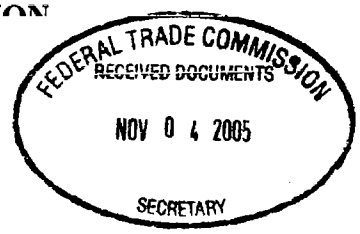
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of	)	
	)	
BASIC RESEARCH, L.L.C.,	)	
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,	)	**Docket No. 9318**
BAN, L.L.C.,	)	**PUBLIC DOCUMENT**
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	
	)	

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

Complaint Counsel hereby respond to Respondents "*Additional Arguments Supporting the Motion for Sanctions*." Respondents Gay and Mowrey submitted this filing in response to our *Opposition to Respondents' Omnibus Motion to Exclude a Witness and for Sanctions, or in the Alternative, Reopen Discovery*, on October 31st, without leave of Court or conferring with opposing counsel.[1]

Given the choice of rebutting the facts and arguments set forth in our *Opposition* with leave of Court or unilaterally resuming their attacks on Complaint Counsel, Respondents have chosen the latter course. Their *Additional Arguments* primarily focus on peripheral issues, criticize isolated statements in our *Opposition,* and castigate counsel, but fail to rebut the material facts. Respondents' "*Additional Arguments*" rely upon unsupported accusations and

[1] Respondents did not comply with RULE 3.22(c) and request leave to file their supplement, nor did they confer with counsel as required by RULE 3.22(f) concerning the issues raised in their supplement before advancing those issues as new grounds for sanctions.

alleged inconsistencies but offer no evidence that is material to the core issues in this litigation. Respondents' criticisms are not material even to the satellite issues raised by Respondents in their opening *Motion*. If the Court chooses to allow the filing of Respondents' "*Additional Arguments*," we respectfully request that the Court permit this response pursuant to RULES 3.15 and 3.22.

DISCUSSION

Our *Opposition* revealed the infirmities of Respondents' omnibus *Motion*, which relied on bare assumptions and incorrect conclusions. The *Opposition* identified substantial evidence demonstrating Dr. Heymsfield's extensive efforts to comply with the publication disclosure requirement of the *Scheduling Order*, and good faith belief that because the Darsee papers had been withdrawn from publication it was appropriate to withdraw them from his CV. Additionally, the *Opposition* established with sworn affidavits that Complaint Counsel categorically did not withhold the Darsee papers from discovery. We also presented arguments and evidence to show that Respondents have not demonstrated any actual prejudice from the prior non-identification. Our *Opposition* identified relevant legal authorities supporting the conclusion that Respondents are not entitled to reshape these proceedings by shutting out relevant expert testimony, obtaining sanctions against opposing counsel, and conducting satellite litigation on collateral issues.

Respondents Gay and Mowrey have attempted to revive Respondents' *Motion* not by addressing these material facts and arguments, but by criticizing isolated statements in our thirty-two page *Opposition*. In their "*Additional Arguments*" filing, Respondents have construed a few selected statements as falsehoods "shocking for their patent falsity," and presented these

alleged falsehoods as new grounds for sanctions. *See* Resp'ts' Add'l Args., Oct. 31, 2005, at 1, 4, 8. The remainder of Respondents' filing reiterates old arguments concerning the credibility of our expert witness, and simply maintains that our affidavits are implausible and false. These arguments are incorrect, and they do not rebut the material facts and arguments set forth in our *Opposition* to the omnibus *Motion* before the Court.

Respondents' counsel have disregarded the RULES in their evident zeal to impugn the integrity of counsel supporting the *Complaint*. Respondents' response to our *Opposition* is improper. The RULES OF PRACTICE state that "[t]he moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission." RULE 3.22(c). Messrs. Gay and Mowrey have joined the omnibus *Motion*, so they are movants bound by this RULE, but they have not sought leave to file their reply. Moreover, "[a] motion to strike is not an appropriate vehicle through which to contest the credibility of a witness." *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 33 (D.D.C. 2002). Respondents have inappropriately contested issues of witness credibility in their papers. Their repetitive challenges exemplify why reply papers are not permitted as of right. "Reply papers should be the exception and not the rule." *United States v. IBM Corp.*, 66 F.R.D. 383, 384 (S.D.N.Y. 1975). As the Southern District of New York has observed, "[c]learly, nothing but delay, unnecessary work, and unwarranted expense can result from the routine filing of reply and, inevitably, surreply papers which do nothing more than restate in a different form or with additional detail material set forth in the moving and opposing papers." *IBM Corp.*, 66 F.R.D. at 384.

