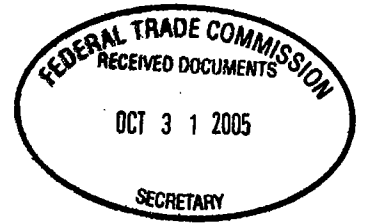


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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In the Matter of	:	
	:	
BASIC RESEARCH, L.L.C., et al.,	:	DOCKET NO. 9318
	:	
Respondents.	:	Public Document
	:	

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**RESPONDENTS DANIEL B. MOWREY'S AND DENNIS GAY'S JOINDER IN  
RESPONDENTS' MOTION TO EXCLUDE A WITNESS AND FOR SANCTIONS, AND  
CORRECTION OF COMPLAINT COUNSEL'S FALSE STATEMENTS**

Respondents Daniel B. Mowrey, Ph.D. and Dennis Gay (sometimes hereinafter collectively referred to as "these Respondents") hereby submit notice of their joinder in *Respondents' Motion to Exclude a Witness and for Sanctions or, in the Alternative, for Sanctions and for Leave to Reopen Discovery for a Limited Purpose* (the "Motion for Sanctions"). These Respondents hereby adopt as if set forth herein the arguments and requested relief set forth in the Motion for Sanctions.<sup>1</sup> These Respondents also submit the additional arguments below in support of the Motion for Sanctions.

**ADDITIONAL ARGUMENTS SUPPORTING, AND CORRECTION OF COMPLAINT  
COUNSELS' FALSE STATEMENTS CONCERNING, THE MOTION FOR  
SANCTIONS**

In their Opp. Mem., Complaint Counsel make numerous false and misleading assertions. While vigorous advocacy is understandable and is to be commended, some of Complaint Counsels' assertions are shocking for their patent falsity. Accordingly, in order to provide the Court with a complete and accurate record, and in addition to the arguments set forth in the

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<sup>1</sup> Respondents Mitchell K. Friedlander will be filing his own separate joinder.

Motion for Sanctions which are incorporated herein, these Respondents respectfully submit the following additional arguments in support of the Motion for Sanctions.<sup>2</sup>

**I. COMPLAINT COUNSELS' ASSERTIONS THAT DR. MOWREY DID NOT DISCLOSE, AND THAT COMPLAINT COUNSEL DID NOT LEARN OF, DR. MOWREY'S PUBLISHED STUDY UNTIL AFTER THE CLOSE OF DISCOVERY ARE PATENTLY FALSE**

In their Opp. Mem., Complaint Counsel make the following argument:

Respondents have criticized Dr. Heymsfield's CV for what they characterize as an unexplained omission that allegedly prejudiced them. In weighing these assertions, it is appropriate to note that, in expert discovery, Respondents produced a CV for their proposed expert witness, Respondent Mowrey, that omitted the only study published in a medical journal that we know to be attributed to him, even though Respondents (Mowrey, at the very least) knew that it existed. See Ex. B to Compl. Counsel's Opp'n to Mot. to Add Expert Witness (Mowrey CV disclosed in October 2004, which failed to identify publication, followed by study citation). We learned of Dr. Mowrey's omission of this study only *after* the close of written discovery. Despite this clear (and still unexplained) omission by a named Respondent, Complaint Counsel declined to press for sanctions, because there was no prejudice—we learned of the previously-undisclosed publication and then had an opportunity to depose the witness. See *infra* Section V (discussing Respondents' deposition of Dr. Heymsfield and failure to establish prejudice).

Opp. Mem. at 4, n. 4 (emphasis in original). Complaint Counsel repeat this argument at least three (3) other times in their opposition memorandum. *See id.* at 14, 16-17, 28. Complaint Counsels' assertions that Dr. Mowrey did not disclose, and that they learned of Dr. Mowrey's publication "only *after* the close of written discovery[.]" are patently false. The true facts are set forth below.

1. On 13 October 2004, respondents decided, for the first time, to identify Dr. Mowrey as a potential expert witness. Later that day respondents served their expert witness list

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<sup>2</sup> These Respondents will not burden the Court with responding to all of Complaint Counsel's questionable assertions, but will address herein the most egregious of the false assertions contained in Complaint Counsels' Opp. Mem.

wherein respondents identified Dr. Mowrey as an expert witness. In conjunction therewith, respondents provided Complaint Counsel with a copy of Dr. Mowrey's CV, a CV which, as Complaint Counsel have noted and these Respondents acknowledge, did not list Dr. Mowrey's published study.<sup>3</sup>

2. However, just one week later, on 20 October 2004, respondents produced to Complaint Counsel an updated CV for Dr. Mowrey, which CV expressly identified Dr. Mowrey's published study. Specifically, on 20 October 2004, respondents served and filed their *Supplement to Respondents' Expert Witness List Including Transcribed Testimony* ("Supp. Expert Witness List"). In that document, respondents expressly state that they are providing a copy of Dr. Mowrey's updated CV (*see, e.g.*, Supp. Expert Witness List at 2), a copy of which updated CV was in fact provided along with the Supp. Expert Witness List.<sup>4</sup>

3. Dr. Mowrey's updated CV, which was provided to Complaint Counsel on 20 October 2004, discloses the existence of the following study: Mowrey, D.B. & Clayson, D.E. "Motion Sickness, Ginger and Psychophysics." *The Lancet*, March 20, 1982, 655-657. *See, e.g.*, Dr. Mowrey's CV (Exhibit A hereto) at 2.

4. Thus, while maintaining throughout their Opp. Mem. that Dr. Mowrey did not disclose his published study, and that they learned of Dr. Mowrey's published study only after the

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<sup>3</sup> Because Respondents decided only that day to identify Dr. Mowrey as a potential expert witness, Dr. Mowrey had not updated his CV, and Complaint Counsel were provided on 13 October 2004 with a copy of Dr. Mowrey's then existing CV, a CV which had not been prepared with an eye towards expert disclosure.

<sup>4</sup> A copy of Respondents' Supp. Expert Witness List, together Dr. Mowrey's updated CV which was submitted with the Supp. Expert Witness List, is attached hereto as Exhibit A. Because the other documents which were attached to the Supp. Expert Witness List are not relevant to this particular issue, they are not submitted herewith.

close of discovery, Complaint Counsel fail to disclose that they in fact received Dr. Mowrey's updated CV on 20 October 2005 -- *before* the close of discovery. Complaint Counsels' assertions that Dr. Mowrey did not disclose his published study, and that they learned of Dr. Mowrey's published "only *after* the close of written discovery[,]" are patently false.

