposition should include all facts and circumstances germane to (1) the failure of Heymsfield to disclose to Respondents the existence of six fraudulent studies co-authored by him; (2) the generally accepted 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 (here, Heymsfield) for a junior scientist co-author's (here, Darsee's) work; and (5) the extent to which Heymsfield's August 30, 2005 testimony raises questions of his scientific integrity, reliability, and independence that may impugn the competence and reliability of his scientific opinion.

Heymsfield's testimony reveals that he apprised Complaint Counsel of the documents in question at the time of his retention in this case and in prior cases and that he and Complaint Counsel neither disclosed the existence of the documents nor produced them to Respondents. That complicity by Complaint Counsel in condoning and facilitating the wrongful non-disclosure falls far beneath the minimum standards of ethical conduct expected of government attorneys. On December 9, 2004 the ALJ granted Complaint Counsel's motion for a protective order and quashed that portion of the subpoena that required Heymsfield to produce copies of his published studies. However, the fact that Heymsfield did not have to submit actual copies does not excuse him, or Complaint Counsel, from failing to comply with his Honor's prior August 11, 2004 Scheduling Order that required all materials "fully describing his [Heymsfield's] background" and "a list of all publications." Those materials and that list necessarily require revelation of the six fraudulent Darsee studies.

Moreover, at his January 11, 2005 deposition, when asked his reasons for leaving Emory University, Heymsfield said there was no reason other than "enormous opportunity" prompting his departure from Emory (in direct contradiction to his published statements in The Scientist that Emory University "asked me to leave," "considered me an eyesore," had "taken [me] off the ladder to the sky," and had made it "obvious" that "there would be no promotions or opportunities." *See infra* at 17-18. When the question as to the reasons for his departure was repeated again, Heymsfield reiterated that there was no other reason compelling his departure from Emory, in direct contradiction to his published statements that Emory University considered him a pariah

after the discovery of the six fraudulent Darsee studies.² This incident once more underscores the profound questions relating to Heymsfield's lack of candor during the course of this proceeding.

The veracity of a witness is always in issue. Proof of willful non-disclosure of material and damaging facts and documents support witness exclusion, particularly in the case of an expert. An untrustworthy expert can mislead and beguile the Presiding Officer who, like counsel, looks to expert opinion with lay eyes. That misleading testimony can lead to a miscarriage of justice. Presiding Officers, particularly in FTC deceptive advertising cases, often place trust in the reliability and veracity of expert testimony in forming ultimate conclusions on the extent to which health benefit representations are backed by competent and reliable scientific evidence. Thus, when presented with direct evidence of lack of candor and purposeful withholding of material (and damaging) information that goes to the veracity and reliability of the expert, the Presiding Officer must protect the integrity of the administrative truth-seeking process by excluding the witness from testifying. Given evidence of Heymsfield's willful non-disclosure and

² See January 11, 2005 Depo., at 204, lines 10-17:

Q. You left Emory University, what? '84?

A. '86.

Q. '86. And anything in particular that prompted you to leave Emory University and join St. Luke's?

A. Same thing. Enormous opportunity.

Q. Any other reason?

A. No.

Compare August 30, 2005 Depo., at 630, 631, lines 14-25, 2-5:

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." See Exhibit 4.

halting and evasive testimony, the Presiding Officer cannot place trust in him to be honest and unbiased.

Commission Rule 3.38 governs the discovery process in an administrative proceedings, including sanctions imposed for failure to disclose requested evidence. At the center of the Presiding Officer's inquiry is the determination of whether the failure to disclose responsive records is deliberate and willful.³ Upon finding the misconduct cited above, the Presiding Officer may order appropriate relief to remedy the injury caused.⁴ The sanctions available are enumerated in Rule 3.38(b), 16 C.F.R. § 3.38(b), although his Honor is free to impose additional punitive measures tailored to address the gravity of the offense committed. Specifically, Rule 3.38(b) provides:

If a party or an officer or agent of a party fails to comply with an order, including an order [...] for the production of documents, [...] the Administrative Law Judge or the Commission, or both, 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, including but not limited to the following:

- (1) Inference that the admission, testimony, documents or other evidence would have been adverse to the party;
- 2) Ruling that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
- (3) Ruling that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, the documents or other evidence;
- (4) Ruling that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;
- (5) Ruling that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was

³ *In the Matter of Verrazzano Trading Corp.*, 1976 FTC Lexis 390, 400-401 (April 16, 1976).

⁴ *Id.* at 401.

issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.⁵

Moreover, Rule 3.38(c) provides:

It shall be the duty of parties to seek, and Administrative Law Judges to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the withheld testimony, documents, or other evidence.

Complaint Witness has engaged in willful misconduct by failing to disclose information required by the August 11 Scheduling Order (specifically by failing to disclose truthfully and fully his participation in and knowledge of six fraudulent studies that he co-authored). Those purposeful acts of non-disclosure by a professional FTC witness are in direct violation of the Scheduling Order. They go to the heart of Heymsfield's credibility and reliability as an expert. They are a repeat offense. In his March 15, 2004 order, the Presiding Officer held certain documents produced by FTC immediately prior to Heymsfield's second deposition to be wrongfully withheld and required that Heymsfield testify for four additional hours. That pattern of non-compliance taints the administration of justice and interferes with the Respondents' ability to present their defense.

The protective order granted on December 9, 2004 almost succeeded in insulating Complaint Counsel from having to account before the Presiding Officer and Respondents for Complaint Witness' questionable academic and professional practices. The gravity of the non-disclosure and the seriousness of the misconduct give rise to the question of whether Complaint Counsel, then aware of the fraudulent studies, endeavored to evade detection of the studies altogether. Such action severely undermines the truth-seeking

⁵ 16 C.F. R. § 3.38(b)(1)-(5).

process and further suggests conduct beneath minimum standards of ethics for government counsel.

III. PERTINENT FACTS

The following facts were first revealed at the August 30, 2005 deposition:

1. Heymsfield co-authored six studies published in the peer-reviewed literature with co-author John Darsee. Those studies are:
 - a. Darsee JR, Heymsfield SB. *Decreased myocardial taurine levels and hypertauroinuria in a kindred with mitral-valve prolapse and congestive cardiomyopathy*. [retracted by Heymsfield SB, Glenn JF. In: N Engl J Med 1983; 308:1400]. N Engl J Med 1981; 304:129-35.
 - b. Darsee JR, Heymsfield SB, Nutter DO. *Hypertrophic cardiomyopathy and human leukocyte antigen linkage: differentiation of two forms of hypertrophic cardiomyopathy*. N Engl J Med 1979;300:877-82.
 - c. Darsee JR, DO Nutter, LC Hopkins Jr and SB Heymsfield. *Neurogenic skeletal myopathy in patients with primary cardiomyopathy*. [retracted by Nutter DO, Hopkins LC Jr, Heymsfield SB. In: Circulation 1984 Jan;69 (1):202]
 - d. Darsee JR, Heymsfield SB, Miklozek CL. *Cirrhotic cardiomyopathy: the hyperdynamic-unloaded-failing heart*. Circulation 1979;60(suppl II):38 .
 - e. Darsee J, Mikolozek C, Heymsfield S, et al. *Mitral Valve Prolapse and Ophthalmoplegia. A Progressive Cardioneurologic Syndrome*. Am Int Med 1980; 92: 735.
 - f. Darsee JR, Fulenwider JT, Ridders LF, Ansley JD, Nordlinger BF, Ivey G, Heymsfield SB. *Hemodynamics of LeVeen shunt pulmonary edema*. Ann Surg. 1981 Aug; 194(2):189-92.
2. Heymsfield did not list any of those studies as published articles on his *curriculum vitae*. Aug. 30, 2005 Depo. at 451-452, lines 23-25; 2-12. See Exhibit 2.
3. Neither Heymsfield nor Complaint Counsel supplied Respondents with a list containing the six studies, or with the studies themselves.

4. The six Darsee studies were withdrawn from publication upon proof that the data relied on in the studies were fictitious and fraudulent. Aug. 30, 2005 Depo. at 452-453, lines 20-25; 2-3.
5. Heymsfield at the time the fraud was revealed was a tenured professor at Emory University. Aug. 30, 2005 Depo. at 452, lines 7-12.
6. In The Scientist Heymsfield was quoted as saying: “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.” See Exhibit 3.
7. Under examination, Heymsfield would not admit, but would also not deny, having made the statement quoted in the enumerated paragraph immediately above. Aug. 30, 2005 Depo. at 632-634, lines 3-25; 2-25; 2-10.
8. Heymsfield left his position as Associate Professor of Medicine at Emory University School of Medicine in 1986, after revelation of his co-authorship of the six fraudulent Darsee studies.
8. Under examination, Heymsfield admitted that when first contacted by Complaint Counsel he revealed the studies and the fraud to them. Aug. 30, 2005 Depo. at 658-660, lines 13-25; 2-25; 2-6.
9. Under examination, Heymsfield admitted he has previously informed Complaint Counsel of the studies and the fraud when retained in other FTC proceedings. Aug. 30, 2005 Depo. at 655- 657, lines 10-25; 2-25; 2-16.

