

MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. M. ARTHUR CHARLES  
CASE No. 10-CV-4879 JCS

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1 NOTICE OF MOTION TO EXCLUDE EXPERT TESTIMONY

2 On August 9, 2013, at 9:30 a.m., pursuant to Civil Local Rule 7-2, the Federal Trade  
3 Commission ("Plaintiff," "FTC," or the "Commission") will and hereby does move this Court to  
4 exclude the opinions of Dr. Arthur Charles ("Dr. Charles") in support of Wellness Support  
5 Network, Inc., Robert Held, and Robyn Held (collectively, "WSN") under ~~Deubert~~ v. Merrell  
6 Dow Pharms., yn1993). and Rob

1 substantiation; and 3) whether the challenged claims are material to prospective consumers. See  
2 FTC v. Pantron I, Corp., 33 F.3d 1088, 1095 (9th Cir. 1994). Dr. Charles has no relevant  
3 expertise with respect to whether the ads convey the challenged claims or whether the challenged

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1 In the next section, titled "Results," Dr. Charles assigned certain WSN ingredients to his  
2 "clinical effectiveness categories" at 8-10. Noticeably absent from Dr. Charles' report is  
3 any discussion of how he knows that the WSN products provide any benefits they claim  
4 since there are no studies or test WSN's products. Dr. Charles cited to articles ostensibly  
5 supporting his conclusions, but did not offer any review of the literature for any  
6 ingredient. Nor did Dr. Charles discuss the results of any study or compare studies with each  
7 other. Dr. Charles concluded his report with a statement that "[i]t is also my opinion that the  
8 claims made by [WSN] are truthful and substantiated." at 10. But Dr. Charles did not  
9 explain what "claims made by WSN" he was referring to.

10 III.

1 may conclude that there is simply too great an analytical gap between the data and the opinion  
2 proffered.” Id.

3 The Court should also make certain that an expert . . . employs in the courtroom the  
4 same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”  
5 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (emphasis added). The court  
6 should consider whether an expert prepared his methodology for purposes of litigation, or  
7 articulated the methodology before litigation without any incentive to reach a particular  
8 outcome. See Daubert v. Merrell Dow Pharms., 148 F.3d 1311, 1317 (9th Cir.1995)  
9 (“Daubert II”).

10 Under the second prong, the relevancy or “fit” analysis, the Court must “ensure that the  
11 proposed expert testimony . . . logically advance[s] a material aspect of the proposing party’s  
12 case.” Redfoot v. B.F. Ascher & Co., No. 05-cv-2045-PJH, 2007 WL 1593239, at \*4 (N.D. Cal.  
13 June 1, 2007) (citing Daubert II, 43 F.3d at 1315). The standard for fit is higher than bare  
14 relevance. Id. (citing In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994)). See  
15 also Daubert II, 43 F.3d at 1317, n.17 (explaining that Rule 702’s “relevance” requirement is not  
16 “merely a reiteration of the general relevancy requirement of Rule 402”). As a result, the Court  
17 “should exclude the scientific expert testimony under the second prong of the Daubert standard  
18 unless [the court] is convinced that it speaks clearly and directly to an issue in dispute in the  
19 case.” Jones v. United States, 333 F. Supp. 894, 900 (N.D. Cal. 1996) (internal quotations  
20 omitted).

21 Courts should resolve expert challenges early because the admissibility of an expert’s  
22 testimony is a designated “preliminary question



1 IV. ARGUMENT

2 A. Dr. Charles' Opinions Are Irrelevant.

3 In his expert reports, Dr. Charles never mentions the claims challenged by the FTC, nor  
4 does he provide any analysis of whether the claims exists are truthful or adequately  
5 substantiated. And at his deposition Dr. Charles made clear that the "claims" he was referring to  
6 were not the challenged claims, but certain testimonials offered by WSN and the articles  
7 referenced in his reports. Snow Decl., Ex. D, Transcript of Deposition of Dr. M. Arthur Charles,  
8 178:25-180:2 ("Charles Dep."). In other words, Dr. Charles assessed the existence of  
9 substantiation for "claims" that are not at issue in this lawsuit. His opinions are therefore of no  
10 help to the Court in determining whether the claims challenged by the FTC are truthful and  
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1 the cited articles, Dr. Charles did not identify anything else he considered a “claim” made by  
2 WSN that, in his opinion, was truthful and substantiated.

