

Comprehensive advertising compliance information emphasizing the practical analysis of government, industry and media restrictions on advertising

Advertising Compliance Service

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FROM THE EDITOR IN CHIEF

FTC charged the operators of the website “Jerk.com” with harvesting personal information from Facebook to create profiles labeling people a “Jerk” or “not a Jerk,” then falsely claiming that consumers could revise their online profiles by paying \$30. Our lead article, “FTC Charges Operators of ‘Jerk.com’ Website with Deceiving Consumers,” examines this important FTC case.

On March 27, 2014, a new bill—the Truth in Advertising Act of 2014 H.R.4341—was referred to the House Committee on Energy and Commerce. Our next article, “‘Truth in Advertising Act of 2014’ Advances in House,” discusses this new bill.

Our next article, "Social Media Roundup," is a review of ad actions reported via Twitter and other social media. This roundup consists of representative examples of updates (or "tweets") from Twitter via **Advertising Compliance Service** at "AdvertisingLaw" and updates from LinkedIn and Facebook.

Our next article, “FTC Final Consent Settles Charges that Company Mised Consumers to Believe Creams Could Slim Their Bodies,” looks at this FTC case.

Our next article, “Marketer of Robocalling Services Banned from Telemarketing,” discusses this FTC case.

Our next article, “FTC OK’s Final Order Settling Charges Against Flashlight App Creator,” reports on this FTC settlement.

Our NAD article examines recent NAD cases in these two categories: (1) Food Advertising, and (2) Demonstrations .

FILING INSTRUCTIONS ARE ON LAST PAGE OF THIS BULLETIN

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BRIEF NEWS OF NOTE

BRAZIL BANS ADVERTISING TO CHILDREN UNDER AGE 12—The Brazilian Ministry of Human Rights' Council of Rights of Children and Teenagers (CONANDA) issued a resolution that effectively bans all advertising to children under age twelve.

"CONANDA's action significantly limits the ability of advertisers to market to young children in Brazil." So said Jeffrey A. Greenbaum, the Chairman of the Global Advertising Lawyers Alliance.

CONANDA's newly-issued Resolution #163 provides that any marketing communication to children under 12 years old is abusive, unless it falls under one of the narrow exceptions to the Resolution. Since Brazil's Consumer Defense Code bars abusive advertising, this CONANDA's action now bans all marketing directed at children in Brazil. CONANDA was created by federal law in Brazil. Accordingly, it has the authority to issue rules regarding the rights of children and teenagers.

The Resolution exempts only those campaigns with no marketing strategy aimed at educating children about good nutrition, safety, education, health and other aspects of children's social development.

(Global Advertising Lawyers Alliance, Release, April 9, 2014.)

FTC WARNS SMALL BUSINESSES: DON'T OPEN EMAIL FALSELY CLAIMING TO BE FROM FTC—FTC is warning small businesses that an email with a subject line "Pending consumer complaint" is not from FTC. The email falsely states that a complaint has been filed with the agency against their company. FTC advises recipients not to click on any of the links or attachments with the email. Clicking on the links may install a virus or other spyware on the computer. FTC's advice: Delete the email.

(FTC Release, April 9, 2014; see also, Blog: "Pending FTC complaint" emails are fakes, April 9, 2014.)

FILING INSTRUCTIONS FOR CONTENTS OF THIS ISSUE

File all articles behind existing articles in the tabs noted:

File, "FTC Charges . . ." under Tab #4, False, Unfair, Deceptive, Article #389.

File, "Truth . . ." under Tab #2, General Article, Article #759.

File, "Social Media Roundup . . ." under Tab #15, New Media, Article #442.

File, "FTC Final . . ." under Tab #17, Food, Drugs, Cosmetics, Article #223.

File, "Marketer . . ." under Tab #2, General Article, Article #760.

File, "FTC OK's . . ." under Tab #15, New Media, Article #443.

