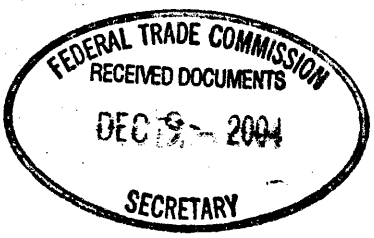
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	)	
	)	
BASIC RESEARCH, LLC	)	
A.G. WATERHOUSE, LLC	)	
KLEIN-BECKER USA, LLC	)	
NUTRASPORT, LLC	)	
SOVAGE DERMALOGIC LABORATORIES, LLC	)	
BAN, LLC d/b/a BASIC RESEARCH, LLC	)	
OLD BASIC RESEARCH, LLC,	)	Docket No. 9318
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.	)	
	)	

ORDER ON COMPLAINT COUNSEL'S SECOND MOTION FOR PROTECTIVE ORDER

I.

On November 18, 2004, Complaint Counsel filed its second motion seeking a protective order ("Motion"). On December 3, 2004, Respondents Basic Research, LLC; A.G.Waterhouse, LLC; Klein-Becker USA, LLC; Nutrasport, LLC; Sovage Dermalogic Laboratories, LLC; Ban, LLC; Daniel Mowrey; Mitchell Friedlander; and Dennis Gay (collectively "Respondents") filed their opposition ("Opposition").

II.

Complaint Counsel moves for a protective order to limit the scope of Respondents' subpoena *duces tecum* for two of Complaint Counsel's testifying experts; to deny discovery demanded in twenty-two separate subpoenas sent to non-parties; and to limit the scope of Respondent Gay's notice of videotape depositions sent to four other non-parties. Motion at 1.

Complaint Counsel argues that Respondents' subpoenas or notices are overly broad, unduly burdensome, harassing, seek information that is not reasonably expected to yield information relevant to this matter, and seek to gain expert testimony improperly. *Id.* Respondents contend that the requested discovery is proper and focuses on issues central to this litigation. Opposition at 18.

III.

A.

Positions of the Parties

Complaint Counsel objects to parts of two subpoenas *duces tecum* served to two testifying experts retained by Complaint Counsel, Steven Heymsfeld, M.D. and Robert Eckels, M.D. Motion at 5. Complaint Counsel has agreed to provide documents which were prepared or used and relied upon by these experts in this case. Motion at 3.

Complaint Counsel contends that specifications 8-11 of the subpoenas seek an overly broad range of documents and information which is readily discoverable by a reading of each expert's *curriculum vitae* ("CV"). Specifications 8-11 seek copies of all documents that the experts have authored or contributed to; that are related to lectures, speeches, or testimony given; related to medical or clinical studies or tests; and all patents and patent applications regarding a series of issues, including obesity, weight loss, fat loss, clinical trial protocol, and dietary supplements. Motion at 6 nn.4-7. Complaint Counsel describes the request as a "fishing expedition" not tailored to discover relevant information and notes that Eckels' CV lists over 200 publications and Heymsfeld's CV lists over 400 publications, many of which are not relevant to the issues involved in this case. Motion at 8-9. Respondents indicate that they seek this information to determine "what the relevant scientific community considers adequate with respect to weight loss, fat loss, obesity and dietary supplements." Opposition at 8; *see also* Opposition at 9 ("specifications [9 and 10] seek material related to the general issue on which Experts will testify, namely, the level of substantiation the relevant community of experts considers adequate.").

Complaint Counsel also objects to specification 12, which seeks all documents relating to lawsuits, whether criminal or civil, in which the experts were named as a party. Motion at 9-10. Complaint Counsel argues that this request is not reasonably expected to yield relevant information and that it is prejudicial and harassing. Motion at 10. Respondents argue in a footnote that this discovery is relevant for cross-examination, rebuttal, and impeachment. Opposition at 7 n.6.

