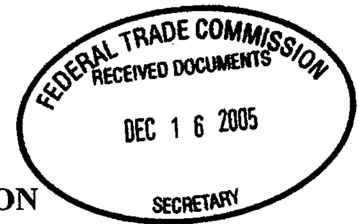

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTIONS FOR RECONSIDERATION, CLARIFICATION, OR CERTIFICATION OF NOVEMBER 22ND ORDERS DENYING RESPONDENTS' MOTIONS TO EXCLUDE AN EXPERT, SANCTION COUNSEL, ADD A WITNESS, AND REOPEN DISCOVERY

Complaint Counsel hereby oppose Respondents' December 6th *Motion for Reconsideration or Clarification* and Respondent Mitchell Friedlander's December 7th *Motion for Reconsideration, Clarification, or Certification*, also styled as a *Motion in Limine*. Respondents have failed to present valid grounds for reconsideration of the Court's November 22nd *Orders*. Their arguments are immaterial, untimely, and unpersuasive. Their *Motions* should be denied.

In their *Motions*, Respondents demand that this Court reconsider and reverse its November 22nd *Orders* denying Respondents' omnibus *Motion to Exclude a Witness, Sanction Counsel, and Reopen Discovery*, their piecemeal replies in support thereof, and their *Motion to Add an Expert Witness and Reopen Discovery*. In its two November 22nd *Orders*, the Court clearly and correctly enunciated that the fabrication of data by a former colleague of one of Complaint Counsel's expert witnesses was a "collateral matter" and a "collateral issue . . . not relevant to establish a fact of

consequence to this matter . . . . [and] not reasonably related to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent." Order Denying Resp'ts' Mot. for Leave to Add Expert Witness, Nov. 22, 2005, at 2. The Court recognized that "a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter," and ruled that "[e]xtrinsic evidence on this collateral issue will not be permitted." *Id.* This Court denied Respondents' *Motion for Leave to Add an Expert Witness*, and also concluded that Respondents had failed to demonstrate cause for excluding Complaint Counsel's expert, sanctioning Complaint Counsel, or reopening discovery for the purposes identified by Respondents. *Id.*; Order on Motions to Exclude Witness, For Sanctions, or to Reopen Discovery, Nov. 22, 2005, at 2.

In demanding that the Court reverse its November 22nd *Orders*, Respondents do not point to new evidence or a change in controlling law. Respondents' *Motions for Reconsideration* do not add to, or modify, the material facts underlying the collateral issue before the Court.[1] Rather, Respondents persist in rearguing old points and complaining that the Court did not adopt their views. Respondents complain that the Court did not draw credibility determinations concerning Complaint Counsel's expert witness, when the Court's *Orders* found that our expert "articulated a reasonable, *bona fide* explanation." *Id.* at 3. Respondents also complain that the *Orders* contain a

[1] Complaint Counsel advanced substantial evidence demonstrating that our expert witness, Dr. Heymsfield, made extensive efforts to comply with the publication disclosure requirement of the *Scheduling Order*, believed that the Darsee papers had been withdrawn from publication, and acted in good faith in withdrawing those papers from his list of publications. *See* Opp'n to Omnibus Mot. at 2-3, 10, 14-17, and Exs. thereto. We were not aware of the Darsee papers before August 30th and we did not withhold them from discovery. *See id.* at 2-3, 17-23, and Exs. thereto; *see also* Resp. to Resp'ts' Add'l Args. at 11-13. Most significantly, Respondents had a full four hours to depose the expert as they wished (following eleven previous hours of deposition testimony), and they failed to prove actual prejudice. Respondents are not entitled to sanctions. *See* Orders, Nov. 22, 2005; Opp'n to Omnibus Mot. at 6-8, 14-15, 18-22 and Ex. A thereto; *see also id.* at 23-31; Resp. to Resp'ts' Add'l Args. at 5-6.

inaccurate statement of fact, but Respondents advanced that contention in their own omnibus *Motion* and that contention was not material to the Court's decisions.

Respondent Friedlander's motions *in limine* and for reconsideration or certification are defective and unpersuasive for many additional reasons. First, his additional motions are untimely. Second, with respect to the merits of Mr. Friedlander's previous *Motion*, that *Motion* was devoid of merit, and the Court duly considered and denied that *Motion*. Fourth, far from pointing to new controlling law, Mr. Friedlander's *Motion* presents inaccurate *First Amendment* arguments that bear no real relationship to Respondents' original motions. Lastly, the collateral issue pressed by Respondents cannot warrant an interlocutory appeal. Respondents' *Motions* are immaterial, untimely, and unpersuasive, and they should be denied.

I. Respondents' Joint *Motion for Reconsideration* Should Be Denied

We address the arguments presented in Respondents' December 6th *Motion* before turning to those attributed to Respondent Friedlander in the December 7th *Motion*.

A. Standard for Motions for Reconsideration

This Court has recognized that motions for reconsideration should be granted only sparingly. *See In re Rambus Inc.*, Docket No. 9302, 2003 FTC LEXIS 49, at *11 (Mar. 26, 2003) (citing *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991)). "Reconsideration motions are not intended to be opportunities 'to take a second bite of the apple' and relitigate previously decided matters." Order Denying Resp't Gay's Mot. for Recons., Aug. 9, 2005, at 2 (citing *Greenwald v. Orb Communications & Mkt'g*, 2003 WL 660844, at *1 (S.D.N.Y. Feb. 27, 2003). The standards for granting reconsideration are stringent and motions demanding such relief are only granted 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. *See In re Rambus Inc.*, 2003 FTC LEXIS at *11 (citing *Regency Communications Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002)); *see also In re Intel Corp.*, Docket No. 9288, 1999 FTC LEXIS 231, at *1 (Mar. 2, 1999).

B. Respondents Advanced the Statement At Issue, and that Statement was Not Material to the Court's Decisions

There is no factual basis for reconsidering the November 22nd *Orders*. In their *Motions*, Respondents complain about the accuracy of a single statement, but that statement was a contention offered in their initial moving papers. The Court correctly reported that Respondents offered that contention. Most importantly, even if the Court had adopted Respondents' inaccurate contention, that contention was immaterial to the Court's decision on their *Motions*.

