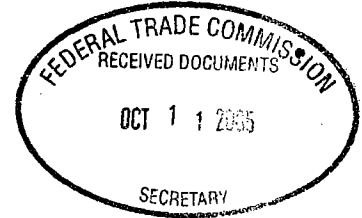


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)

BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
PUBLIC DOCUMENTS)



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

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION
TO ADD AN EXPERT WITNESS AND TO REOPEN DISCOVERY**

Complaint Counsel oppose Respondents' belated *Motion to Add an Expert Witness and to Reopen Discovery*. In their *Motion*, Respondents seek to launch a late round of satellite

BACKGROUND

vs. *Deia Research LLC and other related persons and companies (collectively: "Defendants")*

University. When Complaint Counsel named Dr. Heymsfield as a testifying expert last October,

we simultaneously produced his detailed *curriculum vitae* to Respondents. Dr. Heymsfield

[REDACTED]

the filing of their pending *Motion*.

After Respondents made their expert witness designations last October, Complaint Counsel sent subpoenas duces tecum to Respondents' testifying experts. During the course of

the discovery process, Complaint Counsel also responded to discovery requests from Respondents

relating to their testifying experts. The case of *Smith v. [redacted]* was argued on November 8, 2004.

Reconsideration.

On August 30, 2005, Respondent Friedlander started Dr. Heymsfield's deposition by

Friedlander stated that he was "assuming that the list of publications contain every publication

anytime ever published in a journal." Dr. Heymsfield corrected Respondent Friedlander's

Heymsfield participated in some research with Mr. Darsee at Emory. Dr. Heymsfield was not,

having [redacted] all of the research data. Mr. Darsee was not his employee and Dr. Heymsfield

[redacted]

[redacted]

[redacted]

[redacted]

Some four weeks and two days after the conclusion of Dr. Heymsfield's deposition, Respondents filed their *Motion for Leave to Add An Expert Witness and to Reopen Discovery*, prompting this response.

DISCUSSION

Respondents' pending *Motion* claims the right to offer expert testimony to attempt to discredit him on collateral issues unrelated to the parties' claims and defenses. Respondents' cursory *Motion* should be denied. As discussed in Section I below, the subjects of Respondents' proposed expert testimony are fit for cross-examination at best, and are clearly irrelevant and

inadmissible as to the issues presented at trial. Respondents have failed to justify their

...and (2) the commercial [redacted] of a senior

scientist co-author (here, Heymsfield) for a junior scientist co-author's (here, Darsee's) work; and (4) the extent to which Heymsfield's August 30th testimony

raises questions of his scientific integrity, reliability, and independence that may

Discovery is “reasonably related” to these subjects “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Additionally, RULE 3.43 provides that “[i]rrelevant, immaterial, and unreliable evidence shall be excluded” from trial, and “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed

itself is not relevant in the litigation to establish a fact of consequence, *i.e.*, not relevant for a purpose other than mere contradiction of the in-court testimony of the witness.” *United States v*

006 P.3d 1134 (Colo. 1999) (quoting *McCormick v. State*, 915 P.2d 160)

Respondents also state that “[e]xpert witnesses are essential for a party to defend its case against charges of false advertising under the [FTC] Act.” Mot. at 2. This appears to be a fragmentary argument and in any event, there is no authority for the view that parties are entitled, ~~and ought to introduce all experts and expert testimony of their choosing; expert testimony must~~

~~and ought to be excluded from testimony on grounds of irrelevance or materiality.~~

