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 *IN LIMINE*

I.

Complaint Counsel filed a motion *in limine* ("Motion") on March 1, 2005. Respondents filed their opposition ("Opposition") on March 14, 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) limit the trial testimony of certain fact witnesses to factual testimony; (2) limit testimony of Respondents' expert witnesses; (3) preclude Respondents from presenting testimony concerning the manufacture of the challenged products; (4) limit or exclude testimony concerning the pre-Complaint investigation; (5) limit Respondents' questioning of Complaint Counsel's witnesses to exclude questioning regarding safety claims; (6) strike the term "without limitation" in the description of the proposed testimony of each witness; and (7) strike Respondents' reservation of the right to call any witness to testify on any subject addressed in deposition. Motion at 1-2.

Respondents oppose the Motion on grounds that Complaint Counsel failed to meet the rigorous requirements courts impose on a party seeking to exclude evidence *in limine*. Opposition at 1-2. Respondents urge, at a minimum, the ruling on these issues should be reserved until the time of trial when the Court can fairly consider these requests in the context of the actual evidence and testimony developed. Opposition at 2.

III.

As previously noted in this proceeding, a "motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp., Inc.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. American Home Products Corp.*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toeppen*, 1998 WL 102702, at *2 (N.D. Ill. 1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also SEC v. U.S. Environmental, Inc.*, 2002 WL 31323832, at *2 (S.D.N.Y. 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental,* 2002 WL 31323832, at *2. *In limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial. *Ohler v. U.S.*, 529 U.S. 753, 758 (2000); *Luce*, 469 U.S. at 41 (A motion *in limine* ruling "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer."). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000); *Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029, 1034 n.4 (N.D. Ohio 2002).

A. Opinion Testimony From Lay Witnesses

Complaint Counsel asserts Respondents' Final Witness List includes several witnesses for whom the described intended testimony appears to include improper expert opinion testimony. Motion at 3. Complaint Counsel further asserts none of these proposed witnesses are listed on Respondents' Expert Witness List and none provided expert reports or other information required of experts. Motion at 3. Complaint Counsel seeks to limit the testimony of: Michael Meade, Nathalie Chevreau, and Mitchell Friedlander. Motion at 3.

Meade is listed on Respondents' Final Witness List as expected to testify, among other things, about "the formulation and manufacture of the challenged products and the active

ingredients contained in the challenged products." Respondents' Final Witness List at 2. Complaint Counsel argues, any testimony Meade may offer about the science of the active ingredients must be reserved for an expert witness. Motion at 5.

Chevreau is listed on Respondents' Final Witness List as expected to testify, among other things, about "the composition, nature and properties of the challenged products, substantiation for the challenged products, [and] scientific studies referred to in the challenged advertisements." Respondents' Final Witness List at 3. Complaint Counsel states it has no objection to Chevreau's factual testimony about her role with respect to the challenged products, but argues the proposed description of her testimony appears to call for scientific expert opinion as to the competence and reliability of the substantiation provided by Respondents for their claims made in their promotional materials. Motion at 6.

Friedlander is listed on Respondents' Final Witness List as expected to testify, among other things, about "the substantiation provided for the challenged advertisements." Respondents' Final Witness List at 3. Complaint Counsel does not object to Friedlander's factual testimony about his role or his knowledge about others' role regarding the substantiation, but argues Friedlander should not be permitted to give any opinion regarding the scientific support for the challenged products. Motion at 6.

Respondents state each of these individuals has relevant, material information obtained from personal observation, investigation, and participation in the very processes central to this case. Opposition at 5. Respondents assert the descriptions of the proposed testimony do not suggest that Respondents intend to elicit expert opinion testimony from these witnesses. Opposition at 5. Respondents urge that any rulings on the specific testimony of each witness be deferred until trial. Opposition at 5.

The Scheduling Order in this case specifically provides, "[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. Further, "[f]act witnesses shall not be allowed to provide expert opinions." Scheduling Order at 6; *see also* Fed. R. Evid. 701. A witness not testifying as an expert may give an opinion only if it is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

Witnesses not designated as experts are limited to testifying to opinions which are rationally based on their actual perception. *Indemnity Ins. Co. v. Am. Eurocopter*, 227 F.R.D. 421, 424 (D.N.C. 2005); *Express One Int'l, Inc. v. Sochata*, 2001 U.S. Dist. LEXIS 25281, *11-12 (N.D. Tex. 2001). As noted in the Advisory Committee Notes to Rule 701, "Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of*

Civil Procedure, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony" and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process").

