Tuesday, October 26
4:30pm-6:00pm

807 - You Said What?!? Recognizing When Your Marketing Has Crossed the Line

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Martin Hernandez
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Julia Huston
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Jennifer Millones
Senior Attorney
Diageo North America, Inc.

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Session 807

Faculty Biographies

Lesley Fair

Lesley Fair is a senior attorney with the Federal Trade Commission's Bureau of Consumer Protection, where she has represented the commission in numerous investigations of false advertising. A recipient of the Paul Rand Dixon Award for Law Enforcement, the FTC's Award for Outstanding Scholarship, and the Janet D. Steiger Award, she now specializes in industry education and compliance with the FTC's Division of Consumer & Business Education.

Ms. Fair is on the adjunct faculty of the Catholic University School of Law and holds the title of Distinguished Lecturer and has been named Outstanding Adjunct Professor. She recently joined the adjunct faculty of George Washington University Law School. Before coming to the FTC, she was law clerk to United States District Judge Fred Shannon of the Western District of Texas in San Antonio and served as staff counsel to the United States Court of Appeals for the Fifth Circuit in New Orleans.

Ms. Fair is a vice-chair of the Consumer Protection Committee of the ABA's Section of Antitrust Law and co-editor of ABA Consumer Protection Update. In addition to writing a monthly column for Electronic Retailer magazine, Ms. Fair is the author of FTC Regulation of Advertising in FOOD AND DRUG LAW AND REGULATION (2009) and The FTC's Approach to Health Claims in Advertising in REGULATION OF FUNCTIONAL FOODS AND NUTRACEUTICALS (2005).

Ms. Fair graduated from the University of Notre Dame and received a JD from the University of Texas School of Law.

Martin Hernandez

Martin Hernandez is associate general counsel at Dell Inc. In his role as advertising and marketing counsel, he advises clients on legal and business issues associated with general advertising as well as comparative advertising, disputes with competitors, sweepstakes and contests, rights of publicity, trademark, copyright, and privacy.

Prior to joining Dell, Mr. Hernandez was an associate in the Austin office of Fulbright & Jaworski, LLP where his litigation practice focused on trademark and false advertising cases.

Mr. Hernandez is on the board of directors of The Representation Alliance, an Austin-based, independent non-profit organization devoted to creating systemic change in healthcare and education laws and regulations that impact low-income families.

Mr. Hernandez received his law degree from the University of Chicago and a BA from the University of Texas at El Paso.

Julia Huston

Julia Huston is a partner in Foley Hoag LLP's intellectual property department and chair of the firm's Trademark, Copyright and Unfair Competition practice group. She has had high-profile victories in cases involving trademarks, false advertising, copyrights, trade secrets, Internet commerce, domain name piracy, unfair competition, and patents. She has several multi-million dollar judgments and settlements to her credit, including a $20.7 million jury verdict in a false advertising and commercial disparagement case. In the context of corporate transactions, Ms. Huston has led due diligence teams that have investigated and evaluated intellectual property rights, and provided comprehensive advice concerning the protection of intellectual property in licensing and assignment transactions.

Prior to joining Foley Hoag, Ms. Huston was chair of the trademark practice group at an intellectual property boutique in Boston.

She has held leadership positions in several bar associations and professional organizations. She is currently vice-chair of the Trademark Law (U.S.) Committee of the Intellectual Property Owners Association, and is an active member of the International Trademark Association (INTA) Parallel Imports Committee. Working on behalf of INTA and the Boston Bar Association, she spearheaded the first overhaul of the Massachusetts trademark laws in over thirty years. She is currently president of Greater Boston Legal Services and a past-president of the Women's Bar Association of Massachusetts.

Ms. Huston received BA and BS degrees from Boston University, an Ed.M. degree from Harvard University, and is a graduate of the Boston University School of Law.

Jennifer Millones

Jennifer J. Millones is founder of Blue Door LLC, an intellectual property consulting company, and also serves as special counsel, intellectual property, for Diageo North America, Inc., the North American subsidiary of the world's leading premium drinks business with beverage alcohol brands across spirit, wine and beer categories. Ms. Millones is based in Norwalk, Connecticut at the North American headquarters of Diageo. She handles global intellectual property issues relating to many of Diageo's brands.

Prior to joining Diageo, Ms. Millones was with the firm of White & Case in its New York office, where her practice centered on intellectual property litigation in the sports arena, representing the National Football League and ESPN. Ms. Millones was a litigator with Latham & Watkins' New York office before joining White & Case.

Ms. Millones is a member of the Online Reference Committee of the International Trademark Association and a member of the Intellectual Property Committee of ACC's

WESFACCA. Ms. Millones is a frequent speaker on trademark, false advertising, copyright and right of publicity issues.

Ms. Millones earned her JD, cum laude, from Boston College Law School, and her BS from Cornell University.

Edward Shin

Edward (Ted) Shin is senior corporate counsel to Welch's, a Massachusetts-based producer of grape juices, grape jelly, and other fruit-based products. In this role, Mr. Shin has responsibility for reviewing advertising, product labels, promotions, and other consumer messaging for compliance with FDA, FTC, and other laws; employment counseling; litigation management; trademark management; and contract review.

Prior to joining Welch's, Mr. Shin was a staff lawyer at the New York City Law Department, defending the city against administrative and employment claims.

Mr. Shin is a member of the Boston Bar Association and the Asian-American Lawyers' Association of Massachusetts.

He received his BA from Macalester College in St. Paul, Minnesota, and his JD from New York Law School in New York City.

"You Said What?!? Recognizing When Your Marketing Has Crossed the Line"

Association of Corporate Counsel Annual Meeting
San Antonio, TX – October 26, 2010

Julia Huston, Esq. (Moderator)
Partner, Foley Hoag LLP

Lesley Fair, Esq. (Panelist)
Senior Attorney, Bureau of Consumer Protection, Federal Trade Commission

Martin G. Hernandez, Esq. (Panelist)
Advertising & Marketing Legal Counsel, Dell Inc.

Jennifer Millones, Esq. (Panelist)
Senior Attorney, Diageo North America, Inc.

Edward "Ted" Shin, Esq. (Panelist)
Senior Corporate Counsel, Welch Foods Inc.

List of Resources

Statutes

Lanham Act

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. *15 U.S.C. § 1125(a)(1)(B)*

Federal Trade Commission Act

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. *15 U.S.C. § 45(a)(1)*

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It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, services, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics. *15 U.S.C. § 52(a)*

Federal Food, Drug, and Cosmetic Act

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded. *21 U.S.C. § 331*

* * *

A food shall be deemed to be misbranded—

(a) False or misleading label. If (1) its labeling is false or misleading in any particular, or (2) in the case of a food to which section 411 applies, its advertising is false or misleading in a material respect or its labeling is in violation of section 411(b)(2). *21 U.S.C. § 343*

Cases

Apple Inc. (Apple Notebooks), NAD Report #5013, *NAD/CARU Case Reports* (June 2009)

Black & Decker (U.S.) Inc., 113 F.T.C. 63 (1990)

Buy.com Inc., FTC Docket No. C-3978 (9/5/00 Complaint; 9/5/00 Decision and Order)

Chavez v. Blue Sky Natural Beverage Co., C.A. No. 07-16154, 340 F. App'x 359 (9th Cir. June 23, 2009) (unpublished)

CKE Restaurant v. Jack in the Box, Inc., 494 F. Supp. 2d 1139 (C.D. Cal. 2007)

Coca-Cola Co. v. Tropicana Products, Inc., 690 F.2d 312 (2d Cir. 1982)

Fed. Trade Comm'n v. Airborne Health, Inc., C.A. No. 08-05300 (C.D. Cal. Aug. 13, 2008) (unpublished) (8/13/08 Complaint; 8/13/08 Stipulated Final Judgment and Order for Injunctive and Other Equitable Relief)

Holk v. Snapple Beverage Corp., 575 F.3d 329 (3d Cir. 2009)

Isaly Klondike Co., 116 F.T.C. 74 (1993)

Kellogg Co., FTC Docket No. C-4262 (7/27/09 Complaint; 7/27/09 Decision and Order; 5/28/10 Order to Show Cause and Order Modifying Order; 6/3/10 Concurring Statement)

KFC Corp., 138 F.T.C. 422 (2004)

Kmart Corp., FTC Docket No. C-4263 (7/15/09 Complaint; 7/15/09 Decision and Order)

Polar Corp. v. Coca-Cola Co., 871 F. Supp. 1520 (D. Mass. 1994)

Sears Holdings Mgmt. Corp., FTC Docket No. C-4264 (8/31/09 Complaint; 8/31/09 Decision and Order)

Sugawara v. PepsiCo, Inc., C.A. No. 08-01335, 2009 WL 1439115 (E.D. Cal. May 21, 2009) (unpublished)

Videtto v. Kellogg USA, C.A. No. 08-01324, 2009 WL 1439086 (E.D. Cal. May 21, 2009) (unpublished)

Regulations

Federal Trade Commission, *Guides Concerning Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. §§ 255.0-255.5

Federal Trade Commission, *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. §§ 260.1-260.8

Federal Trade Commission, *Procedures and Rules of Practice for the Federal Trade Commission*, 16 C.F.R. §§ 1.1, et seq.

Other Resources

Food Labeling, 58 Fed. Reg. 2,302, 2,407 (January 6, 1993) (FDA addressing "natural" claims for foods, but declining to establish a formal definition)

National Advertising Review Council, *The Advertising Industry's Process of Voluntary Self-Regulation*, Policies and Procedures for the National Advertising Division (NAD), the Children's Advertising Review Unit (CARU), and the National Advertising Review Board (NARB) (revised March 8, 2010)

National Advertising Division of the Council of Better Business Bureaus, *Environmental Claims Digest* (2009)

FEDERAL TRADE COMMISSION ADVERTISING ENFORCEMENT

Lesley Fair
Attorney, Bureau of Consumer Protection

This document was written by the staff of the Bureau of Consumer Protection and does not necessarily reflect the opinions of the Bureau or the Federal Trade Commission. Consent orders are for settlement purposes only and are not an admission of liability. This is not a comprehensive list of all FTC law enforcement actions. For more information about the FTC, visit ***www.ftc.gov***.

I. LEGAL FRAMEWORK

A. Commission's Statutory Authority in Advertising Cases

1. Section 5 of the FTC Act. 15 U.S.C. § 45 gives the Commission broad authority to prohibit "unfair or deceptive acts or practices."

2. Sections 12-15 of the FTC Act. 15 U.S.C. §§ 52-55 prohibits the dissemination of misleading claims for food, drugs, devices, services or cosmetics.

3. Section 13(b) of the FTC Act. 15 U.S.C. § 53 authorizes the Commission to file suit in United States District Court to enjoin an act or practice that is in violation of any provision of law enforced by the FTC.

B. Deception: Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), cited with approval in Kraft, Inc. v. FTC, 970 F.2d 314 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993). An advertisement is deceptive if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment. Although deceptive claims are actionable only if they are material to consumers' decisions to buy or use the product, the Commission need not prove actual injury to consumers.

C. Unfairness: Unfairness Policy Statement, appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984). See 15 U.S.C. § 45(n). An advertisement or trade practice is unfair if it causes or is likely to cause substantial consumer injury which is not reasonably avoidable by consumers themselves and which is not outweighed by countervailing benefits to consumers or competition. "In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination." According to the Conference Report, the definition is derived from the Commission's 1980 Unfairness Policy Statement, the Commission's 1982 letter on the subject, and interpretations and applications in specific proceedings before the Commission. Rep. No. 617, 103d Cong., 2d Sess. (1994), 140 Cong. Rec. H6006 (daily ed. July 21, 1994).

Revised April 1, 2010

II. REMEDIES FOR VIOLATIONS OF THE LAW

A. Cease and Desist Orders: In advertising cases, the basic administrative remedy is a cease and desist order. The purpose of the order is two-fold: 1) to enjoin the illegal conduct alleged in the complaint; and 2) to prevent future violations of the law. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965). The voluntary cessation of an advertising campaign is "neither a defense to liability, nor grounds for omission of an order." Sears, Roebuck & Co., 95 F.T.C. 406, 520, citing Fedders Corp. v. FTC, 529 F.2d 1398, 1403 (2d Cir. 1976).

B. Fencing-In: "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). Therefore, "those caught violating the Act must expect some fencing in." FTC v. National Lead Co., 352 U.S. 419 (1957); see FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967). Given the Commission's expertise in the area, the Supreme Court has afforded it broad discretion in fashioning fencing-in provisions that will not be disturbed except "where the remedy selected has no reasonable relation to the unlawful practices found to exist." Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946). Courts have upheld FTC orders encompassing all products the company markets or all products in a broad category, based on violations involving only a single product or group of products. ITT Continental Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976). Among the factors the Commission will consider in determining the appropriate remedy are the seriousness of the present violation, the violator's past record with respect to deceptive practices, and the potential transferability of the illegal practice to other products. Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 391 (9th Cir. 1982). The weight given a particular factor or element will vary. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. Id. at 391-92. See also Telebrands Corp. v. FTC, 457 F.3d 354 (4th Cir. 2006).

C. Corrective Advertising: If merely prohibiting future misrepresentations will not dispel misperceptions conveyed through prior misrepresentations, the FTC may order corrective advertising. See Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978) (upholding order enjoining company from representing that Listerine helps prevent colds and sore throats and requiring it for a specific period to state in future advertising "Listerine will not help prevent colds or sore throats or lessen their severity"). Representative corrective advertising cases:

- Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000) (upholding Commission order requiring marketer of Doan's pills to run corrective advertising to remedy deceptive claim that product is superior to other analgesics for treating back pain)

- Unocal Corp., 117 F.T.C. 500 (1994) (consent order) (requiring gasoline company to mail corrective notices to credit card holders who had received ads making unsubstantiated performance claims for higher octane fuels)

- Eggland's Best, Inc., 118 F.T.C. 340 (1994) (consent order) (requiring marketer of eggs to label packaging for one year with corrective notice regarding product's effect on serum cholesterol)

D. Other Informational Remedies: The FTC may require advertisers to make accurate information available through disclosures, direct notification, or consumer education.

1. Representative disclosure cases:

- FTC v. Western Botanicals, Inc., No. CIV.S-01-1332 DFL GGH (E.D. Cal. July 11, 2001) (stipulated final order); and FTC v. Christopher Enterprises, Inc., No. 2:01 CV-0505-ST (D. Utah Nov. 29, 2001) (stipulated final order) (prohibiting sale of comfrey for internal use without proof of safety, challenging claims that product could safely treat serious diseases, requiring warnings in labeling and advertising that internal use can cause serious liver damage or death, and ordering consumer redress)

- Panda Herbal Int'l, Inc., 132 F.T.C. 125 (2001), and ForMor, Inc., 132 F.T.C. 72 (2001) (consent orders) (requiring warnings in labeling and advertising that St. John's Wort can have potentially dangerous interactions for patients taking certain prescription drugs and for pregnant women)

- Aaron Co., 132 F.T.C. 172 (2001) (consent order) (requiring safety warnings in labeling and advertising that products containing ephedra can have dangerous effects on central nervous system and heart, including heart attack, stroke, seizure, and death)

- FTC v. Met-Rx USA, Inc., No. SAC V-99-1407 (D. Colo. Nov. 15, 1999), and FTC v. AST Nutritional Concepts & Research, Inc., No. 99-WI-2197 (C.D. Cal. Nov. 15, 1999) (stipulated final orders) (requiring labeling and advertising for purported body-building supplements containing androgen and other steroid hormones to disclose, "**WARNING:** This product contains steroid hormones that may cause breast enlargement, testicle shrinkage, and infertility in males, and increased facial and body hair, voice deepening, and clitoral enlargement in females. Higher doses may increase these risks. If you are at risk for prostate or breast cancer, you should not use this product.")

- R.J. Reynolds Tobacco Co., 128 F.T.C. 262 (1999) (consent order) (requiring marketer of Winston "no additives" cigarettes to disclose in ads that "No additives in our tobacco does NOT mean a safer cigarette")

- Global World Media Corp., 124 F.T.C. 426 (1997) (consent order) (requiring marketer of "Herbal Ecstasy" to disclose "**WARNING:** This product contains ephedrine which can have dangerous effects on the central nervous system and heart and could result in serious injury. Risk of injury increases with dose.")

- Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (requiring marketer of Sierra antifreeze to include a statement on containers warning that product may be harmful if swallowed)

- Third Option Laboratories, Inc., 120 F.T.C. 973 (1995) (consent order) (requiring marketers of Jogging in a Jug cider beverage to disclose that there is no scientific evidence that product provides any health benefits)

2. Representative direct notification cases:

- Brake Guard Products, Inc., 125 F.T.C. 138 (1998) (requiring marketer of purported after-market braking system to notify distributors and purchasers that FTC has determined ad claims to be deceptive); see also FTC v. Brake Guard Products, Inc., No. CO1-686P (W.D. Wash. May 31, 2001) (complaint for civil penalties)

- PhaseOut of America, Inc., 123 F.T.C. 395 (1997) (consent order) (requiring marketer of device advertised to reduce health risks of smoking to notify purchasers that the product has not been proven to reduce the risk of smoking-related diseases)

- Consumer Direct, Inc., 113 F.T.C. 923 (1990) (consent order) (requiring marketer of Gut Buster exercise device to mail warnings to purchasers regarding serious safety hazard of product)

3. Representative consumer education cases:

- WebTV Networks, Inc., C-3988 (Dec. 12, 2000) (consent order) (in settlement of charges that company made deceptive claims about performance capabilities of WebTV, requiring consumer education campaign in magazines, retail stores, and online to inform consumers about determining advantages and disadvantages of Internet access devices as compared to computers)

- United States v. Macys.com, Inc., (D. Del. July 26, 2000) (in settlement of charges that company violated the Mail and Telephone Order Rule during the 1999 holiday season, imposing civil penalty of $350,000 and requiring company to post banner ads on major search engines such as Yahoo!, Excite, AOL or Lycos that alert consumers about their rights when shopping online)

- United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (in settlement of charges that company made deceptive claims about use of aspirin for prevention of heart attacks and strokes in the general population, requiring $1 million educational campaign to inform consumers of proper use of aspirin therapy and disclosure in ads, “Aspirin is not appropriate for everyone, so be sure to talk with your doctor before beginning an aspirin regimen”)

- United States v. Mazda Motor of America, Inc., (C.D. Cal. Sept. 30, 1999) (consent decree) (requiring yearly distribution of FTC consumer education materials on vehicle leasing to consumers in settlement of charges that Mazda failed to make clear and conspicuous disclosures of leasing terms)

- Exxon Corp., 124 F.T.C. 249 (1997) (consent order) (in settlement of charges that advertiser made misleading claims about gasoline’s ability to clean engines and reduce maintenance costs, requiring consumer education campaign, including television ads and brochure)

- Schering-Plough Healthcare Products, Inc., 123 F.T.C. 1301 (1997) (consent order) (requiring marketer of Coppertone Kids Waterproof Sunblock to distribute educational brochures on sunscreen protection)

- California SunCare, Inc., 123 F.T.C. 332 (1997) (consent order) (requiring prominent cautionary statement in future advertising for suntanning products about hazards of sun exposure)

- Blenheim Expositions, 120 F.T.C. 1078 (1995) (consent order) (requiring producer of franchise trade shows to distribute copies of FTC's ***Consumer's Guide to Buying a Franchise*** to attendees)

E. Bans, bonds, and other remedies: To protect consumers in the future, district courts have banned individuals from certain industries, required them to post bonds before engaging in business, or ordered other remedies to ensure compliance. In addition, the Commission has upheld its authority to impose bonds. See, e.g., Telebrands, Corp., 140 F.T.C. 278 (2005) (Commission Decision); Synchronal Corp., 116 F.T.C. 1189 (1993) (consent order) (requiring corporate officer to establish $500,000 escrow account before marketing certain products to fund consumer redress, if necessary). Representative cases:

- FTC v. Wintergreen Systems, No. 3:09-CV-00124-EMC (N.D. Cal. Jan. 13, 2009) (stipulated final judgment) (banning defendants for life from any involvement in rebate programs)

- FTC v. 7 Day Marketing, Inc., No. CV08-01094-ER-FFM (C.D. Cal. Feb. 27, 2008) (permanent injunction) ($14 million suspended judgment and banning individuals who sold "7 Day Miracle Cleanse Program" from marketing via infomercial or marketing any health-related product in any medium)

- FTC v. Neiswonger, No. 4:96CV02225 SNL (E.D. Mo. May 8, 2007) (banning repeat offender for life from engaging in telemarketing or selling any type of business opportunity)

- FTC v. AmeriDebt, Inc. and Andris Pukke, No. PJM-03-3317 (D. Md. Sept. 13, 2006) (stipulated final judgment) (in addition to $13 million redress, banning defendant for life from engaging in credit counseling, debt management, and credit education activities)

- FTC v. International Research and Development Company of Nevada, No.04C 6901 (N.D. Ill. Aug. 22, 2006) (banning marketers of FuelMAX and SuperFuelMAX for life from sale of similar fuel saving or emissions-decreasing products)

- FTC v, American Bartending Institute, Inc., (C.D. Cal. Apr. 18, 2006) (stipulated final order) (banning repeat offender for life from telemarketing)

- FTC v. Kevin Trudeau, No. 98-C-0168 and No. 03-C-904 (N.D. Ill. Sept. 3, 2004) (stipulated final order) (banning defendant for life from appearing in, producing, or disseminating infomercials that advertise almost any type of

product, service, or program to the public). See also FTC v. Kevin Trudeau, (N.D. Ill. Nov. 21, 2007) (memorandum opinion and order) (finding defendant in contempt for violating 2004 permanent injunction when he misrepresented the contents of a purported weight loss book), and FTC v. Kevin Trudeau, (N.D. Ill. Jan. 15, 2009) (order denying reconsideration) (imposing $37 million redress judgment)

- FTC v. Tyme Lock 2000, Inc., No. CV-S-02-1078-JCM-RJJ (D. Nev. July 11, 2003) (stipulated final judgment) (banning principals for life from advertising, marketing, or selling any credit-related goods or services)

- FTC v. Sloniker, No. CIV 02 1256 PHX RCB (D. Az. Feb. 6, 2003) (stipulated final judgment) (banning principals for life from any future telemarketing activities)

- FTC v. American Urological Corp., No. 98-CVC-2199-JOD (N.D. Ga. Apr. 29, 1999) (final order for permanent injunction) (imposing $6 million bond on marketer of Väegra, a dietary supplement purporting to treat impotence)

- FTC v. iMall, Inc., (C.D. Cal. Apr. 12, 1999) (banning principals from Internet-related business ventures and imposing $500,000 performance bond before selling any business opportunity)

- United States v. Telebrands Corp., No. 96-0827-R (W.D. Va. Sept. 2, 1999) (consent decree) (ordering recidivist to pay $800,000 civil penalty and hire FTC-approved monitor to audit compliance with the Mail Order Rule)

F. Trade Name Excision: The Commission has the authority to forbid the future use of a brand name or trade name when less restrictive remedies, such as affirmative disclosures, would be insufficient to eliminate the deception conveyed by the name or would lead to a confusing contradiction in terms. ABS Tech Sciences, Inc., 126 F.T.C. 229 (1998) (enjoining company from further use of term "ABS" as part its trademark or trade name because consumers would likely confuse its product with factory-installed anti-lock breaking systems). See also Continental Wax Corp. v. FTC, 330 F.2d 475, 479-80 (2d Cir. 1964), aff'g 62 F.T.C. 1064 (1963); Thompson Medical Co., 104 F.T.C. at 837-39.

G. Consumer Redress, Disgorgement, and Other Financial Remedies: Pursuant to its inherent equitable powers, a district court may order redress or disgorgement of profits under Section 13(b). FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982). In addition, Commission consent orders often require advertisers to pay redress or disgorge profits. The Commission also may seek redress under Section 19 of the FTC Act, 15 U.S.C. § 57b, if an advertiser has been found to have violated Section 5 and if the court finds that the challenged act or practice is "dishonest or fraudulent."

1. Representative Section 13(b) cases:

- FTC v. CompuCredit Corp., No. 1:08-CV-1976-BBM-RGV (N.D. Ga. Dec. 19, 2008) (stipulated order) ($114 million redress in the form of reversed charges for subprime credit card marketer's illegal practices, including undisclosed fees)

- FTC v. The Bear Stearns Companies, No. 4:08-CV-338 (E.D. Tex. Sept. 9, 2008) (stipulated final judgment) ($28 million redress for violations of Section 5, Fair Debt Collection Practices Act, Fair Credit Reporting Act, and Regulation Z of the Truth-in-Lending Act for unlawful practices related to servicing consumers' mortgages, including misrepresenting amounts owed, charging unauthorized fees, and engaging in abusive collection practices)

- FTC v. Davison & Associates, No. 2:97-CV-01278-GLL (W.D. Pa. July 18, 2008) (consent order) ($10 million redress for deceptive representations about invention promotion services)

- FTC v. BlueHippo Funding, LLC and BlueHippo Capital, LLC, No. 08-CIV-1819 (S.D.N.Y. Feb. 25, 2008) (stipulated final judgment) (up to $5 million redress for selling computers and electronic equipment to consumers with bad credit without disclosing key terms and conditions of the transaction, in violation of Section 13(b), Section 5, Mail Order Rule, Truth in Lending Act, Electronic Fund Transfer Act, Regulation E, and Regulation Z). See also FTC v. BlueHippo Funding, LLC and BlueHippo Capital, LLC, No. 08-CIV-1819 (S.D.N.Y. Nov. 12, 2009) (motion for order to show cause) (urging that defendants should be held in contempt for allegedly violating the 2008 order)

- FTC v. International Product Design, No. 1:97-CV-01114-GBL-TCB (E.D. Va. Sept. 6, 2007) (stipulated order) ($60 million redress for customers of purported invention promotion company)

- FTC v. Stefanchik, No.: CV04-1852 (W.D. Wash. May 21, 2007) (final judgment) (ordering $17,775,369 redress for purchasers of course materials, seminars, workshops, videotapes, etc., purporting to teach them how to buy and sell privately held mortgages

- FTC v. AmeriDebt, Inc., No. PJM-03-3317 (D. Md. Sept. 13, 2006) (stipulated final judgment) ($13 million redress for false claims that company was a nonprofit organization that provided counseling services to consumers in debt when, in fact, company funneled funds to affiliated for-profit entities and individuals and did not provide advertised services to consumers)

- FTC v. Rexall Sundown, Inc., Civ. No. 00-706-CIV (S.D. Fla. Mar. 11, 2003) (stipulated final order) (up to $12 million redress for deceptive efficacy representations for Cellasene, a purported anti-cellulite dietary supplement)

- FTC v. Smolev and Triad Discount Buying Service, Inc., No. 01-8922-CIV-Zloch (S. D. Fla. Oct. 24, 2001) (stipulated final order) (joint action by FTC and 40 states ordering $9 million redress from buying clubs that misled consumers into accepting trial memberships and obtained consumers' billing information from telemarketers without authorization)

- FTC v. Enforma Natural Products, Inc., No. 04376JSL(CWx) (C.D. Cal. Apr. 26, 2000) (stipulated final order) ($10 million redress from marketer of purported weight loss products)

- FTC v. American Urological Corp., No. 98-CVC-2199-JOD (N.D. Ga. Apr. 29, 1999) (permanent injunction) ($18.5 million judgment against marketers of Väegra, a dietary supplement purporting to treat impotence)

- FTC v. SlimAmerica, Inc., No. 97-6072-Civ (S.D. Fla. 1999) (permanent injunction) ($8.3 million redress from marketer of purported weight loss product)

- FTC v. Amy Travel Service, Inc., 875 F.2d 564 (7th Cir. 1988) (upholding district court's award of redress under Section 13(b) to victims of fraudulent travel promotion)

- FTC v. International Diamond Corp. No. C-82-078 WAI (JSB) (N.D. Cal. Nov. 8, 1983) (upholding court's authority to order redress under Section 13(b) of the FTC Act)

2. Representative Section 19 cases:

- FTC v. Telebrands Corp., No. 2:07-CV-3525 (D.N.J. Jan. 14, 2009) (stipulated final order) ($7 million redress for false weight loss and muscle development claims for Ab Force electronic abdominal belt). See also Telebrands, Inc. v. FTC, 457 F.3d 354 (4th Cir. 2006), aff'g, 140 F.T.C. 278 (2005)

- FTC v. Figgie, Inc., 994 F.2d 595 (9th Cir. 1993) (upholding district court's award of redress following Commission's finding of Section 5 violation for deceptive representations regarding safety of heat detectors)

3. Representative administrative consent orders requiring financial or other remedies:

- ValueVision International, Inc., 132 F.T.C. 338 (2001) (consent order) (requiring home shopping company to offer refunds to all purchasers of weight loss, cellulite, and baldness products)

- Weider Nutrition International, Inc., C-3983 (Nov. 17, 2000) (consent order) ($400,000 redress for deceptive weight loss claims for PhenCal, a dietary supplement marketed as a safe alternative to prescription drug combination Phen-Fen)

- Dura Lube, Inc., D-9292 (May 5, 2000) (consent order) ($2 million redress for deceptive efficacy claims for engine treatment)

- Apple Computer, Inc., 128 F.T.C. 190 (1999) (consent order) (challenging company's practice of charging computer owners for technical support despite advertising that such services were free and requiring company to honor representation that customers would receive free support for as long as they own the product)

- Apple Computer, Inc., 124 F.T.C. 184 (1997) (consent order) (requiring company to provide computer upgrade kits at reduced cost and to offer rebates to purchasers)

- Azrak-Hamway International, Inc., 121 F.T.C. 507 (1996) (consent order) (requiring toymaker to offer refunds to consumers and to notify TV stations that ran the ad of the Children's Advertising Review Unit's policies)

- L & S Research Corp., 118 F.T.C. 896 (1994) (consent order) ($1.45 million in disgorgement for deceptive claims for Cybergenics bodybuilding products)

H. Civil Penalties for Violations of Commission Orders and Trade Regulation Rules: Section 5(l) of the FTC Act authorizes the Commission to seek civil penalties in federal court for violations of cease and desist orders. Section 5(m)(1) authorizes the Commission to seek civil penalties for violations of trade regulation rules.

1. Representative order violation cases involving advertising:

- United States v,. Bayer Corp., No. 07-01 (HAA) (D.N.J. Jan. 4, 2007) (consent decree) ($3.2 million civil penalty for deceptive weight loss claims for One-A-Day WeightSmart, disseminated in violation of 1991 FTC order)

- United States v. NBTY, Inc., No. CV-05-4793 (E.D.N.Y. Oct. 12, 2005) (consent decree) ($2 million civil penalty for violating terms of 1995 FTC order by making deceptive claims that Royal Tongan Limu was clinically proven to treat diabetes, cancer, Alzheimer's disease, and other serious conditions and that Body Success PM Diet Program reduces body fat, increases metabolism, and causes weight loss, even during sleep)

- United States v. Brake Guard Products, Inc., No. C01-686P (W.D. Wash. July 7, 2003) (consent decree) ($100,000 civil penalty for violations of FTC order related to deceptive safety representations for after-market braking system)

- United States v. ValueVision International, Inc., No. 03-2890 (D. Minn. Apr. 17, 2003) (consent decree) ($215,000 civil penalty for violations of FTC order related to unsubstantiated health claims for dietary supplements)

- United States v. Mazda Motor of America, Inc., (C.D. Cal. Sept. 30, 1999) (consent decree) ($5.25 million civil penalty for violations of FTC and state orders related to car leasing ads)

- United States v. Nu Skin International, Inc., No. 97-CV-0626G (D. Utah Aug. 6, 1997) (stipulated permanent injunction) ($1.5 million civil penalty against seller of weight loss products for violating FTC order barring deceptive claims)

- United States v. STP Corp., No. 78 Civ. 559 (CBM) (S.D.N.Y. Dec. 1, 1995) (stipulated permanent injunction) ($888,000 civil penalty against motor oil additive manufacturer for violating FTC order barring deceptive claims)

- In re Dahlberg, No. 4-94-CV-165 (D. Minn. Nov. 21, 1995) (stipulated permanent injunction) ($2.75 million civil penalty against hearing aid manufacturer for violating FTC order barring deceptive claims)

- United States v. General Nutrition Corp., No. 94-686 (W.D. Pa. Apr. 28, 1994) (stipulated permanent injunction) ($2.4 million civil penalty for violating FTC order requiring substantiation for disease, weight loss, and muscle building claims)

2. Representative trade regulation rule violation cases involving advertising:

- United States v. Prochnow, No. 1 02-CV-917 (N.D. Ga. Sept. 11, 2006) (permanent injunction) ($5.4 million civil penalty and disgorgement of $1.6 million for magazine seller's violations of the Telemarketing Sales Rule and violation of 1996 FTC consent order)

- United States v. Scholastic Inc. and Grolier Incorporated, Civil No. 1:05CV01216 (D.D.C. June 21, 2005) (consent order) ($710,000 civil penalty for book club companies' violations of Negative Option Rule, Unordered Merchandise Statute, Telemarketing Sales Rule, and Section 5)

- United States v. Igia and Igia.com, No. 04-CV-3038 (S.D.N.Y. Apr. 21, 2004) (consent decree) ($300,000 civil penalty against marketer of Epil-Stop depilatory product for violations of the Mail Order Rule)

- United States v. Deer Creek Products, Inc., No. 03-61592-CIV (S.D. Fla. Aug. 19, 2003) (consent decree) (suspended $150,000 civil penalty against marketer of Big Mouth Billy Bass for violations of Mail Order Rule)

- United States v. Staples, Inc., No. 03-10958 GAO (D. Mass. May 22, 2003) (consent decree) ($850,000 civil penalty for office supply company's violation of the Mail Order Rule through misleading "real time" inventory availability and delivery claims)

- United States v. Oxmoor House, Inc., No. CV-02-B-2735-S (N.D. Ala. Nov. 7, 2002) (consent decree) ($500,000 civil penalty for publisher's violation of Unordered Merchandise Statute, Negative Option Rule, and Telemarketing Sales Rule for misrepresenting terms of free trial membership in book club)

- United States v. Toysrus.com, Inc., (D.N.J.); United States v. Kay-Bee Toy, Inc., (D. Minn.); United States v. Macys.com, Inc., (D. Del.); United States v. CDnow, Inc., (E.D. Pa.); United States v. MiniDiscNow, Inc., (N.D. Cal.); United States v. The Original Honey Baked Ham Company of Georgia., (N.D. Ga.); and United States v. Patriot Computer Corp., (N.D. Tex.) (July 26, 2000) (consent decrees) (total of $1.5 million in civil penalties for holiday season shipping delays)

- United States v. Iomega Corp., No. 98-CV-00141C (D. Utah Dec. 9, 1998) (consent decree) ($900,000 civil penalty for violations of Mail Order Rule)

- United States v. Dell Computer Corp., No. 98-CA-0210 (W.D. Tex. Apr. 2, 1998) (consent decree) ($800,000 civil penalty for violations of Mail Order Rule)

I. Civil or Criminal Contempt for Violations of District Court Orders: Federal district court orders may be enforced through civil or criminal contempt actions filed in district court. In 1997 the FTC announced Project Scofflaw, a program of criminal and civil enforcement against violators of FTC-obtained district court orders. Representative cases:

- FTC v. Neovi, Inc., d/b/a Qchex.com, No. 06-CV-1952-JLS (JMA) (S.D. Cal. Nov. 18, 2009) (order to show cause filed) (civil contempt action charging Internet-based check creation and delivery service and its operators with violating a 2009 court order)

- FTC v. Global Marketing Group, Inc., No. 8:06-CV-02272 JSM-TGW (M.D. Fla. Feb. 15, 2008) (order finding corporate officer in contempt and issuing arrest warrant for multiple violations of TRO and PI related to cross-border payment-processing scheme)

- FTC v. Lane Labs-USA, No. 00CV3174 (D.N.J. Jan. 29, 2007) (application for an order to show cause why defendants should not be held in contempt filed) (alleging that corporation and corporate officer violated FTC order against by making deceptive claims for Fertil Male, a dietary supplement purporting to enhances male fertility)

- FTC v. Vocational Guides, Inc., No: 3-01-1070 (M.D. Tenn. Nov. 22, 2006) (ordering $2.37 million redress and finding defendant guilty of civil contempt for misrepresenting the benefits of government information packages, in violation of a 2001 FTC-obtained order)

- United States v. Taves, (C.D. Cal. May 10, 2004) (135-month sentence for unauthorized credit card charges and contempt of earlier FTC-obtained order)

- United States v. Ferrara, 334 F.3d 774 (8th Cir. 2003), cert. denied, 124 S. Ct. 1127 (2004) (upholding 125-month sentence for six counts of criminal contempt arising from violation of court order barring violations of the FTC's Franchise Rule)

- United States v. Dante, CV-90-945 ABC (GX) (C.D. Cal. 1998) (imposing prison term for criminal contempt related to violations of federal court order barring misrepresentations to consumers)

- United States v. Jordan, CR-S-96 113-LRL (D. Nev. 1998) (imposing prison term for criminal contempt related to violations of asset freeze order enjoining operation of telemarketing "recovery room")

III. ADVERTISING SUBSTANTIATION

A. Advertising Substantiation Policy Statement: Appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987), the statement sets forth the requirement, articulated in prior Section 5 cases, that advertisers must have a reasonable basis for making objective claims before the claims are disseminated. This doctrine was first announced in Pfizer, Inc., 81 F.T.C. 23 (1972).

B. An advertiser must possess at least the level of substantiation expressly or impliedly claimed in the ad. See, e.g., Honeywell, Inc., 126 F.T.C. 202 (1998) (consent order) (requiring claims that imply a level of performance under specific conditions, such as household use, to be substantiated by evidence relating to those conditions).

C. If no specific level of substantiation is claimed, what constitutes a reasonable basis is determined on a case-by-case basis by analyzing six "Pfizer factors":

1. the type of claim;
2. the benefits if the claim is true;
3. the consequences if the claim is false;
4. the ease and cost of developing substantiation for the claim;
5. the type of product; and
6. the level of substantiation experts in the field would agree is reasonable.

D. For health or safety claims, the Commission has required a higher level of substantiation, usually "competent and reliable scientific evidence," defined as "tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." See, e.g., Brake Guard Products, Inc., 125 F.T.C. 138 (1998); ABS Tech Sciences, Inc., 126 F.T.C. 229 (1998); see also ***Dietary Supplements: An Advertising Guide for Industry*** (Nov. 1998). Representative cases:

- Schering Corp., 118 F.T.C. 1030 (1994) (consent order) (requiring that tests and studies relied upon as reasonable basis must employ appropriate methodology and address specific claims made in ad)
- FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995) (holding that consumer satisfaction surveys and studies demonstrating the placebo effect are insufficient to meet "competent and reliable scientific evidence" standard)
- Removatron International Corp., 111 F.T.C. 206 (1988), aff'd, 884 F.2d 1489 (1st Cir. 1989) (requiring "adequate and well-controlled clinical testing" to substantiate claims for hair removal product)
- Thompson Medical Co., 104 F.T.C. 648 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) (requiring two well-controlled clinical studies to substantiate certain drug claims)

IV. LIABILITY FOR FALSE OR UNSUBSTANTIATED CLAIMS

A. Principals: An advertiser is responsible for all claims, express and implied, that are reasonably conveyed by the ad. See Sears, Roebuck & Co., 95 F.T.C. 406, 511 (1980), aff'd, 676 F.2d 385 (9th Cir. 1982). The advertiser is strictly liable for violations of the FTC Act. Neither proof of intent to convey a deceptive claim nor evidence that consumers have actually been misled is required for a finding of liability. See Chrysler Corp. v. FTC, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); Regina Corp., 322 F.2d 765, 768 (3d Cir. 1963). See also Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988), cert. denied, 488 U.S. 1041 (1989) (holding that company's purported good faith reliance on the advice of counsel is not a defense under Section 5).

