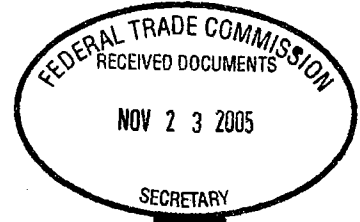


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

In the Matter of

BASIC RESEARCH, LLC
A.G. WATERHOUSE, LLC
KLEIN BECKER USA, LLC



Meris must be prohibited from testifying on (and his ...)

discussion of) PediaLean. In addition, Dr. Nunberg lacks requisite expert knowledge and, thus, impermissibly bases his opinions on subjective belief and unsupported speculation. His testimony should therefore be deemed inadmissible under FTC Rule 3.31 and under Fed. R. Evid.

402-441-700 and District of Columbia, D.C. 20001-1111

consumer perception of advertising of any kind, including of weight loss products. Id.

No scientific or technical journal article of any kind is cited in Dr. Nunberg's report. See

He did not examine the use of the words "significant" and "significance" in the

Enquirer, and the *Standard*. Id. He cited no authorities for his assertion that the

advertising in particular, Dr. Nowlis finds the “lexical analysis” approach of Dr. Nunberg unreliable. Id. at 5-6.

II. THE LAW

Under FTC Rule 2.21, with respect to comparative advertising, the Commission has stated that “[a]n advertiser’s comparative advertising is deceptive if it is likely to mislead consumers as to the relative merits of the advertiser’s product and the product of another advertiser.”

is measured by education, training, and experience in the subject addressed and by the

acceptance and reliability of the methodology used for assessment. Dr. Nunberg is neither an

expert nor qualified to testify as to the meaning of weight loss as just a “dieting” program.

The application of Rule 702 is qualified by the Daubert standard. Under Daubert, two questions must be addressed before proffered expert testimony can be accepted by the trier of fact: (1) whether the expert's testimony is based on 'scientific knowledge,' and (2) whether the testimony 'will assist the trier of fact to understand or determine a fact in issue.' 509 U.S. at 502. "Scientific" implies grounding in the methods and procedures of science." 509 U.S. at 502.

omitted). This factor is also described as "fit," meaning whether the testimony fits the factual

scientific validity for other models. 1. The model is a 101 B.C. 101 B.C. 101 B.C. 101 B.C. 101 B.C.

requisite expertise to testify concerning consumer perception of the advertising in this case. Dr

Nunberg's testimony must be excluded. In the alternative, should Dr. Nunberg be considered an

Exhibit E at 6. Thus, those two experts are analyzing the same materials and proffering the same

opinions. Their testimony is duplicative and, therefore, under Federal Rule of Evidence 403
either Dr. Nunberg must be either excluded from testifying or Dr. Mazis' testimony must be

Dr. Nunberg Is Not An Expert in Consumer Perception of Weight Loss Product Advertising

Dr. Nunberg should further be excluded from testifying as an expert in this case because

advertising.

Dr. Nunberg's Proffered Opinion Is Based Solely on Subjective Belief and Unsubstantiated Allegations

Dr. Nunberg's testimony must be excluded because it fails the Daubert test both as to fitness and to scientific knowledge. Dr. Nunberg does not cite any authorities for his methodology for determining consumer perception of the PediaLean advertisements. He cites no authority for his conclusions. He has not shown that the methodology is generally accepted in the scientific community.

to the trier of fact than Dr. Nunberg's interpretation of them. Dr. Nunberg's report is therefore

consumer perception in any way to provide any use of labels...

[The remainder of the page is heavily obscured by horizontal black bars, making the text illegible.]

**A.G. Waterhouse, LLC
Klein-Becker USA, LLC
Nutrasport, LLC
Sovage Dermatologic Laboratories, LLC,
BAN, LLC**

Stephen E. Nagin
Nagin, Gallop & Figueredo, P.A.
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**Counsel for Respondent Daniel B.
Mowrey**

Mitchell K. Friedlander
5742 West Harold Gatty Drive
Salt Lake City, Utah 84111,

Pro se.

Dated: November 23, 2005

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

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

PUBLIC

Docket No. 9318

PENNSYLVANIA

FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C.

In the Matter of

BASIC RESEARCH, LLC
A.G. WATERHOUSE, LLC
KLEIN-BECKER USA, LLC
ADMINISTRATIVE

2) two paper copies delivered by hand delivery to:

The Hon. Stephen J. McGuire
Chief Administrative Law Judge
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-112
Washington, D.C. 20580

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James Kohm
Associate Director, Enforcement

601 New Jersey Avenue, N.W.
Washington, D.C. 20001

4) one paper copy by first class U.S. mail and one electronic copy in PDF format
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Laureen Kapin
Joshua S. Millard
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Mitchell K. Friedlander
c/o Compliance Department

Salt Lake City, UT 84116

BY THE COURT

1

IN RE: [REDACTED]

2

Expert Report of Geoffrey Nunberg

In the matter of Basic Research et al. Docket No. _____

9318

Scope of Retention

1. I have been retained in this matter to opine on the question of whether the language of the advertisements and promotional material used by Basic Research et al. ("BR") for PediaLean

("the Advertisements") supports the allegations made by the Complaint in this matter that BR has represented that "PediaLean causes substantial weight loss in overweight or obese children" (Complaint, §37) and that BR has "represented, expressly or by implication, that

Stanford University. I have held visiting lectureships at the University of Toronto, the

University of Texas, the Frei Universität of Berlin, and Princeton University.

I have published numerous papers in peer-reviewed journals and other publications on various

aspects of linguistics. I am the author of books and articles dealing with syntax and

semantics, language variation and use, and the structure of written language. I am a regular

Summary of Opinions

12. On the basis of my review of the documents mentioned above, my examination of the

citational evidence, and several other considerations described below, I have reached the following conclusions:

14. The Advertisements represent that PediaLean is an effective weight-loss product for fat or

lean children, which will lead to "significant weight loss" for the consumer's child

15. The Advertisements represent that the consumer can expect results like those in the clinical tests it reports; it is a "clinically proven solution."

16. In the context of the Advertisements, significant can only be interpreted as having the same

sometimes call "dictionary meaning"), whereas lexical pragmatics is concerned with elucidating conveyed meaning.

For example, suppose we are interested in determining whether the phrase "You may request

will tell us in which contexts such an inference will be justified (e.g. in a sign at an airport

check-in that says "If you do not want to go through the metal detector, you may request a

[redacted] children's weight control that simply stated, cannot and will not

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

fail." (5050012, etc.)

D. A part of the Advertisement describe the clinical trial and go on to say

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] ... TM

[redacted]

[redacted]

The advertisements also represent that clinical testing proves that PediaLean causes

is "significant weight loss" and the statement that "each and every and every child who used

PediaLean™ as directed lost a significant amount of excess body weight... a success rate of 100%." (Complaint Exhibit L, 5050054, 5050058, etc.)

... PediaLean™ as directed lost a significant amount of excess body weight... a success rate of 100%." (Complaint Exhibit L, 5050054, 5050058, etc.)

2 a : having or likely to have influence or effect : IMPORTANT <a
significant piece of legislation> also : of a noticeably or measurably large

1. It is not something other than mere chance, statistically.

significant correlation between vitamin deficiency and disease>

volatility are not only statistically significant they are quite large

significant" in a way that demonstrates that they are mistaken about its meaning. For

significant error(s) "a location that makes no sense statistically" - sample can be

statistically significant, but not a sample itself.

The use of *significant* in the Advertisements is not consistent with a statistical interpretation

statistical interpretation. Consider the frequently repeated statement "this natural weight-control program resulted in significant weight loss in virtually every child studied." True, the

children who were "studied" included the control group, strictly speaking. But if we take "every child studied" here to refer to the experimental group and we take *significant* to mean

"noticeably large," then the statement is straightforward. If, however, we tried to take *significant* in its statistical sense, the statement makes no sense. Even if one accepts that the

loss," as used in the Complaint, however, *substantial* can have only the sense that the

Merriam-Webster defines as "5. Considerable in importance, value, degree, amount."

extent" and that Merriam-Webster's Eleventh Collegiate defines as "considerable in quantity :

significantly great."