Respondents complain that one or both the Court's *Orders* contain a inaccurate statement, to wit, that all six of Dr. John Darsee's papers bearing Dr. Steven Heymsfield's name as co-author were based on fraudulent data and subsequently withdrawn, when the actual number of withdrawn papers bearing both names was only five. *See* Resp'ts' Mot. for Recons. at 4 (Dec. 6, 2005). Respondents are complaining about a statement that they previously offered to the Court. In Respondents' omnibus *Motion*, Respondents averred that *all* papers bearing Dr. Darsee's name, with Dr. Heymsfield listed as a co-author, were withdrawn from publication. *See, e.g.*, Resp'ts' Omnibus Mot. at 11. In their *Reply* to our *Opposition* to the *Motion to Add an Expert Witness*, Respondents muddied the waters somewhat by representing that two of those papers were not retracted. Resp'ts' Reply to Opp'n at 1. Neither of these representations was accurate. Following the filing of Respondents' omnibus *Motion*, Complaint Counsel determined that only one of these

papers was not retracted. *See* Compl. Counsel's Opp'n to Pet., Oct. 20, 2005; Opp'n to Resp'ts' Omnibus Mot. at 7 n.8. Respondents have adopted these facts presented by Complaint Counsel, and now complain that the Court erred in reciting their own previous contention.

The Court did not expressly adopt the contention that all six papers bearing Dr. Darsee's name, with Dr. Heymsfield listed as a co-author, were withdrawn from publication. The Court's November 22nd *Order on Motions to Exclude a Witness* simply reported that Respondents had offered that contention. The Court stated:

> *Respondents assert* that Complaint Counsel's expert, Dr. Steven B. Heymsfield, did not list on his *curriculum vitae* six publications that Heymsfield co-authored with John Darsee. These six publications were based on fraudulent data and subsequently rescinded from publication due to the fraud, *Respondents assert. Respondents argue* that Heymsfield should have listed the six withdrawn studies and that Heymsfield's failure to do so is indicative of a general lack of candor.

Id. (emphasis added). Respondents charge the Court with their own error, even though the Court correctly summarized Respondents' opening arguments—Respondents did, in fact, initially and erroneously contend that all of the papers were withdrawn.

Even if one assumes for purposes of argument that the Court had adopted Respondents' erroneous contention as a conclusion of fact, or declined to formally note how Respondents revised their contentions in their improper reply briefs, there are still no grounds for reconsideration because the assertion in question was not material to the Court's decisions. Whether medical journals withdrew five or six of the papers in question had no bearing on the Court's decisions. The Court expressly based its decisions on the grounds that Dr. Heymsfield "ha[d] offered a *bona fide* explanation for not identifying the studies co-authored with Darsee as published studies—that Heymsfield *understood that these studies had been withdrawn* from publication and that he

believed it was appropriate to not list withdrawn studies." *Id.* at 2 (emphasis added); *id.* at 3 (concluding that "Heysmfield . . . has articulated a reasonable, *bona fide* explanation for not identifying studies that he understood to have been withdrawn."). This factual finding, not the number of papers actually withdrawn over twenty years ago, is the material fact upon which the Court rested its decision. There is no need to revisit statements that are not material to the reasoning and decision of the Court. Federal courts may grant reconsideration to "correct manifest errors of law or fact *upon which the judgment is based*." 11 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE Civil 2d § 2810.1 (2005) (discussing FED. R. CIV. P. 59 and citing cases). Respondents have failed to demonstrate how the material fact upon which the Court based its decision was erroneous in any respect. Consequently, Respondents' motion for reconsideration should be denied.

C. The Court's *Orders* Addressed and Dismissed Respondents' Credibility Arguments

Even though the Court addressed and dismissed Respondents' credibility arguments, Respondents insist that the Court failed to address those arguments and draw any credibility determination concerning our expert witness, thereby unjustly prejudicing them. *See* Resp'ts' Mot. for Recons. at 2. Respondents' argument ignores the plain text of the Court's *Orders*—the Court did, in fact, address Respondents' credibility arguments.

First, in its *Order on Motions to Exclude a Witness*, the Court acknowledged Respondents' arguments. *See* Order, Nov. 22, 2005, at 2 ("Respondents argue that Heysmfield should have listed the six withdrawn studies and that Heymsfield's failure to do so is indicative of a general lack of candor."); *see also supra* page 5. As previously noted, the Court then addressed those arguments

by concluding that Dr. Heymsfield "articulated a reasonable, *bona fide* explanation for not identifying studies that he understood to have been withdrawn from publication." *Id.* at 3. The Court's finding effectively dismissed Respondents' credibility arguments, without descending into the separate question of whether one expert or another would be found more credible or reliable after the hearing in this matter.

Respondents claim unjust prejudice, but adverse rulings alone do not constitute such prejudice. "The moving party must show more than . . . disappointment or pique with the Court's ruling in order for reconsideration to be granted." *Helfrich v. Lehigh Valley Hosp.*, Civ. No. 03-5793 2005 WL 1715689, at *3 (E.D. Pa. July 21, 2005) (citations omitted).

The Court may make determinations concerning the reliability and credibility of expert witnesses, as appropriate, in considering the relevant testimony and evidence during and after the upcoming hearing in this matter. Respondents' effort to litigate the issue of credibility in advance, in their pre-hearing papers, is entirely improper. This practice has been condemned by numerous courts. *See, e.g., Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 33 (D.D.C. 2002) (declining to impose sanctions, even though plaintiff's expert failed to disclose all publications, and plaintiff offered no substantial justification for such failure, because defendant failed to aver actual prejudice, and further stating: "A motion to strike is not an appropriate vehicle through which to contest the credibility of a witness . . . ."); *see also Kennedy v. C-P Integrated Servs., Inc.*, No. 041263C, 2005 WL 1923607, at *2 (W.D. Okla. Aug. 11, 2005) (noting that such challenges to witness credibility are not properly resolved during pretrial stage of case). Rather than dispute these authorities, Respondents instead continue to impugn the integrity of a distinguished physician and scientist as well as counsel supporting the *Complaint.*

This Court has stated that the credibility of testifying experts in this matter will be assessed during or after trial. *See* Order on Resp'ts' Mots. to Strike Expert Reports, Dec. 7, 2005, at 2 (noting that "Complaint Counsel's motion for partial summary decision was denied on the grounds that it raised genuine issues of material facts that could not be resolved without a full evidentiary hearing on the merits," and that "where, as here, the experts are expected to testify and will be subject to cross-examination, the reliability of the statements contained in their expert reports may be assessed"). In rehashing their old arguments, Respondents have neglected to present any valid grounds for reconsideration.

