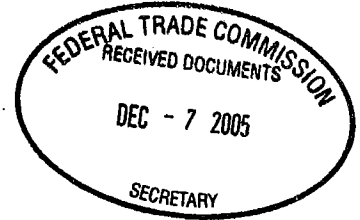


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



_____)
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 EXCLUDE COMPLAINT COUNSEL
WITNESSES HEYMSFIELD, MAZIS, AND NUNBERG**

I.

On November 23, 2005, Respondents filed three motions: Motion to Exclude Complaint Counsel Witness Heymsfield or, in the Alternative, to Limit His Testimony; Motion to Exclude Complaint Counsel Witness Michael B. Mazis; and Motion to Exclude Complaint Counsel Witness Geoffrey D. Nunberg. On December 5, 2005, Complaint Counsel filed a consolidated opposition to the motions on Mazis and Nunberg. For the reasons set forth below, Respondents' motions are **DENIED**.

II.

The Scheduling Order entered in this case on August 11, 2004, established clear deadlines for the disclosure of expert witnesses and their reports and for the filing of motions *in limine* and motions to strike. Complaint Counsel represents that it complied with the Scheduling Order by identifying its testifying expert witnesses on October 6, 2004, and providing the experts' reports later that month. The deadline for filing motions *in limine* and motions to strike, set by the August 11, 2004 Scheduling Order, was February 22, 2005.

The First Revised Scheduling Order was issued in this case on March 24, 2005. The March 24, 2005 First Revised Scheduling Order did not reset or extend the previously expired deadline for motions *in limine* or motions to strike.

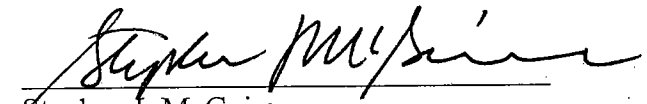
By Order dated April 6, 2005, this case was stayed pending resolution by the Commission of three motions that were certified to the Commission. The Commission lifted the stay by Order dated June 17, 2005. On August 4, 2005, the Second Revised Scheduling Order was issued in this case. The August 4, 2005 Second Revised Scheduling Order did not reset or extend the previously expired deadline for motions *in limine* or motions to strike.

III.

“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 *Provident Life & Accident Ins. Co. v. Adie*, 176 F.R.D. 246, 250 (E.D. Mich. 1997) (“Motions in limine typically involve matters which ought to be excluded from the jury’s consideration due to some possibility of prejudice or as a result of previous rulings by the court.”). Although Respondents titled their motions as “motions to exclude,” the relief sought is to exclude Complaint Counsel’s experts from presenting testimony at trial, in part or in whole. Accordingly, Respondents’ motions are motions *in limine*.

The Scheduling Order definitively set February 22, 2005 as the deadline for filing motions *in limine*. “A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992). Respondents’ three motions to exclude witnesses and testimony, filed November 23, 2005, are untimely. Respondents have not demonstrated good cause for filing these motions outside the deadline. Moreover, Respondents did timely file, on January 31, 2005, two motions raising related issues. Accordingly, Respondents’ November 23, 2005 motions to exclude are **DENIED**.

ORDERED:


Stephen J. McGuire
Chief Administrative Law Judge

Date: December 7, 2005