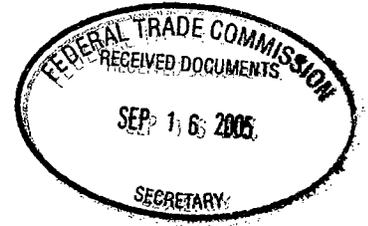


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

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**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 “[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.*

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 Counsels' 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,

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<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 deliberate or flagrant violation of the Order. The undersigned interprets the Order in a manner consistent with

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<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 (head of the Corporate Respondents' compliance department) to Dr. Mowrey, forwarding to Dr. Mowrey an email which Ms. Fobbs had received from Nicole Slatter (a paralegal with counsel for Respondent Dennis Gay). The email from Ms. Slatter to Ms. Fobbs references notes of Respondent Gay'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. Slatter'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 Solan*, 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 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." 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 author of 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 Witnesses 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 identify 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 counsels' 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 Laureen Kapin and Joshua Millard 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>

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<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 knew 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. Catlett*, 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

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<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>5</sup> *See, e.g.*, Letter from Ronald F. Price to Complaint Counsel, dated 16 August 2005, a copy of which is attached hereto as Exhibit A.

3. In the 16 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.

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<sup>5</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 Counsels’ 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 Millard dated 22 August 2005, a copy of which is attached hereto as Exhibit B.<sup>6</sup>

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<sup>6</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.

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:

a. 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 Slatter, 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. Slatter included attachments which were notes of interviews of fact witnesses conducted by the law firm

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 Respondents 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

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<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 concede 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 concede 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>8</sup> Furthermore, the document does not mention or refer

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<sup>8</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

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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. Bate 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,

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<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.

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

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<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, PC, “Is the placebo powerless? An analysis of clinical trials comparing placebos with no treatment.” *NEJM*, 334[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 PediaLean 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.

(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>10</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 "luminaries," and consists of a single

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<sup>10</sup> As Complaint Counsel are aware, Respondents long ago provided Complaint Counsel with Dr. Mowrey's CV.

phrase 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.

h. 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 seek production of the following documents in addition to those identified above:

a. 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 Sprik (with the Corporate Respondents' Compliance Department) dated 11/01/04, (v) Ms. Sprik to Dr. Mowrey dated 11/01/04, (vi) Ms. Sprik to Dr. Mowrey dated 11/03/04, (vii) Ms. Fobbs to Ms. Sprik dated 11/11/04, (viii) Ms. Sprik to Dr. Mowrey dated 11/11/04, and (ix) Ms. Sprik 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 its 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. Bates 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. Burbidge & 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

proceedings. Accordingly, the following facts will address some of Complaint Counsel's and their expert's violations.

14. As the Court will recall, in flagrant violation of the Court's protective order, Complaint Counsel caused some of the Corporate Respondents' most highly confidential information and documents (which were clearly marked as attorneys' eyes only) to be posted on the internet.

15. This Court found that there had been a serious violation of the Court's protective order, and referred Respondents' contempt motion and related motion to compel production of web log/server information to the Commission.

16. The Commission refused to impose any fines on Complaint Counsel, refused to hold any contempt proceedings, and refused to sanction Complaint Counsel. Instead, the Commission simply ordered Complaint Counsel to have any future filings reviewed by another employee of the Commission before being filed.

17. The scheduling order in this case provides, in part, that "[a]t the time an expert is first listed as a witness by a party, the listing party will provide to the other party: (a) materials fully describing or identifying the background and qualifications of the expert, list of all publications, and all prior cases in which the expert has testified or has been deposed; and (b) transcripts of such testimony in the possession, custody or control of the listing party or the expert." Scheduling Order, ¶ 11.

18. Complaint Counsel and their expert, Dr. Heymsfield, have failed to comply with the scheduling order in numerous respects:

a. in the Court's *Order on Respondents' Motion to Strike Expert Witnesses and for Sanctions and Other Relief*, this Court specifically found that Complaint Counsel and Dr. Heymsfield failed to timely provide a complete list of all matters in which Dr. Heymsfield had testified as an expert, and had failed to timely provide a copy of a transcript of expert testimony given by Dr. Heymsfield. The Court found that *after* his first day of deposition on 11 January 2005, Dr. Heymsfield determined he had failed to identify all cases in which he had served as an expert witness, and that Complaint Counsel provided an updated list immediately prior to Dr. Heymsfield's second deposition. The Court further found that *after* Dr. Heymsfield's second deposition, Complaint Counsel produced, for the first time, a copy of testimony which Dr. Heymsfield had given on behalf of the FTC in another matter. *See id.* at 5. In response to these violations, the Court ordered that Complaint Counsel make Dr. Heymsfield available for an additional four (4) hours of deposition, but denied Respondents' request for sanctions;

b. contrary to the requirements of the scheduling order, at the time Complaint Counsel provided Dr. Heymsfield's expert report to Respondents on 21 October 2005, Complaint Counsel did not produce copies of all documents read, reviewed, considered or relied on by Dr. Heymsfield in connection with forming his expert report/opinion. *See, e.g.,* Price Supp. Dec. at ¶ 24. For example, Dr. Heymsfield's report, and the documents produced therewith, consisted of a total of approximately 135 pages. *Id.* Those materials did not include any drafts of his

report (Complaint Counsel may assert that no drafts existed), any communications between Dr. Heymsfield and Complaint Counsel, or, other than approximately 65 pages of documents, did not include any of the literally thousands of pages of documents which Complaint Counsel had provided to Dr. Heymsfield in connection with his role as an expert witness in this case. *Id.* Instead, Complaint Counsel and Dr. Heymsfield did not produce those documents until 14 December 2004 (they were received on 16 December 2004), and then only in response to a subpoena which Dr. Mowrey had served on Dr. Heymsfield.<sup>11</sup> *Id.* And, even then, Dr. Heymsfield did not produce all the required documents, as he produced documents in January 2005, and again in February 2005. *Id.*

19. Dr. Mowrey does not seek to use Complaint Counsel's and their expert's violations of the Court's orders as justification for his interpretation of the Court 9 August 2005 Order. Rather, Dr. Mowrey simply notes these clear violations to demonstrate that Complaint Counsel do not come before this Court with clean hands. Dr. Mowrey further notes these violations so that Complaint Counsel's request for sanctions can be viewed in light of Complaint Counsel's own violations, and the relief awarded by this Court and the Commission with respect to those violations.