**II. COMPLAINT COUNSELS' ASSERTION THAT RESPONDENTS PROVIDED NO PRIOR NOTICE THAT THEY NEEDED MORE THAN ONE DAY IN WHICH TO DEPOSE DR. HEYMSFIELD IS PATENTLY FALSE**

Complaint Counsel note in their Opp. Mem. that respondents took Dr. Heymsfield's deposition on 11 January 2005. Complaint Counsel go on to assert that at the end of that day, they "agreed to continue the deposition for four hours on another day, *even though Respondents provided no prior notice that they intended to take more than one day of testimony.*" Opp. Mem. at 5 (emphasis added). The emphasized portion of Complaint Counsels' argument is false. Contrary to Complaint Counsels' assertion, respondents had, on several occasions prior to 11 January 2005, expressly informed Complaint Counsel that respondents would need more than a single eight hour day to depose Dr. Heymsfield. Furthermore, respondents had, prior to 11 January 2005, specifically asked Complaint Counsel to verify with Dr. Heymsfield that he would be available for his deposition to continue late into the evening on 11 January 2005, and possibly to be continued on 12 January 2005. Despite those requests for assurances, Complaint Counsel simply refused to timely communicate with Dr. Heymsfield on this topic. The following discussion which occurred on the record at approximately 7:00 pm, during a deposition which Complaint Counsel took on 6 January 2005 (and which began at approximately 9:00 am and concluded at approximately 8:20 pm), demonstrates the abject falsity of Complaint Counsels'

assertion that “Respondents provided no prior notice that they intended to take more than one day of testimony.”

THE WITNESS: On the record, I’m willing to stay as long as it takes -- I don’t want to come back -- as long as you’re willing to afford us the same opportunity with Dr. Heymsfield.

MR. FELDMAN: Which we still despite repeated requests have not gotten any assurance on.

MS. SCHNEIDER: We said we were going to be as flexible as possible.

MR. FELDMAN: Again, as possible means nothing.

MS. SCHNEIDER: And we will talk to Dr. Heymsfield.

MR. FELDMAN: . . . But let’s go back and remind the court and the record that *yesterday<sup>5</sup> I had a conversation which was not the first time about Dr. Heymsfield*

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<sup>5</sup> During the deposition of Carla Fobbs which Complaint Counsel took on 5 January 2005, the following discussion occurred concerning the length of Dr. Heymsfield’s deposition:

MR. FELDMAN: Okay. Understand this. I’ll talk to Carla about the -- you know, about the courtesy, but we’ve got Dr. Heymsfield’s deposition, and I expect Dr. Heymsfield to remain until he’s done, right, because we have one, two, three, four parties that need to depose Dr. Heymsfield, and I can’t have him leaving just because we hit the end of the day. You know, I need to know from you that you’ll extend that courtesy to us if we --

MS. KAPIN: As far as it’s in my control, I will absolutely extend you that courtesy.

MR. FELDMAN: He’s got to understand that he’s got remain. So I don’t want to hear about how busy Dr. Heymsfield is. If we’re going to operate on a set of rules where each side is going to have the right to complete its inquiry, your witness is going to have to stay. Now, that’s what you’re requesting of us, and we’re requesting the same of you. *You’ve requested two days of Dan Mowrey because you fear that you’re not going to have enough time with him. I would ask that you make whatever arrangements you need with Dr. Heymsfield to make sure that he clears his schedule that we can complete his deposition.*

MS. KAPIN: I will agree to make it clear to Dr. Heymsfield -- if you pronounce his name, you’ll make much better friends with him -- Dr. Heymsfield that he needs be available so you can complete your deposition that day.

MR. FELDMAN: That will likely mean more than 5:00 o’clock. I’m just telling you right now. Okay?

MS. KAPIN: Do you want to start earlier? Are you starting him at 10:00?

MR. PRICE: No. He’s set for 9:00.

MS. KAPIN: He’s set for 9:00?

MR. FELDMAN: Right. You know, so Ron Price has questions on behalf of Dr. Mowrey, and Mr. Shelby has questions on behalf of Mr. Gay. I have questions on behalf of the corporate respondent, and Mr. Friedlander has questions.

(continued...)

**availability, and I would ask now -- at least over the last two days -- for assurance that Dr. Heymsfield would make himself available and *be available for as long as we need him next week* because there are one, two, three, four people that need to question him.**

I asked Ms. Kapin to call Dr Heymsfield -- I asked this yesterday -- to determine whether or not he would be available and would be able to stay late if necessary. I have not gotten anything back.

Have you spoken with him, Ms. Kapin, with the doctor? Did you make the call as you said you would?

MS. KAPIN: What I said, Jeff, is that I would talk with him. I have not had the opportunity to do that. I will do that.<sup>[6]</sup>

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<sup>5</sup> (...continued)

MS. KAPIN: I hear you. I will speak to him, and I will ask him to make himself available so that you all can ask your questions.

Deposition of Carla Fobbs, 01/05/05 at 209:18-211:8 (emphasis added). The referenced pages from Ms. Fobbs' deposition are attached hereto as Exhibit B.

<sup>6</sup> During Dr. Heysmsfield's deposition, Dr. Heysmfield reluctantly testified that it was not until the day before his deposition that Complaint Counsel first asked him about staying late to complete his deposition.

Q. Dr. Heymsfield, did anybody from Complaint Counsel's office discuss with you prior to yesterday the length of time this deposition may take and your availability?

A. I think when I scheduled this I made it clear that I was very busy and that I had - - today was the only day I had to do this.

Q. Did anybody from Complaint Counsel's office discuss with you during the last week the length of this deposition and your availability for deposition?

A. I think if anything I've been the one who has raised the issue about how much time I had to spend on this.

Q. When did you raise that issue with Complaint Counsel?

A. I think when we scheduled this originally I said that I had one day, and that was it.

Q. So prior to yesterday would it be fair to say that between the time this deposition was scheduled and yesterday you and Complaint Counsel did not further discuss your availability for the deposition?

