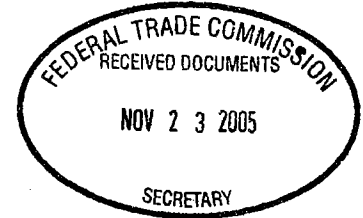


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.



In the Matter of

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

PUBLIC

Docket No. 9318

**RESPONDENTS' MOTION TO EXCLUDE COMPLAINT COUNSEL WITNESS
GEOFFREY D. NUNBERG**

All Respondents, by counsel and pursuant to Rule 3.22, hereby move the Presiding Officer to exclude Complaint Counsel's witness, Geoffrey D. Nunberg, Ph.D.¹

Dr. Nunberg testifies to all of the same substantive points as Complaint Counsel witness Dr. Michael B. Mazis. Compare Exhibit A at 3 to Exhibit B at 6. Consequently, Dr. Nunberg should be excluded from testifying in light of the unnecessary duplication; alternatively, Dr.

¹ In their Final List of Proposed Witnesses, Complaint Counsel state that Dr. Nunberg shall testify "about the language in the advertisements and promotional materials, the bases for his conclusions about that language, and any related topics. Dr. Nunberg may also testify to rebut expert evidence presented by the respondents concerning the foregoing topics and any related topics." *Id.* at 8. This motion to exclude is submitted as Respondents' objection to that identification in accordance with the Second Revised Scheduling Order, and extended by the Court's November 21, 2005 order, requiring that objections to witness lists be filed on November 23, 2005. In addition to the reasons stated herein, Respondents further object to that identification because it is not limited to PediaLean's advertising which Dr. Nunberg's report is.

Mazis must be prohibited from testifying on (and his expert report must be excised to remove 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. 403 and 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993) (which rules FTC regards as persuasive, see In re Herbert R. Gibson, Jr., 1978 FTC LEXIS 375, at *2, n.1 (May 3, 1978)(attached as Exhibit C). Respondents request a Daubert hearing on this motion.

I. THE FACTS

A. Background

FTC brought this action against Respondents, in part, alleging that the advertisements attached to the Complaint as exhibits K-L for the product PediaLean were deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act. PediaLean was sold as a dietary supplement intended to facilitate weight loss among overweight children. Id.

B. Testimony and Report of Dr. Nunberg

Dr. Nunberg has no prior experience in evaluating consumer perception of weight loss product advertising. Exhibit A at 1-2. Dr. Nunberg has experience in the statistical analysis of language, automatic summarization, and automatic text classification. Exhibit A at 2. Dr. Nunberg has experience in evaluating product and corporate names using techniques derived from statistical analysis of text databases. Id. Dr. Nunberg has experience in the dictionary meaning of words. Id. In his CV Dr. Nunberg admits he has not taught a course nor given a lecture on consumer perception of advertising for weight loss products, or even consumer

perception generally. Exhibit A at Attachment A. Dr. Nunberg has no experience measuring 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 Exhibit A. Dr. Nunberg stated that in preparing his report he reviewed the Complaint, the advertising and promotional materials for PediaLean, and "records from various dictionaries and databases, as referenced in [his] report and included in Attachment B." Exhibit A at 1. In preparing the report, Dr. Nunberg did not rely on any treatises or publications other than the dictionary. See generally, Exhibit A; see Exhibit D at requests 20-22 (in response to which no documents were produced). The databases that Dr. Nunberg accessed were Nexis (to examine newspaper articles) and Google (to examine search term results). Exhibit A at 7, 9, 11, 14. Dr. Nunberg accessed no database to compare weight loss product advertising.

Dr. Nunberg cited no authority for the proposition that the use of the word "significant" in advertising for a dietary supplement weight loss product is the same as the use of the word "significant" in the sources he looked at, i.e., "three major newspapers over the second half of September, 2004." Id. at 7. He cites no authority for the proposition that "the statistical sense of the word 'significant' is extremely rare in the general press, and when it does occur it is invariably prefaced by 'statistically.'" Id. at 7. He cites no authority for the proposition that, "In fact it is certain that a large proportion of consumers are unaware of the statistical use of the term 'significant.'" Exhibit A at 8. He cites no authority for the proposition that, "[E]ven consumers who are aware that significant is used in a statistical sense very often misunderstand its meaning, and are unaware that even a difference of .001 percent in two values might be 'statistically significant.'" Id. at 8.

He did not examine the use of the words “significant” and “significance” in the periodicals in which the PediaLean advertisements appeared (*Redbook*, *Cosmopolitan*, the *Enquirer*, and the *Star*). Id. He cited no authority for his conclusion that *People* magazine is “roughly comparable” to those periodicals and that use of those words would be the same amongst those periodicals. Id. at 8.

Dr. Nunberg neither performed nor reviewed any consumer tests, copy tests, or penetration studies on consumer perception of the advertising at issue in this case. He formed no focus groups to evaluate consumer perception of the advertising at issue in this case. He conducted no research of any kind on consumer interpretation of the advertising at issue in this case. See Exhibit E at 12; Exhibit D at 22 (in response to which no documents were produced).

In his report Dr. Nunberg does not compare the PediaLean advertisements to any other weight loss products’ advertisements. See generally, Exhibit B. He does not compare the use of the word “significant” in PediaLean to uses in other dietary supplement advertisements. See Exhibit B at 11-12.

Dr. Stephen M. Nowlis, the AT&T Distinguished Research Professor of Marketing in the W.P. Carey School of Business at Arizona State University (Nowlis Statement attached hereto as Exhibit F) finds fault, *inter alia*, with Dr. Nunberg’s lexical analysis and the conclusions drawn therefrom. Dr. Nowlis finds the lexical analysis nothing more than unsubstantiated speculation, not recognized in the profession as an accepted method for analysis of consumer perception of advertising. Id. at 2-5. Dr. Nowlis finds advertising research, such as surveys, to be the proper empirical basis for an opinion concerning consumer perception, and “a well accepted technique among marketing academics...” Id. at 4. In light of the frequently differing perceptions of consumers as to the meaning of ad copy and in light of persuasive skepticism about weight loss

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

II. THE LAW

Under FTC Rule 3.31 witnesses must be competent to testify as experts. Competence 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 one on the meaning of weight loss product advertising in general or the particular weight loss product advertising in this case. Moreover, he bases his opinion entirely on a “lexical analysis” (dictionary meaning of words and their use in the general press) and not on any empirical evidence. As such, he lacks a competent and reliable foundation for assessment. His opinion is not derived from the generally accepted testing method (survey research or copy tests) used to discern consumer perception. Federal Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.

The Federal Rules of Evidence are persuasive authority in FTC adjudicative hearings in determining evidentiary issues. See, In re Herbert R. Gibson, Jr., 1978 FTC LEXIS 375, at *2, n.1 (Exhibit C)(Federal Rules of Evidence are “persuasive authority” in FTC adjudicative hearings). The party proffering the testimony has the burden of establishing the admissibility of expert testimony and the qualifications of the expert witness by a “preponderance of proof.”

Meister v. Medical Engineering Corp., 267 F.3d 1123, (D.C.Cir. 2001)(citing Daubert, 509 U.S. at 592 n.10(citing Bourjaily v. U.S., 483 U.S. 171, 175-176 (1987))).

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 592. "'Scientific' implies a grounding in the methods and procedures of science" and "'knowledge' connotes more than subjective belief or unsupported speculation." Id. at 590.

The Daubert test is applicable to any expert, not just one whose expertise is "scientific." Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 141 (1999). The question before the trial court is whether "this particular expert [has] sufficient specialized knowledge to assist the [trier of fact] 'in deciding the particular issues in the case.'" Id. at 156 (citing 4 J. McLaughlin, Weinstien's Federal Evidence p702.05[1], p. 702-33 (2d ed. 1998)(citations omitted)). "Nothing in Daubert of the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." Id. at 157 (citing Joiner, 522 U.S. at 146). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Joiner, 522 U.S. at 146 (citations omitted). Where there is no indication in the record that other experts in the industry use the methodology of the proffering expert and no articles or papers validate that approach, then exclusion of the expert's testimony is appropriate. Id.

Scientific Knowledge. The first prong requires that the Court focus on "principles and methodology, not on the conclusions that they generate," Daubert at 595, "and thus demands a grounding in the methods and procedures of science, rather than subjective belief or unsupported

speculation.” Id. at 590; see also Meister v. Medical Engineering Corp., 267 F.3d 1123, 1126 (D.C.Cir. 2001) citing Ambrosini v. Labarraque, 101 F.3d 129, 133 (D.C.Cir. 1996). “In order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., ‘good grounds,’ based on what is known.” Daubert, 509 U.S. at 590. Under Daubert, courts must still regulate the subjects and theories of expert testimony, and “the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.” Ambrosini, 101 F.3d at 134 citing Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 569-570 (D.C.Cir. 1993)(citations omitted).

Four factors are considered in evaluating scientific validity: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer-review and publication; (3) the method’s known or potential rate of error; and (4) whether the theory or technique finds general acceptance in the relevant scientific community. Id. at 593-94; see also Ambrosini, 101 F.3d at 134.

Expert testimony that rests solely on ‘subjective belief or unsupported speculation’ is not reliable. Daubert, 509 U.S. at 590. The court’s inquiry must “focus on the principles and methodology [used] rather than on the conclusions they generate.” 509 U.S. at 595. “A court may refuse to admit expert testimony if it concludes that ‘there is simply too great an analytical gap between the data and the opinion proffered.’” Groobert v. President and Directors of Georgetown College, 219 F.Supp. 2d 1 (D.D.C. 2002) citing General Electric v. Joiner, 522 U.S. 136, 146 (1997).

Aiding the trier of fact. The second prong of Daubert primarily concerns relevance. Id. at 591. The court must determine whether the proffered expert testimony is “sufficiently tied to the facts of the case that it will aid the [trier of fact] in resolving a factual dispute.” Id.(citation

omitted). This factor is also described as “fit,” meaning whether the testimony fits the factual dispute. “Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.” Ambrosini, 101 F.3d at 134 citing Daubert, at 591.

Duplicative testimony. Under Rule 403 of the Federal Rules of Evidence, a court may exclude relevant evidence which is otherwise cumulative, a waste of time, misleading, or confusing to the trier of fact, or which causes undue delay or unfair prejudice. See id; see also, Secretary of Labor v. DeSisto, 929 F.2d 789, 795 (1st Cir. 1991)(Rule 403 of the Federal Rules of Evidence enables a trial judge to exclude needlessly cumulative evidence); compare to id. at 796 where trial court’s limitation on witnesses was an abuse of discretion because limitation was arbitrary).

III. ANALYSIS

Dr. Nunberg is not qualified to testify as an expert in this proceeding. Even were he, his testimony is a duplicate of the testimony of Dr. Michael B. Mazis on all material points.

Moreover, Dr. Nunberg’s testimony lacks an authoritative basis and is, thus, entirely speculative.

Dr. Nunberg offers a report on the same subject as Complaint Counsel’s expert Michael Mazis, Ph.D.: how consumers would perceive, understand, or otherwise interpret the advertising for PediaLean.² Dr. Nunberg is not qualified to offer expertise on consumer perception of weight loss advertising because his expertise lies not in that area but in in syntax and semantics, language variations and use, and the structure of written language, apparently in particular when connected with statistical analysis of language, automatic summarization, and automatic text classification. Finally, Dr. Nunberg cites no authority for his interpretation of the PediaLean advertising (offering instead subjective belief and unsubstantiated allegation). Lacking

² Dr. Mazis’ expert report is on all products at issue while Dr. Nunberg’s report is on PediaLean only.

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 expert in the area of consumer perception of weight loss product advertising, his testimony is duplicative of the testimony given by Dr. Mazis concerning PediaLean and should therefore be excluded. Either the testimony of Dr. Nunberg on PediaLean or that of Dr. Mazis must be excluded in light of the duplication.

Dr. Nunberg's Testimony Is Duplicative

Dr. Nunberg offers the following conclusions in his expert report:

- (1) The PediaLean advertisements "represent that PediaLean is an effective weight loss product for fat or obese children, which will lead to 'significant weight loss' for the consumer's child."
- (2) The PediaLean advertisements "represent that the consumer can expect results like those in the clinical tests it reports; it is a 'clinically proven solution.'"
- (3) In the context of the PediaLean advertisements, "significant can only be interpreted as having the sense 'of a noticeably or measurably large amount,' rather than its sense in statistics, where it applies to observations that cannot be ascribed to chance."
- (4) "In the use of the word [significant], there are no material differences between speaking of a significant weight loss and speaking of a substantial weight loss: no weight loss could qualify under one description and not under the other. This point is supported by examination of the uses of both terms in press stories and on the Web."
- (5) "More generally, the [PediaLean] Advertisements characterized PediaLean as 'effective' and as a 'solution' for the problems of children who are substantially overweight ('fat' or 'obese'), from which it can only follow that the product will cause substantial loss of weight."

Exhibit B at 3. In comparison, Michael D. Mazis, Ph.D., another Complaint Counsel witness, whose report examines the advertising for all of the products identified in the complaint, offers the opinion that,

[T]he facial analysis for PediaLean revealed that ads for PediaLean strongly imply that the product causes substantial weight loss in overweight or obese children. Ads promise 'hope for you and your overweight child.' The advertising for PediaLean also communicates to consumers that clinical testing proves that PediaLean causes substantial weight loss in overweight or obese children.

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 limited to products other than PediaLean.

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 he lacks the requisite expertise. His summary of qualifications and his CV reveal that he lacks any experience or recognized expertise in the field of consumer perception of advertising, including no experience assessing consumer perception of weight loss product advertising.³ His speaking engagements and professional writing are in the technical aspects of linguistics. See Exhibit B at 1-2 and CV at 2-6, 7-10, 12. He describes his teaching experience as in semantics and pragmatics, lexicography, the structure of written languages, and other language-related areas. Id. at 1. In his corporate consulting experience he describes no experience drafting or analyzing advertising. The companies for which Dr. Nunberg has worked are not, to Respondents' knowledge, manufacturers or sellers of weight loss products (nor does Dr. Nunberg identify them as such). Id. at 2. Of the nineteen cases he has testified in as an expert witness, only one is identified as involving "the language of advertisements" but it was a civil action not involving standards for determining consumer perception of advertising under the FTCA. See Exhibit A at Attachment A. In short, Dr. Nunberg's experience and credentials are

³ All advertising must be evaluated in context, as the consumer would see it in the marketplace surrounded by advertising for competing products in the same product category. Harris et al., The effect of Type of Claim, Gender, and Buying History on the Drawing of Pragmatic Inferences from Advertising Claims. 2 *J. of Consumer Psychology* 89, 93 (1993); attached as Exhibit G at L MS00740 (attached to Dr. Mazis' report). In many instances claims are particular to a category of products and frequently used with little variation, saturating that marketplace with the same phrases. Exhibit F at 5-6.

inapplicable to measuring and opining on consumer perception of weight loss product 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 leaps in logic from the dictionary definition of a single word in the PediaLean advertisement (the word "significant"), to how that word is used in general press stories and in the results of search terms using Google. He offers no explanation or citation for how data from outside the weight loss advertising context is at all relevant or applicable to evaluating consumer protection of advertising and, more particularly, of weight loss advertising. In fact, Dr. Nunberg offers the Presiding Officer dictionary definitions of words that the Presiding Officer can take judicial notice of under Fed. R. Evid. 201; see also Daubert, 509 U.S. at 593, n.11 (firmly established theories are properly the subject of judicial notice). Thus, he offers no expertise to aid the trier of fact under the second prong of Daubert.

Moreover, Dr. Nunberg offers the trier of fact only synonyms to the words used in the advertisements. The maze of synonyms Dr. Nunberg provides is equivalent to asking the trier of fact to enter a hall of mirrors and find its way out. That is no assistance in interpreting and quantifying the language of the advertisements. Dr. Nunberg, in fact, never arrives at a quantifiable interpretation of the advertising language, despite the fact that the advertisements themselves do contain quantifiable information concerning amount of weight loss. See, Complaint, Exhibits K and L. Thus the advertisements themselves are more specific and helpful

to the trier of fact than Dr. Nunberg's interpretation of them. Dr. Nunberg's report is, therefore, no assistance to the trier of fact in interpreting the advertisements. The fact that the terms discussed by Dr. Nunberg are not quantifiable also means that they cannot possibly be deceptive, as unquantifiable terms have been found to constitute "puffing," advertising language incapable of deceiving consumers. FTC v. Febre, 1996 U.S. Dist. LEXIS 9487 at *9 (N.D. Ill. 1996)(Exhibit H)(citing FTC v. U.S. Sales Corp., 785 F.Supp. 737, 744 (N.D. Ill. 1992)(citing Cliffdale Associates, Inc., 103 F.T.C. 110, 181 n.42 (1984))). Thus, Dr. Nunberg's testimony is not fit under Daubert. He offers no explanation or citation that there is an accepted procedure or methodology for using that data to interpret consumer perception of single words in advertising of weight loss products. It is neither logical to presume that opinion based on general press stories or results of search terms using Google has relevance to the meaning of weight loss product advertising nor is it reasonable in the absence of any empirical evidence to support the application. Exhibit F at 2-5. His conclusions are thus wholly speculative and unsubstantiated. They are not expert.

Dr. Nunberg has also failed to evaluate PediaLean advertising in the context of other weight loss product advertising. Id. at 5-6. He has not measured similarity of claims among advertisers in the weight loss market and consumer perception of those claims in light of their frequent use. See id. He has not examined the marketing of weight loss advertising compared to the consumer product marketplace as a whole. Id.

The lack of objective testing in Dr. Nunberg's report further undermines his conclusions. Dr. Nunberg offers no empirical evidence of consumer perception of PediaLean advertising. Exhibit F at 2-6. He has formed no consumer focus groups. Id. He has conducted no surveys to measure consumer perception of PediaLean advertising. Id. He has not tested or measured

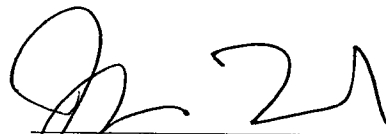
consumer perception in any way to provide any proof, let alone persuasive proof, that his understanding of the word “significant” is the same as that held by some, most, or all who make purchases based on weight loss product advertising. Id.

In conclusion, Dr. Nunberg’s report fails under Daubert’s four factors : (1) his reliance on a dictionary definition and search term results have not been tested as reflective of consumer perception of weight loss advertising; (2) his wholly subjective approach to discerning the meaning of the PediaLean advertising has not been subjected to peer-review and publication; (3) his subjective analysis, wholly unsupported with any empirical basis or with any proven expertise in the relevant area, is not reliable ; and (4) his wholly subjective method has not been shown to be generally accepted as an appropriate means for discerning consumer perception of weight loss product advertising. Thus, Dr. Nunberg should be excluded because he lacks requisite expertise. His testimony lacks expert qualification and is incompetent opinion evidence that is wholly speculative and, thus, will not aid the trier of fact.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Presiding Officer exclude Dr. Nunberg from testifying.

Respectfully submitted,



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Pro se.

Dated: November 23, 2005

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
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BAN LLC d/b/a BASIC RESEARCH LLC
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BASIC RESEARCH, A.G. WATERHOUSE,
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DENNIS GAY
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MITCHELL K. FRIEDLANDER,
Respondents.

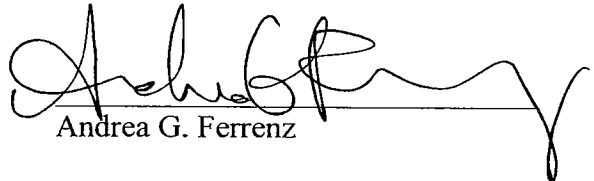
PUBLIC

Docket No. 9318

CERTIFICATION

I, Andrea G. Ferrenz, hereby certify that the electronic copy of the document accompanying this certification is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with the Secretary of the Commission on November 23, 2005 by other means.

Respectfully submitted,


Andrea G. Ferrenz

Dated: November 23, 2005

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

In the Matter of

**BASIC RESEARCH, LLC
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 **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

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2005, I caused Respondents' Motion To Exclude Complaint Counsel Witness Geoffery D. Nunberg to be filed and served as follows:

- 1) an original and one paper copy filed by hand delivery and one electronic copy in PDF format filed by electronic mail to

Donald S. Clark
Secretary
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580
Email: secretary@ftc.gov

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

3) one paper copy by first class U.S. Mail to:

James Kohm
Associate Director, Enforcement
U.S. Federal Trade Commission
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 by electronic mail to:

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Joshua S. Millard
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Andrea G. Ferrenz

EXHIBIT A

Expert Report of Geoffrey Nunberg

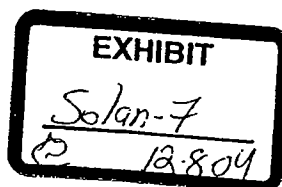
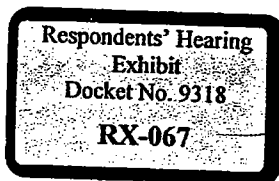
In the matter of Basic Research et al., Docket No.
9318

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 clinical testing proves that PediaLean causes substantial weight loss in overweight or obese children."
2. In the course of preparing this report, I have reviewed the Complaint in this matter, the advertisements and promotional materials for PediaLean included here as Attachment C, and records from various dictionaries and databases, as referenced in this report and as included in Attachment B.
3. I am being compensated for my work on this matter at an hourly rate of \$375 for preparing this report and for deposition and trial testimony.
4. As I continue to receive and review additional information, I reserve the right to supplement, revise, or further explain the opinions set forth in this report.

Qualifications

5. I hold a B.A. from Columbia College, an M.A. in Linguistics from the University of Pennsylvania and a Ph.D. in Linguistics from the City University of New York. I am currently a Senior Research Fellow at the Center for the Study of Language and Information at Stanford University and a Consulting Full Professor in the Department of Linguistics at Stanford, where I have taught courses in semantics and pragmatics, lexicography, the structure of written language, and in other language-related areas. I have held teaching posts at the City University of New York, UCLA, the University of California at Berkeley, and



Stanford University. I have held visiting lectureships at the University of Naples, the University of Texas, the Frei Universität of Berlin, and Princeton University.

6. I have published numerous papers in peer-refereed 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 contributor of commentaries on language to the National Public Radio program "Fresh Air" and write a regularly appearing feature on language for *The New York Times* in its Sunday Week in Review section.
7. I serve as usage editor and Chair of the Usage Panel of the *American Heritage Dictionary* and have for many years been a consultant to the dictionary regarding matters of definition, usage, and other lexicographical questions. I have taught graduate-level courses in lexicography and related topics at Stanford University and at the Summer Institute of the Linguistic Society of America.
8. For a number of years I worked as a Principal Scientist at the Xerox Palo Alto Research Center. I worked among other things on the design systems for the of statistical analysis of language, automatic summarization, and automatic text classification. I have authored several publications describing this work and am named as an inventor on several American and European patents and patent applications, all of which are listed on my vita, attached as Attachment A.
9. I have written a number of articles on language and the law, chiefly for *American Lawyer* and *California Lawyer*, including articles on the use of dictionaries and linguistic evidence in legal proceedings. I delivered an invited talk on linguistics and trademark law at the Midwest IP Institute in 2003.
10. I have worked in a consulting capacity with marketing firms, branding firms, and advertising agencies in developing and evaluating product and corporate names, slogans, and on other linguistic matters, often making use of techniques derived from statistical analysis of text databases to ascertain features of word meaning. The clients for whom I have done work include Nvidia, Monsanto, AXA Insurance, Pennzoil, Bank of America, and the Martin Company.
11. I have served as an expert witness in a number of cases, including several trademark cases. I have been qualified as an expert witness in a number of cases, both as regards matters of word meaning and digital search and classification technologies.
12. I have attached as Attachment A my curriculum vitae, which includes a list of my publications and the cases I have worked on as an expert witness.

Summary of Opinions

13. 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 obese 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 sense "of a noticeably or measurably large amount," rather than its sense in statistics, where it applies to observations that cannot be ascribed to chance.
17. In this use of the word, there are no material differences between speaking of a significant weight loss and speaking of a substantial weight loss: no weight loss could qualify under one description and not under the other. This point is supported by examination of the uses of both terms in press stories and on the Web.
18. More generally, the Advertisements characterize PediaLean as "effective" and as a "solution" for the problems of children who are substantially overweight ("fat" or "obese"), from which it can only follow that the product will cause substantial loss of weight.

Background

19. Linguistic expertise can contribute in two ways to the understanding of the language used in ordinary discourse. The subfield of lexical semantics is concerned with characterizing the meanings of the words and expressions of a language and the relations among the senses of words (lexicography should be considered a specific application of this field). Lexical analyses can be made on the basis of examinations of the treatments of words in existing dictionaries, but all such treatments are ultimately based on systematic examinations of the use of words in context. In recent years, lexical semanticists and lexicographers have also relied on quantitative analyses of the use of words in various databases and on the World Wide Web.
20. The subfield of lexical pragmatics is concerned with the use of language in context: in particular, with explaining how listeners determine which sense of a word is intended on a given occasion of use, and what inferences the use gives rise to. Or to put it another way, lexical semantics is concerned with the elucidation of literal meaning (or what people

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 an X" entails that such a request will be automatically granted. A lexical pragmatic analysis 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 personal search") and when such an inference may not be justified (e.g., "You may request an extension by filling out the enclosed form").

The Advertisements

21. The Advertisements differ in specific details, but taken together they contain several basic themes that are repeated from one advertisement to the next.

A. The Advertisements indicate that PediaLean is intended for seriously overweight children whose problem cannot be redressed by diet and exercise alone:

When your child needs more than diet or exercise (heading, 5050072, 5050080, etc. passim)¹

B. The Advertisements underscore the seriousness of childhood obesity as the source of social stigma for both parents and children and as correlating with problems in later life:

• Your Child is Overweight. And It's Destroying Both Your Lives. (5050072, 5050077, 5050080, 5050009)

• Your Child is Fat. And It's Destroying Both Your Lives (5050007)

The pain and rejection our children feel every day is real... and it hurts. Years of published research confirm that an overweight child will grow up to earn less money, be less likely to marry, more likely to be divorced, complete fewer years of school, and more likely to become a burden to an ageing [sic] parent (even if that child becomes leaner in adulthood). (505067 etc.)

C. The Advertisements represent that PediaLean is an effective weight-loss product proven in clinical trials. It is described as "a 100% natural, completely stimulant-free compound proven to cause significant, effortless weight loss in actual clinical trials" (5050059. etc.); as "the first and only clinically proven, safe, and effective weight-control compound designed for overweight children and adolescents" (Complaint Exhibit L, 5050054, 5050058, etc.); or as "a

¹ The numbers here and below refer to the numbers stamped on the Advertisements.

revolutionary approach to children's weight control that, simply stated, cannot and will not fail." (5050012, etc.)

D. Many of the Advertisements describe the clinical trial, and go on to say:

"What does this mean in plain English? Children who used PediaLean™ along with a healthy, but not calorie-restricted, diet and modest exercise lost an incredible 20% of their excess body weight. Those who followed the same diet and exercise program but did not take PediaLean™, failed to lose any significant excess weight at all. (Complaint Exhibit L, 5050054, 5050058, 505067, etc.)

