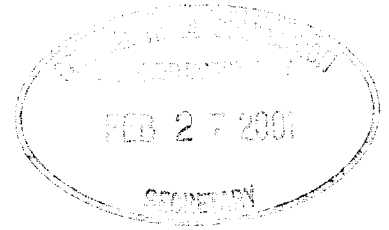


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )  
 )  
NATURAL ORGANICS, INC., )  
a corporation, and )  
 )  
GERALD A. KESSLER, )  
individually and as an officer )  
of the corporation. )  
\_\_\_\_\_

DOCKET NO. 9294

TO: The Honorable James P. Timony  
Administrative Law Judge

COMPLAINT COUNSEL'S MOTION TO LIMIT EXPERT WITNESSES

Complaint counsel, pursuant to Section 3.22 of the Commission's Rules of Practice, respectfully move for an order requiring respondents to limit their expert witnesses to no more than six. Respondents have filed an expert witness list that includes fourteen names, and have stated that they may add a fifteenth name to this list. Fourteen experts not only will inevitably result in cumulative testimony, but also will unduly burden complaint counsel's right to take effective depositions of each expert within the time period allowed under the Discovery Schedule. Respondents' efforts to overwhelm complaint counsel with numbers should not be allowed. Judicial economy demands that respondents' expert witness list be pared down significantly.

**Background**

On Friday, February 16, 2001, respondents provided complaint counsel with a letter containing a list of fourteen individuals whom they stated they plan to call to provide expert

testimony (See Exhibit A). In that letter, respondents stated that they may add an expert to this list “in the near future.”<sup>1</sup> Respondents followed this letter up with a package that complaint counsel received on Tuesday, February 20, 2001.<sup>2</sup> By contrast, complaint counsel have designated only two experts – one to address the substantiation issues, and one to conduct a series of tests to determine with some precision the components of the product at issue, Pedi-Active A.D.D.

It appears from the respondents’ experts’ CVs that respondents intend to call one marketing expert to address ad meaning (Dr. Preston), and one legal expert to discuss food and drug law (Mr. Lambert).<sup>3</sup> That leaves twelve experts to testify regarding substantiation issues. The expert reports, as well as documents forming the basis of each expert’s opinion, are due on March 14, 2001. The close of discovery is April 13, 2001.<sup>4</sup>

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<sup>1</sup> As of the date of this motion, respondents have not designated a fifteenth expert.

<sup>2</sup> This package contained CVs for thirteen of the fourteen individuals identified in the February 16 letter. Respondents stated that they would provide the CV for the fourteenth individual during the week of February 19. As of the date of this motion, we have not received that document. More importantly, as discussed later in this motion, respondents have failed to provide numerous additional documents and information that was due on February 16.

<sup>3</sup> We do not here address the dubious merits of calling a “legal expert” in this type of judicial proceeding.

<sup>4</sup> Admittedly, we do not have specific information regarding what each witness will testify about. We have CVs for thirteen of the fourteen witnesses, some of which are abbreviated and some of which appear to be complete. From those documents, we are able to infer, to a general degree, the reason for the expert’s inclusion on the witness list. We have no choice but to file this motion now, however, because to wait for the expert reports before filing this motion would not give us enough time to depose more than a few of the experts in the time allotted under the scheduling order.

**Respondents Propose to Call Several More Expert Witnesses  
than did the Respondents in the “Joe Camel” Litigation**

To put this situation in perspective, a comparison to *R. J. Reynolds*, FTC Docket No. 9285, is in order. That matter, perhaps the most complicated consumer protection litigation that the Commission has brought in the last twenty years, involved numerous complex issues needing expert testimony. The parties planned to call risk perception experts, legal experts, econometricians, marketing experts, and experts addressing various medical issues, including addiction and the connection between smoking and cancer. Nonetheless, R. J. Reynolds' final witness list in that case contained only ten experts, five of whom were designated as rebuttal experts. (See Exhibit B). By contrast, Natural Organics' naming of at least fourteen experts (not including rebuttal experts) is absurd. This can only result in a waste of the court's time.