File, "NAD . . ." under Tab #3, Self-Regulation, Article #586.

File, Bulletin #785 (pages 1-2) under Tab #1, Bulletins.

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FTC CHARGES
OPERATORS OF
“JERK.COM” WEBSITE
WITH DECEIVING
CONSUMERS

DEFENDANTS CREATED JERK.COM PROFILES FOR MORE THAN
73 MILLION PEOPLE: FTC

FTC charged the operators of the website “Jerk.com” with harvesting personal information from Facebook to create profiles labeling people a “Jerk” or “not a Jerk,” then falsely claiming that consumers could revise their online profiles by paying \$30.

According to FTC’s complaint, between 2009 and 2013 the defendants, Jerk, LLC and the operator of the website, John Fanning, created Jerk.com profiles for more than 73 million people, including children.

FTC’s COMPLAINT

FTC Act

In its complaint, FTC charged that defendants violated the FTC Act by—

- misleading consumers that the content on Jerk.com had been created by other Jerk.com users, when in fact most of it had been harvested from Facebook; and
- falsely leading consumers to believe that by paying for a Jerk.com membership, they could access “premium” features that could allow them to change their “Jerk” profile.

Search Engine Results

According to the FTC’s complaint, Jerk.com profiles often appeared in search engine results when consumers searched for an individual’s name. Upon viewing their photos on Jerk.com, many believed that someone they knew had created their Jerk.com profile. Jerk reinforced this view by representing that users created all the content on Jerk.

Defendants Created Vast Majority of Profiles: FTC

But in reality, defendants created the vast majority of the profiles by misusing personal information they improperly obtained through Facebook, FTC alleged. They registered many websites with Facebook and then allegedly used Facebook’s application programming interfaces to download the names and photos of millions of Facebook users, which they in turn used to create nearly all the Jerk.com profiles.

BUTTONS ALLOWED USERS TO VOTE

In addition to buttons that allowed users to vote on whether a person was a “Jerk” or not, Jerk profiles included fields in which users could enter personal information about the subject or post comments about them. In some cases, the complaint alleged, the profile comment fields subjected people to derisive and abusive comments, such as, “Omg I hate this kid he\’s

such a loser,” and, “Nobody in their right mind would love you ... not even your parents love [you].”

PROFILES ALSO INCLUDED MILLIONS OF PHOTOS

The profiles also included millions of photos, including photos of children and photos that consumers claim they had designated on Facebook as private, according to FTC’s complaint.

REPUTATION MANAGEMENT CLAIM

The defendants also told consumers they could “use Jerk to manage your reputation and resolve disputes with people who you are in conflict with,” according to FTC’s complaint. They allegedly charged consumers \$25 to email Jerk.com’s customer service department, and also falsely told consumers that if they paid \$30 for a website subscription, they could access “premium features,” including the ability to dispute information posted on Jerk.com, and receive fast notifications and special updates. But according to FTC, in many cases, consumers who paid the customer service or subscription fee often got nothing in return.

WHAT FTC SEEKS

FTC seeks an order barring the defendants’ allegedly deceptive practices that would bar them from using improperly obtained personal information and requiring them to delete the information.

FTC’s VOTE

FTC’s vote to issue the administrative complaint was 4-0. The evidentiary hearing is scheduled to begin before an administrative law judge at FTC on January 27, 2015.

NOTE: “The Commission issues an administrative complaint when it has `reason to believe’ that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. The issuance of the administrative complaint marks the beginning of a proceeding in which the allegations will be tried in a formal hearing before an administrative law judge.”

LAWYER'S REFERENCE SERVICE

Jerk, LLC, d/b/a Jerk.com, In the Matter of, FTC Dkt. #9361, April 15, 2014.

