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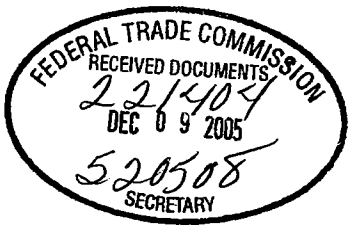
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.



In the Matter of

BASIC RESEARCH, LLC
A.G. WATERHOUSE, LLC
KLEIN-BECKER USA, LLC
NUTRASPORT, LLC
SOVAGE DERMALOGIC LABORATORIES, LLC
BAN LLC d/b/a BASIC RESEARCH LLC
OLD BASIC RESEARCH, LLC
BASIC RESEARCH, A.G. WATERHOUSE, KLEIN-BECKER USA, NUTRA SPORT, and SOVAGE DERMALOGIC LABORATORIES
DENNIS GAY
DANIEL B. MOWREY d/b/a AMERICAN PHYTOTHERAPY RESEARCH LABORATORY, and
MITCHELL K. FRIEDLANDER,
Respondents

PUBLIC

Docket No. 9318

RESPONDENT MITCHELL FRIEDLANDER'S MOTION *IN LIMINE* TO EXCLUDE A WITNESS OR, ALTERNATIVELY, TO INCLUDE WITNESSES AND RE-OPEN DISCOVERY FOR A LIMITED PURPOSE,

OR, IN THE ALTERNATIVE,

FOR RECONSIDERATION, CLARIFICATION OR CERTIFICATION OF ORDERS DENYING THE EXCLUSION OF A WITNESS, SANCTIONS, AND LEAVE TO ADD A WITNESS AND TO REOPEN DISCOVERY FOR LIMITED PURPOSE

Respondent Mitchell K. Friedlander ("Respondent") hereby files a *Motion In Limine to Exclude a Witness or, Alternatively, to Include Witnesses and Re-Open Discovery for a Limited Purpose, or, In the Alternative, for Reconsideration, Clarification or Certification of Orders Denying the Exclusion of a Witness, Sanctions, and Leave to Add a Witness and Leave to Reopen Discovery for a Limited Purpose* (the "Motion"). The Orders that form the subject of

Respondent's alternative request for reconsideration, clarification or certification to the Commission are his Honor's *Order on Motions to Exclude a Witness, for Sanctions, or for Leave to Reopen Discovery for a Limited Purpose* ("Order on Motion to Exclude and for Sanctions"), dated November 22, 2005, and his *Order Denying Respondents' Motion for Leave to Add an Expert Witness and to Reopen Discovery for a Limited Purpose* ("Order on Motion for Leave"), also dated November 22, 2005 (collectively, the "Orders").[1]

A motion *in limine* to exclude and include witness testimony is appropriate in advance of an enforcement hearing.[2] It also is an appropriate procedure to exhaust administrative remedies, so as to obtain discovery into alleged agency wrongdoing that could affect the outcome of the hearing, so as to obtain a full record of the alleged wrongdoing, to protect a respondent's right to a fair hearing, and to prevent the government from targeting a particular defendant or industry.[3]

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[1] Respondent incorporates by this reference his and the other *Respondents' Motion for Reconsideration or Clarification of Orders Denying Motions to Exclude a Witness for Sanctions, or for Leave to Reopen Discovery for a Limited Purpose; and Motion for Leave to Add an Expert Witness and to Reopen Discovery for a Limited Purpose*, which, among other things, shows that good cause exists for reconsideration or clarification. *First*, his Honor's Orders appear to rely upon an erroneous statement of fact: that all six of the fraudulent studies Dr. Stephen B. Heymsfield co-authored with Dr. John Darsee were withdrawn and that Dr. Heymsfield truthfully testified about his participation in the publication and withdrawal of those studies, in addition to the fact that other fraudulent studies were not disclosed by Complaint Counsel and Dr. Heymsfield in violation of his Honor's August 11, 2004 Scheduling Order. *Second*, his Honor's Orders fail to address one of the main arguments contained in Respondents' motions and thus require clarification: that the nondisclosure of publications and Dr. Heymsfield's repeated false and evasive testimony undermine his credibility, (a) are relevant to the issues in dispute and thus are proper subjects of inquiry at trial, and (b) have interfered with Respondents' right and ability to cross-examine Dr. Heymsfield in discovery, and thus reopening discovery for a limited purpose is required.

[2] To the extent any deadlines pertaining to the originally scheduled hearing in this action purport to set a prior deadline for a motion *in limine*, which is based in part on events transpiring after the deadline, including the re-noticed deposition of Dr. Heymsfield and the fortuitous discovery of his violation of the Scheduling Order and Complaint Counsel's complicity, Respondent Friedlander requests leave to file this motion *in limine* or, in the alternative, for reconsideration, clarification or certification to the Commission.

[3] *See Gulf Oil Corp. v. U.S. Dept. of Energy*, 663 F.2d 296, 297, 312 (D.C. Cir. 1981) (affirming jurisdiction in district court to "expand discovery into an alleged pattern of wrongdoing by agency officials that could affect the outcome of the proceeding," so as to preserve a full record in the administrative action, for purposes of both the administrative action and any subsequent appeal, based on totality of circumstances).

Motions for reconsideration are appropriate "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." *In re Rambus*, Docket 9303, 2003 FTC LEXIS 49 (March 26, 2003) (citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002)); *In re Rambus*, Docket 9302 (May 29, 2003). These grounds support reconsideration here, particularly given his Honor's apparent denial – *without consideration* – of Respondent's *Motion to Exclude a Witness, for Sanctions and to Depose Complaint Counsel* (the "Motion for Sanctions"), which shows the clear error and manifest injustice of the Court's Orders.

Alternatively, certification of this Motion and his Honor's Orders pursuant to Rule of Practice 3.22, or authorization of an interlocutory appeal pursuant to Rule of Practice 3.23(b), are required because Respondent's Motion touches on administrative discretion, is based on constitutional principles, and requires the interpretation of the Commission's obligations and the propriety of expert witness testimony under the Federal Trade Commission ("FTC") Act, the Administrative Procedures Act ("APA"), and the United States Constitution, including the Commission's obligations in discovery to preserve a full record for appeal. *See In the Matter of Herbert R. Gibson, Sr., et al.*, 90 F.T.C. 275, 275 (Oct. 12, 1977) ("It is well established that an administrative law judge lacks authority to rule on and must certify . . . motions containing questions pertaining to the Commission's exercise of administrative discretion."); *In the Matter of Boise Cascade Corp.*, 97 F.T.C. 246 (March 27, 1981) ("The administrative law judge . . . issued orders rejecting several of the grounds asserted in the motion and certif[ied] to the Commission.").

Even if the issues raised do not require certification to the Commission, interlocutory review by the Commission is warranted. *See* 16 C.F.R. §3.23(b) (interlocutory review is appropriate when (1) a pre-trial ruling involves a controlling question of law or policy as to which there exists a substantial ground for a difference of opinion, and (2) either (i) an immediate appeal from the ruling may materially advance the ultimate termination of the litigation, or (ii) subsequent review of the ALJ's ruling will be an inadequate remedy). The controlling question of law or policy, here, concerns the obligations of Complaint Counsel and propriety of expert witness testimony under the FTC Act, the APA and the U.S. Constitution during an enforcement proceeding, including the obligation to uphold and protect a respondent's First and Fifth Amendment rights, and to ensure a fair hearing. In addition to not considering the separate grounds for and arguments in Respondent's Motion for Sanctions, His Honor's Orders failed to consider three facts that make this case different from general civil litigation and other enforcement proceedings:

1. Complaint Counsel represent both the government and the people of the United States, and therefore they are held to **higher standards**.[4]

2. When representing the government and the people of the United States, Complaint Counsel owe a **duty to adduce the truth** and uphold the fact-finding process, and these obligations temper and in certain cases override whatever interest Complaint Counsel might otherwise have as a zealous advocate in a case.[5]

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[4] *See Berger v. United States*, 295 U.S. 78, 88 (1935) (government lawyers are representatives not of "an ordinary party to a controversy, but of a sovereignty" and therefore are held to higher standards than private lawyers); *Freeport-McMoRan Oil & Gas v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992); *Gray Panthrs v. Schweiker*, 716 F.2d 23, 33 (D.R. Cir. 1983) ("There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large."); *Cobell v. Babbitt*, 1999 U.S. Dist. LEXIS 20918 (1999) ("The United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in federal court"); *U.S. v. Boyd*, 833 F. Supp. 1277, 1351 (N.D. Ill. 1993) ("That the prosecution, as the representative of the sovereign, holds a responsibility above that of a private advocate should be of no surprise to any Assistant United States Attorney.").

[5] *See U.S. v. Bagley*, 473 U.S. 667, 696 (1985) ("The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the

3. At issue is a fundamental liberty – **freedom of speech** – and the government's effort to (a) obtain penalties, such as a broad twenty-year "fencing-in" provision, that are *unavailable* in a civil action redressing the same alleged wrongdoing, under (b) a theory of liability and a measure of proof that are *unavailable* to the complaining party in a civil action.[6]

These circumstances all weigh in favor of granting Respondent's Motion, issuing a new order vacating his Honor's Orders and granting Respondents' motions for sanctions, in whole or in part, or certifying this Motion to the Commission or granting an interlocutory appeal of his Honor's Orders. Such relief will materially advance the ultimate termination of this proceeding. In contrast, subsequent review his Honor's Orders will be an inadequate remedy, because it will risk an unconstitutional deprivation of rights and an unfair administrative hearing.