D. Respondent Friedlander's *Motions* Are Untimely

Respondent Friedlander has filed additional motions in a single document styled as a motion *in limine* and a motion for certification for an interlocutory appeal of the Court's November 22nd *Orders*. Both motions are woefully out of time. The Court's deadline for the filing of motions *in limine* passed nearly ten months ago, on February 22, 2005. *See* Order, Aug. 11, 2004, at 2. The Court recently cited and relied upon on this fact in denying Respondents' motions to exclude the testimony of three of Complaint Counsel's timely-designated experts. *See* Order, Dec. 7, 2005, at 2 ("A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.") (citation omitted). Respondent Friedlander's motion styled as a motion *in limine* should likewise be denied as untimely. Assuming for purposes of argument that Mr. Friedlander truly is a *pro se* litigant (a questionable assumption)[2], the hoary argument that

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[2] Complaint Counsel recently received an e-mail from Respondents' Counsel suggesting that Mr. Friedlander collaborated with the Corporate Respondents' former counsel in preparing the current submission. The e-mail stated that "*Todd Malynn, counsel for Respondent Mitchell Friedlander*, has requested that I contact you directly regarding the possibility of granting an extension for Mr. Friedlander's independent motion for reconsideration of the Presiding Officer's

pro se litigants are not bound by procedural rules has been soundly rejected. *See, e.g., Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (citing cases for principle that *pro se* parties must "follow the same rules of procedure that govern other litigants") (internal citations omitted).

Respondent Friedlander's motion for certification is untimely as well. RULE OF PRACTICE 3.22 states that movants seeking interlocutory appeals must file such motions "within five (5) days after notice of the Administrative Law Judge's determination." RULE 3.23(b). As applied to the Court's November 22nd *Orders*, that deadline passed last month, on November 28th. Respondent Friedlander's motion is untimely. Respondent Friedlander has failed to articulate any reason why his untimely request for leave to pursue an interlocutory appeal should be granted. Respondent Friedlander's untimely motion fails to conform to the RULES. His motion should be flatly denied.

November 22 Order. Mr. Malynn would like to file the motion by close of business day this Friday, December 9th." Respondents' Counsel and Mr. Friedlander subsequently hastened to deny that Mr. Malynn represented Mr. Friedlander. Nevertheless, this transmission, coupled with the complexity of Mr. Friedlander's legal analysis, raise the question of whether his submissions are truly *pro se*. *See Klein v. Robinson*, 328 F. Supp. 417,418 (E.D. N. Y. 1971) (quoting text of order concluding that nominal *pro se* litigant was "not a bona fide *pro se* litigant," noting, among other things that litigant's papers were bore the "hallmark of a lawyer's supervision."). Clearly, if Mr. Friedlander is receiving assistance from counsel, then the Court should not grant him greater latitude than represented parties. *See generally In re Mungo*, 305 B.R. 762, 769 (D.S.C. Bankr. 2003) (appended hereto as Attachment A):

> [F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party. . . . Ghost-writing attorneys and the pro se litigants who take an advantage in this manner should not be rewarded.

E. Respondent Friedlander's Previous *Motion* Was Plainly Without Merit, and the Court Duly Considered and Denied His *Motion*

1. Mr. Friedlander's Previous *Motion* Was Without Merit

In his previous *Motion*, Respondent Friedlander belatedly joined Respondents' omnibus *Motion to Exclude a Witness*, advanced redundant and invalid sur-reply arguments, and did so improperly, without leave of Court, in the guise of a purported *Motion for Sanctions* submitted without conferring with Complaint Counsel.[3] Respondent Friedlander's *Motion* failed to rebut the material facts. Instead, Mr. Friedlander offered schoolyard taunts. *See* Resp't Friedlander, Mot. to Excl. at 8 ("Stupidity at some point gives way to fraud."). He invented rhetorical conversations. *See id.* at 11-12. He submitted an irrelevant affidavit. *See id.* at 2, Ex. A thereto.[4] He claimed a defense that he never actually pled.[5] He stated, incorrectly, that Complaint Counsel prepared Dr. Heymsfield's CV. *See* Mot. to Excl. at 10; Opp'n to Omnibus Mot. at 3 (setting forth true facts). Further, he claimed an exemption from the RULES OF PRACTICE because the Rule in question

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[3] Respondent Friedlander was named as a moving party in the omnibus *Motion*. *See* Omnibus Mot. at 35. Respondents' counsel later confirmed that Mr. Friedlander concurred in that *Motion*. *See* Joinder, Resp'ts' Mowrey and Gay (Oct. 28, 2005). Respondent Friedlander did not comply with RULE 3.22(c) and request leave to file his sur-reply arguments. He did not confer with Complaint Counsel before seeking sanctions based on allegations not made in the original omnibus *Motion*.

[4] Respondent Friedlander's affidavit offered general allegations and denials like those in his *Answer*. Mr. Friedlander argued that the affidavits appended to our *Opposition* concerning Dr. Heymsfield and the Darsee matter were unworthy of credence for lack of cross-examination. *See* Mot. at 2-3. His argument ignored the salient facts: Respondents, including Mr. Friedlander, have already had the opportunity to examine Dr. Heymsfield on the topic of Dr. Darsee, they have done so at length, and they will have that opportunity again at trial.

[5] *Compare* Mot. at 4 n.3 (purporting to summarize defenses and contending that the substantiation requirement "violates the Federal Trade Commission (FTC) Act") and Mot. for Recons. at 10 n.12 (same), *with* Answer, Resp't Friedlander, at 7-10 (pleading no such allegation or purported defense).

referred to "counsel." *See* Mot. to Excl. at 2 n.1.[6] Mr. Friedlander concluded his argument by condemning Dr. Heymsfield's extensive list of publications as a list of "some publications," *id.* at 7, without admitting that his own proposed witness, Respondent Mowrey, submitted a revised CV that expressly did just that.[7] Respondent Friedlander's pending *Motion* repeats many of those arguments, often *verbatim*. *See* Resp't Friedlander, Mot. for Recons. at 22-28.

