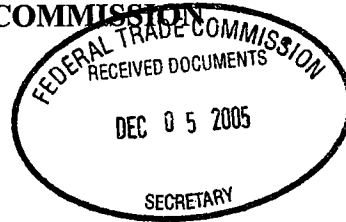


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S CONSOLIDATED OPPOSITION TO RESPONDENTS'
MOTIONS TO EXCLUDE COMPLAINT COUNSEL'S DESIGNATED EXPERTS
MICHAEL B. MAZIS, PH.D AND GEOFFREY NUNBERG, PH.D**

Pursuant to RULE OF PRACTICE 3.22(c), Complaint Counsel hereby oppose Respondents' motions to exclude two timely-designated experts who intend to offer scientific opinions at trial concerning the promotional materials for the challenged products.¹ Respondents' latest motions to exclude these experts are untimely, redundant, and unpersuasive. Respondents filed these motions long after the expiration of the deadlines for submitting such motions to strike and for providing expert opinion statements. Respondents' motions rely on a dismissive view of our experts and the Commission's caselaw, rehashing arguments raised in their previous motions to preclude facial analysis and to exclude our experts' reports and testimony. The only new facet of Respondents' argument is that they now cite statements of one of their eight late-disclosed,

¹ Respondents served Complaint Counsel with their motions well after 5p.m. on Wednesday, November 23, 2005. As the Court's Scheduling Order requires service by that time, the effective date for service was Friday, November 25th, the day after the Thanksgiving holiday. Our *Opposition* is timely filed within 10 days of that date.

unilaterally added, “re-rebuttal” witnesses. These previously-undisclosed statements of opinion are irrelevant to admissibility; Respondents’ dismissive criticism relates only to the weight that the Court should accord to our designated experts and their opinions. The Court should deny Respondents’ untimely, redundant, and unpersuasive motions.

BACKGROUND

The *Complaint* in this matter alleges, *inter alia*, that Basic Research LLC and other related companies and individuals (collectively, “Respondents”) marketed certain dietary supplements with unsubstantiated claims for fat loss and weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52. On August 11, 2004, this Court issued its *Scheduling Order*, which among other things established clear deadlines for the disclosure of expert witnesses and their reports, as well as the filing of motions *in limine* and motions to strike.

Complaint Counsel complied with this Court’s *Scheduling Order* by identifying our testifying expert witnesses on October 6, 2004, and providing the experts’ reports later that month. Among the experts we timely identified as witnesses for trial were two scientific experts qualified to offer opinions relating to the contents of the promotional materials for the challenged products: Michael B. Mazis, Ph.D, Professor of Marketing and former longtime Chair of the Marketing Department at the Kogod School of Business of American University, and Geoffrey Nunberg, Ph.D, Consulting Full Professor of the Stanford University Department of Linguistics, and Senior Research Fellow at the Center for the Study of Language and Information at Stanford University.

Both Professor Mazis and Professor Nunberg have exercised their scientific expertise in the fields of consumer behavior and linguistics, respectively, and related fields, in reviewing the contents of Respondents' promotional materials. Both intend to offer testimony at trial, based on their fields of expertise, concerning their analyses and conclusions. These experts' reports appear to be attached to Respondents' motions. At the hearing in this matter, armed with this and other extrinsic evidence and testimony, Complaint Counsel intend to argue, *inter alia*, that Respondents have, in fact, marketed certain dietary supplements with unsubstantiated claims for fat loss and weight loss, and have falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the FTC Act.

Following Complaint Counsel's timely designations of experts, in mid-October 2004, Respondents identified three proposed expert witnesses. Respondents identified Edward Popper, Lawrence Solan, and one of the parties in interest, Respondent Daniel Mowrey, as proposed expert witnesses by the October 2004 deadline set in the Court's *Scheduling Order*. These proposed witnesses' *curricula vitae* suggested that Messrs. Popper and Solan would address advertising issues. According to the *vitae*, at that time, Mr. Popper was a Dean and Professor of International Business with some teaching experience in marketing, and Mr. Solan was a Professor of Law at Brooklyn Law School, with a Ph.D in linguistics, whose teaching experience includes a course on language and law. Respondent Mowrey was the only person whom Respondents appeared to designate as a proposed expert witness relating to the issue of substantiation.

Although Respondents considered naming additional expert witnesses for trial in November 2004, Respondents ultimately submitted only *two* expert reports, one from

Respondent Mowrey, addressing issues raised by Complaint Counsel's medical experts, on December 8, 2004, and one from Lawrence Solan, addressing linguistic issues concerning word meaning or usage, on November 29, 2004. *See, e.g.*, Solan Rep. (filed Nov. 30, 2004).

Complaint Counsel did not find it necessary to submit a rebuttal report for Professor Nunberg concerning Lawrence Solan's report. Moreover, Respondents never sought leave to submit any additional response to Professor Nunberg's report.

Respondents withdrew their designation of marketing professor Edward Popper as an expert witness on November 29, 2004, the day Mr. Popper's expert report was due. As a result, Respondents failed to submit any timely expert report relating to the analyses and conclusions of Professor Mazis. Additionally, Respondents never sought leave to submit any response to the Mazis report, and they never moved to supplement their list of proposed expert witnesses.

In late January 2005, Respondents filed separate motions to strike the reports of Professors Mazis and Nunberg, and a third motion to preclude any facial analysis of their advertising and promotional materials. Respondents filed these three motions by the February 22, 2005 deadline set by the Court for motions to strike and motions *in limine*. Thereafter, the Court issued a *Second Revised Scheduling Order*, which did not reset or extend the previously-expired deadline for motions to strike and motions *in limine*. *See Order*, Aug. 4, 2005, at 2.