MS. RICHARDSON: Objection, asked and answered. Objection, relevance. If you're concerned about finishing this deposition today, I suggest you pose a question to this witness other than timing.

Q. You can go ahead and answer the question.

(continued...)

Deposition of Mitchell K. Friedlander at 246:17-247:22 (emphasis added).<sup>7</sup> The discussions which occurred during the Friedlander and Fobbs depositions make it undisputedly clear that respondents had made it clear to Complaint Counsel that they would need significantly more than one eight-hour day in which to depose Dr. Heysmfield.

Complaint Counsel may assert they interpreted respondents' inquiries to being limited to inquiring about Dr. Heysmfield's availability to stay late the night of 11 January 2005. Indeed, during Dr. Heysmfield's deposition Complaint Counsel Ms. Kapin asserted that "tomorrow was never discussed" with respondents' counsel (Heysmfield Dep. at 69:8), and Complaint Counsel repeatedly tried to limit respondents' inquiries concerning Dr. Heysmfield's availability to a single day. *See, e.g.*, Fobbs Dep. at 210:15-19.

However, despite Complaint Counsels' self-serving attempts to narrowly limit respondents' broad inquiries concerning Dr. Heysmfield's availability to complete his deposition the week of 11 January 2005, it is clear is that prior to Dr. Heysmfield's deposition, respondents' counsel and Complaint Counsel had expressly discussed the fact that respondents would need

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<sup>6</sup> (...continued)

A. I mentioned earlier that it came up yesterday, that we had a time frame on this.

Q. What I'm asking is, before yesterday at any time during the past week did you have any discussions with Complaint Counsel concerning the length of this deposition and your availability for the deposition?

A. Not in the past week that I recall.

Deposition of Steven B. Heysmfield at 79:3-80:18. Thus, counsel had to ask Dr. Heysmfield essentially the same basic question four (4) times before he would answer the question. Copies of all pages from the Heysmfield Deposition referenced in this Joinder are attached hereto as Exhibit C.

<sup>7</sup> The pages referenced from the Friedlander Deposition are attached hereto as Exhibit D.

more than a single “normal” day to complete Dr. Heysmfield’s deposition. Furthermore, it would have been apparent to Complaint Counsel on 10 January 2005 that respondents would be unable to complete Dr. Heysmfield’s deposition on 11 January 2005, when Dr. Heysmfield informed Complaint Counsel he needed to leave the deposition by 6:00 pm. Moreover, Complaint Counsel made it clear during Dr. Heysmfield’s deposition that they had in fact discussed with Dr. Heysmfield whether he would be available “tomorrow” (i.e., on 12 January 2005), and that he was not:

MR. FELDMAN: We have tomorrow open as well.

MS. RICHARDSON: This witness is not available tomorrow.

Heysmfield Dep. at 67:20-23. If Complaint Counsel sincerely believed that respondents had never asked about continuing Dr. Heysmfield’s deposition on 12 January 2005, why then had Complaint Counsel already asked Dr. Heysmfield whether could be available on 12 January 2005? The simple answer is because Complaint Counsel knew, based on the several discussions which had occurred previously, that respondents had asked whether Dr. Heysmfield could be available on that day to complete his deposition. Any assertion by Complaint Counsel that respondents never gave prior notice that they would need more than a single day for Dr. Heysmfield’s deposition is, at best disingenuous, and is clearly not true.

**III. COMPLAINT COUNSEL’S ASSERTIONS THAT DR. HEYMSFIELD WAS BUT ONE OF MANY CO-AUTHORS WITH DR. DARSEE IS MISLEADING. DR. HEYMSFIELD WAS THE ONLY CO-AUTHOR ON ONE OF THE FRAUDULENT STUDIES, AND WAS ONE OF ONLY TWO OTHER CO-AUTHORS OF ANOTHER OF THE STUDIES**

In an apparent effort to obfuscate and distance Dr. Heysmfield from the level of his involvement with the fraudulent studies he co-authored with Dr. Darsee, Complaint Counsel



assert that “Dr. Heymsfield was [simply] one of numerous scientists listed as co-authors on papers authored by Dr. Darsee.” Opp. Mem. at 7. While this statement may be literally true, Complaint Counsels’ use of the term “numerous” is reminiscent of former President’s Clinton’s infamous testimony that “it depends on what the definition of is, is.” What Complaint Counsel fail to disclose to the Court is that Dr. Heymsfield was the sole co-author with Dr. Darsee on one of the fraudulent studies, and was but one of two other co-authors on another of the fraudulent studies. *See, e.g.*, Darsee JR, Heymsfield SB, Decreased Myocardial Taurine Levels and Hypertaurinuria in a Kindred with Mitral-Valve Prolapse and Congestive Cardiomyopathy, N. Engl. J. Med. 1981, 304:129-35; Darsee JR, Heymsfield SB, Nutter DO, Hypertropic Cardiomyopathy and Human Leukocyte Antigen Linkage: Differentiation of Two Forms of Hypertropic Cardiomyopathy, N. Eng. J. Med. 1979, 300:877-82. Considering that Dr. Heymsfield was the *only* co-author with Dr. Darsee on the Decreased Myocardial Taurine Levels study, Dr. Heymsfield’s current testimony and Complaint Counsels’ assertions that Dr. Heymsfield was not privy to the underlying data used in the study are simply not credible.

**IV. COMPLAINT COUNSELS’ ASSERTIONS THAT THEY WERE NOT AWARE OF THE FRAUDULENT STUDIES WHICH DR. HEYMSFIELD CO-AUTHORED BUT FAILED TO DISCLOSE ON HIS CV MUST BE VIEWED WITH SUSPICION IN LIGHT OF COMPLAINT COUNSELS’ FALSE AND MISLEADING STATEMENTS**

Complaint Counsels’ assertions that they were not aware prior to 30 August 2005 of the fraudulent studies which Dr. Heymsfield co-authored with Dr. Darsee are simply not credible. As an initial matter, these Respondents note that Complaint Counsel are the same attorneys whom this Court has previously found violated the Court’s protective order when they published the Corporate Respondents’ attorneys’ eyes only, highly confidential trade secret information on

the internet. Complaint Counsel are also the same attorneys which, in opposing the Motion for Sanctions, made the false and misleading assertions discussed above. The patently false and misleading assertions contained in Complaint Counsels' Opp. Mem. seriously call into question Complaint Counsels' credibility and their assertions that they were unaware of the fraudulent studies which Dr. Heymsfield co-authored.