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<sup>11</sup> Complaint Counsel's failure to provide documents as required by the scheduling order was not limited to Dr. Heymsfield, as their other experts likewise produced documents only in response to subpoenas. *Id.*

## ARGUMENT

### **I. DR. MOWREY HAS PRODUCED ALL DOCUMENTS REQUIRED BY THE COURT'S ORDER. THEREFORE, COMPLAINT COUNSEL'S MOTION SHOULD BE DENIED**

Dr. Mowrey has produced all documents which he read, reviewed, considered and or relied upon in his capacity as an expert witness, and in connection with the formation of his expert report/opinion. Given such fact, the fundamental question presented by the Motion is whether Complaint Counsel's extremely broad and overreaching interpretation of the Court's Order (an interpretation which is inconsistent with the Court's Order Governing Expert Discovery), is correct. If, indeed, Complaint Counsel's interpretation is correct, then Dr. Mowrey concedes that some of the documents Complaint Counsel seek are subject to production under the Order.<sup>12</sup> If, however, Complaint Counsel's interpretation is, as Dr. Mowrey asserts, too broad and overreaching, then Dr. Mowrey has complied with the Court's Order and Complaint Counsel's Motion should be summarily denied.

As an initial matter, Dr. Mowrey notes that Complaint Counsel's interpretation of the Order is inconsistent with the Court's Order Governing Expert Discovery, and would impose upon Dr. Mowrey a burden to produce types of documents which this Court specifically held did not have to be produced by expert witnesses. For example, in quashing portions of subpoenas which Respondents served on Complaint Counsel's experts, Drs. Heymsfield and Eckel, which subpoenas sought production of, *inter alia*, all materials published by Complaint Counsel's experts, as well as material for purposes of cross-examination, rebuttal or impeachment, this

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<sup>12</sup> As discussed below, even under Complaint Counsel's interpretation, many of the documents at issue are not subject to production.

Court specifically ruled that the discovery sought by Respondents was “beyond that permitted by the Rules, the Scheduling Order, and the *Dura Lube* case.” Order Governing Expert Discovery at 4. The Court further ruled that experts needed only to produce “document[s] considered by an expert in forming an opinion . . .[.]” and stated that “while reports and testimony, including deposition testimony, from prior investigations or litigation must be produced, the documents underlying such reports or testimony are not discoverable in this subsequent litigation, ***unless such documents were also relied upon or reviewed by a testifying expert in formulating an opinion in this case.***” *Id.* (emphasis added). Thus, according to the Court’s Order Governing Expert Discovery, even if expert witnesses possess documents which mention or relate to topics discussed in their expert report, or which mention or relate to authors of studies cited in the expert report, the experts are not required to produce those documents unless they were specifically “relied upon or reviewed by a testifying expert in formulating an opinion in this case.” *Id.*

Here, Complaint Counsel seek to impose discovery obligations on Dr. Mowrey which go far beyond those which this Court has held constitutes allowable expert discovery. For example, Complaint Counsel argue that Dr. Mowrey should be required to produce documents which he reviewed ***before*** he was ever designated or asked to be an expert witness, and which he did not read, review, consider or rely upon after having been designated as an expert witness. Complaint Counsel also assert that they are entitled to documents which Dr. Mowrey did not read, review, consider or rely upon in connection with forming his expert report/opinion. Such assertions are inconsistent with the Court’s ruling that, with the exception of expert reports and testimony given

in prior matters, experts are not required to produce documents that they did not read, consider, review or rely upon in forming their expert report/opinion in this case.

The fact is, Dr. Mowrey has produced all documents he read, reviewed, considered or relied upon in his capacity as an expert witness, including all documents which he read, reviewed, considered or relied upon in connection with forming his expert report/opinion. Thus, Dr. Mowrey has produced all documents which this Court has ruled must be produced by testifying experts in general, and all documents which were required to be produced under the terms of the Order. Accordingly, Complaint Counsel's Motion should be denied.

## **II. *IN CAMERA* REVIEW IS NOT REQUIRED -- ANALYSIS OF THE SPECIFIC DOCUMENTS AT ISSUE**

If the Court determines that the Order should be interpreted in a fashion which is consistent with the Court's Order Governing Expert Discovery -- i.e., that Dr. Mowrey is required to produce all documents that he created, read, reviewed, considered and/or relied upon in his capacity as an expert witness, including in connection with forming his expert report/opinion, then no *in camera* review is required. The fact that Dr. Mowrey has produced all such documents <sup>13</sup> ends the inquiry, and Complaint Counsel's Motion should be denied.

Assuming, *arguendo*, that the Court adopts Complaint Counsel's broad interpretation of the Court's Order, and thereby imposes upon Dr. Mowrey expert disclosure requirements which are greater than those imposed on Complaint Counsel and their experts, there is still no need for *in camera* review for any of the documents at issue. This is demonstrated by an analysis of each of the documents Complaint Counsel seek through their Motion.

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<sup>13</sup> Dr. Mowrey's testimony on this issue is uncontroverted.