E. The Advertisements indicate that the results of the clinical trial entail that PediaLean will be an effective obesity treatment for the reader's children:

"Does PediaLean™ work? You bet it does! In a well-controlled double-blind clinical trial, each and every child who used PediaLean™ as directed lost a significant amount of excess body weight... a success rate of 100% (Complaint Exhibit K, 5050054, 5050058, 505066, etc.)

"'It's just baby fat.' 'She'll grow out of it,' and 'Oh, he's just a growing boy'... these are the traditional excuses parents use to justify their child's overweight condition. The old excuses can no longer stand... especially now that there is a safe, natural weight-loss control compound designed and developed specifically for children. Combined with a proactive program specifically created to support both parent and child -- this natural weight-control program resulted in significant weight loss in virtually every child studied. For your child's sake, for your sake, you must take advantage of this clinically proven solution." Dr. Nathalie Chevreau, Ph.D., R.D. Director of Women's Health, Klein-Becker usa. (Complaint Exhibit L, 5050011 etc.) [ellipses in original]

"Published Medical Studies Don't Lie... Clinically Proven Safe and Effective." (Complaint Exhibits K and L, 5050027, etc.)

The Advertisements promise that PediaLean causes substantial weight loss in overweight or obese children.

22. The statements in D draw a close connection between the results of the clinical trial and the results promised to PediaLean customers. The trial is described as proving that PediaLean will work. And Dr. Chevreau's statement clearly indicates that the fact that the product resulted in weight loss in the trial leaves parents with no excuses for allowing their child to maintain his or her overweight condition and describes the product as a "clinically proven" solution. The phrase "Clinically proven safe and effective" appears in numerous advertisements, again drawing a connection between the results of clinical trials and the results that the consumer can expect.

23. The Advertisements also represent that clinical testing proves that PediaLean causes substantial weight loss in overweight or obese children, as indicated by phrases like "resulted in 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.)
24. These claims are also repeated on the PediaLean packaging, which states that "There is nothing more effective than PediaLean in helping your child lose weight. European research confirms it and medical studies don't lie." (5050001).

The Meaning of *Significant*

25. Almost all the Advertisements use the word *significant* to describe the effects of PediaLean, which is described as having "resulted in significant weight loss in every child studied" (Complaint Exhibit L, 5050004, 5050007, 5050009, 5050011, 5050021, etc.). Since, as we saw, the results of clinical trials are offered as a model for the consumer's expectations of the product, this amounts to a claim that consumers can expect to see significant weight loss in their own children. In these contexts, phrases like "significant weight loss" can only be understood as entailing the same results as "substantial weight loss," as an examination of the meanings of *significant* and *substantial* demonstrates
26. It is true that *significant* has several senses in English. Among other things, it can mean "notable or important," as in "a significant contribution to the literature on language acquisition" or "a significant security threat"; or "meaningful," as in "a significant glance." And it can have a statistical sense to apply to observations that are too closely correlated to be explained by chance. The senses of the word are given in the *American Heritage Dictionary*, 4th edition (2000) as follows:

1. Having or expressing a meaning; meaningful.
2. Having or expressing a covert meaning; suggestive: *a significant glance*. See synonyms at expressive.
3. Having or likely to have a major effect; important: *a significant change in the tax laws*.
4. Fairly large in amount or quantity: *significant casualties*; *no significant opposition*.
5. Statistics Of or relating to observations or occurrences that are too closely correlated to be attributed to chance and therefore indicate a systematic relationship.

Merriam-Webster's *Eleventh Collegiate Dictionary* (2003) defines the word as follows:

1 : having meaning; especially : SUGGESTIVE <a significant glance>

2 a : having or likely to have influence or effect : IMPORTANT <a significant piece of legislation>; also : of a noticeably or measurably large amount <a significant number of layoffs> <producing significant profits> b : probably caused by something other than mere chance <statistically significant correlation between vitamin deficiency and disease>

For these purposes, we need to consider only the senses that the *American Heritage* defines as (4) and (5), and that Merriam-Webster's defines as "of a noticeably or measurably large amount" or "probably caused by something other than mere chance." These are the only possible interpretations of *significant* in the phrase "significant weight loss," which entails a change in a measurable value.

27. As used in an advertisement for a children's weight loss product appearing in a consumer magazine or similar source, however, the phrase "significant weight loss" could be given only the "considerable" interpretation. The reason for this is that the statistical sense of the word is extremely rare in the general press, and when it does occur it is invariably prefaced by "statistically."

Examination of the use of *significant* and *substantial* in press stories

28. To demonstrate this point, I did a search in the Nexis database for all occurrences of the word *significant* in three major papers over the second half of September, 2004. The papers were *The New York Times*, the *Washington Post*, and the *Los Angeles Times*, chosen because these were sources in which the statistical sense of the word was deemed more likely to appear than in most other dailies. The search turned up a total of 853 occurrences of the word for this period. Of these, 153 occurrences (18%) involved the use of *significant* to mean "measurably large," as in "gave up significant yardage," "significant nurse vacancies," or "a significant increase in the voter roll."² By contrast, there were only 8 occurrences of *significant* in its statistical sense, and each these was modified by *statistically*, as in the following:

This finding applied to any one percentage point increase, not just increases over the 5 percent level. The results were similar in Type 1 diabetes, but not statistically significant. *The New York Times*, September 21, 2004

² Most of the rest involved phrases like "significant threat" and "significant impact," where the word was used to mean "important."

Furthermore, the correlations between message board postings, volume and volatility are not only statistically significant, they are quite large compared with the magnitude of correlation one typically observes in financial markets. *The New York Times*, September 23, 2004

Not surprisingly, those not at the Pentagon that day reported less psychological distress or psychiatric illness. The effect of indirect exposure -- through at least three hours of television coverage of the destruction there and in New York -- was no longer measurably statistically significant after two years. *The Washington Post*, September 15, 2004

The data are based on an annual national survey of about 800,000 households. Statistically, the bureau says, there is no significant difference among the Top 10, which also includes Montgomery and Fairfax counties. *The Washington Post* September 19, 2004

29. The fact that these newspapers invariably qualify *significant* by *statistically* when the word is used in its statistical sense demonstrates that they are aware that readers would otherwise take it to mean "considerable." The principle here is no different from that which leads newspapers to refer to "London, Ontario" when they are referring to a city in Canada.

The statistical sense of *significant* is rare in the general press, as well as being poorly understood

30. What is more, it is fair to conclude that the statistical sense of *significant* (or *significance*) is virtually never seen in sources like those in which the PediaLean advertisements appeared, such as *Redbook* or *Cosmopolitan*, much less the *Enquirer* or the *Star*. While online records of these particular sources are not available, I note that *significant* and *significance* have never appeared in a statistical sense in the roughly comparable *People* magazine for as far back as online records are available (a total of more than 100 issues), whether or not preceded by *statistical(ly)*.
31. In fact it is certain that a large proportion of consumers are unaware of the statistical use of the term. For this reason, anyone who saw the phrase "significant weight loss" in an advertisement in a consumer magazine could reasonably conclude only that *significant* meant "considerable" or "measurably large." Even a reader who happens to be aware of the statistical use of the term will realize that this sense is not likely to be foremost in the mind of the typical reader, and that it would be unreasonable for a writer to use it in this sense in the context without explicitly qualifying it by *statistically*.
32. Note moreover that even consumers who are aware that *significant* is used in a statistical sense very often misunderstand its meaning, and are unaware that even a difference of .001 percent in two values might be "statistically significant." In fact people often use "statistically

significant" in a way that demonstrates that they are mistaken about its meaning. For example, Google Groups postings turn up 2650 hits for postings containing "statistically significant sample(s)," a locution that makes no sense statistically -- a result can be statistically significant, but not a sample itself.

In summary, large, statistically significant samples of a variety of fossil organisms (from trilobites to mammals) have been examined, and NO large, systematic gaps have been found.³

I've long forgotten the math for calculating the size of a "statistically significant sample" but I'm pretty sure we'd need at least 40 or 50 in each group.⁴

And "statistically significant" is often used on the Web in a way that seems to mean simply "big, and there are precise figures to prove it." For example:

Between 1999 and 2001/2, all [British Crime Survey] crime fell by 14 per cent, which is a statistically significant reduction. The figure includes statistically significant falls in domestic burglary (down 23 per cent), vehicle thefts (down 14 per cent) and common assaults (down 28 per cent).⁵

That is, even if some readers of the advertisements were tempted, unreasonably, to assume that *significant* had a statistical sense in the phrase "significant weight loss," a large number of them would assume that the word entailed "large," with an implication that there were statistics to support the claim.

³ See

<http://groups.google.com/groups?q=%22statistically+significant%22+large&hl=en&lr=&safe=off&selm=9q444t%24qm0%241%40hydra.bigsky.net&rnum=5>

⁴

<http://groups.google.com/groups?q=%22statistically+significant+sample%22+OR+%22statistically+significant+samples%22&hl=en&lr=&safe=off&selm=6dbddb9.0309211858.2d6fac2a%40posting.google.com&rnum=29>

⁵ See

<http://groups.google.com/groups?q=%22statistically+significant%22&start=100&hl=en&lr=&safe=off&selm=87smz5c6ym.fsf%40happy.sherilyn.org.uk&rnum=138>

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

33. Note moreover that as used in the Advertisements, *significant* is not consistent with a statistical interpretation. Consider the frequently repeated statement "this natural weight-control program resulted in significant weight loss in virtually every child studied." True, the statement is not quite accurate on whatever interpretation we give to significant, since 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 clinical trial demonstrated a (statistically) significant difference between the experimental and control groups, it obviously did not demonstrate a statistically significant weight loss for every child in the experimental group. Statistically speaking, that would entail that children were being compared to themselves, which was clearly not the procedure in the trial as described in the Advertisements.⁶

Note also that inasmuch as the statement is attributed in the Advertisements to Dr. Chevreau, it is not reasonable to assume that in the phrase "significant weight loss in virtually every child studied," the word *significant* is being used in a sloppy version of its statistical sense. A PhD who is the director of women's health for a pharmaceutical company would presumably have knowledge of statistics to be able to accurately describe the results of the clinical trials. The fact that this use of *significant* is attributed to someone with Dr. Chevreau's credentials, accordingly, adds further weight to the conclusion that the word is being used in its ordinary sense of "noticeably large."

When applied to phrases like "weight loss," *significant* and *substantial* are functionally equivalent

34. Like *significant*, *substantial* has a number of senses -- we can speak of a "substantial breakfast" (i.e., one that is ample and sustaining), a "substantial roof" (i.e. "solid and strong") or a "substantial merchant" (i.e., one who is well-to-do). In the phrase "substantial weight

⁶ One could imagine a very different experiment, in which every child was observed over a period of time in which he or she did not use the product, and then observed for a period of time in which he or she used the product, with no control group. In that case we might reasonably speak of a particular child losing a significant amount of weight. But that is clearly not the procedure followed in the Advertisements.

loss," as used in the Complaint, however, *substantial* can have only the sense that the *American Heritage* defines as "5. Considerable in importance, value, degree, amount, or 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 *Encarta College Dictionary* (2001) defines the relevant sense of *significant* as "SUBSTANTIAL: relatively large in amount." The tendency to interdefine these words implies that they are essentially interchangeable in this sense.

Press usage demonstrates the equivalence of *significant* and *substantial*

36. In fact in actual usage, which is the basis for dictionary definitions of words like these, *significant* and *substantial* have the same quantitative implications.
37. To demonstrate this point, I looked at all the citations from the Nexis major newspapers database from the year ending on October 15, 2004, in which *significant* and *substantial* were used to modify *reduction*, *loss*, or *decrease* in the vicinity (within 10 words) of an explicit mention of a percentage, then hand-filtered those in which the percentages provided an indication of the specific change in value referred to.⁷ That is, I included examples like the first of the following, but not the second:

(included) The new regulations will require significant reductions - a 46 per cent cut from 1994 sulphur dioxide levels, and 21 per cent for nitrogen oxide - over six years and will become stricter over time. *Toronto Star*, June 22, 2004

(not included) Since America consumes 45 percent of the world's gasoline, a significant reduction here would bring down the world price. *The Washington Post*, May 21, 2004

Printouts of the pages are provided in Attachment B. Table 1 summarizes the results of these searches.

⁷ For these purposes, I included adverbial uses, as well; i.e., "substantially reduce," "significantly decrease," and so forth.

PHRASE	SUBJECT	PERCENT CHANGE IN VALUE
substantial reduction	difference in muscle and tendon strength between older and younger people	10 percent
substantial reduction	salt levels in breakfast cereals	16 percent
substantial reduction	mercury emissions	greater than 40 percent
substantially reduce	insurance premiums	15 to 30 percent
substantial decrease	shipping injuries	18.7 percent
substantial loss	retail trade	30-40 percent
substantial loss	student attendance	27 percent
significant decrease	hormone prescriptions	25 percent
significant decrease	surveyors reporting price declines	62 percent
significant decrease	cap on property tax increases	60 percent
significant reduction	nutrient emissions from treatment plants	60 percent
significant reduction	mortality rates	greater than 15 percent
significant reductions	Sulphur dioxide levels	21 and 46 percent
significant reduction	acreage covered by wetlands	7 percent
significant reduction	proportion of young smokers	27 percent
significant reductions	mercury emissions	up to 70 percent
significant reductions	commercial rents	17.6-32.7 percent
significantly reduce	greenhouse gases	60 percent
significantly reduce	fatal accidents	35 percent
significantly reduce	paved surfaces	52 percent
significantly reduce	traffic fatalities	11 percent
significantly reduce	road injuries	61 percent
significant loss	gross personal income	10 percent
significant loss	manufacturing jobs	21 percent
significant loss	farm revenue	30-50 percent

Table 1: Use of *significant* and *substantial* to Describe Explicit Changes of Value in Major Newspapers, Year Ending 10/15/04

38. Several points are clear from this table. First, the overall range of percentages that are described as "significant" in press stories is not systematically different from the percentage range of reductions that are described as a "substantial." For example, a 9 percent reduction in

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 emissions is described in one article as substantial, while a 70 percent reduction in mercury emissions is described in another article as significant. One article describes an 18.7 percent reduction in work injuries as substantial while another describes a 61 reduction in road injuries as significant. Clearly any change in value that could be described as "significant" could be described as "substantial," and vice-versa, a point I will return to below.

39. Second, the question of what counts as a "significant" or "substantial" change in value in a given case depends to some extent on the particular quantities being compared. In election polls, for example, a shift of 6 percent in the support for a particular candidate might be described as significant or substantial, as might a 4 percent drop in the mortality rate. Whereas if a baseball player goes from hitting 50 home runs in a season to 48 in the next -- also a 4 percent drop -- we would presumably not describe that as a significant or substantial drop.
40. It would be wrong to conclude on this basis, however, that the words *significant* and *substantial* are "too vague" to have any meaning in a given context. It is true that we cannot provide an absolute percentage threshold that a change in value must cross before it can be described by one of these words. But relative to a particular context, both words are applied to changes in value or amount that are sufficient to suggest an important qualitative difference, however that is understood relative to the topic in question. Thus a 4 percent drop in the mortality rate from a disease might be taken as evidence that new treatments or prevention measures are working, and a 6 percent decrease in poll support for a candidate might suggest an important qualitative difference in his or her chances of winning the election. Whereas a 4 percent decrease in a player's home-run production from one year to the next would not suggest a qualitative change in his hitting ability -- no one would take that as grounds for arguing, say, that he was not the hitter he was last year.
41. Note also that whether a change in quantity counts as either "substantial" or "significant" often depends on how far the original value of the quantity departs from a generally established mean or normal range for the quantity in question. A 5 percent (\$650) drop in the \$12,965 base sticker price of the Ford Focus would be more readily described as substantial or significant than a proportional 5 percent reduction in the base sticker price of a Rolls Royce Phantom from \$325,000 to \$309,000, for example -- with good reason, since the

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 starting point 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 "stand to lose a few pounds," since a reduction to 123 pounds would make her feel that she was at a "normal" weight. But for a woman of the same height who weighs 225 pounds, a 5 percent (11 pound) weight loss would be less likely to count as significant or substantial, since it wouldn't materially affect her self-perception as "obese" or "fat." That is, a promise of "significant weight loss" or "substantial weight loss" implies a far greater percentage loss for obese people than for those who are merely slightly overweight.

Uses of *significant* and *substantial* in phrases demonstrate their functional equivalence

43. While *significant* and *substantial* are cognitively or truth-conditionally synonymous in this sense (that is, one cannot be true while the other is false), they differ slightly in connotation, as I noted above. In particular, to speak of "a significant reduction" suggests that the change in value of a quantity is meaningful or noticeable, whereas *substantial* does not have this express entailment.
44. For this reason, people often combine the two words by way of emphasizing the size of a change in the value of some quantity, as in speaking of a "significant and substantial increase." Such phrases are widely encountered in the Web pages indexed by Google. By contrast, the phrases "significant but not substantial" rarely occurs in Web pages before words like *increase* and *decrease*, as Table 2 shows:

Phrase	Number of Google Hits
significant and substantial reduction(s) OR substantial and significant reduction(s)	276
significant and substantial decrease(s) OR substantial and significant decrease(s)	190
significant and substantial increase(s) OR significant and substantial increase(s)	499
significant but not substantial increase(s)	0
substantial but not significant increase(s)	1
significant but not substantial decrease(s)	2
substantial but not significant decrease(s)	2
significant but not substantial reduction(s)	0
substantial but not significant reduction(s)	1

Table 2: Collocation of *substantial* and *significant*

45. Note moreover that every one of the instances of the phrases "substantial but not significant" or "significant but not substantial" occurs in scientific publications in which *significant* is clearly being used in its statistical sense. For example:

The mean values for systolic and diastolic blood pressure as well as the plasma cholesterol level of the original cohort were found to be significantly lower than 10 years previously. There was a substantial, but not significant reduction in the percentage of male smokers in the age group 20 to 64 years, but no change in the percentage of female smokers.⁹

A substantial but not significant decrease in serum levels of 7{alpha}-hydroxycholesterol was found, but no relevant changes occurred in 27-hydroxycholesterol levels.¹⁰

Significant, but not substantial, increases in *M. dubius* dry weight were observed as the dietary fructose concentration was raised to 12% (w/w).¹¹

That is, in its sense of "noticeably large," *significant* is never used in a way that implies a contrast with *substantial* as applied to reductions or increases in a quantity.

⁹ See

http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=2588592&dopt=Abstract

¹⁰ <http://www.jlr.org/cgi/content/full/42/3/437>

¹¹ See

http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=6835700&dopt=Abstract

46. Thus a reader who sees the phrase "significant weight loss" in the PediaLean advertisements, where *significant* is clearly not used in a statistical sense, could only conclude that it is 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 repeatedly stress the pain, embarrassment, social consequences and health risks of severe obesity. Note also that the Advertisements promise that PediaLean will be "effective" (5050054, 5050058, 505067, etc.), and make numerous other claims that promise that the product will remedy the consequences of obesity -- i.e., it promises a "solution" to the problem (505004, 505009, etc.):

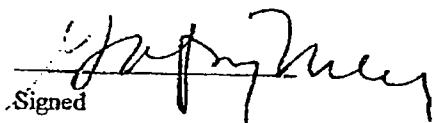
"Does PediaLean™ work? You bet it does! (5050054, 5050058, 505067, etc.)

The PediaLean program delivers results that will thrill you and your child (5050069)

PediaLean will work for your child, just as it has for thousands around the globe. You will be thrilled by the results. (R0035568)

48. Claims like these will inevitably be interpreted as offering more than just modest weight loss, which would hardly "thrill" a parent or child. They promise a dramatic qualitative change: your child will no longer be ridiculed, will no longer be at risk of earning less money, not getting married, becoming a burden to aging parents, and so forth. And if the child at whom the product is directed is "fat," "obese," or "needs more than diet or exercise" then the child is substantially overweight by any understanding of the term. (*The American Heritage Dictionary*, for example, defines *obese* as "Extremely fat; grossly overweight." Obviously we would not say that someone was "grossly but not substantially overweight.")

49. But in that case, there can be no "solution" to the problem that does not involve substantial weight loss. In other words, the Advertisements are saying, in effect, "If your child is substantially overweight, we offer a solution." There is no way to interpret that statement except as a promise that your child will lose substantial amounts of weight.

Signed 

10/19/04
Date

Attachment A

Geoffrey D. Nunberg

Curriculum Vitae

January, 2004

Center for the Study of Language and Information
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Born: June 1, 1945
U. S. citizen

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

Positions:

- 2004- Visting Lecturer, School of Information Management and Systems, University of California at Berkeley
- 2002-2003 Marta Sutton Weeks Fellow, Stanford Humanities Center
- 2001- Senior Researcher, Center for the Study of Language and Information, Stanford University
- 1986-2001 Xerox Corporation, Corporate Research and Technology.
1995-2002, Principal Scientist, Xerox Palo Alto Research Center
1993-1995. Senior Research Scientist, Rank Xerox Research Centre, Grenoble
1993-1995, Research scientist, Xerox Palo Alto Research Center
- 1988-present Consulting Full Professor, Department of Linguistics, Stanford University
- 1980-1985 Stanford University.
Visiting Assistant Professor, Department of Linguistics
Researcher, Center for the Study of Language and Information
- 1979-1980 Assistant Professor, Department of Linguistics, U.C.L.A.
- 1978-1979 Fulbright Lecturer, University of Rome
- 1977-1978 Postdoctoral Fellow, Institute for Human Learning, University of California at Berkeley
- 1976-1977 Instructor, Department of English, Brooklyn College of C.U.N.Y.
- 1975-1976 Instructor, Department of Anthropology, Hunter College of C.U.N.Y.

Other Affiliations:

- 1984-2001 Associate, Center for the Study of Language and Information, Stanford University
- 1992-present Membre Associé, Institut Jean Nicoud (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
- 1999-2002 Member of Steering Committee, Coalition for Networked Information
- 1998-present Member of Scientific Board, Università degli Studi, San Marino
- 1998-2002 Member of Advisory Board, Ecole Nationale des Sciences de l'Information et des Bibliothèques, Lyon.
- 1987-1995 Affiliated Research Scientist, Institute for Research on Learning, Palo Alto, California

Areas of Specialization**Linguistics and Natural Language:**

- Semantics and pragmatics, lexical semantics and lexicography
- Structures and genres of written language
- Normative grammar and language criticism
- Language policy (US and comparative)
- Text classification technologies

Technology and communication (history and theory)**Courses Taught**

Graduate and undergraduate courses in semantics and pragmatics, language policy, discourse analysis, structure and history of English, language and literature, language and politics

Grants, Awards, and Special Lectureships:

- 2002-03 Martha Sutton Weeks fellow, Stanford Humanities Center.
- 2002 Fellow. Council of the Humanities, Princeton University.
- 1999 Language and the Public Interest Prize, Linguistic Society of America
- 1998-99 Fulbright Distinguished Chair, University of Naples
- 1998 Harry Ransom Distinguished Visiting Humanities Professorship, University of Texas
- 1989 Xerox Corporate Research Group Award for Excellence in Science and Technology
- 1979-1980 Fulbright Lectureship, University of Rome,
- 1977-78 NIMH Postdoctoral Fellowship, Institute for Human Learning, University of California, Berkeley
- 1976-77 NSF Dissertation Grant

Books and Monographs:

After Information (with Paul Duguid) in prep.

- Talking Right: How Conservatives Hijacked the Language of Politics*, forthcoming from Public Affairs, 2005
- Going Nucular: Language, politics, and culture in a confrontational age*, Public Affairs, 2004
- The Way We Talk Now*. Houghton Mifflin, 2001.
- 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.
- Scholarly Articles, Research, and Shorter Publications:**
- Technological Determinism and the Digital Future (with Paul Duguid), to appear in as-yet untitled Cambridge University Press collection on the influence of Elisabeth Eisenstein, 2004, Eric N. Lindquist, ed.
- Indexical Descriptions and Descriptive Indexicals, in *Descriptions and Beyond: An Interdisciplinary Collection of Essays on Definite and Indefinite Descriptions and Other Related Phenomena*, Marga Reimer and Anne Bezuidenhout, eds., Oxford University Press, 2004.
- The Liberal Label, *The American Prospect*, September, 2003.
- The Pragmatics of Deferred Reference, article in *The Handbook of Pragmatics*, Laurence Horn and Gregory Ward, eds. Blackwell, 2003.
- Authoritativeness Grading, Estimation and Sorting (with Francine Chen and Ayman Farahat), in Proceedings of the Twenty-Fifth Annual International ACM-SIGIR Conference on Research and Development in Information Retrieval, 2002.
- Do You Know What it Means to Miss New Orleans? *Philology and Semantics: Linguistics and Philosophy*, 25, 5-6, December, 2002.
- Punctuation and Text-Category Indicators (with Edward Briscoe and Rodney Huddleston), chapter of *The Cambridge Grammar of English*, Rodney Huddleston and Geoffrey K. Pullum, eds., Cambridge University Press. 2002.
- The Internet Filter Farce. *The American Prospect*, January 1, 2001.
- Will the Internet Speak English? *The American Prospect*, March 27, 2000.
Reprinted in the *Guardian*, November 2000.
Reprinted in *The Economics of Language*, ed. D. Lamberton, Edward Elgar Publishing, to appear.
- Usage in the *American Heritage Dictionary*, introductory essay to the *American Heritage Dictionary*, Fourth Edition, 2000.
- The Persistence of English, introductory essay to the *Norton Anthology of English Literature*, Seventh edition, M. H. Abrams and Stephen Greenblatt, eds., Norton Publishing, 1999.
- Les Enjeux Linguistiques d'Internet, *Critique Internationale*, 1999, 4.
Reprinted in *Le Multilinguisme et le Traitement de L'information*, F. Segond, ed., Editions Hermes, 2002.
Reprinted in D. Lacorne, ed., *La Politique de Babel*, PUF, 2002.
- Will Libraries Survive? *The American Prospect*, November-December, 1998.
- L'Avenir des Bibliothèques Numériques. Actes du Colloque, "Le livre a-t-il un avenir?," Doc Forum, Lyon, 1998