10. Under examination, Heymsfield admitted that the fabricated facts that were used in each of the six studies were produced by John Darsee, a medical student at Emory University, where Heymsfield taught and with whom he collaborated in writing all six articles. Aug. 30, 2005 Depo. at 462-463, lines 24-25; 2-9.
11. Neither Heymsfield nor Complaint Counsel informed Respondents of the six fraudulent Darsee studies before Heymsfield begrudgingly admitted co-authorship of them in his August 30, 2004 deposition. Aug. 30, 2005 Depo. at 453, lines 6-15.
12. Under oath, Heymsfield refused to admit any specific responsibility for the six fraudulent Darsee studies he co-authored and (1) would neither admit nor deny any adverse actions or inferences against him from colleagues at Emory and (2) would neither admit nor deny communicating the statement in The Scientist (above). Instead, he testified haltingly and evasively to the questions asked. Aug. 30, 2005 Depo. at 632-634, lines 3-25; 2-25; 2-10.

A. FAILURE TO DISCLOSE MATERIAL DOCUMENTS AND FAILURE TO TESTIFY TRUTHFULLY

The following are relevant excerpts from Heymsfield's August 30, 2005 deposition:

1. Heymsfield begrudgingly admitted that he did not list the six fraudulent Darsee studies that he co-authored.
 - a. A: "[...] 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.”

b. Q: “What papers are those?”

c. 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.” Aug. 30, 2005 Depo. at 451-452, lines 23-25; 2-12.

2. Heymsfield acknowledged that an investigative committee found the data for the studies to be fabricated by a co-author.

a. A: “[...] 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.” Aug. 30, 2005 Depo. at 452-453, lines 20-25; 2-3.

3. Heymsfield confirmed that he co-authored the fraudulent studies containing falsified data.

a. Q: “You were a co-author?”

b. A: “Yes, me and about 25 other people, 25 or 30.”

c. Q: “That were all on the same paper?”

d. A: “On all of his papers that were retracted, yes.”

- e. Q: “What about the ones that you were involved in, how many other co-authors were there?”
 - f. A: “About ten.” Aug. 30, 2005 Depo. at 453, lines 6-15.
4. Heymsfield haltingly and evasively avoided explaining his exact participation and responsibility in the six fraudulent Darsee studies.
- a. Q: “Does a co-author have any responsibility in regards to how a study is published, a review of the data, things like that?”
 - b. 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.” Aug. 30, 2005 Depo. at 454-455, lines 20-25; 2-4. [* * *]
 - c. Q: “I’m asking you what your involvement was in the study?”
 - d. 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.”
 - e. Q: “So you were privy to all the data?”
 - f. 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.” Aug. 30, 2005 Depo. at 455, lines 10-21. [* * *]
 - g. 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." Aug. 30, 2005 Depo. at 456, lines 3-14.

5. Heymsfield acknowledged that the six fraudulent Darsee studies made findings based on fictional patient data analyses.
 - a. Q: "What do you mean by the word 'fraud' in that context?"
 - b. 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 [...]." Aug. 30, 2005 Depo. at 460, lines 4-10.
6. Heymsfield alleged that he does not remember whether he sent retraction letters to all of the peer-reviewed journals that published the study.
 - a. Q: "Did you write to the peer review journals that published the studies and ask for retraction of the studies?"
 - b. 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 there were retraction letters and I believe that I may have signed some of them. I don't recall specifically."
 - c. Q: "Do you have copies of any of those letters?"
 - d. A: "Actually I do."
 - e. Q: "And would you provide them?"

- f. Ms. KAPIN: “Objection. If you have document requests you can take that off-line and we will go through the formal process that has been set forth in this case, and discovery is closed.”
- g. Mr. FRIEDLANDER: “Well, we are just learning about this. This deposition hasn’t been finished yet.”
- h. Ms. KAPIN: “I understand. All I’m saying is that there’s a formal process and the deposition is not that process.”
- i. Q: “But you’d be willing to provide those letters?”
- j. A: “Letters are published.” Aug. 30, 2005 Depo. at 461-462, lines 19-25; 2-22. [* * *]
- k. Q: “If the letters are published, can you tell me where?”
- l. A: “Yes.”
- m. Q: “And where are they published?”
- n. A: “Whichever journals the retractions took place, the letters would be in those journals and you could probably find them the way I mentioned. If you just search PubMed you can dig up Darsee and you will find those letters.” Aug. 30, 2005 Depo. at 462-463, lines 24-25; 2-9.

7. Heymsfield admitted that he was interviewed by investigating committees but disavows any specific memory of the facts and of whether records or transcripts of the proceedings were made.

- a. Q: "You mentioned that you were examined or questioned by the committee that discovered these transgressions by Darsee; is that correct?"
 - b. A: "Yes, I was interviewed by the committees."
 - c. Q: "Are there any transcripts of those hearings or those questionings?"
 - d. A: "There were reports of those meetings which were probably made public to some extent and those could be obtained from the National Institute of Health or maybe even from Emory University."
 - e. Q: "But do you know whether there were any transcripts made? Did you ever read a transcript for correction?"
 - f. A: "Oh, you are asking me something that happened 25 years ago. I don't remember. I don't specifically remember a transcript, as in this type of transcript, no. I don't remember anything like that. There might have been some minutes, that would be logical, but I don't have any specific recollection of it. It's very possible but it's not, you know." Aug. 30, 2005 Depo. at 463-464, lines 10-25; 2-10.
8. Heymsfield testified haltingly and evasively about statements made to a reporter about the circumstances prompting him to leave Emory University after the exposure of the six fraudulent Darsee studies.
- a. Q: "Well, the bottom line is that you were asked to leave Emory University as a result, fair?" [* * *]
 - b. A: "If you can find that written anyplace, anywhere in any reliable document I'd be happy to affirm its validity."

- c. Q: “Down at the bottom, last full paragraph it says, and quoting you [from The Scientist, dated at May 18, 1987; Exhibit 3 hereto], ‘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?”
- d. 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 of the files, that asked me to leave I would be very shocked.”
- e. Q: “Get my question back. I didn’t ask that question.”
- f. A: “This is a newspaper article.”
- g. Ms. KAPIN: “Doctor, you don’t have to throw out challenges to opposing question.”
- h. A: “Yes, yes.” Aug. 30, 2005 Depo. at 630-631, lines 3-10, 21-25; 2-22.

9. Heymsfield again testified haltingly and evasively about statements made to The Scientist and states that implications stemming from his own quoted words are “inaccurate.”

- a. Q: “That’s the question. Did you tell that to the reporter?”

- b. 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.”
- c. Q: “But you are not denying that you said this?” [* * *] “Right, you are not denying it?”
- d. 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.”
- e. Q: “I’ll do it in just a second.”
- f. A: “But whatever the implication of this are are not accurate.”
- g. Q: “But if you don’t recall what you said I take it you can’t deny saying what’s quoted here, right?” [* * *]
- h. A: “This is a – this is a newspaper article – “ [* * *] “No, I’m just [sic] telling you that.”
- i. 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?” [* * *]
- j. 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.”

- k. Q: "As you sit here today and you are under oath, can you deny that you said what this reporter quotes?" [* * *]
- l. A: "I don't know whether or not this is an accurate quote or not. I'm just telling you the facts." Aug. 30, 2005 Depo. at 632-634, lines 3-25; 2-25; 2-10:

10. Heymsfield testified evasively about co-author responsibilities following revelation in the deposition of his co-authorship of the six fraudulent Darsee studies.

- a. Q: "Have you ever had an instance in which you have submitted an article for publication or have been listed as a co-author upon the article that you did not read in its entirety?" [* * *]
- b. A: "Did not read in its entirety? You know, like I said, I have a couple of hundred of 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."
- c. 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?"
- d. A: "An article with my name, that I didn't read?"
- e. Q: "Right." [* * *]
- f. A: "Unlikely, but again a specific example would be helpful."