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“TRUTH IN ADVERTISING ACT OF 2014” ADVANCES IN HOUSE

ACT WAS REFERRED TO HOUSE COMMITTEE ON ENERGY AND COMMERCE

On March 27, 2014, a new bill—the Truth in Advertising Act of 2014 H.R.4341—was referred to the House Committee on Energy and Commerce. The purpose of this measure is—

“To direct the Federal Trade Commission to submit to Congress a report on the use, in advertising and other media for the promotion of commercial products, of images that have been altered to materially change the physical characteristics of the faces and bodies of the individuals depicted.”

The sponsor of this measure is Rep. Ros-Lehtinen, Ileana [R-FL-27]. It was introduced on March 27, 2014 and was referred to the House Committee on Energy and Commerce on the same day.

FINDINGS CITED IN BILL

The findings contained in this measure justifying the passage of this bill are as follows:

“(1) Advertisers regularly alter images used in print and electronic media to materially change the physical characteristics of models' faces and bodies, often altering the models' size, proportions, shape, and skin color, removing signs of ageing, and making other similar changes to models' appearance.

(2) An increasing amount of academic evidence links exposure to such altered images with emotional, mental, and physical health issues, including eating disorders, especially among children and teenagers. There is particular concern about the marketing of such images to children and teenagers through distribution in teen-oriented publications, advertising displayed in public places outside the home, and online media.

(3) Such altered images can create distorted and unrealistic expectations and understandings of appropriate and healthy weight and body image.

(4) The dissemination of unrealistic body standards has been linked to eating disorders among men and women of varying age groups, but it has a particularly destructive health effect on children and teenagers.

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(5) Academic evidence has demonstrated a connection between the use of very thin models in advertising and consumer attitudes toward a brand based on such advertising, as well as a material influence of the use of such models on consumer purchase intent, conduct, and reliance.

(6) In 2011, the American Medical Association adopted a policy encouraging advertising associations to work with public and private sector organizations concerned with child and adolescent health to develop guidelines for advertisements, especially those appearing in teen-oriented publications, that would discourage the altering of photographs in a manner that could promote unrealistic expectations of appropriate body image.”

We'll keep you posted on major developments concerning this legislation.

LAWYER'S REFERENCE SERVICE

Truth in Advertising Act of 2014, H.R.4341, introduced in House of Representatives and referred to the House Committee on Energy and Commerce, March 27, 2014.

See also:

“New Bill Aims to Curb Overzealous Photoshopping,” by Gillian Mohney, ABC News Medical Unit Blog, April 18, 2014. >
<http://abcnews.go.com/blogs/health/2014/04/18/new-bill-aims-to-curb-overzealous-photoshopping/>

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SOCIAL MEDIA
ROUNDUPA Review of Ad Actions
Reported Via Twitter and
Other Social MediaUPDATES FROM TWITTER, LINKEDIN, FACEBOOK AND GOOGLE+

Advertising Compliance Service continues to have a large—and steadily growing—presence on Twitter with over 15,300 followers (as of April 23, 2014). Be sure to join **ACS** on Twitter at: "AdvertisingLaw".

While Twitter updates are limited to 140 characters, this important social medium is an excellent way to keep up-to-date in the period between **Advertising Compliance Service's** twice-monthly issues. The following roundup consists of representative examples of updates (or "tweets") from Twitter via **Advertising Compliance Service** at "AdvertisingLaw" and LinkedIn (600+ connections), Facebook (1,700+ friends) and - the newest social media entrant - Google+ (800+ in others' circles, 500+ in my legal circle).

Note: Many of the URL's listed in this Roundup are in abbreviated form—shortened URLs—and are working URL's.

Updates from Twitter

FTC OK's final consent settling charges that company misled consumers to believe creams could slim their bodies <http://1.usa.gov/1szQMZH> #ftc

Top 10 Advertising Compliance List: You Must Substantiate Your Ad's Claims <http://bit.ly/GLJGe3>

RT @AdvLaw Court Says FTC Can Sue Companies Over Compromised Consumer Data <http://at.law.com/xHQkch>

FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition <http://1.usa.gov/1geY13T> #ftc #privacy

Twitter Ads Get More Clicks Than Facebook [STUDY] | AllTwitter <http://bit.ly/1mXqsYb>

RT @CarolOnAdvLaw 3rd Circ: Google, WPP, Vibrant Media Oppose Safari Users' Bid To Revive Privacy Case <http://bit.ly/1efJaYo> @mediapost

...