B. Individual Liability: Corporate officers may be held individually liable for violations of the FTC Act if the officer "owned, dominated and managed" the company and if naming the officer individually is necessary for the order to be fully effective in preventing the deceptive practices which the Commission had found to exist. FTC v. Standard Education Society, 302 U.S. 112 (1937). The Commission is not required to show that defendants intended to defraud consumers in order to hold them personally liable. FTC v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999).

1. Individual liability is justified "where an executive officer of the respondent company is found to have personally participated in or controlled the challenged acts or practices" or if the officer held a "control position" over employees who committed illegal acts. See Rentacolor, Inc., 103 F.T.C. 400, 438 (1984); Thiret v. FTC, 512 F.2d 176 (10th Cir. 1975).

2. Individuals are personally liable for restitution for corporate misconduct if they "had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that consumer injury resulted." The knowledge requirement can be satisfied by showing that the individuals had actual knowledge of a material misrepresentation, were recklessly indifferent to the falsity of a misrepresentation, or were aware of the probability of fraud along with an intentional avoidance of the truth. FTC v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999), quoting FTC v. Publishing Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1996).

3. In the absence of specific evidence, requisite authority may be inferred from activities that exhibit signs of planning, decision making, and supervision, such as preparing or approving ads containing deceptive representations. See Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986).

C. Advertising Agencies: An advertising agency may be liable for a deceptive advertisement if the agency was an active participant in the preparation of the advertisement and if it knew or should have known that the advertisement was deceptive. Standard Oil Co., 84 F.T.C. 1401, 1475 (1974), aff'd and modified, 577 F.2d 653 (9th Cir. 1978). An ad agency will be held to know what claims – express and implied – are conveyed to consumers by their ads. ITT Continental Baking Co., 83 F.T.C. 865, 968 (1973), aff'd as modified, 532 F.2d 207 (2d Cir. 1976). An ad agency does not have to substantiate independently the claims or scientifically reexamine the advertiser's substantiation. However, it cannot ignore obvious shortcomings

or facial flaws in an advertiser's substantiation. Bristol-Myers Co., 102 F.T.C. 21, 364 (1983). Representative advertising agency cases:

- Campbell Mithun, L.L.C., 133 F.T.C. 702 (2002) (consent order) (challenging agency's role in ads claiming that calcium in Wonder Bread could improve children's brain function and memory)

- Bozell Worldwide, Inc., 127 F.T.C. 1 (1999), and Martin Advertising, Inc., 127 F.T.C. 10 (1999) (consent orders) (challenging agencies' roles in advertisements containing deceptive representations of car leasing terms)

- Foote, Cone & Belding, Inc., 125 F.T.C. 528 (1998); Grey Advertising, Inc., 125 F.T.C. 548 (1998); and Rubin Postaer and Associates, Inc., 125 F.T.C. 572 (1998) (consent orders) (challenging agencies' roles in advertisements containing deceptive representations of car leasing terms)

- Grey Advertising, Inc., 122 F.T.C. 343 (1996) (consent orders) (challenging agency's role in advertisements containing deceptive demonstration for Hasbro paint-sprayer toy and deceptive claims for Dannon frozen yogurt)

- Jordan McGrath Case & Taylor, 122 F.T.C. 152 (1996) (consent order) (challenging ad agency's role in advertisements containing deceptive claims for Doan's pills)

- Young & Rubicam, Inc., 122 F.T.C. 79 (1996) (consent order) (challenging agency's role in advertisements containing deceptive claims for Ford's auto air filtration system)

- NW Ayer & Son, Inc., 121 F.T.C. 656 (1996) (consent order) (challenging agency's role in advertisements containing deceptive claims regarding the effect of Eggland's Best eggs on cholesterol)

- BBDO Worldwide, Inc., 121 F.T.C. 33 (1996) (consent order) (challenging agency's role in advertisements containing deceptive claims for Häagen-Dazs frozen yogurt)

D. Means and Instrumentalities: Companies may be liable if they provide others with the means and instrumentalities for engaging in deceptive conduct. See Castrol North America Inc., 128 F.T.C. 682 (1999) (consent order), and Shell Chemical Co., 128 F.T.C. 729 (1999) (challenging both Castrol's role in disseminating deceptive power and acceleration representations for its Syntec brand fuel additives and Shell's role in providing trade customers, including Castrol, with promotional materials containing deceptive claims for the purported active ingredient of Syntec, which Shell developed and tested).

E. Liability of Other Parties: The Commission has held other parties, such as catalog marketers, retailers, infomercial producers, home shopping companies, and payment processors, liable for their role in making or disseminating deceptive claims or engaging in deceptive trade practices. Representative cases:

- United States v. QVC, Inc., No. 04-CV-1276 (E.D. Pa. Mar. 19, 2009) (consent decree) ($6 million redress for deceptive claims for For Women Only weight loss pills, Lite Bites weight loss bars and shakes, and Bee-Alive Royal Jelly energy supplements, and $1.5 civil penalty for deceptive claims for Lipofactor Cellulite Target Lotion, in violation of 2000 FTC order)

- FTC and Illinois, Iowa, Nevada, North Carolina, North Dakota, Ohio, and Vermont v. Your Money Access, LLC, (E.D. Pa. Dec. 11, 2007) FTC File No. 052-3122 (complaint filed) (charging a payment processor with violating federal and state laws by debiting consumers' bank accounts on behalf fraudulent telemarketers and online merchants)

- FTC v. Universal Processing, Inc., No.: SA CV05-6054FMC (VBKx) (C.D. Cal. Sept. 7, 2005) (stipulated permanent injunction) (holding payment processor liable for unauthorized debits to consumers' checking accounts made on behalf of company selling allegedly bogus pharmacy discount cards)

- FTC v. Modern Interactive Technology, Inc., No. CV 00–09358 GAF (CWx) (C.D. Cal. Mar. 1, 2005) (stipulated final order for permanent injunction) (holding infomercial producer and two principals of the company liable for deceptive weight loss claims made for the Enforma system)

- FTC v. First American Payment Processing, Inc., No. CV 04-0074 PHX SRB (D. Az. Nov.3, 2004) (stipulated permanent injunction) ($1.5 million redress for electronic payment processor's role in assisting fraudulent telemarketers by electronically debiting consumers' bank accounts in violation of the Telemarketing Sales Rule and the FTC Act)

- FTC v. No. 1025798 Ontario, Inc., d/b/a The Fulfillment Solutions Advantage, Inc., No.: 03-CV-910A (W.D.N.Y. Oct. 12, 2004) (stipulated final order) (holding fulfillment company liable for its role in marketing of deceptively advertised weight loss products)

- ValueVision International, Inc., 132 F.T.C. 338 (2001) (consent order) (holding home shopping company liable for role in making and disseminating deceptive claims for weight loss, cellulite, and baldness products)

- FTC v. Lane Labs-USA, Inc., No. 00CV3174 (D.N.J. June 28, 2000) (stipulated final order) (applying common enterprise theory to hold both the product manufacturer and a company that distributed information about the use of the product liable for deceptive cancer treatment claims for BeneFin, a shark cartilage product)

- QVC, Inc., C-3955 (June 16, 2000) (consent order) (holding home shopping company liable for its role in making and disseminating deceptive cold prevention claims for zinc supplement)

- Kent & Spiegel Direct, Inc., 124 F.T.C. 300 (1997) (holding infomercial producer liable for deceptive weight loss and spot reduction claims for abdominal exerciser)

- Home Shopping Network, Inc., 122 F.T.C. 227 (1996) (consent order) (holding home shopping company liable for its role in making and disseminating deceptive claims for vitamin and stop-smoking sprays)

- Lifestyle Fascination, Inc., 118 F.T.C. 171 (1994) (consent order) (holding cataloger liable for deceptive claims for fuel additive, pain reliever, and device advertised to treat addiction and depression)

- Sharper Image Corp., 116 F.T.C. 606 (1993) (consent order) (holding cataloger liable for unsubstantiated claims for telephone tap detector, exercise device, and dietary supplement)

- General Nutrition, Inc.,111 F.T.C. 387 (1989) (consent order) (holding retailer liable for deceptive claims for dietary supplements)

- Walgreen Co., 109 F.T.C. 156 (1987) (holding retail drugstore chain liable for deceptive advertising of OTC pain reliever)

V. LIABILITY FOR PARTICULAR KINDS OF CLAIMS

A. Claims Made through Endorsements: False or deceptive endorsements or testimonials violate Section 5. See Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255. The Guides are premised on the principle that because consumers may rely on the opinions of endorsers in making product decisions, product endorsements must be non-deceptive. Endorsements "may not contain any representations which would be deceptive or could not be substantiated if made directly by the advertiser." 16 C.F.R. § 255.1(a). In other words, endorsements are not themselves substantiation for advertising claims; rather, they give rise to the need for the advertiser to possess competent and reliable evidence to support the underlying efficacy representations conveyed to consumers. In addition, any material connection between the endorser and the advertiser (i.e., a relationship not reasonably expected by a consumer that might materially affect the weight or credibility of the endorsement) must be disclosed. See Numex Corp., 116 F.T.C. 1078 (1993) (consent order) (challenging endorser's status as corporate officer to be a material connection that must be disclosed); TrendMark Int'l, Inc., 126 F.T.C. 375 (1998) (consent order) (challenging consumer endorsers' status as distributors of weight loss product or their spouses to be a material connection that must be disclosed). On October 5, 2009, the FTC issued revised Endorsement Guides.

1. Expert Endorsers: An "expert" is defined as "an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals." 16 C.F.R. § 255.0(d). Endorsers represented directly or by implication to be experts must have qualifications sufficient to give them the represented expertise. 16 C.F.R. § 255.3(a); see FTC v. Lark Kendall, No. 00-09358-AHM

(AIJx) (C.D. Cal. Aug. 31, 2000) (challenging false representation that person who appeared on an infomercial touting a weight loss product was a nutritionist) (stipulated final order). An expert endorsement must be supported by an examination or testing of the product at least as extensive as experts in the field generally agree would be needed to support the conclusions presented in the endorsement. 16 C.F.R. § 255.3(b). Both the advertiser and the expert endorser may be held liable for deceptive claims made by the endorser. See Synchronal Corp., 116 F.T.C. 1189 (1993); (consent order) (holding both advertiser and expert endorsers liable for deceptive representations for a purported baldness remedy and cellulite treatment). Representative expert endorsement cases:

- FTC v. Terrill Mark Wright, M.D., No. 1:04-CV-3294 (N.D. Ga. Jan. 15, 2009) ($15,454 redress for doctor's deceptive endorsement of Thermalean weight loss product)

- Robert M. Currier, D.O., 134 F.T.C. 672 (2002) (consent order) (challenging deceptive representations made by eye doctor for SNOR-enz, a purported anti-snoring treatment)

- Gerber Products Co., 123 F.T.C. 1365 (1997) (consent order) (challenging deceptive representation regarding pediatricians' endorsement of baby food in survey)

- The Eskimo Pie Corp., 120 F.T.C. 312 (1995) (consent order) (challenging deceptive claim that line of frozen desserts was approved or endorsed by American Diabetes Association)

- Third Option Laboratories, Inc., 120 F.T.C. 973 (1995) (consent order) ($480,000 redress for deceptive claim that Jogging in a Jug cider beverage was approved by the Department of Agriculture)

- James McElhaney, M.D., 116 F.T.C. 1137 (1993) (consent order) (challenging deceptive representations made by a physician for a purported pain relief and arthritis treatment device)

- Steven Victor, M.D., 116 F.T.C. 1189 (1993), and Patricia Wexler, M.D., 115 F.T.C. 849 (1992) (consent orders) (challenging deceptive representations made by dermatologists for a purported baldness remedy)

- Ana Blau a/k/a Anushka, 116 F.T.C. 1189 (1993) (consent order) (challenging deceptive representations made by a spa owner for a purported cellulite remedy)

- Black & Decker (U.S.) Inc., 113 F.T.C. 63 (1990) (consent order) (challenging deceptive claim that iron received the endorsement of the National Fire Safety Council because the group did not have expertise to evaluate appliance safety)

2. Consumer Endorsers: Anecdotal evidence, such as consumer testimonials, is generally inadequate to substantiate efficacy claims. See, e.g., Removatron, 111 F.T.C. at 302; Original Marketing, Inc., 120 F.T.C. 278 (1995) (consent order) (challenging use of testimonials that did not represent typical experience of consumers who used weight loss ear clip). Consumer testimonials may not contain claims that could not be substantiated if the advertiser made them directly. An advertisement using consumer endorsements will generally be interpreted to convey that the endorser's experience is representative of what consumers will typically achieve with the product in actual use. 16 C.F.R. § 255.2(a); see Cliffdale Associates, 103 F.T.C. 110, 173 (1984). If the advertiser doesn't have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must have adequate substantiation for that representation. 16 C.F.R. § 255.2(b) Statements like "Your results may vary" or "Not all consumers will get this result" are insufficient to disclaim a representation that the endorser's experience is typical of what a consumer will achieve. 16 C.F.R. § 255.2(b) n.1 and Example 4.

3. Celebrity Endorsers: Like any other endorsement or testimonial, celebrity endorsements must reflect the "honest opinions, findings, beliefs, or experience" of the celebrity. Advertisers must substantiate not only the accuracy of any claims made by the celebrity, but also any underlying efficacy claims conveyed to consumers through the celebrity endorsement. 16 C.F.R. § 255.1(a). A celebrity who is represented to use the product must, in fact, be a bona fide user. Advertisers may use an endorsement only as long as they have good reason to believe that the endorser continues to subscribe to the views presented. 16 C.F.R. § 255.1(b). See also FTC v. Garvey, 383 F.3d 891 (9th Cir. 2004) (holding that celebrity endorser possessed requisite level of substantiation).

B. Claims Made Through Demonstrations: Product demonstrations must accurately depict how the product will perform under normal consumer use. See Colgate-Palmolive Co., 59 F.T.C. 1452 (1961), remanded, 310 F.2d 89 (1st Cir. 1962), modified, 62 F.T.C. 1269 (1963), remanded, 326 F.2d 517 (1st Cir. 1963), rev'd and enforced, 380 U.S. 374 (1965). Representative demonstration cases:

- United States v. Goodtimes Entertainment, Ltd., No. 03 CV 6037 (S.D.N.Y. Aug. 11, 2003) (consent decree) (challenging deceptive use of before-and-after photos in ads for Copa hair straightening product)

- Arak-Hamway International, Inc., 121 F.T.C. 507 (1996) (consent order) (challenging company's use of off-camera techniques deceptively to depict performance of toy cars)

- National Media Corp., 116 F.T.C. 549 (1993) (consent order) (challenging deceptive demonstration of kitchen mixer "whipping" skim milk and "pureeing" fresh pineapple)

- Hasbro, Inc., 116 F.T.C. 657 (1993) (consent order) (challenging company's deceptive use of monofilament wire to show G.I. Joe helicopter flying)

- Volvo North America Corp., 115 F.T.C. 87 (1992) (consent order) (challenging deceptive demonstration depicting monster truck driving over row of cars because Volvo had been reinforced and roof supports of other cars had been severed)

C. Comparative Advertising: Commission policy encourages truthful references to competitors or competing products, but requires clarity and, if necessary, appropriate disclosures to avoid deception. Statement of Policy Regarding Comparative Advertising, 16 C.F.R. § 14.15. Representative cases:

- KFC Corp., 138 F.T.C. 442 (2004) (consent order) (challenging deceptive claims about the relative nutritional value and healthiness of company's fried chicken as compared to a Burger King Whopper)

- Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000) (upholding Commission finding that marketer of Down's pills had misrepresented that product is superior to other analgesics for treating back pain)

- London International Group, 125 F.T.C. 726 (1998) (consent order) (challenging claims that Ramses condoms are "30% stronger" than competing products)

- Kraft, Inc., 114 F.T.C. 40 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993) (holding ads for Kraft Singles cheese slices deceptive because ads implied that product contained more calcium than imitation cheese slices, when that generally was not the case)

D. Safety and Risk-Reduction Claims: Advertisers must have reliable substantiation to support safety-related or risk reduction claims and must carefully qualify claims to indicate the level of safety or significant risks. Representative cases:

- Prince Lionheart, Inc., 138 F.T.C. 403 (2004) (consent order) (challenging unsubstantiated claims for the Love Bug, a device designed to clip onto a baby stroller and advertised to repel mosquitos and protect children from the West Nile Virus)

- FTC v. Tecnozone International, L.L.C., No. 03 CV 9000 (S.D.N.Y. Nov. 14, 2003) (stipulated final order) ($85,000 redress for deceptive safety and efficacy claims for Tecno AO cell phone shield)

- FTC v. Vital Living Products, Inc., No. 3:02CV74-MU (W.D.N.C. Feb. 27, 2002) (stipulated final order) (challenging deceptive efficacy claims for a purported do-it-yourself test kit represented to detect anthrax bacteria and spores)

- Kris A. Pletschke d/b/a Raw Health, 133 F.T.C. 574 (2002) (consent order) (challenging deceptive claims that colloidal silver product could treat 650

different diseases, could eliminate all pathogens in the human body, and is medically proven to kill anthrax, Ebola virus, Hanta virus, and flesh-eating bacteria)

- FTC v. Rhino International, Inc., No. CV 03-3850 (E.D.N.Y. Aug. 6, 2003) (stipulated final order) ($342,665 redress for deceptive safety and efficacy claims for the WaveScrambler cell phone shield); FTC v. Safety Cell, Inc., No. CV 03-3851 (E.D.N.Y. Aug. 6, 2003) (stipulated final order) (challenging deceptive safety and efficacy claims for the WaveGuard cell phone shield)

- FTC v. Comstar Communications, Inc, No. 02-CV-003483 (E.D. Cal. May 7, 2003) (stipulated final order); and FTC v. Interact Communications, Inc, No. 02-CV-80131 (S.D. Fla. Dec. 1, 2003) (stipulated final order) (challenging deceptive safety and efficacy claims for the WaveShield cell phone shield)

- FTC v. Western Botanicals, Inc., No. CIV.S-01-1332 DFL GGH (E.D. Cal. July 11, 2001) (stipulated final order); FTC v. Christopher Enterprises, Inc., No. 2:01 CV-0505 ST (D. Utah Dec. 6. 2001) (stipulated final order); Panda Herbal Int'l, Inc., 132 F.T.C. 125 (2001); ForMor, Inc., 132 F.T.C. 72 (2001), and Aaron Co., 132 F.T.C. 174 (2001) (consent orders) (requiring warnings in labeling and advertising about potentially serious health risks of improper use of comfrey, St. John's Wort, and ephedra)

- FTC v. Medimax, Inc., No. 99-1485-CIV (M.D. Fla. Mar. 22, 2000), and FTC v. Cyberlinx Marketing, Inc., No. CV-S-99-1564-PMP-LRL (D. Nev. Nov. 8, 1999) (stipulated final orders) (challenging false representation that home HIV test kits could accurately detect HIV virus)

