

(Substituted Version)

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

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In the Matter of )  
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BASIC RESEARCH, L.L.C., )  
A.G. WATERHOUSE, L.L.C., )  
KLEIN-BECKER USA, L.L.C., )  
NUTRASPORT, L.L.C., )  
SOVAGE DERMALOGIC )  
LABORATORIES, L.L.C., )  
BAN, L.L.C., )  
DENNIS GAY, )  
DANIEL B. MOWREY, and )  
MITCHELL K. FRIEDLANDER, )  
 )  
Respondents. )  
\_\_\_\_\_ )

Docket No. 9318

PUBLIC VERSION

**COMPLAINT COUNSEL’S OBJECTIONS TO RESPONDENTS’ LATE DISCLOSURE OF EIGHT WITNESSES AND ADDITIONAL PURPORTED SUBSTANTIATION AND MOTION TO STRIKE AND EXCLUDE SUCH TESTIMONY AND EVIDENCE**

Pursuant to RULE OF PRACTICE 3.22, 3.31(b)(3), 3.38(b)(3), and 3.43(b), Complaint Counsel moves to exclude at trial the testimony of eight witnesses not listed on Respondents’ October 2004 Expert Witness List or original February 2005 Final Witness List and to exclude a proposed exhibit that Respondents failed to timely identify or provide to Complaint Counsel during expert discovery and beyond. Respondents’ extraordinary delay and autocratic addition of these witnesses and evidence flouts this Court’s *Scheduling Order* and the RULES OF PRACTICE and lacks justification.<sup>1</sup> Moreover, the addition of new purported substantiation at

<sup>1</sup> Given their late designations, Respondents should have sought leave of the Court and demonstrated “good cause” to add these witnesses *prior* to adding them to their witness list.

this late juncture will cause severe prejudice both to Complaint Counsel and the orderly disposition of these proceedings. Accordingly, the Court should strike these new experts and evidence and prohibit Respondents from using such evidence during trial.

### BACKGROUND

The *Complaint* in this matter alleges, *inter alia*, that Basic Research and other related companies and individuals (collectively, "Respondents") marketed certain dietary supplements with unsubstantiated claims for fat loss and weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52. On August 11, 2004, the Court issued its *Scheduling Order* setting forth general deadlines and requirements regarding witnesses. The *Scheduling Order* dealt with expert witnesses more specifically and mandated a sequence of identification and disclosure for experts, their reports, any rebuttal, and further sur-rebuttal if appropriate.

The Court's *Scheduling Order* required Respondents to identify their primary experts in October. The Court ordered the parties to identify expert witnesses in October (October 13, 2004 for Respondents) and ordered Complaint Counsel to provide expert reports in late October and Respondents to provide expert reports by November 29, 2004.<sup>2</sup> Pursuant to the *Scheduling*

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Their failure to demonstrate good cause for this lengthy delay should not shift the burden of proof. Although this Motion will set forth the bases of Complaint Counsel's arguments mandating exclusion, Respondents bear the burden of establishing good cause as to why their untimely designations are justified in the first instance.

<sup>2</sup> Respondents sought additional time to submit their expert reports both during negotiation of the *Scheduling Order* and through two enlargements of time. See August 10, 2004 Hearing Transcript and August 11, 2004 letter to Court (both attached as Exhibit 1) and November 30, 2004 and December 9, 2004 Orders on Respondent's Motions for Extension of Time to Provide Expert Reports. In arguing for additional time under the *Scheduling Order*, Respondents' justified their request by pointing to their need to review Complaint Counsel's

*Order*, all parties submitted their Expert Witness Lists and related background materials in October 2004. Respondents' Expert Witness List submission dated October 13, 2004, is attached as Exhibit 2. Respondents' Expert Witness List identified only three witnesses: Edward Popper, Lawrence Solan and Daniel Mowrey. The related Curriculum Vitae suggested that Messrs. Popper and Solan would address advertising issues and that Respondent Mowrey would address substantiation issues.

Later it came to light that in late November 2004, Respondents and their counsel apparently "had discussions considering the possibility of designating additional expert witnesses" and even discussed the identity of such witnesses among themselves. Respondents' Oppos. to Complaint Counsel's Mot. for In Camera Rev. & Sanctions (received September 16, 2005) at 14 (attached in pertinent part as Exhibit 3). Nevertheless, Respondents ultimately submitted only two expert reports, one from Dr. Solan on November 29, 2004 and one from Respondent Mowrey on December 8, 2004. Respondents withdrew their designation of Mr. Popper as an expert witness on November 29, 2004, the day his expert report would have been due. *See* December 1, 2004 correspondence attached as Exhibit 4. Respondents never added any other experts to their expert witness list or submitted reports for any other expert witness other than Dr. Solan and Respondent Mowrey.

The *Scheduling Order* specified that Rebuttal reports were due in mid-December. The *Order* also noted that seeking leave to submit "sur-rebuttal expert reports" would be appropriate only if Complaint Counsel's rebuttal reports presented material "outside the scope of fair rebuttal." *Order* at p.2. Respondents never sought leave to file sur-rebuttal expert reports – not  

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expert reports and depose our experts.

after service of Complaint Counsel's expert rebuttal reports and not after deposition of Complaint Counsel's expert witnesses.<sup>3</sup>

The *Scheduling Order* also contained several provisions pertinent to the parties' obligations regarding identification of witnesses in general and expert witnesses in particular.

Paragraph 9 of the *Scheduling Order* stated:

The preliminary and final witness lists shall represent counsel's *good faith designation of all potential witnesses* who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party *promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order*. The 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* [emphasis added].

Paragraph 11 of the *Scheduling Order* also listed numerous requirements regarding the contents of an expert designation and ensuing expert report. On December 9, 2004, the Court entered another Order granting in part Complaint Counsel's Motion for a Protective Order which expressly cautioned Respondents that they had an obligation to "seasonably amend their witness lists" and discovery responses and notify Complaint Counsel of any additions. *See Order of Dec. 9, 2004, at 6.*

The original *Scheduling Order* set trial in late March 2005. Approximately one month prior to the original trial date, on February 18, 2005, both parties submitted their Final Witness

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<sup>3</sup> Respondents' expert depositions of three out of four of Complaint Counsel's experts concluded on December 30, 2004. Respondents primary deposition of Dr. Heymsfield took place on January 11, 2005, followed by two shorter depositions on February 4<sup>th</sup> and August 30, 2005.

Lists. Respondents' February Witness List [attached as Exhibit 5] contained none of the eight newly-disclosed experts. On February 18, 2005, Respondents also served their third version of the exhibit list upon Complaint Counsel, a "corrected" version. That exhibit list did not include RX 807, a newly-disclosed report { }

On September 8, 2005, Corporate Respondents filed a notice informing the Court that they had retained new counsel.<sup>4</sup> Subsequently, on November 8, 2005, more than one year after the deadline to identify experts, Respondents submitted their second "Final" Witness List and fourth iteration of their exhibit list ("Revised Witness List and Revised Exhibit List"). The Revised Witness List identified eight expert witnesses never previously disclosed by Respondents as expert witnesses, along with scant descriptions of their testimony:

1. Stephen C. Adler, Ph.D. Dr. Adler may be called to testify, without limitation on the analysis of statistics in the testimony of Complaint Counsel's witness Dr. Stephen Heymsfield [*sic*] in his assessment of the scientific evidence relating to the efficacy of PediaLean, Leptroprin, and Anorex.
2. Arne Astrup, M.D. Dr. Astrup may be called to testify, without limitation, on the scientific analysis in the testimony of Dr. Stephen Heymsfield [*sic*] relating to the efficacy of PediaLean, Leptroprin, and Anorex.
3. Michael John Glade, Ph.D. Dr. Glade may be called to testify, without limitation, on the scientific analysis in the testimony of Dr. Stephen Heymsfield [*sic*] relating to the efficacy of PediaLean, Leptroprin and Anorex.
4. Xiaoying Hui, M.D., M.S. Dr. Hui may be called to testify, without limitation, on the testimony of Dr. Robert Eckel relating to scientific evidence concerning the penetration and effect of aminophyllin in the Tummy Flattening Gel, Cutting Gel and Dermalin products.

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<sup>4</sup> Mr. Emord had entered his first appearance on August 29, 2005 on behalf of only one of the Corporate Respondents.

5. Howard I. Maibach, M.D. Dr. Maibach may be called to testify, without limitation, on the testimony of Dr. Robert Eckel relating to scientific evidence concerning the penetration and effect of aminophyllin in the Tummy Flattening Gel, Cutting Gel and Dermalin products.
6. Stephen M. Nowlis, Ph.D. Dr. Nowlis may be called to testify, without limitation, on the testimony of Dr. Michael Mazis concerning consumer perception of advertising and statements in advertising.
7. Ronald C. Wester, Ph.D. Dr. Wester may be called to testify, without limitation, on the testimony of Dr. Robert Eckel relating to scientific evidence concerning the penetration and effect of aminophyllin in the Tummy Flattening Gel, Cutting Gel and Dermalin products.
8. William Wilke, Ph.D. Dr. Wilke may be called to testify, without limitation, on the testimony of Dr. Michael Mazis concerning consumer perception of advertising and statements in advertising.

See Respondents' Final Proposed Witness List attached at Exhibit 6 at pp. 9-10. These witnesses did not provide expert reports and were never deposed by Complaint Counsel. The revised exhibit list included RX 807, a new report dated {

} Respondents had not produced this study as substantiation in support of their {  
} in response to Complaint Counsel's document requests, Respondents' expert did not cite this paper in his expert report, and Respondents did not timely provide this report to Complaint Counsel.

Between last February and November 7, 2005, Respondents have not sought leave to amend their original "Final" Witness List to either add or eliminate witnesses. Respondents have never sought to amend their Expert Witness List, other than to withdraw Edward Popper as an expert witness. Following the entry of new counsel, however, Respondents now seek to add to

their expert designations and materials. Complaint Counsel move to strike these belatedly proffered witnesses and substantiation and exclude them from trial for the numerous reasons described below.

## DISCUSSION

The Court should strike and exclude the testimony of eight newly-identified, expert witnesses listed on Respondents' Revised Witness List at trial because Respondents failed to update their original expert witness list to include these experts as required by the *Scheduling Order* and failed to meet the numerous other disclosure requirements pertinent to expert and other witness testimony. Moreover, Respondents failed to list these witnesses on any prior witness list. The Court should strike RX 807 and exclude evidence testimony related thereto because Respondents failed to timely provide that paper to Complaint Counsel. Moreover Respondents' expert did not reference that paper, or the work then being conducted on that paper, in his *Expert Report*. Respondents' bear the burden of demonstrating "good cause" for these late disclosures.<sup>5</sup> Respondents' failure to provide timely notice of these witnesses and evidence severely prejudices Complaint Counsel because we have not had an opportunity to investigate these experts, their reports or the alleged substantiation and conduct and realign discovery to deal with the numerous new issues that Respondents belatedly seek to raise in these proceedings.

Respondents attempt to avoid their obligations under the *Scheduling Order* by claiming

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<sup>5</sup> Respondents failure to seek leave to add these witnesses and exhibits does not remove their burden of explaining and justifying these late additions. Because Complaint Counsel can not anticipate all of Respondents' arguments, Complaint Counsel will likely seek leave to respond to these arguments in the form of a Reply. Had Respondents followed the proper procedure, Complaint Counsel would have had a right to respond to these arguments in the form of an Opposition.

that these witnesses will be used “not in Respondents’ case in chief.” See Respondents’ Revised Witness List attached at Exhibit 6 at p. 8. Instead, Respondents allege that they will seek to introduce these witnesses as “rebuttal” expert witnesses “should Complaint Counsel’s experts’ testimony mirror that of their deposition testimony.” *Id.* Nevertheless, Respondents admit that these “[r]ebuttal expert witnesses” are “essential” to Respondents’ defense.”<sup>6</sup> *Id.* In reality, the core of Respondents’ case in chief is its “defense” to the Complaint. So whether Respondents’ call their responsive arguments their “defense” or contrive to apply the term “rebuttal,” the deadlines set forth in the *Scheduling Order* still apply. Respondents have failed to demonstrate good cause to justify their extraordinary delay in disclosing these witnesses and evidence.

**A. Respondents’ Late Designation of Expert Witnesses  
Violates the *Scheduling Order* and the RULES OF PRACTICE**

Respondents’ inclusion of new experts on their Revised Witness List, without previously identifying them to Complaint Counsel, constitutes a clear violation of several provisions of *Scheduling Order* and the Commission’s RULES OF PRACTICE.

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<sup>6</sup> Respondents’ citation to cases that allegedly support this proposition is misplaced. Respondents’ primary case, *Secretary of Labor v. DeSisto*, 929 F.2d 789, 794-795 involved reversal of a trial court’s seemingly arbitrary ruling limiting each party to one witness each. Other cases involved analysis under Fed. R. Evid. 403 which permits the exclusion of relevant evidence under certain circumstances. See e.g. *Martin v. Weaver*, 666 F.2d 1013, 1020-21 (6<sup>th</sup> Cir. 1981.) These cases are inapposite because Respondents’ actions do not invoke a simple question of whether this rebuttal evidence is proper under Rule 403. Rather, Respondents’ actions involve their failure to abide by the Court’s *Scheduling Order* and failure to justify their extraordinary delay in disclosing new evidence and experts. Respondents’ other two cases, *Murphy v. Magnolia Electric Power Assoc.*, 639 F.2d 232 (5<sup>th</sup> Cir. 1981) and *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978) involved situations where the parties seeking to exclude expert testimony had actual notice the of expert’s identity and/or the substance of their testimony and hence the prejudice was nominal. These cases are not applicable because here Complaint Counsel had no such notice prior to Respondents’ Revised Witness List and still have not received Expert Reports.



First, the *Scheduling Order* mandated the disclosure of expert witnesses in October and the disclosure of all witnesses for trial in February of 2005. Respondents cannot dispute that they failed to meet either of these deadlines. Second, the *Scheduling Order* required Respondents' expert reports by November 29, 2004. Respondents cannot dispute that all eight newly-disclosed experts failed to file expert reports at that time or anytime to date. Third, Respondents waived any opportunity to seek "sur-rebuttal" after service of Complaint Counsel's Rebuttal Reports in late December 2004 and the ensuing primary depositions of its experts which concluded in mid-January 2005 by failing to move for sur-rebuttal at those times.<sup>7</sup>

Respondents have violated both the letter and spirit of Paragraph 9 of the *Scheduling Order*. That *Order* states that the parties' final witness lists may not include additional witnesses not listed in the preliminary witness lists unless allowed by order of the Administrative Law Judge upon a showing of good cause. The *Order* also requires a party to notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates set forth. Although the *Scheduling Order* did not mandate the disclosure of expert witnesses in the preliminary witness list, they certainly should have appeared on Respondents purported "final" witness list provided just weeks before the original March trial date. Respondents included eight new experts on their Revised Witness list without ever seeking leave of the Administrative Law Judge in violation of ¶9 of the *Scheduling Order*, Rule 3.31(b)(3) and the

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<sup>7</sup> Respondents may argue that the second and third depositions of Dr. Heysmfield somehow justify this tardy attempt to identify expert witnesses. However, Respondents have provided no indication of how these depositions would somehow warrant Respondents' entitlement to rebuttal. Given that Respondents' have had since December 2004 to review and examine Dr. Heysmfield's expert and rebuttal report, the time for any permissible response has long since expired.

spirit of the December 9<sup>th</sup>, 2004 Order. By failing to make Complaint Counsel aware of these new witnesses *before* filing their Revised Witness list, and failing to *attempt* to demonstrate, much less show good cause, Respondents have violated yet another provision of the *Scheduling Order*.

In addition, Respondents have violated both the *Scheduling Order* and the RULES OF PRACTICE by failing to submit expert reports and other materials for their new experts. Rule 3.31(b)(3) requires that, absent a stipulation or directive from the Law Judge, disclosures of the identity of experts must be accompanied by a written report prepared and signed by the expert. The directives in the *Scheduling Order* for Respondents to identify expert witnesses and submit expert reports expired more than a year ago. Even if Respondents could somehow justify these new experts, they have failed to submit the required expert reports and all pertinent background materials. Although they provide no reason for failing to do so, they appear to think it is not necessary if they refer to these experts as “rebuttal experts.” As clear from Respondents’ request to amend the initial proposed scheduling order, Respondents pressed for and received additional time in order to “review” Complaint Counsel’s Expert Reports. Hence their responsive expert reports are already for rebuttal purposes.

Even if the moniker of “rebuttal” was significant, the *Scheduling Order* prohibits Respondents from using their new experts as “rebuttal expert witnesses.” The *Scheduling Order* directives for December 13, 2004, state that Respondents have the right to submit sur-rebuttal expert reports *only if* Complaint Counsel’s rebuttal reports include material outside the scope of fair rebuttal:

December 13, 2004 -- Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).

*Scheduling Order* at 2. Respondents have not identified a single instance where Complaint Counsel's rebuttal reports went beyond fair rebuttal and, in any event, the time to have done so has long expired. In fact, Respondents never sought leave to file sur-rebuttal reports. Therefore, Respondents have no right to designate sur-rebuttal experts or submit sur-rebuttal reports now.<sup>8</sup>

**B. Respondents Cannot Show Good Cause for Adding Expert Witnesses at This Late Date**

Having had more than a year to scrutinize Complaint Counsel's expert reports and almost that long to review rebuttal reports, Respondents can not justify their delayed disclosures of experts and evidence and such delay should not be condoned by the Court. Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension. *Bradford v. Dana Corp.*, 249 F.3rd 8078, 809 (8<sup>th</sup> Cir. 2001); *Sosa v Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11<sup>th</sup> Cir.1998); Fed. R. Civ P. 16, Advisory Committee Notes (1983 amendment).

Respondents did not act diligently to identify these experts and disclose the new substantiation. The magnitude of Respondents' failure to give prompt notice of their new

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<sup>8</sup> Respondents' late designation of RX 807 also violates the *Scheduling Order* because Respondents failed to identify this study as substantiation in support of their claims for the { } during the pre-complaint investigation, failed to provide this study to Complaint Counsel during discovery and failed to include it on their pre-trial exhibit list filed last February. Accordingly, Respondents should not be permitted to introduce such evidence at trial. See *Scheduling Order* at ¶10 and Rule 3.38(b) (3).

experts witnesses becomes apparent when we consider the many opportunities Respondents had to select their experts in compliance with the *Scheduling Order*. The parties submitted their expert witness lists in October 2004. Respondents received reports from all four of Complaint Counsel's experts by October 20, 2004. They received rebuttal reports by December 30, 2004. Respondents completed their primary depositions of Complaint Counsel's experts by January 11, 2005. They completed all but the last of Dr. Heymsfield's depositions by February 4, 2005. Respondents submitted their Final Witness List on February 18, 2005, little more than a month before the originally scheduled trial date. Respondents informed Complaint Counsel and the Court that these were their witnesses. Yet after objecting to earlier trial dates due to conflicts, Respondents have used the last 10 months after the close of expert discovery, to find new experts without showing cause that such a delay was reasonable despite diligence in attempting to meet the Court-ordered deadline. As established by this witness list, no information prior to February 18, 2005 justified adding any additional witnesses for sur-rebuttal or else they would have included these new expert witnesses on their then-final witness list. Yet incredibly, Respondents' recently Revised Witness List includes eight new experts.

Respondents had ample information upon which to select new experts and update their expert witness list when they received Complaint Counsel's experts reports. Thirteen months have elapsed since Respondents received our expert reports. Now Respondents claim that the depositions of our experts made them aware of the need for new experts. This statement ignores the timing and the substance of these depositions. Except for the third deposition of Dr. Heymsfield, nine months have passed since Respondents completed their depositions of our experts. Yet they provide no explanation for this delay. Furthermore, even if these depositions

took place yesterday, Respondents have not even attempted to explain how the deposition testimony justifies the need for untimely experts.<sup>9</sup> With regard to Dr. Heymsfield, although Respondents' questions have ranged far from his expert report, Respondents cannot use their own deposition questions on peripheral topics to bootstrap their argument that sur-rebuttal is somehow necessary. Nothing has changed the substance of Complaint Counsel's four expert reports.