35. Relative to the "quantity" senses of each word, *substantial* and *significant* can be regarded as "cognitive synonyms." While they differ slightly in connotation or emphasis, each word entails the other. That is, if a reduction in a value can be described as "significant" it can also

be described as "substantial," and vice-versa. In this connection it is notable that Merriam-Webster's defines this sense of *substantial* as "significantly great" and that the Eleventh

greenhouse gas is described as substantial in one article, while in another article a 60 percent

reduction in greenhouse gases is described as significant. A 40 percent reduction in mercury

11/15/2001 10:00 AM

11/15/2001 10:00 AM

11/15/2001 10:00 AM

reduction in the price of the Focus would presumably have a far greater impact on the number of cars sold.

42. For this reason, a promise of "significant weight loss" can only be interpreted relative to the
status of the subject relative to the normal range. A loss of 5 percent of body weight

might very well count as significant for a 130 pound woman 5'6" tall who feels she could
"need to lose a few pounds," since a reduction to 123 pounds would make her feel that she

46. Thus a reader who sees the phrase "significant weight loss" in the PediaLean advertisements,

~~where significant loss~~

equivalent in meaning to "substantial weight loss."

Other Indications show that the Advertisements promise substantial weight loss

47. ~~The implication that PediaLean will produce substantial weight loss does not rest exclusively~~

on the use of *significant*, but is implicit in the rest of the advertising copy, as well. As I noted, PediaLean is marketed as benefiting children who are "fat" or "obese" in advertisements that

Attachment A

Geoffrey D. Nunberg

January, 2004

Stanford University
Stanford, CA 94305
Telephone: (650) 723-8260
Fax: (415) 282-1633
nunberg@csli.stanford.edu

Education:

- 1972-1977 Department of Linguistics, Graduate Center, City University of New York.
January 1978: Ph.D. awarded
- 1971-1972 Department of Linguistics, Graduate School of Arts and Sciences, University
of Pennsylvania. 1972: M.A. awarded
- 1969-1971 School of General Studies, Columbia University. 1971: B.A. awarded
- 1962-1964 Columbia College, Columbia University

Other Affiliations:

1984-2001 Associate, Center for the Study of Language and Information, Stanford University

1992-present Membre Associé, Institut Jean Nicod (Centre de Recherche en Epistémologie Appliquée) (CNRS) Paris

1991 Member of Faculty, Linguistic Society of America Summer Institute, University of California at Santa Cruz

1999-present Member of Board of Trustees, Center for Applied Linguistics

Talking Right: How Conservatives Hijacked the Language of Politics, forthcoming from
Public Affairs, 2005

2004

The Future of the Book. (ed.). University of California Press. 1996.

Punctuation: An Exercise in the Linguistics of Written Language. CSLI and University of
Chicago Press, 1990. Reprinted 1995. Second edition, forthcoming 2001.

The Pragmatics of Reference (dissertation) Indiana University Linguistics Club. 1978

Double Standards (the Ebonics controversy) *Natural Language and Linguistic Theory* 15

[jingo jingo: Why English-only is a mistake *The American Prospect* July 1997]

Systematic Polysemy in Lexicology and Lexicography (with Annie Zaenen). Hannu Tommola, Krista Varantola, Tarja Salmi-Tolonen and Jürgen Schopp, eds., Proceedings of Eurolex II University of Tampere, Tampere, Finland 1992

Two Kinds of Indexicality. Chris Barker and David Dowty, eds. *Semantics and Linguistic*

Selected Book Reviews:

... ..

February 24, 2002.

Review of *Language and the Internet* by David Crystal. *Nature*, January 15, 2002...

Review of *The Scientific Voice*, by Scott Montgomery, *Science*, September 20, 1996.

Processing natural-language text using autonomous punctuational structure (first-named applicant, with Curtis Abbott and Brian Smith). US patent application 07/274,158 (1999) (Patent granted March 1991)

A method for manipulating digital data [natural-language structure editor] (first-named applicant, with Tayloe Stansbury, Curtis Abbott, and Brian Smith). European patent

Selected Papers of

The Shadowy Center for Language and Truth, University of Western Ontario

UC Santa Cruz, Oct. 22, 2004

Linguistic Issues in Trademark Law, invited talk at Midwest Intellectual Property Institute, Sept. 19, 2003.

The Future of Propaganda, McClatchy Lecture, Stanford University Department of Communication, May 10, 2003.

Building the Democratic Brand, presentation to U.S. Senate Democratic Caucus,

[The main body of the page is almost entirely obscured by heavy black redaction bars.]

The Shadow of Rruth, Conference on "Inscribing Grammar on Culture," Clark Library, Los
Angeles, CA, 1992

The Compositionality of Phrasal Idioms (with Ivan Sag and Thomas Wasow), Conference
on Idioms, Tilburg, Netherlands, September 1992.

Systematic Polysemy in Lexicology and Lexicography (with Annie Zaenen), Annual
Meeting of the European Association of Lexicography (Euralex), Tampere, Finland,
August, 1992.

Indexicality and Deixis, Conference on the Pragmatics of What is Said, Centre de la
Recherche Linguistique, Université de Montréal, 1992

Idiosyncratic Argumentation for the Functional Classes (with J. G. ...)

© 1999 Cambridge University Press

University of Naples, 1999

California State University at Northridge, 2002

Ohio State University, 1993

University of Pennsylvania, 1986, 1992

Pitzer College, 1995

Princeton University, 2002

Ph.D. Stanford University 1992 1993

Ph.D. University of California at Berkeley 1990

U.S. District Court, Southern District of California, 2004. Rudolph International Inc. v.
Decker, Inc. Expert report for defendant. H. H. and J. Edwards, attorneys for defendant.

case)

California Court of Appeals, Sixth Appellate District, 2004. Janet Gray Hayes v. Security
National Insurance Company. Expert report for plaintiff. McManis, Faulkner, and

U.S. District Court, Southern District of California, 2004. Rudolph International Inc. v. Decker, Inc.

Other Professional and Public Activities:

Member of Board of Trustees, Center for Applied Linguistics 1999-2004

Referee of articles or manuscripts: *Language, Linguistic Inquiry, General Linguistics, Linguistics and Philosophy, Recherches Linguistiques, Natural Language and Linguistic Theory, Philosophical Review, Synthese* Yale University Press, Cambridge.

Attachment B

Records of all uses of *substantial* and *significant* modifying *reduction, decrease, or loss*:

March 15, 2001

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Copyright 2004 The Scotsman Publications Ltd.

October 6, 2004, Wednesday

SECTION: Pg. 1

LENGTH: 712 words

appeared to back down over Mr McConnell's earlier claims, saying: "I would like people to judge us on what we achieve and look back.

"If, at that time, people wish to make comparisons between what we achieve here and what's done

down south, that's their business."

Last night, opposition politicians launched a vociferous attack on the Executive spending plans.

claiming hard-pressed council tax payers would once again have to tighten their belts.

Copyright 2004 The Irish Times

The Irish Times

Page 1 of 1

LENGTH: 850 words

HEADLINE: We will pay for carbon emissions

BODY:

One group surely delighted with Charlie McCreevy at the moment must be Ireland's SUV drivers, writes Mary Raftery

The owners of these monstrous polluters rapidly taking over our city streets have been saved from having to pay more for their gas-guzzling activities by the Minister for Finance's scrapping of the

France and Sweden are leading the way, and there have even been moves in the US, particularly California, to penalize those who insist on owning such wasteful cars of CO2.

atmosphere. London's mayor, Ken Livingstone, is particularly determined. Calling SUV owners

"complete idiots" he said earlier this year that 4x4 vehicles were totally unnecessary and bad for

London.

In a world becoming more concerned at the effects of climate change...

However figures again given in the Dail by Minister McCreevy (March 2004) do not support.

Copyright 2004 Chicago Sun-Times, Inc.

Chicago Sun-Times

August 10, 2004 Tuesday

SECTION: EDITORIALS; Pg. 39

LENGTH: 744 words

HEADLINE: U.S. trading partners keep fingers crossed for Bush;
Consumers in the United States could be relieved of the cost of farm subsidies

BYLINE: Michael Barone

BODY:

Amid all the coverage of the Democratic National Convention and of the fact that I-1-1

seems to have gotten little or no bounce from it, slight attention has been given to the

THE DAILY TELEGRAPH(LONDON)

June 19, 2004, Saturday

SECTION: News Pg. 11

LENGTH: 543 words

RELEVANT

BY THE DAILY TELEGRAPH

BODY:

Aunt Bessie's Tidgy Toads - small sausages in batter - had 12 per cent more salt than a year ago,

Wid's Crispies had 15 per cent more. Another 15 products had exactly the

same salt content as a year ago.

meal for one, Cheesestring Attack a Snack chicken snack and Dairylea Lunchables Yummy Ham Stack 'ems.