Furthermore, it is simply not credible that not one, but four, attorneys would be apprised of the "Darsee matter" and yet not become aware that the "Darsee matter" involved fabricated data in publications co-authored by Drs. Heymsfield and Darsee. It strains credulity to think that Dr. Heymsfield would mention to Complaint Counsel Dr. Darsee and Dr. Darsee's involvement with fraudulent data, but not mention Dr. Heymsfield's own connection with Dr. Darsee and the fraudulent studies they had co-authored together. It also strains credulity to think that four experienced attorneys would not ask Dr. Heymsfield why he was mentioning Dr. Darsee and his fraudulent data to them, and whether he had been involved in any of the studies published by Dr. Darsee.

Dr. Heymsfield himself is not a credible witness on this topic, and his assertion that he was not aware that at least one of the studies he co-authored with Dr. Darsee had not been withdrawn (and was simply inadvertently omitted from his CV) is likewise not credible. As an initial matter, these Respondents note that in the Corporate Respondents' original Motion for Sanctions, the Corporate Respondents discuss Dr. Heymsfield's deliberately misleading testimony that the *only* reason he left Emory University was for a better opportunity. That testimony was clearly false and apparently designed to hide the fact that, as Dr. Heymsfield himself once told a reporter, Emory University "asked me to leave," "considered me an eyesore,"

had “taken [me] off the ladder to the sky,” and had made it “obvious” that “there would be no promotions or opportunities.”<sup>8</sup> *See, e.g.,* Motion for Sanctions at 6.

Furthermore, this is not the first time that Dr. Heymsfield has failed to timely disclose to respondents matters required by the Court’s scheduling order. As the Court may recall, when respondents took Dr. Heymsfield’s deposition on 11 January 2005, respondents learned, for the first time, that Complaint Counsel and Dr. Heymsfield had failed to disclose that Dr. Heymsfield had testified via deposition and at trial as an expert witness for the FTC. Additionally, in their expert witness disclosure, Complaint Counsel and Dr. Heymsfield represented that Dr. Heymsfield had testified via deposition in the case of *Parks v. Cytodyne Technologies, Inc.* However, respondents independently learned that in addition to testifying via deposition in the *Parks* case, Dr. Heymsfield also testified at the trial of that case. *See Respondents’ Emergency Motion to Strike Dr. Robert Eckel and Dr. Steven Heymsfield as Petitioner’s Expert Witnesses and for Sanctions and Other Relief* at 23-25. Later still, on 3 February 2005, Complaint Counsel disclosed to respondents other matters in which Dr. Heymsfield had been an expert, but had failed to disclose. *See Supplement to Respondents’ Emergency Motion to Strike Dr. Robert Eckel and Dr. Steven Heymsfield as Petitioner’s Expert Witnesses and for Sanctions and Other Relief.* Yet later still, on 14 February 2005, Complaint Counsel provided to respondents, for the first

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<sup>8</sup> In his deposition, Dr. Heymsfield did not deny making these statement to the reporter, and testified that he could not say whether the quotes attributed to him by the reporter were inaccurate.

time, a copy of Dr. Heymsfield's trial testimony, on behalf of the FTC, in *FTC v. SlimAmerica*, Case No. 97-6072-CV-WDF (Dec. 9, 1997).<sup>9</sup>

Moreover, Dr. Heymsfield testified that he "always" tells attorneys who retain him as an expert witness about Dr. Darsee. Thus, it is not as if the "Darsee matter" is something that never crosses Dr. Heymsfield's mind. Furthermore, regardless of whether the dean of the Emory University Medical School in fact told Dr. Heymsfield that he did not need to list on his CV the withdrawn fraudulent studies which Dr. Heymsfield co-authored with Dr. Darsee does not explain or excuse Dr. Heymsfield's failure to list the one study he did with Dr. Darsee which was not withdrawn. The "Darsee matter" has always been an issue for Dr. Heymsfield in connection with being an expert witness, and his assertion that he was not aware that one of the studies he co-authored with Dr. Darsee had not been withdrawn is simply not credible.

In short, Complaint Counsel's and Dr. Heymsfield's assertions are not credible, and the Motion for Sanctions should be granted. At a minimum, if the Court declines, at this time, to exclude Dr. Heymsfield as a witness, respondents should be allowed to conduct discovery of Dr. Heymsfield and other non-party witnesses to test the veracity of Dr. Heymsfield's assertions, and

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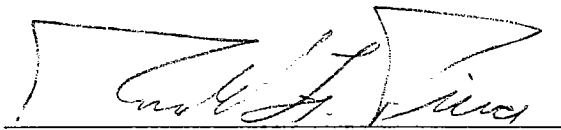
<sup>9</sup> Complaint Counsel excused Dr. Heymsfield's prior omissions as being the result of "a very busy man relying on work he had already conducted in another matter." *See, e.g., Complaint Counsel's Memorandum in Opposition to Respondents' Motion to Strike Complaint Counsel's Expert Witnesses and for Other Relief*, at 25. Regardless of whether Dr. Heymsfield's prior failures to timely disclose information was inadvertent, his current failure to disclose the withdrawn fraudulent studies he co-authored with Dr. Darsee, as well as his failure to disclose the study he co-authored with Dr. Darsee which was not withdrawn, appears to be the result of an attempt to hide his involvement with Dr. Darsee. Even if the failure to disclose was inadvertent or "excusable" as Complaint Counsel claim, there must be a limit to the number of times Complaint Counsel can seek to avoid the consequences of violating this Court's orders by claiming that their noncompliance was inadvertent (i.e., their prior failure to timely disclose materials, and their assertions that their violation of the Court's protective was inadvertent).

to investigate, *inter alia*, whether Dr. Heymsfield deliberately failed to list the withdrawn fraudulent studies (as well as the study which was not withdrawn) on his CV in order to hide his involvement with Dr. Darsee, whether the former dean of Emory University Medical School in fact told Dr. Heymsfield that he did not need to list the fraudulent studies on his CV, and the extent of Dr. Heymsfield's role as a co-author of the fraudulent studies.

