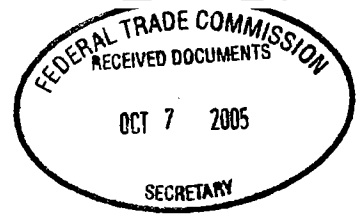


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C.



In the Matter of

BASIC RESEARCH, LLC  
A.G. WATERHOUSE, LLC  
KLEIN-BECKER USA, LLC

Counsel individually for their complicity in and condonation of the wrongful withholding  
of information responsive to discovery. If the Presiding Officer ... 1 1 3

Complaint Witness, Respondents seek, in the alternative, (1) the aforementioned  
sanctions and (2) leave to reopen discovery for the limited purpose of investigating all  
matters germane to: (a) the failure of the Complaint Witness to disclose to Respondents  
the existence of six fraudulent studies co-authored by him; (b) the generally accepted  
standards for listing of publications on a scientist's curriculum vitae; (c) the ethical

responsibility of co-authors of scientific publications. Complaint Witness

*publications*, and all prior cases in which the expert has testified or has been deposed. (Emphasis added.)

Immediately preceding the second deposition of Heymsfield, he supplied a list

proposing cases omitted from his initial list. [REDACTED]

to issue an order requiring Heymsfield to appear for a third deposition. [REDACTED]

March 15, 2005 Order on Defendant's Motion to Compel Discovery [REDACTED]

the six studies, Aug. 30 2005 Depo. at 462, lines 5-22. He also admitted that he informed Complaint Counsel of the existence of the six fraudulent studies and his involvement in them when first retained by Complaint Counsel.

11

Aug. 30, 2005 Depo. at 658-660, lines 13-25; 2-25; 2-6; 655- 657, lines 10-25; 2-25; 2-16.

## II. ARGUMENT

FTC Rule of Practice 3.38 provides that “it shall be the duty of parties to seek, and Administrative Law Judges to grant, sanctions or other appropriate relief as may be sufficient to compensate for failure to disclose documents as ordered.” The facts arising in Heymsfield’s August 30, 2005 deposition amply justify sanctions against Heymsfield and Complaint Counsel along with additional relief. As explained in detail herein, Dr. Heymsfield intentionally withheld from Respondents for over a year the fact that

misconduct warrants exclusion of this witness. The facts presented in detail *infra* also warrant the requested sanction of a reprimand by name of each of Complaint Counsel.

If exclusion is not ordered Respondents seek the aforementioned sanctions along

with a determination by the Presiding Officer that adverse inferences are warranted against Heymsfield for his wrongful withholding and lack of candor. In addition, Respondents ask that his Honor order discovery reopened for the limited purpose of

exceed seven hours<sup>1</sup> (2) the opportunity to discuss and obtain discovery of the

Heymsfield's testimony reveals that he apprised Complaint Counsel of the documents in question at the time of his retention in this case and in prior cases and that he and Complaint Counsel neither disclosed the existence of the documents nor produced them to Respondents. That complicity by Complaint Counsel in condoning and facilitating the wrongful non-disclosure falls far beneath the minimum standards of ethical conduct expected of government attorneys. On December 9, 2004, the ALJ

granted Complaint Counsel's motion for a protective order and quashed that portion of

the subpoena that required Heymsfield to produce copies of his published studies. However, the fact that Heymsfield did not have to submit actual copies does not excuse him, or Complaint Counsel, from failing to comply with his Honor's prior August 11, 2004 Scheduling Order that required all materials "fully describing his [Heymsfield's]

after the discovery of the six fraudulent Darsee studies.<sup>2</sup> This incident once more

underscores the profound questions relating to Heymsfield's lack of candor during the course of this proceeding.

The veracity of a witness is always in issue. Proof of willful non-disclosure of material and damaging facts and documents support witness exclusion, particularly in the case of an expert. An untruthfully expert can mislead a jury and cause a party to

who, like counsel, looks to expert opinion with lay eyes. That misleading testimony can

honest and unbiased.



issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.<sup>5</sup>

Moreover, Rule 3.38(c) provides:

If shall be the duty of parties to comply with Administrative Law Judges to ensure that

process and further suggests conduct hereafter minimum at 1 1 6 1 1 6

government counsel.