**C. Precedent Supports Exclusion of Respondents' New Expert Witnesses Based On Violations of Pre-trial Notice Requirements And Prejudice**

Administrative precedent and federal case law support refusal of Respondents' attempt to disrupt these proceeding by adding new expert witnesses. Although exclusion of testimony should be considered carefully, Courts have excluded testimony under similar circumstances. *See Praxair, Inc. v. ATMI, Inc.*, 2005 WL 2994539 at \*4 (D. Del. 2005)(court excluded supplemental expert report filed close to a month after discovery had closed citing lack of justification for delay and disruption to the trial process); *Perkasie Indus. v. Advance Transformer*, 143 F.R.D. 73 (E.D. Pa 1992). Courts have recognized that flouting discovery deadlines not only causes harm to one particular case, it causes substantial harm to the judicial system. *Id.* at \*5.

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<sup>9</sup> Respondents were apparently reconsidering their need for experts last year shortly before November 29, 2004, when they had discussions about experts, including (apparently) scientific experts. *See* Respt's Opp. to Mot. for In Camera Review and Sanctions at 14. Respondents withdrew their advertising expert as a witness; now, they have changed their minds and want to add an advertising expert. However it is unlikely that the cursory depositions of Complaint Counsel's advertising experts Messrs. Mazis and Nunberg contributed to this latest change of heart. The depositions lasted less than an hour, and a mere 15 minutes, respectively. Respondents barely questioned either expert on the substance of their report and neither expert submitted a rebuttal report. Any suggestion that these year-old depositions justifies sur-rebuttal strains belief.

Prior rulings by the Commission's Administrative Law Judges ("ALJ") support exclusion of Respondents experts based on Respondents pertinent violations of the *Scheduling Order*. For example, in *Dura Lube*, the ALJ barred one of Complaint Counsel's witness from testifying as an expert because Complaint Counsel did not designate the witness as an expert witness. Even with a month left in discovery (and presumably months more until trial), the Administrative Law Judge barred the expert testimony because of the failure to timely designate the witnesses as experts. *Dura Lube*, No. 9292, 1999 FTC Lexis 253, Order on Respondents' Motion to Exclude Witnesses (Dec. 8, 1999). Also, in *Automotive Breakthrough Sciences*, the Administrative Law Judge struck seventy six witness from Respondents' witness list because their names were submitted out of time and on the eve of trial. *Automotive Breakthrough Sciences*, No 9275, 1996 FTC Lexis 461, Order Striking Witnesses (Oct. 15, 1996), The Court condemned the late addition as exactly the type of "game-playing" that the federal courts condemn by excluding such last minute witnesses from testifying at trial. *Id.*

Likewise, federal case law supports exclusion of Respondents untimely proffered expert witnesses. The courts generally consider the following factors when determining whether to exclude testimony for violations of pre-trial notice requirements: (1) the ability of the party to have discovered the witnesses earlier; (2) wilfulness of the party's failure to comply with the court's order; (3) the party's intent to mislead or confuse his adversary; and (4) the importance of the excluded testimony. *Praxair* at \*4; *Perkasie Indus. v. Advance Transformer*, 143 F.R.D. 73 (E.D. Pa 1992).

In striking the proffered expert report, the district court in *Praxair* noted that Defendant's alleged justification "should have been evident months ago when the expert reports were filed."

*Praxair* at \*5. The district court rejected the notion of extending discovery as too disruptive of the pre-trial process. *Id.* The district court also rebuffed attempts to add “rebuttal” witnesses that defendants failed to identify on their witness list, concluding that the declarations at issue were not really in rebuttal of any facts presented and were presented too late, in violation of the local rules. *Id.*

One court has analyzed these factors in circumstances that are strikingly similar to Respondents’ untimely attempt to add new expert witnesses. The court found that each of the four factors militated against permitting the late-named experts to testify. *See Perkasio*, 143 F.R.D. 75-77. First, the court found that plaintiff’s failure to explain its failure to comply with the established schedule was evidence of bad faith and wilfulness. Second, it found that the short notice – two months before trial – was “inadequate” and risked rendering the defendant “unable to effectively anticipate the approach taken by [plaintiff’s] experts or the data on which they will base their opinion at trial.” *Id.* at 76. Third, the court found that, although the defendant could eliminate this prejudice, it would have to depose three experts, retain new experts and realign its strategy. This was found to be “unduly prejudicial and patently unfair. . . .” *Id.* At 77. The Court emphasized that a “[a] party is not permitted to postpone identification of its own witnesses and the substance of their testimony until a critical point in the proceedings at which it will become extremely burdensome for his opponent to prepare effectively to meet them.” *Id.* at 76-77. Fourth, the court refused to grant a continuance in this situation “lest its orders be regularly disregarded.” *Id.*

Respondents’ untimely attempt to add eight new expert witnesses fits within the court’s analysis in *Perkasio*. First, Respondents could have discovered these witnesses months and

months ago. Although they appear to suggest that they recognized their need for new experts when they deposed Complaint Counsel's experts, Respondents have not explained why they waited so long after our experts were deposed to identify these new experts. Respondents attempt to cloak these individuals as "rebuttal" provides no shield either.

To begin, simply asserting they would not present their proposed experts during their "case in chief" but would merely seek to "rebut" what our experts testified to in deposition is no more than a game of semantics. Respondents case in chief consists primarily of their attempt to rebut Complaint Counsel's evidence after Complaint Counsel has presented its case. Even Respondents' counsel acknowledged this point when he stated that this matter was "fundamentally an advertising substantiation case" and requested a schedule that required Complaint Counsel to disclose its experts and reports before Respondents. *See* Exhibit 1 at Transcript p. 10. Even if these new experts would only testify regarding Complaint Counsel's Expert Rebuttal Reports, Respondents should have identified any issues warranting rebuttal months ago because Respondents have had expert and rebuttal reports for almost a year. Tellingly, Respondents admit they could have discovered additional expert witnesses a year ago because they had considered the possibility of designating additional experts as early as last November. *See* Resp'ts Oppos. to Mot. for In Camera Rev. at Exh. 3. The facts surrounding Respondents untimely expert designation demonstrate that their failure to comply with Court's *Scheduling Order* is willful and deliberate. Although the decision to attempt to add eight new experts may have been prompted by new counsel Corporate Respondents retained this past August, change of counsel is not a legitimate reason for allowing such violations of the *Scheduling Order*.



Second, Complaint Counsel are surprised and prejudiced by Respondents' addition of eight new experts after almost a year after discovery closed, coinciding with the winter holidays. Respondents have not disclosed these witnesses in accord with *Scheduling Order* and RULES and have failed to provide reports and other materials. Consequently, Respondents have deprived Complaint Counsel of the opportunity to take depositions, reconsider our designation of experts, identify rebuttal experts and prepare rebuttal reports, and realign our written discovery. Respondents actions effectively blind side Complaint Counsel and deprive us of the tools necessary for a fair airing of the issues, testimony and evidence they now seek to introduce into this matter . The timing for expert discovery set forth in the *Scheduling Order* was intended to prevent the very predicament that Respondents seek to create.

The Court should reject any arguments that sufficient time exists to allow review and analysis of any future reports and deposition of the new witnesses. First, the parties are preparing for trial and in that regard each side has designated hundreds of exhibits and dozens of witnesses. The parties will shortly address the *in camera* issues which may involve expansive designations of hundreds of documents by Respondents and will require careful review and analysis by Complaint Counsel. In addition, Complaint Counsel is still entitled to depose Respondent Mowrey and will schedule that deposition after the Court rules on its *Motion for In Camera Review and Sanctions*. Further, the parties still need to prepare and submit pre-trial briefs and prepare for what will likely be a lengthy and hotly-contested trial. Finally, Complaint Counsel's experts have extremely busy schedules and the time required to review such reports and provide feedback to counsel would prove burdensome in terms of both scheduling and expense.

More importantly, however, these proceedings have been delayed until March primarily to accommodate Respondents' counsels' schedules. It would be patently unfair to allow Complaint Counsel's cooperation on scheduling to create an opportunity for Respondents to flout the rules. The Court should not reward Respondents when their conduct so clearly prejudices Complaint Counsel.

At this late date, it would be unreasonable to force Complaint Counsel to conduct discovery and reevaluate our trial strategy to prepare for eight new expert witnesses because Respondents ignore the Court's Rules. Lastly, it is obvious that inserting new experts at this point would disrupt these proceedings and is clearly at odds with the Commission's RULES OF PRACTICE, which contemplate the "orderly and expeditious disposition of the proceeding." RULES OF PRACTICE, 3.21(b).

**D. The Court Should Exclude Respondents' Late Disclosure of Alleged Substantiation**

The Court should exclude Respondents' exhibit RX 807, a {  
} This study appeared on Respondents' latest Exhibit List dated November 8, 2005. However, Respondents did not include this study on their February Exhibit List filed just weeks before the original trial was originally scheduled to start and did not provide this document during discovery.

Complaint Counsel's June 2004 document request demanded at Specification 4:

**All documents and communications referring or relating to the efficacy of the challenged products or their ingredients (including but not limited to tests, reports, studies, scientific literature, written opinions, and any other documents referring or relating to the amount, type, or quality of testing or substantiation) that are relied upon as substantiation of efficacy claims or that tend to refute**

efficacy claims in **promotional materials** for any of the **challenged products, including** the claims alleged in the Complaint (¶¶ 14, 17, 20, 23, 25, 28, 31, 33, 37, 40, and 42) regardless of whether you contest that those claims were made.

Nevertheless, Respondents did not produce this study or documents relating to this study during the discovery period.

Moreover, Rule 3.31(b)(1) required the parties to provide in their initial disclosures the identity and contact information of “each individual likely to have discoverable information” relevant to the Complaint or Respondents’ defenses. Respondents’ Initial Disclosures listed the names of many authors appearing on studies they alleged constituted substantiation for their claims concerning the Challenged Products. However, Respondents never disclosed any of the authors appearing on RX 807. Moreover, RX 807 identifies { } as Basic Research’s representative. Yet Respondents failed to identify { } as an individual likely to have discoverable information in its Initial Disclosures. Respondents’ actions contravene the intent of the Court’s December 9, 2004 Order reminding Respondents of their obligation to “seasonably amend” witness lists and discovery responses.

Rule 3.31(b)(3) also requires that the parties’ Expert Report contain “a *complete* statement of all opinions to be expressed and the basis and reasons therefor.” Respondent Mowrey’s Expert Report neither discussed nor referenced this study. Moreover, Respondents’ Expert Report failed to disclose that such a study was in the works. Finally, the study itself is dated { }. Respondents should have provided this study to Complaint Counsel months and months ago yet they chose to strategically delay its disclosure.

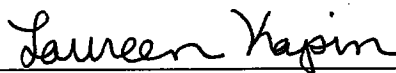
Such delayed disclosure prejudices Complaint Counsel because we have not had the

on Respondents regarding the study. As an example, this paper did not just emerge as a final product. Respondents and third parties likely possess background correspondence, data and information regarding the study and its methodology and outcome. Further, we have been deprived of the opportunity to allow our own experts to review the study, and conduct pertinent depositions. For example, had we known of { } participation, we might have deposed him. To engage in these pursuits now would result in a significant distraction for our pre-trial preparations and cause an undue diversion of our time and resources. Having failed to abide by the Rules of Practice, the Court should exclude Respondents use of the Study and any testimony related thereto at trial.

### CONCLUSION

For the reasons set forth above, and in the interest of fairness, efficiency and economy, this Court should grant Complaint Counsel's Motion to Strike.

Respectfully submitted:



|                   |                |
|-------------------|----------------|
| Laureen Kapin     | (202) 326-3237 |
| Lemuel W. Dowdy   | (202) 326-2981 |
| Walter Gross, III | (202) 326-3319 |
| Joshua S. Millard | (202) 326-2454 |
| Edwin Rodriguez   | (202) 326-3147 |
| Laura Schneider   | (202) 326-2604 |

Dated: December 16, 2005

---

# EXHIBIT 1

**FELDMANGALE**  
INTELLECTUAL PROPERTY LAW

MIAMI CENTER, 19<sup>TH</sup> FLOOR  
201 SOUTH BISCAYNE BOULEVARD  
MIAMI, FLORIDA 33131-4332  
TEL 305.358.5901  
FAX 305.358.3309

PONCAHAWK WEST SUITE 315  
880 WEST FIRST STREET  
LOS ANGELES, CALIFORNIA 90012  
TEL 213.622.5972  
FAX 213.622.5973  
www.feldmanGale.com

DEAR TO: MIAMI OFFICE  
E-MAIL: [feldman@feldmanGale.com](mailto:feldman@feldmanGale.com)

August 11, 2004

VIA FACSIMILE AND REGULAR U.S. MAIL

The Honorable Stephen J. McGuire  
Federal Trade Commission  
Room H-106  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: *In the Matter of Inusic Research, et al. adv. FTC*  
Docket No.: 9318

Dear Judge McGuire:

Lead Complaint Counsel and I have made significant progress on an Agreed Scheduling Order. However, two unresolved issues remain: (1) the date Respondents must disclose their expert witness reports; and (2) the date Complaint Counsel must disclose rebuttal experts. All other deadlines have been resolved.

As explained at the Scheduling Conference, Respondents will only be in a position to disclose their expert reports after experts testifying at the behest of Complaint Counsel are disclosed. Complaint Counsel claim their experts will define the substantiation standard. Respondents are accusing of breaching. Until this definition is disclosed, no expert will be in a position to evaluate the adequacy of Respondents' substantiation. Accordingly, Respondents' expert witness reports can only be filed after Complaint Counsel's experts first are deposed and Respondents' experts have had an opportunity to review the "standard" Complaint Counsel's expert's postulate.

Under the Agreed Scheduling Order, Complaint Counsel would disclose their experts by October 6<sup>th</sup> and file their experts' reports by October 20<sup>th</sup>. Respondents propose to file their experts' reports by December 3, 2004. This proposal presumes that no externalities occur, and – even then – would provide Respondents only six weeks to depose Complaint Counsel's experts, obtain transcripts, have the transcripts reviewed by the witnesses, submit the transcripts to their

The Honorable Stephen J. McGuire  
August 11, 2004  
Page 2

own experts, and then have Respondents' expert witnesses reports prepared, reviewed and then disclosed to Complaint Counsel. Six weeks is the minimum, reasonable period needed to accomplish all these tasks, particularly given that the Thanksgiving also occurs during this time period.

Respondents further propose that Complaint Counsel should be accorded the opportunity to disclose their rebuttal experts by December 17, 2004. Complaint Counsel and undersigned counsel agree that the deposition cutoff date should be January 21, 2005. This schedule presumes cooperation by third parties and the absence of any appreciable delays due to externalities. Accordingly, sufficient time for Complaint Counsel to depose Respondents' expert witnesses and for Respondents to depose Complaint Counsel's rebuttal experts is preserved under the proposed schedule.

Your consideration of Respondents' position on these two unresolved issues is appreciated.

Respectfully submitted,

  
Jeffrey D. Feldman

IDF:bsm  
cc: Laureen Kaplan, Esq.

OFFICIAL TRANSCRIPT PROCEEDING

**FEDERAL TRADE COMMISSION**

**FEDERAL TRADE COMMISSION**

**MATTER NO.**  
D09318

**TITLE**  
BASIC RESEARCH, LTD., ET AL

**PLACE**  
FEDERAL TRADE COMMISSION  
600 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C.

**DATE**  
AUGUST 10, 2004

**PAGES**  
1 THROUGH 61

PREHEARING CONFERENCE

FOR THE RECORD, INC.  
603 POST OFFICE ROAD, SUITE 309  
WALDORF, MARYLAND 20602  
(301)870-8025

1 prehearing conference -- oh, I also want to introduce,  
 2 before I forget, our staff counsel Erin Wirth. I think  
 3 you've had some contact with her already. She is your  
 4 contact person for this case, and so any inquiries you  
 5 might have regarding any aspect of this case, you're to  
 6 contact her.  
 7 Keep in mind, if you offer her any e-mails, you  
 8 copy the other side. Let's not have any ex parte  
 9 problems here, so -- and I believe she's also going to  
 10 be here at the end of this prehearing conference to  
 11 answer any other questions you might have.  
 12 So with that in mind, let me say that the court  
 13 has put together a proposed scheduling order which I  
 14 think the parties had an opportunity to go through.  
 15 Any comments by either side at this point as it  
 16 pertains to that scheduling order?  
 17 MR. FELDMAN: Yes, Judge.  
 18 JUDGE MCGUIRE: Yes, Mr. Feldman.  
 19 MR. FELDMAN: Your Honor, let me start by saying  
 20 that Ms. Kaplin and I have spoken numerous times, and she  
 21 has and her colleagues have given their best efforts in  
 22 helping us work through these deadlines.  
 23 With that said, the FTC has proposed changes and  
 24 I have some proposed changes, and we were not really  
 25 able to come to terms with the schedule.

For The Record, Inc.  
 Waldorf, Maryland  
 (301) 870-8025

1 The fundamental -- I understand that these  
 2 proceedings are fast track even when they're not under  
 3 the fast-track provisions of the Rules of Practice.  
 4 JUDGE MCGUIRE: Right.  
 5 MR. FELDMAN: However, there are some  
 6 fundamental problems with this order.  
 7 The first problem, fundamentally, is that the  
 8 court is cutting off the date for discovery, for  
 9 written discovery, on September 29, yet the court is  
 10 not requiring the government to provide its expert  
 11 witness list, its expert witness reports and its  
 12 rebuttal expert disclosures until at the earliest  
 13 October 6. It's October 6, October 20 and 11-12.  
 14 So under your current proposal, we would not  
 15 even have a chance to use written discovery with respect  
 16 to obtaining information about the government's experts,  
 17 and this case is principally about experts, so that's  
 18 problem number one.  
 19 The second problem that we see is that, under  
 20 the current schedule, we would have -- you're planning  
 21 on closing discovery 11-3 and the deadline for  
 22 depositions would be 11-30, but the dates for  
 23 disclosure of the government's rebuttal experts would  
 24 be November 12 and the disclosure of their expert  
 25 witness report would be October 20, so what we're

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1 really talking about is maybe a 40-day period. From  
 2 the day we get their expert witness reports, we would  
 3 have 40 days, thereabouts, to complete the discovery,  
 4 the depositions of their experts. And that of course  
 5 doesn't even account for the Thanksgiving holidays.  
 6 The other problem that we have here is that we  
 7 believe that before we're going to be able to even  
 8 figure out what experts we need, we're going to need to  
 9 depose their experts.  
 10 The reason I say that is because, based on the  
 11 response that we've received from the government with  
 12 respect to the motion for a more definite statement,  
 13 they're of the view, as I understand it from their  
 14 pleadings, that the level of substantiation that we need  
 15 is going to be -- or the level of substantiation they  
 16 believe we needed which we violated, which is yet to be  
 17 determined, is a function of expert testimony.  
 18 The case is fundamentally an advertising  
 19 substantiation case. I need to know what level of  
 20 substantiation the government claims was the appropriate  
 21 standard.  
 22 As I understand it, their position is we won't  
 23 know that until the experts testify. Once we take the  
 24 depositions of the experts, then I need to go out -- and  
 25 once we obtain the standard, theoretically, I need to go

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1 out and find an expert who can tell me whether or not  
 2 our substantiation meets the standard.  
 3 So we need more time.  
 4 JUDGE MCGUIRE: All right. How much more time  
 5 would you need, Mr. Feldman?  
 6 MR. FELDMAN: Here's what I am proposing,  
 7 Judge.  
 8 And forgive me, but I put together a matrix and  
 9 I could give the court the matrix.  
 10 What I'm proposing is the following:  
 11 The deadline for document requests -- I'm  
 12 essentially proposing an additional month. And I  
 13 understand we have this one-year rule. And before I get  
 14 into the matrix, the only I'm proposing an extra 30 days  
 15 is because -- principally because the number of  
 16 witnesses who appear on these initial disclosures were  
 17 in excess of 40 witnesses.  
 18 With that said, I'm proposing the deadline for  
 19 document requests would be November 8.  
 20 We would provide our expert witness lists on  
 21 December 2.  
 22 And I meant to tell Ms. Kapin this. I had  
 23 spoken to you earlier, and after I spoke with you, I  
 24 spoke with Mr. Friedlander.  
 25 What we're proposing now is December 2 to

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1 provide our list.  
 2 Our expert witness report would be December 15.  
 3 Close of discovery would be December 17.  
 4 Disclosure of the government's rebuttal  
 5 witnesses would be 12-29.  
 6 The deadline for all depositions would be  
 7 January 31.  
 8 Summary judgments would be February 14, with  
 9 responses to summary judgments due February 28.  
 10 Final witness lists by both parties  
 11 February 25.  
 12 Rule 3.45 notice February 21.  
 13 Motion in limine March 4.  
 14 Deadlines for motion of in camera treatment  
 15 March 9.  
 16 The objections to final exhibit and witness  
 17 lists March 14.  
 18 Pretrial briefs March 28.  
 19 Final stipulations of law, facts and  
 20 authenticity April 4.  
 21 With the commencing hearing date of April 18,  
 22 2005.  
 23 Under this order, Judge, we would still have the  
 24 use of written discovery after they disclose their  
 25 experts we would have from October 20 till December 2

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 (301) 870-8025

1 to disclose our witnesses, and we'd have until the 15th  
 2 to disclose our expert witness reports. It would give  
 3 us about six weeks or so after we get the names of their  
 4 experts to take their experts and to go find experts.  
 5 And given again that's during the holiday season, it's  
 6 more reasonable than what is now --  
 7 JUDGE McGUIRE: Yeah. Part of my concern is  
 8 I've got three other trials on the docket starting in  
 9 January, so I have to sort of balance all these cases at  
 10 once.  
 11 Let me hear from complaint counsel any comments  
 12 on the proposed schedule by respondent.  
 13 MS. KAPIN: Thank you, Your Honor.  
 14 In an ideal world everyone would have more time  
 15 to do the things they need to do.  
 16 We do also have some specific requests vis-a-vis  
 17 the scheduling order, and I would be happy to run  
 18 through those a little later, but first I just wanted to  
 19 address Mr. Feldman's bases for extending this out a  
 20 month. It all seems to revolve around the fact that he  
 21 believes that they need to see our expert reports before  
 22 they even find an expert.  
 23 This case has been through an investigative  
 24 process where the parties exchanged views about what  
 25 basis there was for the claims that the commission

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1 believed were at issue in the advertisements. And  
 2 studies have been identified. There has been an  
 3 exchange of views about whether those studies stack up  
 4 when they are compared to the claims that were made.  
 5 So I'm skeptical that opposing counsel and  
 6 respondents need to wait until they even see our expert  
 7 reports to go about defending this action when the  
 8 issues have been in play.

