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

In the Matter of	:	
	:	DOCKET NO. 9318
BASIC RESEARCH, L.L.C., et al.,	:	
	:	Public Document
Respondents.	:	
	:	

RESPONDENT DANIEL B. MOWREY'S RESPONSE TO COMPLAINT COUNSEL'S MOTION FOR PROTECTIVE ORDER TO LIMIT RESPONDENTS' DISCOVERY OR, IN THE ALTERNATIVE, TO CLARIFY SCHEDULING ORDER

Pursuant to the Court's order requiring Respondents to submit an expedited response to Complaint Counsel's motion for protective order to limit Respondents' discovery or, in the alternative, to clarify the Court's scheduling order, respondent Daniel B. Mowrey, Ph.D. ("Dr. Mowrey") submits the following response to Complaint Counsel's motion.[1]

INTRODUCTION AND FACTUAL BACKGROUND

Through its motion Complaint Counsel seeks to relitigate an issue which this Court has already decided -- i.e., this Court previously ruled that each ***party*** (as opposed to each side) in this action is entitled to serve a total of 60 interrogatories, 60 requests for admission, and 60 requests for production of documents. Not satisfied with the Court's prior resolution of this issue, and unhappy with the burden they have as a result of their own strategic decision to name nine (9) separate respondents in this action, Complaint Counsel now asks the Court to revisit its

[1] The other Respondents are submitting their own responses to Complaint Counsel's motion. For the sake of brevity, Dr. Mowrey will not repeat here all of the arguments made in the other Respondents' memoranda, but incorporates herein by this reference the arguments and memoranda submitted by the other Respondents' in opposition to Complaint Counsel's motion.

prior decision. However, nothing has changed since the issuance of the Court's scheduling order, and Complaint Counsel has not met the burden necessary to justify reconsideration.[2]

The facts pertaining to the Court's prior ruling on this issue are set forth below.

1. After conducting a 3½ year investigation, Complaint Counsel decided to recommend to the Commission to commence this action. In connection with that recommendation, Complaint Counsel made their own strategic decision to name six (6) companies and three (3) individuals as respondents. Thus, unlike the Commission's ordinary practice to name just one or two respondents in any particular action, Complaint Counsel chose to name nine (9) separate entities and individuals as respondents in this action.

2. On 2 August 2004, this Court provided the parties with the Court's initial draft scheduling order, which draft order provided, in relevant part, that "[t]he parties are limited to a total of 50 document requests, 50 interrogatories, and 50 requests for admissions . . ." Proposed Scheduling Order at 5, ¶ 6. A copy of the relevant portion of the Proposed Scheduling Order is attached hereto as Exhibit A.

3. The Court's proposed limit of 50 document requests, interrogatories and requests for admission was discussed at the initial prehearing conference held on 10 August 2004, as was the issue of whether the limit on discovery requests would apply to each side or to each party.

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[2] As discussed *infra*, the only thing that has "changed" since the issuance of the scheduling order is that Respondents have, consistent with the plain and unambiguous language of the scheduling order, served discovery requests, which requests do not even come close to meeting the limitations imposed by the scheduling order. On the other hand, Complaint Counsel have, in violation of the scheduling order, served at least 513 interrogatories and 121 requests for production of documents.

The following colloquy occurred between counsel and the Court during the initial prehearing conference:

MR. FELDMAN: In item 6, we have -- Your Honor proposes a cutoff of 50 requests, RFPs and interrogatories.

JUDGE McGUIRE: Yes.

MR. FELDMAN: And what I was -- I don't want to horse-trade with the court, but I was going to ask the court if it would give us a little bit more leeway with that because of the number of respondents that we're dealing with.

JUDGE McGUIRE: What are you seeking?

MR. FELDMAN: I was going to say 75.

JUDGE McGUIRE: Ms. Kapin, any objection?