### III. PERTINENT FACTS

The following facts were first revealed at the August 30, 2005 deposition:

1. Heysfield co-authored six studies published in the peer-reviewed literature with co-author John Darsee. Those studies are:

2. Darsee JR, Heysfield SP, Decreased myocardial function in

\_\_\_\_\_

4. The six Deroso studies were withdrawn from publication. Oct 1, 2005

data relied on in the studies were fictitious and fraudulent. Aug. 30, 2005

Depo. at 452-453, lines 20-25; 2-3.

5. Heymsfield at the time the fraud was revealed was a tenured professor at

Emory University. Aug 30 2005 Depo. at 452 lines 7-12

6. In The Scientist, Heymsfield was quoted as saying "I am not a doctor" on the website www.heymsfield.com

10. Under examination, Heymsfield admitted that the fabricated facts that were

student at Emory University, where Heymsfield taught and with whom he collaborated in writing all six articles. Aug. 30, 2005 Depo. at 462-463, lines 24-25; 2-9.

If a paper, for example, those were actual papers that I

number of years ago, those papers are not on my CV.”

b. Q: “What papers are those?”

c. A: “There was a set of papers written by a student at Emory University, where I was a professor, and some of the information then was later found to be falsified. That group of papers was retracted from the journals and they are not on my CV.” Aug. 30, 2005 Depo.

45] 150 11-22-05-10

Q: "What about the ones that you were involved in, how many other

A: "About ten" Aug. 30, 2005 Depo. at 452, lines 6-15

4. Heymsfield haltingly and evasively avoided explaining his exact participation and responsibility in the six fraudulent Darsee studies.

a. Q: "Does a co-author have any responsibility in regards to..."



f. Mr. KADIN: "Objection. If you have document requests..."

that off-line and we will go through the formal process that has been set forth in this case, and discovery is closed."

g. Mr. FRIEDLANDER: "Well, we are just learning about this. This deposition hasn't been finished yet."

h. Mr. KADIN: "I understand. All I'm saying is that there's a..."

process and the deposition is not that process."

i. Q: "But you'd be willing to provide those letters?"

j. A: "Letters are published." Aug. 30, 2005 Depo. at 461-462, lines 19-25; 2-22. [\* \* \*]



- a. Q: "You mentioned that you were examined or questioned by the committee that discovered these transgressions by Darsee; is that correct?"
- b. A: "Yes, I was interviewed by the committees."
- c. Q: "Are there any transcripts of those hearings or those questionings?"
- d. A: "There were reports of those meetings which were probably made

public to some extent and those could be obtained from the National Institute of Health or maybe even from Emory University."

- e. Q: "But do you know whether there were any transcripts made? Did you ever read a transcript for correction?"
- f. A: "Oh, you are asking me something that happened 25 years ago. I

c. Q: "Down at the bottom, last full paragraph it says, and quoting you  
[from The Scientist, dated at May 18, 1987; Exhibit 3 hereto], "The

tenured, so they couldn't fire me. But they definitely considered me

an eyesore. I was set aside - taken off the ladder to the sky. It was

obvious there would be no promotions or opportunities.' That's what

b. A: "I don't remember specifically what I told the reporter. This is

1097 that this was written last Tuesday, 10/1/97.

this was in, I'm not sure what specifically was said to him at the time."

c. Q: "But you are not denying that you said this?" [\* \* \*] "Right, you are not denying it?"

d. A: "I don't know what I said to the reporter, but I don't, you know, I'm telling you objectively that the statement you made earlier, that I was – or you asked me was I ever asked, maybe we could go back to that statement."

e. Q: "I'll do it in just a second."

f. A: "But whatever the implication of this are are not accurate."

g. Q: "But if you don't recall what you said I take it you can't deny saying what's quoted here, right?" [\* \* \*]

h. A: "This is a – this is a newspaper article – " [\* \* \*] "No, I'm just [sic] telling you that."

i. Q: "You are off my question. My question is very simple. I take it

k. Q: "As you sit here today and you are under oath, can you deny that

you said what this reporter quotes?" [\* \* \*]

A: "I don't know whether or not this is an accurate quote or not. I...