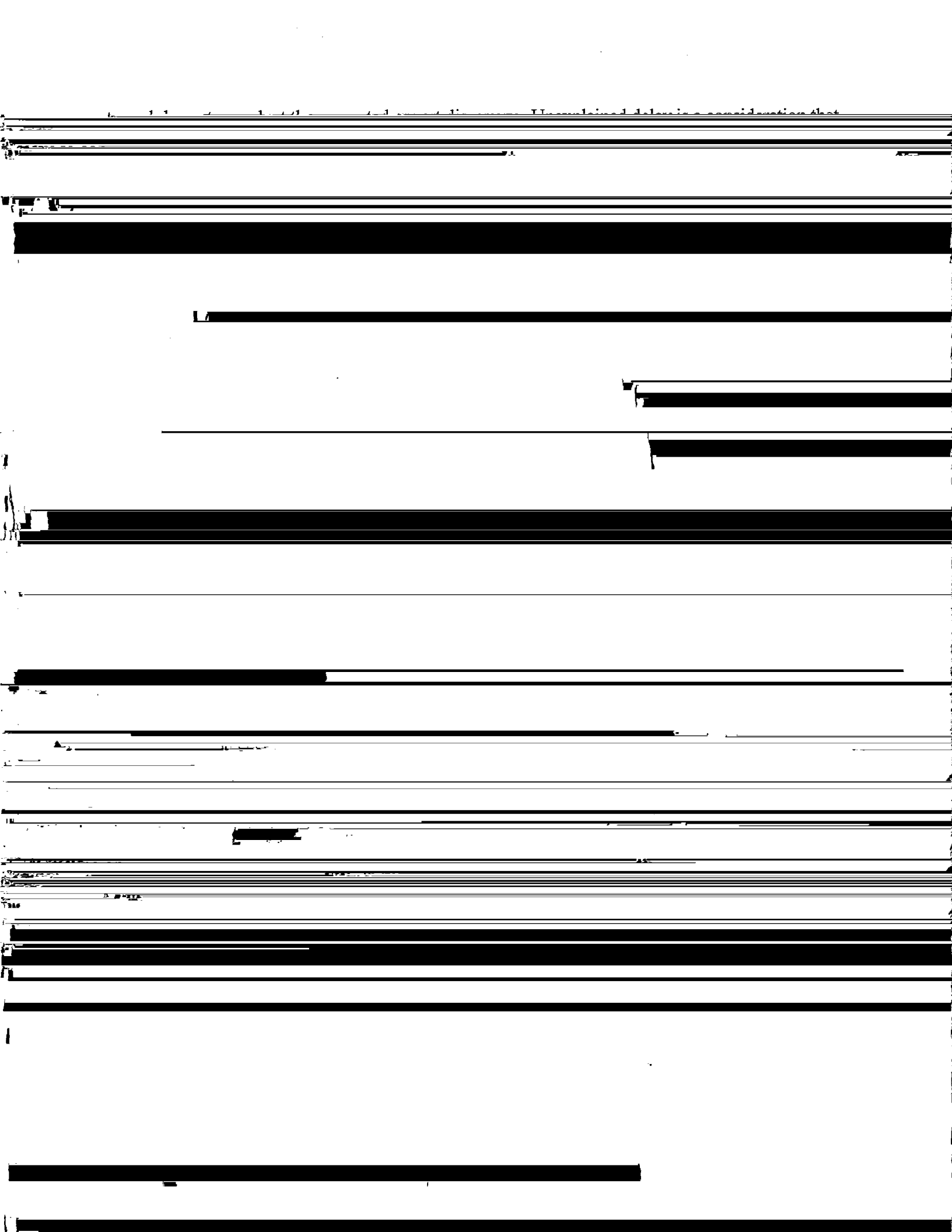
remotely comparable to the present situation.

Here, the proposed testimony is clearly not directed to the elements of proof of any claim or defense: it is targeted at Dr. Hevmsfield, who is not even a named party to this action. Under

PRR 2.47(b) this Court has the power to “[e]xclude witnesses from harassment” and

Defendants’ attempt to present expert testimony on the supposed ethical ramifications of the

cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. These disclosures shall be made at the times and in the sequence directed by the Administrative Law Judge. In the absence of other



B. Respondents Already Had An Opportunity to Depose Dr. Heymsfield on the

Dr. Heymsfield's deposition clearly indicates that Respondents were aware of the Darsee papers before the deposition took place, and had a full opportunity to depose Dr. Heymsfield on the subject of Mr. Darsee and his fabrication of data. Respondent Friedlander opened the deposition and elicited around fifteen pages of testimony concerning Mr. Darsee and his fabricated data. Respondents then moved onto other topics for most of the allotted four hours. Late in the deposition, Respondent Gay's counsel produced a printed exhibit, a web page,

C. Respondents' Motion Proposes Arbitrary and Improper Limits on the Scope of the Proposed Expert Discovery, and Granting the Motion will Require Further Revision of the Pretrial and Trial Calendar

Respondents grudgingly concede that Complaint Counsel has a right to expert discovery if

Respondents have proposed arbitrary and improper limits on the

scope of expert discovery. The evident purpose of these limits is to forestall the obvious need for further revisions to the pretrial deadlines and trial dates, to accommodate the proposed expansion of this case.

testimony than Rule 3.31(h)(3) would permit Complaint Counsel to present evidence in rebuttal.