9 JUDGE MCGUIRE: Okay. That's a good point,  
 10 Mr. Feldman. That's one that I had contemplated during  
 11 the time you were giving me your proposed dates.

12 I mean, could you address that.  
 13 I mean, I'm not quite sure that I feel you have  
 14 to find out what their experts are going to say before  
 15 you go out and ascertain whom you're going to need to  
 16 testify as an expert on your behalf.

17 MR. FELDMAN: Judge, I think the -- this is the  
 18 most fundamental issue that we have in the case.

19 I've read Pfizer. I've read Bristol-Myers.  
 20 I've read the whole line of cases dealing with  
 21 substantiation.

22 This case is no different than any other case  
 23 where the government says there's a line, you crossed  
 24 it, and therefore we need to impose something, a cease  
 25 and desist order in this case.

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 Waldorf, Maryland  
 (301) 870-8025

1 Where I'm at is that we don't know what that  
 2 line is. They're claiming that we breached in the  
 3 sense that we had inadequate substantiation to support  
 4 claims that the government, that the commission says we  
 5 made.

6 JUDGE MCGUIRE: Can you not ascertain that line  
 7 from the prior case law?

8 MR. FELDMAN: No. Because each case is  
 9 different.

10 In fact, the premise of Pfizer is that, except  
 11 in a specific establishment case, you're dealing with  
 12 situations where the level of substantiation that the  
 13 commission believes that one may need varies from case  
 14 to case.

15 What we tried to do right at the beginning with  
 16 this case is say okay, you say reasonable basis. Under  
 17 Pfizer, reasonable basis can mean a bunch of different  
 18 things. Tell us what level of substantiation you  
 19 believe we needed in order to make the claims that we  
 20 made.

21 And the response we got back is that we don't  
 22 need to give you any more notice.

23 And your predecessor, Judge Chappell, entered an  
 24 order saying, Well, you know, if there's any ambiguity,  
 25 do it by way of discovery.

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 Waldorf, Maryland  
 (301) 870-8025

1 Well, if that's what I need to do, then I need  
2 to engage in discovery to first figure out what level  
3 of proof they're claiming we needed that we didn't  
4 have.

5 Now, they can't on the one hand say that this  
6 has been in play for three years, you should know, and  
7 then come back and say, well, we'll figure out the  
8 standard in discovery.

9 I mean, that's how --

10 JUDGE McGUIRE: No. I understand. I think  
11 that's a good point.

12 And what I'm going to ask the parties to do  
13 here, as is oftentimes the case, it's not so much a  
14 question of what the parties, say, want as to what they  
15 need.

16 So I'm going to ask you two to get together to  
17 determine what you need and try to get something to me  
18 that you can agree on, maybe not quite the time that  
19 you've sought here on this, Mr. Feldman, but I'd like  
20 complaint counsel to attempt to offer them some  
21 pliability from your position and see if we can't get  
22 maybe some extension from these dates.

23 And is that something the two of you could do if  
24 we took a short break this morning, or do you have to go  
25 back to your offices and work on that?

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

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# EXHIBIT 2

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

*In the Matter of*

BASIC RESEARCH, L.L.C.,  
A.G. WATERHOUSE, L.L.C.,  
KLEIN-BECKER USA, L.L.C.,  
NUTRASPORT, L.L.C.,  
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,  
d/b/a BASIC RESEARCH, L.L.C.,  
OLD BASIC RESEARCH, L.L.C.,  
BASIC RESEARCH, A.G. WATERHOUSE,  
BAN, L.L.C.,  
d/b/a 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,

DOCKET NO. 9318

*Respondents.*

RESPONDENTS' EXPERT WITNESS LIST

Pursuant to the Court's August 22, 2004 *Scheduling Order*, Respondents Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker usa, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, Daniel B. Mowrey, Ph.D and Mitchell K. Friedlander (collectively, "Respondents") hereby submit the following *Expert Witness List* in connection with their case-in-chief. Respondents reserve the right to supplement or modify this list as additional information becomes available. Respondents further reserve the right to call additional expert witnesses for rebuttal and/or to call expert witnesses listed on Complaint Counsel's *Expert Witness List*.

Expert Witnesses

Respondents, individually or collectively, may call one or more of the following expert

witnesses.

- Edward T.L. Popper, D.B.A.  
Merrimack College  
87 Elm Street  
Andover, MA 01810

A copy of Mr. Popper's *Curriculum Vitae* is attached hereto, which includes a list of cases in which he has testified or given depositions. Mr. Popper is in possession of several transcripts which will be provided to Complaint Counsel at a mutually agreeable time and place.

- Lawrence M. Solan, J.D., Ph.D.  
Brooklyn Law School  
250 Joralemon Street  
Brooklyn, N.Y. 11201

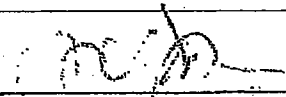
A copy of Dr. Solan's *Curriculum Vitae* is attached hereto. In 1996, Dr. Solan testified at an arbitration in Philadelphia in a dispute entitled, "Lease between The Jade Corporation and Mark Hankin." The issue was the interpretation of a commercial lease. There are no copies of trial or deposition transcripts in the possession, custody, or control of Mr. Solan or Respondents.

- Daniel B. Mowrey  
Director of Scientific Affairs, American Phytotherapy Research Laboratory  
Director, President, and Treasurer, DBM Enterprises, Inc.  
Manager and Member, Victory Publications, LLC  
5742 West Harold Gatty Dr.  
Salt Lake City, UT 84116

A copy of Dr. Mowrey's *Curriculum Vitae* is attached hereto. Dr. Mowrey may be in possession of transcripts which will be provided to Complaint Counsel at a mutually agreeable time and place if any are located. Additionally, Respondents will supplement this list with a case list identifying the matters in which Dr. Mowrey has given testimony.

Respectfully submitted,

---

  
Jeffrey D. Feldman  
Gregory L. Hillyer  
Christopher P. Demetriades  
FeldmanGale, P.A.  
Miami Center, 19<sup>th</sup> Floor  
201 South Biscayne Blvd.  
Miami, Florida 33131  
Tel: (305) 358-5001  
Fax: (305) 358-3309

Attorneys for Respondents Basic Research,  
LLC, A.G. Waterhouse, LLC, Klein-Becker  
usa, LLC, Nutrasport, LLC, Söväge  
Dermalogic Laboratories, LLC and Ban,  
LLC

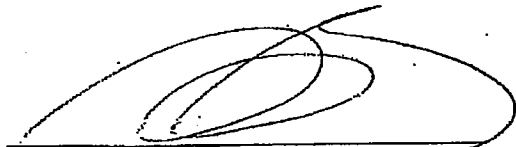
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DATED this 13<sup>th</sup> day of October, 2004.

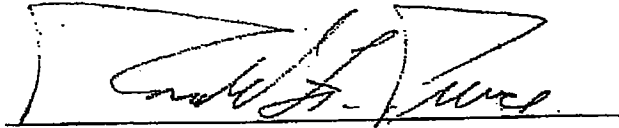
**BURBIDGE & MITCHELL**

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

**Richard D. Burbidge**  
**Attorneys for Respondent Dennis Gay**

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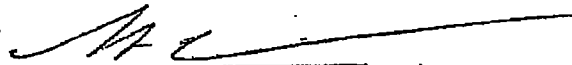
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RONALD F. PRICE  
**PETERS SCOFIELD PRICE**  
*A Professional Corporation*  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 322-2002  
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E-mail: rfp@psplawyers.com

Attorneys for Respondent Daniel B. Mowrey

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Mitchell K. Friedlander  
c/o Compliance Department  
5742 West Harold Getty Drive  
Salt Lake City, Utah 84116  
Telephone: (801) 414-1800  
Facsimile: (801) 517-7108

Pro Se Respondent

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Expert Witness List was provided to the following parties this 13th day of October, 2004 as follows:

---

(1) One (1) copy via e-mail attachment in Adobe® ".pdf" format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of [lkapin@ftc.gov](mailto:lkapin@ftc.gov), [jmillard@ftc.gov](mailto:jmillard@ftc.gov), [rjrichardson@ftc.gov](mailto:rjrichardson@ftc.gov), [lschneider@ftc.gov](mailto:lschneider@ftc.gov) with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(3) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(4) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(5) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, Pro Se.

  
\_\_\_\_\_

Home: 87 Elm Street  
Andover, MA 01810

Home: 978.623.8160  
Office: 978.837.5471  
edward.popper@merrimack.edu

## CURRICULUM VITAE

EDWARD T. L. POPPER

---

### EDUCATION

Harvard University, Graduate School of Business Administration, DBA, 1978

Harvard University, Graduate School of Business Administration, MBA with High Distinction, 1975

### ACADEMIC/RESEARCH APPOINTMENTS

2000 - Present Dean & Francis E. Girard Professor of Business International Commerce  
Girard School of Business & International Commerce; Merrimack College

1994 - 2000 Dean & Professor of Business Administration  
W. Fielding Rubel School of Business; Bellarmine College

1991 - 1994 Dean & Professor of Business Administration  
School of Business & Professional Studies; Aurora University

1988 - 1991 Director - Honors Program & Associate Professor of Marketing  
Bryant College

1981 - 1988 Associate Professor of Marketing  
College of Business Administration; Northeastern University

1982 - 1984 Consumer Research Advisor  
Bureau of Consumer Protection  
Federal Trade Commission

1982 - 1984 Adjunct Associate Professor of Marketing  
School of Government and Business Administration  
The George Washington University

1977 - 1981 Assistant Professor of Marketing & Research Associate  
Center for Consumer Research  
College of Business Administration; University of Florida

1975 - 1977 Lecturer in Marketing  
Graduate School of Management  
Boston University

1975 - 1977 Research Associate  
Marketing Science Institute

1974 - 1976 Research Associate  
Graduate School of Business Administration,  
Harvard University

---

**ACADEMIC ADMINISTRATIVE RESPONSIBILITIES**

~~2000 - Present Dean, Francis E. Girard School of Business & International Commerce,  
Merrimack College~~

- 1994 - 2000 Dean, W. Fielding Rubel School of Business, Bellarmine College
- 1991 - 1994 Dean, School of Business & Professional Studies, Aurora University
- 1989 - 1991 Director - Honors Program and Integrative Studies, Bryant College
- 1987 - 1988 Chair --- University Committee on Student Retention, Northeastern University
- 1983 - 1987 Chair - Marketing Department Faculty Recruiting Committee,  
College of Business Administration, Northeastern University
- 1982 - 1986 High Tech MBA Program Development Task Force  
College of Business Administration, Northeastern University
- 1977 - 1981 Chair - MBA Program Management Committee, University of Florida

**PROFESSIONAL DEVELOPMENT**

- Aspen Institute, 1998, 2000-2004
- Pew Higher Education Roundtable, 1996 - 1997
- Center for Entrepreneurial Leadership; Premier Fast Trac Entrepreneurship --- Leadership Program; Ewing  
Marion Kauffman Foundation, 1996-1998
- Center for Creative Leadership - Leadership Development Program (LDP), 1996
- Outward Bound, 1981

**AACSB Activities**

- Federal Faculty Fellow, 1981-1984
- Governmental Relations Committee 1993-1994
- Small School Workshop Program Committee, 1994, 1995, 1996  
Program Chair & Presenter
- Business School External Resource Development Workshop, Core Faculty, 1996
- AACSB - KKC Japan Study Tour, 1994
- AACSB - KKC Japan Study Tour Selection Committee, 1997
- EBI/Benchmarking Taskforce, 1996
- Mid-Continent East Regional Association, 1995 - 1997, Board of Directors
- Continuous Improvement Symposium, 1998, Presenter
- Continuous Improvement Symposium, 1999, Presenter

**Research Grants/Contracts**

- 1985 - 1988 Northeastern University; Research and Scholarship Development Fund
- 1986 - 1987 Northeastern University; College of Business Administration Teaching Grant
- 1979 - 1982 Federal Trade Commission, Grant to study TV Advertising's Information  
Communication Principal Investigator
- 1976 - 1979 Office of Social Research; CBS-TV, Grant to study the Effects of Advertising on  
Children., Co-Principal Investigator

CORPORATE EXPERIENCE

- 1971 - 1973 Account Supervisor  
Marvin & Leonard Advertising

---

- 1970 - 1971 Account Executive  
Earle Ludgin Advertising
- 1969 - 1970 National Product Manager - Milk  
\* American Dairy Association
- 1967 - 1969 Advertising Supervisor  
Consumer Products Division; Brunswick Corporation

TEACHING

- Advertising & Promotion Management (UG, MBA & EXEC)
- Competitive Strategy (UG, MBA, & EXEC)
- Consumer Behavior (UG & MBA)
- Leadership & Vision (Undergraduate, MBA & EXEC)
- Management Ethics (MBA)
- Marketing Ethics (UG & MBA)
- Marketing for High Tech Firms (MBA & EXEC)
- Marketing Management (UG, MBA & EXEC)
- Marketing & Public Policy (UG & MBA)
- Marketing Research (UG & MBA)
- Strategic Planning (MBA & EXEC)

EXECUTIVE EDUCATION PROGRAMS CONDUCTED

- 1997 - 2000 Leadership & Vision; Executive MBA Program; Bellarmine College
- 1995 - 1997 Fast Trac II - Entrepreneurial Leadership; Louisville Chamber of Commerce
- 1990 - 1991 Seminar in Marketing Strategy; Center for Management Development; Bryant College
- 1988 - 1989 Seminar in Marketing Strategy; Ford Motor Company, Europe
- 1986 - 1987 Marketing Management, Executive MBA Program; Northeastern University
- 1983 - 1985 Industrial Marketing Management, Babson College
- 1982 - 1987 The Management Workshop ( General & High Tech); Northeastern University
- 1981 Marketing for Technology Managers; Harris Corporation
- 1980 Marketing for Service Industries; Management Center; University of Florida
- 1980 - 1981 International Senior Managers Program, ITT Corp./Europe
- 1979 - 1981 The Executive Program; University of Florida
- 1979 Strategic Market Planning ; Management Center; University of Florida
- 1978 - 1979 Advanced Management for Senior Media Executives, The Poynter Institute
- 1977 - 1978 Management for Media Professionals; The Poynter Institute / Modern Media Institute

Publications

- "Advertising for Over-the-Counter Antacids - A Review of Key Research Studies" in Brewer, et al, *Advertising for Over-the-Counter Antacids: Staff Report and Recommendations*, Washington, DC: FTC, 1983.
- 
- Advertising Substantiation Program Analysis of Public Comment and Recommended Changes*, Washington, DC: FTC, 1984.
- "Children's Purchase Requests and Mothers' Responses Results from a Diary Study," *Journal of Advertising Research*, 27:5, October/November 1987, (with Isler & Ward).
- "Cigarette Marketing Strategy in the 1980's: Statement and Testimony", *Advertising of Tobacco Products: Hearings before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, House of Representatives; Ninety Ninth Congress; Second Session*, Serial No. 99-167, U.S. Congress, Washington, D.C.:U.S. Government Printing Office; 1987.
- "Communication Effectiveness and Format Effects on In-Ad Disclosure of Health Warnings"; *Journal of Public Policy and Marketing*; VIII; 1989, with K. Murray.
- Competing Under Regulatory Uncertainty: Advertising in the Emerging European Market," in R.T. Green & J. Laban (eds.), *Marketing in a Changing World*, Aix-en Provence, France: Institut d'Administration des Entreprises, 1991 with K. Murray.
- Competing Under Regulatory Uncertainty: Advertising in the Emerging European Market : A U.S. Perspective," *Journal of Macromarketing* XII-3, Spring, 1993, with K. Murray.
- "Disclosures in Multi-National Products' Advertising: Problems, Obligations and Responsibility," in Nagayama (ed), *22<sup>nd</sup> International Congress of Applied Psychology Proceedings*, Kyoto, Japan, 1990.
- Effectiveness of In-Ad Disclosure in Consumer Advertising; Northeastern University; Working Paper 87-52; 1987. Presented at the 1987 Macromarketing Conference.
- "The Effects of Cigarette Advertising and Promotion on Youth: Statement and Testimony", *Hearings on H.R.1250 "The Protect Our Children From Cigarettes Act of 1989; Subcommittee on Transportation and Hazardous Materials; Committee on Energy and Commerce; House of Representatives; One Hundred and First Congress; First Session; U.S. Congress*, Washington, D.C.:U.S. Government Printing Office; 1989.
- "The Effects of Alcoholic Beverage Advertising and Marketing Practices: The Current State of Affairs," in Lutz, ed., *Advances in Consumer Research, Vol. XIII*, Las Vegas, NV: Association for Consumer Research, 1985.
- "Integrating Values Based Leadership into MBA Program Curricula using the material of the Aspen Institute Executive Seminars", ", Proceedings 1998 Continuous Improvement Symposium, St. Louis, MO, AACSB, 1998 (with Bauer).
- "Ethics and the Marketing MBA: Philosophy v. Application," in King, ed., *Marketing Toward the Twenty First Century*, Richmond VA: Southern Marketing Association, 1991.
- Family Purchase Decision Processes*, Cambridge, MA: Marketing Science Institute, 1978.
- "Format Effects on In-Ad Disclosure," in Srull, ed., *Advances in Consumer Research, XVI*, Honolulu, HI: Association for Consumer Research, 1988, (with Murray).
- "Growth Strategies for High Tech Firms," *The Graziado Business Report*, Spring, 1998, with B.D. Buskirk.
- "In-Ad Disclosure in Consumer Advertising", *Proceedings 1988 Educator's Conference*, Chicago, IL: American Marketing Association, 1988.
- "Integrating Values Based Leadership into MBA Program Curricula using the material of the Aspen Institute Executive Seminars", Proceedings 1999 Continuous Improvement Symposium, St. Louis, MO, AACSB, 1999.
- "Internationalizing Curricula for Part-Time MBA Students Through Required International Trips," Proceedings 2<sup>nd</sup> Annual International Business & Economics Conference, Green Bay, WI: St. Norbert's College, 1999 (with Bauer, Eller and Richardson).