2-25; 2-10:

g. Q: "But it could have happened that you allowed an article to be

published with your name on it that you didn't read in its entirety?" E\*

10/10/2019 10:10:10 AM

trying to discredit me for one reason or another. So I brought that up

c. Q: "And you were told not to reveal that information to the opposing counsel in this case?" [\* \* \*]

d. A: "No. I was never told not to reveal anything in Court. I was just

aware of."

e. Q: "So let me just get this straight. You inspected the information

k. Q: "Dr. Heymsfield, who among FTC counsel did you inform about

the Derses study?" \* \*

A: "I informed the FTC about Derses in general, but I can't remember

specifically who that was. I've interacted with several people at the  
FTC so I don't remember exactly who that was."

m. Q: "Did you discuss it with the lawyers sitting in this room?"

A: "You know honestly, I don't recall it's been about over a year."

o. Q: "But it was with lawyers for the Federal Trade Commission?" [\* \*

\*]

p. A: "Yes."

On "All right. So Hermsfeld's testimony is that he is not a doctor."

x. A: "More than likely." Aug. 30, 2005 Depo. at 658-660, lines 13-25;  
2-25; 2-6.

As is evidenced by the transcript cited above, Hermsfeld's testimony is that he is not a doctor.

admission has been an expert witness for FTC on numerous occasions, willfully violated his Honor's August 11, 2004 Scheduling Order. He also repeatedly testified haltingly and evasively to inquiries posed during his August 30 deposition. These actions justify



the six fraudulent Darsee studies, co-authored by Heysfield. Heysfield did not list the six studies on his *curriculum vitae*. Neither he nor the Complaint Counsel listed them in any other disclosure to Respondents. Heysfield testified that [redacted]

probe fully the newly discovered matters without the presence of [REDACTED]

motion to the Presiding Officer.

Moreover, Complaint Counsel, through their purposeful non-disclosure of  
damaging information, have violated the basic trust this government places in them – that  
they not only follow the law, the rules, and the orders but do so in an exemplary manner

above and beyond reproach. See *Rosen v. United States*, 205 F.3d 78, 82, 701 F.2d



on the incomplete record of initial disclosures made by Commlaint Counsel and their

witness they would inevitably be prejudiced by the omissions.<sup>16</sup> If these were to be

than those required by the rules of procedure in the conduct of Government litigation in federal court."<sup>19</sup>

**C. RESPONDENTS ARE PREJUDICED BY COMPLAINT**

**DARSEE STUDIES AND COMPLAINT WITNESS' HEARING AND**

**EVASIVE TESTIMONY**

Complaint Counsel's non-disclosure of the six fraudulent studies Heymesfield co

condoned, and was complicit in, their non-disclosure. Heymsfield's noncompliance and Complaint Counsel's complicity in that noncompliance reveal bad faith and warrant the imposition of sanctions that will meaningfully deter such conduct in future.

knew of, and informed Complaint Counsel of, his co-authorship of the six fraudulent



to which Heymsfield was involved in the fraudulent studies and to test the credibility of the statements he has already made in this proceeding. Truth is always in issue, and

the sanctions and alternate relief to reopen discovery are "reasonable in light of the



If his Honor elects not to exclude Homefield, the Defendants request that

[REDACTED]

[REDACTED]

request the aforementioned sanctions combined with an order reopening discovery for a

[REDACTED]

[REDACTED]

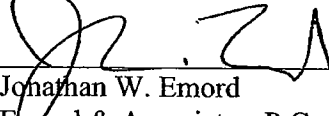
e. Compelling Complaint Counsel to identify by full name each counsel

aware of the six fraudulent Demco studies before August 1, 2005. d

time each became aware, and how each became aware.

Dated: October 6, 2005

Respectfully Submitted,



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Suite 200  
Reston, VA 20191  
Tel. (202) 466-6937  
Fax (202) 466-6938

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**A.G. Waterhouse, LLC**

**KLIPPEL USA, LLC**

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111 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 322-2002  
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**Counsel for Respondent Daniel B.  
Mowrey**

Mitchell K. Friedlander  
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*Pro se.*

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF BUSINESS LITIGATION**

**WASHINGTON, D.C.**

**In the Matter of**

**BASIC RESEARCH, LLC  
A.G. WATERHOUSE, LLC  
KLEIN-BECKER USA, LLC  
NUTRASPORT, LLC**



those studies, the statements Complaint Witness made to The Scientist,  
and the effect revelation of the fraudulent studies had on the scientific community.

association with Emory University;

- d. Compelling Complaint Witness under penalty of perjury to give a complete listing by name and subject matter, dates, addressees, and length all documents in his possession or under his control that relate to the six fraudulent Darsee studies;
- e. Compelling Complaint Counsel to identify by full name each counsel ~~involved in the six fraudulent Darsee studies before August 20, 2005.~~

time each became aware, and how each became aware.

