

1 **monitor blood pressure while an**  
2 **individual is on Metabolife 356?**

3 MS. DAVIS: Objection.  
4 Assumes facts not in evidence.

5 THE WITNESS: This statement  
6 that you are referring to is an  
7 opinion. It is not one of the  
8 pieces of data from the study.  
9 It's not a conclusion from the  
10 study. It's really just an  
11 opinion, and apparently our  
12 opinion about this changed over  
13 the course of putting this paper  
14 into final form.

15 BY MR. ALLEN:

16 **Q. Did anyone from Metabolife**  
17 **or ST&T comment upon this paper and try**  
18 **to get you to change it in that regard,**  
19 **or do you recall?**

20 A. We did have comments from  
21 ST&T and from Metabolife, and I'm not  
22 sure if -- I had a list of comments. I'm  
23 not sure that I knew which ones came from  
24 Metabolife versus which ones from ST&T,

1 finish, because if we are not, I'm  
2 just keeping my flight, and I'm  
3 getting on it tomorrow, and Dr.  
4 Boozer is not making any  
5 arrangements to change her  
6 schedule either.

7 MR. TERRY: What time do you  
8 have to be out?

9 MS. DAVIS: My flight is at  
10 11:30.

11 MR. TERRY: And what time do  
12 you have --

13 MS. DAVIS: I have to leave  
14 here physically by 9:30.

15 MR. ALLEN: I'm not opposed  
16 to that. If you want me to sit  
17 here and go through my notes real  
18 quick, I'm almost through, and  
19 mark these things. If she can  
20 identify them on the record, I  
21 need things identified as being  
22 hers. So, I mean, it's up to you.  
23 I was fixing to check my notes and  
24 see what I have left to do.

1 but -- and I don't recall whether that  
2 was suggested by them or not.

3 MS. DAVIS: Okay. We're  
4 done for the day.

5 MR. ALLEN: Okay. Thank  
6 you.

7 THE VIDEOTAPE TECHNICIAN:  
8 This completes videotape 4. The  
9 time is 6:29 p.m. We're off the  
10 record.

11 MR. LEVINE: We need to stay  
12 on the record. Are we coming back  
13 tomorrow?

14 MS. ABARAY: The conference  
15 room is available. That's what  
16 I've been negotiating. So, they  
17 will let us in for 8:00 tomorrow.  
18 I don't know if anyone has checked  
19 with the court reporter to see if  
20 they are available.

21 MS. DAVIS: Before I agree  
22 that we are going to come back  
23 here tomorrow, I need some  
24 assurance that we are going to

1 MR. LEVINE: Why don't you  
2 check your notes.

3 MR. ALLEN: Let me tell you,  
4 I'm going to have her identify  
5 documents.

6 MS. DAVIS: Identifying  
7 documents to you may be something  
8 different than it is to me. To  
9 you we've been going through word  
10 by word for her.

11 THE WITNESS: Are you just  
12 going to ask me if I recall those  
13 or what.

14 MR. ALLEN: Yes, ma'am.

15 MS. DAVIS: Fine. Have her  
16 sit here and look at the stack and  
17 we'll flip on the camera.

18 MR. ALLEN: That's exactly  
19 what I have to do unless somebody  
20 is going to stipulate that these  
21 are admissible documents in our  
22 case. Do you want to agree to  
23 that?

24 MR. TERRY: What are they?

1 presentation at Experimental Biology  
2 '99." Exhibit 41; is that correct?

3 A. Yes.

4 Q. Did you submit the abstract  
5 of the Metabolife study to Mr. Scott  
6 pursuant to your contract?

7 A. I did.

8 Q. Were changes made before it  
9 was published in final form in the  
10 International Journal of Obesity?

11 A. I don't recall.

12 Q. You don't recall?

13 A. I don't recall.

14 Q. Have you seen the abstract?  
15 We saw it earlier. Weren't there  
16 differences in the abstract and the final  
17 report, the draft abstract?

18 A. I don't recall going through  
19 an abstract. I know we went over some  
20 draft publications.

21 Q. I apologize. Let me have  
22 the documents, and I'll try to get that.  
23 Is Exhibit 37 a draft abstract?

24 A. I don't think this is an

1 are finishing up references. I'm sending  
2 you this draft without them for your  
3 review."

4 A. It does.

5 Q. What Exhibit Number is that?

6 A. 42, I believe.

7 Q. It also goes on to say,  
8 "Please call to discuss if you like.  
9 Carol Boozer." Right?

10 A. Yes.

11 Q. Again reflecting that prior  
12 to the time of the publication of your  
13 articles in the literature, you were  
14 discussing changes with ST&T and Michael  
15 Scott?

16 A. I don't think the word  
17 "changes" is included in here.

18 Q. You are sending him a draft.  
19 You are asking him to call to discuss if  
20 he'd like. Is that right?

21 A. I'm saying, "Please call to  
22 discuss if you like."

23 Q. Do you recall if he ever  
24 called you to discuss potential changes

1 abstract.

2 Q. What is Exhibit 37 if it's  
3 not an abstract?

4 A. I think it is a draft of a  
5 very, very preliminary report. This is  
6 too long for an abstract. It is two  
7 pages, page-and-a-half.

8 Q. Nevertheless, you agree  
9 drafts of your abstracts and of your  
10 paper were sent to ST&T before final  
11 publication?

12 A. I agree.

13 Q. I would like to hand you  
14 what's been marked as Exhibit 42.

15 - - -  
16 (Whereupon, Boozer Exhibit  
17 42 was marked for identification.)  
18 - - -

19 BY MR. ALLEN:

20 Q. Exhibit 42, is this a fax  
21 with your handwriting on it that you sent  
22 to Michael Scott at ST&T in March of '99?

23 A. It appears to be, yes.

24 Q. Does it say, "Michael, we

1 concerning your drafts?

2 A. As I've said previously, I  
3 was sent a list of suggestions that was  
4 compiled by people from Metabolife as  
5 well as Mr. Scott.

6 Q. Do you have that list?

7 A. I don't know that he  
8 telephoned me and discussed it.

9 Q. Where is that list of  
10 suggested changes to your article that  
11 was drafted by Metabolife and Mr. Scott?

12 A. It's probably in that pile.  
13 I don't know where it is. I haven't seen  
14 it for a while.

15 Q. Ma'am, in the documents you  
16 produced, and I think maybe we'll save  
17 some time here, you produced documents  
18 yesterday Bates stamped 000001 to 000634?

19 MS. ABARAY: With CB as a  
20 prefix.

21 BY MR. ALLEN:

22 Q. With CB. I never saw --

23 A. Well --

24 Q. Let me finish.

1 Does Exhibit 39 reflect  
2 charges for time that you spent  
3 testifying and working before the Texas  
4 Department of Health for Metabolife?

5 A. Well, I don't know that it  
6 was necessarily for Metabolife. It  
7 reflects time and expenses for my trip to  
8 Texas to appear before the Board of  
9 Health. Now, I don't think I received  
10 this amount. I think this includes  
11 whatever costs Michael Scott had, but  
12 it's related to me. I didn't prepare  
13 that. I've never seen it before.

14 Q. Do you recall flying out of  
15 LaGuardia, landing in Dallas/Fort Worth  
16 and then flying to Austin?

17 A. To tell you the truth, I  
18 don't. I probably did. I know I got out  
19 there somehow.

20 Q. Let me show you one other  
21 thing, and if it doesn't refresh your  
22 recollection, you let me know.

23 Do you see that the bill,  
24 the last page of Exhibit 39 says "To:

1 Metabolife C/O Garry Pay," and the  
2 description of the work is "Dr. Carol  
3 Boozer, 2/24-25/99 TDH  
4 meeting/hearing/travel"?

5 A. Well, I see that, but just  
6 because my name is on it doesn't mean I  
7 prepared it.

8 Q. I didn't say you prepared  
9 it, ma'am. I'm asking you a simple  
10 question.

11 Do you recall working for  
12 Metabolife as reflected in those bills,  
13 working for Metabolife before the Texas  
14 Department of Health back in February of  
15 '99?

16 A. Well, as I think we went  
17 over before, I did say that I went to the  
18 Board of Health meeting, I did say that I  
19 spoke, and I was reimbursed for my time.  
20 I'm not sure that Metabolife paid this.  
21 This is to Metabolife. Maybe they did.  
22 I don't know where the money came from.  
23 I think I said that before.  
24

- - -

1 (Whereupon, Boozer Exhibit  
2 40 was marked for identification.)  
3 - - -

4 BY MR. ALLEN:

5 Q. Exhibit 40 is, and I only  
6 have one copy of this, this is a memo  
7 from you to Michael Scott at Science,  
8 Toxicology & Technology. And I'll read  
9 the first sentence: "I attach a draft of  
10 the abstract report for the Metabolife  
11 study." Did I read that correctly?

12 A. You did.

13 Q. The Metabolife study is  
14 what, the eight-week study?

15 A. It is.

16 Q. You are specifically sending  
17 drafts of your eight-week study as  
18 reflected in Exhibit Number 40 to ST&T?

19 A. Yes, as per contract  
20 requirement.

21 Q. As per the contract, you  
22 sent drafts of your Metabolife eight-week  
23 study to ST&T as reflected in Exhibit 40?

24 A. That's correct.

1 Q. As reflected in our  
2 comparison of your drafts and the final  
3 published study, there were certainly  
4 changes made in what was finally put in  
5 the published data from what was put in  
6 the drafts; correct?

7 MS. DAVIS: Objection.

8 Asked and answered.

9 BY MR. ALLEN:

10 Q. Correct?

11 A. Correct.

12 Q. Ma'am?

13 A. Correct. I think that's the  
14 definition of a draft.  
15 - - -

16 (Whereupon, Boozer Exhibit  
17 41 was marked for identification.)  
18 - - -

19 BY MR. ALLEN:

20 Q. Exhibit 41, this is a memo  
21 you wrote to Michael Scott November 11,  
22 '98 saying as follows: "I am sending you  
23 a copy of an abstract which we plan to  
24 submit within the next few days for

1           - - -  
 2           **(Whereupon, Boozer Exhibit**  
 3           **43 was marked for identification.)**  
 4           - - -  
 5 **BY MR. ALLEN:**  
 6           **Q. I'm handing you what's been**  
 7           **marked as Exhibit 43. This is an e-mail**  
 8           **from you; is it not?**  
 9           A. Uh-huh.  
 10          **Q. Is that yes?**  
 11          A. Yes. This is an e-mail from  
 12 me.  
 13          **Q. To whom?**  
 14          A. This is to Garry Pay.  
 15          **Q. Where does Mr. Pay work as**  
 16 **of August of 2000?**  
 17          A. Metabolife.  
 18          **Q. The subject is regarding**  
 19 **what, ma'am?**  
 20          A. I'm sorry.  
 21          **Q. What is the subject of this**  
 22 **exhibit, this e-mail to Garry Pay?**  
 23          A. Subject line isn't filled  
 24 out, but -- you mean from the content I'm

1           A. Well, I don't recall this  
 2 actually, but I think this is probably  
 3 true, but I really don't have specific  
 4 knowledge of this. I mean, I don't  
 5 recall this e-mail.  
 6          **Q. So, the document itself**  
 7 **would be the best recollection of what**  
 8 **happened, and this is an e-mail from you;**  
 9 **right? You are not denying that?**  
 10          A. It appears to be an e-mail  
 11 from me.  
 12          **Q. Right. To Mr. Pay?**  
 13          A. To Mr. Pay.  
 14          **Q. With a revised manuscript?**  
 15          A. Yes.  
 16          **Q. In response to questions**  
 17 **from him?**  
 18          A. I assume so. Right. He  
 19 says something about some other person  
 20 who is going to bring information to him.  
 21           - - -  
 22           **(Whereupon, Boozer Exhibit**  
 23 **44 was marked for identification.)**  
 24           - - -

