

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

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In the Matter of	)	
	)	
NATIVE ESSENCE HERB COMPANY,	)	
a corporation, and	)	DOCKET NO. 9328
	)	
MARK J. HERSHISER, and	)	
	)	
MARIANNE HERSHISER	)	
Respondents.	)	
_____	)	

**SCHEDULING ORDER**

- November 19, 2008 - Complaint Counsel provides preliminary witness list (not including experts) with description of proposed testimony.
- December 2, 2008 - Respondent's Counsel provides preliminary witness lists (not including experts) with description of proposed testimony.
- December 8, 2008 - Complaint Counsel provides expert witness list.
- December 15, 2008 - Respondent's Counsel provides expert witness list.
- December 16, 2008 - Deadline for issuing document requests, requests for admission, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
- January 6, 2009 - Complaint Counsel provides revised witness lists, including preliminary rebuttal witnesses, with description of proposed testimony.

- January 13, 2009 - Respondent's Counsel provides revised witness list, including preliminary sur-rebuttal witnesses, with description of proposed testimony.
- January 14, 2009 - Complaint Counsel provides expert witness reports.
- January 21, 2009 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- February 4, 2009 - Respondent's Counsel provides expert witness reports.
- February 13, 2009 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondent).
- February 20, 2009 - Deadline for depositions of experts (including rebuttal experts).
- February 27, 2009 - Deadline for filing motions for summary decision.
- February 27, 2009 - Complaint Counsel provides to Respondent's counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.  
  
Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.
- March 3, 2009 - Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition and copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.  
  
Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.

- March 5, 2009 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
- March 10, 2009 - Deadline for filing responses to motions for summary decision, or 10 days after service of the motion, whichever is sooner.
- March 16, 2009 - Deadline for filing motions *in limine* and motions to strike.
- March 19, 2009 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- March 26, 2009 - Deadline for filing responses to motions *in limine* and motions to strike.
- March 26, 2009 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- March 30, 2009 - Complaint Counsel files pretrial brief, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
- April 1, 2009 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.
- April 7, 2009 - Exchange proposed stipulations of law, facts, and authenticity.
- April 14, 2009 - Respondent's Counsel files pretrial brief, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
- April 15, 2009 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
- April 16, 2009 - Final prehearing conference to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.

April 16, 2009 - Commencement of hearing in room 532, Federal Trade  
immediately Commission Building, 600 Pennsylvania Avenue NW,  
following the Washington, DC 20580. (The date of the commencement of  
conclusion of the the hearing and other deadlines listed above are contingent upon  
final prehearing scheduling constraints in other dockets. Should the dates change,  
conference the parties will be notified as soon as practicable.)

#### **ADDITIONAL PROVISIONS**

1. Pursuant to Rule 3.21(c)(2), extensions or modifications to these deadlines will be made only upon a showing of good cause.

2. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: [oyalj@ftc.gov](mailto:oyalj@ftc.gov) by 5:00 p.m. on the designated date. This email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary. All submissions shall bear the words "Docket 9328" in the re line. Service by email shall be followed promptly by delivery of two hard copies by the next business day.

3. The parties shall serve each other by electronic mail. Service by email shall be followed promptly by delivery of a hard copy through one of the methods in 16 C.F.R. § 4.4(b). Deliveries shall be as follows:

For Complaint Counsel:	name:	Erika Wodinsky
	address:	Federal Trade Commission 901 Market St., Suite 570 San Francisco, CA 94103
	fax:	415-848-5184
	tel:	415-848-5190
	email:	<a href="mailto:ewodinsky@ftc.gov">ewodinsky@ftc.gov</a>

name: Matthew Gold  
address: Federal Trade Commission  
901 Market St., Suite 570  
San Francisco, CA 94103  
fax: 415-848-5176  
tel: 415-848-5190  
email: [mgold@ftc.gov](mailto:mgold@ftc.gov)

For Respondents' Counsel:

name: Richard A. Jaffe  
address: 3200 Southwest Frwy., Suite 3200  
Houston, TX 77027  
fax: 713-626-9420  
tel: 713-626-3550  
email: [rickjaffeesq@aol.com](mailto:rickjaffeesq@aol.com)

4. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

5. Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. Motions that fail to include such statement may be denied on that ground.

6. Each motion must attach a draft order containing the proposed relief. All such attachments must be titled "Proposed Order," instead of simply "Order." In no event shall a party file a pleading that is titled "Order."

7. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45. Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

8. Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion

for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

9. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 5 days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute.

10. Each party is limited to 50 document requests, 50 interrogatories, and 50 requests for admissions, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Additional discovery may be permitted only for good cause shown upon application to and approval by the Administrative Law Judge. Responses to document requests, interrogatories, and requests for admission shall be due within 20 days of service. Objections to document requests, interrogatories, and requests for admission shall be due within 10 days of service.

11. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition.

12. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the deposition date is scheduled.

13. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within five business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition as agreed to by all parties involved.

14. The revised and final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary or revised preliminary witness

lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause.

15. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by order of the Administrative Law Judge upon a showing of good cause.

16. At the time an expert is first listed as a witness by a party, the listing party will provide to the other party the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years; and transcripts of such testimony in the possession, custody or control of the listing party or expert.

17. Each expert report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions. Unless otherwise agreed by the parties, draft reports and notes of experts need not be produced. Communications between experts and counsel or consultants need not be produced unless relied upon by the expert in formulating an opinion in the case.

18. A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not listed as a witness at hearing.

19. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the adjudicative hearing must comply with 16 C.F.R. § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel. Oppositions to applications for issuance of subpoenas shall be due within three business days.

20. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

21. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 702. F.R.E. 701.

22. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and may not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

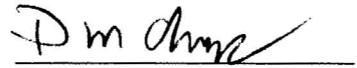
23. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

24. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

25. Complaint Counsel's exhibits shall bear the designation CX and Respondent's exhibits shall bear the designation RX or some other appropriate designation. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

26. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. Additional exhibits may be added after the final prehearing conference only by order of the Administrative Law Judge upon a showing of good cause. Counsel will also be required to give *the originals* of exhibits to the court reporter, which the court reporter will maintain as part of the record.

ORDERED:

  
D. Michael Chappell  
Administrative Law Judge

Date: October 23, 2008