- Double Standards [the Ebonics controversy] *Natural Language and Linguistic Theory*, 15, 3. 1997.
- Lingo jingo: Why English-only is a mistake. *The American Prospect*, July, 1997.
Reprinted in Fred Pincus and Howard Erlich, eds., *Race and Ethnic Conflict: Contending Views on Prejudice, Discrimination, and Ethnviolence*, Westview Press, 1988.
Reprinted in Rebecca Wheeler, ed., *Language Alive*, Praeger, 1998.
Reprinted in Barbara Mori, ed. *STAND: Race and Ethnicity*, CourseWise Publishing, Bellevue, Ia, 1999.
- Automatic Classification of Genre (with Hinrich Schütze and Brett Kessler), Proceedings of The Annual Meeting, Association for Computational Linguistics, 1997.
- L'Amérique par la Langue. *Cahiers de Médiologie*, April, 1997.
- The View from Section Z [Linguistics as a science] *Natural Language and Linguistic Theory*, 14, 2. 1996.
- Snowblind [On linguistic relativism]. *Natural Language and Linguistic Theory*, 14, 1. 1996
- Farewell to the Information Age, in *The Future of the Book*, Geoffrey Nunberg, ed., University of California Press, 1996.
- Gimcrack nation [Electronic discussion lists] *Natural Language and Linguistic Theory*, 13, 4. 1995.
Reprinted (as "To Delete or Not to Delete") in *Lingua Franca*, January, 1996.
- The Future of Multilingualism and Multilingual Technologies (with Annie Zaenen). In *Computational Linguistics in the Netherlands*, 1995.
- Les Langues du Discours Electronique. In Actes du colloque "Langues et Sciences en Europe", Roger Chartier and Pietro Corsi, eds., Ecole des Hautes Etudes en Sciences Sociales, Paris, November 1994.
Reprinted in *Alliages*, December 1995.
Reprinted (in Italian, as Impigliati nella rete). *Sapere*, June, 1995.
- Angels in America [Linguistic nativism], *Natural Language and Linguistic Theory*, 13, 2. 1995.
- Meanings and Theories. In J.Klavans, ed., Proceedings of AAAI Symposium on the Lexicon, March 1995.
- A Touch of Crass: The popularizers we deserve, *Natural Language and Linguistic Theory*, 13, 1, 1995.
- Transfers of Meaning. *Journal of Semantics*, Winter, 1995.
- Les Télétheques. In Actes du Colloque "Va-t-on vivre par l'écran interposé?", Institut National de l'Audiovisuel, Paris, 1994, ed. Régis Debray.
- Idioms (with Ivan Sag and Thomas Wasow). *Language*, 70: 3, September, 1994.
- The Places of Books in the Age of Electronic Reproduction. *Representations* 24, Spring, 1993.
Reprinted in *Future Libraries*, R. Howard Bloch and Carla Hesse, eds., University of California Press, 1994.
- Indexicality and Deixis. *Linguistics and Philosophy*, 16: 1, 1993.
- Text, Form, and Genre. Screening Words: Proceedings of 8th Annual Conference of Waterloo Center for the New OED, University of Waterloo, 1992

- Systematic Polysemy in Lexicology and Lexicography (with Annie Zaenen). Hannu Tommola, Krista Varantola, Tarja Salmi-Tolonen and Jürgen Schopp, eds., Proceedings of Euralex II, University of Tampere, Tampere, Finland, 1992.
Reprinted in French translation in *Linguistique Française*, June, 1996
- Two Kinds of Indexicality. Chris Barker and David Dowty, eds. *Semantics and Linguistic Theory II*, Ohio State, 1992.
- Usage in the Dictionary. Introduction to the *American Heritage Dictionary*, Third Edition. Houghton Mifflin, 1992.
- Reimagining America. James Crawford, ed. *Language Loyalties. A Sourcebook on the Official-Language Movement*. The University of Chicago Press, 1992.
- The Official-English Movement. Karen Adams and Daniel Brink, eds., *Perspectives on Official English*, New York: Mouton, 1990.
- From Criticism to Reference. *International Journal of Lexicography*, 3:1. 1990.
- The Field of Linguistics. Publication of the Linguistic Society of America, 1990.
- Indexicality in Contexts. Xerox PARC Tech Report, 1990.
- What the Usage Panel Thinks. L. Michaels and C. Ricks, eds., *The State of the Language*. University of California Press, 1990.
- Linguists and the Official Language Movement. *Language*, 66:3, September, 1989.
- Common-Sense Semantics and the Lexicon. Proceedings of the Third Conference on Theoretical Issues in Natural-Language Processing, 1987.
- Prosaic and Poetic Metaphors. Proceedings of the Third Conference on Theoretical Issues in Natural-Language Processing, 1987.
- Contextualizing Individuation: "The same F." Papers from the Third West Coast Conference on Formal Linguistics, CSLI Publications, Stanford University, 1984.
- Idioms: An Interim Report (with Thomas Wasow and Ivan Sag). Proceedings of the Plenary Sessions, XIIIth International Congress of Linguists. Tokyo, 1982.
- English and Good English. Introduction to *The American Heritage Dictionary*, Second College Edition. Boston: Houghton-Mifflin, 1982.
- Validating Pragmatic Explanations. P. Cole, ed., *Radical Pragmatics*. New York: Academic Press, 1981.
- The Reversal of a Reported Merger in Eighteenth-Century English. W. Labov, ed., *Locating Language in Space and Time*. New York: Academic Press, 1980.
- Upper-class Speech in New York City. T. Shopen, ed., *Variation in the Structure and Use of English*. Boston: Newbury, 1980.
- The Non-uniqueness of Semantic Solutions: Polysemy. *Linguistics and Philosophy*, 3:1, 1979.
- Slang, Usage-conditions and l'Arbitraire du Signe. Papers from the Parasession on the Lexicon. Chicago: Chicago Linguistics Society, 1978.
- Inferring Quantification in Generic Sentences (with Chiahua Pan). Proceedings of the Eleventh Annual Meeting, Chicago Linguistic Society. Chicago: Chicago Linguistics Society, 1975.
- Syntactic Relations in Types and Tokens, in Proceedings of the Tenth Annual Meeting, Chicago Linguistic Society. Chicago: Chicago Linguistics Society, 1974.
- Two Problematic Mergers (with William Labov). W. Labov, M. Yaeger, and R. Steiner, *The Quantificational Study of Sound Change in Progress*. Philadelphia: U.S. Regional Survey, 1974.

Selected Book Reviews:

Review of *The Power of Babel*, by John McWhorter, the *Los Angeles Times Book Review*, 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.
Reprinted in Katherine Livingstone, ed., *Scientifically Yours*. Groupe Lavoisier, Paris, 1997.

Story time (commentary on "About Design," by J. S. Brown and Paul Duguid). *Human-Computer Interaction*, Winter, 1994.

Review of *Language of the Underworld*, by David Maurer. *The New York Times Book Review*, April 9, 1982.

Review of *The Psychology of Literacy*, by Sylvia Scribner and Michael Cole. *The New York Times Book Review*, December 13, 1981.

Review of *Beyond the Letter*, by Israel Scheffler. *The Philosophical Review*, 1981:2.

Review of *Forms of Talk*, by Erving Goffman. *The New York Times Book Review*, March 10, 1981.

Electronic Publications:

Time line of the history of information, for the Encyclopedia Britannica, CD-ROM version.

The Field of Linguistics: Web project for the Linguistic Society of America. Co-editor, with Thomas Wasow. See <http://www.lsadc.org/flxtitlepg.html>

General-Interest Articles and Regularly Appearing Features:

Bi- or triweekly commentaries on language and politics, Sunday *New York Times Week in Review* section, 2002-

Regular language commentaries, "Fresh Air," National Public Radio, 1989-present.

Individual "Fresh Air" pieces published in various magazines in US and Europe.

Bimonthly features on language and the law for *California Lawyer*, 2000-2002

"Topic... Comment." Quarterly column, *Natural Language and Linguistic Theory*. 1994-1998.

Other commentaries and opinion pieces in the *Washington Post*, the *Los Angeles Times*, the *San Jose Mercury News*, *Newsday*, the *San Francisco Chronicle*, and the *Chicago Tribune*.

General interest articles in *The Atlantic*, *Forbes ASAP*, *Fortune*, *American Lawyer*, the *Harvard Business Review* and *The American Prospect*.

A number of these articles and commentaries are available at my Web pages at <http://www-csli.stanford.edu/~nunberg>

Patents and Patent Applications:

A method of determining the authoritativeness of texts using surface features of untagged texts, with Francine Chen and Ayman Farahat. US Patent application, 2002. (3 separate patents)

A method of automatically determining text genres using surface features of untagged texts, with Hinrich Schuetze. US Patent application, 1997.

Processing natural-language text using autonomous punctuational structure (first-named applicant, with Curtis Abbott and Brian Smith). US patent application 07/274,158 (1990) (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 application 89312093.1-. (1989).

Selected Presentations:

The Shadow Cast by Language upon Truth, keynote talk, Western Humanities Conference, 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, Democratic Leadership Conference, May 1, 2003.

Language in the Public Eye, plenary talk, American Association of Applied Linguistics, Washington, D.C., March, 2003.

Language Questions and Questions of Language (two lectures), Princeton Humanities Council, November, 2002.

Why "Literacy"? Keynote talk, Conference on "Reading Literacy," Harvard Humanities Center, April 12, 2002.

Can There be an Electronic Dictionary?, invited talk, ATLAN conference, Paris, January 24, 2002.

The Future of Paper, invited talk, Conference on "The Future of Paper as a Communications Medium," Stockholm, March 20-22, 2001.

What Language for the Internet?, Keynote Address, Voice and Technology Forum, Santa Clara, CA December 12, 2000

En Quête de l'Ordre des Livres Numériques, Annual UNESCO Lecture, University of Grenoble, May 10, 2000.

The Order of Electronic Discourse, Invited Address, Victoria Library Association, Melbourne Australia, February 2000.

Languages in a Wired World. Conference on "La politique de la langue," Centre d'Etudes et Recherches Internationales, Paris, October 2, 1998.

The Future of Academic Publishing. Conference on "The Endangered Monograph," Berkeley Humanities Center, April 12, 1998.

Le Papier et les Nouvelles Technologies de l'Impression. Conference on "Le devenir du papier moderne," Bibliothèque Nationale de France, December, 1997.

L'Avenir de la Bibliothèque, DocForum, Lyon, November, 1997.

Individual and Collective Semantics, Conference on the future of semantics, San Marino, November, 1997.

The Compositionality of Idioms, International Congress of Linguists, Paris, July, 1997.

Does Cyberspace have Boundaries? Panel on cyberspace and community. University of Indiana, 1997.

Automatic Classification of Genre (with Hinrich Schütze and Brett Kessler), Annual Meeting, Association for Computational Linguistics, Madrid, 1997.

- Variation in Written-Language Category Structure, keynote talk, ACL Workshop on punctuation and written language, Santa Cruz, CA, June 28, 1996.
- Does the Book have a Future? Commonwealth Club of San Francisco, (broadcast on C-SPAN) June 4, 1996.
- Regular Polysemy and Lexical Representation, plenary talk, Conference on the Lexicon, Courmayeur, Italy, September 6, 1996.
- Underdetermination in the Lexicon, invited talk, conference on Lexical Underdetermination, Berlin, October 27, 1996.
- Are there Universal Language Rights? Invited talk, Conference on Language Legislation and Linguistic Rights, University of Illinois, to be held March 20-23, 1996.
- Language Standards and Language Science. Session on Language Standards and Language Science, Annual Meeting, American Association for the Advancement of Science. To be held February 28, 1996.
- The Technologies of Reputation, Keynote talk, Conference on Literature and Libraries, Columbia University, October 27, 1995.
- Maux d'Archive*: Preservation and access in electronic collections, CARL conference on "Retooling Academic Libraries for the Digital Age," San Francisco, October 21, 1995.
- Les Langues du Discours Electronique. Colloquium on *Sciences et Langues en Europe*, Ecole des Hautes Etudes en Sciences Sociales, Paris, November 14, 1994.
- The once and Future Dictionary. Conference on Dictionaries and Information Technology, Grenoble, October 17-19, 1994.
- Farewell to the Information Age. Conference on the Future of the Book, San Marino, July 28, 1994.
- The Future of the Book. Keynote talk, Annual Meeting, American Association of University Presses, Washington, D. C., June 23, 1994.
- Information in its Place. Plenary talk, Annual meeting, American Society of Information Science, Portland, May 22, 1994.
- Remarques sur les Télétheques, Conference "Va-t-on vivre par l'écran interposé?," University of the Sorbonne, Paris, April 15, 1994.
- Transferts de Signification, Cognitive Science Seminar, Centre de Recherche en Epistémologie Appliquée, CNRS, Paris, Jan 20, 1994.
- The Future of Information, Conference on The Electronic Book: A New Medium?, Grenoble, September 9, 1993.
- Meaning and Metaphor, Invited address, Association for Computational Linguistics, Columbus, Ohio, June 20, 1993.
- Taking Usage Seriously, Invited talk, Dictionary Society of North America, Las Vegas, May, 1993.
- On Predicate Transfer, Invited talk, Conference on Lexical Universals, Dagstuhl, Germany, April, 1993.
- Indexicality and Direct Reference, Conference on Context and Interpretation, Berkeley, March, 1993.
- Dirty Words. Paper given at Special Session of Dickens Society on "Dirt," Modern Language Association, New York City, December, 1992.
- Polysemy in Lexical Description. Conference on Computational Approaches to the Lexicon, Las Cruces, New Mexico; November 2, 1992.
- Text, Form, and Genre, 8th Annual Conference of Waterloo Center for the New OED, Waterloo, Ontario, October, 1992.

- The Shadow of Ruth, Conference on "Inscribing Grammar on Culture," Clark Library, Los Angeles, October, 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 en Epistémologie Appliquée, Paris, June, 1992.
- The Places of Books in the Age of Electronic Reproduction, Conference on Future Libraries, University of California, Berkeley, April, 1992.
- Two Kinds of Indexicality, Conference on Semantics and Linguistic Theory, Columbus, Ohio, April, 1992.
- Good Grammar and Good Taste: Eighteenth-century prescriptivism and theories of aesthetics, Annual Meeting, North American Association for the History of Linguistic Science, Philadelphia, January, 1992.
- Le Varietà della Metafora, Conference on Topics in Semantic Theory, Università degli Studi, San Marino, December, 1991.
- The Teaching of Grammar: a historical overview, Special session on Linguistics in the K-12 Curriculum. Annual Meeting, Linguistic Society of America, Chicago, December 28, 1991.
- On Document Genres. Xerox Corporation Symposium on the Document, Stamford, CT, April 15, 1991.
- Usage and Naturalism, Meeting of American Dialect Society, Atlanta, October, 1990.
- Indexicality in Context, CNRS conference on Philosophie et les Sciences Cognitives, Cérisy-la-Salle, France, 1990.
- A survey of Prescriptive Attitudes (with Kristin Hanson), Annual Meeting, Linguistic Society of America, New Orleans, 1988.
- Linguistic Nationalism in the English tradition, Conference on Language Rights and Public Policy, Stanford University April 17-18, 1988.
- American Attitudes toward Second-Language Learning, Annual Meeting, Advocates for Language Learning, San Francisco, 1988.
- What the 'English-only' People are After, Colloquium on the Official Language movement, Roundtable Conference on Languages and Linguistics, Georgetown University, 1987.
- Common-Sense Semantics and Lexical Information, Third Conference on Theoretical Issues in Natural-Language Processing, Las Cruces, NM, 1987.
- Prosaic and Poetic Metaphors, Third Conference on Theoretical Issues in Natural-Language Processing, Las Cruces, NM, 1987.
- What we talk about when we talk about grammar, Annual Meeting, National Council of Teachers of English; Detroit, Michigan, 1985.
- Some Difficulties for Direct-Reference Theories. Conference on "Themes from Kaplan," Stanford University, April, 1984.
- Individuation in Context, Conference on Semantic Theory, Centro Di Studi Linguistici e Semiotici, Urbino, Italy, 1983.
- Why there is no syntax of words, Conference on Morphology and Linguistic Theory, Stanford University, 1983.

- Idiomacity in Argumentation for Transformational Grammar, (with Ivan Sag and Thomas Wasow), U.C.L.A. Conference on the Extended Standard Theory, 1982.
- The same F, NSF-CNRS Seminar on Discourse Comprehension, Cadarache, France, June, 1982.
- The Compositionality of Idioms, (with Ivan Sag and Thomas Wasow), Annual Meeting, Linguistic Society of America, New York City, 1981.
- The Case for Prescriptive Grammar, Conference on New Ways of Analyzing Linguistic Variation, Ann Arbor, 1981.
- Langue and Competence: The bases of idealization in linguistics,*" Colloquium on the Object of Linguistic Theory, Annual Meeting, Linguistic Society of America, San Antonio, 1980.
- What do We Mean by "The Same Language"? Annual Meeting, Berkeley Linguistics Society, 1980.
- Deferred Interpretation and Direct Reference, Sloan Workshop on Semantics, Asilomar, California, 1980.
- Idealization in syntax and semantics, Conference on Pragmatics, Centro di Studi Linguistici e Semiotici, Urbino, 1979.
- La Metafora nel Lessico, Conference on Metaphor, D.A.M.S., University of Bologna, 1979.
- Methodology and Explanation in Sociolinguistics, First Berkeley Conference on Sociolinguistics, 1978.
- Sociolinguistics and Social History, Conference on Linguistic Variation, S.U.N.Y. at Binghamton, 1976.
- Lexical Ambiguity and Referential Indeterminacy, Annual Meeting, Linguistic Society of America, San Francisco, 1975.
- The Semantics of Parenthetical Verbs, Annual Meeting, Linguistic Society of America, New York City, 1974.
- English Pro-Complementizers, Annual Meeting, Linguistic Society of America, San Diego, 1973.
- The Quantificational Study of a Sound Change in Progress: Social and linguistic setting, Summer Meeting, Linguistic Society of America, Ann Arbor, 1973.

Invited Lectures:

LINGUISTICS DEPARTMENTS

- University of Arizona, 1988, 1997
- University of British Columbia, 1992
- Cambridge University, 1994, 1998
- University of California, Berkeley, 1979, 1987, 1993, 1997
- Edinburgh University 2002
- Georgetown University, 1985, 2003
- University of Grenoble, 1994
- University of Illinois, 1989, 1995
- University of Kentucky, 1991
- University of California at Los Angeles, 1981, 1989
- University of California at San Diego, 1997
- Massachusetts Institute of Technology, 1986

University of Naples, 1999
California State University at Northridge, 2003
Ohio State University, 1993
University of Pennsylvania, 1986, 1992
Pitzer College, 1995
Princeton University, 2002
San Jose State, 1995
University of California, Santa Cruz, 1984, 1991
University of Southern California, 1987
Stanford University, numerous colloquia
University of Strasbourg, 1993
University of Texas at Austin, 1987, 1998
University of Washington, 2004

OTHER DEPARTMENTS AND PROGRAMS

Max-Plank-Gesellschaft, Arbeitsgruppe Strukturelle Grammatik, Berlin 1996
Cognitive Science Program, University of Illinois, 1989
Cognitive Science Program, University of Edinburgh, 1994
Cognitive Science (ICSC), University of Pennsylvania, 1996
Computer Science, Yale University, 1988
Computer Science, University of Brighton, 1998
Computer Science, University of Pennsylvania, 1992
Communications, University of Grenoble, 2000
Communications, University of California at San Diego, 2002
Digital Libraries program, University of California, Berkeley, 1996
Digital Libraries program, Stanford University, 1996
English and Rhetoric, University of Southern California, 1987
English, Frei Universität, Berlin
English, University of California at Irvine, 1985
English, University of British Columbia, 1992
English, University of Michigan, 1986
English, Graduate Center of C.U.N.Y., 1998
English, University of California, Santa Cruz, 1984
English, University of Minnesota, 1979
Informatics, University of Edinburgh, 2002
Library Science, University of Texas, 1998
Library Science, University of Arizona, 1997
Library Science, University of California at Berkeley, 1992
Library Science, University of California at Los Angeles, 1999
Library Science, San Jose State, 1994
Library, Stanford University, 1992
School of Information Management and Systems, U. C. Berkeley, 1999, 2003

National Foreign Language Center, Washington D.C., 1988
Natural Language Group, Bell Laboratories, 1985
Philosophy, Stanford University, 1983, 1990
Philosophy, University of California at Berkeley, 1980
Philosophy, University of Bologna, 1980
Psychology, The American University, 1996
Istituto di Psicologia, CNR, Rome, 1979, 1983
CNRS, Groupe de Recherche sur la Cognition, Paris, 1992, 1994, 1998
CNRS, Groupe de Recherche sur les Orthographe et Systèmes d'écriture, Paris, 1992
American Association of University Presses, 1994, 1998
DAMS, University of Bologna, 1999

Conferences, Conference Sessions, and Workshops Organized:

The future of academic publishing. Workshop at annual meeting of American Association of University Presses, Berkeley, CA, October 14, 1998.
Does the book have a future? University of California, San Francisco, April 23, 1996.
Genre in Digital Documents. Track of Hawaii International Conference on Systems Science, Maui, Jan 5-7, 1997. Also organized this session for 1998, 1999.
Fencing off the Public Sphere (Envelope technologies and fair use). Xerox PARC, May 5, 1996.
Language Standards and Linguistic Science. Conference session, Annual Meeting, American Association for the Advancement of Science. To be held February 28, 1996.
Conference on the Future of the Book, San Marino, July 28-30, 1994. Co-sponsored by Rank Xerox European Research Centre, Grenoble, and the Center for Cognitive and Semiotic Studies, San Marino. (Co-organizer with Patrizia Violi, University of Bologna.)
Conference on The Electronic Book: A New Medium?, Grenoble, September 9-10, 1993. Co-sponsored by Rank Xerox European Research Centre and the Bibliothèque de France. Also subject of seminar presentation at RXRC inauguration, October 15, 1993.
NSF Conference on Digital Libraries, Xerox Palo Alto Research Center, March 10-11, 1992. (Co-organizer, with David Levy, Xerox PARC, and Y. T. Chien, NSF.)
Workshop on Linguistics and Lexicography, Center for the Study of Language and Information, Stanford University, April 18-19, 1991.
Special session on Linguistics in the K-12 curriculum, Annual Meeting, Linguistic Society of America, Chicago, January 11, 1991. (Co-Organizer with Penelope Eckert, Institute for Research on Learning.)
Conference on Language Rights and Public Policy, Stanford University, April 17-18, 1988. Sponsored by Californians United, ACLU, and NEA. (Co-organizer with Edward Chen, American Civil Liberties Union, and Martha Jimenez, MALDEF.)

Expert Testimony:

U.S. District Court, Northern District of California, 2004. *Monster Cable Products Inc. vs. Discovery Communications, Inc.* Expert report for plaintiff. Cooper, White, and Cooper, attorneys. (Trademark case)

- U.S. District Court, Southern District of California, 2004. Rudolph International Inc. v. Realys, Inc. Expert report for defendant. Heller and Edwards, attorneys. (Trademark case)
- California Court of Appeals, Sixth Appellate District, 2004. Janet Gray Hayes v. Security National Insurance Company. Expert report for plaintiff. McManis, Faulkner, and Morgan, Attorneys. (Language of insurance policy)
- U.S. District Court, District of Northern California, 2004. Verisign Inc. v. Visa USA Inc. Expert report for plaintiff, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, Attorneys. (Trademark case).
- Superior Court of the State of California, 2003, Horn v. UnumProvident, Expert report for plaintiff, Hersh and Hersh, Attorneys. (Language of insurance policy)
- U.S. District Court for the District of Delaware, 2003, Verizon Wireless v. Nextel Communications. Expert report and research for defendant. Fitch, Even, Tabin & Flannery, Attorneys. (Trademark case)
- Superior Court of the State of California, 2003, Webster Bivens v. CSK Auto, Inc. aka Kragen Auto Parts. Michael A. Vacchio, attorney. (Language of advertisements)
- Superior Court of the State of California, 2003, Annette Friskopf v. Sharon Silverstein, Expert report for defendant, Gray Cary Ware & Friedrich, Attorneys. (Defamation case)
- Superior Court of the State of California, 2003, Paul and Myra Bogdan v. Noble Broadcast Group, Expert report for defendant. Gray Cary Ware & Friedrich, Attorneys. (Defamation case)
- Superior Court of the State of California, 2003, Garza et al. v. GMAC. Expert report and trial testimony for defendant. Severson and Werson, Attorneys. (Language of statutory notice)
- U.S. District Court, District of Oregon, 2002. Matthew Rausch et al. v. Hartford Financial Services. Expert report for defendant. Bullivant Houser Bailey, Attorneys. (Language of statutory notice)
- U.S. District Court, Northern District of Illinois, 2002. Sears, Roebuck and Co. v. Menard, Inc. Expert report for defendant. Fish and Richardson, Attorneys. (Trademark case)
- U.S. District Court, Eastern District of Pennsylvania, 2001. American Library Association v. U.S. Expert report and trial testimony for plaintiff, Jenner & Block, attorneys. (Constitutional challenge to Children's Internet Protection Act)
- U.S. District Court, Central District of California, 2000; More Online v. More.com. Expert statement for defendant. Fenwick & West, attorneys. (Trademark case)
- California Court of Appeals, First Appellate District, Division 3, 2000. People v. Johnny Ralph Fanin. Expert statement for defendant. Zanzinger & Johnston, attorneys. (Criminal proceeding)
- Superior Court of the State of California, 1999. California Consumers v. Columbia House Company. Expert statement for defendant. Heller Ehrman White & McAuliffe, attorneys. (Contract interpretation)
- Trademark Trial and Appeals Board, Patent and Trademark Office, 1998-99; Harjo v. Pro-Football, Inc. Expert statement and trial depositions for petitioners (pro bono) Dorsey and Whitney, attorneys. (Trademark cancellation petition)
- U.S. District Court, Southern District of New York, 1998; Raine v. CBS Inc., Expert statement and deposition for defendant. CBS Inc. legal department, attorneys. (Contract interpretation)
- Superior Court of the State of California, 1997; Bertolucci v. Ananda Church of God. Expert statement for defendant. Rockhill, Schaiman, and Carr, attorneys. (civil action)

Other Professional and Public Activities:

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

Member of Steering Committee, Coalition for Networked Information, 1999-2003

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 University Press, Stanford University Press, Oxford University Press, University of Chicago Press, MIT Press, D. Reidel, Sage Publishing.

Perennial reviewer for various program committees (WCCFL, SALT, etc.),

Referee of grant proposals: National Science Foundation (sections on linguistics, computer science, AI and robotics, psychology); National Foreign Language Center; National Institute of Mental Health, National Endowment for the Humanities.

Executive Committee, National Coalition for Language Rights (co-founder).

Committee on Political and Social Concerns, Linguistic Society of America, 1990-1997

Usage Editor, *The American Heritage Dictionary*, second edition.

Usage Editor and Chair of Usage Panel, *The American Heritage Dictionary*, third and fourth editions. Ongoing consultancy with Houghton Mifflin.

Host of programs for City Arts and Lectures, San Francisco (broadcast on NPR), 2001-:
Interviewees include Eavan Boland, A. S. Byatt, Robert Hass, Maxine Hong Kingston, Michael Ondaatje, Simon Winchester, Tobias Wolff, Terry Gross.

Attachment B

Records of all uses of *substantial* and *significant* modifying *reduction, decrease, or loss*:
Nexis Newspaper Database, year ending Oct. 15, 2004
Records of all articles are included up to the relevant use of *significant* or *substantial*

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The Scotsman

October 6, 2004, Wednesday

SECTION: Pg. 1

LENGTH: 713 words

HEADLINE: BUDGET PLANS WILL PUSH UP COUNCIL TAX SAYS ADVISER

BYLINE: Andrew Denholm, Political Correspondent

BODY:

COUNCIL tax payers will be hit by an above-inflation rise as a direct result of the Scottish Executive's spending plans, one of Scotland's leading financial experts warned yesterday.

Professor Arthur Midwinter, a consultant to Holyrood's finance committee, said the squeeze on local authority finances announced last week would almost certainly lead to council tax hikes over the next three years.

Prof Midwinter went on to pour scorn on claims by Jack McConnell that the Executive would outdo Westminster in public sector efficiency savings.

Last month, the First Minister made great play of insisting he would go further than the savings from public sector budgets drawn up for the Treasury by Sir Peter Gershon.

However, Prof Midwinter told MSPs yesterday savings south of the Border were proportionally three times greater than the GBP 650 million identified in Scotland because they amounted to 7.2 per cent of overall spend, compared with just 2.6 per cent here.