Lay witnesses are not precluded from giving first-hand participant testimony simply because they have specialized training. *Indemnity Ins.*, 227 F.R.D. at 424. For example, in *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 113 (1st Cir. 2003), the mere fact that an individual testified that he gave legal advice did not transform that testimony into a legal opinion which would subject the individual to being nominated an expert witness. There, the individual was not commenting on the correctness of the opinion, only that it had been made. As stated by the court in *Gomez*, "a party need not identify a witness as an expert so long as the witness played a personal role in the unfolding of events at issue and the anticipated questioning seeks only to elicit the witness' knowledge of those events." 344 F.3d at 113-14.

In *West Tennessee Chapter of Associated Builders & Contractors, Inc. v. Zellner Construction Co., Inc.*, 219 F.R.D. 587 (W.D. Tenn. 2004), the defendants proffered as fact witnesses individuals who had conducted a study which examined whether racial disparities existed in the procurement of contracts. The court found the witnesses to have opinions rationally based on their perceptions of the study, since they were the individuals who conducted the study and found that their testimony could be helpful to a clear understanding of the facts since the methods of the study were at the center of the controversy of the case. 219 F.R.D. at 590-91. The court permitted the witnesses to testify as lay witnesses on how the study was written and how the conclusions were formulated. *Id.*

In the instant motion and opposition thereto, neither party has clearly articulated the role of Meade, Chevreau, or Friedlander. Thus, it is difficult to discern the testimony sought to be elicited or precluded from these individuals. If these witnesses did in fact perform the tests or have first hand knowledge of the tests upon which Respondents relied for substantiation for their products, they may testify, but only to the extent of their personal knowledge of how the conclusions were drawn. For example, the Complaint alleges Respondents represented that they possessed and relied upon a reasonable basis that substantiated the representation that Dermalin-APg causes rapid and visibly obvious fat loss in areas of the body to which it is applied. Complaint ¶¶ 13, 14. Using these allegations as an example, Respondents may elicit testimony on what was Respondents' reasonable basis for their representation that Dermalin-APg causes rapid and visibly obvious fat loss and how they reached such conclusions if the witness has personal knowledge of the relevant facts. However, Respondents may not elicit opinion testimony from fact witnesses on whether Dermalin-APg, by way of example, does in fact, cause rapid and visibly obvious fat loss.

Such a scenario is similar to one contemplated by the Advisory Committee Notes to Rule 701(c) which state: "most courts have permitted the owner or officer of a business to testify as to the value or projected profits of the business without the necessity of qualifying the witness as an accountant, appraiser, or similar expert." Fed. R. Evid. 701(c) advisory committee note. "Such

opinion testimony," the committee stated, "is admitted not because of experience, training or knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business." *Id.* Once the business positions of the proposed witnesses are determined, if these witnesses have personal knowledge of the scientific support relied upon for the challenged products, such testimony will be admissible only to facts of the scientific support utilized, but not to the interpretation of such evidence.

To the extent that Complaint Counsel seeks a ruling on whether these lay witnesses will be offering expert testimony, the request is premature. Once the witnesses' testimony and the specific opinions are identified, the Court will rule on any objections according to the strict rules of evidence. Accordingly, with respect to Meade, Chevreau, and Friedlander, Complaint Counsel's Motion is **DENIED**.

B. Expert Testimony of Respondents' Expert Witnesses

Complaint Counsel seeks to limit the testimony of Respondents' experts, Lawrence Solan and Daniel Mowrey, who is both an expert and a fact witness in this action. Motion at 8.

1. Legal standards

To be admissible, evidence must be relevant, material, and reliable, pursuant to Commission Rule 3.43(b)(1). When ruling on the admissibility of expert opinions, courts traditionally consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and the many cases applying *Daubert,* including *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153-54 (1999). *See also In re Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994).

