

discussed below, we respectfully request the issuance of orders: (1) directing Respondents to submit an expedited response by September 6, 2005; (2) extending the date by which Complaint Counsel may depose Dr. Mowrey beyond September 9, 2005; (3) requiring Dr. Mowrey to finally produce, for judicial *in camera* review, the expert-related documentary evidence still withheld from discovery, identified below; and (3) imposing appropriate sanctions for his persistent refusal to produce all expert-related documents and fully comply with the Court's repeated expert discovery orders.

BACKGROUND

As the Court is well aware, Respondents have selected Daniel B. Mowrey, Ph.D, an experimental psychologist and a named Respondent in this matter, to supplement his testimony as an "important fact witness" by testifying as an expert witness at the hearing in this matter.

As a designated expert witness, Respondent Mowrey is subject to the Court's expert discovery orders.¹ Recently, on August 9th, the Court entered an expert discovery order directing Respondent Mowrey to comply with his expert discovery obligations. As documented in our *Motion to Compel Production of Dr. Mowrey's Expert-Related Documents*, throughout discovery in this matter, Respondent Mowrey refused to fully comply with Complaint Counsel's expert-

¹ The Court has entered several expert discovery orders in this matter. On August 11, 2004, this Court entered the *Scheduling Order* requiring the parties to provide, *inter alia*, all "materials fully describing or identifying the background or qualifications of the expert," and "all documents and other written materials relied upon by the expert in formulating an opinion in this case." Scheduling Order ¶ 11. Earlier this year, the Court reaffirmed that "all data, documents, or information considered by a testifying witness in forming the opinions to be proffered in a case are discoverable." Order, Jan. 19, 2005 (granting motion to compel production of document shown to Respondents' testifying expert); *see also* Order, Dec. 29, 2004 (order granting first motion to compel: "Respondents claim that they 'have produced all responsive documents at this juncture' The phrase 'at this juncture' is disturbing. . . . At this juncture, Respondents should have completed their document production.").

related discovery requests and flatly declined to answer certain expert-related deposition inquiries on grounds of privilege. In its *Order on Complaint Counsel's Motion to Compel*, the Court concluded that Respondent Mowrey's refusal to answer these discovery inquiries was improper. The Court also observed that Dr. Mowrey's failure to produce expert-related documents was widespread. In its *Order*, the Court observed: "*Many* of the withheld documents, as described by the privilege log, fall well within the scope of discovery applicable to expert witnesses." *Order*, Aug. 9, 2005, at 3 [hereinafter "*Order*"] (emphasis added).

The Court's August 9th *Order* compelled Dr. Mowrey to produce "all documents that relate to his capacity as an expert witness, including communications with his attorney, the other Respondents, and the other Respondents' attorneys." *Id.* The Court specifically identified some examples of documents relating to Dr. Mowrey's capacity as an expert witness, including, *inter alia*, documents relating to his background reflected in *Privilege Log* entries such as "Daniel Mowrey CV," "all documents that Dr. Mowrey reviewed in the course of forming his opinion," and all documents referring to "studies referenced in his expert report." *Id.* at 2-3.

Respondent Mowrey has *not* produced all of the compelled documents. Notwithstanding the Court's statement that "[m]any of the withheld documents . . . fall well within the scope of discovery," Dr. Mowrey has produced only a small portion of the expert-related documents.²

² On August 16th, Respondent Mowrey produced only 26 pages culled from nearly 200 pages of documents listed on the *Privilege Log*. In forwarding these documents, his counsel affirmed that all of the attachments to the newly-produced documents had been produced already. After we asked Respondent's counsel to confirm this statement, counsel belatedly turned over another document, a draft of Dr. Mowrey's *Report*. This draft was not turned over before Dr. Mowrey's deposition in January, nor was it produced by the date set in the Court's recent *Order*.

Stranger still, Respondent Mowrey also produced four pages dating from December 2004 that were *never* listed on the *Privilege Log*—clearly indicating that he had withheld documents from production without disclosing the existence of those documents on his March 2nd *Log*.

He has failed to produce the rest of the expert-related documents.

Respondent Mowrey failed to produce several types of discoverable documents in response to the Court's *Order*. First, he failed to produce numerous communications and documents concerning his background and credentials, including the three emails identified on his *Privilege Log* as "Daniel Mowrey CV." Dr. Mowrey also failed to produce certain documents relating to topics addressed in his *Report*, such as an email identified as referring to the subject of **REDACTED**.³ Moreover, Dr. Mowrey failed to produce certain communications and documents referring to the actual studies referenced in his *Report*, and the authors of those studies, including the emails identified on the *Privilege Log* as **REDACTED**. See *infra* pages 5-11 (discussing expert-related documents in greater detail). The Court's August 9th *Order* cited or referred to some of these withheld documents as examples of documents that are "well within the scope of discovery applicable to expert witnesses." *Order* at 3 (citing "Daniel Mowrey CV" as first example; also referring to "documents relating to . . . studies referenced in his expert report").

Complaint Counsel wrote Respondent Mowrey's counsel on August 17th to ask whether Dr. Mowrey would finally produce these withheld documents and others. Following exchanges with Complaint Counsel,⁴ Dr. Mowrey now refuses to produce all of the expert-related

³ Respondent's counsel has advised Complaint Counsel that his client's *Privilege Log* is *not* designated as confidential or otherwise subject to the *Protective Order*. Nevertheless, as the *Privilege Log* does not expressly indicate that the above-named subjects or studies were discussed in Dr. Mowrey's *Report*, we have bracketed certain text in this *Motion*, and we will omit that text from the public version of this document.

⁴ The parties engaged in good faith negotiations concerning Respondent Mowrey's failure to produce the compelled documents. These negotiations concluded with an impasse late on August 25th, five business days ago. See Ex. A (correspondence exchanged between counsel). Although the Court's *Scheduling Order* sets a five-day window for motions to compel only, we have endeavored to file this *Motion* as quickly as possible, and within five business days.

documents, or any portion thereof, necessitating this *Motion*.

DISCUSSION

Respondent Mowrey's refusal to produce all of the compelled expert-related documents relating to his credentials, the topics upon which he intends to opine, and the studies referenced in his *Report*, warrants further investigation and other action by this Court. As discussed below, the Court should review the withheld documentary evidence, enter sanctions against Respondent as appropriate, order an expedited response from Respondents, and provide other relief relating to the timing of Dr. Mowrey's continued deposition.