Before burdening the Court with their filing, Respondents' counsel easily could and should have discussed or sought clarification of these statements, as necessary, with Complaint

Counsel in the context of an ordinary phone call. Respondents' counsel has disregarded the legal requirement of a RULE 3.22(f) conference between the parties before deploying isolated statements in our *Opposition* as ammunition for additional attacks and demands for sanctions against Complaint Counsel in their unauthorized filing. Had Respondents actually followed the RULES, those parties and the Court would have been apprised as follows.

I. Complaint Counsel Did Not State that Respondent Mowrey Never Disclosed the Previously-Omitted Study, We Agree that the Study Was Disclosed Earlier, and this Clarification Does Not Change the Fact that Respondents Have Failed to Show Actual Prejudice

At the outset, Complaint Counsel wish to dispel any confusion and clarify an item raised in Respondents' filing. In a footnote in our *Opposition*, Complaint Counsel stated that "in expert discovery, Respondents produced a CV for their proposed expert witness, Respondent Mowrey, that omitted the only study published in a medical journal that we know to be attributed to him, even though Respondents (Mowrey, at the very least) knew that it existed." Compl. Counsel's Opp'n to Omnibus Mot. at 4 n.4. This is correct. Respondents now admit this is correct. *See* Resp'ts' Add'l Args. at 3 ("Respondents acknowledge [the CV] . . . did not list Dr. Mowrey's published study").[2] In that footnote, Complaint Counsel also stated that "[w]e learned of Dr.

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[2] Respondents' filing also proffers the previously-missing key to understanding why Respondent Mowrey did not initially identify this unretracted study as a publication—his CV "had not been prepared with an eye towards expert disclosure." Resp'ts' Add'l Args. at 3 n.3. We therefore withdraw our previously-valid assertion that Respondent Mowrey has ventured no explanation for omitting his only published study from his CV. Opp'n to Omnibus Mot. at 16-17.

Respondents submitted a small excerpt from a supplemental witness list as an exhibit to their *Additional Arguments*. So that the record is clear, we wish to note that the CV disclosing the study appeared amidst eighty to ninety pages of other documents pertaining to various proposed expert witnesses retained by Respondents. *See* Resp'ts' Add'l Args. at 3 n.4 (noting, with respect to supplemental expert witness list, that other documents attached to supplement were not submitted with present filing).

Mowrey's omission of this study only after the close of written discovery." Opp'n to Omnibus Mot. at 4 n.4. Respondents assail this statement as "patently false," but the statement is likewise, to the best of our recollection, correct.

In the *Opposition*, Complaint Counsel did not state that Respondent Mowrey never disclosed the paper previously not listed on his CV to Complaint Counsel. Our *Opposition* did not make this statement, nor did we intend to convey that impression. However, the *Opposition* once referred to "Respondent Mowrey's failure to timely disclose his own publication prior to the close of written discovery." Opp'n to Omnibus Mot. at 28. As previously noted, it is true that Respondent Mowrey did not initially disclose that publication by the deadline set by the Court, but Complaint Counsel agree that Respondent Mowrey did provide a version of his CV that identified the previously-undisclosed study before the close of written discovery. We did not note the disclosure as it appeared amidst eighty to ninety pages of other documents pertaining to various proposed expert witnesses retained by Respondents. *See* Resp'ts' Add'l Args. at 3 n.4 (acknowledging, with respect to supplemental expert witness list, that other documents attached to supplement were not submitted with Resp'ts' Add'l Args.). Accordingly, we withdraw the above-quoted statement. Had opposing counsel raised this issue with us in advance of their submission, we would have corrected this statement.