3 Of central concern to Federal Rule of Evidence 702 is whether the expert’s testimony  
4 “will help the trier of fact to understand the evidence or determine a fact in issue.” Fed. R. Evid.  
5 702(a). Because Dr. Charles’ reports do not consider analyze the challenged claims, they are  
6 not helpful to the Court in determining the centr

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1 See Charles Dep. 43:18-21 (testifying that he is not a lawyer); 42-44:5 (testifying that he has  
2 no formal training relating to FDA regulation of medical foods); 45:15-24 (testifying that before  
3 this case he has never reviewed any FDA documents relating to medical foods). His entire  
4 analysis, therefore, is unreliable and inadmissible. See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d  
5 717, 745 (3d Cir. 1994) (“[A]ny step that renders the analysis unreliable . . . renders the expert’s  
6 testimony inadmissible. This is true whether the step completely changes a reliable methodology  
7 or merely misapplies that methodology.”).

8                                   2. Dr. Charles Never Explains How His Preference For Positive  
9                                   Studies Is Grounded In Science.

10 Dr. Charles’ reports fails to provide any sound scientific basis for his effectiveness  
11 opinions. While he cites studies that purportedly show the efficacy of ingredients in WSN’s  
12 products, Dr. Charles fails to analyze the numerous studies that show that ingredients have no  
13 effect. His only justification for this approach is that “positive clinical studies often take  
14 precedence over negative studies.” Charles Report at 6. His report’s entire explanation for this  
15 concept is as follows:

16                                   In many of the human trials of various substances, e.g. vitamins,  
17                                   minerals, trace elements and plant extracts, both positive and  
18                                   negative studies are published; but it must be emphasized that it is  
19                                   exceedingly difficult to prove a negative. Thus the properly  
20                                   conducted, positive studies take precedence, and negative studies  
21                                   often list the potential weaknesses of these studies to be improved  
22                                   upon during future studies.

23 Charles Report at 6. Dr. Charles cited no authority explaining the scientific basis for this  
24 concept. Nor did he elaborate in his report what he meant by “positive,” or “negative”  
25 studies. And in listing his ingredient-related conclusions, Dr. Charles never explained how the  
26 principle had been applied to give particular studies “precedence” over others. Dr. Charles has  
27 written bias into his methodology.

28 When asked about this subject at this deposition, Dr. Charles testified that there was also  
a third category, “neutral” studies, which he had omitted from his report:

Q       All right. What do you mean by positive studies?  
A       Studies that would show a ch

Q Okay. So what –

A So a change in the direction that you would expect it to be changing. So for in diabetes you would expect it to say lower the blood sugar, lower the A1C.

Q Okay so a positive study would do that?

A Yes. There's actually the kind of studies and I should have put that in here. There could be a positive study, a neutral study and a negative study. I shouldn't use negative, because I may have seen one negative study where there was actually the detriment sugars in all the studies reviewed, but most of the studies are either positive or neutral, not negative. So neutral would be no statistical change . . . .

Charles Dep. 182:8-183:1. As clarified by Dr. Charles in his deposition, “positive” studies are those showing a benefit to diabetes patients and “negative” studies are those showing a detriment to diabetes patients. And “neutral” studies are those showing no statistically significant change at all. In preparing his report, Dr. Charles cited only to positive studies. Charles Dep. 189:22-25 (“Q. . . . You talked about the positive studies? Yeah I didn't really talk about the neutral studies.”). Ultimately, Dr. Charles' preference for “positive” over “negative” and “neutral” studies appears to be nothing more than a preference for studies that demonstrate efficacy—and thereby support WSN—over those that do not.

To comply with Daubert, Dr. Charles must explain precisely how he went about reaching his conclusions and he must point to some objective source to show that he followed the scientific method. *Carnegie Mellon Univ.*, 55 F. Supp. 2d at 1034 (citing *Daubert II*, 43 F.3d at 1318-19). Dr. Charles has done neither. Instead, he has invented a rule that allows him to disregard studies that report contrary empirical findings. Dr. Charles has not cited to any authority—much less any “objective source”—to demonstrate the scientific validity of his extraordinary rule preferring positive over negative and neutral studies.

Dr. Charles' reports must also include a complete statement of all opinions the witness will express and the basis and reasons for them.” Fed. R. Civ. P. 26(a)(2)(B)(i) (emphasis added). But those reports do not breathe a word of the numerous neutral studies refuting those positive studies Dr. Charles elects to cite. Dr. Garvey also identifies numerous contrary

<sup>5</sup> Some of the articles Dr. Charles cites point to significant studies that show the ingredients have no statistically significant effect. See Snow Decl. Ex. G, William T. Cefalu & Frank. B. Hu, Role of Chromium in Human Health and in Diabetes, 27 *DIABETES CARE* 2741, 2741-2742 (2004) (noting that “significant controversy exists regarding the effect of chromium supplementation on parameters assessing human health” and that “[results] from other studies

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