The rest of Mr. Friedlander's previous *Motion* echoed the other papers that Respondents' counsel filed, offering conjecture and accusations of bad faith where there was abundant evidence of good faith, a reasonable explanation for the challenged conduct, and absolutely no prejudice to Respondents. Respondent Friedlander's *Motion* was without merit. The Court duly considered that *Motion* in its *Order*, and denied it. *See* Order on Mots. to Excl. at 2. There are no grounds to revisit the November 22nd *Orders* with respect to Mr. Friedlander.

F. Respondent Friedlander's *First Amendment* Arguments Are Inaccurate and Wholly Unrelated to Respondents' Original *Motions*

Far from pointing to new controlling law, Mr. Friedlander has offered *First Amendment* arguments wholly unrelated to Respondents' original motions, contending that the Court's November 22nd *Orders* somehow amount to a Constitutional deprivation of *First Amendment* rights.

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[6] According to Mr. Friedlander, the fact that he is not an attorney means that he is not bound by the requirements of RULE 3.22(f). *See* Mot. to Excl. at 2 n.1. Mr. Friedlander claims to be serving as his own counsel here. As previously noted, the argument that *pro se* litigants are not bound by procedural rules has been soundly rejected. *See, e.g.*, *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (citing cases for principle that *pro se* parties must "follow the same rules of procedure that govern other litigants") (internal citations omitted).

[7] *See* Resp'ts' Add'l Args., Ex. A, Mowrey Revised CV at 3 (identifying "Several papers on the scientific support of herbal medicine. *Some, but not all*, of these are listed below.") (emphasis added); *see also id.* (referring to "several" unidentified "papers of fat management").

There are no grounds to reconsider the November 22nd Orders on *First Amendment* grounds. First, as a threshold issue, Respondent Friedlander is not entitled to raise this argument in a motion for reconsideration. *See Kinesoft Dev. Corp. v. Softbank Holdings, Inc.*, Civ. No. 99-7428, 2001 WL 197631 (N.D. Ill. Feb. 27, 2001) ("Motions to reconsider 'should not be a Pavlovian Response to an adverse ruling,' nor are they a vehicle for raising new arguments or evidence that previously could have been offered.") (quoting *Jefferson v. Security Pac.-Fin. Servs., Inc.*, 162 F.R.D. 123, 125 (N.D. Ill. 1995), and citing *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996)). Second, as a substantive matter, there is no Constitutional right to present irrelevant evidence or use extrinsic evidence to impeach a witness. "Without question, the Government has a legitimate interest in excluding evidence which is not relevant or is confusing." *United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996) (stating that "[t]he Constitutional right to testify is not absolute," and recognizing that U.S. Supreme Court has described this guarantee as the right to present *relevant* testimony). Moreover, the courts have long recognized that the Commission can evaluate claims under the FTC Act based on its expertise. *See Kraft Inc. v. FTC*, 970 F.2d 311, 316 (7th Cir. 1992) (stating that agency findings are "to be given great weight by reviewing courts because findings 'rests so heavily on inference and pragmatic judgment," and observing that deferential standard in reviewing FTC findings long predated earlier decisions). The Court's November 22nd *Orders* reflect the ordinary exercise of the Administrative Law Judge's authority to rule on motions and regulate these proceedings under the RULES OF PRACTICE, not a deprivation of Constitutional rights.

G. The Collateral Issue that Respondents Persist in Litigating is Not Eligible for, and Does Not Warrant, an Interlocutory Appeal

Given that Respondents' *Motions* are devoted to re-litigating a matter that this Court has described as a "collateral issue" and a "collateral matter", there are no grounds for an interlocutory appeal of the November 22nd *Orders* to the Commission. "Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process." *Bristol-Myers Co.*, 90 F.T.C. 273 (1977); *see, e.g., Gillette Co.*, 98 F.T.C. 875 (1981). Hence, the "overwhelming majority of decisions by Administrative Law Judges deny requests for certification." *Schering-Plough Corp.*, No. 9297, 2002 WL 31433937 (Feb. 12, 2002).

Applications for immediate review of an Administrative Law Judge's ruling may be made only if the applicant meets both prongs of a two-prong test. First, the applicant must demonstrate that the challenged ruling involves "a controlling question of law or policy as to which there is substantial ground for difference of opinion." RULE 3.23(b). Second, the applicant must show that "an immediate appeal . . . may materially advance the ultimate termination of the litigation or [that] subsequent review will be an inadequate remedy." *Id.* These are stringent requirements, and Respondents' *Motion* does not come close to satisfying them. The "controlling question" standard "forecloses interlocutory appeals in situations in which the law is well settled and the dispute arises in the application of the facts attached to that law." *Int'l Assoc. of Conf. Interp.*, No. 9270, 1995 F.T.C. LEXIS 452, at *4 (Feb. 15, 1995) (citation omitted). A question is deemed controlling "only if it may contribute to the determination, at an early stage, of a wide spectrum of cases" and not merely "a question of law which is determinative of a case at hand." *In re Rambus Inc.*, 2003 FTC LEXIS 49, at *9. In stating that the fabrication of data by a former colleague of one of Complaint Counsel's expert witnesses was a "collateral matter," Order

Denying Resp'ts' Mot. for Leave to Add Expert Witness at 2, the Court foreclosed any reasonable argument that this topic could be determinative of this litigation, let alone "a wide spectrum of cases." No "controlling question" is present, and the reconsideration of the November 22nd *Orders* would only slow the ultimate termination of the litigation. Respondent Friedlander has failed to adduce facts or legal argument to make the showing required under RULE 3.23. Respondent Friedlander's motion to certify the November 22nd *Orders* for appeal should be denied.