In *R. J. Reynolds*, Your Honor denied complaint counsel's motion to limit that smaller number of experts. In doing so, however, Your Honor set forth two tests that are clearly met in this case -- unreasonable burden and the need to limit cumulative testimony. We address these considerations below.<sup>5</sup>

**It will be Extremely Burdensome for Complaint Counsel to  
Effectively Take the Depositions of Fourteen Expert Witnesses in the Allotted Time**

Pursuant to the Scheduling Order in this case, on March 14, 2001, respondents will be obligated to provide complaint counsel with the following documents regarding their designated expert witnesses: (1) the experts' reports; (2) all communications between respondents and those

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<sup>5</sup> In denying that motion, Your Honor ruled that “Complaint counsel have not shown that the expected testimonies of these witnesses are cumulative, nor have complaint counsel shown that they will be unduly burdened by having to take the depositions of these experts and cross examine them at trial.” 1998 FTC Lexis 182 (Oct. 16, 1998).

experts; and (3) copies of all documents and other written materials relied upon or reviewed by the experts in formulating their opinions. On that date, there will be twenty-two business days until the close of discovery, a time period of which both parties have been cognizant since the Scheduling Order first went into effect. During this twenty-two day period, depositions of any remaining fact witnesses must take place, as well as the procurement of, and depositions of, rebuttal witnesses. The parties must also conclude all other discovery and address all of the other needs of this matter. Even putting aside these other obligations, deposing respondents' fourteen experts during this period would entail trips to at least eight metropolitan areas.<sup>6</sup>

Clearly, both the parties' prior statements to Your Honor, and the time periods called for in the Scheduling Order, contemplated that fewer experts would be used. During the September 26, 2000, scheduling conference, the parties notified Your Honor that we expected the trial to take approximately one week. Even with each witness's direct testimony in writing, this time period does not come close to what would be necessary to accommodate the approximately twenty-seven witnesses currently designated by respondents.

The Scheduling Order's limited time periods for deposing expert witnesses also clearly contemplate that each party would be using far fewer experts. These time periods are virtually identical to those originally proposed by Your Honor's draft scheduling order. In addition, the relevant time periods were never the subject of discussion either with respondents' prior counsel, or with current counsel when we discussed the amended schedule.

Although some limited preparation can take place prior to the receipt of the March 14,

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<sup>6</sup> Respondents' designated experts reside in or near San Francisco, CA, Los Angeles, CA, Washington, DC, Jackson, TN, New York, NY, Boston, MA, Madison, WI, Syracuse, NY, and Richmond, VA.

2001, materials, true preparation can start in earnest only once we have received an expert's report. This limitation has been exacerbated by respondents' failure to comply with Your Honor's Scheduling Order, which requires that certain information and documents be provided when a party first designates its expert witnesses. (See Additional Provision 3 of Order Setting Amended Discovery and Trial Schedule). Respondents' submission was deficient in several respects, without explanation. First, respondents provided a list of publications for only eight of the fourteen designated experts. Second, only two of the experts' CVs even mentioned any prior cases in which the designated expert had testified or been deposed. Third, respondents did not provide copies of prior court or deposition testimony of any of the fourteen experts, nor did they provide a statement that such testimony does not exist or is not in their or the expert's possession.

On February 26, 2001, complaint counsel received from respondents some materials that supplemented respondents' expert information. Even now, however, we have a list of publications for only ten of respondents' fourteen designated experts. In addition, they have provided, at best, complete information regarding prior publications and testimony for only one of the fourteen designated experts.

Complaint counsel understand that respondents may decide to call only a portion of their designated experts at trial. Nevertheless, we are duty-bound to take the deposition of all designated experts and are specifically entitled to do so under the Scheduling Order. Failure to do so would leave us in the untenable position of having to guess which experts they might call, leaving respondents open to call only those individuals whom we did not depose. Indeed, respondents have suggested that complaint counsel need not depose all of the experts. That,

however, obviously is not an option.

**Respondents' Proposed Expert Testimony would be Needlessly Cumulative**

Commission Rule 3.43(b) provides: "Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>7</sup> The Rules of Practice further provide that "the Administrative Law Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence..." *Id.*

A judge "has broad discretion in admitting and excluding expert testimony." *See Davis v. Mason County*, 927 F.2d 1473, 1484 (9<sup>th</sup> Cir.), *cert denied*, 502 U.S. 899 (1991). "Evidence is cumulative if repetitive, and if 'the small increment of probability it adds may not warrant the time in introducing it.'" *Elwood v. Pina*, 815 F.2d 173, 178 (1<sup>st</sup> Cir. 1987) (citation omitted). The rationale for excluding cumulative expert testimony is to "discourage attorneys from parading additional experts before the court in the hope that the added testimony will improve on some element of the testimony by the principal expert." *Leefe v. Air Logistics, Inc.*, 876 F.2d 409, 411 (5<sup>th</sup> Cir. 1989). For this reason, and because of the delay that results from the presentation of unnecessary evidence, courts frequently exclude evidence that is cumulative. *See Davis*, 927 F.2d at 1484 (affirming trial court's exclusion of expert testimony as cumulative where excluded