MS. KAPIN: Your Honor, I have concerns about that. First of all, they have all those respondents. I'm not sure -- and, I would ask you, Your Honor, do they each have 50? If that is the case, it seems to me they have a lot of document requests in their quiver.

JUDGE McGUIRE: That's going to be a problem.

MR. FELDMAN: I actually was interpreting this to mean that you were giving us the sides.

JUDGE McGUIRE: Yes. And that's how this order is intended. So would you -- I could -- would you have any opposition if that's what we intend and what we're going to be -- he's asking for 75 per side. Do you have any problem with that, Ms. Kapin?

MS. KAPIN: I still think, in light of the very broad document requests that have been made and also the fact that counsel would like to extend these discovery deadlines, frankly, Your Honor, I'm just concerned about being so mowed under by a lot of discovery that we're not able to turn our attention to the nuts and bolts of this case.

JUDGE McGUIRE: I believe as well that the rules have been interpreted in the past to confine it to that number per side, so I think that's where we're going to keep it at, Mr. Feldman.

MR. FELDMAN: Judge, may I just say -- and. I think Mr. Friedlander may have a different feeling on this issue than I do -- but ***the commission brought in the respondents that they wanted to bring in. The rules do give each respondent certain rights as it relates to discovery. The only rule that -- I believe I'm correct on this -- that has limitation is the rule dealing with interrogatories***. I think it's 25 per side. ***There is no limit on requests for admissions and no limits on requests for production. And it should not -- you know, a party should not be at a disadvantage in what it can propound.***

JUDGE McGUIRE: No. ***I agree. And each party should have some limit***. This paragraph was taken from a prior order, which typically contemplates a respondent. What do you -- or do you propose something on that, Mr. Friedlander?

MR. FRIEDLANDER: Well, as Mr. Feldman just explained, on interrogatories I think the limit for me is 25 and no limit on other forms of written discovery. And ***I'd like to reserve all my rights*** --

JUDGE McGUIRE: Well, you're -- ***that's not a problem. All right. We'll take a look at that one as well and we'll determine how to account for the several respondents in this proceeding***.

Transcript of Initial Pretrial Conference, 8/10/04 at 28:16-31:7 (emphasis added). Copies of the referenced pages from the transcript are attached hereto as Exhibit B.

4. After considering the arguments of counsel and respondent Friedlander, after having agreed that the various parties should not be at a disadvantage as to what discovery requests they could each propound, and after stating at the hearing that it was "not a problem" for respondent Friedlander to reserve all of his rights with respect to conducting discovery, the Court modified the language of the proposed scheduling order, such that the final scheduling court adopted and entered by the Court provides that "***[e]ach party*** is limited to a total of 60 document requests, 60 interrogatories, and 60 requests for admissions . . ." Scheduling Order, 08/11/04 at 5, ¶ 6 (emphasis added).

5. A side by side comparison of the language from the original draft proposed scheduling order, and the final order adopted by the Court shows the following:

Draft Proposed Scheduling Order	Final Scheduling Order
The parties are limited to a total of 50 document requests, 50 interrogatories, and 50 requests for admissions . . . (Emphasis added).	***Each party*** is limited to a total of 60 document requests, 60 interrogatories, and 60 requests for admissions . . . (Emphasis added).

6. Thus, the Court made a conscious determination that the limitation on discovery requests would apply to ***each party***, and not to each "side" as Complaint Counsel asserts. *See, e.g.*, ¶¶ 4-5 above.

7. Upon commencing discovery, Complaint Counsel chose to serve discovery requests on all of the Respondents, which requests purport to require each Respondent to respond to all of the discovery requests. In so doing, Complaint Counsel has greatly exceeded the number of discovery requests which it is allowed to serve on the Respondents. For example, Complaint Counsel has served three sets of interrogatories on the Respondents, containing a total of 57 interrogatories (by Complaint Counsel's method of counting), purporting to require each Respondent to respond to the interrogatories. However, since each Respondent is purportedly required to respond to the 57 interrogatories, and since there are 9 separate respondents, the total number of interrogatories served by Complaint Counsel actually totals at least 513 (57 x 9 = 513), not including discrete subparts, a number which is far in excess of the 60 interrogatories allowed by the Court's scheduling order.[3] Thus, Complaint Counsel wants to have it both ways -

[3] Similarly, Complaint Counsel has served at least three sets of requests for production of documents, containing a total of at least 121 requests for production.