Consistent with the *Second Revised Scheduling Order*, Complaint Counsel have filed no additional motions to strike, save one motion directed at eight proposed "surprise" experts that Respondents unilaterally added to their latest *Final Witness List*. Respondents added these newly-proposed experts to their *Final Witness List* quite recently, despite the fact that the deadline for identification of expert witnesses expired over one year ago on October 13, 2004, and the deadline

for seeking leave to submit sur-rebuttal reports expired nearly a year ago, in late January 2005, thirty days after the service of our medical experts' rebuttal reports.² Respondents did not seek leave to add the witnesses they added to their *Final Witness List*. Complaint Counsel have vehemently objected to Respondents' attempt to override the deadlines for the disclosure of expert witnesses, and we have moved to strike those late-disclosed, newly named "re-rebuttal" witnesses. *See* Compl. Counsel's Objs. and Mot. to Strike (Nov. 30, 2005).

Despite the Court's *Scheduling Order*, Respondents have filed new motions to strike three of Complaint Counsel's testifying experts, including Professors Mazis and Nunberg. Attached to Respondents' motions to strike Professors Mazis and Nunberg are statements of opinion attributed to one of Respondents' eight proposed "surprise" experts, Stephen M. Nowlis, a Professor of Marketing. Respondents recently identified Stephen Nowlis as a proposed expert to testify "without limitation, on the testimony of Dr. Michael Mazis." Resp'ts' List at 10 (Nov. 8, 2005). In their untimely identification of additional proposed expert witnesses for trial, Respondents did not state that Stephen Nowlis would express opinions concerning Professor Nunberg.

Most recently, the Court has addressed the issues raised in Respondents' motion to preclude any facial analysis of their promotional materials. On December 1st, this Court denied Respondents' motion to preclude such expert analysis, observing that "Respondents' motion

² *See* RULE OF PRACTICE 3.31(b)(3):

In the absence of other directions from the Administrative Law Judge or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut proposed expert testimony on the same subject matter identified by another party under this paragraph, within 30 days after the disclosure made by the other party.

appears to seek to preclude Complaint Counsel from presenting evidence about the very issue that must be decided after receipt of the evidence in this case.” Order, Dec. 1, 2005, at 2. The Court declared that the question of “whether such claims are reasonably clear on the face of the challenged advertisements is a factual issue to be determined after the evidentiary hearing.” *Id.*

Respondents’ present motions to exclude, in essence, argue that the proposed testimony of Professors Mazis and Nunberg are “subjective belief and unsupported speculation,” and duplicative of each other, and should be excluded from evidence. Respondents’ filing necessitates this response.

DISCUSSION

Complaint Counsel’s designated experts offer competent and reliable expert opinions, founded on different fields of scientific expertise, and their expert testimony concerning the promotional materials for Respondents’ challenged products should be admitted into evidence. Respondents’ renewed efforts to prevent these experts from testifying are untimely, repetitious, and improper. The only fresh material submitted in their latest motions consists of previously-undisclosed and unduly delayed opinions relating to the weight, not the admissibility, of our experts’ reports and their anticipated testimony. Respondents have submitted the record on which they rely; no hearing is necessary to deny their untimely, redundant, and unpersuasive motions.

I. Respondents’ Motions to Strike Complaint Counsel’s Timely-Designated Experts Are Untimely and Redundant

Respondents’ motions are untimely. Respondents filed the present motions to exclude our testifying witnesses’ testimony nearly nine months after the deadline for such motions to strike and motions *in limine* passed. In the *Second Revised Scheduling Order*, the Court did not extend

the deadline for motions to strike and thereby exclude witnesses. *See* Order, Aug. 4, 2005, at 2. The fact that Respondents have dubbed their latest motions to strike as “objections” or “motions to exclude” does not alter the reality that Respondents are again affirmatively seeking to preclude properly-designated experts from testifying at the hearing in this matter. Respondents are seeking to strike our experts and portions of their reports as well. *See, e.g.*, Resp’ts’ Mot. to Exclude Prof. Mazis at 1 (arguing that expert report must be excised). Such motions are untimely. Respondents have failed to show good cause, or even argue that such cause exists, for the filing of their untimely motions.³

Respondents’ motions are redundant as well. They repeat many of the arguments presented and debunked in the briefing on Respondents’ motions to strike the expert reports of Professors Mazis and Nunberg. Our argument therefore turns to the arguments we highlighted in responding to those motions.

II. Complaint Counsel’s Timely-Designated Experts Offer Competent and Reliable Expert Opinions that Should be Admitted Into Evidence

A. Standards Underlying Respondents’ Motions

Respondents’ latest motions to exclude Professors Mazis and Nunberg are essentially additional motions *in limine* and are discussed as such below. In federal court practice, motions

³ By contrast, with good cause, Complaint Counsel recently submitted our motion to strike Respondents’ late-disclosed, additional “re-rebuttal” witnesses and a trial exhibit that Respondents did not timely produce to Complaint Counsel. In our motion, we demonstrated good cause for filing an additional motion to strike because Respondents identified their eight new witnesses long after the expiration of the deadline for motions to strike, and failed to produce the exhibit referenced in that motion, RX-807, for many months after that deadline as well. We have filed no other motions to strike of late, and our Objections to Respondents’ witness list expressly relied upon our previous motions *in limine* filed in compliance with the Court’s *Scheduling Order*.