- "The Marketing Factor for Non-Conventional Protein Products," in Milner et al, eds., *Protein Resources and Technology: Status and Research Needs*, Westport, CT: Avi Publishing Co., 1978 (with Austin, Quelch, & DeCruz).
- ~~"Marketing Mandatory Deposit Laws in the Northeast: Lessons From the Past: Comment," in Holman, ed., *Proceedings, 1985 NEBEA Conference*, Baltimore, MD, NEBEA, 1985.~~
- "Maternal Mediation of The Effects of Advertising on Children" in Proceedings, *Southeastern Psychological Association*, 1978.
- "Mothers' Mediation of Children's Purchase Requests" in Beckwith, et al, eds., 1979 *Educator's Conference Proceedings*, Chicago, IL: AMA, 1979.
- Parent Under Pressure: Mothers' Responses to Children's Purchase Requests*, Cambridge, MA: Marketing Science Institute, 1977 (with Ward & Wackman).
- "Personal versus Voice Mail Communication: Is the Difference Important to Service Organizations and Their Customers," in Brown, Johnston & Schneider (eds.) *Marketing Operations and Human Resources Insights into Services*, Marseille, FRANCE: Institute d'Administration Des Entreprises; Université d'Aix-Marseille III, 1992 (with Murray).
- "Planning Market Development in High Tech Firms," *Technovation*, 1994, (with Buskirk).
- "Price Measurement in the U.S. Computer Software Industry: Comment," in Holman, ed., *Proceedings, 1985 NEBEA Conference*, Baltimore, MD, NEBEA, 1985.
- "The Problem of High Technology Business: What To Do When the Growth Stops," in Holman, ed., *Proceedings, 1985 NEBEA Conference*, Baltimore, MD, NEBEA, 1985.
- "Process Based Strategies for Growth" in Bullinger and Warnecke, *Toward the Factory of the Future*, Berlin, West Germany: Springer-Verlag 1985 (with Millen & Blackburn).
- Recommendations of the Staff of the Federal Trade Commission Re Omnibus Petition for Regulation of Unfair and Deceptive Alcoholic Beverage Advertising and Marketing Practices*; Washington, DC: FTC, 1985 (with Levine, D'Amato and Keenan).
- "The Regulation of Cigarette Advertising: Comments and Reactions," Speech to the AMA; Public Policy Workshop, Washington, DC: August, 1991.
- "The Regulation of Cigarette Advertising in the U.S.: Some Alternatives," in R. Pollay (ed.), *Advances in Consumer Research*, XVII, 1989.
- A Report to the Federal Trade Commission on Information Communication in Television Advertising*, Washington, DC: FTC, 1983.
- Report of the Tobacco Policy Research Group on Marketing and Promotions Targeted at African-Americans, Latinos, and Women *Tobacco Control* 1 (supplement):S24-S30, 1992, with Robinson, R.G., et al.
- Sampling and Couponing Promotional Activity in the Domestic Cigarette Market*, Office of Smoking and Health, US Department of HHS, Rockville, MD, 1986.
- "Technology Life Cycles in Industrial Markets," *Industrial Marketing Management*, February 1992.
- "Testimony on the Expected Effects of In-Advertising Warnings for Alcoholic Beverages", *Hearings on H.R. 4493 "The Sensible Advertising and Family Education Act of 1990; Subcommittee on Transportation and Hazardous Materials; Committee on Energy and Commerce; House of Representatives; One Hundred and First Congress; First Session; August 15, 1990; with K.B. Murray.*
- Tobacco Use: Who Starts and Why; The 1993 Report of the Surgeon General of the United States*, Washington, DC: US Department of HHS, 1994 (Co-author).
- "MBA Curriculum Turnaround: A Case of Discontinuous Improvement", AACSB Continuous Improvement Seminar, 1998, with D. Bauer.
- 25 Years of Progress: The 1989 Report of The U.S. Surgeon General*, Washington, DC: US Department of Health and Human Services, 1989, (contributing author).
- User's Guide to The Great Marketing Wars*, Englewood Cliffs, NJ: Prentice-Hall, 1984.

HARVARD BUSINESS SCHOOL - INTERCOLLEGIATE CASE CLEARING HOUSE CASES

California Prune Advisory Board A & B  
 Canada Dry A & B  
 Club Mediteranee  
 General Foods: Cycle Dog Food  
 General Foods: Opportunities in the Dog Food Market  
 General Foods: Super Sugar Crisp A & B  
 Rekon Camera Company  
 Sears, Roebuck & Co: The Tri-Blend Decision  
 Zenith Radio Corporation: Allegro  
 Zenith Radio Corporation: Videodisc

REVIEW AND ACADEMIC JOURNAL RESPONSIBILITIES

Reviewer Association for Consumer Research,  
 1979 - 1981, 1988-1990.

Reviewer American Marketing Association, Educator's Conference, 1979 -1982.

Reviewer American Marketing Association Marketing and Public Policy Workshop, 1990-1993.

Reviewer Northeast Business & Economics Conference, 1985.

Reviewer *Journal of Consumer Marketing*, 1988 - 1991.

Reviewer *Journal of Marketing*, 1988 - 1990 (Ad Hoc)

Reviewer *Journal of Public Policy & Marketing*, 1990 to Present (Ad Hoc)

Reviewer 1989 US Surgeon General's Report on Smoking and Health.

ACADEMIC CONFERENCE / PROGRAM RESPONSIBILITIES

Session Chair In-Ad Disclosure  
 1993 A.M.A. Marketing & Public Policy Conference

Session Chair Effects of Alcoholic Beverage Advertising  
 1985 Association for Consumer Research Conference

Session Chair High Technology Marketing  
 1983 American Marketing Association Educator's Conference

Session Chair Family Consumer Behavior  
 1982 American Marketing Association Educator's Conference

Session Chair Effects of Advertising on Children  
 1979 American Marketing Association Educator's Conference

Session Chair Family Consumer Behavior  
 1979 Association for Consumer Research Conference

Discussant Marketing & the Legal System  
 1992 A. M. A. Marketing and Public Policy Workshop

Discussant Regulation of Cigarette Advertising  
 1990 A. M. A. Marketing and Public Policy Workshop

Discussant Communications Effects  
 1988 Association for Consumer Research Conference

Discussant High Technology, Public Policy  
 1985 Northeast Business & Economics Association Conference

Discussant Family Consumer Behavior  
 1978 American Marketing Association Educator's Conference

EXPERT TESTIMONY

Testified At Trial:

~~FTC vs. International Harvester, 1981, FTC~~  
FTC vs. Brown & Williamson, Inc., 1983, US District Court for the District of Columbia  
The City of Lakewood, d/b/a Lakewood Hospital vs Blue Cross & Blue Shield Mutual of Northern Ohio, et al., 1985, The Court of Common Pleas of Cuyahoga County, Ohio  
Breedlove & Associates, Inc. vs. John A. Davis, Bruce T. Lower, Stephen R. Adams and Environmental Services & Permitting, Inc., 1985, Circuit Court of Florida, Eighth Judicial Circuit, in and for Alachua County  
Nathan Horton vs. American Tobacco Co., and New World Tobacco and Candy Corp., 1988, Circuit Court of Holmes County, Mississippi  
Baker vs. Liggett, et al., U.S. District Court for the District of Massachusetts.  
Arthur G. Girton, Executor of the Estate of John R. Gunsalsus vs The American Tobacco Co.; US District Court for the Eastern District of Pennsylvania, June, 1988.  
George Kotler v. American Tobacco Co., et al.  
Constitution Bank v. Shearson Lehmann Brothers  
Peter Ierardi v. Lorillard Tobacco Co.; US District Court for the Eastern District of Pennsylvania,  
F. T. C. in Re. Stouffer's Foods Inc., Federal Trade Commission, 1993  
State of Iowa v. National Dietary Research, Superior Court, Des Moines, Iowa, 1993

Deposition Only:

Sands, Taylor & Wood vs. Quaker, US District Court, Northern District of Illinois  
Harrison Bozman & Mildred Bozman vs. Fibreboard Corp. et al., Superior Court of the State of California in and for the County of Alameda.  
Betker v. KayPro  
In Re: Milli Vanilli Litigation  
In Re: Perrier Bottled Water Litigation  
Rick Proietti vs. Fibreboard Corp., et al.; Superior Court of the State of California in and for the County of Alameda.  
Hampton Inns. v. AmeriTel Inns  
Iron Workers Local Union No. 17 Insurance Fund, et al. v. Philip Morris, Inc., et al.  
David Feinberg, DDS & James Moore et al v Toshiba American Information Systems, Super Court of New Jersey, Law Division; Camden County

Expert Reports/Affidavits:

Shiela Paschke f/k/a Shiela Schrier, Elmer Olson and Mary Jane Olson, on their own behalf and on behalf of all others similarly situated vs. Northwestern Bell Telephone Company and AT&T Information Systems, 1985, Circuit Court of South Dakota, Seventh Judicial Circuit in and for Pennington County  
Hunter, et al. vs. Southern Bell Telephone & Telegraph Co.; Superior Court of Chatham County, Georgia.  
David M. Barasch, Consumer Advocate of Pennsylvania v. Bell Telephone Company of Pennsylvania  
State of New York v. ChemLawn Corporation.  
Conopco, Inc. v. Campbell Soup Company  
Web Communications Group, Inc. v. Gateway 2000, INC. and Quebecor Printing, Inc.  
State of Montana v. Atlantic Richfield Company, Inc.  
North American Directories  
Sample v. J.C. Penney Company, Inc., et al.  
Louis Dow, et al. v. Holiday Spa Health Club of California, Inc., et al.

Witt, *et al.* v. Duncan Enterprises, *et al.*

FTC v. Kim Crowder, *et al.*

Cohabaco Cigar Co., v. United States Tobacco Co., *et al.*

~~Conwood Co, L.P., *et al.* v. United States Tobacco Co., *et al.*~~

FTC v. H. G. Kuykendall, Jr., *et al.*

Donald W. Howard, *et al.* v. Glaxo Wellcome, Inc., *et al.*, Circuit Court of Montgomery County, Tennessee

Philip Morris v. Cowboy Cigarettes

Loretta Calvit v. Proctor & Gamble

#### OTHER TESTIMONY

Surgeon General's Interagency Task Force on Smoking and Health, June, 1986

Hearings on Cigarette Advertising and Promotion, before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, United States House of Representatives, July 18, 1986

Hearings on H.R.1250 "The Protect Our Children From Cigarettes Act of 1989; Subcommittee on Transportation and Hazardous Materials; Committee on Energy and Commerce; United States House of Representatives; One Hundred and First Congress; July 25, 1989.

Hearings on "Sensible Advertising & Family Education Act of 1990;" Subcommittee on Health and the Environment; Committee on Energy and Commerce; United States House of Representatives; One Hundred and First Congress; July 20, 1990.

#### CONSULTING

Attorney General, State of Iowa

Attorney General, Commonwealth of Massachusetts

Attorney General, State of New York

Attorney General, Commonwealth of Pennsylvania

Baker and Hotstetler

Breedlove, Dennis and Associates, Inc.

Cadwalader, Wickersham, and Taft

Drum Industries, Inc.

Federal Trade Commission

Ford Motor Company of Europe

Greenfield & Chimicles

Harris, Corp.

Herzfeld and Rubin

U.S. Surgeon General's Interagency Task Force on Smoking & Health

McDonald & Little Advertising, Inc.

Modern Media Institute

National Cancer Institute, U.S. National Institutes of Health

Porzio, Bromberg & Newman .

Ralston-Purina, Inc.

South Dakota Public Utilities Commission

Sterling Institute

### COMMUNITY SERVICE

Center for Quality Management, Louisville Branch, Executive Team (1999-Present)  
Louisville Ballet - Board of Trustees (1995 - Present); Vice President,  
Endowment (Chair), Long Range Planning (Chair) & Finance Committees  
The Louisville Zoo Foundation - Board of Directors (Capital Projects, Finance and Development  
Committees) (1996 - Present)  
The Louisville Better Business Bureau - Board of Directors (1997 - Present)  
The Venture Club of Louisville -- Board of Directors (1998 - Present); Education Committee Chair  
Leadership Louisville, Class of 1995  
Louisville, KY Chamber of Commerce (1995 - Present)  
Information Resources, Small Business/Entrepreneurship, & Urban Workshop Committees  
Rotary Club of Louisville - Committee Chair (1995 - Present)  
Kentucky / Southern Indiana Entrepreneur of the Year Award Judge, 1995, 1996  
Southern Indiana Business of the Year, Judge, 1995  
American Blues Theater; Chicago, IL; Board of Directors, 1992 - 1995  
Chair - Development/Fundraising Committee  
Rotary Club - Aurora Sunrise Chapter (Charter Member) 1993 - 1994; Vice President  
Aurora IL Chamber of Commerce  
Aurora IL Hispanic Chamber of Commerce  
Hippodrome Theater; Gainesville, FL; Board of Directors, 1977-1981; Executive Vice President  
Publick Theater Company; Boston, MA; Board of Directors, 1985 - 1987; Chair - Development Committee

### MILITARY SERVICE

1968 - 1976 U.S. Army Reservé  
12<sup>th</sup> Special Forces Group, HHC, (1968 - 1971)  
804<sup>TH</sup> Hospital Center (1971 - 1976)  
Rank at Discharge - E6

### HONORS

Federal Faculty Fellow, American Association of Collegiate Schools of Business, 1981-1984  
American Marketing Association Doctoral Fellow, 1977  
George F. Baker Foundation Fellow, 1976  
Baker Scholar (Harvard Business School), 1975  
George Haye Brown Award (Harvard Business School & American Marketing Association), 1975  
Century Club (Harvard Business School), 1974 - 1978.  
*Beta Gamma Sigma*  
*Delta Sigma Pi*  
*Omicron Delta Kappa*

### MEMBERSHIPS

American Association of Collegiate Schools of Business  
American Marketing Association  
Association for Consumer Research  
European Foundation for Management Development

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## EDUCATION:

- J.D. Harvard Law School, June, 1982.
- Ph.D. University of Massachusetts, Amherst,  
Department of Linguistics, September, 1978.
- B.A. Brandeis University, June, 1974. Summa Cum Laude, Phi Beta Kappa, Honors in  
English, Honors in Linguistics.

## TEACHING EXPERIENCE:

- 1996- Brooklyn Law School, Professor of Law (2000-) and Director, Center for the  
Study of Law, Language and Cognition (2002-). Associate Professor (1996-  
2000). Courses include legislation and statutory interpretation, contracts,  
remedies, language and law, insurance law and property.
- 2003 Princeton University, Visiting Fellow in the Department of Psychology (spring  
semester)
- 2002 Princeton University, Visiting Professor in the Linguistics Program (spring  
semester). Undergraduate seminar on language and law.
- 1999- Princeton University, Visiting Associate Professor in the  
2000 Linguistics Program (fall semester). Undergraduate seminar on language and law;  
series of faculty seminars on language and law sponsored by the Council of the  
Humanities.
- 1980- Harvard Extension School, Instructor. Organized course  
1982 on legal aspects of the non-profit organization.
- 1981 Brandeis University, Lecturer in Legal Studies.
- 1974- University of Massachusetts, Graduate Instructor.  
1978 Taught course on language acquisition.

## LEGAL EXPERIENCE:

1983- Orans, Elsen & Lupert, New York, New York. Partner from  
1996-1989, associate from 1983-1989. The firm has nine lawyers and specializes in  
complex commercial litigation, white collar criminal defense work, and the  
representation of individuals being investigated by government agencies.

---

1982- Law Clerk to Justice Stewart Pollock, Supreme Court of 1983  
New Jersey, Court House, Morristown, New Jersey 07960.

Admitted to practice law in New York and New Jersey.

## PUBLICATIONS:

### Books:

*Why Laws Work Pretty Well, But Not Great: Statutes and their Interpretation* (in preparation)

*Speaking of Crime: The Language of Criminal Justice* (with Peter Tiersma), University of  
Chicago Press (forthcoming 2005, University of Chicago Press).

*The Language of Judges*, University of Chicago Press (1993).

*Pronominal Reference: Child Language and the Theory of Grammar*, D. Reidel Publishing  
Company (1983).

### Articles:

"Language and Law: Definitions in Law." Elsevier Encyclopedia of Language and Linguistics  
(forthcoming 2005).

"Author Identification in American Courts," *Applied Linguistics* (with Peter M. Tiersma)  
(forthcoming 2005).

"Private Language, Public Laws: The Central Role of Legislative Intent in Statutory  
Interpretation," *Georgetown Law Journal* (forthcoming 2004).

"Pernicious Ambiguity in Legal Interpretation," *Chicago-Kent Law Review* (forthcoming 2004).

"Cops and Robbers: Selective Literalism in American Courts," (with Peter M. Tiersma), 38 *Law  
& Society Review* 229 (2004).

"Jurors as Statutory Interpreters," 78 *Chicago-Kent Law Review* 1281 (2003).

"Statutory Inflation and Institutional Choice," 44 *William & Mary Law Review* 2209 (2003).

"Finding Ordinary Meaning in the Dictionary," in M. Robinson, ed., *Language and Law: Proceedings of a Conference* (2003).

"The Impulse to Blame," symposium article, 68 *Brooklyn Law Review* 1003 (2003).

"Hearing Voices: Speaker Identification in Court," (with Peter M. Tiersma), 54 *Hastings Law Review* 373 (2003).

"Should Criminal Statutes be Interpreted Dynamically?" *Issues in Legal Scholarship*, Symposium on Dynamic Statutory Interpretation (2002)([www.bepress.com/ils/iss3/art8](http://www.bepress.com/ils/iss3/art8)).

"The Linguist on the Witness Stand: Forensic Linguistics in American Courts," (with Peter M. Tiersma), 78 *Language* 221 (2002).

"The Clinton Scandal: Some Legal Lessons from Linguistics," in J. Cotterill, ed., *Language in the Legal Process*, Palgrave, (2002).

"Ordinary Meaning in Legal Interpretation," *Pohjois-Suomen Tuomarikoulu - Julkaisuja* 4/2001 (Rovaniemi Finland, 2002).

"The Written Contract as Safe Harbor for Dishonest Conduct," 77 *Chicago-Kent Law Review* 87 (2001).

"Convicting the Innocent Beyond a Reasonable Doubt: Some Lessons About Jury Instructions from the *Sheppard* Case," Symposium on the *Sheppard* case, 49 *Cleveland State Law Review* 465 (2001).

"Introduction: Symposium: The Jury in the 21<sup>st</sup> Century," (with Susan N. Herman), 66 *Brooklyn Law Review* 971 (2001).

"Causation, Contribution and Legal Liability: An Empirical Study," (with John M. Darley), 64 *Law & Contemporary Problems* 265 (2001).

"Perjury and Impeachment: The Rule of Law or the Rule of Lawyers?," in L. Kaplan and B. Moran, eds., *Aftermath: The Clinton Scandal and the Future of the Presidency and the Liberal State*, NYU Press, 199-211 (2001).

"Why Laws Work Pretty Well, But Not Great: Words and Rules in Legal Interpretation," 26 *Law & Social Inquiry* 243 (2001).

"Un effet du principe C chez l'enfant francophone," (with Helen Goodluck), 45 *Canadian Journal of Linguistics* 49 (2000).

"Let Us Never Forget Our Humanity: Reflections on Justice Stewart Pollock," 31 *Rutgers L. J.* (2000).



"Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt," 78 *Texas L. Rev.* 105 (1999).

"Can the Legal System Use Experts on Meaning," 66 *Tennessee L. Rev.* 1167 (1999).

---

"Linguistic Experts as Semantic Tour Guides," 5 *Forensic Linguistics* 87 (1998).

"Law, Language and Lenity," 40 *William & Mary L. Rev.* 57 (1998).

"Fault Lies Not Only in Starr but in Law," *National L.J.* A19 (Apr. 20, 1998).

Review of Bernard Jackson, *Making Sense in Law*, 4 *Forensic Linguistics* 305 (1997).

"Learning Our Limits: The Decline of Textualism in Statutory Cases," 1997 *Wisconsin L. Rev.* 235.

"Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?" 73 *Washington Univ. L. Q.* 1069 (1995).

"When All is Lost: Why it is Difficult for Judges to Write About Concepts," 1 *Graven Images* (1994).

"Chomsky and Cardozo: Linguistics and the Law," in Carlos P. Otero, ed., *Noam Chomsky: Critical Assessments*, London: Routledge (1994).

"When Judges Use the Dictionary," 68 *American Speech* 50 (1993).

"Does the Legal System Need Experts in English Syntax?" In W. Stewart and R. Reiber, eds., *The Language Scientist as Expert in the Legal Setting*, New York Academy of Sciences (1990).

"Linguistic Principles as the Rule of Law," in P. Pupier and J. Woehrling, eds., *Langue et droit — Language and Law*, Wilson & Lafleur Itée (1989).