Top 10 Ad Compliance List: Make Sure Your Claims Are Not Deceptive <http://bit.ly/GR1C28> #advertising

Facebook says WhatsApp deal cleared by FTC | Reuters <http://reut.rs/1iBJ1eN> #ftc #privacy

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FTC Warns Small Businesses: Don't Open Email Falsely Claiming to be From FTC <http://1.usa.gov/1hG514L> #ftc

FTC Approves Final Order Settling Charges Against Flashlight App Creator <http://1.usa.gov/1IPNPA2> #ftc

RT @WinstonPrivacy EU gives further guidance on personal data breach reporting obligations <http://ow.ly/vzEiZ> #privacy #databreach

FTC Warns Small Business: Don't Open Emails With This Subject Line | Fox Small Business Center <http://bit.ly/1eqiVhM> #ftc

FTC Wins Court Judgment Against Immigration Services Scam <http://1.usa.gov/1m2PuSU> #ftc

What Are the Rules on Cell Phone Use in Court? | Findlaw's Law and Daily Life <http://bit.ly/1kgFCoD>

FTC Approves Toys "R" Us Petition to Reopen and Modify 1998 Final Commission Order <http://1.usa.gov/1h0mRR4> #ftc

Alleged billing scheme defendant agrees to settle FTC charges <http://1.usa.gov/1hIBcHG> #ftc

California's POM Wonderful takes on Coke over pomegranate juice | McClatchy DC <http://bit.ly/1gM7FLL> /via @jeffgreenbaum

FTC Invites Further Public Comment on Mobile Security <http://1.usa.gov/1peeZWc> #ftc

Does 'Liking' a Company Mean You Can't Sue? | Findlaw's Law and Daily Life <http://bit.ly/1ePslDX>

Advertising Is Protected by the First Amendment <http://is.gd/XCY7bT> #advertising

Buying a General Mills product eliminates the right to sue, according to online legal terms | ABA Journal <http://bit.ly/1i1Oycz> #legal

RT @LegalPlanet What Makes a Copy-Cat a Copy-Cat? The Complex Case of Architectural Copyright ~ <http://goo.gl/Asdd7Y> #Law #Legal #IP

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Legal Birds by Community Connections | Justia Legal Birds
<http://bit.ly/1hrQNn> #legal #lawyers {Honored to rank #3 on this great list!}

RT @FindLaw How do Clients Find Your Firm? Survey Says...the Internet.
<http://ow.ly/vVW0E> #lawyermarketing

Marketer of Robocalling Services Banned from Telemarketing
<http://1.usa.gov/1jqEbjE> #ftc

Comcast Merger Could Dominate Market for Local Political Advertising |
Washington Free Beacon <http://bit.ly/1jsrrsQ> #advertising

Reading: "Supremes appear skeptical of Coca-Cola claim it can't be sued over
juice label blessed by FDA" <http://bit.ly/1jDdpGj> #scotus

Passwords: a User Guide for Lawyers and Law Firms | Lawyerist
<http://bit.ly/1poInZS> #law #lawyers

RT @briheidelberger Court Hold's Gawker's Linking to Quentin Tarantino
Script Not a Direct Copyright Infringement <http://lnkd.in/bw6GaBz>

RT @briheidelberger NYPD's Feel-Good Twitter Attempt Goes Awry
<http://adweek.it/1idWoj6>

75% of Brands' Facebook Posts Are Photos, Study Says
<http://on.mash.to/1IEG2UE>

Former FTC Chairman Janet D. Steiger Named Recipient of 2014
Kirkpatrick Award <http://1.usa.gov/1jDaIEu> #ftc

