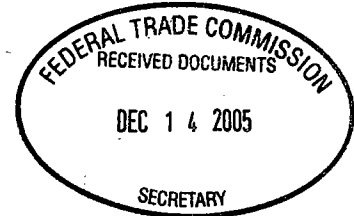


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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,)
 BASIC RESEARCH, A.G. WATERHOUSE,)
 KLEIN-BECKER USA, NUTRA SPORT, and)
 SOVAGE DERMALOGIC LABORATORIES)
DENNIS GAY)
DANIEL B. MOWREY d/b/a AMERICAN)
 PHYTOTHERAPY RESEARCH LABORATORY, and)
MITCHELL K. FRIEDLANDER,)
 Respondents.)



Docket No. 9318

**ORDER ON COMPLAINT COUNSEL'S OBJECTIONS TO
LATE DISCLOSED WITNESSES AND EXHIBIT**

I.

On November 23, 2005, Complaint Counsel filed a motion objecting to Respondents' late disclosure of eight expert witnesses and one piece of evidence ("Motion"). On December 2, 2005, Respondents filed an opposition ("Opposition").

On November 30, 2005, Complaint Counsel filed an unopposed motion for leave to substitute the motion with a non-public version. Complaint Counsel's motion for leave is **GRANTED**.

II.

Complaint Counsel argues that Respondents' late designation of eight expert witnesses violates the Scheduling Order and the Federal Trade Commission ("Commission") Rules of Practice; Respondents cannot show good cause for adding eight expert witnesses at this late date; and precedent supports exclusion of Respondents' eight new expert witnesses based on

violations of pretrial notice requirements and prejudice. Motion at 8-18. Complaint Counsel also asserts that the Court should exclude Respondents' late disclosure of alleged substantiation. Motion at 18-20.

Respondents contend that there is no violation of the Scheduling Order, the exclusion of

rebuttal expert witnesses who are not presenting cumulative evidence is an abuse of discretion; precedent does not support the exclusion of the eight witnesses; and permitting Respondents' rebuttal expert witnesses will not prejudice Complaint Counsel.¹ Opposition at 5-13.

Respondents also claim that exhibit P Y 807 should not be precluded because there is no harm or

prejudice to Complaint Counsel. Opposition at 13-14.

III.

A.

The Complaint in this matter was issued on June 15, 2004. After a prehearing conference and input from the parties, a Scheduling Order was issued on August 11, 2004. The Scheduling

lift of the stay, the Second Revised Scheduling Order was issued on August 4, 2005. The Second Revised Scheduling Order states that Respondents' counsel asserted a "genuine unavailability"

prepare and present this matter at a trial scheduled prior to the end of February [2006] due to immovable conflicts," that Complaint Counsel did not object, and that due to "the unique facts of this case, the parties' joint request is not unreasonable." Second Revised Scheduling Order at 1. Therefore, at the request of Respondents, the trial was delayed by six months

The Second Revised Scheduling Order set November 8, 2005 as the deadline for parties to exchange final proposed witness and exhibit lists. On November 8, 2005, Respondents identified, for the first time, eight new expert witnesses, to be called "should the Complaint Counsel's experts' testimony mirror that of their deposition testimony" and indicating that the experts were "not a part of Respondents' case in chief." Motion, Exhibit 6 at 8. Complaint Counsel contends that no expert reports have been provided from these eight expert witnesses, in

motions. *See* Motion at 17. Therefore, the eight additional expert witness being named at this late date would require reopening discovery and would likely disrupt the orderly and efficient trial of the case. Finally, after thorough review of Respondents' Opposition, the Court finds that

Respondents have not provided any legitimate justification for the delay in identifying the eight expert witnesses at issue.

Respondents state that the eight expert witnesses "were not identified until 11/11/11."

