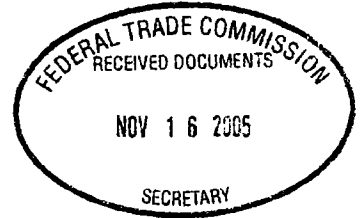


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of :
 :
BASIC RESEARCH, L.L.C., et al., :
 :
Respondents. :

DOCKET NO. 9318

Public Document

RESPONDENTS' ANSWERS TO DISCOVERY

Respondent, I hereby adopt as if set forth in this Motion, all the arguments and relief requested in

the Motion for Sanctions. And I provide additional arguments that were not

presented by the other Respondents, in support of this Motion and the Motion for Sanctions.¹

I COMPLAINT COUNSEL CANNOT "ESTABLISH" FACTS IN PUBLIC

PROCEEDING THROUGH SWORN AFFIDAVITS FROM THE VEDV

**PERSONS ACCUSED OF WRONGDOING, WITHOUT MAKING
THEMSELVES AVAILABLE FOR DEPOSITIONS ON THAT TESTIMONY**

In the Commission's Response to Respondents' Reply to Complaint Counsel's Opposition

the trial in this matter [-] whether Respondents violated the FTC Act's prohibition against false and misleading advertising." Opp. Memo, at 32. Specifically, Dr. Heymsfield has been retained

constitute "adequate substantiation" under the FTC Act, and (b) whether the studies proffered in support of the challenged advertisements constitute "competent and reliable scientific evidence," which is the ultimate "issue to be litigated at the trial in this matter" Opp. Memo, at 32.

Dr. Heymsfield's demonstrated lack of credibility and veracity is the main event. It is not just a side show. His proffered testimony is the measure by which Complainant is trying to judge

Respondents' First Amendment rights. Your Honor likely will demand competent testimony.

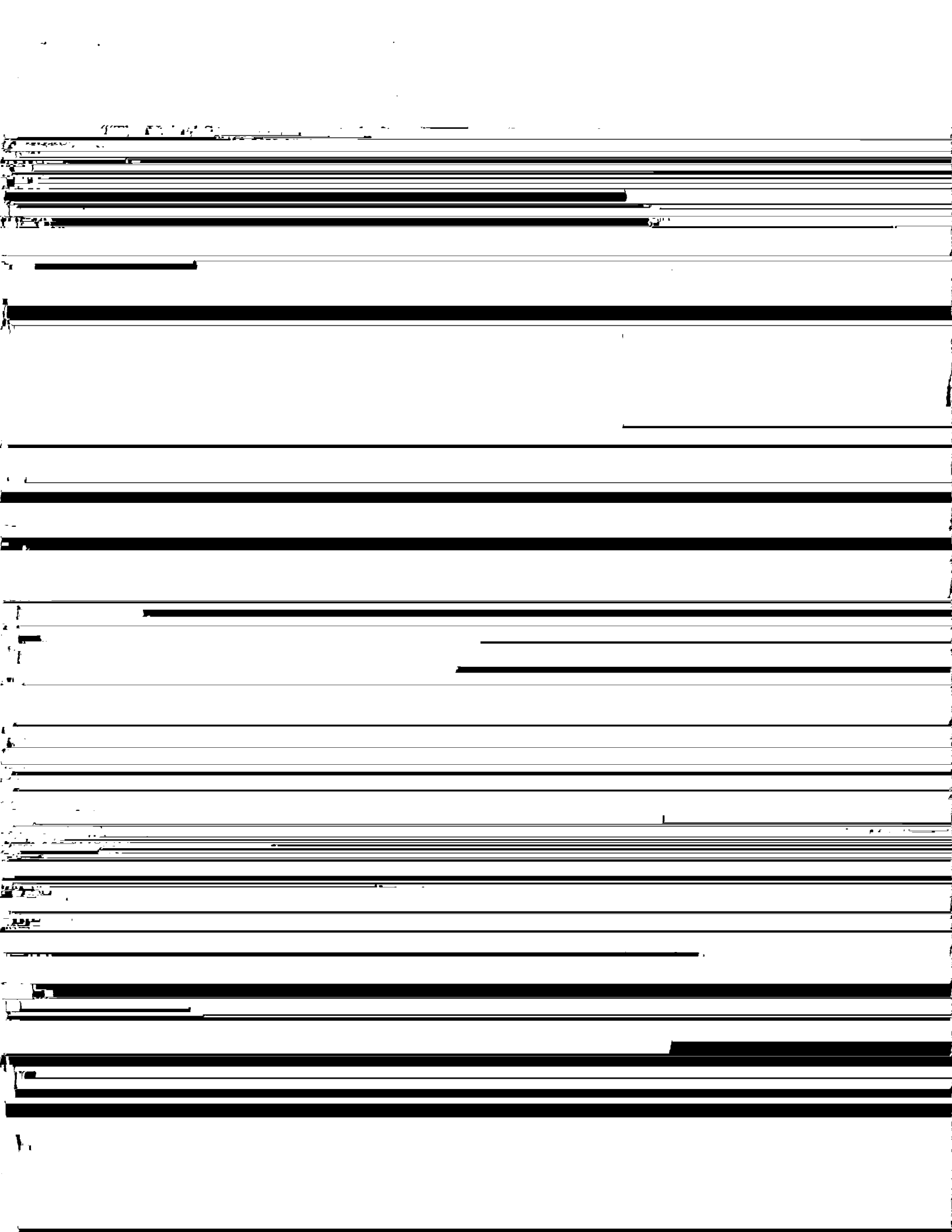
Complainant's case-in-chief, which is wholly dependent on the credibility and veracity of a proffered expert who (a) lies and (b) suppresses evidence.