- FTC v. Met-Rx USA, Inc., No. SAC V-99-1407 (D. Colo. Nov. 15, 1999), and FTC v. AST Nutritional Concepts & Research, Inc., No. 99-WI-2197 (C.D. Cal. Nov. 15, 1999) (stipulated final orders) (challenging unsubstantiated safety claims for purported body-building supplements containing androgen and other steroid hormones)

- Conopco, Inc. d/b/a Unilever Home and Personal Care USA, C-3914 (Jan. 7, 2000) (consent order) (challenging antimicrobial and disease prevention claims for Vaseline Intensive Care Anti-Bacterial Hand Lotion)

- Brake Guard Products, Inc., 125 F.T.C. 138 (1998), and ABS Tech Sciences, Inc., 126 F.T.C. 229 (1998) (holding that safety claims for after-market braking systems were deceptive)

- Global World Media Corp., 124 F.T.C. 426 (1997) (consent order) (challenging safety claims for Herbal Ecstasy, an ephedra-based product advertising a natural high)

- Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (challenging comparative safety claims for Sierra antifreeze)

E. "Made in U.S.A." Claims: On December 1, 1997, the FTC issued an Enforcement Policy Statement retaining the "all or virtually all standard" for merchandise advertised and labeled as "Made in U.S.A." The Commission has since issued ***Complying with the Made in USA Standard***, a guide for businesses making country-of-origin claims. Representative cases:

- Enhanced Vision Systems, Inc., FTC File No. 092 3010 (July 20, 2009) (consent agreement published for public comment) (challenging allegedly deceptive Made in USA claims for magnifiers and other vision products)
- United States v. The Stanley Works, No. 3:06cv883(JBA) (D. Conn. June 9, 2006) ($205,000 civil penalty to settle charges that company falsely claimed its Zero Degree ratchets were Made in USA)
- Leiner Health Products, Inc.,133 F.T.C. 485 (2002); A&S Pharmaceutical Corp., C-4036; LNK International, Inc., 133 F.T.C. 501 (2002); Pharmaceutical Formulations, Inc., 133 F.T.C. 537 (2002); Perrigo Company, 133 F.T.C. 559 (2002) (consent orders) (challenging deceptive Made in USA label claims for private brand OTC analgesics)
- Jore Corp., 131 F.T.C. 585 (2001) (consent order) (challenging deceptive Made in USA claims for power tool accessories)
- Black & Decker Corp., 131 F.T.C. 439 (2001) (consent order) (challenging deceptive Made in USA claims for Kwikset locks)
- Physicians Formula Cosmetics, Inc., 128 F.T.C. 676 (1999) (consent order) (challenging deceptive Made in USA claims for Physicians Formula skincare products and cosmetics)
- The Stanley Works, 127 F.T.C. 897 (1999) (consent order) (challenging deceptive Made in USA claims for mechanics tools)
- American Honda Motor Co., Inc., 127 F.T.C. 461 (1999) (consent order) (challenging deceptive Made in USA claims for lawn mowers)

F. Rebates, "Free" Offers and Continuity Plans, Gift Cards, and Other Promotions: Claims regarding rebates, free offers, continuity plans, gift cards, and other promotions are subject to the same standards of truthfulness and accuracy as other product claims. In addition to Section 5 of the FTC Act, marketers may be subject to the requirements of the Mail or Telephone Order Merchandise Rule, the Telemarketing Sales Rule, the Negative Option Rule, and the Unordered Merchandise Statute.

1. **Rebates.** On April 27, 2007, the FTC sponsored ***The Rebate Debate***, a national workshop on complying with Section 5 and other laws and rules when advertising the availability of rebates. Representative cases:

- American Telecom Services, Inc., C-4256 (Mar. 11, 2009) (consent order) (challenging seller of telephones' failure to pay rebates in a timely fashion)

- FTC v. Wintergreen Systems, No. 3:09-CV-00124-EMC (N.D. Cal. Jan. 13, 2009) (stipulated final judgment) (challenging company's failure to pay advertised rebates, suspending judgment of $330,000, and banning defendants for life from any involvement in rebate programs)

- Soyo, Inc., C-4193 (Apr. 27, 2007) (consent order) (challenging company's practice of delaying rebates for purchasers of computer motherboards and other products despite representation that company would mail rebate checks within "10 to 12 weeks")

- InPhonic, C-4192 (Apr. 27, 2007) (consent order) (challenging mobile phone retailer's failure to disclose adequately before purchase that consumers would have to wait at least three to six months to submit rebate requests and would have to wait at least six to nine months after their purchase to get their rebate)

- CompUSA Inc., 139 F.T.C. 357 (2005), and Priti Sharma and Rajeev Sharma, 139 F.T.C. 343 (2005) (consent orders) (alleging that manufacturer and retailer failed to pay rebates in a timely fashion and requiring retailer to pay rebates for bankrupt manufacturer when retailer continued to advertise the availability of manufacturer's rebates despite knowing that manufacturer was not fulfilling rebate requests)

- FTC v. Cyberrebate.com, Inc., No. 04-3616 (E.D.N.Y. Aug. 24, 2004) (stipulated final order) (challenging company's practice of failing to honor rebate promises)

- Philips Electronics North America Corp., 134 F.T.C. 532 (2002), and OKie Corp., 134 F.T.C. 511 (2002) (consent orders) (challenging companies' misrepresentations about delivery time for rebates and unilateral modification of terms of rebate programs after they had begun)

- America Online, Inc. and Compuserve Interactive Services, Inc., 137 F.T.C. 117 (2004) (consent order) (challenging companies' failure to deliver timely $400 rebates to eligible consumers)

- FTC and People of the State of New York v. UrbanQ, No. CV-0333147 (E.D.N.Y. June 26, 2003) (stipulated permanent injunction) ($600,000 in consumer refunds stemming from failure to provide advertised rebates and related deceptive representations)

- Memtek Products, Inc., C-3927 (Feb. 17, 2000) (consent order) (challenging delays in issuing advertised rebates and gift checks to purchasers of Memorex diskettes and tapes)

- UMAX Technologies, Inc., C-3928 (Feb. 17, 2000) (consent order) (challenging delays in issuing rebates to purchasers of scanners)

- United States v. Iomega Corp., No. 1:98CV00141C (D. Utah Dec. 9, 1998) (imposing $900,000 civil penalty for failure to fulfill rebate and premium requests in violation of the Mail Order Rule)

2. **"Free" offers and continuity plans.** On February 9, 2009, the FTC issued *Negative Options*, a staff report outlining five principles for avoiding deception in negative option offers, including disclosing material terms in an understandable manner, making disclosures clear and conspicuous, disclosing material terms before consumers incurs a financial obligation, getting affirmative consent, and honoring cancellation requests. On May 14, 2009, the FTC began a regulatory review of its Negative Option Rule. Representative cases:

   - FTC v. Commerce Planet, Inc., No. 09-CV-01324 (C.D. Cal. Nov. 19, 2009) ($19.7 million suspended judgment and as much as $1 million redress for deceptive "free" claims for Internet auction kits when marketers automatically charged consumers $59.95 a month for enrollment in an "online supplier" program)

   - FTC v. NextClick Media, LLC, No. C08-1718 VRW (D. Del. Nov. 9. 2009) (stipulated final order) ($3.4 million suspended judgment and $315,000 redress for deceptive "free trial" of bogus smoking cessation patches and debiting consumers' bank accounts as much as $99 per month without their consent)

   - FTC and Commonwealth of Kentucky v. Direct Connection Consulting, Inc., No. 1-08-CV-1739 (N.D. Ga. Apr. 1, 2009) (final judgment) ($5 million performance bond for deceptive "free" offers in which defendants misled consumers into thinking they were calling from a major retailer or from the consumer's credit card company and didn't deliver the "free" goods and services they promised)

   - FTC v. JAB Ventures, No. 2:08-CV-04648-SVW-RZ (C.D. Cal. Feb. 9, 2009) (stipulated final order) ($7.8 million judgment, all but $610,000 of which is suspended, for deceptive weight loss claims for hoodia products and bogus "free" sample offers in which consumers were charged for products without their consent)

   - FTC v. Complete Weightloss Center, Inc., No. 1:08-CV-00053-DLH-CSM (D.N.D. Feb. 9, 2009) ($2.5 million judgment, all but $3,000 of which is suspended, for deceptive weight loss claims and bogus "free" sample offers in which consumers were charged for products without their consent)

   - FTC v. PureHealth Laboratories, No.: 2:08-CV-07655-DSF-PJW (C.D. Cal. Dec. 3, 2008) (stipulated order) ($9.9 million judgment, all but $150,000 of which is suspended, for offering consumers a "free" sample of a purported weight loss product and then enrolling them in a continuity plan without their consent and billing their credit cards without authorization)

- FTC v. Think All Publishing, No.: 4:07-CV-11 (E.D. Tex. June 11, 2008) (preliminary injunction with asset freeze) ($2 million redress for company's deceptive practice of advertising "free" software CDs but billing consumers' credit cards without authorization based on a statement buried in the computer software licensing agreement)

- FTC v. NextClick Media LLC, No. C08-1718 VRW (N.D. Cal. May 7, 2008) (stipulated preliminary injunction) (alleging that company billed consumers' credit and debit cards for what was falsely advertised as a "free trial" of its products and that purported success claims for smoking cessation patches were unsubstantiated)

- United States v. ValueClick, Inc., No. CV08-01711 MMM (Rzx) (C.D. Cal. Mar. 17, 2008) ($2.9 million civil penalty for violations of CAN-SPAM Act related to deceptive e-mails, banner ads, and pop-ups deceptively claiming that consumers were eligible for "free" gifts)

- United States v. Member Source Media, Inc., No.: CV-08 0642 (N.D. Cal. Jan. 30, 2008) ($200,000 civil penalty for violation of CAN-SPAM Act and deceptive representation that recipient of spam email had won "free" prizes)

- United States v. Adteractive, Inc., No. CV-07-5940 SI (N.D. Cal. Nov. 28,. 2007) (stipulated final judgment) ($650,000 civil penalty for violation of CAN-SPAM Act and failure to disclose that consumers have to spend money to receive the so-called "free" gifts)

- FTC v. Consumerinfo.com., Inc. d/b/a Experian Consumer Direct, No. CV-SACV05-801 AHS(ML,Gx) (C.D. Cal. Feb. 21, 2007)(supplemental stipulated judgment and order) ($300,000 disgorgement for violating terms of existing FTC order regarding disclosures about "free" credit reports); and (C.D. Cal. Aug. 16, 2005) (stipulated final judgment) ($950,000 payment and refunds to consumers for deceptive marketing of "free" credit reports without disclosing to consumers that they would be enrolled in credit report monitoring service and charged $79.95 annually)

- FTC v. Berkeley Premium Nutraceuticals, Inc., No. 1:06-CV-51 (S.D. Ohio Feb. 2, 2006) (complaint filed) (alleging that marketers offered consumers "free" samples of dietary supplements only to enroll them in an automatic shipment program and bill them without their authorization)

- United States v. Scholastic Inc. and Grolier Incorporated, No. 1:05CV01216 (D.D.C. June 21, 2005) (consent order) ($710,000 civil penalty for book club companies' violations of Negative Option Rule, Unordered Merchandise Statute, Telemarketing Sales Rule, and Section 5)

- FTC v. Conversion Marketing, Inc., No. SACV 04-1264 (C.D. Cal. Jan. 17, 2006) (stipulated order) ($474,000 in redress and civil penalties for advertiser's practice of offering "free samples" of weight loss and tooth-

whitening products and then debited consumer's accounts and enrolled them in automatic shipment programs without their knowledge or authorization)

- United States v. Mantra Films, Inc., No. CV-03-9184 RSWL (C.D. Cal. July 30, 2004) (stipulated order) ($1.1 million civil penalty and redress in settlement of charges that marketers of "Girls Gone Wild" videos violated Section 5, the Electronic Fund Transfer Act, and the Unordered Merchandise Statute by billing consumers for products without their express consent)

- FTC v. Preferred Alliance, Inc., No.: 03-CV-0405 (N.D. Ga. Feb. 12, 2003) (complaint) (challenging allegedly deceptive negative option marketing of buying club memberships)

- United States v. Micro Star Software, Inc., (S.D. Cal. May 22, 2002) (consent decree) (ordering $90,000 civil penalty for company's failure to disclose adequately that its 30-day "no risk" trial offer obligated consumers to continuous unordered shipments of software and a $49.95 non-refundable membership fee)

- FTC v. Smolev and Triad Discount Buying Service, Inc., No. 01-8922-CIV-Zloch (S. D. Fla. Oct. 24, 2001) (stipulated final order) (joint action by FTC and 40 states ordering $9 million in redress from buying clubs that misled consumers into accepting trial memberships and obtained consumers' billing information from telemarketers without authorization)

- FTC v. Creative Publishing International, Inc., (D. Minn. May 30, 2001) (consent decree) (ordering $200,000 civil penalty for publisher's failure to disclose adequately that acceptance of "free trial" offer unknowingly enrolled consumers in book club)

- Value America, Inc., C-3976, Office Depot, Inc., C-3977, and BUY.COM, Inc., C-3978 (Sept. 8, 2000) (consent orders) (challenging promotions for "free" and "low-cost" computers that failed to disclose the true costs of and important restrictions on the offers, including that consumers had to sign a contract for three years of service from a particular Internet service provider)

3. **Gift cards and stored value cards**. Representative cases:

- Darden Restaurants, C-4183 (Apr. 3, 2007) (consent order) (challenging company's failure to clearly and conspicuously disclose dormancy fees for non-use of Olive Garden, Red Lobster, Bahama Breeze, and Smokey Bones gift cards)

- Kmart Corp., C-4197) (Mar. 12, 2007) (challenging company's failure to clearly and conspicuously disclose dormancy fees for non-use of gift card and falsely representations that cards would never expire)

- FTC v. EdebitPay, LLC, No. CV-07-4880 ODW (AJWx) (C.D. Cal. Aug. 7, 2007) (temporary restraining order) (challenging marketers of Visa- and

MasterCard-branded stored-value cards from allegedly making unauthorized debits from consumers' bank accounts)

4. **Other forms of promotion.** Representative cases:

- Bumble Bee Seafoods, Inc., C-3954 (June 16, 2000) (consent order) (challenging "75¢ off next purchase" promotion that did not disclose until consumers had already bought product that coupon was good only for purchase of five cans of tuna and requiring company to undertake new coupon promotion with $200,000 payout to consumers)

- Benckiser Consumer Products, Inc., 121 F.T.C. 644 (1996) (consent order) (challenging deceptive "cause-related marketing" campaign in which advertiser falsely claimed that a portion of proceeds from its EarthRite line of products would be donated to non-profit environmental groups)

G. Advertising and Marketing Directed at Spanish-Speaking Consumers: On May 12-13, 2004, the FTC hosted a national workshop to explore strategies for effective education and law enforcement to protect Hispanic consumers from fraud and deceptive advertising. The Commission followed up with community workshops in other cities. To complement its law enforcement initiatives, the FTC launched a Spanish-language consumer fraud awareness campaign, "¡Ojo! Mantente alerta contra el fraude. Infórmate con la FTC" ("Be on the alert against fraud. Stay informed with the FTC."), and a special website, www.ftc.gov/ojo. Representative cases:

- FTC v. Del Sol LLC, No.: CV-05-3013 GAF(RCx) (C.D. Cal. Dec. 14, 2006) ($235,000 redress and $1.6 million suspended judgment for Do Not Call violations and deceptive Spanish-language telemarketing of bogus "prizes")

- FTC v. Unicyber Technology, No. CV-04-1569 LGB (MANx) (C.D. Cal. Mar. 25, 2005) (stipulated final judgment) ($400,000 redress and $4.6 million avalanche clause for deceptive claims about the cost, availability, and quality of computers advertised on national Spanish-language television)

- FTC v. Crediamerica Group d/b/a Latin Shopping Network, No. 05-20504-CIV-Martinez (S.D. Fla. Feb. 24, 2005) (stipulated final judgment) ($47,000 redress and $2.9 million avalanche clause for deceptive claims about availability and quality of low-cost computers)

- FTC v. Alternative Medical Technologies, Inc., (S.D. Fla. Apr. 27, 2004) (stipulated final order) (challenging deceptive weight loss claims for X-TOX 10 and deceptive smoking cessation claims for X-TOX 80, disseminated via Spanish-language media)

- FTC v. Latin Hut, Inc., No. 04-CV-0830- BTM (RBB) (S.D. Fla. Apr. 22, 2004) (stipulated final order) ($149,425 redress for deceptive claims for Parche Para Bajar Peso and Iman De Grasa, purported weight loss products, and Total Bust, a purported breast augmentation supplement)

H. Advertising and Marketing Related to Mortgages: Although banks, thrifts, federal credit unions, and many other entities in the financial sector are exempt from FTC jurisdiction, see 15 U.S.C. 45(a)(2), unfair or deceptive practices by non-bank mortgage companies, mortgage brokers, and finance companies are within the purview of Section 5. In addition, the FTC has used Section 5 to challenge deceptive claims by companies promising to "rescue" homeowners from foreclosure or modify the terms of their mortgages. Representative cases:

- ***Operation Stolen Hope.*** On November 24, 2009, the FTC announced Operation Stolen Hope, a coordinated action involving 118 cases by 26 federal and state agencies as part of an ongoing crackdown on mortgage foreclosure rescue and loan modification scams.