- g. Q: “But it could have happened that you allowed an article to be published with your name on it, that you didn’t read in its entirety?” [* * *] “If that’s possible?”
- h. 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.”
- i. Q: “Now, is a co-author responsible for the entire article in your judgment?” [* * *]
- j. A: “Well, when you put your name on as an author you are generally responsible for the content of the article.”
- k. Q: “Right.”
- l. A: “But not for necessarily reading it entirely.” Aug. 30, 2005 Depo. at 641-643, lines 25; 2-25; 2-23.

11. Heymsfield admitted informing Complaint Counsel of his co-authorship of the six fraudulent Darsee studies.

- a. Q: “Did you inform the Federal Trade Commission in advance of your expert report that you would not include the Darsee studies on your CV?”
- b. 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.”
- c. Q: “And you were told not to reveal that information to the opposing counsel in this case?” [* * *]
- d. A: “No, I was never told not to reveal any information as far as I’m aware of.”
- e. 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?” [* * *]
- f. A: “No.”
- g. 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?”
- h. A: “I’ve answered this several times. I’ll answer it again.”
- i. Q: “Please.”
- j. 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.”
- Aug. 30, 2005 Depo. at 655- 657, lines 10-25; 2-25; 2-16. [* * *]

- k. Q: "Dr. Heymsfield, who among FTC counsel did you inform about the Darsee studies?" [* * *]
- l. 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."
- m. Q: "Did you discuss it with the lawyers sitting in this room?"
- n. A: "You know honestly I don't recall it's been oh, over a year."
- o. Q: "But it was with lawyers for the Federal Trade Commission?" [* * *]
- p. A: "Yes."
- q. Q: "You said yes, sir I'm sorry if missed it?"
- r. A: "I always inform people who retain me as an expert about that, yes."
- s. Q: "And when did you inform them to the best of your recollection, before or after you produced the expert report in this case?"
- t. 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?"
- u. Q: "No. When did you make the disclosure, to the best of your recollection; was it before or after your expert report was prepared?"
- v. A: "I'm going by recollection and it's always when people first call me and ask me to be an expert for them."

- w. Q: "All right. So it was when you were first retained in this case?"
- x. A: "More than likely." Aug. 30, 2005 Depo. at 658-660, lines 13-25; 2-25; 2-6.

As is evidenced by the transcript cited above, Heymsfield, who, by his own admission has been an expert witness for FTC on numerous occasions, willfully violated his Honor's August 11, 2004 Scheduling Order. He also repeatedly testified haltingly and evasively to inquiries posed during his August 30 deposition. Those actions justify the imposition of both Rule 3.38(b) sanctions and additional Rule 3.38(c) relief. The relief should be tailored to reflect the gravity of the violations and the fact that Complaint Counsel have condoned and been complicit in them. An expert who engages in testimonial lack of candor and non-disclosure of material information cannot be counted upon to testify truthfully, fully and accurately at the hearing. Accordingly, the appropriate sanction is exclusion.

The Supreme Court prescribes use of strict enforcement powers in cases involving this kind of discovery misconduct. In the seminal case of *National Hockey League*, the Court issued sanctions in an antitrust proceeding by dismissing the plaintiff's case for failure to timely comply with a discovery order.⁶ While acknowledging that dismissing an action is one of the most severe sanctions imposed, the Court nevertheless held that, "[...] here, as in other areas of law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the [...] court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."⁷ In this

⁶ *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976).

⁷ *Id.* at 643.

case, Heymsfield and Complaint Counsel were complicit in the willful nondisclosure of the six fraudulent Darsee studies, co-authored by Heymsfield. Heymsfield did not list the six studies on his *curriculum vitae*. Neither he nor the Complaint Counsel listed them in any other disclosure to Respondents. Heymsfield testified haltingly and evasively when questioned about his involvement in and the consequences flowing from his involvement in those studies. His Honor has full power in such a circumstance to impose the most severe sanction, case dismissal. The requested sanction, witness exclusion, is a measured response calculated to redress the specific harm, avoid miscarriage of justice, and impose an appropriate sanction.

B. EXISTING PRECEDENT FOR THE IMPOSITION OF SANCTIONS AGAINST COMPLAINT COUNSEL AND COMPLAINT WITNESS

Administrative Law Judges presiding in FTC adjudicative proceedings have broad discretion to issue orders sanctioning misconduct. *See* 61 F.R. 50640 (1996). The existing regulatory framework aims to reinforce efficient judicial administration and integrity of legal process. To achieve those objectives, the Commission revised the Rules in 1996.⁸ Complaint Counsel's failure to ensure the accurate and full disclosure of responsive information during discovery greatly impedes the Respondents' case preparation, denying Respondents the full benefit of discovery. Heymsfield and Complaint Counsel have hidden damaging information that goes to the credibility of the Heymsfield and, to be sure, to Complaint Counsel's entire case (depending as it does so greatly on the opinion of Heymsfield). Because discovery is now closed, Respondents are foreclosed from further discovery, including documents and testimony necessary to

⁸ *Id.*

probe fully the newly discovered matters, without the expense and delay of making a motion to the Presiding Officer.

Moreover, Complaint Counsel, through their purposeful non-disclosure of damaging information, have violated the basic trust this government places in them – that they not only follow the law, the rules, and the orders but do so in an exemplary manner above and beyond reproach. *See Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). Their condonation of and complicity in the non-disclosure of the damaging information is unquestionably beneath the minimum standards expected of government counsel.

The Commission has upheld the imposition of Rule 3.38 sanctions in previous cases that are factually similar to the present.⁹ Specifically, the Court has frequently resorted to the sanction of adverse inferences, which are imposed on the party who has relevant evidence within its control, as Complaint Witness does here, but fails to disclose it. The failure to disclose gives rise to an inference that the evidence is unfavorable to the non-disclosing party, which inference is particularly applicable in the present case where Heymsfield's testimony reveals his co-authorship in six fraudulent scientific studies.

American Medical Association concluded that the application of the adverse inference rule may be made “only when the party's failure to produce documents is not adequately explained.”¹⁰ The adequacy of the explanation is assessed on the basis of the parties' conduct and accompanying circumstances. In the absence of “a strong

⁹ *See, e.g., Olin Corporation*, 113 F.T.C. 400 (1990) (Commission upheld sanctions for violation of prehearing scheduling order); *International Telephone and Telegraph Corp.*, 104 F.T.C. 280 (1984) (Commission upheld use of sanctions where respondent willfully withheld some of the documents required to be produced by an order, even after complaint counsel had reduced the scope of subpoena specifications on which compliance had been delayed).

¹⁰ *American Medical Association*, 94 F.T.C. 701, 706 (1979).

explanation for non-compliance,” adverse inferences are appropriately drawn.¹¹

Heymsfield offers no substantive justification for his failure to disclose the six fraudulent studies he co-authored. The apparent willfulness of his actions should compel the Presiding Officer to draw adverse inferences as to the motivation behind the sequestering of the six fraudulent studies. Moreover, Heymsfield’s evasive and halting testimony concerning his involvement with them casts serious doubt on his candor as an expert in the proceeding.

In *Arthur Andersen*, the Presiding Officer held that the eventual disclosure of required responsive material does not excuse a party from liability for sanctions where the compliance exceeded the time limitations imposed by a court order.¹² The legal obligations imposed by a court order require Complaint Counsel and their witnesses to respond to discovery in full, and to take ameliorative measures to ensure that the requested disclosure is fully achieved.¹³ Sanctions may attach even when the failure to make timely disclosure stems from simple negligence.¹⁴

Moreover, courts have adjudged sanctions to be appropriate when the responding party fails to disclose requested documents in a complete and accurate way to the prejudice of opposing counsel.¹⁵ Complete compliance with discovery requests is crucial in determining the scope of discovery, trial strategy, and trial preparation, perhaps even more so for respondents facing an FTC enforcement action. If the requesting party relied

¹¹ *International Telephone and Telegraph Corp.*, 104 F.T.C. 280, 410-411 (1984) (citing *American Medical Association*, *supra*, at 195-196.

¹² *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1237, 1374 (10th Cir.), cert. denied, 439 U.S. 833 (1978).

¹³ See *Fautek v. Montgomery Ward & Co.*, 96 F.R.D. 141, 145-146 (N.D. Ill. 1982) (citing *Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940 (4th Cir. 1964); *Allen Penn Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23 (1st Cir. 1981).

¹⁴ *Compagnie de Bauxites de Guinee v. Insurance Co. of North America*, 651 F.2d 877, 885 (3d Cir. 1981), *aff'd sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099 (1982).