Updates from LinkedIn

Marketer of Robocalling Services Banned from Telemarketing >
<http://www.ftc.gov/news-events/press-releases/2014/04/marketer-robocalling-services-banned-telemarketing>

FTC Chairwoman Edith Ramirez to Participate in International Competition
Network Conference in Marrakech, Morocco > <http://www.ftc.gov/news-events/press-releases/2014/04/ftc-chairwoman-edith-ramirez-participate-international>

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Updates from Facebook

Marketer of Robocalling Services Banned from Telemarketing >
<http://www.ftc.gov/news-events/press-releases/2014/04/marketer-robocalling-services-banned-telemarketing>

LAWYER's REFERENCE SERVICE

Selected Twitter Updates from "AdvertisingLaw" and updates from LinkedIn and Facebook, April 9, 2014–April 23, 2014.

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FTC FINAL CONSENT
SETTLES CHARGES THAT
COMPANY MISLED
CONSUMERS TO BELIEVE
CREAMS COULD SLIM
THEIR BODIES

COMPANY AGREES TO PAY \$450,000 FOR CONSUMER REFUNDS

FTC approved a final consent order settling charges that beauty products and cosmetics marketer L'Occitane violated the Federal Trade Commission Act with claims about the slimming properties of its Almond Beautiful Shape and Almond Shaping Delight skin creams.

SETTLEMENT BARS COMPANY FROM FUTURE FALSE AND DECEPTIVE WEIGHT-LOSS CLAIMS

First announced in January 2014, the settlement with L'Occitane requires the company to pay \$450,000 for consumer redress and bars it from making future false and deceptive weight-loss claims.

FTC had reached a settlement in January requiring L'Occitane, Inc. to stop making deceptive claims that its Almond Beautiful Shape and Almond Shaping Delight skin creams have body slimming capabilities and are clinically proven. The online and in-store retailer of beauty and cosmetic products – which charged \$48 for 7 ounces of Almond Shaping Delight and \$44 for 6.7 ounces of Almond Beautiful Shape – also agreed to pay \$450,000 for consumer redress as part of the settlement.

2012 ADVERTISING CAMPAIGN

L'Occitane launched an advertising campaign in 2012 claiming that Almond Beautiful Shape could “trim 1.3 inches in just 4 weeks,” and that it was a “cellulite fighter;” and that Almond Shaping Delight has “clinically proven slimming effectiveness,” and will “visibly refine and reshape the silhouette, to resculpt and tone the body contours.” L'Occitane’s ads also claimed that both products could produce a “noticeably slimmer, firmer you ... (in just 4 weeks!).”

NOW-FINALIZED SETTLEMENT

The now-finalized settlement bans the company from claiming that any product applied to the skin causes substantial weight or fat loss or a substantial reduction in body size; prohibits the company from claiming that any drug or cosmetic causes weight or fat loss or a reduction in body size, unless the claim is backed by two adequate and well-controlled human clinical studies; requires that any claim that a drug or cosmetic reduces or eliminates cellulite or affects body fat or weight be backed by competent and reliable scientific evidence; and prohibits the company from misrepresenting the results of any test, study, or research, or that the benefits of a product are scientifically proven.

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FTC's VOTE

FTC's vote to approve the final order in this case was 4-0.

NOTE: The Commission issues an administrative complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to \$16,000.

LAWYER's REFERENCE SERVICE

L'Occitane, Inc., In the Matter of, FTC File #122 3115, April 8, 2014.

See also:

L'Occitane, Inc., FTC File #122 3115, January 15, 2014.

"Sensa and Three Other Marketers of Weight-Loss Products Settle FTC Charges," **Advertising Compliance Service**, Tab # 17, Food, Drugs, Cosmetics, #220.