... "These were the crosses identified by the Food

1941

5.

...

July 10, 2004, Saturday

SECTION: Features; Body & Soul 3

LENGTH: 127 words

HEADLINE: [REDACTED]

BYLINE: John Naish

BODY:

EXERCISING in your eighties can keep you as fit as a twentysomething (albeit a lazy one), Manchester Metropolitan University researchers report.

They compared groups of 20 unfit young people with 20 unfit older people, and asked the older

group to do half-hour exercise sessions with light weights three times a week for six weeks. The

older group, aged 65 to 92, had started off with 30 per cent less muscle and tendon strength than the 18 to 35-year-olds. After six weeks, the difference was down to 10 per cent. "That is a substantial reduction," says Costios Maganaris, who presented the study at this week's Royal

Copyright 2004 The Buffalo News
Buffalo News (New York)

January 11, 2004 Sunday, FINAL EDITION

SECTION: VIEWPOINTS, Pg.H5

LENGTH: 772 words

HEADLINE: STATE'S EFFORT TO HELP UNINSURED IS LAUDABLE/

BODY:

What exactly is this Healthy New York program that Gov. George Pataki is constantly promoting

Healthy New York work to substantially reduce premiums. For example, premiums for qualified individuals are from 30 to 50 percent less than those in the individual market and from 15 to 30 percent less than in the small group classification.

Copyright 2004 Singapore Press Holdings Limited
The Business Times Singapore

March 22, 2004 Monday

SECTION: SHIPPING TIMES; Dockyard

LENGTH: 787 words

HEADLINE: Salvage industry may face the crunch as workload shrinks

BYLINE: David Hughes

BODY:

AFTER another year of frantic political activity in some quarters aimed at making the shipping

PHOTO COURTESY OF THE SINGAPORE PORT AUTHORITY

The results of the latest ISU survey show that oils, chemicals, other pollutants and bunker fuel recovered last year totalled 605,677 tonnes, against 957,122 tonnes in 2002. This amounts to a decrease of nearly 37 per cent.

potential pollutants in the 10 years to end-2003. While the volume of pollutants recovered in 2003

The Gazette (Montreal, Quebec)

March 26, 2004 Friday Final Edition

SECTION: Business; Pg. B1 / BREAK

LENGTH: 515 words

HEADLINE: Prescriptions rise by 7.9%; \$15.9 billion spent on drugs in 2003; study: Most-

frequently prescribed in Quebec is a remedy for hyperthyroidism

SOURCE: The Gazette

BYLINE: SHEILA MCGOVERN

BODY:

By category, and across Canada, medications for cardiovascular disease were the most frequently prescribed, with drugs for high blood pressure leading the group.

Psychotherapeutics, most notably anti-depressants, came second.

Hormones took third place, but IMS said they were the only major class of drugs to have a significant decrease in 2003. Prescriptions for estrogen and progestin dropped 25 per cent.

2003 Guardian Newspapers Limited
The Observer

November 9, 2003

SECTION: Observer Cash Pages. Pg 27.

LENGTH: 466 words

HEADLINE: Cash: Property: Finishib touches

BYLINE: Helen Monks

BODY:

First time buyers in the UK now need to borrow almost four times their salary, compared with 2.5

Final Edition

SECTION: Metro; B06

LENGTH: 740 words

HEADLINE: District Panel Backs Property Tax Limit;
10% Cap on Yearly Increases Proposed

DATE: 11/11/11 11:11 AM BY: [REDACTED]

BODY:

1. The District Panel has approved a 10% cap on annual property tax increases for the next five years.

The Baltimore Sun

SECTION: EDITORIAL, Pg. 10A LETTERS TO THE EDITOR

LENGTH: 1076 words

HEADLINE: LETTERS TO THE EDITOR

BODY:

Sewage plants have sharply cut their emissions

A recent Sun editorial suggested that the Chesapeake Bay Program is "fundamentally flawed" because the bay "cleanup management plan ... has no power to enforce pollution reduction goals and holds no individual or agency responsible for lack of progress" ("Fundamentally flawed," editorial, Apr 18).

But the real failure lies in the fixation by interest groups on holding pollution from point sources responsible for the bay's ills. That is simply wrong.

The Irish Times

August 10, 2004

SECTION: CITY EDITION; HEALTH SUPPLEMENT; NEWS FOCUS; Pg. 54

LENGTH: 1121 words

HEADLINE: Cancer strategy political poison

As advisers draw up a blueprint for cancer care, they would do well to take public opinion into account, writes Martin Wall

BODY:

of the documents up for discussion was a report on communications which emphasised how important it would be for the advisory body to sell the controversial recommendations contained

The message coming from the forum appears to be that the era of virtually every hospital in the State doing a bit of everything in the area of cancer surgery would have to come to an end.

Approx 20,000 people in Ireland are diagnosed with cancer every year and about 7,500 people die

However, cancer services in Ireland are improving, albeit from a low base. Since 1996 the

Government has invested heavily in this area, appointing up to 60 additional consultants, and the return has been a significant reduction of more than 15 per cent in the mortality rates in persons aged under 65.

The Toronto Star

June 22, 2004 Tuesday

SECTION: EDITORIAL · Pg. A74

LENGTH: 317 words

BODY:

When smog alerts are issued for Algonquin Park, as they have been for the past several summers, it's clear Ontario needs all hands on deck to combat air pollution.

industries will be asked to do their share.

May 4, 2004

SECTION CONVENTION HOLDINGS D. C.

SECTION 400

The Irish Times

May 4, 2004

LENGTH: 420 words

HEADLINE: EEA satellite images reveal urban sprawl

BODY:

The Times (London)

March 19, 2004, Friday

SECTION: Home news; 9

LENGTH: 624 words

HEADLINE: Women exercise rights to indulge ...

BYLINE: Alexandra Frean

BODY:

A new vogue has emerged for females aged 16 to 24 to drink and smoke heavily, reports Alexandra Frean.

THE DISING side of gender equality has produced a nasty sting in the tail, with new government

figures confirming that destructive behaviour such as heavy drinking and smoking are now on the

decline among young men but increasing in young women .

Figure 14. Percentage of the same sex, average consumption rates from 11 units in 1998 to 14.1 in 2002

nearly double the level of 7.3 recorded ten years earlier.

Figure 15. Percentage of young men aged 16 to 19 between 1998 and 2002.

proportion of young men aged 16 to 19 between 1998 and 2002.

Tampa Tribune (Florida)

December 10, 2003, Wednesday, FINAL EDITION

SECTION: NATION/WORLD, Pg. 1

LENGTH: 1325 words

HEADLINE: Environmentalists Sound Mercury Alarm

BYLINE: MIKE SALINERO . msalinero@tampatrib.com; Reporter Mike Salinero can be

reached at (850) 222-8382.

BODY:

TALLAHASSEE - Claiming the Bush administration is not doing enough to protect the Gulf of Mexico from mercury, environmentalists

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plan.

Vertical text on the right edge of the page.

October 22, 2003, Wednesday

SECTION: NEWS; NATIONAL; Pg. 1; BRIEF

LENGTH: 794 words

HEADLINE: Council to review rating policies

BYLINE: CULL, Bridget

BODY:

The Nelson City Council will be reviewing how rates are spread across the district following new

property valuations which could cause rates to skyrocket in some areas.

The review comes amid a warning from Nelson City Council that

"The council is going to have to decide whether or not the disparities which came out of these

"Even though I've had assurances from them that the rates will not rise in line with the higher values of properties, I'm inclined to say something like, 'pigs might fly,'" Mr Curry said.

The Mercury (Australia)

LENGTH: 1461 words

HEADLINE: LETTERS TO THE EDITOR

BODY:

Wind benefits

In each of their letters (August 19), David Jeffery and Libby Anthony make a strong case that generating electricity with wind turbines is both economically and environmentally beneficial.

What they underestimate is why fostering wind energy is so important. Wind energy will help reduce

amount of legroom in the first two rows and enough space in the third row to accommodate what my brother calls high-maintenance sub-units.

If you want all three rows there are 12.9 cubic feet of space available.