This correction does not affect the validity of our argument. The point of our assertions concerning Respondent Mowrey's disclosures was not to engage in meaningless finger-pointing, but to illustrate that when a delayed disclosure occurs, there can be no reasonable suggestion of actual prejudice when the opposing party is already aware of the previously-undisclosed material or becomes aware of that material and then has an opportunity to depose the witness. With

respect to Respondent Mowrey, "Complaint Counsel declined to press for sanctions, because there was no prejudice—we learned of the previously-undisclosed publication and then had an opportunity to depose the witness." Opp'n to Omnibus Mot. at 4 n.4.[3] Similarly, despite any delay, Respondents have not been prejudiced because they learned of the Darsee papers beforehand and had a full and fair opportunity to depose the witness. *See* Opp'n to Resp'ts' Omnibus Mot. at 6-8, 14-15, 18-22 and Ex. A thereto. Indeed, Respondents' *Additional Arguments* does not dispute this point.[4] Respondents are not entitled to sanctions.

II. Respondents' Deposition Notice Arguments Are Inaccurate and Immaterial

Moving further from any matters that could conceivably bear on the pending *Motion* before the Court, Respondents' counsel challenges the statement in our *Opposition*, appearing in the context of a general background discussion of Dr. Heymsfield's previous depositions, that back in January 2005, "Respondents provided no prior notice that they intended to take more than one day of testimony." *See* Resp'ts' Add'l Args. at 4. However, Complaint Counsel's

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[3] Moreover, even if all parties to this litigation had been aware of the Darsee papers last year, Respondents' far-ranging demands for information would not have fallen within the scope of permissible discovery. *See* Order, Dec. 9, 2004, at 4 (indicating that demands for publications sought "discovery beyond that permitted by the Rules, the Scheduling Order, and the *Dura Lube* case").

[4] Nor do Respondents volunteer the time period in which they first learned of the Darsee papers, or deny our contention, supported by Respondents' own exhibit, that they were aware of those papers at least half a year ago.

Elsewhere in their *Additional Arguments*, Respondents occasionally employ language suggesting that Dr. Heymsfield did not acknowledge the Darsee papers and somehow strove to conceal them. This suggestion is incorrect. Respondents were aware of the withdrawn papers, and when they asked the witness a simple, open-ended question concerning publications, our expert witness volunteered the existence of those papers, which he believed to be withdrawn from publication, as well. *See* Heymsfield Dep., Aug. 30, 2005, at 451-453, 655. (attached as Ex. A to *Opp'n to Omnibus Mot.*).

statement finds support in the record, and to the extent that Respondents argue otherwise, the portions of the record they rely upon are equivocal at best. This is another instance in which Respondents' counsel easily could have, and should have, discussed the challenged statement with opposing counsel in a simple phone call, and was required to meet-and-confer under RULE 3.22(f), before pressing these statements before the Court in yet another effort to obtain sanctions against Complaint Counsel.

It is plain that Respondents provided no clear advance notice to the witness that they intended to take more than one day of testimony. The deposition notice itself clearly indicates that Respondents' counsel noticed Dr. Heymsfield for the date of Tuesday, January 11, 2005, *not* January 11th and Wednesday, January 12th. *See* Ex. 1 (Heymsfield deposition notice). This notice stands in contrast to other deposition notices which clearly referenced two days for other witnesses such as Respondent Mowrey or Dennis Gay. *See* Ex. 1 (page 1 of Gay and Mowrey deposition notices, attached after Heymsfield notice). Moreover, the December correspondence memorializing the parties' intentions regarding deposition schedules also indicates that Dr. Heymsfield's deposition was intended to take place on a single day while other Respondents were notified of depositions that could last two days. *See* Ex. 1 (letter dated Dec. 2, 2004, attached after deposition notices). Complaint Counsel agreed to schedule Dr. Heymsfield's deposition on January 11th with the written understanding that it would take place on one day. In November and December, the parties discussed days on which Dr. Heymsfield and others might be available for deposition, including January 11th and other days in the week of January 10th. It is well- documented that Complaint Counsel agreed to Dr. Heymsfield's deposition on January 11th based, in part, on a corresponding agreement from Respondents' counsel that the deposition

of another person would take place on the following day in Washington, D.C. *See* Ex. 1 (letter dated Dec. 2, 2004). The January 12th deposition was later rescheduled and went forward in another city, but Dr. Heymsfield's deposition went forward on January 11th. Complaint Counsel made it clear to Respondents that Dr. Heymsfield would be made available for a single day of testimony.[5]