Although Complaint Counsel moves for exclusion, the "better approach under *Daubert* in a bench trial is to permit the expert testimony and 'allow "vigorous cross-examination, presentation of contrary evidence" and careful weighing of the burden of proof to test "shaky but admissible evidence."'" *The Ekotek Site PRP Committee v. Self*, 1 F. Supp. 2d 1282, 1296 n.5 (D. Utah 1998) (citing *Fierro v. Gomez*, 865 F. Supp. 1387, 1396 n.7 (N.D. Cal. 1994) (quoting *Daubert,* 509 U.S. at 596)). *See also Clark v. Richman*, 339 F. Supp. 2d 631, 648 (M.D. Pa. 2004) ("The court believes that these issues will best be resolved at trial rather than now in writing or following a *Daubert* hearing sometime prior to trial. As this case will be a bench trial, the court's "role as a gatekeeper pursuant to *Daubert* is arguably less essential."); *Albarado v. Chouest Offshore, LLC*, 2003 U.S. Dist. LEXIS 16481, *2-3 (E.D. La. Sept. 5, 2003) ("Given that this case has been converted into a bench trial, and thus that the objectives of *Daubert* . . . are no longer implicated, the Court finds that defendant's motion [*in limine*] should be denied at this time. Following the introduction of the alleged expert testimony at trial, the Court will either exclude it at that point, or give it whatever weight it deserves.").

Direct testimony by any expert witness at trial shall be limited to the contents of his or her expert report unless there is substantial justification for exceeding the bounds of the report. *Bristol-Myers Squibb Co. v. Rhone Poulenc Rorer, Inc.*, 2000 U.S. Dist. LEXIS 4075, *4 (S.D.N.Y. 2000); *In re Kreta Shipping S.A.*, 181 F.R.D. 273, 275 (S.D.N.Y. 1998); *Saroeung Nguon v. T.E.X. Assoc., Inc.*, 1992 U.S. Dist. LEXIS 16346, at *5 (E.D. Pa. 1992) (at trial, the expert's testimony will be confined to the matters covered by his report). *See also Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998) (if the expert's report contains only incomplete opinions, the court may choose to restrict the expert's testimony to those opinions alone).

2. Solan

Solan is listed on Respondents' Final Witness List as expected to testify about "the meanings of certain terms Complaint Counsel contends are implied by the challenged advertising." Respondents' Final Witness List at 4. Complaint Counsel argues Solan should be precluded from offering expert opinion as to advertising meaning because any such testimony would be beyond the scope of Solan's expertise and his expert report submitted in this case. Motion at 9.

Respondents respond they never requested Solan to review the advertisements for the purpose of providing expert opinion concerning the meaning of the advertisements and never asked Solan to opine in any way about explicit or implicit promises allegedly present in Respondents' advertising. Opposition at 7. Respondents further state they have never held Solan out as an expert on advertising interpretation and have no intention of eliciting such testimony. Opposition at 7.

Based on the representations of Respondents and case law limiting expert testimony to topics covered in the expert's report, Solan is precluded from providing testimony beyond the scope of his expertise and his expert report. To this extent, Complaint Counsel's Motion, as to Solan, is **GRANTED**.

3. Mowrey

Mowrey is listed on Respondents' Final Witness List as expected to testify about "the composition, nature and properties of the challenged products, substantiation for the challenged products, scientific studies referred to in the challenged advertisements, and research and development conducted by Corporate Respondents and others relating to the challenged products." Respondents' Final Witness List at 3.

Complaint Counsel recognizes that Mowrey, as a named Respondent, may properly testify to the topics on Respondents' Final Witness List as a fact witness, but objects to the extent Mowrey intends to give expert testimony on the "composition, nature and properties of the challenged products, substantiation for the challenged products, scientific studies referred to in

the challenged advertisements, [or] research and development conducted by the Corporate Respondents and others relating to the challenged products." Motion at 11-12. Complaint Counsel argues that Mowrey's opinions are based on inherently unreliable data and his practice fails to adhere to practices that are generally accepted in the scientific community. Complaint Counsel requests Mowrey's expert opinion should be limited to his specialized knowledge about archival research with respect to dietary supplements. Motion at 13-14.

Respondents argue Complaint Counsel has failed to demonstrate any basis for excluding Mowrey's testimony. Opposition at 8. Respondents further state that an expert may rely on his experience as the basis for his testimony. Opposition at 10. Respondents acknowledge that if an expert's opinion is based exclusively, or to a great extent on, anecdotal evidence, then under some circumstances that expert's testimony could be properly limited or excluded. Opposition at 10-11. However, Respondents state that anecdotal evidence is only a small part of the totality of the evidence that Mowrey takes into account in determining whether a particular ingredient is supported in its claims by the research and that there is nothing improper with Mowrey's consideration of anecdotal evidence in addition to the scientific and other information considered by Mowrey. Opposition at 11-12.