I. Dr. Mowrey Should Be Ordered to Produce the Withheld Documents for Judicial *In Camera* Inspection.

Complaint Counsel respectfully request that the Court require Respondent Mowrey to finally produce, for purposes of judicial *in camera* inspection, the expert-related documents that he has long withheld from discovery. The Court has authority to review documents *in camera*. *See In re Amrep Corp.*, 90 F.T.C. 140, 140-41 (1977) (discussing procedure for *in camera* review of grand jury testimony by Administrative Law Judge and indicating that Judge may grant access to respective parties to lawsuit under varying circumstances). Although the Court may order sanctions for failure to comply with expert discovery orders based on the present record alone, an *in camera* review of the withheld documents may assist the Court if it wishes to confirm that those documents are discoverable, and the Court may also find an *in camera* review of assistance in determining the appropriate sanctions.

As set forth below, Complaint Counsel has adduced substantial evidence, based on Respondent's *Privilege Log* and subsequent descriptions, that numerous documents still withheld

by Dr. Mowrey relate to his background, his opinions, and/or the studies and authors cited in his *Expert Report*. The following materials should be produced for inspection.

A. Documents and Communications Relating to Dr. Mowrey's Background or Credentials

Respondent Mowrey still refuses to disclose certain communications and/or documents exchanged with his counsel, referring or relating to his professional background and credentials. These documents are briefly identified on Dr. Mowrey's *Privilege Log* as follows: Mowrey 92-93 ("Daniel Mowrey CV"); Mowrey 135-41, 151-52, and 184 ("Information Requested").

Mowrey 92-93 ("Daniel Mowrey CV"). The first of the documents cited above, Mowrey 92-93, actually consists of three emails. Respondent Mowrey has refused to produce these emails on the grounds that the emails "related solely to Respondents' counsels' investigation concerning the facts and background of the case," and "had nothing to do with Dr. Mowrey's role as an expert witness." Ex. A, Letter from Respondent's counsel, dated Aug. 22, 2005, at 3. Such references to "counsels' investigation" and bare assertions by counsel do *not* put documents such as the "Daniel Mowrey CV" emails beyond the scope of expert discovery.

The Court has already indicated that these documents are within the scope of expert discovery. The Court's August 9th *Order* specifically referred to the "Daniel Mowrey CV" entry on Respondent's *Privilege Log* as an example of a discoverable expert witness communication. *See Order* at 3 ("Many of the withheld documents, as described by the privilege log, fall well within the scope of discovery applicable to expert witnesses. For example, the log describes some of the entries as follows, "Daniel Mowrey CV"").

Even if the Court had not already specifically cited Mowrey 92-93, these emails refer to

Dr. Mowrey's *curriculum vitae*, which sets forth this witness' professional background and/or credentials. The Court compelled Dr. Mowrey to produce expert-related documents such as Mowrey 92-93, and he has refused to produce these emails, instead seeking to re-litigate the issue of whether the emails are discoverable. This Court should repudiate this tactic. The Court's August 9th *Order* made clear that Dr. Mowrey's expert-related communications are not shielded by work product or attorney-client privileges. *Id.* These communications indisputably relate to Dr. Mowrey's background, and may reveal attorney input or questions that may have influenced the presentation of his credentials or the contents of the CV produced to Complaint Counsel. These communications are discoverable, they should have been produced to Complaint Counsel already, and they should now be produced for *in camera* review by the Court.

Mowrey 135-41, 151-52, and 184 ("Information Requested"). Although the titles of the other documents cited above, Mowrey 135-41, 151-52, and 184, do not *expressly* reference Dr. Mowrey's background, his counsel has clarified for the record that these documents also "relate to [his] investigation of the background of [his] client." *Id.* at 5. Counsel communicated with a testifying expert witness in this "investigation," and the Court has already ruled that Dr. Mowrey is *not* entitled to withhold communications referring or relating to his background on privilege grounds. "When Respondent Mowrey stepped into the shoes of an expert, the privilege governing communications between an attorney and his client, no longer applied to communications between Mowrey and [his] attorney relating to his role . . . as an expert." *Id.* These documents are well within the scope of expert discovery.

Respondent Mowrey contends generally that these documents and others at issue here cannot possibly relate to his capacity as an expert, his background, opinions, or so forth, because

these documents were not generated before Respondents determined to name him as a testifying expert. *See* Ex. A, Letter from Respondent's counsel, dated Aug. 22, 2005, at 3. According to counsel, Respondent Mowrey can permanently withhold these documents because they "were generated, sent, received and/or viewed by Dr. Mowrey solely in his capacity as a Respondent in this case." *Id.* This is an artificial and unpersuasive argument. Dr. Mowrey does not have two separate identities with separate backgrounds and memories. Respondent's counsel suggests that Dr. Mowrey could not have formulated an expert opinion concerning the efficacy of the challenged products before Respondents officially designated him as a expert witness, but this argument ignores the record evidence. Dr. Mowrey is *not* a person whose familiarity with the challenged products developed only after his designation as a testifying expert.

There is substantial evidence that Dr. Mowrey had an opinion concerning the efficacy of the challenged products well before the date that Respondents designated him as a testifying expert witness. Dr. Mowrey researched and developed ideas and ingredients for the challenged products. Corporate Resp'ts Resp. to Compl. Counsel Interrog. 1 (Tab. 11 to Mot. for Partial Summ. J).⁵ He also personally performed substantiation research for the challenged products. *Id.*

REDACTED

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⁵ The portion of the summary decision exhibit cited above was marked as public and did not include information designated as non-public.

**B. Documents and Communications Relating to Topics and Studies
Addressed in Dr. Mowrey's *Expert Report***

Respondent Mowrey also continues to withhold certain documentary evidence relating to various topics addressed in his *Expert Report*. These documents include: **REDACTED**

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// ; and other documents cited *infra* page 11. According to Respondent Mowrey, these communications or documents are not within the scope of expert discovery. The Court's August 9th *Order* and the facts indicate otherwise.

REDACTED Dr. Mowrey's refusal to produce this communication is plainly unjustified. **REDACTED**

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This subject is clearly germane to his *Report*. Yet again, Dr. Mowrey claims through counsel that he is not required to produce this communication because it was created "before Respondents discussed or determined to identify Dr. Mowrey as an expert witness." Ex. A, Letter from Respondent's counsel, Aug. 22, 2005, at 5. This is the same argument for special treatment for Dr. Mowrey, based on an irrelevant fortuity, the timing of Respondents' expert disclosures. This argument does nothing to change the fact that the withheld document clearly refers to a topic upon which Dr. Mowrey has opined. The witness may argue that the withheld documents are not relevant, but he cannot be the final arbiter of whether they are discoverable in these proceedings. The document should be produced for *in camera* review.

REDACTED

// In its August 9th *Order*, the Court declared that Dr. Mowrey's documents

and communications referring to the “studies referenced in his expert report” are discoverable.

Yet Dr. Mowrey persists in refusing to turn over these documents as well.