The deposition testimony cited by Respondents hardly proves that Respondents gave prior notice that they needed more than one day to depose Dr. Heymsfield. The cited testimony actually indicates that Complaint Counsel agreed with Respondents to convey to Dr. Heymsfield that Respondents would seek to complete his deposition in one day. *See* Fobbs Dep. at 210 (cited and quoted in Resp'ts' Add'l Args. at 5 n.5):

> MS. KAPIN: I will agree to make it clear to Dr. Heymsfield -- if you pronounce his name, you'll make much better friends with him -- Dr. Heymsfield that he needs be available so you can complete your deposition that day.
> MR. FELDMAN: That will likely mean more than 5:00 o'clock. I'm just telling you right now. Okay?

Not only does the cited testimony not support Respondents' argument, but the record shows that on the day of his deposition, Dr. Heymsfield testified well past 5:00pm. The expert participated in an arduous full-day deposition, testifying past 7:00pm. Notwithstanding this lengthy and grueling deposition by Respondents' counsel, a deposition in which Respondents' counsel remarkably waited until mid-afternoon to broach the topics addressed in the *Expert Report*,

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[5] As Complaint Counsel has previously advised Respondents, Dr. Heymsfield's availability is necessarily limited by the fact that he serves as Executive Director at Merck Laboratories, and also has responsibilities at St. Luke's-Roosevelt Hospital.

Every other testifying expert has been subject to a single-day deposition only, with the exception of Respondent Mowrey, who has served as a witness in three capacities: (1) as a designated witness for Corporate Respondents; (2) a named Respondent who allegedly participated in the deceptive acts alleged in the *Complaint*; and (3) a proposed expert.

Complaint Counsel recessed the deposition by immediately offering to make the expert available for another half-day for Respondents to complete their questioning. Respondents have conducted two subsequent depositions. In the last deposition, in August, Respondents inquired at length of Dr. Heymsfield regarding the topic of Dr. Darsee and his papers. *See* Opp'n to Omnibus Mot. at 6-8, 14-15, 18-22 and Ex. A thereto. Dr. Heymsfield's deposition testimony concluded on August 30th with the four hours offered by Complaint Counsel and ordered by the Court.

Respondents' five-page discussion of the sufficiency of notice relating to a 10-month old deposition is inaccurate and wholly immaterial to the issues before the Court. Respondents have no grounds to demand sanctions here.

III. Respondents' Arguments Concerning the Number of Dr. Darsee's Co-Authors Are Inaccurate and Immaterial

Having expended substantial energies in attempting to recast ordinary statements in our *Opposition* as "shocking falsehoods," when they are nothing of the sort, Respondents Gay and Mowrey next retreat to complaining about a statement that they themselves admit is true. *See* Resp'ts' Add'l Args. at 9 (conceding that statement is "literally true"). Respondents challenge the true statement in our *Opposition* that "Dr. Heysmfield was one of numerous scientists listed as co-authors on papers authored by Dr. Darsee." Opp'n to Resp'ts' Omnibus Mot. at 7.[6] We echo Respondents' assertion that our statement is true, and we are frankly perplexed that Respondents would advance this accurate statement as grounds for sanctions.

The statement that "numerous" scientists were listed as co-authors on Darsee papers is

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[6] Instead of actually quoting Complaint Counsel's statement, Resp'ts' Add'l Args. at 9 modify this proposition by adding a word to state that "Dr. Heysmfield was [simply] one of numerous scientists listed."

not some sort of "half truth," or akin to "infamous testimony," as Respondents would have this Court believe. Many scientists were listed as co-authors of Dr. Darsee's—twenty-four, by our count, according to the PubMed database hosted by the U.S. National Library of Medicine of the National Institutes of Health. *See* Ex. 2 (PubMed database search result identifying scientists listed as co-authors on various Darsee papers). Moreover, twelve scientists were listed as co-authors on papers that were withdrawn, and a majority of those scientists were listed on multiple papers that were withdrawn from publication. Respondents' argument has no merit, it bears not the slightest relation to any relevant issue before the Court, and it is pertinent only to Respondents' ill-founded effort to discredit opposing counsel and a distinguished expert.

