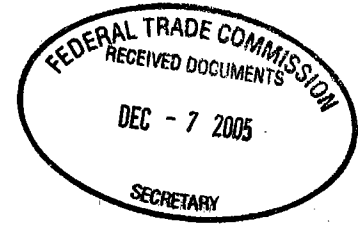


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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 COMPLAINT COUNSEL'S MOTION TO STRIKE

I.

Complaint Counsel filed a motion to strike on February 25, 2005. Respondents filed their opposition on March 10, 2005. For the reasons set forth below, Complaint Counsel's motion is **GRANTED in part and DENIED in part.**

II.

Complaint Counsel moves to: (1) exclude at trial the testimony of certain witnesses not listed on Respondents' Preliminary Witness List; (2) exclude at trial expert opinion that may be offered from lay witnesses; (3) exclude at trial the testimony of certain officials or members of the Federal Trade Commission ("FTC") listed on Respondents' Final Witness List; and (4) exclude at trial the testimony of witnesses Complaint Counsel charges would be irrelevant or cumulative.

Respondents argue that the motion seeks draconian measures to prevent Respondents from defending the charges levied against them in this case. Respondents argue that the

witnesses they seek to call are appropriate and that they should not be prevented from calling them at trial.

III.

A. Witnesses Not Listed on Respondents' Preliminary Witness List

Complaint Counsel asserts that Respondents have improperly listed Magestic Media, Paul Lehman, Ken Shirley, and BPI Labs as witnesses Respondents intend to call at the trial in this matter. Complaint Counsel moves to exclude these witnesses because Respondents failed to include them on their Preliminary Witness List and neither notified Complaint Counsel of a change in the list, nor sought permission from the Administrative Law Judge to add these witnesses.

The Scheduling Order entered in this case provides, “[t]he final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause.” Scheduling Order at 5. The Scheduling Order further provides that a party must “notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order.” Scheduling Order at 5. Moreover, an Order previously issued in this case expressly cautioned Respondents that they had an obligation to timely update their Preliminary Witness List and notify Complaint Counsel of any additions. (December 9, 2004 Order).

Majestic Media, Lehman, Shirley, and BPI Labs were not listed on either Respondents' or Complaint Counsel's Preliminary Witness Lists. Complaint Counsel represents that Respondents never notified Complaint Counsel that Respondents wished to add any of these parties to their list.

Respondents concede that Majestic Media, Shirley, and BPI Labs were not listed on Respondents' Preliminary Witness List, and agree to withdraw them from their Final Witness List. With respect to Lehman, however, Respondent asserts that Lehman is the President of DermTech International and that DermTech International was listed on Respondents' Preliminary Witness List.

Respondents' Preliminary Witness List reveals that Respondents “may call yet to be identified representatives of the following entities to testify as to the evaluation and/or regulation of the products identified in the Complaint” and specifically lists DermTech International. Respondents' Final Witness List enumerates both Lehman and a representative of DermTech International to testify about certain studies, including cadaver studies, performed in connection with the challenged topical gel products. Respondents represent in their Opposition that Lehman is the named representative expected to testify on behalf of DermTech International.

With respect to Lehman, Complaint Counsel's motion is **DENIED**. Respondents may

call Lehman as the representative of DermTech International. Respondents may not call any additional witness on behalf of DermTech International. To avoid any undue prejudice, Complaint Counsel shall have ten business days or a date mutually agreed upon to conduct the deposition of Lehman.

With respect to Majestic Media, Shirley, and BPI Labs, Complaint Counsel's motion to strike witnesses is **GRANTED**.

B. Opinions That May Be Offered From Lay Witnesses

Complaint Counsel asserts that on Respondents' Final Witness List, there are several witnesses for whom the described intended testimony appears to include improper expert opinion testimony. Complaint Counsel further asserts that, with the exception of Edward Popper, who was subsequently withdrawn, none of these proposed witnesses are listed on Respondents' Expert Witness List and none have provided expert reports or other information required of experts. Complaint Counsel seeks to exclude or to limit the testimony of the following witnesses: Lehman, Shirley, DermTech International, BPI Labs, Frank Greenway, C. Livieri, and Edward Popper.

Respondents concede that Popper has been withdrawn as an expert in the case. Respondents further state that they have agreed to withdraw Shirley and BPI Labs, as they were not listed on Respondents' Preliminary Witness List. With respect to Lehman, Greenway, and Livieri, however, Respondents argue that the motion lacks merit and is premature.

Both Lehman and an unnamed representative of DermTech International are listed on Respondents' Final Witness List as expected to testify "about, without limitation, certain studies, including cadaver studies, performed in connection with the challenged tropical gel products." Complaint Counsel states that DermTech International is the company that conducted cadaver studies which Respondents submit as substantiation for the challenged aminophylline gels and that Lehman is an officer with DermTech who conducted and approved the cadaver studies.

Greenway is listed on Respondents' Final Witness List as expected to testify "about, without limitation, certain clinical studies conducted in connection with the challenged topical gel products." Complaint Counsel states that Greenway is one of the individuals who conducted the studies Respondents have submitted as substantiation for the challenged aminophylline gels.