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MARKETER OF
ROBOCALLING
SERVICES BANNED
FROM TELEMARKETING

NATIONAL DO NOT CALL REGISTRY

The head of an operation that enabled telemarketers to make illegal robocalls, call phone numbers on the National Do Not Call Registry, and mask Caller ID information, is permanently banned from telemarketing and robocalling. That is the result of a recent settlement with the federal government.

FTC's TELEMARKETING SALES RULE

In November 2011, on FTC's behalf, the Department of Justice (DOJ) filed a complaint alleging that Joseph Turpel sold services to telemarketers who were violating FTC's Telemarketing Sales Rule. The complaint alleged that Turpel knew, or consciously avoided knowing, that clients used his services while—

- calling numbers on the National Do Not Call Registry,
- transmitting inaccurate caller ID information, and
- making illegal prerecorded telemarketing solicitations (i.e., robocalls).

CREDIT CARD SERVICES, HOME SECURITY SYSTEMS, AND GRANT PROCUREMENT PROGRAMS

According to the complaint, Turpel's clients offered credit card services, home security systems, and grant procurement programs. He allegedly gave clients the means to hide their identity by transmitting inaccurate caller names, such as "SERVICE MESSAGE" or "SERVICE ANNOUNCEMENT," on caller ID displays.

\$395,000 CIVIL PENALTY SUSPENDED BASED ON INABILITY TO PAY

In addition to banning Turpel from telemarketing and robocalling, the settlement order imposes a \$395,000 civil penalty that is suspended based on his inability to pay. The full penalty will become due immediately if Turpel is found to have misrepresented his financial condition.

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FTC's VOTE

FTC's vote authorizing DOJ staff to file the proposed stipulated final order was 4-0. The final order was entered by the U.S. District Court for the Central District of California on April 15, 2014.

LAWYER's REFERENCE SERVICE

Sonkei Communications, et al., FTC File #1123060, Civil Action #SACV11-1777-AG (JPRx), Federal Court: Central District of California, April 17, 2014.

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FTC OK'S FINAL ORDER SETTLING CHARGES AGAINST FLASHLIGHT APP CREATOR

FTC's FINAL ORDER

FTC approved a final order settling charges against Goldenshores Technologies, LLC, and its owner, Erik Geidl.

Additionally, the settlement requires the defendants to—

- provide a just-in-time disclosure that fully informs consumers when, how, and why their geolocation information is being collected, used and shared, and requires defendants to obtain consumers' affirmative express consent before doing so.
- delete any personal information collected from consumers through the Brightest Flashlight app.

ADVERTISING NETWORKS AND OTHER THIRD PARTIES

The creator of one of the most popular apps for Android mobile devices agreed to settle FTC charges that the free app deceived consumers about how their geolocation information would be shared with advertising networks and other third parties. The free app allows a device to be used as a flashlight.

FTC's COMPLAINT

According to FTC's complaint, the company created a popular flashlight app for Android devices that the FTC charged deceived consumers with a privacy policy that did not reflect the app's use of personal data and presented consumers with a false choice on whether to share their information.

FTC's complaint alleged that the company's privacy policy deceptively failed to disclose that the app transmitted users' precise location and unique device identifier to third parties, including advertising networks. Additionally, FTC's complaint alleged that the company deceived consumers by presenting them with an option to not share their information, even though it was shared automatically rendering the option meaningless.

PRIVACY POLICY

In its complaint, FTC alleged that Goldenshores' privacy policy told consumers that information collected by the Brightest Flashlight app would

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be used by the company, and listed some categories of information that it might collect. However, the policy didn't mention that the information would also be sent to third parties, such as advertising networks, according to FTC.

The settlement bars defendants from misrepresenting how consumers' information is collected and shared and how much control consumers have over the way their information is used.

FTC's VOTE

FTC's vote approving the final order and letters to members of the public who commented on it was 4-0.

NOTE: "The Commission issues an administrative complaint when it has 'reason to believe' that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to \$16,000."