The Washington Post

July 14, 2004 Wednesday

Final Edition

SECTION: C-1

LENGTH: 1734 words

HEADLINE: A Vision for the Southwest;
New Homes, Parks, Cultural Facilities Among Changes Planned

BYLINE: Benjamin Forgey, Washington Post Staff Writer

BODY:

This is a five part series

A failed place where the fish sellers hang on at the edge and where people parade from cars and

just for the pleasure of it.

Now, the day has arrived, again, to brace for dramatic change, because the Southwest waterfront is a prime focus of the city's Anacostia Waterfront Initiative.

By Andrew Alton, director of the city's Office of Planning

To avoid incidents of nearby apartment buildings and townhouses, the chances should be on

[Redacted]

[Redacted]

helicopters, which also, though anyone fond of the clean atmosphere may well regret the new

[Redacted]

The overarching error, of course, was the failure to put people back in residences at the center of the waterfront. Post-World War II planners believed strongly that cities would be rebuilt

10/10/2014 10:10:10 AM

b6
b7C

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10/10/2014 10:10:10 AM

February 25, 2004 Wednesday Final Edition

SECTION: Automotive Plus; Pg. E1 / BREAK

LENGTH: 404 words

HEADLINE: Side air bags effectiveness: The next big bang in car safety

SOURCE: CanWest News Service; National Post

BYLINE: DAVID DEHAAS

BODY:

The first significant figures are in. And they show that side air bags are highly effective in preventing fatalities in side-impact car crashes.

A study conducted by the Insurance Institute for Highway Safety (IIHS) in the United States has

This has prompted United Nations Secretary-General Kofi Annan to warn in a recent address to the General Assembly: 'Road traffic injuries now pose a global public health crisis that requires

The challenges are so pressing that road accidents will be the main subject of World Health Day next April, supplanting diseases like HIV/Aids and malaria.

WHO will also present its World Traffic Report at that gathering.

Worldwide, three times as many men die from traffic accidents as women;

About 60 per cent of those killed in motor vehicle accidents are between 15 and 44 years old; and

The seat belt has been shown to 'significantly reduce' the severity of road injuries by as much as 61 per cent.

Ottawa Citizen

SECTION: City; Pg. C4

LENGTH: 175 words

HEADLINE: No-shows cost us money

SOURCE: The Ottawa Citizen

BYLINE: Nancy A. Clavette, MD

BODY:

Re: No-show blues, July 14.

The Irish Times

July 10, 2004

SECTION: CITY EDITION; HOME NEWS; Pg. 5

LENGTH: 501 words

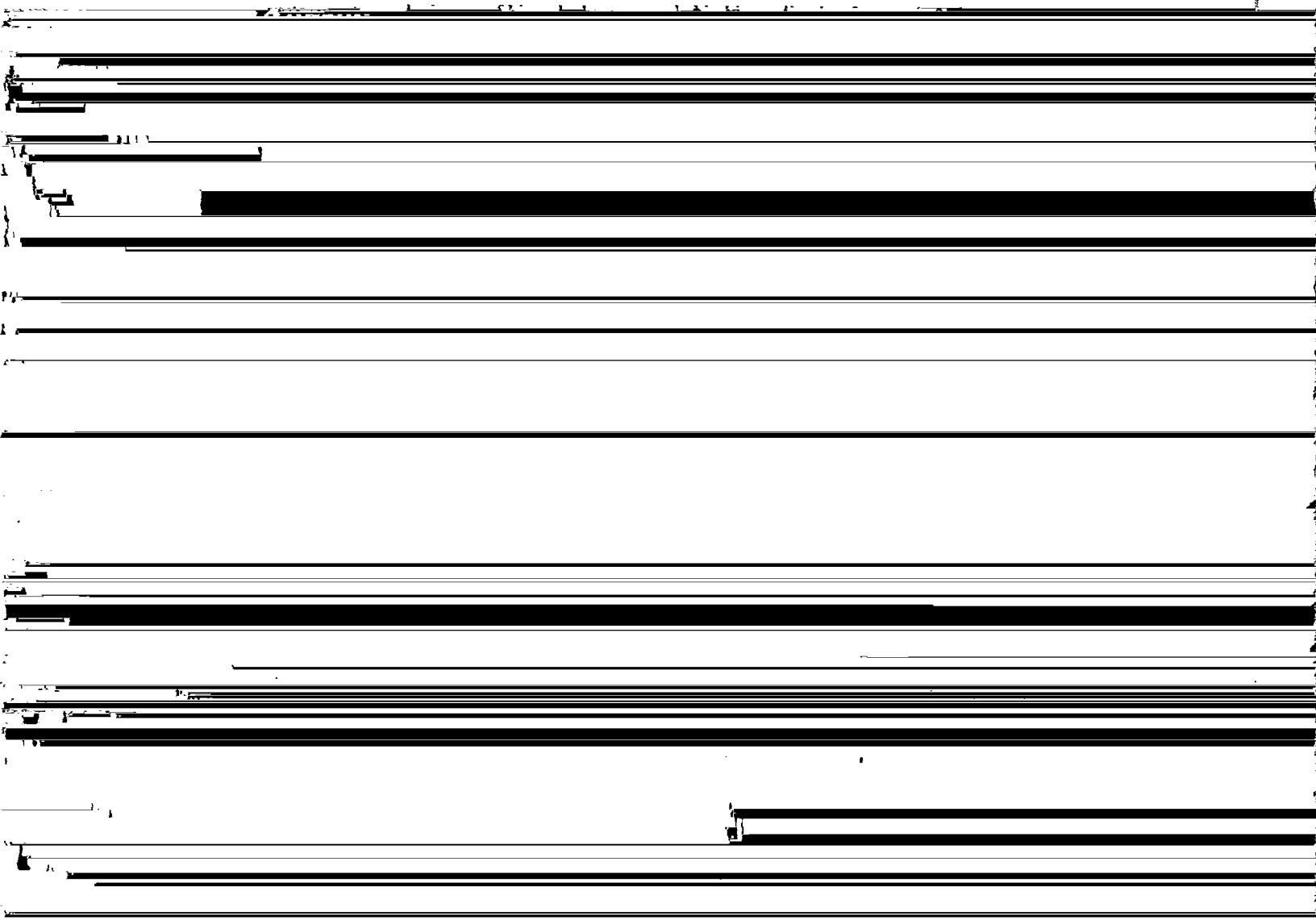
HEADLINE: Court grants Galway pub owner special exemptions

BYLINE: By MICHELLE MCDONAGH

DATELINE: GALWAY

BODY:

The Galway publican who this week controversially defied the smoking ban by permitting



[REDACTED]

while he prepares to mount a constitutional challenge to the ban

[REDACTED]

Speaking outside Spiddal courthouse yesterday, Mr Lawless, who says business fell significantly

[REDACTED]

August 17, 2004, Tuesday

SECTION: Local/State; Pg. 1B, 3B

LENGTH: 425 words

HEADLINE: Storm ravages area crops; Wind, rain leave farmers facing millions of dollars in damage

BYLINE: Cheryl Welch, Staff Writer

BODY:

BURGAW | Charles Giddens looked over his 27 acres of tobacco after hurricanes Bonnie and Charley blew through and decided it would do him no good to salvage it.

"It isn't worth 2 cents to pick it back up," the 56-year-old Willard farmer said. "The storm just

hurt me bad."

Mr. Giddens isn't alone in his misery.

According to the N.C. Department of Agriculture and Consumer Services, farmers in Bladen, Columbus, Duplin, New Hanover and Pender counties suffered an estimated \$ 17.9 million in crop damage from the hurricanes. Brunswick County officials reported an additional \$ 1.2 million

June 3, 2004 Thursday

SECTION: ILLINOIS SPOTLIGHT

LENGTH: 772 words

HEADLINE: Parts of damaged plastic plant still off-limits to investigators

BYLINE: Sarah Antonacci Copley News Service

DATELINE: ILLIOPOLIS

BODY:

Investigators for the lead agency probing the April 23 explosion at the East Moline plant

"We just don't know what's there. The concern is that there could still be some chemicals left in the piping or the reactor vessels themselves," he said.

McLean said he does not believe that anything done to clean up the property will have any effect on the

evidence at the site. He said OSHA's structural engineer will make sure there is a safe pathway

to the site. He said that OSHA will be the lead agency in the cleanup process.

Phil Mahler, the commission's director, said the move would allow Formosa to seek sales tax breaks on building materials and would also provide sales tax breaks on natural gas.

plant "more economically viable." He said the inquiry was related to increases in natural gas taxes

on top of record high natural gas prices.

"This had been in the works for a while," he said.