Document Bates No. 91. As discussed in the statement of facts, this document is an email string (dated 27 September 2004, more than two weeks *before* Dr. Mowrey was ever designated as an expert witness) which relates solely to notes of interviews which Respondent Gay's counsel conducted with four (4) potential fact witness (none of which was Dr. Mowrey), and which identifies other potential fact witnesses which Respondent Gay's counsel was going to attempt to interview. The original email included attachments which were notes of interviews of four potential fact witnesses conducted by the law firm representing Respondent Gay. Dr. Mowrey testifies that he has *never* opened, read, considered, or otherwise reviewed the interview notes attached to the email.<sup>14</sup> *See, e.g.,* Mowrey Supp. Dec. at ¶ 11. Because Dr. Mowrey has never opened, read or reviewed the interview notes, it is impossible for him to have "considered" or relied upon them, and there is thus no basis for an order compelling Dr. Mowrey to produce them, and there is no need for the Court to review them to determine if they should be produced.<sup>15</sup> They are classic work product documents (*see, e.g., Bristol-Meyers Co. v. FTC*, 598 F.2d 18 (D.C. Cir. 1978) (holding that attorney notes of witness interviews are attorney work

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<sup>14</sup> As set forth in the 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 concede in their motion that notes of interviews with non-authors are not discoverable. *See, e.g.,* Motion at 11-12, 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, read, reviewed, considered or otherwise relied upon that particular document. *See, e.g.,* Mowrey Supp. Dec. at ¶ 11.

<sup>15</sup> In any event, any *in camera* review of any of the Attorney Interview Documents and Potential Expert Witness Documents would be problematic inasmuch as this Court is the trial of fact, and is thus both the judge and jury in this matter. *In camera* review would result in the trial of fact viewing and considering nondiscoverable, and inadmissible, documents, and would thus risk cause serious legal prejudice to Respondents.

product ) and, because they have never been read or considered by Dr. Mowrey, in any capacity, let alone as an expert witness, they are not subject to production.

Complaint Counsel may assert that the text of the email itself should be produced, even if the attachments are not, inasmuch as Dr. Mowrey concedes he read the text of the email. However, the text provides absolutely no substantive information concerning the interviews which had been conducted, and does not even identify the potential witnesses who had been interviewed. Although the text does identify several potential fact witnesses which Respondent Gay's counsel was going to attempt to interview, the mere identity of those potential fact witnesses is completely irrelevant and unrelated to Dr. Mowrey's report. Furthermore, the disclosure of the identify of those persons would impinge on Respondents' counsel's work product, and provide Complaint Counsel with an unfair advantage in the litigation by allowing them to specifically identify potential witnesses Respondents' counsel may have interviewed, and thereby allowing Complaint Counsel to specifically focus their own attention on those potential witnesses.

Document Bates No. 94. This is an email dated 29 September 2004 (more than two weeks *before* Dr. Mowrey was ever 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 Respondents Friedlander and Dr. Mowrey. This document relates solely to a telephone conference which Dr. Mowrey's counsel had with a potential fact witness. That potential witness was not Dr. Mowrey, and was not any 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 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 concede 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 n.8. Given such admission, Complaint Counsel are not entitled to obtain a copy of Document Bates No. 94, and there is no need for *in camera* review of this document.

Document Bates Nos. 166-167. This document 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. This email 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, and 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. Furthermore, the document does not mention or refer 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. In light of Complaint Counsel's

admission that they do not seek production of this document if it does not mention any author of any of the scientific studies mentioned in Dr. Mowrey's expert report, there is no need for *in camera* review of this document.

Document Bate 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), and contain no substantive information of any kind. *See, e.g.*, Price Supp. Dec. at 14. 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 ¶ 14. In light of these facts, there is no basis for an *in camera* review of these documents.

Documents 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," pursuant to which Respondent Friedlander forwarded to Dr. Mowrey a copy of a scientific study relating to placebos. 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. Mowrey Supp. Dec. at ¶ 15.

As indicated above, Dr. Mowrey acknowledges that the scientific study referenced in this email is related to the Placebo Study referenced in Dr. Mowrey's expert report. 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. In light of these facts, there is no basis for an *in camera* review of this document.

Document 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 (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). Regardless of whether the documents do or do not mention potential fact witness who are authors of scientific studies mentioned in Dr. Mowrey's report, 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 contact information. Price Supp. Dec. at ¶ 16. 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, 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. Thus, there is no basis for an *in camera* review of these documents.

Document 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). Dr. Mowrey acknowledges that the description of these documents on his privilege log says "Daniel Mowrey CV." Dr. Mowrey further recognizes that, in its Order, the Court stated that documents identified on the privilege log with the topic of "Mowrey CV" appear to "fall well within the scope of discovery applicable to expert witnesses." Order at 3. However, the Court prefaced that statement by saying that many of the documents "*as described by the privilege log*" fall within the scope of expert discovery. Given that prefatory statement, Dr. Mowrey believes additional information concerning the documents will demonstrate that they do not fall within the scope of expert discovery.

First, 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. The emails simply relate to a request by Mr. Gay's counsel for a copy of his client's co-Respondent's CV, which Mr. Gay's counsel was seeking as part of his investigation of the facts and fact witnesses in this case. It was simply part of the process which any trial lawyer or legal team goes through in investigating a case -- i.e., seeking to become familiar with the parties to the case, the parties' backgrounds, and the background of potential witnesses. Thus, these emails relating to Dr. Mowrey's CV related solely to Respondents' counsels' investigation concerning the facts and background of the case, and the potential fact witnesses in the case.

Second, these emails were sent to and reviewed by Dr. Mowrey more than two weeks *before* Respondents and their counsel had considered or designated Dr. Mowrey as an expert witness. Thus, they had nothing to do with Dr. Mowrey's *subsequent* role as an expert witness. Indeed, Respondents did not even discuss or determine to call Dr. Mowrey as an expert witness until well *after* these documents were created.

Third, 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.

Finally, both Complaint Counsel and this Court have expressly acknowledged that given Dr. Mowrey's dual role as a Respondent and as an expert witness, not all documents reviewed by Dr. Mowrey in this case are subject to expert discovery. Thus, while Dr. Mowrey concedes that *if* these documents had been sent to, and reviewed by, Dr. Mowrey after he had been designated as an expert witness (or in connection therewith), these documents would be part of normal expert discovery. However, in the Court's Order Governing Expert Discovery, the Court made it clear that while experts are required to produce documents they read, reviewed, considered or relied upon in their capacity as an expert witness or in forming their expert report/opinion, they are not required to produce documents which were not read, reviewed, considered or relied upon in their capacity as an expert or in connection with forming their expert report/opinion. Dr.