- Complaint Counsel wants to be able to serve 60 interrogatories, 60 requests for admission and 60 requests for production of documents, on each Respondent (for a total of 540 possible interrogatories, admissions and document requests), while wanting to limit Respondents to a total of 60 such discovery requests.

ARGUMENT

I. COMPLAINT COUNSEL DOES NOT MEET THE APPLICABLE BURDEN TO JUSTIFY RECONSIDERATION OF THE COURT'S SCHEDULING ORDER

The law is clear that "[m]otions for reconsideration should be granted only sparingly. *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991). Such motions should be granted only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. *Regency Communications, Inc. v. Clearrel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002). Reconsideration motions are not intended to be opportunities "to take a second bite at the apple" and relitigate previously decided matters. *Greenwald v. Orb Communications & Marketing, Inc.*, 2003 WL 660844 at *1 (S.D.N.Y. Feb. 27, 2003)." *In re Rambus, Inc.*, Docket No. 9302, 2003 WL 1866416, F.T.C. (March 26, 2003). *See also In re Detroit Auto Dealers Ass'n, Inc.*, Docket No. 9189, 1985 WL 260544, F.T.C. (April 17, 1985) ("A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the administrative law judge before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such

decision, or (c) a manifest showing of a failure to consider material facts presented to the administrative law judge before such decision").

Here, although Complaint Counsel styles its motion as a motion for protective order or for clarification, the motion is, in reality, a motion for reconsideration. As the facts set forth above demonstrate, the issue of whether the number of discovery requests would apply to each side or to each party was specifically addressed, and was resolved against Complaint Counsel, by the Court. Complaint Counsel now asks the Court to revisit its prior decision. However, Complaint Counsel has fallen far short of meeting the burden applicable to motions for reconsideration. Instead, Complaint Counsel bases its motion on the false assertion that Respondents have abused the discovery process by serving separate sets of discovery requests -- a practice allowed by the plain language of the Court's scheduling order, which provides that "***each party***" is allowed 60 interrogatories, 60 document requests, and 60 requests for admission.

The fact that several of the Respondents have served separate discovery requests is not a "new" fact and does not constitute "new" evidence which would justify reconsideration. On the contrary, at the initial pretrial hearing Complaint Counsel specifically raised the concern about allowing each party to serve 60 interrogatories, 60 document requests and 60 requests for admission. Thus, the very thing Complaint Counsel complains about now was at the forefront of the discussion at the initial prehearing scheduling conference. Notwithstanding the concerns expressed by Complaint Counsel at the initial prehearing scheduling conference, the Court modified the language of its proposed scheduling order, and adopted the provision that the limitation on discovery would apply to ***each party***, and not to each "side." Because Complaint

Counsel has not met its burden, Complaint Counsel's motion for reconsideration, disguised as a motion for protective order or for clarification, should be denied.

II. COMPLAINT COUNSEL'S MOTION IGNORES THE MOST SALIENT AND RELEVANT PORTIONS OF THE TRANSCRIPT OF THE PREHEARING CONFERENCE

In support of its motion, Complaint Counsel quotes a portion of the transcript of the initial prehearing conference where it was made clear that everyone interpreted the Court's draft proposed scheduling order as limiting each "side" to a certain number of interrogatories, requests for admissions, and requests for production of documents. However, it was the colloquy which transpired after the portion Complaint Counsel quotes in its motion which is the most revealing and relevant:

> JUDGE McGUIRE: I believe as well that the rules have been interpreted in the past to confine it to that number per side, so I think that's where we're going to keep it at, Mr. Feldman.
>
> MR. FELDMAN: Judge, may I just say -- and. I think Mr. Friedlander may have a different feeling on this issue than I do -- but the commission brought in the respondents that they wanted to bring in. ***The rules do give each respondent certain rights as it relates to discovery. The only rule that -- I believe I'm correct on this -- that has limitation is the rule dealing with interrogatories***. I think it's 25 per side. ***There is no limit on requests for admissions and no limits on requests for production. And it should not -- you know, a party should not be at a disadvantage in what it can propound.***
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> JUDGE McGUIRE: No. ***I agree. And each party should have some limit.*** This paragraph was taken from a prior order, which typically contemplates a respondent. What do you -- or do you propose something on that, Mr. Friedlander?
>
> MR. FRIEDLANDER: Well, as Mr. Feldman just explained, on interrogatories I think the limit for me is 25 and no limit on other forms of written discovery. ***And I'd like to reserve all my rights*** --

> JUDGE McGUIRE: Well, you're -- ***that's not a problem***. All right. ***We'll take a look at that one as well and we'll determine how to account for the several respondents in this proceeding.***

Transcript of Initial Pretrial Conference, 8/10/04 at 30:1-31:7 (emphasis added). This portion of the transcript makes it clear that the Court "***agree[d]***" with the proposition that "a party should not be at a disadvantage in what [discovery] it could propound." Furthermore, the Court made it clear that it would not be "a problem" for an individual respondent such as Mr. Friedlander (or Dr. Mowrey in this instance) to propound his own discovery. Moreover, the Court then made a conscious decision to "determine how to account for the several respondents in this proceeding." That determination is reflected in the Court's scheduling order, where the Court clearly and unambiguously determined that "each party" was entitled to serve 60 interrogatories, 60 requests for admissions, and 60 requests for production of documents.

III. FAIRNESS AND DUE PROCESS REQUIRES THAT THE LIMITATIONS ON DISCOVERY APPLY TO EACH PARTY, AND NOT SIMPLY TO EACH SIDE

Principles of fundamental fairness and Respondents' rights to due process require that Complaint Counsel's motion be denied. To begin with, it was Complaint Counsel who, in a significant departure from the Commission's ordinary practice, chose to name nine (9) separate companies and individuals as respondents in this action. Thus, the "problem" about which Complain Counsel now complains -- i.e., having to respond to discovery propounded by several of the Respondents, is a problem of Complaint Counsel's own making.

Furthermore, although the Respondents obviously have certain interests in common, there are also significant differences in the posture of each Respondent, especially the individual Respondents. For example, Dr. Mowrey is not an owner, officer or director of any of the

company Respondents, and does not control, or have the authority to control, any of the company Respondents. Where it was Complaint Counsel who chose to name Dr. Mowrey as a respondent in this action, Complaint Counsel should not be allowed to deny Dr. Mowrey his due process rights to conduct discovery which is necessary to defend against the charges which have been brought against him.

IV. CONTRARY TO COMPLAINT COUNSEL'S ARGUMENT, DR. MOWREY HAS NOT ABUSED THE DISCOVERY PROCESS

Complaint Counsel bases much of its motion on the false assertion that Dr. Mowrey has abused the discovery process by serving requests for admission which Complaint Counsel asserts are repetitive and unreasonable. The examples given by Complaint Counsel are a series of requests for admission which ask Complaint Counsel to admit certain facts relating to what constitutes, under Complaint Counsel's theory, a competent and reliable scientific study. Contrary to Complaint Counsel's assertions, however, the requests are neither repetitive nor unreasonable.[4] Rather, they go to the very heart of the claims which Complaint Counsel has asserted against Dr. Mowrey, and Dr. Mowrey's defenses to those claims.