**CONCLUSION**

These Respondents expressly join in the Motion for Sanctions. For the reasons set forth above and in the original motion, the Motion for Sanctions should be granted.

Dated: October 28, 2005.

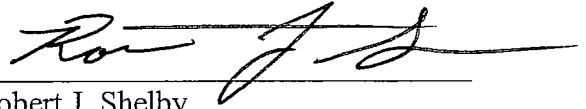


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**Counsel for Respondent Daniel B. Mowrey**

DATED this 28<sup>th</sup> day of October, 2005.

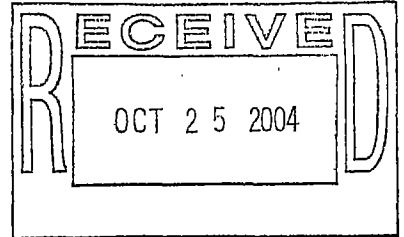
BURBIDGE & MITCHELL

A handwritten signature in black ink, appearing to read "Robert J. Shelby", written over a horizontal line.

Robert J. Shelby  
BURBIDGE & MITCHELL  
215 S. State Street, #920  
Salt Lake City, Utah 84111  
Telephone: 801/355-6677  
Facsimile: 801/355-2341  
Attorneys for Respondent Dennis Gay

# EXHIBIT A

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

**SUPPLEMENT TO RESPONDENTS' EXPERT WITNESS LIST INCLUDING  
TRANSCRIBED TESTIMONY**

Pursuant to the Court's August 22, 2004 *Scheduling Order* and *Order* dated October 18, 2004, 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 *Supplement to Expert Witness List Including Transcribed Testimony*.



Supplement to Expert Witness Disclosure

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

A copy of Mr. Popper's *Curriculum Vitae* has been previously provided on October 13, 2004. Attached are electronic copies of a portion of the transcribed testimony that Mr. Popper has given as an expert. Complete copies of the scanned documents are not presently available because the scanner at Kinko's, the copy service retained by Mr. Popper broke during the scanning process. Undersigned counsel anticipates forwarding additional transcripts of transcribed testimony as these are scanned and forwarded later tonight..

- 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* has been previously provided on October 13, 2004. There are no supplements pertaining to Dr. Solan at this time.

- 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 updated *Curriculum Vitae* is attached in electronic form. Dr. Mowrey has acted as an expert witness in two matters. There was no trial or deposition testimony taken in either matter. The first matter was a case circa 1988-89 in which one of the parties was a company called Rainbow Lite. The other was a matter circa 1985-86 pending in the Second Judicial District Court, Weber County, Utah. That case was titled *Nature's Way v. Solaray*. No further information about either case is available.

Dr. Mowrey testified before Congress on June 16, 2004. Attached is an electronic version of the transcript from that hearing. Dr. Mowrey also testified before Congress on May 27, 1999. Attached is an electronic version of the transcript from that hearing.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of Respondents' Supplement to Expert Witness List was provided to the following parties this 20<sup>TH</sup> 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); [r-richardson@ftc.gov](mailto:r-richardson@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.

  
CHRISTOPHER P. DEMETRIADES

## DANIEL B. MOWREY, Ph.D.

### EDUCATION:

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

### EXPERIENCE:

1991-Present President, American Phytotherapy Research Laboratory. This entity exists to serve the research needs of the herb community. Basic and archival research geared toward proprietary products as well as generic materials. Long range goal is to combine clinical and pre-clinical in vivo research with in vitro investigation. Publication of findings in peer review journals is sought but not necessarily required.

1986-Present Author, lecturer and consultant in the area of medicinal plants. Activities include development of new products, market surveys, basic experimental research, technical writing, and import/export consultation. Of particular importance are the writing of several books on scientific herbalism, the development of the guaranteed potency herb concept in America, the creation of whole lines of herbal combinations, and the opportunity to promote herbal medicine in trade magazines, and on radio and television around the country and abroad.

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 (1986), a comprehensive alternative health care database for professionals, and for health stores.

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.

1978-1999 Director, Behavior Change Agent Training Institute. This small informal entity served 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 principles.

1978-1986 Director of Research & Development, Nova Corporation, Salt Lake City, Utah. Handled the development of new fluid systems based on polymer and surfactant rheological technology. Concurrently wrote operations and technical manuals.

1973-1979 Instructor (Part-time Faculty), Brigham Young 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.

1975-1978 Director, Research & Development for Nature's Sunshine Products.

#### **BOOKS:**

- Mowrey, D.B. *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 (currently under revision).
- *Herbal Tonic Therapies*. Keats Publishing, New Canaan, CT. 1993. Revitalizes the concept of a tonic in light of modern research (currently under revision).
- *Fat Management: The Thermogenic Factor*. Victory Pubs. Lehi, Utah 1994.
- *Natural Relaxants: Freedom From Prescription Drugs*. American Research Institute, Scottsville, KY. 1990
- *Proven Herbal Blends*. Keats Pubs, 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) (currently under revision). This is the first book to introduce guaranteed potency herbs to the American public.
- *Herbal Medicine and Your Immune System*. Keats Publishers, New Canaan, CT, 1991.
- *Echinacea: How An Amazing Herb Supports and Stimulates Your Immune System*, Keats Publishers, New Canaan, CT, 1995.
- *Yerbamate: Unequaled Natural Nutrition*. Victory Pub., Lehi, UT, 1991.
- *Lapacho: Ancient Herb, Modern Miracle*. Victory Pub., Lehi, UT, 1991.
- *Life With Stevia: How Sweet It Is!* Victory Pub., Lehi, UT, 1991.

#### **PUBLICATIONS:**

- Mowrey, D.B. & Clayson, D.E. "Motion Sickness, Ginger and Psychophysics." *The Lancet*, March 20, 1982, 655-657.