Mowrey should not be treated differently than Complaint Counsel's experts with respect to the scope of expert discovery.<sup>16</sup>

These additional facts, which provide much more information than the phrase "Daniel Mowrey CV" which appears on the privilege log, demonstrate that these documents do not fall within the realm of ordinary expert discovery. Accordingly, there is no basis for production or for *in camera* review of these documents.

Document Bates No. 96. This is an email from Ms. Fobbs to Dr. Mowrey dated 4 October 2004, with the subject line "luminaries," and consists of a single phrase 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. In light of such facts, there is basis for production or an *in camera* review of this document.

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<sup>16</sup> For example, Dr. Heymsfield has been an expert witness on a number of prior occasions, including on behalf of the Federal Trade Commission. In connection with those matters Dr. Heymsfield no doubt submitted a CV which, due simply to passage of time, is not as current as the CV submitted in this proceeding. Dr. Heymsfield very well may have a copy of that old CV, which the Federal Trade Commission no doubt possesses. Dr. Mowrey doubts that Complaint Counsel would agree that Dr. Heymsfield's old CV is subject to production merely because it relates to his credentials.

Documents 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 are scientific studies of any kind, and none of which are mentioned, discussed or addressed in Dr. Mowrey's expert report. In light of Complaint Counsel's concession in footnote 8 of their Motion that they are not entitled to production of documents if they do not mention studies discussed in Dr. Mowrey's report, these documents are not subject to production under the Court's Order.

Furthermore, Dr. Mowrey notes that these emails were created, received, and reviewed by Dr. Mowrey before Respondents ever discussed or determined to identify Dr. Mowrey as an expert witness. Price Supp. Dec. at ¶ 19. Moreover, Dr. Mowrey testifies that the documents referenced in the emails are not documents created by Dr. Mowrey, 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. Thus, consistent with the Court's Order Governing Expert Discovery, these documents are not the types of documents which experts are required to produce. Accordingly, there is no basis for production or *in camera* review of these documents.

Documents 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 Sprik (with the Corporate Respondents' Compliance Department) dated 11/01/04, (v) Ms. Sprik to Dr. Mowrey dated 11/01/04, (vi) Ms. Sprik to Dr. Mowrey dated 11/03/04, (vii) Ms. Fobbs to Ms. Sprik dated 11/11/04, (viii) Ms. Sprik to Dr. Mowrey dated 11/11/04, and (ix) Ms. Sprik to Dr. Mowrey dated 12/03/04. These emails all relate to a request by Dr. Mowrey's counsel for assistance in gathering copies of certain documents -- specifically, documents listed on Dr. Mowrey's CV. Thus, the documents requested in these emails have nothing to do with any of the studies (or studies' authors) discussed in Dr. Mowrey's expert report.

Furthermore, 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. Moreover, in its Order Governing Expert Discovery, this Court expressly ruled that expert witnesses do not have to produce their prior publications. *See, e.g.,* Order Governing Expert Discovery, at 3. Finally, 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. Thus, these documents are not subject to production and there is no basis for *in camera* review.

Documents Bates 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. Burbidge & 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 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.<sup>17</sup> 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

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<sup>17</sup> Dr. Mowrey notes that the 22 November 2004 email from him to his counsel (which is part of document bates no. 168), and the 22 November 2004 email from Dr. Mowrey's counsel to Dr. Mowrey (which is document bates no. 165) contain absolutely no substantive information concerning the Colker/Kalman paper. Price Supp. Dec. at ¶ 22. Dr. Mowrey further notes that, in response to the Court's Order, Dr. Mowrey produced to Complaint Counsel a copy of the transmittal email pursuant to which Dr. Mowrey's counsel transmitted to Dr. Mowrey a copy of the Colker/Kalman paper.

Respondents Dr. Mowrey & Friedlander) which is part of Document Bates No. 168, that email relates solely to Respondents' litigation strategy and potential discovery to undertake, and relates solely to the issue of whether to take the depositions of certain potential fact witnesses. Price Supp. Dec. at ¶ 22. It is not related to Dr. Mowrey's capacity as an expert witness, or to his expert report/opinion. *Id.* Accordingly, they are not subject to production under the Court's Order Governing Expert Discovery, or under the terms of the Order. Thus, there is no basis for *in camera* review of these documents.

Dr. Mowrey acknowledges that, in its Order, the Court stated that "Respondent must produce all documents relating to his capacity as an expert witness and studies referenced in his expert report." Order at 3. However, the Court also clearly stated that Dr. Mowrey was not required to produce documents "that do not relate to his capacity as an expert or to the formation of his expert opinion in this case[.]" *Id.* Similarly, when ruling on the scope of discovery permissible with respect to Complaint Counsel's experts, the Court made it clear that experts are not required to produce documents they did not read, review, consider or rely on in their capacity as an expert witness, or in forming their expert opinion. *See, e.g.,* Order Governing Expert Discovery at 4. Here, Dr. Mowrey testifies that he received, read and reviewed Documents Bates Nos. 165 and 168 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. Accordingly, under the express terms of the Court's Order that Dr. Mowrey is not required to produce documents "that do not relate to his capacity as an expert or to the formation of his expert opinion in this case[.]" as well as under the terms of the Court's prior Order Governing Expert

Discovery, Documents Bates Nos. 165 and 168 are not subject to discovery, and there is, therefore, no basis for *in camera* review.<sup>18</sup>

### **III. COMPLAINT COUNSEL’S MOTION FOR SANCTIONS SHOULD BE DENIED**

For the reasons set forth above, the documents Complaint Counsel seek are not subject to production under the Court’s Order. Accordingly, there is no basis for the sanctions requested by Complaint Counsel. Furthermore, even assuming *arguendo* that the Court concludes Dr. Mowrey’s interpretation of the Order is incorrect, and directs Dr. Mowrey to produce additional documents, Complaint Counsel’s motion for sanctions should be denied.