in limine are generally “confined to very specific evidentiary issues of an extremely prejudicial nature.” *United States v. Certain Land Situated in Detroit*, 547 F. Supp 680, 681 (E.D. Mich. 1982). “Orders *in limine* which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility of evidence as they arise.” *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir.1975) (addressing motion to exclude expert); *A & M Records v. Napster, Inc.*, 2000 U.S. Dist. Lexis 20668 (N.D. Cal. 2000) (holding that under-inclusiveness of expert survey went to the weight of the survey, not its admissibility). Respondents’ motions to exclude the testimony of Professors Mazis and Nunberg are “too sweeping in scope to be decided *in limine*.” See generally *National Union Fire Ins. Co. v. L. E. Myers Co. Group*, 937 F. Supp 276, 287 (S.D.N.Y. 1996) (motion to exclude any extrinsic evidence or testimony regarding the meaning of insurance policies); MCCORMICK ON EVID. § 52 (4th ed. 1992). Moreover, even after the Supreme Court’s decision in *Daubert*, testimony, cross-examination, and introductions of contrary evidence remain the traditional and appropriate means to challenge expert opinion. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 595 (1993); see also *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996) (“The trial court’s role as a gatekeeper is not intended to serve as a replacement for the adversary system.”). We discuss the application of *Daubert* to these proceedings *infra* pages 18-20.

B. The Commission and the Courts Have Long Endorsed Expert Analysis of the Contents of Respondents’ Promotional Materials

Once again, Respondents are effectively seeking to prevent Complaint Counsel from advancing evidence that the alleged claims may be discerned from the content of Respondents’

promotional materials, literally the face of the advertisements themselves and the words used therein. Respondents seek to deprive this Court of the ability to exercise its authority to consider expert analysis relevant to the contents of Respondents' promotional materials.

“The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself.” *Kraft, Inc.*, 114 F.T.C. 40, 121 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992). In *Thompson Medical*, the Commission noted that it is “often able to conclude that an advertisement contains an implied claim by evaluating the content of the ad and the circumstances surrounding it.” 104 F.T.C. 648, 789 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). When the language of, or depictions in, an ad are clear enough to permit the Commission to conclude with confidence that a claim, whether express or implied, is conveyed to consumers acting reasonably under the circumstances, no extrinsic evidence is necessary to determine that an ad makes an implied claim. *Kraft, Inc.*, 114 F.T.C. at 120. If, after examining all the elements of an ad and the interaction between them, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis, alone, will permit the Commission to conclude that the ad contains the claim. *Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994) (citing *Kraft*, 114 FTC at 121, and *Thompson Medical*, 104 F.T.C. at 789 (1984)).

The Commission deems an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to convey that message. *Kraft, Inc.*, 114 F.T.C. at 120; *Thompson Medical*, 104 F.T.C. at 788. An advertisement may convey numerous representations, and the same advertising elements may be amenable to more than one reasonable interpretation. *Kraft, Inc.*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7; *Cliffdale Assocs.*, 103 F.T.C. 110, 178 (1984) (Policy Statement on Deceptive

Acts and Practices) (“Deception Statement”). Thus, the representation(s) alleged in the complaint need not be the only reasonable interpretation(s) of the challenged advertising; an advertisement that reasonably can be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. *Kraft, Inc.*, 114 F.T.C. at 120 n.8; *Thompson Medical*, 104 F.T.C. at 789 n.7, 818; *Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff’d*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).⁴

Because consumers may be misled by innuendo as well as by outright false statements, both implied and express representations may be found deceptive. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir.), *cert. denied*, 429 U.S. 818 (1977). Evidence that consumers have actually been misled is not necessary; the likelihood of deception is the standard by which the advertising is judged. *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982); *Cliffdale Assoc.*, 103 F.T.C. at 165.

The Court’s December 1st *Order* is grounded on, and reaffirms, a settled point in Commission jurisprudence—that Complaint Counsel may rely upon expert analysis to illuminate and prove the existence of claims implied by Respondents’ advertising and promotional materials. The Commission’s ability to interpret advertisements without extrinsic evidence in the form of consumer surveys has been accepted by the courts for over 50 years⁵ and has survived First

⁴ See also *Deception Statement*, 103 F.T.C. at 178 n.21 (“A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate.”).

⁵ E.g., *Thompson Medical*, 104 F.T.C. at 788-89; *Bristol-Myers Co.*, 738 F.2d at 563; *American Home Products Corp.*, 695 F.2d at 687 n.10; *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); *National Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944) (Commission “not required to sample public opinion,” but may determine representations from the ads

Amendment challenges. *Kraft, Inc.*, 970 F.2d at 320-22. The Commission's use of expert analysis is wholly consistent with the teachings of the U.S. Supreme Court. That Court has recognized that even a non-expert body (e.g., a court or bar disciplinary committee) need not rely on survey evidence where an implied claim is "self-evident." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985). The implied claims at issue here are no less apparent than the implied claim in *Zauderer*, as discussed in our *Opposition to Respondents' Motion to Preclude Facial Analysis*. Moreover, it is well within the Commission's acknowledged expertise to find Respondents' ads misleading on their face. As the Commission has repeatedly made clear, however, it will rely solely on its own reading of an ad only where the claim at issue is express or where the claim, although implied, is reasonably apparent from the face of the ad.⁶

Whether an advertisement communicates a deceptive message is determined by the net impression that the ad, taken as a whole, is likely to make upon reasonable members of the viewing public. Thus, literally true statements may be deceptive, and ads reasonably capable of being interpreted in a misleading way are unlawful even if other, non-misleading interpretations are possible.⁷ As previously noted, it is well-settled that the Commission may rely on its own

themselves); *Kraft*, 970 F.2d at 319.