Upon review, Mowrey, in his capacity as an expert witness, is not, at this stage, precluded from providing opinion testimony on matters contained in his expert report. However, at trial, Respondents must demonstrate the reliability of any proffered opinions. Such testimony, as with all evidence, will only be ascribed its due weight. In addition, because Mowrey is both a participant and an expert, Respondents shall take all measures necessary to segregate their questioning of Mowrey to make clear which role Mowrey is taking on the stand. As to Mowrey, Complaint Counsel's Motion is thus, **DENIED**.

C. Testimony on the Manufacture of the Challenged Products

Complaint Counsel moves for an order precluding Respondents from presenting testimony at trial concerning the manufacture of the challenged products on grounds that Respondents failed to provide this testimony in response to a valid subpoena *ad testificandum* served on corporate Respondents before the close of depositions. Motion at 14. Complaint Counsel argues that Mowrey, the witness designated on behalf of Respondents to provide testimony on this topic on their behalf, was unable to answer questions concerning the manufacture of the products. Motion at 15. On this grounds, Complaint Counsel seeks to preclude Respondents from presenting testimony at trial concerning the manufacturing of the challenged products. Motion at 14.

Respondents answer that they did designate Mowrey as their corporate designee to respond to inquiries on the manufacture of the challenged products; that Mowrey did provide responsive testimony; and that the only information Mowrey was not able to provide was an identification of the specific manufacturers of the challenged products. Opposition at 13. Respondents further state they offered to make another witness, Michael Meade, available for

further examination on the area Mowrey was unable to address. Opposition at 14.

With respect to Complaint Counsel's request to preclude Respondents from presenting testimony at trial concerning the manufacture of the challenged products, Complaint Counsel's motion is **DENIED**. Respondents shall make Michael Meade available for deposition for the limited topic of the manufacture, including the manufacturers, of the challenged products. The deposition shall be limited to two hours and shall be completed within 10 business days or a date mutually agreed upon that is at least 20 days prior to the start of trial.

D. Testimony on the pre-Complaint Investigation

Respondents' Final Witness List indicates that the intended testimony for Dennis W. Gay, Carla Fobbs, and Mitchell K. Friedlander includes "the investigation by the Federal Trade Commission ("FTC") and the impact of the investigation and proceedings." Respondents' Final Witness List at 2. Complaint Counsel seeks to preclude testimony from these and any other witnesses concerning the FTC's investigation and its impact on grounds that such testimony is irrelevant to the issues to be tried. Motion at 19.

Respondents argue they are entitled to call Gay, Fobbs, and Friedlander to testify concerning Respondents' efforts, during the pre-Complaint investigation by the Commission to obtain guidance from the Commission concerning the Commission's substantiation standards. Opposition at 15. Respondents further state such testimony is relevant to Complaint Counsel's pre-Complaint protocol; Respondents' good faith voluntary submission of materials in support of their claims; Complaint Counsel's reasonable basis for issuing the Complaint; and the costly and time-consuming efforts undertaken by Respondents to comply with the pre-Complaint investigation and post-Complaint defense of the charges brought by the Commission. Opposition at 15-16.

By previous Orders, Respondents have been repeatedly instructed that, "the issue to be litigated at the trial in this matter is whether Respondents violated the FTC Act's prohibition against false and misleading advertising." Order on Complaint Counsel's Motion to Strike Respondents' Additional Defenses, 2004 FTC LEXIS 211, *3 (Nov. 4, 2004). *See also* Order Denying Basic Research's Motion to Compel, 2004 FTC LEXIS 210, *10 (Nov. 4, 2004) ("[t]he issue to be tried is whether Respondents disseminated false and misleading advertising, not the Commission's decision to file the Complaint").

The pre-Complaint investigations are clearly irrelevant to the present matters before the Court. *See In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974). "Once the Commission has . . . issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. *Id.*

Pursuant to Commission Rule 3.43, "[i]rrelevant, immaterial, and unreliable evidence shall

be excluded." 16 C.F.R. § 3.43. To the extent Respondents seek to introduce evidence on Complaint Counsel's pre-Complaint protocol, Complaint Counsel's reasonable basis for issuing the Complaint, or the costs to Respondents to comply with the pre-Complaint investigation and post-complaint defenses, such evidence is irrelevant and shall be excluded. In this respect, Complaint Counsel's motion is **GRANTED in part.**

With respect to other proffered evidence, Complaint Counsel, as the party with the burden on its motion *in limine*, has not clearly articulated the evidence sought to be excluded or the reasons therefor. Accordingly, Complaint Counsel's motion is **DENIED in part**. As to such other evidence, Respondents must be prepared to demonstrate at trial the relevance to the issues raised in the Complaint and Respondents' valid defenses thereto. Complaint Counsel may then raise its specific objections.

