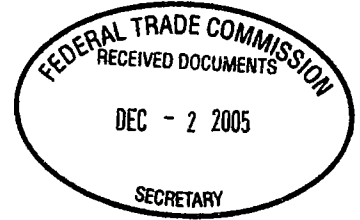


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

Respondents.)
)
_____)

Docket No. 9318

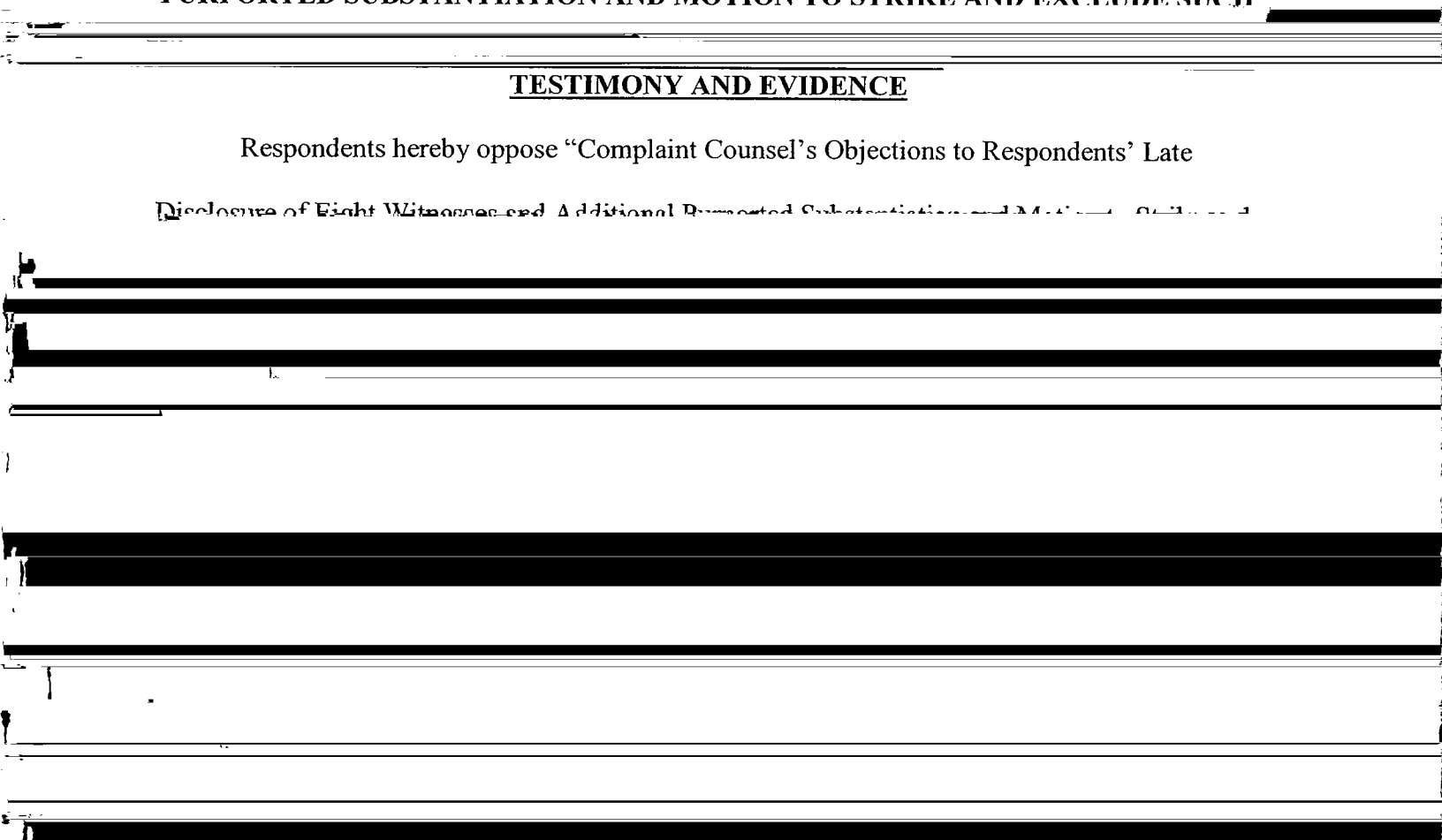
PUBLIC

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S OBJECTIONS TO
RESPONDENTS' LATE DISCLOSURE OF EIGHT WITNESSES AND ADDITIONAL
PURPORTED SUBSTANTIATION AND MOTION TO STRIKE AND EXCLUDE SUCH**

TESTIMONY AND EVIDENCE

Respondents hereby oppose "Complaint Counsel's Objections to Respondents' Late

Disclosure of Eight Witnesses and Additional Purported Substantiation and Motion to Strike and Exclude Such



such requirement in this instance where the purpose of the witnesses is to rebut live hearing

testimony, not the reports of Complaint Counsel's experts.