Respondents have repeatedly leveled accusations of scientific fraud and mendacity at Dr. Heymsfield, and these accusations have no perceptible basis in fact. Dr. Heymsfield did not participate in Dr. Darsee's fabrication of data. He is a distinguished scientist and medical doctor whose learning, teaching, expertise, accomplishments, and awards over the past several decades speak volumes for his reliability and credibility as a medical expert. Respondents have no valid grounds to question his integrity here. Dr. Heymsfield testified on this subject on August 30th:

> Q. And how do you determine, when you put your name on a study as a co-author and you don't have the ultimate responsibility as being the lead author --
> A. Yes.
> Q -- how do you determine that all of the data that they are providing you to review is correct?
> A. It's called trust and integrity. And if somebody lies to you then they violated that trust and it's just like in any business, in any relationship, people can be either honest or dishonest. And so there's a certain level of trust that you have and if they violate it then, you know, there's nothing you can do to test someone's honestly [sic], including lie detector tests or whatever so, you know, so you have to depend on integrity. And that's what science is based on and it doesn't always work perfectly, but it works most of the time.

Heymsfield Dep. at 457-58 (attached as part of Ex. A to Opp'n to Resp'ts' Omnibus Mot.).

Here, Respondents have extended their baseless accusations against Dr. Heymsfield to attack the integrity of counsel supporting the *Complaint* as well. Respondents have no good faith basis for impugning us or challenging the above-quoted statement in our *Opposition*, and they have no grounds whatsoever to demand sanctions.

IV. Respondents' Remaining Arguments Are Improper and Unpersuasive

Respondents' remaining arguments are improper and unpersuasive. Respondents belabor their previous line of argument disputing the credibility of our expert witness, and further argue that the contents of our *Opposition*, including the sworn affidavits submitted therewith, are implausible and false. However, these arguments are based on Respondents' innuendos, not facts.

Respondents have no basis to dispute the sworn statement of Dr. Heymsfield. According to Respondents, Dr. Heymsfield's affidavit concerning his communications with Complaint Counsel "strains credulity" because they doubt his deposition testimony concerning why he joined the faculty at the Columbia University College of Physicians and Surgeons. *See* Resp'ts' Add'l Args. at 10. These are two separate subjects and there is no logical reason why any aspect of Dr. Heymsfield's affidavit should be doubted on account of his decision to pursue the opportunity to teach and perform research at Columbia University, or his inability to confirm or deny the authenticity of a web page, possibly a magazine article from the 1980s, that purports to relate statements attributed to him nearly two decades ago. Indeed, it is Dr. Heymsfield's sworn testimony that the Dean and the recruitment committee of the Columbia University College of Physicians and Surgeons reviewed Dr. Heymsfield's professional qualifications prior to his receiving an appointment to the University. They were aware of the Darsee matter and the

Darsee papers. *See* Heymsfield Decl. ¶ 10. Respondents themselves have demonstrated that those papers are publicly available, and Dr. Heymsfield has been affiliated with Columbia University for nearly 20 years now. Respondents' repeated attacks on Dr. Heymsfield have no merit, and simply illustrate the desperate measures that they will take to discredit a reliable expert whose truthful testimony will expose the inadequacies of their purported substantiation.

Additionally, no aspect of Dr. Heymsfield's affidavit can be called into question based on his supplemental disclosures. Again, these are two separate topics. There is no logical reason why any aspect of Dr. Heymsfield's affidavit should be doubted on account of the fact that he has made supplemental disclosures in this matter.