⁶ See, e.g., *Removatron Int'l Corp.*, 111 F.T.C. 206, 292 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Thompson Medical*, 104 F.T.C. at 788-89; *Deception Statement*, 103 F.T.C. at 176-77. Of course, the Commission will not ignore extrinsic evidence if presented, but will instead consider it to the extent it is probative. See *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 587-89 (D.C. Cir. 1970); *Deception Statement*, 103 F.T.C. at 176; *Stouffer Foods Corp.*, 118 F.T.C. at 798 (citing *Kraft*, 114 F.T.C. at 121 and *Thompson Medical*, 104 F.T.C. at 789).

⁷ *Thompson Medical*, 791 F.2d at 197; see, e.g., *Removatron*, 884 F.2d at 1496; *American Home Prods. Corp.*, 695 F.2d at 687.

reasoned analysis of an ad, without resort to extrinsic evidence, to determine whether that ad may reasonably be understood to convey a particular claim. The Supreme Court has recognized that “it [was not] necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead” *Colgate-Palmolive*, 380 U.S. at 391-92; accord *Zauderer*, 471 U.S. at 652-53.⁸ Hence, the Commission has repeatedly stated that where, as here, an implied claim is reasonably apparent from the face of the ad itself, the Commission may find the claim without extrinsic evidence.

The Commission also has noted that the Administrative Law Judges in adjudicatory proceedings should use “common sense and expertise in setting forth the overall effects and net impressions that the advertisements” convey and that “[s]uch an approach [*i.e.*, the use of common sense and expertise] is not merely permissible, but is required in order to assess whether advertising is ‘false’ . . . , and the Commission has long been upheld in reading advertising for its total or general impression on the consuming public.” *Porter & Dietsch, Inc.*, 90 F.T.C. 770, 862 & n.3 (1977), *aff’d*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

In *Kraft*, the Commission said it will find an implied claim in an ad only where “the language or depictions are clear enough to permit us to conclude with confidence, after examining the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances.” The Seventh Circuit upheld the

⁸ *Colgate* involved the materiality of an express claim and not the interpretation of an implied claim, but in *Zauderer*, the Supreme Court quoted *Colgate* with approval in concluding that an implied claim apparent on the face of an ad could be found without a consumer survey. See 471 U.S. at 652-53. Indeed, it is logical that, if the Commission is able to assess materiality without extrinsic evidence, it is equally capable of determining for itself whether a reasonably apparent implied claim has been made.

Commission's decision in *Kraft*, stating that the First Amendment is not violated when the Commission finds implied claims "so long as those claims are reasonably clear from the face of the advertisement." *Kraft, Inc.*, 970 F.2d at 319.

In sum, for more than fifty years the courts have recognized that the Commission can evaluate ads based on its expertise. *Cf. Kraft*, 970 F.2d at 316 (an FTC finding is "to be given great weight by reviewing courts because it 'rests so heavily on inference and pragmatic judgment' and in light of the frequency with which the Commission handles these cases") (citing *Colgate-Palmolive Co.*, 380 U.S. at 385). Enormous financial incentives to provide truthful product information render commercial speech far too hardy to be chilled by the Commission's continued use of an interpretative expertise that courts have sustained for over fifty years.⁹

Respondents repeatedly argue now, as before, that the Court cannot rely on expert analysis to determine whether the alleged claims were made but rather must rely exclusive on a copy test to make that determination. *See, e.g.*, Resp'ts' Mot. to Exclude Prof. Mazis at 4 (service date Nov. 25, 2005) (noting that newly-disclosed witness "Dr. Nowlis finds 'facial analysis' nothing more than unsubstantiated opinion, not recognized in the profession"); *see also id.* at 3-4. Respondents' argument ignores many years of Commission caselaw, findings, and experience to the contrary. *See supra* pages 9-12. The Court has effectively rejected Respondents' argument already, in concluding that "whether [the alleged] claims are reasonably clear on the face of the challenged advertisements is a factual issue to be determined after the evidentiary hearing."

⁹ *See, e.g., Kraft*, 970 F.2d at 321; *Bose*, 466 U.S. at 504 n.22 ("danger that governmental regulation of false or misleading * * * product advertising will chill accurate and nondeceptive commercial expression" is "minimal"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977); *Sears Roebuck & Co. v. FTC*, 676 F.2d 385, 400 (9th Cir.1982).

Order, Dec. 1, 2005, at 2. Respondents' argument has not gained currency through repetition.

Complaint Counsel should not be precluded from arguing that this Court should find, based on analyses of the contents of the promotional materials, including the words used therein, that the advertisements for the challenged products are deceptive. This Court's application of common sense and experience to the interpretation of implied claims remains essential to its adjudication of the Commission's *Complaint* under Sections 5(a) and 12 of the FTC Act.