IV. YOUR HONOR CANNOT CONDONE DR. HEYMSFIELD'S AND COMPLAINT COUNSEL'S SUPPRESSION OF IMPEACHMENT EVIDENCE IN VIOLATION OF YOUR HONOR'S ORDER

View Hearing's August 11, 2004 G-1-11' G-1-11' 16-11-04

retained expert witness to provide "a list of all publications, and all prior cases in which the expert has testified or has been deposed." The disclosure of potential impeachment evidence is necessary to protect the integrity of the FTC's challenged regulatory process which is supposed to discover the truth, but instead is being abused to prosecute protected commercial speech.⁴

Even if the *ad* and *post hoc* process Complainant is using survives scrutiny, the



the form of "List of Unsettled"

[REDACTED]

connected later to [REDACTED]

mentioned in trial testimony or deposition testimony. In fact, the name Darsee does not appear

of all publications” to a job interview, where in his mind it would be permissible to omit from a curriculum vitae fabricated publications he co-authored that impugn his integrity and veracity.

But the very point of the Presiding Officer’s ordered disclosure was to elicit such a list!

There is no justification for Complaint Counsel’s and Dr. Hermefield’s suppression of

evidence in violation of your Honor’s August 11, 2005 Scheduling Order. Complaint Counsel had an obligation to investigate and ensure compliance with the August 11, 2005 Order, including the disclosure of the “Darsee matter.” They knew of this matter. They knew it was an event that had been used “in other cases” to impeach their chosen expert witness. One of the

Either Complainant's lawyers are being less than honest with your Honor and knowingly suppressed evidence, or they knowingly and utterly failed their first obligation to the Presiding Officer and to the government and the citizens of the United States they represent – that is, to discover the truth, which included an obligation to investigate, verify and disclose to

Respondents Dr. Heymsfield's involvement in the "Deerose matter" is a highly sensitive matter. It



COMPLAINT COUNSEL: Okay. Thanks for coming clean.