1 supposed to say that, or from the subject  
 2 line?  
 3          **Q. Whatever you want to say it**  
 4 **from.**  
 5          A. Well, it says, "I'm sending  
 6 you a copy of the letter," I'm not sure  
 7 what letter, "and revised manuscript -  
 8 with changes highlighted. I think this  
 9 will be OK. Let me know what you think."  
 10          **Q. This is in response to an**  
 11 **e-mail that Mr. Pay had sent you on that**  
 12 **same page; isn't that right?**  
 13          A. Apparently. Right. It  
 14 says, "Please cc your email to my  
 15 assistant Colleen Hanna. I have added  
 16 her to this email. I will be in a  
 17 meeting but she can bring the information  
 18 to me when the email arrives."  
 19          **Q. So, not only were you in**  
 20 **communication with ST&T concerning your**  
 21 **manuscripts and revisions, you were also**  
 22 **in contact directly, as reflected in**  
 23 **Exhibit 43, with Metabolife, Mr. Garry**  
 24 **Pay; right?**

1 **BY MR. ALLEN:**  
 2          **Q. I'm going to hand you what's**  
 3 **Exhibit Number 44. Jennifer Nasser, she**  
 4 **worked with you on the Metabolife study?**  
 5          A. Yes, she did.  
 6          **Q. Exhibit 44 is in the**  
 7 **documents you produced?**  
 8          A. I think it is.  
 9          **Q. Yes, ma'am. It has the CB**  
 10 **number at the bottom; doesn't it?**  
 11          A. Yes.  
 12          **Q. Do you recall that document?**  
 13          A. Not specifically, but I mean  
 14 I remember seeing it when I prepared  
 15 these to give to you all.  
 16          **Q. Let me see it. That's the**  
 17 **only copy I have. It says, "Michael,**  
 18 **this is analysis of 104 (Bottle 175)**  
 19 **Metabolife 356 Product. Need to know why**  
 20 **concentration is so high." Is that what**  
 21 **it says?**  
 22          A. That looks like what it  
 23 says.  
 24          **Q. Thank you.**

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1 I never saw in any of the  
2 documents that you produced any of these  
3 suggested changes from Metabolife and  
4 ST&T.

5 A. I don't believe it was in  
6 the documents that I produced, but you've  
7 got all sorts of other documents. I have  
8 produced it in the past for individuals,  
9 and it has gone -- so, I assume you have  
10 it in all the stuff you get from other  
11 lawyers.

12 Q. I don't have it.

13 A. Well --

14 Q. That's all right.

15 A. You haven't done your  
16 homework.

17 Q. I haven't done my homework.  
18 I'm just doing my best.

19 MR. ALLEN: I'm going to ask  
20 for the list of suggested changes.

21 THE WITNESS: I'm not sure I  
22 have it anymore.

23 MS. DAVIS: If it is not the  
24 custody or control --

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1 A. Well, if I don't have it, I  
2 don't have it.

3 Q. Ma'am, I'm not upset with  
4 you.

5 A. I had it one time. I don't  
6 think I have a copy now.

7 MS. DAVIS: That's all  
8 right. Let's keep going with the  
9 deposition.

10 MR. ALLEN: All I can do is  
11 the best I can do. This is all my  
12 job is.

13 BY MR. ALLEN:

14 Q. What you can swear to is  
15 that changes were made to your  
16 manuscripts -- let me finish, and we'll  
17 be done.

18 What you can swear to to  
19 this jury under oath is that changes were  
20 made to the manuscripts that you prepared  
21 by ST&T and Metabolife, they were put in  
22 writing, and at one time you had those  
23 changes?

24 A. I don't think that's what I

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1 THE WITNESS: I have  
2 produced so much stuff that has  
3 been pawed over by so many  
4 lawyers, and some of it has gone  
5 missing in the meantime, and I  
6 can't locate it. But I know at  
7 some time somebody had their hands  
8 on it. So, it is probably in one  
9 of those piles of paper that  
10 results from those depositions.

11 MS. DAVIS: Let me clear  
12 this up. Do you have it your  
13 possession, custody or control  
14 now?

15 THE WITNESS: I don't  
16 believe I do. I have not seen it.  
17 I think in a previous deposition  
18 to this one, it was requested, and  
19 I was not able to locate it. So,  
20 I don't know that I currently have  
21 a copy of it.

22 BY MR. ALLEN:

23 Q. And that's all you can do is  
24 the best you can do.

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1 said.

2 Q. Then tell me what you said.

3 A. I said I received a list of  
4 suggested changes. I didn't say those  
5 changes were made.

6 Q. I apologize. What you can  
7 testify under oath is that Metabolife and  
8 ST&T prepared a list of suggested changes  
9 to your manuscripts?

10 A. Correct.

11 Q. At one time you had that  
12 list of suggested changes?

13 A. Correct.

14 Q. And now you don't know where  
15 it is?

16 A. Correct.

17 Q. Do you know who from  
18 Metabolife prepared the suggested  
19 changes?

20 A. I don't know. I mean, I  
21 would -- well, I shouldn't guess. I  
22 don't know. I don't know who.

23 Q. Maybe Exhibit 43 will help  
24 you.

1 A. Correct.  
 2 Q. While those studies were  
 3 going on, the eight-week Metabolife study  
 4 was referred to throughout your course of  
 5 correspondence with ST&T as an efficacy  
 6 study; was it not?  
 7 MS. DAVIS: Objection, lack  
 8 of foundation. Assumes facts not  
 9 in evidence.  
 10 THE WITNESS: I think it was  
 11 often referred that way. We  
 12 didn't. I mean, like I said,  
 13 in-house we called them by the  
 14 numbers. We called them 104 and  
 15 105. That's what we always called  
 16 them. This is from ST&T, and they  
 17 referred to it as the efficacy  
 18 study. And when I saw that, I  
 19 knew that they referred to what we  
 20 called the 104 study as efficacy,  
 21 so I understood what they meant.  
 22 BY MR. ALLEN:  
 23 Q. When ST&T referred to the  
 24 efficacy study, you knew that meant the

1 are needed."  
 2 Q. Mr. Scott wrote that to you  
 3 in October of '98?  
 4 A. Correct.  
 5 Q. Where did Mr. Scott reach  
 6 the understanding that you had a greater  
 7 than expected number of dropouts in the  
 8 study you were performing?  
 9 A. From our report to him.  
 10 Q. Which study did you have a  
 11 greater than expected number of dropouts?  
 12 A. Well, this refers to the --  
 13 he refers to it here as the 105 study.  
 14 This refers to the six-month study. Yes.  
 15 This is referring to the six-month study.  
 16 Q. In the six-month Ma  
 17 Huang/kola nut study, you had a greater  
 18 than expected number of dropouts due to  
 19 potential side effects associated with Ma  
 20 Huang/kola nut; right?  
 21 MS. DAVIS: Objection.  
 22 Misstates prior testimony.  
 23 Assumes facts not in evidence.  
 24 THE WITNESS: I don't think

1 Metabolife eight-week study; right?  
 2 A. That's right.  
 3 - - -  
 4 (Whereupon, Boozer Exhibit  
 5 47 was marked for identification.)  
 6 - - -  
 7 BY MR. ALLEN:  
 8 Q. Exhibit 47 is a letter from  
 9 Michael Scott to you dated October 21st,  
 10 '98. Did you receive Exhibit 47?  
 11 A. Yes. I think I recall this  
 12 letter.  
 13 Q. That was in the documents  
 14 you produced; right?  
 15 A. Yes, it was.  
 16 Q. Can you read the first  
 17 sentence of the letter, please?  
 18 A. 1998. The first sentence?  
 19 Q. Yes, ma'am.  
 20 A. "It is our understanding  
 21 that because of a greater than expected  
 22 number of dropouts in this study, if you  
 23 are to achieve the study designed  
 24 statistical power, additional subjects

1 that they were necessarily due to  
 2 adverse effects. We actually had  
 3 a fairly low dropout rate due to  
 4 adverse effects. But the -- I  
 5 mean, we were just referring to  
 6 --  
 7 BY MR. ALLEN:  
 8 Q. Was that dropouts from the  
 9 prescreening process reflected in Exhibit  
 10 47?  
 11 A. Well, that was another  
 12 problem. Certainly, we did screen out  
 13 more people than we expected from the  
 14 screening. But I think here we were  
 15 referring to people that were randomized  
 16 and then dropped out.  
 17 Q. So, on that point, you had a  
 18 hard time -- when you applied the  
 19 standards of screening with those Holter  
 20 monitors, you had a hard time finding  
 21 enough study people?  
 22 A. We screened out more than we  
 23 had expected, yes.  
 24 Q. That's because when you

1 - - -  
2 (Whereupon, Boozer Exhibit  
3 45 was marked for identification.)

4 - - -  
5 BY MR. ALLEN:

6 Q. Exhibit 45, this is a fax to  
7 you from Science, Toxicology &  
8 Technology; is that correct?

9 A. Yes.

10 Q. Is that the list of  
11 ingredients you received from ST&T that  
12 were contained in Metabolife 356?

13 A. I believe it is.

14 Q. Hand that right back to me  
15 real quick, ma'am.

16 A. (Handing over document.)

17 Q. Do you know of any  
18 nutritional value in bee pollen, ginseng,  
19 ginger, sarsaparilla, nettles, bovine  
20 complex?

21 A. No.

22 MS. DAVIS: Objection,  
23 compound.

24 BY MR. ALLEN:

1 BY MR. ALLEN:

2 Q. For purposes of getting your  
3 daily supply of lecithin or magnesium?

4 A. No. I don't think anyone  
5 would recommend it for that purpose.

6 MS. DAVIS: Objection.

7 BY MR. ALLEN:

8 Q. Why not?

9 A. Well, there are other -- if  
10 you want to take an ingredient -- you can  
11 find those ingredients without all the  
12 other accompanying.

13 Q. Do you know what bovine  
14 complex is?

15 A. No. I'm not really sure  
16 what all this contains.

17 - - -

18 (Whereupon, Boozer Exhibit  
19 46 was marked for identification.)

20 - - -  
21 BY MR. ALLEN:

22 Q. This is Exhibit 46, a letter  
23 from Simone Derayeh, ST&T, to you. Do  
24 you see that?

1 Q. Is there any nutritional  
2 value on any one of the ingredients  
3 listed on Exhibit 45?

4 A. Well, lecithin.

5 Q. Lecithin? How do you  
6 spell that for the jury?

7 A. L-E-C-I-T-H-I-N. I believe  
8 lecithin is an ingredient that would have  
9 some nutritional value.

10 Q. What's it do?

11 A. Well, you know, I can't  
12 really remember exactly what that is, to  
13 define that for you, but I believe that  
14 would be the one.

15 Magnesium. Magnesium  
16 protein chelate -- I mean, magnesium is  
17 an essential element. So, I suppose one  
18 could say that those -- of those two,  
19 there might be some nutritional value.

20 Q. Do you think it would be a  
21 good idea to take Metabolife 356 for  
22 magnesium and lecithin purposes?

23 MS. DAVIS: Objection, calls  
24 for speculation.

1 A. Yes.

2 Q. Did you receive that letter?

3 A. I assume I did.

4 Q. Ms. Derayeh refers to the  
5 "efficacy study." Do you see that? I  
6 highlighted that.

7 A. Yes.

8 Q. Which one is the efficacy  
9 study?

10 A. Well, I think she was  
11 referring to the Metabolife study.

12 Q. Right.

13 While the studies were  
14 ongoing, you said to Ms. Abaray that they  
15 were called 97104 and 97105?

16 A. That's correct.

17 Q. 97104 was the eight-week  
18 Metabolife study?

19 A. Correct.

20 Q. 97105 was the 60 day --

21 MS. ABARAY: Six-month.

22 BY MR. ALLEN:

23 Q. Excuse me. 97105 was the  
24 six-month ephedra/kola nut study; right?

1 all of what he said.