Respondents have no grounds to criticize Dr. Heymsfield's sworn statement that he previously believed the Darsee papers naming him as a co-author were withdrawn. The record shows that many Darsee papers were withdrawn. *See* Ex. 2. Respondents themselves initially indicated that all of the papers listing Dr. Heymsfield as a co-author were withdrawn. *See* Resp'ts' Omnibus Mot. at 11. Thereafter, in their *Reply* to our *Opposition* to the *Motion to Add an Expert Witness*, Respondents represented that two of those papers were not retracted. *See* Resp'ts' Reply to Opp'n at 1. After our review indicated that only one of these papers was not retracted, see Compl. Counsel's Opp'n to Pet., Oct. 20, 2005, Respondents accepted that fact. *See* Add'l Args. at 12. Respondents insinuate that Dr. Heymsfield must have previously learned, in earlier litigation as an expert witness, that one of the papers was not withdrawn, but remarkably, they present no evidence to support that insinuation. Given that many Darsee papers have been withdrawn, and that Respondents themselves have performed the research and have offered three different accounts, Dr. Heymsfield's statement that he previously believed that all of the Darsee papers naming him as a co-author were withdrawn is entirely credible.

Each of Respondents' foregoing arguments improperly contests the credibility of our expert witness, in support of Respondents' motion to exclude that expert from these proceedings before trial. "A motion to strike is not an appropriate vehicle through which to contest the credibility of a witness."[7] Respondents have not adduced caselaw to the contrary, despite being so advised in our last filing, and so their argument appears doubly improper.

Lastly, Respondents' counsel briefly suggest to the Court, without any supporting evidence whatsoever, that we have submitted incredible, false affidavits. Yet review of the *Additional Arguments* indicates that Respondents present absolutely no proof, not even the slightest record citation, supporting their extraordinary allegation of mendacity. *See* Add'l Args. at 9-11. Respondents simply rely on their own insinuations. Gamely citing the unintended website posting, isolated and largely misconstrued statements in our *Opposition*, and our supplementation of previous expert disclosures after additional information came to our attention, see Add'l Args. at 9-10, does not suffice.[8] Respondents' distrust of Complaint Counsel does not suffice. The record is clear: There is absolutely no support for Respondents' allegation of mendacity.

CONCLUSION

Respondents Gay and Mowrey's unbidden, unauthorized "*Additional Arguments*" represents one of the least impressive episodes in the"try the prosecutor" campaign that

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[7] *Lohrenz*, 223 F. Supp. 2d at 33; *Kennedy v. C-P Integrated Servs., Inc.*, No. 041263C, 2005 WL 1923607, at *2 (W.D. Okla. Aug. 11, 2005) (noting that such challenges to witness credibility are not properly resolved during pretrial, summary judgment stage of case).

[8] Complaint Counsel could have easily presented a lengthy litany of facts showing how Respondents have failed to cooperate in discovery but the result would have been the same as what Respondents have offered—a meaningless and meritless exercise in finger-pointing.

Respondents have waged in this matter to divert the parties and the Court from the merits—or more precisely, in this instance, a *Motion* related to collateral issues instead of the merits. Rather than rebutting the material facts and arguments set forth in our *Opposition*, Respondents have disputed only a few isolated statements therein, to no material effect. Their redundant reply addresses topics that easily could have been discussed or clarified with a simple phone call or the required RULE 3.22(f) conference instead of burdening the Court. Complaint Counsel respectfully request that the Court permit this response, reject Respondents' *Additional Arguments*, and deny Respondents' omnibus *Motion*.

Respectfully submitted,

Laureen Kapin	(202) 326-3237
Lemuel Dowdy	(202) 326-2981
Walter C. Gross, III	(202) 326-3319
Joshua S. Millard	(202) 326-2454
Edwin Rodriguez	(202) 326-3147
Laura Schneider	(202) 326-2604

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

Dated: November 4, 2005

EXHIBIT 1

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

In the Matter of	)	
	)	
BASIC RESEARCH, L.L.C., et al.,	)	
	)	**DOCKET NO. 9318**
	)	
Respondents.	)	
	/	

RE-NOTICE OF TAKING VIDEOTAPED DEPOSITION OF STEVEN B. HEYMSFIELD, M.D.

Please take notice that Respondents will take the following videotaped deposition upon the following date and time:

Steven B. Heymsfield, M.D. January 11, 2005 9:00 A.M. EST

Said videotaped deposition will be taken at the offices of Esquire Deposition Services, 216 East 45th Street, 8th Floor, New York, New York 10017-3304, before a certified court reporter and will continue thereafter until completed.