¹⁵ *Tec-Air, Inc. v. Nippondenso Manufacturing USA, Inc.*, 1994 U.S. Dist. Lexis 2026 (N.D. Ill. 1994).

on the incomplete record of initial disclosures made by Complaint Counsel and their witness, they would inevitably be prejudiced by the omissions.¹⁶ Here, they would not know of direct and material evidence impugning the credibility and integrity of Heymsfield upon whose testimony Complaint Counsel heavily depend to support their case.

Government lawyers are held to a very high standard in the performance of their duties before the public and the courts. Courts have frequently stated government attorneys' paramount obligation to comport themselves with the highest ethics. The Supreme Court expressly invoked the elevated standard in the seminal *Berger* case, arguing that "a government lawyer is the representative not of an ordinary party to a controversy, but of a sovereignty [...]."¹⁷

The Court later re-emphasized the paramount ethical duties of government lawyers by citing the Model Code of Professional Responsibility: "[...] government lawyers in a civil action or administrative proceeding [are held] to higher standards than private lawyers [...]."¹⁸ The government's commitment to ensuring the highest level of ethical conduct has similarly manifested itself in an Executive Order, which provides: "The United States sets an example for private litigation by adhering to higher standards

¹⁶ *Id.*

¹⁷ *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 295 U.S. App. D.C. 236, 962 F.2d 45, 47, U.S. App. LEXIS 7587 (1992); *Gray Panthers v. Schweiker*, 230 U.S. App. D.C. 219, 716 F.2d 23, 33 (D.C. Cir. 1983) ("There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large").

¹⁸ *Young v. United States ex. rel. Vuitton et Fils S.A. et. al.*, 481 U.S. 787, 803, 95 L. Ed. 2d 740, 107 S. Ct. 2124 (1987) (citing Model Code of Prof'l Responsibility EC 7-14 (1981)); (see also *United States v. Witmer*, 835 F. Supp. 208, 215 (1993); *United States of America v. Gaetano Vastola, et. al.*, 830 F. Supp. 250, 254, (1993).

than those required by the rules of procedure in the conduct of Government litigation in federal court."¹⁹

C. RESPONDENTS ARE PREJUDICED BY COMPLAINT COUNSEL'S AND COMPLAINT WITNESS' FAILURE TO DISCLOSE THE DARSEE STUDIES AND COMPLAINT WITNESS' HALTING AND EVASIVE TESTIMONY

Complaint Counsel's non-disclosure of the six fraudulent studies Heymsfield co-authored prejudices the Respondents' preparation. Sanctions are necessary to remedy the harm, to penalize the misconduct and to prevent recurrence of the offense (this constitutes a second instance of Heymsfield's failure to disclose in this proceeding).²⁰ The non-disclosure of the Darsee studies has 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 and Heymsfield's responsibility for it.

In the course of the deposition, Heymsfield attempted to qualify his misconduct by stating that the withheld information was not disclosed because it was no longer listed on his *curriculum vitae*.²¹ That self-serving "justification" is completely unavailing. Courts have held the self-serving argument (that material sought would not have been of value to the requesting party) entirely insufficient to support non-disclosure.

Furthermore, Complaint Counsel cannot raise the defense that the noncompliance was inadvertent. Complaint Counsel has the ultimate obligation of ensuring that a Complaint Witness fully complies with the Presiding Officer's orders.²² Here, despite awareness of the existence of the six fraudulent Darsee studies, Complaint Counsel

¹⁹ *Executive Order on Civil Justice Reform*, 27 Weekly Comp. Pres. Doc. 1485 (Oct. 23, 1991) (cited in *Cobell v. Babbitt*, 1999 U.S. Dist LEXIS 20918 (1999)).

²⁰ See March 15, 2005, *Order on Respondents' Motion to Strike Expert Witnesses and for Sanctions and Other Relief*.

²¹ Continued Deposition of Steven Heymsfield, M.D., page 452, lines 4-5. Aug. 30, 2005.

²² *Fautek* at 145.

condoned, and was complicit in, their non-disclosure. Heymsfield's noncompliance and Complaint Counsel's complicity in that noncompliance reveal bad faith and warrant the imposition of sanctions that will meaningfully deter such conduct in future.

There can be no doubt based on the Heymsfield testimony quoted above, that he knew of, and informed Complaint Counsel of, his co-authorship of the six fraudulent studies at the time of his retention in this case (indeed, in prior cases as well). Yet Complaint Counsel – rather than disclose the existence of the fraudulent studies – became complicit with Heymsfield in withholding the information from Respondents for over a year until the August 30 deposition and after the close of discovery, at which point Heymsfield, not Complaint Counsel, first revealed his co-authorship under cross-examination (and he did so begrudgingly). The joint knowledge and non-disclosure is deliberate. Heymsfield omitted the studies from his *curriculum vitae*. Complaint Counsel assisted and organized disclosure, including the *curriculum vitae*, and omitted listing the studies aware throughout of the fact that they go to the credibility of their chosen expert. In hindsight, it now appears, that Complaint Counsel's motion for protective order preceding his Honor's August 11 Scheduling Order had the plain aim of keeping the six fraudulent studies from disclosure. His Honor's Scheduling Order, however, prevented that effect by ordering a complete listing of the articles – an order Heymsfield and Complaint Counsel then chose to violate.

The purposeful non-disclosure of evidence revealing Heymsfield's co-authorship of six fraudulent studies goes directly to his candor, credibility, and reliability as an expert. The non-disclosure is thus profoundly material. To ensure that this misconduct is sanctioned appropriately, the sanction must be weighty – sufficient to deter recurrence.

That is particularly appropriate here in light of proof of a prior act of non-disclosure. The appropriate sanction is to exclude Heymsfield, exclusion doubly warranted in light of his testimonial lack of candor concerning the circumstances surrounding the studies, his role in them, and the influence the fraud incidents had on his departure from Emory.

If his Honor elects not to exclude Heymsfield, he should, at a minimum, reprimand each Complaint Counsel by name, individually; proclaim that he will make adverse inferences against the credibility and reliability of Heymsfield's testimony at hearing based on the misconduct, and grant the Respondents leave to probe in full all facts and circumstances surrounding Heymsfield's involvement in the six fraudulent Darsee studies, Heymsfield's statements to The Scientist, Heymsfield's departure from Emory University, Heymsfield's non-disclosure of the studies in these proceedings, and Heymsfield's lack of candor in his August 30th deposition. Respondents are entitled to examine and obtain germane documents from Heymsfield and each individual to whom Heymsfield disclosed his involvement and participation in the Darsee studies. Respondents are entitled to all correspondence between Heymsfield and any investigator or investigative committees that evaluated the six fraudulent Darsee studies. They are entitled to all correspondence between Heymsfield and the Emory University administration or staff in relation to the Darsee studies and his departure from Emory University. They are entitled to know precisely who among Complaint Counsel were informed of the six fraudulent studies, and when they were informed. 16 C.F.R. § 3.38(c).

In short, Respondents should be allowed to pursue this matter until the whole truth is revealed. They should be accorded all discovery necessary to adduce the extent

to which Heymsfield was involved in the fraudulent studies and to test the credibility of the statements he has already made in this proceeding. Truth is always in issue, and Heymsfield's credibility as a witness is seriously in doubt. Based on the facts presented, the sanctions and alternate relief to reopen discovery are "reasonable in light of the material withheld and the purposes of Rule 3.38(b)." The Presiding Officer may also refer to precedent established under the Federal Rules of Civil Procedure to fashion appropriate relief.²³

Respondents would be irreparably prejudiced if denied the opportunity to review, rebut, and adduce information concerning the newly discovered facts. Respondents also ask that Heymsfield be ordered to supply Respondents' Counsel a complete list of all materials in his files, or over which he exercises control, or in his possession, involving and relating to the Darsee studies and his departure from Emory University.

III. CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated above, Respondents respectfully request that his Honor exclude Heymsfield as a witness, exclude his expert reports, and exclude all documents upon which he relied for that report, based on his purposeful non-disclosure of the six fraudulent Darsee studies he co-authored and based on his testimonial lack of candor. Respondents also request the imposition of sanctions against Complaint Counsel for their condonation of and complicity in that non-disclosure. Respondents ask His Honor to reprimand Complaint Counsel by name for the wrongful non-disclosure of the six fraudulent Darsee studies.

²³ *Grand Union Co.*, 102 F.T.C. 812, 1589 (1983).