Simply put, Respondents' requested relief would lead to a cascade of further discovery and

Respondents propose arbitrary limits on discovery and rebuttal testimony to prejudice their

Respectfully submitted,

Lauren Kapin

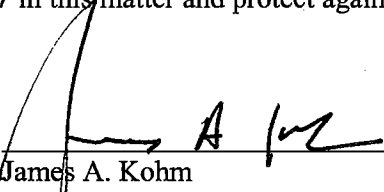
Lemuel Dowdy (202) 326-2981
Walter C. Gross, III (202) 326-3319
Joshua S. Millard (202) 326-2454
Edwin Rodriguez (202) 326-3147
Laura Schneider (202) 326-2604

Division of Enforcement
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: October 11, 2005

CERTIFICATION OF REVIEWING OFFICIAL

and redaction of materials subject to the *Protective Order* in this matter and protect against any violation of that *Order* or applicable RULE OF PRACTICE.


James A. Kohm
Associate Director, Division of Enforcement
Bureau of Consumer Protection

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2005, I caused *Complaint Counsel's Opposition to*

Deegee Dental Matters to Adjudicate and *Deegee Discontinue* to be served and filed as follows:

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

Donald S. Clark, Secretary
Federal Trade Commission

EXHIBIT A



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

Bureau of Consumer Protection
Division of Enforcement

Joshua S. Millard
Attorney

Direct Dial:
(202) 326-2454

enclosures

Attorney, Division of Enforcement

EXHIBIT B

CURRICULUM VITAE

Daniel B. Mowrey, Ph.D.

EDUCATION:

1978 Ph.D. Experimental Psychology Brigham Young University, Provo, Utah. Emphasis in

neurology, anatomy.

PROFESSIONAL:

1991-Present President, American Phytotherapy Research Laboratory. This entity
serves the needs of the herb community. Basic and archival research

1973, 1979

Inspector Brigham University Department of Psychology Courses taught:

EXHIBIT C


1
2 specific. The paper that you've provided me
3 here, I think whichever one this is, this
4 might be number 3, to my way of thinking this
5 is a competent paper. Reliable, I'm not sure
6 that's a reasonable judgment, but, I mean,
7 ~~I'll just say that this study was done with~~

8 acceptable scientific criteria.

9 Q. What about the other study that you
10 were -- of an ephedra product that you were
11 involved with with Dr. Boozer? Was that also
12 a competent scientific study?

13 MS. RICHARDSON: Objection, vague,
14 goes to foundation.

15 A. Keep in mind that I am not an author
16 on that paper. I was acknowledged on that
17 paper. I am not an author and I didn't review



19 outside the scope of my testimony today
20 whether or not that's a competent reliable
21 study and a paper.

22 Q. With respect to the published study



1
2 context of your question is. I think you're
3 asking it -- I am telling you in a scientific
4 manner why -- my opinion about that paper and
5 why I'm not an author on it, but reliability,
6 I have already answered to you my general idea
7 of what reliability is.

8 Q. Are there any other reasons that you
9 were not an author on that paper?

10 MS. RICHARDSON: Objection, form,
11 ambiguous.

12 Q. Aside from what you testified?

13 A. I think the reason that I'm giving
14 you is a very important one, and that is that
15 I disagreed with the conclusions of the paper,
16 and there are many other reasons that are part
17 of my rationale for not being on that paper,
18 but that really is the main one.

19 Q. What were the other rationales?

20 MS. RICHARDSON: Objection. This
21 witness has already told you he doesn't
22 have a copy of the paper. He has

23 testified with regard to this paper

1

2 Can you explain to me what the other

3 reasons were for you not wanting to be an

4 author on that study?