Mahler said the idea was tabled because more information was needed. Logan County officials told Steve McClure and Andy Hamilton of Opportunity Alliance to check with Springfield about

expanding its enterprise zone to

Copyright 2004 The Irish Times
The Irish Times

July 10, 2004

~~SECTION: CITY EDITION: HOME NEWS: Pg 5~~

LENGTH: 501 words

~~HEADLINE: Court grants Galway pub owner special exemption~~

BYLINE: By MICHELLE MCDONAGH

DATELINE: GALWAY

BODY:

The Galway publican who this week controversially defied the smoking ban by permitting customers to smoke in one of his pubs has succeeded in his application for a series of special exemptions for another premises

while he prepares to mount a constitutional challenge to the ban.

Speaking outside Spiddal courthouse yesterday, Mr Lawless, who says business fell significantly when the ban was introduced, confirmed that he had appointed a legal team to work on a constitutional challenge. He said he was "a law abiding citizen and I always have been, but I feel this law is fundamentally wrong and draconian".

The Southern Health Board yesterday said it had received written undertakings from a publican in

number is based on attendance before the fires and flu epidemic,

Assistant Superintendent Don Wood said by phone

these events, Gillette said in a telephone interview. For example, Menifee Elementary reported attendance at 425 students on Dec. 12, a day when the district estimated 585 students would

EXHIBIT B

In the Matter of)
)
)

A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NURTASPORT, L.L.C.,)

EXPERT REPORT OF MICHAEL B. MAZIS

1. I have been asked by the Federal Trade Commission ("FTC") to provide expert testimony in the FTC matter of Basic Research, LLC, et al. (Docket No. 9318).

The matter concerns allegations about the advertising and labeling for Domnamin

APg, Sovage Tummy Flattening Gel, Cutting Gel, Anorex, Leptoprin, and

respondents' advertisements in newspapers and tabloids, in magazines, in

8. Based on my knowledge, experience, education, and training, I consider myself to be an expert in consumer behavior in marketing research in consumer response

to advertising and other promotional materials, and in measuring advertising

deception.

Materials Considered

9. The documents that I considered in forming my opinions include the FTC complaint and attached exhibits and other advertising materials created by the

FTC (including print advertisements, radio commercials, television commercials,

transcripts of radio and television commercials, promotional materials, and product packages). I have also cited academic articles that I have considered.

(See Appendix C). I reserve the right to modify my opinions based on other

materials that I may receive in the future.

names.

12. The facial analysis focused on three product categories: topical products, weight-

of advertising for the topical products (Dermalin-APe, Cutting Gel, and Tummy

Flattening Gel) revealed that the advertising and product packaging strongly implies that using these products results in (1) rapid fat loss, (2) visibly obvious fat loss, and (3) rapid and visibly obvious fat loss in the areas to which the

subject claimed results. In addition, references to "two published clinical trials"

strongly suggest to consumers that the claims in the ads for Leptoprin are supported by published, clinical testing.

14. Finally, the social analysis of ads for Padina[®] can reveal that ads for

on fact" Moreover, ads state "In only Dermalin-APg's development"

...and ... match them ... in size within ...

describing the "story" of Dermalin-APg's development, ads mention that although
a "fat-dissolving ingredient" was discovered in 1993 it took seven more years to

implies that when Cutting Gel is applied topically fat cells start to deflate instantly. Therefore, there are many instances of strongly implied claims in ads for Cutting Gel that consumers are likely to perceive as communicating rapid fat loss.

12. Advertisements for Tummy Flattening Gel also strongly imply that product use

causes rapid fat loss. For example, ads declare that "when beta adrenergic stimulants such as Epidril™ are added to a culture dish with adipose (fat) cells,

Also, the Dermalin A De package indicates that it is "penetrating gel for the visible

appearance of problem area fat accumulation and visible cellulite."6

Similarly, the Cutting Gel package states that it is "penetrating gel for the visible reduction of surface body fat" and that it leaves "pure, ripped muscle behind!"7

Ads for Cutting Gel maintain "You will see the difference (and so will everyone else!)"8 and "Cutting Gel™ reduces surface fat."9

Visibly Obvious Spot Fat Loss

20 _____

strongly imply that visible obvious fat

product is applied. For example, ads state that "Dermalin-APTM permits users to

spot reduce. Put it on your thighs – slimmer thighs."¹² Other ads for Dermalin-

21. Ads for Cutting Gel claim that it is a "clinically proven, patented formula"¹⁶ and that "published clinical trials prove Cutting Gel's™"¹⁷

Flattening Gel mention that it is "clinically proven" and that its effects have been

"verified by two published clinical trials"¹⁸ And recent advertising for Cutting

Gel and Tummy Flattening Gel likely communicates to consumers that published, clinical testing supports claims that these products cause rapid and visibly obvious fat loss in areas of the body to which they are applied.

"So What's The Catch?" or "The 'Fine Print'"

Fat on Contact," "Rinned Ahe Rinned Dece Rinned Clutter D" 12

promotional messages than the "fancy" 2

and "help" used in the first "caveat" are confusing, and they are likely to be

Advertising for Leptoprin and Anorex

24. The advertisements for Leptoprin and Anorex strongly imply that product use

leads to substantial weight loss in significantly overweight users. Ads indicate

that the products have been used by a significant number of people

who need to lose "20 or more pounds" or "more than 30 pounds of excess body weight"²² In addition, television and radio commercials for Leptoprin provide

Substantial Fat Loss in Significantly Overweight Users

25. Advertising for Leptoprin and Anorex declares that use of the products results in

substantial fat loss:

However, if substantial, excess body fat is adversely affecting your health and self-esteem, then it's time for you to discover Leptoprin™ [Anorex] – the first comprehensive weight loss compound designed to

The advertising goes on to state that Leptoprin (and Anorex) "dramatically

Thus, advertising for Leptoprin likely communicates to consumers that the weight loss and fat loss claims discussed in paragraphs 24 and 25 are supported by

High Price

27. Advertising for Leptoprin and Anorex also highlight the products' high price

(\$153 a bottle). Advertisements ask the question "Why is Leptoprin so expensive?"

a bottle?" The answers provided include: Because "Leptoprin is simply the most

Advertising for PediaLean

28

The advertisements for PediaLean

substantial weight loss in overweight or obese children. Ads show a picture of what appears to be a mother comforting her significantly overweight child. Ads indicate that PediaLean gives "hope for you and your overweight child" and discuss the "pain and embarrassment" that is suffered by "more than 11 million

discussion reports, for example, that "...children showed a drop of excess body

weight from 51.16% to 41.215% (p=0.0005) (40)

11/11/2025 10:00:00 AM

11/11/2025 10:00:00 AM

11/11/2025 10:00:00 AM

CONCLUSION

21 In conducting a social analysis, it is important to

conveyed by each advertisement. Thus, my opinions are based on an evaluation

about what is the likely consumer perception of each of respondents' ads taken as

pragmatic. In reaching my conclusions, I have relied on

research on pragmatic implications. Pragmatic implications occur when
statements strongly suggest something that is not explicitly asserted, thereby

leading the person receiving the message (recipient) to

In my facial analysis of Basic Research's advertising, I provide numerous examples of claims that are not directly asserted but that are implied

to consumers because such claims are strongly implied. These pragmatic implications occur because many of respondents' advertisements include

persuasive offensive statements that are not directly stated but are implied to consumers through

conspicuous visual images, references to high prices, and suggestive brand names.

Michael B. Mazis
Michael B. Mazis, Ph.D.

20 October 2004
Date

EXHIBIT C

Service: Get by LEXSEE®
Citation: 1978 FTC LEXIS 375

1978 FTC LEXIS 375, *

In the Matter of HERBERT R. GIBSON, SR., et al.

DOCKET No. 9016

Federal Trade Commission

~~1978 FTC LEXIS 375~~

May 3, 1978

ALJ: [*1]

Theodor P. von Brand, Administrative Law Judge

ORDER:

Complaint counsel move pursuant to Rule 3.43(d) of the Rules of Practice that official notice be taken of
certain listings in the Dallas

EXHIBIT D



SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

F

Exhibit A

1. Your complete file related to this matter.
2. All correspondence with the Federal Trade Commission concerning this matter regardless of whether you were the author, addressee or copy recipient

3. All correspondence with any individual or entity other than the Federal Trade Commission concerning this matter regardless of whether you were the author, addressee or copy recipient.