Respondent Mowrey concedes that **REDACTED**

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Ex. A, Letter from Respondent’s

counsel, Aug. 22, 2005, at 5.⁷ Dr. Mowrey refuses to produce these documents, however, because the documents also disclose that his attorney or others previously considered deposing the authors of the studies. *See id.* Dr. Mowrey refusal to produce these documents is improper. Having conceded that the withheld document refers to a study referenced in his *Report*, his concession ends the applicable analysis: The Court has already identified documents referring to “studies referenced in his expert report” as discoverable documents. *See Order* at 3 (“Respondent must produce all documents relating to . . . studies referenced in his expert report.”). Communications referring or relating to those studies are discoverable expert-related documents, regardless of the nature of the references made. Simply referring to scientific studies as “fact issues” or labeling cited sources as “fact witnesses” for deposition does not remove these documents the scope of expert discovery. The documents should be produced for *in camera* review.⁸

⁷ Although Respondent’s counsel did not mark this correspondence as confidential, his statement discloses one of the studies discussed in the *Expert Report*. Accordingly, we will redact it from the public version of this *Motion* out of an abundance of caution.

⁸ Additionally, based on the information made available to Complaint Counsel, it appears that other documents listed on Dr. Mowrey’s *Privilege Log* may well relate to the topics or studies discussed in his *Expert Report*. These documents are Mowrey 26-32 (“Dr. Mowrey interview”) (four documents); Mowrey 84, 86, 87 (emails to or from Mowrey re: “Information requested by R. Price”); Mowrey 91 (“Notes of Interviews”); Mowrey 94 (“Notes of interview”); Mowrey 96 (“Luminaries”); Mowrey 100, 106-07, 109-14 (“Information Requested”); and Mowrey 166-67 (“Experts”).

According to Respondent’s counsel, many of the above-cited documents refer to Dr. Mowrey and to “the background of important fact witnesses,” or “potential expert witnesses,” but

Respondent Mowrey should not be the final arbiter of whether the above-cited documents are discoverable. Dr. Mowrey's *Privilege Log* and his counsel's correspondence generally describing the withheld documents both strongly indicate that Dr. Mowrey has refused to turn over certain documents relating to his capacity as a testifying expert witness, including documents concerning his credentials, the topics addressed in his *Report*, and the studies discussed therein.

Judicial *in camera* review of documents such as "Daniel Mowrey CV," **REDACTED**

// and others, would further confirm that these documents are subject to the Court's August 9th *Order*. Such review would also assist the Court in determining what sanctions are warranted for Dr. Mowrey's refusal to produce the documents previously compelled. We turn to review why sanctions are appropriate, and the form of the appropriate sanctions.

II. The Court Should Impose Sanctions for Respondent Mowrey's Refusal to Produce the Compelled Expert-Related Documents

Respondent Mowrey's failure to produce the expert-related documents identified above, in the face of numerous expert discovery orders—including the August 9th *Order* specifically citing some of the withheld documents as examples of documents "well within the scope of discovery applicable to expert witnesses"—provides compelling grounds for an order of sanctions. As this Court has already observed, many of the withheld documents fall well within the scope of expert discovery. Accordingly, we request that the Court enter appropriate sanctions, *i.e.*, sanctions relating to his capacity to testify as an expert, and the weight that his testimony may be accorded.

Respondents have not given us any assurance that these "witnesses" are not, in fact, the authors cited in Dr. Mowrey's *Expert Report*. If the withheld documents relate to Dr. Mowrey's opinions or the cited sources, they are relevant to Dr. Mowrey's *Report*. Has Dr. Mowrey privately expressed certain views to counsel about the sources that he relied upon in his *Report*? We respectfully request judicial *in camera* review of these withheld documents to determine whether Dr. Mowrey also improperly withheld any of these materials from discovery.

**A. Legal Framework and Factual Grounds for Sanctions
for Dr. Mowrey's Refusal to Produce Expert-Related Documents**

1. Legal Framework

RULE OF PRACTICE 3.38 provides that an Administrative Law Judge may impose sanctions when a party fails to comply with a subpoena, an order for the production of documents, or an order issued by the Administrative Law Judge as "a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling ." RULE 3.38(b). The Commission has summarized the available sanctions as follows:

Under RULE 3.38, an unjustified failure to comply with a subpoena or an order may subject a party to an array of sanctions, including an order that matters sought to be discovered will be taken as inferred or established, a preclusion order, the striking of the pleadings, the right to introduce secondary evidence without objection, and such other orders as are just.

In re Grand Union Co., 102 F.T.C. 812, 1087 (1983). These sanctions may be imposed to permit the "resolution of relevant issues and disposition of the proceeding without unnecessary delay." RULE 3.38(b). The Commission has emphasized that "[t]he discovery sanctions set forth in RULE 3.38(b) represent a legitimate and necessary procedure, and the Commission will vigorously apply them when necessary to remedy an unjustified failure to comply with a valid subpoena or other discovery order." *In re ITT Corp.*, 102 F.T.C. 280, 451 (1984).

RULE 3.38(b) is analogous to FED. R. CIV. P. 37(b)(2). *See Grand Union Co.*, 102 F.T.C. at 1090 ("Federal Rule of Civil Procedure 37(b)(2) . . . is substantially similar in both purpose and language to Rule 3.38(b)"). Both rules are based on the common law principle that no party would refuse to provide evidence that would benefit it. *See generally UAW v. NLRB*, 459 F.2d 1329, 1336, 1338-39 (D.C. Cir. 1972). The sanctions set forth in RULE 3.38(b) are designed to

maintain the integrity of Commission proceedings by prohibiting a party from benefitting from its own concealment of evidence. *See, e.g., ITT Corp.*, 104 F.T.C. at 447-48; *Grand Union Co.*, 102 F.T.C. at 1089; *In re Market Dev. Corp.*, 95 F.T.C. 100, 225-26 (1980). These sanctions also serve another important purpose—they provide an injured party with relief from a recalcitrant party's refusal to provide certain discoverable evidence. *See ITT Corp.*, 104 F.T.C. at 450; *Market Dev. Corp.*, 95 F.T.C. at 226.

Commission precedent establishes two preliminary criteria for determining whether sanctions are appropriate: First, one must identify the specific discovery orders at issue, and then second, the Court must determine that the party refusing to provide discovery has done so without adequate justification. *See Grand Union Co.*, 102 F.T.C. at 1089. We review both criteria below.

2. Summary of Grounds for Sanctions

As previously discussed, the Court has issued numerous expert discovery orders in this matter—the Court's August 11, 2004, *Scheduling Order*, the Court's January 19, 2005, *Order on Complaint Counsel's Motion to Compel a Document from Respondents' Testifying Expert Solan*, and most importantly, on August 9th, the Court's *Order on Complaint Counsel's Motion to Compel Production of Dr. Mowrey's Expert-Related Documents*. *See supra* page 2 n.1, page 3.