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<sup>7</sup> The Commission included this language in Rule 3.43(b) for the first time in 1996 when it amended its rules of practice for adjudicatory proceedings. At that time, the Commission stated: "The amended rule is intended to make clearer to litigants that the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally relevant materials that merely burden the record and delay the trial. This clarification is intended to enhance the ALJ's ability to assemble a concise and manageable record." 61. F.R. 50639, 50644 (Sept. 26, 1996).

testimony would have been on the “same topic” as another expert’s testimony); *Leefe*, 876 F.2d at 411 (upholding district court’s decision to exclude the testimony of an expert witness based on a comparison of the actual testimony of the expert allowed to testify and the testimony to be offered by the excluded expert witness); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 370 (4<sup>th</sup> Cir. 1986) (exclusion of testimony of independent expert witness proper where testimony would have been cumulative of the testimony of a fact witness). *See also Aetna Cas. & Sur. Co. v. Guynes*, 713 F.2d 1187, 1193 (5<sup>th</sup> Cir. 1983) (“It is well within the discretion of a [court] to limit the number of expert witnesses who testify at trial.”); *Upsher-Smith Laboratories, Inc. v. Mylan Laboratories, Inc.*, 944 F. Supp. 1411, 1440 (D. Minn. 1996) (court ‘may limit or exclude expert testimony which is cumulative.”); *Rios v. Bigler*, 847 F. Supp. 1538, 1550 (D. Kan. 1994), *aff’d*, 67 F. 3d 1543 (10<sup>th</sup> Cir. 1995) (expert witness excluded because the “court had no basis from which to conclude that the addition of this expert would significantly aid the plaintiff in the pursuit of her claim or that it would be anything but cumulative”).

Natural Organics’ witness list indicates that its expert testimony would likely be cumulative. Again, we are somewhat hampered by the limited amount of information we currently possess regarding the fourteen designated experts. Nonetheless, as stated earlier, it appears that respondents intend to call one marketing expert to address ad meaning, and one legal expert to discuss food and drug law. With twelve experts remaining to address some aspect of respondents’ substantiation, the burden should be on respondents to explain why their testimony would not be cumulative and a waste of the Court’s time. (See Rule of Practice 3.43(b)).

### Conclusion

Complaint counsel respectfully submit that respondents have designated fourteen experts merely to gain an unfair tactical advantage, and not to assist the court in understanding complex issues. For the reasons stated above, the testimony of these experts would inevitably be cumulative. In any event, their sheer number would prevent complaint counsel from effectively taking their depositions in the allotted time.

Perhaps respondents, in naming fourteen experts, would welcome an extension in the close of discovery and a new trial date. Complaint counsel, however, are of a different mind. We have been proceeding, for several months, under the Discovery Schedule that calls for an April 13, 2001 close of discovery and a June 19, 2001 hearing date. We submit that one party's decision to name an excessive number of cumulative experts can not constitute the "extraordinary circumstances" that might justify a relaxation of the trial date and, by extension, a delay in Your Honor's Initial Decision. (See Rule 3.51 of the Commission's Rules of Practice).

We have attached a proposed order that limits respondents' experts (not including legitimate rebuttal experts) to six. This number is admittedly somewhat arbitrary, and is itself arguably excessive. Given the matters at issue in this case, however, respondents will be hard-



pressed to explain why they will be unable to mount an effective defense if limited to six experts.<sup>8</sup> In the interest of judicial economy and fundamental fairness, we respectfully request that Your Honor enter the attached order.

Respectfully submitted,



Matthew D. Gold (415) 356-5276  
Kerry O'Brien (415) 356-5289  
Dean Graybill (415) 356-5224

Complaint Counsel  
Western Region  
Federal Trade Commission  
901 Market Street, Suite 570  
San Francisco, CA 94103

Dated: February 26, 2001

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<sup>8</sup> The proposed order would allow respondents to present at least four substantiation experts, if they wish to continue to proffer a marketing expert and a legal expert.



