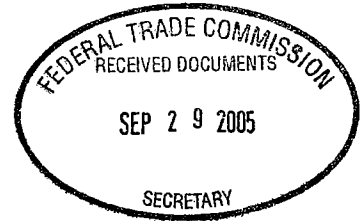


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C.

In the Matter of

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



PUBLIC

Docket No. 9318

**RESPONDENTS' MOTION FOR LEAVE TO ADD AN EXPERT WITNESS AND TO  
REOPEN DISCOVERY FOR A LIMITED PURPOSE**

Respondents Basic Research, LLC; A.G. Waterhouse, LLC; Klein-Becker USA, LLC; Nutrasport, LLC; Sovage Dermalogic Laboratories, LLC; Ban, LLC; Dennis Gay, Daniel B. Mowry, and Mitchell K. Friedlander respectfully request leave to add an expert rebuttal witness and to reopen discovery for the limited purpose of preparing and exchanging an expert report and providing Complaint Counsel an opportunity to depose the expert. The matters upon which the proposed expert will testify first arose as substantive issues at the August 30, 2005 deposition of Complaint witness Steven Heymsfield, M.D., the Complaint Counsel's designated expert on whether the alleged advertising claims for Leptoprin, Anorex, and PediaLean are supported by competent and reliable scientific evidence. That deposition was taken pursuant to his Honor's

Order of March 15, 2005 after discovery had closed. The Order permitted four additional hours of examination. This motion is filed within 30 days of August 30, 2005.

**I. RULES AND STANDARDS FOR EXPERT WITNESS TESTIMONY**

FTC Rule of Practice Section 3.31(b)(3) (16 C.F.R. § 3.31) states, in pertinent part,

Parties shall disclose to each other the identity of any person who may be used at trial to present evidence as an expert. Except as otherwise stipulated or directed by the Administrative Law Judge, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness....These disclosures shall be made at the times and in the sequence directed by stipulation by the Administrative Law Judge. In the absence of other directions from the Administrative Law Judge or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut proposed expert testimony on the same subject matter identified by another party under this paragraph, within 30 days after the disclosure made by the other party.

In accordance with his Honor's August 11, 2004 Scheduling Order, the parties exchanged expert witness lists on October 6 and 13, 2004, and expert reports on October 20 and November 29, 2005, for Complaint Counsel and Respondents, respectively. Complaint Counsel identified rebuttal experts on December 13, 2004 and provided rebuttal expert reports then as well. Dr. Heymsfield's deposition was taken on January 11, 2005, February 4, 2005, and August 30, 2005. The hearing in this case is scheduled for March 7, 2006, more than ninety days from the date of this motion (approximately 155 days).

The August 11, 2004 Scheduling Order addressed in paragraph 11 the requirements for expert production: "At the time an expert is first listed as a witness by a party, the listing party will provide to the other party: (a) materials fully describing or identifying the background and qualifications of the experts, a list of all publications, and all prior cases in which the expert has testified or has been deposed..."

Expert witnesses are essential for a party to defend its case against charges of false advertising under the Federal Trade Commission Act. See, e.g., Novartis Corporation v. FTC, 223 F.3d 783, 787 (2000) (weighing expert testimony on either side to decide deceptive advertisement case). Failure to grant a party the opportunity to present expert witness testimony on elements of proof necessary to defend its case is prejudicial. See U.S. v. Cavin, 39 F.3d 1299, 1308 (5th Cir. 1994) (District Court abused its discretion in excluding expert evidence crucial to building the defense); U.S. v. Van Dyke, 14 F.3d 415, 422-23 (5th Cir. 1994) (District Court committed reversible error in excluding expert testimony that would clarify complex regulatory matters with closely intertwined legal and factual issues); U.S. v. Alexander, 816 F.2d 164, 169 (5th Cir. 1987) (reversing as clearly erroneous exclusion of expert testimony where entire case turned on subject of expert testimony.)