"Parameter Setting and the Development of Pronouns and Reflexives," in T. Roeper and E. Williams, eds., *Parameter Setting*, D. Reidel Publishing Company (1987).

"The Judge as Linguist: Linguistic Principles as Rule of Law," in Fred Marshall, ed., *Proceedings of the Third Eastern States Conference on Linguistics*, University of Pittsburgh (1986).

"A Comparison of Null and Pronoun Anaphora in First Language Acquisition," (B. Lust, L. Solan, S. Flynn, C. Cross, and E. Schuetz, in B. Lust, ed., *Studies in the Acquisition of Anaphora: Defining the Constraints*, D. Reidel Publishing Company (1986).

"Language Acquisition Data and the Theory of Markedness: Evidence from Spanish," in F. Eckman, E. Moravcsik and J. Wirth, eds., *Markedness*, Plenum (1986).

"Focus and Levels of Representation," 15 *Linguistic Inquiry* 174 (1984).

"A Metrical Analysis of Spanish Stress," in W. Cressey and D. Napoli, eds., *Linguistic Symposium on Romance Languages: 9*, Georgetown University Press (1981). Translated in "Análisis métrico del acento español," in Juana Gil (ed.), *Panorama actual de la fonología del español* (2000).

"Fixing Parameters: Language Acquisition and Language Variation," in J. Pustejovsky and V. Burke, eds., *Markedness and Learnability*, University of Massachusetts Occasional Papers in Linguistics, Volume 6 (1981).

"The Acquisition of Structural Restrictions on Anaphora," in S. Tavakolian, ed., *Language Acquisition and Linguistic Theory* 59-73, MIT Press (1981).

"Contrastive Stress and Children's Interpretation of Pronouns," 23 *Journal of Speech and Hearing Research* 688 (1980).

"A Reevaluation of the Basic Operations Hypothesis," (H. Goodluck and L. Solan), 7 *Cognition* 85 (1979).

"The Acquisition of Tough Movement," in F. Eckman and A. Hastings, eds., *Studies in First and Second Language Acquisition*, Newbury House Publishers (1979).

"Children's Use of Syntactic Structure in Interpreting Relative Clauses," (L. Solan and T. Roeper), in 1996 H. Goodluck and L. Solan, eds., *Papers in the Structure and Development of Child Language*, University of Massachusetts Occasional Papers in Linguistics, Volume 4 (1978).

## RECENT LECTURES AND PRESENTATIONS

"Private Language, Public Laws: the Role of Legislative Intent," Law & Society Association Meeting, Chicago, May 2004.

Course on Statutory Interpretation. Florida Advanced Judicial College, Orlando, May 2004 (3-hour course for state trial and appellate judges).

"Sneaking Emotion into Statutory Interpretation," Association for the Study of Law, Culture and the Humanities, Hartford Connecticut, March 2004.

"Author Identification Experts in the Age of Daubert," Loyola Law School, faculty workshop, February 2004.

"Speaking of Legislative Intent," DePaul Law School, faculty workshop, November 2003

"Speaking of Legislative Intent," Princeton University Cognitive Psychology series, November 2003.

"Pernicious Ambiguity in Legal Interpretation," University of Wisconsin Institute for Legal Studies, November 2003.

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"Pernicious Ambiguity in Contracts and Statutes," Chicago-Kent symposium, October 2003.

"What's So Hard about Statutory Interpretation," St. Thomas Law School, Florida (Distinguished Speakers Series), September 2003.

"Linguistic Issues in Statutory Interpretation," Faculty of Law, Australian National University, Canberra, July 2003.

"Ethical Issues in Expert Testimony by Linguists," International Association of Forensic Linguistics, Sydney, July 2003.

"Ordinary Meaning in Legal Interpretation," Italian-American Summit on Ordinary Meaning, sponsored by the American Society of Comparative Law, Milan, May 2003.

"Forensic Linguistics in American Courts," Workshop on Forensic Linguistics, Barcelona, April 2003.

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A series of three lectures at Cardiff University, April 2003: "Linguistic Issues in Statutory Interpretation" (Law Faculty), "Linguistic Identification in American Courts" (Forensic Linguistics graduate seminar), "Plain and Ordinary Meaning in Legal Interpretation" (Department of Language and Communication).

"Plain and Ordinary Meaning in Legal Interpretation," Department of Linguistics, University of Rochester, March 2003.

"Statutory Inflation," Loyola School of Law (Chicago), February 2003.

"Differing Conceptualizations of Causation in Law, Science and Everyday Speech," (Organizer of Symposium, "Causation in Law, Science and Everyday Speech"), American Association for the Advancement of Science, Denver, February 2003.

"Concepts and Categories in Legal Interpretation, Princeton University Psychology Department, Cognitive Psychology Series, February 2003

"Statistics Jurors Can't Do Without," NIJ Conference on Science and the Law, Miami, October 2002.

"The Limited Ability to Testify Accurately About What was Said," International Academy of Law and Mental Health, Amsterdam, July 2002.

"Judicial Reactions to Developments in Insurance Law," conference on developments in insurance law in the Northeast, New York, June 2002.

"The Dictionary as Source of Ordinary Meaning," Law and Society Association, Vancouver, May, 2002.

---

"Hearing Voices: Speaker Identification in Court," New York Psychology-Law Research Group, February, 2002 (reporting on work co-authored with Peter Tiersma).

"Ordinary Meaning in Legal Interpretation," Conference on Language and Law: Retrospect and Prospects, University of Lapland, Finland, December 2001.

"Finding Ordinary Meaning in the Dictionary," University of Texas Conference on Language and Law, December 2001.

"Juror Understanding of Scientific Evidence," NIJ Conference on Science and the Law, Miami, October 2001.

"The Linguist as Legislative Consultant," International Association of Forensic Linguistics, Malta, July 2001.

"A Psycholinguistic Approach to Mental Health Legislation," International Academy of Law and Mental Health, Montreal, July 2001.

"Convicting the Innocent Beyond a Reasonable Doubt: Some Lessons about Jury Instructions from the *Sheppard* Case, Cleveland-Marshall School of Law, April 2001.

"The Parol Evidence Rule as a Source of Dishonest Conduct," Chicago-Kent School of Law, Chicago, April 2001.

"Linguistic Identification in the Courtroom: Some Judicial Missteps," American Association for the Advancement of Science, San Francisco, February 2001.

### **Other Presentations**

#### **Judges and Judicial Officers**

Sixth Circuit Judicial Conference, U.S. District Court Judges for the E.D. Michigan, E.D. Pennsylvania, D. Oregon and C.D. California, New Jersey Judicial College

#### **Organizations**

Association of American Law Schools (AALS), National Institute of Justice Science and Law Conference, American Association of Applied Linguistics, National Association of Judicial Interpreters and Translators, New York Academy of Sciences, Law and Society Association,

International Association of Forensic Linguistics (plenary speaker, 1997), International Congress of Law and Mental Health, International Association of Forensic Phonetics, Various Bar Associations

#### Universities (partial list)

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Harvard University, MIT, University of Pittsburgh, Swarthmore College, University of Massachusetts, University of North Carolina, Seton Hall University School of Law, Widener University School of Law, Princeton University, Rutgers Law School, Rutgers University (Political Science Department), University of Tennessee, Georgetown University, University of Wisconsin Law School, Duke University

#### PROFESSIONAL AFFILIATIONS

American Bar Association

International Academy of Law and Mental Health (Member, Board of Directors, 1998- )

Linguistic Society of America (Chair, Committee on Social and Political Concerns (2000-01))

Law and Society Association

International Association of Forensic Linguistics (President, 1999-2003)

American Psychology-Law Society, Member-at-Large

#### OTHER ACTIVITIES

Director, Brooklyn Law School Center for the Study of Law, Language and Cognition. Have organized symposia on various issues involving law, language and psychology. Have received grant from National Institute of Justice to fund interdisciplinary conference involving linguistics, psychology and law as related to the jury system. See [www.brooklaw.edu/academics/centers/cognition](http://www.brooklaw.edu/academics/centers/cognition).

Brooklyn Law School Center for the Study of International Business Law, Member of Steering Committee, 2001-.

New York Uniform Court System, Jury Trial Project, Advisory Committee.

Federal Judicial Center: Have lectured to federal judges on issues in language and law, and have consulted on language issues in class action notices

Consultant to U.S. Department of Justice on linguistic issues in perjury prosecution

Consultant to private litigants on linguistic issues in various lawsuits, and to others on issues of language and law

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Have reviewed grant proposals for National Science Foundation and for universities

Have served on doctoral committees at Yale University and City University of New York

Have reviewed article submissions for journals, including *Language*, *Journal of Child Language*, *Journal of Legal Education*, *Language in Society*, *Law & Society Review*, *Forensic Linguistics*, *Psychological Science*, *Language*.

Association of the Bar of the City of New York (Federal Legislation Committee, 1997-2003)

American Arbitration Association: Have served as arbitrator

Have reviewed book proposals for various publishers

Have reviewed articles for tenure and promotion at other law schools and universities

*International Journal of Speech, Language and the Law* (Editorial Board, 1998-)

## CURRICULUM VITAE

Daniel B. Mowrey, Ph.D.

### EDUCATION:

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1978 Ph.D. Experimental Psychology: Brigham Young University, Provo, Utah. Emphasis in Psychopharmacology. Related fields of graduate study: Biochemistry, biology, botany, neurology, anatomy.

### PROFESSIONAL:

- 1991-Present President, American Phytotherapy Research Laboratory. This entity researches the needs of the herb community. Basic and archival research geared toward proprietary products as well as generic materials. Clinical and pre-clinical *in vivo* research is combined with *in vitro* investigation. Publication of findings in peer-reviewed journals is sought but not necessarily required.
- 1986-Present Author, Lecturer and Consultant in the area of herbal medicine. Activities include development of new products, market surveys, basic experimental research, technical writing and import/export consultation. Of particular importance are the authoring of books on scientific herbalism, the development of the "guaranteed-potency-herb" concept in America and the creation of whole lines of herbal combinations. This has given me an opportunity to educate consumers, industry and policymakers in herbal medicine benefits and risks. I have appeared nationally and internationally in health and trade publications and radio and television.
- 1978-Present Compiled herbal database that became the basis for the 350 page The Scientific Validation of Herbal Medicine (and subsequent books). The database was also used to write the herb sections of Nutri Health Data, a comprehensive alternative health care database for professionals and health stores. Updates to this database are ongoing.
- 1977-1991 Director, Mountainwest Institute of Herbal Sciences. The main vehicle through which private corporations have contributed to the only research entity in the United States dedicated to the validation of wholistic herbal medicine.
- 1978-1996 Director, Behavior Change Agent Training Institute. This small, informal group of psychologists serves the community by developing behavior change programs for counselors, group homes, foster homes, as well as, individual families, and by training key individuals in the use of behavior change and principles.
- 1978-1986 Director of Research and Development, Nova Corporation, Salt Lake City, Utah. Handled the development of new fluid systems based on polymer and surfactant theological technology. Concurrently wrote operations and technical manuals that have become industry standards.
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- 1973-1979 Instructor, Brigham University, Department of Psychology. Courses taught: experimental psychology, psychopharmacology, physiological psychology, sensation, cognition and statistics.
- 1977-1978 Member, Utah State Committee for Investigation of Unproven Health Practices.
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- 1975-1978 Director, Research & Development for Nature's Sunshine Products. Work included toxicological studies on popular herbs, development of herbal blends, efficacy tests on numerous herbs and herbal products.

BOOK PUBLICATIONS: Author: Daniel B. Mowrey, Ph.D.

The Scientific Validation of Herbal Medicine. Keats Publishing, New Canaan, CT. 1990 (1986). This book is currently being used as a textbook in many college level courses on herbal medicine.

Herbal Tonic Therapies. Keats Publishing, New Canaan, CT. 1993. Revitalizes the concept of a tonic in light of modern research.

Fat Management! The Thermogenic Factor. Victory Publications, Lehi, Utah. 1994.

Natural Relaxants: Freedom From Prescription Drugs. American Research Institute, Scottsville, KY. 1990.

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Proven Herbal Blends. Keats Publishing, New Canaan, CT. 1990, (1987).

Cayenne: Volume One of the Scientific Validation of Medicinal Foods Monographs. Cormorant Books, Lehi, UT. 1987.

Guaranteed Potency Herbs: Next Generation Herbal Medicine. Keats Publishing, New Canaan, CT. 1990 (1988). This is the first book to introduce guaranteed potency herbs to the American public.

Herbal Medicine and Your Immune System. Keats Publishing, New Canaan, CT. 1991 (in Press).

Echinacea, How An Amazing Herb Supports & Stimulates Your Immune System. Keats Publishing, New Canaan, CT. 1991

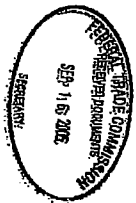
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# EXHIBIT 3

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



In the Matter of  
BASIC RESEARCH, L.L.C., et al.,  
Respondents.

DOCKET NO. 9318  
Public Document

RESPONDENT DANIEL B. MOWREY'S MEMORANDUM OPPOSING COMPLAINT  
COUNSEL'S MOTION FOR *IN CAMERA* REVIEW AND FOR SANCTIONS

Respondent Daniel B. Mowrey, Ph.D. ("Dr. Mowrey") submits the following  
memorandum opposing Complaint Counsel's motion for *in camera* review and for sanctions (the  
"Motion").

INTRODUCTION

In response to the Court's recent *Order on Complaint Counsel's Motion to Compel  
Production of Dr. Mowrey's Expert-Related Documents* ("Order"), Dr. Mowrey has produced all  
documents he created, reviewed, considered or relied upon in his capacity as an expert witness  
(including all documents he created, reviewed, considered or relied upon in the formation/  
creation of his expert report/opinion), that had not previously been produced, including  
"communications with his attorney, the other Respondents and the other Respondents' attorneys"  
(collectively referred to as "Expert Related Documents"). Dr. Mowrey's production is consistent  
with the Court's direction that Dr. Mowrey produce "all documents that relate to his capacity as  
an expert witness, including communications with his attorney, the other Respondents, and the  
other Respondents' attorneys." Order at 3. It is also consistent with the Court's ruling that "[f]o  
the extent that Complaint Counsel's motion [to compel] is aimed at compelling production of

documents from Dr. Mowrey that do not relate to his capacity as an expert or to the formation of  
his expert opinion in this case, Complaint Counsel's motion is DENIED IN PART." *Id.*

However, Complaint Counsel are apparently not satisfied with the Court's denial of their  
motion to compel Dr. Mowrey to produce documents not related to his capacity as an expert  
witness and the formation of his expert report. Accordingly, Complaint Counsel have filed their  
Motion, accusing Dr. Mowrey of flagrantly violating the Court's Order by not producing what  
Complaint Counsel characterize as large numbers of documents which Complaint Counsel claim  
are subject to production under the Order, while essentially ignoring the Court's ruling that Dr.  
Mowrey is not required to produce non-expert related documents.<sup>1</sup> In so doing, Complaint  
Counsel paint a misleading picture of the nature of this dispute, a misleading picture of the  
numbers of documents at issue, and a misleading picture of the level of Dr. Mowrey's  
compliance with the Court's Order.

For example, Complaint Counsel assert that, in response to the Court's Order, Dr.  
Mowrey has produced only a "few," or "only a small portion of the expert-related documents."  
Complaint Counsel's Motion at 1, 3. Complaint Counsel assert that Dr. Mowrey has "failed to  
produce numerous communications and documents . . ." *Id.* at 4. What Complaint Counsel fail  
to disclose to the Court, however, is the actual number of documents produced by Dr. Mowrey,  
and the actual number of documents at issue in Complaint Counsel's Motion. For example,

<sup>1</sup> Complaint Counsel's Motion also ignores the fact that, with respect to some of the  
documents Complaint Counsel seek, in a prior expert discovery related order, the Court  
specifically ruled that Complaint Counsel's expert witnesses did not have to produce the types of  
documents Complaint Counsel seek through their Motion. See e.g. *Order On Complaint  
Counsel's Second Motion For Protective Order*, dated 9 December 2004 (the "Order Governing  
Expert Discovery").

before the Court entered the Order; Dr. Mowrey had already produced to Complaint Counsel over nine hundred pages of documents he had read, reviewed, considered and/or relied on his forming his expert report. Then, subsequent to the Court's Order, Dr. Mowrey produced an additional thirty-seven (37) pages of documents.<sup>2</sup> Thus, as of the date of this memorandum, Dr. Mowrey has produced almost one thousand pages of expert related documents, almost twenty-five times the 40 pages of documents Complaint Counsel seek through their motion.<sup>3</sup>

As discussed in more detail below, and contrary to Complaint Counsel's assertions of alleged willful and flagrant violations of the Order, Complaint Counsel's Motion stems from a disagreement over the interpretation and scope of the Court's Order, not from any deliberation or flagrant violation of the Order. The underlined interprets the Order in a manner consistent with

<sup>2</sup> Dr. Mowrey's privilege log identified 191 documents through 8 December 2004. As explained below, twenty-six (26) of the pages recently produced by Dr. Mowrey were listed on the privilege log, four (4) were documents created after 8 December 2004 (the last date on documents identified on the privilege log), and seven (7) pages were an attachment to an email that Dr. Mowrey's counsel had mistakenly believed had been produced on 10 January 2005. Thus, of the 191 documents listed on the privilege log, Dr. Mowrey produced twenty-six of them. Of the remaining 165 pages of documents identified on the privilege log, Complaint Counsel seek production of 40 pages. Thus, although Complaint Counsel fail to forthrightly acknowledge it in their Motion, even Complaint Counsel concede that at least 125 of the 165 pages of documents listed on the privilege log have been properly withheld by Dr. Mowrey

<sup>3</sup> As explained below, one of the documents identified on the privilege log which Complaint Counsel seek (Document Bates No. 91) is an email from Carla Fobbs (lead of the Corporate Respondents' compliance department) to Dr. Mowrey, forwarding to Dr. Mowrey an email which Ms. Fobbs had received from Nicole Slater (a paralegal with counsel for Respondent Dennis Gray). The email from Ms. Slater to Ms. Fobbs references notes of Respondent Gray's counsel's interviews with certain potential fact witnesses (not Dr. Mowrey). The notes of those interviews, although not specifically listed on the privilege log, are attachments to Ms. Slater's email to Ms. Fobbs. However, Dr. Mowrey testifies that he has never opened, read, reviewed or otherwise considered those attached notes of the interviews with the potential fact witnesses. *Declaration of Daniel B. Mowrey, Ph.D. in Opposition to Complaint Counsel's Motion for Sanctions* dated 15 September 2005 ("Mowrey Supp. Dec.," at ¶ 11.

the Court's Order Governing Expert Discovery, and the Court's Order On Complaint Counsel's Motion To Compel A Document From Respondents' Testifying Expert Solon, dated 19 January 2005 (the "Second Order Governing Expert Discovery") -- i.e., that Dr. Mowrey was required to produce all documents he created, read, considered, reviewed and/or relied upon in his capacity as an expert witness in this case, including all documents he created, reviewed, considered or relied upon in connection with the formulation/creation of his expert report/opinion, that had not previously been produced, including "communications with his attorney, the other Respondents and the other Respondents' attorneys." That is precisely what Dr. Mowrey has produced. Dr. Mowrey has thus complied with the Court's Order because he has in fact produced all Expert Related Documents.

On the other hand, and despite the fact that the Court expressly denied Complaint Counsel's prior motion to compel "[t]o the extent that Complaint Counsel's motion [to compel] is aimed at compelling production of documents from Dr. Mowrey that do not relate to his capacity as an expert or to the formation of his expert opinion in this case," (Order at 3), Complaint Counsel seek to obtain copies of documents having absolutely nothing to do with Dr. Mowrey's capacity as an expert witness or the formation of his expert report. Complaint Counsel have taken the position that Dr. Mowrey must produce documents which were created months before Dr. Mowrey was ever asked to be, or designated as, an expert witness, and further assert that Dr. Mowrey must produce classic attorney-client communications and attorney-work product documents such as attorney notes of interviews with potential fact witnesses, and documents relating to Respondents' and their attorneys' litigation strategy discussions concerning the possibility of designating other potential expert witnesses in this case, and which

documents Dr. Mowrey did not read, review, consider or rely upon in connection with forming his expert report/opinion.

