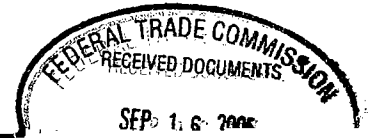


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

BASIC RESEARCH, L.L.C., et al.,

Respondents.

DOCKET NO. 0218

Public Document

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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

and the formation of his expert report. Accordingly, Complaint Counsel have filed their

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.² 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.³

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

documents Dr. Mowrev did not read, review, consider or rely upon in connection with forming

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

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

Respondent, and regardless of whether he read, reviewed, considered or relied upon it in

A. FACTS RELATING TO THE DOCUMENTS AT ISSUE

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

after the last date of documents identified on the privilege log.⁵ *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.

2 [REDACTED] August 2005 Letter the undersigned stated that "Exhibit [REDACTED]"

[REDACTED]

[REDACTED]

[REDACTED]

1. On 17 August 2005, Complaint Council sent a letter indicating that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. As discussed in Dr. Mowrey's memorandum opposing Complaint Counsel's

critical motion to compel Respondents did not decide to disclose Dr. M.

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*

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

representing Respondent Gay. The email also identifies other potential fact

considered or otherwise reviewed the interview notes attached to the email.⁷ See.

review the email after he had been designated as an expert witness. and did not

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.

to Dr. Mowrey's expert opinion or report, and is wholly unrelated to Dr. Mowrey's capacity as an

expert witness on his expert opinion/report. Indeed, Dr. Mowrey testified that he was not a

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

Dr. [REDACTED]

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

(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 merely 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

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

phrase request. No further information can be provided concerning the specific

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

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.

those identified above:

Discovery, this Court expressly ruled that experts did not have to produce their

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

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,

information and documents (which were clearly marked as attorneys' eyes only) to be posted on the internet.

between Dr. Heymsfield and Complaint Counsel, or, other than approximately 65

pages of documents, did not include any of the litigation records of [redacted]

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 interpretation of the Court's~~

Order (an interpretation which is inconsistent with the Court's Order Governing Expert

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

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

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.

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,

Document Bates No. 91. As discussed in the statement of facts, this document is an

ppid stings (dated 27 September 2004) more than two weeks before Dr. Mowrev was over

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. Mowrev).

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 Defendant

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

any of the scientific studies mentioned in Dr. Mowrey's report. *See, e.g.*, Motion at n.8. Given

such admissions, Complaint Counsel are not entitled to obtain a copy of Document D-100-04

decision that they do not seek production of this document if it does not mention any author of

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

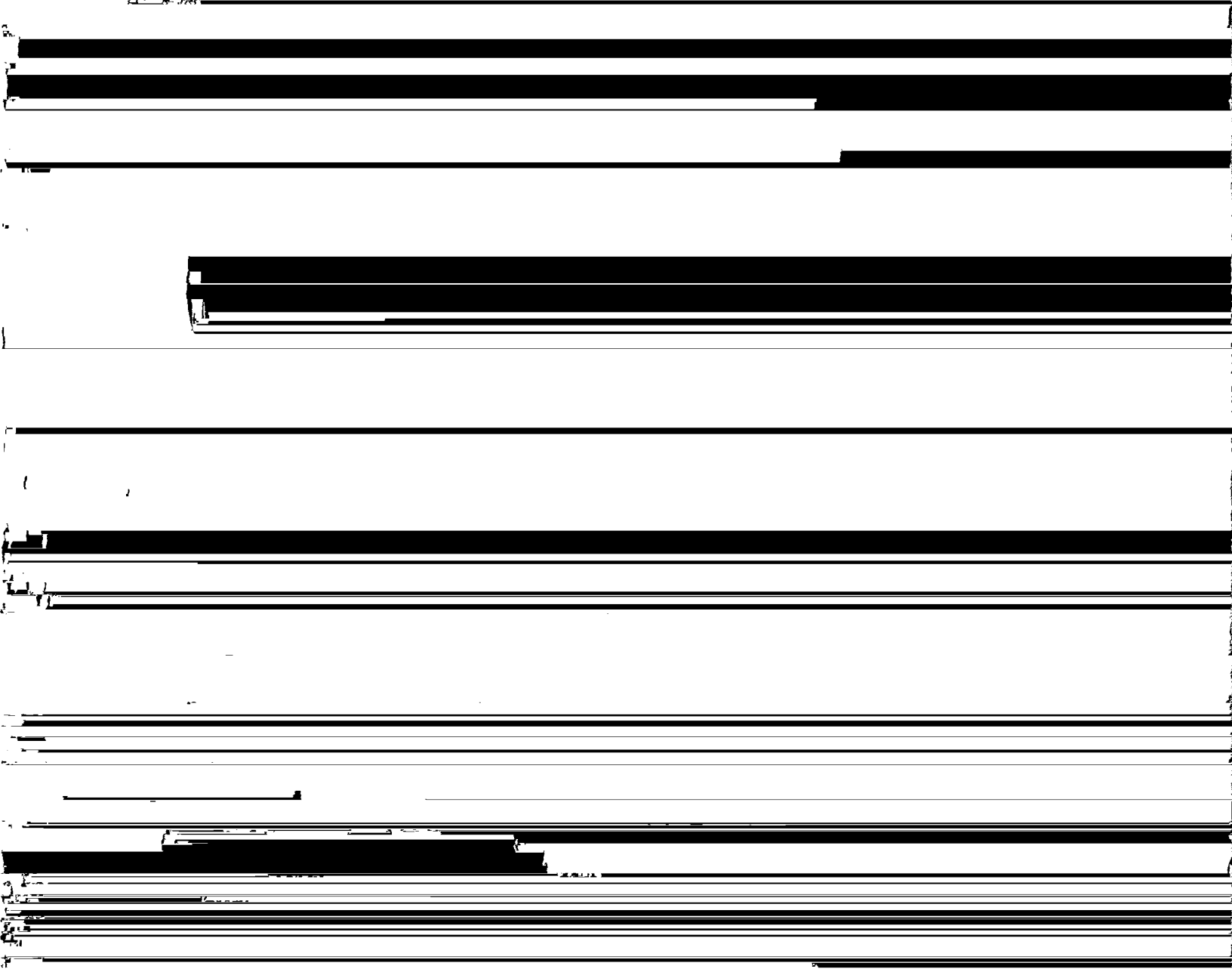
[REDACTED]