C. Complaint Counsel's Timely-Designated Experts Offer Competent and Reliable Expert Analyses of the Contents of Respondents' Promotional Materials and Those Analyses Should be Admitted Into Evidence

Respondents again contend that the expert reports and testimony of Professors Mazis and Nunberg are unreliable. To the contrary, these experts' reports and testimony are based on sound, objective, professional judgment. They are relevant, material, and reliable. They are probative and supported by well-recognized scientific theory, and by the extensive background and experience of their authors, which qualify them to render the opinions they have expressed. As discussed in more detail below, Professor Mazis bases his conclusions on his expertise and research in evaluating consumer perception, his familiarity with the academic literature, and his experience in reviewing thousands of ads. Professor Nunberg, an accomplished expert in the field of linguistics, bases his conclusions on his study and research in that field, and his experience as a Senior Research Fellow at the Center for the Study of Language and Information at Stanford University. These experts' duly-disclosed opinions should be accepted into evidence at trial.

1. Relevant Expertise and Experience Qualify Professors Mazis and Nunberg to Render Expert Opinions in this Matter That Are Reliable Under Applicable FTC Precedent

When the Commission turns to extrinsic evidence to determine the meaning of an ad, the

evidence can consist of “common usage of terms, expert opinion as to how an advertisement might reasonably be interpreted, copy tests, generally accepted principles of consumer behavior, surveys, or ‘any other reliable evidence of consumer interpretation.’” Final Decision, *In re Telebrands Corp.*, Docket No. 9313, 2005 WL 2395791, slip op. at 8 (Sept. 19, 2005); see *Deception Statement*, 103 F.T.C. at 174, 176 n.8 (emphasis added); *Thompson Medical*, 104 F.T.C. at 790. The Commission certainly may rely on opinions of expert witnesses as to how an advertisement may reasonably be interpreted. See *Kraft*, 114 F.T.C. at 122. The Supreme Court has recognized that expert opinion based on personal knowledge and experience has a place in the framework of a *Daubert* analysis, see *Kumho Tire Co. v Carmichael*, 526 U.S. at 150.¹⁰

Federal Rule of Evidence 702 provides that an expert witness may rely on his or her experience as the basis for testimony. FED. R. EVID. 702 (2000). Rule 702 provides as follows:

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 comment to post-*Daubert* amendment of the *Federal Rules of Evidence* in 2000 makes clear that “[n]othing in this amendment is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a

¹⁰ A strict application of the *Daubert* factors is not appropriate in this case and is inconsistent with Commission jurisprudence. See Final Decision, *In re Telebrands Corp.*, Docket No. 9313, 2005 WL 2395791, slip op. at 22-23 & n.32 (Sept. 19, 2005); see also *infra* pages 18-20.

sufficient foundation for expert testimony.”¹¹ Considering his extensive background and experience in the field of consumer behavior and marketing, Professor Mazis is well-qualified to render an opinion in this matter. Similarly, considering Professor Nunberg’s background in linguistics, including common word usage, he is well-qualified to render an opinion in this matter. Both experts pass any “gatekeeper” test, and Respondents must wait until trial to cross-examine and introduce contrary opinions. *Daubert*, 509 U.S. at 595; *United States v. 14.39 Acres*, 80 F.3d at 1078. Of course, as noted in their motions, Respondents have already had an opportunity to examine the experts in depositions. Excluding their testimony at trial is improper.

Throughout their expert reports, Professors Mazis and Nunberg rely on and apply their specialized knowledge, experience, education, and training, as well as research reported in academic literature. If Respondents wished to inquire in more detail into the basis for their opinions, they could have cross-examined them about those opinions during their depositions. As the transcripts attached to Respondents’ motions reveal, Respondents did not do so. As further discussed below, the testimony of Professors Mazis and Nunberg will aid the Court in rendering a decision in this matter and should not be excluded.

a. Professor Mazis

Dr. Michael B. Mazis, Ph.D, Professor of Marketing of the Kogod School of Business at

¹¹ Moreover, Respondents themselves have previously acknowledged that “‘administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence’ that govern judicial proceedings.” Resp’ts’ Mot. to Strike Mazis Rep. at 2 (Jan. 31, 2005) (quoting *FTC v. Cement Instit.*, 333 U.S. 683, 705-06 (1948)). RULE 3.43(b)(1) of the Commission Rules of Practice provides that “[r]elevant, material, and reliable evidence shall be admitted.” In any event, as discussed above, even under the “rigid rules of evidence,” the Supreme Court has recognized that expert opinion based on personal knowledge and experience has a place in the framework of an analysis pursuant to *Daubert*. See *Kumho Tire*, 526 U.S. at 150.

American University, has an extensive background and experience as a researcher and university professor in consumer behavior and marketing. *See* Resp'ts' Mot. to Exclude Prof. Mazis at Ex. A (Mazis *curriculum vitae*). He has served over 10 years as Chair of the Department of Marketing at American University and has been a faculty member for 25 years. *See id.*, Mazis Expert Report at 2. He has also published over 60 articles in academic journals and conference proceedings, *see id.* at 3, and he has conducted hundreds of surveys and research studies. *See In re Telebrands Corp.*, 2004 FTC LEXIS 154, at *42 (Sept. 15, 2004). He also has been editor of several marketing and consumer research journals. *Id.* In addition, he has provided expert testimony about ad interpretation in numerous federal court cases and before Administrative Law Judges, including before this Court in *Telebrands*. *See* Resp'ts' Mot. to Exclude Prof. Mazis at Ex. A (Mazis case list). In rendering his expert opinion in this matter, Professor Mazis relied on and applied his experience, gleaned from years of research and familiarity with academic literature. Professor Mazis drew his conclusions based on reviewing the text of Respondents' promotional materials, the names of products, and the use of visual images. All of these are appropriately considered under Commission precedent. As a result of Professor Mazis' knowledge, experience, education and training, as applied to Respondents' promotional materials, Complaint Counsel intend to offer Professor Mazis as an expert in consumer response to advertising and other promotional materials, and in measuring advertising deception. Professor Mazis' opinion addresses the claims concerning all the challenged products.