Tom McCabe, appearing before the committee on his first day as finance minister, immediately 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.

David McLetchie, leader of the Scottish Conservatives, said: "We warned when the spending announcement was made that council tax was set to soar once again.

"We would use planned increases in the budget to make substantial reductions in council tax of up to 45 per cent."

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The Irish Times

September 16, 2004

SECTION: Opinion; Opinion; Pg. 16

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 proposed carbon tax.

SUVs (sports utility vehicles, or big 4X4 jeeps) are one of the more obscene manifestations of new wealth in Ireland. Sales have increased enormously over the past few years (up 35 per cent this year alone), with uncertainty over rising fuel prices providing no deterrent. Most new SUV drivers are not in rural areas, where they might need the extra height and power for off-road driving. The largest growth in sales is in fact to city dwellers, particularly in Dublin, making the SUV the latest, and supremely redundant, status symbol for the middle classes.

Vehicle emissions are identified as one of the major causes of the greenhouses gases currently changing our climate. Carbon-dioxide (CO₂) is the most significant of these, and how much is released into the atmosphere depends on the amount of fuel used. With their huge petrol consumption (as high as 24 litres per 100km in some cases), SUVs are increasingly being targeted internationally as an important contributor to global warming. Studies have indicated that they emit up to four times more CO₂ than ordinary cars. As a result, several European countries are planning action against SUVs, including banning them from city areas.

France and Sweden are leading the way, and there have even been moves in the US, particularly California, to penalise those who insist on pumping such vast amounts of CO2 into the 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, one might imagine that people would now think twice before buying these enormous CO2-spewing vehicles. But not the Dublin middle classes. It seems keeping up with the Jones family is still far more important than the environment.

And why not, when you have the Minister for Finance on your side?

The most effective way of altering polluting and profligate behaviour is to penalise it. The now defunct carbon tax was to apply across the board, from industry and agriculture to transport and domestic fuel use. Bodies such as the ESRI and the OECD were of the view that a carbon tax in Ireland was necessary in order to alter behaviour throughout society, and so limit the growing damage to our environment. Even the Department of Finance's tax strategy group stated that taxation "represents the least cost and most efficient method of achieving the required reduction in emissions on an economy wide basis, and it is already widely used across the EU and elsewhere in the OECD specifically to target greenhouse gas emissions".

Business interests, however, have been intensively lobbying the Government against such a tax since it was proposed by Charlie McCreevy in his 2002 budget speech. He embarked on a consultation process and received 117 submissions.

One of the reasons he gave last week for abolishing the carbon tax was that a majority of these submissions opposed the measure. While this is technically accurate, the exact figure given by himself earlier this year in the Dail was that 51 per cent were in opposition, hardly an overwhelmingly negative response.

Also last week, the Government was peddling the line that the carbon tax would have meant only a tiny reduction in our CO2 emissions of half a million tonnes, about 5 per cent of our total target.

However, figures again given in the Dail by Minister McCreevy (March 2004) do not support this. With the generally accepted tax level of EUR 20 per tonne of CO₂, the reduction in emissions would have in fact amounted to more than two millions tonnes, bringing us much closer to our stated commitment to reduce emissions under the Kyoto protocol.

The ESRI has repeatedly pointed out that a carbon tax need not have a negative effect either on households or on competitiveness in industry. It argues that the money raised should be used to offset any hardship caused and also encourage the development of low-pollution alternatives. The experience of Denmark, which has had such a tax for well over a decade with no negative economic impact and a substantial reduction of 9 per cent in greenhouse gas emission, supports the contention that if carefully applied, a carbon tax would ultimately benefit the Irish economy rather than harm it.

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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 John Kerry seems to have gotten little or no bounce from it, slight attention has been given to the most important development in trade policy in the last four years. That is the Aug. 1 agreement at the World Trade Organization talks in Geneva on a framework for advancing the Doha Round of negotiations.

The Doha Round was launched in November 2001 but seemed at an impasse at last September's WTO meeting in Cancun when Latin American, African and Asian nations rejected the approach of the United States and the European Union. The WTO rules require consensus.

But in Geneva a consensus emerged. The United States and the EU agreed to eliminate agricultural export subsidies and to make a "substantial reduction," starting with a 20 percent cut, in domestic farm supports. Developing countries, led by Brazil and India, agreed to lower barriers to manufactured goods and to services. This is not a final agreement, which everyone agrees cannot be reached by the original deadline of December. But there is a good chance of a deal by the December 2005 meetings in Hong Kong.

THE DAILY TELEGRAPH(LONDON)

June 19, 2004, Saturday

SECTION: News Pg. 11

LENGTH: 543 words

HEADLINE: Food firms are adding more salt to meals for children

BYLINE: By David Derbyshire Science Correspondent

BODY:

SALT levels in some children's foods have risen in the past year despite protests from the industry that it is making junk food healthier.

A Food Commission survey found that some manufacturers were adding more salt to their products, despite concerns about the long-term health risks. Even where salt content had stayed the same, levels were "worryingly high" in many foods, the pressure group said.

A small can of HP Action Man pasta in tomato sauce, for instance, had more salt than the recommended daily maximum for a six-year-old.

Food companies were involved in a row with the Government this week after Melanie Johnson, the public health minister, said plans to cut salt did not go far enough.

In a letter to 27 companies, including Heinz, Nestle, Northern Foods, United Biscuits, Waitrose, Asda, Marks & Spencer and Sainsbury, she said industry proposals would leave half of all products such as pizzas and ready meals with "unacceptably high levels of salt".

The industry accused the Government of "inept political spin" and claimed significant reductions.

But the year-long survey suggests progress has been limited in food meant for children. It found salt levels rose in two out of 20 products.

Nunberg PedialLean Attachment B

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Aunt Bessie's Tidgy Toads - small sausages in batter - had 12 per cent more salt than a year ago, while Iceland's Kids Crew pizzas had 15 per cent more. Another 15 products had exactly the same salt content as a year ago.

Only three foods had less salt: Marks & Spencer's Tweenies chicken nugget, chips and yoghurt meal for one, Cheesestring Attack a Snack chicken snack and Dairylea Lunchables Yummy Ham Stack 'ems.

Kath Dalmeny, a spokesman for the independent commission, said the food industry had made progress in cutting salt from soups and sauces. But it needed to do more in products aimed directly at children.

Food Standards Agency guidelines say children aged one to three should have no more than 2g of salt a day, while those aged four to six should have a maximum of 3g.

Most children's food labels describe sodium levels rather than salt. To calculate the salt content, sodium levels have to be multiplied by 2.5.

A small can of HP Barney pasta in tomato would provide a three-year-old with 2.75g of salt - almost one and half times their recommended daily intake. A small can of HP Action Man pasta has 3.75g - almost twice the recommended level.

"Some companies have pledged to reduce salt levels which is to be welcomed," said Miss Dalmeny. "However levels of salt are still far too high in children's food.

"There is no reason why Action Man pasta needs that much salt. HP have other cans of pasta with far less."

A Food and Drink Federation spokesman said the industry had cut salt in soups and meal sauces by 10 per cent in 2003 and was committed to another 10 per cent this year.

Between 1998 and 2004, salt levels had fallen by 16 per cent in breakfast cereals.

"These are substantial reductions," he said. "These were the areas identified by the Food Standards Agency because they contributed most to children's diet."

July 10, 2004, Saturday

SECTION: Features; Body & Soul 3

LENGTH: 127 words

HEADLINE: Pension power

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 Society Summer Science Exhibition. "Next we'll see what moderate exercise can achieve with sedentary middle-aged people."

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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/

BYLINE: MURRAY LIGHT

BODY:

What exactly is this Healthy New York program that Gov. George Pataki is constantly promoting on his television spots? I've been curious, so I assume you are, too. The governor is proud of this plan and is doing his best to get New Yorkers involved. He never gives any details about Healthy New York in his television appearances, and I've now ascertained the reason -- it's a complex insurance program that's not easy to explain.

But now, after hours of Internet searches, I do have some answers. Healthy New York actually consists of three parts -- one for firms with 50 or fewer employees, one for low-income, uninsured individuals who work and a third for independent contractors and self-employed individuals. The eligibility criteria vary for the various categories.

The program was approved by the State Legislature in 2000 and is designed to provide assistance to New Yorkers without health insurance. It offers health insurance benefits that are made more affordable through sponsorship by the state so that more uninsured small employers and uninsured employed individuals can purchase health insurance coverage.

In order to keep costs down, Healthy New York provides fewer coverage benefits than traditional plans. It does not cover mental health care, home health care, chiropractic care and outpatient treatment for alcoholism and substance abuse. Additionally, many of the design features of

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.

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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 industry and the world's oceans safer, the International Salvage Union's (ISU) latest annual Pollution Prevention Survey would probably come as a surprise to the man on the street.

As has been the case for many years, the number of casualties continued on its general downward trend in 2003. That poses a big problem for the salvage industry which has to maintain expensive resources and a unique pool of expertise on which there are fewer calls.

Nevertheless, the members of the ISU did recover over 605,000 tonnes of potential pollutants during salvage operations last year. Put simply, that means a lot of beaches did not get polluted in 2004 because of the salvage industry.

Given the current row over the Tasman Spirit and the refusal of the Pakistani authorities to allow the salvage master to leave the country, it should be noted that even in that case the salvors managed to prevent a large portion of the ship's crude oil cargo from spilling.

The Tasman Spirit was one of 218 instances of cargoes and bunkers threatening pollution where emergency assistance was provided worldwide in 2003. But, as the ISU highlights, the equivalent figure in 2002 was 268 ships. That represent a significant decline in the earnings base of the global salvage industry.

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.

ISU president Joop Timmermans says: 'ISU salvors have recovered over 11 million tonnes of potential pollutants in the 10 years to end-2003. While the volume of pollutants recovered in 2003 is down on 2002, it represents a figure more in keeping with the trend of recent years, with total annual recoveries at around half-a-million tonnes. In 2001, for example, the total recovery was 539,000 tonnes. In 2002, the figure was inflated by a laden VLCC - the first such case to appear in the ISU caseload for several years. There were no laden VLCC cases involving ISU salvors in 2003.'

Forty-three of the ISU's 50 members contributed data for the latest annual survey. In 2003, ISU salvors responsible for the 218 salvage assistances recovered the following:

50% crude oil and diesel oil, 303,486 tonnes against 603,736 tonnes in 2002;

10% chemicals, 61,177 tonnes against 8,179 tonnes in 2002;

28% other pollutants (eg gasoline, slops, dirty ballast, etc; 169,181 tonnes against 272,556 tonnes in 2002;

12% bunkers, 71,833 tonnes against 72,651 tonnes in 2002. Mr Timmermans adds: 'Last year there was a substantial decrease of 18.7 per cent in the number of casualties assisted. This suggests continued shrinkage in the salvage industry's workload.'

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:

Canadians bought a record number of prescription drugs in 2003, and Quebecers are most likely to walk out of their pharmacy with a brand-name drug, not a cheaper generic substitute.

IMS Health, an industry research group, said Canadian retail pharmacies filled 361 million prescriptions during the year - a jump of 7.9 per cent over 2002, the largest gain in the last decade.

Taking into account the cost of drugs and any mark-ups and dispensing fees, Canadians shelled out \$15.9 billion, which represents an average 11 prescriptions per person at \$44 per prescription.

Quebecers outstripped the national average, buying 18 prescriptions per person, but that doesn't mean we took more drugs. Sue Cavallucci, spokesperson for IMS Health, said Quebec doctors tend to write shorter prescriptions - such as one month's supply, instead of three. As a result, the average price per prescription was also lower, at \$32.44. Quebecers spent a total of \$4.4 billion on 136 million prescriptions.

The most-frequently prescribed drug in Canada, by brand, was Pfizer's Lipitor, for high cholesterol. Second place went to Abbott's Synthroid, for hyperthyroidism.

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In Quebec, the drugs reversed order, with Synthroid coming first.

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 times 10 years ago, according to Datamonitor. In London, average first-time buyer deposits have reached pounds 40,000 - more than three times what it was a decade ago. As a result, the proportion of first-time buyers accounting for loans for house purchase has dropped dramatically, from 40 per cent in August 2002 to 28 per cent in August 2003. Andrew Frankish of broker Mortgage Talk says the number of first-time buyers is now at an all-time low: 'This inevitably causes problems. It distorts prices, and alienates a whole class of young people, who simply feel priced out of the market.' Mortgage Talk is calling for the abolition of stamp duty on all first-time purchases.

City folk looking to buy into country idylls are facing increasing competition for residential farm properties as availability falls, according to the Royal Institution of Chartered Surveyors. In the third quarter of 2003, 58 per cent more surveyors reported a fall in the supply of farms with a desirable house, a significant decrease from the 22 per cent reporting a decline in quarter two. The low level of transactions taking place and predicted price rises are putting the rural dream even further out of reach for some. Thirty-nine per cent more surveyors expect a rise in farm prices than a fall.

The Washington Post

November 26, 2003 Wednesday
Final Edition

SECTION: Metro; B06

LENGTH: 740 words

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

BYLINE: David Nakamura, Washington Post Staff Writer

BODY:

A D.C. Council committee approved a bill yesterday that would cap the amount of property tax increases for city homeowners at 10 percent each year, welcome relief for residents who have expressed sticker shock at soaring assessment increases.

The new legislation, co-authored by council members Jack Evans (D-Ward 2) and David A. Catania (R-At Large), is a significant decrease from the current 25 percent cap that has been in place since 2001.

The Baltimore Sun

August 23, 2004 Monday FINAL Edition

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, Aug. 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.

Maryland's sewage treatment plants have achieved significant reductions in nutrient emissions (which have been cut by 60 percent since 1985). These plants are accountable for the reductions they have committed to make through legally binding grant agreements between state and local governments.

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:

When the members of the National Cancer Forum met at Government Buildings in mid-July, one 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 in its forthcoming blueprint on cancer care.

The history of Irish medico-politics is littered with expert group reports which ran into trouble in the face of public hostility.

From the Fitzgerald report on hospital reform in 1968 to its distant off-spring - the Hanly report last year - their recommendations may have made good medical practice but were extremely dangerous politically.

When its new strategy is published in the autumn, the National Cancer Forum will have to sell to a somewhat sceptical public that it would be in their long-term interest if cancer surgery services were centralised in regional or supra-regional centres.

The report cites the medical literature as indicating that the outcome for patients with common cancers is better where large numbers of people are treated under multi-disciplinary teams of doctors and other healthcare professionals.

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.

Around 20,000 people in Ireland are diagnosed with cancer every year and about 7,500 people die from the disease annually.

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. A24

LENGTH: 317 words

HEADLINE: Pitch in for clean air

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.

Yesterday, Environment Minister Leona Dombrowsky announced more of Ontario's large industries will be asked to do their share.

They will be ordered to cut their emissions of nitrogen oxide and sulphur dioxide - two of the most significant smog-causing pollutants.

The new emission limits will apply to Ontario's iron and steel producers, cement manufacturers, oil refineries and pulp and paper mills. Previously, only the electricity sector and some smelters - nickel, being the biggest - were subject to limits.

The new regulations will require significant reductions - a 46 per cent cut from 1994 sulphur dioxide levels, and 21 per cent for nitrogen oxide - over six years and will become stricter over time.

The Irish Times

May 4, 2004

SECTION: CITY EDITION; HOME NEWS; Pg. 2

LENGTH: 420 words

HEADLINE: EEA satellite images reveal urban sprawl

BYLINE: By FRANK MCDONALD, Environment Editor

BODY:

Satellite imaging by the European Environment Agency (EEA) has shown up dramatic changes in Ireland's land cover, with a 31 per cent increase in the amount given over to housing and other "artificial surfaces" during the 1990s.

The data also found a significant reduction of more than 7 per cent (some 240,000 acres) in the area covered by wetlands, including bogs, a trend described as "depressing" by the EEA's director-general, Dr Jacqueline McGlade.

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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 RISING tide 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.

While the findings may dismay health professionals and policymakers, psychiatrists believe there may be a simple explanation: if they are now working and earning like men, it is only understandable that young women might want to start living and behaving like them as well.

Results from the Government's annual Living in Britain survey, published yesterday and based on questionnaires completed by 20,000 adults, show that the proportion of women aged 16 to 24 who drink heavily (more than 35 units a week for women) increased from 7 to 10 per cent between 1998 to 2002. Among young men of the same age, there was a decrease in heavy drinking (more than 50 units a week for men) from 14 to 12 per cent.

A similar pattern is shown in average alcohol consumption levels. In 2002, the average number of units consumed a week by men aged 16 to 24 was 21.5, down from 25.5 in 1998.

For women of the same age, average consumption rose from 11 units in 1998 to 14.1 in 2002, nearly double the level of 7.3 recorded ten years earlier.

Figures on smoking show that there has been a significant reduction from 30 to 22 per cent in the 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 putting an entire generation of children at risk, environmentalists are mobilizing to fight proposed rules regulating mercury emitted from coal-fired power plants. They view the rules as too weak.

The organization Environmental Defense on Tuesday issued a report that ranks Florida among the nation's top 10 "hot spots" for mercury contamination.

Calling the amount of the toxic metal spewing from the nation's power plant smokestacks "out of control," the report spells out the dangers for local communities.

"We have truly come to realize that mercury is a dangerous health threat," said the report's author, Michael Shore.

The new rules proposed by the U.S. Environmental Protection Agency call for nationwide caps on mercury, a neurotoxin that can cause brain damage and learning disabilities in unborn children, infants and toddlers.

But the EPA proposal calls for a 30 percent reduction by 2010, far short of the 90 percent reduction environmentalists say is possible using modern pollution controls.

More significant reductions of up to 70 percent wouldn't happen until 2018 under the Bush EPA plan.

The Nelson Mail (New Zealand)

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 Grey Power that pensioners will be forced out of their family homes if the council or Government don't do something to even the spread.

Three-yearly property valuations, on which the council bases its rating calculations, were released last week.

The valuations will not impact on rates until the 2004-05 financial year but a valuation roll available for inspection at council offices includes a hypothetical rate. This rate is a calculation of how the new valuations would have impacted if applied to the current year's rates.

The full impact of the new valuations on next year's rate will not be known until the council goes through the annual plan process and decides how much money it needs to spend and collect.

shows the hypothetical rate calculations for different suburbs of Nelson.

predicts an average increase in rates of 20 percent in some areas such as the Port Hills, compared to an average increase of 2.25 percent in others, such as behind the Cathedral. Council planner Mark Tregurtha said the council would be reviewing its rating policies next year.

"The council is going to have to decide whether or not the disparities which came out of these new valuations are acceptable or whether it wants to change the system," he said.

"Last year we had the community facilities levy, next year it will be how the divergence between the lowest valuation properties and highest valuation properties has grown."

Nelson Grey Power president Gordon Currie said the latest valuations were a major concern for Grey Power, which had 8000 members in the region.

"We are worried that with the escalated property values around Nelson we will find some senior citizens, who bought a house 50 years ago with a beautiful view, will be landed with a massive rates increase while their incomes stay the same," Mr Currie said.

Grey Power had asked Nelson Mayor Paul Matheson and MP Nick Smith to lobby the Government to increase the rates rebate level.

Turn to RATES Page 2

Mr Tregurtha said the council could consider two main ways of changing its ratings system to even out the variations.

It could increase its Uniform Annual General Charge, which was the fee it charged each property to pay for services that benefited the whole community.

The council's UAGC, at about \$ 84, was very low in comparison to many other councils which charged about \$ 220, he said.

Or it could start basing its ratings calculations on capital value, rather than land value.

Mr Tregurtha said urban centers had traditionally used land value, while rural areas mainly used capital value, to get an equitable rates spread.

But with land becoming so pricey in Nelson, it might make sense for the council to make the change.

The new valuations will be sent to ratepayers this week. Continued from page 1

"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.

A report to be presented to a council committee tomorrow shows properties with sea views will face the greatest increases in rates. Applying the new valuations to this year's rates sees an average 19.32 percent increase in rates for houses at the Glen and an average 17.33 percent increase for those in Atawhai.

Meanwhile, it generates an average 4.45 percent increase for houses in the Wood, an average 3.65 percent increase in Tahunanui and an average 6.77 percent in Stoke.

Using the current rating system, the new valuations cause significant reductions in commercial rates, with a decrease of 17.6 percent for commercial properties outside the city centre and a decrease of 32.7 percent for those inside the city centre.

The Mercury (Australia)

August 23, 2004 Monday

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 understate is why fostering wind energy is so important. Wind energy will help reduce the overall greenhouse gas emissions created by Australia and reduce our contribution to global climate change. The overwhelming majority of scientists agree that global climate change is real, it's happening and that it's due to human causes.

The other side of this coin is that we humans also have the power to offset severe climate change by controlling and reducing our greenhouse gas emissions. Wind energy must be seen as part of a comprehensive strategy to significantly reduce greenhouse gases by 60 per cent of 1990 levels by the year 2020.

Plain Dealer (Cleveland)

July 15, 2004 Thursday

FINAL Edition; ALL Editions

SECTION: DRIVING; Pg. G1

LENGTH: 973 words

HEADLINE: Lincoln Aviator: Send in the clone?;

In the beginning, it was an Explorer

BYLINE: CHRISTOPHER JENSEN, PLAIN DEALER AUTO EDITOR

BODY:

IN THE DRIVER'S SEAT

It would be easy to assume that the Lincoln Aviator is another example of "badge engineering," taking the Ford Explorer and slapping on a new name and hiking the price. But would that be fair?

For sure, the price sticker has been re-engineered. The Aviator that Ford lent us for a weeklong test had a base price of \$45,125, plus the destination charge of \$740.

Major standard equipment ranged from power everything to high-intensity discharge headlamps and front seats that could be heated or cooled.

If it was my choice, I would head out the door with only one option, a skid-control system called Advance Trac, which is \$855. Of course, the Scion xB, which is priced at a little more than \$14,000, has a skid-control program as standard, so one might bristle a bit at Lincoln having it as an option.

Dimensionally, the Aviator is almost identical to the Explorer. Inside that means a reasonable 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 use all three rows, there are 13.8 cubic feet of cargo space, close to what you would find in a Ford Focus sedan. Lower the third row into the floor and 44.5 cubic feet allow for more serious cargo hauling.

As expected, the interior has an upscale look that is far richer than an Explorer or many other sport utilities.

One unusual feature involves rainy days. Open the window and water dribbles in; how refreshing.

Also, despite the lux-price, the rake of the driver's seatback is still not power adjustable, requiring the wealthy to engage in burdensome manual labor. Ford is either too cheap to offer a power adjustment or hasn't figured out the engineering yet.

There is a serious complement of safety equipment, including adjustable pedals, allowing a short driver to get back a bit from the air bag.

There are air curtains, which come down from the ceiling and cover the side windows (front and second row only) in a side-impact crash or if sensors determine the vehicle is likely to roll over.

The idea is to keep heads away from hard objects and valuable accessories, such as arms, inside the vehicle. These are not replacements for seat belts.

A study of real-world crashes by the Insurance Institute for Highway Safety showed such head protection can reduce the driver's chance of being killed by 45 percent in a side-impact crash on the driver's side.

The Aviator also is available with Advance Trac, a skid-control system, thought to be particularly valuable in a sport utility. The reason is that such vehicles have higher centers of gravity than cars and when they are sliding sideways, they are more vulnerable to being tripped by a curb or soft ground, causing a rollover.

A study in Sweden found such a system can significantly reduce fatal accidents on a slippery surface by about 35 percent.

The Washington Post

July 14, 2004 Wednesday

Final Edition

SECTION: Style; C01

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:

Third in a five-part series

The Southwest waterfront is one of the few places in Washington where the city busily engages the water's edge.

A place where people live. An active, interesting place that people walk to from nearby streets, mingling with fish sellers, fishermen, folks hanging out at waterside restaurants and bars, families out for an evening stroll.

Oops. Time warp. That reality was eons ago. Back before much of the neighborhood was bulldozed in the 1960s to make way for something new.

And, believe it or not, that lively image was how it was supposed to be once again -- only cleaner and brighter when the bulldozing was done. Despite the fine intentions, however, the urban renewers got it wrong, and the waterfront became the place we know and, for so many, find impossible to love today.

A failed place where the fish sellers hang on at the edge and where people parade from cars and buses directly to and from eateries and tourist boats. Where, most days, nobody really hangs out 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.

"The Southwest waterfront," says Andrew Altman, director of the city's Office of Planning, "is absolutely at the pivotal location between the water, the Mall, the downtown and the Southwest neighborhood. It should be the premier destination waterfront in Washington. It should be a great urban waterfront."

Chances for change are good. Despite its faults, the setting, extending nearly a mile along the Washington Channel, is all-around great. It's got water and boats, and it's a five-minute walk from the Jefferson Memorial. Ten minutes from the Mall. It is perfectly placed to supply the demand for in-city residences. And the city already controls much of the land.

And chances are strong that when it comes, the change will look pretty much like this: An orderly row of mid-rise buildings for residences, hotel rooms, small offices, stores and cultural facilities will replace the low buildings now facing the channel. The new buildings will accommodate up to 800 upscale housing units (with 20 percent "affordable") and a hotel with up to 450 rooms. It'll be a high-density urban neighborhood.

The waterside esplanade will be redesigned to be active and alluring. The 10th Street Overlook, now the site of a modest memorial to Benjamin Banneker, will be rebuilt to connect directly to the waterfront. Stores and restaurants will be greatly increased in number.

Existing parks will be significantly improved, and two new ones will be added -- a Market Square at the northwestern end of the promenade, next to the existing fish market, and a civic park at the southeastern end. The civic park, with space for an as yet undesignated cultural facility, would greatly enhance the setting for Arena Stage, which has its own plans for an exciting makeover.

For today's residents of nearby apartment buildings and townhouses, the changes should be, on balance, a big plus -- though anyone fond of the sleepy atmosphere may well resent the new busyness that change will bring.

Ironically, this bold restructuring was made possible by one of the biggest of the mistakes made by the urban renewers decades ago. They thought the main idea was to make sure there was plenty of room for cars. Thus, they laid out two parallel streets -- wide Maine Avenue and wide Water Street, with parking lots in between.

To be sure, the plan does work for cars. Access to and from the freeway and the 14th Street bridges is a snap and, except at the fish market, parking is always easy to find. It's as if the planners actually wanted to keep nearby residents away from the waterside or, more likely, expected them to use their cars to get there.

All in all, the 1960s waterfront layout, a key part of the Southwest Urban Renewal Plan, amounted to a catalogue of errors that have long needed correcting.

Those long, low buildings placed in a row along the waterfront act more as barriers than allurements.

The architecture is banal, at best, from the early Pizza Hut profile of the Capital Yacht Club in the north to the dull motel modernism of the Channel Inn in the south. Paint jobs and quick fixes of the other buildings have done little to improve their warehouselike exteriors.

The public spaces are equally nondescript. Hard-surfaced, with mere dollops of shade and a few well-intentioned nautical implements (anchors, ship's bells and the like) for local color, the rectangular parks between the buildings are, not surprisingly, unpopulated most of the time.

Sadder still is the waterfront esplanade. Intended as a grand public promenade, it turned out to be a forbidding, narrow walkway.

On the waterside, fences with locked gates separate walkers from the water and the boating piers of the channel marinas. On the land side, a concrete wall closes off access to the restaurants. A row of waterside trees is but a sorry reminder of good intentions gone amiss.