- FTC v. Federal Housing Modification Department d/b/a Nations Housing Modification Center and Loan Modification Reform Association, No. 09-CV-01753 (D.D.C. Sept. 17, 2009) (complaint filed) (allegedly violating the FTC Act and the Telemarketing Sales Rule by misrepresenting themselves as a federal government agency or affiliate and falsely claiming that, in return for a $3,000 fee, they would obtain favorable mortgage modifications)

- FTC v. Lucas Law Center, No. 09-CV-770 (C.D. Cal. Sept. 17, 2009) (preliminary injunction freezing assets) (challenging practices of using an attorney to circumvent state prohibitions against receiving a fee before providing any purported services and advising clients to stop paying their mortgages in order to pay fees of up to $3,995)

- FTC v. United Home Savers, LLP, No. 8:08-CV-01735-VMC-TBM (M.D. Fla. Aug. 24, 2009) (challenging company's deceptive claims that for a $1200 fee it could prevent homes from being foreclosed)

- FTC v. Freedom Foreclosure Prevention Services LLC, No. CV-09-1167-PHX-FJM (D. Az. June 22, 2009) (stipulated preliminary injunction) (alleging that company that claimed it could prevent foreclosure in 97% of cases completed loan modification in only about 6% of cases)

- FTC v. New Hope Property LLC, No. 1:09-CV-01203-JBS-JS, and FTC v. Hope Now Modifications, LLC, No. 1:09-CV-01204-JBS-JS (D.N.J. Mar. 24, 2009) (complaints filed) (alleging that companies falsely claimed to be part of a government-endorsed mortgage assistance network and deceptively represented they could successfully modify most homeowners' mortgages)

- FTC v. National Foreclosure Relief, Inc., No. SA-CV-09-117-DOC (C.D. Cal. Feb. 11, 2009) (complaint filed) (alleging that foreclosure "rescue" company falsely claimed that it would stop foreclosure)

- FTC v. Mortgage Foreclosure Solutions, Inc., No. 8:08-CV-00388-SDM-EAJ (M.D. Fla. 2009) (stipulated final judgment) (challenging deceptive claims that company would stop foreclosure for a $1,200 fee)

- Good Life Funding, C-4248 (Jan. 8, 2009) (consent order); American Nationwide Mortgage Company, Inc., C-4249 (Jan. 8, 2009) (consent order); and Shiva Venture Group, C-4250 (Jan. 8, 2009) (consent order) (challenging mortgages companies' deceptive advertising of low monthly payments and low rates without fully disclosing loan terms, in violation of Section 5, the Truth in Lending Act, and Regulation Z)

- FTC v. The Bear Stearns Companies, No. 4:08-CV-338 (E.D. Tex. Sept. 9, 2008) ($28 million redress for violations of Section 5, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and Regulation Z of the Truth-in-Lending Act for unlawful practices related to servicing consumers' mortgage loans, including misrepresenting the amounts owed, charging unauthorized fees, and engaging in abusive collection practices)

- FTC v. Capital City Mortgage Corp., No. 1:98-CV-00237 (D.D.C. Feb. 24, 2005) (consent decree) ($750,000 redress for companies' practice of including phony charges in monthly statements, foreclosing on borrowers who were in compliance, and failing to release liens on homes after loans were paid off)

- United States v. Fairbanks Capital Corp., No. 03-12219-DPW (D. Mass. Nov. 12, 2003 and Aug. 2, 2007) (stipulated judgments) ($40 million redress for deceptive mortgage practices, including charging consumers illegal late fees and other unauthorized fees and failing to post mortgage payments on time)

- FTC v. The Associates and Citigroup, Inc., No. 1:01-CV-00606-JTC (N.D. Ga. Sept. 29, 2002) (stipulated settlement) ($215 million redress for deceptive marketing practices that induced consumers to refinance existing debts into home loans with high interest rates and fees, and to purchase high-cost credit insurance)

- FTC v. First Alliance Mortgage Co., No. SACV 00-964 DOC (C.D. Cal. Mar. 22, 2002) (stipulated settlement) ($74 million redress for deceptive mortgage practices in case brought in cooperation with states and consumer groups)

VI. DETERMINING AD MEANING

A. Express Claims: Because express claims unequivocally state the representation, the representation itself establishes the meaning of the claim. No further proof about the meaning of the claim is necessary. Deception Policy Statement, 103 F.T.C. at 176; Thompson Medical Co., 104 F.T.C. at 788.

B. Implied Claims: Implied claims are any claims that are not express and range on a continuum from language virtually synonymous with an express claim to language that literally says one thing but strongly suggests something else to language that relatively few consumers would interpret as making the claim. See Kraft, Inc., 114 F.T.C. 40, 120 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993); Thompson Medical Co., 104 F.T.C. at 789.

1. When the language or depictions in an ad are clear enough to permit the Commission to conclude with confidence that an implied claim is conveyed to consumers acting reasonably under the circumstances, no extrinsic evidence is necessary to determine that an ad makes an implied claim. Kraft, 114 F.T.C. at 121.

2. In determining if reasonable consumers are likely to take an implied claim, the Commission looks at the net impression created by the ad as a whole. Deception Policy Statement, 103 F.T.C. at 179 & n. 32; Stouffer Foods Corp., 118 F.T.C. 746, 799 (1994). In determining the claims that an ad conveys, the Commission examines "the entire mosaic, rather than each tile separately." FTC v. Sterling Drug, 317 F.2d 669, 674 (2d Cir. 1963).

C. Extrinsic Evidence: When an implied claim is not clear enough to permit the Commission to determine its existence by examining the ad alone, extrinsic evidence may be required. Stouffer Foods Corp., 118 F.T.C. at 798-99. In all cases, if extrinsic evidence is available, the Commission will consider it, taking into account its relative quality and reliability. Kraft, 114 F.T.C. at 121.

1. Copy tests – research in which consumers answer questions designed to elicit the claims they took from an ad – are one form of extrinsic evidence used to establish that an implied claim is conveyed. To be reliable evidence, the copy test must be methodologically sound. Kraft, 114 F.T.C. at 121; Thompson Medical Co., 104 F.T.C. at 790; Stouffer Foods Corp., 118 F.T.C. at 807 ("Perfection is not the prevailing standard for determining whether a copy test may be given any weight. The appropriate standard is whether the evidence is reliable and probative.")

2. Other forms of extrinsic evidence include testimony by marketing experts regarding principles derived from marketing research showing how consumers generally respond to ads presented in a particular way, and evidence of the advertiser's intent. Kraft, Inc., 114 F.T.C. at 121-22; Thompson Medical Co., 104 F.T.C. at 790.

D. Disclosures in Ads: Advertisements often contain fine-print footnotes or video superscripts that attempt to disclaim, limit, modify, or explain claims made elsewhere in the ad. Advertisers cannot use fine print to contradict other statements in an ad or to clear up misimpressions the ad would otherwise leave. Deception Policy Statement, 103 F.T.C. at 180-81. Similarly, accurate information in a footnote or text will likely not remedy a false headline because reasonable consumers may glance only at the headline. Id.

1. To be effective, disclosures must be clear and conspicuous. E.g., Thompson Medical Co., 104 F.T.C. 648, 842-43 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) (requiring simultaneous audio and visual disclosure of certain information). See also FTC v. Cyberspace.com, 453 F.3d 1196 (9th Cir. 2006) (holding that fine-print statement on purported rebate check was insufficient to disclose clearly and conspicuously that cashing the check would prompt monthly charges for Internet access services); United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (requiring audio and visual disclosure of information when ads make certain representations about the benefits of aspirin in the prevention of heart attacks).

2. In evaluating the effectiveness of disclosures, the Commission considers factors like:

   - Prominence: whether the qualifying information is prominent enough for consumers to notice and read (or hear)
   - Presentation: whether the qualifying information is presented in easy-to-understand language that does not contradict other things said in the ad and is presented at a time when consumers' attention is not distracted elsewhere
   - Placement: whether the qualifying information is located in a place and conveyed in a format that consumers will read (or hear)
   - Proximity: whether the qualifying information is located in close proximity to the claim being qualified.

3. The Commission has convened workshops and issued policy statements to reiterate the "clear and conspicuous" standard. See, e.g., ***Disclosure Exposure: An FTC-NAD Workshop on Effective Disclosures in Advertising*** (May 22, 2001); ***Dot Com Disclosures: Information about Online Advertising*** (May 3, 2000); ***Joint FTC-FCC Policy Statement on the Advertising of Dial-Around and Other Long-Distance Services to Consumers*** (Mar. 1, 2000); ***Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms: A Bureau of Economics Staff Report*** (June 13, 2007)

4. In addition to the requirements of Section 5, other federal statutes mandate that information about certain products and services be clearly and conspicuously disclosed to consumers. See, e.g., Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. § 308; Dell Computer Corp., 128 F.T.C. 151 (1999) (consent order); Micron Electronics, Inc., 128 F.T.C. 137 (1999) (consent order) (challenging under Section 5 and the Consumer Leasing Act television, print and Internet ads for consumer leases that placed material cost information in inconspicuous or unreadable fine print). On September 11, 2007, the FTC sent more than 200 warning to mortgage brokers and lenders – and media outlets carrying their ads for home mortgages – that their claims may violate Section 5 of the FTC Act and the Truth in Lending Act. The Commission alleged that the ads touted very low monthly payments or interest rates, without adequate disclosure of other important loan terms.

5. Print disclosures: In print ads and point-of-sale materials, the Commission has frequently found fine-print footnotes or blocks of text to be inadequate to disclaim or modify a claim made elsewhere in the promotion. Representative cases:

   - Budget Rent-A-Car Systems, Inc., C-4212 (Jan. 4, 2008) (consent order) (challenging car rental company's failure adequately to disclose fuel fees automatically charged to customers who drove fewer than 75 miles)
   - Palm, Inc., 133 F.T.C. 715 (2002) (consent order) (challenging ads for personal digital assistants that represented that products came with built-in wireless access to the Internet and email while revealing in fine-print note

printed down the side of the ad "Application software and hardware add-ons may be optional and sold separately. Applications may not be available on all Palm handhelds")

- Gateway Corp., 131 F.T.C. 1208 (2001) (consent order) (challenging ads for "free" or flat-fee internet services that disclosed in a fine-print footnote that many consumers would incur significant additional telephone charges)

- Hewlett-Packard Co., 131 F.T.C. 1086 (2001), and Microsoft Corp., 131 F.T.C. 1113 (2001) (consent orders) (challenging ads for personal digital assistants that represented that products came with built-in wireless access to the Internet and email while revealing in fine print "Modem required. Sold separately.")

- Value America, Inc., C-3976, Depot, Inc., C-3977, and BUY.COM, Inc., C-3978 (Sept. 8, 2000) (consent orders) (challenging promotions for low-cost computer systems that disclosed true costs of the offer and important restrictions in fine-print footnotes)

- Häagen-Dazs Co., 119 F.T.C. 762 (1995) (consent order) (challenging effectiveness of fine-print footnote modifying claim that frozen yogurt was "98% fat free")

- Stouffer Food Corp., 118 F.T.C. 746 (1994) (holding that sodium content claims for Lean Cuisine products were false and unsubstantiated and not cured by fine-print footnote)

6. Television disclosures: Video superscripts that are difficult to understand, superimposed over distracting backgrounds, compete with audio elements, or are placed in parts of the ad less likely to be remembered have been found to be ineffective in modifying a claim made in the body of the ad. Thompson Medical Co., 104 F.T.C. at 797-98. Representative cases:

   - United States v. Mazda Motor of America, Inc., (C.D. Cal. Sept. 30, 1999) (consent decree) ($5.25 million total civil penalty for violations of FTC and state orders related to disclosures in car leasing advertising).

   - General Motors Corp., 123 F.T.C. 241 (1997); American Honda Motor Co., 123 F.T.C. 262 (1997); American Isuzu Motor Co., 123 F.T.C. 275 (1997); Mitsubishi Motor Sales of America, Inc., 123 F.T.C. 288 (1997); Mazda Motor of America, Inc., 123 F.T.C. 312 (1997); Toyota Motor Sales, U.S.A., Inc., 125 F.T.C. 39 (1998); and Volkswagen of America, Inc., 125 F.T.C. 74 (1998) (consent orders) (requiring clear and conspicuous disclosure of terms in ads for car leases, defined as "readable [or audible] and understandable to a reasonable consumer")

   - Frank Bommarito Oldsmobile, Inc., 125 F.T.C. 1 (1998); Beuckman Ford, Inc., 125 F.T.C. 59 (1998); Suntrup Buick-Pontiac-GMC Truck, Inc., 125 F.T.C. 91 (1998); and Lou Fusz Automotive Network, Inc., 125 F.T.C. 111

(1998) (consent orders) (requiring clear and conspicuous disclosure of terms in ads for car leases, defined as "readable [or audible] and understandable to a reasonable consumer")

- Foote, Cone & Belding, Inc., 125 F.T.C. 528 (1998); Grey Advertising, Inc., 125 F.T.C. 548 (1998); Rubin Postaer and Associates, Inc., 125 F.T.C. 572 (1998); Bozell Worldwide, Inc. 127 F.T.C. 1 (1999); and Martin Advertising, Inc., 127 F.T.C. 10 (1999) (consent orders) (challenging advertising agencies' roles in ads containing deceptive representations of car leasing terms)

- Kraft, Inc., 114 F.T.C. at 124 (Initial Decision) (holding that complicated superscript – "one ¾ ounce slice has 70% of the calcium of five ounces of milk" – does not cure deceptive calcium content claim for cheese slices)

7. Internet disclosures: On May 3, 2000, staff issued ***Dot Com Disclosures: Information about Online Advertising***, a working paper examining how the FTC's rules and guides apply to advertising and sales on the Internet. The paper, provides guidance to businesses about how FTC law applies online with a focus on the clarity and conspicuousness of online disclosures. The Commission also sent letters to search engine companies on June 27, 2002, regarding the clear and conspicuous disclosure of paid placements. See Letter from Heather Hippsley, Acting Director of FTC's Division of Advertising Practices, to Gary Ruskin, Executive Director of Commercial Alert.

VII. FOOD ADVERTISING

A. FTC-FDA Liaison Agreement: Under a longstanding agreement between the Commission and the Food and Drug Administration, the FTC has primary responsibility for food advertising, while the FDA has primary responsibility for food labeling. See Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. ¶ 9851 (CCH) (1971).

B. Nutrition Labeling and Education Act (NLEA), 21 U.S.C. § 343(I), (q), and (r). The NLEA, and FDA's regulations implementing the NLEA, effected broad changes in the regulation of nutrition information on food labels. Under the NLEA, only FDA-approved nutrient content and health claims may appear on labels.

C. Enforcement Policy Statement on Food Advertising, 59 Fed. Reg. 28388 (June 1, 1994). The FTC issued this Statement to provide guidance on its enforcement policy regarding the use of nutrient content and health claims in food advertising, in light of the NLEA and FDA's regulations. The Statement clarifies how the FTC's deception and substantiation standards apply to issues raised by FDA's regulations. Issues addressed by the Enforcement Policy Statement include:

1. Absolute nutrient content claims: The Commission will apply FDA's definitions for terms such as low fat and high fiber.

2. Serving size: The Commission will use FDA's serving sizes in analyzing nutrient content claims.

3. Relative or comparative nutrient content claims: Unqualified comparative claims must meet FDA's minimum percentage difference requirements, although other comparative claims that are accurately qualified to identify the nature of the increase or reduction in a nutrient and to eliminate misleading implications may also comply with Section 5, even if that increase or reduction does not meet FDA's prescribed levels.

4. Synonyms: Claims that characterize the level of a nutrient, including those using synonyms not provided for in FDA's regulations, must be consistent with FDA definitions.

5. Health claims: The FTC will use FDA's "significant scientific agreement" standard as its principal guide in determining whether unqualified health claims are substantiated. Health claims that are not yet FDA-approved must be adequately qualified so that consumers understand both the extent of the support for the claim and any significant contrary evidence in the scientific community. In many cases, the presence and significance of risk-increasing nutrients must be disclosed to prevent a health claim from being deceptive. On July 30, 2004, FTC staff filed a comment with FDA encouraging the agency to revise regulations to allow more accurate health-related information for consumers.

D. Representative health benefits cases

- Kellogg Co., C-4262 (2009) (consent order) (challenging as false claims touting a breakfast of Frosted Mini-Wheats as "clinically shown to improve kids' attentiveness by nearly 20%")

- Tropicana Products, Inc., 140 F.T.C. 176 (2005) (consent order) (challenging unsubstantiated representations that drinking 2-3 glasses a day of "Healthy Heart" orange juice would produce dramatic effects on blood pressure, cholesterol, and homocysteine levels, thereby reducing the risk of heart disease and stroke)

- KFC Corp., 138 F.T.C. 422 (2004) (consent order) (challenging deceptive claims about the relative nutritional value and healthiness of company's fried chicken and its compatibility with popular weight-loss programs)

- Unither Pharma, Inc., and United Therapeutics Corp., 136 F.T.C. 145 (2003) (consent order) (challenging claims that food bar containing amino acid reduces the risk of heart disease and reverses damage to the heart)

- Interstate Bakeries Corp., 133 F.T.C. 687 (2002) (consent order) (challenging claims that calcium in Wonder Bread could improve children's brain function and memory)

- Conopco, Inc., 123 F.T.C. 131 (1997) (consent order) (challenging heart-health claims for Promise margarine)

- United States v. Eggland's Best, Inc., No. 96 CV-1983 (E.D. Pa. Mar. 12, 1996) (stipulated permanent injunction) ($100,000 civil penalty for violation of previous order challenging claims about product's effect on cholesterol)

- The Isaly Klondike Co., 116 F.T.C. 74 (1993) (consent order) (challenging claims about effect of Klondike Lite frozen dessert bars on consumers' serum cholesterol levels)

- Bertolli USA, Inc., 115 F.T.C. 774 (1992) (consent order) (challenging claims that olive oil had been medically proven to reduce cholesterol, blood pressure, and blood sugar)

- Campbell Soup Co., 115 F.T.C. 788 (1991) (consent order) (challenging heart-health claims for soups that are high in sodium)

- CPC International, Inc., 114 F.T.C. 1 (1991) (consent order) (challenging claims about the effect of Mazola Corn Oil and Mazola Margarine on cholesterol levels)

E. Representative nutrient content claim cases:

- Pizzeria Uno Corp., 123 F.T.C. 1038 (1997) (consent order) (challenging misleading low-fat representations for Thinzetta pizzas)

- Mrs. Fields Cookies, Inc., 121 F.T.C. 599 (1996) (consent order) (challenging low-fat claims for cookies)

- The Dannon Co., 121 F.T.C. 136 (1996) (consent order) (challenging low-fat, low-calorie, and lower in fat than ice cream claims for Pure Indulgence frozen yogurt)

- Häagen-Dazs Co., 119 F.T.C. 762 (1995) (consent order) (challenging low-fat representations for Häagen-Dazs frozen yogurt)

- The Eskimo Pie Corp., 120 F.T.C. 312 (1995) (consent order) (challenging low-calorie claims for Sugar Freedom products)

- Stouffer Food Corp., 118 F.T.C. 746 (1994) (holding that sodium content claims for Lean Cuisine products were deceptive)

- Kraft, Inc., 114 F.T.C. 40 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993) (holding that calcium content claims for Kraft Singles cheese slices were deceptive)

F. Food and Beverage Marketing to Children: On July 14-15, 2005, the FTC and the Department of Health & Human Services sponsored a national workshop, ***Perspectives on Marketing, Self-Regulation, and Childhood Obesity***, to discuss industry self-regulation concerning the marketing of food and beverages to children, as well as initiatives to educate children and parents about nutrition. The agencies issue a joint report on May 2, 2006. On

June 1, 2007, the FTC's Bureau of Economics issued s staff report, ***Children's Exposure to Television Advertising in 1977 and 2004: Information for the Obesity Debate***. The FTC and HHS sponsored a second joint workshop on July 18, 2007, ***Weighing In: A Check-Up on Marketing, Self-Regulation, and Childhood Obesity***. On July 29, 2008, the FTC issued a report to Congress, ***Marketing Food To Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation***. According to the report, in 2006, 44 major food and beverage marketers spent $1.6 billion to promote their products to children and adolescents in the United States. The report called for all companies in the industry "to adopt and adhere to meaningful, nutrition-based standards for marketing their products to children under 12." On December 15, 2009, the FTC hosted a public forum, ***Sizing Up Food Marketing and Childhood Obesity***.

VIII. OVER-THE-COUNTER DRUGS, MEDICAL AND TREATMENTS, DIETARY SUPPLEMENTS, and WEIGHT-LOSS PRODUCTS

A. Pursuant to the FTC-FDA Liaison Agreement, the FTC has primary responsibility for over-the-counter (OTC) drug advertising, while the FDA has primary responsibility for OTC drug labeling, prescription drug labeling, and prescription drug advertising. See Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. ¶ 9851 (CCH) (1971).