#### **A. APPLICABLE STANDARDS**

Under FTC precedent, an administrative law judge may impose sanctions such as those requested by Complaint Counsel “only where the party’s failure to comply [with the ALJ’s order] is *unjustified*.” *In re The Grand Union Co.*, 102 F.T.C. 812, 1090 (1983). Furthermore, “sanctions under Rule 3.38 should be imposed only if (1) production of the requested material has been mandated by a subpoena or specific discovery order issued by an ALJ or the Commission and directed at the party (or its officer or agent) from whom the material is sought; (2) the party’s failure to comply is unjustified; and (3) the sanction imposed “is reasonable in light of the material withheld and the purposes of Rule 3.38(b).” *In re International Telephone & Telegraph Corp.*, 104 F.T.C. 280, 449 (1984).

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<sup>18</sup> As with the Attorney Interview Documents and the Potential Expert Witnesses Documents, production for *in camera* review of the portion of document bates no. 168 which is the 22 November 2004 email from Dr. Mowrey’s counsel to Ms. Fobbs and Mr. Watson (and copied to the Corporate Respondents’ prior counsel, Mr. Gay’s counsel, and Respondents Dr. Mowrey & Friedlander), is problematic because it discusses litigation/trial strategy, and disclosure of the contents of that document to the Court, which is the trier of fact, could prejudice Respondents during the remainder of these proceedings.

Additionally, even if an administrative law judge determines sanctions should be imposed, the Commission has made it clear that “Rule 3.38 should be interpreted to permit the party that fails to supply the required documents to tender them within a reasonable period of time following the issuance of an order imposing sanctions.” *Id.* The Commission further explained:

Prior to that [reasonable] time period, a party that elects to contest portions or all of an order for the production of documents or other materials does not know whether the ALJ or the Commission will in fact impose some or all of the available sanctions, modify the terms of the subpoena or order, or instead apply to a district court for enforcement.

This approach would be consistent with the procedure adopted in *International Union [(UAW) v. NLRB]*, 459 F.2d 1329 (D.C. Cir. 1972)]. There, the Court of Appeals confronted a respondent in an NLRB proceeding that had for seven years refused to provide clearly relevant documents in response to an NLRB subpoena. The Court of Appeals nevertheless directed the NLRB to draw an adverse inference from that failure to produce only if the respondent failed to produce the documents at issue within thirty days after the entry of the Court's order. The court indicated that

in order to be absolutely certain that no miscarriage of justice occurs, we think the company should be given one last chance to come forward with the documents. Now that the consequences of suppression have been made abundantly clear, surely Gyrodyne will produce the rehiring records if they are in any way exculpatory. If the company still prefers suppression--even at the price of having its cost-cutting defense stricken--then the tenor of the documents will be obvious to all.

By permitting Gyrodyne a last chance to come forward with the documents, however, we do not mean to suggest that the proceedings may be delayed indefinitely while Gyrodyne ponders its decision. We have seen quite enough pondering--and not nearly enough deciding--already. Therefore, the Board should allow the company 30 days to produce the rehiring records. If, by the end of that time the company has still not come forward with the evidence, the consequences outlined above should swiftly follow.

In this case, the ALJ simply imposed the sanctions at issue without giving Continental the alternative of tendering the disputed documents within a limited period of time--thirty days would probably have been a useful maximum-- after the finalization of his order. The ALJ then certified for appeal to the Commission the policy question of

whether the Commission should rely upon his adverse inferences or should instead seek federal district court enforcement of the subpoena at issue. Once the Commission determined that interlocutory appeal of the ALJ's order was not appropriate, and remanded the issue to the ALJ, Continental immediately tendered the disputed documents. Nevertheless, the ALJ refused to withdraw the adverse inferences entered earlier, and instead permitted complaint counsel to refuse to accept the disputed documents. The ALJ should have permitted Continental to tender the disputed documents within thirty days after the Commission denied Continental's appeal, and should have withdrawn the adverse inferences once Continental did so. That approach would have provided a better resolution of the cost issue than the sanctions order, and the purpose of Rule 3.38(b) is after all to induce parties to supply subpoenaed material. We should note that if the ALJ had prescribed an additional time period within which to tender the subpoenaed documents, and Continental had refused to supply them within that time period, then reliance upon the ALJ's sanctions order --to determine in particular that Continental sold bread at prices below average variable cost--would have been entirely appropriate.

*Id.* at 449-450 (footnotes omitted).

Moreover, the federal courts have made it clear that where any alleged prejudice resulting from the alleged discovery violations can be cured by allowing additional discovery, sanctions such as those requested by Complaint Counsel should not be imposed.<sup>19</sup> *See, e.g., Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 752 (7<sup>th</sup> Cir. 2005) (reversing discovery sanction imposed by trial court, and finding that “[a]ny (slight) harm to STG caused by Fidelity's [discovery] violation . . . could have been fully compensated by the judge's granting STG a continuance to enable it to conduct any additional discovery that might have been warranted by information revealed by the interview notes and requiring Fidelity to reimburse STG for the expense of such additional discovery and for any other litigation expenses caused by

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<sup>19</sup> The Commission has directed that when considering imposing sanctions, an administrative law judge should look to case law under the Federal Rules of Civil Procedure for guidance in determining when sanctions are appropriate, and the type of sanctions that should be imposed. *Id.*

Fidelity's failure to make timely and complete disclosure of the notes").<sup>20</sup> *See also Webb v. District of Columbia*, 146 F.3d 964, 974 (D.C. Cir. 1998) (holding that the prejudice caused by a litigant's destruction of documents (not just a failure to produce) could have been cured by allowing the aggrieved party to conduct additional discovery prior to trial).