**EXHIBIT A**

LAW OFFICES  
**HYMAN, PHELPS & MCNAMARA, P.C.**

JAMES R. PHELPS  
PAUL M. HYMAN  
ROBERT A. DORMER  
STEPHEN H. MCNAMARA  
ROGER C. THIES  
THOMAS SCARLETT  
JEFFREY N. GIBBS  
BRIAN J. DONATO  
FRANK J. SASINOWSKI  
DIANE B. MCCOLL  
A. WES SIEGNER, JR.  
ALAN M. KIRSCHENBAUM  
DOUGLAS B. FARQUHAR  
JOHN A. GILBERT, JR.  
JOHN R. FLEDER  
ROBERT T. ANGAROLA  
(1945-1996)

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MARY KATE WHALEN  
OF COUNSEL

JENNIFER B. DAVIS  
FRANCES K. WU  
DAVID B. CLISSOLD  
KATE DUFFY MAZAN  
HOLLY M. BAYNE  
CASSANDRA A. SOLTIS  
JOSEPHINE M. TORRENTE  
MICHELLE L. BUTLER  
PATRICIA A.A. VANSTORY  
THOMAS R. GIBSON  
LEIGH E. KENNEDY\*  
ANNE MARIE MURPHY\*  
PAUL L. FERRARI  
JEFFREY N. WASSERSTEIN  
BRIAN J. MALKIN

\*NOT ADMITTED IN DC

DIRECT DIAL (202) 737-4289

February 16, 2001

BY FACSIMILE/CONFIRMATION COPY BY FEDERAL EXPRESS WITH ATTACHMENTS

Matthew D. Gold  
Kerry O'Brien  
Dean Graybill  
Federal Trade Commission  
Western Region  
901 Market Street, Suite 570  
San Francisco, CA 94103

Dear Mr. Gold:

This letter sets out Respondents' expert witness list, as required by the Amended Discovery and Trial Schedule. At this time, we plan to call the following individuals to provide expert testimony. It is possible that we may add an expert to this list, and will let you know in the very near future if we intend to do so.

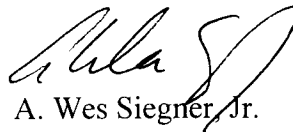
1. Peter R. Breggin, M.D.
2. Jerry Cott, Ph.D.
3. William G. Crook, M.D.
4. Leo Galland, M.D.
5. Charles Gant, M.D., Ph.D.
6. Edward M. Hallowell, M.D.
7. Parris M. Kidd, Ph.D.
8. Richard Kunin, M.D.
9. Eugene I. Lambert, Esq.
10. Lester Packer, Ph.D.
11. Ivan L. Preston, Ph.D.
12. Osvaldo N. Re, M.D.
13. Joseph A. Sandford, Ph.D.
14. Richard J. Wurtman, M.D.

HYMAN, PHELPS & MCNAMARA, P.C.

Matthew D. Gold  
February 16, 2001  
Page 2

With the exception of Dr. Gant, Curriculum Vitae for these experts are attached. We will forward a copy of Dr. Gant's C.V. next week.

Sincerely,

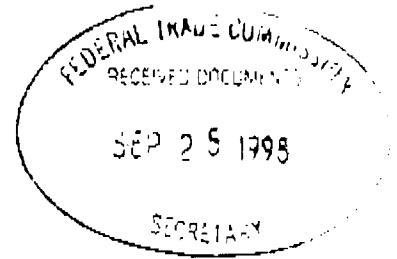


A. Wes Siegner, Jr.

AWS/ibd  
Enclosures

**EXHIBIT B**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )  
)  
)

R.J. REYNOLDS TOBACCO COMPANY, )  
a corporation )  
)  
)  
\_\_\_\_\_ )

Docket No. 9285

To: The Honorable James P. Timony  
Administrative Law Judge

**RESPONDENT'S SUPPLEMENTAL FINAL WITNESS LIST**

Pursuant to the discovery schedule dated December 10, 1997, as modified by the Order of July 30, 1998, Respondent R.J. Reynolds Tobacco Company ("Reynolds" or "Respondent") submits its supplemental final witness list.