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 greatly improved if people were to live, work and play in zones that are separate and distinct. The Southwest waterfront is a testament to that idea.

By contrast, the city's waterfront initiative pursues an opposite, older urban ideal of mixed-used, interconnected neighborhoods. How well it fulfills these noble intentions remains to be seen, but the ideas are fundamentally sound.

"Yesteryear's mistake is today's opportunity" would be a good motto for the plan. All that "wasted" space, as Altman rightly calls the redundant roads and surface parking, can be adapted for useful purposes -- namely to put up buildings people can live in and to shape new spaces for them to play in.

As a result, not only will the new Southwest waterfront provide lots of homes where there are none, it'll also dramatically increase space for public parks, almost tripling the area from five to 14 acres.

At the same time, it'll significantly reduce surfaces covered by paving from 42 percent of the total area to about 20 percent. Not incidentally, there will be a lot more parking than now exists, but most of it will be underneath new buildings.

The Gazette (Montreal, Quebec)

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 found that side air bags with head protection reduce the fatality rate by about 45 per cent in passenger cars struck on the driver's side. Air bags that feature torso protection only were also shown to significantly reduce fatalities, in this case by about 11 per cent.

The Straits Times (Singapore)

November 29, 2003 Saturday

SECTION: World

LENGTH: 508 words

HEADLINE: Road deaths a growing global threat;
Traffic accidents set to overtake major diseases to become the third leading cause of death and disability, says WHO

BYLINE: William Choong

BODY:

ROAD traffic accidents are a growing global problem and could overtake malaria, tuberculosis and Aids as a leading cause of death in just over a decade, the World Health Organisation (WHO) has warned.

Worldwide, the economic costs resulting from such injuries are estimated to amount to US \$518 billion (S\$896 billion) a year - which works out to six times Singapore's annual economic output.

Road traffic accidents are now the ninth leading cause of death and disability in the world.

But by 2020, they could become the world's third leading cause of death and disability after heart disease and depression, said WHO in a recent report.

According to the latest figures available, an estimated 1.26 million people worldwide died in 2000 as a result of road accident injuries.

A 1999 WHO report stated that the world's top two causes of death and disability were lower respiratory infections and HIV/Aids. But road accidents are fast gaining on diseases as a cause of death.

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 urgent action at the national and international levels.'

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.

'It's going to be a bigger World Health Day than usual because of the magnitude of the issue,' Dr Etienne Krug, director of WHO's department for injuries and violence prevention, told the New York Times.

Across the world, a clear trend is emerging: road fatality rates in developed nations are falling while fatality rates in developing countries are heading north.

The death rate from traffic accidents in the United States, for example, fell to 1.51 deaths per 100 million miles (160 million km) travelled last year, from 1.58 deaths in 1998 and 4.8 in 1970.

Australia's death rate fell from 7.13 in 1971 to 1.45 in 2001, according to the Organisation for Economic Co-operation and Development, a grouping of industrialised countries.

WHO gave no specific figures for developing countries but it noted that South-east Asia had the highest proportion of road fatalities.

The region accounted for 435,000 deaths, or a third of the global total in 2000.

No figures were given for Singapore, but according to recent statistics provided by the Singapore Police Force, Singapore's roads are among the safest worldwide.

Its accident fatality rate was 4.7 per 100,000 population in 2001, compared with 6.1 in Britain, 7.9 in Japan and nine in Australia.

Other findings from the WHO report:

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

July 21, 2004 Wednesday Final Edition

SECTION: City; Pg. C4

LENGTH: 175 words

HEADLINE: No-shows cost us money

SOURCE: The Ottawa Citizen

BYLINE: Nancy A. Clevette, MD

BODY:

Re: No-show blues, July 14.

I read with interest the problems restaurants are having with individuals making reservations and then not turning up. I empathize with the restaurateurs because physicians and other professionals who do business by appointment have the same problem. Making a reservation or appointment is in effect making a commitment to the business; it is poor manners to fail to meet this commitment without calling to cancel. More important, the public often is unaware that the business (or professional) cannot be reimbursed for lost time caused by no shows and loses money every time it happens.

I see about 30 patients a day and some days I may have three or more no-shows, so I suffer a 10-per-cent (significant) loss of gross income. These "no-shows" rob other patients of the opportunity of being seen when they are ill. The most aggravating situation is when the last patient of the day fails to show up, which leaves me sitting and wondering if I can go home to my family or not.

Nancy A. Clevette, MD,

Ottawa

Nunberg PediaLean Attachment B

Page 45

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 customers to smoke in one of his pubs has succeeded in his application for a series of special exemptions for another premises.

Mr Ronan Lawless, proprietor of five licensed premises around Galway city, including Fibber Magees in Eyre Square, was ordered to appear before Spiddal District Court in Galway yesterday by Judge Mary Fahy in relation to an application for special exemptions for another pub, Fox's of Forster Street.

Judge Fahy had granted the 10 special exemptions for late licences for Fox's between 12.30 a.m. and 2 a.m. from July 10th to August 29th at the morning sitting of Galway District Court on Wednesday last. However, when she learned that Mr Lawless was refusing to comply with the smoking ban in Fibber Magees, she revoked the exemptions and ordered him to appear before her.

She granted the exemptions yesterday when Mr Lawless gave an undertaking that he would comply with all of the provisions of the Act.

Meanwhile, Mr Lawless has closed the doors of Fibber Magees pub in Eyre Square indefinitely 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 Cork city and another in Cobh that they would obey the smoking directive after being warned by Environmental Health Officers that they faced legal action. Mr Gareth Kendellen, who owns Paddy The Farmers on Old Blackrock Road and had defied the smoking ban on Thursday, said yesterday that he had no choice but to reintroduce the ban after being advised by his solicitors that he should obey the smoking directive.

Meanwhile, a report commissioned by Dublin publicans claims that 2,000 jobs have been lost in the trade since the introduction of the smoking ban. The report said drink sales in the city were down by 16 per cent and employment in the sector down 14 per cent. Marketing research company, Behaviour and Attitudes, surveyed 277 pub owners and managers in recent weeks by telephone.

Ciaran Tierney adds: Businesses located on the east side of Galway's Eyre Square have reported a substantial loss of trade because of construction work. Businesses have reported a drop of between 30 per cent and 40 per cent in turnover while digging to allow pipes to be laid goes on.

Star News (Wilmington NC)

August 17, 2004, Tuesday

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

LENGTH: 425 words

HEADLINE: Storm ravages area corps; 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 to \$ 1.5 million loss.

Tobacco stalks were plowed flat or stripped of their yellow-green leaves throughout the region, though some fields remained perfectly fine.

Other crops suffered flood or wind damage. As Pender County Extension Director Wayne Batten walked through muddy, wind-damaged tobacco fields Monday afternoon, he said the loss was going to be hard for farmers to swallow.

"We actually were looking at an excellent crop throughout the region until this weekend," he said of a forecast calling for a high-yield, high-market-value year. "Then something like this comes through."

Shirley Blanton, Pender/New Hanover County Farm Service Agency director, estimated a 35 percent loss of the tobacco crop, 35 percent loss of the corn crop, a 25 percent loss of the cotton crop and a 20 percent loss of the soybean crop in both counties.

"It could be higher," she said.

Mr. Batten stopped in to talk to tobacco farmers in the area about the possibility of using about 100 inmates for a week to straighten the stalks of tobacco.

"It's a temporary fix," he said, indicating it would just enough to reduce further damage and allow farmers to get into the fields to mechanically harvest the crop.

But the county would first have to be declared a disaster area by Gov. Mike Easley before the inmate population could be used to help farmers. No announcement came by 5 p.m. Monday.

Low-interest loans also could be offered through county farm offices if a declaration is made.

Al Hight, agriculture extension for Brunswick County, said it wouldn't much help his farmers.

"There's some significant loss out there," he said, estimating that 30 percent to 50 percent of the tobacco crop has been destroyed.

Copley News Service

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 Formosa Plastics plant have not yet been able to get into the most severely damaged area due to structural instability and the possibility that dangerous chemicals are still present.

Stephen Wallace, lead investigator for the U.S. Chemical Safety and Hazard Investigation Board, estimated it would be at least the end of the month before they can get into the area where the explosion occurred.

"We have been into the peripheral areas," he said Thursday. "We have not yet been able to get into that specific unit. There are safety concerns with the structural integrity of the building because of the damage of the explosion and residual toxic material in the area."

Four workers were killed in the blast, a fifth died later of his injuries and another remains hospitalized.

Rob Thibault, manager of corporate communications for Formosa, said company officials and the Occupational Safety and Health Administration are working on a plan to get investigators into the blast area. That might require shoring up the property, he said.

"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.

Wallace said he does not believe that anything done to shore up the property will harm forensic evidence at the site. He said OSHA's structural engineer will make sure there is a safe pathway into the area of the explosion and that OSHA will look for residual vinyl chloride to determine what safety measures investigators must take.

While they are unable to work in the blast area itself, investigators are focusing on interviewing Formosa employees, eyewitnesses and are requesting paperwork from Formosa.

"We asked for drawings of the facility so we can get familiar with it, documents to help us get familiar with the production process, specific equipment, the way it operated, problems they'd had with it in the past, previous incidents," Wallace said.

"The data we get from interviews is vital, when we talk to people who are eyewitnesses who can tell us what happened that led up to it. There can be a disconnect between what's on paper and what happens in the plant, though I'm not predicting that's what happened."

Wallace estimated that the investigation may take up to a year, but if the chemical safety board is unable to get into the blast area, it could take even longer.

"Our mission is to discover the root causes of the explosion and to make recommendations," he said. "We will look for the specific cause of the explosion, the cause of the release of material and if any safety systems that did not function and what may have caused them not to function. We will look for equipment that broke and why it broke.

"We don't just want to fix the problem, but find out why it occurred."

Also, Wednesday night, two Springfield residents with a firm called Opportunity Alliance LLC made a presentation to the Logan County Regional Planning Commission asking that the panel consider expanding that county's enterprise zone to include the Formosa site.

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.

Thibault said Formosa hired Opportunity Alliance before the explosion in an effort to make the 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, too.

McClure said Formosa is looking at a situation now where there would be a significant amount of reinvestment, and that a sales tax break on new materials could be beneficial. Wednesday's meeting with Logan County officials was a first step in a long process, he said.

"Formosa is a multi-national corporation. We need to put our best foot forward in keeping them. In the last five years, Sangamon County has lost 21 percent of its manufacturing jobs, and that's a significant loss," he said, quoting chamber of commerce statistic.

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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

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Press Enterprise (Riverside, CA)

February 10, 2004, Tuesday

SECTION: LOCAL; Pg. B03

LENGTH: 328 words

HEADLINE: School district considers asking for financial help;

MENIFEE: Trustees will vote on whether to seek waivers for absences due to the wildfires.

BYLINE: IOANA PATRINGENARU; THE PRESS-ENTERPRISE

BODY:

MENIFEE

School district officials want to ask the state for financial help after many students missed school because of wildfires and a flu epidemic.

School board members will vote tonight on whether to ask the state for attendance waivers, which would bring the Meniffee Union School District an extra \$ 27,000, district officials said.

Trustee Patricia Hanson said Monday that she supported the idea, as long as the state will allow it.

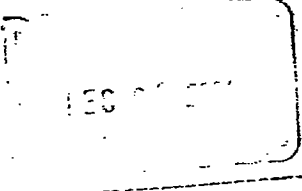
"It's hard with the state. Sometimes they say yes; sometimes they say no," she said by phone.

California schools receive most of their funds based on the average number of students attending school every day. Meniffee Union receives a little more than \$ 25 per student per day, said Pam Gillette, director of fiscal services. If the waivers are approved, the state would fund Meniffee schools based on a projected number of students, rather than the actual number of children who attended school on certain days. The estimated

number is based on attendance before the fires and flu epidemic, Assistant Superintendent Dan Wood said by phone.

Many students in October and December stayed home because of 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



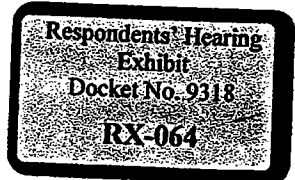
**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

_____)
In the Matter of)
)
BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NURTASPORT, 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

Expert Report of Michael B. Mazis, Ph.D.

October/ 2004



LMS00701

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 Dermalin-APg, Sovage Tummy Flattening Gel, Cutting Gel, Anorex, Leptoprin, and PediaLean. My anticipated testimony will focus on a facial analysis of respondents' advertisements in newspapers and tabloids, in magazines, in television and radio commercials, on Internet websites, and on product labels. A summary of my qualifications and anticipated testimony follows.

SUMMARY OF QUALIFICATIONS AND EXPERIENCE

Credentials and Expertise

2. I am a Professor of Marketing at the Kogod School of Business, American University. I have been a faculty member at American University for 25 years, serving over 10 years as chair of the Department of Marketing. During my teaching career at American University, I have taught undergraduate and graduate marketing courses, including courses in consumer behavior, marketing research, principles of marketing, marketing management, and Internet marketing. Attached to this report is a current copy of my curriculum vitae, which contains a complete description of my professional background. (See Appendix A.)
3. I received my B.S. degree in Economics from the University of Pennsylvania, my M.B.A. degree from New York University, and my Ph.D. degree in Business Administration from Pennsylvania State University.
4. From 1976 to 1979, I served as an in-house marketing expert at the Food and

Drug Administration ("FDA") and at the FTC. I have served as a consultant on advertising issues and consumer behavior for the FTC, FDA, Consumer Product Safety Commission, Department of Justice, U. S. Mint, Bureau of Alcohol, Tobacco, and Firearms, and the State of California. (See Appendix B for a list of cases in which I have testified.)

5. I have also worked as a marketing research analyst for the Warner-Lambert Pharmaceutical Company. In this position, I designed marketing research surveys and focus group studies.
6. I am a member of the American Marketing Association and a member and former director of the Association for Consumer Research. I was editor of the *Journal of Public Policy & Marketing* from 1992 to 1995, and I was Associate Editor of *The Journal of Consumer Affairs* from 1998 to 2001.
7. I have published over 60 articles in academic journals and conference proceedings. My research has been published in the *Journal of Marketing*, *Journal of Consumer Research*, *Journal of Marketing Research*, *Journal of Public Policy & Marketing*, *The Journal of Consumer Affairs*, *Journal of Personality and Social Psychology*, *Journal of Experimental Social Psychology*, and *Journal of the American Medical Association*. I was principal investigator on a three-year grant from the National Institute on Alcohol Abuse and Alcoholism to study consumer perception of alcohol warning labels. In addition, I have spoken on designing consumer perception surveys at conferences sponsored by the American Marketing Association, American Bar Association, and Better Business Bureaus (National Advertising Division).

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 supplied 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.

Compensation

10. For my work in this case, I am being paid \$200 per hour.

SUMMARY OF EXPERT OPINION

11. The facial analysis that I have conducted is based on my knowledge, experience, and training in understanding consumer perceptions of advertising and product labels. I have also relied on the psychological research conducted on pragmatic implications. Pragmatic implications occur when statements in an advertisement strongly suggest something that is not explicitly asserted. In the advertising disseminated by respondents, I have found numerous examples of claims that are not directly asserted but that are communicated to consumers because they are strongly implied. Such pragmatic implications occur because many of the advertisements include strong efficacy statements, reports of clinical testing, vivid

visual images, discussions about the high prices charged, and evocative product names.

12. The facial analysis focused on three product categories: topical products, weight-loss products for adults, and weight-loss products for children. The facial analysis of advertising for the topical products (Dermalin-APg, 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 products are applied. Ads for these products include statements such as "watch them [waist and abdomen] shrink in size within a matter of days," "fat literally melts away," "penetrating gel for visible reduction of surface body fat," "targeted fat loss," and "spot-reducing gel." Also, the names Cutting Gel and Tummy Flattening Gel strongly suggest that use of the products produces visibly obvious fat loss. Moreover, the use of visual images, such as slim models and models with well-defined muscles, further strengthens the verbal statements made in the advertising. In addition, phrases such as "a double-blind clinical trial" and "clinically proven," strongly suggest to consumers that claims in the ads are supported by published, clinical testing.
13. The facial analysis of advertising for Leptoprin and Anorex found that ads for these products strongly implied that product use results in substantial weight loss and fat loss in significantly overweight adult users. Ads stated that these products were developed for "significantly overweight" individuals who need to lose at least 20 or 30 pounds. Ads also provided reports from testimonialists who reported losing between 31 and 216 pounds using Leptoprin. Retail brochures

also strongly suggest that diet and exercise are unnecessary for the products to achieve 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 facial analysis of ads for PediaLean revealed that ads for PediaLean strongly imply that the product causes substantial weight loss in overweight or obese children. Ads promise “hope for you and your overweight child.” The advertising for PediaLean also communicates to consumers that clinical testing proves that that PediaLean causes substantial weight loss in overweight or obese children

FACIAL ANALYSIS OF ADVERTISING

Advertising for Topical Products

15. Advertisements for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel strongly imply that using these products cause (1) rapid fat loss, (2) visibly obvious fat loss, and (3) rapid and visibly obvious fat loss in the areas to which the topical product is applied. These representations are made through efficacy statements (“penetrating gel emulsifies fat on contact” and “goes to work directly on your abs, biceps, glutes, pecs, or anywhere else you rub it in”), statements about clinical testing (“clinically proven” and “double-blind clinical trial”), and through visual images (slim models with flat abdomens and muscular models with well-defined muscles).

Rapid Fat Loss

16. Advertisements for Dermalin-APg strongly imply that using the product results in rapid fat loss. For example, ads state that the “Penetrating Gel Emulsifies Fat

on Contact.” Moreover, ads state “Just apply Dermalin-APg’s transdermal gel to your waist and tummy and watch them shrink in size within a matter of days.” In 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 produce a base formula that would enable it to “work quickly on all parts of the body.” The advertising strongly implies that the Dermalin-APg formulation enabled this “discovery” to work quickly on all parts of the body. Advertisements also describe a “scientific” experiment: “Put Dermalin-APg™ in a culture dish with fat cells and you can literally watch them deflate – similar to sticking a pin into a balloon.”¹ This description strongly implies that Dermalin-APg acts in a similar manner when applied topically; fat cells start to deflate instantly. In addition, a retail brochure contained a section of “frequently asked questions.” In answer to the question “When can I expect to see results?,” the brochure stated “You will begin to see an improvement within ten days. After 30 days, you can expect substantial results.”² Thus, there are numerous examples in ads for Dermalin-APg that consumers are likely to perceive as claims for rapid fat loss.

17. Advertisements for Cutting Gel make similar representations. Ads claim that Cutting Gel “dissolves stubborn body fat on contact” and “dissolves surface body fat on contact.” Further, ads maintain that as a result of using Cutting Gel “fat literally melts away.” In addition, ads assert that users will obtain the desired results in “about ten days.” Advertisements also state “Put Cutting Gel™ in a culture dish with fat cells and you can literally watch them deflate – similar to

¹ Statements mentioned in this paragraph appear in ads shown in Exhibit A and Exhibit B to FTC Complaint

² R0012259

sticking a pin into a balloon.”³ As stated previously, this statement strongly 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.

18. 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, the cells deflate as they release their stored fat – very similar to the way a balloon deflates when stuck with a pin.” Such a description strongly implies that Tummy Flattening Gel, which contains Epidril, will start working quickly when applied topically. In addition, ads state that “...Epidril-containing gels have been proven to emulsify fat on contact...” and that users will “see dramatic, visible results in approximately 19 days.”⁴ As a result, consumers reading ads for Tummy Flattening Gel are likely to “take away” the message that using the product results in rapid fat loss.

Visibly Obvious Fat Loss

19. Advertisements for Dermalin-APg also strongly imply that use of the product leads to visibly obvious fat loss. Ads assert that the product “...reduces the accumulation of ‘age-related’ body fat around your waist and abdomen” and it “...not only helps reduce dimpled appearance of your cellulite-afflicted areas, but also has the distinct ability to actually reduce the size of ‘saddlebag’ thighs’.”⁵

³ Exhibit D to FTC Complaint

⁴ Exhibit F and Exhibit G to FTC Complaint

⁵ Exhibit A to FTC Complaint

Also, the Dermalin-APg package indicates that the product will “reduce appearance of problem area fat accumulation and visible cellulite deposits.”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 and exposes the toned muscle beneath!”⁹ Use of words such as “ripped” and “tighter” in conjunction with words such as abs, thighs, and glutes convey the impression to consumers that Cutting Gel reduces fat and such a reduction is visibly obvious.¹⁰ Of course, the names “Cutting Gel” and “Tummy Flattening Gel” strongly imply that the products produce visibly obvious effects. In addition, ads for Tummy Flattening Gel promise “dramatic, visible results in approximately 19 days” and refer to a “perfectly sculpted midsection.”¹¹ Also, the visual images shown in advertisements for the three topical products convey the impression that use of the products leads to visibly obvious fat loss. For example, slim female models are shown in the ads for Dermalin-APg and Tummy Flattening gel, and well-muscled male models and “tight” female models are shown in the ads for Cutting Gel. Consequently, consumers are likely to perceive that advertising for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel communicates that using the product will result in visibly obvious fat loss.

⁶ R0009252

⁷ Exhibit C to FTC Complaint

⁸ Exhibit D to FTC Complaint

⁹ R0006757

¹⁰ Exhibit D and Exhibit E to FTC Complaint

¹¹ Exhibit F to FTC Complaint

Visibly Obvious Spot Fat Loss

20. Advertisements for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel strongly imply that visibly obvious fat loss occurs in the areas to which the topical product is applied. For example, ads state that “Dermalin-APg™ permits you to spot reduce. Put it on your thighs – slimmer thighs.”¹² Other ads for Dermalin-APg assert “Finally! Targeted Fat Loss. Helps reduce deep-stored body fat wherever applied.”¹³ The Cutting Gel package directs users to “Focus on one targeted area at a time (i.e., abs, quads, triceps, etc.) until you achieve desired results” and suggests that users “...apply Cutting Gel™ topically, directly to the specific areas that need extra definition”¹⁴ Ads indicate that “Cutting Gel goes to work directly on your abs, biceps, glutes pecs, or anywhere else you rub it in.”¹⁵ Ads for Tummy Flattening Gel declare “This new, highly concentrated formula allows for precise, targeted delivery...making it the first true spot-reducing gel capable of effective reduction of dense abdominal fat.” Of course, the name “Tummy Flattening Gel” itself strongly suggests that the gel when applied to the abdominal area causes a reduction of “tummy” fat. Therefore, consumers are likely to perceive that ads for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel communicate that using these products will cause visibly obvious fat loss in the areas to which the products are applied.

¹² Exhibit A to FTC Complaint

¹³ R0009316

¹⁴ Exhibit C to FTC Complaint

¹⁵ Exhibit D to FTC Complaint

Clinical Testing

21. Ads for Cutting Gel claim that it is a “clinically proven, patented formula”¹⁶ and that “published clinical trials prove Cutting Gel’s™ power.”¹⁷ Ads for Tummy Flattening Gel mention that it is “clinically proven” and that its effects have been “verified by two published clinical trials.”¹⁸ As a result, 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’”

22. Many of the advertisements for Dermalin-APg, Cutting Gel, and Tummy Flattening Gel include a section entitled “So What’s The Catch?” or “The ‘Fine Print’” with “two caveats.” In the first part of the section, consumers are informed that the advertised product releases fat into the blood stream and that they have to “help” burn off the fat by increasing physical activity or decreasing caloric activity to prevent the fat from being redeposited. In the second part of the section, consumers are cautioned to avoid using the advertised product “all over your body at the same time” because there is “simply no way for your body to utilize all the newly released fat.”¹⁹
23. The relative lack of prominence and wording of these “caveats” are likely to have an impact on consumers’ processing of the message. First, the “caveats” are much less prominent than the provocative headlines – “Penetrating Gel Emulsifies

¹⁶ Exhibit E to FTC Complaint

¹⁷ R0006757 and R0006792

¹⁸ Exhibit F and Exhibit G to FTC Complaint

¹⁹ Exhibit A to FTC Complaint

Fat on Contact,” “Ripped Abs Ripped Pecs Ripped Glutes Ripped Everything,” and “Reduces Tummy Fat.” Consumers are much more likely to read the promotional messages than the “caveats.” Second, words such as “redeposited” and “help” used in the first “caveat” are confusing, and they are likely to be interpreted in multiple ways by consumers. For example, if consumers fail to exercise or reduce calorie intake, will the fat that is forced into the blood stream be “redeposited” in the same spot that the gel has been applied or will it be “redeposited” in other areas of the body? In addition, while increased physical activity and calorie reduction “help” to prevent fat from being “redeposited,” are such changes in behavior required for effective spot reduction? Respondents’ retail brochure indicates that Dermalin-APg will “work faster” with an increase in physical activity, a decrease in caloric intake, or a metabolism-enhancing dietary supplement.²⁰ Thus, consumers are likely to read this brochure and conclude that the advertised product will still be effective without additional physical activity and reduced calorie consumption. Finally, the second “caveat” conflicts, in part, with the first “caveat.” The first caveat appears designed to communicate to consumers a limitation on the potential effectiveness of the topical product by mentioning the benefits of increased physical activity and reduced caloric intake. However, the second “caveat” reinforces the products’ effectiveness by focusing on the idea that “there is simply no way for your body to deal with that much released fat.”²¹

²⁰ R0012259

²¹ Exhibit F to FTC Complaint

Advertising for Leptoprin and Anorex

Substantial Weight Loss in Significantly Overweight Users

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 developed for "significantly overweight" individuals 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 testimonials from individuals who claim to have lost 31 pounds, 38 pounds, 50 pounds, 60 pounds, 80 pounds, 147 pounds, and 216 pounds using Leptoprin.²³ The potency of Leptoprin and Anorex also has been extolled in statements such as "If you're one of those people who constantly worry about five or six vanity pounds, Leptoprin is not for you. Leptoprin is much too expensive and much too powerful for the casual dieter."²⁴ Moreover, because the name "Anorex" is similar to the word "anorexia," it is likely to communicate to consumers the idea of substantial weight loss. Also, consumer brochures for Leptoprin and Anorex suggests that diet and exercise are unnecessary to achieve the claimed results: "The clinical studies proving Leptoprin's (Anorex's) effectiveness were conducted without caloric restriction or an exercise regimen."²⁵ Therefore, ads for Leptoprin and Anorex likely communicate to consumers that use of the products results in substantial weight loss in significantly overweight users, even without dieting or exercise.

²² Exhibits H, I, and J to FTC Complaint and R0000224

²³ Exhibit H to FTC Complaint and R0012334-R0012346

²⁴ Exhibit H to FTC Complaint and R0012310

²⁵ R0029768 and R0006551

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 specifically to overcome your genetic predisposition.²⁶

The advertising goes on to state that Leptoprin (and Anorex) “dramatically interferes with the process of converting calories to fat,” that “it ‘mobilizes’ stored fat, moving it out of the fat cell and thereby reducing the size of the fat cell mass,” and that it “inhibits the creation of new fat cells.”²⁷ Thus, ads for Leptoprin and Anorex strongly imply that use of the products results in substantial fat loss in significantly overweight users.

