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&GRAY

1900 K STREET, NW, SUITE 750 WASHINGTON, DC 20006-1163 202-626-3900 F 202-626-3961
BOSTON NEW YORK SAN FRANCISCO WASHINGTON, DC

March 21, 2003

BY HAND

Dockets Management Branch
Food and Drug Administration
Department of Health and Human Services
5630 Fishers Lane, Room 1061, HFA-305
Rockville, MD 20852

Re: Regulation of NICOWater™ and Ariva™
(Docket Nos. 01P-0572, 01P-0573, and 02P-0075)

Dear Sir or Madam:

On behalf of GlaxoSmithKline Consumer Healthcare, LP ("GSK"), we are writing to advise the Food and Drug Administration ("FDA") of the plans of QT 5, Inc. ("QT5") to market a nicotine-containing beverage product, NICOWater™, in the United States. In July 2002, FDA determined that this product was being marketed as an unapproved new drug in violation of Section 505(a) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(a) ("FDCA"). In reaching that conclusion, FDA found that NICOWater was not a dietary supplement, as claimed by QT5 and the other parties then marketing the product. To avoid a similar result, QT5 now intends to call NICOWater a "homeopathic nicotinum formula" and, thereby, take advantage of FDA's more lenient enforcement policy toward homeopathic medicine products. The FDA need not, and should not, fall for this legal maneuvering. That is because NICOWater, as described by QT5 itself, does not meet one of the agency's most fundamental requirements governing marketing of over-the-counter ("OTC") homeopathic products – that is, prescription strength homeopathic products may not be sold as OTC products.[1] The bases for this conclusion are set forth below and supporting documents are included in the attached appendix.

[1] To the extent that FDA has focused on the illegal sale of homeopathic products, it has not hesitated to take enforcement action where, as here, manufacturers market prescription homeopathic products over-the-counter. *See, e.g.*, Food and Drug Administration, *Homeopathy: Real Medicine or Empty Promise*, FDA CONSUMER MAGAZINE (Dec. 1996) (statement of Edward Miracco, FDA, referring to such activities as "illegal" and a "violation" and indicating that FDA will "focus" on this problem), *available at* http://www.fda.gov/fdac/features/096_home.html.

02P-0075 C10

I. To Avoid FDA Enforcement Action, QT5 Has Resurrected NICOWater As A Homeopathic Product That Is Available Over-The-Counter

In December 2001, many of the nation's leading public health organizations, led by the Campaign for Tobacco Free Kids, petitioned FDA to prohibit marketing of Nicotine Water as a drug, dietary supplement or food product.[2] That petition was filed to address the distribution of Nicotine Water over the Internet (www.nicotinewater.com) by S&F Garret, Nicotine Beverage Corporation, and QuickTest 5, Inc. In connection with marketing of this product, those companies aggressively promoted Nicotine Water as a treatment for both nicotine addiction and as an aid to smoking cessation. Based on its evaluation of this literature and the patent for this product, FDA agreed that Nicotine Water could not be marketed in this manner and it granted the public health organizations' petition.[3] To that end, FDA ruled that Nicotine Water could not be marketed as a dietary supplement since its active ingredient – nicotine or nicotine polacrilex – was first marketed as an approved new drug. At the same time, FDA indicated that Nicotine Water could not be distributed as a drug product since the agency had not approved a new drug application ("NDA") authorizing these companies to claim that Nicotine Water can be used to treat nicotine addiction or as an aid in smoking cessation programs.[4]

Shortly following FDA's decision, these companies stopped marketing Nicotine Water through their website or otherwise. Nevertheless, within the next few months, QT5 intends to renew marketing of Nicotine Water under the name NICOWater in the United States. On January 24, 2003, QT5 filed a Form 8-K with the Securities and Exchange Commission ("SEC") in which it disclosed that it had acquired the patent for nicotine beverages (Patent No. 6,268,386) from the previous owner.[5] QT5 also reported

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[2] *See* Citizen Petition filed by the National Center for Tobacco-Free Kids, American Cancer Society, American College of Preventive Medicine, American Heart Association, American Legacy Foundation, American Lung Association, American Medical Association, American Public Health Association, American Society of Addiction Medicine, American Society of Clinical Oncologists, American Thoracic Society, Latino Council on Alcohol and Tobacco, National Association of Local Boards of Health, National Education Association, Oncology Nursing Society, Oral Health America, National Spit Tobacco Education Program, and Partnership for Prevention (Dec. 18, 2001).

[3] *See* Letter from Dennis E. Baker, Associate Commissioner for Regulatory Affairs, FDA, to Mr. William Schultz, Zuckerman Spaeder, and Mr. Matthew Myers, National Center for Tobacco-Free Kids (July 1, 2002).

[4] In light of these conclusions, FDA did not consider the question whether Nicotine Water also constitutes an adulterated food product. Id.