**Zalman Amit, Ph.D.**

Zalman Amit is Professor of Psychology at the Center for Studies in Behavioural Neurobiology at Concordia University, Montreal, Quebec, Canada. Dr. Amit's testimony will respond to the testimony of the FTC's expert witnesses. Dr. Amit is expected to testify about the behavioral and pharmacological aspects of smoking uptake, dependence, and cessation. Dr. Amit will address the lack of data to support, and the data which refutes, any claim by the FTC the smokers under the age of 18 are "addicted" to cigarettes and unable to quit. Dr. Amit's CV has been marked RX1000 on the accompanying exhibit list.

**J. Howard Beales III, Ph.D.**

J. Howard Beales, III is Associate Professor of Strategic Management and Public Policy at George Washington University, Washington, D.C. Dr. Beales' testimony will respond to the testimony of the Federal Trade Commission's (FTC's) expert witnesses. Dr. Beales will address the FTC's theories on how and why the Joe Camel campaign causes youth to begin to smoke or to continue to smoke. He will also address any data relied upon by the FTC's witnesses.

Dr. Beales' testimony will discuss his research concerning youth smoking behavior. He will discuss the model that he has developed regarding that behavior. Dr. Beales will testify that his research confirms that neither advertising nor advertising expenditures affect teenage smoking decisions. Dr. Beales will testify concerning the risk factors, predictors, and determinants of underage smoking. He will testify that there is no statistically significant relation between youth smoking initiation and cigarette advertising in general, and no statistically significant relation between youth smoking and Joe Camel advertising in particular. He will also discuss the evidence relating to brand-switching.

Dr. Beales may discuss some of the studies in the published literature regarding the asserted relationship between advertising (including the Joe Camel campaign) and smoking behavior, including his review of the underlying data, research proposals, and research critiques (when available).

Dr. Beales will testify about the various allegations that the FTC staff has pursued in its eight year investigation of the Joe Camel campaign, including the theories advanced and abandoned. He will discuss his efforts in addressing the FTC theories, as set forth in Reynold's submissions to the



FTC and restated in its comments to the FDA. Dr. Beales' Curriculum Vitae ("CV") has been marked RX997 on the accompanying exhibit list.

**Lynn J. Beasley**

Ms. Beasley is expected to testify about the development, execution, and eventual withdrawal of the Joe Camel campaign, and how the campaign successfully repositioned the brand among 18-24 year old smokers. Ms. Beasley will testify about the specific marketing components of the Joe Camel campaign, and how significant aspects of Camel marketing were not related to Joe Camel advertising.

Ms. Beasley will also testify on the topic of Reynolds' marketing policies and practices, and how those policies and practices have been followed. Ms. Beasley will testify about Reynolds' direct marketing and focus group policies. Ms. Beasley's testimony will also address particular documents relied upon by the FTC and the errors in the FTC's characterization of those documents. Ms. Beasley will testify to the steps Reynolds took to ensure that Joe Camel advertisements complied with company policy, and the steps taken to ensure that the campaign did not appeal disproportionately to youth. She will discuss the formation and work of Reynolds' advertising review panel. Finally, Ms. Beasley is expected to testify about the history of the FTC's investigation of the Joe Camel campaign, the various causal theories adopted and then abandoned by the FTC.

**Richard A. Blevins, Jr.**

Mr. Blevins will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Mark R. Bolger**

Mr. Bolger will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Carolyn Brinkley**

Ms. Brinkley will testify on Reynolds' youth anti-smoking programs, and the reasons why Reynolds elected to undertake these programs.

**Diane Burrows**

Ms. Burrows' testimony will address Reynolds' marketing efforts towards young adult smokers, aged 18-24. Ms. Burrows will also provide testimony regarding her development of econometric models and her analysis of the success of the Joe Camel campaign with young adult smokers. Ms. Burrows will testify that retail pack promotions played an important role in Camel's growth among young adult smokers. Finally, Ms. Burrows will place into context several documents relied upon by the FTC, and will testify that her actions complied with policy.

**James S. Carpenter**

Mr. Carpenter will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Rick T. Caufield**

Mr. Caufield will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Alan R. Cox**

Mr. Cox will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Frances Creighton**

Ms. Creighton is expected to testify about the development, execution, and eventual withdrawal of the Joe Camel campaign, and how the campaign successfully repositioned of the brand among 18-24 year old smokers. In particular, Ms. Creighton is expected to testify regarding Reynolds' use of focus groups in its advertising and marketing activities, and its adherence to Reynolds' corporate policy in conducting such focus groups. Ms. Creighton is expected to testify about the results of the focus groups conducted during the development and execution of the Joe Camel campaign, and how focus groups helped assure Reynolds that its Joe Camel advertising principally appealed to adult smokers, not to those under 18. Ms. Creighton is also expected to provide the context for various memoranda regarding the development of the Joe Camel campaign.