**ORDERED:**

\_\_\_\_\_  
Stephen L. McGuire

**UNITED STATES OF AMERICA**

**OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C.**

**In the Matter of**

**BASIC RESEARCH, LLC**

unethical non-disclosure fails to meet the minimum standards of ethical conduct expected

of government attorneys. Accordingly, Respondents' motion is **GRANTED**.

It is hereby **ORDERED** that Steven Heymsfield, M.D., is hereby excluded as a witness in this proceeding. It is further **ORDERED** that his expert report and all documents upon which he relied for that report are excluded from this proceeding.



**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

**WASHINGTON, D.C.**

**In the Matter of**

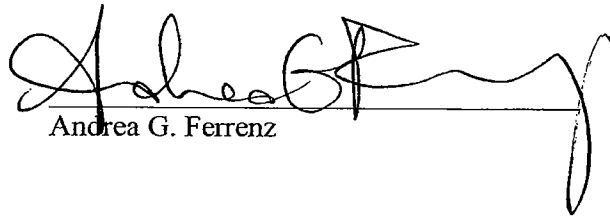
**BASIC RESEARCH, LLC  
A.G. WATERHOUSE, LLC  
KLEIN-BECKER USA, LLC  
NUTRASPORT, LLC  
SOVAGE DERMALOGIC LABORATORIES, LLC  
BAN LLC d/b/a BASIC RESEARCH LLC  
OLD BASIC RESEARCH, LLC**



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Andrea G. Ferrenz

# EXHIBIT 1

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**Rule 3.22 Statement**

In accordance with FTC Rule of Practice 3.22(f) (16 C.F.R. § 3.22(f)) Corporate Respondents' counsel Jonathan W. Emord and Andrea G. Ferrenz conferred with

comparing Complaint Counsel's proposed settlement with the settlement proposed by the respondents.

comparing proposed settlement with the settlement proposed by the respondents.

- 4) On October 6, 2005 in the morning Kapin called Emord and confirmed the call would be later that day at 3 PM.

conference call scheduled for 3 PM that same day to discuss the motion.

- 6) The follow-up teleconference occurred on October 6, 2005 at 3 PM with Emord and Ferrenz participating for Respondents and Kapin, Millard and two other FTC attorneys participating for Complainant

Counsel. Following discussion of argument for and against the motion, an agreement could not be reached.

**Jonathan Emord**

---

**From:** Jonathan Emord  
**Sent:** Wednesday, October 05, 2005 11:18 AM  
**To:** 'jmillard@frc.gov'; 'kcapin@frc.gov'

**Cc:** 'MarkQuinn@basicresearch.org'  
**Subject:** Time Certain for Thursday Call

Dear Mr. Millard and Ms. Kapin:

Thursday, 4 October 2005 11:18 AM

**Jonathan Emord**

From:

MARSH, JAMES C. EMAIL ADDRESS

**To:** Jonathan Emord; Kapin, Lauren  
**Subject:** RE: Time Certain for Thursday Call

Dear Mr. Emord:

Although I do not have time to respond to all of the many allegations in your letter, please permit me to remind you (as it was my understanding that you had previously been advised) that my colleague Ms. Kapin was out of the office yesterday, and is out of the office today, observing a religious holiday. Ms. Kapin is scheduled to return to the office tomorrow, but I am not aware of her schedule for Thursday.



available. Please confirm a time on Thursday. Please also confirm that

Sincerely,

Jonathan W. Emord

Andrea Ferrenz

**From:** Jonathan Emord  
**Sent:** Thursday, October 06, 2005 10:03 AM

**To:** 'lkapin@ftc.gov'  
**CC:** 'MedQuinn@businessweek.com'; Andrea Ferrenz

Dear Lauren--

As per your request, we will contact you at 3PM today to conclude our discussion on our pending request for you

# EXHIBIT 2

**Appendix 1**

**Steven B. Heymsfield, M.D.**

**New York, N.Y. 10025  
Phone: 212-523-3561  
Fax: 212-523-3571  
E-mail: SBH2@Columbia.edu**

**Birth date: July 15, 1944**

**Citizenship: U.S.A.**

Emory University, School of Medicine  
Division of Nutrition, Department of Medicine