For example, it is Respondents' position that the product efficacy claims for all six of the products at issue in this action are supported by a variety of scientific studies. However, Complaint Counsel took the position in its complaint, and has taken the position throughout this action, that none of the studies upon which Respondents rely are competent and reliable scientific studies. Accordingly, both prior to and after the filing of the complaint in this action,

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[4] What is unreasonable is Complaint Counsel refusal to respond to the requests for admission, thereby continuing its game of hide the ball on the issue of what constitutes a competent and reliable scientific study.

Respondents have repeatedly asked the Commission to tell Respondents what type of scientific evidence is required to support product efficacy claims, and to tell Respondents what requirements must be met in order for a scientific study to constitute, in the Commission's eyes, a competent and reliable scientific study. However, Complaint Counsel has steadfastly refused to provide a substantive response to Respondents' inquiries on these issues, instead repeating the mantra that the claims must be supported by competent and reliable scientific evidence, while refusing to define in any sort of meaningful way the phrase "competent and reliable scientific evidence."

Accordingly, in an effort to discover exactly what type of scientific evidence it is that Complaint Counsel alleges Respondents must have in order to make product efficacy claims, and to determine whether the studies upon which Respondents relied meet that threshold, Dr. Mowrey propounded a variety of requests for admissions which go to the heart of that issue. For example, the studies upon which Respondents relied were conducted over varying lengths of time -- i.e., 6 weeks, 8 weeks, 12 weeks, and 6 months. Complaint Counsel has asserted that the studies at issue are not competent and reliable, and cannot support product efficacy claims, because of, *inter alia*, the length of time over which the studies were conducted. Accordingly, Dr. Mowrey propounded the following requests for admissions which were designed to determine whether Complaint Counsel contends that a scientific study must be conducted over any certain length of time in order to constitute a competent and reliable scientific study and, if so, over what length of time and whether the studies at issue meet that test:

> 31. Admit that a scientific study conducted over a period of 6 weeks can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

32. Admit that a scientific study conducted over a period of 8 weeks can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

33. Admit that a scientific study conducted over a period of 12 weeks can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

34. Admit that a scientific study conducted over a period of 6 months can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Respondent Daniel B. Mowrey's First Request for Admission, Request No. 31-34. While these requests for admission are, admittedly, identical to each other, except for the time period referenced in each request, they are not "repetitive" or unreasonable as Complaint Counsel contends. On the contrary, the period of time referenced in each of the foregoing requests for admission was based directly on the lengths of times over which the studies at issue in this case were conducted. Thus, the time periods were not merely hypothetical, but were based on the very studies at issue.[5]

Similarly, the studies at issue had a varying number of participants. As with the length of time over which the studies were conducted, Complaint Counsel has asserted that some or all of the studies are not competent and reliable, and cannot support product efficacy claims, because

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[5] Complaint Counsel has refused to respond to each of the requests. For example, in response to request for admission no. 31, Complaint Counsel provided the following response: "Complaint Counsel object to this request as vague to the extent that Respondent has failed to define the term "nutraceutical." Complaint Counsel further objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lacks sufficient information to either admit or deny this request." Complaint Counsel provided identical responses to request nos. 32-34, even though the word "nutraceutical" is defined in standard dictionaries, and even though the time frame referenced in each request for admission comes directly from the studies at issue in this case.

the studies did not have enough participants. Accordingly, Dr. Mowrey propounded the following requests for admissions which were designed to determine whether Complaint Counsel contends that a scientific study must have any certain minimum of participants in order to constitute a competent and reliable scientific study, and if so, what that minimum number of participants is and whether the studies at issue in this case meet that threshold:[6]

20. Admit that a scientific study which has 6 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

21. Admit that a scientific study which has 10 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

22. Admit that a scientific study which has 16 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

23. Admit that a scientific study which has 18 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

24. Admit that a scientific study which has 20 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

25. Admit that a scientific study which has 24 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

26. Admit that a scientific study which has 30 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

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[6] As with the time periods referenced in the requests for admission, the number of participants referenced in the requests for admissions were taken directly from the studies at issue in this case.