**Kay Duffy**

Ms. Duffy will give the context for and explain the content of documents of which she has personal knowledge and which are relied upon by complaint counsel.

**Jeffrey F. Durgee**

Mr. Durgee will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**John F. Geweke, Ph.D.**

John F. Geweke is Professor of Economics, University of Minnesota. Dr. Geweke is expected to testify regarding certain studies which attempt to link cigarette advertising and promotion with cigarette use. Dr. Geweke's testimony will address the underlying assumptions of such studies, as well as the validity and robustness of various empirical models. He will test

alternative specifications of the models, and will address the sensitivity of the models. Dr. Geweke's CV has been marked RX1005 on the accompanying exhibit list.

**Carol Greene**

Ms. Greene will provide the context for and explain the content of documents of which she has personal knowledge and which are relied upon by complaint counsel.

**Lawrence Hall**

Mr. Hall will give the context for and explain the content of various memoranda authored prior to the Joe Camel campaign. Mr. Hall will also testify that his actions complied with Reynolds' corporate policy.

**Randall J. Harden**

Mr. Harden will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Lucy L. Henke, Ph.D.**

Dr. Henke is a Professor of Marketing at the University of New Hampshire. She has a Ph.D. in Communications Studies. Dr. Henke's testimony will respond to the testimony of the FTC's expert witnesses. Dr. Henke is expected to address awareness and skepticism of children and adolescents with respect to advertising and marketing. Dr. Henke is also expected to testify about the way in which children and adolescents process advertising and the role, if any, that advertising plays in the decisions of children and adolescents regarding smoking. Her testimony will also cover issues addressed and conclusions reported in her studies, *Young Children's Perceptions of Cigarette Brand Advertising Symbols: Awareness, Affect, and Target Market Identification*, Journal of Advertising, Vol. XXIV, No. 4 Winter 1995 and *Parent Intervention to Prevent Smoking*.

*Proceedings of the 1996 Conference of the American Academy of Advertising*, 1996. Her testimony is also expected to cover issues addressed and conclusions reported in her statement submitted in connection with the FDA "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents," Docket Nos. 95N-0253 and 0253J. Dr. Henke's CV has been marked RX1004 on the accompanying exhibit list.

**James F. Hind**

Mr. Hind will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Michael J. Houston, Ph.D.**

Michael J. Houston is the Ecolab/Pierson M. Grieve Chair in International Marketing, Carlson School of Management, University of Minnesota. Dr. Houston's testimony will respond to the testimony of the FTC's expert witnesses. Dr. Houston is expected to testify on the role of the Joe Camel advertising campaign in repositioning the Camel brand among 18-24 year old smokers. Dr. Houston is also expected to testify about the role of the Joe Camel campaign in Camel's capturing young adult Marlboro smokers. Dr. Houston is expected to offer rebuttal testimony to FTC witnesses who testify about the relevance and materiality of Reynolds company documents to any issues of appeal of Joe Camel advertising and constructive knowledge of Reynolds as to its effect.

Dr. Houston will also testify that based on his review of Reynolds' corporate documents, the success of the Joe Camel campaign can be attributed to marketing components unrelated to Joe Camel image advertising, and that it is not possible to isolate the effects of these components. Dr. Houston's CV has been marked RX1003 on the accompanying exhibit list.

**David Iauco**

Mr. Iauco is expected to testify about the development, execution, and eventual withdrawal of the Joe Camel campaign, and how the campaign successfully repositioned of the brand among 18-24 year old smokers. Mr. Iauco will testify about the specific marketing components of the Joe Camel campaign, and how important Camel marketing aspects of the campaign were not related to Joe Camel advertising. Mr. Iauco is also expected to testify on Reynolds' corporate policy as well as actions taken by Reynolds when corporate policy is not followed. Mr. Iauco will also provide the context for and explain the content of various Reynolds documents relied upon by complaint counsel.