Complaint Counsel objects to specifications 13-19 which request documents relating to work the experts performed outside of this case. Motion at 10-12. For example, specification 15 seeks "all documents relating to requests for approval that you have made to the FDA, FTC or

any other regulatory body, either on behalf of yourself or some other third party, relating to advertising or package labeling claims that you sought to make in relation to any weight loss or fat loss product." Motion at 10 n.12. Complaint Counsel argues that this request is overly broad, unreasonable, unduly burdensome, and not reasonably expected to yield relevant information. Motion at 11-12. Respondents contend that these requests are relevant to what constitutes competent and reliable scientific evidence; whether the experts maintain these standards in their own work; whether these standards are relevant in the area of dietary supplements, weight and fat loss; and that Complaint Counsel has failed to establish any real burden. Opposition at 11-12.

Complaint Counsel objects to specifications 23 and 24 of the subpoena to Heymsfeld which seeks records and documents regarding side effects experienced by subjects in a study conducted by Heymsfeld and ten other doctors regarding Orlistat. Motion at 12 and n.13. Complaint Counsel argues that the drug Orlistat is not at issue or relevant to this case; the challenged products in this case do not contain any of the same active ingredients as Orlistat; and that side effects are not relevant to this case. Motion at 12-13. Respondents contend that the side effects had the effect of "unblinding" what Heymsfeld claims is a double blind placebo controlled test. Opposition at 13.

Analysis

Heymsfeld and Eckels are testifying experts. Therefore, discovery directed to them is governed by Commission Rule 3.31(c)(4)(i) which states:

> (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
>
> (B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

The Scheduling Order entered in this case on August 11, 2004 ("Scheduling Order") entitles parties to "materials fully describing or identifying the background and qualifications of the expert, list of all publications, and all prior cases in which the expert has testified or has been deposed;" "transcripts of such testimony in the possession, custody or control of the listing party or the expert," and "all documents and other written materials relied upon by the expert in formulating an opinion in this case." Scheduling Order ¶ 11.

The court in *Dura Lube* clarified the law regarding the disclosure of expert testimony and information, concluding that all data, documents, or information considered by a testifying expert

witness in forming the opinions to be proffered in a case is discoverable. *In re Dura Lube*, 1999 FTC LEXIS 254, at *6 (Dec. 15, 1999) (citing Fed. R. Civ. Pro. 26(a)(2)(B); 16 C.F.R. § 3.31(c)(4)(B); *Thompson Med. Co.*, 101 F.T.C. at 388). Full disclosure of the basis of an expert opinion ensures the independence of the expert's conclusions. *FDIC v. First Heights Bank, FSB*, 1998 U.S. Dist. LEXIS 21506, at *9-10 (E.D. Mich. 1998). Therefore, for each expert expected to testify at trial, the parties must exchange all documents reviewed, consulted, or examined by the expert in connection with forming his or her opinion on the subject on which he or she is expected to testify, regardless of the source of the document or whether a document was originally generated in another investigation or litigation against another after-market additive manufacturer. *Dura Lube*, 1999 FTC LEXIS 254, at *6-7; *see also In re Shell Oil Refinery,* 1992 U.S. Dist. LEXIS 4896, at *2 (E.D. La. 1992). The scope of discovery is not limited to documents relied on by the expert in support of his or her opinions, but extends to documents considered but rejected by the testifying expert in reaching those opinions. *Torrance*, 163 F.R.D. at 593-94. Any document considered by an expert in forming an opinion, whether or not such document constitutes work product or is privileged, is discoverable. *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *Karn v. Rand Ingersoll*, 168 F.R.D. 633, 639 (N.D. Ind. 1996).

If an expert offers an opinion which includes or is based upon a comparative analysis or an opinion relating to general industry standards and the type of testing needed to substantiate particular claims, all data, documents, or other information supporting that opinion is discoverable. *Dura Lube*, 1999 FTC LEXIS 254, at *8. An opposing party is entitled to know if an expert has taken an inconsistent position in another investigation or other litigation. *Dura Lube*, 1999 FTC LEXIS 254, at *8. While reports and testimony, including deposition testimony, from prior investigations or litigation must be produced, the documents underlying such reports or testimony are not discoverable in this subsequent litigation, unless such documents were also relied upon or reviewed by a testifying expert in formulating an opinion in this case. *Dura Lube*, 1999 FTC LEXIS 254, at *9.