5

6 to get much more specific with me because the

7 study itself was the subject of great

EXHIBIT D

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2

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION OFFICE

3

ADMINISTRATIVE LAW JUDGES

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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HEYMSFIELD

MR. EMORD: Jonathan Emord on behalf of Klein Becker USA.

MR. PRICE: Ron Price on behalf of respondent Daniel Mowrey.

MR. FELDMAN: Jeff Feldman on behalf of corporate respondents.

MS. KAPIN: Lauren Kapin on behalf of the Federal Trade Commission.

[Redacted]

3

think.

4

A. Okay.

[Redacted]

HEYMSFIELD

1
2 error, but not to omit anything. If a paper,
3 for example, there were several papers that
4 were retracted a number of years ago, those
5 papers are not on my CV.

6 Q. What papers are those?

7 A. There was a set of papers written
8 by a student at Emory University, where I was
9 a professor, and some of the information then
10 was later found to be falsified. That group
11 of papers was retracted from the journals and
12 they are not on my CV.

13 Q. Can you tell us what that was
14 about?

15 A. Sure. I think this has come up
16 already in our discussions if I recall
17 correctly, but there was a student at
18 Emory University who did research and later
19 went to Harvard, and while he was at Harvard
20 it was discovered he had fabricated some data
21 at Harvard, and when an investigative
22 committee was set up it was found that some

1

HEYMSFIELD

HEYMSFIELD

1
2 course that, you know, people who are
3 co-authors share certain responsibilities for
4 the data.

5 Q. So did you share any responsibility
6 in the fraudulent data being supplied by
7 Darsee?

8 A. You mean, are you asking me if I
9 was involved in the fraud?

10 Q. I'm asking you what your

HEYMSFIELD

1

2

Q. Okay.

3

A. You know, co-authorship, as I

4

mentioned, can be based on any set of

5

criteria. There are ten different things you

6

do when you are a co-author. You have to

7

HEYMSFIELD

1
2 what you are saying. The contribution on a
3 paper could have involved, as I said, there
4 are about ten different criteria. Usually
5 most journals require two to three of those
6 criteria so it could be any one of these two

HEYMSFIELD

1

2 certain level of trust that you have and if

3 they violate it then, you know, there's

4 nothing you can do to test someone's

1 HEYMSFIELD

2 A. Well --

3 MP FEJDMAN. He asked if you were

HEYMSFIELD

1

2 Darsee studies?

3 A. Yes.

4 Q. What do you mean by the word
5 "fraud" in that context?

6 A. Darsee made up data that was
7 eventually put into the papers. He

8 submitted the data. He claims to have

[REDACTED]

2

supervision. He was working as a medical

[REDACTED]

HEYMSFIELD

1

2 A. Sure.

3 Q. Co-authorship is a subject that I
4 want to -- and I know Mr. Friedlander went
5 into that. I want to ask just a couple more
6 questions.

7 I take it it would just not be

1

HEYMSFIELD

2 there published standards that I can look to
3 and say, look, if somebody signed on as a
4 co-author this is the standard that they had
5 to meet?

6 MS. KAPIN: Objection, overbroad,

HEYMSFIELD

1
2 me -- you can go through my CV or whatever
3 publications you can find and I can tell you
4 what my role specifically in that study was.

5 Q. I appreciate that.

6 A. I would be happy to do that.

7 Q. The fact that you can't tell me,
8 maybe that's the answer to the question. But
9 I take it you have never embraced for
10 yourself, this is my minimal standard of
11 involvement before I'll put my name on a
12 study?

13 MS. KAPIN: Objection,
14 argumentative, mischaracterizes.

15 A. You know, again, I would have to
16 see a specific example. But getting back to
17

HEYMSFIELD

1
2 paper and revision of the paper. That would
3 be very unusual for me to ever have done

1 HEYMSFIELD

2 and there's a checklist. And you go down the
3 checklist and if you meet two out of the ten
4 criteria you can be a co-author, and you have
5 to check it off and you sign it.

6 Q. But before these were published
7 what did you use?

8 MS. KAPIN: Objection, relevance,
9 overbroad.

10 A. Whatever the morays were at the
11 time, that's what I used.

12 Q. How would I find them?

13 A. I've already told you that they've
14 only recently been published, recently being,
15 I don't know, maybe a decade or more.