Complaint Counsel further assert that any document which Dr. Mowrey has ever reviewed which mentions or relates to any scientific study relates to Dr. Mowrey's capacity as an expert witness and his expert opinion, even if those documents (a) were reviewed before Dr. Mowrey was ever asked to be or was designated as an expert witness, (b) were received, read and reviewed by Dr. Mowrey solely in his capacity as a Respondent, and (c) were never read, reviewed, considered or relied upon by Dr. Mowrey in connection with forming his expert report/opinion.

For example, Complaint Counsel seek to obtain documents relating to notes of interviews which Respondents' counsel conducted of a variety of potential fact witnesses (not Dr. Mowrey) (the "Attorney Interview Documents"), as well as documents relating to Respondents' Counsel's deliberations concerning other expert witnesses which Respondents' Counsel considered, but did not ultimately designate in this case (the "Potential Expert Witness Documents"). Contrary to the express provisions of Fed. R. Civ. P. 26, the discovery rules applicable to these proceedings, and this Court's prior expert related discovery orders in this case, Complaint Counsel assert they are entitled to know (a) the identity of other potential experts discussed by Respondents and their counsel (who have never been designated as expert witnesses in this case), (b) why Respondents chose not to designate those other potential experts, and (c) why Respondents selected Dr. Mowrey as an expert witness as opposed to some other potential expert. According to Complaint Counsel, if Respondents considered and rejected designating any author of any scientific study relied upon by Dr. Mowrey in his expert report, such documents allegedly relate to Dr. Mowrey's

expert opinion. Thus, Complaint Counsel assert they are entitled to a copy of Documents Bates Nos. 166-167, which documents relate solely to Respondents' and their counsel's deliberations concerning potential expert witnesses.

However, the Attorney Interview Documents and the Potential Expert Witnesses Documents have nothing to do with Dr. Mowrey's capacity as an expert witness. Indeed, some of them were created and sent to, and read and reviewed by, Dr. Mowrey weeks before he was ever designated as an expert witness, and none of them were reviewed by him as an expert witness, or considered or relied upon by him in forming his expert opinion. Yet it is these very documents which are at the center of, and appear to be the motivating force behind, Complaint Counsel's Motion.

While Complaint Counsel virtually ignore the issue of the Attorney Interview and Potential Expert Witnesses Documents in their Motion (only mentioning them, almost as an afterthought, in footnote no. 8 of their Motion), these documents lay at the center of the current dispute. For example, on Wednesday, 24 August 2005, the undersigned spoke with Complaint Counsel Lauren Kepin and Joshua Willard in an effort to resolve this dispute without the need for Court intervention. During this conversation the undersigned specifically raised the issue of the Attorney Interview Documents and the Potential Expert Witnesses Documents, discussed the fact that they were never reviewed or relied upon by Dr. Mowrey in connection with his expert report/opinion, and indicated that because of their especially sensitive nature (i.e., attorney's notes and mental impressions), they would not be produced. As a result of Complaint Counsel's insistence that these documents be produced, no agreement could be reached.

Complaint Counsel's strained reading of the Order goes way too far. If Complaint

Counsel's interpretation is correct, then Dr. Mowrey would arguably be required to produce virtually every document he has ever reviewed in connection with this matter, regardless of when it was created, regardless of whether he viewed the document solely in his capacity as a Respondent, and regardless of whether he read, reviewed, considered or relied upon it in connection with preparing his expert opinion/report. It would also arguably require Dr. Mowrey to produce everything he has published, and all documents he may possess or which he has ever read at any time, which mention any author of any scientific study discussed in Dr. Mowrey's report, or which mention any topic addressed in that report. Dr. Mowrey does not believe the Court's Order was intended to embrace such an extraordinary and burdensome universe. Indeed, it would be directly contrary to the Court's prior ruling concerning the scope of expert discovery (see e.g., Order Governing Expert Discovery), and would eviscerate the Court's ruling that Dr. Mowrey was not required to produce non-expert related documents.

In short, Dr. Mowrey has fully complied with the Court's Order. Complaint Counsels' insistence on an unreasonably broad production exceeds greatly the scope of the Court's Order and should be rejected. Complaint Counsels' Motion should be denied.<sup>4</sup>

<sup>4</sup> Complaint Counsel have asserted that the Court's scheduling order prohibits a person who is a fact witness from also being an expert witness. However, Complaint Counsel learned as early as 13 October 2004 that Respondents were designating Dr. Mowrey as an expert witness, and failed to timely file a motion *in limine* to exclude Dr. Mowrey as an expert witness. Thus, Complaint Counsel have waived any objection to Dr. Mowrey being both a fact witness and an expert witness. Furthermore, Dr. Mowrey notes that the federal courts have made it clear that there is no *per se* prohibition against a fact witness also being an expert witness. Indeed, the federal courts have made it clear that even in jury trials, where there is a risk of a jury being confused about the dual roles, that there is nothing wrong with a witness having both roles. See, e.g., *U.S. v. Carhart*, 97 F.3d 565, 571 (D.C. Cir. 1996) ("we have never adopted the rule that dual (continued...)

#### STATEMENT OF FACTS

##### A. FACTS RELATING TO THE DOCUMENTS AT ISSUE

1. Pursuant to the Order, Dr. Mowrey is required to produce "all documents that relate to his capacity as an expert witness, including communications with his attorney, the other Respondents, and the other Respondents' attorneys." Order at 3. The Order further provides that "[t]o the extent that Complaint Counsel's motion [to compel] is aimed at compelling production of documents from Dr. Mowrey that do not relate to his capacity as an expert or to the formation of his expert opinion in this case, Complaint Counsel's motion is DENIED IN PART." *Id.* The Court then directed Dr. Mowrey to produce documents within five (5) business days after 9 August 2005 – i.e., on or before 16 August 2005.

2. On 16 August 2005, Dr. Mowrey produced to Complaint Counsel what he believed to be all documents required to be produced by the Order. Specifically, Dr. Mowrey produced to Complaint Counsel all remaining documents that he had read, considered, reviewed or relied upon in his capacity as an expert witness, including in connection with forming his expert report/opinion. Those documents consisted of thirty (30) pages of documents, twenty-six (26) of which had been listed on the privilege log, and four (4) of which were documents created

<sup>4</sup> (...continued)  
testimony as both a fact and expert witness is improper . . . every federal court to consider the issue of dual testimony as both a fact and expert witness has concluded that the Federal Rules of Evidence permit such testimony". See also *U.S. v. Tocco*, 200 F.3d 401, 418 (6<sup>th</sup> Cir. 2000) (refusing to adopt a *per se* rule prohibit a fact witness from also testifying as an expert witness); *U.S. v. Rivera*, 971 F.2d 876, 888 (2<sup>nd</sup> Cir. 1992) ("Although Mendez testified as both a fact witness and an expert witness, such dual testimony is not improper").

after the last date of documents identified on the privilege log.<sup>4</sup> See, e.g., Letter from Ronald F.

Priest to Complaint Counsel, dated 16 August 2005, a copy of which is attached hereto as Exhibit

A.

3. In the 15 August 2005 letter, the undersigned stated that "[w]ith respect to

attachments referenced in some of the emails, it is my understanding that those documents have been produced previously. Accordingly, they are not reproduced herewith. It is my

understanding that Dr. Mowrey has now produced all documents which he has which relate to his capacity as an expert witness in this case." See Exhibit A.

<sup>4</sup> Complaint Counsel make much ado in their Motion about the fact that four of the pages produced on 16 August 2005 were not listed on Dr. Mowrey's privilege log. However, as has previously been explained, the privilege log only listed documents through 8 December 2004 because that is the date on which Respondents provided Dr. Mowrey's expert report, and Respondents' responses to the Second and Fourth Requests had been provided on 14 November 2004, and 1 December 2004, respectively. Accordingly, the latest date for documents identified on the privilege log was tied to the date of the discovery responses, and the date of Dr. Mowrey's report. Price Dec. at ¶ 35. See also Letter from Ronald F. Price to Complaint Counsel, dated 2 March 2005, a copy of which is attached as Exhibit G to Respondent Daniel B. Mowrey's *Response to Complaint Counsel's Motion to Compel Dr. Mowrey to Produce His Confidential Attorney-Client Communications, Joint-Defense Communications, and Documents Protected by the Work Product Doctrine*. Thus, there is no mystery to the fact that when Complaint Counsel provided their rebuttal reports on 27 December 2004, that such reports were forwarded by email to Dr. Mowrey. The fact Dr. Mowrey subsequently produced the post 8 December 2004 documents, even though they were not listed on the privilege log and thus previously unknown to Complaint Counsel, demonstrates that Dr. Mowrey was not trying to hide the documents.

The absurdity of Complaint Counsel's argument on this particular point is further demonstrated by the fact that on 13 January 2005, Complaint Counsel produced to Respondents an amended privilege log. However, the latest document on that amended privilege log bears a date of 16 December 2004. It is hard to believe that Complaint Counsel did not generate any privileged documents during the time frame of 17 December 2004 and 13 January 2005, especially given all the depositions the parties were taking during that time frame. Yet it is doubtful that Complaint Counsel would concede that their failure to list post-17 December 2004 documents on their privilege log of 13 January 2005 is evidence of a deliberate attempt to hide documents.

4. On 17 August 2005, Complaint Counsel sent a letter indicating, *inter alia*, that

because the attachments to the recently produced emails had been produced separately (in January 2005), Complaint Counsel were unable to determine which attachments were associated with which specific email, and Complaint Counsel requested that the undersigned provide information which would allow Complaint Counsel to make that determination. In order to provide the requested assistance to Complaint Counsel, on 22 August 2005 the undersigned sent Complaint Counsel a letter wherein the undersigned specifically identified for Complaint Counsel which emails were associated with which attachments. During this process, the

undersigned discovered, for the first time, that contrary to his prior belief, one of the attachments to one of the emails had inadvertently been omitted from the 10 January 2005 production.

Specifically, it was learned that the attachment to an email from Dr. Mowrey to the undersigned, dated 9 November 2004, had inadvertently not been produced. This discovery was immediately disclosed to Complaint Counsel, and the inadvertently omitted attachment was produced. See, e.g., Letter from Ronald F. Price to Joshua Willard dated 22 August 2005, a copy of which is attached hereto as Exhibit B.<sup>5</sup>

<sup>5</sup> As set forth in the Mowrey Supp. Dec., and the *Declaration of Ronald F. Price in Opposition to Complaint Counsel's Motion for Sanctions* ("Price Supp. Dec."), when Dr. Mowrey provided documents to his counsel for production to the FTC in January 2005, Dr. Mowrey believed he had printed out and delivered to his counsel all of the attachment "drafts" of his reports that he had emailed to his counsel. When the undersigned's office produced those documents to Complaint Counsel on 10 January 2005, the undersigned (who was traveling to New York for the deposition of Complaint Counsel's expert) believed that he produced to Complaint Counsel all such drafts. When this inadvertent error was discovered, it was immediately brought to Complaint Counsel's attention, and the inadvertently omitted attachment was produced.

5. As discussed in Dr. Mowrey's memorandum opposing Complaint Counsel's initial motion to compel, Respondents did not decide to designate Dr. Mowrey as an expert witness until 13 October 2004, the very day on which Respondents served their expert witness list. Furthermore, Dr. Mowrey had no communications of any kind with any Respondent or any counsel concerning his role as an expert witness until approximately 18 October 2004, *after* Respondents had already designated him as a possible expert witness. See, e.g., Declaration of Daniel B. Mowrey, Ph.D. dated 21 July 2005 ("Mowrey Dec.") ¶¶ 10-11; Declaration of Ronald F. Price, dated 21 July 2005 ("Price Dec.") at ¶¶ 5-8, previously submitted.
6. On 12 October 2004, a draft of Respondents' proposed witness list was circulated amongst Respondents' joint legal defense team. That draft did not include Dr. Mowrey as a potential expert witness. On the 13 October 2004, Respondents' counsel decided to identify Dr. Mowrey as a potential expert witness. That was the first time Respondents decided to designate Dr. Mowrey as a potential expert witness. Respondents' finalized expert witness list, which was served on Complaint Counsel the afternoon of 13 October 2004, identified Dr. Mowrey as a potential expert witness. Price Dec. at ¶ 6.
7. As of 13 October 2005, Dr. Mowrey had not had a single communication with any Respondent or any counsel for Respondents, including his own counsel, about being identified on Respondents' witness list as a potential expert witness. Mowrey Dec. ¶ 13. See also Price Dec. at ¶¶ 7-8.
8. On about 18 October 2005, Dr. Mowrey and his counsel had a conversation concerning the fact that Respondents had identified Dr. Mowrey as a potential expert witness.

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- This was the first time that Dr. Mowrey was made aware that he had been named as a potential expert witness. Mowrey Dec. ¶ 14. See also Price Dec. at ¶ 8.
9. When Dr. Mowrey provided his expert report, he produced to Complaint Counsel more than 700 pages of documents which he read, considered, reviewed and relied upon in connection with forming his expert report. Mowrey Supp. Dec. at ¶ 5. Altogether, before this Court ever issued its 9 August 2005 Order, Dr. Mowrey had produced over nine hundred pages of expert related documents. *Id.* at ¶¶ 6-8.
10. Complaint Counsel seek production of documents which relate solely to notes of Respondents' counsel's interview with potential fact witnesses (and not of Dr. Mowrey). Specifically, Complaint Counsel seek production of the following documents:
- e. Bates No. 91. This is a document which relates solely to notes of interviews which Respondent Gay's counsel conducted with a number of potential fact witnesses, none of which was Dr. Mowrey. The document is an email string consisting of an email on 27 September 2004 from Nicole Slater, a paralegal with the law firm of Burbidge & Mitchell, to Carla Fobbs (head of the Corporate Respondents' compliance department), Ron Price (Dr. Mowrey's counsel), and Jeff Feldman (the Corporate Respondents' attorney), which email was forwarded by Ms. Fobbs on 27 September 2004 to Respondents Mowrey, Gay & Friedlander, and to Dan Watson, a paralegal with the Corporate Counsel's compliance department. The email itself does not identify the witnesses who were interviewed, although the original email from Ms. Slater included attachments which were notes of interviews of fact witnesses conducted by the law firm

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representing Respondent Gay. The email also identifies other potential fact witnesses who Respondent Gay's counsel was attempting to interview. Price Supp. Dec. at ¶ 11. Dr. Mowrey testifies that he has never opened, read, considered, or otherwise reviewed the interview notes attached to the email.<sup>7</sup> See, e.g., Mowrey Supp. Dec. at ¶ 11.

b. Bates No. 94. This is an email dated 29 September 2004 (more than two weeks before Dr. Mowrey was designated as an expert witness) from Dr. Mowrey's counsel to the Corporate Respondents' prior counsel, Respondent Gay's counsel, Ms. Slatter, Ms. Fobbs, Mr. Watson, and Respondent Friedlander and Dr. Mowrey. This document relates solely to a telephone conference which the undersigned had with a potential fact witness. That potential witness was not Dr. Mowrey, and was not an author of any scientific study mentioned in Dr. Mowrey's report or in any of Complaint Counsel's experts' reports. See, e.g., Price Supp. Dec. at ¶ 12. Furthermore, Dr. Mowrey testifies that although he believes he read the email on or about the date it was sent, he did not read or

<sup>7</sup> As set forth in the accompanying Declaration of Ronald F. Price in Opposition to Complaint Counsel's Motion for Sanctions ("Price Supp. Dec."), the notes relate to counsel's interviews with three potential witnesses who are not authors of any scientific study of any kind, and with one potential witnesses who is an author of a scientific study discussed in Dr. Mowrey's report. Complaint Counsel concedes in their motion that notes of interviews with non-authors are not discoverable. See, e.g., Motion at n.8. Thus, of these attorney interview notes, it appears that the only notes which Complaint Counsel claim they are entitled to obtain are notes of Mr. Gay's counsel's interview with a study author. However, as indicated above, Dr. Mowrey testifies that he never opened that attachment, and never read, reviewed, considered or otherwise relied upon that particular document. See, e.g., Mowrey Supp. Dec. at ¶ 11. Because Dr. Mowrey never even opened the attachment and never read the document, even in a cursory manner, it is impossible for him to have "considered" the document in forming his expert report.

review the email after he had been designated as an expert witness, and did not read, consider, review or rely upon the email in connection with preparing his expert report/opinion. Moreover, Complaint Counsel concedes in their Motion that they are not entitled to notes of interviews with potential fact witnesses who are not authors of any of the scientific studies mentioned in Dr. Mowrey's report. See, e.g., Motion at 11-12, n. 8. Given such admission, Complaint Counsel are not entitled to obtain a copy of Document Bates No. 94.

11. Complaint Counsel seek production of documents which relate solely to discussions between Respondents and their counsel concerning potential expert witnesses (not Dr. Mowrey). The document at issue, Bates Nos. 166-167, is an email dated 22 November 2004, from Mr. Watson to Ms. Fobbs, and to Respondents Friedlander and Dr. Mowrey. During the 22 November 2004 time frame, Respondents and their counsel had discussions concerning the possibility of designating additional expert witnesses. Document Bates Nos. 166-167 identifies certain potential expert witnesses which Respondents were considering, but did not designate in this case. None of the persons identified in this document is an author of any of the scientific studies mentioned in Dr. Mowrey's expert report. Price Supp. Dec. at ¶ 13. Complaint Counsel have conceded, in footnote no. 8 of their Motion, that they do not seek production of this document if the persons identified in the document are not authors of any of the scientific studies referenced in Dr. Mowrey's expert report.<sup>1</sup> Furthermore, the document does not mention or refer

<sup>1</sup> Dr. Mowrey believes Complaint Counsel were not even entitled to know whether any of the persons identified on this document were or were not authors of any scientific study referred to in Dr. Mowrey's report, as such information is work product, and because Dr. Mowrey's testimony is clear that he did not read, review, consider or rely upon this document in his (continued...)



to Dr. Mowrey's expert opinion or report, and is wholly unrelated to Dr. Mowrey's capacity as an expert witness and his expert opinion/report. Indeed, Dr. Mowrey testifies that he received, read, considered, and reviewed this document solely in his capacity as a Respondent in this case, and that he did not read, consider, review or rely upon this document in his capacity as an expert witness, or in connection with his expert opinion/report. Mowrey Supp. Dec. at ¶ 13.

12. Many of the documents Complaint Counsel demand were created before Respondents ever decided to designate Dr. Mowrey as an expert witness. These documents are as follows:

a. Bates Nos. 26-32. These documents are a series of emails on 9 August 2004 between Dr. Mowrey's counsel and Ms. Fobbs (and copied to Dr. Mowrey). The emails relate solely to efforts to arrange a meeting between Dr. Mowrey and the Corporate Respondent's counsel (a meeting which did not occur). See, e.g., Price Supp. Dec. at ¶ 14. The documents contain no substantive information of any kind. *Id.* Furthermore, Dr. Mowrey testifies that he received and reviewed these documents solely in his capacity as a Respondent in this case, that he did not read, consider, review or rely upon these documents after having been designated as an expert witness, and that he did not read,

<sup>8</sup> (...continued)  
capacity as an expert, or in connection with forming his expert report/opinion. Nevertheless, in light of the fact that Complaint Counsel have conceded in their Motion that, even under their interpretation of the Order, they are entitled to this document only if it mentions an author of one of the scientific studies mentioned in Dr. Mowrey's report, Dr. Mowrey has chosen to disclose the fact that none of the persons identified in the document is an author of any scientific study cited in Dr. Mowrey's expert report. Accordingly, the Court need not waste time reviewing *in camera* a document which Complaint Counsel have conceded is not subject to production.