[5] In this SEC document, QT5 indicated that, effective January 9, 2003, QuickTest 5 merged with and into MoneyZone.com, Inc., the separate corporate existence of QuickTest 5 ceased, and Moneyzone changed its name to QT 5, Inc. (Exhibit A).

that it was currently "working with regulatory counsel to determine what requirements, if any, must be satisfied prior to marketing NicoWater in the United States and worldwide." At the time that QT5 issued this SEC document, the company described NICOWater as an "odorless and tasteless liquid based nicotine adult beverage to be consumed 'when you want to smoke but can't or can smoke but shouldn't'." Just six weeks later, however, QT5 described NICOWater in a slightly different manner. In a February 27, 2003, press release announcing the "the world's first nicotine beverage as an alternative to smoking," QT5 declared that NICOWater "is a clear, colorless and odorless homeopathic nicotinum formula."[6] QT5 also indicated that its purported homeopathic product is "designed to relieve the symptoms of tobacco cravings."[7]

The characterization of NICOWater in this manner appears to be designed to take advantage of FDA's lenient enforcement policy toward treating homeopathic medicines as "new drugs" under the FDCA where, as here, such products are accompanied by therapeutic claims. To be sure, Section 201(g)(1)(A) of the FDCA provides that the term "drug" includes "articles recognized in . . . the official Homeopathic Pharmacopeia of the United States" [("HPUS")] or any supplement to that document. 21 U.S.C. § 321(g)(1)(A). And, nicotinum is recognized in the HPUS.[8] Nevertheless, FDA has taken the position that a homeopathic medicine is not a "new drug" for the purposes of Section 505(a) of the FDCA, and consequently no NDA need be in effect, if the product satisfies certain conditions set out at Section 400.400 of the agency's Compliance Policy Guide ("CPG 7132.15").[9] Thus, it appears that QT5 will assert that NICOWater meets all of the conditions governing marketing of a homeopathic medicine and, therefore, FDA

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[6] *See* Press Release, QT 5, Inc., QT 5, Inc. Introduces NICOWater; "The World's First Nicotine Beverage as an Alternative to Smoking" (Feb. 27, 2003) (Exhibit B).

[7] The courts have made clear that, whether a particular product is an official homeopathic medicine or not, it is a drug if it is offered for the cure, mitigation, prevention, or treatment of disease conditions. *See United States v. Writers & Research, Inc.*, 113 F.3d 8, 11 (2nd Cir. 1997); *United States v. Meserey*, 447 F. Supp. 548, 552 (D. Nev. 1977).

[8] *See* Homeopathic Pharmacopoeia of the United States, Section on Nicotinum (Exhibit C).

[9] *See* Food and Drug Administration, Compliance Policy Guide (CPG 7132.15), Section 400.400: Conditions Under Which Homeopathic Drugs May Be Marketed (Mar. 1995). Among other things, this document provides that OTC homeopathic products must be intended to treat self-limiting disease conditions amenable to self-diagnosis and treatment. In addition, the product must meet the standards for strength, quality, and purity set forth in the HPUS. Furthermore, as with all OTC drug products, homeopathic products must bear the name and place of business of the manufacturer, packer, or distributor, adequate directions for use, and ingredient information. 21 C.F.R. §§ 201.1, 201.5, and 201.10. Finally, homeopathic drug products must be manufactured in conformance with current Good Manufacturing Practices ("cGMP") requirements. 21 C.F.R. Part 211.

may not pursue an enforcement action against the company for its claim that the product relieves the symptoms of tobacco cravings.[10]

II. QT5 Cannot Legally Market NICOWater As An Over-The-Counter Homeopathic Product

Despite QT5's attempt to circumvent FDA's earlier determination in this manner, NICOWater cannot legally be marketed in the United States as an OTC homeopathic product. Specifically, QT5 has indicated that each bottle of NICOWater will contain approximately four milligrams of nicotine in 16.9 fluid ounces of water.[11] Based on our calculations, that formula yields a concentration of 8 parts of nicotine per one million parts of water (i.e., 8 ppm) or approximately 1 part of nicotine per 100,000 parts of water – that is, a "potency" of 5X.[12] Under the HPUS, however, nicotinum is designated for marketing as an OTC product at a potency of 6X – that is, a dilution of 1/1,000,000 of the "mother tincture" containing nicotinum. Moreover, for liquid preparations containing nicotinum (a "class B product"), that tincture is already diluted at a factor of 1/100 or 2X. Thus, a homeopathic product containing a 6X potency for nicotinum actually contains one part of nicotine per 100,000,000 parts of water. Inasmuch as NICOWater is being offered for sale at a concentration substantially greater than the permissible OTC potency, it cannot be sold as an OTC product. 21 U.S.C. § 353(b).[13] Rather, it can only be sold as a prescription homeopathic product, whose potency for nicotinum is 3X or one part of nicotine per 100,000 parts of water.[14]

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[10] QT5 may also assert that this is not an actionable claim under the FDCA. In its earlier letter on nicotine water, FDA indicated that nicotine addiction is a disease. Indeed, GSK's NRT products, Nicorette®, Nicoderm® and Commit®, are approved for the following use: "reduces withdrawal symptoms, including nicotine craving, associated with quitting smoking." The Nicotrol® Inhaler and Nasal Spray are approved for use as "an aid to smoking cessation for the relief of nicotine withdrawal symptoms."

