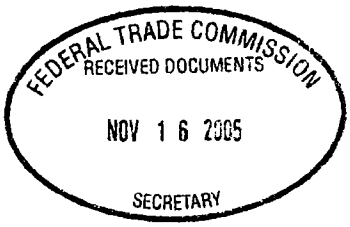
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	:	
	:	DOCKET NO. 9318
BASIC RESEARCH, L.L.C., et al.,	:	
	:	Public Document
Respondents.	:	
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RESPONDENTS', MITCHELL FRIEDLANDER'S, COMBINED MOTION TO EXCLUDE A WITNESS, FOR SANCTIONS, AND TO DEPOSE BOTH COMPLAINANT'S COUNSEL AND COMPLAINANT'S EXPERT, DR. STEVEN HEYMSFIELD; AND THIS RESPONDENT'S JOINDER IN THE MOTION BY THE OTHER RESPONDENTS TO EXCLUDE A WITNESS AND FOR SANCTIONS; AND ALSO TO CORRECT FALSE STATEMENTS OF RECORD THAT WERE MADE BY COMPLAINANT'S COUNSEL

Respondent Mitchell K. Friedlander ("Respondent") hereby submits his *Motion to Exclude a Witness, For Sanctions and to Depose Both Complaint Counsel and Dr. Heymsfield* ("Friedlander's Motion" or "this Motion"), and joins in *Respondents' Motion to Exclude a Witness and for Sanctions or, in the Alternative, for Sanctions and for Leave to Reopen Discovery for a Limited Purpose* and in *Respondents Daniel B. Mowrey's and Dennis Gay's Correction of Complaint Counsel's False Statements* (collectively, the "Motion for Sanctions"). As counsel correctly pointed out in *Complaint Counsel's Opposition to Respondents' Omnibus Motion to Exclude a Witness, Sanction Counsel and Reopen Discovery* ("Opp. Memo"), at 2, this Motion and joinder are proper because the pending *Respondents' Motion to Exclude a Witness and for Sanctions or, in the Alternative, for Sanctions and for Leave to Reopen Discovery for a Limited Purpose* was submitted on behalf of corporate respondents only. Therefore, as a

Respondent, I hereby adopt as if set forth in this Motion, all the arguments and relief requested in the Motion for Sanctions. And, I provide additional arguments that were not previously presented by the other Respondents, in support of this Motion and the Motion for Sanctions.[1]

I. COMPLAINT COUNSEL CANNOT "ESTABLISH" FACTS IN THIS PROCEEDING THROUGH SWORN AFFIDAVITS FROM THE VERY PERSONS ACCUSED OF WRONGDOING, WITHOUT MAKING THEMSELVES AVAILABLE FOR DEPOSITIONS ON THAT TESTIMONY

In the Commission's *Response to Respondents' Reply to Complaint Counsel's Opposition to Respondents' Motion to Exclude a Witness, Sanction Counsel and Reopen Discovery* (the "Response Memo"), counsel for the Commission postulated that because counsel Laureen Kapin and Dr. Heymsfield now have submitted declarations reciting certain alleged "facts," the truth of these facts therefore are established "categorically." Response Memo, at 2. This absurd, self-effectuating position, if adopted by the Presiding Officer, certainly would make short work of these proceedings. If the Declarations of Laureen Kapin and Dr. Steven Heymsfield – two of the very persons who stand accused of wrongdoing in the Motion for Sanctions – can be accepted as true, without the possibility of cross-examination, then a Declaration that I submit also must be accepted as true. Therefore, I attach, as Exhibit A, my own sworn Declaration, attesting to the facts I am willing to establish through sworn affidavit (*see* Exhibit A, Declaration of Mitchell K.

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[1] Complaint Counsel argues that Respondents' recent Memoranda are inappropriate because of Rule of Practice 3.22(f), which requires that counsel confer prior to filing a motion for sanctions. *See* Response Memo, at 4. Complaint Counsel is wrong and their argument has no foundation. It is undisputed that Mr. Jonathon Emord, attorney for the corporate Respondents, conferred with Complaint Counsel prior to filing Respondents' original motion for sanctions. Nothing in Rule 3.22(f) requires counsel to confer repeatedly, every time new grounds for sanctions *on the same issue* are discovered and proffered *in support of the same motion*. In fact, the Rule states: "Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed *only with the first motion* concerning compliance with *the discovery demand at issue*" (emphasis added). Rule 3.22(f) does not require repeated conferences between counsel on the same motion and/or on the same issues raised with respect to the same discovery demand. Moreover, the plain terms of Rule 3.22(f) apply only to counsel, not the parties themselves. Thus, Rule 3.22(f) has no application to a *pro se* party such as Respondent Friedlander.

Friedlander), and based on those facts, any claim against me must be dismissed as well.[2] If your Honor is unwilling to accept the facts as set forth in my Declaration, then Ms. Kapin must make herself available for deposition on the issues to which she testifies, because her testimony bears on a violation of a Order that is at the heart of this controversy. Likewise, Dr. Heymsfield must make himself available for deposition based on the testimony provided in his Declaration related to the Commission's counsel's failure to disclose impeachment evidence as required by the August 30, 2004 Scheduling Order. Ordering depositions of Ms. Kapin and Dr. Heymsfield on issues to which they chose to submit sworn testimony by way of respective Declarations is fair because Respondent already has made himself available for deposition on the issues to which he testifies. Moreover, adjudication of any issue by untested Declarations would be inimical to a search for the truth and would deprive Respondent Friedlander of this right to a fair hearing.

II. RESPONDENTS' MOTIONS TO EXCLUDE DR. HEYMSFIELD AND TO DEPOSE COMPLAINT COUNSEL AND DR. HEYMSFIELD ARE BASED ON THEIR VIOLATION OF THE PRESIDING OFFICER'S ORDERS

Complaint Counsel mislead your Honor when they suggest that the pending motion to exclude Dr. Heymsfield as a witness is based on his credibility. *See* Response Memo, at 3. To be sure, Dr. Heymsfield's credibility and proven dishonesty are at issue in this case, in fact, they are a central issue. However, they are not the basis of Respondents' motion to exclude, nor are they the basis of my Motion. Rather, the motions to exclude Dr. Heymsfield as a witness or, in the alternative, to depose both Complaint Counsel and Dr. Heymsfield are based on the fact that this witness, upon whose testimony Complaint Counsel's case depends, repeatedly has violated

[2] Respondent has previously filed a *Motion to Dismiss for Lack of Subject Matter Jurisdiction*, which is supported by his sworn testimony. The Presiding Officer apparently has not ruled on that motion; therefore, Respondent respectfully requests that the Presiding Officer now consider and rule on that Motion.

the Presiding Officer's August 30, 2004 Scheduling Order by failing to produce impeachment evidence to Respondents. Dr. Heymsfield's demonstrated lack of integrity and veracity *in violation of the Presiding Officer's Order* raise more than an issue of credibility and trustworthiness (though the fact that impeachment evidence called for by the Presiding Officer's Order exists – and was suppressed by Dr. Heymsfield – directly impugns his integrity). It raises an issue of compliance with the Orders of the Presiding Officer, and the appropriate remedy, namely, whether a witness who purposefully flouts your Honor's Orders should be allowed a place at the heart of a proceeding where my livelihood and that of other Respondents (and their employees) are at stake.

III. DR. HEYMSFIELD'S REPEATED AND MOST RECENT VIOLATION OF THE PRESIDING OFFICER'S AUGUST 30, 2004 SCHEDULING ORDER LIE AT THE HEART OF COMPLAINT COUNSEL'S CASE-IN-CHIEF

There is a basic difference between Respondents' affirmative defenses and Complaint Counsel's case-in-chief. Respondents' defenses challenge the *subjective, expert-driven process* Complaint Counsel is using to regulate Respondents' commercial speech.[3] Complaint Counsel in contrast contends that Respondents are liable under the challenged process for allegedly implying subjective claims regarding the efficacy of the advertised products, because according to Complaint Counsel's expert witness the challenged claims lack "*adequate substantiation.*"

At the heart of Complaint Counsel's case-in-chief is Dr. Steven B. Heymsfield, the professional witness Complainant has retained to testify on the ultimate "issue to be litigated at

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[3] Specifically, Respondents contend that the purported non-statutory requirement that they had to possess "competent and reliable scientific evidence" before allegedly making the implied product claims of "rapid" and/or "substantial" weight or fat loss violates the Federal Trade Commission (FTC) Act, the Administrative Procedures Act ("APA"), the Due Process Clause of the Fifth Amendment, and the Free Speech Clause of the First Amendment, including without limitation (a) the prohibition against the FTC's use of vague, general standards of liability, (b) the

the trial in this matter [–] whether Respondents violated the FTC Act's prohibition against false and misleading advertising." Opp. Memo, at 32. Specifically, Dr. Heymsfield has been retained to testify on both (a) the standard of "competency" and "reliability" a clinical study must have to constitute "adequate substantiation" under the FTC Act, and (b) whether the studies proffered in support of the challenged advertisements constitute "competent and reliable scientific evidence," which is the ultimate "issue to be litigated at the trial in this matter . . . ." Opp. Memo, at 32.

Dr. Heymsfield's demonstrated lack of credibility and veracity is the main event. It is not just a side show. His proffered testimony is the measure by which Complainant is trying to judge Respondents' First Amendment rights. Your Honor likely will depend on expert testimony to evaluate clinical studies and to determine whether they adequately substantiate a product claim under the FTC's inherently subjective substantiation standard. This adjudication is not one where the challenged advertisements have no substantiation. The advertisements in this case are supported by published, peer-reviewed studies, which Dr. Heymsfield opines are not "competent" or "reliable."

The relief sought by Respondents' Motion for Sanctions and this Motion is essential to protect Respondents' First Amendment rights under the FTC's challenged regulatory process. The Motion for Sanctions and this Motion in no way seek to reshape "the hearing process itself—away from relevant and admissible testimony, toward collateral issues and inadmissible documents, and into satellite discovery and litigation on topics not related to the *Complaint* . . . ." Opp. Memo, at 32. Respondents' Motion for Sanctions and this Motion go to the heart of

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FTC's obligation to regulate protected commercial speech with objective, specifically defined rules, and (c) the FTC's obligation to objectively define implied claims with extrinsic evidence of consumer perception.

Complainant's case-in-chief, which is wholly dependent on the credibility and veracity of a proffered expert who (a) lies and (b) suppresses evidence.

IV. YOUR HONOR CANNOT CONDONE DR. HEYMSFIELD'S AND COMPLAINT COUNSEL'S SUPPRESSION OF IMPEACHMENT EVIDENCE IN VIOLATION OF YOUR HONOR'S ORDER

Your Honor's August 11, 2004 Scheduling Order obligated Complaint Counsel and each retained expert witness to provide "a list of all publications, and all prior cases in which the expert has testified or has been deposed." The disclosure of potential impeachment evidence is necessary to protect the integrity of the FTC's challenged regulatory process which is supposed to discover the truth, but instead is being abused to prosecute protected commercial speech.[4]

Even if the *ad* and *post hoc* process Complainant is using survives scrutiny, the Complainant's first obligation is to uphold the integrity of the challenged process. The Government's attorneys must not only follow the law, relevant rules of practice, and orders, but they must do so in an open, transparent manner that is above reproach. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("[A] government lawyer is the representative not of an ordinary party to a controversy, but of a sovereignty" and thus are held "to higher standards than private lawyers"); *Freeport-McMoRan Oil & Gas v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992); *Gray Panthrs v. Schweiker*, 716 F.2d 23, 33 (D.R. Cir. 1983) ("There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large."); *Cobell v. Babbitt*, 1999 U.S. Dist. LEXIS 20918 (1999)

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[4] The challenged advertisements are protected by the First Amendment because they are supported by "credible evidence" (*e.g.*, published, peer-reviewed studies) within the meaning of *Pearson v. Shalala,* 164 F.3d 650 (D.C. Cir. 1999). That the challenged speech is protected does not mean it cannot be regulated. However, it does mean that the FTC, including Complaint Counsel, cannot use the FTC's regulatory power to suppress Respondents' speech but rather must regulate their speech in a manner consistent with the FTC's affirmative obligations under the FTC

("The United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in federal court") (citation omitted).

Respondents' Motion for Sanctions establishes – unequivocally – that Complaint Counsel and their retained professional witness, Dr. Heymsfield, have suppressed impeachment evidence in violation of your Honor's August 11, 2004 Scheduling Order. And it is not the first violation. It first was discovered that Complaint Counsel and Dr. Heymsfield failed to disclose all prior cases in which Dr. Heymsfield had testified or had been deposed, including a prior FTC case involving a dietary supplement.[5] It now has been discovered that Complaint Counsel and Dr. Heymsfield failed to disclose **six published studies** – five of which had been withdrawn – that Dr. Heymsfield co-authored with Dr. John Darsee, a proven fraud. *See* Declaration of Steven B. Heymsfield, M.D. ("Heymsfield Decl.") ¶¶ 5-7; Declaration of Laureen Kapin ("Kapin Decl.") ¶¶ 5-7.

It cannot be disputed that the August 11, 2004 Scheduling Order affirmatively obligated Complaint Counsel to gather, verify and disclose potential impeachment evidence in the form of "a list of *all* publications," not some publications, or non-withdrawn publications, or only those publications that Dr. Heymsfield recalled or somebody at a university allegedly told him he had to include in a curriculum vitae – but *all* potential impeachment evidence. The due diligence required of Complaint Counsel to ensure the disclosure of all potential impeachment evidence in

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Act, the APA, and the First and Fifth Amendments to use specifically defined rules, even if case specific, *before* prosecuting anyone for engaging in otherwise protected commercial speech that offends a FTC rule.

[5] After discovery of this violation, Complaint Counsel violated the Court's Protective Order, the Commission's Rules of Practice and the FTC Act, itself, by publicly disclosing trade secret information obtained in this matter through discovery under terms of confidentiality under circumstances that plainly evidenced, at a minimum, a callous disregard of Respondents' rights.

the form of "a list of *all* publications" cannot be minimized as some nuisance that can be corrected later if impeachment evidence fortuitously is discovered by the accused.

Complaint Counsel's obligations under the August 11, 2004 Scheduling Order to gather, verify and disclose "a list of *all* publications" is essential to the integrity of the challenged, subjective, expert-driven process. Complaint Counsel's entire case-in-chief depends on the credibility and veracity of their retained expert witnesses.

Complaint Counsel's and Dr. Heymsfield's claims of negligence and ignorance as proffered justifications for their most recently discovered violation of the Presiding Officer's order cannot stand. Stupidity at some point gives way to fraud. Here, Complaint Counsel admits prior knowledge of the "Darsee matter" – an event Dr. Heymsfield told them has been used to impeach him "in other cases" – but unbelievably they deny looking into this matter or being told of or discovering for themselves the six published studies their retained expert co-authored with a proven fraud. *See* Heymsfield Decl. ¶¶ 5-7; Kapin Decl. ¶¶ 5-7, 10-11. Complaint Counsel say that Dr. Heymsfield told them of the "Darsee matter," just not about the publications he co-authored with Dr. Darsee. *See* Kapin Decl. ¶¶ 5-7, 10-11. It does not wash. The "Darsee matter" is, at root, important to Dr. Heymsfield **only because** he is a co-author on six studies with Dr. Darsee. But for these publications, there would be no "Darsee matter" to speak of here. It is Dr. Heymsfield's co-authorship of fabricated studies that stands to impeach him – which is a material fact, indeed the very answer to Complaint Counsel's admitted inquiry into "issues" used "in other cases" to "impeach" their main expert witness in this case. *See* Kapin Decl. ¶¶ 5-7.

In not a single case where Dr. Heymsfield has previously been retained as an expert – and ordered to disclose to Respondents – was the name "Darsee" mentioned. Dr. Darsee was not

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

It is disingenuous to say the least for Complainants to contend, as they now do after the suppression of evidence has been discovered, that they somehow did not know that the "Darsee matter" involved scientific publications in which Dr. Heymsfield and Dr. Darsee were co-authors. The only credible and logical explanation for the non-disclosure of this damaging information that has been used "in other cases" to impeach Dr. Heymsfield is a purposeful one. Purposeful or not, however, the non-disclosure is a violation of the August 11, 2004 Scheduling Order. It violates the Order in the case of five published studies that were subsequently withdrawn. It violates the Order in the case of the published study that has not been withdrawn. The fact of the matter and unavoidable truth is neither Dr. Heymsfield nor Complainant's lawyers wanted this damaging information revealed and were willing to hide it, and did hide it, for over a year.

Dr. Heysmfield knew he did not disclose the fabricated publications he co-authored with Dr. Darsee, which were used to impeach him "in other cases" in response to the August 11, 2004 Scheduling Order. Unbelievably, this professional expert witness attempts to justify his suppression of evidence in violation of a court order by likening his obligation to disclose "a list

of *all* publications" to a job interview, where in his mind it would be permissible to omit from a curriculum vitae fabricated publications he co-authored that impugn his integrity and veracity. *But the very point of the Presiding Officer's ordered disclosure was to elicit such a list!*

There is no justification for Complaint Counsel's and Dr. Heymsfield's suppression of evidence in violation of your Honor's August 11, 2005 Scheduling Order. Complaint Counsel had an obligation to investigate and ensure compliance with the August 11, 2005 Order, including the disclosure of the "Darsee matter." They knew of this matter. They knew it was an event that had been used "in other cases" to impeach their chosen expert witness. One of the publications he co-authored with a fraud had not been withdrawn. They prepared a self-described "detailed, 47-page long curriculum vitae" which "includes a lengthy list of publications, which itself runs over 40 single-spaced pages" to portray Dr. Heymsfield as a well-credentialed, trustworthy expert witness. Opp. Memo, at 3. And they knew the "detailed" curriculum vitae omitted any reference to the one event – the "Darsee matter" which involved the publication of fabricated studies co-authored by Dr. Heymsfield – used "in other cases" to impeach him.

That is reprehensible regardless of Complaint Counsel's attempt to deny knowledge of the fabricated publications, and Dr. Heymsfield's attempt to deny knowledge that he was obligated to disclose "a list of *all* publications" – particularly those used "in other cases" to impeach him. The facts manifest fraud and a callous disregard of Respondents' rights and Complaint Counsel's and Dr. Heymsfield's obligations under the August 11, 2004 Scheduling Order.

Either Complainant's lawyers are being less than honest with your Honor and knowingly suppressed evidence, or they knowingly and utterly failed their first obligation to the Presiding Officer and to the government and the citizens of the United States they represent – that is, to discover the truth, which included an obligation to investigate, verify and disclose to Respondents Dr. Heymsfield's involvement in the "Darsee matter," *i.e.,* his co-authoring of the fabricated publications. Complaint Counsel is complicit and their conduct is reprehensible even if your Honor were to accept their unbelievable story that they did not ask pertinent questions about the "Darsee matter" or otherwise know of the fabricated publications – an event Complaint Counsel knew had been used "in other cases" to impeach their main witness in this case.

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

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

COMPLAINT COUNSEL: Okay. Thanks for coming clean.

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

The prosecution of Respondents under the FTC Act is not a game. Careers, livelihoods, due process and First Amendment rights are at stake.[6] Under the guise of protecting consumers from alleged confusion, Complaint Counsel is asking the Presiding Officer to render findings of wrongdoing and liability based on the subjective opinion of one man. But how can the Presiding Officer accept that one man's opinion, namely, that published peer-reviewed studies by experts in the relevant field supporting the challenged advertisements are not "competent" or "reliable," when the same man withholds material information in violation of a court order, and lies to cover it up? Your Honor cannot restrict and burden Respondents' First Amendment rights and impugn their integrity for the next twenty (20) years based on the testimony of a professional expert witness who does not have the integrity and honesty to disclose adverse information called for by the your Honor's August 11, 2004 Scheduling Order, and testify candidly about it.

V. IF DR. HEYMSFIELD IS NOT IMMEDIATELY DISQUALIFIED, RESPONDENTS ARE ENTITLED TO DISCOVER THE TRUTH

If your Honor does not immediately disqualify Dr. Heymsfield and put an end to this charade, as a Respondent, I must be entitled to discover what really occurred in connection with Complaint Counsel's and Dr. Heymsfield's violation of the Your honor's August 11, 2005 Order. Somebody is lying and being less than candid and cannot be trusted. Your Honor simply cannot accept, at face value, both Complaint Counsel's and Dr. Heymsfield's denial of wrongdoing and

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

the significance of the "Darsee matter," which is self-described as an event used "in other cases" to impeach the government's proffered expert in this case.

Again, the suppression of evidence impeaching Dr. Heymsfield in violation of the Presiding Officer's August 11, 2005 Scheduling Order goes to the heart of Complaint Counsel's case-in-chief. Notwithstanding the attempt to downplay the significance of Dr. Heymsfield's failure to disclose his involvement as a "co-author" in the "Darsee matter" used "in other cases" to impeach him, this suppression of evidence puts in doubt his veracity and credentials as an expert to testify as to *any* scientific matter in *any* case. Respondents must be allowed additional time to depose Dr. Heymsfield to further establish the grounds for his disqualification, and in the unlikely event he is not disqualified, to properly defend themselves at trial from this proffered "scientific" opinions.

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

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

for another "enormous opportunity," and that there was *no other reason* for leaving! January 11, 2005 Heymsfield Depo., at 204, lines 10-17.

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

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

At the August 30, 2005 deposition of Dr. Heymsfield, Respondents had their first opportunity to question the witness about his role in the studies he published as a co-author with Dr. Darsee. Under questioning about this matter, Dr. Heymsfield, for the first time, disclosed that the role of a co-author on scientific studies might have nothing to do with the substantive science at issue in the study for which he is listed as a co-author, but instead the responsibilities of a co-author are "very variable depending on the specific study." Heymsfield Depo., Aug. 30,

2005, at 456, lines 3-14. The implication of this stunning testimony is that neither the Respondents nor the Presiding Officer can now determine the relevance of the studies listed on Dr. Heymsfield's curriculum vitae, without questioning him about his actual role in each of those individual studies. Dr. Heymsfield admitted this fact in his deposition:

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

Heymsfield Depo., Aug. 30, 2005, at 456, lines 15-21. In fact, Dr. Heymsfield testified that he would have to be given specific examples even to state whether he even *consented* to the publication of the studies in which he is listed as a co-author – even though he took credit for those same studies when he listed them in his *curriculum vitae*. *Id.* at 644, lines 18-23.

According to Dr. Heysfield, one cannot presume a co-author's involvement, but must specifically inquire, on a study-by-study basis, into the nature of the co-author's involvement. *See* Heymsfield Depo., Aug. 30, 2005, at 456, lines 3-14. Given the ambiguity about the role of a co-author that now exists based on Dr. Heymsfield's testimony, the relevance of nearly every study listed in his curriculum vitae is questionable at best.

Therefore, if Dr. Heymsfield is not disqualified on the existing record before the Presiding Officer, then Respondents must be given the opportunity to depose Dr. Heymsfield, completely and fully, not only about the "Darsee matter" but also about his "detailed" curriculum vitae, including without limitation his interaction with Complaint Counsel in connection with their preparation of this document in violation of your Honor's August 11, 2005 Scheduling

Order. Additional deposition time is necessary to determine Dr. Heymsfield's actual involvement in the studies listed in his curriculum vitae, as well as the six published studies Dr. Heymsfield knowingly omitted from his curriculum vitae, to determine whether his involvement in those studies was substantive or not, and thus, whether they can be used, as Complaint Counsel is attempting to use 400 of those studies, to establish Dr. Heymsfield's alleged expertise in the areas in which he is testifying.

B. Respondents Are Entitled To Discover The Specifics Relating To The Subjects Used In Other Cases To Discredit Dr. Heymsfield.

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

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

the full disclosure of these "other matters" used in other trials to impeach Dr. Heymsfield. Complaint Counsel's effort to suppress this evidence may reveal a further violation of the Presiding Officer's Scheduling Order, and entitle Respondents to further sanctions against Complaint Counsel and Dr. Heymsfield for their ongoing and continuing failure to disclose this required information.

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

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

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

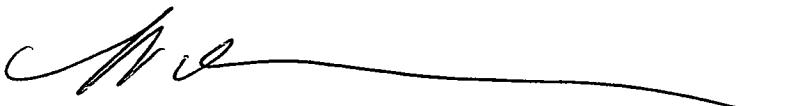
Complaint Counsel's and Dr. Heymsfield's carefully orchestrated declarations too finely parse what really happened. They are inconsistent with any fair reading of Dr. Heymsfield's

deposition testimony. Moreover, they avoid answering germane questions, but raise more questions than they purport to answer. One thing is clear, though, if Complaint Counsel's declarations are true, it would be far worse for Dr. Heymsfield, who would be guilty of eviscerating his own credibility. Not only would he have violated a court order and suppressed impeachment evidence from Respondents, but he also would have withheld material information and deceived the government who retained him.

CONCLUSION

As a Respondent, I join in the Motion for Sanctions and respectfully request the opportunity to depose Complaint Counsel and Dr. Heymsfield if this retained professional expert is not immediately excluded from ths proceeding. For the reasons set forth above and in the original motion, the Motion for Sanctions and my Motion should be granted.

Dated: November 15, 2005.



Mitchell K. Friedlander
In pro per

Exhibit A

DECLARATION OF MITCHELL K. FRIEDLANDER

I, Mitchell K. Friedlander, hereby declare:

1. I have not engaged in false and/or misleading advertising.

2. I did not know of and should not have known of any of the allegedly deceptive acts or practices described in the Complaint.

3. The regulatory standards imposed by the Federal Trade Commission and the Commission's enforcement of those standards violate my constitutional rights.

4. I was an independent consultant to American Phytotherapy Research Laboratory, Inc., ("APRL"), nka DBM Enterprises, Inc.

5. I did not disseminate, or cause to be disseminated, any advertisements for the six products at issue in the Complaint (the Challenged Products") in "commerce" as that term is defined by section 4 of the Federal Trade Commission Act.

6. I did not sell any of the Challenged Products at any time.

7. I did not have any final say or control over product development for any of the Corporate Respondents.

8. I had no authority to act on behalf of any of the Corporate Respondents.

9. I did not provide any services to APRL that involved interstate commerce.

10. I did not approve dissemination of any advertisements for any of the Challenged Products, including without limitation the Challenged Advertisements.

11. The language "causes rapid and visibly obvious fat loss in areas of the body to which it is applied" does not even appear in the advertisements for Dermalin-APg, in the advertisements for Tummy Flattening Gel, or in the advertisements for Cutting Gel, and this language is inherently vague, subjective, and susceptible to numerous different interpretations.

12. I have not represented, expressly or by implication, that Dermalin-Apg, Tummy Flattening Gel, or Cutting Gel cause rapid and visibly obvious fat loss in areas of the body to which they are applied.

13. The language "causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users" does not appear in the advertisements for Leptoprin, is not defined in the Complaint, and is

inherently vague, subjective, and susceptible to numerous different interpretations.

14. I have not represented, expressly or by implication, that Leptoprin causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users.

15. The language "Leptoprin causes loss of substantial, excess fat in significantly overweight users" does not appear in the advertisements for Leptoprin, is not defined in the Complaint, and is inherently vague, subjective and susceptible to numerous different interpretations.

16. The language "causes weight loss of more than 20 pounds in significantly overweight users" does not appear in advertisements for Anorex and is inherently vague, subjective, and susceptible to numerous different interpretations.

17. I have not represented that Anorex causes weight loss of more than 20 pounds in significantly overweight users.

18. I have not represented that Leptoprin causes loss of substantial, excess fat in significantly overweight users.

19. The language "causes substantial weight loss in overweight or obese children" does not appear in the advertisements for PediaLean, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

20. I have not represented that PediaLean "causes substantial weight loss in overweight or obese children."

21. I have not engaged in false or misleading advertising with respect to Dermalin-Apg.

22. I have not engaged in false or misleading advertising with respect to Tummy Flattening Gel.

23. I have not engaged in false or misleading advertising with respect to Cutting Gel.

24. I have not engaged in false or misleading advertising with respect to Leptoprin.

25. I have not engaged in false or misleading advertising with respect to Anorex.

26. I have not engaged in false or misleading advertising with respect to PediaLean.

27. The regulatory standards imposed by the Federal Trade Commission violate my right to due process under the Fifth Amendment to the Constitution of the United States.

28. The Commission's Complaint and enforcement action restricts my protected commercial speech through the use of ad hoc and non-defined terms.

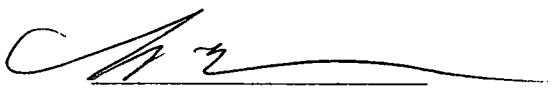
29. The Commission has labeled advertisements false or misleading without relying on extrinsic evidence.

30. The claims in the Challenged Advertisements constitute puffery, which is not likely to mislead a reasonable consumer.

31. The regulatory standards governing quantity and quality of substantiation fail to provide reasonable persons, including me, with fair notice as to which advertisements are permissible.

32. Because the regulatory standards are unconstitutional, the Commission's decision to initiate this enforcement proceeding against me is not in the interest of the public.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on November 15, 2005 in the City of Salt Lake, State of Utah.



Mitchell K. Friedlander

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT MITCHELL K. FRIEDLANDER'S MOTION TO EXCLUDE A WITNESS, FOR SANCTIONS, AND TO DEPOSE BOTH COMPLAINT COUNSEL AND DR. HEYMSFIELD, AND JOINDER IN RESPONDENTS' MOTION TO EXCLUDE A WITNESS AND FOR SANCTIONS, AND CORRECTION OF COMPLAINT COUNSEL'S FALSE STATEMENTS** was provided to the following as follows:

(1) On 16th November 2005, the original and one (1) paper copies sent via hand delivery, and one (1) electronic copy via email attachment in Adobe® ".pdf" format, to: Donald S. Clark, Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room H-159, Washington, D.C. 20580.

(2) On 16th November 2005, two (2) paper copies sent via hand delivery to: The Honorable Stephen J. McGuire, Chief Administrative Law Judge, 600 Pennsylvania Avenue, N.W., Room H-112, Washington, D.C. 20580.

And on 16th November 2005, to the following as follows:

(3) One (1) copy via e-mail attachment in Adobe® ".pdf" format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, Lemuel Dowdy, Walter C. Gross III, and Edwin Rodriguez all care of lkapin@ftc.gov, jmillard@ftc.gov; ldowdy@ftc.gov, wgross@ftc.gov, and erodriguez@ftc.gov, with one (1) paper copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580, facsimile no. (202) 326-2558.

(4) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 18001 Old Cutler Road, Miami, Florida 33157.

(5) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(6) One (1) copy via United States Postal Service to Jonathan W. Emord, Emord & Associates, 1800 Alexander Bell Drive, Suite 200, Reston, Virginia, 20191, Counsel for Respondents A. G. Waterhouse, L.L. C., Klein-Becker, L.L. C., Nutrasport, L.L. C., Sovage, Dermalogic Laboratories, L.L. C., and BAN, L.L. C.

(7) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, *pro se*.