Livieri is listed on Respondents' Final Witness List as expected to testify "about, without limitation, certain clinical studies conducted in connection with the challenged product PediaLean." Complaint Counsel states that Livieri is one of the individuals who conducted a study that Respondents have submitted as substantiation for PediaLean.

Complaint Counsel argues that Respondents appear to seek to elicit expert testimony from these witnesses regarding certain studies upon which Respondents rely as substantiation for

the challenged products. Complaint Counsel asserts that any testimony given by these witnesses would necessarily elicit scientific expert opinion as to the competence and reliability of any of the studies or other substantiation provided by Respondents for their claims made in promotional materials.

Respondents state that they intend to elicit fact testimony, not opinion testimony, from these witnesses. Respondents further assert scientists may testify concerning the facts and circumstances of tests and studies in which they participated, without offering opinion testimony concerning the ultimate issues in the case.

The Scheduling Order in this case specifically provides, “[f]act witnesses shall not be allowed to provide expert opinions.” Scheduling Order at 6; *see also* Fed. R. Evid. 701. Further, “[w]itnesses may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Scheduling Order at 6; *see also* Fed. R. Evid. 602.

Each of these witnesses appears to have personal knowledge concerning the facts of the studies in which they participated, the tests they conducted, the manner in which those tests were conducted, and the results of those tests. Respondents will not be precluded from eliciting testimony concerning the underlying studies in which these fact witnesses participated. However, if Respondents intend to elicit testimony from these individuals as to the competence and reliability of studies or other substantiation provided by Respondents of which the witness has no personal knowledge, such testimony will not be allowed at trial.

Accordingly, with respect to Lehman or a substitute representative of DermTech International, Greenway, and Livieri, Complaint Counsel’s motion is **DENIED**. With respect to Shirley and Popper, Complaint Counsel’s motion is **GRANTED**.

C. Certain Officials or Members of the Federal Trade Commission

Complaint Counsel asserts that Respondents have designated several officials or members of the FTC staff as persons Respondents may call upon to testify. Included on Respondents’ list are several present or former Commissioners of the FTC, attorneys of record for Complaint Counsel in this matter, a former Director of the Bureau of Consumer Protection, and several current or former FTC staff members. Respondents’ Final Witness List indicates that the subject matter on which these individuals are expected to testify is the Commission’s reasonable basis standard, the competent and reliable evidence standard, the investigation and prosecution of this administrative action, and the standards used by the Commission to interpret advertisements.

Respondents assert that “constitutional due process and fairness commands that Respondents be advised of the standards against which their conduct, and in this case, their substantiation for claims made, will be judged. Respondents further assert that “the only place left to look for testimony to cure this constitutional infirmity [is] the current and former

Commission staff most likely knowledgeable about those standards.”

In numerous previous orders entered in this case, Respondents have been instructed that the probe they seek into the mental processes of the FTC Commissioners and staff is inappropriate. Those standards will not be repeated. Complaint Counsel’s motion to strike is **GRANTED**. Accordingly, Respondents may not elicit testimony from the following individuals on Respondents’ Final Witness list, each of whom is a current or former FTC official or staff: Commissioners Leary and Harbour, former Commissioners Swindle and Thompson, former Chairman Muris, Walter Gross, Joshua Millard, Howard Beales, Richard Cleland, and Jonathan Cowen.

D. Irrelevant or Cumulative witnesses

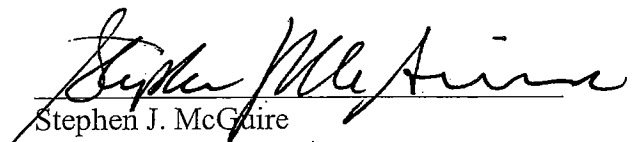
Complaint Counsel also moves to strike Bodee Gay, BPI Labs, DermTech International, and George Bybee from testifying at trial on grounds that their proposed testimony is either irrelevant or duplicative of other witnesses’ proposed testimony.

Respondents do not address this argument. However, Respondents do explicitly state that they agree to withdraw from their Final Witness List: BPI Labs, Frank Greenway, Livieri, Bodee Gay, Bybee, and Millard, provided that the Court allow Respondents to call the other witnesses listed on their Final Witness List. Such an offer may be appropriately extended by Respondents’ counsel in negotiations with Complaint Counsel. It is not appropriate to make such an offer to the Court. The Court’s ruling on certain witnesses listed on Respondents’ Final Witness List rests on the merits of each witness or category, discussed above.

As determined in previous sections, the following witnesses are stricken: BPI Labs, Greenway, Livieri, and Millard. With respect to BPI Labs, Greenway, Livieri, and Mallard, Complaint Counsel’s motion to strike is **GRANTED**.

Respondents may call Lehman on behalf of DermTech International. Whether the testimony of Bodee Gay and Bybee would be irrelevant or cumulative cannot be determined at this stage in the litigation. With respect to Lehman, Bodee Gay, and Bybee, Complaint Counsel’s motion to strike is **DENIED**.

ORDERED:


Stephen J. McGuire
Chief Administrative Law Judge

Date: December 7, 2005