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same time, as a representative of the state, he *must place foremost in his hierarchy of interests the determination of truth.*") (Marshall, J., dissenting) (emphasis added); *Berger*, 295 U.S. at 88 (The United States Attorney's interest when prosecuting a case on behalf of the government as a sovereign "*is not that it shall win a case, but that justice shall be done.*") (emphasis added); *U.S. v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998) ("A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. *But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused.*") (emphasis added); *Boyd*, 833 F. Supp. at 1351 (the obligation of the prosecution, "as the representative of the sovereign," "is not merely to obtain a conviction, *but rather to ensure that justice is served.*") (emphasis added).

[6] *See Thomas Medical Co., Inc. v. Ciba-Geigy Corp.*, 643 F. Supp. 1190, 1197 (S.D.N.Y. 1986) (quoting *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984), "plaintiff bears the burden of showing that the challenged advertisement is false and misleading . . . , not merely that it is unsubstantiated . . . .") (citations omitted); *U-Haul Intern., Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1248 (D. Ariz. 1981) (quoting *Toro Company v. Textron, Inc.*, 499 F. Supp. 241, 253 (D. Del. 1980), "I cannot accept Toro's argument that it is entitled to prevail on a claim under Section 43(a) simply by showing that a defendant's advertising claim is unsubstantiated. The plain language of Section 43(a), which prohibits false rather than unsubstantiated representations, requires that a plaintiff establish not merely that the defendant's claims lack substantiation but also that it is false or deceptive."); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990) ("The Second Circuit, which had previously ruled that the FTC could find a violation of Sections 5 and 12 based upon the inadequate substantiation of a defendant's advertising claim regarding an OTC drug, . . . held that a Lanham Act plaintiff bears the burden of showing that a challenged advertisement is false or misleading, not merely that it is unsubstantiated by acceptable tests or other proof. *Procter & Gamble Co.*, 747 F.2d at 119 (citations omitted). We agree with the holdings of the Second Circuit in *Procter & Gamble* and of Judge Stapleton, then sitting on the district court, in Toro, supra. These decisions are not only well-reasoned, they are consistent with this court's long-established construction of the Lanham Act in general. *See Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir.1958) (noting that the plaintiff bears the burden of persuasion in Lanham Act cases).").

I. RESPONDENT'S FIRST AMENDMENT RIGHTS ARE INALIENABLE AND CANNOT BE SUPPRESSED BY RULE, PROCESS OR ACTION

Freedom of speech is an inalienable right guaranteed by the First Amendment of the United States Constitution. The government shall pass no law, make no rule, or take any action abridging freedom of speech. *See* U.S. Const., Amend. I; *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which . . . power has been applied but, whatever the form, whether such power has in fact been exercised."); *CPC Intern., Inc. v. Skippy Inc.*, 214 F.3d 456, 461 (4th Cir. 2000) ("The First Amendment prohibits not only statutory abridgment but also judicial action that restrains free speech."); *New Orleans S.S. Ass'n v. General Longshore Workers*, 626 F.2d 455, 462 (5th Cir. 1980) (The First Amendment "prohibits not only statutory abridgment but all governmental action including judicial action that restrains free expression."); *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F.2d 850, 851 (D.C. Cir. 1932) ("[F]reedom of speech and press cannot be infringed by legislative, executive, or judicial action, and that the constitutional guaranty should be given liberal and comprehensive construction.").

The First Amendment prohibits the government from suppressing protected speech. Whether indecent or parody, commercial or political, the government simply is without power to suppress protected speech through the adoption or application of any law, rule or process, and must permit protected speech and cure any perceived potential for confusion with more speech solutions, not enforcement actions and remedial orders unavailable in a civil action. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502-03 (1996); *Peel v. Attorney Registration and Disciplinary Commission of Ill.*, 496 U.S. 91, 107-08 (1990); *Zauderer v. Office of*

Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 646 (1985); *In re RMJ*, 455 U.S. 191, 203 (1982) (protected speech may be regulated, but not suppressed).[7]

The First Amendment puts the burden on the government to prove that it is not suppressing protected speech. The government must prove that the speech either is not protected or does not comply with a constitutional rule or process of government. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993) ("'The party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'") (quoting *Bolger*, 463 U.S. at 71, n. 20). In the context of commercial speech, the government's burden is generally set forth in *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557, 569-70 (1980) ("*Central Hudson*").

In some cases, the government can never meet its burden. A statute, rule or process is facially invalid and therefore any prosecution thereunder would be unconstitutional. For example, in *Freedman v. Maryland*, 380 U.S. 51 (1965), the Supreme Court reversed a conviction under "a noncriminal process which require[d] the prior submission of a film to a censor . . . ." *Id.* at 58. The argument adopted by the Supreme Court was that, because the

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[7] The Supreme Court has stressed "the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate 'commercial' information; the near impossibility of severing 'commercial' speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly." *44 Liquormart*, 517 U.S. at 520 (THOMAS, J., concurring in part and in judgment); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96-97 (1977); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364-65, 368-69, 374-75, 376-77 (1977); *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1979); *id.*, at 23-24 (BLACKMUN, J., for two Justices, concurring and dissenting in part); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) ("*Central Hudson*"); *id.*, at 566, n.9 (BLACKMAN, J., joined by BRENNAN, J., concurring in judgment); *id.*, at 581 (STEVENS, J., also joined by BRENNAN, J., concurring in judgment); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 79 (1983) (REHNQUIST, J., for two Justices, concurring in judgment); *Zauderer*, 471 U.S. at 646; *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421-22, n.17 (1993); *id.*, at 432 (BLACKMUN, J., concurring); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 437-39, and n. 1, 3, 4 (1993) (STEVENS, J., for two Justices, dissenting); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142-43 (1994); *Rubin v. Coors Brewing Co.*, 514, U.S. 476, 481-82 (1995); *id.* at 492-93, 494 (STEVENS, J., concurring in judgment); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 639-640, 644-45 (1995) (KENNEDY, J., for four Justices, dissenting)).

challenged process "operates in a statutory context in which *judicial review may be too little and too late*, the Maryland statute *lacks sufficient safeguards* for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion." *Id.* at 57 (emphasis added). The process was unconstitutional, not because it was a prior restraint, but because, "[u]nlike a prosecution for obscenity, a censorship proceeding *puts the initial burden on the exhibitor or distributor.* Because the censor's business is to censor, there inheres the danger that he may well be *less responsive than a court*—part of an independent branch of government—to the constitutionally protected interests in free expression." *Id.* at 57-58 (emphasis added). The Supreme Court's rational in *Freedman* applies to the Commission, who is in the business of prosecuting false advertising claims,[8] to the Commission's substantiation doctrine, which puts the initial burden on the advertiser to substantiate their claims, and to the enforcement process, where judicial review may be too little and too late for the persecuted advertiser.

In other cases, the government must meet a greater, more exacting burden because of an increased risk of suppression or an increased risk of disparate treatment among speakers under the challenged regulation. For example, the government bears a greater burden in prosecuting speech where, as here, the regulating body is non-elected officials acting without traditional

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[8] Commentators have recognized the legitimate concern that the Commission is predisposed to finding liability, because political factors may have motivated the charges, or simply because they already have identified claims as potentially wrongful, a view they are unlikely to change, which renders it highly unlikely that their perspective will reflect the perceptions of unbiased consumers in the marketplace. *See* Comment, *The Use and Reliability of Survey Evidence in Deceptive Advertising Cases,* 62 Or. L. Rev. 561, 572 (1983) ("since commissioners are highly trained attorneys with very specialized views of advertising, they lack the perspective to accurately identify the meaning given an advertisement by the general public"). This commentary about the Commission's inherent bias was plainly born out by the Commission's summary reversal, without hearing or discovery, of his Honor's order certifying the issue of Complaint Counsel's prior willful or, at a minimum, gross and callous public disclosure of clearly marked confidential and trade secret documents obtained through compelled disclosure under terms of confidentiality in violation his Honor's Protective Order, the Commission's Rules of Practice, and the FTC Act, itself.

safeguards of protected freedoms,[9] or is regulating speech with content-based bans or burdens,[10] or with vague deterrents that burden a broad range of expression by a large number of potential speakers.[11] In these circumstances, "neither the 'greater objectivity' nor the 'greater hardiness' of truthful, nonmisleading commercial speech justifies . . . added deference." *44 Liquormart,* 517 U.S. at 502 (Stevens, J., plurality opinion, joined by Kennedy, J., and Ginsburg, J.); *id.* at 518 (Thomas, J., concurring in part and in judgment); *id.* (Scalia, J., concurring in part and in judgment).

II. DR. HEYMSFIELD SHOULD BE EXCLUDED

There is a basic difference between Respondent's affirmative defenses and Complaint Counsel's case-in-chief. Respondent's defenses challenge the *subjective, expert-driven process* Complaint Counsel is using to regulate Respondent's speech, because it: (1) utilizes a general standard of liability without statutory authorization; (2) the Commission's vague standard

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[9] *See State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 417-18 (2003) ("Exacting appellate review" is required when traditional safeguards of liberties are missing); *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000) (deference to agency interpretation of enabling statute does not apply when interpretation is not product of notice-and-comment rulemaking, but is embodied in "policy statements, agency manuals, and enforcement guidelines"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-71 (1963) (administrative scheme identifying alleged obscene speech with vague notices was unconstitutional, because the implicit threat of prosecution chilled protected speech, even if indecent, without "procedures that will ensure against the curtailment of constitutionally protected expression").