4. All reports prepared by you in connection with this matter

5. All notes prepared by you in connection with this matter.
6. All drafts of all reports or other documents prepared by you in connection with this matter.
7. All documents reviewed by you in connection with this matter.
8. All materials consulted by you or relied upon by you in forming any opinion in connection with this matter.
9. All articles, books or other documents that you have authored, whether

- r. Weight loss or fat loss advertising
- s. The study of linguistics in relation to advertising and marketing

All documents relating to research, tests and/or medical or clinical studies that

- a. Obesity
- b. Weight loss
- c. Fat loss
- d. Dietary supplements
- e. The study of linguistics in relation to advertising and marketing

19. All documents relating to efforts by you either on behalf of yourself or third

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EXHIBIT E

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of:

BASIC RESEARCH, LLC,
a limited liability company;

A.G. WATERHOUSE, LLC,
a limited liability corporation;

KLEIN-BECKER USA, LLC,
a limited liability company;

NUTRASPORT, LLC,
a limited liability company;

SOVAGE DERMALOGIC LABORATORIES, LLC,
a limited liability company;

BAN, LLC,
a limited liability corporation, also doing
business as BASIC RESEARCH, LLC,
OLD BASIC RESEARCH, LLC,
BASIC RESEARCH, A.G. WATERHOUSE,
KLEIN-BECKER USA, NUTRA SPORT, and
SOVAGE DERMALOGIC LABORATORIES,

DEPT. OF COM.

limited liability corporations,

DANIEL B. MOWREY, Ph.D.,
Also doing business as AMERICAN
PHYTOTHERAPY RESEARCH
LABORATORY, and

MITCHELL K. FRIEDLANDER.

Respondents.

Friday, November 19, 2004
Washington, DC 20036

Deposition of:

Suite 620, Washington, D.C. 20036, commencing at 10:04 a.m.,

APPEARANCES:

ON BEHALF OF FEDERAL TRADE COMMISSION:

ROBIN M. RICHARDSON, ESQ.

Division of Enforcement
Federal Trade Commission

600 Pennsylvania Avenue, NW
Washington, DC 20580

Telephone: 202.326.2798
Facsimile: 202.326.2558

LAURA SCHNEIDER, ESQ.
Division of Enforcement
Federal Trade Commission
Bureau of Consumer Protection
601 New Jersey Avenue, NW
Washington, D.C.
Telephone: 202.326.2604
Facsimile: 202.326.2559

ON BEHALF OF RESPONDENT DENNIS GAY:

ROBERT J. SHELBY, ESQ.
Burbridge & Mitchell

Parkside Tower
215 South State Street
Suite 220

A P P E A R A N C E S (Cont'd):

ALCO...
[REDACTED]

REBECCA HUGHES
[REDACTED]

Student Intern
Federal Trade Commission

ZACH MABLE
[REDACTED]

Federal Trade Commission

REPORTED BY:

OVEDA V. HANCOCK, CVR

Notary Public, District of Columbia

C-O-N-T-E-N-T-S

WITNESS	EXAMINATION BY	PAGE
Geoffrey D. Nunberg	Mr. Shelby	5
	Mr. Price	--
	Ms. Schneider	--
	Ms. Kapin	--

E-X-H-I-B-I-T-S

No. 1	Subpoena Duces Tecum	7
-------	----------------------	---

1 P-R-O-C-E-E-D-I-N-G-S

2 Whereupon,

3 GREGORY D. MUNDRECK BY D

4 a witness called for examination by counsel for the

5 plaintiffs, was duly sworn and was examined and

6 testified as follows:

7 MS. SCHNEIDER: Before we start this morning

8 why don't we have counsel state their appearances on

9 the record, please.

10 MS. RICHARDSON: Robin Richardson for

11 complaint counsel.

12 MS. KAPIN: Lauren Kapin for complaint

13 counsel.

14 MS. SCHNEIDER: Laura Schneider for

15 complaint counsel.

16 MS. RICHARDSON: Let the record also reflect

17 before we have two students with us today. Would you

1 MR. SHELBY: Robert Shelby for Respondent
2 Dennis Gay.

3 EXAMINATION BY COUNSEL FOR RESPONDENT GAY

4 BY MR. SHELBY:

5 Q. Sir, would you state and spell your full
6 name?

10 A. In San Francisco.

12 A. It is 370 Fair Oaks Street.

13 Q. And your phone number?

15 Q. Is that a home--?

1 maintained in this action?

2 A. Yes.

3 Q. That is everything that you have reviewed
4 and compiled with respect to your involvement with

5 this case?

6 A. Yes.

7 MR. SHELBY: I'm going to ask the court

9 (The document, Nunberg
10 Deposition Exhibit No. 1, was
11 marked for identification.)

12 MS. RICHARDSON: Can I look at what you are
13 marking?

14 MR. SHELBY: It is the --

15 MS. RICHARDSON: Subpoena Duces Tecum?

16 MR. SHELBY: Yes.

17 MS. RICHARDSON: Is it the complete part of
18 it?

19 MR. SHELBY: Let's go off the record.

20 (Pause.)

21 MR. SHELBY: Back on the record.

22 MS. RICHARDSON: Let the record reflect that

2 Tecum and Exhibit A.

3 BY MR. SHELBY:

5 A. Yes.

6 Q. Can you describe it for us?

7 A. It is a Subpoena Duces Tecum addressed to me
8 from the -- it doesn't matter who it's from. It is a

10 Q. Is this why you are here testifying today?

11 A. I believe so.

12 Q. You are here in response to this subpoena?

13 A. Yes.

14 Q. Attached to the subpoena is an "Exhibit A"

15 that is referenced in the body of the subpoena. Do
16 you see that?

17 A. Yes, I do.

18 Q. I asked you to bring a number of materials

1 before this document?

2 A. Yes.

3 Q. That includes all of the correspondence that
4 you have had with the FTC concerning this matter?

5 A. Yes.

6 Q. It is listed there as item number two?

7 A. Yes.

8 [redacted] Q. Listed as item number three is all

9 corresponding with any other individual concerning
10 this matter? You have included anything of that

11 nature that you have included?

12 A. I have nothing of that nature.

13 Q. Previously, you have submitted an expert
14 report in this case. I think there is a draft of that
15 in the file as well?

16 A. Yes.

17 Q. Are there any other drafts of any reports
18 that you have prepared in this case?

[redacted]

1 A. Yes.

2 Q. All the documents that you reviewed in
3 connection with this matter are also included in the
4 materials that you provided?

5 A. Yes.

6 Q. Are there any materials that you consulted
7 or relied upon in forming your opinions that are not
8 included in the materials you have provided this

10 A. No, apart from dictionary definitions that I

12 Q. All the dictionary definitions that you
13 cited are -- excuse me, all the dictionary definitions

15 A. Yes.

1 [redacted] reports that were called and you said that you

2 had them already. I didn't produce those.

5 other documents that you have or have reviewed that

1 didn't attempt in this case to offer definitions for

2 the terms "rapid" or "substantial" or "visibly

3 obvious" as those terms are used in the complaint; is
4 that right?

5 MS. RICHARDSON: Objection as to form.

6 THE WITNESS: Can you repeat the question?

7 I'm not sure what you're trying to get at.

8 BY MR. SHELBY:

9 Q. Well, I'll come back to that.

10 A. Okay.

11 Q. And with respect to 22, 23 and 24, any
12 documents that you have that were responsive to those
13 requests are included with the materials you have
14 given us this morning?

15 A. Yes.

16 MR. SHELBY: I am going to ask the court

17 reporter to mark this as Exhibit 2, please.

18 (The document, Nunberg

1 Jeff Feldman and I. What we did was point Mr. Feldman
2 to the online Web site where the patents could be

3 found. My understanding is Mr. Nunberg does not have
4 any documents related to the patents.

5 MR. SHELBY: That's fair. I appreciate that
6 clarification.

7 BY MR. SHELBY:

8 Q. Sir, I'm showing you what has been marked as
9 Deposition Exhibit No. 2. I assume you recognize
10 that?

11 A. (Examining) Yes.

12 Q. Is that the expert report you rendered in
13 this case?

14 A. Yes.

15 Q. Is this the report that the FTC produced?

16 MS. RICHARDSON: Objection. Overly broad.

17 have a moment to look through it?

18 MR. SHELBY: Of course.

19 MS. RICHARDSON: Counsel would like to see a
20 copy of what you are marking as an exhibit. Do you
21 have copies of these?