CONCLUSION

Respondents have attempted to re-litigate the collateral issues briefed in their previous filings by forcefully repeating their old arguments and offering variants thereof. Respondents' *Motions* are not based on new evidence or new controlling law. They are based on immaterial, untimely, and unpersuasive arguments. Respondents' *Motions* do not add to, or modify, the material facts underlying the collateral issue before the Court. The Court's *Orders* clearly and correctly enunciated that the fabrication of data by a former colleague of one of Complaint Counsel's expert witnesses was a "collateral matter" and a "collateral issue." Respondents have failed to demonstrate valid grounds for reconsideration, clarification, or certification. Respondents' *Motions* should be denied.

Respectfully submitted,

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Division of Enforcement
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Washington, D.C. 20580
Counsel Supporting the Complaint

Dated: December 16, 2005

ATTACHMENT A

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<KeyCite Citations>

United States Bankruptcy Court,
D. South Carolina.

In re Richardo J. MUNGO a/k/a Richardo Mungo a/k/a Rick Mungo, Debtor.
No. C/A 03-06648-W.

Oct. 17, 2003.

Background: Rule to show cause was entered requiring Chapter 7 debtor, his local counsel, and his counsel admitted pro hac vice to appear and show cause why debtor's pleading filed pro se should not be stricken, why pro hac vice admission should not be revoked, and why sanctions should not be ordered.

Holdings: The Bankruptcy Court, John E. Waites, J., held that:

(1) by failing to sign debtor's conversion and reinstatement of stay motions and by failing to represent him at the ensuing hearing, local counsel violated the local bankruptcy rule governing the responsibilities of attorneys of record;

(2) addressing an issue of apparent first impression in the district, an attorney's practice of "ghost-writing" pleadings for "pro se" individuals violates the local bankruptcy rules, the Federal Rules of Civil Procedure, and the South Carolina Rules of Professional Conduct; and

(3) as sanctions, given the limited authority in the District of South Carolina concerning the matter of ghost-writing, the court would publicly admonish local counsel and place him on notice that in the future such violations might result in more severe sanctions, including suspension or disbarment from practice before the court.

Attorney admonished, employment vacated, and pro hac vice admission revoked.

West Headnotes

[1] Bankruptcy k3030
51k3030
Local bankruptcy rule governing the responsibilities of attorneys of record provides that an attorney who files documents or appears on behalf of a debtor or party in interest shall remain the responsible attorney of record for all purposes, including the representation of the client in all hearings and in all matters that arise in conjunction with the case. U.S.Bankr.Ct.Rules D.S.C., Rule 9010-1(d).

[2] Bankruptcy k3030
51k3030
Application of local bankruptcy rule governing the responsibilities of attorneys of record is quite strict; thus, requirements of the rule are not subject to waiver by a debtor absent court approval. U.S.Bankr.Ct.Rules D.S.C., Rule 9010-1(d).

[3] Bankruptcy k3030
51k3030
Local bankruptcy rule governing the responsibilities of attorneys of record allows the court and other interested parties to determine and rely on the appearance of counsel in order to encourage the efficient administration of cases, to include coordinating the service of pleadings and objections and the noticing of hearings, the rule provides a means of placing other members of the bar on notice that a particular party to the bankruptcy case has legal representation, so that all discussions concerning the case can be directed toward that party's counsel, and the rule allows the court to determine the source of a party's legal instruction in order to hold the counsel providing assistance accountable to the applicable rules of court, other substantive requirements, and standards of conduct. U.S.Bankr.Ct.Rules D.S.C., Rule 9010-1(d).

[4] Bankruptcy k3030
51k3030
Chapter 7 debtor's local counsel violated local bankruptcy rule governing the responsibilities of attorneys of record by failing to sign debtor's conversion and reinstatement of stay motions and by failing to represent debtor at the ensuing hearing. U.S.Bankr.Ct.Rules D.S.C., Rule 9010-1(d).

[5] Bankruptcy k3030
51k3030
Chapter 7 debtor's local counsel was obligated to sign pleadings in debtor's case, know and observe the court's local rules, attend hearings, and be prepared to actively participate in those hearings.

[6] Bankruptcy k3030
51k3030
If Chapter 7 debtor's local counsel had any reservations about representing debtor in regards to his conversion motion and reinstatement of stay motion, then counsel should have formally filed a

motion to withdraw as counsel or otherwise advised the court.

[7] Attorney and Client k62
45k62
Ghost-writing occurs when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar.

[8] Attorney and Client k32(7)
45k32(7)
While a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge, attorneys cross the line when they gather and anonymously present legal arguments, with the actual and constructive knowledge that the work will be presented in some similar form in a motion before the court.

[9] Attorney and Client k62
45k62
"Ghost-writing" is the act of an attorney anonymously drafting or guiding the drafting of a substantial portion of a pleading or various pleadings for a litigant, with the actual and constructive knowledge that the work will be presented pro se in some similar form to a court.

[10] Attorney and Client k32(14)
45k32(14)

[10] Attorney and Client k62
45k62

[10] Bankruptcy k2162
51k2162
Attorney's practice of "ghost-writing" or anonymously drafting pleadings for "pro se" individuals violates the local bankruptcy rules, the Federal Rules of Civil Procedure, and the South Carolina Rules of Professional Conduct; ghost-writing is a deliberate evasion of a bar member's obligations and prevents the policing of such individuals pursuant to applicable ethical, professional, and substantive rules, ghost-writing violates an attorney's duty to provide utmost candor toward the court, allowing pro se litigants whose pleadings have been ghost-written to receive the greater latitude usually afforded true pro se
litigants would disadvantage non-offending parties and negatively taint well-meaning pro se litigants who have no legal guidance, and ghost-writing taxes the efficient administration of the courts. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.; U.S.Bankr.Ct.Rules D.S.C., Rule 9010-1(d); Appellate Court Rule 407, Rules of Prof.Conduct, Rules 3.3(a)(2), 8.4(d).

[11] Bankruptcy k2162
51k2162
To counter the danger that attorneys who anonymously draft pleadings and motions for "pro se" clients could not be policed pursuant to applicable ethical, professional, and substantive rules, bankruptcy court would, in its discretion, require pro se litigants to disclose the identity of any attorneys who had "ghost-written" pleadings and motions for them.

[12] Bankruptcy k2162
51k2162
Upon finding that an attorney had "ghost-written" or anonymously drafted pleadings for a "pro se" litigant, bankruptcy court would require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive rules and standards regulating other attorneys, who properly sign pleadings, were applicable to the ghost-writing attorney.