2 Q. Do you know Dr. Heymsfield's  
3 opinion concerning the safety of  
4 over-the-counter ephedra/caffeine  
5 products?

6 A. Well, yes. I don't pretend  
7 to know all of his opinion, but I have  
8 some idea of what he thinks about it.

9 Q. Give the jury an idea what  
10 your co-author of the Metabolife study,  
11 Dr. Heymsfield, thinks about the safety  
12 of over-the-counter ephedra/caffeine  
13 products.

14 MR. SILLER: Objection.

15 MS. DAVIS: Calls for  
16 speculation.

17 MR. ALLEN: She didn't.  
18 She's testified about it before.  
19 I'm just trying to give her an  
20 opportunity.

21 MR. LEVINE: I've got a  
22 running objection.

23 MR. TERRY: To the rest of  
24 his questions. We don't have to

1 BY MR. ALLEN:

2 Q. Do you know what Dr.  
3 Heymsfield thinks about the  
4 over-the-counter sale of ephedra/caffeine  
5 products?

6 MS. DAVIS: Objection.  
7 Calls for speculation, lack of  
8 foundation.

9 THE WITNESS: I haven't  
10 discussed this issue with Dr.  
11 Heymsfield for a very long time,  
12 but I think at the time of the  
13 20/20 interview, his position was  
14 that some of these adverse effects  
15 that we reported in that study  
16 were of concern because they could  
17 be indicative of serious  
18 underlying medical conditions.

19 BY MR. ALLEN:

20 Q. Now, do you know for a fact  
21 that Dr. Heymsfield believes that the  
22 over-the-counter ephedra/caffeine  
23 products can potentially kill you?

24 MS. DAVIS: Objection.

1 say it again.

2 MR. LEVINE: Scott,  
3 recognizing that he's asking  
4 objectionable questions.

5 MR. ALLEN: I just gave you  
6 a running objection.

7 MR. LEVINE: Yes. We've got  
8 a running objection to the rest of  
9 his questions.

10 - - -  
11 (Whereupon, the requested  
12 portion of the notes of testimony  
13 was read by the court reporter.)  
14 - - -

15 MR. TERRY: Are you asking  
16 her to repeat what the doctor  
17 said? Are you calling for  
18 hearsay? Are you asking her to --

19 MR. ALLEN: You know, where  
20 I come from in a deposition, first  
21 of all, I'm entitled to discover  
22 this information. Second of all,  
23 that's coaching. You don't need  
24 to object.

1 Calls for speculation.

2 BY MR. ALLEN:

3 Q. Do you know that for a fact?

4 A. No. I don't know that for a  
5 fact.

6 Q. Do you know for a fact that  
7 Dr. Heymsfield has submitted an affidavit  
8 on behalf of Dr. George Blackburn?

9 A. I do.

10 Q. Who is Dr. George Blackburn?

11 A. He's a clinician who engages  
12 in research in the field of obesity in  
13 Boston.

14 Q. You know for a fact that Dr.  
15 Heymsfield supports Dr. Blackburn's  
16 position in a lawsuit that was filed  
17 against Dr. Blackburn by Metabolife;  
18 don't you?

19 MS. DAVIS: Objection.

20 Calls for speculation. Lack of  
21 foundation.

22 THE WITNESS: I do know that  
23 Dr. Heymsfield participated in  
24 some manner. I think he gave a



1 asked the people to come in to  
2 potentially take the ephedra/kola nut,  
3 your medical screening was such that you  
could not find enough healthy obese  
people; is that right?

6 MS. DAVIS: Objection.  
7 Misstates prior testimony.  
8 Assumes facts not in evidence.

9 THE WITNESS: Well, as I  
10 said, because of the inclusion  
11 criteria and exclusion criteria  
12 that we applied for the study, we  
13 had a smaller number of people who  
14 met those inclusion criteria than  
15 we had expected.

16 BY MR. ALLEN:

17 Q. It was tougher to find  
18 people to be able to study with your  
19 exclusion criteria; right?

20 A. Right. We had very  
21 stringent exclusion criteria, right.

22 - - -  
23 (Whereupon, Boozer Exhibit  
24 48 was marked for identification.)

3 BY MR. ALLEN:  
4 Q. Exhibit 48 is a letter from  
5 Michael Scott to you dated April 6, 2000.  
6 Did you receive that letter?

7 A. (Witness reviewing  
8 document.)  
9 Yes.

10 Q. Can you read the highlighted  
11 sentence down there that I've  
12 highlighted?

13 A. "Regarding access to data:  
14 Finally, because of what I perceived as  
15 previous breaches of confidentiality by  
16 Dr. Heymsfield with respect to our (non  
17 published) information and data that he  
18 had access to relating to this and other  
19 ST&T Studies, it is my wish that he not  
20 be provided access to any of this  
21 data/work until such time it has been  
22 published."

23 Q. Now, Dr. Heymsfield was one  
24 of the co-authors on your Metabolife  
study?

1 A. Yes, he was.

2 Q. In fact, he was the only  
3 medical doctor listed as an author on the  
4 Metabolife study?

5 A. Correct.

6 Q. Dr. Heymsfield is a  
7 respected researcher and physician in the  
8 field of obesity; correct?

9 A. He is.

10 Q. In fact, Dr. Heymsfield  
11 initially began work with you on the  
12 six-month ephedra/kola nut study?

13 A. He did.

14 Q. But Dr. Heymsfield's name  
15 does not appear on the six-month study  
16 that was published; does it?

17 A. Not as a co-author. He's  
18 acknowledged in the acknowledgment  
19 section.

20 Q. He's not listed as a  
21 co-author?

22 A. Correct.

23 Q. In fact, Michael Scott in  
24 Exhibit Number 4 --

1 MS. DAVIS: 8.

2 BY MR. ALLEN:

3 Q. -- 8 asked you not to share  
4 the information from the six-month study  
5 with Dr. Heymsfield; correct?

6 A. He did.

7 Q. Why is that?

8 A. Because he was concerned  
9 about the fact that Dr. Heymsfield had  
10 agreed to appear and did appear on 20/20  
11 and discussed the Metabolife study prior  
12 to publication of that study.

13 Q. Were you aware that Dr.  
14 Heymsfield appeared on 20/20?

15 A. Yes.

16 Q. Dr. Heymsfield had -- this  
17 was after the eight-week Metabolife study  
18 had been completed?

19 A. I believe it had been  
20 completed, but it was not published at  
21 that time.

22 Q. What did Dr. Heymsfield say  
23 on 20/20?

24 A. You know, I don't remember

1 A. Yes.  
 2 Q. Who blacked out the  
 3 signature line for the checks on Exhibit  
 4 49?  
 5 A. I don't know. This is the  
 6 way I received them.  
 7 Q. Where did you receive those  
 8 checks from?  
 9 A. Well, I didn't receive the  
 10 checks. I simply received this photocopy  
 11 of the checks.  
 12 Q. Who sent you the photocopy  
 13 of the checks listed on Exhibit 49?  
 14 A. Someone from ST&T, one of  
 15 Mr. Scott's assistants, probably Simone  
 16 Derayeh, but I don't remember which  
 17 person.  
 18 Q. Do you see down at the  
 19 bottom of each check in the left-hand  
 20 corner is DSSSC?  
 21 A. Right.  
 22 Q. Who is that?  
 23 A. I'm not sure. This is the  
 24 same initials that came out previously,

1 and I think there was a suggestion of the  
 2 name, but I don't -- dietary supplement  
 3 something. I don't know. I don't  
 4 recognize those initials.  
 5 Q. That same organization was  
 6 listed on the invoices concerning your  
 7 trip to Austin, Texas for the TDH  
 8 hearing; isn't that correct?  
 9 MS. DAVIS: Objection.  
 10 Assumes facts not in evidence.  
 11 MR. ALLEN: Let me show you.  
 12 BY MR. ALLEN:  
 13 Q. Isn't that correct?  
 14 MS. DAVIS: You are assuming  
 15 it is the same organization. How  
 16 does she know? She doesn't know  
 17 who it is.  
 18 MR. ALLEN: It does say the  
 19 same initials.  
 20 MS. DAVIS: Fine. You can  
 21 say the same initials.  
 22 THE WITNESS: This one?  
 23 MR. ALLEN: Yes, ma'am.  
 24 THE WITNESS: Yes, there it

1 is.  
 2 BY MR. ALLEN:  
 3 Q. If you look at the invoice  
 4 reflected on Exhibit 39 regarding Carol  
 5 Boozer along with Exhibit 49, the  
 6 initials DSSSC are reflected in both of  
 7 those documents; right?  
 8 MS. DAVIS: Objection. The  
 9 documents speak for themselves.  
 10 THE WITNESS: They are.  
 11 BY MR. ALLEN:  
 12 Q. Ma'am?  
 13 A. They are.  
 14 Q. Do you have any idea why  
 15 DSSSC is involved in the payment of  
 16 invoices in regard to the ephedra  
 17 projects?  
 18 MS. DAVIS: Objection, asked  
 19 and answered, calls for  
 20 speculation.  
 21 THE WITNESS: Both of these  
 22 documents were produced by ST&T.  
 23 This is some kind of a coding  
 24 system for him to keep track of

1 things, and I assume that this  
 2 refers to this organization that's  
 3 funding the study.  
 4 - - -  
 5 (Whereupon, Boozer Exhibit  
 6 50 was marked for identification.)  
 7 - - -  
 8 BY MR. ALLEN:  
 9 Q. Exhibit 50. That was  
 10 produced in your production?  
 11 A. Yes.  
 12 Q. What is Exhibit 50?  
 13 A. Well, this is yet another  
 14 laboratory analysis of one of the  
 15 ephedra-containing products. It says,  
 16 "Metabolife." There's two. One is  
 17 Metabolife and one is from the six-month  
 18 study.  
 19 Q. Okay. Hand that back to me,  
 20 please.  
 21 A. (Handing over document.)  
 22 Q. I'm not trying to be  
 23 difficult, ma'am, but it looks like to me  
 24 that Exhibit 50, Page 1 and Page 2

1 deposition for that case.

2 BY MR. ALLEN:

3 Q. In fact, you know for a fact  
4 that Dr. Blackburn was sued by  
5 Metabolife; don't you?

6 A. I do.

7 Q. You know for a fact that Dr.  
8 Heymsfield assisted Dr. Blackburn in that  
9 litigation; don't you?

10 MS. DAVIS: Objection, asked  
11 and answered.

12 THE WITNESS: Yes.

13 BY MR. ALLEN:

14 Q. What was Dr. Blackburn's  
15 position on the safety of Metabolife 356?

16 MS. DAVIS: Objection.  
17 Calls for speculation. Lack of  
18 foundation.

19 THE WITNESS: Well, I  
20 believe his comment was "this  
21 stuff could kill you."

22 BY MR. ALLEN:

23 Q. Now, you know for a fact  
24 that Dr. Blackburn said "this stuff could

1 A. I didn't include him because  
2 in order to put his name on as an author,  
3 I would have had to allow him the  
4 opportunity to read the paper and to have  
5 access to the data. And I didn't want to  
6 do that, because I knew by this time that  
7 he was heavily involved in all of this,  
8 and I actually believed that he had lost  
9 his objectivity with regard to this  
10 issue.