Clinical Testing

26. The advertising for Leptoprin indicates that the weight loss and fat loss claims are supported by clinical testing. For example, a television commercial for Leptoprin trumpets that the product is “...backed by ...two published clinical trials”²⁸ In addition, a radio commercial describes the clinical studies in greater detail:

The first study that was done on it was actually published in the International Journal of Obesity and the second study was published in the Journal of The American College of Nutrition.²⁹

²⁶ Exhibit I and Exhibit J to FTC Complaint and R0012310 and R0000244

²⁷ *Ibid.*

²⁸ Exhibit H to FTC Complaint

²⁹ R0012336

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 published, clinical testing.

High Price

27. Advertising for Leptoprin and Anorex also highlight the products' high price (\$153 a bottle). Advertisements ask the question: "When is a diet pill worth \$153 a bottle?" The answers provided include: Because "Leptoprin is simply the most powerful, clinically proven weight control compound available"³⁰ and "When it works. Really works."³¹ This theme is echoed in other ads for Leptoprin and Anorex.³² High price is also emphasized in ads for Dermalin-APg: "At \$135.00 a jar it better be good..."³³ and "At that price, it better be good..."³⁴ Academic research has shown that consumers associate a higher prices with higher quality products.³⁵ Therefore, ads for Leptoprin, Anorex, and Dermalin-APg that refer to the high price are likely to reinforce consumers' perceptions about product efficacy.

³⁰ Exhibit H to FTC Complaint

³¹ R0012338 and R0012346

³² R0012310, R0012335, and R0000257

³³ Exhibit A and Exhibit B to FTC Complaint

³⁴ R0009252

³⁵ Akshay R. Rao and Kent B. Monroe, "The Effect of Price, Brand Name, and Store Name on Buyers' Perceptions of Product Quality: An Integrative Review," *Journal of Marketing Research*, Vol.26, August 1989, pp. 351-357.

Advertising for PediaLean

28. The advertisements for PediaLean strongly imply that product use leads to 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 overweight and obese school-aged children in the United States.”³⁶ Advertising also emphasizes that PediaLean resulted in “significant weight loss in virtually every child studied.”³⁷ In addition, the name “PediaLean” is likely to communicate to consumers the idea of substantial weight loss because most consumers are likely to associate “Pedia” with children and “Lean” with thin, slim, or slender. Therefore, the advertising and the product name suggest that overweight and obese children will lose an extensive amount of weight from using PediaLean.
29. Ads for PediaLean also indicate that “Children who used PediaLean along with a healthy, but not calorie-reduced diet and modest exercise lost an incredible 20% of their excess body weight.”³⁸ Many consumers have only rudimentary levels of numerical literacy,³⁹ and they would be unlikely to discern that the 20% refers to “excess body weight” (an unfamiliar term) rather than overall body weight (a more familiar term). Other ads for PediaLean provide more detail about the clinical study and supply a complex discussion of the study’s results. This

³⁶ Exhibit K and Exhibit L to FTC Complaint

³⁷ Exhibit L to FTC Complaint

³⁸ Exhibit K to FTC Complaint

³⁹ National Center for Educational Statistics. “Adult Literacy in America: Overview of 1992 Results,” 1992 at <http://nces.ed.gov/naal/resources/92results.asp>

discussion reports, for example, that "...children showed a drop of excess body weight from 51±16% to 41.3±15% ($p<0.0005$)."⁴⁰ Most consumers would be unable to decipher the meaning of the statistical information provided. The data presented are particularly confusing because the numbers are not expressed in pounds. Also likely confusing to consumers is the phrase "significant weight loss."⁴¹ Although the reported study may refer to a "statistically significant" weight loss, most consumers, who are unfamiliar with statistical concepts, would be likely to equate the "significant weight loss" described in the PediaLean ads with a substantial, extensive, or considerable weight loss.

30. Finally, ads for PediaLean refer to the clinical trial discussed above. The advertising includes phrases such as "clinically proven," "clinically proven safe and effective," "clinically proven solution," "published medical studies don't lie...clinically proven safe and effective," and "well-controlled double-blind clinical trial."⁴² Therefore, the advertising for PediaLean likely communicates to consumers that clinical testing proves that that PediaLean causes substantial weight loss in overweight or obese children.

⁴⁰ Exhibit L to FTC Complaint

⁴¹ Exhibit L to FTC Complaint

⁴² Exhibit K and Exhibit L to FTC Complaint

CONCLUSION

31. In conducting a facial analysis, it is important to assess the overall impression 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 a whole. In reaching my conclusions, I have relied, in part, on the psychological research on pragmatic implications. Pragmatic implications occur when statements strongly suggest something that is not explicitly asserted, thereby leading the person receiving the message (receiver) to make an inference. Pragmatic implications are likely to occur when a message is structured so as to lead the receiver to use information stored in memory in a manner that causes the receiver to make assumptions not expressly conveyed in the message.

For example, on hearing "The clumsy waiter dropped the delicate glass teacup," we may infer that the teacup broke but it may not in fact have done so.⁴³

Such inferences are common because people learn that language communicates far more than what is directly asserted by a communicator. However, pragmatic implications are more troubling in advertising. Sometimes advertisements do not directly assert a proposition, but such propositions may be pragmatically or strongly implied, thereby encouraging consumers to make inferences. Research has shown that there is little difference in consumers' processing of directly asserted (express) advertising claims and claims that are pragmatically implied.⁴⁴

⁴³ Richard Jackson Harris, Julia C. Pounds, Melissa J. Maiorelle, and Maria Mermis. "The Effect of Type of Claim, Gender, and Buying History on the Drawing of Pragmatic Inferences from Advertising Claims," *Journal of Consumer Psychology*, Vol. 2 (No. 1), 1993, p. 84.

⁴⁴ Richard J. Harris, "Comprehension of Pragmatic Implications in Advertising," *Journal of Applied Psychology*, Vol.62 (No. 5), 1977, pp. 603-608.

In my facial analysis of Basic Research's advertising, I provide numerous examples of claims that are not directly asserted but that are likely communicated to consumers because such claims are strongly implied. These pragmatic implications occur because many of respondents' advertisements include persuasive efficacy statements and testimonials, accounts of clinical tests, 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

ORDER TAKING OFFICIAL NOTICE OF CERTAIN TELEPHONE DIRECTORY LISTINGS

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, Texas telephone directories in the period 1969-77. Respondents have filed an answer in opposition.

At the outset it may be noted the authenticity of the directories is not in dispute. Nor can there be any question that the listings which complaint counsel request be noticed in fact appeared in the directories in question.

Respondents urge that the Commission's Rules of Practice do not provide for the taking of official notice of adjudicative facts. The short answer is that 3.43(d) of the Commission's Rules does provide that initial or Commission decisions may rest upon facts officially noticed provided there is opportunity to disprove the noticed facts. Respondents further argue that official notice should not be taken because they would be deprived of cross-examination of the telephone company employees preparing the directories, and further that this procedure would unfairly shift the burden of proof. In addition, they urge that the motion should be denied because if such official notice [*2] were granted their defense would require time consuming discovery leading to delay.

Rule 803 of the Federal Rules of Evidence entitled "Hearsay Exceptions; Availability of Declarant Immaterial" n1/ provides that certain materials are not excluded by the hearsay rule even though the declarant is available as a witness. Among the exceptions are:

n1/ The Federal Rules of Evidence while not controlling in FTC proceedings frequently provide a useful guide to the resolution of evidentiary problems.

"(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."

The basis of trustworthiness underlying the rule is general reliance by the public or by a particular segment of it on such publications and the motivation of the compiler to foster reliance by being accurate. Weinstein's Evidence 803-49. The public generally uses and relies upon such directories in making use of the telephone. n2/ The material is accordingly within the exception of Rule 803(17) and the taking of official notice of such facts does not [*3] deprive respondents of their right to cross-examine.

n2/ Courts admitting such evidence have noted that "Telephone directories... are semipublic documents" and that such directories are constantly consulted [with] "Reliance... generally placed thereon" State v.

McInerney, 182 P.2d 28, 34 (Wyo. 1947); see also In re Gilbert's Estate, 13 A.2d 111, 115 (N.J. 1940); Peoples Nat. Bank v. Manos Brothers, 84 S.E.2d 857 (S.C. 1954); Williams v. Campbell Soup Co., 80 F. Supp. 865, 868 (W.D. Mo. 1948); Harris v. Beech Aircraft Corporation, 248 F. Supp. 599, 601 (E.D. Tenn. 1965).

Nor does this procedure unfairly shift the burden of proof. Respondents are in the best position to rebut the facts noticed or the inferences which may be drawn therefrom. If, in fact, some of the listings were in error, respondents should be able to demonstrate that fact. Moreover, respondents, not telephone company officials, have command of the facts which may be introduced to rebut the inferences to be drawn from such listings. Finally, if, in fact, the listings in question did contain errors then respondents should be able to document their efforts to obtain corrections [*4] if such efforts were made. Under the circumstances, there is no need for time consuming discovery from telephone company officials or employees as respondents contend. Accordingly.

IT IS ORDERED that complaint counsel's motion to take official notice filed April 17, 1978, be, and it hereby is, granted.

Service: **Get by LEXSEE®**

Citation: **1978 FTC LEXIS 375**

View: Full

Date/Time: Tuesday, November 22, 2005 - 7:11 PM EST

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EXHIBIT D



SUBPOENA DUCES TECUM

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

1. TO Geoffrey Nunberg, Ph.D.
Department of Linguistics
Stanford University
Center for the Study of Language
and Information - Ventura Hall
Stanford, CA 94305

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION

ESQUIRE DEPOSITION SERVICES
1020 19th Street, N.W. - Suite 620
Washington, D.C. 20036

4. MATERIAL WILL BE PRODUCED TO

FeldmanGale, P.A.

5. DATE AND TIME OF PRODUCTION OR INSPECTION

Friday, November 19, 2004
10:00 A.M.

6. SUBJECT OF PROCEEDING

In the Matter of Basic Research, LLC, et. al., Docket No. 9318

7. MATERIAL TO BE PRODUCED

SEE EXHIBIT A ATTACHED HERETO

8. ADMINISTRATIVE LAW JUDGE

The Honorable Stephen J. McGuire

Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA

FeldmanGale, P.A.
201 South Biscayne Boulevard - Suite 1920
Miami, Florida 33131

DATE ISSUED

10/12/2004

SECRETARY'S SIGNATURE

Donald S. Clark

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

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 individually or with others, or to which you have contributed regarding the following:
 - a. Obesity
 - b. Weight loss
 - c. Fat loss
 - d. The Federal Trade Commission
 - e. Clinical trial protocols or procedures
 - f. FTC advertising rules or regulations
 - g. The definition of "competent and reliable scientific evidence"
 - h. Dietary supplements
 - i. Weight loss or fat loss advertising
 - j. The study of linguistics in relation to advertising and marketing
10. All documents relating to lectures, speeches or testimony that you have given relating to:
 - j. Obesity
 - k. Weight loss
 - l. Fat loss
 - m. The Federal Trade Commission
 - n. Clinical trial protocols or procedures
 - o. FTC advertising rules or regulations
 - p. The definition of "competent and reliable scientific evidence"
 - q. Dietary supplements

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

11. All documents relating to research, tests and/or medical or clinical studies that you have conducted or contributed to or participated in relating to or involving:

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

12. All documents relating to patents and patent applications (whether or not published or pending review by the U.S. Patent and Trademark Office) in which you are named as the inventor or patent owner or assignee of any invention relating to:

- a. Obesity
- b. Weight loss
- c. Fat loss
- d. Dietary Supplements
- e. Linguistics

13. All documents relating to lawsuits, whether criminal or civil, in which you were named as a party.

14. All documents pertaining to work that you have performed for any company that manufactures, markets or sells pharmaceuticals or dietary supplements relating to

- a. obesity
- b. weight loss
- c. fat loss

15. All documents reflecting compensation that you have earned from any company that manufactures, markets or sells pharmaceuticals or dietary supplements relating to

- a. obesity
- b. weight loss
- c. fat loss

16. All documents relating to weight loss or fat loss advertisements that you have authored, reviewed or approved or were asked to review or approve.

17. All documents relating to requests for approval that you have made to the FDA, FTC or any other regulatory body, either on behalf of yourself or a third party, relating to advertising or package labeling claims that you sought to make in relation to any dietary supplement including but not limited to weight loss or fat loss dietary supplement products.

18. All documents relating to efforts by you, either on behalf of yourself or third parties, to justify or substantiate advertising claims made in relation to any weight or fat loss product including but not limited to pharmaceutical products or dietary supplements.

19. All documents pertaining to work that you have performed for the Federal Trade Commission, the Food and Drug Administration or any other federal agency, whether as an expert, consultant or in any other capacity, relating to:

- a. obesity
- b. weight loss
- c. fat loss
- d. clinical trial protocols or procedures
- e. FTC advertising rules or regulations
- f. The definition or meaning of "competent and reliable scientific evidence"
- g. Dietary supplements
- h. Weight loss or fat loss advertising

20. All documents relating to your any analysis that you conducted of the Challenged Ads.

21. All documents which support your definition of the terms "rapid", "substantial", "visibly obvious", and "causes" as those terms are used in the FTC's complaint in this matter.

22. All documents relating to consumer tests, copy tests, penetration studies, focus groups or similar research that you conducted, directed, supervised or assisted in connection with this matter.

23. All scientific and/or medical testing protocols or guidelines that you have authored.

24. All scientific and/or medical testing protocols on which you have provided comments including your comments.

Definitions and Instructions:

"This matter" shall refer to the Complaint filed by the Federal Trade Commission against Respondents Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker usa, LLC, Nutrasport, LLC, Söavage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, Daniel B. Mowrey, Ph.D and Mitchell K. Friedlander, Docket No. 9318.

"Challenged Ads" shall refer to the advertisements identified in Complaint Counsel's Complaint.

“Challenged products” shall refer to Dermalin-APg™, Cutting Gel™, Söväge Tummy Flattening Gel™, Leptoprin™, Anorex™ and PediaLean™.

“Dietary Supplement” shall mean a product (other than tobacco) intended to supplement the diet that bears or contains vitamins; minerals; herbs or other botanicals; amino acids; dietary substance used to supplement the diet by increasing the total dietary intake; or a concentrate, metabolite, constituent, extract; or combination of any of the above listed ingredients.

Unless otherwise specified in the particular request below, each request should be construed to include materials from January 1, 1995 through the present.

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,

DENNIS GAY,
individually and as an officer of the
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:

GEOFFREY D. NUNBERG, PH.D.,

a witness, called for examination by counsel for the
Respondents, pursuant to Notice, at the offices of Esquire
Deposition Services, 1020 Nineteenth Street, Northwest,

Respondents' Hearing
Exhibit
Docket No. 9318
RX-037

Suite 620, Washington, D.C. 20036, commencing at 10:04 a.m.,
there being present on behalf of the respective parties:

APPEARANCES:

ON BEHALF OF FEDERAL TRADE COMMISSION:

ROBIN M. RICHARDSON, ESQ.
LAUREEN KAPIN, ESQ.
Division of Enforcement
Federal Trade Commission
Bureau of Consumer Protection
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 920
Salt Lake City, UT 84111-2311
Telephone: 801.355.6677
Facsimile: 801.355.2341

ON BEHALF OF RESPONDENT MOWREY:

RONALD F. PRICE, ESQ.
Peters Scofield Price
340 Broadway Centre I
111 East Broadway
Salt Lake City, UT 84111
Telephone: 801.322.2002
Facsimile: 801.322.2003

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

ALSO PRESENT:

REBECCA HUGHES

Student Intern

Federal Trade Commission

ZACH MABLE

Student Intern

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

NUNBERG'S	DESCRIPTION	PAGE
No. 1	Subpoena Duces Tecum	7
No. 2	Expert Report of Geoffrey Nunberg	12

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

2 Whereupon,

3 GEOFFREY D. NUNBERG, PH.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 MR. SHELBY: 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 that we have two students with us today. Would you

18 introduce yourselves?

19 MS. HUGHES: Rebecca Hughes.

20 MR. MABLE: Zach Mable.

21 MR. PRICE: Ron Price representing

22 Respondent Dan Mowrey.

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?

7 A. Geoffrey, G-E-O-F-F-R-E-Y, Nunberg,
8 N-U-N-B-E-R-G.

9 Q. Where do you live?

10 A. In San Francisco.

11 Q. What is your address there?

12 A. It is 370 Fair Oaks Street.

13 Q. And your phone number?

14 A. It is (415) 285-2822.

15 Q. Is that a home--?

16 A. That is a home phone.

17 Q. Do you have any intention of moving any time
18 soon?

19 A. No.

20 Q. You brought with you this morning, and have
21 given to me before the deposition, a packet of
22 materials. Is this the complete file that you

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
8 reporter to mark this as Exhibit 1, please.

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

1 Exhibit 1 is going to consist of the Subpoena Duces
2 Tecum and Exhibit A.

3 BY MR. SHELBY:

4 Q. Mr. Nunberg, have you seen this before?

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
9 subpoena addressed to me.

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
19 with you today; is that right?

20 A. Yes.

21 Q. Number one was your complete file related to
22 this matter. That is what you had given to me earlier

1 before this deposition?

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 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 was involved?

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?

19 A. No.

20 Q. Are all notes that you created or prepared
21 in connection with your work in this case included in
22 the materials that you provided?

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
9 morning?

10 A. No, apart from dictionary definitions that I
11 cited in the report.

12 Q. All the dictionary definitions that you
13 cited are -- excuse me, all the dictionary definitions
14 that you referenced are cited in your report?

15 A. Yes.

16 Q. Did you produce anything this morning
17 responsive to numbers 10 -- excuse me, 9, 10, 11 or 12
18 on this exhibit?

19 A. (Perusing) No, not this morning. I don't
20 know what the story is on the patents. I didn't have
21 the patents. My understanding in conversations with
22 Laura Schneider is that she offered to give you the

1 two patents that were online, and you said that you
2 had them already. I didn't produce those.

3 Q. Okay. There are some patents that you have
4 that you didn't bring with you. But, are there any
5 other documents that you have or have reviewed that
6 would be responsive to Request No. 9, 10, 11 or 12?

7 A. No.

8 Q. Are there any documents in your possession
9 that would be responsive to Request No. 13, 14 or 15?

10 A. No.

11 Q. Sixteen?

12 A. None other than what I have provided to you.

13 Q. Okay. Seventeen or eighteen?

14 A. No.

15 Q. Do you have in your possession any documents
16 that would be responsive to Question No. 19?

17 A. No.

18 Q. And all of the documents responsive to
19 number 20 are included in the materials you have given
20 us this morning?

21 A. Yes.

22 Q. I gather with respect to Question No. 21 you

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
19 Deposition Exhibit No. 2, was
20 marked for identification.)

21 MS. KAPIN: Rob, just as a clarification,
22 the conversation about the patents took place between

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. Can we just
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 (The witness perused the document.)

6 BY MR. SHELBY:

7 Q. Have you had an opportunity to review that
8 now?

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 paragraph four where I state I reserve the right to
17 supplement, revise or further explain the opinions of
18 this report.

19 Q. As we sit here today, do you have any
20 intention to receive or review any additional
21 information in this case?

22 A. There is no information, particular

1 information, that I have any intention of receiving or
2 reviewing.

3 Q. As we sit here today, do you have any
4 intention of supplementing this report in any way?

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
14 all of the opinions that you currently hold in this
15 case, and all of those opinions are included in this
16 report?

17 A. Yes.

18 Q. Did you review the complaint in this case at
19 some point?

20 A. Yes.

21 Q. A copy of that, I think, was included in the
22 materials that you gave us this morning?

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 BY MR. SHELBY:

10 Q. I would like to go back to Exhibit No. 1 for
11 a moment, if I may, Part A. We were looking at that
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 MS. RICHARDSON: Objection. That was
20 actually asked and answered. When he answered it
21 previously, he indicated the he didn't include
22 dictionary definitions.

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
16 give this copy of your file to a copy service to make
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?

2 MR. SHELBY: We would be happy to do that,
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 p.m., signature having
9 not been waived, the deposition was adjourned.)

10 * * *

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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 foregoing deposition was duly sworn by me; that 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, nor financially or otherwise interested in the outcome of the action.

Notary Public in and for the
District of Columbia

My Commission Expires:

June 29, 2008

Robin M. Richardson, Esq.
Division of Enforcement
Federal Trade Commission
Bureau of Consumer Protection
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: 202.326.2798

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

Dear Ms. Richardson:

Enclosed please find your copy of the deposition of Geoffrey D. Nunberg, Ph.D., along with the original signature page. As agreed, you will be responsible for contacting the witness regarding reading and signing the transcript.

Within 30 days of receipt, please forward errata sheet and original signature page signed to counsel for Respondent Dennis Gay, Robert J. Shelby. If you would like to change this procedure, or, if you have any questions, please do not hesitate to call.

Thank you.

Sincerely yours,

Oveda V. Hancock
Reporter/Notary Public

ERRATA SHEET

Case Name: Federal Trade Commission v.
Basic Research, Et Al

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

Deposition Date: Friday, November 19, 2004

Job No.: 682570

Page No.	Line No.	Correction	Reason For Correction
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EXHIBIT F

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. A copy of my curriculum vitae, which includes a complete list of my publications, is attached as Exhibit A. It includes a list of cases in which I provided expert witness consulting services. I am being compensated at the rate of \$500 per hour.
2. I hold a Ph.D. in Marketing and a Master's degree in Business Administration (MBA) from the University of California at Berkeley, Haas School of Business, and a Bachelor's degree in Economics from Stanford University.
3. My field of expertise is consumer behavior, marketing and advertising management, survey methods, and decision making. Most of my research has focused on consumer decision making and choice, marketing strategies, and methodology issues.
4. I have received several awards, including (a) the 2001 Early Career Contribution Award from the Society for Consumer Psychology – Sheth Foundation, which is given annually to the most productive young scholar in the field of consumer behavior/marketing, (b) the 2001 O'Dell Award, given to the Journal of Marketing Research (the major journal on marketing research issues) article that has had the greatest impact on the marketing field in the previous five years, and (c) a finalist for the 2002 O'Dell Award.
5. I currently serve as an Associate Editor at the Journal of Consumer Research (the major journal on consumer behavior research). In this capacity, I review many papers and help determine whether they are acceptable for publication. I also serve on the editorial review boards at the Journal of Marketing Research, Journal of Marketing and Marketing Letters.

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 conducting research projects. A second course dealt with buyer behavior, covering such topics as buyer decision making processes, influences on purchase decisions, and persuasion.
7. After completing my undergraduate studies and before starting the MBA program, I worked for two years as an Assistant Buyer for a major retail chain.
8. I was asked by counsel representing Basic Research LLC to evaluate the Expert Report of Dr. Geoffrey Nunberg. Dr. Nunberg was asked by the Federal Trade Commission (FTC) to consider whether Basic Research LLC et al. used language in its advertisements for PediaLean that would deceive consumers. In my report, I rely on well-established principles of consumer behavior and advertising research to evaluate the methodology used by Dr. Nunberg and the conclusions that he reached.
9. As I continue to receive and review additional information, I reserve the right to supplement, revise, or further explain the opinions contained in this report.

II. Summary of Conclusions

10. I disagree with the methods used and the conclusions drawn by Dr. Nunberg in his Expert Report. First and foremost, Dr. Nunberg uses lexical analysis to attempt to determine what consumers might think about advertisements for PediaLean. In particular, he uses this method to examine what the word “significant” means by looking at how this word has been used in newspaper articles. However, Dr. Nunberg admits that the word “significant” can have many meanings. Thus, it would make far more sense to directly test what this word means to consumers, by actually asking consumers, in the context of advertisements for PediaLean. Such direct tests can be

done through the use of survey research, which is a well-accepted method for testing what consumers actually think about messages contained in advertisements. Given that Dr. Nunberg used an unorthodox method, I cannot accept his conclusions. Furthermore, a great deal of research has shown that consumers are often quite skeptical of advertising messages in general, and weight loss advertisements in particular. Dr. Nunberg, however, did not examine how the word “significant” was used in advertisements, but instead how it was used in general newspaper articles. This flaw likely affected his results, given that consumers would likely be skeptical of advertisements for PediaLean in general, and messages that contained the word “significant” in particular.

III. Proper Methodology for Testing Potential Deceptive Advertising

11. Dr. Nunberg uses lexical analysis to examine possible consumer perceptions regarding PediaLean. In particular, he tries to determine how consumers would interpret the word “significant”. He does this by examining newspaper articles that have used this word, and then attempts to determine what the word meant across these different articles. However, given that the intent of this analysis is to determine what consumers perceive, the obvious question is, why not directly test consumers? Only with such direct tests can we really know what certain words in advertisements may or may not imply. As Dr. Nunberg admits, “It is true that ‘significant’ has several senses in English.”¹ Thus, it would make sense to see which of these particular meanings consumers would use in the context of ads for PediaLean. Furthermore, there are well-accepted methods for determining what consumers actually believe about messages and words in advertising. I describe these methods below.

¹ Nunberg Expert Report, p. 6.

12. Research published in academic, peer reviewed journals talk about the need to collect survey data to determine what consumers perceive about advertisements. As one 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 a violation has occurred. When the alleged violation involves consumer perception or consumer behavior issues, survey research can provide government agencies with the needed objective data.” (pages 174-175).² Survey research, unlike lexical analysis, is a well-accepted technique among marketing academics, as it provides the type of objective information that is needed to test a hypothesis. In my experience as an Associate Editor and active reviewer, I see many papers which use such a technique, because it can provide the type of data that is objective, and that tests what consumers really believe rather than relying on one person to estimate what consumers might think.
13. The FTC often relies on advertising copy tests in deceptive advertising cases, because this type of information is far less subjective than other types of analyses, such as lexical analysis.³ Advertising copy tests also directly ask the consumer about his or her perceptions, rather than relying on estimates about what a consumer might think. Furthermore, “Extrinsic evidence is frequently offered in Federal Trade Commission advertising deception cases, most often in the form of advertising research, such as copy tests.” (page 301). In a FTC case against Thompson Medical involving deceptive advertising, the FTC noted “The extrinsic evidence we prefer to use and to which we give great weight is direct evidence of what consumers actually thought upon reading the advertisement in question. Such evidence will be in the form of consumer survey research for widely distributed ads...” (page 301).

² Hastak, Manoj, Michael B. Nunberg, and Louis A. Morris (2001), “The Role of Consumer Surveys in Public Policy Decision Making,” *Journal of Public Policy & Marketing*, 20 (2), 170-185.

³ Andrews, J. Craig, and Thomas J. Maronick (1995), “Advertising Research Issues from FTC versus Stouffer Foods Corporation,” *Journal of Public Policy & Marketing*, 14 (2), 301-309.

14. Other independent research on tests for deceptive advertising, published in peer reviewed journals, have also discussed the use of survey evidence.⁴ This research 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 technique is inferior to empirical, objective data on what consumers really think about an advertisement. In addition, an entire book was written by an academic on tests for deceptive advertising.⁵ This book also goes into a great amount of detail as to how potential deceptive advertising can be properly tested. Yet, lexical analysis is never mentioned as a possible technique, whereas a large part of the book discusses survey methods.
15. Given such research published by academics, there is ample support for the notion that survey research is a generally accepted methodology (apparently often preferred by the FTC as well) to assess whether or not consumers have been misled by advertisements. Thus, without such data, Dr. Nunberg is left with a technique that estimates what consumers might think, rather than directly surveying consumers.