#### **PAPERS/PRESENTATIONS:**

- "Ma Huang: Ancient and Modern Perspectives." Testimony and paper submitted to the Congressional Committee on Government Reform entitled "How accurate is the FDA's Monitoring of Supplements Like Ephedra?" May 27<sup>th</sup>, 1999.
- "Comments Regarding Docket No. 95N-0304; FDA Proposed Rule on Dietary Supplements Containing Ephedrine Alkaloids: Federal Register, June 4, 1997, submitted December 2, 1997.
- "Review of Clinical Summaries; Request for Extension of Comment Period." Submitted to FDA Dockets Management Branch in reference to FDA's Proposed Rule on Dietary Supplements Containing Ephedrine Alkaloids. August 16, 1997.
- "Comments Regarding Docket No. 95N-0304; FDA Proposed Rule on Dietary Supplements Containing Ephedrine Alkaloids: Federal Register, June 4, 1997, submitted July, 1997.
- Testimony before the 121<sup>st</sup> General Assembly of Ohio/Board of Pharmacy regarding a proposed bill to amend section 3719.44 of the Revised Code to except from Schedule V controlled substances schedule a drug product containing a limited quantity of ephedrine derived from the plant genus Ephedra, August, 1995.

- Testimony before the Texas Department of Health regarding the approved rule restricting the sale, distribution or possession of certain foods and drugs which contain ephedrine, April 28, 1995.
- "Recent advances in polymer-enhanced oil field foams." Presented at the DEPEC 1984 Conference, October 3, 1984, Denver Colorado."
- Several papers on the scientific support of herbal medicine. Some, but not all, of these are listed below.
- "Use of Topical Agents in the Reduction of Local Fat Mass," Singapore GNC symposium, 2002.
- "The genetic basis of alternative medicine." Presented at the GNC convention, Atlanta, GA, 2000.
- "Activation of Brown Adipose Tissue Reverses Obesity." Poster Session at 5<sup>th</sup> International Conference on Anti-Aging Medicine & BioMedical Technology, Las Vegas, NV, Nov, 1997.
- "Ma huang and the treatment of obesity." Presented at the NNFA convention, Las Vegas, July, 1996.
- "The pros and cons of weight loss treatments." Presented at the Baltimore Expo, October, 1997.
- Several papers of fat management at various regional NNFA shows, 1995- 1998.
- Mowrey, D.B. "Guaranteed Potency Herbs." Presented at the National Nutritional Foods Association (NNFA) National Convention, Las Vegas, July 14, 1989.
- "Phytopharmacology: Implications for Medicine Today." Presented at the North American Nutrition & Preventive Medicine Association, Tenth International Conference, Atlanta GA, June 20-23, 1991.
- "Recent advances in worldwide medicinal plant research." Presented before the Mid American Health Organization, September, 1987.
- "The effects of herbs on sleep and activity rates." "The effect of herbs on vomiting and diarrhea." "The effects of ginger root on motion sickness." Presented before the Rocky Mountain Psychological Association. Convention, 1976, 1977, 1978.
- "New Trends in herbal research." Presented before the 1st Annual Herbal Research Symposium, Santa Cruz, CA 1978.
- Several papers in the trade magazines such as The Herbalist, Let's Live, Health World, Whole Foods, Contemporary Health and Nutrition, Health Store News, and Delicious, 1975-present, including three Question & Answer columns. Examples of papers follow:
  - "The ECA Stack: Aspirin vs. Salicin"
  - "A brief review of natural weight loss options."
  - "Taking ephedra safely."
  - "Ma huang or Frankenhuang."
  - "When fat things happen to thin people."
  - "Unified approach to body fat management."
  - "Guaranteed Potency herbs."
  - "Liver disorders."
  - "Herbs for nervous tension."
  - "Current Laboratory Research: Capsicum, ginseng and gotu kola in combination."
  - "Medicinal use of licorice root."
  - "Cayenne and ulcers?"
  - "Constipation."
  - "Chamomile: calming, soothing herb."

"Kelp aids in health of cardiovascular system."  
"Licorice root and Addison's disease: a review."  
"Herbal Intoxication?: A reply to Ronald K. Siegal, JAMA, August 2, 1976, pp 473-476."  
"Herbal relief of flu symptoms: Original Research."  
"The effects of capsicum, ginseng and gotu kola on activity: Further evidence."  
"Stocking your herb shelves for winter."  
"Tonics from the earth: Foundations for whole body wellness."  
"Combing herbs: Part I and Part II."  
"Ho-shou-wu: The facts, the frauds, the future."  
"The great burdock."  
"Licorice root and ulcers."  
"Ten herbs to enhance your immune system."  
"Cordyceps."  
"Protect your heart with herbs."  
"Turmeric."  
"Herbs of good cheer. . ."  
"Insomnia relief through herbs."  
"Therapeutics of horsetail grass."  
"Chlorella: A Jack-of-all trades."  
"Bilberry: It has many benefits."  
"Licorice: Poisonous or Priceless."  
"Ume: A gift from Japan."  
"Hawthorn."  
"Ginger root."  
"Schizandra, an introduction."  
"The stomach, intestines, and your health."  
"Pygeum for the prostate."  
"Standardized herbal extracts: horsetail, pygeum and others."  
"Echinacea."  
"The stomach, intestines and your health."  
"Black Cohosh."  
"Cayenne: Friend or foe."  
"Ginger root: a review."

**OTHER:**

----- Advisor for Rodale Press on their project published as "The Doctor's Book of Home Remedies," 1990.

**CURRENT ACTIVITY:**

----- Emphasis in the development of weight management products, with emphasis in the biochemistry of lipolysis, lipogenesis, apoptosis, fat cell differentiation, receptor pharmacology, and the influence of intracellular messengers including cyclic AMP, hormone sensitive lipase and adenylate cyclase. Both oral and topical products are targets for this investigation. Also of primary focus is the development of web-based programs to encourage long-term weight loss in children and their parents.

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# EXHIBIT B



**COPY**

**OFFICIAL TRANSCRIPT PROCEEDING**

**FEDERAL TRADE COMMISSION**

**MATTER NO. D09318**

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

**PLACE GARCIA & LOVE REPORTING  
36 SOUTH STATE STREET  
SALT LAKE CITY, UTAH**

**DATE JANUARY 5, 2005**

**PAGES 1 THROUGH 241**

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**TESTIMONY OF CARLA FOBBS**

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

---

1 me what you understand that term to mean?

17:00:47:25 2 A Black out.

17:00:51:06 3 Q Okay. I just want -- I want to make sure we're  
4 talking --

17:00:52:21 5 A Okay.