b. Professor Nunberg

Dr. Geoffrey Nunberg, Ph.D, Professor of Linguistics at Stanford University, has an extensive background and experience as a researcher and university professor in linguistics. Professor Nunberg's opinion focuses on the claims for PediaLean, and the words used in the promotional materials for that product. Professor Nunberg holds a Ph.D. in Linguistics and is currently a Senior Research Fellow at the Center for Study for the Study of Language and Information at Stanford University. He is also a Consulting Full Professor in the Department of Linguistics at Stanford where he has taught courses in semantics and pragmatics, lexicography, the structure of written language, and other language related areas. Professor Nunberg serves as usage editor and Chair of the Usage Panel of the *American Heritage Dictionary* and has for many years acted as a consultant to the dictionary regarding matters of definition usage. He has published numerous papers in peer-reviewed journals and served as a witness in a number of cases regarding word meaning. Resp'ts' Mot. to Exclude Prof. Nunberg at Ex. A, Nunberg Expert Report at 1-2.

In rendering his expert opinion in this matter, Professor Nunberg relied on and applied his experience, gleaned from years of research, teaching, consulting and familiarity with academic literature, as well as his own research relevant to this matter, set forth in his Expert Report. Based on Professor Nunberg's knowledge, experience, education, training, and research, Complaint Counsel intend to offer Professor Nunberg as an expert in linguistics, the meaning and use of words, including lexicography and common word usage. As an expert in these subjects, Professor Nunberg's opinion constitutes extrinsic evidence of how Respondents' ads might reasonably be interpreted by consumers. *See Kraft*, 114 F.T.C. at 121-22. The Commission recently reaffirmed

the value of such extrinsic evidence in its final decision in the *Telebrands* case, in which it cited common term usage as the first of numerous kinds of extrinsic evidence that the Court and the Commission may consider. *See* Final Decision, *In re Telebrands Corp.*, Docket No. 9313, 2005 WL 2395791, slip op. at 8.

Professor Nunberg drew his conclusions based upon his review of the contents of Respondents' promotional materials and his other professional analyses of how the terms used in Respondents' advertisements are used in press stories and the Internet. Resp'ts' Mot. to Exclude Prof. Nunberg at Ex. A, Nunberg Expert Report at 3. His conclusions are based on his research and application of his experience in his field and therefore are competent and reliable.

2. A Strict Application of the *Daubert* Factors Is Not Appropriate and Is Inconsistent with Federal Trade Commission Jurisprudence

Respondents appear to argue that this Court should apply *Daubert's* so-called "hard science" gatekeeper test to the expert reports and the opinions stated therein. *Daubert* and its progeny, including *Kumho*, require a federal court to maintain a gatekeeper role for expert testimony, setting forth five factors for the court to weigh. As the Commission has stated, however, "*Daubert* and *Kumho* do not apply directly to administrative agencies' adjudicative proceedings." *In re Telebrands Corp.*, 2005 WL 2395791, slip op. at n.32 (citations omitted). The Commission is simply "guided by the spirit of *Daubert* and *Kumho* in making a determination as to the admissibility of expert testimony." *Id.* (citations omitted). Following these precepts, and mindful of the fact that the Commission has not expressly adopted *Daubert* in its jurisprudence,¹² a strict application of the *Daubert* factors is not appropriate.

¹² See, for example, the Commission's post-*Daubert* opinion in *Novartis Corp.*, 127 F.T.C. 580 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000), in which it assessed the quality and

According to the *Daubert* framework and the *Federal Rules of Evidence*, the trier of fact must determine whether the expert is proposing to testify to (1) scientific, technical, or *specialized knowledge* that (2) will assist the trier of fact to understand or determine a fact in issue. FED. R. EVID. 702; *see also Daubert*, 509 U.S. at 590-92. Moreover, while *Daubert* dealt with “pure” or “hard” science, *Kumho* provides that for fields of soft science, the gatekeeper role is the same, but the *Daubert* factors are to be applied on a case-by-case basis allowing the court discretion in its choice of factors, depending on the issue, the expertise in question and the subject of the expert testimony.¹³ Thus, the court has considerable leeway in deciding in a particular case how to determine whether particular expert testimony is reliable. *Kumho*, 526 U.S. at 152. Indeed, in applying *Daubert* and Rule 702 to advertising cases, federal courts have looked to what specialized knowledge the proposed expert possesses in assessing admissibility. *See, e.g., Half Price Books, Records, Magazines, Inc. v. Barnesandnoble.com, LLC*, 2004 U.S. Dist. LEXIS 23691 at *10 (N.D. Tex. Nov. 22, 2004) (finding that expert’s years of experience in market analysis, as well as his research and writing in the field, constituted “specialized knowledge” for purposes of determining the admissibility of his testimony and report); *see also Anthony Tyus v. Urban Search Management*, 102 F.3d.256 (7th Cir. 1996), *cert. denied*, 520 U.S.1251 (1997)

reliability of experts introduced by both parties following its long-standing jurisprudence.

¹³ For example, in *Kumho*, the Court noted (526 U.S. at 151):

[*Daubert*] made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist.