None of these orders broke new legal ground. Based on Commission precedent, the Court's *Scheduling Order*, and even analogous federal court precedent, Respondents and their counsel reasonably should have known over a year ago of their discovery obligations with respect to Dr. Mowrey as a testifying expert witness. As set forth more fully in Complaint Counsel's *Motion to Compel Production of Dr. Mowrey's Expert-Related Documents*, and as indicated by the Court's August 9th *Order*, Respondent Mowrey previously failed to fully comply with these

discovery requirements, withholding documents, refusing to answer valid deposition inquiries, and ultimately forcing Complaint Counsel to move to compel his compliance with the discovery requirements. Yet, despite the Court's August 9th *Order*, Respondent Mowrey is still not fully complying with his discovery obligations.

Respondent Mowrey has declined to turn over all of the expert discovery required by the Court's *Orders*. Dr. Mowrey has refused to produce numerous communications and documents concerning his background and credentials, including the emails identified on his *Privilege Log* as "Daniel Mowrey CV." He has refused to produce certain documents relating to topics addressed in his *Report*, such as the **REDACTED** email, and he has further refused to produce documentary evidence referring to the actual studies referenced in his *Report*, and the authors of those studies. *See supra* pages 3-11. The Court's August 9th *Order* expressly cited and/or referred to some of these withheld documents as being "well within the scope of discovery applicable to expert witnesses," *Order* at 3, but through his actions, Dr. Mowrey has unilaterally withdrawn them from the scope of discovery.

Respondent Mowrey's failure to produce these documents is willful, not inadvertent. Upon demand, he has reiterated his refusal to produce the documents. Respondent Mowrey's refusals are based on a series of imagined amendments to his *Privilege Log*, such as his counsel's clouded references to "counsels' investigation," his bare assertions that the withheld documents have "nothing to do with Dr. Mowrey's role as an expert," artificial arguments that Dr. Mowrey was only wearing the hat of a fact witness in reviewing certain documents; unproven and incorrect assumptions that Dr. Mowrey did not formulate opinions concerning the challenged products before mid-October 2004; and hopelessly vague references to "the background of important fact

witnesses” or “potential expert witnesses,” which may well refer to Dr. Mowrey or to the authors cited in his *Expert Report*.

Despite an *Order* stating that “[m]any of the withheld documents . . . fall well within the scope of discovery,” Respondent Mowrey has produced only a small portion of the expert-related documents and withheld the rest. The seriousness of Dr. Mowrey’s conduct is underscored by the fact that, following the Court’s August 9th *Order*, his counsel produced four pages from December 2004 that were *never* listed on the *Privilege Log*—clearly indicating that he had failed to disclose the existence of certain documents withheld on grounds of privilege. This disturbing incident, and counsel’s belated production of a draft of Dr. Mowrey’s *Expert Report* on August 22nd, on the heels of his assurance that we had already received all of the documents responsive to the Court’s August 9th *Order*, only heightens concerns about whether Respondents have fully complied with Dr. Mowrey’s expert discovery obligations in good faith.

Dr. Mowrey’s intransigent refusal to produce every one of the expert-related documents, and thereby fully comply with the Court’s repeated expert discovery orders, can no longer be justified. His intransigence calls for a response in the form of appropriate judicial sanctions.

B. Appropriate Sanctions for Dr. Mowrey’s Refusal to Produce

If the Court concludes that sanctions are warranted under the circumstances, the form of the sanction imposed should be “reasonable in light of the material withheld and the purposes of RULE 3.38(b).” *Id.*; *see ITT Corp.*, 104 F.T.C. at 449-50 (echoing statement and noting that RULE 3.38 effectively prohibits a party from benefitting from its own concealment of evidence, and provides relief for that party’s refusal to produce discoverable evidence).

Under RULE 3.38, the Court may consider an order that matters sought to be discovered will be taken as established, a preclusion order, the striking of the pleadings, the right to introduce secondary evidence, or other relief. *Grand Union Co.*, 102 F.T.C. at 1087. To ensure that Dr. Mowrey does not reap the benefits of selectively refusing to produce a variety of documents relating to his capacity as an expert, we request that the Court enter: (1) an order pursuant to RULE 3.38(b)(3) precluding Dr. Mowrey from serving in that expert capacity; or (2) an order pursuant to RULE 3.38(b)(1) concluding that, if Dr. Mowrey proves to be qualified as an expert, the withheld documentary evidence and testimony related thereto would have generally and adversely impacted his credibility as an expert and the weight accorded his expert testimony.

In this case, Respondent Mowrey has repeatedly refused, without compelling or credible justification, to produce certain documents that are clearly within the scope of expert discovery. Accordingly, a reasonable sanction should be limited to his capacity as an expert witness.

RULE 3.38(b)(3) provides that the Administrative Law Judge may rule as a sanction “that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence.” This sanction should be applied to preclude Dr. Mowrey from testifying as an expert witness. Precluding Dr. Mowrey from introducing the withheld evidence at trial pursuant to RULE 3.38(b)(3) would serve no purpose, for he evidently intends to spirit this evidence from the Commission, not use it at trial. A sanction directed at Respondent’s expert-related testimony, however, directly addresses the subject matter on which he has resisted discovery—his background and credentials as an avowed expert, the topics of his *Expert Report*, and his proffered opinions. The proposed sanction directly addresses Dr. Mowrey’s obstruction and

calculated refusal to fully comply with expert discovery orders, and yet stops well short of the issue-dispositive sanctions authorized under RULE 3.38, such as a ruling that issues “be taken as established adversely to the party.” RULE 3.38(b)(2). This sanction is also consistent with the Court’s directive, in the *Scheduling Order*, that “[f]act witnesses shall not be permitted to provide expert opinions.” Scheduling Order ¶ 14. As a fact witness, Dr. Mowrey can identify the research that he obtained, and the date that he retained it. He should not be permitted to venture expert opinions if he insists on holding onto discoverable expert-related documents.

The Commission has recognized that an order striking all or part of an expert witness’ testimony is less severe than the imposition of an adverse ruling. *See Grand Union Co.*, 102 F.T.C. at 1089-90 (“An adverse ruling is a severe sanction to be imposed only in extraordinary circumstances. A more appropriate sanction would likely have been an order to strike all or part of Dr. Marion’s testimony . . .”). If the Court declines to bar Dr. Mowrey from testifying as an expert witness at trial, however, the Court should consider other sanctions to ensure that Respondent does not benefit from his obstructionist behavior and inspire others to follow his intransigent example in future Commission proceedings.