16 Q. So these are word of mouth morays
17 that you followed before?

18 A. Probably, yes.

19 MR. BURBIDGE: Let's look at this.

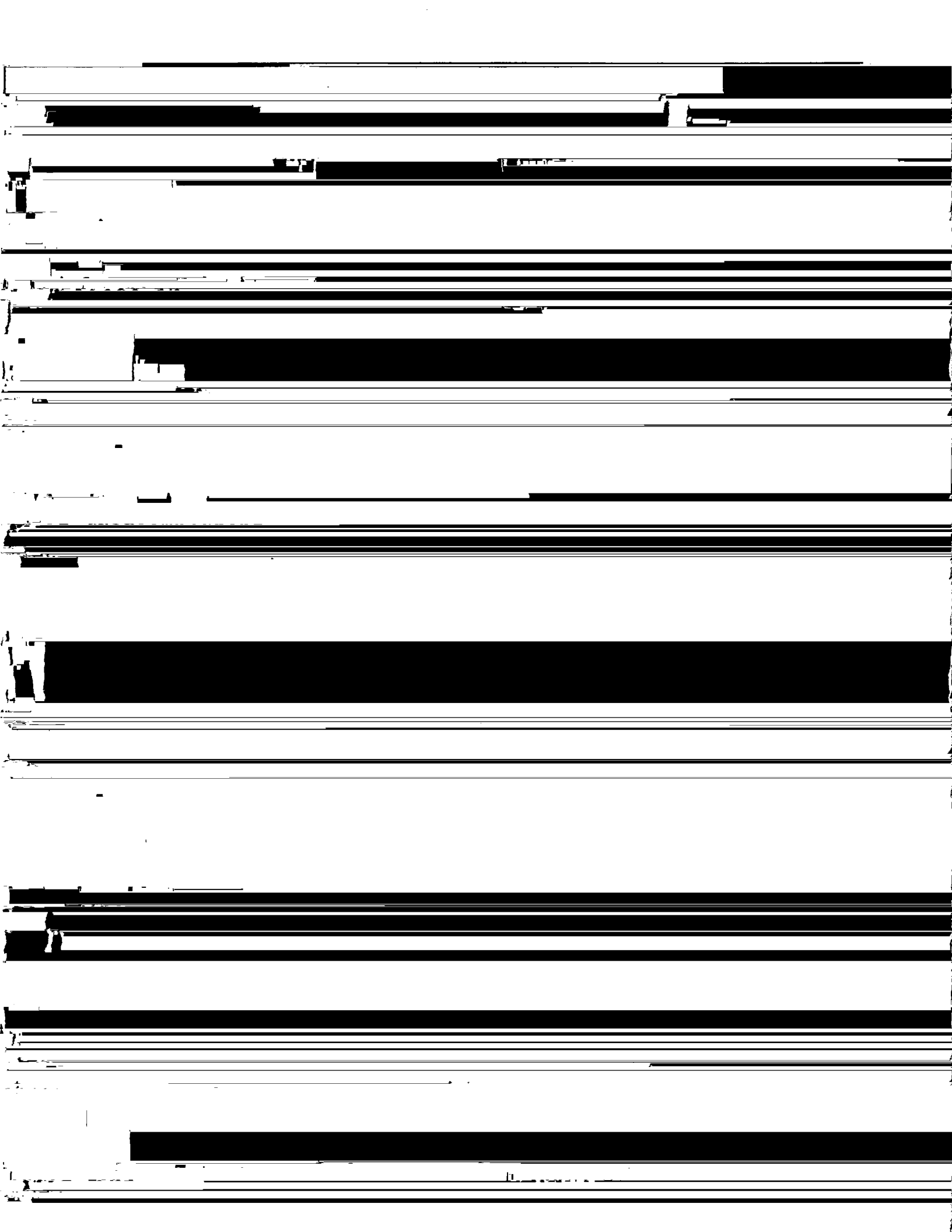
20 (Respondents' Exhibit 19, document,
21

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HEYMSFIELD

2 of a learned text that sets forth appropriate

[The remainder of the page is almost entirely obscured by heavy black redaction bars and horizontal scanning artifacts.]