11 Q. In your opinion, Dr.  
12 Heymsfield lost his objectivity; right?

13 A. Yes.

14 Q. Do you think the fact that  
15 you have acted as an expert for the  
16 ephedra industry, testified for them,  
17 received money for them on multiple  
18 occasions, that maybe you've lost your  
19 objectivity? Do you think that's  
20 possible?

21 MS. DAVIS: Objection,  
22 argumentative.

23 THE WITNESS: Of course,  
24 it's possible.

1 kill you" in regard to 356; don't you?

2 MS. DAVIS: Objection, calls  
3 for speculation.

4 THE WITNESS: Well, I wasn't  
5 present when he said it, but I  
6 have seen it reported multiple  
7 times.

8 BY MR. ALLEN:

9 Q. Did Dr. Heymsfield's support  
10 of Dr. Blackburn have anything to do with  
11 why Mr. Scott did not want you to give  
12 Dr. Heymsfield any of the data?

13 A. You know, I don't remember  
14 the timing of all of this, but to the  
15 best that I can recall, Mr. Scott's  
16 concern about Dr. Heymsfield here was  
17 related to the 20/20 interview more than  
18 to the Blackburn case, but as -- I think  
19 those were going on about the same time.  
20 So, I don't know that I could separate  
21 out.

22 Q. Why did you not include Dr.  
23 Heymsfield as a listed co-author on the  
24 six-month study?

1 BY MR. ALLEN:

2 Q. Thank you, ma'am.

3 - - -

4 (Whereupon, Boozer Exhibit  
5 49 was marked for identification.)

6 - - -

7 BY MR. ALLEN:

8 I'll hand you Exhibit Number  
9 49.

10 A. Yes.

11 Q. What are those?

12 A. Well, these are photocopies  
13 of checks from ST&T to St. Luke's  
14 Roosevelt Hospital.

15 Q. On the other checks -- these  
16 are checks that you produced in your  
17 production; is that right? CB number?

18 A. Correct.

19 Q. Who is the signatory on the  
20 checks?

21 A. Well, it is a little hard to  
22 read because it's been blacked out.

23 Q. It's been blacked out; has  
24 it not?

1 Q. That slide show, do you know  
2 who prepared that slide show?

3 A. Well, Jennifer Nasser  
4 prepared it with help from me.

5 Q. So, you had involvement in  
6 the preparation of this slide show?

7 A. Sure, yes.

8 Q. Where was this slide show  
9 presented?

10 A. I believe that was -- it was  
11 either Experimental Biology -- where is  
12 the abstract? That will tell us. It was  
13 either Experimental Biology or the  
14 Obesity meeting, the NAASO meeting. I  
15 can't remember now which.

16 Q. Do you have the originals of  
17 these slides?

18 A. Do I have the original  
19 slides?

20 Q. Yes, ma'am. That's what I'm  
21 asking.

22 A. I might. I'm not sure.

23 Q. The reason I ask, and I'll  
24 mark it with a green tab, the conclusions

1 A. Okay.

2 Q. -- and provide it to your  
3 attorney?

4 A. I think actually she has  
5 it.

6 MS. DAVIS: Don't instruct  
7 her to do anything. If you have a  
8 request --

9 MR. ALLEN: I asked her -- I  
10 said, will she.

11 MS. DAVIS: If you have any  
12 requests afterwards, you can send  
13 me a letter, and we'll work things  
14 out.

15 BY MR. ALLEN:

16 Q. I understand. You don't  
17 mind saving it, though, that's all I  
18 care --

19 A. No, not at all.

20 Q. There's no technical reason  
21 preventing you from saving that  
22 PowerPoint?

23 A. I have plenty of hard disk  
24 space.

1 on Exhibit 51 are blacked out. I can't  
2 read them. Maybe you can.

3 A. No. It's pretty hard to  
4 read.

5 Q. It's not hard to read --

6 A. It's impossible to read.

7 Q. -- it's impossible.

8 A. There's actually -- I think  
9 there's two copies here. I think this  
10 was a PowerPoint. I think this may have  
11 been a PowerPoint presentation. So if it  
12 is, I would have a copy. If it's slides,  
13 I'm not sure. I might have copies of the  
14 slides. I don't honestly remember if I  
15 have copies of the slides. I think this  
16 is what I had in my computer.

17 Q. Exhibit 51 is a PowerPoint  
18 that's on your computer?

19 A. I think so. I think so.

20 Q. It looks like a PowerPoint.

21 A. Yes. I think that's what it  
22 is.

23 Q. I'm going to ask you, if you  
24 still have it, will you save that --

1 Q. Exhibit 52, this is from  
2 toxinfo to "cnb7@columbia." Is that you?

3 A. That's me.

4 Q. Carbon copied Garry Pay at  
5 Metabolife; right?

6 A. Yes.

7 Q. This is an e-mail dated July  
8 25, 2000; right?

9 A. I'm sorry, July 25, 2000,  
10 yes.

11 Q. I'll read the e-mail, and  
12 then I want to discuss this. Did you  
13 receive this e-mail?

14 A. Well, I probably did. I  
15 don't actually recall it right now.

16 Q. Does the e-mail reflect that  
17 you received it at least?

18 A. It does.

19 Q. What Exhibit Number is it?  
20 I'm sorry.

21 A. 52.

22 Q. Here's the e-mail. Is this  
23 from Michael Scott?

24 A. This is from Michael Scott.

1 concern sample Ids, the same numbers;  
2 don't they?

3 A. It's possible accidentally I  
4 gave you two copies of the same thing. I  
5 think that's probably the case.

6 Q. No, actually, I don't think  
7 you did.

8 A. No. Let's see. They are  
9 not the same. Let's see.

10 Q. But the sample ID of the  
11 material being tested is the same, is it  
12 not?

13 A. Pardon me?

14 Q. You see "sample ID" on the  
15 left-hand corner of each of those  
16 documents?

17 A. Right. Right.

18 Q. The sample ID is 175, 186,  
19 1109, 1114?

20 A. Correct.

21 Q. Are the ephedra and caffeine  
22 tablets tested, as reflected on Exhibit  
23 50, are the levels of ephedra and  
24 caffeine as tested of any concern to you?

1 A. It's some kind of a  
2 presentation. I'm not sure now which one  
3 this is. Oh, Nasser. Actually, this is  
4 the one from Metabolife that Jennifer  
5 Nasser gave. I think this was the only  
6 slide presentation that was given on  
7 that. We mentioned that earlier.

8 Q. That was contained in your  
9 production?

10 A. I'm sorry?

11 Q. Ma'am, I don't know anything  
12 about these documents. I have to ask  
13 you.

14 A. Yes. This came from me.  
15 Y'all asked for everything I had, and I  
16 gave it to you.

17 Q. I understand. What I'm  
18 asking you is, you know that that Exhibit  
19 51 is a slide presentation prepared by  
20 Metabolife?

21 A. No. No. No. No. I said

22 --

23 MR. TERRY: She said it was  
24 prepared by Nasser. It was

1 A. No, I don't think so. I  
2 don't remember having concern about  
3 these.

4 Q. What study was this in  
5 regard to?

6 A. Well, you know, one of these  
7 says 104, which would be the Metabolife  
8 study. The other one indicates that the  
9 first two were for Metabolife, and the  
10 second two were for the six-month. These  
11 actually were from the files of my  
12 postdoc, Dr. Jennifer Nasser, so, she was  
13 handling this at this point. So, I'm not  
14 as familiar with these.

15 Q. I'll talk to somebody else  
16 about that.

17 - - -

18 (Whereupon, Boozer Exhibit  
19 51 was marked for identification.)

20 - - -

21 BY MR. ALLEN:

22 Exhibit 51, this was in your  
23 production. It looks like a slide  
24 presentation to me. Is that right?

1 presented on behalf -- by her on  
2 one occasion. It's the only slide  
3 show that she's aware of that  
4 pertains to the eight-week study.  
5 The eight-week study involves  
6 Metabolife 356. That's  
7 essentially what she said, and she  
8 said it all day. Do you have any  
9 other documents?

10 MR. ALLEN: That document  
11 has never been identified. I  
12 haven't heard that all day. And I  
13 don't appreciate the snide  
14 comments or the tone.

15 MR. TERRY: I'm sorry.

16 THE WITNESS: Well, earlier  
17 you had a copy of an abstract that  
18 was published, and this is the  
19 slide talk that resulted from the  
20 abstract.

21 BY MR. ALLEN:

22 Q. Now, the abstract on  
23 Metabolife study number 104?

24 A. Correct.

1 BY MR. ALLEN:  
 2 Q. Exhibit 52, does this  
 3 exhibit refresh your recollection that  
 4 you were instructed by ST&T not to talk  
 5 to the FDA?  
 6 A. No. Actually, I didn't  
 7 recall this at all.  
 8 Q. Does it help you recall it  
 9 now?  
 10 A. No.  
 11 Q. It says, "I will collect the  
 12 funds necessary to compensate you both  
 13 for your time and expenses." Is that  
 14 what the e-mail goes on to say?  
 15 A. It does.  
 16 MS. DAVIS: Objection. The  
 17 document speaks for itself.  
 18 BY MR. ALLEN:  
 19 Q. Who is Patricia?  
 20 A. That's Dr. Daly.  
 21 Q. Did Mr. Scott at ST&T  
 22 actually collect funds and compensate you  
 23 for attending the FDA hearings in August  
 24 of 1990?

1 MS. DAVIS: Objection, asked  
 2 and answered.  
 3 BY MR. ALLEN:  
 4 Q. Excuse me, in August of  
 5 2000?  
 6 MS. DAVIS: Objection, asked  
 7 and answered.  
 8 THE WITNESS: Yes, I believe  
 9 he did.  
 10 BY MR. ALLEN:  
 11 Q. He goes on to say, "I will  
 12 work with you to coordinate your travel  
 13 arrangements. We may want to fly in  
 14 around the same time...and stay at same  
 15 hotel, etc." Do you recall if you met  
 16 with people from ST&T prior to the FDA  
 17 HHS hearings in August of 2000?  
 18 A. I did meet with people, but  
 19 I'm not sure -- I don't recall that  
 20 Michael was present, but it sounds like  
 21 he intended to go. So, I assume he must  
 22 have gone. I didn't recall that he was  
 23 there.  
 24 Q. Did you ever contact Dr.