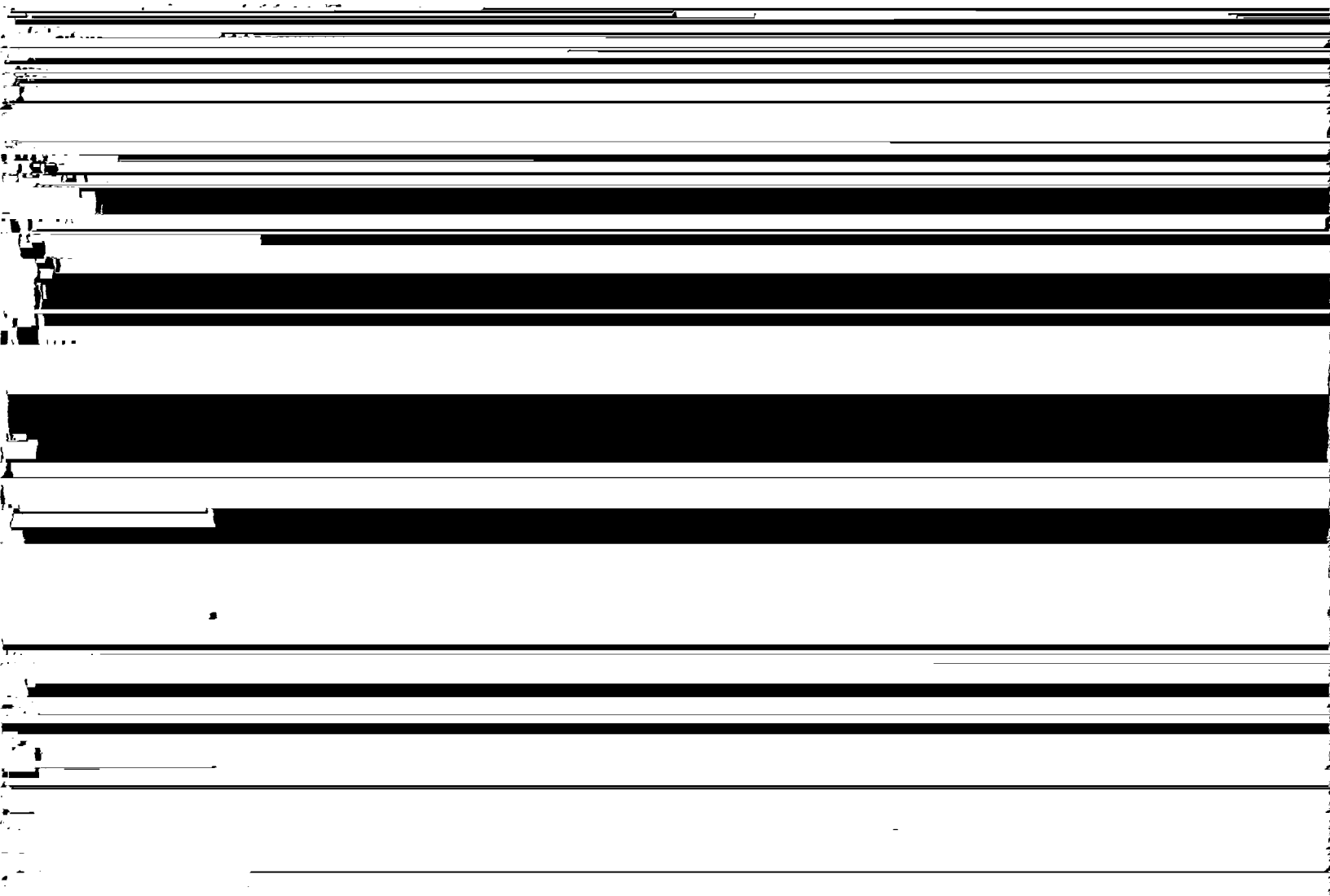
Heymsfield withheld the truth or Complaint Counsel is lying (or they both were conspiring to keep the truth from Respondents and from the Presiding Officer).

The prosecution of Respondents under the FTC Act is not a game. Careers, livelihoods, due process and First Amendment rights are at stake.⁶ Under the guise of protecting consumers from alleged confusion, Complaint Counsel is asking the Presiding Officer to render findings of

wrongdoing and liability based on the subjective opinion of Complaint Counsel.

the significance of the “Darsee matter,” which is self-described as an event used “in other cases” to impeach the government’s proffered expert in this case.

Again, the suppression of evidence impeaching Dr. Heymsfield in violation of the Presiding Officer’s August 11, 2005 Scheduling Order goes to the heart of Complaint Counsel’s case-in-chief. Notwithstanding the attempt to downplay the significance of Dr. Heymsfield’s failure to disclose his involvement as a “co-author” in the “Darsee matter” used “in other cases”



expert to testify as to *any* scientific matter in *any* case. Respondents must be allowed additional time to depose Dr. Heymsfield to further establish the grounds for his disqualification, and in the unlikely event he is not disqualified, to properly defend themselves at trial from this proffered “scientific” opinions.

for another “enormous opportunity,” and that there was *no other reason* for leaving! January 11, 2005 Heymsfield Depo., at 204, lines 10-17.

Put simply, Dr. Heymsfield lied under oath and is now being less than candid about his testimony. It is plainly false and not credible to characterize the “Darsee matter” as not a reason for leaving Emory University. Dr. Heymsfield co-authored fraudulent studies. That is the most serious charge he has faced in his academic career. It is as plain and memorable to him as the nose on his face.