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HEYMSFIELD

2

if you gave me New England Journal and I

3

could see their signature page, then I could

4

tell you -- I mean I don't disagree with

5

these necessarily.

6

Q. Okay. Would you have disagreed

7

with these at any time in your academic

8

career?

9

MS. KAPIN: Objection, vague,

10

vagueness, ambiguous, relevance

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 HEYMSFIELD

2 Q. Let me just ask the straightforward
3 question.

4 A Yes.

HEYMSFIELD

1
2 the summary information. In other words, the
3 patient gives samples, the samples are
4 analyzed by the lab, there's data, the data
5 goes into a computer -- at the time there
6 were no computers -- and put into tables and
7 charts and then created into summary
8 statistics for a paper.

9 ~~So there's a long chain going from~~

HEYMSFIELD

1
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 -- Exhibit 20 -- correct -- The name familiar --

HEYMSFIELD

1
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?

8 This is a newspaper article and I'm

1 HEYMSFIELD

2 (Record read.)

3 Q. That's the question. Did you tell
4 that to the reporter?

5 A. I don't remember specifically what

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HEYMSFIELD

said I take it you can't deny saying what's
quoted here, right?

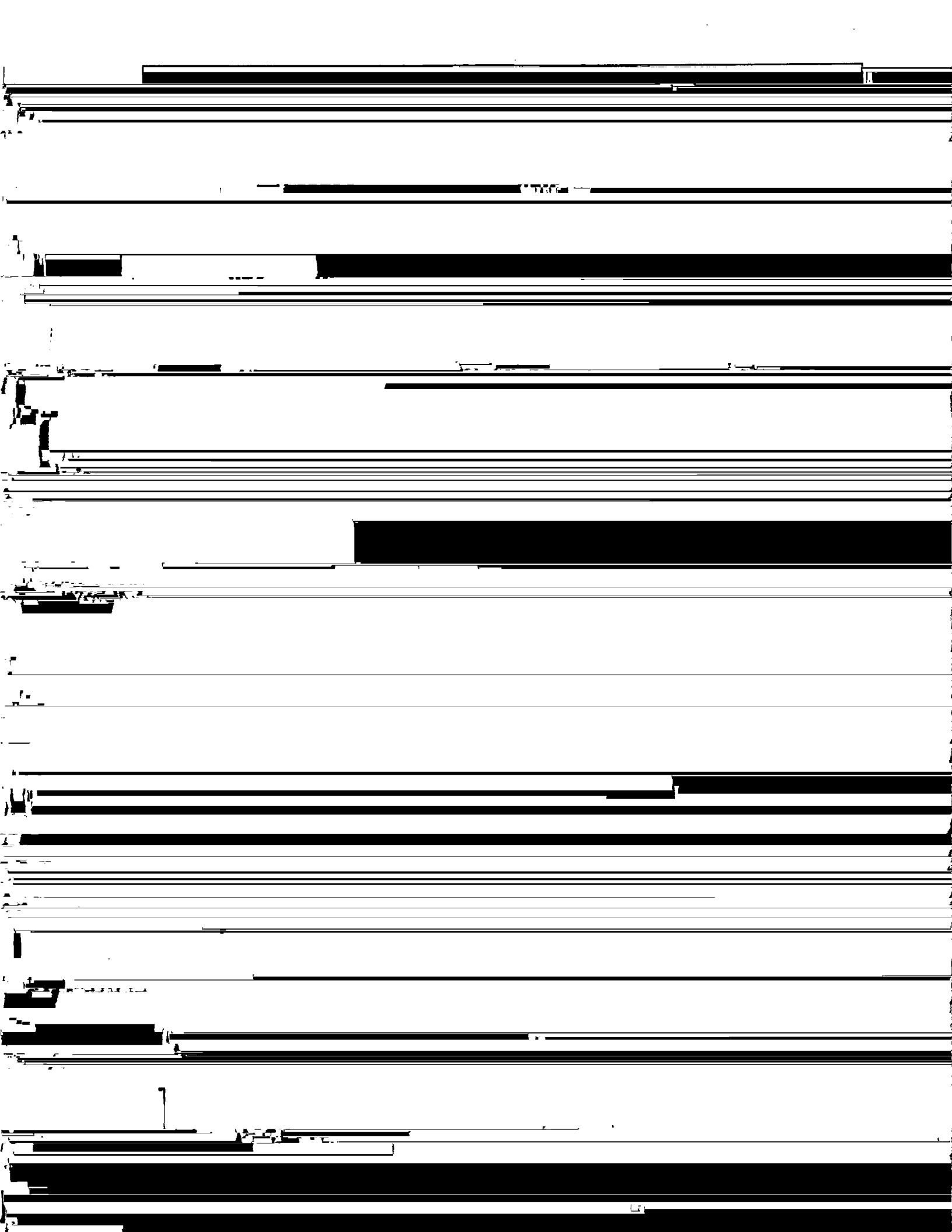
MS. KAPIN: Objection,
argumentative, mischaracterizing.