E. Testimony on Safety Claims

Respondents' Final Witness List indicates that the intended testimony for Complaint Counsel's Expert Witnesses, Steven Heymsfield, M.D. and Robert Eckel, M.D. includes testimony regarding "safety claims made in advertisements for dietary supplements and/or weight control products." Respondents' Final Witness List at 4-5. Complaint Counsel asserts the Complaint in this case does not allege any false or deceptive advertising with regard to safety claims and thus any such testimony is irrelevant to the issues to be tried. Motion at 22.

Respondents assert that they will rely on Complaint Counsel's representation in its Motion that "the Complaint in this case does not allege any false or deceptive advertising with respect to safety claims." Opposition at 16 (quoting Motion at 22). Based on Complaint Counsel's representation, Respondents agree not to question Complaint Counsel's experts concerning safety claims in connection with the challenged advertisements. Opposition at 16. But, Respondents state they reserve the right to examine any knowledgeable witness concerning the use and reliance on anecdotal evidence and case reports in the context of safety issues generally. Opposition at 16.

Based on these representations, with respect to Complaint Counsel's request to limit Respondents from questioning Heymsfield and Eckel concerning safety claims made in advertisements for dietary supplements and/or weight control products, the Motion is **GRANTED**. With respect to any other safety related issues that might be raised during trial, the Court will rule on the admissibility of such evidence at the appropriate time.

F. "Without limitation" Term

On Respondents' Final Witness List, Respondents have used the term "without limitation" to preface each description of intended testimony. Complaint Counsel argues that the "without limitation" preface is an apparent effort to allow Respondents to delve into more subject areas than listed. Motion at 23. Complaint Counsel seeks an order striking the phrase, "without limitation," and limiting Respondents to testimony that within reason falls within the subject

matter designated on their Final Witness List. Motion at 23.

Respondents assert that it is impossible to "summarize" every aspect of a witness' anticipated testimony and that the use of this phrase is not intended to allow them to "blind side" Complaint Counsel with surprise testimony at trial. Opposition at 17. Respondents further point out that Complaint Counsel used similar language in its final witness list, for example using the qualifier of "and any related topics" immediately following the descriptions of the expected subject matter of witnesses' testimony. Opposition at 17.

With respect to Complaint Counsel's request to strike the term "without limitation," Complaint Counsel's Motion is **DENIED**. In the event either side believes the other is attempting to elicit unexpected testimony not reasonably within the scope of the testimony described in the witness' designation and not made relevant through the other side's examination, the time and forum for raising and resolving such objections is at trial.

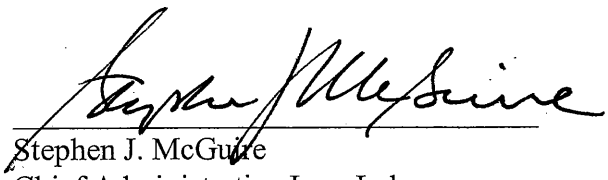
G. Reservation of the Right to Call Witnesses

Respondents' Final Witness List includes a reservation of the "right . . . to call any witness to testify on any subject matter addressed in deposition." Respondents' Final Witness List at 1-2. Complaint Counsel objects that this reservation is overbroad and is an attempt by Respondents to reserve a right to call any witness even if not listed on their Final Witness List to testify to any topic that any witness may have addressed in a deposition. Motion at 24. Complaint Counsel seeks to limit Respondents to calling only those witnesses specified on their Final Witness List. Motion at 24.

Respondents state they have no intention of calling as a witness any person who was not deposed in this case and that all persons deposed in this case are listed on Respondents' Final Witness List. Opposition at 18. Respondents explain that the reservation of rights was intended to reserve the right to examine any person who was deposed in this case concerning subjects on which that person was deposed. Opposition at 18.

Complaint Counsel's request is premature. Respondents have not attempted to call witnesses not listed on their Final Witness List. In the event Respondents seek to do so at trial, the Court will entertain Complaint Counsel's timely objections. With respect to Complaint Counsel's request to strike Respondents' reservation of this right, Complaint Counsel's Motion is **DENIED**.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: January 10, 2006