Emory University, School of Medicine

- 1986- College of Physicians and Surgeons, N.Y.  
Visiting Physician,  
Rockefeller University, N.Y.
- 1986- Director, Human Body Composition Laboratory and Weight  
Control Unit of the Obesity Research Center

217 1st Avenue Hospital Center

**Departmental Committees**

**Executive Committee, Obesity Research Center**



**Other Professional Activities**

**Editorial Boards:**

***Current:***

- Journal of Parenteral and Enteral Nutrition**
- American Journal of Clinical Nutrition**
- International Journal of Body Composition Research**
- Age & Nutrition**
- Nutrition Reviews**
- Clinical Nutrition**

North American Association for the Study of Obesity (NAASO), Nominations  
Committee

Secretary, American Society of Clinical Nutrition

Secretary, American Society of Parenteral and Enteral

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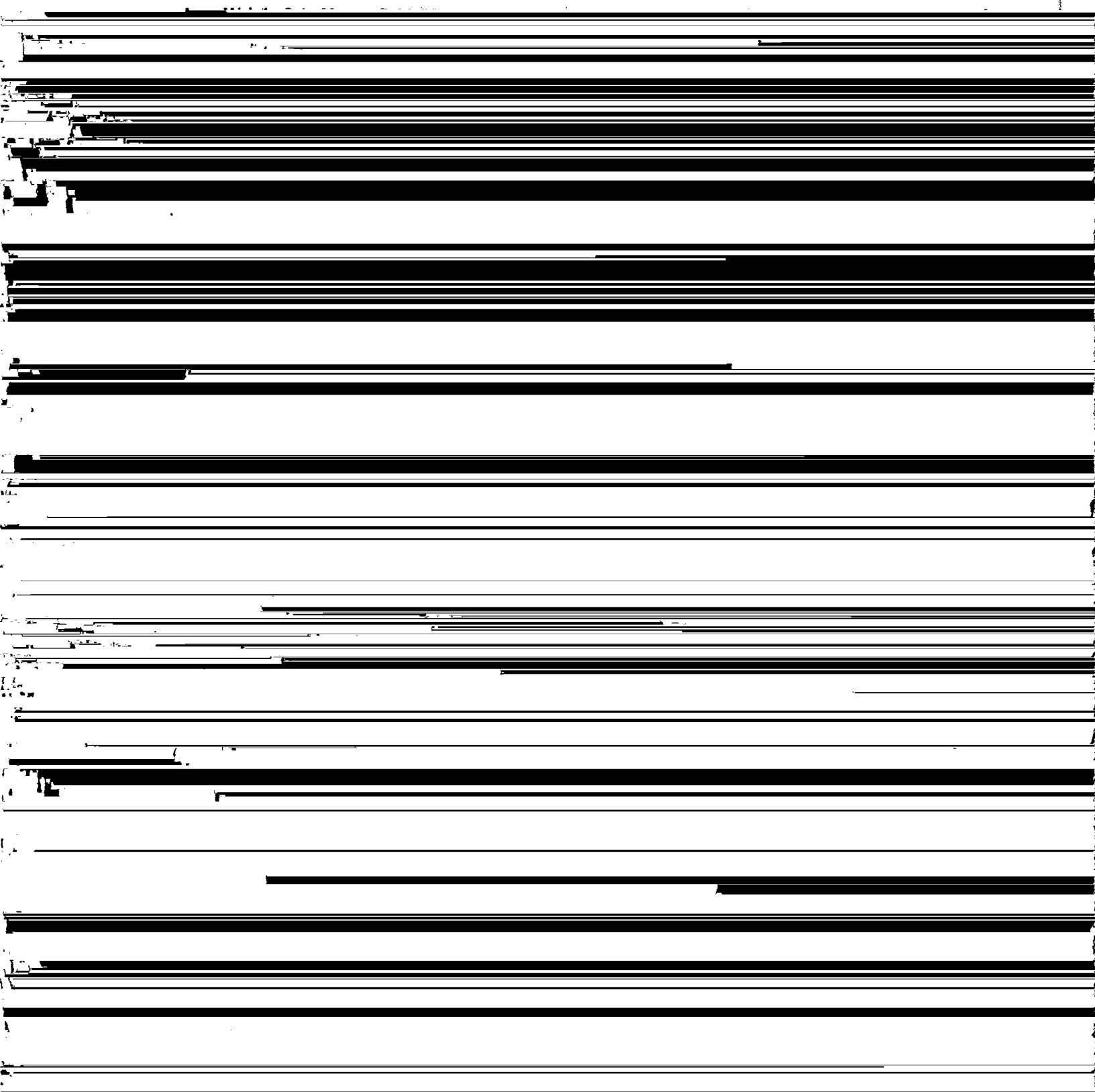
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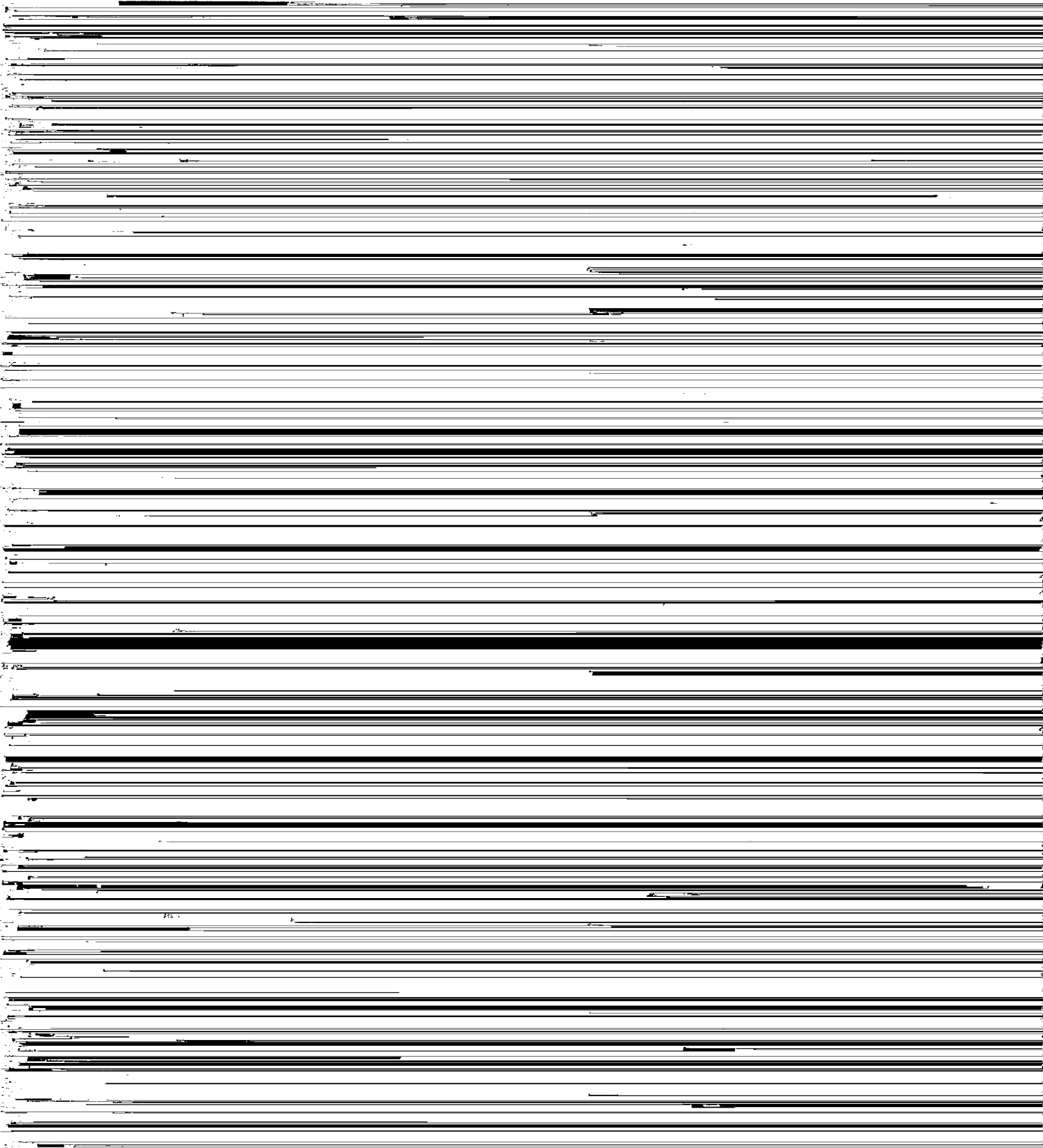
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# EXHIBIT 3

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there would be no promotions or opportunities."