LAWYER'S REFERENCE SERVICE

Goldenshores Technologies, LLC, and Erik M. Geidl, In the Matter of, FTC File #132 3087, April 9, 2014.

See also:

Goldenshores Technologies, LLC, and Erik M. Geidl, FTC File No. 132 3087, December 5, 2013.

"Android Flashlight App Developer Settles FTC Charges", **Advertising Compliance Service**, Tab #15, New Media, Article #424.

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NAD INVESTIGATIONS: LATEST CASES
RECENT HIGHLIGHTS

Advertisers cooperate with the National Advertising Division (NAD) of the Council of Better Business Bureaus, Inc., to resolve challenges to their national advertising. You should be aware of the latest NAD cases because of the helpful advertising compliance information found in these decisions. The following article contains representative examples of NAD cases in these two categories:

I. FOOD ADVERTISING—Here’s a recent interesting NAD case that involved chocolate-covered candies:

Hershey Company, The. NAD recommended that this advertiser should modify advertising for its Brookside Chocolate-Covered Candies. Reason: to assure that consumers understand the products are made with fruit flavors, rather than pieces of fruit. The advertising claims at issue were made on product packaging and in TV advertising. Mars Incorporated, a competing maker of chocolate products, challenged these claims.

The claims at issue included:

- “Brookside Dark Chocolate Acai with Blueberry”
- “Brookside Dark Chocolate Goji with Raspberry”
- “Brookside Dark Chocolate Pomegranate”
- “Smooth dark chocolate covered real fruit juice pieces.”
- “Natural Source of Flavanol Antioxidants”

In addition, NAD considered whether the advertising at issue implied:

- Brookside chocolate-covered products are chocolate covered fruit.
- Brookside chocolate-covered products provide a meaningful nutritional benefit.

The advertiser asked NAD to administratively close its inquiry into packaging claims since the packaging was revised to omit the mention of flavanols and add the word “flavor” to the end of each product name – “Dark Chocolate Goji with Raspberry Flavor.” The advertiser told NAD in writing that it permanently discontinued the original product packaging, an action NAD that found necessary and appropriate.

In considering the advertiser’s position, NAD noted that the original packaging was still available in retail outlets at the outset of Mars’ challenge and retained jurisdiction.

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NAD noted that, generally, consumers who are told that a product is “flavored” with a particular fruit do not take away the message that the product necessarily contains a piece of that fruit. NAD found that the phrase “Soft fruit flavored centers covered in smooth dark chocolate” accurately described the advertiser’s product—a fruit-flavored candy covered in chocolate.

In addition, NAD found that the product names, “Brookside Dark Chocolate Acai and Blueberry Flavors,” “Brookside Dark Chocolate Goji and Raspberry Flavors,” and “Brookside Dark Chocolate Pomegranate and Fruit Flavors,” did not inherently convey a message that the product contained actual fruit. NAD stated that absent extrinsic evidence that consumers have been confused or misled, NAD is reluctant to require an advertiser to change the product’s name.

But NAD found that the layout and font sizes used in revised packaging could be read in a way that conveyed additional messages. NAD found that since the name of a single fruit was presented on its own line in much larger font than the word “flavors,” consumers could reasonably understand the product to have three distinct parts: dark chocolate, a real piece of the highlighted fruit (Acai, Goji, or Pomegranate), and, separately, other fruit flavors. NAD’s recommendation: The advertiser should further modify its packaging to present the product name in a way that makes it clear that all of the identified fruits are in fact “flavors” and not actual pieces of fruit in the product.

The TV commercial at issue depicted a team of chefs, chopping chocolate and preparing berries and pomegranates in an outdoor kitchen. A voiceover described the products as:

“[r]ich dark chocolate meets sweet soft centers flavored with exotic fruit juices” The super read: “Flavored with a blend of juice concentrates and fruit flavors.”