17:00:53:12 6 Q -- about the same thing. Okay.

17:01:06:27 7 MS. KAPIN: Let me just step out with Counsel for  
8 a minute to see if we can wrap up this part.

17:01:14:06 9 MR. FELDMAN: Where are you generally?

17:01:15:15 10 MS. KAPIN: Generally I still have more topics to  
11 cover, but I want to make sure I covered this one.

17:01:21:07 12 MR. FELDMAN: It's now five after 5:00, so I need  
13 to have a sense. We'll be flexible a little bit, but not  
14 much.

17:01:30:12 15 MS. KAPIN: Here's what I would liked to do. I  
16 think I can wrap this up in an hour so that we're out by  
17 6:00, no later than 6:00.

17:01:39:12 18 MR. FELDMAN: Okay. Understand this. I'll talk  
19 to Carla about the -- you know, about the courtesy, but  
20 we've got Dr. Heymsfield's deposition, and I expect  
21 Dr. Heymsfield to remain until he's done, right, because we  
22 have one, two, three, four parties that need to depose  
23 Dr. Heymsfield, and I can't have him leaving just because we  
24 hit the end of the day. You know, I need to know from you  
25 that you'll extend that courtesy to us if we --

17:02:09:18 1 MS. KAPIN: As far as it's in my control, I will  
2 absolutely extend you that courtesy.

17:02:16:03 3 MR. FELDMAN: He's got to understand that he's got  
4 to remain. So I don't want to hear about how busy  
5 Dr. Heymsfield is. If we're going to operate on a set of  
6 rules where each side is going to have the right to complete  
7 its inquiry, your witness is going to have to stay. Now,  
8 that's what you're requesting of us, and we're requesting  
9 the same of you.

17:02:33:27 10 You've requested two days of Dan Mowrey because  
11 you fear that you're not going to have enough time with him.  
12 So I would ask that you make whatever arrangements you need  
13 with Dr. Heymsfield to make sure that he clears his schedule  
14 so that we can complete his deposition.

17:02:51:18 15 MS. KAPIN: I will agree to make it clear to  
16 Dr. Heymsfield -- if you pronounce his name, you'll make  
17 much better friends with him -- Dr. Heymsfield that he needs  
18 to be available so you can complete your deposition that  
19 day.

17:03:05:19 20 MR. FELDMAN: That will likely mean more than  
21 5:00 o'clock. I'm just telling you right now. Okay?

17:03:11:00 22 MS. KAPIN: Do you want to start earlier? Are you  
23 starting him at 10:00?

17:03:12:25 24 MR. PRICE: No. He's set for 9:00.

17:03:14:03 25 MS. KAPIN: He's set for 9:00?

17:03:14:27 1 MR. FELDMAN: Right. You know, so Ron Price has  
2 questions on behalf of Dr. Mowrey, and Mr. Shelby has  
3 questions on behalf of Mr. Gay. I have questions on behalf  
4 of the corporate respondent, and Mr. Friedlander has  
5 questions.

17:03:28:06 6 MS. KAPIN: I hear you. I will speak to him, and  
7 I will ask him to make himself available so that you all can  
8 ask your questions.

17:03:40:19 9 MR. FELDMAN: Okay. Why don't we -- why don't you  
10 do what you need to do, and I'll speak to Carla. You say  
11 you'll get it done by 6:00?

17:03:50:00 12 MS. KAPIN: Yeah.

17:03:54:15 13 (Recess taken 5:03 p.m. to 5:13 p.m.)

17:13:34:21 14 THE VIDEOGRAPHER: We're back on the record, 5:18.

17:13:37:06 15 Q (By MS. KAPIN) I just have a few more questions in  
16 your corporate capacity, Ms. Fobbs, and then we'll move back  
17 to your individual capacity. Fair enough?

17:13:45:00 18 A All right.

17:13:45:15 19 Q Okay. Can you tell me what your understanding is  
20 of which corporate respondents actually produced documents  
21 responsive to the FTC's discovery requests?

17:14:00:18 22 A Basic Research and Ban, L.L.C.

17:14:05:16 23 Q And can you tell me whether a search was made of  
24 the other corporate respondents for documents that might  
25 have been responsive to the FTC's discovery requests?

# EXHIBIT C

# ORIGINAL

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

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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.,  
BAN, L.L.C.,  
DENNIS GAY,  
DANIEL B. MOWREY, and  
MITCHELL K. FRIEDLANDER,

Docket No. 9318

Respondents.

-----X

VIDEOTAPED DEPOSITION OF  
STEVEN B. HEYMSFIELD  
New York, New York  
Tuesday, January 11, 2005

Reported by:  
Thomas R. Nichols, RPR  
Toni Allegrucci  
JOB NO. 168691

1

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And what's your specific question?

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MR. FELDMAN: My specific question is does Dr. Heymsfield understand that Mr. Price is only one of several parties who need to question him, that there are multiple respondent interests that are going to be addressed here? We set no limit on the depositions that you took last week. We let you go until you were finished.

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We expect Dr. Heymsfield to remain until all parties have asked the questions that they have. And I don't think we need to go beyond that. We'll do our level best to avoid any redundancy.

18

19

MS. KAPIN: Right, we're all going to try and be cooperative today, OK?

20

21

MR. FELDMAN: We have tomorrow open as well.

22

23

MS. RICHARDSON: This witness is not available tomorrow.

24

25

MR. FELDMAN: We gave warning last week, and my expectation is -- hold on.

1

2 BY MR. PRICE:

3 Q. Dr. Heymsfield, did anybody from  
4 Complaint Counsel's office discuss with you  
5 prior to yesterday the length of time this  
6 deposition may take and your availability?

7 A. I think when I scheduled this I made  
8 it clear that I was very busy and that I had --  
9 today was the only day I had to do this.

10 Q. Did anybody from Complaint Counsel's  
11 office discuss with you during the last week  
12 the length of this deposition and your  
13 availability for deposition?

14 A. I think if anything I've been the  
15 one who has raised the issue about how much  
16 time I had to spend on this.