[13] Bankruptcy k2162
51k2162
Upon finding that an attorney had "ghost-written" or anonymously drafted pleadings for a "pro se" litigant, bankruptcy court would not provide the wide latitude that is normally afforded to legitimate pro se litigants.

[14] Attorney and Client k58
45k58

[14] Bankruptcy k2187
51k2187
As sanctions for his "ghost-writing" or anonymous drafting of "pro se" Chapter 7 debtor's conversion and reinstatement of stay motions, debtor's local counsel would be publicly admonished and placed on notice that, in the future, such violations might result in more severe sanctions, including suspension or disbarment from practice before the bankruptcy court; counsel's conduct violated the local bankruptcy rule governing the responsibilities of attorneys of record, the Federal Rules of Civil Procedure, and the South Carolina Rules
of Professional Conduct. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.; U.S.Bankr.Ct.Rules D.S.C., Rule 9010-1(d); Appellate Court Rule 407, Rules of Prof.Conduct, Rules 3.3(a)(2), 8.4(d).
***764** Ralph C. McCullough, II, Columbia, SC, for

interest shall remain the responsible attorney of record for all purposes including the representation of the client at all hearings and in all matters that arise in conjunction with the case. Upon motion which details the reasons for the request for withdrawal and which details the portion of any retainer which has been earned, and after notice to the debtor, all creditors and parties in interest and a hearing, the court may permit an attorney to withdraw as attorney of record.

***766** More succinctly, Local Rule 9010-1(d) provides that an attorney who files documents or appears on behalf of a debtor or party in interest shall remain the responsible attorney of record for all purposes, including the representation of the client in all hearings and in all matters that arise in conjunction with the case. *Johnson v. Bank of Travelers Rest (In re Johnson),* C/A No. 02-12545, Adv. Pro. No. 03-80212, slip op. (Bankr.D.S.C. May 8, 2003). Application of this Local Rule to counsel of record is quite strict; and thus, the requirements of the Local Rule are not subject to waiver by a debtor absent approval of the Court, *Id.* at *2.

[3] The adoption of *Local Rule 9010-1(d)* was an important step in maintaining the integrity and efficient handling of matters before the Court. Among other benefits, *Local Rule 9010-1(d)* allows the Court and other interested parties to determine and rely on the appearance of counsel in order to encourage the efficient administration of cases, to include coordinating the service of pleadings and objections and the noticing of hearings. *Local Rule 9010-1(d)* also provides a means of placing other members of the bar on notice that a particular party to the bankruptcy case has legal representation; thus, all discussions concerning the case can be directed toward that party's counsel. Furthermore, *Local Rule 9010-1(d)* allows the Court to determine the source of a party's legal instruction in order to hold the counsel providing assistance accountable to the applicable rules of court, other substantive requirements, and standards of conduct.

The positive effects provided by *Local Rule 9010-1(d)* are frustrated whenever an attorney either fails to completely satisfy its provisions or anonymously represents a party to a case. Clients who proceed through a case without an attorney to shepherd them through the complexities of the bankruptcy process tax the resources of the Court since these pro se individuals often require more time consuming handling by the Clerk's Office and the Court in order to insure they are provided adequate due process. Additionally, pro se litigants are more likely to make errors which require the Clerk and Court to expend resources to correct. Finally, when litigants are properly represented they are more likely to obtain the full benefits of the bankruptcy laws and follow necessary procedures.

[4][5][6] In this case, the facts clearly demonstrate that McMaster violated this Local Rule. McMaster serves as an attorney of record in Mungo's personal Chapter 7 bankruptcy case. As local counsel, McMaster is subject to the provisions of *Local Rule 9010-1(d).* In fact, as local counsel he is obligated to sign pleadings in Mungo's case, know and observe this Court's Local Rules, attend hearings, and be prepared to actively participate in those hearings. *See U.S. District Court Local Civil Rules 83.I.04, 83.I.06.* When McMaster failed to file and sign Mungo's Conversion Motion and Reinstatement of Stay Motion and failed to represent Mungo at the ensuing hearing, McMaster failed to fulfill his duty to "remain the responsible attorney of record for all purposes including representation of the client at all hearings and in all matters that arise in conjunction with the case." *Local Rule 9010-1(d).* If McMaster had any reservations about representing Mungo in regards to the Conversion Motion and Reinstatement of Stay Motion, then McMaster should have formally filed a Motion to Withdraw as Counsel or otherwise advise the Court. Pursuant to *Local Rule 9010-1(d),* McMaster was under the duty to represent Mungo in his efforts to convert the case and effect a stay as well as in all proceedings ***767** arising from the Conversion Motion and the Reinstatement Motion.

Furthermore, McMaster had notice of the duties placed upon him by *Local Rule 9010-1(d),* including the duty to advise the Court of matters affecting his continued representation and compliance with the Rule. The act of anonymously drafting pleadings for which a client appears and signs pro se is often termed "ghost-writing." For the reasons set forth hereinafter, the Court recognizes the act of ghost-writing as a violation of *Local Rule 9010-1(d)* and in contravention of the policies and procedures set forth in the South Carolina Rules of Professional Conduct and the Federal Rules of Civil Procedure.

II. Ghost-Writing

The act of ghost-writing is not a new phenomenon--it is a problem that has occurred in other courts and has been deemed an unethical practice. Inasmuch as this Court and courts within this District have yet to specifically and directly address the issue, this Court finds it necessary to issue this Order to provide notice to the bar that anonymous drafting or ghost-writing of pleadings for pro se individuals without signing such

pleadings is prohibited and may result in sanctions and possibly suspension or disbarment from practice before this Court.

In light of the attendant circumstances involved in this case and the limited precedent within the District of South Carolina concerning the professional, ethical, and the substantive implications of an attorney's anonymous drafting of pleadings that his client represents as pro se filings, the Court will examine and discuss the actions of McMaster in this case in order to provide guidance on why such a practice is prohibited.