A. This is a -- this is a newspaper
article --

MS. KAPIN: And you can take the
time to read this if you like,

~~Dr. Heymsfield to read the context~~





HEYMSFIELD

1

2

That was my question.

3

A. I can't answer that specifically

4

because I've always had a flow of grants

1

HEYMSFIELD

2

A. Supports some weight loss with

3

time frames also no studies longer than six

1

HEYMSFIELD

2

which you have submitted a article for

3

publication or have been listed as a

4

co-author upon the article that you did not

5

read in its entirety?

HEYMSFIELD

1
2 name on it, that you didn't read in its
3 entirety?

4 MS. KAPIN: Objection, overbroad.

5 Q. If that's possible?

6 A. You said "entirety" this time, but
7 you didn't say "entirety" last time and so
8 "entirety" is very specific. So it's

UNCLASSIFIED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

HEYMSFIELD

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2

A. Did I fail to consent, in other words, I knew the article existed and I said no, you can't publish it?

3

4

5

Q. You said no, you can't put my name on that article?

6

7

A. Did I ever do that? Did I ever --

8

Q. In advance of a publication, did

~~refuse to publish the name of the...Darce studies~~

1 HEYMSFIELD

2 have fulfilled that obligation.

3 MR. FELDMAN: Laureen, I want to
4 address this matter. There was an --

5 MS. KAPIN: No, Mr. Feldman, I'm
6 not done and, therefore, I will finish
7 what I'm saying.

8 MR. FELDMAN: There's an obligation
9 in the scheduling order --

10 MS. KAPIN: And the court reporter
11 can't get it down anyway because you
12 continue to interrupt me. I promise I
13 will give you your turn, Mr. Feldman.
14 Please allow me to take mine.

15 MR. FELDMAN: You can just called
16 me Feldman. Go ahead.

17

MS. KAPIN: Please, Mr. Feldman, please

1 HEYMSFIELD

2 correct?

3 A. I can't recall specifics, but I was
4 a co-author on a number of Darsee studies.
5 To the extent I consented beyond them, you
6 know, that's a very specific question or if I
7 signed anything that went beyond them I can't
8 recall. We'd have to be specific.

9 Q. Now, you've listed or you've
10 mentioned a number of Darsee studies that
11 were published. How many Darsee studies were
12 published in which you were a co-author?

13 A. I don't remember the exact number
14 because this is not really what I've prepared
15 for today, but nevertheless, I would say it
16 could have been anywhere between five and
17 eight papers.

18 Q. And how many of those five to eight
19 papers were withdrawn?

1 HEYMSFIELD

2 conduct weight loss trials.

3 Q. Returning to a moment to your CV,
4 what was the reason you had for not including
5 any of the Darsee studies on your CV?