1 Prettyman at the FDA?  
 2 A. Well, I have, yes, contacted  
 3 him, but I don't believe at this time.  
 4 Q. When did you contact Dr.  
 5 Prettyman at the FDA?  
 6 A. I contacted him after our  
 7 presentation of the poster from the  
 8 six-month study. I think that was the  
 9 NAASO meeting, the abstract that was  
 10 published in 2001. Is that right?  
 11 Anyway, I think I may have contacted him  
 12 before that, notifying him that we were  
 13 indeed going to present a poster of our  
 14 results at that meeting. And then when  
 15 he didn't come to the meeting or nobody  
 16 from the FDA came to the meeting, then I  
 17 prepared a copy of the poster and sent it  
 18 to Mr. Prettyman or to some people -- I  
 19 think it was Mr. Prettyman from the FDA.  
 20 Q. Did you release to Mr.  
 21 Prettyman at that time the raw data on  
 22 your studies?  
 23 A. Not --  
 24 MS. DAVIS: Objection, asked

1 and answered. Move on.  
 2 MR. ALLEN: No, I don't  
 3 think so.  
 4 MS. DAVIS: Don't answer.  
 5 BY MR. ALLEN:  
 6 Q. Did you?  
 7 A. Not the raw data. I gave  
 8 him a copy of the poster that we had  
 9 presented.  
 10 - - -  
 11 (Whereupon, Boozer Exhibit  
 12 53 was marked for identification.)  
 13 - - -  
 14 BY MR. ALLEN:  
 15 Q. Exhibit 53, can you identify  
 16 that for the jury, please?  
 17 A. Let's see.  
 18 (Witness reviewing  
 19 document.)  
 20 Right. This is from Mr.  
 21 Levitt at the Health and Human Services,  
 22 a letter to me.  
 23 Q. Yes, ma'am, and I understand  
 24 that answer, but I think actually Exhibit

1 Q. "Dear Carol: Garry will  
 2 register you and/or Patricia. Do not  
 3 contact Prettman." Do you see that?  
 4 A. I see that.  
 5 Q. Who is "Prettman"?  
 6 A. Well, I would suppose he  
 7 means Prettman.  
 8 Q. It says, "Garry will  
 9 register you and/or Patricia." Who is  
 10 Garry?  
 11 A. I assume this is Garry Pay.  
 12 Q. What is Garry Pay  
 13 registering you and/or Patricia for?  
 14 A. Well, this is probably --  
 15 this is our meeting that we went to in  
 16 Washington, I assume. And he's going to  
 17 register us for the meeting, I guess.  
 18 Q. Now, doesn't Prettman work  
 19 with the FDA?  
 20 A. He does.  
 21 Q. Weren't you going to go up  
 22 and talk to the FDA in the fall of 2000?  
 23 MS. DAVIS: Objection.  
 24 Assumes facts not in evidence.

1 This e-mail to you from  
 2 Michael Scott of July 25th is telling  
 3 you, do not talk to Prettman at the FDA;  
 4 right?  
 5 MS. DAVIS: Objection. The  
 6 document speaks for itself. Are  
 7 you going to keep going through  
 8 and reading these just so we can  
 9 read them on to the record?  
 10 MR. ALLEN: You know what,  
 11 I'm going to do what I've done for  
 12 20 years, and I've been fairly  
 13 successful at it, maybe not in  
 14 California.  
 15 MS. DAVIS: You are going to  
 16 be successful at us stopping and  
 17 us going home.  
 18 MR. ALLEN: Look what I've  
 19 done. I've gone through these  
 20 documents for you. That's what  
 21 I'm going to do. We can go home  
 22 until tomorrow. That's fine.  
 23 I'll come back.  
 24 MS. DAVIS: I'm not sure

1 Misstates prior testimony.  
 2 THE WITNESS: Well, I  
 3 thought it was actually the fall  
 4 of 2001.  
 5 BY MR. ALLEN:  
 6 Q. Was the FDA requesting  
 7 information from you in the summer of  
 8 2000?  
 9 A. Well, as I said earlier, I  
 10 had received a telephone call from Mr.  
 11 Prettman requesting data at some point  
 12 prior to the 2001 meeting, but I don't  
 13 recall when that telephone call was.  
 14 Q. I apologize. Ms. Abaray has  
 15 pointed out, I've gotten a little  
 16 confused.  
 17 August of 2000 was the FDA  
 18 hearing on ephedra; right?  
 19 A. Or HHS, yes.  
 20 Q. Health and Human Services  
 21 Department; isn't that right?  
 22 A. I suspect that that's what  
 23 this is referring to.  
 24 Q. Yes.

1 we're coming back tomorrow, but go  
 2 finish those documents.  
 3 MR. ALLEN: I'll do whatever  
 4 you want to, as I've told you all  
 5 day.  
 6 MS. DAVIS: Just continue,  
 7 please.  
 8 MR. ALLEN: Because if you  
 9 want me to stop, I'll be glad to  
 10 stop.  
 11 MS. DAVIS: We don't need to  
 12 argue back and forth.  
 13 MR. ALLEN: I'm not arguing.  
 14 Do you want me to stop? I'm  
 15 asking you.  
 16 MR. LEVINE: Scott, come on,  
 17 let's just go.  
 18 MR. ALLEN: This is Exhibit  
 19 Number, what is it?  
 20 THE WITNESS: 52.  
 21 - - -  
 22 (Whereupon, Boozer Exhibit  
 23 52 was marked for identification.)  
 24 - - -

1 not simply a conduit between yourself and  
2 Metabolife, you actually had direct  
3 dealings with Metabolife; did you not?

4 MS. DAVIS: Objection,  
5 argumentative.

6 THE WITNESS: As we have  
7 seen from these documents, I  
8 occasionally consulted --  
9 communicated with Mr. Pay. I  
10 think there are occasions we have  
11 cited here where I wrote and asked  
12 him the ingredients in the  
13 Metabolife 356 and so on.

14 MS. DAVIS: That's fine.

15 BY MR. ALLEN:

16 Q. And you communicated with  
17 Mr. Pay concerning requests from the FDA  
18 before your final studies regarding  
19 Metabolife were published; right?

20 MS. DAVIS: Objection.

21 Asked and answered.

22 THE WITNESS: Well, this  
23 date on here is 2000, I believe,  
24 and the study was not published

1 going to make her come back, and I  
2 understand, Ms. Abaray, that none  
3 of this is your fault or your  
4 responsibility. She will not be  
5 burdened by coming back here at 8  
6 a.m. tomorrow.

7 MR. ALLEN: I'm not asking  
8 her to. I've never asked her to  
9 come back tomorrow morning. I've  
10 told I would have quit at 4:30 if  
11 you wanted me to. I told you I  
12 have to go through this stack of  
13 documents. I have been less than  
14 four hours with the witness  
15 including breaks. So, I'll stop  
16 right now.

17 MS. DAVIS: Right. And we  
18 are stopping now.

19 MR. ALLEN: Okay, then I'll  
20 stop.

21 MS. ABARAY: Let me just say  
22 something, though. Everybody  
23 agreed we were coming back  
24 tomorrow at 8.

1 until 2001. So, I think the  
2 obvious answer is yes.

3 BY MR. ALLEN:

4 Q. Now, let's turn to the  
5 second page of Exhibit 53, which is the  
6 letter that you forwarded to Mr. Pay and  
7 Mr. Scott. Who is that letter addressed  
8 to?

9 A. To me.

10 Q. Who is that letter addressed  
11 to?

12 A. To me.

13 Q. Who is it signed by?

14 MS. DAVIS: You know what,  
15 as soon as she's done with this  
16 document, we're going to stop.

17 MR. ALLEN: That's fine. We  
18 only have one more document left.

19 MS. DAVIS: That's fine. We  
20 can do that next month.

21 MS. ABARAY: Next month?

22 MS. DAVIS: That's correct.  
23 The witness has been harassed long  
24 enough this evening, and I'm not

1 MR. ALLEN: Right.

2 MS. ABARAY: I've changed my  
3 airfare.

4 MS. DAVIS: That was prior  
5 to the harassment that Mr. Allen  
6 has subjected this witness to for  
7 the last hour and a half.

8 MS. ABARAY: I don't think  
9 it is fair to call it harassment.

10 MR. ALLEN: Me, neither.

11 MS. ABARAY: He's doing a  
12 thorough job with documents.

13 MS. DAVIS: It is 7:30 p.m.

14 MS. ABARAY: Why don't we  
15 let him finish his documents, but  
16 I've arranged for this conference  
17 room tomorrow at everyone here's  
18 agreement. We've got people in  
19 this law firm coming in early to  
20 let us in.

21 MS. DAVIS: The only person  
22 I'm interested in at this time is  
23 the witness, who has been sitting  
24 here since 9 a.m. --



1 53, the first page is a fax from you to  
2 Mike Scott and Garry Pay. Is that right?

3 A. Well, that's a cover sheet  
4 where I assume I was sending a copy of  
5 this letter from Mr. Levitt to Mr. Scott  
6 and Mr. Pay.

7 Q. So, you, Carol Boozer, who  
8 were performing the studies which we've  
9 discussed today, kept not only in contact  
10 with Mike Scott at ST&T about your  
11 studies, you also kept in contact with  
12 Garry Pay at Metabolife; true?

13 MS. DAVIS: Objection.  
14 Counsel, we have gone over and  
15 over and over this. She has  
16 discussed multiple times any  
17 contact with Garry Pay.

18 MR. ALLEN: It may be  
19 inaccurate. We find more and  
20 more. I'm entitled to question  
21 her about the documents.

22 MS. DAVIS: Then question  
23 about the document. You are  
24 putting words into her mouth.

1 Mr. Pay for me to send this copy of the  
2 poster to the FDA. So, it seemed  
3 reasonable that they would be interested  
4 to see the reply from the FDA once I had  
5 done that.

6 MS. DAVIS: Just answer his  
7 question.

8 MR. ALLEN: I object to the  
9 portion that's nonresponsive.

10 THE WITNESS: Strike all of  
11 that.

12 MR. ALLEN: Right.

13 BY MR. ALLEN:

14 Q. My only question is --

15 MS. DAVIS: She's answered  
16 your question.

17 MR. ALLEN: I have another  
18 question.

19 MS. DAVIS: Fine.

20 MR. ALLEN: You know what,  
21 all of y'all can leave. I'm  
22 sitting here doing what I have to  
23 do with 1,000 documents produced  
24 to me, and I'm doing it in less

1 MR. ALLEN: I'm asking her a  
2 question. Let me rephrase the  
3 question.

4 BY MR. ALLEN:

5 Q. As reflected in Exhibit 53,  
6 did you contact and keep in touch with  
7 Garry Pay during the course of the time  
8 you were doing the studies on the  
9 ephedra-containing products?

10 MS. DAVIS: Objection.  
11 Misstates prior testimony,  
12 inaccurately reflects the  
13 document. The document speaks for  
14 itself. If you have a question --

15 MR. ALLEN: It is a  
16 question.

17 BY MR. ALLEN:

18 Q. Did you keep in contact with  
19 Garry Pay during the process of you doing  
20 the studies on Metabolife?

21 A. I occasionally contacted Mr.  
22 Pay as we see from these documents. I  
23 believe they had asked me -- I believe  
24 the request had come from Mr. Scott and

1 than four hours and in three  
2 cases. So, I think the rules  
3 permit it, and if you don't think  
4 so, we can call a court, and we'll  
5 talk to them tomorrow.

6 MR. TERRY: I haven't done  
7 anything.

8 MR. ALLEN: Okay. And I  
9 resent the side bar comments.

10 MR. TERRY: Mike, why are  
11 you giving me a lecture?

12 MS. DAVIS: I resent the  
13 side bar comments and the  
14 discussion, and I'll be glad to  
15 call any judge anywhere at any  
16 time.

17 MS. DAVIS: Which of those  
18 are you referring to? Because I'm  
19 sitting right here, and I'm the  
20 only one discussing out loud, and  
21 it is my witness.

22 MR. ALLEN: Right.

23 BY MR. ALLEN:

24 Q. Dr. Boozer, Mr. Scott was

1 not presented to the jury.  
 2 MR. ALLEN: Right. I'm  
 3 trying to tell you, Pam, I offered  
 4 an hour and a half ago to stop,  
 5 and you know that.  
 6 MS. DAVIS: Because you  
 7 represented you would be able to  
 8 go through a stack of documents  
 9 that she would authenticate.  
 10 MS. ABARAY: Let me just  
 11 say --  
 12 MR. ALLEN: And I told you I  
 13 could make no promise,  
 14 representation, warranty or  
 15 guarantee.  
 16 MS. DAVIS: Fine. I will  
 17 let you finish those two  
 18 documents. When we're done, I  
 19 will discuss with my witness  
 20 whether or not she's available to  
 21 come in after this.  
 22 MR. ALLEN: Let me tell  
 23 you --  
 24 MS. DAVIS: Please proceed.