A. Definition of ghost-writing

[7][8][9] Ghost-writing is best described as when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar. *See Barnett v. LeMaster,* No. 00-2455, 2001 WL 433413 at *3 (10th Cir.2001); *Ellis v. Maine,* 448 F.2d 1325, 1328 (1st Cir.1971); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.,* 968 F.Supp. 1075, 1078 (E.D.Va.1997); *Wesley v. Don Stein Buick,* 987 F.Supp. 884, 885 (D.Kan.1997); *U.S. v. Eleven Vehicles,* 966 F.Supp. 361, 367 (E.D.Pa.1997). The court in *Ricotta v. Cal.,* 4 F.Supp.2d. 961, 987 (S.D.Cal.1998) went further and answered the threshold issue of what constitutes ghost-writing by analyzing *Ellis, Johnson v. Board of Comm'rs of Fremont County,* 868 F.Supp. 1226 (D.Colo.1994), and *Laremont-Lopez:*

> [I]n *Ellis,* the Court stated that its concern was directed at petitions that were "manifestly written" by someone with some legal knowledge and briefs that were prepared in "any substantial way" by a member of the bar. In *Johnson,* the ghost-writing attorney drafted the documents entirely. The Court asserted that it was concerned with attorneys who "authored pleadings and necessarily guided the course of litigation with an unseen hand." Finally, in *Laremont,* the allegations were that the Plaintiff actually paid attorneys who secretly drafted the complaints, tried to resolve the dispute, and paid the court filing fees out of their law firm's account. In light of these opinions, in addition to this Court's basic common sense, it is the Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court ***768** by lending some assistance to friends, family members and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice law would be eligible for contempt proceedings. Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual and constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door.

Ricotta v. Cal., 4 F.Supp.2d. at 987 (internal citations omitted). Much like the court in *Ricotta,* this Court recognizes that there are certain degrees of undisclosed attorney guidance for clients that need not be prohibited. However, in light of the bright line determination made in *Ricotta,* this Court defines ghost-writing as the act of an attorney anonymously drafting or guiding the drafting of a substantial portion of a pleading or various pleadings for a litigant with the actual and constructive knowledge that the work will be presented pro se in some similar form to a court.

B. Factors that lead the Court to prohibit ghost-writing and resulting remedies

[10][11][12][13] Policy issues lead this Court to prohibit the ghost-writing of pleadings and motions for litigants that appear pro se and to establish measures to discourage ghost-writing.

i. First and foremost, ghost-writing must be prohibited in this Court because it is a deliberate evasion of a bar member's obligations, pursuant to *Local Rule 9010-1(d)* and *Fed.R.Civ.P. Rule 11. See Barnett,* 2001 WL 433413 at *3; *Duran v. Carris,* 238 F.3d 1268, 1272 (10th Cir.2001); *Ellis v. Maine,* 448 F.2d at 1328; *Ricotta v. Cal.,* 4 F.Supp.2d. at 987; *Laremont-Lopez,* 968 F.Supp. at 1078-79; *Wesley,* 987 F.Supp. at 886. As previously discussed, this Court's *Local Rule 9010-1(d)* provides that an attorney who files documents or appears on behalf of a debtor or party in interest shall remain the responsible attorney of record for all purposes, including the representation of the client in all hearings and in all matters that arise in conjunction with the case.

Additionally, *Fed.R.Civ.P. 11* requires an attorney to sign all documents submitted to the court and to personally represent that there are grounds to support the assertions made in each filing in the course of that attorney's representation of a client. Ghost-writing frustrates the application of these rules by shielding the attorney who drafted pleadings for pro se litigants in a cloak of anonymity. An obvious result of the anonymity afforded ghost-writing attorneys is that

they cannot be policed pursuant to the applicable ethical, professional, and substantive rules enforced by the Court and members of the bar since no other party to the existing litigation is aware of the ghost-writing attorney's existence. *See Barnett,* 2001 WL 433413 at *3; *Duran,* 238 F.3d at 1272; *Ellis,* 448 F.2d at 1328; *Laremont-Lopez,* 968 F.Supp. at 1078-79. The Court finds this result particularly disturbing; and thus, considers this factor a strong policy ground for prohibiting attorneys from ghost-writing pleadings and motions for pro se litigants. Therefore, to counter this danger, the Court will, in its discretion, require pro se litigants to disclose the identity of any attorneys who have ghost written pleadings and motions for them. Furthermore, upon finding that an attorney has ghost written pleadings for a pro se litigant, this Court will require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive rules and standards ***769** regulating other attorneys, who properly sign pleadings, are applicable to the ghost-writing attorney.

ii. Secondly, federal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party. *See Barnett,* 2001 WL 433413 at *3; *Duran,* 238 F.3d at 1271-72; *Laremont-Lopez,* 968 F.Supp. at 1078; *Wesley,* 987 F.Supp. at 885-86; *U.S. v. Eleven Vehicles,* 966 F.Supp. at 367. Furthermore, such activities negatively taint the Court towards the appearance of well meaning pro se litigants who have no legal guidance at all and rely on the Court's discretionary patience in order to have a level litigating field. Ghost-writing attorneys and the pro se litigants who take an advantage in this manner should not be rewarded. Therefore, upon a finding of ghost-writing, the Court will not provide the wide latitude that is normally afforded to legitimate pro se litigants.

iii. Furthermore, this Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court. *See Barnett,* 2001 WL 433413 at *4 ("where [pro se litigant] entered a *pro se* appearance as well as filed and signed his appeal *pro se,* the attorney who drafted the brief misrepresented the nature of his or her assistance to [the pro se litigant]"); *Duran,* 238 F.3d at 1272 ("We determined that [the act of ghost-writing] as presented here constitutes a misrepresentation to this court by litigant and attorney"); *Ellis v. Maine,* 448 F.2d at 1328 (condemning the practice of attorneys ghost-writing pleadings for pro se litigants); *Ricotta,* 4 F.Supp.2d. at 987 ("Attorneys cross the line ... when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court ... The Court believes that this assistance is more than informal advice to a friend or family and amounts to unprofessional conduct."); *Laremont-Lopez,* 968 F.Supp. at 1079 ("The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding pro se is inconsistent with procedural, ethical and substantive rules of this Court."); *Clarke v. U.S.,* 955 F.Supp. 593, 598 (E.D.Va.1997) ("Ghost-writing by an attorney of a 'pro se' plaintiff's pleadings has been condemned as[ ] unethical ... Thus, if in fact an attorney has ghost written plaintiff's pleadings in the instant case, this opinion serves as a warning to that attorney that this action may be both unethical and contemptuous."); *U.S. v. Eleven Vehicles,* 966 F.Supp. at 367 ("participating in a ghost-writing arrangement such as this, where a lawyer drafts the pleadings and the party signs them, implicates the lawyer's duty of candor to the Court. Clearly the party's representation to the Court that he is pro se is not true. A lawyer should not silently acquiesce to such representation.") (internal citation omitted).