If his Honor elects not to exclude Heymsfield, the Respondents respectfully request the aforementioned sanctions combined with an order re-opening discovery for a period of sixty (60) days for the limited purpose of:

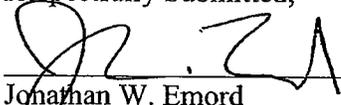
- a. Authorizing a one day, not to exceed seven hours, deposition of the Complaint Witness;²⁴
- b. Authorizing Corporate Counsel to propound additional document production requests to the Complaint Witness, for the purpose of discovering all documents related to the six fraudulent Darsee studies, the Complaint Witness' involvement in those studies, the investigation of those studies, those statements Complaint Witness made to The Scientist, and the effect that revelation of the fraudulent studies had on his association with Emory University;
- c. Authorizing depositions and document production from any person who has knowledge of the six fraudulent Darsee studies, the Complaint Witness' involvement in those studies, the investigations of those studies, the statements Complaint Witness made to The Scientist, and the effect revelation of the fraudulent studies had on Heymsfield's association with Emory University;
- d. Compelling Complaint Witness under penalty of perjury to give a complete listing by name, subject matter, dates, addressees, and length of all documents in his possession or under his control that relate to the six fraudulent Darsee studies;

²⁴ See footnote 1 concerning the scope of the deposition.

- e. Compelling Complaint Counsel to identify by full name each counsel aware of the six fraudulent Darsee studies before August 30, 2005, the time each became aware, and how each became aware.

Dated: October 6, 2005

Respectfully Submitted,



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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

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 GRANTING RESPONDENTS' MOTION FOR SANCTIONS AND FOR
LEAVE TO REOPEN DISCOVERY FOR A LIMITED PURPOSE**

On October 6, 2005 Respondents filed a motion requesting the exclusion of Complaint Counsel's expert witness Steven B. Heymsfield, M.D. (hereinafter Complaint Witness) and for sanctions against Complaint Counsel or, in the alternative, for sanctions against Complaint Counsel and to reopen discovery for Respondents to investigate the six fraudulent Darsee studies and Complaint Witness' role in them.

Respondents have demonstrated good cause for their request to sanction Complaint Witness and Complaint Counsel for wrongful nondisclosure of the six fraudulent Darsee studies. Respondents have shown that the Complaint Witness has engaged in willful non-disclosure of information required to be supplied by the August 11, 2004 Scheduling Order and in halting and evasive testimony concerning his involvement in the six fraudulent studies. Those acts of non-disclosure and evasiveness reveal a lack of candor that impugn Complaint Witness' credibility to testify at hearing. Respondents have also demonstrated Complaint Counsel were apprised of the six fraudulent Darsee studies at the time FTC retained the Complaint Witness in this case and in prior cases, and Complaint Counsel neither disclosed the existence of the documents nor produced them to Respondents. That complicity by Complaint Counsel in condoning the wrongful non-disclosure fails to meet the minimum standards of ethical conduct

expected of government attorneys. Respondents have also shown good cause to reopen discovery for the limited purpose of investigating all matters germane to: (a) the failure of the Complaint Witness to disclose to Respondents the existence of six fraudulent studies co-authored by him; (b) the generally accepted standards for listing of publications on a scientist's curriculum vitae; (c) the ethical responsibility of a co-author of scientific works for fraudulent data in those works; (d) the supervisory responsibility of a senior scientist co-author (here, Heymsfield) for a junior scientist co-author's (here, Darsee's) work; and (e) the extent to which Heymsfield's August 30, 2005 deposition testimony raises questions of his scientific integrity, reliability, and independence that may impugn the competence and reliability of his scientific opinion. Accordingly, Respondents' motion is **GRANTED**.

It is hereby **ORDERED** that the presiding officer will make adverse inferences against the credibility and reliability of the Complaint Witness at hearing based on the misconduct present here.

It is further **ORDERED** that Complaint Counsel Laureen Kapin, Joshua Millard, Laura Schneider, and Walter C. Gross III are sanctioned and reprimanded for the wrongful non-disclosure of the six fraudulent Darsee studies in violation of the August 11, 2004 Scheduling Order.

It is hereby **ORDERED** that discovery is re-opened for a period of sixty (60) days for the limited purpose of:

- a. Authorizing an additional day of deposition by the Respondents of the Complaint Witness, not to exceed seven (7) hours, to explore: (a) the failure of the Complaint Witness to disclose to Respondents the existence of six fraudulent studies co-authored by him; (b) the generally accepted standards for listing of publications on a scientist's curriculum vitae; (c) the ethical responsibility of a co-author of scientific works for fraudulent data in those works; (d) the supervisory responsibility of a senior scientist co-author (here, Heymsfield) for a junior scientist co-author's (here, Darsee's) work; and (e) the extent to which Heymsfield's August 30, 2005 deposition testimony raises questions of his scientific integrity, reliability, and independence that may impugn the competence and reliability of his scientific opinion;
- b. Authorizing Respondents to propound additional document production requests to the Complaint Witness, for the purpose of discovering all documents related to the six fraudulent Darsee studies, the Complaint Witness' involvement in those studies, the investigation of those studies, those statements Complaint Witness made to The Scientist, and the effect that revelation of the fraudulent studies had on his association with Emory University;
- c. Authorizing depositions and document production from any person who has knowledge of the six fraudulent Darsee studies, the Complaint Witness' involvement in those studies, the investigations of

those studies, the statements Complaint Witness made to The Scientist, and the effect revelation of the fraudulent studies had on Heymsfield's association with Emory University;

- d. Compelling Complaint Witness under penalty of perjury to give a complete listing by name and subject matter, dates, addressees, and length all documents in his possession or under his control that relate to the six fraudulent Darsee studies;
- e. Compelling Complaint Counsel to identify by full name each counsel aware of the six fraudulent Darsee studies before August 30, 2005, the time each became aware, and how each became aware.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.**

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 GRANTING RESPONDENTS' MOTION TO EXCLUDE A WITNESS
AND FOR SANCTIONS**

On October 6, 2005 Respondents filed a motion requesting the exclusion of Complaint Counsel's expert witness Steven B. Heymsfield, M.D. (hereinafter Complaint Witness) and for sanctions against Complaint Counsel or, in the alternative, for sanctions against Complaint Counsel and to reopen discovery for Respondents to investigate the six fraudulent Darsee studies and Complaint Witness' role in them. Respondents have demonstrated good cause for their request to exclude the Complaint Witness, to exclude his expert report and all documents he relied upon for its preparation, and to sanction Complaint Counsel for purposeful nondisclosure of the six fraudulent Darsee studies despite the requirement that they be disclosed under the August 11, 2004 Scheduling Order. Respondents have shown that the Complaint Witness has engaged in willful non-disclosure of information required to be supplied by the August 11, 2004 Scheduling Order and in halting and evasive testimony concerning his involvement in the six fraudulent studies. Those acts of non-disclosure and evasiveness reveal a lack of candor. Respondents have also demonstrated Complaint Counsel were apprised of the six fraudulent Darsee studies at the time FTC retained the Complaint Witness in this case and in prior cases, and Complaint Counsel neither disclosed the existence of the documents nor produced them to Respondents. That complicity of Complaint Counsel in the

wrongful non-disclosure fails to meet the minimum standards of ethical conduct expected of government attorneys. Accordingly, Respondents' motion is **GRANTED**.

It is hereby **ORDERED** that Steven Heymsfield, M.D., is hereby excluded as a witness in this proceeding. It is further **ORDERED** that his expert report and all documents upon which he relied for that report are excluded from this proceeding.

It is hereby **ORDERED** that the Complaint Counsel Laureen Kapin, Joshua Millard, Laura Schneider, and Walter C. Gross III are sanctioned and reprimanded for withholding from Respondents six fraudulent studies co-authored by Complaint Witness Heymsfield.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

In the Matter of

BASIC RESEARCH, LLC
A.G. WATERHOUSE, LLC
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DENNIS GAY
DANIEL B. MOWREY d/b/a AMERICAN
PHYTOTHERAPY RESEARCH
LABORATORY, and
MITCHELL K. FRIEDLANDER,
Respondents

Docket No. 9318

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2005 I caused the Respondents' Motion to Exclude a Witness and for Sanctions or, in the Alternative, for Sanctions and for Leave to Reopen Discovery for a Limited Purpose, the exhibits thereto, and its draft orders to be filed and served as follows:

- 1) an original and one paper copy filed by hand delivery and one electronic copy in PDF format filed by electronic mail to

Donald S. Clark
Secretary
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

Email: secretary@ftc.gov

2) two paper copies delivered by hand delivery to:

The Hon. Stephen J. McGuire
Chief Administrative Law Judge
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-112
Washington, D.C. 20580

3) one paper copy by first class U.S. Mail to:

James Kohm
Associate Director, Enforcement
U.S. Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

