



The August 9, 2005 Order held, “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 . . . .” *In re Basic Research*, 2005 FTC LEXIS 121, \*3 (August 9, 2005) (“August 9, 2005 Order”) (quoting *In re Basic Research*, 2005 FTC LEXIS 8, \*2-3 (Jan. 19, 2005) (citing *Dura Lube*, 1999 FTC LEXIS 254, at \*6-7; *In re Shell Oil Refinery*, 1992 U.S. Dist. LEXIS 4896, at \*2 (E.D. La. 1992))). The August 9, 2005 Order compelled Mowrey, as a testifying expert, to “produce all documents that Dr. Mowrey reviewed in the course of forming his opinion on the subject on which he is expected to testify - even if such documents are covered by the attorney-client privilege or work product doctrine.” August 9, 2005 Order, 2005 FTC LEXIS 121, \*4 (quoting *In re Pioneer Hi-Bred Int’l Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (“litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed”); *TV-3, Inc. v. Royal Ins. Co. of Am.*, 194 F.R.D. 585, 589 (S.D. Miss. 2000) (correspondence between counsel and expert witness is discoverable)).

The August 9, 2005 Order further held that “Respondent must produce all documents relating to his capacity as an expert witness and studies referenced in his expert report” and ordered Respondent “to produce all documents that relate to his capacity as an expert witness, including communications with his attorney, the other Respondents, and the other Respondents’ attorneys.” August 9, 2005 Order, 2005 FTC LEXIS 121, \*6. However, the August 9, 2005 Order explicitly stated, “[t]o the extent that Complaint Counsel’s motion is aimed at compelling production of documents from Dr. Mowrey that do not relate to his capacity as an expert or to the formation of his expert opinion in this case, Complaint Counsel’s motion is DENIED IN PART.” *Id.* at \*6-7.

### III.

At issue in the instant motion is whether Respondent Mowrey has fully complied with the August 9, 2005 Order. Complaint Counsel asserts that Dr. Mowrey persists in refusing to produce certain documents relating to his capacity as a testifying expert witness. Complaint Counsel requests that Dr. Mowrey be ordered to produce to the Court, for *in camera* review, the expert-related documentary evidence still withheld from discovery. Further, Complaint Counsel seeks an Order imposing sanctions for Mowrey’s refusal to comply with the Court’s expert discovery orders.

Respondent asserts that Dr. Mowrey has produced all documents he created, reviewed, considered or relied upon in his capacity as an expert witness. Respondent’s opposition is supported by the sworn Declaration of Dr. Daniel B. Mowrey which provides information about the withheld documents under penalty of perjury. (“Mowrey Declaration”). For each one of the withheld documents, Mowrey provides additional information about the withheld document and avers that he did not “read, consider, review or rely upon [the] document[] in [his] capacity as an

expert witness, or in connection with [his] expert opinion/report.” Respondent further asserts that because Mowrey has complied with the August 9, 2005 Order, judicial *in camera* review is unnecessary and sanctions are inappropriate.

#### IV.


The sworn Mowrey Declaration certifies that the withheld documents do not relate to Mowrey’s capacity as an expert witness and that Mowrey did not read, consider, review or rely upon the withheld documents in his capacity as an expert witness, or in connection with his expert opinion or report. Accepting these declarations as true, Mowrey has thus complied with the requirements of the August 9, 2005 Order.

Complaint Counsel requests that the Court require Respondent Mowrey to produce the challenged documents for purposes of judicial *in camera* inspection. Inspection of the withheld documents would not enable the Court to determine whether Mowrey reviewed, consulted, or examined such documents in connection with forming his expert opinion. Accordingly, this request for relief is **DENIED**.

Complaint Counsel also requests that the Court impose sanctions for Mowrey’s continued refusal to produce documents. Because Mowrey has complied with the August 9, 2005 Order, this request for relief is **DENIED**.

Complaint Counsel may still re-open the deposition of Mowrey, in a manner consistent with the August 9, 2005 Order. The deposition shall be completed by December 9, 2005.

ORDERED:

  
Stephen J. McGuire  
Chief Administrative Law Judge

Date: November 22, 2005