[REDACTED]

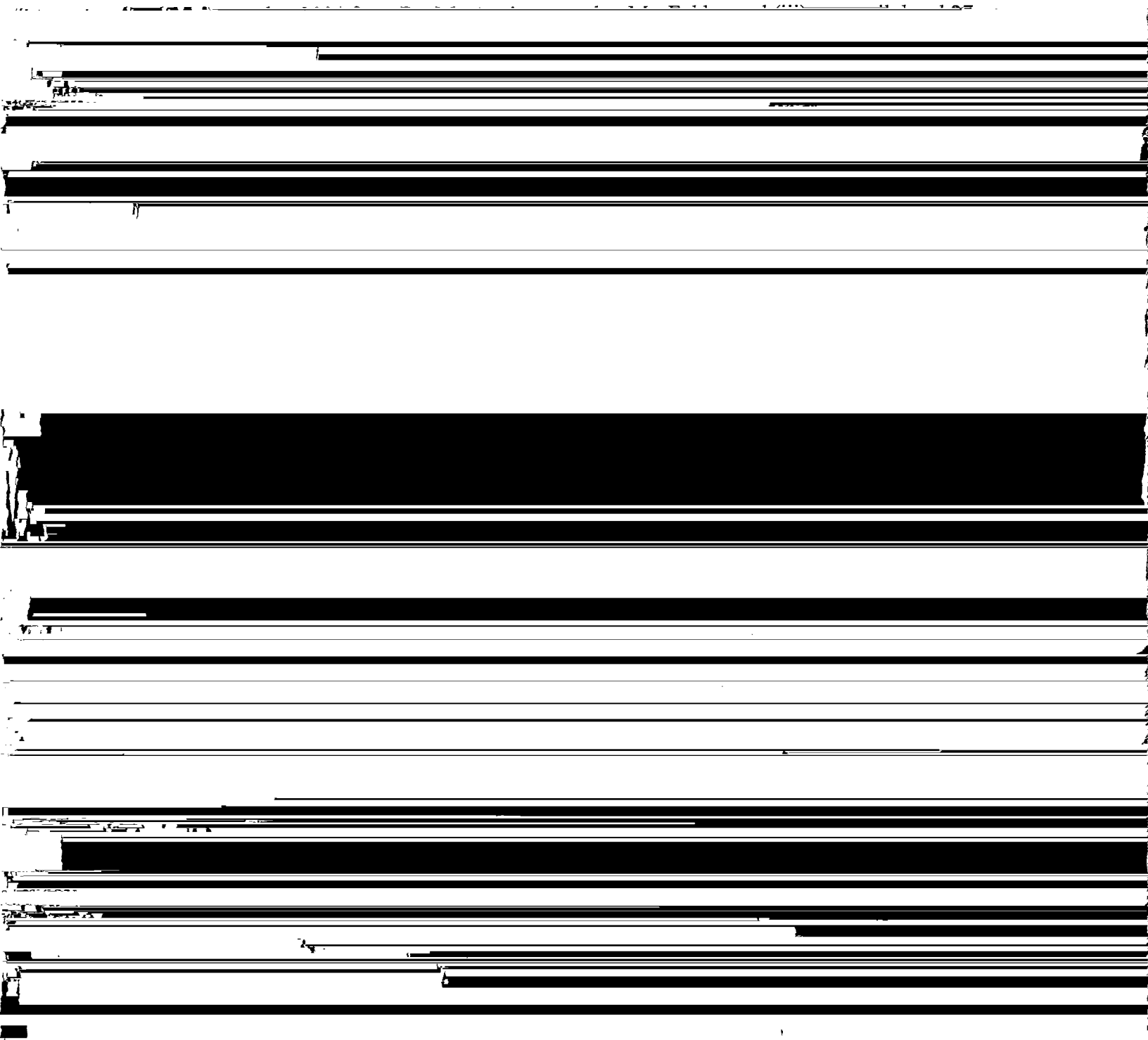
particular email in his capacity as an expert witness, or in connection with his expert opinion/report. Mowrey Supp. Dec. at ¶ 15.