Respectfully submitted,

Dated: January 7, 2005

Jeffrey D. Feldman
Gregory L. Hillyer
Christopher P. Demetriades
FeldmanGale, P.A.
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Attorneys for Respondents Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC and Ban, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 7th day of January, 2005, as follows:

(1) One (1) copy via e-mail attachment in Adobe® ".pdf" format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; rrichardson@ftc.gov; lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(3) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(4) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(5) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, *Pro Se*.

SUBPOENA AD TESTIFICANDUM

Issued Pursuant to Rule 3.34(a)(1), 16 C.F.R. § 3.34(a)(1) (1997)

1. TO

Dennis Gay
5742 West Harold Gatty Dr.
Salt Lake City, UT 84116

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and give testimony, at the date and time specified in Item 5, at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF HEARING

United States Attorney's Office
185 South State St., Suite 400
Salt Lake City, UT 84111

4. YOUR APPEARANCE WILL BE BEFORE

An authorized Federal Trade Commission representative

5. DATE AND TIME OF HEARING OR DEPOSITION

January 7, 2005, at 9AM, continuing to January 8, 2005, at 9AM

6. SUBJECT OF PROCEEDING

In the Matter of Basic Research, L.L.C., et al., Docket No. 9318

7. ADMINISTRATIVE LAW JUDGE

The Honorable Stephen J. McGuire
Chief Administrative Law Judge

Federal Trade Commission
Washington, D.C. 20580

8. COUNSEL REQUESTING SUBPOENA

Joshua S. Millard
Complaint Counsel
Federal Trade Commission
Division of Enforcement
Suite NJ-2122
Washington, DC 20580

DEPOSITION EXHIBIT 06-1

DATE ISSUED

DEC 2 2004

SECRETARY'S SIGNATURE

Donald S. Clark

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

SUBPOENA AD TESTIFICANDUM

Issued Pursuant to Rule 3.34(a)(1), 16 C.F.R. § 3.34(a)(1) (1997)

1. TO	2. FROM
Daniel B. Mowrey 5742 West Harold Gatty Dr. Salt Lake City, UT 84116	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

This subpoena requires you to appear and give testimony, at the date and time specified in Item 5, at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission Satellite Building 601 New Jersey Ave., Room 2201 Washington, DC 20001	An authorized Federal Trade Commission representative
	5. DATE AND TIME OF HEARING OR DEPOSITION January 13, 2005, at 9AM, continuing to January 14, 2005, at 9AM

6. SUBJECT OF PROCEEDING

In the Matter of Basic Research, L.L.C., et al., Docket No. 9318

7. ADMINISTRATIVE LAW JUDGE	8. COUNSEL REQUESTING SUBPOENA
The Honorable Stephen J. McGuire Chief Administrative Law Judge Federal Trade Commission Washington, D.C. 20580	Joshua S. Millard Complaint Counsel Federal Trade Commission Division of Enforcement Suite NJ-2122 Washington, DC 20580

DATE ISSUED	SECRETARY'S SIGNATURE
DEC 2 2004	Donald S. Clark

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

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December 2, 2004

Via Electronic Mail and First Class Mail

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

Dear Gentlemen:

This letter serves to confirm the deposition schedule that Mr. Feldman and I discussed on December 1, 2004. Although Complaint Counsel had previously agreed to a deposition schedule and made travel and other arrangements based upon those plans, we have been asked to consider other alternatives based upon several circumstances including 1) Respondent Friedlanders' medical issues which resulted in Respondents' requesting cancellation of the November 22nd and 23rd depositions for Messrs. Sandberg, Davis, Atkinson and Weight; 2) Respondent Mowrey's medical issues regarding his spouse and 3) Mr. Feldman's revised vacation dates at the end of December. With regard to Respondent Mowrey, based upon his spouse's illness, we have agreed to two enlargements of time so that his expert report is now due on December 8th with our scientific rebuttal reports now due on December 27th. We are agreeing to this accommodation because of the exigent circumstances presented but want to emphasize two points – first respondents have known about this deadline for some time and we are dismayed that such requests are necessary even with the illness of Respondent Mowrey's spouse. Second, the enlargement causes Complaint Counsel and its experts