## II. ANALYSIS

In his August 30, 2005 deposition, Dr. Heymsfield testified for the first time as to the scientific community's standards for co-authorship, a co-authors' responsibility for data and findings in a published article, and his failure to list on his CV (attached as Exhibit 1) (and to supply in response to the presiding officer's August 22, 1004 Scheduling Order) six fraudulent studies in which he was a co-author, five of which were rescinded by the publications due to the discovery of the fraudulent data (August 30<sup>th</sup> Deposition at 452-459; 643-645 attached as Exhibit 2).<sup>1</sup> Those matters are directly material to the credibility of Dr. Heymsfield as a witness, to the credibility of his expert report, and to the reliability of his testimony in this case. Dr.

Heymsfield's affiliation with Darsee for whom Dr. Heymsfield may have had supervisory

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<sup>1</sup> There is a sixth article, according to National Library of Medicine's database "PubMed," that lists Dr. Heymsfield among other co-authors with the individual, "J.R. Darsee," who Dr. Heymsfield testified was the person that generated fictitious data in the fraudulent studies. Darsee JR, et al., Hemodynamics of LeVeen shunt pulmonary edema, 194(2) Annals of Surgery 189-92 (Aug. 1981). That article was not retracted.

responsibility and his involvement in the six fraudulent studies directly reflect on his credibility and reliability as a witness.

While discovery has closed, the circumstances here justify reopening discovery for the limited purpose of allowing Respondents the opportunity to identify and present an expert on (1) the generally accepted standards for listing of publications on a scientist's curriculum vitae; (2) the ethical responsibility of a co-author of scientific works for fraudulent data in those works; (3) the supervisory responsibility of a senior scientist co-author (here, Heymsfield) for a junior scientist co-author's (here, Darsee's) work; and (4) the extent to which Heymsfield's August 30<sup>th</sup> testimony raises questions of his scientific integrity, reliability, and independence that may impugn the competence and reliability of his scientific opinion. The order reopening discovery for this limited purpose should designate a deadline for receipt of an expert report on these issues and give Complaint Counsel an opportunity to depose the expert in accordance with Rule of Practice 3.31(b)(3).

The Hearing in this case is scheduled to begin March 7, 2005. The identification of the expert, submission of his expert report and of other documents required by Rule 3.31(b)(3), and his deposition by Complaint Counsel can be achieved within his Honor's existing Second Revised Scheduling Order with little or no delay to the existing schedule. Respondents are prepared to identify their expert immediately on the grant of this motion for leave and to provide his expert report and all Rule 3.31(b)(3) document disclosures within fourteen days of that order. At that time the witness will be available at Complaint Counsel's convenience for deposition.

Thus, there is no prejudice to Complaint Counsel should this Court grant Respondents' leave to present an expert witness and expert report on the four above enumerated issues. Equity favors grant of this motion because it helps guard against a miscarriage of justice by protecting

the integrity of the truth-seeking process and by aiding the Court in discerning the gravity of the malfeasance committed by Complaint Counsel's key witness, Dr. Heymsfield. To deny Respondents the opportunity to present an expert witness on the foregoing issues will bar them from a full and fair opportunity to challenge the credibility of the witness, a challenge warranted in light of the 11<sup>th</sup> hour chance discovery of the six fraudulent studies co-authored by Heymsfield but not disclosed by him or Complaint Counsel.

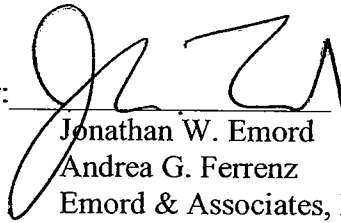
Moreover, because Complaint Counsel's case involves assessment of commercial speech presumed fully protected by the First Amendment from government restriction unless and until Complaint Counsel proves, by a preponderance of the evidence, that the speech is false, there is a constitutional imperative that no testimony that could reveal the inadequacy of Complaint Counsel's proof be excluded from this proceeding. The sum total of the foregoing justifications counterbalance and outweigh any administrative inconvenience Complaint Counsel may posit as grounds for disallowing the expert.

### III. CONCLUSION

For the reasons stated above, Respondents respectfully request leave to identify an expert witness on the issues enumerated above first raised in the August 30<sup>th</sup> deposition and to present his expert report and required disclosures under Rule 3.31(b)(3). Furthermore, Respondents respectfully request leave to reopen discovery for the limited purpose of permitting Complaint Counsel the opportunity to depose the identified expert. With their permission, the undersigned counsel submit this motion on behalf of all Respondents. A proposed order is attached.

Respectfully submitted,

By:



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P: (202) 466-6937  
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Date submitted: September 29, 2005

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

In the Matter of

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

Docket No. 9318

**ORDER GRANTING RESPONDENTS' MOTION FOR LEAVE TO ADD AN  
EXPERT WITNESSES AND REOPEN DISCOVERY FOR A LIMITED  
PURPOSE**

On September 28, 2005, Respondents filed a motion for leave to add an expert witness and to reopen discovery for a limited purpose. Complaint Counsel's expert witness Steven Heymsfield, M.D. raised new issues in his August 30, 2005 deposition concerning: (1) the generally accepted standards for listing of publications on a scientist's curriculum vitae; (2) the ethical responsibility of a co-author of scientific works for fraudulent data in those works; (3) the supervisory responsibility of a senior scientist co-author for a junior scientist co-author's work; and (4) the extent to which Heymsfield's August 30<sup>th</sup> testimony raises questions of his scientific integrity, reliability, and independence that may impugn the competence and reliability of his scientific opinion. Respondents have demonstrated good cause for their request to identify an expert witnesses to testify on these matters and to reopen discovery in order for Complaint Counsel to depose that expert. Accordingly, Respondents' motion is **GRANTED**.

It is hereby **ORDERED** that Respondents shall have fourteen days from the date of this order in which to identify their expert in accordance with Rule of Practice 3.31 and to provide Complaint Counsel with the expert's report. Complaint Counsel shall have 30 days from service of the expert report in which to depose that expert for a period not to exceed 2 hours.

ORDERED:

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Stephen J. McGuire  
Chief Administrative Law Judge

Date:



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

**In the Matter of**

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

**Docket No. 9318**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of September, 2005 I caused the Respondents' Motion for Leave to Identify an Expert Witness and to Reopen Discovery for a Limited Purpose and its draft order to be filed and served as follows:

- 1) an original and one paper copy filed by hand delivery and one electronic copy in PDF format filed by electronic mail to

Donald S. Clark  
Secretary  
U.S. Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-159  
Washington, D.C. 20580  
Email: [secretary@ftc.gov](mailto:secretary@ftc.gov)

2) two paper copies delivered by hand delivery to:

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

3) one paper copy by first class U.S. Mail to:

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

4) one paper copy by first class U.S. mail and one electronic copy in PDF format by electronic mail to:

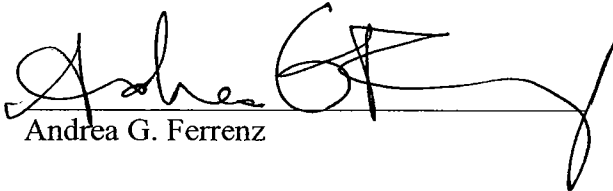
Laureen Kapin  
Joshua S. Millard  
Laura Schneider  
Walter C. Gross III  
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Salt Lake City, UT 84116  
Email: mkf555@msn.com



Andrea G. Ferrenz

# **EXHIBIT 1**

## Appendix 1

**Steven B. Heymsfield, M.D.**  
Obesity Research Center  
St. Luke's-Roosevelt Hospital  
1090 Amsterdam Avenue #14C  
New York, N.Y. 10025  
Phone: 212-523-3561  
Fax: 212-523-3571  
E-mail: SBH2@Columbia.edu  
Beeper: 877-861-2687

**Birth date:** July 15, 1944  
**Birthplace:** Brooklyn, New York  
**Citizenship:** U.S.A.

### Academic Training

Hunter College, City University of New York, B.A. Chemistry: 1962-1966  
Mt. Sinai School of Medicine, New York, NY, M.D. 1969-1971  
Licensed in GA, 1973  
Licensed in NY, 1987

### Traineeship

Emory University, Atlanta, Georgia; Medical Intern: 1971-1972  
Emory University, Atlanta, Georgia; Medical Resident  
Internal Medicine: 1972-1973  
Emory University, Atlanta, Georgia; Fellow in Medicine,  
Dept of Pharmacology: 1973-1975

### Professional Organizations

American Federation of Clinical Research  
American Institute of Nutrition  
American Society of Clinical Nutrition  
Southern Society of Clinical Investigation (inactive)  
American Society of Parenteral and Enteral Nutrition  
North American Association for the Study of Obesity

### Academic Appointments

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1975-1978	Assistant Professor of Medicine, Emory University, School of Medicine
1975-1983	Assistant Director, Emory University, Clinical Research Facility
1978-1986	Associate Professor of Medicine,

- 1980-1984 Emory University, School of Medicine  
Director, Division of Nutrition, Department of Medicine,  
Emory University, School of Medicine
- 1986-1994 Associate Professor of Medicine, Columbia University,  
College of Physicians and Surgeons, N.Y.
- 1986- Visiting Physician,  
Rockefeller University, N.Y.
- 1986- Director, Human Body Composition Laboratory and Weight  
Control Unit of the Obesity Research Center,  
St. Luke's-Roosevelt Hospital Center.
- 1987- Research Scientist, Department of Energy,  
Brookhaven National Laboratory
- 1990-1997 Associate Professor of Applied Physiology,  
Teachers College, Columbia University
- 1990- Deputy Director, Obesity Research Center,  
St. Luke's-Roosevelt Hospital
- 1994- Professor of Medicine, Columbia University, College of  
Physicians and Surgeons, N.Y.
- 1998- Affiliate Faculty Member, Columbia University, Department of  
Biomedical Engineering

### **Hospital Appointments**

Associate Attending Physician, St. Luke's-Roosevelt Hospital Center

### **Honors**

Dean's List, 1965, 1966 - Hunter College, City University of New York.  
Phi Sigma, 1966 - Honorary biology society, Hunter College.  
Dean's List, 1968, 1969 - Medical Units, University of Tennessee.  
Mosby Award in Clinical Medicine, 1971 - Mt. Sinai School of Medicine.  
First Place Award - Annual Emory Univ. Housestaff Research Day, 1972.  
Crutcher Award - Annual Emory Univ. Housestaff Research Day, 1974.  
Clinical and Research Scholar, American College of Physicians, 1979-1982.  
Honorary Member, Latin American & Argentine Medical Associations, 1985.  
Horowitz Alumni Award, Mount Sinai School of Medicine - Outstanding  
Medical Investigator, 1987.  
Burroughs-Wellcome Scholar in Basic Science, 1988.  
Honorary Member, American Dietetic Association, 1996.  
Honorary Member, Chilean Clinical Nutrition Association, 1997.  
Honorary Member, New York Dietetic Association, 1997.  
Fourth Beaudette-Thompson Lectureship, Rutgers University, 1998.  
Hellenistic Medical Society Lectureship, 1999.  
Fifth Annual Clinical Nutrition Foundation Lectureship, 1999.  
Rhoades Award, American Society of Parenteral and Enteral Nutrition, 2002.  
TOPS Award, North American Association for the Study of Obesity, 2003.

## **Departmental Committees**

Executive Committee, Obesity Research Center  
Institute of Human Nutrition, Executive Committee  
Nutrition Committee, Head, St. Luke's-Roosevelt Hospital

## **Other Professional Activities**

### **Editorial Boards:**

#### ***Current:***

Journal of Parenteral and Enteral Nutrition  
American Journal of Clinical Nutrition  
International Journal of Body Composition Research  
Age & Nutrition  
Nutrition Reviews  
Clinical Nutrition  
Adipocytes

#### ***Past:***

Nutrition in Clinical Practice  
American Journal of Human Biology  
The Journal of Nutrition, Health & Aging

### **Consultative:**

#### ***Current:***

Board of Advisors, American Society of Parenteral and Enteral Nutrition  
Science Committee, International Ctr. for Assessment of Nutritional Status, Milan, It.  
North American Association for the Study of Obesity, IASO representative  
National Academy of Sciences, Institute of Medicine, Committee on Military  
Nutrition  
National Academy of Sciences, Institute of Medicine, Committee on Testosterone  
Replacement in Elderly Men  
Budget, Finance, and Audit Committee; and Long Range Planning Committee,  
American Society of Clinical Nutrition

#### ***Past:***

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Board of Directors, American Society of Parenteral and Enteral Nutrition  
Publications Management Committee, American Society of Clinical Nutrition  
United States Pharmacopoeia Convention, Advisory Panel on Nutrition and  
Electrolytes

North American Association for the Study of Obesity (NAASO), Nominations  
 Committee  
 Secretary, American Society of Clinical Nutrition  
 Governmental Relations Committee, American Society of Parenteral and Enteral  
 Nutrition  
 Chair, Nutrition Support Guideline Committee, American Society Parent and Enteral  
 Nutrition  
 Chair, Public Policy Committee, North American Association for the Study of  
 Obesity  
 Chair, Publication Committee, American Society of Parenteral and Enteral Nutrition  
 Chair, Postgraduate Education Committee, American Society of Clinical Nutrition  
 Nominating Committee, American Society of Clinical Nutrition  
 President, Food and Nutrition Council of Greater New York  
 President, American Society of Parenteral and Enteral Nutrition  
 Vice President, American Society of Clinical Nutrition  
 President, American Society of Clinical Nutrition  
 Council, American Society of Clinical Nutrition

## **PUBLICATIONS**

### **Original Peer-Reviewed Articles**

1. Metzger AL, Heymsfield SB, Grundy SM. The lithogenic index - a numerical expression for the relative lithogenicity of bile. *Gastroenterology* 62:499-501, 1972.
  2. Metzger AL, Adler R, Heymsfield SB, Grundy SM. Diurnal variation in biliary lipid composition. *N Eng J Med* 288:333-336, 1973.
  3. Heymsfield SB. Cystic dilation of the intrahepatic biliary tree (Carolis Disease) - a suggested treatment. *Gastroenterology* 64:663, 1973.
  4. Wenger J, Heymsfield SB. Adsorption of bile by aluminum hydroxide. *J Pharmacol Exp Ther* 14:163-165, 1974.
  5. Rudman D, Chawla RK, Heymsfield SB, Bethel RA, Shoji M, Vogler WR, Nixon DW. Urinary excretion of the cancer-related glycoprotein EDCI: effect of chemotherapy. *Ann Intern Med* 86:174-179, 1977.
  6. Chawla RK, Heymsfield SB, Wadsworth AA, Shoji M, Rudman D. Isolation and characterization of a glycoprotein (JBB5) in the urine of a patient with carcinoma of the colon. *Cancer Res* 37:873-878, 1977.
- 
7. Heymsfield SB, Bethel RA, Rudman D. Hyperresponsiveness of patients with clinical and premypathic myotonic dystrophy to human growth hormone. *J Clin Endocrinol Metab* 45:147-158, 1977.



8. Schlant RC, Felner JM, Heymsfield SB, Gilbert CA, Shulman NB, Tuttle EP, Blumenstein BA. Echocardiographic studies of left ventricular anatomy and function in essential hypertension. *Cardiovasc Med* 2:477-491, 1977.
9. Gilbert CA, Nutter DO, Felner JM, Perkins JV, Heymsfield SB, Schlant RC. Echocardiographic study of cardiac dimensions and function in the endurance-trained athlete. *Am J Cardiol* 40:528-533, 1977.
10. Cutter G, Heymsfield SB, Kraus J, Lee ES, McDill M, Stamler T, Watson R. Race, education and prevalence of hypertension. *Am J Epidemiol* 106:351-361, 1977.
11. Heymsfield SB, Bethel RA, Hall EC, Mills JB, Moseley MH, Kostyo JL, Rudman D. Anabolic actions of reduced and S-Carbamidomethylated human growth hormone and its plasmin digest in man. *J Clin Invest* 60:563-570, 1977.
12. Heymsfield SB, Bethel RA, Ansley JD, Gibbs DM, Felner JM, Nutter DO. Cardiac abnormalities in cachectic patients before and during nutritional repletion. *Am Heart J* 95:584-594, 1978.
13. Heymsfield SB, McNish T, Perkins JV, Felner JM. Sequence of cardiac changes in Duchenne muscular dystrophy. *Am Heart J* 95:283-294, 1978.
14. Rudman D, Davis GT, Priest JH, Patterson JH, Kutner MH, Heymsfield SB, Bethel RA. Prevalence of growth hormone deficiency in children with cleft lip or palate. *J Pediatr* 93:378-382, 1978.
15. Bethel RA, Jansen RD, Heymsfield SB, Ansley JD, Hersh T, Rudman D. Nasogastric hyperalimentation through a polyethylene catheter: an alternative to central venous hyperalimentation. *Am J Clin Nutr* 32:1112-1120, 1979.
16. Heymsfield SB, Olafson RP, Kutner MH, Nixon DW. A radiographic method of quantifying protein-calorie undernutrition. *Am J Clin Nutr* 32:693-702, 1979.
17. Nutter DO, Murray G, Heymsfield SB, Fuller EO. The effect of chronic protein-calorie undernutrition in the rat on myocardial function and cardiac function. *Circ Res* 45:144-152, 1979.
18. Heymsfield SB, Fulenwider T, Nordlinger B, Barlow R, Sones P, Kutner M. Accurate measurement of liver, kidney and spleen volume and mass by computerized axial tomography. *Ann Intern Med* 90:185-187, 1979.
19. Heymsfield SB, Noel R, Lynn M, Kutner M. Accuracy of soft tissue density predicted by CT. *J Comput Assist Tomogr* 3:859-360, 1979.

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20. Heymsfield SB, Bethel RA, Ansley JD, Nixon DW, Rudman D. Enteral hyperalimentation: an alternative to central venous hyperalimentation. *Ann Intern*

Med 90:63-71, 1979.

21. Nixon DW, Heymsfield SB, Cohen AE, Kutner MH, Ansley J, Lawson DH, Rudman D. Protein-calorie undernutrition in hospitalized cancer patients. *Am J Med* 68:683-690, 1980.
22. Horowitz JH, Smith J, Heymsfield SB. Nutritional support of the trauma patient. *J Med Assoc* 69:815-819, 1980.
23. Heymsfield SB, Smith J, Kasriel S, Barlow J, Lynn MJ, Nixon D, Lawson D. Energy malabsorption: measurement and nutritional consequences. *Am J Clin Nutr* 34:1954-1960, 1981.
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28. Nixon DW, Moffitt S, Lawson DH, Ansley J, Lynn MJ, Kutner MH, Heymsfield SB, Wesley M, Chawla R, Rudman D. Total parenteral nutrition as an adjunct to chemotherapy of metastatic colorectal cancer. *Cancer Treat Rep* 65; Supplement 5:121-128, 1981.
29. Smith J, Horowitz J, Henderson JM, Heymsfield SB. Enteral hyperalimentation in undernourished patients with cirrhosis and ascites. *Am J Clin Nutr* 35:56-72, 1982.
30. Heymsfield SB, McManus C, Smith J, Stevens V, Nixon DW. Anthropometric measurement of muscle mass: revised equations for calculating bone-free arm muscle area. *Am J Clin Nutr* 36:680-690, 1982.
31. Smith JL, Arteaga C, Heymsfield SB. Increased ureagenesis and impaired nitrogen use during infusion of a synthetic amino acid formula. *N Eng J Med* 306:1013-1018, 1982.

32. Heymsfield SB, McManus C, Stevens V, Smith J. Muscle mass: Reliable indicator of protein-energy malnutrition severity and outcome. *Am J Clin Nutr* 35:1192-1199, 1982.
  33. Heymsfield SB, Stevens V, Noel R, McManus C, Smith J, Nixon D. Biochemical composition of muscle in normal and semistarved human subjects: relevance to anthropometric measurements. *Am J Clin Nutr* 36:131-142, 1982.
  34. Brubaker LH, Prisant ML, Heymsfield SB. Computer-assisted nutritional assessment. *Phys Comp* 1:39-41, 1983.
  35. Heymsfield SB, Arteaga C, McManus C, Smith J, Moffitt S. Measurement of muscle mass in humans: validity of the 24 hour urinary creatinine method. *Am J Clin Nutr* 37:478-494, 1983.
  36. Smith JL, Heymsfield SB. Enteral nutritional support: formula preparation from modular ingredients. *JPEN* 7:280-288, 1983.
  37. Bagatell CJ, Heymsfield SB. Effect of meal size on myocardial oxygen requirements: implications for postmyocardial infarction diet. *Am J Clin Nutr*, 39:421-426, 1984.
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# **EXHIBIT 2**

1 HEYMSFIELD

2 error, but not to omit anything. If a paper,  
3 for example, there were several papers that  
4 were retracted a number of years ago, those  
5 papers are not on my CV.

6 Q. What papers are those?

7 A. There was a set of papers written  
8 by a student at Emory University, where I was  
9 a professor, and some of the information then  
10 was later found to be falsified. That group  
11 of papers was retracted from the journals and  
12 they are not on my CV.

13 Q. Can you tell us what that was  
14 about?

15 A. Sure. I think this has come up  
16 already in our discussions if I recall  
17 correctly, but there was a student at  
18 Emory University who did research and later  
19 went to Harvard, and while he was at Harvard  
20 it was discovered he had fabricated some data  
21 at Harvard, and when an investigative  
22 committee was set up it was found that some  
23 of the data he worked on while he was at  
24 Emory also was fabricated.

25 All of the papers at Harvard and at

1 HEYMSFIELD

2 Emory that involved any fabrication were  
3 retracted from the medical journals.

4 Q. What was his name?

5 A. Darsee, John Darsee.

6 Q. You were a co-author?

7 A. Yes, me and about 25 other people,  
8 25 or 30.

9 Q. That were all on the same paper?

10 A. On all of his papers that were  
11 retracted, yes.

12 Q. What about the ones that you were  
13 involved in, how many other co-authors were  
14 there?

15 A. About ten.

16 Q. On each paper?

17 A. Probably it ranged, it varied.  
18 Several. Is there a reason you are asking me  
19 that? I can't give you the exact number.

20 I have 400 or 500 publications in  
21 my career and I can't tell you the exact  
22 author count on each one.

23 Q. Do you know where I can find copies  
24 of those?

25 A. Sure. Just go on to PubMed and

1 HEYMSFIELD

2 more than likely you will be able to find if  
3 you type in Darsee, D-A-R-S-E-E, you should  
4 be able to pull up those papers. Even though  
5 they are retracted they are still more than  
6 likely in electronic form on the internet.

7 Q. Pardon the question, but what's the  
8 role of a co-author?

9 A. What is the role of a co-author?

10 Q. Yes.

11 A. It's actually fairly  
12 well-described. There's criteria for  
13 co-authorship that's published by each  
14 journal and so you can see it there, but  
15 there's a criteria for co-authorship and  
16 there are a number of different functions a  
17 co-author has. It doesn't -- it may not  
18 necessarily be one function. It can be three  
19 or four different functions.

20 Q. Does a co-author have any  
21 responsibility in regards to how a study is  
22 published, a review of the data, things like  
23 that?

24 A. I'm not sure, you know, exactly  
25 what the question is you are asking. Of

1 HEYMSFIELD

2 course that, you know, people who are  
3 co-authors share certain responsibilities for  
4 the data.

5 Q. So did you share any responsibility  
6 in the fraudulent data being supplied by  
7 Darsee?

8 A. You mean, are you asking me if I  
9 was involved in the fraud?

10 Q. I'm asking you what your  
11 involvement was in the study?

12 A. I was a colleague and I  
13 participated in the research with him. I saw  
14 some of the patients that were in the study  
15 and I helped him prepare the manuscript,  
16 manuscripts, several.

17 Q. So you were privy to all the data?

18 A. No. "All of the data," no. I  
19 rarely see all the data in any study, except  
20 in studies which I'm the primary author of  
21 the paper.

22 Q. So when you are a co-author you see  
23 less of the data and take less  
24 responsibility; is that what you are saying?

25 A. No, that's what you are saying.



1 HEYMSFIELD

2 Q. Okay.

3 A. You know, co-authorship, as I  
4 mentioned, can be based on any set of  
5 criteria. There are ten different things you  
6 do when you are a co-author. You have to  
7 meet usually two or three of those different  
8 things to be a co-author, so a part of it  
9 could be getting the funds to the study,  
10 helping to prepare the manuscript, analyzing  
11 the data, designing the studies.

12 It's a rather long list. So  
13 co-authorship is very variable depending on  
14 specific study.

15 Q. So in your list of publications,  
16 many of them list you as a co-author?

17 A. Yes.

18 Q. We would have to go through each  
19 and every one of those studies to find out  
20 what your participation is, has been?

21 A. Yes, yes.

22 Q. And in some of them you list it  
23 could have been minimal, like just getting  
24 the funding; is that correct?

25 A. Not necessary -- you know, that's

1                                    HEYMSFIELD  
2    what you are saying. The contribution on a  
3    paper could have involved, as I said, there  
4    are about ten different criteria. Usually  
5    most journals require two to three of those  
6    criteria, so it could be any one of those two  
7    combination, those two or three.

8                    If you get the money for a study  
9    that usually means you had the idea and wrote  
10   the grant, as in academia, and so that  
11   already commutes a lot of responsibility in  
12   terms of conception of the ideas and so on.

13            Q.    And how do you determine, when you  
14   put your name on a study as a co-author and  
15   you don't have the ultimate responsibility as  
16   being the lead author --

17            A.    Yes.

18            Q.    -- how do you determine that all of  
19   the data that they are providing you to  
20   review is correct?

21            A.    It's called trust and integrity.  
22   And if somebody lies to you then they  
23   violated that trust and it's just like in any  
24   business, in any relationship, people can be  
25   either honest or dishonest. And so there's a

1                                    HEYMSFIELD  
2    certain level of trust that you have and if  
3    they violate it then, you know, there's  
4    nothing you can do to test someone's  
5    honestly, including lie detector tests or  
6    whatever so, you know, so you have to depend  
7    on integrity. And that's what science is  
8    based on and it doesn't always work  
9    perfectly, but it works most of the time.

10            Q.    You used the word "fraud" when I  
11    asked you a question and you answered me  
12    back, are you accusing me of fraud; is that  
13    correct?

14            A.    Well, I think you used the word to  
15    begin with. We can read it back. I was  
16    just --

17            Q.    What do you mean by "fraud"?

18                    MS. KAPIN: Objection, relevance.

19            A.    I'm not sure why you are asking me  
20    this or what it has to do with what we're  
21    discussing. "Fraud" is a word and you'd have  
22    to give me a context to put it in into.

23            Q.    Well, you just used the word --  
24    could you find that in the transcript where  
25    he used the word fraud?

1 HEYMSFIELD

2 A. Well --

3 MR. FELDMAN: He asked if you were  
4 accusing him of participating in fraud,  
5 that was the question of Dr. Heymsfield  
6 to you.

7 Q. What do you mean when you use the  
8 word "fraud"?

9 A. What was the sentence that I was  
10 responding to when I asked that, can I get  
11 that from you?

12 (Record read.)

13 A. So I'm just responding back to your  
14 use of the word "fraudulent."

15 Q. Well, what did you mean by the use  
16 of the word "fraud"?

17 A. Well, I told you.

18 MS. KAPIN: I'm going to renew my  
19 objection.

20 MR. FELDMAN: Can we get that  
21 colloquy read back, the three, four  
22 sentences that led up to the comment  
23 that Dr. Heymsfield made.

24 (Record read.)

25 Q. Was there fraud involved in the