(concluding that it was error for court to exclude social sciences expert testimony on the results of a focus group); *Betterbox Communications LTD v. BB Techs., Inc.* 300 F. 2d 325, 329-30 (3^d Cir. 2002) (refusing to rule that lower court's admitting expert opinion testimony on likelihood of confusion in trademark infringement case based on his personal knowledge or experience was abuse of discretion). Otherwise, a rigid *Daubert* analysis would preclude all experts except those in pure sciences such as chemistry, physics, and biology. Such a rigid analysis is contrary to the Commission's jurisprudence that it will consider the testimony of "expert witnesses . . . as to how an advertisement might reasonably be interpreted." *Thompson Medical*, 104 F.T.C. at 790; *see also Kraft*, 114 F.T.C. at 122.

3. The Proposed Testimony Satisfies a "Gatekeeper" Test for Expert Opinion

Professors Mazis and Nunberg pass a "gatekeeper" test for the "soft" science fields of consumer behavior and linguistics, respectively, and their testimony will assist the Court in analyzing the contents of Respondents' promotional materials and determining whether the alleged claims were made.

Professor Mazis performed a facial analysis as part of his Expert Report. Professor Mazis states in his report that the claims are communicated by elements within the four corners of the ads. For example, regarding the efficacy claims for the fat loss gels, Professor Mazis noted the use of particular phrases, 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." He also noted that the names of the products (Cutting Gel and Tummy Flattening Gel) strongly suggest that use of the products produces visibly obvious

fat loss. In addition, he noted that the use of visual images, such as slim models and models with well-defined muscles, further strengthens the verbal statements made in the advertising. Resp'ts' Mot. to Exclude Prof. Mazis, Ex. A (Mazis Expert Report). In making such an analysis, Professor Mazis used specialized knowledge that he gained over many years of viewing advertisements, conducting consumer surveys, and reading academic research. Respondents have insisted that Professor Mazis can draw such conclusions based only on a survey. Underlying Respondents' entire argument, and the previously-undisclosed statement of their proposed surprise expert witness, is the erroneous assumption that consumer surveys provide absolute answers that common sense and "administrative experience" cannot. But differences of opinion concerning sampling, questionnaire design, methodology, and statistical analysis create their own set of uncertainties.¹⁴ Professor Mazis' testimony is clearly admissible under Commission caselaw.

Professor Nunberg offered the Court the benefit of his expertise as a linguist relating to common word usage and the meanings of words. For example, he analyzed the meaning of "significant" as used in the PediaLean ads. He concluded that, in the context of the ads, "*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." Resp'ts' Mot. to Exclude Prof. Nunberg at Ex. A, Nunberg Expert Report at 3. He also concluded that "there are no material differences between speaking of a significant weight loss and speaking of a substantial weight loss." *Id.* Furthermore, he supported his conclusion by examining how the terms "substantial" and "significant" were used in press stories and on the

¹⁴ See, e.g., *Tyco Indus., Inc. v. Lego Sys. Inc.*, 5 U.S.P.Q.2d 1023, 1031 (D.N.J. 1987), *aff'd*, 853 F.2d 921 (3d Cir.), *cert. denied*, 408 U.S. 955 (1988).

Web. *Id.* He noted that analysis of the use of words in the press and on the Internet is a technique utilized by persons in his profession. *Id.* at ¶ 19.¹⁵

Another example of the useful expertise provided by Professor Nunberg is his analysis of the meaning of “substantial” versus “significant.” He states that they are “cognitive synonyms” in the conventional, “quantity” sense of each word. Nunberg Expert Report at ¶ 35. He notes that the words may differ slightly in connotation or emphasis, but each word entails the other— if a reduction in a value can be described as “substantial,” it can also be “significant,” and vice-versa. *Id.* (noting dictionaries’ tendency to interdefine these terms); *id.* at ¶ 38 (noting, on basis of linguistic analysis of other media, that overall range of percentages that are described as “significant” is not systematically different from the percentage range of reductions that are described as “substantial”). “In actual usage, which is the basis for dictionary definitions of words like these, significant and substantial have the same quantitative implications.” *Id.* at ¶ 36. Linguistic analysis by a qualified expert of the meanings of the words “significant” and “substantial” can aid the trier of fact in reaching its determination of the meaning of the ads. The proffered testimony is clearly admissible under Commission caselaw.

Respondents have not demonstrated that the proffered linguistic evidence is inadmissible. Respondents themselves have proposed presenting expert testimony grounded in the field of linguistics, in the form of Lawrence Solan’s testimony. *See* Solan Rep. (filed Nov. 30, 2004). Respondents strangely rely on the statements of a marketing professor, Stephen Nowlis, to challenge Professor Nunberg, when they have already retained Mr. Solan, a proposed expert

¹⁵ FED. R. EVID. 703 provides that an expert may rely on facts or data that are “of a type reasonably relied upon by experts in the particular field” even if those facts or data would not be admissible in evidence.