B. Drugs: Section 15 of the FTC Act defines the terms "drug" to include articles intended "for use in the diagnosis, cure, mitigation, treatment, or prevention of disease" or intended "to affect the structure or any function of the body." Representative drug cases:

- United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (challenging unsubstantiated claims that regular use of aspirin is appropriate therapy for the prevention of heart attacks and strokes in the general population)

- Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000) (upholding Commission finding that marketer of Doan's pills misrepresented that product is superior to other analgesics for treating back pain)

- Pfizer, Inc., 126 F.T.C. 847 (1998); Del Pharmaceuticals, Inc., 126 F.T.C. 775 (1998); and Care Technologies, Inc., 126 F.T.C. 830 (1998) (consent orders) (challenging efficacy claims for anti-lice shampoos)

- Johnson & Johnson Consumer Products, 121 F.T.C. 22 (1996) (consent order) (challenging sexually-transmitted disease prevention claims for K-Y Plus Spermicidal Lubricant)

- United States v. Sterling Drug, Inc., No. CA90-1352 (D.D.C. June 12, 1990) (consent decree) ($375,000 civil penalty for unsubstantiated claims for Midol, in violation of previous order)

C. Devices, Medical Treatments, and Other Health-Related Claims or Promotions: Section 15 of the FTC Act defines the term "device" to include "instruments, apparatus, and contrivances" intended "for use in the diagnosis, cure, mitigation, treatment, or prevention of

disease" or intended "to affect the structure or any function of the body." Representative actions involving devices, medical treatments, and other health-related claims or promotions:

- Indoor Tanning Association, File No. 082 3159 (Jan. 26, 2010) (proposed consent order published for public comment) (alleging that trade association made false health and safety claims about indoor tanning)

- FTC v. Roex, Inc., No. SA-CV-090266 (C.D. Cal. Mar. 6, 2009) (final order) ($3 million redress for deceptive claims disseminated primarily through a call-in radio program called "The Truth About Nutrition" for a device sold to treat cancer and supplements advertised to treat or prevent cancer, HIV/AIDS, diabetes, Alzheimer's disease, Parkinson's disease, and other conditions)

- FTC v. Xacta 3000, Inc., No. 3:09-CV-00399-JAP-TJB (D.N.J. Jan. 28, 2009) (complaint filed) (alleging that marketers of Kinoki Foot Pads deceptively claimed that product would remove toxins from the body; treat high blood pressure, depression, and other medical conditions; and cause weight loss)

- United States v. See Right Vision and Vision Contact Lenses, No. 08 CIV 11793 (D. Mass. Dec. 11, 2008) (consent decree) ($27,000 civil penalty for selling cosmetic contact lenses without a prescription)

- United States v. Contact Lens Heaven, Inc., No. 08CV61713 (S.D. Fla. Dec. 11, 2008) (consent decree) ($233,498 suspended civil penalty and $15,000 payment for selling cosmetic contact lenses without a prescription.

- FTC v. Q-Ray Company, No. 03C 3578 (N.D. Ill. Sept. 20, 2006), aff'd, 512 F.3d 858 (7th Cir. 2008) ($16 million redress for deceptive pain relief claims for metal bracelet)

- United States v. Walsh Optical, Inc., No.: 06-3591 (D.N.J. Aug. 7, 2006) ($40,000 civil penalty for failing to verify consumers' contact lens prescriptions, in violation of the Contact Lens Rule)

- FTC v. Myfreemedicine.com, LLC, No. CV5 1607 (W.D. Wash. Oct. 17, 2005) (asset freeze entered) (challenging allegedly deceptive practice of representing that consumers who paid company $199 could get free prescription medicine)

- FTC v. Media Maverick, Inc., No. 04-3395-SVW (CWx) (C.D. Cal. Oct. 25, 2004) (stipulated final order) ($400,000 redress for deceptive pain relief claims for the Balance Bracelet)

- Contact Lens Rule, 16 C.F.R. Part 31. Pursuant to the Fairness to Contact Lens Consumers Act, the FTC issued the Contact Lens Rule, which imposed new prescription release and verification requirements on prescribers and sellers. On August 15, 2007, FTC staff sent warning letters to ten prescribers of contact lenses for allegedly failing to release prescription information to

their patients, requiring patients to purchase contact lenses from them, or imposing additional fees on patients before releasing prescriptions.

- FTC v. Smart Inventions, Inc., No. CV 04-4431 Mm(ex) (C.D. Cal. Sept. 18, 2007) (stipulated order for permanent injunction) (up to $2.5 million redress for deceptive claims for Biotape, adhesive strips advertised to relieve pain)

- FTC v. Pharmacycards.com, No. CV-S-04-0712-RCJ-RJJ (D. Nev. May 27, 2004) (temporary restraining order issued) (challenging company's practice of allegedly making unauthorized withdrawals from consumers' checking accounts for unordered "discount pharmacy cards")

- FTC v. Seville Marketing, Ltd., No. C04-1181L (W.D. Wash. May 19, 2005) (stipulated final judgment) (challenging efficacy claims for at-home HIV test kits advertised as 99.4% accurate, but with error rates of 59.3%)

- Laser Vision Institute, 136 F.T.C. 1 (2003) (consent order); and LCA-Vision, Inc. d/b/a LasikPlus, 136 F.T.C. 41 (2003) (consent order) (challenging representations by purveyors of LASIK that the procedure would eliminate the need for glasses, contact lenses, reading glasses, and bifocals and would eliminate the risk of haloing and glare that can be caused by LASIK)

- FTC v. CSCT, Inc., No. 03 C 00880 (N.D. Ill. Feb. 17, 2004) (stipulated final judgment) (in conjunction with Canadian and Mexican health authorities, challenging anti-cancer claims made by a British Columbia company for electromagnetic treatments in its Tijuana, Mexico, clinic)

- FTC v. Dr. Clark Research Ass'n, No. 1:03CV0054 (N.D. Ohio Dec. 3, 2004) (stipulated final judgment) (ordering full refunds to consumers who purchased devices and dietary supplements deceptively advertised to treat cancer and other serious illnesses)

- FTC v. Walker, No. C02-5169 RJB (W.D. Wash. Oct. 28, 2002) (stipulated final judgment) (challenging efficacy claims for purported cancer treatments)

- FTC v. Sani-Pure Food Laboratories, No. 02-CV-4608 (D.N.J. Oct. 4, 2002) (final order) (challenging role of testing laboratory in providing false test results for a purported do-it-yourself home anthrax test)

- FTC v. BioPulse International, Inc., No. C023511 (N.D. Cal. July 23, 2002) (stipulated final judgment) (as part of ongoing Operation Cure.All, challenging deceptive cancer treatment claims made by California company for insulin-induced hypoglycemic sleep therapy and acoustic light wave therapy offered in its Tijuana, Mexico, clinic)

- FTC v. Vital Living Products, Inc., No. 3:02CV74-MU (W.D.N.C. Feb. 27, 2002) (stipulated final order) (challenging deceptive efficacy claims for a purported do-it-yourself test kit represented to detect the presence of anthrax bacteria and spores)

- FTC v. Western Dietary Products Co., No. C01-0818R (W.D. Wash. June 14, 2001) (permanent injunction), and Jaguar Enterprises, 132 F.T.C. 229 (2001) (consent order) (as part of third phase of Operation Cure.All, challenging deceptive representations that electronic therapy devices could treat AIDS, Alzheimer's disease, cancer, and other serious conditions)

- FTC v. Medimax, Inc., No. 99-1485-CIV (M.D. Fla. Mar. 22, 2000) (stipulated final order), and FTC v. Cyberlinx Marketing, Inc., No. V-S-99-1564-PMP-LRL (D. Nev. Nov. 8, 1999) (stipulated final order) (holding that Internet marketers falsely represented that HIV home test kits could accurately detect HIV virus, ordering full restitution, imposing lifetime ban on sale of unapproved devices, and requiring certain defendants to post $500,000 bond before selling any medical devices)

- Magnetic Therapeutic Technologies, Inc., 128 F.T.C. 380 (1999) (consent order) (as part of first phase of Operation Cure.All, challenging claims that purported magnetic therapy devices could treat a multitude of diseases and symptoms, including cancer, high blood pressure, HIV, multiple sclerosis, and diabetic neuropathy)

- American College for Advancement in Medicine, 127 F.T.C. 890 (1999) (consent order) (challenging representations that chelation therapy is an effective treatment for arteriosclerosis)

- London International Group, 125 F.T.C. 726 (1998) (consent order) (challenging comparative efficacy claims for Ramses condoms)

- Natural Innovations, Inc., 123 F.T.C. 698 (1997) (consent order) (challenging pain relief claims for the Stimulator, a device emitting a purported acupressure-like electrical charge)

- Zygon International, Inc., 122 F.T.C. 195 (1996) (consent order) ($195,000 redress for deceptive claims for The Learning Machine, a device purported to accelerate learning and enable users to lose weight, quit smoking, increase their I.Q., and learn foreign languages overnight)

- Numex Corp., 116 F.T.C. 1078 (1993) (consent order) (challenging arthritis treatment and pain relief claims for roller device)

- Viral Response Systems, Inc., 115 F.T.C. 676 (1992) (consent order) (challenging claims that inhaler device can remedy colds)

D. Dietary Supplements, Herbal Products, and Related Advertising Claims: The FTC has challenged deceptive claims for dietary supplements through traditional law enforcement, industry outreach, and education. On November 18, 1998, the Commission issued a ***Dietary Supplements: An Advertising Guide for Industry***, describing how the basic principles of advertising law apply to the marketing of dietary supplements. Representative cases:

- FTC v. Walgreens Co., No.1:10-CV-01813 (N.D. Ill. Mar. 23, 2010) (stipulated final order) ($6 million redress for deceptive claims that Wal-Born product could prevent and treat colds and flu)

- ***Omega-3 Fatty Acid Supplements.*** On February 16, 2010, the FTC sent warning letters to 11 companies that promote various Omega-3 fatty acid supplements, telling them to review their product packaging and labeling to make sure they do not violate federal law by making baseless claims about how the supplements benefit children's brain and vision function and development.

- FTC v. CVS Pharmacy, Inc., FTC File No.072 -237 (D.R.I. Sept. 8, 2009) (stipulated final order) ($2.8 redress for deceptive claims that AirShield product could prevent and treat colds and flu)

- Daniel Chapter One, D-9329 (Dec. 24, 2009) (Commission Decision) (holding company and corporate officer liable for deceptive claims that shark cartilage and herbal formulations would prevent, treat, and cure cancer, and heal the effects of chemotherapy and radiation)

- FTC v. Rite Aid Corp., FTC File No. 072-3236 (M.D. Pa. July 13, 2009) (stipulated final order) ($500,000 redress for deceptive claims that Germ Defense tablets could prevent and treat colds and flu)

- United States v. QVC, Inc., No. 04-CV-1276 (E.D. Pa. Mar. 19, 2009) (consent decree) ($6 million redress for deceptive claims for For Women Only weight loss pills, Lite Bites weight loss bars and shakes, and Bee-Alive Royal Jelly energy supplements, and $1.5 civil penalty for deceptive claims for Lipofactor Cellulite Target Lotion, in violation of 2000 FTC order)

- FTC v. National Urological Group, Inc., No. 1:04-CV-3294 (N.D. Ga. Jan. 15, 2009) (final judgment) ($15.8 million redress for deceptive claims for Thermalean and Lipodrene, purported weight-loss products with ephedra, and Spontane-ES, a purported erectile dysfunction product with yohimbine)

- ***CURE-ious Cancer Cure Sweep:*** Native Essence Herb Co., D-9328 (Apr. 3, 2009) (challenging deceptive cancer prevention and cure claims for essiac tea and cat's claw products) (consent order); Herbs for Cancer, D-9331 (Apr. 3, 2009) (Commission Decision) (challenging deceptive cancer cure claims for what purported to be Chinese herbal teas); FTC v. Nu-Gen Nutrition, Inc., No.1:08-CV-05309 (N.D. Ill. Sept. 18, 2008) (stipulated final order) ($246,000 redress for deceptive cancer cure claims for products containing cantron, apricot seeds, and laetrile); FTC v. Westberry Enterprises, Inc., (W.D. La. Sept. 18, 2008) (stipulated final order) ($15,000 for deceptive cancer cure claims for herbal tea containing burdock root, sheep sorrel, cat's claw, slippery elm bark, melatonin, and other ingredients); FTC v. Clark, (W.D. Ky. Sept. 18, 2008) (stipulated final order) ($25,000 for deceptive cancer cure claims for products containing laetrile, apricot seeds, digestive

enzymes, okra-pepsin-E3, and coral calcium); Bioque Technologies, Inc., (challenging deceptive melanoma treatment claims for Serum GV, a product containing soursop or guanabana extracts); Cleansing Time Pro; (challenging deceptive claims that products containing black salve could treat cancer, HIV, SARS, and Avian Flu); Premium Essiac Tea 4less (challenging deceptive claims that products containing essiac teas could treat cancer, AIDS, ulcers, and hepatitis C) (Sept. 18, 2008) (proposed consent orders published for public comment)

- FTC v. Airborne, Inc., No. CV-08-05300 (C.D. Cal. Aug. 14, 2008) (stipulated judgment) (total of up to $30 million in consumer redress to settle FTC and class actions alleging false and unsubstantiated cold prevention and germ-fighting claims for Airborne)

- FTC v. North American Herb and Spice Co., No. 08 CV 3169 (N.D. Ill. Aug. 12, 2008) (stipulated judgment) ($2.5 million redress for deceptive claims that oregano-based dietary supplements are scientifically proven to prevent or treat colds and flu, to boost the immune system, and to kill avian bird flu virus, hepatitis C, staphylococcus, and other germs and pathogens)

- Springboard and Pro Health Labs, C-4203; Elation Therapy, Inc., C-4204; Women's Menopause Health Center, C-4208; The Green Willow Tree LLC, C-4207; Health Science International, Inc., C-4205; Progesterone Advocates Network, 4206; and Herbs Nutrition Corporation, D-9325 (2008) (consent orders) (challenging deceptive claims for alternative hormone replacement therapy products)

- FTC v. Pacific Herbal Sciences, Inc., (C.D. Cal. May 29, 2007) (stipulated judgment) ($172,500 redress for deceptive weight loss, anti-aging, and disease treatment claims for HGH Revolution and Natural Rejuvenator HGH-R, oral sprays sold via spam that claimed to contain human growth hormone)

- FTC v. Sunny Health Nutrition Technology & Products, No. 8:06-CV-2193-T-24EAJ (M.D. Fla. Apr. 24, 2007 and Nov. 28, 2006) (stipulated final order) ($1.9 million redress for deceptive claims for HeightMax, a dietary supplement purporting to make teens and young adults taller, including application of avalanche provision upon a finding that company had hidden assets)

- FTC v. Seasilver USA, Inc., No. CV-S-03-0676-RLH (LRL) (D. Nev. July 24, 2006), aff'd, No. 06-16373 (9th Cir. 2008) ($120 million order for company's failure to comply with $3 million redress order). See FTC v. Seasilver USA, Inc., No. CV-S-03-0676-RLH (D. Nev. June 19, 2003) (stipulated final judgment) (challenging deceptive claims for Seasilver, a dietary supplement advertised to treat serious diseases, including AIDS and cancer)

- FTC v. Garden of Life, Inc.,No. 06-80226-CIV (S.D. Fla. Mar. 9, 2006) (stipulated final order) ($225,000 redress and $47 million suspended judgment for deceptive representations for Primal Defense, RM-10, Living Multi, and

FYI, dietary supplements advertised to lower cholesterol; treat disorders such as asthma, irritable bowel syndrome, chronic fatigue syndrome, arthritis, lupus, colds, and Crohn's disease; and reduce risk factors for diabetes)

- FTC v. Berkeley Premium Nutraceuticals, Inc., No. 1:06-CV-51 (S.D. Ohio Feb. 2, 2006) (complaint filed) (alleging that marketers made deceptive claims for Avlimil, a purported treatment for female sexual dysfunction, and Rogisen, a purported treatment for night vision problems)

- United States v. NBTY, Inc., No. CV-05-4793 (E.D.N.Y. Oct. 12, 2005) ($2 million civil penalty against company formerly known as Nature's Bounty for violating the terms of a 1995 FTC order by making deceptive claims that Royal Tongan Limu was clinically proven to treat diabetes, cancer, Alzheimer's disease, and other serious conditions and that Body Success PM Diet Program reduces body fat, increases metabolism, and causes weight loss, even during sleep)

- FTC v. Direct Marketing Concepts, Inc., No. 04-CV-11136-GAO (D. Mass. Oct. 6, 2005) (stipulated final order against certain defendants) ($80,000 redress for deceptive representations that Supreme Greens could prevent or treat serious medical conditions such as cancer)

- FTC v. Emerson Direct, Inc., No 2-05-CV-377-AM-33 (M.D. Fla. Aug. 23, 2005) (stipulated final order) ($1.3 million redress for deceptive claims that Smoke Away dietary supplement kit would allow smokers to quit smoking quickly, easily, permanently, and without cravings or other side effects and for deceptive use of purported expert endorsements)

- FTC v. Creaghan Harry, No. 04C-4790 (N.D. Ill. June 15, 2005) (stipulated final judgment) ($485,000 redress and $5.9 million suspended judgment for unsubstantiated anti-aging claims for purported human growth hormone product and for violations on the CAN-SPAM Act)

- FTC v. Braswell, No. CV 03-3700 DT (PJWx) (C.D. Cal. 2005 and 2006) (stipulated final judgments) ($5 million redress, $1 performance bond, lifetime ban, and $30 suspended judgment from multiple individual and corporate defendants for deceptive claims that products could treat numerous conditions and illnesses, including asthma, diabetes, Alzheimer's disease, overweight, and sexual dysfunction)

- FTC v. Great American Products, Inc., No. 3:05-CV-00170-RV-MD (N.D. Fla. May 20, 2005), aff'd, 200 Fed. Appx. 897 (4th Cir. 2006) (up to $20 million redress for unsubstantiated anti-aging claims for purported human growth hormone product, deceptive format for radio and television infomercials, and violations of the Telemarketing Sales Rule)

- United States v. Body Wise International, Inc., No. SACV-05-43 (DOC) (Anx) (C.D. Cal. Jan. 18, 2005) (stipulated order) ($3.5 million civil penalty to FTC and California for deceptive representations that AG-Immune dietary

supplement treats numerous diseases, including cancer, HIV/AIDS and asthma, in violation of a 1995 FTC order)

- FTC v. Sagee U.S.A. Group, Inc., No.CV04 10560 GPS (CWx) (C.D. Cal. Aug. 10, 2006) (modified stipulated final judgment and order) ($10,396 redress and lifetime ban from selling health-related products for deceptive claims about a purported diabetes treatment, in violation of an FTC order). See also FTC v. Sagee U.S.A. Group, Inc.,(C.D. Cal. Jan. 5, 2005) (stipulated final judgment) (challenging claims in Chinese-language ads that dietary supplement sagee could treat Alzheimer's disease, epilepsy, Parkinson's disease, senile dementia, stroke, and other serious conditions)

- FTC v. VisionTel Communications LLC, No. 1:04CV01412 (D.D.C. Aug. 26, 2004) (stipulated final judgment) ($750,000 redress for deceptive efficacy and safety claims for Impulse Female Herbal Blend and Maximus Male Herbal Blend, dietary supplements advertised to treat sexual dysfunction, and two weight loss products)

- FTC v. Hitech Marketing, Scientific Life Nutrition, and Rejuvenation Health Corp., No. 04C-4790 (N.D. Ill. July 27, 2004) (temporary restraining order) (challenging claims for Supreme Formula HGH and Youthful Vigor HGH, allegedly bogus human growth hormone products sold via spam)

- Nutramax Laboratories, Inc., 138 F.T.C. 380 (2004) (consent order) (challenging deceptive claims that Senior Moment dietary supplement could prevent memory loss and restore memory function)

- Dynamic Health Of Florida, LLC, D-9317 (June 16, 2004) (consent order) (challenging deceptive libido-enhancement representations for Fabulously Feminine, a dietary supplement containing L-arginine, ginseng, damiana leaf, gingko biloba leaf, and horny goat weed)

- United States v. QVC, Inc., C-3955 (Mar. 24, 2004) (complaint filed) (charging home shopping channel with violating previous FTC order by, among other allegations, making allegedly deceptive claims that Bee-Alive royal jelly can significantly improve energy, strength, or stamina in people suffering from fibromyalgia, lupus, and Epstein Barr virus)

- Vital Basics, Inc., 137 F.T.C. 254 (2004), and Creative Health Institute, Inc., 137 F.T.C. 350 (2004) (consent orders) (more than $1 million redress for deceptive claims that Focus Factor could improve focus, concentration, or memory in children, adults, and older persons, and for deceptive sexual performance claims for V-Factor)

- United States v. Estate of Michael Levey, No. CV 03-4670 GAF (AJWx) (C.D. Cal. Mar. 9, 2004) (consent decree) ($2.2 million redress for deceptive weight loss and arthritis cure claims for dietary supplements)

- Unither Pharma, Inc., and United Therapeutics Corp., 136 F.T.C. 145 (2003) (consent order) (challenging claims that food bar containing amino acid reduces the risk of heart disease and reverses damage to the heart)

- FTC v. Kevin Trudeau, No. 98 C 0168 and No. 03 C 904 (N.D. Ill. Sept. 4, 2004) (stipulated final order) (banning defendant for life from infomercials and ordering $2 million redress for deceptive claims that Coral Calcium Supreme can treat cancer, multiple sclerosis, heart disease, and other serious diseases); FTC v. Robert Barefoot, No. 03 C 904 (N.D. Ill. Jan. 22, 2004) (stipulated final order) (challenging allegedly deceptive claims that Coral Calcium Supreme can treat cancer, multiple sclerosis, heart disease, and other serious diseases). See also FTC v. Kevin Trudeau, (N.D. Ill. Jan. 15, 2009) (order denying reconsideration) (imposing $37 million redress judgment).