1 that I mentioned getting from Mr.  
 2 Prettyman I think occurred before this.  
 3 Q. Why did you forward this  
 4 letter from the FDA requesting the raw  
 5 data to Mr. Pay and to Mr. Scott?  
 6 A. I think they requested it.  
 7 Q. How did they know you got  
 8 that letter?  
 9 A. Oh, they probably --  
 10 somebody probably talked to me on the  
 11 telephone.  
 12 Q. So, did you keep Mr. Scott  
 13 and Mr. Pay informed when the FDA talked  
 14 to you about your data?  
 15 A. I think this is the only  
 16 letter that I have received from them.  
 17 - - -  
 18 (Whereupon, Boozer Exhibit  
 19 54 was marked for identification.)  
 20 - - -  
 21 BY MR. ALLEN:  
 22 Q. I'm going to hand you what's  
 23 been marked as Exhibit 54 and ask you if  
 24 you received that.

1 I don't want to discuss anymore  
 2 with you.  
 3 MR. ALLEN: I'm not asking  
 4 for her to return tomorrow.  
 5 MS. DAVIS: Do not discuss  
 6 anymore or we're going to leave.  
 7 MR. ALLEN: You are the one  
 8 that started this conversation.  
 9 BY MR. ALLEN:  
 10 Q. Exhibit 53. Now, you  
 11 forwarded this to Mr. Pay and to Mike  
 12 Scott. The letter is from Mr. Levitt at  
 13 the Center for Food Safety and Applied  
 14 Nutrition for the FDA; correct?  
 15 A. Correct.  
 16 Q. Addressed to you. What is  
 17 this letter asking you for?  
 18 A. The raw data.  
 19 Q. The raw data on what?  
 20 A. The six-month study.  
 21 Q. Had Mr. Levitt and the FDA  
 22 previously asked you for the raw data on  
 23 your six-month study?  
 24 A. Well, that telephone call

1 A. Yes. Oh, no, this is not  
 2 received.  
 3 Q. I'm sorry.  
 4 A. This is a letter I sent.  
 5 This is the letter that I sent that I  
 6 think prompted this response from them.  
 7 No, that's wrong. Maybe they were that  
 8 slow. Let's see. There's not a date.  
 9 It is a little hard to tell.  
 10 Q. I think there is a date.  
 11 A. Well, there's a date stamped  
 12 on there, December 5, 2000. Maybe they  
 13 actually -- right. This letter  
 14 accompanied the poster, I believe.  
 15 Q. When you say "this letter,"  
 16 this letter --  
 17 A. Let's see. No, maybe this  
 18 wasn't. This was -- I guess this was  
 19 just an update.  
 20 Q. Ma'am, I'm not trying to be  
 21 difficult.  
 22 A. I'm sorry. I'm trying to  
 23 figure it out.  
 24 Q. I know. It's hard to figure

1 MS. ABARAY: I understand.  
2 MS. DAVIS: -- subjected to  
3 questioning. I understand, Ms.  
4 Abaray, that you did not harass  
5 her. You finished timely. We are  
6 now at 7:30.

7 MR. ALLEN: I want the  
8 record to reflect that I haven't  
9 harassed her, and I also want the  
10 record to reflect that I have been  
11 shorter with the witness than Ms.  
12 Abaray.

13 MS. DAVIS: Because she  
14 covered the bulk of the material,  
15 and you are now just repeating the  
16 majority of it.

17 MR. ALLEN: I resent that  
18 comment. None of these documents  
19 I have marked -- they are  
20 different than any document marked  
21 previously and we were produced --

22 MS. DAVIS: Fine. How many  
23 documents do you have left to  
24 cover with her?

1 documents that were not previously  
2 marked. I don't think there's  
3 anything wrong with that, and I  
4 apologize it's 7:30, but I didn't  
5 set this schedule. And I've  
6 offered you, as you will admit  
7 both on the record and off the  
8 record, that I would quit at any  
9 time you wanted to quit, and I'll  
10 quit right now.

11 MS. DAVIS: Right, and then  
12 my witness will have to be  
13 subjected to another full day of  
14 your harassment.

15 MR. ALLEN: No. That's  
16 exactly wrong what you just said,  
17 and I really resent that. The  
18 witness will not be subjected to  
19 another full day of anything. I  
20 have asked my questions I think  
21 I'm entitled to. I'm trying to  
22 get through at your request. You  
23 said about an hour ago that if I  
24 would go through these documents,

1 MR. ALLEN: I have two.  
2 That's what I told you. And I'll  
3 tell you, whatever the record will  
4 reflect, I think there were well  
5 over 700 documents produced to me.

6 MS. DAVIS: No, there were  
7 not.

8 MR. ALLEN: What's the  
9 number?

10 MS. ABARAY: 684 pages.

11 MR. ALLEN: 680, and I got  
12 them on Saturday.

13 MS. DAVIS: Yes. And you  
14 have never served me with a  
15 notice. That was a courtesy that  
16 I served the notice on you at all  
17 prior to this deposition.

18 MR. ALLEN: Ms. Davis, I'm  
19 not complaining. I'm just telling  
20 you the facts. I got 680  
21 documents on Saturday. I have  
22 flown to New York. I have been  
23 shorter with the witness than Ms.  
24 Abaray was. I have marked

1 Mr. Terry was going to get the  
2 witness tomorrow.

3 MS. DAVIS: Right. And that  
4 was at 6 p.m. It is now 7:30 p.m.

5 MR. ALLEN: No.

6 MS. DAVIS: And you keep  
7 grabbing more documents and  
8 putting them into that stack of  
9 yours.

10 MR. ALLEN: That is a  
11 misrepresentation of the facts.

12 MR. LEVINE: How many  
13 minutes have you got left if you  
14 are able to continue?

15 MR. ALLEN: That's a  
16 misrepresentation of the facts. I  
17 have not kept on grabbing. I  
18 stacked them up here. I have two  
19 more documents, but I don't want  
20 statements on the record that are  
21 not true. I offered to complete  
22 the deposition.

23 MS. DAVIS: Clearly all of  
24 this will be off the record and

1 Calls for speculation.  
 2 THE WITNESS: I'm sorry?  
 3 BY MR. ALLEN:  
 4 Q. Do you know how Metabolife  
 5 356 was promoted in relation to the need  
 6 to do diet and exercise?  
 7 A. How it was promoted in what  
 8 sense? You mean through their ads?  
 9 Q. Yes, ma'am.  
 10 A. I'm not really aware how  
 11 they advertise with regard to exercise.  
 12 Q. Can you tell us the people  
 13 that were in the active herbal supplement  
 14 group in either one of your studies, can  
 15 you tell me what their weight is today?  
 16 A. No.  
 17 Q. Can you tell me if they have  
 18 achieved permanent weight loss?  
 19 A. I can't tell you that.  
 20 Q. Do you know?  
 21 A. I don't know.  
 22 Q. Is that important?  
 23 A. Well, permanent weight loss  
 24 is important.

1 Q. Now, your published paper in  
 2 regard to the Metabolife, the eight-week  
 3 study, called your study a small scale  
 4 study, a small scale study. Do you  
 5 recall that?  
 6 A. I'm sorry. Who referred to  
 7 it as a small scale?  
 8 Q. You did in your actual  
 9 publication. You called it a small scale  
 10 study.  
 11 A. In the publication of the  
 12 eight-week study itself?  
 13 Q. Yes, ma'am.  
 14 A. It is entirely possible. I  
 15 don't recall those exact words.  
 16 Q. Do you agree it is a small  
 17 scale study?  
 18 A. I think at the end, right,  
 19 we said that, yes.  
 20 Q. Now, in fact, the study  
 21 group that was going to receive either  
 22 the placebo or the active herbal  
 23 supplement was not even powered by your  
 24 statistician to study the parameters of

1 safety; was it?  
 2 MS. DAVIS: Objection,  
 3 vague, ambiguous.  
 4 THE WITNESS: No. I don't  
 5 think we did. I think we were  
 6 powering for weight loss.  
 7 BY MR. ALLEN:  
 8 Q. So, to solve, if necessary,  
 9 your lawyer's objection, you said you do  
 10 not think you powered the study group in  
 11 the Metabolife study to look at safety;  
 12 is that right?  
 13 A. I think that's correct.  
 14 Q. Tell the jury what it means  
 15 that you did not power the Metabolife  
 16 study, the eight-week study, to study  
 17 safety?  
 18 A. The power analysis is a  
 19 procedure, a statistical procedure to  
 20 determine how many subjects you need to  
 21 demonstrate -- to prove one way or the  
 22 other whether you are going to see an  
 23 effect of a certain defined size. So,  
 24 for example, if it is weight loss, then

1 you have to estimate how much weight loss  
 2 you project to be a meaningful number,  
 3 and then you can calculate how many  
 4 people you need to recruit in order to  
 5 demonstrate that much weight loss. So,  
 6 the other way to do it, like we did for  
 7 the other study, is that was powered on  
 8 the basis of blood pressure measurement,  
 9 and so we estimated how much of a blood  
 10 pressure change we expected to be  
 11 meaningful, and then we calculate how  
 12 many people we needed to recruit in order  
 13 to see that change.  
 14 Q. But no calculations were  
 15 made by statisticians, and no attempt was  
 16 made to power the Metabolife eight-week  
 17 study with a sufficient number of people  
 18 so you could look at safety; is that  
 19 correct?  
 20 MS. DAVIS: Objection, asked  
 21 and answered.  
 22 THE WITNESS: Yes. I think  
 23 that's correct. As I recall, we  
 24 powered it on the weight change

1 it out. It's hard for me to figure it  
2 out. I didn't write either one of them.

3 MS. DAVIS: Move to strike  
4 side bar comment by counsel.

5 THE WITNESS: Okay. I think  
6 what this is, I think this is  
7 just -- I think the FDA must have  
8 been requesting it, and I think  
9 what this was was just an update  
10 to say what the status of the  
11 study was. I think this was not  
12 what I thought it was initially.  
13 I don't think this was the letter  
14 that accompanied the poster that I  
15 sent. That must have gone later  
16 and then prompted this response.

17 BY MR. ALLEN:

18 Q. All right. I'm sorry for  
19 the confusion. It's because you use this  
20 and that on the record, and it won't  
21 reflect.

22 A. Okay.

23 Q. 54 is a letter you sent to  
24 the FDA; right?

1 MS. DAVIS: Fine.

2 MR. ALLEN: We can go off  
3 the record.

4 THE VIDEOTAPE TECHNICIAN:  
5 Off the record at 7:37 p.m.

6 - - -  
7 (Whereupon, there was a  
8 recess.)

9 - - -  
10 THE VIDEOTAPE TECHNICIAN:  
11 Back on the record at 7:41 p.m.

12 BY MR. ALLEN:

13 Q. Dr. Boozer, in the studies,  
14 both the Metabolife study and the  
15 combination of Ma Huang and kola nut that  
16 you performed, the individuals in the  
17 study, whether they were active or  
18 placebo, were actually given handouts on  
19 diet and exercise; is that correct?

20 A. They were given handouts on  
21 diet. I'm not sure they were given  
22 handouts on exercise. I really can't  
23 remember that.

24 Q. What was the purpose of

A. Correct.

3 Q. And why did you send 54 to  
4 the FDA?

5 A. Well, I think -- I mean, it  
6 doesn't say anything about sending the  
7 poster. So, I assume that this letter  
8 was just -- I think this was one that Mr.  
9 Scott had asked me to write to update the  
10 FDA on the progress of our study, because  
11 the FDA was very anxious to get some  
12 information about it.