Complaint Counsel present four arguments in support of their motion: (1) Respondents' actions violate the Scheduling Order, (2) Respondents cannot show good cause for adding the witnesses at this time, (3) precedent supports the exclusion on the witnesses, and (4)

Respondents' actions prejudice Complaint Counsel.

testimony in rebuttal on elements of proof necessary to defend its case is prejudicial. See United

States v. Cain, 30 F.2d 1200, 1208 (5th Cir. 1904) (District Court's refusal to admit evidence of

excluding expert evidence crucial to building the defense). United States v. D. J. [redacted]

Counsel's witnesses and to provide rebuttal expert reports. The order also provided a deadline of

pertinent part,

present evidence as an expert. Except as otherwise stipulated or directed by the Administrative Law Judge, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness....These disclosures shall be made at

Complaint Counsel's argument that the witnesses proposed by Respondents should be excluded is a draconian measure never to be imposed except under the most compelling

circumstances. See, e.g., *DiDino v. United States*, 42 F.3d 1107 (W.D.N.Y. 1999).

judgment amended on other grounds, 189 F.R.D. 60 (W.D.N.Y. 1999). Witnesses who will rebut live testimony are necessary for the Presiding Officer to engage in a full inquiry and critical assessment of Complaint Counsel's witnesses.

"Rebuttal evidence" is defined as "evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party." Black's Law Dictionary, Henry

Campbell Black, 6 ed. (West Group 1999), Black's Law Dictionary, 1999, § 1000, 1007-1011.

allow Respondents to present expert rebuttal testimony in order to refute the [REDACTED]

new theories presented by Complaint Counsel's witnesses that deviate from the expert reports.

A. Respondents' Actions Do Not Violate the Scheduling Order

Respondents' actions do not violate the presiding officer's August 11, 2004 Scheduling Order [REDACTED]

B. Exclusion of Rebuttal Expert Witnesses Who Are Not Presenting Cumulative Evidence Is an Abuse of Discretion

The exclusion by trial courts of rebuttal expert witnesses who are not presenting

cumulative evidence has been ruled an abuse of discretion. *E.g.*, *Secretary of State v. [REDACTED]*, 929 F.2d 789, 796 (1st Cir. 1991) (the court's witness limitation constituted an abuse of discretion in that it prevented parties from presenting sufficient evidence on which to base a reliable judgment) (citing *Martin v. Weaver*, 666 F.2d 1013, 1020 (6th Cir. 1981) (abuse of discretion to exclude rebuttal witness), cert. denied, 456 U.S. 962 (1982) (citations omitted)).

Exclusion of rebuttal witness testimony that is essential to the evidence in [REDACTED]

Rebuttal testimony is vital because it enhances the ability of the judge to reach a fully informed and just decision.

As the courts have recognized, experts should not be excluded where doing so could

frustrate the overarching objective of the Rules, which is to assist the trier of fact in reaching a

[REDACTED]

witnesses under similar circumstances. In Freeman v. Package Machinery Co., 865 F.2d 1331 (1st Cir. 1988), the court upheld the trial court's denial of the defendant's motion to exclude a statistical expert's testimony where the plaintiff had listed the expert as a witness after a court-

imposed deadline but more than two months before trial. The court found that the plaintiff had

not shown any prejudice because it was able to depose the expert prior to trial. Id. The facts here are nearly identical. Respondents here listed the rebuttal experts four months before trial², giving Complaint Counsel even more time than was given in Freeman. Like Freeman,

Respondents have no objection to Complaint Counsel deposing each of the witnesses.

in Perkasie, the plaintiff violated a direct court order to submit its expert damages report by a certain date. 143 F.R.D. at 76. Even then, the court recognized that “[t]he exclusion of otherwise admissible expert witness testimony for failure to meet the timing requirements of a court order is an extreme measure.” Id. at 75. As discussed above, Respondents in this case did not violate the presiding officer’s August 11, 2004 Scheduling Order because the Scheduling Order set no deadline for Respondents’ rebuttal experts. Moreover, the court in Perkasie found that the prejudice to defendants could not be cured. Id. at 77. In contrast, as discussed in detail below, Complaint Counsel will not be prejudiced by permitting Respondents’ experts to testify. Thus, the case is not controlling.

In Praxair, the court’s scheduling order did not allow for supplemental reports. 2003 U.S. Dist. LEXIS 26794 at *18. Thus, the court excluded a supplemental expert report. Id. at *18-19. Moreover, the court found that plaintiffs were prejudiced because the report was filed ten days before the summary judgment motions were due. Id. at *19. In this case, Complaint Counsel

experts to testify. Thus, each of the cases relied on by Complaint Counsel is distinguishable

facts to this case, provide precedence for denying Complaint Counsel's request to exclude Respondents' expert witnesses.

D. Permitting Respondents' Rebuttal Expert Witnesses Will Not Prejudice Complaint Counsel

A party moving to strike a rebuttal witness must demonstrate prejudice with specificity. The Presiding Officer in In re Schering-Plough Corp., 2001 FTC Lexis 194 at *7 (Dec. 26, 2001), held that "where the movant failed to show that 'the expected testimonies of [the]

220, Complaint Counsel has the opportunity to depose these witnesses beyond the close of discovery deadline. There is thus no prejudice to Complaint Counsel, as they will have ample opportunity to depose the witnesses.

E. Respondents' Exhibit RX 807 Should Not Be Precluded Because There Is No Harm or Prejudice to Complaint Counsel

This Court should not exclude Respondents' exhibit RX 807 because there was no harm or prejudice to Complaint Counsel and because Respondents reasonably provided the exhibit.

Complaint Counsel.

responses. Upon identification, Defendants provided the document to Complaint Counsel. 1 1

included the document on their Final Proposed Exhibit List. Those steps reveal appropriate diligence in production of the document to Complaint Counsel.

Moreover, Complaint Counsel are in no way prejudiced by the production of the

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Date submitted: December 2, 2005

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

In the Matter of

[REDACTED]

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