17 Q. When did you raise that issue with  
18 Complaint Counsel?

19 A. I think when we scheduled this  
20 originally I said that I had one day, and that  
21 was it.

22 Q. So prior to yesterday would it be  
23 fair to say that between the time this  
24 deposition was scheduled and yesterday you and  
25 Complaint Counsel did not further discuss your



1  
2 availability for the deposition?

3 MS. RICHARDSON: Objection, asked  
4 and answered. Objection, relevance. If  
5 you're concerned about finishing this  
6 deposition today, I suggest you pose a  
7 question to this witness other than  
8 timing.

9 Q. You can go ahead and answer the  
10 question.

11 A. I mentioned earlier that it came up  
12 yesterday, that we had a time frame on this.

13 Q. What I'm asking is, before yesterday  
14 at any time during the past week did you have  
15 any discussions with Complaint Counsel  
16 concerning the length of this deposition and  
17 your availability for the deposition?

18 A. Not in the past week that I recall.

19 Q. Now Dr. Heymsfield, you've submitted  
20 an expert opinion in this case, correct?

21 A. Yes.

22 Q. And in that expert opinion and in  
23 your testimony today your use of the term  
24 "obesity."

25 A. Yes.

# EXHIBIT D

**COPY**

**OFFICIAL TRANSCRIPT PROCEEDING**

**FEDERAL TRADE COMMISSION**

**MATTER NO. D09318**

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

**PLACE GARCIA & LOVE REPORTING  
36 SOUTH STATE STREET  
SALT LAKE CITY, UTAH**

**DATE JANUARY 6, 2005**

**PAGES 1 THROUGH 295**

**TESTIMONY OF MITCHELL FRIEDLANDER**

---

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

---

18:52:24:03 1 MR. PRICE: Assumes -- assumes facts not in  
2 evidence.

18:52:27:21 3 MR. SHELBY: Compound.

18:52:28:15 4 A So let's -- what's the question again?

18:52:30:19 5 Q Do you know what, if anything, you had planned to  
6 change about that ad?

18:52:37:07 7 MR. SHELBY: Same objection.

18:52:38:22 8 A All I can tell you is I know that I liked the  
9 original version that I wrote, and I made that clear to  
10 everybody. What they did with it once I gave them my  
11 recommendation, they did.

18:52:57:28 12 MR. FELDMAN: I want to break for a second. Let's  
13 go off.

18:53:04:21 14 MS. SCHNEIDER: Go ahead.

18:53:09:12 15 (Off-the-record discussion)

19:04:44:00 16 THE VIDEOGRAPHER: We're on the record at 7:04.

19:04:47:15 17 THE WITNESS: On the record, I'm willing to stay  
18 as long as it takes -- I don't want to come back -- as long  
19 as you're willing to afford us the same opportunity with  
20 Dr. Heymsfield.

19:04:58:15 21 MR. FELDMAN: Which we still despite repeated  
22 requests have not gotten any assurance on.

19:05:05:06 23 MS. SCHNEIDER: We said we were going to be as  
24 flexible as possible.

19:05:08:28 25 MR. FELDMAN: Again, as possible means nothing.

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

19:05:10:09 1 MS. SCHNEIDER: And we will talk to  
2 Dr. Heymsfield.

19:05:10:15 3 MR. FELDMAN: Again, you know that that is? Those  
4 are just hollow words that you can put into a transcript so  
5 that at the end of day you can go to the judge and say,  
6 look, Judge, see, here we said it.

19:05:19:21 7 But let's go back and remind the court and the  
8 record that yesterday I had a conversation which was not the  
9 first time about Dr. Heymsfield availability, and I would  
10 ask now -- at least over the last two days -- for assurance  
11 that Dr. Heymsfield would make himself available and be  
12 available for as long as we need him next week because there  
13 are one, two, three, four people that need to question him.

19:05:45:27 14 I asked Ms. Kapin to call Dr. Heymsfield -- I  
15 asked this yesterday -- to determine whether or not he would  
16 be available and would be able to stay late if necessary. I  
17 have not gotten anything back.

19:05:57:04 18 Have you spoken with him, Ms. Kapin, with the  
19 doctor? Did you make the call as you said you would?

19:06:04:27 20 MS. KAPIN: What I said, Jeff, is that I would  
21 talk with him. I have not had the opportunity to do that.  
22 I will do that.

19:06:15:01 23 MR. FELDMAN: When?

19:06:18:21 24 MS. KAPIN: When I get a chance to.

19:06:21:18 25 MR. FELDMAN: Okay. Well, I guess you know what

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENTS DANIEL B. MOWREY'S AND DENNIS GAY'S JOINDER IN RESPONDENTS' MOTION TO EXCLUDE A WITNESS AND FOR SANCTIONS, AND CORRECTION OF COMPLAINT COUNSEL'S FALSE STATEMENTS** was provided to the following as follows:

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(2) On 28 October 2005, two (2) paper copies sent via Federal Express overnight delivery to: The Honorable Stephen J. McGuire, Chief Administrative Law Judge, 600 Pennsylvania Avenue, N.W., Room H-104, Washington, D.C. 20580.

And on 31 October 2005, to the following as follows:

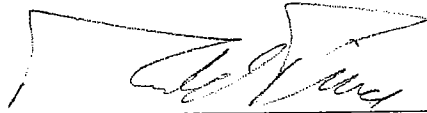
(3) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, Laura Schneider, Walter C. Gross III, and Edwin Rodriguez all care of [lkapin@ftc.gov](mailto:lkapin@ftc.gov), [jmillard@ftc.gov](mailto:jmillard@ftc.gov), [lschneider@ftc.gov](mailto:lschneider@ftc.gov), [wgross@ftc.gov](mailto:wgross@ftc.gov), and [erodriguez@ftc.gov](mailto:erodriguez@ftc.gov), with one (1) paper 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, facsimile no. (202) 326-2558.

(4) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 18001 Old Cutler Road, Miami, Florida 33157.

(5) 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.

(6) One (1) copy via United States Postal Service to Jonathan W. Emord, Emord & Associates, 1800 Alexander Bell Drive, Suite 200, Reston, Virginia, 20191, Counsel for Respondents A. G. Waterhouse, L.L. C., Klein-Becker, L.L. C., Nutrasport, L.L. C., Sovage, Dermalogic Laboratories, L.L. C., and BAN, L.L. C.

(7) 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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