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. Fallick to Dr. Mowrey), 20 September 2004 (from Dr. Mowrey to Ms. Fallick), and 23 September 2004 (from Ms. Fallick to Dr. Mowrey).



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



forward through email 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

They also had nothing to do with Dr. Mowrey's subsequent release as an expert witness.

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

These additional facts, which provide much more information than the phrase "Daniel

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

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

[Redacted]

[Redacted]

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

Supp. Dec. at ¶ 22. It is not related to Dr. Mowrey's capacity as an expert witness, or to his

Discovery Documents Bates Nos. 165 and 168 are not subject to discovery, and there is

therefore, no basis for *in camera* review.¹⁸

III COMPLAINT COUNSEL'S MOTION FOR SANCTIONS SHOULD BE DENIED

For the reasons set forth above, the Court finds that the motion for sanctions should be denied.

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." *In re* [redacted]

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 interloper personnel of the A.I. Pa. order was not appropriate, and

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Fidelity's failure to make timely and complete disclosure of the notes").²⁰ See also *Webb v.*

District of Columbia, 146 F.2d 964, 974 (D.C. Cir. 1948) (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).

RE DR MOWREY'S REFUSAL TO PRODUCE ALL 40 PAGES OF THE DOCUMENTS

DEMANDED BY COMPLAINT COUNSEL IS NOT UNJUSTIFIED

documents which are not relevant to his capacity as an expert witness -- i.e., documents which he

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

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~~ ~~Dr. Mowrey~~ ~~documents~~ ~~Rule 3.38~~ ~~sanctions~~ ~~opportunity~~ ~~produce~~ ~~documents~~ ~~before~~ ~~sanctions~~ ~~are~~ ~~imposed~~

Dated September 15, 2005.



Ronald F. Price
PETERS SCOFIELD PRICE
A PROFESSIONAL CORPORATION

240 Broad Street

111 East Broadway

Facsimile: (801) 322-2003
E-mail: rfp@pslawyers.com

Counsel for Respondent Daniel B. Mowrey

EXHIBIT A



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:

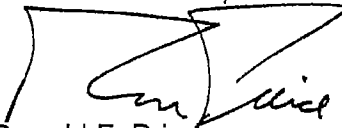
As you are aware, Judge McGuire has ordered Dr. Mowrey to produce "all

Edwin Rodriguez, Laura Schneider
16 August 2005
Page 2

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

Mitchell K. Friedlander (via email)

EXHIBIT B



RONALD F. PRICE
ATTORNEY AT LAW

PETERS SCOFIELD PRICE

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. Enclosed for your~~

Joshuas S. Millard
22 August 2005
Page 2

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.

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.

TABLE

Joshuas S. Millard
22 August 2005
Page 3

and continued by Dr. M... in his...
[REDACTED]

[REDACTED]

continued reviewed by Dr. M... in connection with forming his expert opinion in this

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.

Joshuas S. Millard

22 August 2005

Page 5

investigation concerning certain witnesses in this case. They have absolutely nothing

do to 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.²

Documents Bates Nos. 150-164 -- These documents reflect Dr. Mowrey's

22 August 2005
Page 6

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