**B. DR. MOWREY'S REFUSAL TO PRODUCE ALL 40 PAGES OF THE DOCUMENTS DEMANDED BY COMPLAINT COUNSEL IS NOT UNJUSTIFIED**

In this case, Dr. Mowrey's refusal to produce all of the documents demanded by Complaint Counsel is not unjustified, and thus does not merit the imposition of sanctions. As discussed above, Dr. Mowrey's refusal to produce all of the documents demanded by Complaint Counsel is not, as Complaint Counsel would have this Court believe, part of some widespread refusal to produce large amounts of documents. Rather, it stems from a good faith dispute concerning the interpretation of the Court's Order. Dr. Mowrey believes that (a) the Court's Order should be interpreted in a fashion consistent with the Court's prior Order Governing Expert Discovery, (b) the Order required Dr. Mowrey to produce all documents he read, reviewed, considered or relied upon in his capacity as an expert witness or in connection with forming his expert report/opinion, and (c) the Order does not require Dr. Mowrey to produce

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<sup>20</sup> Indeed, with the exception of requiring the payment of expenses, this is precisely the procedure that has been followed in this case, when the Court ordered Complaint Counsel to make Dr. Heymsfield available for a third deposition, when it became clear that Dr. Heymsfield had not produced all documents required by the Court's scheduling order and by the a subpoena which had been served on him. When the Court ordered Complaint Counsel to make Dr. Heymsfield available for a third day (four hours) of additional deposition due to Dr. Heymsfield's failure to produce all documents he had been required to produce, the Court did not require Complaint Counsel to reimburse Respondents for the expenses incurred in connection with deposing Dr. Heymsfield a third time. Where the Court declined to require Complaint Counsel to pay such expenses, the Court should similarly decline to require Dr. Mowrey to pay such expenses.

documents which are not relevant to his capacity as an expert witness -- i.e., documents which he did not read, review, consider or rely upon in his capacity as an expert witness or in connection with forming his expert report/opinion. Dr. Mowrey's proffered interpretation is consistent with the Court's prior Order Governing Expert Discovery, as well as the Court's express ruling in the Order 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." Order at 3.

That Dr. Mowrey's refusal to produce all 40 pages of the documents Complaint Counsel demand in their Motion is not unjustified is further demonstrated by the fact that Complaint Counsel concede in footnote 8 of their Motion that if the documents they demand do not mention (a) topics discussed in Dr. Mowrey's report, (b) scientific studies mentioned in Dr. Mowrey's report, or (c) authors of scientific studies mentioned in Dr. Mowrey's report, then such documents are not subject to production under the Order. In light of that concession, it is clear that many of the 40 pages of documents at issue in this Motion are not subject to production even under Complaint Counsel's broad interpretation of the Court's Order. Thus, even assuming the Court directs Dr. Mowrey to produce some of the documents demanded by Complaint Counsel, the fact that Complaint Counsel are not entitled to obtain all of the documents they demand, by itself, demonstrates that Dr. Mowrey's refusal to produce all of the documents is not unjustified.

**C. ASSUMING THE COURT ORDERS DOCUMENTS TO BE PRODUCED AND DETERMINES TO IMPOSE THE SANCTIONS REQUESTED BY COMPLAINT COUNSEL, RULE 3.38 REQUIRES THAT DR. MOWREY BE GIVEN AN OPPORTUNITY TO PRODUCE THE DOCUMENTS BEFORE THE SANCTIONS ARE IMPOSED**

Complaint Counsel expressly acknowledge in their Motion that ““Rule 3.38 should be interpreted to permit the party that fails to supply the required documents to tender them within a reasonable period of time *following* the issuance of an order imposing sanctions.”” *ITT Corp.*, 104 F.T.C. at 449 (emphasis in original).” *See, e.g.*, Motion at 19, n. 9. Accordingly, in the event the Court orders Dr. Mowrey to produce additional documents, and in the event the Court also determines that Dr. Mowrey’s refusal to produce all 40 documents was unjustified and merits the imposition of sanctions, Dr. Mowrey should be allowed a reasonable amount of time to produce the documents before any proposed sanctions take effect.

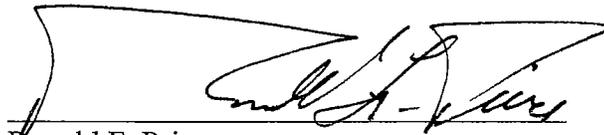
**D. ANY ALLEGED PREJUDICE TO COMPLAINT COUNSEL CAN BE CURED THROUGH THE CONTINUED DEPOSITION OF DR. MOWREY**

Finally, and as set forth above, the federal courts have made it clear that where any alleged prejudice resulting from the alleged discovery violations can be cured by allowing additional discovery, sanctions such as those requested by Complaint Counsel should not be imposed. *See, e.g., Fidelity*, 412 F.3d at 752. This Court has already made it clear that Complaint Counsel will be allowed further deposition of Dr. Mowrey. Such further deposition clearly cures any perceived prejudice to Complaint Counsel. Accordingly, Complaint Counsel’s request for any additional sanctions beyond the continued deposition should be denied.

**CONCLUSION**

For the foregoing reasons, Complaint Counsel’s Motion should be denied in its entirety.

Dated September 15, 2005.

A handwritten signature in black ink, appearing to read "Ronald F. Price", written over a horizontal line.

Ronald F. Price

PETERS SCOFIELD PRICE

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111 East Broadway

Salt Lake City, Utah 84111

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**Counsel for Respondent Daniel B. Mowrey**

# EXHIBIT A



RONALD F. PRICE  
ATTORNEY AT LAW

PETERS SCOFIELD PRICE  
A PROFESSIONAL CORPORATION

rfp@psplawyers.com

16 August 2005

VIA E-MAIL AND U.S. MAIL

Laureen Kapin  
Walter C. Gross, III  
Joshua S. Millard  
Edwin Rodriguez  
Laura Schneider  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Suite NJ-2122  
Washington, DC 20580

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

Dear Counsel:

As you are aware, Judge McGuire has ordered Dr. Mowrey 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 on Complaint Counsel's Motion to Compel Production of Dr. Mowrey's Expert-related Documents*, dated 9 August 2005, at 3. Judge McGuire further ordered that "[t]o the extent that Complaint Counsel's motion 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.* While Dr. Mowrey naturally disagrees with the Court's ruling, he intends to comply with it. Accordingly, enclosed herewith are copies of documents being produced in compliance with the Court's order. With 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.