4) one paper copy by first class U.S. mail and one electronic copy in PDF format by electronic mail to:

Lauren Kapin
Joshua S. Millard
Laura Schneider
Walter C. Gross III
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite NJ-2122
Washington, D.C. 20580
Email: lkapin@ftc.gov
jmillard@ftc.gov
lschneider@ftc.gov
wgross@ftc.gov

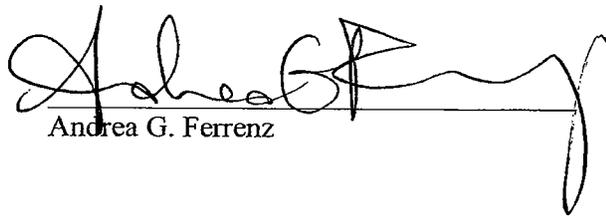
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Andrea G. Ferrenz

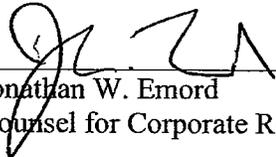
EXHIBIT 1

Rule 3.22 Statement

In accordance with FTC Rule of Practice 3.22(f) (16 C.F.R. § 3.22(f)) Corporate Respondents' counsel Jonathan W. Emord and Andrea G. Ferrenz conferred with opposing Complaint Counsel Laureen Kapin and Joshua Millard in a good faith effort to resolve by agreement Respondents' attached motion to exclude a witness and for sanctions or, in the alternative for sanctions and to reopen discovery for a limited purpose. The matters in controversy in that motion remain unresolved. Copies of the correspondence between counsel regarding this motion are attached. The date, time, and place of each such conference and the names of all parties participating are as follows.

- 1) Jonathan Emord with Andrea G. Ferrenz called Laureen Kapin and Joshua Millard on Thursday, September 29, 2005 at 12:12 PM EST. Emord set out the grounds for the motion and specified all of the relief sought. Kapin and Millard asked for an email reiterating those statements and for time to confer among counsel regarding the proposed motion and relief. The requested email was sent on October 5, 2005 and is included in Exhibit 5. The parties scheduled a second conference call on Wednesday October 5, 2005, at 10 AM EST.
- 2) On October 5, 2005 Emord sent Millard and Kapin an email requesting a meeting at noon on October 6, 2005.
- 3) On October 5, 2005 Millard sent an email to Emord responding to Emord's October 5, 2005 email (paragraph 3 above).

- 4) On October 6, 2005 in the morning Kapin called Emord and confirmed the call would be later that day at 3 PM.
- 5) On October 6, 2005 Emord sent Kapin an email confirming the conference call scheduled for 3 PM that same day to discuss the motion.
- 6) The follow-up teleconference occurred on October 6, 2005 at 3 PM with Emord and Ferrenz participating for Respondents and Kapin, Millard and two other FTC attorneys participating for Complaint Counsel. Following discussion of argument for and against the motion, an agreement could not be reached.


Jonathan W. Emord
Counsel for Corporate Respondents

Jonathan Emord

From: Jonathan Emord
Sent: Wednesday, October 05, 2005 11:18 AM
To: 'jmillard@ftc.gov'; 'lkapin@ftc.gov'
Cc: 'MarkQuinn@basicresearch.org'
Subject: Time Certain for Thursday Call

Dear Mr. Millard and Ms. Kapin:

Pursuant to 16 C.F.R. 3.22(f) of the Commission's Rules, we conferred on September 29, 2005, commencing at 12:12PM. Present in the conference were for all of the Respondents, Jonathan Emord and Andrea Ferrenz, and for Complaint Counsel, Laureen Kapin and Joshua Millard. During the conference, we informed you of our intention to file a motion to exclude a witness and for sanctions or, in the alternative, for sanctions and for leave to reopen discovery for a limited purpose. In particular, we explained--based on testimony from the August 30, 2005 deposition of Complaint Witness Heymsfield--that the Complaint Witness and Complaint Counsel had wrongfully withheld from Respondents information identifying six fraudulent studies in which the Complaint Witness was a co-author. We explained that the six fraudulent studies were not listed as required by the August 11, 2004 Order of the Presiding Officer; that they had been omitted from the Complaint Witness's curriculum vitae; and that Complaint Witness had testified to disclosing the existence of the studies to Complaint Counsel at the time of his retention in this case and in earlier cases. Based on those revelations, we asked you to withdraw the Complaint Witness voluntarily and to accept sanctions voluntarily for the wrongful withholding. We said that we would seek that remedy from the Presiding Officer and would, in the alternative, seek to reopen discovery to fully explore all facts and circumstances germane to the Complaint Witness's wrongful withholding of the fraudulent studies, to his involvement in them, and to his lack of candor in testimony at the August 30 deposition.

Ms. Kapin explained that she could not respond to our request at that time and stated that she would confer with her colleagues and would respond this week, eventually identifying Thursday, October 6, as that date. Yesterday I sent an email to Ms. Kapin explaining that I would be available for the Thursday call at noon or later at her convenience but have not received confirmation of the time when she (or you) can be available. Please confirm a time on Thursday. Please also confirm that you will supply me with a definitive answer to our requests.

Sincerely,

Jonathan W. Emord

10/5/2005

Jonathan Emord

From: Millard, Joshua S. [JMILLARD@ftc.gov]
Sent: Wednesday, October 05, 2005 11:51 AM
To: Jonathan Emord; Kapin, Laureen
Subject: RE: Time Certain for Thursday Call

Dear Mr. Emord:

Although I do not have time to respond to all of the many allegations in your letter, please permit me to remind you (as it was my understanding that you had previously been advised) that my colleague Ms. Kapin was out of the office yesterday, and is out of the office today, observing a religious holiday. Ms. Kapin is scheduled to return to the office tomorrow, but I am not aware of her schedule then. I am confident that Ms. Kapin will contact you in response after she returns to the office.

Joshua S. Millard, Attorney
FTC Enforcement Division
202.326.2454

-----Original Message-----

From: Jonathan Emord [mailto:JEmord@Emord.com]
Sent: Wednesday, October 05, 2005 11:18 AM
To: Millard, Joshua S.; Kapin, Laureen
Cc: MarkQuinn@basicresearch.org
Subject: Time Certain for Thursday Call

Dear Mr. Millard and Ms. Kapin:

Pursuant to 16 C.F.R. 3.22(f) of the Commission's Rules, we conferred on September 29, 2005, commencing at 12:12PM. Present in the conference were for all of the Respondents, Jonathan Emord and Andrea Ferrenz, and for Complaint Counsel, Laureen Kapin and Joshua Millard. During the conference, we informed you of our intention to file a motion to exclude a witness and for sanctions or, in the alternative, for sanctions and for leave to reopen discovery for a limited purpose. In particular, we explained--based on testimony from the August 30, 2005 deposition of Complaint Witness Heymsfield--that the Complaint Witness and Complaint Counsel had wrongfully withheld from Respondents information identifying six fraudulent studies in which the Complaint Witness was a co-author. We explained that the six fraudulent studies were not listed as required by the August 11, 2004 Order of the Presiding Officer; that they had been omitted from the Complaint Witness's curriculum vitae; and that Complaint Witness had testified to disclosing the existence of the studies to Complaint Counsel at the time of his retention in this case and in earlier cases. Based on those revelations, we asked you to withdraw the Complaint Witness voluntarily and to accept sanctions voluntarily for the wrongful withholding. We said that we would seek that remedy from the Presiding Officer and would, in the alternative, seek to reopen discovery to fully explore all facts and circumstances germane to the Complaint Witness's wrongful withholding of the fraudulent studies, to his involvement in them, and to his lack of candor in testimony at the August 30 deposition.

Ms. Kapin explained that she could not respond to our request at that time and stated that she would confer with her colleagues and would respond this week, eventually identifying Thursday, October 6, as that date. Yesterday I sent an email to Ms. Kapin explaining that I would be available for the Thursday call at noon or later at her convenience but have not received confirmation of the time when she (or you) can be

available. Please confirm a time on Thursday. Please also confirm that you will supply me with a definitive answer to our requests.

Sincerely,

Jonathan W. Emord

Andrea Ferrenz

From: Jonathan Emord
Sent: Thursday, October 06, 2005 10:03 AM
To: 'lkapin@ftc.gov'
Cc: 'MarkQuinn@basicresearch.org'; Andrea Ferrenz
Subject: 3PM Conference Call

Dear Lauren--

As per your request, we will contact you at 3PM today to conclude our discussion on our pending request for you to agree, voluntarily, to withdraw Heymsfield as a witness and to accept sanctions for the wrongful nondisclosure of the six fraudulent studies Heymsfield co-authored. I will call you at that time.