**James Johnston**

Mr. Johnston will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Timothy J. Key**

Mr. Key will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Gerald H. Long**

Mr. Long will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Claude R. Martin Jr., Ph.D.**

Claude R. Martin Jr. is the Isadore & Leon Winkelman Professor of Retail Marketing at the Graduate School of Business Administration, University of Michigan. Dr. Martin's testimony will respond to the testimony of the FTC's expert witnesses. Dr. Martin is expected to testify concerning

cigarette advertising in general; the effect of advertising on consumers and consumption; and the published literature that may bear on the issue of any relation between advertising and smoking behavior. Dr. Martin's testimony will also address his analysis of the published literature relating to the following topics: advertising recall, econometric studies, the efficacy of tobacco advertising bans in other countries, and the factors that bear on the decision to smoke. Dr. Martin may discuss the methodology used in these studies as well as the methodology that may be relied upon by the FTC's witness. Dr. Martin will address the concept of mature products and the role of advertising within those markets.

Dr. Martin is also expected to contrast access restrictions and other effective means of reducing underage smoking to advertising bans (shown to be an ineffective means of reducing underage smoking. Dr. Martin will testify on the changing nature of cigarette advertising in the context of changing social mores. Dr. Martin's testimony will address the FTC's allegation of the relation between the Joe Camel campaign and decisions by youth to begin to smoke, or to continue smoking. Dr. Martin's CV has been marked RX999 on the accompanying exhibit list.

**Donald L. Martin, Ph.D.**

Donald L. Martin is Senior Vice President of Glassman-Oliver Economic Consultants, Inc. Dr. Martin is expected to testify on the validity of certain studies, including Pollay, R. W., et al. "The Last Straw? Cigarette Advertising and Realized Market Shares Among Youths and Adults, 1979-1993" *J. of Marketing* (April 1996) 1-16) and Pierce, J. et al., "Tobacco Industry Promotion of Cigarettes and Adolescent Smoking" *J. Am. Med. Assn.* (1998) 279:7, 511-15) which attempt to link cigarette advertising and promotion with youth behavior. Dr. Martin's testimony will address the underlying assumptions of such studies, as well as their validity and robustness. Dr. Martin will use

the underlying data in these studies to test alternative specifications of the models. He will also address the sensitivity of the models to underlying assumptions and specifications. Dr. Martin's CV has been marked RX1002 on the accompanying exhibit list.

**JoAnn H. Miller**

Ms. Miller will provide the context for and explain the content of documents of which she has personal knowledge and which are relied upon by complaint counsel.

**Alicia Nance Mitchell**

Ms. Mitchell will provide the context for and explain the content of documents of which she has personal knowledge and which are relied upon by complaint counsel.

**Richard Mizerski, Ph.D.**

Richard Mizerski is Professor of Marketing, Griffith University, Australia. Dr. Mizerski's testimony will respond to the testimony of the FTC's expert witnesses. Dr. Mizerski is expected to discuss his two studies on advertising recognition and future use of cigarettes. His testimony will address the fact that a delay in the age of onset of smoking is not necessarily related to a reduction in adult smoking. Dr. Mizerski will offer testimony on the plausibility of designing a study that will show the effect of targeted marketing on youth smoking. Dr. Mizerski's testimony will also address the FTC's theories on how and why the Joe Camel campaign causes youth to begin to smoke or to continue to smoke.

Dr. Mizerski will discuss the published literature regarding the asserted relationship between advertising and youth smoking behavior, including the underlying data, research proposals, and research critiques (when available). He will also present his analysis of that data, as well as the research proposals and critiques. Dr. Mizerski will offer his critique of three articles published in



the Journal of the American Medical Association (JAMA), as well as the underlying correspondence, proposals, data, and findings of those studies (when available): DiFranza, J., et al., "RJR Nabisco's Cartoon Camel promotes Camel Cigarettes to Children," *J. Am. Med. Assn.* (1991) 266:22, 3149-53; Fischer, P., et al., "Brand Logo recognition by Children Aged 3 to 6 Years: Mickey Mouse and Joe Camel," *J. Am. Med. Assn.* (1991) 266:22, 3145-47; Pierce, J., et al., "Does Tobacco Advertising target Young People to Start Smoking?" *J. Am. Med. Assn.* (1991) 266:22, 3154-59. Dr. Mizerski's CV has been marked RX998 on the accompanying exhibit list.

**Ellen Monahan**

Ms. Monahan will provide the context for and explain the content of various memoranda authored prior to the Joe Camel campaign. Ms. Monahan will describe the role of the marketing department at Reynolds.