Please be aware that the fact that a particular document is produced herewith does not mean that the entirety of the document necessarily relates to Dr. Mowrey's capacity as an expert witness. However, because at least a portion of such documents relate to Dr. Mowrey's capacity as an expert witness, they are produced herewith. In so doing, Dr. Mowrey does not waive any, and expressly reserves all, attorney-client, work product, joint defense or other applicable privileges which may apply to those non-expert witness related portions of the produced documents.

Laureen Kapin, Walter C. Gross, III, Joshuas S. Millard,  
Edwin Rodriquez, Laura Schneider  
16 August 2005  
Page 2

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Finally, please let me know within five (5) business days whether you intend to take Dr. Mowrey's deposition concerning the documents produced with this letter.

Best regards,

**PETERS SCOFIELD PRICE**  
*A Professional Corporation*



Ronald F. Price

cc: Respondents' Counsel (via email)  
Mitchell K. Friedlander (via email)

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# EXHIBIT B



RONALD F. PRICE  
ATTORNEY AT LAW

PETERS SCOFIELD PRICE  
A PROFESSIONAL CORPORATION

rfp@psplawyers.com

22 August 2005

VIA E-MAIL

Joshua S. Millard  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Suite NJ-2122  
Washington, DC 20580

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

Dear Mr. Millard:

This letter is in response to your letter of 17 August 2005. I apologize for not having responded sooner, but I was out of the office all day Thursday, and most of the day Friday.

I will first address your request that I specifically identify by bates nos. the attachments which have previously been produced to you and the emails to which such attachments correspond. The resume referenced in Document Bates No. 122 was provided to Complaint Counsel in connection with the *Supplement to Respondent's Expert Witness List Including Transcribed Testimony* on 20 October 2004. With respect to the attachment referenced in Document Bates No. 147, it appears that although I believed that the attachment had been produced on 10 January 2005, it apparently was not. Accordingly, produced herewith is the attachment referenced in Document Bates No. 147.

With respect to the attachments referenced in Documents Bates 149, 153, 175, 180, 186, 187, 188, 189 and 190, the attachments were all produced on 10 January 2005, and their specific bates nos. are as follows:

Document Bates No. 149: Bates Nos. 166 - 175, of the documents produced on 10 January 2005.

Document Bates No. 153: Bates Nos. 176 - 185, of the documents produced on 10 January 2005.

Document Bates No. 174: Although the document references an attachment, no document was attached.

Document Bates No. 175: Bates Nos. 146 - 165, of the documents produced on 10 January 2005.

Document Bates No. 180: Bates Nos. 135 - 145, of the documents produced on 10 January 2005.

Document Bates No. 186: Bates Nos. 54 - 134, of the documents produced on 10 January 2005.

Document Bates No. 187: Bates Nos. 39 - 53, of the documents produced on 10 January 2005.

Document Bates No. 188: Bates Nos. 1 - 16, of the documents produced on 10 January 2005.

Document Bates No. 189: Bates Nos. 35 - 38, of the documents produced on 10 January 2005.

Document Bates No. 190: Bates Nos. 17 - 34, of the documents produced on 10 January 2005.

With respect to the reference to the Colker/Kalman study in Document Bates No. 171, I indicated in my letter of 16 August 2005 "that the fact that a particular document is produced herewith does not mean that the entirety of the document necessarily relates to Dr. Mowrey's capacity as an expert witness." Furthermore, as stated above, while I acknowledge that the Colker/Kalman study referenced in document bates no. 171 is also referenced in Dr. Mowrey's report, the reference to that study in this particular email was unrelated to Dr. Mowrey's report. In any event, as you are aware, the study referenced in this particular document was produced as part of Exhibit A to Dr. Mowrey's report, and was previously produced in this matter by the "corporate respondents." See, e.g., R0000160 - R0000172.

Having provided the above information and the accompanying documents, I confirm to you that to the best of my knowledge, information and belief, all of the attachments referenced in the documents listed on Dr. Mowrey's privilege log which were produced on 16 August 2005 have been produced to you (although we have not reproduced Complaint Counsel's expert reports and rebuttal expert reports which were forwarded by email to Dr. Mowrey). If you believe there are attachments that have not been produced, please identify any such ones in question so I can investigate.

Turning now to your demand that Dr. Mowrey produce the other documents identified in your letter of 17 August 2005, those documents were not created, received

and/or viewed by Dr. Mowrey in his capacity as an expert witness, were not created, received or viewed by Dr. Mowrey in connection with forming his expert opinion in this case, and are not related to Dr. Mowrey's capacity as an expert witness. Notwithstanding your attempt to characterize the documents in question as expert related (i.e., your labels such as "interview conducted with expert" etc.), your mistaken belief and attempt to engage in *ipsi dixit* does not turn documents which Dr. Mowrey viewed solely in his capacity as a Respondent in this case into documents which relate to his capacity as an expert. The simple fact is that the documents which have not been produced were received, viewed and/or created by Dr. Mowrey solely in his capacity as a Respondent, not in his capacity as an expert witness. By way of example only, you demand that Dr. Mowrey produce a variety of documents which were created **before** the Respondents even discussed or decided to identify Dr. Mowrey as an expert witness (some of the documents you demand were created more than two months before such discussions or designation ever occurred). Such documents clearly are unrelated to Dr. Mowrey's capacity as an expert witness. The documents you demand in your letter are protected by the various previously asserted privileges, are not subject to production under the Court's order, and will not be produced.

As to the specific documents you demand in your letter, I will provide below some additional information concerning the reasons for their being withheld (the fact that they were received, viewed and/or created solely in the capacity of a Respondent is reason enough). In so doing, neither Dr. Mowrey nor I waive, and we specifically reassert, all attorney-client privilege, joint defense privilege, work product immunity and other applicable privileges with respect to those documents.