iv. Additionally, the South Carolina Rules of Professional Conduct do not condone ghost-writing. *South Carolina Rule of Professional Conduct Rule 3.3(a)(2)* ("*SCRPC Rule 3.3(a)(2)*") states "A lawyer shall not knowingly: ... [f]ail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." *South Carolina Rule of Professional Conduct Rule 8.4(d)* ("*SCRPC Rule 8.4(d)*") states "It is professional misconduct for a lawyer to: ... [e]ngage in conduct involving ***770** dishonesty, fraud, deceit or misrepresentations." The act of ghost-writing violates *SCRPC Rule 3.3(a)(2)* and *SCRPC Rule 8.4(d)* because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar. *See Ricotta,* 4 F.Supp.2d. at 986 (quoting *Johnson,* 868 F.Supp. at 1231). For the sake of enforcing and maintaining the ethical and professional responsibilities governing attorneys within the District of South Carolina, in the future, the Court will, in its discretion, consider sanctions which may include suspension or disbarment of a ghost-writing attorney from practice before this Court.

v. Finally, the effect of ghost-writing on the operation of this Court cannot be overemphasized. This Court has a high volume of cases--many, if not all, involve time-sensitive matters that require the Court to hear matters and issue rulings in an expeditious manner. The Court has established procedures to efficiently address emergency motions. An integral part of these procedures includes the need for the filing party to correctly serve the motion and notice of the hearing in an expedited fashion and be immediately prepared to present evidence justifying the relief sought. Pro se litigants frequently have difficulty meeting these requirements, particularly in matters concerning case administration and scheduling, thus taxing the Court's system and forcing the Court to expend more time and effort to handle the matter. The Court must be able to look to attorneys of record to perform these tasks for the benefit of their clients and case administration.

C. Analysis and Conclusion of the case at bar

[14] In this case, McMaster admitted that he drafted or authored the Conversion Motion and Reinstatement of Stay Motion on behalf of his client, Mungo, who then filed the documents pro se. McMaster did not sign the pleadings he drafted for Mungo; therefore, McMaster drafted the pleadings anonymously. McMaster knew that Mungo would file the pleadings he drafted in this Court. The filings caused confusion and a waste of judicial resources, not only in their misguided aim to halt the foreclosure sale and their failure to set forth substantively adequate grounds, but in seeking action by the Court on an emergency basis. The filings required the Chapter 7 Trustee to respond, causing cost and expense to the estate. McMaster's ghost-writing of the Motions and failure to meet his responsibilities as counsel of record were improper.

This Court has struggled with the appropriate sanction to impose in this matter. [FN2] In light of the limited authority addressing the matter of ghost-writing within the District of South Carolina, this Court finds that setting forth a clear prohibition for future cases and publicly admonishing McMaster is the best and fairest sanction. Hereafter, the bar at large is considered aware of the requirements of *Local Rule 9010-1(d)* and this Court's stand on ghost-writing and is also on notice that in the future, such violations may be addressed by the imposition of possible sanctions, suspension, or disbarment from practice before this Court. It is therefore

FN2. The Court notes that a pro se litigant may also be subject to sanctions, including the sua sponte dismissal of the pleading, for presenting a ghost-written pleading as a pro se pleading. In this case, the Motions were dismissed or withdrawn.

ORDERED that George Hunter McMaster, Esq., is hereby publicly admonished ***771** for violating *Local Rule 9010-1(d)* and for the unethical act of ghost-writing pleadings for a client, for aiding his client with misrepresenting to the Court that such client was acting pro se, and for the resulting waste of judicial resources and resources of the estate; and it is further

ORDERED that the employment of McMaster as local counsel in the matter before the Court is hereby vacated; and it is further

ORDERED that in as much as Santore is also responsible for representing Debtor on all actions taken in this case and such actions were improper, the Order granting Santore's application for pro hac vice admission in this case is hereby vacated; and it is further

ORDERED that Debtor shall act within the next ten (10) days from the entry of this Order to obtain substitute counsel or will be considered acting pro se in this case.

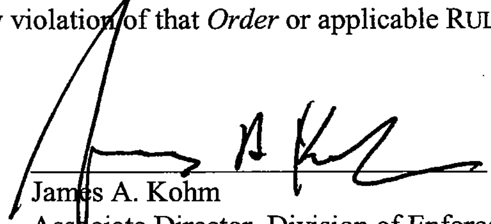
AND IT IS SO ORDERED.

305 B.R. 762

END OF DOCUMENT

CERTIFICATION OF REVIEWING OFFICIAL

I certify that I have reviewed the attached public filing, *Complaint Counsel's Consolidated Opposition to Respondents' Motions for Reconsideration, Clarification, or Certification of November 22nd Orders Denying Respondents' Motions to Exclude an Expert, Sanction Counsel, Add a Witness, and Reopen Discovery*, prior to its filing to ensure the proper use and redaction of materials subject to the *Protective Order* in this matter and protect against any violation of that *Order* or applicable RULE OF PRACTICE.



James A. Kohm
Associate Director, Division of Enforcement
Bureau of Consumer Protection

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2005, I caused *Complaint Counsel's Consolidated Opposition to Respondents' Motions for Reconsideration, Clarification, or Certification of November 22nd Orders Denying Respondents' Motions to Exclude an Expert, Sanction Counsel, Add a Witness, and Reopen Discovery* to be served and filed as follows:

(1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-135
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

(3) one (1) electronic copy via email and one (1) paper copy by first class mail to:

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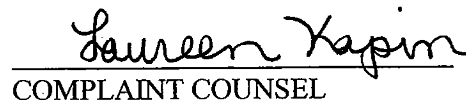

COMPLAINT COUNSEL