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consider, review or rely upon these documents in his capacity as an expert witness, or in connection with his expert opinion/report. Mowrey Supp. Dec. at ¶ 14.

b. Bates Nos. 54-55. This is an email dated 21 August 2004 from Respondent Friedlander to Dr. Mowrey and Luigi Rinaldo (an employee of the Corporate Respondents). The email has a subject identified as "placebo," and consists of a copy of a scientific study relating to placebos which Respondent Friedlander forwarded to Dr. Mowrey. The specific scientific study referenced in this email is not cited in Dr. Mowrey's expert report. Furthermore, Dr. Mowrey testifies that he received and reviewed this email solely in his capacity as a Respondent in this case, that he did not read, consider, review or rely upon this particular email after having been designated as an expert witness, and that he did not read, consider, review or rely upon this particular email in his capacity as an expert witness, or in connection with his expert opinion/report.<sup>9</sup> Mowrey Supp. Dec. at ¶ 15.

c. Bates Nos. 84, 86-87. These documents are a series of three emails dated 16 September 2004 (from Ms. Fobbs to Dr. Mowrey), 20 September 2004

<sup>9</sup> Dr. Mowrey does acknowledge that the scientific study referenced in this email is related to the following scientific study which is identified in Dr. Mowrey's expert report: Hrobjartsson, A and Gotzsche, P.C., "Is the placebo powerless? An analysis of clinical trials comparing placebos with no treatment." *NEJM*, 344(sic)(21):1594-1602 (2001) (the correct cite is *NEJM*, 344(21):1594-1602, (2001)) (the "Placebo Study"). *See, e.g., Dr. Mowrey's report concerning the Pediallean product*. However, Dr. Mowrey testifies that in formulating his expert opinion in this matter he relied upon the Placebo Study, and not the particular study identified in the email at issue. Mowrey Supp. Dec. at ¶ 15.

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(from Dr. Mowrey to Ms. Fobbs), and 20 September 2004 (from Dr. Mowrey to Ms. Fobbs), respectively, relating to certain potential fact witnesses (not Dr. Mowrey). The documents contain absolutely no substantive information concerning the potential fact witnesses identified in the documents. Rather, they simply identify certain potential fact witnesses and their potential contact information. Price Supp. Dec. at ¶ 16. Dr. Mowrey testifies that he received and reviewed these documents solely in his capacity as a Respondent in this case, that he did not read, consider, review or rely upon these documents after having been designated as an expert witness, and that he did not read, consider, review or rely upon these documents in his capacity as an expert witness, or in connection with his expert opinion/report. Mowrey Supp. Dec at ¶ 16.

d. Bates No. 91. This document is discussed *supra* in ¶ 11.

e. Bates Nos. 92-93. These documents are an email string consisting of (i) an email dated 27 September 2004 from Ms. Fobbs to Respondent Gay's counsel and his paralegal (and copied to Dr. Mowrey's counsel and the Corporate Respondents' counsel), (ii) an email dated 27 September 2004 from Dr. Mowrey's counsel to Ms. Fobbs, and (iii) an email dated 27 September 2004 from Ms. Fobbs to Dr. Mowrey's counsel (and copied to Dr. Mowrey). These emails relate to Respondent Gay's counsel's investigation of the facts and background of potential witnesses in this case — in this instance, Dr. Mowrey, and involves a request by Mr. Gay's counsel for a copy of Dr. Mowrey's CV, which Mr. Gay's counsel was seeking as part of his investigation of the facts and fact witnesses in this case. As

has previously been disclosed to Complaint Counsel, part of the process which any trial lawyer or legal team goes through in investigating a case is to become as familiar as possible with the parties to the case, the parties' backgrounds, and the background of potential fact witnesses. These emails relating to Dr. Mowrey's CV relate solely to Respondents' counsels' investigation concerning the facts and background of the case, and the potential fact witnesses in the case — in this case, Dr. Mowrey. It had nothing to do with Dr. Mowrey's role as an expert witness. Price Supp. Dec. at ¶ 17. Indeed, Respondents did not even discuss or determine to call Dr. Mowrey as an expert witness until well *after* these documents were created. Dr. Mowrey also notes that the email string to Dr. Mowrey did not include a copy of the CV.<sup>18</sup> Moreover, Dr. Mowrey testifies that he received and reviewed these documents solely in his capacity as a Respondent in this case, that he did not read, consider, review or rely upon these documents after having been designated as an expert witness, and that he did not read, consider, review or rely upon these documents in his capacity as an expert witness, or in connection with his expert opinion/report. Mowrey Supp. Dec. at ¶ 17.

f. Bates No. 94. This document, relating to attorney notes of an interview with a potential fact witness, is discussed *supra* in ¶ 12.

g. Bates No. 96. This is an email from Ms. Fobbs to Dr. Mowrey dated 4 October 2004, with the subject line "humaniaries," and consists of a single

<sup>18</sup> As Complaint Counsel are aware, Respondents long ago provided Complaint Counsel with Dr. Mowrey's CV.

phase request. No further information can be provided concerning the specific request without divulging the request itself. However, the document was received, read and reviewed by Dr. Mowrey before Respondents ever discussed or determined to identify Dr. Mowrey as an expert witness. Furthermore, Dr. Mowrey testifies that he received and reviewed this document solely in his capacity as a Respondent in this case, that he did not read, consider or review this document after having been designated as an expert witness, and that he did not read, consider, review or rely upon this document in his capacity as an expert witness, or in connection with forming his expert opinion/report. Mowrey Supp. Dec. at ¶ 18.

<sup>h</sup> Bates No. 100, 106-107, 109-114. These documents consist of a series of the following emails: (i) Ms. Fobbs to Dr. Mowrey dated 7 October 2004, (ii) Dr. Mowrey to Ms. Fobbs dated 7 October 2004, (iii) Ms. Fobbs to Dr. Mowrey dated 12 October 2004, (iv) Dr. Mowrey to Ms. Fobbs, dated 12 October 2004, (v) Ms. Fobbs to Dr. Mowrey, dated 12 October 2004, (vi) Dr. Mowrey to Ms. Fobbs, dated 12 October 2004, and (vii) Ms. Fobbs to Dr. Mowrey, dated 12 October 2004. These documents relate to a request by Ms. Fobbs as to whether Dr. Mowrey had copies of certain documents, none of which documents are mentioned, addressed or discussed in Dr. Mowrey's expert report. Mowrey Supp. Dec. at ¶ 19; Price Supp. Dec. at ¶ 19. Furthermore, these emails were created, received, and reviewed by Dr. Mowrey before Respondents ever discussed or determined to identify Dr. Mowrey as an expert witness. Moreover, Dr. Mowrey

testifies that the documents referenced in the emails are not documents created by him, that he received, read and reviewed these emails solely in his capacity as a Respondent in this case, that he did not read, consider or review these emails after having been designated as an expert witness, and that he did not read, consider, review or rely upon these emails in his capacity as an expert witness, or in connection with forming his expert opinion/report. Mowrey Supp. Dec. at ¶ 19.

13. Complaint Counsel seeks production of the following documents in addition to those identified above:

<sup>a</sup> Bates Nos. 135-141, 151-152, 184. These documents consist of the following emails: (i) Dr. Mowrey's counsel to Ms. Fobbs (copied to Dr. Mowrey) dated 11/01/04, (ii) Ms. Fobbs to Dr. Mowrey's counsel dated 11/01/04, (iii) Dr. Mowrey's counsel to Ms. Fobbs dated 11/01/04, (iv) Ms. Fobbs to Heather Sprink (with the Corporate Respondents' Compliance Department) dated 11/01/04, (v) Ms. Sprink to Dr. Mowrey dated 11/01/04, (vi) Ms. Sprink to Dr. Mowrey dated 11/03/04, (vii) Ms. Fobbs to Ms. Sprink dated 11/11/04, (viii) Ms. Sprink to Dr. Mowrey dated 11/11/04, and (ix) Ms. Sprink to Dr. Mowrey dated 12/03/04. These emails all relate to a request by Dr. Mowrey's counsel for copies of certain documents. Specifically, the emails concern a request for assistance in locating materials previously published by Dr. Mowrey (all of which are identified on Dr. Mowrey's CV). Other than identifying the documents requested by Dr. Mowrey's counsel, these emails contain no substantive information concerning the requested materials. Price Supp. Dec. at ¶ 20. Furthermore, in his Order Governing Expert

Discovery, this Court expressly ruled that experts did not have to produce their prior publications. Moreover, Dr. Mowrey testifies that he received, read and reviewed these emails solely in his capacity as a Respondent in this case, and that he did not read, consider, review or rely upon these emails in his capacity as an expert witness, or in connection with forming his expert opinion/report. Mowrey Supp. Dec. at ¶ 20.

b. Rules Nos. 165, 168. These documents consist of the following: (i) Document Bates No. 165 is an email from Dr. Mowrey's counsel to Dr. Mowrey dated 22 November 2004; and (ii) Document Bates No. 168 is an email string consisting of the following email: (1) Dr. Mowrey's counsel to Ms. Fobbs and Mr. Watson (copied to the Corporate Respondents' counsel Mr. Feldman & Mr. Nagin, Mr. Gay's counsel Mr. Burbridge & Mr. Shelby, and Respondents Dr. Mowrey & Friedlander), dated 22 November 2004, and (2) Dr. Mowrey to his counsel, dated 22 November 2004. During this time frame, Respondents and their counsel were engaged in discussions concerning the possibility of deposing certain fact witnesses. These documents relate solely to those discussions, and are unrelated to Dr. Mowrey's capacity as an expert witness.

With respect to Document Bates No. 165, and with respect to the 22 November 2004 email from Dr. Mowrey to his counsel which is part of Document Bates No. 168, Dr. Mowrey acknowledges that those two emails refer to the "Colker/Kalman paper." However, the emails related to Respondents' discussions concerning the topic of the possibility of deposing Dr. Colker and Mr. Kalman.

They were unrelated to Dr. Mowrey's expert report/opinion, and the emails contain absolutely no substantive information concern the Colker/Kalman paper, or concerning Dr. Colker and Mr. Kalman. Furthermore, as Complaint Counsel are aware, the "Colker/Kalman paper" referenced in these two emails has been produced to Complaint Counsel on at least two (2) separate occasions. Price Supp. Dec. at ¶ 21.

With respect to the 22 November 2004 email from Dr. Mowrey's counsel to Ms. Fobbs and Mr. Watson (copied to the Corporate Respondents' counsel, Mr. Gay's counsel, and Respondents Dr. Mowrey & Friedlander) which is part of Document Bates No. 168, that document relates solely to Respondents' litigation strategy and potential discovery to undertake. Price Supp. Dec. at ¶ 22. Moreover, Dr. Mowrey testifies that he received, read and reviewed these documents solely in his capacity as a Respondent in this case, and that he did not read, consider, review or rely upon these documents in his capacity as an expert witness, or in connection with forming his expert opinion/report. Mowrey Supp. Dec. at ¶ 21.

**B. FACTS RELATING TO COMPLAINT COUNSEL'S AND THEIR EXPERT'S VIOLATION OF THE COURT'S ORDERS**

In considering Complaint Counsel's request for sanctions, this Court should be mindful of Complaint Counsel's and their expert's own multiple violations of their discovery obligations and this Court orders, and should bear in mind the remedies thus far allowed in these

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**EXHIBIT 4**



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Bureau of Consumer Protection  
Division of Enforcement

Joshua S. Millard  
Attorney

Direct Dial:  
(202) 326-2454

December 1, 2004

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Nagin, Gallop &  
Figueredo, P.A.  
3225 Aviation Ave. 3<sup>rd</sup> Fl.  
Miami, FL 33133-4741

VIA ELECTRONIC MAIL AND US MAIL

Re: *Basic Research et al.*, Docket No. 9318

Dear Mr. Feldman:

This letter will confirm our conversation of November 29, 2004, which included my colleague Laureen Kapin, in which you represented that all Respondents are withdrawing their designation of Edward Popper as a testifying expert witness in this matter.

As you will recall, the *Expert Report* of Mr. Popper was due on November 29<sup>th</sup>. You represented that Complaint Counsel would not receive any *Report* written by Mr. Popper because Respondents have withdrawn their designation of Mr. Popper as a testifying expert witness. We confirm that we have received no *Expert Report* written by Mr. Popper.

If you have any questions concerning this letter, please contact me at the number listed above.

Sincerely,

Joshua S. Millard  
Attorney, Division of Enforcement

cc: Mitchell K. Friedlander, *pro se*  
5742 West Harold Gatty Dr.  
Salt Lake City, UT 84116

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**EXHIBIT 5**

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

*In the Matter of*

BASIC RESEARCH, L.L.C.,  
A.G. WATERHOUSE, L.L.C.,  
KLEIN-BECKER USA, L.L.C.,  
NUTRASPORT, L.L.C.,  
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,  
d/b/a BASIC RESEARCH, L.L.C.,  
OLD BASIC RESEARCH, L.L.C.,  
BASIC RESEARCH, A.G. WATERHOUSE,  
BAN, L.L.C.,  
d/b/a 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**

**RESPONDENTS' FINAL WITNESS LIST**

Pursuant to the August 11, 2004 *Scheduling Order*, Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, Daniel B. Mowrey, Ph.D and Mitchell K. Friedlander (collectively "Respondents") hereby submit their Final Witness List of individuals who may be called upon to testify, by deposition or live testimony, at trial. Respondents reserve the right: (1) not to call any of the persons listed herein to testify at the hearing, as circumstances may warrant; (2) to call as a witness any person identified as a witness by Complaint Counsel, all of whom are hereby designated for that purpose; (3) to supplement or amend this witness list to add any individual for the purpose of establishing the authenticity or admissibility of documents; (4) to call any witness



by deposition only pursuant to the terms of the Scheduling Order; (5) to call any witness to testify on any subject addressed in deposition; and (6) to supplement or amend this witness list to ~~add rebuttal witnesses or any other witnesses permitted by the Commission's Rules of Practice or~~ the terms of the *Scheduling Order*.

#### **PERSONS AFFILIATED WITH RESPONDENTS**

1. Dennis W. Gay. Mr. Gay may be called to testify about, without limitation, the history, structure and operations of the Corporate Respondents, the relationship between the Corporate Respondents and certain individuals, the challenged products, the advertising, marketing and promotion of the challenged products, a system established for substantiation, review, compliance, and approval of advertisements and communication materials, the role of certain individuals in connection with the challenged products, the investigation by the Federal Trade Commission ("FTC") and the impact of the investigation and proceedings.
2. Carla Fobbs. Ms. Fobbs may be called to testify about, without limitation, the operations of the Corporate Respondents, the challenged products, the advertising, marketing and promotion of the challenged products, the role of certain individuals in connection with the challenged products, compliance measures taken regarding the challenged products and the advertising thereof, returns of the challenged products, customer complaints, compliments and inquires made about the challenged products and the advertising thereof, document handling and retention, the investigation by the FTC and the impact of the investigation and proceedings.
3. Mitchell K. Friedlander. Mr. Friedlander may be called to testify about his role in or his knowledge about, without limitation, the challenged products, the role of certain individuals in connection with the challenged products, certain aspects of the advertising, marketing and promotion of the challenged products, the intended meanings of the challenged advertisements, the substantiation provided for the challenged advertisements, consumer response to the challenged products, the investigation by the FTC and the impact of the investigation and proceedings.
4. Michael Meade. Mr. Meade may be called to testify about, without limitation, the history, structure and operations of the Corporate Respondents, the relationship between the Corporate Respondents and certain individuals, the challenged products, the advertising, marketing and promotion of the challenged products, the role of certain individuals in connection with the challenged products, quality control of challenged products, formulation and manufacture of the challenged products and the active ingredients contained in the challenged products.
5. Jeffrey A. Davis. Mr. Davis may be called to testify about, without limitation, the

drafting and editing of print or other advertisements or promotional materials for the challenged products.

6. Gary L. Sandberg. Mr. Sandberg may be called to testify about, without limitation, the ~~placing of advertisements or promotional materials for the challenged products in certain~~ electronic media, such as television and radio.
7. Val Weight. Mr. Weight may be called to testify about, without limitation, the structure and operations of the Corporate Respondents, accounting practices and procedures of the Corporate Respondents, accounting practices and procedures relating to the sale of the challenged products, and gross revenue and profits made in connection with challenged products.
8. Don Atkinson. Mr. Atkinson may be called to testify about, without limitation, staffing of the Corporate Respondents and other logistics relating to the sales of the challenged products.
9. Gina Gay. Gina Gay may be called to testify about, without limitation, the marketing operations of the Corporate Respondents, the advertising, marketing and promotion of the challenged products, and the role of certain individuals in connection with the marketing of the challenged products.
10. Bodey Gay. Bodey Gay may be called to testify about, without limitation, the marketing operations of the Corporate Respondents, the advertising, marketing and promotion of the challenged products, and the role of certain individuals in connection with the marketing of the challenged products.
11. George Evan Bybee. Mr. Bybee may be called to testify about, without limitation, the negotiation of a license for Dicoman-5/Pediatropin with Schimizu Corporation.
12. Majestic Media. A representative of Majestic Media may be called to testify about, without limitation, the development of advertising for the challenged products and their placement in various media.
13. Nathalie Chevreau, Ph.D. Dr. Chevreau may be called to testify about, without limitation, the composition, nature and properties of the challenged products, substantiation for the challenged products, scientific studies referred to in the challenged advertisements, certain text appearing in the challenged advertisements, and research and development conducted by the Corporate Respondents and others relating to the challenged products.
14. Daniel B. Mowrey, Ph.D. Dr. Mowrey may be called to testify about, without limitation, the composition, nature and properties of the challenged products, substantiation for the challenged products, scientific studies referred to in the challenged advertisements, certain text appearing in the challenged advertisements, and research and development conducted by the Corporate Respondents and others relating to the challenged products.

**OTHER WITNESSES**

1. Lawrence M. Solan, Ph.D. Dr. Solan may be called to testify about, without limitation, the meanings of certain terms Complaint Counsel contends are implied by the challenged advertising.

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2. Paul Lehman. Mr. Lehman may be may be called to testify about, without limitation, certain studies, including cadaver studies, performed in connection with the challenged topical gel products.
3. DermTech Int. A representative of DermTech Int. may be may be called to testify about, without limitation, certain studies, including cadaver studies, performed in connection with the challenged topical gel products.
4. Ken Shirley. Mr. Shirley may be called to testify about, without limitation, the formulation, function and/or performance of one or more of the challenged topical gel products.
5. BPI Labs. A representative of BPI Labs may be called to testify about, without limitation, the formulation, function and/or performance of one or more of the challenged topical gel products.
6. Dr. Bruce Fromme. Dr. Fromme may be called to testify about, without limitation, the acquisition of certain rights relating to the challenged products.
7. Dr. Frank Greenway. Dr. Greenway may be called to testify about, without limitation, certain clinical studies conducted in connection with the challenged topical gel products.
8. Edward Popper. Mr. Popper may be called to testify about, without limitation, certain consumer surveys conducted in connection with the challenged product Dermalin.
9. C. Livieri. Dr. Livieri may be called to testify about, without limitation, certain clinical studies conducted in connection with the challenged product PediaLean.
10. Respondents reserved the right to call as a witness at trial any individuals involved in the evaluation and/or regulation of the products identified in the Complaint, including but not limited to, the U.S. Food and Drug Administration and the National Institute of Health.

**PERSONS AFFILIATED WITH COMPLAINT COUNSEL**

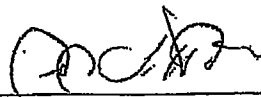
1. Steven Heymsfield, M.D. Steven Heymsfield may be called to testify about, without limitation, the challenged products Leptoprin, Anorex and PediaLean, the substantiation supporting the representations allegedly made about these products in the challenged advertisements and the appropriate standards for efficacy and safety claims made in advertisements for dietary supplements and/or weight control products (this designation

is being made subject to, and without waiver of, Respondents' pending motion to strike or otherwise limit testimony).

2. Robert H. Eckel, M.D. Robert Eckel may be called to testify about, without limitation, the challenged topical gel products Dermalin, Tummy Flattening Gel and Cutting Gel, the substantiation supporting the representations allegedly made about these products in the challenged advertisements and the appropriate standards for efficacy and safety claims made in advertisements for dietary supplements and/or weight control products. Robert Eckel may also comment on the opinions of Dr. Daniel Mowrey (this designation is being made subject to, and without waiver of, Respondents' pending motion to strike or otherwise limit testimony).
3. Michael B. Mazis, Ph.D. Michael Mazis may be called to testify about, without limitation, the alleged facial meanings of the challenged advertisements and the standards used to interpret advertisements (this designation is being made subject to, and without waiver of, Respondents' pending motion to strike or otherwise limit testimony).
4. Geoffrey D. Nunberg, Ph.D. Geoffrey Nunberg may be called to testify about, without limitation, whether the language used in the advertisements and promotional materials for the product PediaLean supports Complaint Counsel's allegations relating to the meanings of the challenged advertisements and the standards used to interpret advertisements (this designation is being made subject to, and without waiver of, Respondents' pending motion to strike or otherwise limit testimony).
5. Timothy J. Muris. Mr. Muris may be called to testify about, without limitation, testimony provided regarding the "reasonable basis" and "competent and reliable evidence" standards and the standards used to interpret advertisements.
6. Richard Cleland. Mr. Cleland may be called to testify about, without limitation, the "reasonable basis" and "competent and reliable" evidence standard, comments made at the Utah Natural Products Association seminar, and the standards used to interpret advertisements.
7. Respondents reserve the right to call as a witness at trial any individual currently or formerly employed by the Federal Trade Commission concerning the investigation or prosecution of this administrative action, the "reasonable basis" and "competent and reliable" evidence standard, and the standards used to interpret advertisements, including, but not limited to, Walter Gross, Joshua S. Millard, Jonathan Cowen, Richard Cleland, Timothy J. Muris, Mozelle W. Thompson, Orson Swindle, Thomas B. Leary, Pamela Jones Harbour, Howard Beales, III, Denise Owens and Kevin Towers.
8. Respondents reserve the right to call as a witness at trial any individual not mentioned above who is (a) identified on any of Complaint Counsel's witness lists; (b) deposed during discovery or in the underlying investigation; or (c) called by Complaint Counsel to testify at trial.