If the Court declines to bar Dr. Mowrey from serving as an expert witness in this matter, an appropriate sanction would be an order, pursuant to RULE 3.38(b)(1), inferring that the withheld documentary evidence and testimony related thereto would have generally and adversely impacted the weight accorded his expert testimony. Complaint Counsel has been deprived of materials that would almost certainly be used to examine Dr. Mowrey as a testifying expert at his

deposition and/or in trial.⁹ It is reasonable to conclude that the withheld evidence would not benefit Dr. Mowrey, see *NLRB*, 459 F.2d at 1336, 1338-39, but without access to the evidence, we cannot conclusively prove how these documents would specifically prove adverse to him on a particular topic.¹⁰ Accordingly, an inference that the withheld documentary evidence and testimony related thereto would have generally and adversely impacted the weight accorded his expert testimony accurately compensates for Dr. Mowrey's refusal to let Complaint Counsel discover the specific contents of his withheld documents. Simply put, if Dr. Mowrey insists on holding onto his discoverable expert-related communications, and concealing the contents thereof, the Court should question his credibility as an expert and give less weight to his expert testimony.

Imposing sanctions on Dr. Mowrey relating to his capacity as an expert witness, instead of his individual capacity as a fact witness, ensures that no party to this proceeding benefits from his refusal to produce certain expert-related documents. Dr. Mowrey has been designated as an expert witness for all Respondents. Other Respondents have voiced no objection to Dr. Mowrey's refusal to produce the remaining expert-related documents. Respondents have a joint defense agreement, as indicated in various documents of record, including Dr. Mowrey's *Privilege Log*, which claims a joint defense privilege. These facts make clear that Dr. Mowrey or others cannot object to the imposition of expert-related sanctions on the grounds that such sanctions would

⁹ In discussing the available sanctions, we note the statement of the Commission in the *ITT* matter that "RULE 3.38 should be interpreted to permit the party that fails to supply the required documents to tender them within a reasonable period of time *following* the issuance of an order imposing sanctions." *ITT Corp.*, 104 F.T.C. at 449 (emphasis in original).

¹⁰ Confronted with this dilemma, Complaint Counsel are not specifically requesting sanctions in the form permitted under RULE 3.38(b)(4), *i.e.*, a ruling that the party "may not be heard to object to introduction and use of secondary evidence to show what the withheld . . . documents, or other evidence would have shown."

improperly penalize other Respondents. “Where the circumstances of a witness’ failure to provide material suggest conclusion between the witness and a party, they should be treated as one entity and sanctions may be imposed.” *Grand Union Co.*, 102 F.T.C. at 1089.

Under RULE 3.38, it is “the duty of parties to seek and Administrative Law Judges to grant such . . . appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence.” RULE 3.38(c). The proposed sanctions are appropriate because Dr. Mowrey’s continuing refusal to produce all of the compelled expert-related documents frustrates our efforts to fully depose him in advance of trial. We close this *Motion* by requesting other relief related to the timing of this impending deposition.

III. The Court Should Extend the Date by Which Complaint Counsel Must Depose Dr. Mowrey and Order an Expedited Response to Resolve this Controversy

As the Court’s recent *Order* presently requires Complaint Counsel to depose Dr. Mowrey no later than September 9th, Complaint Counsel request that the Court extend the date by which we may depose Respondent Mowrey and order an expedited response from Respondents, so that Dr. Mowrey’s deposition may go forward in the near future, *after* the present *Motion* is resolved.

Complaint Counsel’s preference, and presumably the most efficient outcome for all concerned, would be to conduct a single deposition once this controversy is fully resolved, *i.e.*, once it is clear that Dr. Mowrey has produced all of the documentary evidence relating to his capacity as an expert witness. We therefore request leave to depose Dr. Mowrey at a later date in the near future as the Court deems appropriate under the circumstances, after this controversy has been resolved, Dr. Mowrey has finally produced all of the compelled evidence, or has been finally sanctioned for his repeated failure to comply with the Court’s expert discovery orders. This

brief extension of time will not necessitate changes in the Court's present *Scheduling Order*.

An expedited response from Respondents would assist in the prompt and efficient resolution of this *Motion*. There is a genuine controversy surrounding Dr. Mowrey's repeated refusal to produce certain documents. This controversy will likely prevent Complaint Counsel from conducting a single, complete deposition of the witness, with the certainty that all of the compelled documents have been produced, by September 9, 2005. An expedited response from Respondents will ensure, however, that this controversy is resolved as soon as practicable given the serious issues involved.

At present, unless the Court enters an order extending the time period in which Complaint Counsel may depose Dr. Mowrey, we intend to depart our offices in Washington D.C. on September 6, 2005, and travel to Utah to depose Dr. Mowrey on or about September 8, 2005. The Court's *Order* sets September 9, 2005 as the present deadline for his deposition, and Respondents have contended that we would forfeit the right to examine their expert witness later. Based on the foregoing, and in the interests of efficiency and a fair hearing of this controversy, we request that the Court enter an order extending the date by which we may depose Respondent Mowrey and order an expedited response from Respondents, so that Dr. Mowrey's deposition may go forward in the near future, *after* the present *Motion* is fully resolved.

CONCLUSION

Last month, on August 9th, this Court entered an *Order* compelling Respondents' expert witness of choice, Respondent Mowrey, to comply with his voluntarily-assumed expert discovery obligations and turn over all documents relating to his capacity as an expert witness. This *Order* should not have been necessary because Dr. Mowrey was already required, by the RULES OF

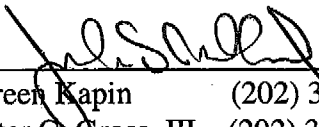
PRACTICE, this Court's previous *Orders*, and Commission law relating to testifying expert discovery, to produce all of these documents. In its *Order*, the Court correctly concluded that "[m]any of the withheld documents . . . fall well within the scope of expert discovery." The Court ordered Dr. Mowrey to turn over the expert-related documents, and specifically identified some of those documents, including such as "Daniel Mowrey CV," and all documents referring to "studies referenced in his expert report." *Id.* at 2-3. Many months after the scheduled close of discovery, Respondent Mowrey received another opportunity to fulfill his expert discovery obligations.

Respondent Mowrey has now repeatedly refused to fulfill his expert discovery obligations. He has produced a meager number of documents, recharacterized the remaining expert-related documents, reimagined himself as an individual who had no opinions concerning the challenged products before mid-October 2004, and offered various other *post hoc* rationalizations for his continued refusal to turn over all documents relating to his capacity as an expert witness. He has refused to turn over all of the compelled expert-related documents, including some of the documents specifically identified in the Court's August 9th *Order*.