13 Q. So, 54 is written to the FDA  
14 at the request of Mr. Scott?

15 A. I'm guessing. I think it  
16 was from -- yes. I think that's what  
17 happened.

18 Q. And 53 was a letter you  
19 received from the FDA that you forwarded  
20 to Mr. Scott and Mr. Pay?

21 A. That's correct.

22 Q. Now, if your counsel would  
23 be so kind, I'm through with the  
24 documents. If you let me look at my  
notes, I may be through forever.

1 giving them handouts on diet?

2 A. Well, to try -- the goal of  
3 the study was to try to encourage them to  
4 reduce their intake of dietary fat, given  
5 my previous interest in dietary fat. We  
6 didn't ask them to restrict their  
7 calories, but we were trying to teach  
8 them to reduce their intake of fat.

9 MR. ALLEN: I would object  
10 to the side bar of counting with  
11 your fingers.

12 MR. LEVINE: I was just  
13 keeping track of your questions.

14 MR. ALLEN: I object to it.  
15 It is distracting.

16 BY MR. ALLEN:

17 Q. Did you also instruct the  
18 patients in the study to engage in  
19 exercise?

20 A. Yes.

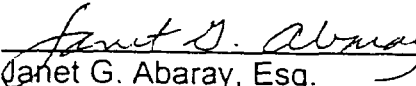
21 Q. You know that that is not  
22 the way Metabolife 356 was promoted;  
23 don't you?

24 MS. DAVIS: Objection.

COURTESY COPY TO:

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Attorney for Dr. Boozer

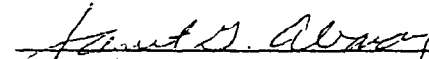
  
\_\_\_\_\_  
Janet G. Abaray, Esq.  
Beverly H. Pace, Esq.



III. CONCLUSION

Plaintiffs therefore respectfully request that their motion for expedited release of the Boozer transcript and exhibits be granted.

Respectfully submitted,

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by ordinary U.S. Mail on this the 12 of March 2003, upon the following:

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In addition, while the protective order entered in this case does provide that depositions be maintained as confidential for a 30 day period, during which time the parties are to review the transcript and designate those portions they submit are confidential, public policy dictates that the 30-day period be disregarded in this case. With the FDA's 30-day comment period already running, and the FDA currently engaged in reviewing the Boozer study raw data, it is imperative that full information concerning Dr. Boozer's study be made available to the FDA. Athletes, students, and other consumers are continually reassured by the ephedra industry that their products are safe, based in large part upon the results of the Boozer study. Public policy demands that full information regarding the serious flaws in the Boozer study be made equally available to those regulating the supplement industry, and to those consuming the industry's products, as to industry itself. Dr. Boozer's eyeball method of investigating the product contents, her disregard of the systemic error in the labeling of product, and her admitted potential of bias towards industry, are all information which the FDA, and the public, must know.

Finally, Plaintiffs note that without prior notice to Plaintiffs' counsel, and without notice to Dr. Boozer's counsel, Metabolife secretly cross-noticed Dr. Boozer's deposition of March 4 and 5, 2003, in numerous other cases, the identities of which are largely unknown to Plaintiffs. Appearing on the record, however are Plaintiffs' counsel from Pensacola, Florida; St. Louis, Missouri; and Pennsylvania. Plaintiffs have no idea what other courts Metabolife served cross notices in. (See, transcript at 19.) However, because Metabolife opened the deposition to the world, Metabolife cannot simultaneously attempt to impose secrecy upon Plaintiffs.



F.R.D. 506, 508 (E.D.N.Y. 1987) (in determining if information is trade secret or confidential commercial information, courts consider the extent to which the information is known outside the business.)

Indeed, a review of the documents marked as "confidential" or "restricted access" reveals that they are routine transmittal letters, updates on study progress, or summaries of data. To the extent that they include raw data, such as statistics on blood pressure for people in the studies, or the HPLC test results of study product, this is not commercial or trade secret information, because the data is generated by Dr. Boozer, not by industry. Moreover, the final results are published. Furthermore, no issue of confidentiality of medical records exists, because no patient names are included in any of the summary data, nor were any actual medical records produced.

Basically, the documents produced reveal the truth, with happens to be discomfoting to Dr. Boozer, Metabolife and the supplement industry. However, the fact that documents expose critical errors in the study and potential bias by the investigator does not constitute a secret which the Court can or should protect. To the contrary, the burden rests with the party seeking a protective order to establish particular need for protection. *Lewis v. St. Luke's Hospital*, 132 F.3d 33, 1997 WL 778410 (6<sup>th</sup> Cir., 1997) (unpublished opinion.) As recognized by the Sixth Circuit Court of Appeals in *Procter & Gamble v. Bankers Trust*, 78 F.3d 219, 227 (6<sup>th</sup> Cir. 1996), the public interest is served by open and public court proceedings, and the parties cannot arbitrarily define as confidential that which is not. "Rule 26(c) allows the sealing of court papers only for 'good cause shown' to the court that the particular documents justify court-imposed secrecy." *Id.*



1 BY MR. ALLEN:  
 2 Q. Is that why it was referred  
 3 to, the eight-week study was referred to  
 as an efficacy study?  
 A. I think that's correct.  
 6 MR. ALLEN: Thank you. I  
 7 have no further questions.  
 8 Anybody else have any  
 9 questions? We ought to see if  
 10 anybody else has any, Pamela.  
 11 MS. DAVIS: I think I need  
 12 to talk to my witness.  
 13 MR. TERRY: We do.  
 14 MR. ALLEN: That may be the  
 15 best way to handle it.  
 16 MS. DAVIS: I understand Mr.  
 17 Terry --  
 18 MR. TERRY: I do.  
 19 MS. DAVIS: I understand Mr.  
 20 Terry does. I need to discuss  
 21 with her whether she's going to be  
 22 available tomorrow morning. So,  
 23 I'm going to step out in the hall.  
 24 MR. ALLEN: Okay.

1 CERTIFICATE  
 2 I hereby certify that the  
 3 witness was duly sworn by me and that the  
 4 deposition is a true record of the  
 5 testimony given by the witness.  
 6  
 7  
 8  
 9  
 10 Linda L. Golkow, CRR, CSR, a  
 11 Federally-Approved Registered  
 12 Diplomate Reporter and Notary  
 13 Public  
 14  
 15  
 16  
 17 (The foregoing certification  
 18 of this transcript does not apply to any  
 19 reproduction of the same by any means,  
 20 unless under the direct control and/or  
 21 supervision of the certifying reporter.)  
 22  
 23  
 24

1 THE VIDEOTAPE TECHNICIAN:  
 2 Off the record at 7:46 p.m.  
 3 - - -  
 4 (Whereupon, the deposition  
 5 adjourned at 7:46 p.m.)  
 6 - - -  
 7  
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1 INSTRUCTIONS TO WITNESS  
 2 Please read your deposition  
 3 over carefully and make any necessary  
 4 corrections. You should state the reason  
 5 in the appropriate space on the errata  
 6 sheet for any correction that is made.  
 7 After doing so, please sign  
 8 the errata sheet and date it.  
 9 You are signing same subject  
 10 to the changes you have noted on the  
 11 errata sheet, which will be attached to  
 12 your deposition.  
 13 It is imperative that you  
 14 return the original errata sheet to the  
 15 deposing attorney within thirty (30) days  
 16 of receipt of the deposition transcript  
 17 by you. If you fail to do so, the  
 18 deposition transcript may be deemed to be  
 19 accurate and may be used in court.  
 20  
 21  
 22  
 23  
 24

1 -----  
 2 ERRATA  
 3 -----  
 4 PAGE LINE CHANGE  
 5 -----  
 6 -----  
 7 -----  
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ACKNOWLEDGMENT OF DEPONENT

2 I, \_\_\_\_\_, do hereby  
 3 certify that I have read the foregoing  
 4 pages, \_\_\_\_\_ and that the same is a  
 5 correct transcription of the answers  
 6 given by me to the questions therein  
 7 propounded, except for the corrections or  
 8 changes in form or substance, if any,  
 9 noted in the attached Errata Sheet.

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 11 DATE \_\_\_\_\_ SIGNATURE \_\_\_\_\_  
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13 Subscribed and sworn to before me this  
 14 \_\_\_\_\_ day of \_\_\_\_\_,  
 15 200\_\_.  
 16 My commission expires: \_\_\_\_\_  
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18 Notary Public  
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IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

**FILED**

APR 10 2003

KENNETH J. MURPHY, Clerk  
CINCINNATI, OHIO

ROBIN WHITE, et al. : Civil Action No. C-1-01-356  
: :  
Plaintiffs : Judge Beckwith  
: Magistrate Hogan  
vs. : :  
METABOLIFE INTERNATIONAL, INC. :  
: :  
Defendant :

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SHERRY COX, et al. : Civil Action No. C-1-01-643  
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: :  
Defendant :

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CYNTHIA A. JOHNSON, et al. : Civil Action No. C-1-01-676  
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Plaintiffs, : Judge Beckwith  
: Magistrate Hogan  
vs. : :  
METABOLIFE INTERNATIONAL, INC. :  
: :  
Defendant :

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4. No other deposition exhibits are considered confidential under the terms of the protective order.

STIPULATED TO THIS 10 DAY OF APRIL, 2003.

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STIPULATED TO THIS 8<sup>th</sup> DAY OF APRIL, 2003.

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STIPULATED TO THIS \_\_\_\_\_ DAY OF APRIL, 2003.

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**FILED**

MAR 12 2003

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Plaintiffs, : Judge Beckwith  
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vs. : Magistrate Hogan  
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METABOLIFE INTERNATIONAL, INC. :  
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Defendant :  
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BARBARA J. BRADLEY, et al. : Civil Action No. 02-CV-809  
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Plaintiffs, : Judge Beckwith  
: :  
vs. : Magistrate Hogan  
: :  
METABOLIFE INTERNATIONAL, INC. :  
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Defendant :  
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PLAINTIFFS' MEMORANDUM IN SUPPORT OF  
MOTION FOR EXPEDITED RELEASE OF TRANSCRIPT  
OF DR. BOOZER AND LIFTING OF PROTECTIVE ORDER DESIGNATION  
SUBMITTED UNDER SEAL

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I. THE TESTIMONY OF DR. BOOZER

On March 4, 2003, and continuing on March 5, 2003, Plaintiffs deposed Dr. Carol Boozer, a doctor of nutrition science at Columbia University and St. Luke's Hospital in New York. Dr. Boozer published two articles in the International Journal of Obesity on herbal ephedra clinical trials in which acted as lead author. These articles are Dr. Boozer's only published clinical trials, and the only published clinical trials on herbal ephedra. (Boozer Depo. at 38-39.)

Dr. Boozer was retained by Michael Scott of Science, Toxicology & Technology (ST&T) to perform the research on herbal ephedra. (Boozer Depo. at 114-117.) One study, sponsored by Metabolife, examined 35 persons consuming Metabolife 356 for eight weeks, compared to persons on 35 placebo<sup>1</sup>. (Boozer Depo. at Ex. 17.) All study participants were pre-screened to exclude persons with health problems, including but not limited to cardiac symptoms, such as high blood pressure. Each Metabolife tablet is labeled to contain 12 mg. of herbal ephedra derived from Ma Huang, and 20 mg. of caffeine derived from Guarana. (*Id.*) During the course of the study, 8 persons (23%) dropped from the Metabolife group for cardiac related adverse events which the study authors considered to be potentially related to Metabolife 356, compared to zero in the placebo group. (*Id.*) The adverse events included palpitations, chest pain, elevated blood pressure, and, irritability. (*Id.*)

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<sup>1</sup> Only 24 persons in each group completed the eight-week trial.