22 MR. SHELBY: I do.

1 MS. RICHARDSON: Great. I just want to make
2 certain that these are the same things.

3 MR. SHELBY: Of course.

4 (Pause.)

5 [REDACTED]

6 BY MR. SHELBY:

7 Q. Have you had an opportunity to review that

9 A. Yes.

10 Q. Does that appear to be a complete and
11 accurate copy of the report you rendered in this case?

12 A. Yes, it does.

13 Q. Does that report contain all of the expert

14 opinions that you intend to offer in this case?

15 A. Well, subject to my reservations in

16 [REDACTED]

17 supplement, revise or further explain the opinions of

2 reviewing.

3 Q. As we sit here today, do you have any

4 intention of ~~concluding this matter~~

5 A. I have no intentions.

6 Q. Have you been asked to provide any opinions

7 that are not expressed in the report?

8 A. No.

9 Q. Have you been asked to do any additional
10 research or investigation on matters not addressed in
11 the report?

12 A. No.

13 Q. You have had a fair opportunity to express

1 A. Yes.

2 Q. You stand by the opinions that you have
3 expressed in the report?

4 A. Yes.

5 MR. SHELBY: Okay. Let's break for just a
6 moment.

7 (Thereupon, from 10:13 a.m. to 10:15 a.m.,
8 there was a pause in the proceedings.)

9 MR. SHELBY:

10 Q. I would like to go back to Exhibit No. 1 for

12 earlier.

13 A. Yes?

14 Q. With respect to Question No. 21 or subpart

15 21, I think a better way for me to ask the question
16 is, Have you produced all of the documents in your
17 possession that are responsive to Question No. 21?

18 A. Yes.

19 MR. RICHARDSON: Objection. What was

1 BY MR. SHELBY:

2 Q. All right. Well, save that explanation,
3 have you provided everything else in your possession

4 that is responsive to Question 21?

5 A. Yes.

6 Q. Do you have anything to add to your report
7 this morning?

8 A. No.

9 MR. SHELBY: That's all the questions I
10 have.

11 Do you have any questions?

12 MR. PRICE: I don't. We just need to make
13 arrangements for getting copies of the documents.

14 BY MR. SHELBY:

15 Q. Sir, would it be all right with you if I

17 copies, and send your original back to you at your
18 home address?

19 A. Absolutely.

20 Q. That would be all right?

21 A. Yes.

22 MS. RICHARDSON: Would you send us a copy

1 too?

3 sure.

4 Any questions for the witness?

5 MR. PRICE: No.

6 MS. KAPIN: Yes, he will read and sign.

7 MS. RICHARDSON: Absolutely.

8 (Whereupon at 10:20 a.m. signature having

9 not been waived, the deposition was adjourned.)

10 * * *

11

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22

ACKNOWLEDGMENT OF DEPONENT

I, GEOFFREY D. NUNBERG, PH.D., do hereby

acknowledge I have read and examined the foregoing

pages of testimony, and the same is a true, correct

and complete transcription of the testimony given by

me, and any changes or corrections, if any, appear in

the attached errata sheet signed by me.

Date

Geoffrey D. Nunberg, Ph.D.

CERTIFICATE OF NOTARY PUBLIC

I, OVEDA V. HANCOCK, the officer before whom
the foregoing deposition was taken, do hereby certify
that the witness whose testimony appears in the

testimony of said witness was taken by me in shorthand

and thereafter reduced to computerized transcription
under my direction; that said deposition is a true
record of the testimony given by said witness; that I
am neither counsel for, related to, nor employed by
any of the parties to the action in which this
deposition was taken; and further, that I am not a
relative or employee of any attorney or counsel

employed by the parties hereto, and signed by

Robin M. Richardson, Esq.
[Redacted]

Federal Trade Commission
[Redacted]

IN RE: Federal Trade Commission v.
Basic Research, LLC, Et Al

Dear Ms. Richardson:

Enclosed please find your copy of the

ERRATA SHEET

Basic Research, Et Al

Witness Name: Geoffrey D. Nunberg, Ph.D.

Witness Date: Friday, November 10, 2004

Job No.: 682570

Reason For
Connection

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

Statement of Dr. Stephen M. Nowlis

I. Background and Qualifications

1. I am the AT&T Distinguished Research Professor of Marketing in the W. P. Carey

School of Business at Arizona State University, Tempe, Arizona

which includes a complete list of my publications is attached as Exhibit A.

6. At Arizona State University. I have taught undergraduate and MBA courses on

marketing management, covering such topics as buyer behavior, developing marketing plans, advertising, sales promotions, retailing, and product development. I have also taught several doctoral courses. One course focused on various methods for

such topics as buyer decision making processes, influences on purchase decisions,

done through the use of survey research, which is a well-accepted method for testing

that Dr. Nunberg used an unorthodox method. I cannot accept his conclusions

Unorthodox means a great deal of research has shown that

12 Research published in academic peer-reviewed journals talk about the need to collect

article mentions. "At the enforcement stage of policymaking, there is a potential for

legal action. Therefore, government agencies frequently seek objective data to make

a strong case that violation has occurred. When the alleged violation is

14. Other independent research on tests for deceptive advertising, published in peer

goes to great lengths to discuss the appropriate techniques involved in properly
conducting survey research. For example, the proper use of control conditions is

discussed among many other issues for ensuring that reliable data is collected

However, this research never discusses the use of lexical analysis, because such a

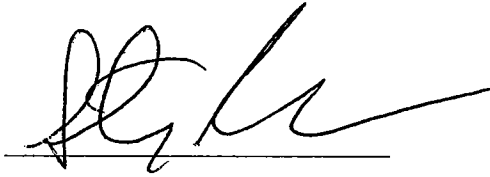
time, based on the answers to national opinion polls.⁷ This paper found that, “Poll results strongly suggest that consumers are deeply skeptical of advertising claims.

more.” (page 244). Other research finds that consumers can be very skeptical of advertisements for health claims.⁸ In particular, this research finds that consumers

affordable, and fast” (enhancement version). The results from this study showed that

consumers were unaffected by the message of easy weight loss, as they were just as

likely to want to buy the product if they saw the neutral condition as they were if they saw the enhanced condition of the advertisement. Thus, consumers in this study were quite skeptical of weight loss claims, as they had no effect on purchase intentions.

A handwritten signature in black ink, consisting of a stylized 'S' and 'N' followed by a long horizontal stroke.

Stephen M. Nowlis

11/22/2005

Date

Stephen M. Nowlis

Office:
WP Carey School of Business
Arizona State University

Home:
9119 Davenport Dr.
Scottsdale, AZ 85260

350 E. Lemon St.
PO Box 874106
Tempe, AZ 85287-4106
Phone: 480-965-2939
Fax: 480-965-8000
email: stephen.nowlis@asu.edu
<http://wpcarey.asu.edu/mkt>

Phone: 480-614-9786

Education

Ph.D. Business Administration (Marketing concentration) W.P. Carey School of Business

Professional service

Associate Editor, *Journal of Consumer Research*, 2002-
Editorial Review Board, *Journal of Marketing*, 2005-
Editorial Review Board, *Journal of Consumer Research* 2000-2001

Ad-Hoc Reviewer. *Journal of Marketing*. *Marketing Science*. *Journal of Consumer*

AMA Consortium faculty participant, 2003 and 2004

Association for Consumer Research Doctoral Symposium speaker, 2003 and 2004

Nominated by the Arizona State University Marketing Department and Finalist (top 4)

College of Business, University of Arizona, Tucson, AZ, 1997-1999, 2000-2006

Lemon, Katherine and Stephen M. Nowlis (2002), "Developing Synergies Between
Promotions and Brands in Different Price-Quality Tiers," *Journal of Consumer Research*, 29(4), 315-327.

Research, 171-185.