Respondents essentially seek information regarding everything the experts have worked on during the course of their entire careers, including every publication, presentation, study, patent, and paid employment. Moreover, Respondents seek information about private legal actions in which the experts have been named. Respondents have not demonstrated that this discovery is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the respondent as required by Rule 3.31(c)(1). Respondents have not demonstrated a need for discovery beyond that permitted by the Rules, the Scheduling Order, and the *Dura Lube* case. Moreover, Complaint Counsel has demonstrated that the burden and expense of the proposed discovery outweighs its likely benefit and that many of the documents are available from sources that are equally accessible to Respondents. Accordingly, the motion for protective order for the Heymsfeld and Eckels subpoenas is **GRANTED**.

B.

Complaint Counsel objects to twenty-two subpoenas *duces tecum* issued to non-party individuals and entities that participated in the Orlistat study and a different study regarding ephedrine, caffeine, and other ingredients. Motion at 14-15. Complaint Counsel contends that the studies referred to in the subpoenas are not relevant and have not been identified by either party as studies that will be introduced at trial. Motion at 15. Complaint Counsel argues that this discovery is untimely, unreasonable, overly burdensome, and irrelevant and a protective order is necessary to protect the non-parties from annoyance, embarrassment, oppression, or undue burden or expense. Motion at 16. Respondents argue that the subpoenas were served timely and are relevant to what experts in the field of weight loss consider competent and reliable evidence. Opposition at 14-15.

Complaint Counsel has not demonstrated that the subpoenas were untimely. However, Respondents have not demonstrated that this discovery is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the respondent as required by Rule 3.31(c)(1). According to Complaint Counsel, these are not studies that the parties intend to introduce at trial. Moreover, Complaint Counsel has demonstrated that the burden and expense of the proposed discovery outweighs its likely benefit.

Although Respondents raise standing as an issue for other discovery at issue in the Motion, Respondents do not raise the standing issue with regard to these twenty-two subpoenas, presumably because it is clear that the recipients of the subpoenas object to the subpoenas. In the interest of judicial efficiency, it is appropriate to resolve this issue here, rather then requiring twenty-two separate motions. Accordingly, the motion for protective order for the twenty-two subpoenas at issue is **GRANTED**.

C.

Complaint Counsel next objects to notices of videotaped depositions issued to four non-parties: Dermtech International, Edward Fey, Ken Shirley, and Paul Lehman. Motion at 17. According to Complaint Counsel, these non-parties are related to studies submitted by Respondents as substantiation for the challenged products. Motion at 17. Two of the non-parties were listed as potential fact witnesses by both Complaint Counsel and Respondents, while the other two were not listed by either party. Motion at 17-18. Complaint Counsel seeks an order limiting the depositions to factual inquiries within each witness's personal knowledge and prohibiting any expert opinion relating to the issues in the case.

Respondents argue that Complaint Counsel lacks standing to object to a non-party subpoena and that these witnesses should be allowed to testify to the results and conclusions of their studies as well as other information within their personal knowledge. Opposition at 15-17. Respondents also state that "The Preliminary Witness List, however, was merely a good faith listing. That Respondents did not list the specific identities of the Witnesses at that time does not

violate their obligations. Final Proposed Witness Lists are not due until February 8, 2005." Opposition at 17.

The general rule is that a party to litigation lacks standing to object to a non-party subpoena. *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979); *Langford v. Crysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir. 1975). There is no reason to deviate from this general rule in this case, where, according to Respondents, the non-parties do not object to the depositions. Opposition at 16. Accordingly, the motion for protective order for the videotaped depositions is **DENIED**. Respondents are reminded, however, of their obligation to seasonably amend their witness lists. Respondents will be required to notify Complaint Counsel of any additions to their witness list, with a description of proposed testimony, five days prior to depositions of those witnesses.

IV.

For the above-stated reasons, Complaint Counsel's second motion to compel is **GRANTED in part and DENIED in part**. All parties are reminded of their duty to seasonably amend prior responses to interrogatories, requests for production, or requests for admission, pursuant to Rule 3.31(e). 16 C.F.R. § 3.31(e). Parties shall not wait until the close of discovery to make supplemental responses.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: December 9, 2004