[10] *See U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

[11] *See United States v. National Treasury Employees Union,* 513 U.S. 454, 466-68 (1995) ("*NTEU*") (holding "wholesale deterrent to a broad category of expression by a massive number of potential speakers" an unconstitutional burden on speech; the "[g]overnment's burden is greater with respect to [such] restriction on expression than with respect to an isolated disciplinary action."); *see also Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) ("The vagueness of regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) ("the absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.").

suppresses and unduly burdens protected commercial speech; and (3) there are far less restrictive and likely more effective ways to regulate commercial speech.[12] Complaint Counsel in contrast contends that Respondents are liable under the challenged process for allegedly implying subjective claims related to the efficacy of the advertised products, because *according to Complaint Counsel and their expert witness* the challenged claims lack "adequate substantiation." *See* Complaint ¶¶ 14-41.

A. The Government Cannot Avoid Its Obligations Under the FTC Act and U.S. Constitution By Proffering Expert Testimony.

The Commission's obligations in regulating commercial speech do not vary case-by-case, but have been fixed by Congress and the U.S. Constitution. Under the FTC Act, the Commission must engage in formal rulemaking, with notice and comment, if it wants to hold advertisers engaged in speech protected by the First Amendment liable for not possessing adequate substantiation.[13]

1. The Commission's Prior Substantiation Requirement.

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[12] Specifically, Respondents contend that the non-statutory requirement that they had to possess "competent and reliable scientific evidence" before allegedly making the implied product claims of "rapid" and/or "substantial" weight or fat loss violates the FTC Act, the APA, the Due Process Clause of the Fifth Amendment, and the Free Speech Clause of the First Amendment, including without limitation (a) the prohibition against the FTC's use of vague, general standards of liability, (b) the FTC's obligation to regulate protected commercial speech with objective, specifically defined rules, even if case specific, *before* threatening onerous litigation, and (c) the FTC's obligation at the outset of an enforcement action to provide fair notice of the factual allegations and legal grounds of their charges, and the FTC's obligation during an enforcement action to objectively define with extrinsic evidence of consumer perception any subjective, product claims that are allegedly implied by the challenged advertisements.

[13] *See* FTC's November 30, 2000 denial of the December 20, 1999 Petition for Rulemaking filed on behalf of Dr. Julian Whitaker *et al.* at 2 ("With respect to advertising, [FTC Act §§ 5 and 12] impose two basic obligations: 1) advertising must be truthful and not misleading; and 2) before disseminating an ad, advertisers must have adequate substantiation for objective product claims."); FTC's April 1, 2004 denial of the April 16, 2003 Petition for Rulemaking filed on behalf of The First Amendment Health Freedom Association at 2 ("Advertisers are prohibited from making false or misleading claims for [products] and also must have adequate substantiation for objective product claims before the claims are disseminated.").

The Commission has imposed a non-statutory barrier to commercial speech. In contrast to a statutory claim of false advertising, where Complaint Counsel has to *prove a material risk of confusion*,[14] a non-statutory claim of inadequate substantiation imposes liability based on a perceived risk of *potential confusion* arising out of *the mere evaluation of scientific evidence.*[15] In other words, the Commission's theory of liability, itself, is a direct regulation on protected commercial speech. *Brief of Federal Trade Commission as Amicus Curiae* in *Peel v. Attorney Registration & Disciplinary Commission of Ill.*, 496 U.S. 91 (1990) (admitting that even if advertised claims have the potential to mislead, it has "constitutional protection.").

The Commission has adopted a vague, minimum standard for dietary supplement and weight-loss claims. "For claims related to health and safety, including the health and safety benefits of a dietary supplement, the Commission has determined that these [*Pfizer*] factors translate to a substantiation standard of 'competent and reliable scientific evidence.'" *Complaint Counsel's Memorandum in Opposition to Respondents' Motion for Partial Summary Decision Adverse to Petition on Validity of Petitioner's 'Competent and Reliable Scientific Evidence' Standard, or In the Alternative, for Certification to the Commission* at 8.

Of course, it is unclear how much substantiation the Commission's standard requires, because the Commission refuses to bind itself to any standard or protocol, other than to render an

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[14] *See* 15 U.S.C. § 55(a)(1) (2004) ("false advertisement" means a false or misleading representation of material fact, or omission of material fact necessary to make advertisement truthful or non-misleading); FTC's *Policy Statement on Deception* appended to *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984) (cause of action for deceptive advertising has three elements: (1) a representation, omission or practice that is (2) likely to mislead consumers acting reasonably under the circumstances; and (3) the representation, omission or practice must be material to consumers' purchasing decisions).

[15] *See In re Pfizer, Inc.*, 81 F.T.C. 23, 62, 67 (1972) (even if claim is truthful and non-misleading, liability attaches if claim lacked "reasonable basis," not because Complaint Counsel has proven a material risk of confusion under Section 12, but because it has demonstrated a perceived "unfair" risk of potential confusion under Section 5 based on the Commission's evaluation of the so-called *Pfizer* factors).

ad and *post hoc* decision at the end of each enforcement action. Thus, advertisers simply have to guess in each case. For example, to qualify as "competent and reliable scientific evidence" in this case, Complaint Counsel's expert witnesses have tied their testimony to a very high standard. They have opined that at least "17 to 18" out of "20 scientists" would have to agree "that the study was of high quality,"[16] reflected "the strongest possible evidence collected using the best possible methods to answer yes or no or true or false,"[17] and its "results [have been] reproduced by other scientists," *i.e.,* a "competent" study cannot be deemed "reliable" unless its results "can be shown to be true across studies, not just within a single study"; reliability requires, or might require, "something more in the framework of a number of studies."[18]

Of course, "determining whether something is competent and reliable" is an "exercise of judgment"; "equally qualified people sometimes have a different view of medical data"; "there are medical modalities used commonly on which there is not a consensus of highly educated, qualified medical practitioners."[19] Thus, under the Commission's vague substantiation standard, which the Commission refuses to define by substantive, interpretive or procedure rule, so long as "experts" in the field are *reasonably divided* about the science underlying the benefits of a dietary supplement, **the Commission can suppress commercial speech on one side of the debate.**[20]

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[16] Deposition Transcript of Robert H. Eckel, M.D. ("Eckel Dep.") at 199:2-22, Exhibit 25 to *Respondents' Memorandum in Opposition to Respondents' Motion for Partial Summary Decision Adverse to Petition on Validity of Petitioner's 'Competent and Reliable Scientific Evidence' Standard, or In the Alternative, for Certification to the Commission* ("Respondents' MSJ").

[17] Deposition of Dr. Stephen B. Heymsfield ("Heymsfield Dep.") at 39:7-18, Respondents' MSJ, Ex. 26.

[18] Heymsfield Dep. at at 72:23-73:2, 170:8-10, Respondents' MSJ, Ex. 26.

[19] Eckel Dep. at 64:7-18, 66:18-23, 68:12-17, Respondents' MSJ, Ex. 25.

[20] Of course, the Commission can never be sure whether they have suppressed the correct side of the debate, because even when there is a consensus among scientists, it would not mean that a product claim is false or misleading. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1099 (9th Cir. 1994) ("Galileo's theories were contrary to

Thus, even if a product claim is truthful and non-misleading, the dietary supplement advertiser cannot lawfully speak if *reasonable minds* can differ about *the science* underlying the claim.

In *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the Supreme Court plainly rejected this precise type of restriction on commercial speech, holding:

> "There is, of course, an alternative to [the government's] highly paternalistic approach [of suppressing product information]. **That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.**"

Id. at 371 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (emphasis added)).

2. Dr. Heymsfield's Proffered Opinion Is Not Relevant or Admissible to Justify the Commission's Substantiation Requirement.

Under its quasi-judicial power, the Commission cannot defend its requirement that dietary supplement advertisers must possess "competent and reliable scientific evidence" before engaging in otherwise protected commercial speech on a theory that product claims which lack this level of substantiation are false or misleading. While agencies sometime have discretion to proceed "by general rule or by individual, *ad hoc* litigation," *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) ("*Bell Aerospace*"), this is not one of those occasions:

- The Commission has no authority to adopt general substantive rules with respect to "acts or practices which are unfair or deceptive . . . . ." 15 U.S.C. § 57a(a)(1); *Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 662 (2d Cir. 1979).
- The Commission already recognizes that it has no authority to interpret Section 5 of the FTC Act as prohibiting protected commercial speech. *See In re Rodale Press, Inc.*, 71 F.T.C. 1184 (1967) ("We bow to no one in our concern and responsibility to protect the public from any invasion of its Constitutional rights,

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then-contemporary scientific standards, but we treat as a given that these theories were as essentially 'true' when he explained them as they surely are today.").

particularly those associated with the rights of freedom of speech and expression.").

- The Commission cannot use its quasi-judicial authority to circumvent these limitations on its rulemaking authority. *See N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969) (plurality opinion); *Cities of Anaheim, Riverside, Banning, Colton & Azusa, Cal. v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984). Rather, outside its notice and comment procedures, the Commission may only adopt rules that are consistent with these limitations, resolve a particular case, and "'generally provide a guide to action that the agency may be expected to take in future cases.'" *Bell Aerospace,* 416 U.S. at 294 (citation omitted).