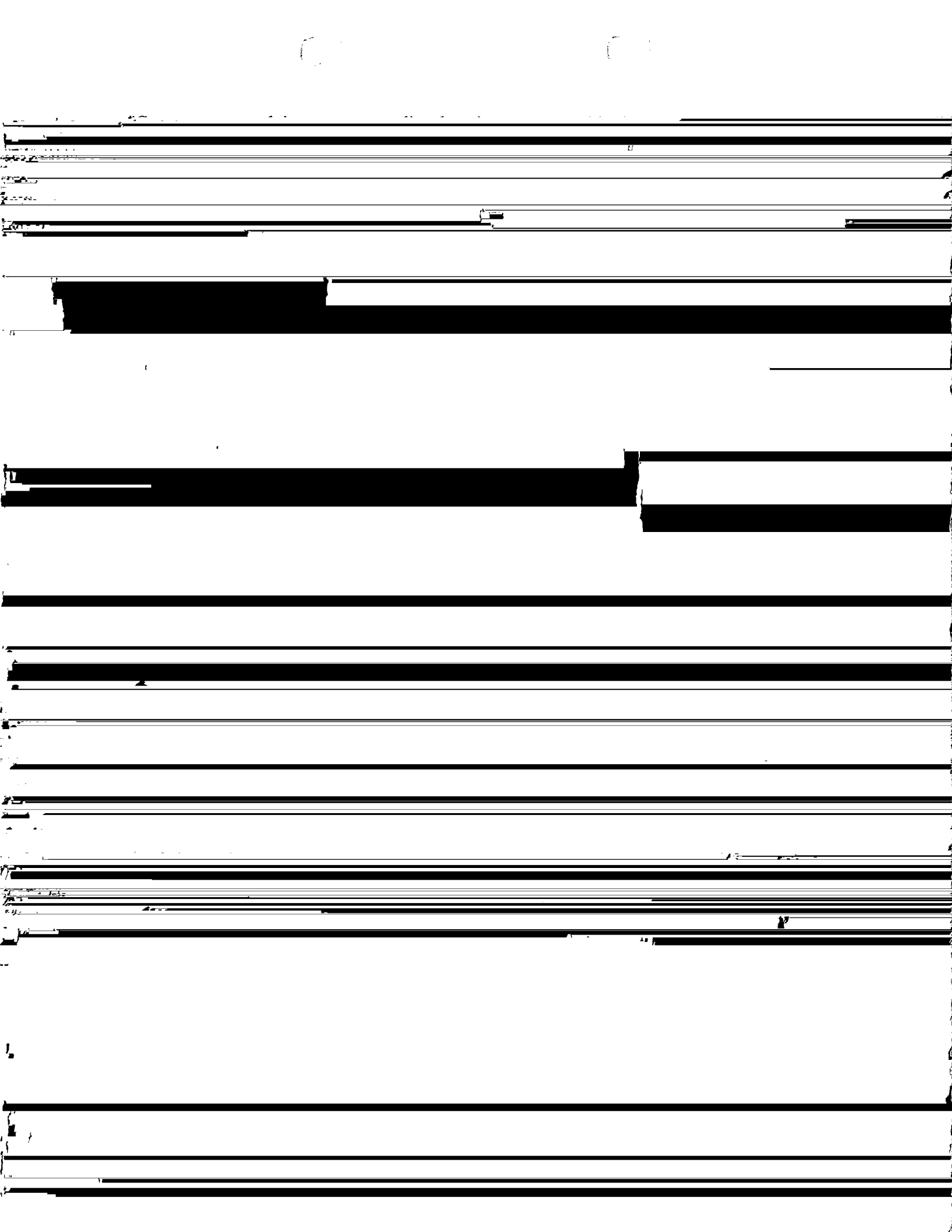
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Professional affiliations

American Marketing Association
Association for Consumer Research
Society for Judgment and Decision Making
Society for Consumer Psychology

Conference presentations



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Co-chair of session, "A Later Mover Advantage? The Impact of Order of Entry and Brand

Differentiating Product Features on Brand Choice" (with Ziv Carmon) *Journal of Consumer Research*

California Consumers v. BMG Direct Marketing, Inc.

Coblentz Patch Duffy & Bass, San Francisco, CA

- November 2002

UMG Recordings, Inc., et al. v. Sinnott

- Mitchell, Silberberg & Knupp, Los Angeles, CA

- Expert report, deposition

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- Rothschild, Barry & Myers, Chicago, IL

- Expert report, deposition

- April 2005

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Expert report, deposition

EXHIBIT G

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EXHIBIT H

Source: [Legal](#) > [Federal Legal - U.S.](#) > [Federal Cases After 1944, Combined Courts](#)
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*1996 U.S. Dist. LEXIS 9487, **

FEDERAL TRADE COMMISSION Plaintiff vs. ROBERT J. FERRE et al. Defendants

No. 94 C 3625

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN
DIVISION

1996 U.S. Dist. LEXIS 9487

July 2, 1996, Decided
July 3, 1996, DOCKETED

SUBSEQUENT HISTORY: [*1] Adopting Order of September 25, 1996, Reported at: [1996 U.S. Dist. LEXIS 14297](#).

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff Federal Trade Commission (FTC) filed a motion for summary judgment in the action that the FTC brought against defendants, publishing company and its representative, to secure injunctive relief and the disgorgement of any proceeds that defendants received from consumers as a result of certain allegedly unfair and deceptive advertising that violated § 5(a) of the Federal Trade Commission Act, [15](#)

OVERVIEW: Defendants used advertisements to promote and sell work-at-home business

recommendation, refund, postcard, misrepresented, misled, genuine issue, participating, disgorgement, advertising, message, unfair, permanent injunction, misrepresentations, omission, address, entities, multiple, jurisdiction, limited liability, liability

John F. [REDACTED] U.S. District Judge

Plaintiff, the Federal Trade Commission (FTC) brought this action under § 13(b) of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 53(b), to secure injunctive relief and the

disgorgement of any proceeds that defendants received from consumers.

issued. I am mindful, however, that with respect to plaintiff's current request for summary

determine only whether any genuine issues of fact remain for trial. To the extent that additional evidence has been submitted or summary judgment standards require different factual inferences than those made in the July 1994 Report, changes in the facts will be

discussed as part of the analysis herein.

ANALYSIS

and use of \$ 200 income per month for discussion violated F.T.C. 16 CFR 16.01 despite disclaimer

that some would earn more and some would earn less because neither a substantial nor appreciable number of consumers regularly achieved those earnings); *National Dynamics*

Cir. 1974), on remand, **85 F.T.C. 1052 (1975)**(claim that one can earn \$ 12,000 per year found deceptive). Contrary to defendants' attempt to characterize their earnings claims as

fail to disclose the alleged need for classified advertising because both advertisements refer to "advance classified ad participation." They further assert that no participant was required to purchase classified advertising and that Ace even suggested ways to implement the programs through free advertising. Similarly, defendants contend that the Amazing Pase Photo System advertisement warned potential consumers that they would have to follow the Pase system to make the indicated earnings. With respect to the Hi-Tech 900 program, defendants claim that consumers knew they were starting a new business venture and, therefore, would have reasonably expected to invest money in the program. The crux of these contentions is that, taking the advertisements as a whole, the FTC has not proven that reasonable consumers would have been misled by the alleged omissions. At the very least,

impression [*16] that consumers would be paid for any photographs that they took

whatever the subject matter. The reference to "following our system" does nothing to alter that impression. Similarly, in Hi-Tech 900, the defendants' failure to disclose that consumers

would have to pay additional fees after expressly stating that between \$ 19.95 and \$ 49.95

"Gets You Started!" created an implied message that the stated fees would be all that was required.

----- Footnotes -----

17 Indeed, the Home Inquiry Tabulator advertisement suggested the contrary. There

defendants deducted the \$ 89 initial fee from their calculation of the program's earnings

from an overall reading of the advertisements. Nevertheless, the FTC has not relied solely on that text to establish the defendants' violation of FTC Act 5(a). Rather, the FTC

provided evidence, in the form of consumer affidavits and testimony, indicating that consumers

consumers were in fact misled by the alleged affirmative misrepresentations. The defendants'

Defendant's responsive brief characterizes the FTC's request for injunctive relief and

payment of refunds to consumers who are entitled to receive them as "nonissues." In

defendants words, "the sole issue before the court is whether or not the government should

be indemnified for SIXTEEN MILLION DOLLARS as a result of its enforcement of the

defendant whose total net worth is approximately TWO POINT NINE MILLION DOLLARS."

----- End Footnotes----- [*22]

Although essentially undisputed, the evidence establishes that the entry of a permanent

With respect to defendants' Eighth Amendment argument, the FTC only seeks injunctive relief along with disgorgement of the amount by which defendants have been unjustly

these equitable remedies as cruel and unusual punishment. In any event, defendants provide no factual or legal support for this argument.

The FTC has provided ample evidence that nearly 700,000 consumers were at least

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~~Terms: puffery w/ advertisement! w/p FTC (Edit Search | Support Terms for My Search)~~

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