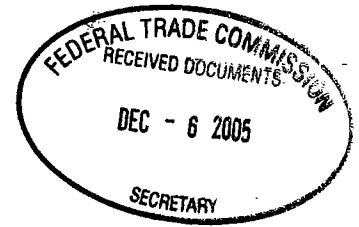


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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. )

Docket No. 9318

**ORDER ON RESPONDENTS' MOTIONS TO STRIKE EXPERT REPORTS  
OF MICHAEL MAZIS AND OF GEOFFREY NUNBERG**

**I.**

Respondents filed two motions: Motion to Strike Expert Report of Michael Mazis ("Mazis Motion") and Motion to Strike Expert Report of Geoffrey Nunberg ("Nunberg Motion") on January 31, 2005. Complaint Counsel filed a consolidated opposition ("Opposition") on February 11, 2005.

**II.**

Respondents assert that the opinions expressed in the reports of two of Complaint Counsel's experts, Michael Mazis ("Mazis Report") and Geoffrey Nunberg ("Nunberg Report") are speculative, unsupported by objectively verifiable evidence, and are more likely to cause prejudice and confusion than to assist the trier of fact in determining any material issue in these proceedings. Respondents urge that both Mazis and Nunberg "be stricken as an expert in this cause." Motions at 2.

Complaint Counsel asserts that the testimony and reports of Mazis and Nunberg will assist the trier of fact, are reliable and credible, and meet the standards for admissibility under the Federal Rules of Evidence, applicable court precedent, and the Commission's Rules of Practice. Opposition at 2-3.

Although Respondents titled their motions as "Motions to Strike Expert Report," the conclusion to each motion ends with the "request that the expert opinion [of Mazis and of Nunberg] be stricken, and that his opinion be excluded from consideration in summary decision proceedings, and to the extent necessary, at trial." Motions at 10. Thus, though not styled as a motion *in limine*, Respondents seek to prevent Complaint Counsel from introducing the Mazis and Nunberg Reports at trial and to preclude Mazis and Nunberg from testifying at trial.

Complaint Counsel's motion for partial summary decision was denied on the grounds that it raised genuine issues of material facts that could not be resolved without a full evidentiary hearing on the merits. *In re Basic Research*, 2005 FTC LEXIS 100 (June 27, 2005) (Order Denying Complaint Counsel's Motion for Partial Summary Decision). The Mazis and Nunberg Reports were not considered in reaching this determination. *See Id.* Accordingly, Respondents' request with respect to consideration of the expert reports in the summary decision proceedings is **DENIED** as moot.

Respondents' requests to exclude the Mazis and Nunberg Reports from introduction at trial and to preclude Mazis and Nunberg from testifying at trial are also **DENIED**, as set forth below.

### III.

#### A.

Under the Commission's Rules of Practice, evidence shall be excluded if it is "[i]rrelevant, immaterial, [or] unreliable." 16 C.F.R. § 3.43(b). "Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b).

Courts may exclude expert reports if they are unreliable. *Engebretsen v. Fairchild Aircraft, Corp.*, 21 F.3d 721, 728-29 (6th Cir. 1994); *Grabovac v. Allstate Ins. Co.*, 426 F.3d 951 (8th Cir. 2005). Courts consistently exclude reports of non-testifying experts on hearsay grounds. *E.g.*, *United States v. Visinaiz*, 2005 U.S. App. LEXIS 24604, \*31 (10th Cir. 2005) (where author of report did not testify, to admit report without testimony would have been highly confusing and prejudicial since no cross examination could occur); *Polythane Systems, Inc. v. Marina Ventures Int'l, Ltd.*, 993 F.2d 1201 (5th Cir. 1993). But where, as here, the experts are expected to testify and will be subject to cross-examination, the reliability of the statements contained in their expert reports may be assessed. *See Buchwalter v. Federal Trade Commission*,

235 F.2d 344, 346 (2nd Cir. 1956) (“[I]t is doubtful whether test reports, when testified to by a person supervising and participating in them are hearsay.”). *See also United States v. Lindemann*, 85 F.3d 1232, 1238 (7th Cir. 1996) (“The basis for excluding hearsay evidence is the notion that statements made while not under oath and while not subject to cross-examination are inherently unreliable.”). “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993).

Prior to the pre-hearing conference, the parties shall meet and confer and reach an agreement with respect to admissibility of each of the documents to be offered into evidence. If there is no objection to the admissibility of expert reports, then the Mazis and Nunberg Reports will be admitted into evidence. If the parties are unable to reach an agreement, a determination will be made at trial on whether the Mazis and Nunberg Reports, if offered as trial exhibits, are unreliable and thus should be excluded. Accordingly, if Complaint Counsel offers the opinions of Mazis and Nunberg at trial, Complaint Counsel must demonstrate the reliability of any proffered opinions. At this stage in the litigation, Respondents’ motions to strike the Mazis and Nunberg Reports are **DENIED**.

#### B.

Under the Commission’s Rules of Practice, evidence shall be admitted if it is “[r]elevant, material, and reliable evidence.” 16 C.F.R. § 3.43(b). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. 16 C.F.R. § 3.43(b). Under the Federal Rule of Evidence relating to admission of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Mazis has been designated as an expert in consumer response to advertising and other promotional materials and in measuring advertising deception. Opposition at 21. Complaint Counsel states that Mazis’ opinion addresses the claims concerning the challenged products. Opposition at 21.

Nunberg has been designated as an expert in linguistics, the meaning and use of words, including common word usage, and lexicography. Opposition at 22. Complaint Counsel states

that Nunberg's opinion constitutes extrinsic evidence of how Respondents' ads might reasonably be interpreted by consumers. Opposition at 22.


Respondents challenge Mazis' opinion for failure to conduct a survey, study or analysis to show what actual consumers perceive when viewing the advertisements for Respondents' products and charges that Mazis' opinion is a personal opinion. Mazis Motion at 4. Respondents challenge Nunberg's opinion for failure to perform any survey, study or analysis that demonstrates how consumers understand the term "substantial" in the context of viewing the advertisements for Respondents' products and charges that Nunberg's opinion is the type of opinion evidence generally regarded as inadmissible. Nunberg Motion at 4.

The challenges raised by Respondents go to the weight of the testimony, not to the admissibility. See *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002); *Cummings v. Standard Register Co.*, 265 F.3d 56, 65 (1st Cir. 2001). Only if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the trier of fact must such testimony be excluded. *Bonner v. ISP Tech., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001).

Even after the Supreme Court's decision in *Daubert*, testimony, cross-examination, and introductions of contrary evidence are the traditional and appropriate means to challenge expert opinion. *Daubert*, 509 U.S. at 595; *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). This is especially so in a bench trial where the judge and the fact finder are the same. *United States v. Brown*, 279 F. Supp. 2d 1238, 1243 (S.D. Ala. 2003) ("In a bench trial, [it is acceptable] to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled."); *Volk v. United States*, 57 F. Supp. 2d 888, 896 n.5 (N.D. Cal. 1999) (the *Daubert* gatekeeping obligation is less pressing where the judge and the fact finder are the same). Thus, the appropriate weight to be given to the opinions offered by Mazis and Nunberg will be determined, if necessary, in the Initial Decision to be issued in this case.

To the extent that Respondents seek to preclude Mazis and Nunberg from testifying as experts at trial, Respondents' motion is **DENIED**.

ORDERED:

  
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Stephen J. McGuire  
Chief Administrative Law Judge

Date: December 6, 2005