[11] *See* Press Release, QT 5, Inc., QT 5, Inc. Introduces NICOWater; "The World's First Nicotine Beverage as an Alternative to Smoking" (Feb 27, 2003).

[12] *See* Exhibit D.

[13] In pertinent part, CPG 7132.15 provides that, "[i]f the HPUS specifies a distinction between nonprescription (over-the-counter (OTC)) and prescription status of products which is based on strength (e.g., 30x) – and which is more restrictive than Section 503(b) of the Act – the more stringent criteria will apply . . . Homeopathic products offered for conditions not amenable to OTC use must be marketed as prescription products."

[14] In describing the meaning of the OTC designation, the HPUS states that it is "the potency at or above which a drug may be offered for sale for internal use without a prescription." Thus, "if OTC=6X, the drug may be offered for over the counter sale at 6X, 12X, 6C; however, 1X through 5X and 1C through 2C would be available only with a prescription." (Exhibit E).

Although other potentially significant issues surrounding marketing of NICOWater as a homeopathic product may arise as additional information becomes available, there is no question that QT5 cannot market NICOWater as an OTC homeopathic formula since it contains too great a concentration of nicotine.[15] Yet, based on QT5's own statements, that is precisely what it intends to do. For example, in its February 27, 2003, press release, QT5 stated that its "product strategy is to utilize contract bottling companies for manufacture and distribution to all major markets including: retail, pharmacy, convenience stores, airports, restaurants, and bars." In its earlier SEC disclosure, the company indicated that it "intends to sell and distribute NicoWater to adults over the age of 18, wherever cigarettes are sold to provide an alternative to smoking." QT5 has also indicated that it will launch NICOWater during the second quarter of 2003. And, in anticipation of that launch, QT5 reports that it has "developed an aggressive marketing and advertising campaign" and has "assembled a world-class sales and marketing team" that is tapping into a "national and regional wholesale broker network." Clearly, FDA must promptly advise QT5 that it cannot market NICOWater in this manner.

Finally, on a broader point, QT5's attempt to characterize NICOWater as an OTC homeopathic product demonstrates the lengths that certain companies will go to avoid FDA regulation and enforcement action against products designed to deliver nicotine to consumers. In this sense, QT5's actions closely parallel those of Star Scientific, Inc. ("Star"), whose legal counsel asserts that FDA does not have jurisdiction over Ariva™ since it purportedly is a smokeless tobacco product.[16] In fact, notwithstanding FDA's authority to regulate such products as drugs under the FDCA, both NICOWater and Ariva are traditional food products – water and candy – that are being used as vehicles for the delivery of an unapproved food additive. In the case of NICOWater, that unapproved additive is nicotine. For Ariva, it is tobacco. As GSK has repeatedly emphasized in the context of its citizen petition to regulate Ariva, FDA must take prompt enforcement

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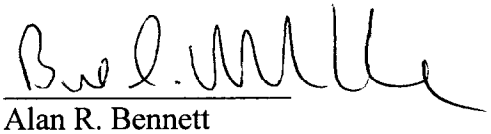
[15] QT5's patent governing nicotine beverages (Patent No. 6,268,386) allows claims for the use of nicotine or an alkaloid in a beverage (e.g., water, carbonated water, natural fruit juice) where the content of nicotine is between 0.0001% and 0.1%. Inasmuch as the lowest concentration of nicotine governed by the patent (1 ppm) exceeds the OTC maximum for a homeopathic nicotinum product (1 part per 100 million), QT5 can only market its patented product as a prescription homeopathic product. *See* U.S. Patent No. 6,268,386 (issued July 31, 2001) (Exhibit F).

[16] On March 10, 2003, QT5 announced that it had also established a "Medical and Regulatory Advisory Board" to "provide guidance and leadership for the development and introduction of a wide array of new products." This board includes an attorney from the law firm of McDermott, Will & Emery – the firm that represents Star on Ariva. *See* Press Release, QT 5, Inc., QT 5, Inc. Establishes Medical & Regulatory Advisory Board (Mar. 10, 2003) (Exhibit G).

action against such products either because they are unapproved drug products or adulterated foods. The agency is to be congratulated for doing so with nicotine lollipops and the "first" nicotine water product. It must now act quickly against Ariva and, once again, NICOWater.

Thank you for your consideration of these comments.

Sincerely,



Alan R. Bennett
Bruce S. Manheim, Jr.
Ropes & Gray
1900 K Street, N.W., Suite 750
Washington, D.C. 20006
(202) 626-3900

Attorneys for GlaxoSmithKline Consumer Healthcare, LP