None of the Court's expert discovery orders have succeeded in dislodging all of the expert-related documents from Dr. Mowrey's grasp. Now, Dr. Mowrey and his co-Respondents stand to reap the benefits of his continued non-compliance with the Court's expert discovery orders, because Dr. Mowrey has unilaterally deprived Complaint Counsel of discoverable evidence, and by extension, his testimony related thereto. This calculated intransigence interferes with our ability to fully examine the witness, and impairs the Court's ability to discern the truth.

Respondent Mowrey's refusal to produce all of the compelled expert-related documents warrants further investigation and other action by this Court. We request that the Court enter an order extending the date by which we may depose Respondent Mowrey and order an expedited response from Respondents. We further respectfully request that the Court perform a judicial *in camera* review or other review of the record, and enter appropriate sanctions against Respondent in his capacity as an expert. Respondents should not benefit from Dr. Mowrey's persistent non-compliance with the Court's expert discovery orders.

Respectfully submitted,



Laureen Kapin (202) 326-3237
Walter C. Gross, III (202) 326-3319
Joshua S. Millard (202) 326-2454
Edwin Rodriguez (202) 326-3147
Laura Schneider (202) 326-2604

Division of Enforcement
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: September 8, 2005

**EXHIBITS TO COMPLAINT COUNSEL'S MOTION FOR *IN CAMERA* REVIEW,
SANCTIONS, AND OTHER RELIEF FOR RESPONDENT MOWREY'S
CONTINUED REFUSAL TO PRODUCE ALL EXPERT-RELATED DOCUMENTS**

- Ex. A - Correspondence of Counsel
(Aug. 22, 2005 correspondence from
Respondent's counsel redacted)
- Ex. B - redacted
- Ex. C - redacted
- Ex. D - Excerpts from *Parents Be Aware: Health
Concerns About Dietary Supplements for
Overweight Children: Hearing Before the
Subcomm. on Oversight and Investigations of the
U.S. House Comm. on Energy and Commerce,
108th Cong. No. 93 (2004).*

EXHIBIT A



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Joshua S. Millard
Attorney

Direct Dial:
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(202) 326-2558

August 17, 2005

Ronald Price, Esq.
Peters Scofield Price
340 Broadway Ctr.
111 East Broadway
Salt Lake City, UT 84111

VIA EMAIL AND FIRST CLASS MAIL

Re: *In re Basic Research LLC, et al.*, Docket No. 9318

Dear Mr. Price:

This letter addresses the document production that your client, Respondent Daniel Mowrey, Ph.D, made yesterday in response to Chief Administrative Law Judge McGuire's August 9th *Order on Complaint Counsel's Motion to Compel*. From our review of the 30 pages produced, we have cause to doubt that Respondent Mowrey has fully complied with Judge McGuire's *Order*. Moreover, we ask that you specifically identify the attachments that you omitted from this production. Based on the documents produced, we intend to depose Dr. Mowrey, and we are promptly expressing these concerns to facilitate a deposition within the timeframe set in the Court's *Order*.

In his August 9th *Order*, Judge McGuire observed: "Many of the withheld documents, as described by the privilege log, fall well within the scope of discovery applicable to expert witnesses." However, your client produced only 26 pages listed on the *Privilege Log*. The other 4 pages produced were not even listed on the *Log*. Consequently, to date, we have received only a small portion of the withheld documents.

Judge McGuire's *Order* compelled Dr. Mowrey to produce "all documents that relate to his capacity as an expert witness," including, *inter alia*, "all documents that [he] reviewed in the course of forming his opinion," and documents referring to "studies referenced in his expert report." Order at 2-3. The *Order* observed that Dr. Mowrey was already obliged to turn over these documents. Nevertheless, your client has again failed to produce certain discoverable documents and information, including:

- **Mowrey's documents re: expert, background, or qualifications.**
Mowrey 92-93 ("Daniel Mowrey CV") (three documents with same Bates numbers listed on *Privilege Log*); Mowrey 96 ("Luminaries"); Mowrey 166-67 ("Experts").

➤ **Mowrey's documents re: interviews conducted with expert.** Mowrey 26-32 ("Dr. Mowrey interview") (four documents); Mowrey 91 ("Notes of Interviews"); Mowrey 94 ("Notes of interview").

➤ **Mowrey's documents re: information requests sent to or from expert.** Mowrey 100, 106-07, 109-14, 134, 135-41, 151-52, 159-61, 184 ("Information Requested") (eighteen documents);¹ Mowrey 84, 86, 87 (emails to or from Mowrey re: "Information requested by R. Price").

➤ **Other documents re: expert topics.** Mowrey 54-55 ("Placebo"); Mowrey 165 ("Complaint; Colker/Kalman study"); Mowrey 168 ("FTC Complaint; Colker/Kalman study").

The above-cited documents are conspicuous by their absence in the document production. Indeed, Judge McGuire's *Order* expressly cited or otherwise referred to some of these *Privilege Log* entries as examples of documentary evidence that fall well within the scope of expert discovery. Please produce all of these documents immediately. If you do not produce the documents by Monday, August 22nd, it is doubtful that we will be able to depose Dr. Mowrey on August 30th as the parties have recently discussed.

Additionally, in your letter accompanying yesterday's document production, you indicated that with respect to attachments referenced in some emails, it was your understanding that the attachments were previously produced. We are willing to dispense with the need to produce those documents in their original form, *i.e.*, appended to their corresponding emails, *provided that*: (1) you confirm that all attachments have been produced to Complaint Counsel; and (2) you provide us with a list of all of the attachments referenced in the emails, identifying the Bates numbers previously assigned to each attachment, by Monday August 22nd. Without this identification, we are left to guess what previously-produced document was attached to each newly-produced email. We would then insist that you reproduce each of the attachments in their original form, appended to their respective emails—an expense that we are willing to help you avoid if you provide the information required to reconnect the attachments to the emails.

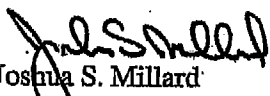
Our ability to depose Dr. Mowrey within the timeframe presently contemplated by the Court and the parties depends on your client's complete and prompt compliance with the Court's *Order* as discussed above. Please produce the documents identified above and provide the requested information so we can obviate the need for further motions practice directed at the issue of your client's compliance with the Court's expert discovery orders.

¹ Your client identified nineteen documents with this description in the *Privilege Log*, but produced only one of these documents yesterday, Mowrey 121 ("Information Requested"). You have provided no reason for producing only one of the withheld documents, and under the circumstances, we see no reason why the others should not be produced.

Ronald Price, Esq.
Aug. 17, 2005
page 3

Thank you for your attention to this matter. If you have any questions, please call me.