NAD said the visual cues in the ad were particularly striking, and served to—

“draw viewers’ attention away from the voiceover’s important message that the products are only ‘flavored’ with fruit juices, and . . . convey an inaccurate message that the products contain actual fruit.”

Accordingly, NAD recommended that the advertiser should discontinue its TV commercial or modify it so as to avoid conveying the unsupported message that the products contain real fruit.

In its advertiser’s statement, Hershey said that while the company “disagrees with NAD’s assessment of the layout of the product name, Hershey supports industry self-regulation and will take NAD’s recommendation into account.”

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Additionally, Hershey disagreed with NAD’s conclusion as to the Brookside TV commercial. Nevertheless, the advertiser said,

“In any event, the particular TV execution challenged by Mars ran its course in 2013. Hershey will take NAD’s concerns into account with respect to any new version of this execution.”

(Hershey Company, The, NAD Release, March 18, 2014.)

II. DEMONSTRATIONS—Demonstrations can be a very effective advertising tool. However, NAD will carefully scrutinize product demonstrations to make sure that they pass muster. Moreover, it increases the likelihood that NAD will take a look at a demonstration when the demonstration appears in an “ad” that contains comparative claims. Here is a recent case in point (involving a demonstration posted on the advertiser’s YouTube channel):

Sun Products, Inc. NAD recommended that this advertiser should discontinue or modify certain comparative claims for the company’s “all with Stainlifters” laundry detergent. Moreover, NAD found that the advertiser took necessary and appropriate action in voluntarily discontinuing a “Grass Stain Demonstration” video posted at its YouTube channel.

Church & Dwight Co. Inc. (CHD), the maker of Arm & Hammer Plus OxiClean laundry detergent, challenged the claims at issue. These claims included:

- “all combines In-Wash Pre-Treaters with its active stainlifters to attack tough grass stains for more cleaning power than just washing with the leading value detergent and booster combined.”
- “MORE CLEANING POWER!”
- “FOR BETTER STAIN REMOVAL”

The broadcast advertising at issue featured a—

- visual comparison of the advertiser’s product against an unidentified orange bottle that closely resembles an Arm & Hammer liquid detergent bottle, and
- voiceover that states “for more cleaning power than just washing with the leading value detergent and booster combined”.

It also contained the following super:

“Comparison based on pretreating and washing with all Stainlifters vs. just washing with the leading value detergent and leading booster combined.”

In its press release describing this action, NAD said that in,

“evaluating the substantiation for comparative advertising claims, it is well-settled that the products being compared must be treated equally and tested in the same manner in which the products are directed to consumers and that comparative demonstrations must fairly and accurately reflect the results that consumers typically see and experience when they use and compare the two products.”

Here, NAD determined that in one of the two tests performed by Sun the products weren't treated equally in accordance with product directions. NAD found the advertiser's comparative performance claim – and the supporting evidence for that claim – was premised upon pre-treating and washing a grass-stained garment in “all with Stainlifters” in accordance with product use directions, but ignoring the product-use directions for pre-treating grass stains with the booster and washing with the challenger's product.

NAD's recommendation: The challenged comparative claim should be discontinued and more clearly and conspicuously disclose the object of comparison (i.e., Arm & Hammer Clean Burst).

NAD found that the advertiser could back up a stand-alone performance claim that “all with Stainlifters” outperforms a previous formulation of all detergent.

In its advertiser's statement, Sun Products said that “for marketing reasons Sun has made the decision to discontinue this commercial and will take NAD's suggestions into consideration in future advertising. Sun appreciates the opportunity to participate in the self-regulatory process.”

(Sun Products, Inc., NAD Release, March 26, 2014.)

LAWYER'S REFERENCE SERVICE

Hershey Company, The, NAD Release, March 18, 2014.

Sun Products, Inc., NAD Release, March 26, 2014.

By citing the NAD Reports, the Service in no way endorses or criticizes the NAD actions or findings.

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