- For example, the Commission cannot adopt rules by adjudication when it "would amount to an abuse of discretion or a violation of the Act . . . ." *Bell Aerospace,* 416 U.S. at 294; *Montgomery Ward & Co., Inc. v. FTC,* 691 F.2d 1322, 1328 (9th Cir. 1982). When Congress limited the Commission's rulemaking authority after that authority was identified by the judiciary, the FTC retained power to adopt rules through adjudication only in three situations, none of which are presented in this case: (a) unforeseeable problems; (b) problems over which the agency does not have sufficient experience to engage in rulemaking; and (c) where it would not be feasible to address a problem with a substantive, interpretative or procedural rule. *See Bell Aerospace,* 416 U.S. at 292-93 ("'The function of filling in the interstices of the [enabling] Act should be performed, as much as possible, through [the agency's] quasi-legislative promulgation of rules . . . .'") (citation omitted).

- The Commission cannot simply ignore Congressional directives to establish "a rational Federal framework" governing dietary supplement and weight-loss claims that "supersede[s] the current *ad hoc*, patchwork regulatory policy on dietary supplements." 21 U.S.C. § 321, Congressional Finding No. 15(B); *Whitaker v. Thompson*, 239 F. Supp. 2d 43, 46 (D.D.C. 2003).

If the FTC is going to regulate commercial speech by overlaying a substantiation requirement on Section 5 of the FTC Act, the Commission is obligated to formally adopt a rule, whether substantive, interpretative or procedural, that defines unprotected speech under the FTC Act *before* prosecuting advertisers under that requirement. *See Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002) ("*if the Government could achieve its interests in a manner that does not restrict free speech, or that restricts less speech, it must do so.*") (emphasis

added); *cf. Miller v. California*, 413 U.S. 15, 24 (1973) ("We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression [including obscenity]. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed."); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1117 (D. Utah 1985) (striking regulation of indecent but otherwise protected speech that vaguely prescribed material presented in a "patently offensive way for the time, place, manner and context in which the material is presented," because statute did not define the "particular time, place, manner, or context" in which the speech would be deemed offensive and unprotected).

The FTC cannot use a vague, non-statutory requirement such as "competent and reliable scientific evidence" to regulate commercial speech, except in a remedial order tailored to (a) a specific wrongdoer to (b) prevent specific future wrongdoing. *See American Home Products Corp. v. FTC,* 695 F.2d 681, 710-11 (3d Cir. 1983) (striking broad "fencing-in" provision that required advertiser to possess "competent and reliable scientific evidence" for all future non-establishment claims, because requirement was not reasonably necessary to prevent wrongdoing found to exist); *Standard Oil Co. of California v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978) (FTC's blanket prohibition in remedial order held invalid because "first amendment considerations dictate that the Commission exercise restraint in formulating remedial orders"; they must bear a "reasonable relation to the unlawful practices found to exist.").

After *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374 (1965), circuit courts, including in the very cases relied upon by Complaint Counsel in this case, have only approved the requirement of

"competent and reliable scientific evidence" in remedial orders, when reasonably necessary to prevent past wrongs from re-occurring, because in that context the FTC is obligated to pre-screen an advertisement to cure vagueness problems and prevent the unlawful suppression of protected speech.[21] *See Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1252 (2nd Cir. 1979) ("we hold only that because the FTC here imposes the requirement of prior substantiation as a reasonable remedy for past violations of the Act, there is no unconstitutional prior restraint of petitioners' protected speech."). The Commission simply ignores its statutory and constitutional obligations and stands its own case law on its head by trying to transform, outside the context of statutory rulemaking, a vague, "fencing-in" requirement approved in the context of tailored remedial orders, ***into a general, non-statutory standard of liability applicable to all dietary supplement advertisers, without any obligation to prescreen an advertisement or otherwise safeguard First Amendment rights, which utterly undermines any proffered justification for the challenged regulation.*** *See Zauderer*, 471 U.S. at 668 (Brennan, J., concurring and dissenting in part) (the inability of businesses to require the government to pre-prescreen their ads or provide sufficiently detailed explanation, "wholly undermines one of the basic justifications for allowing punishment for violations of imprecise commercial regulations—that a businessperson can clarify the meaning of an arguably vague regulation by consulting with government administrators."). ***Put simply, the Commission has already unlawfully "fenced-in" the entire dietary supplement industry!***

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[21] *See, e.g., Colgate-Palmolive,* 380 U.S. at 394 (recognizing prescreening obligation in remedial orders); *Thompson Medical Co. v. FTC*, 791 F.2d 189, 194-96 (D.C. Cir. 1986) (affirming fencing-in provision in remedial order as not overly broad); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1156-57 (9th Cir. 1984) (same); *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 560 (2d Cir. 1984) (same).

Complaint Counsel cannot justify its prior substantiation requirement, and avoid its obligations under the FTC Act and First Amendment, by proffering an unscrupulous expert willing to pin his testimony to Complaint Counsel's non-statutory legal conclusion that Respondents' claim substantiation does not constitute "competent and reliable scientific evidence."[22] Indeed, even if Dr. Heymsfield had something to offer other than being a shill for Complaint Counsel, which is suspect, his proffered opinion would remain irrelevant and inadmissible. *See U.S. v. Williams*, 343 F.3d 423, 435 (5th Cir. 2003) ("Rule 704(a) 'does not allow a witness to give legal conclusions.'") (citation omitted); *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir.) *cert. denied* 513 U.S. 1111 (1994) ("Although an expert's opinion may 'embrace[ ] an ultimate issue to be decided by the trier of fact[,]' Fed.R.Evid. 704(a), the issue embraced must be a factual one.").

The First Amendment defines protected speech, not Congress or the Commission. *Virginia State Bd. of Pharmacy*, 425 U.S. at 770 ("First Amendment makes [this choice] for us"). Absent formal rulemaking, the Commission simply is without power to require more substantiation than "credible evidence," when the challenged product claim is a general tests-prove claim (which require credible tests) or general efficacy claims (which require credible evidence). *See Pearson v. Shalala*, 164 F.3d 650, 659-60 (D.C. Cir. 1999); *Whitaker v. Thompson*, 248 F. Supp. 2d. 1, 10 (D.D.C. 2002); *Pearson v. Shalala*, 130 F. Supp. 2d 105, 118 (D.D.C. 2001) (First Amendment question is whether there is "credible evidence" supporting

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[22] Mr. Heymsfield's proffered opinion is that Respondents allegedly did not posses adequate substantiation before making the challenged product claims because, *in his opinion*, the clinical studies upon which they relied, which include published, peer-reviewed studies by experts in the field, do not satisfy *his understanding of the Commission's undefined, non-statutory substantiation standard* of "competent and reliable scientific evidence." *See* Heymsfield Dep, at 39, 72-73 and 524-532 (confirming, "I have been asked to evaluate if competent and reliable

claim); *Pearson v. Thompson*, 141 F. Supp. 2d 105, 110-11 (D.D.C. 2001) (reconsideration denied).[23]

In an adjudicatory proceeding, Complaint Counsel cannot move the dividing line between protected speech and unprotected speech, and avoid its statutory and constitutional obligations with proffered opinion testimony that talks over the First Amendment issue. No amount of opinion testimony can justify the Commission's use of a vague, non-statutory substantiation requirement, which requires more than credible evidence in support of a product claim.

An analogy can be drawn to the legal distinction between puffery and a statement of fact, where, under the First Amendment, the former is not actionable. No amount of proffered expert testimony can move the dividing line between non-actionable puffery and actionable statements of fact – a line that is demarked by the First Amendment as well. Rather, it is a question of law for the Court whether federal law permits a party to "chill" otherwise protected commercial speech with false advertising litigation. *See Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) ("*Cook, Perkiss*"); *Lens Crafters, Inc. v. Vision World, Inc.*, 943 F. Supp. 1481, 1489 (D. Minn. 1996).

For example, in *American Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004), the advertiser promoted its pasta with a general superiority claim, "America's

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scientific evidence supports" the alleged product claims, and that his understanding of "competent and reliable scientific evidence"came from Complaint Counsel).

[23] Put simply, under *Pfizer*, which pre-dated both (a) the Supreme Court's recognition that commercial speech is protected by the First Amendment and (b) Congress' limitations on the FTC's substantive rulemaking authority, the Commission may **no longer prosecute and convict speakers** who have credible evidence supporting their claims based on some vague notion of inadequate substantiation. To bring a claim, the Commission actually needs a good faith reasonable belief that the challenged claims are false or misleading (not just that they lack "adequate substantiation"), and Complaint Counsel must actually present evidence which proves that the challenged claims are, in fact, false or misleading to obtain a judgment under Sections 5 or 12 of the FTC Act, which would permit the imposition of a 20-year remedial order burdening future commercial speech with reporting obligations and a broad "fencing-in" provision.

Favorite Pasta." In seeking to avoid summary judgment on puffery grounds, the plaintiff submitted a consumer survey purporting to demonstrate that consumers understood the claim as something more than puffery. *See id.* at 393. The court rejected the plaintiff's attempt to change the question of law of puffery into a factual question through the use of a survey, and further opined that to do otherwise would improperly chill protected commercial speech:

> To allow a consumer survey to determine a claim's benchmark would subject any advertisement or promotional statement ***to numerous variables, often unpredictable, and would introduce even more uncertainty into the market place.*** A manufacturer or advertiser who expended significant resources to substantiate a statement or forge a puffing statement could be blind-sided by a consumer survey that defines the advertising statement differently, subjecting the advertiser or manufacturer to unintended liability for a wholly unanticipated claim the advertisement's plain language would not support. ***The resulting unpredictability would chill commercial speech, eliminating useful claims from packaging and advertisements.***

Id. at 393-94 (emphasis added); *see also Cook, Perkiss*, 911 F.2d at 242-46; *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 886 (7th Cir. 2000).