Sincerely,


Joshua S. Millard
Attorney, Division of Enforcement

Copies to:

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3225 Aviation Ave. 3rd Fl.
Miami, FL 33133-4741

Mitchell Friedlander
5742 W. Harold Gatty Dr.
Salt Lake City, UT 84116

REDACTED

Millard, Joshua S.

From: Ron Price [rfp@pslawyers.com]
Sent: Wednesday, August 24, 2005 2:40 PM
To: Kapin, Laureen
Cc: 'Jeffrey D. Feldman'; snagin@ngf-law.com; rburbridge@burbridgeandmitchell.com; 'Robert Shelby'; 'Christopher P. Demetriades'; 'Gregory L. Hillyer'; Gross III, Walter; Millard, Joshua S.; Schneider, Laura; Rodriguez, Edwin; Cathy Murdock
Subject: FTC v. Basic Research, et al.

Laureen,

This is a follow-up to the voice mail message you left me this morning, and the return voice mail message I left you. Based on your voice mail, it is my understanding that you do not intend to take Dr. Mowrey's deposition on Tuesday, 30 August, based on your assertion that Dr. Mowrey has not yet produced "all documents that relate to his capacity as an expert witness, including communications with his attorney, the other Respondents, and the other Respondents' attorneys" as required by the Court's recent order. However, your position is untenable, as Dr. Mowrey has in fact produced all required documents. Accordingly, if you stand by your refusal to take Dr. Mowrey's deposition on August 30, you do so at your own peril, and I reconfirm that Dr. Mowrey will be in New York on August 30, and it is our preference that the deposition proceed as planned.

As I indicated in my voice mail, if you will identify specific documents which you still believe you are entitled to receive, I will review those documents to determine whether I will be willing to produce them even though they are not required to be produced under the Court's order. Please provide that information as soon as possible so we can try to resolve this issue. If you maintain that you are entitled to receive copies of all documents identified in Josh Millard's letter of August 17 (and thus refuse to narrow your demands) and that you refuse to proceed with Dr. Mowrey's deposition without production of all those documents, then it will be difficult to resolve this issue amongst ourselves and we will be at an impasse.

I will be in meetings out of the office the balance of this afternoon, although I will return sometime around 7:00 pm est. I look forward to hearing from you.

Best regards,

Ron Price

Ronald F. Price
PETERS SCOFIELD PRICE
A Professional Corporation
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2002 Ext. 103
Facsimile: (801) 322-2003
Email: rfp@pslawyers.com <mailto:rfp@pslawyers.com>

Millard, Joshua S.

From: Kapin, Laureen
Sent: Wednesday, August 24, 2005 5:13 PM
To: Millard, Joshua S.
Subject: FW: Corrected response / FTC v. Basic Research, et al.

-----Original Message-----

From: Kapin, Laureen
Sent: Wednesday, August 24, 2005 5:13 PM
To: 'Ron Price'
Subject: Corrected response / FTC v. Basic Research, et al.

Corrected e-mail response (please replace previous e-mail with this one):

Ron --

To be clear, my goal is to follow through with the Court's Order which grants Complaint Counsel an addition four hours of deposition time with Dr. Mowrey and orders Dr. Mowrey to produce all documents that relate to his capacity as an expert witness. I would like to do this in a manner that is convenient and efficient for all the parties but I will not prejudice our position by completing Dr. Mowrey's deposition in the absence of all the documents we are entitled to under the Court's Order. If we cannot resolve this matter by Thursday, we will declare impasse and file an appropriate motion within the time-period prescribed by the Court's Scheduling Order.

That said, I appreciate your invitation to provide a revised list of documents for your further consideration in the hopes of resolving our dispute. Please bear in mind that this is an abbreviated summary of our concerns.

Based on your letter, we withdraw our request for Mowrey 159 thru 161.

Based on your letter, we believe we are entitled to Mowrey 92-93, 135-41, 151-52, and 184 as documents pertaining to Dr. Mowrey's background and qualifications as an expert, including your communications with Dr. Mowrey and questions related thereto.

We believe we are entitled to Mowrey 26-32, 91, and 94 to the extent that they may refer or relate to facts or matters that Dr. Mowrey has considered and/or opined upon as an expert, including the authors of the studies.

We believe that we are entitled to Mowrey 84, 86, 87, 100, 106-07, 109-114, and 166-67, to the extent that they may refer or relate to the studies cited by Dr. Mowrey and the authors of the studies cited by Dr. Mowrey.

We also believe we are entitled to Mowrey 54-55, 165, and 168 as documents pertaining to expert topics discussed in the reports.

We would like to discuss these docs with you further to see if there are some that you would agree to produce, and others we would agree to forgo.

As you know, we respectfully disagree with your assertion that documents dated before 10/13/05 are not subject to production. You have designated a fact witness as a testifying expert, and his opinions are at issue. Your preferred expert held an opinion concerning the efficacy of the challenged products before the date that Respondents chose to designate him as a testifying expert. The fact that you designated him as an expert on 10/13 does not, in our view, make earlier documents exempt from discovery. Consider a hypothetical in which our positions were reversed---would you tolerate it if Complaint Counsel withheld correspondence with a testifying expert simply because the correspondence occurred before 10/13? We sincerely doubt you would, so we respectfully urge you to reconsider.

We share your interest in resolving this dispute so the parties can go forward with a Mowrey depo on 8/30 as we have discussed. Pending a satisfactory resolution of this dispute, however, we reserve the right to conduct a depo of Dr. Mowrey on a date other than 8/30, once it is certain that Dr. Mowrey has provided all the documents to which we are entitled under the Court's Order.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

Laureen Kapin
Senior Attorney

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August 25, 2005

Ronald Price, Esq.
Peters Scofield Price
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111 East Broadway
Salt Lake City, UT 84111

VIA EMAIL AND FIRST CLASS MAIL

Re: *Basic Research et al.*, Docket No. 9318

Dear Mr. Price:

I am transmitting a subpoena for Dr. Mowrey's appearance for deposition on Thursday September 8, 2005 in Salt Lake City. By this letter I am providing you notice that Dr. Mowrey's deposition will be videotaped.

As of this date, we believe that Dr. Mowrey has failed to produce all the documents required by Judge McGuire's August 9, 2005 Order. Accordingly, unless the parties are able to resolve this dispute today, we intend to file a motion pursuing the remainder of the documents so that the Judge may resolve this issue prior to the time of Dr. Mowrey's deposition.

If the 8th is not convenient, please let me know as soon as possible. We are also available on September 7th or 9th. If you have any questions, please call me.