Heymsfield now heads the weight control and body composition laboratory at St. Luke's Roosevelt Medical Center.

in New York. He has been nominated for a faculty position at Columbia University.

"I don't get it," Heymsfield said. "There will be one reason: Dargatzis."

data from 1979-80, when both men were staff neurologists at the Children's Hospital of Philadelphia.

#### Disabilities in Michigan

Breuning never performed some studies he wrote up and published in the early 1980s on how drug treatments affect retarded children. Breuning, now an administrator at a facility in western Pennsylvania, has denied any impropriety.

Cullari said the allegations have prompted him to remove from his vita two questioned studies he did with

believe it. I knew it would hurt me in the academic world, but I never thought it would make a difference for a job.

realized it was no game."

Dalton is a staff writer on The San Diego Union.

# EXHIBIT 4



1 HEYMSFIELD

2 events in my life. It was one of many.

3 Q. Well, the bottom line is that you  
4 were asked to leave Emory University as a  
5 result, fair?

6 MS. KAPIN: Objection,  
7 argumentative, mischaracterizing.

8 A. If you can find that written  
9 anyplace, anywhere in any reliable document  
10 I'd be happy to affirm its validity.

11 (Respondents' Exhibit 20, document,  
12 marked for identification, as of this  
13 date.)

14 Q. Let me show you what's been marked

15 as Exhibit 20, correct. Are you familiar  
16 with a publication "the scientist"?

17 A. Yes.

18 Q. This is Volume One, Issue 13,  
19 May 18, '87.

20 A. Yes.

21 Q. Down at the bottom, last full  
22 paragraph it says, and quoting you, "The  
23 response was that Emory asked me to leave; my

1 HEYMSFIELD

2 considered me an eyesore. I was set  
3 aside-taken off the ladder to the sky. It  
4 was obvious there would be no promotions or  
5 opportunities."

6 That's what you told the reporter,  
7 right?

9 not sure what the quote context I gave this

11 objective, and I don't mean a newspaper  
12 article, from Emory University, written to me  
13 in any document, and you can go to the dean,  
14 you can get all the files, that asked me to  
15 leave I would be very shocked.

16 Q. Get my question back. I didn't ask  
17 that question.

18 A. This is a newspaper article.

19 MS. KAPIN: Doctor, you don't have  
20 to throw out challenges to opposing

21 question

22 A. Yes, yes.

23 Q. Did you ever see the article?

1

2 ~~Did you want to say~~

3 Q. So 1971, is that when you were on  
4 the faculty at Emory University or --

5 A. It's when I arrived there for  
6 training as an intern.

7 Q. As an intern at Emory University  
8 were you on the faculty then or was it a  
9 typical medical internship?

10 A. Typical medical internship.

11 Q. And how long was that internship?

12 A. One year.

13 Q. And then after the internship did  
14

15 A. Yes.

16 Q. That was also Emory University?

17 A. Yes.

18 Q. How long was the residency?

19 A. One year.

23 was the nature of your affiliation?

24 A. Did a fellowship at that point.

25 Q. And is that still in a student

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1

2 capacity or is that now a teaching capacity?

3 A. I think that's a marginal question.

4 Of course it's a, you know, you're always

5 teaching in the university. So of course I

6 was teaching at the point I was a fellow. But

7 it's not a faculty appointment if that's the

8 question you're asking.

9 Q. You left Emory University, what?

10 '84?

11 A. '86.

12 Q. '86. And anything in particular

13 that prompted you to leave Emory University

14 and join St. Luke's?

15 A. I saw the

16 Q. Any other reason?

20 A. I am a full-time employee.

21 Q. Is that a salaried position?

22 A. Yes.

23 Q. How much is your compensation?

25 MS. RICHARDSON: I am going to go

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1

2 ahead and object here. This is beyond

3 the scope of this expert's report.

4 MR. PRICE: I think it goes directly

5 to the issue of bias. He is employed by

17 today.

18 BY MR PRICE:

---

19 Q. You can go ahead and answer the  
20 question.

21 A. \$300,000 a year round numbers.

22 Q. Let me have you --