In addition to lying under oath, Dr. Heymsfield’s effort to downplay the significance of the fabricated publications he co-authored with Dr. Darsee puts in doubt all the publications where he is listed as a co-author in his curriculum vitae – which were obviously included to

2005, at 456, lines 3-14. The implication of this stunning testimony is that neither the

~~Deposition of Dr. Heymsfield~~

Dr. Heymsfield's curriculum vitae, without questioning him about his actual role in each of those individual studies. Dr. Heymsfield admitted this fact in his deposition:

Q. So in your list of publications, many of them list you as a co-author?

A. Yes.

Q. We would have to go through each and every one of those studies to find out what your participation is, has been?

A. Yes, yes.

Order. Additional deposition time is necessary to determine Dr. Heymsfield's actual

involvement in the studies listed in his curriculum vitae. [REDACTED]

Heymsfield knowingly omitted from his curriculum vitae, to determine whether his involvement in those studies was substantive or not, and thus, whether they can be used, as Complaint Counsel is attempting to use 400 of those studies, to establish Dr. Heymsfield's alleged expertise [REDACTED]

B. Respondents Are Entitled To Discover The Specifics Relating To The Subjects Used In Other Cases To Discredit Dr. Heymsfield.

Respondents' questioning of Dr. Heymsfield about the "Darsee matter" at the August 30th

the full disclosure of these “other matters” used in other trials to impeach Dr. Heymsfield. Complaint Counsel’s effort to suppress this evidence may reveal a further violation of the Presiding Officer’s Scheduling Order, and entitle Respondents to further sanctions against Complaint Counsel and Dr. Heymsfield for their ongoing and continuing failure to disclose this required information.

C. Respondents Are Entitled To Depose Complaint Counsel Because Their Proffered Declaration Further Implicates Dr. Heymsfield.

Respondents should be permitted to depose Complaint Counsel regarding the following matters:

Heymsfield. Counsel Laureen Kapin has already testified via declaration (a) unbelievably denying knowledge of the fabricated publications, and instead (b) admitting Complaint Counsel’s utter lack of due diligence and, by implication, Dr. Heymsfield’s utter dishonesty, both in violation of your Honor’s August 30, 2004 Scheduling Order. *See* Kapin Decl. ¶¶ 8-12.

deposition testimony. Moreover, they avoid answering germane questions, but raise more questions than they purport to answer. One thing is clear, though, if Complaint Counsel's declarations are true, it would be far worse for Dr. Heymsfield, who would be guilty of eviscerating his own credibility. Not only would he have violated a court order and suppressed

impeachment evidence from Respondents, but he also would

Exhibit A

I, Mitchell K. Friedlander, hereby declare:

1. I have not engaged in false and/or misleading advertising.
2. I did not know of and should not have known of any of the allegedly
deceptive acts or practices described in the Commission's

3. The regulatory standards imposed by the Federal Trade Commission and the
Commission's enforcement of the

inherently vague, subjective, and susceptible to numerous different interpretations.

14. I have not represented, expressly or by implication, that Leptoprin causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users.
15. The language "Leptoprin causes loss of substantial, excess fat in significantly ~~overweight users~~" ~~does not appear in the advertisements for Leptoprin~~ is not

defined in the Complaint, and is inherently vague, subjective and susceptible

16. The language "causes weight loss of more than 20 pounds in significantly

[REDACTED]

PediaLean.

27. The regulatory standards imposed by the Federal Trade Commission violate my right to due process under the Fifth Amendment to the Constitution of the United States.
28. The Commission's Complaint and enforcement action restricts my protected commercial speech through the use of ad hoc and non-defined terms.
29. The Commission has labeled advertisements false or misleading without ~~relying on extrinsic evidence~~
[REDACTED]
30. The claims in the Challenged Advertisements constitute puffery, which is not likely to mislead a reasonable consumer.
31. The regulatory standards governing quantity and quality of substantiation fail to provide reasonable persons, including me, with fair notice as to which
[REDACTED]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT MITCHELL K. FRIEDLANDER'S MOTION TO EXCLUDE A WITNESS, FOR SANCTIONS, AND TO DEPOSE BOTH COMPLAINT COUNSEL AND DR. HEYMSEJELD. AND JOINDER IN RESPONDENTS'**

COUNSEL'S FALSE STATEMENTS was provided to the following as follows:

(1) On 16th November 2005, the original and one (1) paper copies sent via hand delivery, and 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 16th November 2005, two (2) paper copies sent via hand delivery to: The Honorable Stephen J. McGuire, Chief Administrative Law Judge, 600 Pennsylvania Avenue, N.W., Room H-119, Washington, D.C. 20580.