**Jerry Moore**

Mr. Moore will provide the context for and explain the content of various memoranda containing NFO data. Specifically, Mr. Moore will testify that NFO data was collected solely for Reynolds' economic forecasting purposes and was not used for marketing strategy purposes. Mr. Moore will also testify that NFO data on underage smokers was kept in a locked area so that only persons in long range planning would have access to such information.

**Susan Nassar**

Ms. Nassar is expected to testify about the development, execution, and eventual withdrawal of the Joe Camel campaign, and how the campaign successfully repositioned of the brand among 18-24 year old smokers. In particular, Ms. Nassar is expected to testify regarding Reynolds' use of focus groups in its advertising and marketing activities, and its adherence to Reynolds' corporate

policy in conducting such focus groups. Ms. Nassar is expected to testify about the results of the focus groups conducted during the development and life of the Joe Camel campaign, and how focus groups helped assure Reynolds that its Joe Camel advertising principally appealed to adult smokers, not to those under 18. Ms. Nassar will also testify about for documents upon which the FTC may rely.

**G. Clifton Pennell**

Mr. Pennell is expected to testify about the development, execution, and eventual withdrawal of the Joe Camel campaign, and how the campaign successfully repositioned of the brand among 18-24 year old smokers. Mr. Pennell will testify about the specific marketing components of the Joe Camel campaign, and how significant aspects of the campaign were not related to Joe Camel image advertising. Mr. Pennell will testify that retail promotion played a principal role in the progress that was made by Camel among 18-34 year old smokers. Finally, Mr. Pennell will provide the context for and explain the content of documents upon which the FTC may rely.

**Walter S. Pritchard**

Dr. Pritchard will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Martin H. Redish**

Martin H. Redish is Louis and Harriet Ancel Professor of Law, Northwestern University School of Law. Dr. Redish's testimony will address the constitutional limitations on governmental regulation of commercial speech. In doing so, Dr. Redish's testimony will address assertions contained in the Institute of Medicine Report "Growing Up Tobacco Free" that raise constitutional issues. Dr. Redish's CV has been marked RX1006 on the accompanying exhibit list.

**Andrew Schindler**

Mr. Schindler is expected to testify about Reynolds' corporate policy and how it was followed during the development and life of the Joe Camel campaign. Mr. Schindler's testimony will address the import of the FTC's decision in 1994 that the evidence did not support any possible violation of FTC law or support any reason to believe that Joe Camel advertising caused youth to smoke. Finally, Mr. Schindler is expected to testify about why the Joe Camel campaign was eventually withdrawn.

**Steven L. Snyder**

Mr. Snyder will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Claude Teague**

Dr. Teague will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

**Donald Tredennick**

Mr. Tredennick will give the context for and explain the content of a memorandum he authored in July 1974 entitled "What causes smokers to select their first brand of cigarettes." Mr. Tredennick will testify that Reynolds had a very clear policy that the marketing research department did not interview persons under the age of 18.

**Charles A. Tucker**

Mr. Tucker will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.


**W. Kip Viscusi, Ph.D.**

W. Kip Viscusi is the Cogan Professor of Law and Economics and Director, Program on Empirical Legal Studies, Harvard Law School. Prof. Viscusi's testimony will respond to the testimony of the FTC's expert witnesses. Prof. Viscusi is expected to testify about risk awareness and behavior, as well as awareness among underage smokers of risks associated with smoking. He is expected to testify about the process by which consumers assess risks, including risks that are called "cumulative" in nature. His testimony will cover the subjects described in his book, *Smoking: Making the Risky Decision* (1992), as well as other of his publications assessing risk awareness among smokers and nonsmokers. His testimony is expected to include explanations of the accuracy of risk perceptions of smokers and nonsmokers concerning various consequences that have been associated with smoking. Prof. Viscusi is expected to testify that consumers, including those under 18, generally overestimate health risks allegedly associated with smoking, with teenagers overestimating the risks by a larger margin than the general population. Prof. Viscusi testimony is also expected to address risk awareness testimony and evidence offered by the FTC, as well as his own research in this area. Prof. Viscusi's CV has been marked RX1001 on the accompanying exhibit list.

**John M. Wallace**

Mr. Wallace will provide the context for and explain the content of documents of which he has personal knowledge and which are relied upon by complaint counsel.

Respectfully submitted,



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Dated: September 25, 1998

CERTIFICATE OF SERVICE

This certifies that a copy of Complaint Counsel's Motion to Limit Expert Witnesses was served by facsimile and Federal Express on February 26, 2001, on the following:

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