Here, the Commission's prior substantiation requirement imposed on dietary supplement advertisers has the ills identified in *American Italian Pasta.* It has introduced numerous variables, often unpredictable, into the calculus as to what constitutes protected speech under the FTC Act, resulting in even more uncertainty that chills protected speech, which the Commission cannot justify under *Central Hudson.* Moreover, it raises the same First Amendment concerns identified in *Freedman* (regulation by inherently biased law enforcement agency under a theory of liability that shifts the initial burden of proof, where judicial review may come to late), in *Bantam Books* (vague notices and implicit threats of prosecution if advertisers do not succumb to the regulator's point of view), in *NTEU* (a wholesale deterrent to a broad category of expression

by a massive number of potential speakers), and in *City of Lakewood* (a vague scheme permitting the *post hoc* rationalizations, where the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the regulator is permitting favorable, and suppressing unfavorable, expression). It also ignores statutory limitations to the FTC's adoption of general standards of liability discussed in *Bell Aerospace, Wyman-Gordon* and *Katharine Gibbs School.* Dr. Heymsfield's proffered criticism of Respondents' claim substantiation simply is **irrelevant to the real issues** in dispute.

B. Neither the Commission Nor the Presiding Officer Can Justifiably Rely Upon Dr. Heymsfield in This Proceeding.

Even if Respondents' First Amendment rights could lawfully depend on a proffered expert opinion under the FTC's vague, non-statutory prior substantiation requirement, Dr. Heymsfield's proffered testimony should still be excluded. Neither the Commission nor the Presiding Officer can reasonably rely upon a discredited witness who has (a) violated a court order, (b) suppressed relevant impeachment evidence, and (c) lied to cover it up.

Dr. Heymsfield's demonstrated lack of credibility and veracity is no side show. His proffered testimony is the measure by which Complaint Counsel is trying to judge Respondents' First Amendment rights. The Presiding Officer has to depend on expert testimony to evaluate clinical studies and to determine whether they adequately substantiate a product claim. This case is not one where the challenged advertisements have no substantiation. The advertisements in this case are supported by published, peer-reviewed studies, which Dr. Heymsfield opines are inadequate under the Commission's vague, non-statutory substantiation standard.

The relief sought by Respondents is essential to protect Respondents' First Amendment rights. Contrary to his Honor's Orders, which appear to adopt Complaint Counsel's characterization of the issue, Respondents do not seek to reshape "the hearing process itself—away from relevant and admissible testimony, toward collateral issues and inadmissible documents, and into satellite discovery and litigation on topics not related to the *Complaint* . . . ." Opp. Memo, at 32. Respondents' challenge to the credibility and trustworthiness of Dr. Heymsfield go to the heart of Complaint Counsel's case-in-chief, which asserts claims that rely entirely on his credibility and veracity as a witness for the government. Put simply, a witness who flouts court orders, suppresses impeachment evidence and lies to cover it up should not be allowed a place at the heart of a proceeding where the livelihoods of Respondents and their employees are at stake.

III. HIS HONOR HAS COMMITED CLEAR ERROR

If Respondents' First Amendment rights, in fact, depend on Complaint Counsel's proffered expert opinion testimony, the Commission, Complaint Counsel and his Honor owe a constitutional obligation to fully develop the record relating to that expert testimony.[24] Absent a showing of substantial prejudice to the Commission, which has not been made by Complaint Counsel, the rights of the people of the United States, and the obligations of the Commission, Complaint Counsel and his Honor to ensure that First Amendment freedoms are not being wrongfully suppressed and to uphold the integrity of the fact-finding process in an inherently

[24] In this regard, it is noteworthy that, while Respondents challenge the relevance and admissibility of Complaint Counsel's expert witnesses, Michael B. Mazis, Ph.D. and Gregory Nunberg, Ph.D., Respondents do not seek to reopen discovery on their proffered testimony. Contrary to his Complaint Counsel's arguments, which Honor's Orders erroneously accept, Respondents are not engaged in a collateral matter, but are engaged precisely in an effort to rebut Complaint Counsel's case-in-chief based on the discovery of wrongdoing by Complaint Counsel and their proffered witness after the close of discovery.

biased and subjective regulatory scheme, demand a full elicitation of Dr. Heymsfield's violation of a court order.

His Honor's August 11, 2004 Scheduling Order obligated Complaint Counsel and each retained expert witness to provide "a list of all publications, and all prior cases in which the expert has testified or has been deposed." The disclosure of potential impeachment evidence is necessary to protect the integrity of the FTC's challenged regulatory process which is suppose to discover the truth, but instead is clearly being abused to prosecute Respondents' commercial speech.

Even before the instant violation of a court order arose, the record fully substantiated that Complaint Counsel had, long ago, abandoned their obligation to "place foremost in [their] hierarchy of interests the determination of truth," and have been proceeding solely as zealous advocates in callous disregard of Respondents' rights. First, it was discovered that Complaint Counsel and Dr. Heymsfield failed to disclose all prior cases in which Dr. Heymsfield had testified or had been deposed, including a prior FTC case involving a dietary supplement, in violation of his Honor's August 11, 2004 Scheduling Order.

After discovery of this violation, Complaint Counsel violated his Honor's Protective Order, the Commission's Rules of Practice and the FTC Act, itself, by publicly disclosing trade secret information obtained through coerced discovery under terms of confidentiality. The record supported a finding of willful misconduct, and his Honor certified the issue.

It has now been discovered that Complaint Counsel and Dr. Heymsfield failed to disclose **six published studies** – five of which had been withdrawn – that Dr. Heymsfield co-authored with Dr. John Darsee, a proven fraud. *See* Declaration of Steven B. Heymsfield, M.D.

("Heymsfield Decl.") ¶¶ 5-7; Declaration of Laureen Kapin ("Kapin Decl.") ¶¶ 5-7. His Honor's apparent acceptance of Complaint Counsel's and Dr. Heymsfield's unexamined, proffered explanations of their violation of another court order is clear error, violates Respondents' First Amendment rights, and is contrary to the obligations of the Commission, Complaint Counsel and his Honor to (a) ensure that First Amendment freedoms are not being wrongfully suppressed and (b) uphold the integrity, if any, in the Commission's law enforcement process.

It cannot be disputed that the August 11, 2004 Scheduling Order affirmatively obligated Complaint Counsel to gather, verify and disclose potential impeachment evidence in the form of "a list of *all* publications," not some publications, or non-withdrawn publications, or only those publications that Dr. Heymsfield recalled or somebody at a university allegedly told him he had to include in a curriculum vitae – but *all* potential impeachment evidence. The due diligence required of Complaint Counsel to ensure the disclosure of all potential impeachment evidence in the form of "a list of *all* publications" cannot be minimalized or shrugged off – particularly when the violation is first revealed after the discovery cut-off during a limited, re-noticed deposition.

Complaint Counsel's and Dr. Heymsfield's claims of negligence and ignorance cannot go unexamined. Stupid at some point gives way to fraud, and we are passed that point. Complaint Counsel admits prior knowledge of the "Darsee matter" – Dr. Heymsfield told them it has been used to impeach him "in other cases" – but unbelievably denies looking into this matter or being told of or discovering for themselves the six published studies their retained expert co-authored with a proven fraud. *See* Heymsfield Decl. ¶¶ 5-7; Kapin Decl. ¶¶ 5-7, 10-11.

It is clear error to accept Complaint Counsel's contention that Dr. Heymsfield told Complaint Counsel of the "Darsee matter," just not about the publications he co-authored with

Dr. Darsee. *See* Kapin Decl. ¶¶ 5-7, 10-11. The "Darsee matter" is, at root, important to Dr. Heymsfield **only because** he is a co-author on six studies with Dr. Darsee. But for these publications, there would be no "Darsee matter" to speak of here. It is Dr. Heymsfield's co-authorship of fabricated studies that stands to impeach him – which is a material fact, indeed the very answer to Complaint Counsel's admitted inquiry into "issues" used "in other cases" to "impeach" their main expert witness in this case. *See* Kapin Decl. ¶¶ 5-7.

In not a single case in which Dr. Heymsfield had previously been retained as an expert – and ordered to disclose to Respondents – was the name "Darsee" mentioned. Dr. Darsee was not mentioned in trial testimony or deposition testimony. In fact, the name Darsee does not appear on a single piece of paper Complaint Counsel provided to Respondents throughout the entire discovery process. The total absence of the name Darsee begs the following questions: (1) In what "other cases" was the "Darsee matter" used to impeach Heymsfield? (2) Why did Heymsfield fail to disclose these "other cases"? and (3) Was Heymsfield so thoroughly discredited in these "other cases" that he was withdrawn as an expert witness and, therefore, left no paper trail?