IV. Consumers Skepticism Toward Advertising

16. Academic research has shown that consumers are often quite skeptical of advertising.⁶ One of these papers examined consumer perceptions of advertising over

⁴ Stewart, David (1995), "Deception, Materiality, and Survey Research: Some Lessons from Kraft," Journal of Public Policy & Marketing, 14 (1), 15-28; Jacoby, Jacob and George J. Szybillo (1995), "Consumer Research in FTC v. Kraft: A Case of Heads We Win, Tails You Lose?," Journal of Public Policy & Marketing, 14 (1), 1-14.

⁵ Richards, Jef I. (1990), Deceptive Advertising: Behavioral Study of a Legal Concept, Lawrence Erlbaum Associates: Hillsdale, NJ.

⁶ Calfee, John E. and Debra Jones Reingold (1988), "Consumer Skepticism and Advertising Regulation: What Do the Polls Show?," Advances in Consumer Research, 15, 244-248; Ford, Gary T., Darlene B. Smith, and John L. Swasy (1990), "Consumer Skepticism of Advertising Claims: Testing Hypotheses from Economics of Information," Journal of Consumer Research, 16, 433-441; Obermiller, Carl and Eric R. Spangenberg (1998), "Development of a Scale to Measure Consumer Skepticism Toward Advertising,"

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. Moreover, public opinion has remained extraordinarily constant for two decades or more.” (page 244). Other research finds that consumers can be very skeptical of advertisements for health claims.⁸ In particular, this research finds that consumer beliefs for health claims may not be as strong when these claims are made in the form of advertisements instead of in the form of labels and standardized nutritional information.

17. Given this high level of consumer skepticism toward advertisements, it is certainly possible that consumers would interpret the word “significant” differently if it appeared in an advertisement than if it appeared in an article. However, Dr. Nunberg only relied on newspaper articles in estimating what the word “significant” might mean to consumers. This reiterates the need to properly test what the word actually means to consumers when they see it in an advertisement for PediaLean.
18. While consumers exhibit a general degree of skepticism toward advertising, it is also useful to look for published research which has specifically examined consumer perceptions of diet or weight loss claims. One such paper looked at consumer reaction toward claims made by an over-the-counter appetite suppressant.⁹ Empirical data was collected by showing consumers an advertisement for this product which said, “When calling to place your order, mention this advertisement” (the neutral or control condition). A second version said, “PPA can make weight loss easy,

Journal of Consumer Psychology, 7 (2), 159-186; Nunberg, Michael B. and Mary Anne Raymond (1997), “Consumer Perceptions of Health Claims in Advertisements and on Food Labels,” Journal of Consumer Affairs, 31, 10-26.

⁷ Calfee, John E. and Debra Jones Reingold (1988), “Consumer Skepticism and Advertising Regulation: What Do the Polls Show?,” Advances in Consumer Research, 15, 244-248.

⁸ Nunberg, Michael B. and Mary Anne Raymond (1997), “Consumer Perceptions of Health Claims in Advertisements and on Food Labels,” Journal of Consumer Affairs, 31, 10-26.

⁹ Whisenhunt, B.L., D.A. Williamson, R.G. Netemeyer, and C. Andrews (2003), “Health Risks, Past Usage, and Intention to Use Weight Loss Products in Normal Weight Women with High and Low Body Dysphoria,” Eating and Weight Disorders, 8, 114-123.

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.

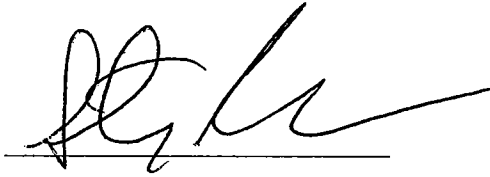
Another published study also examined consumer reaction to weight loss advertisements.¹⁰ This study looked at potential differences in consumer reaction to three different weight loss messages: promising weight loss of up to 12 pounds per week, promising weight loss of 6 pounds per week, and promising weight loss of up to 2 pounds per week. This study found no significant differences across these claims on consumer expectations of them. Thus, this study also shows that consumers are quite skeptical of weight loss claims in advertisements, and often do not believe them or let them influence their purchase decisions.

19. Consumers are also quite aware that marketers often engage in “puffing,” where the seller may be offering an opinion as to how wonderful their product may be.¹¹ After all, advertising is about trying to sell a product, and consumers know this.¹² For instance, the phrase, “They’re great!” may mean one thing in the context of an advertisement and something else in the context of a newspaper article. This again shows the weakness of lexical analysis, since this technique simply estimates what a consumer might think by looking at how a word is used in an entirely different context (i.e., selling a product vs. an article).

¹⁰ Trottier, Kathryn, Janet Polivy, and C. Peter Herman (2005), “Effects of Exposure to Unrealistic Promises about Dieting: Are Unrealistic Expectations about Dieting Inspirational?,” International Journal of Eating Disorders, 37 (2), 142-149.

¹¹ Preston, Ivan L. (1997), “Regulatory Positions Toward Advertising Puffery of the Uniform Commercial Code and the Federal Trade Commission,” Journal of Public Policy & Marketing, 16 (2), 336-344.

¹² Friestad, Marian and Peter Wright, “The Persuasion Knowledge Model: How People Cope with Persuasion Attempts,” Journal of Consumer Research, 21 (1), 1-31.



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Education

Ph.D. Business Administration (Marketing concentration), Haas School of Business,
University of California at Berkeley, 1994

Thesis: Competitive Brand Strategies of High-Tier and Low-Tier Brands: A
Consumer Choice Perspective

M.B.A. Haas School of Business, University of California at Berkeley, 1990

B.A. Economics, with Distinction, Stanford University, 1986

Academic employment

AT&T Distinguished Research Professor of Marketing, WP Carey School of Business,
Arizona State University, Tempe, AZ, 2004-

Professor, WP Carey School of Business, Arizona State University, Tempe, AZ, 2003

Dean's Council Distinguished Scholar, WP Carey School of Business, Arizona State
University, 2002-2004

Center for Services Leadership Distinguished Research Fellow, WP Carey School of
Business, Arizona State University, Tempe, AZ, 2001-2002

Associate Professor, WP Carey School of Business, Arizona State University, Tempe, AZ,
2000-2003

Assistant Professor, WP Carey School of Business, Arizona State University, Tempe,
AZ, 1996-2000

Assistant Professor, Washington State University, Pullman, WA, 1994-1996

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
Editorial Review Board, *Marketing Letters*, 2001-
Editorial Review Board, *Journal of Marketing Research*, 2001-

Ad-Hoc Reviewer, *Journal of Marketing*, *Marketing Science*, *Journal of Consumer Psychology*, *Management Science*, *Journal of Retailing*, *Current Anthropology*, *Nonprofit & Voluntary Sector Quarterly*, *Industrial and Corporate Change*, Reviewer for Association for Consumer Research conferences, American Marketing Association conferences, AMA John A. Howard Doctoral Dissertation Competition, Society for Consumer Psychology conferences. Program Committee, Association for Consumer Research conference, 2001 and 2003. Representative of the Society for Consumer Psychology at the main meeting of the American Psychological Association, 2001. Advisory Board for the MSI-JCP Research Competition on Product Assortment and Variety-Seeking in Consumer Choice, 2004.

Honors and Awards

Co-Chair of ACR doctoral symposium, 2006

Ferber Award Judge, 2005

Outstanding Reviewer Award, *Journal of Consumer Research*, 2002.

Winner of the 2001 William F. O'Dell Award. Given for the article appearing in the *Journal of Marketing Research* in 1996 that has made the most significant long-term contribution to the marketing discipline in the five year period 1996-2001.

Finalist (top 4) for the 2002 William F. O'Dell Award. Given for the article appearing in the *Journal of Marketing Research* in 1997 that has made the most significant long-term contribution to the marketing discipline in the five year period 1997-2002.

Winner of the 2001 Early Career Contribution Award from the Society for Consumer Psychology – Sheth Foundation, Division 23, American Psychological Association. Given annually to the most productive researcher in the field of consumer behavior/marketing who has been a faculty member for less than ten years.

Winner of Best Theoretical Paper award (Stephen M. Nowlis and Deborah B. McCabe), "Online vs. Off-line Consumer Decision Making: The Effect of the Ability to Physically Inspect Merchandise," at 2nd INFORMS "Marketing Science and the Internet: Understanding Consumer Behavior on the Internet," conference, sponsored by Andersen Consulting and the Marshall School of Business, April 29 - 30, 2000. Prize paid \$2500.

AMA Consortium faculty participant, 2003 and 2004

Association for Consumer Research Doctoral Symposium speaker, 2002 and 2004

Nominated by the Arizona State University Marketing Department and Finalist (top 4),
College of Business Undergraduate Teaching Excellence Award, 1997-1998 and 1998-1999.

Voted Outstanding Graduate Student Instructor, Haas School of Business, University of
California at Berkeley, 1992-1993

Winner of Delbert Duncan Award for Best Marketing MBA student, 1988-1990

Publications

Kahn, Barbara E., Mary Frances Luce, and Stephen M. Nowlis, "Debiasing Insights from
Process Tests," with Barbara Kahn and Mary France Luce, *Journal of Consumer Research*,
forthcoming.

Nowlis, Stephen M. and Baba Shiv (2005), "The Influence of Consumer Distractions on the
Effectiveness of Food Sampling Programs," *Journal of Marketing Research*, 42 (May), 157-
168.

Shiv, Baba, Alexander Fedorikhin, and Stephen M. Nowlis (2005), "Interplay of the Heart and
Mind in Decision Making," in *Inside Consumption: Frontiers of Research on Consumer
Motives, Goals, and Desire*, ed. Ratti Ratneshwar and David Mick, forthcoming.

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Between Choice and Consumption on Consumption Enjoyment," *Journal of Consumer
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Shiv, Baba and Stephen M. Nowlis (2004), "The Effect of Distractions while Tasting a Food
Sample: The Interplay of Informational and Affective Components in Subsequent Choice,"
Journal of Consumer Research, 31 (December), 599-608.

Dhar, Ravi and Stephen M. Nowlis (2004), "To Buy or Not to Buy: Response Mode Effects
on Consumer Choice," *Journal of Marketing Research*, 41 (November), 423-432.

Nowlis, Stephen M. and Deborah B. McCabe (2004), "The Effect of Examining Actual
Products or Product Descriptions on Consumer Preference," *Journal of Consumer
Psychology*, 13 (4), 431-439.

Nowlis, Stephen M., Barbara E. Kahn, and Ravi Dhar (2002), "Coping with Ambivalence:
The Effect of Removing a Neutral Option on Consumer Attitude and Preference Judgments,"
Journal of Consumer Research, 29 (December), 319-334.

Lemon, Katherine and Stephen M. Nowlis (2002), "Developing Synergies Between Promotions and Brands in Different Price-Quality Tiers," 39 (May) *Journal of Marketing Research*, 171-185.

Itamar Simonson, Ziv Carmon, Ravi Dhar, Aimee Drolet, Stephen M. Nowlis (2001), "Consumer Research: In Search of Identity," *Annual Review of Psychology*, 52, 249-275.

Simonson, Itamar and Stephen M. Nowlis (2000), "The Role of Explanations and Need for Uniqueness in Consumer Decision Making: Unconventional Choices Based on Reasons," *Journal of Consumer Research*, 27 (June), 49-68.

Dhar, Ravi, Stephen M. Nowlis, and Steven J. Sherman (2000), "Trying Hard or Hardly Trying: Context Effects in Choice," *Journal of Consumer Psychology*, 9 (4), 189-200.

Nowlis, Stephen M. and Itamar Simonson (2000), "Sales Promotions and the Choice Context as Competing Influences on Consumer Decision Making," *Journal of Consumer Psychology*, 9 (1), 1-16.

Dhar, Ravi, Stephen M. Nowlis, and Steven J. Sherman (1999), "Comparison Effects On Preference Construction," *Journal of Consumer Research*, 26 (December), 293-306.

Ravi Dhar and Stephen M. Nowlis (1999), "The Effect of Time Pressure on Consumer Choice Deferral," *Journal of Consumer Research*, 25 (March), 369-384.

Nowlis, Stephen M. and Itamar Simonson (1997), "Attribute-Task Compatibility as a Determinant of Consumer Preference Reversals," *Journal of Marketing Research*, 34 (May), 205-218. This paper was a finalist for the 2002 O'Dell Award. A Brief of this paper is written by John T. Landry in *Harvard Business Review* (1996), 74 (November/December), 13.

Nowlis, Stephen M. and Itamar Simonson (1996), "The Effect of New Product Features on Brand Choice," *Journal of Marketing Research*, 33 (February), 36-46. This paper won the 2001 O'Dell Award.

Nowlis, Stephen M. (1995), "The Effect of Time Pressure on the Choice Between Brands that Differ in Quality, Price, and Product Features," *Marketing Letters*, 6(4), 287-295.

Simonson, Itamar, Stephen M. Nowlis, and Katherine Lemon (1993), "The Effect of Local Consideration Sets on Global Choice Between Lower Price and Higher Quality," *Marketing Science*, 12 (4), 357-377

Simonson, Itamar, Stephen M. Nowlis, and Yael Simonson (1993), "The Effect of Irrelevant Preference Arguments on Consumer Choice," *Journal of Consumer Psychology*, 2 (3), 287-306.

Industry experience

Assistant Buyer, May Company Department Stores, Los Angeles, CA, 1986-1988
Expert Witness Consulting, 2001-

Professional affiliations

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

Conference presentations

“A Bite to Whet the Reward Appetite: Influence of Sampling on Appetitive Behaviors,” (with Baba Shiv and Monica Wadhwa), *Association for Consumer Research* conference, San Antonio, TX, September 2005.

“The Effect of Predictions on the Enjoyment of a Consumption Experience,” (with Naomi Mandel), *Association for Consumer Research* conference, San Antonio, TX, September 2005.

“The Effect of Distractions while Tasting a Food Sample: The Interplay of Informational and Affective Components in Subsequent Choice,” (with Baba Shiv), *Society for Consumer Psychology* conference, San Francisco, CA, February 2004.

“The Effect of Tradeoff Resolution Order on Consumer Choice,” (with Ravi Dhar and Itamar Simonson), *Association for Consumer Research* conference, Toronto, Canada, October 2003.

“The Effect of a Forced Delay after Choice on Consumption Enjoyment,” (with Deborah McCabe and Naomi Mandel), *Society for Consumer Psychology* conference, New Orleans, LA, February 2003.

“Effects of Distraction While Consuming a Food Item: Will it Increase or Decrease Subsequent Choice,” (with Baba Shiv), *Society for Consumer Psychology* conference, New Orleans, LA, February 2003.

“The Effect of a Delay between Choice and Consumption on Consumption Preference,” (with Deborah McCabe and Naomi Mandel), *Association for Consumer Research* conference, Atlanta, GA, October 2002.

“Effects of Distraction while Consuming a Food Item: Will it Increase or Decrease Subsequent Choice?,” (with Baba Shiv), *Association for Consumer Research* conference, Atlanta, GA, October 2002.

"Consumer research in computer mediated environments," (with Sharon Shavitt), *Association for Consumer Research* doctoral symposium, Atlanta, GA, October 2002.

"The Effects of Generating Options on Judgment and Choice," (with Ravi Dhar), *Association for Consumer Research* conference, Austin, TX, October 2001.

"Developing Synergies Between Promotional and Brand Strategies," (with Katherine Lemon), *Association for Consumer Research* conference, Salt Lake City, UT, October 2000.

"The Effect of the Ability to Inspect Merchandise on the Likelihood of Choosing Products Online," (with Deborah B. McCabe), *American Marketing Association* summer marketing educators' conference, Chicago, IL, August 2000.

"Managerial Strategy Making: Problem Structuring and Alternative Generation by Marketing Managers," (with Gabriel R. Gonzales), *American Marketing Association* summer marketing educators' conference, Chicago, IL, August 2000.

"Online vs. Offline Shopping Experiences," (with Deborah Brown McCabe), *INFORMS "Marketing Science and the Internet"* Conference, USC, Los Angeles, April 2000.

"The Effect of Physically Inspecting Merchandise on Product Choice in Store and Online Environments," (with Deborah McCabe), *Haring Symposium*, Indiana University, Bloomington, IN, April 2000.

"The Effect of Alternative Generation on Preference for Hedonic and Utilitarian Goods," (with Ravi Dhar and Steven J. Sherman), *Society for Judgment and Decision Making*, Los Angeles, CA, November 1999.

"Comparison Processes in Consumer Choice," (with Ravi Dhar and Steven J. Sherman) *Association for Consumer Research* conference, Columbus, OH, October 1999.

"Brand Switching Between Quality Tiers: The Role of Price Promotions and the Choice Context," (with Itamar Simonson), *Marketing Science* Conference, Berkeley, CA, March 1997.

Co-Chair of session, "How Do I Prefer Thee? Let the Way Decide for Me: An Examination of Task Effects and Consumer Preference Formation," (with Ziv Carmon) and presenter of "The Effect of Providing Reasons and Being Evaluated by Others on Consumer Decision Making," *Association for Consumer Research* conference, Tucson, AZ, October 1996.

Chair of session, "Moderators of Consumer Response to Promotions," and presenter of "The Effect of Choice Set Composition on Consumer Response to Sales Promotions," *Association for Consumer Research* conference, Minneapolis, MN, October 1995.

Co-chair of session, "The Constructive nature of Consumer Response to Differential Product Advantages," (with Ziv Carmon), and presenter of "The Effect of Response Mode on Consumer Decisions Involving Overall Brand Quality, Price, and Product Features," *Association for Consumer Research* conference, Boston, MA, October 1994

Co-chair of session, "A Later Mover Advantage? The Impact of Order of Entry and Brand Characteristics on Consumer Preferences," (with Jennifer Aaker), and presenter of "The Effect of Differentiating Product Features on Brand Choice," (with Itamar Simonson), *Association for Consumer Research* conference, Nashville, TN, October 1993

"Influences on the Decision to Purchase Product Enhancements," (with Itamar Simonson), National *ORSA/TIMS* Conference, San Francisco, CA, November 1992

"The Effect of Paired Comparisons and Product Display Format on Choices Between Lower Price and Higher Quality," (with Itamar Simonson and Katherine Lemon), *Association for Consumer Research* conference, Vancouver, British Columbia, October 1992.

"Influencing Consumer Preferences Between High and Low Price Alternatives," (with Itamar Simonson and Katherine Lemon), *Marketing Science* Conference, London, England, July 1992.

"Managing the Marketing Mix to Increase Frequent use of Consumer Services," (with Jukka M. Laitamaki and Ross Bellingham), *AMA's Services Marketing* Conference, Chicago, IL, October 1990.

Expert Witness Consulting

Critique of Alcohol Labelling Survey conducted by the Center for Science in the Public Interest

- Wine Institute, San Francisco, CA
- Expert report
- July 2001

Platypus Wear v. Bad Boy Entertainment

- Luce, Forward, Hamilton & Scripps, Los Angeles, CA
- Expert report
- October 2001

Marcia Spielholz v. Los Angeles Cellular Telephone Company

- Gibson, Dunn & Crutcher, Los Angeles, CA
- Expert report, deposition
- April 2002

California Consumers v. BMG Direct Marketing, Inc.

- Coblenz, Patch, Duffy & Bass, San Francisco, CA
- Deposition
- November 2002

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

- Mitchell, Silberberg & Knupp, Los Angeles, CA
- Expert report, deposition
- November 2003

Kinetic Concepts, Inc. v. BlueSky Medical

- Rothschild, Barry & Myers, Chicago, IL
- Expert report, deposition
- April 2005

Arista Records, Inc., et al. v. Flea World, Inc., et al.

- Mitchell, Silberberg & Knupp, Los Angeles, CA
- Expert report, deposition
- September 2005

EXHIBIT G

The Effect of Type of Claim, Gender, and Buying History on the Drawing of Pragmatic Inferences From Advertising Claims

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Research in cognition has shown that people frequently draw pragmatic inferences that go beyond what is stated directly in the text (e.g., understanding that *Sparkle fights cavities* implies that it prevents cavities). This study examines the effects of directly asserted claims and five different types of implied claims (hedge words, deleted comparatives, juxtaposed imperatives implying causality, statistical abuses, and negative questions) on the ratings of the truth value of a related claim and on the rated likelihood of purchasing that product. The different types of implied claims that produced the highest truth rating were not the most convincing in the sense of purchase likelihood. Directly asserted claims were no more true or convincing than many of their weaker implied counterparts. Overall, women rated test claims more true than men, regardless of which type of claim they had read. Subjects who were frequent users of a particular product class tended to rate both truth and purchase likelihood higher than nonusers but the effect was significant only for some products. Results are discussed in terms of methodological concerns and general applications.

It is well-known from research in cognition that people naturally and typically make inferences that go beyond the material directly present in the text (for reviews, see Graesser & Bower, 1990; Harris, 1981; Rickheit & Strohner, 1985). Many inferences are pragmatic (i.e., suggested by the hearer's knowledge

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the test sentence being the only part of the ad that was changed. The rest of the ad's text remained the same for all ads. The five types of implied claims were:

1. *Statistical abuses*, which use incomplete or inadequate reporting of the test or survey results.
2. *Hedge words*, which weaken the assertion.
3. *Deleted comparatives*, which make comparisons without stating the basis of the comparison.
4. *Juxtaposed imperatives*, two imperatives side-by-side pragmatically implying a causal relation.
5. *Negative questions*, which negate a question and thus imply an affirmative answer.

See Table 1 for examples of advertisements and test sentences.

Six counterbalanced lists were constructed by assigning the ads to create List 1 in a sequential manner as follows: Ad 1, direct assertion; Ad 2, statistical

TABLE 1
Examples of the Six Claim Types for One Ad and the
Critical and Control Test Sentences

Direct assertion

"The power to get clothes clean. *Clean-All laundry detergent removes even the toughest stains.* Try our new formula. You will love the fresh smell it leaves behind."

Statistical abuse

"The power to get clothes clean. *Over half of the people we asked said they preferred Clean-All laundry detergent to remove even the toughest stains.* Try our new formula. You will love the fresh smell it leaves behind."

Hedge word

"The power to get clothes clean. *Clean-All laundry detergent battles even the toughest stains.* Try our new formula. You will love the fresh smell it leaves behind."

Deleted comparative

"The power to get clothes clean. *Clean-All laundry detergent removes tough stains better.* Try our new formula. You will love the fresh smell it leaves behind."

Juxtaposed imperative

"The power to get clothes clean. *Remove even the toughest stains. Use Clean-All laundry detergent.* Try our new formula. You will love the fresh smell it leaves behind."

Negative question

"The power to get clothes clean. *Doesn't Clean-All laundry detergent remove even the toughest stains?* Try our new formula. You will love the fresh smell it leaves behind."

Test sentence

"*Clean-All laundry detergent gets rid of stains.*"

False control sentence

"*Clean-All laundry detergent is only used to clean floors.*"

Note. Italicized portions did not appear in italics for subjects.

abuse; Ad 3, hedge word; Ad 4, deleted comparative; Ad 5, juxtaposed imperative; and Ad 6, negative question. The rest of the list was completed with Ads 7 through 12 following the same order of ad type as occurred in Ads 1 to 6. List 2 was then made by putting Ad 1 in the statistical-abuse form, Ad 2 in the hedge-word form, Ad 3 in deleted-comparative form, and so on in order until Ad 6, the direct assertion; Ads 7 to 12 repeated this pattern. The remaining lists were created in the same way so that each ad was presented as one of the six different ad types in each of the six lists.

Each ad was directly followed on the same page by three questions pertaining to it. The first—"Based on this ad, would you want to try this product or service?"—was followed by a model of the 7-point rating scale ranging from *probably no (1) to probably yes (7)*, with the symbol ? appearing at the midpoint (4). The qualifier *probably* was used in the scale anchors because of the simulation nature of the experiment. It was felt that subjects would be reluctant to respond that they would *definitely* purchase a fictitious product they had no knowledge of except for this ad.

Questions 2 and 3 were preceded by a model of a 7-point rating scale ranging from *definitely false (1) to definitely true (7)*, with ? appearing at the midpoint (4). Subjects were asked to rate the truth value of two following statements. Question 2 presented a paraphrased restatement of the test claim contained in the ad and Question 3 was either a false or indeterminate control statement about the ad. These control statements were included to insure that subjects used the entire scale. False items were directly contradicted by information in the ad, whereas the indeterminate items dealt with material never even mentioned in the ad. Examples of these test items appear at the end of Table 1.

Each subject received a list of 12 ads (one of the six lists) and an answer sheet. Each list of ads contained 2 ads per page, with each ad followed by its three questions. The first page of the answer booklet asked for demographic information and contained the 12 buyer questions to assess buying behavior for the different products. The second page of the answer booklet listed Ad 1 through Ad 12 with three spaces for the subject's responses to the questions on each ad.

Procedure and Design

Subjects were randomly assigned into six different groups during each session, determined by which list they received. All six lists were equally, but randomly, distributed at each session. The subjects were then instructed to answer the demographic and buyer questions on the first page of the answer sheet. The subjects were told to read each ad, which appeared in bold type, and to respond to the three questions following each ad; they were instructed to proceed at their own pace through the task.

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interact with the claim-type variable is of some concern but in this study five of the six claim types involved some sort of pragmatic inference. It may have been that the task overall did not evoke a sufficiently high level of attention to produce this interaction. Results do suggest, however, that gender is a useful variable to include in inference research. It has traditionally been ignored in most cognitive research.

Buyer-Nonbuyer Differences

Subjects who used a product class regularly usually gave higher ratings to the truth of the claim about a product in that class and predicted a greater likelihood of purchasing that product, based on reading the ad, than did nonusers and infrequent users of that product class, although the differences were often modest and not always significant. However, no differences were found as a function of whether the subjects had read the asserted or implied claims, nor did the type of implied claim have any effect. Thus, the tendency to interpret implied advertising claims as having been stated more strongly is apparently a general phenomenon not dependent on the subject's experience with that product class. This is consistent with findings of Harris et al. (1981), who found that farmers rated the truth of both asserted and implied claims in ads for farm equipment higher than nonfarmers did, but they did not discriminate asserted and implied claims any better than nonfarmers did.

It seems reasonable that a greater knowledge and use of a product class would either (a) sensitize one to potentially deceptive claims or (b) cause one to process advertising claims more deeply. Either case should result in a greater difference in the truth ratings for asserted and implied claims and in ratings of intent to purchase that product. However, no evidence for such an effect was obtained. The only effect seems to be a very nonspecific elevation of both truth and purchase-likelihood ratings overall among buyers.

Conclusions

Methodologically, several conclusions may be drawn. First, the results argue for the use of multiple dependent measures. Ratings of truth judgment and purchase intent were only weakly correlated and frequently showed an effect on one that was not replicated on the other. Second, the variable of knowledge or buyer experience is very tricky to operationalize and test. Several pilot studies in the authors' laboratory using different ways of measuring this variable have shown inconsistent results, sometimes largely null and often idiosyncratic for different products and ads. Is it best measured by buying experience, by product-class knowledge, by self-rating of knowledge, by the elusive factor of "involvement," or by some combination of these ways or some other way not yet identified? There may in fact be several underlying correlated variables at work here, as well

as possible important interactive variables that have not yet been examined in this context (e.g., durable vs. nondurable goods, products vs. services).