Dr. Boozer published the results of the Metabolife 356 Study in the *International Journal of Obesity*, 2001, 25, 316, "*An Herbal Supplement Containing Ma Huang – Guarana for Weight Loss: A Randomized Double Blind Trial.*" Dr. Boozer testified that this study was a double blind, placebo-controlled, prospective study, meaning that neither the participants nor the clinicians knew which product the subject was taking, that the subjects' exposure to active or placebo product was controlled by the study design, and that the data was gathered on a prospective basis. (Boozer Depo. at 147-150.) Dr. Boozer referred to this study design as the "gold standard" for investigation of product safety and efficacy. (?)

At the same time that the Metabolife 356 study was initiated, Mr. Scott also engaged Dr. Boozer to perform another study on behalf of an herbal supplement industry group, which included Metabolife among its members. (Boozer Depo. at 114-117; 157.) This study was a six-month study, comparing an herbal ephedra and caffeine combination product to placebo. Unlike the Metabolife 356 study, the active product in this study was not an actual marketed product, but rather a specially created combination representative of the products sold by the industry, which was labeled as 15 mg. of herbal ephedra derived from Ma Huang, and 32 mg. of caffeine derived from Kola Nut. The active product in the six-month study contained no other ingredients. (Boozer Depo. at Ex. 14.)

Subjects in this Second Study were subject to much more stringent medical screening than those in the First Study. These subjects were required to wear 24-hour Holter monitors, and 24-hour ambulatory blood pressure devices, on two separate occasions before they were permitted to enter the study. Any person with high blood pressure (greater than 139 over 87) on any of the readings was excluded, as well as



was labeled as placebo, and in another instance, placebo product was labeled as active. (Boozer Depo. at 179-180.)

Although Dr. Boozer became aware in August of 2000 that product from the study was mislabeled, she took no action to notify the FDA (to whom she had presented preliminary results), nor the International Journal of Obesity, to whom she submitted her paper for publication until 2003. (Boozer Depo. at 242-243; 482-483.) Nor did she indicate in any of the abstracts or paper presentations regarding her study published in the fall of 2000 that any irregularity had occurred. (Boozer Depo. at 482-483.) Even when the data revealed that 10 of the placebo patients developed cardiac symptoms, such as palpitations and disorientation, chest pain and dizziness, elevated blood pressure, irregular heart beat, ventricular tachycardia and chest pain, (compared to zero in the first study) and that the rate of such complaints in this study was virtually equal between the placebo and active group, she never considered whether her data was flawed by a mix-up in distribution of placebo and active product. (Boozer Depo. at 228-229.) Nor did she investigate why so many cardiac symptoms suddenly arose in persons who were twice prescreened by both 24 hour Holter monitors and 24 hour ambulatory blood pressure readings and found to have no cardiac problems. (Boozer Depo. at 219-225.)

Dr. Boozer admitted that she could not exclude that the persons in the placebo group who suffered cardiac symptoms were in fact exposed to the active product. (Boozer Depo. at 232.) Dr. Boozer also admitted that a mix up in administration of the product between groups would diminish any differences between the groups in terms of the rate of adverse events reported. (Boozer Depo. at 286-287.)





any with irregular heart rhythms identified by either of the Holter monitor readings.

Other laboratory testing, such as urine and blood toxicology screening, was conducted as well, and used to exclude persons from the study. (Boozer Depo. at 210-218.)

Dr. Boozer published the results of the six month study in the International Journal of Obesity, 2002, 26, 593-604, "*Herbal Ephedra/Caffeine for Weight Loss: A 6-Month Randomized Safety and Efficacy Trial.*" Once again, Dr. Boozer described the study as a double-blind, placebo-controlled, prospective trial. (Boozer Depo. at 147-150.)

In Dr. Boozer's deposition, however, she admitted that as early as August 18, 2000, a year and half before her Second Study was published, she discovered that there was a mix up in the labeling of active and placebo product in the study. (Boozer Depo. at 175-177.) Specifically, after the clinical portion of the trial concluded, and when the data analysis process began, she selected 4 samples from bottles left over from two subjects who left the study before completion, to be sent for HPLC testing. The purpose of the testing was to confirm that the proportions of active ingredients in the study preparation comported with the description of 15 mg. of ephedra and 32 mg. of caffeine. (Boozer Depo. at 160-162.) To Dr. Boozer's surprise, however, one of the two bottles samples came back with a negative finding for active ingredients, indicating that it was in fact a placebo. (Boozer Depo. at 166-171.) Further testing by another laboratory confirmed these results. *Id.*

In addition, Dr. Boozer also identified product labeled as placebo which in fact contained the active product ingredients. (Boozer Depo. at 177.) Dr. Boozer could thus confirm that by August of 2000, she knew that in at least one instance active product



Dr. Boozer testified further that while doing nothing about this issue for over two years, she finally took action after it became revealed in a deposition taken by plaintiffs in an ephedra products liability case, in October of November of 2002, that a mix-up in labeling of placebo and active product had occurred. (Boozer Depo. at 198-200.) After that deposition, Metabolife paid Dr. Boozer over \$10,000 to investigate the mix-up. (Boozer Depo. at 250-251.) By now, nearly all product from bottles actually used in the study had either been consumed by participants or discarded when they returned their unused portions. (Boozer Depo. at 182.) However, some six bottles from "drop-outs" remained in Dr. Boozer's possession (Boozer Depo. at 183), and 320 unassigned bottles were in the possession of ST&T Consulting. (Boozer Depo. at 181-184.) Dr. Boozer therefore traveled to San Francisco, to the law firm which represented Mr. Scott of ST&T at his deposition and which represented Dr. Boozer at her deposition, where she sat in a conference room with a paralegal and physically examined each of 326 bottles left over from the study. (Boozer Depo at 200-201.) She broke open five capsules from each bottle, and determined based on the color of the contents whether the contents were active or placebo, (the proceedings were memorialized on videotape.) (Boozer Depo. at 201-203; 491-494.) In total, she identified five mislabeled bottles, four labeled as active which contained placebo, and one labeled as placebo which contained active. (Boozer Depo. at 202-203.) The four mislabeled active products that were really placebo were all contained within a single series which would have been assigned to one person. (Boozer Depo. at 206.) As to the active which was labeled as placebo, that product came from a series assigned to a placebo participant who subsequently dropped out of the study. (Boozer Depo. at 205-206). She also confirmed that the bottles were accurately labeled by the manufacturer, and



that the error occurred in the system used by ST&T to assign the bottles to the study participants. (Boozer Depo. at 189-194; 196-197; 203.)

Despite acknowledging in her testimony that the error represented a flaw in the system used by ST&T to label product, Dr. Boozer assumed for purposes of defending her study results that the mislabeling represented a random error, at the magnitude of 1.5%, which would not effect her study results. (Boozer Depo. at Ex. 15.) She engaged the study statistician, Dr. Homel to perform an analysis called a "bootstrap" analysis, to attempt to estimate the error in the study results. (Boozer Depo. at 247.) Dr. Boozer then produced a copy of a letter she sent on January 29, 2003, to the Editor of the International Journal of Obesity revealing for the first time the product mix-up, and enclosing the "bootstrap" analysis. (Boozer Depo. at Ex. 15.) Dr. Boozer contended in this letter that based on the "bootstrap" analysis, the problem was essentially a harmless error. (Boozer Depo. at 244-248; Ex. 15.) Dr. Boozer also stated in the letter to the Editor and in her deposition testimony that she forwarded the same information to the FDA, but no letter confirming the submission to FDA was produced. *Id.*

Dr. Boozer also testified that the FDA had been requesting, since before her study was published, that she provide the raw data from her study to the FDA. (Boozer Depo. at 59-62; 63-68.) Initially, she refused because the study was not published. (Boozer Depo. at 61; 63.) Moreover, her contract with ST&T required that she obtain consent from ST&T before providing any data to the FDA. (Boozer Depo. at 53; 62-63.) When the FDA later renewed its attempts to obtain the raw data in 2002, attorney Wes Segner of Patton Boggs undertook to negotiate with FDA on her behalf. (Boozer Depo. at 132-133.) Dr. Boozer stated that the negotiation took months, and just resulted in permission to release her data to the FDA in January or February of 2003. (Boozer



Depo. at 54-57; 68-70; 132-133.) She did not know under what authority Mr. Segner represented her in these negotiations, and acknowledged that he is quoted in the New York Times as counsel for the Ephedra Education Council, an industry group, but did not really understand his role in the issue. (Boozer Depo. at 133-134; 284-285.) Dr. Boozer admitted that she may be biased in favor of the ephedra industry. (Boozer Depo. at 592.)

II. THE PUBLIC HAS A SIGNIFICANT INTEREST IN LEARNING THE FLAWS OF THE BOOZER STUDY.

Dr. Boozer testified that the FDA has recently formed a special committee for the sole purpose of examining the raw data from her study. (Boozer Depo. at 278-280.) Also, on February 28, 2003, the FDA announced the initiation of a 30 day comment period for its proposed new rule regulating the sale of ephedra, which requires labeling that states that ephedra products can cause heart attacks, strokes or death. (*Id.* and, See, Ex. 1 attached hereto.) The FDA also issued on February 28, 2003, the results of the Rand Report, which is a review of the data on ephedra products. The United States Senate, the Honorable Richard J. Durbin, has also been holding hearings on the safety of ephedra and other dietary supplements since July of 2002.

Throughout the Rand Report, the FDA proposed rule, and the Senate hearings, Dr. Boozer's clinical trials feature prominently. In every industry submission to the FDA, in every industry statement submitted to Senator Durbin, in Metabolife's response to Dr. Sidney Wolfe of Public Citizen, in response to every legal claim, Metabolife and other dietary supplement manufacturers rely almost exclusively upon the second Boozer study as proof of product efficacy and safety. (See, e.g., Ex. 2, attached hereto, written statement of David W. Brown. Before the Committee on Governmental Affairs, at 2, discussing and attaching Dr. Boozer's "Harvard/Columbia" trial.) Yet the industry has





orchestrated for over two years to conceal the serious, fatal flaw underlying the second Boozer study, and to this day is attempting to minimize the unreliability of the study. With the FDA currently undertaking to review Dr. Boozer's study, and with the FDA currently undertaking to review the labeling for ephedra products, and with the FDA pondering the withdrawal of ephedra from the market, public policy mandates that the full nature of the Boozer study errors be made known.

Yet, Dr. Boozer, a third party who should have no interest in protecting the supplement industry, has marked as "confidential" or "restricted access" virtually every page produced in response to the notice of deposition and subpoena in this case.<sup>2</sup> Even photocopies of her published article have been marked as confidential by Dr. Boozer. As the Court can see in reviewing the attached deposition and exhibits, none of the documents produced constitute confidential commercial information or trade secret. Instead, the documents reflect Dr. Boozer's own data or communications between herself and industry. As an individual researcher, Dr. Boozer's data cannot rise to the level of confidential commercial information, because she is a third party, not a commercial entity. In *Murray v. Bank One*, 99 Ohio App.3d 89, 649 N.E.2d 1307 (1994), the court defined a trade secret as any "formula, pattern, device or compilation of information which is used in one's business," and which gives him a competitive advantage over others. Such a description cannot apply to data by trial or third party clinical investigation. Similarly, as an "independent" researcher, if Metabolife revealed any trade secrets or confidential information to Dr. Boozer, a third party, then the information cannot be considered secret any more. See, *Cuno Inc. v. Pall Corp.*, 117

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<sup>2</sup> Dr. Boozer's counsel agreed to produce Dr. Boozer for deposition and to produce requested documents, subject to evidentiary objections. As a formality, Plaintiffs' counsel presented Dr. Boozer with a subpoena for the same information at the deposition.