- United States v. ValueVision International, Inc., No. 03-2890 (D. Minn. Apr. 17, 2003) (consent decree) ($215,000 civil penalty for violations of FTC order related to unsubstantiated health claims for dietary supplement)

- Snore Formula, Inc., 136 F.T.C. 214 (2003) (consent order) (challenging unsubstantiated claims about product's efficacy in preventing sleep apnea and significantly reducing snoring)

- FTC v. Vital Dynamics, Inc., No. 029816FMC(MBX) (C.D. Cal. Dec. 26, 2002), and FTC v. Ernest, No. 03-437RSWL(SHSx)(C.D. Cal. Jan. 17, 2003) (stipulated orders) (challenging deceptive breast enlargement representations for Isis System made by company and product developer)

- FTC v. Blue Stuff, Inc., No. Civ-02-1631W (W.D. Okla. Nov. 18, 2002) (stipulated final order) ($3 million redress for deceptive claims for Blue Stuff pain reliever and two dietary supplements advertised to reduce cholesterol and reverse bone loss)

- Kris A. Pletschke d/b/a Raw Health, 133 F.T.C. 574 (2002) (consent order) (challenging deceptive claims that colloidal silver product could treat 650 diseases, could eliminate all pathogens in the human body, and is medically proven to kill anthrax, Ebola virus, Hanta virus, and flesh-eating bacteria)

- Natural Organics, Inc., 132 F.T.C. 589 (2001) (consent order), Efamol Nutraceuticals, Inc., C-3958 (May 23, 2000) (consent order), and New Vision International, Inc., 127 F.T.C. 278 (1999) (consent order) (challenging efficacy claims for dietary supplements marketed to treat Attention Deficit Disorder and hyperactivity)

- FTC v. Liverite Products, Inc., No. SA 01-778 AHS (ANx) (S.D. Cal. Aug. 21, 2001) (stipulated final order) (challenging deceptive claims that dietary supplement was effective in treating hepatitis C, cirrhosis, and hang-overs and could prevent liver damage and other side effects from use of HIV drugs, hepatitis C medications, chemotherapy, interferon, and anabolic steroids)

- FTC v. Western Botanicals, Inc., No. CIV.S-01-1332 DFL GGH (E.D. Cal. July 11, 2001) (stipulated final order); and FTC v. Christopher Enterprises, Inc., No. 2:01 CV-0505 ST (D. Utah Dec. 6, 2001) (stipulated final order) (prohibiting sale of comfrey for internal use without proof of safety, challenging claims that product could safely treat serious diseases, and requiring warnings in labeling and advertising that internal use can cause serious liver damage or death)

- Panda Herbal Int'l, Inc., 132 F.T.C. 125 (2001) (consent order) (challenging claims that product containing St. John's Wort could safely treat AIDS, tuberculosis, hepatitis B, and other serious conditions and requiring warning in future promotional materials that St. John's Wort can have potentially dangerous interactions for pregnant women and patients taking certain prescription drugs)

- ForMor, Inc., 132 F.T.C. 72 (2001) (consent order) (challenging claims that products containing St. John's Wort, colloidal silver, shark cartilage, and other substances could safely treat AIDS, tuberculosis, cancer, dysentery, whooping cough, and other serious conditions and requiring warning in future promotional materials that St. John's Wort can have dangerous interactions for patients taking certain prescription drugs and for pregnant women)

- Aaron Co., 132 F.T.C. 174 (2001) (consent order) (challenging claims that products containing colloidal silver could treat cancer, multiple sclerosis, and AIDS, that products containing chitin could cause weight loss without diet and exercise, and requiring safety warnings on future promotional materials for products containing ephedra)

- MaxCell BioScience, Inc., 132 F.T.C. 1 (2001) (consent order) (challenging claims that products containing DHEA could reverse the aging process and treat or prevent age-related diseases such as atherosclerosis, arthritis, high blood pressure, and elevated cholesterol and ordering $150,000 redress)

- Tru-Vantage International, L.L.C., 133 F.T.C. 229 (2002) (consent order) (challenging deceptive anti-snoring and sleep apnea treatment claims for Snorenz, a dietary supplement consisting of oils and vitamins)

- SmartScience Laboratories, Inc., C-3980 (Nov. 7, 2000) (challenging pain relief claims for Joint Flex, a topically applied cream containing glucosamine and chondroitin sulfate)

- FTC v. Rexall Sundown, Inc., Civ. No. 00-706-CIV (S.D. Fla. Mar. 11, 2003) (stipulated final order) (up to $12 million redress for deceptive efficacy representations by the marketers of Cellasene, a purported anti-cellulite dietary supplement)

- FTC v. Lane Labs-USA, Inc., No. 00 CV 3174 (D.N.J. June 28, 2000) (stipulated final order) ($1 million judgment for unsubstantiated cancer treatment claims for BeneFin, a shark cartilage product, and SkinAnswer, an anti-skin cancer cream)

- Natural Heritage Enterprises, C-3941 (May 23, 2000) (consent order) (challenging claims that essiac tea, a mixture of burdock and rhubarb root, sheep sorrel, and slippery elm bark, was effective in curing cancer, diabetes, AIDS/HIV, and feline leukemia)

- CMO Distribution Centers of America, Inc., C-3942 (May 23, 2000) (consent order) (challenging claims that product containing cetylmyristoleate could treat arthritis and other conditions and had been proven through clinical testing and recognized by the medical community to be a breakthrough in arthritis treatment)

- EHP Products, Inc., C-3940 (May 23, 2000) (consent order) challenging claims that product containing cetylmyristoleate could prevent and treat rheumatoid arthritis, osteoarthritis, and other conditions, and that scientific studies and the issuance of patents proved effectiveness of product)

- J & R Research, Inc., C-3961 (July 25, 2000) (consent order) (challenging claims that dietary supplement containing pycnogenol was effective in treating Attention Deficit Disorder, cancer, heart disease, arthritis, diabetes, and multiple sclerosis)

- FTC v. Rose Creek Health Products, Inc., No. CS-99-0063-EFS (E.D. Wash. May 1, 2000) (consent decree) ($375,000 redress for deceptive claims that Vitamin O could prevent cancer, pulmonary disease, and other conditions by providing oxygen to the body)

- Quigley Corp., C-3926 (Feb. 10, 2000) (consent order), and QVC, Inc., C-3955 (June 16, 2000) (consent order) (challenging unsubstantiated claims that Cold-Eeze zinc supplement would prevent colds, relieve allergy symptoms, and reduce the severity of cold symptoms in children)

- FTC v. Met-Rx USA, Inc., No. SAC V-99-1407 (D. Colo. Nov. 15, 1999), and FTC v. AST Nutritional Concepts & Research, Inc., No. 99-WI-2197 (C.D. Cal. Nov. 15, 1999) (stipulated final orders) (challenging unsubstantiated safety claims for purported body-building supplements containing androgen and other steroid hormones and requiring disclosures in labeling and advertising of the risks of breast enlargement, testicle shrinkage, and infertility in males, and increased facial and body hair, voice deepening, and clitoral enlargement in females)

- Body Systems Technology, Inc., 128 F.T.C. 299 (1999) (as part of first phase of Operation Cure.All, challenging deceptive claims regarding effectiveness of shark cartilage in the prevention and treatment of cancer and effectiveness

of uña de gato, or Cat's Claw, in the treatment of cancer, HIV/AIDS, and arthritis.)

- FTC v. American Urological Corp., No. 98-CVC-2199-JOD (N.D. Ga. Apr. 29, 1999) (permanent injunction) ($18.5 million judgment against marketers of Väegra, a purported impotence treatment)

- Bogdana Corp., 126 F.T.C. 37 (1998) (consent order) (challenging claims that Cholestaway and Flora Source could lower blood pressure, reduce cholesterol, and treat AIDS and chronic fatigue syndrome)

- Nutrivida, Inc., 126 F.T.C. 339 (1998) (consent order) (challenging deceptive representations for shark cartilage product purported to treat cancer, arthritis, diabetes, and other serious conditions)

- Venegas, Inc., 125 F.T.C. 266 (1998) (consent order) (challenging deceptive representations that product containing wheat germ, bran, soybean extract, and seaweed could treat diabetes, anemia, high blood pressure, and other serious conditions)

- Global World Media Corp., 124 F.T.C. 426 (1997) (consent order) (challenging safety claims for Herbal Ecstasy, ephedra-based product advertising a natural high, and requiring safety disclosures in future ads)

- Home Shopping Network, Inc., 122 F.T.C. 227 (1996) (consent order) (challenging unsubstantiated claims for vitamin and stop-smoking sprays); and United States v. Home Shopping Network, Inc., No. 99-897-CIV-T-25C (M.D. Fla. Apr. 15, 1999) (consent decree) ($1.1 million civil penalty for violating previous FTC order barring false and unsubstantiated claims for skin care, weight-loss, and PMS and menopause products)

- FTC v. Redhead, No. 93-1232-JO (D. Ore. June 20, 1994) (stipulated permanent injunction) (challenging deceptive claims that algae-based product could treat AIDS)

- United States v. General Nutrition Corp., No. 94-686 (W.D. Pa. Apr. 28, 1994) (stipulated permanent injunction) ($2.4 million civil penalty for unsubstantiated disease prevention, weight loss, and muscle building claims for dietary supplements)

E. Weight Loss and Fitness: The FTC has challenged deceptive weight loss claims for products, services, and exercise devices through traditional law enforcement actions and industry outreach and education.

1. Industry Guidance. Commission staff participates in the Partnership for Healthy Weight Management, a coalition of scientists, health care professionals, government agencies, businesses, and others interested in promoting sound guidance on strategies for maintaining a healthy weight. In February 1999, the Partnership issued ***Voluntary***

Guidelines for Providers of Weight Loss Products or Services. In September 2002, FTC staff issued ***Report on Weight Loss Advertising: An Analysis of Current Trends***, a study of common deceptive themes found in ads for diet products. The Commission held a workshop in November 2002 to consider additional efforts to combat fraud in weight loss advertising and issued a follow-up report, ***Deception in Weight Loss Advertising: Seizing Opportunities and Building Partnerships to Stop Weight Loss Fraud***, in December 2003. The agency also published ***Red Flags: A Reference Guide for Media on Bogus Weight Loss Claim Detection***, a brochure to assist publishers and broadcasters screen out patently false ads before they are disseminated. In April 2005, the FTC released a report studying industry compliance with Commission calls for more effective self-regulation. According to ***2004 Weight-Loss Advertising Survey: A Report From the Staff of the Federal Trade Commission***, the percentage of ads for weight loss products that contain claims that the Commission considers to be patently false dropped from almost 50% in 2001 to 15% in 2004.

2. Representative weight loss and fitness cases:

- FTC v. Bronson Partners, LLC, No. 304-CV-1866 (D. Conn. Jan. 11, 2010) (order) ($1.9 million redress for "obvious and widespread violations of the FTC Act" in the marketing of Chinese Diet Tea and Bio-Slim Patch)

- United States v. Basic Research, LLC, No. 09-CV-972 (D. Utah Nov. 2, 2009) (complaint filed) (challenging allegedly deceptive weight loss claims for Relacore and Akävar 20/50, in violation of a 2006 order, including statements such as "eat all you want and still lose weight" and "we couldn't say it in print if it wasn't true!")

- United States v. QVC, Inc., No. 04-CV-1276 (E.D. Pa. Mar. 19, 2009) (consent decree) ($6 million redress for deceptive claims for For Women Only weight loss pills, Lite Bites weight loss bars and shakes, and Bee-Alive Royal Jelly energy supplements, and $1.5 civil penalty for deceptive claims for Lipofactor Cellulite Target Lotion, in violation of 2000 FTC order)

- FTC v. Telebrands Corp., No. 2:07CV3525 (D.N.J. Jan. 14, 2009) (stipulated final order) ($7 million redress for false weight loss and muscle development claims for Ab Force electronic abdominal belt). See also Telebrands Corp. v. FTC, 457 F.3d 354 (4th Cir. 2006), aff'g, 140 F.T.C. 278 (2005).

- FTC v. Spear Systems, Inc., No. 07C-5597 (N.D. Ill. July 15, 2008) (stipulated final judgment against certain defendants) ($29,000 disgorgement from international marketers who used illegal spam to drive traffic to their websites where they sold hoodia products deceptively advertised to cause rapid, substantial and permanent weight loss)

- FTC v. Sili Neutraceuticals, LLC, No. 07C 4541 (N.D. Ill. Feb. 4, 2008) (permanent injunction) ($2.5 million redress for using illegal email to disseminate deceptive claims for hoodia weight-loss products and human growth hormone anti-aging products)

- FTC v. Centro Natural Services, Inc., No. SACV06-989 JVS (RNBx) (C.D. Cal. Jan. 30, 2008) (stipulated final order) ($2.3 million suspended judgment for deceptive weight loss claims for Centro Natural de Salud Obesity Treatment)

- FTC v. Diet Coffee, Inc., No. 1:08-CV-0094-JSR-DCF (S.D.N.Y. Jan. 15, 2008) (stipulated final order) ($923,910 suspended judgment for deceptive weight loss claims for "diet coffee" containing hoodia)

- United States v,. Bayer Corp., No. 07-01(HAA) (D.N.J. Jan. 4, 2007) (consent decree) ($3.2 million civil penalty for deceptive weight loss claims for One-A-Day WeightSmart, disseminated in violation of an earlier FTC order)

- FTC v. Chinery, No. 05-3460 (GEB) (D.N.J. Jan. 4, 2007) (stipulated final order) (at least $8 million redress for deceptive weight loss claims for Xenadrine EFX, deceptive consumer testimonials, and failure to disclose material financial connection between advertiser and endorsers); Cytodyne, LLC, 140 F.T.C. 191 (2005) (consent order) ($100,000 redress for deceptive claims for Xenadrine EFX)

- FTC v. Window Rock Enterprises, Inc., No.: CV04-8190 DSF (JTLx) (C.D. Cal. Jan. 4, 2007 and Sept. 21, 2005) (stipulated final orders) ($12 million in cash and assets for deceptive claims that CortiSlim and CortiStress can cause weight loss and reduce the risk of, or prevent, serious health conditions)

- TrimSpa, Inc., C-4185 (Jan. 4, 2007) (consent order) ($1.5 million redress for deceptive claims for that one of TrimSpa's ingredients, *hoodia gordonii*, enables users to lose weight by suppressing the appetite)

- Basic Research, D-9318 (May 11, 2006) (consent order) ($3 million redress for deceptive representations for Leptoprin, Anorex, Dermalin, and other purported weight loss products and PediaLean, a purported weight loss product for children)

- FTC v. Kingstown Associates, Ltd., BVW Associates, Inc., Gary Bush, David Varley, and Laurence White, No.: 03-CV-910A (W.D.N.Y. Sept. 15, 2005) (stipulated final order) ($150,000 redress for deceptive weight loss claims for Hydro-Gel Slim Patch and Slenderstrip and order banning United Kingdom defendants from making, advertising, or selling any dietary supplement, food, drug, or weight loss product)

- FTC v. FiberThin LLC, (S.D. Cal. June 14, 2005) (stipulated final order) ($1.5 million redress and $41 million suspended judgment for deceptive weight loss and metabolism enhancement claims for FiberThin, Propolene, Excelerene, and MetaboUp)

- FTC v. SG Institute of Health & Education, Inc., No. 04-61627 (S.D. Fla. Dec. 15, 2004) (stipulated final order), and FTC v. Transdermal Products International Marketing Corp., No. 04-CV-5794 (E.D. Pa. Aug. 20, 2007) (order) ($180,000 redress for role of manufacturer and retailer in making deceptive claims for purported weight loss patches)

- FTC v. National Institute for Clinical Weight Loss, Inc., No. 1:04-CV-3294 (N.D. Ga. Nov. 10, 2004) (complaint filed) (challenging allegedly deceptive effectiveness and safety of Thermalean and Lipodrene, purported weight-loss products with ephedra)

- ***Operation Big Fat Lie:*** See, e.g., FTC v. AVC Marketing, Inc., No. 04C 6915 (N.D. Ill. June 20, 2005) (stipulated final judgment) ($400,000 redress for deceptive weight loss claims for "Himalayan Diet Breakthrough); FTC v. Iworx, No. 2:04-CV-00241-GPS (D. Me. May 19, 2005) (stipulated final judgment) ($100,000 redress and $20 million avalanche clause from marketer of UltraLipoLean); FTC v. CHK Trading Corp., No. 04-CV-8686 (S.D.N.Y.); FTC v. Femina, Inc., No. 04-61467 (S.D. Fla.) (complaints filed) (Nov. 9, 2004) (challenging allegedly deceptive weight loss claims for a variety of products, including gel-ä-thin, 1-2-3 Reduce Fat, Siluette Patch, Fat Seltzer Reduce, Xena RX, Reduce Gel Magic, Hanmeilin Cellulite Cream, Body-Trim, Bio-Trim, and Himalayan Diet Breakthrough)

- FTC v. Harry Siskind, No. SA02CA1151EP (W.D. Tex. Oct. 22, 2004) (stipulated final order) ($155 million judgment against former president of Mark Nutritionals for falsifying financial statements in an effort to hide assets from the FTC)

- FTC v. Slim Down Solution, LLC, No. 03-80051-DIV-Paine/Johnson (S.D. Fla. Oct. 19, 2004) (modified order) (challenging deceptive claims that Slim Down Solution and its main ingredient, D-glucosamine, could block dietary fat absorption and cause consumers to lose weight without dieting)

- FTC v. Pinnacle Marketing, No. 04-CV-185-PC (D. Maine Aug. 26, 2004) (stipulated final judgment) ($212,000 redress for deceptive claims for Ultra Carb weight loss product)

- FTC v. VisionTel Communications LLC, No. 1:04CV01412 (D.D.C. Aug. 26, 2004) (stipulated final judgment) ($750,000 redress for deceptive claims for Chito Trim and Turbo Tone weight loss products and two dietary supplements advertised to treat sexual dysfunction)