It is disingenuous to say the least for Complaint Counsel to contend, as they have after the suppression of evidence has been discovered, that they somehow did not know that the "Darsee matter" involved scientific publications in which Dr. Heymsfield and Dr. Darsee were co-authors. The only credible and logical explanation for the non-disclosure of this damaging information that has been used "in other cases" to impeach Dr. Heymsfield is a purposeful one. Purposeful or not, however, the non-disclosure is a violation of the August 11, 2004 Scheduling Order on a matter that goes to the heart of Complaint Counsel's case-in-chief.

Complaint Counsel's and Dr. Heymsfield's failure to disclose the fraudulent publications violates the order in the case of five published studies that were subsequently withdrawn. It violates the order in the case of the published study that has not been withdrawn. The reality and unavoidable truth is neither Dr. Heymsfield nor Complaint Counsel wanted this damaging information revealed and were willing to hide it, and did hide it, for over a year.

Dr. Heysmfield knew he did not disclose the fabricated publications he co-authored with Dr. Darsee, which were used to impeach him "in other cases" in response to the August 11, 2004 Scheduling Order. Unbelievably, this professional expert attempts to justify his suppression of evidence in violation of a court order by likening his obligation to disclose "a list of *all* publications" to a job interview, where in his mind it would be permissible to omit from a curriculum vitae fabricated publications he co-authored that impugn his integrity and veracity. While that, by itself, is certainly suspect and impugns his integrity, *the very point of the Presiding Officer's ordered disclosure was to elicit such a list, not to obtain a CV!*

There is no justification for Complaint Counsel's and Dr. Heymsfield's suppression of evidence in violation of the Presiding Officer's August 11, 2005 Scheduling Order. Complaint Counsel had an obligation to investigate and ensure compliance with the August 11, 2005 Order, including the disclosure of the "Darsee matter." They knew of this matter. They knew it was an event that had been used "in other cases" to impeach their chosen expert witness. They prepared a self-described "detailed, 47-page long curriculum vitae" which "includes a lengthy list of publications, which itself runs over 40 single-spaced pages" for the express purpose of portraying, falsely as it turns out, Dr. Heymsfield as a well-credentialed, trustworthy expert witness. Opp. Memo, at 3. And they knew, or Dr. Heymsfield at least knew, that the "detailed"

curriculum vitae provided in response to his Honor's order (a) omitted any reference to the one event – the "Darsee matter" which involved the publication of fabricated studies co-authored by Dr. Heymsfield – used "in other cases" to impeach him, but (b) included other publications he "co-authored," even though Dr. Heymsfield now admits he may not have read, worked on or even *consented* to his name being listed as a co-author. Heymsfield Depo. at 456:15-21, 644:180-23. In other words, Dr. Heymsfield has admitted under oath that, not only did he violate his Honor's order by failing to disclose potential impeachment evidence, his "detailed" curriculum vitae falsely characterizes his qualifications.

That is reprehensible regardless of Complaint Counsel's attempt to deny knowledge of the fabricated publications, and Dr. Heymsfield's attempt to deny knowledge that he was obligated to disclose "a list of *all* publications" – particularly those used "in other cases" to impeach him. The facts manifest fraud and a callous disregard of Respondents' rights and Complaint Counsel's and Dr. Heymsfield's continuing violation of the Commission's overriding obligation to the people of the United States to protect First Amendment freedoms and the integrity of the Commission's fact-finding process, which purports to have adequate safeguards.

Either Complaint Counsel was less than honest with the Presiding Officer and knowingly suppressed evidence, or Complaint Counsel knowingly and utterly failed its first obligation to the Presiding Officer and to the government and people they represent – that is, to discover the truth, which included an obligation to investigate, verify and disclose to Respondents Dr. Heymsfield's involvement in the "Darsee matter," *i.e.,* his co-authoring of the fabricated publications. Complaint Counsel is complicit and their conduct is reprehensible even if the Presiding Officer continues to accept their unbelievable story that they did not ask pertinent questions about the

"Darsee matter" or otherwise know of the fabricated publications – an event Complaint Counsel knew had been used "in other cases" to impeach their main witness in this case.

As things stand, it is clear that Dr. Heymsfield cannot be trusted with his solemn obligation in this case: to tell the truth. If Complaint Counsel is telling the truth and did not know about the fabricated publications, then Dr. Heymsfield lied to and/or withheld material information from the government. For example, both Dr. Heymsfield and Complaint Counsel say that Dr. Heymsfield informed Complaint Counsel of the so-called Darsee matter "in general" but did not disclose that he co-authored the fraudulent studies. How in the world could Dr. Heymsfield and Complaint Counsel ask the Presiding Officer to believe such nonsense? How did that conversation go?

> HEYMSFIELD: Well, I need to tell you about a bunch of things that lawyers in other cases used to impeach my credibility.
>
> COMPLAINT COUNSEL: Okay, go ahead.
>
> HEYMSFIELD: There was this guy, a resident named Darsee at Emory University who fabricated data and got caught. His published papers were withdrawn and Dr. Darsee was thoroughly discredited in the scientific community.
>
> COMPLAINT COUNSEL: Okay. Thanks for coming clean.

Is it believable that the Complaint Counsel did not ask, "How were you involved?" Either Dr. Heymsfield withheld the truth or Complaint Counsel is lying (or they both were conspiring to keep the truth from Respondents and from the Presiding Officer).

IV. THE PREJUDICE IS MANIFEST

The FTC's prosecution of Respondents under the FTC Act is not a contest. Careers, livelihoods, due process and First Amendment rights are at stake.[25] Under the guise of protecting consumers from likely confusion, Complaint Counsel is asking the Presiding Officer to render findings of wrongdoing and liability based on the subjective opinion of one man. But how can the Presiding Officer accept that one man's opinion that published peer-reviewed studies by experts in the relevant field supporting the challenged advertisements are not "competent" or "reliable," when the same man withholds material information in violation of a court order, and lies to cover it up? Unless his Honor re-opens discovery and provides Respondents a full opportunity to develop a factual record and rebut Complaint Counsel's proffered expert witness, without question, his Honor cannot lawfully restrict and burden Respondents' First Amendment rights and impugn their integrity for the next twenty (20) years based on the testimony of a professional expert witness who does not have the integrity and honesty to disclose adverse information called for by the Presiding Officer's August 11, 2004 Scheduling Order, and testify candidly about it.

V. HIS HONOR CANNOT FORECLOSE DISCOVERY INTO ANOTHER VIOLATION OF A COURT ORDER AND THE SUPPRESSION OF IMPEACHMENT EVIDENCE THAT BEARS DIRECTLY ON THE PROPRIETY OF THE COMMISSION'S CLAIMS

His Honor's Orders commit clear error and cause manifest injustice in depriving Respondents' discovery into (a) the violation of his Honor's Scheduling Order, (b) the true and complete set of facts underlying the suppression of impeachment evidence, and (c) the lies and evasive testimony in the cover-up. In *Gulf Oil*, the D.C. Circuit affirmed that, when an agency refuses to permit (or, as in that case, is slow in permitting) full and compete discovery into

[25] Basic Research, alone, employs over eight hundred (800) employees.

alleged agency wrongdoing (in that case, alleged document destruction) relevant to the proceeding, district courts have jurisdiction to intervene, so as to ensure a fully developed administrative record. *See* 663 F.2d at 307 (overruling objection that district court lacked jurisdiction because there was no "finding" of wrongdoing, but rather, government investigators made findings of no wrongdoing, holding that "the district court was justified on the basis of the evidence presented to it in intervening to assure that a full factual record of any misconduct would be preserved for use by the agency itself in the ongoing proceedings as well as for any later judicial review of that action.").

The record in *Gulf Oil*, as the record here, reveals "serious allegations originating in the agency itself of document destruction" (here suppression of impeachment evidence); "backed by admissions of agency personnel that some such actions had already taken place" (here document suppression has been admitted, and the record supports that Dr. Heymsfield and Complaint Counsel may have suppress other documents evidencing the impeachment of Dr. Heymsfield in "other cases" in further violation of his Honor's Scheduling Order and/or Complaint Counsel's prior discovery obligations in this proceeding); "along with a history of extremely restrictive discovery permitted to the parties to explore the extent of alleged document destruction or their cover-up" (here the Commission has already denied discovery into proven, willful or callous wrongdoing, and his Honor's orders now fall in lockstep). *Id.* at 312. Based on the totality of circumstances, a district court was justified in making an "exception to the normal exhaustion, finality, and ripeness rules" and was justified in issuing an "order requiring that an agency-appointed ALJ conduct discovery into the allegations and report back to the court." *Id.*

As the accused in *Gulf Oil*, Respondents here must be entitled to discover what really occurred in connection with Complaint Counsel's and Dr. Heymsfield's violation of the his Honor's August 11, 2005 Order. Somebody is lying and being less than candid, and cannot be trusted. The Presiding Officer simply cannot accept, at face value, both Complaint Counsel's and Dr. Heymsfield's denial of wrongdoing and the significance of the "Darsee matter," which is self-described as an event used "in other cases" to impeach the government's proffered expert in this case. Respondents must be allowed additional time to depose Dr. Heymsfield to further establish the grounds for his disqualification prior to the hearing, and in the event he is not disqualified, to properly defend themselves at hearing from this proffered "scientific" opinions.

A. Respondents Must Be Allowed Additional Time To Depose Dr. Heymsfield To Explore The Newly Discovered Evidence Concerning His Qualifications And Failure To Disclose Evidence In Violation Of His Honor's Order.