27. Admit that a scientific study which has 53 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

28. Admit that a scientific study which has 76 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

29. Admit that a scientific study which has 103 subjects can constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Id., Request Nos. 20-29.[7]

Dr. Mowrey's requests for admission went not only to the studies themselves, but also go to the issue of whether the Respondents had a reasonable basis for relying on the scientific studies at issue. For example, if Complaint Counsel admits that a study which has 20 participants, or which was conducted over a 6 week period of time, can constitute a competent and reliable scientific study, then such admission supports Dr. Mowrey's and the other Respondents' assertions that they had a good faith and reasonable basis for relying on the scientific studies. To deny Dr. Mowrey the right to conduct his own discovery concerning these critical issues, which issues go to the very heart of the claims which have been asserted against him and his defenses to those claims, would be extremely unfair, highly prejudicial, and a gross violation of Dr. Mowrey's rights to due process.[8]

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[7] As with their responses to request nos. 31-34, Complaint Counsel refused to respond to request for admission nos. 20-29.

[8] Complaint Counsel also complains about 6 requests for admission Dr. Mowrey served with respect to the issue of what constitutes "professionals in the relevant area" as that phrase appears in the FTC's advertising guide to the dietary supplement industry, and as Complaint Counsel seeks to apply that phrase in the context of this action. However, as the Court is aware, one of the defenses Dr. Mowrey has asserted in this action is that he is being denied his due

(continued...)

The unfairness, prejudicial nature of Complaint Counsel's position, and violation of Dr. Mowrey's due process rights is highlighted by the fact that Complaint Counsel claims it should be allowed to serve 540 interrogatories, 540 requests for admissions, and 540 document requests on the Respondents, but that the nine Respondents should be limited to a collective total of 60 such discovery requests.[9] Complaint Counsel simply cannot have it both ways. They cannot choose to ignore the limitation on the number of interrogatories and document requests they are allowed under the scheduling order, and then refuse to respond to discovery requests which are clearly allowed under the plain and unambiguous language of the scheduling order. Complaint Counsel's motion should be denied, and Complaint Counsel should be ordered to immediately respond to the discovery requests which have been served.

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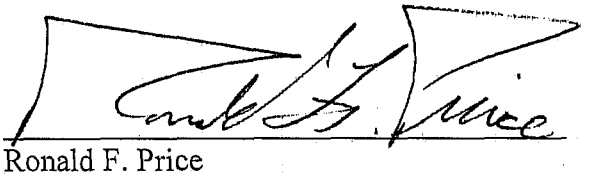
[8] (...continued)
process rights, and that the FTC's "competent and reliable scientific evidence" standard, including the phrase "professionals in the relevant area" is so vague and ambiguous that application of that standard to Dr. Mowrey in this action is unconstitutional. Thus, Dr. Mowrey's requests for admission concerning the phrase "professionals in the relevant area" go directly to Dr. Mowrey's constitutional defenses.

[9] Complaint Counsel has in fact served a total of at least 523 interrogatories, and 121 document requests, on the Respondents. In its motion for reconsideration of the Court's scheduling order, Complaint Counsel complains that Respondents have objected to the interrogatories served upon them on the basis that they exceeded the number of interrogatories permitted by the Court. This, of course, is an entirely separate matter. The objections were raised because had Respondents selectively answered interrogatories rather than refusing to respond to the interrogatories, they would have risked waived their objection to Complaint Counsel exceeding the permitted number of interrogatories. *See Herdlein Technologies, Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 104-105 (W.D. N.C. 1993) (holding that a party cannot selectively choose which interrogatories to respond to when the propounding party has exceeded the permissible number of interrogatories, but must object, without answering, if the responding desires to preserve its objection to the excessive number of interrogatories). However, if Complaint Counsel believes the objections are inappropriate and declines to limit the interrogatories to the number permitted by the Court, Complaint Counsel can raise that issue with the Court by appropriate motion.

CONCLUSION

For the foregoing reasons, Complaint Counsel's motion for reconsideration, disguised as a motion for protective order or for clarification, should be denied. Furthermore, Complaint Counsel should be directed to immediately respond any outstanding discovery requests.

Dated 15 November 2004.



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Counsel for Respondent Daniel B. Mowrey

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT DANIEL B. MOWREY'S RESPONSE TO COMPLAINT COUNSEL'S MOTION FOR PROTECTIVE ORDER TO LIMIT RESPONDENTS' DISCOVERY OR, IN THE ALTERNATIVE, TO CLARIFY SCHEDULING ORDER** was provided to the following this 15th day of November, 2004 as follows:

(1) the original and two (2) paper copies sent via UPS overnight delivery, and one (1) electronic copy via email attachment in Adobe® ".pdf" format, to: Donald S. Clark, Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room H-159, Washington, D.C. 20580.

(2) two (2) paper copies sent via UPS overnight delivery, and a copy via facsimile, to: The Honorable Stephen J. McGuire, Chief Administrative Law Judge, 600 Pennsylvania Avenue, N.W., Room H-104, Washington, D.C. 20580, facsimile no. (202) 326-2427.

(3) 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 facsimile and 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, facsimile no. (202) 326-2558.

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

(5) 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.

(6) One (1) copy via United States Postal Service to Jeffrey D. Feldman FELDMANGALE, P.A. Miami Center - 19th Floor 201 S. Biscayne Boulevard, Miami, FL 33131, Counsel for Respondents A. G. Waterhouse, L.L. C., Klein-Becker, L.L. C., Nutrasport, L.L. C., Sovage, Dermalogic Laboratories, L.L. C., and BAN, L.L. C.

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

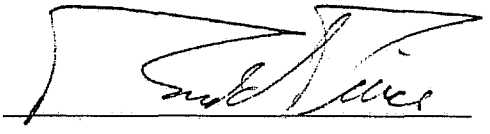

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EXHIBIT A

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.	)	

PROPOSED SCHEDULING ORDER

September 8, 2004	-	Complaint Counsel provides preliminary witness list (not including experts) with description of proposed testimony.
September 22, 2004	-	Respondents provide preliminary witness lists (not including experts) with description of proposed testimony.
September 29, 2004	-	Deadline for issuing document requests, requests for admission, interrogatories, and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
October 6, 2004	-	Complaint Counsel provides expert witness list.
October 13, 2004	-	Respondents provide expert witness list.
October 20, 2004	-	Complaint Counsel provides expert witness reports.
October 27, 2004	-	Respondents provide expert witness reports.

4. All pleadings that cite to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

5. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off, that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 5 days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute.

6. The parties are limited to a total of 50 document requests, 50 interrogatories, and 50 requests for admissions, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Additional discovery may be permitted only for good cause upon application to and approval by the Administrative Law Judge. Responses to document requests, interrogatories, and requests for admission shall be due within 20 days of service. Objections to document requests, interrogatories, and requests for admission shall be due within 10 days of service.

7. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition.

8. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. Counsel scheduling depositions shall immediately notify all other counsel that a deposition has been scheduled.

Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within five business days of receiving the documents.

9. The preliminary and final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause.

10. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by order of the Administrative Law Judge upon a showing of good cause.

EXHIBIT B

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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;	Docket No. 9318
DENNIS GAY;	
DANIEL B. MOWREY d/b/a AMERICAN PHYTOTHERAPY RESEARCH LABORATORY;	
and MITCHELL K. FRIEDLANDER,	
Respondents.	

Tuesday, August 10, 2004

Room 532
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

The above-entitled matter came on for prehearing conference, pursuant to notice, at 11:32 a.m.

BEFORE THE HONORABLE STEPHEN J. McGUIRE

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

MS. KAPIN: It seemed to me also, Your Honor, to be inconsistent, and I was wondering if there was something I didn't understand as to what --

JUDGE McGUIRE: All right. We'll take a look at that, and if it is in fact inconsistent, we'll -- are you proposing then, Mr. Feldman, that paragraph 5 just be deleted in its entirety or just the one --

MR. FELDMAN: I think so, Judge, because what paragraph 5 says is that you'll serve subpoenas and discovery requests sufficiently in advance of discovery cutoff, but you've set a deadline for the last day that you could propound written discovery, so it seems almost superfluous.

JUDGE McGUIRE: All right. I'll take a look at that.

MR. FELDMAN: In item 6, we have -- Your Honor proposes a cutoff of 50 requests, RFPs and interrogatories.

JUDGE McGUIRE: Yes.

MR. FELDMAN: And what I was -- I don't want to horse-trade with the court, but I was going to ask the court if it would give us a little bit more leeway with that because of the number of respondents that we're dealing with.

JUDGE McGUIRE: What are you seeking?

MR. FELDMAN: I was going to say 75.

JUDGE McGUIRE: Ms. Kapin, any objection?

MS. KAPIN: Your Honor, I have concerns about that.

First of all, they have all those respondents. I'm not sure -- and I would ask you, Your Honor, do they each have 50?

If that is the case, it seems to me they have a lot of document requests in their quiver.

JUDGE McGUIRE: That's going to be a problem.

MR. FELDMAN: I actually was interpreting this to mean that you were giving us the sides.

JUDGE McGUIRE: Yes. And that's how this order is intended.

So would you -- I could -- would you have any opposition if that's what we intend and what we're going to be -- he's asking for 75 per side.

Do you have any problem with that, Ms. Kapin?

MS. KAPIN: I still think, in light of the very broad document requests that have been made and also the fact that counsel would like to extend these discovery deadlines, frankly, Your Honor, I'm just concerned about being so mowed under by a lot of discovery that we're not able to turn our attention to the nuts and bolts of this case.

JUDGE McGUIRE: I believe as well that the rules have been interpreted in the past to confine it to that number per side, so I think that's where we're going to keep it at, Mr. Feldman.

MR. FELDMAN: Judge, may I just say -- and I think Mr. Friedlander may have a different feeling on this issue than I do -- but the commission brought in the respondents that they wanted to bring in. The rules do give each respondent certain rights as it relates to discovery.

The only rule that -- I believe I'm correct on this -- that has limitation is the rule dealing with interrogatories. I think it's 25 per side. There is no limit on requests for admissions and no limits on requests for production. And it should not -- you know, a party should not be at a disadvantage in what it can propound.

JUDGE McGUIRE: No. I agree. And each party should have some limit.

This paragraph was taken from a prior order, which typically contemplates a respondent.

What do you -- or do you propose something on that, Mr. Friedlander?

MR. FRIEDLANDER: Well, as Mr. Feldman just explained, on interrogatories I think the limit for me

is 25 and no limit on other forms of written discovery. And I'd like to reserve all my rights --

JUDGE McGUIRE: Well, you're -- that's not a problem.

All right. We'll take a look at that one as well and we'll determine how to account for the several respondents in this proceeding.

MR. FELDMAN: And then I had one other issue, Judge, and I think this is more logistical.

In item 17, you anticipate that the respondent will mark the exhibits "R-", but we have multiple respondents in the case, so we'd just need to come up with a different protocol for that.

JUDGE McGUIRE: Yeah. I'm perfectly open on that. We could mark it RXA, RXB, like RXA 1, RXB 1, whatever is easiest for the parties.

MR. FELDMAN: We'll take that up as part of our --

JUDGE McGUIRE: You can take that up, and at the time we start trial, you can advise the court how you wish to proceed on that. I just think we should --

MR. FELDMAN: That's it.

JUDGE McGUIRE: -- we should have the clear RX for the respondents, and then how you further subset it is fine with me.