- FTC v. Kamarfu Enterprises, Inc., No. 04-21280 (S.D. Fla. June 17, 2004) (stipulated final order) ($30,000 redress for deceptive claims for 1-2-3 Diet Kit, a weight loss product advertised in Spanish-language media)

- Dynamic Health Of Florida, LLC, D-9317 (Apr. 6, 2006) (consent order) (challenging deceptive representations for Pedia Loss, a purported weight loss

product for children); Jonathan Barasch, 138 F.T.C. 355 (2004) (consent order) (challenging role of corporate officer in the marketing of Pedia Loss, a purported weight loss product for children)

- United States v. QVC, Inc., (E.D. Pa. Mar. 24, 2004) (complaint filed) (charging the country's largest home shopping channel with violating previous FTC order by, among other allegations, making allegedly deceptive weight loss claims for For Women Only Zero Fat and Zero Carb pills and Lite Bites products and with violating the FTC Act for allegedly deceptive cellulite treatment claims for Lipofactor Cellulite Target Lotion)

- FTC v. Advanced Patch Technologies, Inc., No, 1:04-CV-0670 (N.D. Ga. Mar. 9, 2004) (stipulated final judgment) (more than $1 million redress for false weight loss claims for Peel Away the Pounds diet patch); and (N.D. Ga. Sept. 30, 2008) ($$110,539 for violating 2004 consent orders by continuing to make false claims that product causes substantial weight loss)

- FTC v. The Fountain of Youth Group, No. 3:04-CV-47-J-99HTS (M.D. Fla. Jan. 28, 2004) (stipulated final order) ($6 million suspended judgment for deceptive weight loss claims for Skinny Pills, Skinny Pills for Kids, and other diet products)

- FTC v. Universal Nutrition Corp., No. 1-03-CV-3822 (N.D. Ga. Dec. 9, 2003) (stipulated final judgment) ($1 million redress for deceptive weight loss claims for ThermoSlim, a purported diet product containing ephedra and other ingredients)

- FTC v. Beauty Visions Worldwide, No. 03 CV 0910 (SC) (W.D.N.Y. Oct. 12, 2004) (stipulated final order) ($72,422 redress and $1.4 million avalanche clause for fulfillment house's role in marketing Hydro-Gel Slim Patch and Slenderstrip, seaweed-based patches advertised to cause weight loss without diet or exercise)

- FTC v. Savvier, Inc., No. LACV 03-8159 FMC (C.D. Cal. Sept. 1, 2004) (stipulated final judgment) ($2.6 million redress for deceptive weight loss representations for BodyFlex products, including claim that users will lose 4 to 14 inches in the first seven days)

- FTC v. No. 9068-8425 Quebec, Inc., No. 1:02:CV-1128 (N.D.N.Y. July 10, 2003) (stipulated final order) ($40,000 redress and $12 million suspended judgment for deceptive weight loss claims for Quick Slim Fat Blocker and Cellu-Fight diet products)

- United States v. Estate of Michael Levey, No. CV-03-4670 GAF (AJWx) (C.D. Cal. July 1, 2003) ($2.2 million redress for deceptive safety and efficacy claims for ephedra-based weight loss products)

- FTC v. USA Pharmacal Sales, Inc., (M.D. Fla. July 1, 2003) (stipulated final judgment) ($175,000 redress for deceptive safety and efficacy claims for ephedra-based weight loss products)

- FTC v. Health Laboratories of North America, Inc., (D.D.C. July 1, 2003) (stipulated final judgment) ($195,000 redress for deceptive safety and efficacy claims for ephedra-based weight loss products)

- FTC v. Mark Nutritionals, Inc., No. SA02CA1151EP (W.D. Tex. Dec. 8, 2003) (stipulated final order) ($1 million redress in state and federal actions and $1 million bond for deceptive representations for Body Solutions, a purported diet product marketed primarily through endorsements by radio personalities)

- FTC v. United Fitness of America, No. CVS 020648-KJD (D. Nev. July 21, 2003) (stipulated final judgment and order) ($5 million redress for deceptive fat loss and muscle building claims for Fast Abs electronic abdominal exercise belts); FTC v. Hudson Berkley Corp., No. CVS 020649-PMP (D. Nev. July 1, 2003) (judgment and order for permanent injunction) (holding defendants jointly and severally liable for $83 million redress for deceptive fat loss and muscle building claims for Abtronic electronic abdominal exercise belts); FTC v. AbFlex USA, Inc. and Ab Energizer, L.L.C., No. 02CV888H-AJB (S.D. Cal. stipulated final order Apr. 22, 2005) ($1.4 redress for deceptive fat loss and muscle building claims for electronic abdominal exercise belts)

- Weider Nutrition International, Inc., C-3983 (Nov. 17, 2000) (consent order) ($400,000 redress for deceptive weight loss and safety claims for dietary supplement PhenCal advertised as a safe and effective alternative to the prescription drug combination Phen-Fen)

- FTC v. Enforma Natural Products, Inc., No. 04376JSL(CWx) (C.D. Cal. Apr. 26, 2000) (stipulated final order) ($10 million redress from marketer of the Enforma System – chitosan-based Fat Trapper and pyruvate-based Exercise in a Bottle – deceptively represented to block absorption of fat, increase body's ability to burn fat, and cause weight loss); see also FTC v. Enforma Natural Products, Inc., No. 04376JSL(CWx) (C.D. Cal. Jan. 18. 2005) (stipulated final order) (resolving contempt proceedings by banning defendants for life from advertising or marketing weight loss products)

- Herbal Worldwide Holding Corp., 126 F.T.C. 356 (1998) (consent order) (challenging deceptive weight loss claims for product containing chitin, psyllium, glucomannan, and apple pectin)

- TrendMark International, Inc., 126 F.T.C. 365 (1998) (consent order) (challenging deceptive weight loss and cholesterol-reduction claims for chitin product)

- FTC v. SlimAmerica, Inc., No. 97-6072-Civ (S.D. Fla. 1999) (permanent injunction) ($8.3 million redress from marketer of purported weight loss products)

- ***Operation Waistline***: See, e.g., Bodywell, Inc., 123 F.T.C. 1577 (1997); Cambridge Direct Sales, 123 F.T.C. 1596 (1997); 2943174 Canada Inc., 123 F.T.C. 1465 (1997) (consent orders) (challenging weight loss claims for SeQuester, Lipitrol, Fat Burner, Smelt-Patch, Slimming Insoles, Food for Life Weight Management System, and the Cambridge Diet)

- ***Project Workout:*** Abflex, U.S.A., Inc., 124 F.T.C. 354 (1997); Kent and Spiegel Direct, Inc., 124 F.T.C. 300 (1997); Icon Health and Fitness, Inc., 124 F.T.C. 215 (1997); and Life Fitness, 124 F.T.C. 236 (consent orders) (challenging deceptive calorie-burning claims for three exercise devices – the Abdomenizer, the Lifecycle, and the Proform Cross Walk Treadmill – with accompanying consumer education materials published with the American College of Sports medicine and other groups)

- Jenny Craig, Inc., 125 F.T.C. 333 (1998) (consent order) (challenging deceptive claims for weight loss program)

- Weight Watchers International, Inc., 124 F.T.C. 610 (1997) (consent order) (challenging deceptive claims for weight loss program)

- Nutrition 21, 124 F.T.C. 1 (1997) (consent order) (challenging deceptive weight loss claims for products containing chromium picolinate)

- NordicTrack, Inc., 121 F.T.C. 907 (1996) (consent order) (challenging deceptive weight loss study claims for exercise device)

- Schering Corp., 118 F.T.C. 1030 (1994) (consent order) (challenging deceptive weight loss and fiber content claims for Fiber-Trim tablet)

- Nutria/System, Inc., 116 F.T.C. 1408 (1993) (consent order) (challenging deceptive claims for weight loss program)

IX. ENVIRONMENTAL AND ENERGY-RELATED ADVERTISING

A. ***Guides for the Use of Environmental Marketing Claims***, 16 C.F.R. § 260. After public hearings, the Commission issued Environmental Marketing Guides in 1992 and revised them in 1996 and 1998. The Guides offer interpretations of how Commission caselaw applies to "green" marketing claims. Through definitions and illustrative examples, the Guides address the use of terms such as degradable, biodegradable, recyclable, recycled, refillable, ozone-safe, and ozone-friendly, as well as general environmental benefit claims such as environmentally safe or environmentally friendly. They also address concerns that qualifiers and disclosures be clear and prominent; that the claims make clear whether they apply to the product, the packaging, or a component of either; and that comparative claims are accurate.

On November 26, 2007, the FTC announced an accelerated regulatory review of its environmental marketing guidelines. The FTC hosted a January 8, 2008, conference addressing the marketing of carbon offsets and renewable energy certificates (RECs); an April 30, 2008, conference on green packaging claims; and a July 15, 2008, conference on green claims for building materials and textiles.

B. ***Bamboo Warning Letters.*** On February 3, 2010, the FTC sent warning letters to 78 companies – including some of the largest retailers in the world – that products they advertised as made from bamboo in fact were made of rayon, a manmade fiber created from the cellulose found in plants and trees and processed with harsh chemicals that release hazardous air pollution.

C. Representative "environmentally friendly" cases:

- Sami Designs, LLC, d/b/a Jonäno, C-4279; CSE, Inc., d/b/a MAD MOD, C-4280; Pure Bamboo, LLC, C-4278 (Aug. 11, 2009); and The M Group, Inc., d/b/a Bamboosa, D-9340 (consent orders) (charging that companies deceptively advertised products as bamboo when they are made of rayon and deceptively claimed their products were manufactured using an environmentally friendly process, retained the natural antimicrobial properties of bamboo, and were biodegradable).

D. Representative degradability cases:

- Dyna-E International Corp., D-9336 (August 26, 2009); Kmart Corp., C-4263 (June 9, 2009); and Tender Corp., C-4261(June 9, 2009) (consent orders) (challenging as deceptive companies' advertised claims that their products – towels, paper plates, and moist wipes – were "biodegradable" because a substantial majority of solid waste is disposed of by methods that would not allow products to completely break down and return to nature)

- Archer Daniels Midland Co., 117 F.T.C. 403 (1994) (consent order) (challenging deceptive biodegradable and landfill benefit claims for plastic products containing corn starch additive)

- Mobil Oil Corp., 116 F.T.C. 113 (1993) (consent order) (challenging deceptive biodegradable and landfill benefit claims for Hefty trash bags)

E. Representative recyclability cases:

- LePage's, Inc., 118 F.T.C. 31 (1994) (consent order) (challenging deceptive recyclable claims for tape's plastic dispenser and paperboard backcard where few facilities exist to recycle either material)

- Keyes Fibre Co., 118 F.T.C. 150 (1994) (consent order) (challenging deceptive biodegradable and recyclable claims for Chinet plates where few facilities exist to recycle food-contaminated waste)

F. Representative cases challenging claims regarding ozone/CFCs:

- Creative Aerosol Corp., 119 F.T.C. 13 (1995) (consent order) (challenging deceptive "Environmentally Safe Contains No Fluorocarbons" claims for aerosol soaps containing VOCs and ozone-depleting chemicals)

- Redmond Products, Inc., 117 F.T.C. 71 (1994) (consent order) (challenging deceptive environmental claims for Aussie hair products that contained VOCs that can contribute to smog formation)

G. Representative cases challenging environmental health or safety claims:

- FTC v. TradeNet Marketing, Inc., No. 99-944-CIV-T-24B (M.D. Fla. Apr. 21, 1999) (consent order) (challenging deceptive claims for a laundry detergent substitute advertised to clean clothes without causing water pollution)

- Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (challenging deceptive claims that Sierra antifreeze was safe if ingested, environmentally safe, and safer for the environment than conventional antifreeze)

- Orkin Exterminating Co., 117 F.T.C. 747 (1994) (consent order) (challenging deceptive claims that company's lawn pesticides are "practically non-toxic" and pose no significant risk to human health or environment)

- Mr. Coffee, Inc., 117 F.T.C. 156 (1994) (consent order) (challenging deceptive claims paper filters were manufactured by a chlorine-free process that was not harmful to the environment)

- The Vons Companies, 113 F.T.C. 779 (1990) (consent order) (challenging deceptive claims for pesticide-free produce sold in grocery stores)

H. Representative cases challenging energy savings or performance claims:

- FTC v. Dutchman Enterprises, No. 09-141 (FSH) (D.N.J. Feb. 2, 2009) (complaint filed) (alleging that claims that device can boost gas mileage by 50% and "turn any vehicle into a hybrid" were deceptive)

- FTC v. International Research and Development Company of Nevada, No.04C 6901 (N.D. Ill. Aug. 22 2006) ($4.2 million redress and lifetime ban for deceptive fuel-saving and emission-reduction claims for FuelMAX and Super FuelMAX)

- Dura Lube, Inc., D-9292 (May 5, 2000) (consent order) (challenging deceptive claims that engine treatment could reduce wear, prolong engine life, reduce emissions, and increase gas mileage by up to 35%)

- Castrol North America Inc., 128 F.T.C. 682 (1999) (consent order), and Shell Chemical Co., 128 F.T.C. 729 (1999) (challenging deceptive power and acceleration claims for Syntec fuel additives)

- Ashland, Inc., 125 F.T.C. 20 (1998) (consent order) (challenging misleading claims about Valvoline TM8 Engine Treatment's ability to reduce engine wear and improve fuel economy)

- Exxon Corp., 124 F.T.C. 249 (1997) (consent order) (challenging misleading claims about gasoline's ability to clean engines and reduce maintenance costs)

- United States v. STP Corp., No. 78 Civ. 559 (CBM) (S.D.N.Y. Dec. 1, 1995) (stipulated order) ($888,000 civil penalty for violation of order prohibiting deceptive claims for motor oil additives)

- Unocal Corp., 117 F.T.C. 500 (1994) (consent order) (challenging unsubstantiated performance claims for higher octane fuels)

- Osram Sylvania, Inc., 116 F.T.C. 1297 (1993) (consent order) (challenging deceptive claim that Energy Saver light bulbs will save energy, conserve natural resources, and lower consumers' electricity costs when company failed to disclose that product provided less light than the light bulbs they are designed to replace)

- General Electric Co., 116 F.T.C. 95 (1992) (consent order) (challenging deceptive claim that Energy Choice light bulbs will help save energy, eliminate pollution, and lower consumers' electricity costs when company failed to disclose that product provided less light than the light bulbs they are designed to replace)

X. TOBACCO

A. Statutory authority:

1. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1337. The Cigarette Act gives the Commission administrative responsibility for the rotational plans for health warnings on packaging and advertising. The Act also directs the Commission to publish an annual report to Congress on cigarette advertising and promotion. In addition, the Commission regularly publishes a report listing official tar and nicotine ratings.

2. Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401. The Smokeless Tobacco Act requires the Commission to issue regulations on the placement of rotating health warnings on packaging and advertising, gives the Commission enforcement responsibility for the warnings, and directs it to publish a biennial report to Congress on smokeless tobacco advertising and promotion. The

Commission issued a trade regulation rule in 1986 setting out provisions for the size, color, typeface, and rotation of the statutory health warnings. 16 C.F.R. § 307.

3. Representative tobacco cases:

- Stoker, Inc., 131 F.T.C. 1139 (2001) (alleging that company violated the Smokeless Tobacco Act by failing to place health warnings in conspicuous and legible type and in a conspicuous and prominent place on smokeless tobacco packaging)

- Swisher International, Inc., C-3964; Havatampa, Inc., C-3965; Consolidated Cigar Corp., C-3966; General Cigar Holdings, Inc., C-3967; John Middleton, Inc., C-3968; Lane Limited, C-3969; and Swedish Match North America, C-3970 (Aug. 25, 2000) (consent orders) (requiring nation's seven largest cigar companies to include warnings about significant adverse health risks of cigar use in their advertising and packaging)

- Santa Fe Natural Tobacco Company, Inc., C-3952 (June 16, 2000) (consent order) (challenging claim that Natural American Spirit cigarettes are safer than other cigarettes because they contain no additives)

- Alternative Cigarettes, Inc., C-3956 (June 16, 2000) (consent order) (challenging claim that Pure, Glory, Herbal Gold, and Magic cigarettes are safer than other cigarettes because they contain no additives)

- R.J. Reynolds Tobacco Co., 128 F.T.C. 262 (1999) (consent order) (challenging deceptive claims for Winston "no additives" cigarettes and requiring disclosures that "No additives in our tobacco does NOT mean a safer cigarette")

- American Tobacco Co., 119 F.T.C. 3 (1995) (consent order) (challenging deceptive claim that "10 packs of Carlton have less tar than one pack" of other brands)

- Pinkerton Tobacco Co., 115 F.T.C. 60 (1992) (consent order) (challenging as violations of television advertising ban the display of Redman Tobacco brand name and selling message on signs, vehicles, uniforms, etc., at company-sponsored televised events)

- R.J. Reynolds Tobacco Co., 113 F.T.C. 344 (1990) (consent order) (challenging deceptive claims regarding findings of scientific study on health effects of smoking)

XI. ALCOHOL

A. Report to Congress: In September 1999, the Commission issued a Report to Congress, ***Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting***

Alcohol to Underage Consumers, evaluating the effectiveness of voluntary industry codes and self-regulatory programs. Based on special reports submitted by eight major marketers pursuant to Section 6(b) of the FTC Act, the Commission recommended that the industry:

1. create independent review boards to consider complaints from consumers and competitors;

2. raise the current standard that permits advertising placement in media where just over 50% of the audience is 21 or older; and

3. adopt a series of best practices to curb on-campus and spring break sponsorships, block underage access to websites, disallow placement on television shows with large underage audiences, and restrict paid product placements to R-rated or NC-17 movies.

B. Education and Outreach. On October 18, 2006, the FTC announced its ***dontserveteens.gov*** initiative, in cooperation with Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau, other government agencies, consumer groups, and industry associations.

C. Representative alcohol cases:

- Constellation Brands, Inc., C-4266 (June 10, 2009) (consent order) (challenging deceptive claims for Wide Eye, a caffeinated alcohol product)

- Allied Domecq Spirits and Wine Americas, Inc. d/b/a Hiram Walker, 127 F.T.C. 368 (1999) (consent order) (challenging misrepresentation of Kahlua White Russian pre-mixed cocktail as a low-alcohol beverage)

- Beck's North America, Inc., 127 F.T.C. 379 (1999) (consent order) (challenging depiction in Beck's beer ads of potentially dangerous and illegal conduct)

- Canandaigua Wine Co., 114 F.T.C. 349 (1991) (consent order) (alleging that the advertising and packaging of Cisco brand beverage misrepresented the product as a wine cooler or other low-alcohol, single-serving drink, when in fact a single bottle of Cisco had the same quantity of alcohol as five one-ounce servings of 80 proof vodka)

XII. COMPUTER-RELATED PRODUCTS and SERVICES

A. The FTC has brought Section 5 actions challenging deceptive claims about computers, software, Internet service providers, and related products. See also Section XV infra.

B. Representative cases:

- FTC v. Innovative Marketing, Inc., No. RDB-08CV3233 (D. Md. June 25, 2009) (stipulated final order) ($1.9 million judgment with all but $116,697

suspended to settle charges against two defendants related to "scareware" scheme in which company falsely claimed that scans had detected viruses, spyware, and illegal pornography on consumers' computers and then sold them products, including WinFixer, WinAntivirus, DriveCleaner, ErrorSafe, and XP Antivirus, that purported to fix the alleged problem)

- Bonzi Software, Inc., C-4126 (consent order) (Oct. 13, 2004) (challenging deceptive representations that InternetALERT software significantly reduced the risk of Internet attacks and unauthorized access into computers)

- FTC v. Network Solutions, