

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

In the Matter of)
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)
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.)

Docket No. 9318

**ORDER DENYING RESPONDENTS' MOTIONS FOR RECONSIDERATION,
CLARIFICATION, *IN LIMINE*, TO INCLUDE WITNESSES AND REOPEN
DISCOVERY, OR FOR CERTIFICATION TO THE COMMISSION**

I.

On December 6, 2005, Respondents Basic Research, LLC; A.G. Waterhouse, LLC; Klein-Becker USA, LLC; Nutrasport, LLC; Sovage Dermalogic Laboratories, LLC; Ban, LLC; Dennis Gay; Daniel B. Mowrey; and Mitchell K. Friedlander ("Respondents") filed a motion seeking reconsideration or clarification of the November 22, 2005 Order on Motions to Exclude a Witness, for Sanctions, or for Leave to Reopen Discovery for a Limited Purpose ("Exclusion Order") and the November 22, 2005 Order Denying Respondents' Motion for Leave to Add an Expert Witness and to Reopen Discovery for a Limited Purpose ("Leave Order").

On December 9, 2005, Respondent Mitchell Friedlander filed a motion *in limine* to exclude a witness or, alternatively, to include witnesses and reopen discovery for a limited purpose, or, in the alternative, for reconsideration, clarification, or certification of the two November 22, 2005 Orders identified above ("Friedlander Motion").

On December 16, 2005, Complaint Counsel filed a consolidated opposition to both motions ("Opposition").

II.

Both November 22, 2005 Orders address the impact on this litigation of the failure of Dr. Steven Heymsfield, one of Complaint Counsel's expert witnesses, to list on his *curriculum vitae* six studies that Heymsfield co-authored with John Darsee over twenty years ago. These studies were based on fraudulent data.

In the Exclusion Order, the Court denied Respondents' motions which sought to exclude Heymsfield from testifying at trial, sought sanctions, and sought leave to reopen discovery. Exclusion Order at 1. The Exclusion Order also denied a motion by Respondents Mowrey and Gay to join in Respondents' motion to exclude a witness and for sanctions, and to correct Complaint Counsel's false statements which provided additional arguments supporting, and correction of Complaint Counsel's false statements concerning, the motion for sanctions. Exclusion Order at 1. In addition, the Exclusion Order denied a motion by Respondent Friedlander to exclude a witness, for sanctions, and to depose Complaint Counsel's expert, and 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 Complaint Counsel. Exclusion Order at 1. The Exclusion Order held that the failure of Heymsfield to list on his *curriculum vitae* these studies does not meet the Commission's standard for imposing sanctions and that even if Heymsfield's failure to list these studies was unjustified, the sanction of excluding Heymsfield from testifying at trial is not reasonable in light of the material withheld. Exclusion Order at 3-4.

In the Leave Order, the Court denied Respondents' motions for leave to add an expert witness to testify regarding Heymsfield's reactions to or responsibility for his co-author's fraudulent actions and deny Respondents' requests to reopen discovery for the limited purpose of preparing and exchanging an expert report and allowing a deposition of the proposed additional expert witness. Leave Order at 1-2.

III.

Respondents express concern regarding whether the credibility of Heymsfield will be considered during trial. Motion at 7. Nothing in the Court's Orders suggests that credibility will not be considered. Credibility is always an issue, however, it is not one that the Court will rule on prior to trial. Moreover, nothing in the Orders limits Respondents' voir dire, cross-examination, or argument on the issue of Heymsfield's credibility. Rather, the Orders prohibit the request for additional witnesses and discovery on this issue and deny the request to exclude Heymsfield.

Motions for reconsideration should be granted only sparingly. *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991). Such motions should be granted only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. *In re Rambus Inc.*, 2003 FTC LEXIS 49, at *11 (Mar. 26, 2003) (citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002)). Reconsideration motions are not intended to be opportunities to take a second bite at the apple and relitigate previously decided matters. *Goulding v. IRS*, 1997 WL 47450, at *1 (N.D. Ill. 1997) (citations omitted); *Sims v. Mme. Paulette Dry Cleaners*, 1986 WL 12511, at *1 (S.D.N.Y. 1986).

Respondents argue that the Orders contain an erroneous statement of fact – that all six of the fraudulent studies were withdrawn from publication when only five of the studies were withdrawn from publication. Motion at 2-5. Respondents also contend that the Orders fail to address Heymsfield’s credibility. Motion at 2, 6-10. Respondent Friedlander argues that the Court has committed clear error, that Respondents have been prejudiced, and that additional discovery and rebuttal evidence should be permitted. Friedlander Motion at 21-36.

Complaint Counsel asserts that the Court’s statement that all of the fraudulent studies had been withdrawn merely reported statements made by Respondents in their initial motions and that whether all of the studies were withdrawn from publication was not a fact upon which the Court’s decision was based. Opposition at 4-6. Complaint Counsel also maintains that Respondents’ efforts to litigate the issue of credibility in advance of trial is improper. Opposition at 6-8.

Respondents have failed to demonstrate that: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. Respondents do not contend that there has been a change in controlling law. Whether some or all fraudulent studies were withdrawn does not change the analysis or decision in either Order and does not constitute new evidence. As mentioned earlier, Respondents may challenge Heymsfield’s credibility in voir dire, cross examination, and argument. In addition, as explained above, credibility determinations will not be made prior to trial, other than to rule that Respondents’ concerns do not justify the severe sanction of excluding Heymsfield as a witness. Clear error is argued by Friedlander, although, after close examination of his arguments, including his extensive First Amendment arguments, they appear to go to the weight of Heymsfield’s testimony and Complaint Counsel’s case in general, but do not demonstrate clear error or manifest injustice from the two Orders at issue. Thus, Respondents’ motions fail to meet the heavy burden required for granting a motion for reconsideration. In addition, Respondents have not demonstrated a need to clarify or change the Orders. Accordingly, Respondents’ motions for reconsideration or clarification are **DENIED**.

Respondent Friedlander filed a motion *in limine* to exclude a witness or, alternatively, to include witnesses and reopen discovery for a limited purpose, or, in the alternative, for reconsideration, clarification, or certification of the two November 22, 2005 Orders identified

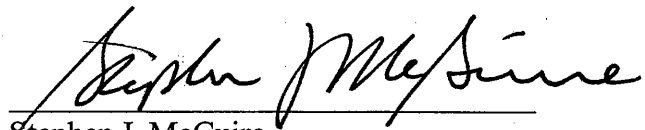
above. Many of these issues have been addressed in the Orders at issue, the December 14, 2005 Order on Complaint Counsel's objections to late disclosed witnesses and exhibit, and in the discussion above. Friedlander's continuing objections to Heymsfield's testimony go to the weight and not the admissibility of this testimony and do not justify excluding Heymsfield or allowing additional witnesses or discovery.

Pursuant to Commission Rule 3.23(b), a ruling by the Administrative Law Judge may be reviewed by the Commission only upon a determination that "the ruling involves a controlling question of law or policy as to which there is a substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b). The Orders for which appeal is sought are discovery rulings. The Commission "generally disfavor[s] interlocutory appeals, particularly those seeking review of an ALJ's discovery rulings." *In re Gillette Co.*, 98 F.T.C. 875, 875, 1981 FTC Lexis 2, at *1 (Dec. 1, 1981).

Respondent Friedlander does not address these factors directly. Upon review of the Orders and parties' pleadings, however, the Orders clearly do not involve a controlling question of law or policy as to which there is a substantial ground for difference of opinion, nor would an immediate appeal from the ruling materially advance the ultimate termination of the litigation, nor will subsequent review be an inadequate remedy.

For the reasons stated above, Respondent Friedlander's motion *in limine* to exclude a witness or, alternatively, to include witnesses and reopen discovery for a limited purpose, or, in the alternative, for reconsideration, clarification, or certification of the two November 22, 2005 Orders is **DENIED**.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: January 10, 2006