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Respectfully submitted,



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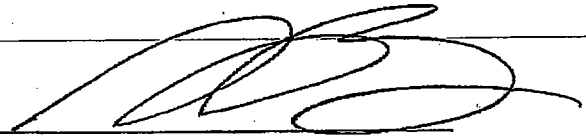
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**Attorneys for Respondents Basic  
Research, LLC, A.G. Waterhouse, LLC,  
Klein-Becker USA, LLC, Nutrasport,  
LLC, Söavage Dermalogic Laboratories,  
LLC and Ban, LLC**

DATED this 18<sup>th</sup> day of February, 2005.

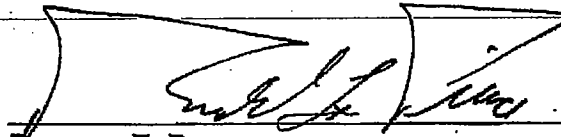
BURBIDGE & MITCHELL

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Richard D. Burbidge  
Attorneys for Respondent Dennis Gay

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**Telephone: (801) 414-1800**  
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**Pro Se Respondent**



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 18th day of February, 2005 as follows:

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(1) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of [lkapin@ftc.gov](mailto:lkapin@ftc.gov), [jmillard@ftc.gov](mailto:jmillard@ftc.gov); [rrichardson@ftc.gov](mailto:rrichardson@ftc.gov); [lschneider@ftc.gov](mailto:lschneider@ftc.gov) with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) Two (2) copies by Federal Express to Administrative Law Judge Stephen J. McGuire, Federal Trade Commission, Room H-104, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580;

(3) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(4) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(5) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(6) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, Pro Se.

  
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**EXHIBIT 6**

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C.

**In the Matter of**

**BASIC RESEARCH, LLC  
A.G. WATERHOUSE, LLC  
KLEIN-BECKER USA, LLC  
NUTRASPORT, LLC  
SOVAGE DERMALOGIC LABORATORIES, LLC  
BAN LLC  
DENNIS GAY  
DANIEL B. MOWREY  
MITCHELL K. FRIEDLANDER,**

**PUBLIC**

**Docket No. 9318**

**Respondents**

**RESPONDENTS' FINAL PROPOSED WITNESS LIST**

Pursuant to the August 4, 2005 Scheduling Order, Basic Research, LLC, A.G. Waterhouse, LLC; Klein-Becker USA, LLC; Nutrasport, LLC; Sovage Dermalogic Laboratories, LLC; Ban, LLC; Dennis Gay; Daniel B. Mowrey, Ph.D.; and Mitchell K. Friedlander (collectively "Respondents") hereby submit their Final Proposed Witness list of individuals who may be called upon to testify, by deposition or live testimony, at trial. Respondents reserve the right: (1) not to call any of the persons listed herein to testify at the hearing, as circumstances may warrant; (2) to call as a witness any person identified as a witness by Complaint Counsel, all of whom are hereby designated for that purpose; (3) to supplement or amend this witness list to add any individual for the purposes of establishing the authenticity or admissibility of documents; (4) to call any witness by deposition only pursuant to the terms of the Scheduling Order; (5) to call any witness to testify on any subject addressed in deposition; and (6) to supplement or amend this

witness list to add rebuttal witnesses or any other witness permitted by the Commission's Rules of Practice or the terms of the Scheduling Order.

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**I. CASE IN CHIEF**

**A. PERSONS AFFILIATED WITH RESPONDENTS**

1. Dennis W. Gay. Mr. Gay may be called to testify about, without limitation, the history, structure and operations of the Corporate Respondents, the relationship between the marketing and promotion of the challenged products, a system established for substantiation, review, compliance, and approval of advertisements and communication materials, the role of certain individuals in connection with the challenged products, the investigation by the FTC and the impact of the investigation and proceedings on the Corporate Respondents.
2. Carla Fobbs. Ms. Fobbs may be called to testify about, without limitation, the operations of the Corporate Respondents, the challenged products, the advertising, marketing and promotion of the challenged products, the role of certain individuals in connection with the challenged products, compliance measures taken regarding the challenged products and the advertising thereof, returns of the challenged products, customer complaints, compliments and inquiries made about the challenged products and the advertising thereof, document handling and retention, the investigation by the FTC and the impact of the investigation and proceedings on the Corporate Respondents.
3. Mitchell K. Friedlander. Mr. Friedlander may be called to testify about his role in or his knowledge about, without limitation, the challenged products, the role of certain individuals in connection with the challenged products, certain aspects of

the advertising, marketing, and promotion of the challenged products, the intended meanings of the challenged advertisements, the substantiation provided for the challenged advertisements, consumer response to the challenged products, the investigation by the FTC and the impact of the investigation and proceedings on the Corporate Respondents.

4. Michael Meade. Mr. Meade may be called to testify about, without limitation, the history, structure, and operations of the Corporate Respondents, the relationship between the Corporate Respondents and certain individuals, the challenged products, the advertising, marketing and promotion of the challenged products, the role of certain individuals in connection with the challenged products, quality control of challenged products, formulation and manufacture of the challenged products, and the active ingredients contained in the challenged products.
5. Jeffrey A. Davis. Mr. Davis may be called to testify about, without limitation, the drafting and editing of print or other advertisements or promotional materials for the challenged products.
6. Gary L. Sandberg. Mr. Sandberg may be called to testify about, without limitation, the placing of advertisements or promotional materials of the challenged products in certain electronic media, such as television and radio.
7. Val Weight. Mr. Weight may be called to testify about, without limitation, the structure and operations of the Corporate Respondents, accounting practices and procedures of the Corporate Respondents, accounting procedures to the sale of the challenged products, and gross revenue and profits made in connection with challenged products.

8. Don Atkinson. Mr. Atkinson may be called to testify about, without limitation, staffing of the Corporate Respondents and other logistics relating to the sales of the challenged products.
9. Gina Gay. Ms. Gay may be called to testify about, without limitation, the marketing operations of the Corporate Respondents, the advertising, marketing and promotion of the challenged products, and the role of certain individuals in connection with the marketing of the challenged products.
10. Bodee Gay. Mr. Gay may be called to testify about, without limitation, the marketing operations of the Corporate Respondents, the advertising, marketing, and promotion of the challenged products, and the role of certain individuals in connection with the marketing of the challenged products.
11. George Evan Bybee. Mr. Bybee may be called to testify about, without limitation, the negotiation of a license for Dicoman-5/ediatricin with Schimizu Corporation.
12. Majestic Media. A representative of Majestic Media may be called to testify about, without limitation, the development of advertising for the challenged products and their placement in various media.
13. Nathalie Chevreau, Ph.D. Dr. Chevreau may be called to testify about, without limitation, the composition, nature and properties of the challenged products, substantiation for the challenged products, scientific studies referred to in the challenged advertisements, certain text appearing in the challenged advertisements, the development of the PediaLean website, and research and development conducted by the Corporate Respondents and others relating to the

challenged products.

14. Daniel B. Mowrey, Ph.D. Dr. Mowrey may be called to testify about, without

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limitation, the composition, nature, and properties of the challenged products, substantiation for the challenged products, scientific studies referred to in the challenged advertisements, certain text appearing in the challenged advertisements, the development of the PediaLean website, the expert report and opinion that he has provided and research and development conducted by the Corporate Respondents and other relating to the challenged products.

**B. OTHER WITNESSES**

1. Lawrence M. Solan, Ph.D. Dr. Solan may be called to testify about, without

limitation, the meanings of certain terms Complaint Counsel contends are implied by the challenged advertising.

2. Paul Lehman. Mr. Lehman may be called to testify about, without limitation, certain studies, including cadaver studies, performed in connection with the challenged topical gel products.

3. DermTech Int. A representative of DermTech Int. may be called to testify about, without limitation, certain studies, including cadaver studies, performed in connection with the challenged topical gel products.

4. Ken Shirley. Mr. Shirley may be called to testify about, without limitation, the formulation, function and/or performance of one or more of the challenged topical gel products.

5. BPI Labs. A representative of BPI Labs may be called to testify about, without limitation, the formulation, function and/or performance of one or more of the

challenged topical gel products.

6. Dr. Bruce Fromme. Dr. Fromme may be called to testify about, without

limitation, the acquisition of certain rights relating to the challenged products.

7. Dr. Frank Greenway. Dr. Greenway may be called to testify about, without

limitation, certain clinical studies conducted in connection with the challenged topical gel products.

8. Edward Pöpper. Mr. Poppper may be called to testify about, without limitation,

certain consumer surveys conducted in connection with the challenged product Dermalin.

9. C. Livieri. Dr. Livieri may be called to testify about, without limitation, certain

clinical studies conducted in connection with the challenged product PediaLean.

10. Respondents reserve the right to call as a witness at trial any individuals involved

in the evaluation and/or regulation of the products identified in the Complaint, including but not limited to, the U.S. Food and Drug Administration and the National Institutes of Health.

#### **C. PERSONS AFFILIATED WITH COMPLAINT COUNSEL**

Respondents hereby identify persons affiliated with Complaint Counsel that Respondents may examine as witnesses at hearing. By identifying those witnesses below, Respondents have not waived any right to object to the qualifications of each witness should they be offered as an expert by Complaint Counsel, to object to the scope of the witness' testimony as beyond their area of expertise and limit it, accordingly, to impeach or otherwise rebut the testimony of those witnesses.

1. Steven Heymsfield, M.D. Dr. Heymsfield may be called to testify about, without



limitation, the challenged products Leptoprin, Anorex, PediaLean, the substantiation supporting the representations allegedly made about those products

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in the challenged advertisements and the appropriate standards for efficacy and safety claims made in advertisements for dietary supplements and/or weight control products.

2. Robert H. Eckel, M.D. Dr. Eckel may be called to testify about, without limitation, the challenged topical gel products Dermalin, Tummy Flattening Gel and Cutting Gel, the substantiation supporting the representations allegedly made about those products in the challenged advertisements and the appropriate standards for efficacy and safety claims made in advertisements for dietary supplements and/or weight control products.
3. Michael B. Mazis, Ph.D. Dr. Mazis may be called to testify about, without limitation, facial meaning, the challenged advertisements, and the appropriate standards used to interpret advertisements.
4. Geoffrey D. Nunberg, Ph.D. Dr. Nunberg may be called to testify about, without limitation, whether the language used in the advertisements and promotional materials for the product PediaLean supports Complaint Counsel's allegations relating to the meanings of the challenged advertisements and the standards used to interpret advertisements.
5. Timothy J. Muris. Mr. Muris may be called to testify about, without limitation, testimony provided regarding the "reasonable basis" and "competent and reliable evidence" standards and the standards used to interpret advertisements.
6. Richard Cleland. Mr. Cleland may be called to testify about, without limitation,

the “reasonable basis” and “competent and reliable evidence” standards, comments made at the Utah Natural Products Association Seminar, and the standards used to interpret advertisements.

7. Respondents reserve the right to call as a witness at trial any individual currently or formerly employed by the FTC concerning the investigation or prosecution of this administrative action, the “reasonable basis” and “competent and reliable evidence” standard, and the standards used to interpret advertisements, including, but not limited to, Walter Gross, Joshua S. Millard, Jonathan Cowen, Richard Cleland, Timothy Muris, Mozelle W. Thompson, Orson Swindle, Thomas B. Leary, Pamela Jones Harbour, Howard Beales, III, Denise Owens, and Kevin Towers.
8. Respondents reserve the right to call as a witness at trial any individual not mentioned above who is (a) identified on any of Complaint Counsel’s witness lists; (b) deposed during discovery or in the underlying investigation; or (c) called by Complaint Counsel to testify at trial.

## II. REBUTTAL WITNESSES

Respondents hereby identify the following individuals that Respondents may choose to call as rebuttal witnesses in response to Complaint Counsel’s witnesses’ testimony. The individuals listed below are not a part of Respondents’ case in chief. Respondents anticipate calling them should the Complaint Counsel’s experts’ testimony mirror that of their deposition testimony. Rebuttal expert witnesses are essential for the Respondents to present their defense. E.g., Secretary of Labor v. DeSisto, 929 F.2d 789, 796 (1st Cir. 1991)(the court’s witness limitation constituted an abuse of discretion in that

it prevented parties from presenting sufficient evidence on which to base a reliable judgment)(citing Martin v. Weaver, 666 F.2d 1013, 1020 (6th Cir. 1981)(abuse of discretion to exclude rebuttal witness), cert. denied, 456 U.S. 962, 102 S.Ct. 2038, 72 L.Ed.2d 485 (1982)(citations omitted)); Murphy v. Magnolia Electric Power Association, 639 F.2d 232, 235 (5th Cir. 1981)(citing DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1192, 1201-02 (3d Cir. 1978)(error to exclude critical expert testimony when no prejudice to opposing party evident)(citations omitted)).

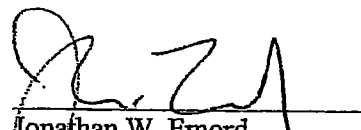
1. Stephen C. Alder, Ph.D. Dr. Alder may be called to testify, without limitation, on the analysis of statistics in the testimony of Complaint Counsel's witness Dr. Stephen Heymsfield in his assessment of the scientific evidence relating to the efficacy of PediaLean, Leptoprin, and Anorex.
2. Arne Astrup, M.D. Dr. Astrup may be called to testify, without limitation, on the scientific analysis in the testimony of Dr. Stephen Heymsfield relating to the efficacy of PediaLean, Leptoprin, and Anorex.
3. Michael John Glade, Ph.D. Dr. Glade may be called to testify, without limitation, on the scientific analysis in the testimony of Dr. Stephen Heymsfield relating to the efficacy of PediaLean, Leptoprin and Anorex.
4. Xiaoying Hui, M.D., M.S. Dr. Hui may be called to testify, without limitation, on the testimony of Dr. Robert Eckel relating to scientific evidence concerning the penetration and effect of aminophyllin in the Tummy Flattening Gel, Cutting Gel and Dermalin products.
5. Howard I. Maibach, M.D. Dr. Maibach may be called to testify, without limitation, on the testimony of Dr. Robert Eckel relating to scientific evidence

concerning the penetration and effect of aminophyllin in the Tummy Flattening Gel, Cutting Gel and Dermalin products.

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6. Stephen M. Nowlis, Ph.D. Dr. Nowlis may be called to testify, without limitation, on the testimony of Dr. Michael Mazis concerning consumer perception of advertising and statements in advertising.
7. Ronald C. Wester, Ph.D. Dr. Wester may be called to testify, without limitation, on the testimony of Dr. Robert Eckel relating to scientific evidence concerning the penetration and effect of aminophyllin in the Tummy Flattening Gel, Cutting Gel and Dermalin products.
8. William Wilke, Ph.D. Dr. Wilke may be called to testify, without limitation, on the testimony of Dr. Michael Mazis concerning consumer perception of advertising and statements in advertising.

Respectfully submitted,



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Counsel for Basic Research,  
LLC, A.G. Waterhouse, LLC,  
Klein-Becker USA, LLC,  
Nutrasport, LLC, Sovage  
Dermalogic Laboratories,  
LLC, and Ban, LLC

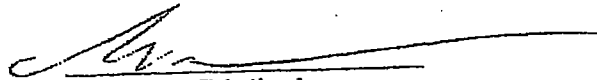
Dated: November 8, 2005

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Dated this 7<sup>th</sup> day of November, 2005

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Respectfully submitted,



Mitchell K. Friedlander  
5742 West Harold Gatty Drive  
Salt Lake City, Utah 84111  
Mkf555@msn.com

*Pro Se*

Dated this 8 day of November, 2005.

Respectfully Submitted,



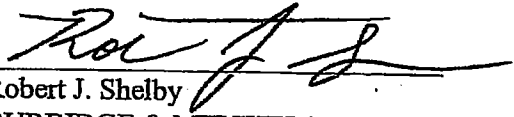
Ronald F. Price  
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Attorneys for Respondent Daniel B. Mowrey

DATED this 8<sup>th</sup> day of November, 2005.

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BURBIDGE & MITCHELL



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Attorneys for Respondent Dennis Gay



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of November, 2005 I caused the Respondents'

Final Proposed Witness List to be filed and served as follows:

1) two paper copies delivered by hand delivery to:

The Hon. Stephen J. McGuire  
Chief Administrative Law Judge  
U.S. Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-112  
Washington, D.C. 20580

2) one paper copy by hand delivery and one electronic copy in PDF format by  
electronic mail to:

Laureen Kapin

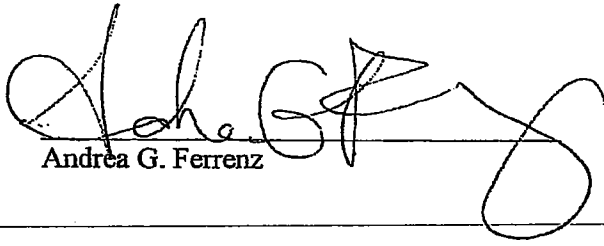
Joshua S. Millard  
Laura Schneider  
Walter C. Gross III  
Lemuel W. Dowdy  
Edwin Rodriguez  
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Ronald F. Price  
Peters Scofield Price  
340 Broadway Center  
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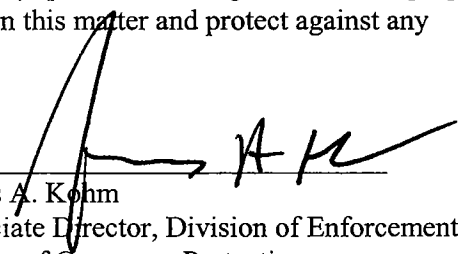
Mitchell K. Friedlander  
c/o Compliance Department  
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Salt Lake City, UT 84116  
Email: mkf555@msn.com

  
Andrea G. Ferrenz

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**CERTIFICATION OF REVIEWING OFFICIAL**

I certify that I have reviewed the attached public filing, *COMPLAINT COUNSEL'S OBJECTIONS TO RESPONDENTS' LATE DISCLOSURE OF EIGHT WITNESSES AND ADDITIONAL PURPORTED SUBSTANTIATION AND MOTION TO STRIKE AND EXCLUDE SUCH TESTIMONY AND EVIDENCE (Substituted Version)*, prior to its filing to ensure the proper use and redaction of materials subject to the *Protective Order* in this matter and protect against any violation of that *Order* or applicable RULE OF PRACTICE.



\_\_\_\_\_  
James A. Kohn  
Associate Director, Division of Enforcement  
Bureau of Consumer Protection

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of December, 2005, I caused *COMPLAINT COUNSEL'S OBJECTIONS TO RESPONDENTS' LATE DISCLOSURE OF EIGHT WITNESSES AND ADDITIONAL PURPORTED SUBSTANTIATION AND MOTION TO STRIKE AND EXCLUDE SUCH TESTIMONY AND EVIDENCE (Substituted Version)* to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery, and one electronic copy to:

**Donald S. Clark, Secretary**  
Federal Trade Commission  
600 Penn. Ave., N.W., Room H-135  
Washington, D.C. 20580

- (2) two (2) paper copies served by hand delivery to:  
**The Honorable Stephen J. McGuire**  
Administrative Law Judge  
600 Penn. Ave., N.W., Room H-104  
Washington, D.C. 20580

- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to:

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(305) 854-5351 (fax)  
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[jemord@emord.com](mailto:jemord@emord.com)  
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LLC, Basic Research, LLC,  
Nutrasport, LLC, Sovage  
Dermalogic Laboratories,  
LLC, and BAN, LLC**

  
**COMPLAINT COUNSEL**