His Honor already has directly conflicting accounts as to the "Darsee matter." In a news article published by *The Scientist*, Dr. Heymsfield is quoted as saying that Emory University "asked me to leave," "considered me an eyesore," had "taken [me] off the ladder to the sky," and had made it "obvious" that "there would be no promotions or opportunities." Of course, there is no reason to think that the *The Scientist*'s reporter would make these quotes up, and Dr. Heymsfield does not deny them (to be accurate, Dr. Heymsfield says he neither admits nor deny them; in other words, he has failed to be candid about them). However, in deposition testimony before the "Darsee matter" was uncovered, Dr. Heymsfield testified that he left Emory University for another "enormous opportunity," and that there was *no other reason* for leaving! January 11, 2005 Heymsfield Depo., at 204, lines 10-17.

Put simply, Dr. Heymsfield lied under oath and was less than candid about his testimony. It is plainly false and not credible to characterize the "Darsee matter" as not a reason for leaving Emory University. Dr. Heymsfield co-authored fraudulent studies. That is the most serious charge he has faced in his academic career. It is as plain and memorable to him as the nose on his face!

In addition to lying under oath, Dr. Heymsfield's effort to downplay the significance of the fabricated publications he co-authored with Dr. Darsee puts in doubt *all* the publications where he is listed as a co-author in his curriculum vitae – which were obviously included to portray him as a qualified expert. If Dr. Heymsfield did not have sufficient involvement as a co-author in the "Darsee matter" to know whether that the data in the study was accurate, fabricated or properly analyzed, one must wonder what Dr. Heymsfield as a "co-author" is qualified to do? Raise money? Type? Is it credible that in a published study where Dr. Heymsfield is Dr. Darsee's sole co-author, for example, that he was utterly ignorant of the fraudulent data? *See* John Darsee, J.R. Heymsfield, S.B. N Engl. J Med. 1981 jan 15:304(3):129-35.

At the August 30, 2005 deposition of Dr. Heymsfield, Respondents had their first opportunity to question the witness about his role in the studies he published as a co-author with Dr. Darsee. Under questioning about this matter, Dr. Heymsfield, for the first time, disclosed that the role of a co-author on scientific studies might have nothing to do with the substantive science at issue in the study for which he is listed as a co-author, but instead the responsibilities of a co-author are "very variable depending on the specific study." Heymsfield Depo., Aug. 30, 2005, at 456, lines 3-14. The implication of this stunning testimony is that neither the Respondents nor the Presiding Officer can now rely on Dr. Heymsfield's curriculum vitae

(which, if there is no further discovery, should be excluded from this proceeding), to determine the relevance of the studies listed on Dr. Heymsfield's curriculum vitae, without questioning him about his actual role in each of those individual studies. Dr. Heymsfield admitted this fact in his deposition:

> Q. So in your list of publications, many of them list you as a co-author?
>
> A. Yes.
>
> Q. We would have to go through each and every one of those studies to find out what your participation is, has been?
>
> A. Yes, yes.

Heymsfield Depo., Aug. 30, 2005, at 456, lines 15-21.

According to Dr. Heysfield, one cannot presume a co-author's involvement, but must specifically inquire, on a study-by-study basis, into the nature of the co-author's involvement. *See* Heymsfield Depo., Aug. 30, 2005, at 456, lines 3-14. In fact, Dr. Heymsfield testified that he would have to be given specific examples even to state whether he even *consented* to the publication of the studies in which he is listed as a co-author – even though he took credit for those same studies when he listed them in his *curriculum vitae*. *Id.* at 644, lines 18-23. Given the ambiguity about the role of a co-author that now exists based on Dr. Heymsfield's remarkable testimony, the relevance of nearly every study listed in his curriculum vitae is questionable at best.

Therefore, if Dr. Heymsfield is not disqualified, then Respondents must be given the opportunity to depose Dr. Heymsfield, completely and fully, not only about the "Darsee matter" but also about his "detailed" curriculum vitae. Additional deposition time is necessary to determine Dr. Heymsfield's actual involvement in the studies listed in his curriculum vitae, as

well as the six published studies Dr. Heymsfield knowingly omitted, to determine whether his involvement in those studies was substantive or not, was fraudulent as in the case with the six Darsee studies, and thus whether they can be used, as Complaint Counsel is attempting to use 400 of those studies, to establish Dr. Heymsfield's alleged expertise in the areas in which he is testifying.

B. Respondents Are Entitled To Discover the Specifics Relating to the Subjects Used in Other Cases to Discredit Dr. Heymsfield.

Respondents' questioning of Dr. Heymsfield about the "Darsee matter" at the August 30th deposition also resulted in a new disclosure of other matters and categories of impeachment evidence that apparently have been used against Dr. Heymsfield in the past, and that also may have been withheld from Respondents in violation of His Honor's ordered disclosures. Under questioning about the "Darsee matter" Dr. Heymsfield testified: "I informed the FTC of *all* the matters that I considered issues that come up *in trials* where attempts *were made* to discredit me one way or the other, the Darsee [matter] was *part* of it, and the papers are such an insignificant *part* of that." Heymsfield Depo., Aug. 30, 2005, at 657, lines 4-9 (emphasis added).

As mentioned above, August 30, 2005 was the first time that these "matters," which have been used in other trials to discredit Dr. Heymsfield, have been disclosed to Respondents. The disclosure of these "other" matters was revealed only late in the deposition and only after repeated questioning about the "Darsee matter." Dr. Heymsfield did not disclose what these other "matters" were, nor have Complaint Counsel disclosed this potential impeachment evidence of which they were informed by their witness. Obviously, Respondents are entitled to the full disclosure of these "other matters" used in other trials to impeach Dr. Heymsfield.

Complaint Counsel's effort to suppress this evidence may reveal a further violation of the Presiding Officer's Scheduling Order, and entitle Respondents to further relief against Complaint Counsel and Dr. Heymsfield for their ongoing and continuing failure to disclose required information.

C. Respondents Are Entitled to Depose Complaint Counsel Because Their Proffered Declaration Further Implicates Dr. Heymsfield.

Respondents should be entitled to depose Complaint Counsel who interfaced with Dr. Heymsfield. Counsel Laureen Kapin has already testified via declaration, (a) unbelievably denying knowledge of the fabricated publications, and instead (b) admitting Complaint Counsel's utter lack of due diligence and, by implication, Dr. Heymsfield's utter dishonesty, both in violation of his Honor's August 30, 2004 Scheduling Order. *See* Kapin Decl. ¶¶ 8-12.

Both Dr. Heymsfield and Complaint Counsel are percipient witnesses to the suppression of impeachment evidence in violation of His Honor's order. The deposition of each percipient witness should be taken. His Honor simply cannot accept the word of the wrongdoers and deprive Respondents of the opportunity to discover that Complaint Counsel or Dr. Heymsfield knowingly suppressed evidence in violation of his Honor's order, and are continuing to suppress impeachment evidence used in other cases to discredit Dr. Heymsfield. That would bias the entire proceeding and eliminate any integrity the challenged process has as a means to adduce truth.[26]

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[26] If the Declarations of Laureen Kapin and Dr. Steven Heymsfield – two of the very persons who stand accused of wrongdoing in the Motion for Sanctions – can be accepted as true, without the possibility of cross-examination, then the proffered Declaration of Respondent Friedlander must also be accepted as true. If his Honor is unwilling to accept the facts as set forth in Respondent Friedlander's Declaration, then Ms. Kapin must make herself available for deposition on the issues to which she testifies, because her testimony bears on a violation of a court order at the heart of this proceeding. Likewise, Dr. Heymsfield must make himself available for deposition based on the testimony provided in his declaration, which attempts to justify his failure to disclose the fraudulent publications and Complaint Counsel's suppression of impeachment evidence in violation of his Honor's August 30, 2004 Scheduling Order.

Complaint Counsel's and Dr. Heymsfield's carefully orchestrated declarations too finely parse what really happened. They are inconsistent with any fair reading of Dr. Heymsfield's deposition testimony. Moreover, they avoid answering germane questions, but raise more questions than they purport to answer. One thing is clear, though, if Complaint Counsel's declarations are true, it would be worse for Dr. Heymsfield, who would be guilty of not only violating a court order and suppressing impeachment evidence from Respondents, but he also would have withheld material information and knowingly deceived the government who retained him.

VI. REBUTTAL EVIDENCE SHOULD BE PERMITTED

If the Court is not going to exclude Complaint Counsel's proffered expert on an essential element of its case-in-chief, notwithstanding Complaint Counsel's violation of an express provision in his Honor's August 11, 2004 Scheduling Order, Complaint Counsel should not be heard to complain about Respondents' proffered rebuttal evidence, the disclosure of which is not expressly provided for in his Honor's August 11, 2004 Scheduling Order. Complaint Counsel will suffer no prejudice – other than to the merits of their case – if rebuttal evidence is fully presented.[27]

Indeed, it runs contrary to the Commission's and Complaint Counsel's primary obligation to the people of the United States, that is, to adduce the truth and uphold the integrity of a process already infected with inherent bias and subjectivity, to object to the submission of evidence relevant to rebut essential elements of Complaint Counsel's case-in-chief. Complaint Counsel

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[27] Respondents have briefed the issue of rebuttal evidence in general (not just as to the Darsee matter) in response to a pending motion. Respondent incorporates by this reference that briefing and seeks relief from his Honor's Order denying Respondents' proffer of evidence on the Darsee matter.

has adequate time to take depositions and to prepare for the hearing, and given the age of this case, is hardly in a position to claim that rebuttal evidence should be excluded because it wants to rush to judgment.