Certainly our study is a very different situation from that of the actual consumer in the marketplace. In particular, two concerns highlight the divergence of the experience of our subjects from that of an actual consumer processing an ad: (a) the lack of pictorial content in the ad, and (b) the artificial situation of reading a list of ads and doing the required rating tasks. Both these constraints, should they have any effect at all, would presumably predict greater-than-normal attention, and, consequently, deeper processing, of the semantic content of the ad copy by our subjects, compared to real-life consumers in a natural context. That there was no stronger effect of the buyer variable and that the directly asserted claims did not differ on either measure from most of the classes of implied claims suggest that such a difference would be very unlikely in the more complex real-world situation. Any real differences should show up with our procedure. It is, of course, possible that the modest effects of gender, ad type, and buyer knowledge obtained in this study would lessen or disappear in a more realistic situation, but that awaits further research.

In terms of applications to advertising, results suggest that stating a claim very strongly and directly is no more effective in persuasion than stating a weaker version of the claim. In fact, subjects generally rated the truth of the implied claim just as strongly as for a direct assertion, although this varied somewhat depending on the type of claim. What then, is the incentive to directly assert advertising claims? There seems to be very little, with considerable incentive to imply the claim instead.

Not only may implying, versus asserting, a claim have some psychological advantage and no disadvantage, but it may also be legally advantageous. The question of the legal and behavioral status of implied claims in advertising has been the subject of considerable study and litigation (Craswell, 1985; Ford & Calfee, 1986; Gardner & Leonard, 1990; Preston, 1989; Preston & Richards, 1986; Richards, 1990). Although it is clear that an advertiser may be held legally accountable for falsehoods directly asserted, the possible culpability of the act of implying a falsehood is less clear. Does the legal responsibility of comprehending false information about a product lie with the advertiser for implying such information or with the consumer for inaccurately inferring such an interpretation from the ad?

ACKNOWLEDGMENTS

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Accepted by Thomas K. Srull during his editorship.

LMS00741

EXHIBIT H

Source: [Legal > Federal Legal - U.S. > Federal Cases After 1944, Combined Courts](#) 
Terms: **puffery w/p advertisement! w/p ftc** ([Edit Search](#) | [Suggest Terms for My Search](#))

 Select for FOCUS™ or Delivery

*1996 U.S. Dist. LEXIS 9487, **

FEDERAL TRADE COMMISSION, Plaintiff, vs. ROBERT J. FEBRE, 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 U.S.C.S. § 45\(a\)](#).

OVERVIEW: Defendants used advertisements to promote and sell work-at-home business opportunities and financial products/services such as grants, loans and credit cards. Alleging that the advertisements made false and misleading claims, that the advertisements failed to disclose material conditions regarding participation in the programs, and that defendants affirmatively misrepresented material aspects of several programs, the FTC sought injunctive relief and consumer redress for defendants' violations of § 5(a) of the Federal Trade Commission Act. The magistrate recommended that summary judgment be granted in favor of the FTC because the undisputed evidence established (1) that defendants' earning claims far exceeded the amounts normally received by program participants, (2) that the advertisements omitted material information regarding the costs and conditions for participating in the programs, (3) that some of the advertisements contained affirmative misrepresentations, and (4) that the deceptive literature was widely disseminated and relied on by consumers who invested in the advertised programs.

OUTCOME: The magistrate judge recommended that summary judgment be granted in favor of the FTC for defendants' use of deceptive advertisements. The magistrate recommended that a permanent injunction be issued barring defendants from engaging in the types of deceptive practices alleged in the FTC's complaint and that a monetary award be entered against defendants based on the gross proceeds that defendants received from consumers.

CORE TERMS: consumer, advertisement, deceptive, earnings, impression, extrinsic

evidence, earn, summary judgment, failure to disclose, injunctive relief, disseminated, recommendation, refund, postcard, misrepresented, misled, genuine issue, participating, disgorgement, advertising, message, unfair, permanent injunction, misrepresentations, omission, redress, entities, preliminary injunction, undisputed facts, recommended

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[Civil Procedure](#) > [Summary Judgment](#) > [Summary Judgment Standard](#) 


HN1 Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). [More Like This Headnote](#)

[Antitrust & Trade Law](#) > [Consumer Protection](#) > [Deceptive Acts & Practices](#) 

HN2 Section 5(a) of the Federal Trade Commission Act, 15 U.S.C.S. § 45(a), forbids unfair or deceptive acts or practices. To establish a violation of § 5(a), the Federal Trade Commission (FTC) must show 1) that a reasonably prudent person would rely on the allegedly deceptive advertisements, 2) that the advertisements were widely disseminated, and 3) that consumers purchased the product. Once the FTC has satisfied that burden, the defendants, to avoid liability, must prove that consumers did not rely on the representations. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Antitrust & Trade Law](#) > [Consumer Protection](#) > [Deceptive Acts & Practices](#) 

HN3 The failure to disclose material facts that could affect consumers' decisions, i.e., the conditions for obtaining refunds, the conditions and costs associated with participating in a program and the true nature of the services or product offered, can be a deceptive practice. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Fundamental Freedoms](#) > [Freedom of Speech](#) > [Commercial Speech](#) 

HN4 The First Amendment does not thwart the efforts of the state or federal government to preclude deceptive commercial speech. [More Like This Headnote](#)

COUNSEL: For FEDERAL TRADE COMMISSION, plaintiff: Marsha A. McClellan, United States Attorney's Office, Chicago, IL. Timothy T. Hughes, Michael Thomas Miller, Karen D. Dodge, Federal Trade Commission, Assistant Regional Director, Chicago, IL. Harlan Kent Heller, Heller, Holmes & Associates, P.C., Mattoon, IL.

For ROBERT J FEBRE, individually and as an officer of Ace Publishing, Inc., ACE PUBLISHING, INC., dba Pase Corp, defendants: Harlan Kent Heller, Heller, Holmes & Associates, P.C., Mattoon, IL. Jerome S. Lamet, Jerome S. Lamet & Associates, Chicago, IL. For MELODY CULVER, individually and as an officer of Ace Publishing, Inc., EFRAIM ARENAS, individually and as an officer of Ace Publishing, Inc., defendants: Patricia M. Higgins, Nagle & Higgins, Naperville, IL.

JUDGES: JOAN HUMPHREY LEFKOW, United States Magistrate Judge. The Honorable Blanche M. Manning, United States District Judge

OPINIONBY: JOAN HUMPHREY LEFKOW

OPINION:

To: The Honorable Blanche M. Manning
United States District Judge

REPORT AND RECOMMENDATION

Joan [*2] H. Lefkow, Magistrate 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 as a result of certain allegedly unfair and deceptive advertising that violated of § 5(a) of the FTCA, 15 U.S.C. § 45(a). The FTC has moved for summary judgment with respect to all counts of its complaint.

PROCEDURE

HN1 Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine issue of fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions and affidavits that are part of the record. Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). Where [*3] the nonmovant has the ultimate burden of proof on an issue, the party seeking summary judgment need only show that there is an absence of evidence to support an essential element of the nonmoving party's case. Id., 106 S. Ct. at 2552-53. In response, the non-moving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a genuine issue for trial. Id. at 324, 106 S. Ct. at 2553. A material fact must be outcome determinative under the governing law. Pritchard v. Rainfair, Inc., 945 F.2d 185, 191 (7th Cir. 1991).

Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983), the non-moving party's evidence is to be believed and all reasonable inferences from the facts must be viewed in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986); Korf v. Ball State University, 726 F.2d 1222, 1226 (7th Cir. 1984).

FACTUAL BACKGROUND

This case involves defendants' use of allegedly deceptive advertisements [*4] to promote and sell work-at-home business opportunities and financial products/services such as grants, loans and credit cards. In July 1994, I held an evidentiary hearing with respect to plaintiff's request for preliminary injunctive relief. Based on the evidence before me, I recommended the entry of extensive proposed findings of fact and an order granting a preliminary injunction with asset freeze against defendant Robert J. Febre. See Report and Recommendation of July 14, 1994 ("July 1994 Report"). Subsequently, the Honorable Marvin E. Aspen adopted my recommendations, entered the proposed findings of fact and issued a preliminary injunction against both Febre and defendant Ace Publishing, Inc. ("Ace"). To a large extent, the factual findings entered with respect to the requested preliminary relief remain valid. Moreover, defendants did not submit a proper Local Rule 12(n) response to the FTC's Rule 12(m) statement of undisputed facts. As a result, the FTC's Rule 12(m) statement, which is based in significant part on the findings contained in my July 1994 Report, is considered admitted to the extent that it is supported by the record. Appley v. West, 929 F.2d 1176 (7th [*5] Cir. 1991); General Rules of the Northern District of Illinois, Rule 12(n)(3)(b). I refer Your Honor to the findings of fact in the July 1994 Report for details regarding the parties, the work-at-home programs, the language of the allegedly deceptive advertisements, the substance of witness testimony concerning the message conveyed by the advertisements, the number of investors in each program and the amount of refunds

issued. I am mindful, however, that with respect to plaintiff's current request for summary judgment, the court must assess the evidence in a light favorable to defendants and 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

In its complaint, the FTC claims that advertisements regarding eight separate programs offered by defendants are unfair or deceptive in one or more respects. Count I alleges that some of the advertisements made false and misleading earnings claims. Count II alleges that some [*6] advertisements failed to disclose material conditions regarding participation in the programs. Finally, in count III, the FTC alleges that the defendants, either directly or by implication, affirmatively misrepresented material aspects of several programs. Each count will be considered separately.

Count I - Earnings Claims

In this count, the **FTC** claims that defendants made unsubstantiated and false claims regarding the earnings potential of four work at home programs. It points to advertising for 1) the "Home Inquiry Tabulator" program, which boasted that consumers could earn \$ 764 for just a few hours of easy work; 2) the "Amazing Pase Photo System" program which claimed that consumers could earn up to \$ 1800 per day; 3) the "Hi-Tech 900" program, which declared that over \$ 250,000 per year in proven income "could be yours;" and, 4) the "Mailing Postcards" program, which stated that "we're going to make it possible for you to make \$ 1,000, \$ 5,000 or even \$ 15,000 a day just by mailing postcards." There is no dispute over the words that appeared in the **advertisements**. Defendants simply assert that the promotional materials contained no express earnings claims because [*7] none guaranteed the stated level of earnings and in fact the language used was conditional (e.g., one "could earn up to" or it was "possible" to make the indicated amount). They note that the **advertisements** did not indicate that other consumers had already earned the stated amounts and argue that the earnings claims are nothing more than "**puffery**." Defendants further contend that there is no extrinsic evidence from which the court can conclude that consumers, acting reasonably, were likely to be misled by any earnings claims that may be implied from the promotional literature.

HN2 Section 5(a) of the FTCA forbids "unfair or deceptive acts or practices." To establish a violation of § 5(a), the **FTC** must show that 1) that a reasonably prudent person would rely on the allegedly deceptive **advertisements**, 2) that the **advertisements** were widely disseminated, and 3) that consumers purchased the product. *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988). Once the **FTC** has satisfied that burden, the defendants, to avoid liability, must prove that consumers did not rely on the representations. *Id.* To establish the first element of its case, the **FTC** must [*8] show that the earnings claims are deceptive, i.e., they "likely would mislead consumers, acting reasonably, to their detriment." *Id.* See also *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 744 (N.D. Ill. 1992). Even though the **advertisements** did not *guarantee* the stated level of earnings, they made express claims regarding the earnings *potential* of the programs. n1 Such express claims are presumed to be material, i.e., likely to affect a consumer's choice or conduct regarding a product, and, within reason, to mean what they say. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd on other grounds*, 253 U.S. App. D.C. 18, 791 F.2d 189 (D.C. Cir. 1986). Thus, while it might not be reasonable to believe that everyone who participates in the program would earn the stated amount, it can be presumed that a consumer would reasonably believe that the statements of earnings potential represent typical or average earnings. *In re Amway*, 93 F.T.C. 618, 729-32 (1979) (statement that a participant could "develop an income of as much as \$ 1,000 per month"

and use of \$ 200 income per month for discussion violated [*9] § 5(a) 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 Corp.*, 82 F.T.C. 488, 563-65 (1973), *denied in part and remanded in part*, 492 F.2d 1333 (2d 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 mere "puffery" or statements of possibility on which no reasonable person would rely, the claims go well beyond the type of general expression of opinion that constitutes "puffing." *U.S. Sales Corp.*, 785 F. Supp. at 746, *citing*, *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 181 n.42 (1984).

----- Footnotes -----

n1 Because the claims of earnings potential are express, it is not necessary to consider extrinsic evidence to ascertain their meaning. *Thompson Medical Co., Inc.*, 104 F.T.C. 648, 788-89 (1984), *aff'd on other grounds*, 791 F.2d 189 (D.C. Cir. 1986).

----- End Footnotes----- [*10]

Here, the FTC has presented evidence that none of the consumers who participated in the Home Inquiry Tabulator, the Amazing Pase Photo System, the Hi-Tech 900 and the Mailing Postcards programs earned what the advertisements said they could earn. Indeed, the testimony of both consumers and defendants' former employees reveals that participants routinely lost money. Defendants offer nothing to controvert that evidence. They point out only that Ace paid participants who attempted to implement the programs according to the stated formula for the particular program, e.g., Ace paid participants in the Home Inquiry Tabulator program 35 cents per inquiry forwarded to Ace. Whether Ace may have made these payments is immaterial to the question whether the advertisements deceptively portrayed the total earnings potential of the programs. Because undisputed evidence establishes that the defendants' earnings claims far exceeded the amounts normally received by program participants, those claims are deceptive within the meaning of FCTA § 5(a).

The FTC also provides evidence that the advertisements at issue were widely disseminated via newspaper and direct mail advertising. The undisputed evidence [*11] establishes that thousands of consumers made the initial investment into the Home Inquiry Tabulator, the Amazing Pase Photo System, the Hi-Tech 900 and the Mailing Postcards programs. Defendants offer no proof to satisfy their burden of establishing that consumers did not rely on the deceptive earnings claims. As a result, the FTC is entitled to summary judgment with respect to count I.

Count II - Material Omissions

The FTC also alleges that defendants violated the FTCA by failing to disclose until after consumers made their initial payment that 1) the Home Inquiry Tabulator and Mailing List Compiler programs would require consumers to generate names and other information from advertising or promotional materials for which consumers themselves paid or which they disseminated; 2) the Amazing Pase Photo System program would require consumers to sell medical identification cards and that the photos the participants were to take would be of personal medical data of individuals who purchased such cards; and, 3) the Hi-Tech 900 program would require additional payments of \$ 95 to \$ 149 purportedly to activate identification codes. Again, there is no factual dispute regarding [*12] the text of the advertisements.

Defendants contend that the Home Inquiry Tabulator and the Mailing List Compiler did not

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, defendants assert, there is a question of fact as to whether the omissions were misleading.

HN3 The failure to disclose material facts that could affect consumers' decisions, i.e., the conditions [*13] for obtaining refunds, the conditions and costs associated with participating in a program and the true nature of the services or product offered, can be a deceptive practice. See *World Travel*, 861 F.2d at 1029 (failure to disclose condition to advertised travel certificate that which required consumers to book hotel reservations and pay a deposit); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 575 (7th Cir. 1989) (failure to disclose price of second airline ticket when its purchase was a condition to the use of the advertised travel certificate). Because the deception results from an omission rather than an express claim, the court must consider whether the impression conveyed by the advertisement as a whole was deceptive. Nevertheless, to succeed, the FTC need only establish that a reasonable consumer, upon reading the advertisements, likely would be misled, not that consumers certainly would be misled. *U.S. Sales Corp.*, 785 F. Supp. at 748.

Defendants argue that a question of fact remains as to whether the alleged false impressions are that of a reasonable consumer upon viewing the advertisements. They insist that no such determination can be made absent extrinsic [*14] evidence, i.e., a consumer survey regarding consumers reaction to the advertisements. There is no authority for defendants' contention that implied claims cannot be found to be deceptive absent extrinsic evidence. The courts and the FTC have consistently recognized that implied claims fall along a continuum from those which are so conspicuous as to be virtually synonymous with express claims to those which are barely discernible. *Kraft*, 970 F.2d at 319. It is only at the latter end of the continuum that extrinsic evidence is necessary. See *Thompson Medical*, 104 F.T.C. at 788-89.

In determining whether an advertisement contains a particular implied claim, the court should first consider the language of the advertisement itself. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652-53, 105 S. Ct. 2265, 2282, 85 L. Ed. 2d 652 (1985) ("When the possibility of deception is as self-evident as it is in this case, we need not require . . . a survey of the . . . public before it [may be] determined that the [advertisement] had a tendency to mislead."); *Kraft*, 970 F.2d at 320 (conspicuous implied claims do not require extrinsic evidence [*15] because the message is reasonably clear). Here, the deceptively false impressions can be gleaned from the advertisements alone. Although the advertisements for the Home Inquiry Tabulator and the Mailing List Compiler programs briefly mentioned that the programs were "based on advance classified ad participation," there is nothing in the advertisements to alert consumers that they would have to undertake and/or finance the classified ad participation. n2 The net impression then was that the consumer would be paid for collecting and forwarding names that he or she would receive as a result of advertisements or notices that Ace would place. Likewise, the brochure for the Mailing List Compiler program, by failing to disclose that the consumer would have to advertise for names and addresses, conveyed the impression that consumers would simply compile names and addresses from readily available sources, e.g., lists to be provided by Ace or publicly available sources, like telephone books. With respect to the Amazing Pase Photo System, the failure to disclose the type of pictures to be taken or that consumers would also be required to sell medical identification cards created an

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 -----

n2 Indeed, the Home Inquiry Tabulator advertisement suggested the contrary. There, defendants deducted the \$ 89 initial fee from their calculation of the program's earnings potential but did not mention or deduct any other possible costs associated with the program. The calculation, then, reasonably created the impression that there were no other costs associated with the program. Moreover, in describing how the program worked, defendants made no mention of the fact that consumers would have to place classified ads or post notices in order to produce names which could then be forwarded to Ace.

----- End Footnotes----- [*17]

Perhaps anticipating defendants' argument regarding the need for extrinsic evidence, the FTC does not rely solely on the language of the advertisements. It has also offered extrinsic evidence in the form of consumer affidavits and/or testimony which confirms that defendants' omissions created the above described false impressions. While a consumer survey is considered the most convincing form of extrinsic evidence, see *Kraft*, 970 F.2d at 318, the absence of such a survey does not indicate that other forms of extrinsic evidence are untrustworthy. "Evidence that some customers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead." *World Travel*, 861 F.2d at 1029-30, quoting, *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976). Defendants offer nothing to suggest that the consumer witnesses were not reasonable consumers or that the false impressions they received were unreasonable. The undisputed facts of record adequately establish that the advertisements for the Home Inquiry Tabulator, the Mailing List Compiler, the Amazing Pase Photo System and the Hi-Tech 900 programs omitted material information [*18] in violation of FTCA § 5(a).

The evidence also establishes that the deceptive literature was widely disseminated and that thousands of consumers chose to invest in these programs. Summary judgment is appropriate with respect to count II.

Count III - Affirmative Misrepresentations

FTC further alleges that several affirmative misrepresentations appear in five of the advertisements at issue: 1) as part of the Hi-Tech 900 and the Mailing Postcards literature, defendants misrepresented that when members of the public responded to an ad placed or a postcard disseminated by or on behalf of a consumer participating in the program, defendants would track those responses according to codes placed in the ad (or on the postcard) and pay the appropriate participating consumer; 2) the Grant program literature misrepresented that defendants were offering grants or acting as agents for persons or entities that make grants; 3) the literature on the Self-Liquidating Loan program misrepresented that defendants were offering loans or significant assistance in obtaining loans; and, 4) the Fortunecard program literature misrepresented that defendants' were offering the consumer a credit [*19] card that could be used to purchase goods or services on credit.

As with the failure to disclose certain facts, the false claims alleged in count III are obvious

from an overall reading of the advertisements. Nevertheless, the FTC has not relied solely on that text to establish the defendants' violation of FTCA § 5(a). Rather the FTC again has provided evidence, in the form of consumer affidavits and testimony, indicating that some consumers were in fact misled by the alleged affirmative misrepresentations. The defendants' argument that the FTC has failed to present adequate evidence of what a reasonable consumer expected when they read the advertisements is without merit.

Defendants also refer the court to words or phrases in the advertisements which they believe adequately alerted consumers to the true nature of the various programs at issue. A review of the advertisements, however, makes it clear that the overall impression of the literature created the false impressions which are at issue herein. There is no genuine issue of fact regarding the false claims made in the advertisements for the Grant, Self-Liquidating Loan or the Fortunecard programs. Again, the literature for [*20] these programs was widely disseminated and hundreds of consumers invested money in response to the advertisements.

It should be noted, however, that Febre has offered at least some evidence that the advertisements for the Hi-Tech 900 and the Mailing Postcards programs did not affirmatively misrepresent that Ace would track the participating consumers calls and postcards via a code number. At the preliminary injunction hearing, Febre testified that the ads placed or postcards sent were coded and tracked as the advertisements represented. While this evidence may not be sufficient to carry the day, n3 on this motion it must be taken as true. As a result, there is an issue of fact as to whether the advertisements for these programs contained affirmative misrepresentations. Ultimately, however, the existence of that factual issue does not change the outcome of the current motion. As discussed above, the advertisements for both the Hi-Tech 900 and the Mailing Postcards programs are otherwise deceptive.

----- Footnotes -----

N3 Other testimony by a former employee of Ace indicates that the tracking was not done.

----- End Footnotes-----

[*21]

Remedies

It is apparent from defendants' responsive memorandum that the fuel for their opposition to the FTC's motion is their disagreement over the propriety of the requested remedies. n4 In addition to a permanent injunction, the FTC has requested a monetary award in the form of consumer redress based on the gross proceeds that defendants received from consumers who invested in the eight relevant programs - approximately sixteen million dollars. Defendants counter that any recovery should be based on net profits, not gross proceeds. They further assert that the requested disgorgement of proceeds is inappropriate because it exceeds the defendants' net worth and much of the money would go to the FTC rather than to the consumers who may be entitled to a refund. Defendants also contend that any award will improperly punish speech protected by the First Amendment and that the request for a large monetary award is intended to punish Febre by effectively causing the forfeiture of his assets, a remedy not available under the FTCA and which amounts to cruel and unusual punishment.

----- Footnotes -----

n4 Defendants' 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 get a judgment for SIXTEEN MILLION DOLLARS as disgorgement of unjust enrichment from a 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 injunction is warranted to protect the public interest. n5 While Ace may no longer be in business and, therefore, is not currently engaging in any deceptive practices, the evidence demonstrates that there is a significant danger that such practices will recur absent an injunction. See *FTC v. Security Rare Coin & Bullion Corp.*, 1989-2 Trade Cases (CCH) P 68,807 at 62,205 (D. Minn. 1989), *aff'd*, 931 F.2d 1312 (8th Cir. 1991)(injunctive relief granted despite abandonment of deceptive scheme); *FTC v. H.N. Singer*, 668 F.2d 1107, 1113 (9th Cir. 1982).

----- Footnotes -----

n5 Injunctive relief is expressly authorized in FTCA § 13. 15 U.S.C. § 53.

----- End Footnotes-----

The Seventh Circuit has also recognized that the authority of the district court to issue permanent injunctions for violations of FTCA § 5(a), includes the power to order any ancillary relief "necessary to accomplish complete justice. *Amy Travel Service*, 875 F.2d at 571; *H.N. Singer*, 668 F.2d at 1113. Other courts have found that, in addition to injunctive relief, consumer redress in the amount of the purchase price of the relevant product or business opportunity is appropriate. See. *U.S. Sales*, 785 F. Supp. at 753 and cases cited therein. The rationale for an award of consumer redress is twofold. First, it deters future deceptive conduct by preventing those who have engaged in unfair and deceptive trade practices from profiting at the expense of the consuming public. Second, it is necessary to effectuate enforcement of FTCA § 5(a) where, as here, the FTC is suing on behalf of a large class of consumers. See *Id.* I conclude that, to accomplish complete justice, the evidence herein supports an award of consumer redress.

Defendants provide no authority for their arguments that 1) gross proceeds is an inappropriate measure of relief; 2) the award should not exceed Febre's net worth; 3) the award should not exceed the amount of refunds to which consumers can prove they are entitled. The constitutional arguments are also without merit. ^{HN4*}The First Amendment does not thwart the efforts of the state or federal government to preclude deceptive commercial [*24] speech. *Zauderer*, 471 U.S. at 638, 105 S. Ct. at 2275. Although the "product" which defendants sold in some instances included books containing ideas or knowledge, which may have had some value to someone, it remains undisputed that defendants, by deceptive means, sold a product or business opportunity that was not what they represented it to be and, therefore, had little or no value to those who purchased it. Gross proceeds then is a reasonable measure of the amount by which defendants were unjustly enriched. Further, it makes no difference that, because some consumers can no longer be located, some portion of the award may ultimately go to the United States' Treasury. As discussed above, the requested equitable award is intended to strip the wrongdoer of his ill-gotten gains, thereby deterring future deceptive conduct. That some consumers will ultimately be compensated for their losses is a secondary, albeit important, benefit.

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 enriched as a result of their deceptive practices. It stretches reason to characterize [*25] 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 200,000 consumers sent Ace at least \$ 13,116,021.00, but more likely an amount approximately \$ 16,096,345.00. Because defendants have not disputed the accuracy of the higher figure if gross proceeds are used to measure damages, the entry of judgment in the amount of \$ 16,096,345.00 is appropriate.

Febre's Individual Liability

To hold Febre liable as an individual defendant, the FTC must demonstrate that Febre actively participated in or had some measure of control over Ace's deceptive practices and had or should have had knowledge or awareness of the misrepresentations. *Amy Travel*, 875 F.2d at 573-74. As detailed in my July 1994 Report and the FTC's Rule 12(m) statement of undisputed facts, many pieces of evidence establish Febre's everyday involvement in and control over the operations of Ace. Defendants offer no evidence to the contrary. The FTC is entitled to a permanent injunction against Febre as well as Ace, and Febre should be jointly and severally liable for any monetary [*26] award.

Jurisdictional Issue

Defendants also contend that this court has no personal jurisdiction over the entities known as Mars-American Advertising, U.S. Press, Inc. or National Fiduciary Trust and, therefore, cannot enter judgment against them. These entities are solely owned by Febre. The FTC, however, does not seek judgment against them. As a result, the court's lack of personal jurisdiction over those entities provides no basis for denying this motion for summary judgment.

RECOMMENDATION

For the foregoing reasons, it is hereby recommended that plaintiff's motion for summary judgment be granted; that a permanent injunction be issued barring defendants from engaging in the types of deceptive practices alleged in plaintiff's complaint; and that judgment be entered against defendants in the amount of \$ 16,096,345.00. It is further recommended that the parties be directed to prepare, by agreement if possible, a proposed order that is consistent with this Report and Recommendation and to submit the proposed order to the court within 14 days.

Written objection to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed [*27] with the Honorable Blanche M. Manning within ten days after service of this Report and Recommendation. See *Fed. R. Civ. P. 72(b)*. Failure to object will waive any such issue on appeal.

Respectfully submitted,

JOAN HUMPHREY LEFKOW

United States Magistrate Judge

Dated: July 2, 1996







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