witness with some experience in Professor Nunberg's field (indeed, one who agrees with statements made in Professor Nunberg's report and cites Nunberg's research concerning the use of words). Respondents' criticism of Professor Nunberg's proposed testimony is most unpersuasive. Mr. Nowlis is not qualified to question how Professor Nunberg has applied his professional and scientific expertise in the field of linguistics. That is not his field of expertise. See Resp'ts' Mot. to Exclude Prof. Nunberg, Nowlis Statement ¶ 3. Respondents themselves have effectively conceded that Mr. Nowlis is not qualified to question how Professor Nunberg has exercised his expertise, for they declined to identify Mr. Nowlis as a "sur-rebuttal" expert to address Professor Nunberg's testimony at trial. See Resp'ts' Final Witness List (Nov. 8, 2005). Mr. Nowlis and Respondents raise criticisms of Professor Nunberg's report, but these criticisms appear to stem from an inadequate understanding of our duly designated expert's field of expertise. See Resp'ts' Mot. Exclude Prof. Nunberg at 5 (acknowledging that expert performed lexical analysis relating to meaning of words and their use in the general press, but dismissing analysis as non-empirical). Respondents' proposed linguistic expert witness, Mr. Solan, relied on sources like those employed by Professor Nunberg, including the research actually performed by Professor Nunberg, in his own report for Respondents. Surely Respondents do not intend to exclude their own witness as well. If Respondents' proposed linguistic expert witness, Mr. Solan, is qualified to question Professor Nunberg's work, it appears he has not done so in support of Respondents' motion. Respondents' reliance on an expert from another field of scientific study is misplaced.

Respondents' renewed effort to preclude Complaint Counsel from presenting evidence and arguments in support of its case should be rebuffed.

III. Respondents' Criticisms Relate to Weight, Not Admissibility, of Testimony and No Hearing is Necessary to Deny Respondents' Motions to Exclude

A. Respondents' Previously-Undisclosed Criticisms Relate to Weight, Not Admissibility

The Court may rule at or after trial on the weight to be given to expert testimony. The question of how much weight the Court should accord to each expert is a different question than whether the testimony should be heard at all. As the comment to *Federal Rule of Evidence 702* notes, “[a] review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.” Fed. R. Evid 702 cmt. (2000). Cross-examination and introduction of contrary evidence are the appropriate means to challenge expert opinion. See *Daubert*, 509 U.S. at 595; *14.38 Acres of Land*, 80 F.3d at 1078. As discussed above, Professors Mazis and Nunberg provide specialized knowledge that may assist the finder of fact. Respondents may ask the Court to accord little or no weight to the experts’ reports or testimony at trial,¹⁶ but they should not be able to prevent the Court from considering those experts’ opinions at all. Respondents have provided no basis for the extreme step of excluding these experts’ testimony.

B. No Hearing is Necessary to Deny Respondents' Motions

In cursory fashion, Respondents have requested a *Daubert* hearing in demanding that this Court exclude two timely-designated experts who intend to offer scientific opinions at trial concerning the promotional materials for the challenged products. See Resp’ts’ Mot. to Exclude Prof. Mazis at 2; Resp’ts’ Mot. to Exclude Prof. Nunberg at 2.

¹⁶ For example, in *Bristol-Myers Co.*, 74 F.T.C. 780, (1968), the hearing examiner rejected two experts’ opinion on the meaning of the phrase “true remission” because they were inconsistent with generally accepted definitions, but he did not exclude the experts’ testimony; indeed, the witnesses testified at the hearing.

Respondents have adduced the record on which they rely. They rely on a record consisting of reports, transcripts, opposing statements of opinion from a late-disclosed, newly-added “sur-rebuttal” witness, and other materials. However, Respondents have not advanced arguments showing that any further supplementation of the record, including a *Daubert* hearing, is necessary. As the Commission has stated, “*Daubert* and *Kumho* do not apply directly to administrative agencies’ adjudicative proceedings.” *In re Telebrands Corp.*, 2005 WL 2395791, slip op. at n.32 (citations omitted). Complaint Counsel’s proposed experts offer relevant, reliable testimony based on specialized knowledge and the application of professional expertise. *See supra* pages 13-18, 20-23. These experts pass a gatekeeper test, *see supra* pages 20-23, and following Commission precedent, the Court should determine the weight to be accorded that testimony during or after trial. 8-13, 23-24. A strict application of the *Daubert* framework is not appropriate. *See supra* pages 18-20. Should the Court consider departing from Commission precedent concerning the use of expert analysis in examining the words, depictions, and other contents of advertisements, we would request a hearing to explore the record and the law more fully. Based on the record submitted by Respondents, however, no hearing is necessary to deny their latest motion to exclude relevant, material testimony from trial.

CONCLUSION

For the reasons discussed above, Respondents' untimely, redundant, and unpersuasive motions should be denied.

Respectfully submitted,



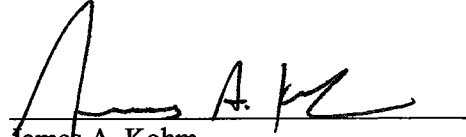
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Division of Enforcement
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Dated: December 5, 2005

CERTIFICATION OF REVIEWING OFFICIAL

I certify that I have reviewed the attached public filing, *Complaint Counsel's Consolidated Opposition to Respondents' Motions to Exclude Complaint Counsel's Designated Experts Michael B. Mazis, Ph.D and Geoffrey Nunberg, Ph.D*, prior to its filing to ensure the proper use and redaction of materials subject to the *Protective Order* in this matter and protect against any violation of that *Order* or applicable RULE OF PRACTICE.

A handwritten signature in black ink, appearing to read 'James A. Kohm', written over a horizontal line.

James A. Kohm
Associate Director, Division of Enforcement
Bureau of Consumer Protection

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2005, I caused *Complaint Counsel's Consolidated Opposition to Respondents' Motions to Exclude Complaint Counsel's Designated Experts Michael B. Mazis, Ph.D and Geoffrey Nunberg, Ph.D*, to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-135
Washington, D.C. 20580

- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to:

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