Sincerely,

Jonathan W. Emord

10/6/2005

EXHIBIT 2

Appendix 1

Steven B. Heymsfield, M.D.
Obesity Research Center
St. Luke's-Roosevelt Hospital
1090 Amsterdam Avenue #14C
New York, N.Y. 10025
Phone: 212-523-3561
Fax: 212-523-3571
E-mail: SBH2@Columbia.edu
Beeper: 877-861-2687

Birth date: July 15, 1944
Birthplace: Brooklyn, New York
Citizenship: U.S.A.

Academic Training

Hunter College, City University of New York, B.A. Chemistry: 1962-1966
Mt. Sinai School of Medicine, New York, NY, M.D. 1969-1971
Licensed in GA, 1973
Licensed in NY, 1987

Traineeship

Emory University, Atlanta, Georgia; Medical Intern: 1971-1972
Emory University, Atlanta, Georgia; Medical Resident
Internal Medicine: 1972-1973
Emory University, Atlanta, Georgia; Fellow in Medicine,
Dept of Pharmacology: 1973-1975

Professional Organizations

American Federation of Clinical Research
American Institute of Nutrition
American Society of Clinical Nutrition
Southern Society of Clinical Investigation (inactive)
American Society of Parenteral and Enteral Nutrition
North American Association for the Study of Obesity

Academic Appointments

1975-1978 Assistant Professor of Medicine,
Emory University, School of Medicine
1975-1983 Assistant Director,
Emory University, Clinical Research Facility
1978-1986 Associate Professor of Medicine,

- 1980-1984 Emory University, School of Medicine
Director, Division of Nutrition, Department of Medicine,
Emory University, School of Medicine
- 1986-1994 Associate Professor of Medicine, Columbia University,
College of Physicians and Surgeons, N.Y.
- 1986- Visiting Physician,
Rockefeller University, N.Y.
- 1986- Director, Human Body Composition Laboratory and Weight
Control Unit of the Obesity Research Center,
St. Luke's-Roosevelt Hospital Center.
- 1987- Research Scientist, Department of Energy,
Brookhaven National Laboratory
- 1990-1997 Associate Professor of Applied Physiology,
Teachers College, Columbia University
- 1990- Deputy Director, Obesity Research Center,
St. Luke's-Roosevelt Hospital
- 1994- Professor of Medicine, Columbia University, College of
Physicians and Surgeons, N.Y.
- 1998- Affiliate Faculty Member, Columbia University, Department of
Biomedical Engineering

Hospital Appointments

Associate Attending Physician, St. Luke's-Roosevelt Hospital Center

Honors

- Dean's List, 1965, 1966 - Hunter College, City University of New York.
- Phi Sigma, 1966 - Honorary biology society, Hunter College.
- Dean's List, 1968, 1969 - Medical Units, University of Tennessee.
- Mosby Award in Clinical Medicine, 1971 - Mt. Sinai School of Medicine.
- First Place Award - Annual Emory Univ. Housestaff Research Day, 1972.
- Crutcher Award - Annual Emory Univ. Housestaff Research Day, 1974.
- Clinical and Research Scholar, American College of Physicians, 1979-1982.
- Honorary Member, Latin American & Argentine Medical Associations, 1985.
- Horowitz Alumni Award, Mount Sinai School of Medicine - Outstanding
Medical Investigator, 1987.
- Burroughs-Welch Scholar in Basic Science, 1988.
- Honorary Member, American Dietetic Association, 1996.
- Honorary Member, Chilean Clinical Nutrition Association, 1997.
- Honorary Member, New York Dietetic Association, 1997.
- Fourth Beaudette-Thompson Lectureship, Rutgers University, 1998.
- Hellenistic Medical Society Lectureship, 1999.
- Fifth Annual Clinical Nutrition Foundation Lectureship, 1999.
- Rhoades Award, American Society of Parenteral and Enteral Nutrition, 2002.
- TOPS Award, North American Association for the Study of Obesity, 2003.

Departmental Committees

Executive Committee, Obesity Research Center
Institute of Human Nutrition, Executive Committee
Nutrition Committee, Head, St. Luke's-Roosevelt Hospital

Other Professional Activities

Editorial Boards:

Current:

Journal of Parenteral and Enteral Nutrition
American Journal of Clinical Nutrition
International Journal of Body Composition Research
Age & Nutrition
Nutrition Reviews
Clinical Nutrition
Adipocytes

Past:

Nutrition in Clinical Practice
American Journal of Human Biology
The Journal of Nutrition, Health & Aging

Consultative:

Current:

Board of Advisors, American Society of Parenteral and Enteral Nutrition
Science Committee, International Ctr. for Assessment of Nutritional Status, Milan, It.
North American Association for the Study of Obesity, IASO representative
National Academy of Sciences, Institute of Medicine, Committee on Military
Nutrition
National Academy of Sciences, Institute of Medicine, Committee on Testosterone
Replacement in Elderly Men
Budget, Finance, and Audit Committee, and Long Range Planning Committee,
American Society of Clinical Nutrition

Past:

Board of Directors, American Society of Parenteral and Enteral Nutrition
Publications Management Committee, American Society of Clinical Nutrition
United States Pharmacopoeia Convention, Advisory Panel on Nutrition and
Electrolytes

North American Association for the Study of Obesity (NAASO), Nominations
 Committee
 Secretary, American Society of Clinical Nutrition
 Governmental Relations Committee, American Society of Parenteral and Enteral
 Nutrition
 Chair, Nutrition Support Guideline Committee, American Society Parent and Enteral
 Nutrition
 Chair, Public Policy Committee, North American Association for the Study of
 Obesity
 Chair, Publication Committee, American Society of Parenteral and Enteral Nutrition
 Chair, Postgraduate Education Committee, American Society of Clinical Nutrition
 Nominating Committee, American Society of Clinical Nutrition
 President, Food and Nutrition Council of Greater New York
 President, American Society of Parenteral and Enteral Nutrition
 Vice President, American Society of Clinical Nutrition
 President, American Society of Clinical Nutrition
 Council, American Society of Clinical Nutrition

PUBLICATIONS

Original Peer-Reviewed Articles

1. Metzger AL, Heymsfield SB, Grundy SM. The lithogenic index - a numerical expression for the relative lithogenicity of bile. *Gastroenterology* 62:499-501, 1972.
2. Metzger AL, Adler R, Heymsfield SB, Grundy SM. Diurnal variation in biliary lipid composition. *N Eng J Med* 288:333-336, 1973.
3. Heymsfield SB. Cystic dilation of the intrahepatic biliary tree (Carolis Disease) - a suggested treatment. *Gastroenterology* 64:663, 1973.
4. Wenger J, Heymsfield SB. Adsorption of bile by aluminum hydroxide. *J Pharmacol Exp Ther* 14:163-165, 1974.
5. Rudman D, Chawla RK, Heymsfield SB, Bethel RA, Shoji M, Vogler WR, Nixon DW. Urinary excretion of the cancer-related glycoprotein EDCl: effect of chemotherapy. *Ann Intern Med* 86:174-179, 1977.
6. Chawla RK, Heymsfield SB, Wadsworth AA, Shoji M, Rudman D. Isolation and characterization of a glycoprotein (JBB5) in the urine of a patient with carcinoma of the colon. *Cancer Res* 37:873-878, 1977.
7. Heymsfield SB, Bethel RA, Rudman D. Hyperresponsiveness of patients with clinical and premypathic myotonic dystrophy to human growth hormone. *J Clin Endocrinol Metab* 45:147-158, 1977.