Documents Bates Nos. 92 & 93 -- As has been previously explained to you, "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 important fact witnesses . . . the September email relating to Dr. Mowrey's CV related solely to Respondents' counsels' investigation concerning the facts and background of the case, and the fact witnesses in the case. It had nothing to do with Dr. Mowrey's role as an expert witness." Indeed, and as been previously explained to you, Respondents did not even discuss or determine to call Dr. Mowrey as an expert witness until well **after** these documents were created. Documents bates nos. 92 and 93 had absolutely nothing to do with Dr. Mowrey's role as an expert witness.<sup>1</sup>

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<sup>1</sup> Parenthetically, I note that later, after the Respondents had determined to identify Dr. Mowrey as an expert witness, Dr. Mowrey provided his CV, which CV has been provided to you.

Document Bates No. 96 -- This document was created **before** Respondents discussed or determined to identify Dr. Mowrey as an expert witness, and has absolutely nothing to do with his role as an expert witness.

Documents Bates Nos. 166-167 -- These documents do not mention, refer or relate to Complaint Counsel's expert witnesses nor do they mention, refer or relate to Dr. Mowrey as an expert witness. Rather, during the course of this proceeding, Respondents and their counsel discussed potential expert witnesses other than Dr. Mowrey. These documents relate solely to those other potential expert witnesses, and have nothing to do with Dr. Mowrey's capacity as an expert witness in this case.

Documents Bates Nos. 26-32 -- First, these documents were created **more than two months before** Respondents discussed or determined to call Dr. Mowrey as an expert witness. That alone demonstrates that they have nothing to do with Dr. Mowrey's role as an expert witness. Second, as with documents bates nos. 92 and 93, 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 important fact witnesses. These documents relate solely to Respondents' counsel's investigation into the facts of this case, and investigation into the fact witnesses in this case. These documents have absolutely nothing to do with Dr. Mowrey's capacity as an expert witness.

Documents Bates Nos. 91 and 94 -- As you have been previously informed, these documents relate solely to interviews which Respondents' counsel conducted of certain potential fact witnesses (not of Dr. Mowrey, either as a fact witness or as an expert witness). These documents are completely unrelated to Dr. Mowrey's capacity as an expert witness.

Documents Bates Nos. 84, 86 & 87 -- First, these documents were created almost three weeks **before** Respondents discussed or determined to call Dr. Mowrey as an expert witness. That alone demonstrates that they have nothing to do with Dr. Mowrey's role as an expert witness. Second, the documents concern information relating to potential fact witnesses (not of Dr. Mowrey, either as a fact witness or as an expert witness). These documents have absolutely nothing to do with Dr. Mowrey's capacity as an expert witness.

Documents Bates No. 100, 106-07, and 109-114 -- First, these documents were created **before** Respondents discussed or determined to identify Dr. Mowrey as an expert witness. This alone demonstrates they are unrelated to Dr. Mowrey's capacity as an expert witness. Second, these documents relate to Respondents' counsel's

investigation concerning certain witnesses in this case. They have absolutely nothing to do with Dr. Mowrey's capacity as an expert witness.

Documents Bates Nos. 135-141, 151-152, and 184 -- Part of the process which any lawyer 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 important fact witnesses. These documents relate to my investigation of the background of my client. They were generated, sent, received and/or viewed by Dr. Mowrey solely in his capacity as a Respondent in this case.<sup>2</sup>

Documents Bates Nos. 159-161 -- These documents refer to information requested relating to potential responses to Complaint Counsel's third set of interrogatories.

Documents Bates No. 54-55 -- This document was created almost two months before Respondents discussed or determined to identify Dr. Mowrey as an expert witness. This alone demonstrates that the document is not related to Dr. Mowrey's capacity as an expert witness. The document was sent to Dr. Mowrey solely in his capacity as a Respondent, and had absolutely nothing to do with his capacity as an expert witness, which capacity was not even determined until almost two months later.

Documents Bates Nos. 165 and 168 -- These documents are unrelated to Dr. Mowrey's capacity as an expert witness, and are unrelated to his expert report. While I acknowledge that the Colker/Kalman study referenced in these documents is a study discussed in Dr. Mowrey's report, these two particular documents are unrelated to the report. Rather, 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 or expert report.

In summary, your demand that Dr. Mowrey produce additional documents, all of which were created, received and/or reviewed by Dr. Mowrey solely in his capacity as a Respondent, and which do not relate to Dr. Mowrey's expert report or opinion, or his capacity as an expert witness, is rejected. You are not entitled to receive those documents under the Court's order, and they will not be produced. Dr. Mowrey has produced "all documents that relate to his capacity as an expert witness, including

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<sup>2</sup> Your letter referenced the fact that Dr. Mowrey produced document bates no. 121, which document had a description on Dr. Mowrey's privilege log of "information requested." That was the only document produced which had the description of "information requested" because it is the only document with the description of "information requested" which was received or reviewed by Dr. Mowrey in his capacity as an expert witness, as opposed to his capacity as a Respondent.

Joshuas S. Millard  
22 August 2005  
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communications with his attorney, the other Respondents, and the other Respondents' attorneys" and has fully complied with the Court's order. Dr. Mowrey will appear for his deposition on 30 August 2005.

Best regards,

**PETERS SCOFIELD PRICE**  
*A Professional Corporation*

Ronald F. Price

cc: Respondents' Counsel  
Mitchell K. Friedlander

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT DANIEL B. MOWREY'S MEMORANDUM OPPOSING COMPLAINT COUNSEL'S MOTION FOR *IN CAMERA* REVIEW AND FOR SANCTIONS** was provided to the following as follows:

(1) on 15 September 2005, the original and two (2) paper copies sent via Federal Express overnight delivery, and on 16 September 2005 one (1) electronic copy via email attachment in Adobe® “.pdf” format, to: Donald S. Clark, Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room H-159, Washington, D.C. 20580.

(2) on 15 September 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 to the following on 16 September 2005 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, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(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*.