Sincerely,

Laureen Kapin
Laureen Kapin
Senior Attorney



RONALD F. PRICE
ATTORNEY AT LAW

PETERS SCOFIELD PRICE
A PROFESSIONAL CORPORATION

rfp@pslawyers.com

25 August 2005

VIA E-MAIL

Lauren Kapin
Federal Trade Commission
600 Pennsylvania Avenue, NW, Suite NJ-2122
Washington, DC 20580

Re: *FTC v. Basic Research, LLC, et al.*, Docket No. 9318

Dear Lauren:

After careful consideration of your demand that Dr. Mowrey produce additional documents, we decline to produce the demanded documents. As set forth in my prior correspondence, none of the documents you demand were received, reviewed or relied upon by Dr. Mowrey in his capacity as an expert witness, and none were received, reviewed or relied upon by Dr. Mowrey in connection with forming his expert opinion/report in this matter. As you are aware, Judge McGuire's order provides that "[t]o the extent that Complaint Counsel's motion [to compel] is aimed at compelling production of documents from Dr. Mowrey that do not relate to his capacity as an expert or to the formation of his expert opinion in this case, Complaint Counsel's motion is DENIED IN PART." Because the documents you demand do not relate to Dr. Mowrey's capacity as an expert witness or to the formation of his expert opinion, they will not be produced.

With respect to taking Dr. Mowrey's deposition on September 8, and because of the weather situation in Florida, I have not been able to communicate with Jeff Feldman and so, therefore, do not know if he is available. Assuming Jeff is available, my strong preference would be to do it on Friday, September 9. I will let you know as soon as I hear from Jeff.

Best regards,

PETERS SCOFIELD PRICE
A Professional Corporation


Ronald F. Price

cc: Respondents' Counsel
Mitchell K. Friedlander

340 BROADWAY CENTRE | 111 EAST BROADWAY | SALT LAKE CITY, UTAH 84111
PHONE 801 322 2002 | FAX 801 322 2003 | info@pslawyers.com

EXHIBIT B

REDACTED

EXHIBIT C

REDACTED

EXHIBIT D

**PARENTS BE AWARE: HEALTH CONCERNS ABOUT
DIETARY SUPPLEMENTS FOR OVERWEIGHT
CHILDREN**

HEARING
BEFORE THE
SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTH CONGRESS
SECOND SESSION

—
JUNE 16, 2004
—

Serial No. 108-93

Printed for the use of the Committee on Energy and Commerce



Available via the World Wide Web: <http://www.access.gpo.gov/congress/house>

Mr. GAY. I have not monitored that. They continue to take it, so I assume they are seeing some benefit.

Mr. GREENWOOD. And do you believe—would you tell your children or grandchildren who are taking this that they could continue to enjoy their favorite foods as long as they were taking PediaLean?

Mr. GAY. With restricted—yes, because I do not think they're going to use very much when they take PediaLean.

Mr. GREENWOOD. Okay. And what studies have demonstrated that?

Mr. GAY. I will let Dr. Mowrey speak to that.

Mr. GREENWOOD. Okay. Dr. Mowrey, could you share with us what studies have demonstrated that PediaLean suppresses appetite?

Dr. MOWREY. The study that you are referring to undoubtedly, Mr. Congressman, is the Italian study that has been introduced here in conversation already. That study did not necessarily address appetite suppression. It is simply found that a group of children who were exposed to a normal caloric and exercise program, and also took the recommended amount of the PediaLean equivalent, the exact same material that is in PediaLean, we will call it Dicoman-5, they lost a greater percentage of their degree of overweight than did the children who were just doing the exercise and—

Mr. GREENWOOD. Okay. My time has expired. But, Dr. Mowrey, you have heard Dr. Ayoob and others in our first panel characterize that study as pathetic.

Dr. MOWREY. Yes. Yes, I have.

Mr. GREENWOOD. Okay. And when you take into consideration the smallness of the sample size, the fact that there were no controls, the fact that people dropped out of that study and that that was not calculated into the results, you must know that that study is laughable, is a laughable idea that you would base the sales of products to marketing products to millions of children based on an absurdly, grotesquely, inadequate, laughable—I cannot think of the next adjective to describe that study. How can you in good conscience do that?

Dr. MOWREY. Mr. Chairman?

Mr. GREENWOOD. Yes.

Dr. MOWREY. Part of the job that I do as a consultant for Basic Research is to review the world's literature on these kinds of problems, especially related to—

Mr. GREENWOOD. And the world's literature on this product consists of this one stupidly, ridiculously, inadequate study; that is the world's literature on this product? And on the basis of that you would market it?

Dr. MOWREY. That is—the world's literature on children's weight loss or children's obesity is not very extensive in terms of actual products that help out in this regard. This product—

Mr. GREENWOOD. Well, I am sure Dr. Ayoob will correct that very briefly, and then I will yield.

Dr. MOWREY. This product is—

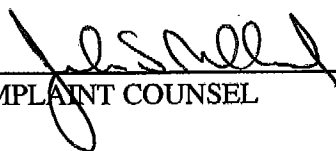
Mr. GREENWOOD. Dr. Ayoob?

Dr. MOWREY. This product—I am sorry.

RULE 3.22(F) STATEMENT

Although this is not the first motion concerning compliance with the expert discovery demands and orders at issue, Complaint Counsel voluntarily certify that we have conferred with opposing counsel in good faith to attempt to resolve this dispute by agreement. The parties' correspondence is attached hereto as Exhibit A. Additionally, Complaint Counsel Lauren Kapin and Joshua Millard participated in a teleconference on or about Wednesday, August 24, 2005, with Respondents' counsel Ron Price, Jeffrey Feldman, and Richard Burbidge, and a second teleconference later on that date with Mr. Price, concerning this dispute. The parties' exchanges concluded on August 25th. *See Ex. A* (Letter from Respondent's counsel refusing to produce any additional documents). The parties have been unable to resolve this dispute by agreement.

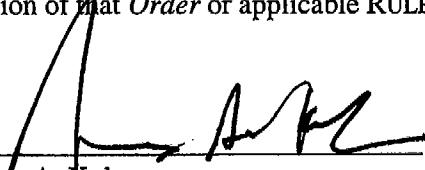
Respectfully submitted,



COMPLAINT COUNSEL

CERTIFICATE OF REVIEWING OFFICIAL

I certify that I have reviewed the attached public filing, *Complaint Counsel's Motion for In Camera Review, Sanctions, and Other Relief for Dr. Mowrey's Continued Refusal to Produce All Expert-Related Documents* 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 8th day of September, 2005, I caused the public version of *Complaint Counsel's Motion for In Camera Review, Sanctions, and Other Relief for Dr. Mowrey's Continued Refusal to Produce All Expert-Related Documents* 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 the following persons:

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LLC, and BAN, LLC**

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COMPLAINT COUNSEL