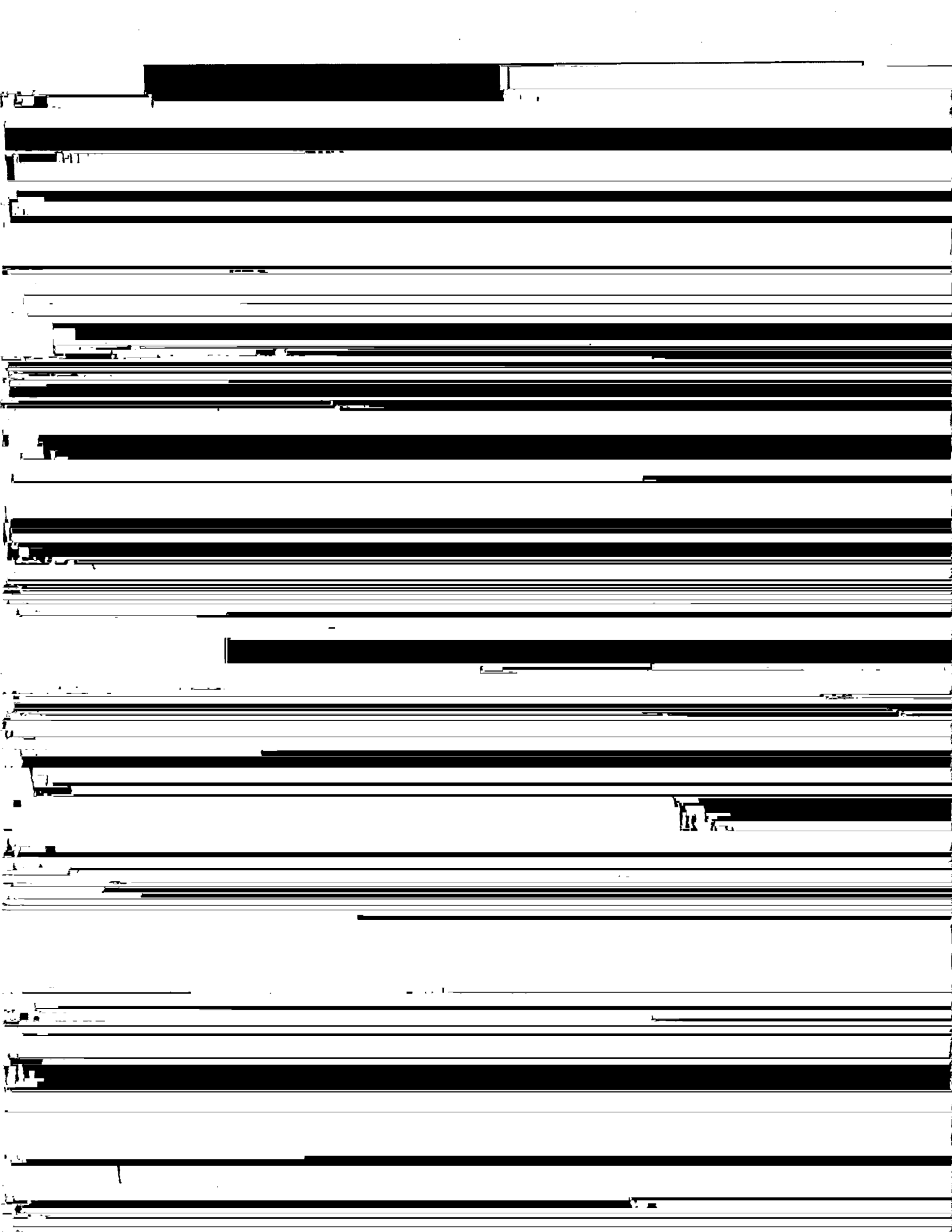
6 A. I talked to the dean at Emory at
7 the time and I said is it appropriate for me
8 to remove these as publications, and he said
9 yes.

10 Q. Did you inform the Federal Trade
11 Commission counsel in advance of your expert
12 report that you would not include the Darsee
13 studies on your CV?

14 A. I informed the Federal Trade
15 Commission to the best of my recollection,
16 about the Darsee matter and other matters
17 that are in the past, that often come up in
18 trials that, you know, where I -- for people
19 trying to discredit me for one reason or
20 another. So I brought that up with them a
21 priority.

22 Q. And you were not told to reveal
23 that information to opposing counsel in this
24 case?

25 MS. KAPIN: Objection. You are



1 HEYMSFIELD

2 I'll answer it again.

3 Q. Please.

4 A. I informed the FTC of all of the

1

HEYMSFIELD

2 it's been oh, over a year.

3 Put it was with lawyers for the

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 HEYMSFIELD

2 always when people first call me and ask me
3 to be an expert for them.

4 Q. All right. So it was when you were
5 first retained in this case?