8. Schlant RC, Felner JM, Heymsfield SB, Gilbert CA, Shulman NB, Tuttle EP, Blumenstein BA. Echocardiographic studies of left ventricular anatomy and function in essential hypertension. *Cardiovasc Med* 2:477-491, 1977.
9. Gilbert CA, Nutter DO, Felner JM, Perkins JV, Heymsfield SB, Schlant RC. Echocardiographic study of cardiac dimensions and function in the endurance-trained athlete. *Am J Cardiol* 40:528-533, 1977.
10. Cutter G, Heymsfield SB, Kraus J, Lee ES, McDill M, Stamler T, Watson R. Race, education and prevalence of hypertension. *Am J Epidemiol* 106:351-361, 1977.
11. Heymsfield SB, Bethel RA, Hall EC, Mills JB, Moseley MH, Kostyo JL, Rudman D. Anabolic actions of reduced and S-Carbamidomethylated human growth hormone and its plasmin digest in man. *J Clin Invest* 60:563-570, 1977.
12. Heymsfield SB, Bethel RA, Ansley JD, Gibbs DM, Felner JM, Nutter DO. Cardiac abnormalities in cachectic patients before and during nutritional repletion. *Am Heart J* 95:584-594, 1978.
13. Heymsfield SB, McNish T, Perkins JV, Felner JM. Sequence of cardiac changes in Duchenne muscular dystrophy. *Am Heart J* 95:283-294, 1978.
14. Rudman D, Davis GT, Priest JH, Patterson JH, Kutner MH, Heymsfield SB, Bethel RA. Prevalence of growth hormone deficiency in children with cleft lip or palate. *J Pediatr* 93:378-382, 1978.
15. Bethel RA, Jansen RD, Heymsfield SB, Ansley JD, Hersh T, Rudman D. Nasogastric hyperalimentation through a polyethylene catheter: an alternative to central venous hyperalimentation. *Am J Clin Nutr* 32:1112-1120, 1979.
16. Heymsfield SB, Olafson RP, Kutner MH, Nixon DW. A radiographic method of quantifying protein-calorie undernutrition. *Am J Clin Nutr* 32:693-702, 1979.
17. Nutter DO, Murray G, Heymsfield SB, Fuller EO. The effect of chronic protein-calorie undernutrition in the rat on myocardial function and cardiac function. *Circ Res* 45:144-152, 1979.
18. Heymsfield SB, Fulenwider T, Nordlinger B, Barlow R, Sones P, Kutner M. Accurate measurement of liver, kidney and spleen volume and mass by computerized axial tomography. *Ann Intern Med* 90:185-187, 1979.
19. Heymsfield SB, Noel R, Lynn M, Kutner M. Accuracy of soft tissue density predicted by CT. *J Comput Assist Tomogr* 3:859-360, 1979.
20. Heymsfield SB, Bethel RA, Ansley JD, Nixon DW, Rudman D. Enteral hyperalimentation: an alternative to central venous hyperalimentation. *Ann Intern*

Med 90:63-71, 1979.

21. Nixon DW, Heymsfield SB, Cohen AE, Kutner MH, Ansley J, Lawson DH, Rudman D. Protein-calorie undernutrition in hospitalized cancer patients. *Am J Med* 68:683-690, 1980.
22. Horowitz JH, Smith J, Heymsfield SB. Nutritional support of the trauma patient. *J Med Assoc* 69:815-819, 1980.
23. Heymsfield SB, Smith J, Kasriel S, Barlow J, Lynn MJ, Nixon D, Lawson D. Energy malabsorption: measurement and nutritional consequences. *Am J Clin Nutr* 34:1954-1960, 1981.
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26. Nixon DW, Lawson DH, Kutner M, Ansley J, Schwartz M, Heymsfield SB, Chawla R, Cartwright TH, Rudman D. Hyperalimentation of the cancer patient with protein-calorie undernutrition. *Cancer Res* 41:2038-2045, 1981.
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29. Smith J, Horowitz J, Henderson JM, Heymsfield SB. Enteral hyperalimentation in undernourished patients with cirrhosis and ascites. *Am J Clin Nutr* 35:56-72, 1982.
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31. Smith JL, Arteaga C, Heymsfield SB. Increased ureagenesis and impaired nitrogen use during infusion of a synthetic amino acid formula. *N Eng J Med* 306:1013-1018, 1982.

32. Heymsfield SB, McManus C, Stevens V, Smith J. Muscle mass: Reliable indicator of protein-energy malnutrition severity and outcome. *Am J Clin Nutr* 35:1192-1199, 1982.
33. Heymsfield SB, Stevens V, Noel R, McManus C, Smith J, Nixon D. Biochemical composition of muscle in normal and semistarved human subjects: relevance to anthropometric measurements. *Am J Clin Nutr* 36:131-142, 1982.
34. Brubaker LH, Prisant ML, Heymsfield SB. Computer-assisted nutritional assessment. *Phys Comp* 1:39-41, 1983.
35. Heymsfield SB, Arteaga C, McManus C, Smith J, Moffitt S. Measurement of muscle mass in humans: validity of the 24 hour urinary creatinine method. *Am J Clin Nutr* 37:478-494, 1983.
36. Smith JL, Heymsfield SB. Enteral nutritional support: formula preparation from modular ingredients. *JPEN* 7:280-288, 1983.
37. Bagatell CJ, Heymsfield SB. Effect of meal size on myocardial oxygen requirements: implications for postmyocardial infarction diet. *Am J Clin Nutr*, 39:421-426, 1984.
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46. Head CA, Grossman GD, Jordan JC, Hepler EL, Heymsfield SB. A valve system for the accurate measurement of energy expenditure during mechanically ventilated patients. *Resp Care* 30:969-973, 1985.
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50. Heymsfield SB, McManus C, Hill J, DiGirolamo M, Nixon D, Head A, Grossman G. Bioenergetic studies in adult patients recovering from semi-starvation. *Int J of Obesity* 9(supp. 2): 147-153, 1985.
51. Affarah HB, Hall WD, Heymsfield SB, Kutner M, Wells JO, Tuttle EP. High-carbohydrate diet: Antinatriuretic and blood pressure response in normal men. *Am J Clin Nutr* 44:341-348, 1986.
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53. Heymsfield SB, Casper K, Funfar J. Physiologic response and clinical implications of nutrition support. *Am J Cardiol* 60:75G-81G, 1987.
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58. Heymsfield SB, Casper K, Grossman GD. Bioenergetic and metabolic response to continuous versus intermittent nasoenteric feeding. *Metabolism* 36(6):570-575, 1987.
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65. Heymsfield SB, Casper K, Hearn J, Guy D. Rate of weight loss during underfeeding: relation to level of physical activity. *Metabolism* 38(3):215-223, 1989.
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68. Heymsfield SB, Wang J, Kehayias J, Heshka S, Lichtman S, Pierson RN Jr. Chemical determination of human body density in vivo: relevance to hydrodensitometry. *Am J Clin Nutr* 50:1282-1289, 1989.
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EXHIBIT 3



▶ NEWS

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 Coidwater 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.

[return to webpage](#)

EXHIBIT 4

1 HEYMSFIELD

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

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

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

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

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

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

17 A. Yes.

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

20 A. Yes.

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

1 HEYMSFIELD

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

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

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

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

18 A. This is a newspaper article.

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

22 A. Yes, yes.

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

1

2 Fifteen years.

3 Q. So 1971, is that when you were on
4 the faculty at Emory University or --

5 A. It's when I arrived there for
6 training as an intern.

7 Q. As an intern at Emory University
8 were you on the faculty then or was it a
9 typical medical internship?

10 A. Typical medical internship.

11 Q. And how long was that internship?

12 A. One year.

13 Q. And then after the internship did
14 you do a residency?

15 A. Yes.

16 Q. That was also Emory University?

17 A. Yes.

18 Q. How long was the residency?

19 A. One year.

20 Q. So it's up to 1973?

21 A. Yes.

22 Q. And then after the residency what

23 was the nature of your affiliation?

24 A. Did a fellowship at that point.

25 Q. And is that still in a student

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1

2 capacity or is that now a teaching capacity?

3 A. I think that's a marginal question.

4 Of course it's a, you know, you're always

5 teaching in the university. So of course I

6 was teaching at the point I was a fellow. But

7 it's not a faculty appointment if that's the

8 question you're asking.

9 Q. You left Emory University, what?

10 '84?

11 A. '86.

12 Q. '86. And anything in particular

13 that prompted you to leave Emory University

14 and join St. Luke's?

15 A. Same thing. Enormous opportunity.

16 Q. Any other reason?

17 A. No.

18 Q. What is your financial arrangement

19 with Merck?

20 A. I am a full-time employee.
21 Q. Is that a salaried position?
22 A. Yes.
23 Q. How much is your compensation with
24 Merck?

25 MS. RICHARDSON: I am going to go

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1
2 ahead and object here. This is beyond
3 the scope of this expert's report.

4 MR. PRICE: I think it goes directly
5 to the issue of bias. He is employed by
6 a pharmaceutical company that is studying
7 weight loss products that --

8 MS. RICHARDSON: You're
9 characterizing the witness's testimony.
10 I hear your argument.

11 MR. PRICE: Let me finish. -- that
12 will compete hopefully with the
13 respondent's product if they get to
14 market.

15 MS. RICHARDSON: Again, I don't
16 believe the witness has testified to that

17 today.

18 BY MR. PRICE:

19 Q. You can go ahead and answer the
20 question.

21 A. \$300,000 a year round numbers.

22 Q. Let me have you --