Absent a showing of real prejudice, which Complaint Counsel has not made, an exclusion order would have constitutional implications. If the excluded evidence rebutted Complaint Counsel's case-in-chief and/or the proffered grounds for a remedial order restraining and burdening future commercial speech, something that cannot be determined until after evidence is presented at the hearing, it would be constitutionally suspect. If his Honor's August 11, 2004 Scheduling Order is not important enough to exclude Complaint Counsel's proffered expert testimony, there is no basis on which to exclude rebuttal testimony. Moreover, because fundamental rights are at issue and serious concerns have been raised about the propriety of the process, itself, there is an overriding interest in ensuring a full and complete administrative record.

CONCLUSION

Respondent Mitchell K. Friedlander respectfully requests that his Honor grant this Motion, issue a new order vacating the prior Orders and granting Respondents' motions for sanctions, in whole or in part, or certifying this Motion to the Commission or granting an interlocutory appeal of his Honor's Orders. Such relief will materially advance the termination of this proceeding, and is necessary to avoid an unconstitutional deprivation of rights, and to ensure a full and complete administrative record.

Dated this 9th day of December, 2005

Respectfully submitted,

Mitchell K. Friedlander
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Mkf555@msn.com

Pro Se

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

In the Matter of

BASIC RESEARCH, LLC **A.G. WATERHOUSE, LLC** **KLEIN-BECKER USA, LLC** **NUTRASPORT, LLC** **SOVAGE DERMALOGIC LABORATORIES, LLC** **BAN LLC d/b/a BASIC RESEARCH LLC** **OLD BASIC RESEARCH, LLC** **BASIC RESEARCH, A.G. WATERHOUSE,** **KLEIN-BECKER USA, NUTRA SPORT, and** **SOVAGE DERMALOGIC LABORATORIES** **DENNIS GAY** **DANIEL B. MOWREY d/b/a AMERICAN** **PHYTOTHERAPY RESEARCH** **LABORATORY, and** **MITCHELL K. FRIEDLANDER,** **Respondents**	**PUBLIC** **Docket No. 9318**

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2005 I caused the Respondent Mitchell Friedlander's Motion *In Limine* to Exclude a Witness, or, Alternatively, to Include Witnesses and Re-Open Discovery for a Limited Purpose, or in the Alternative, for Reconsideration, Clarification, or Certification of Orders Denying the Exclusion of a Witness, Sanctions, and Leave to Add a Witness and to Re-Open Discovery for Limited Purpose to be served as follows:

1) an original and one paper copy filed by hand delivery filed on December 9, 2005, and one electronic copy in PDF format filed on December 7, 2005 by electronic mail to:

Donald S. Clark
Secretary

U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580
Email: secretary@ftc.gov

1) two paper copies delivered on December 9, 2005 by hand delivery to:

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

3) one paper copy mailed December 7, 2005 by first class U.S. Mail to:

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

2) one paper copy mailed by first class U.S. Mail and one electronic copy in PDF format by electronic mail on December 7, 2005 to:

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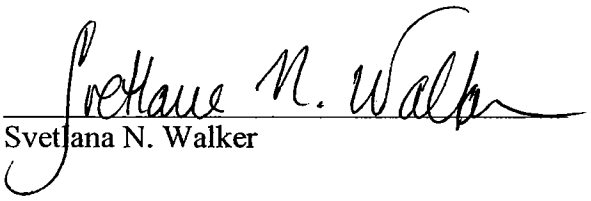

Svetlana N. Walker

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

In the Matter of

BASIC RESEARCH, LLC
A.G. WATERHOUSE, LLC
KLEIN-BECKER USA, LLC
NUTRASPORT, LLC
SOVAGE DERMALOGIC LABORATORIES, LLC
BAN LLC d/b/a BASIC RESEARCH LLC
OLD BASIC RESEARCH, LLC
BASIC RESEARCH, A.G. WATERHOUSE, KLEIN-BECKER USA, NUTRA SPORT, and SOVAGE DERMALOGIC LABORATORIES
DENNIS GAY
DANIEL B. MOWREY d/b/a AMERICAN PHYTOTHERAPY RESEARCH LABORATORY, and
MITCHELL K. FRIEDLANDER,
Respondents

PUBLIC

Docket No. 9318

ORDER GRANTING RESPONDENT MITCHELL FRIEDLANDER'S MOTION *IN LIMINE* TO EXCLUDE A WITNESS

On December 7, 2005, Respondent filed a motion *in limine* to exclude a witness or, alternatively, to include witnesses and reopen discovery for a limited purpose, or, in the alternative, for reconsideration, clarification, or certification pursuant to FTC Rule 3.22 (or interlocutory appeal pursuant to FTC Rule 3.23(b)) of November 22, 2005 orders denying respondents motions to exclude a witness, for sanctions or for leave to reopen discovery for a limited purpose; and motion for leave to add an expert witness and to reopen discovery for a limited purpose. Respondents demonstrated that the November 22 orders err by not excluding Dr. Heymsfield on the basis that his testimony is not relevant to the subject of adequate substantiation raised by the Complaint. Accordingly, Respondent's motion to exclude Dr. Heymsfield as an expert witness is hereby **GRANTED**, and the issue is certified to the Commission or approved for interlocutory review.

It is hereby **ORDERED** that Respondents' motion *in limine* shall be granted.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

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

In the Matter of

BASIC RESEARCH, LLC **A.G. WATERHOUSE, LLC** **KLEIN-BECKER USA, LLC** **NUTRASPORT, LLC** **SOVAGE DERMALOGIC LABORATORIES, LLC** **BAN LLC d/b/a BASIC RESEARCH LLC** **OLD BASIC RESEARCH, LLC** **BASIC RESEARCH, A.G. WATERHOUSE,** **KLEIN-BECKER USA, NUTRA SPORT, and** **SOVAGE DERMALOGIC LABORATORIES** **DENNIS GAY** **DANIEL B. MOWREY d/b/a AMERICAN** **PHYTOTHERAPY RESEARCH** **LABORATORY, and** **MITCHELL K. FRIEDLANDER,** **Respondents**	**PUBLIC** **Docket No. 9318**

ORDER GRANTING RESPONDENT MITCHELL FRIEDLANDER'S MOTION *IN LIMINE* TO INCLUDE WITNESSES AND RE-OPEN DISCOVERY FOR A LIMITED PURPOSE

On December 7, 2005, Respondent filed a motion *in limine* to exclude a witness or, alternatively, to include witnesses and reopen discovery for a limited purpose, or, in the alternative, for reconsideration, clarification, or certification pursuant to FTC Rule 3.22 (or interlocutory appeal pursuant to FTC Rule 3.23(b)) of November 22, 2005 orders denying respondents motions to exclude a witness, for sanctions or for leave to reopen discovery for a limited purpose; and motion for leave to add an expert witness and to reopen discovery for a limited purpose. Respondents demonstrated that the November 22 orders err by failing to permit Respondents to introduce rebuttal witnesses and to reopen discovery for a limited purpose. Accordingly, Respondents' motion *in limine* to include witnesses and reopen discovery for a limited purpose is hereby **GRANTED**.

It is hereby **ORDERED** that Respondents' motion *in limine* shall be granted.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

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

In the Matter of

BASIC RESEARCH, LLC **A.G. WATERHOUSE, LLC** **KLEIN-BECKER USA, LLC** **NUTRASPORT, LLC** **SOVAGE DERMALOGIC LABORATORIES, LLC** **BAN LLC d/b/a BASIC RESEARCH LLC** **OLD BASIC RESEARCH, LLC** **BASIC RESEARCH, A.G. WATERHOUSE, KLEIN-BECKER USA, NUTRA SPORT, and SOVAGE DERMALOGIC LABORATORIES** **DENNIS GAY** **DANIEL B. MOWREY d/b/a AMERICAN PHYTOTHERAPY RESEARCH LABORATORY, and** **MITCHELL K. FRIEDLANDER,** **Respondents**	**PUBLIC** **Docket No. 9318**

ORDER GRANTING RESPONDENTS' MOTION FOR RECONSIDERATION, CLARIFICATION, OR CERTIFICATION OF ORDERS DENYING MOTIONS TO EXCLUDE A WITNESS FOR SANCTIONS, OR FOR LEAVE TO REOPEN DISCOVERY FOR A LIMITED PURPOSE; AND MOTION FOR LEAVE TO ADD AN EXPERT WITNESS AND TO REOPEN DISCOVERY FOR A LIMITED PURPOSE

On December 6, 2005, Respondent Mitchell Friedlander filed an alternative motion for reconsideration, clarification, or certification pursuant to FTC Rule 3.22 (or interlocutory appeal pursuant to FTC Rule 3.23(b)) of the November 22, 2005 orders denying respondents motions to exclude a witness, for sanctions or for leave to reopen discovery for a limited purpose; and motion for leave to add an expert witness and to reopen discovery for a limited purpose. Respondent demonstrated that the November 22 orders err by not addressing the material fact that Dr. Heymsfield did not testify truthfully regarding the publication and withdrawal of the fraudulent Heymsfield/Darsee studies. Respondent also has shown that he would be materially prejudiced by being unable to conduct further discovery and to present rebuttal evidence. Accordingly, Respondent's motion to reopen discovery for a limited purpose and to add an expert witness is hereby **GRANTED**.

It is hereby **ORDERED** that Respondent's motion for reconsideration shall be granted.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge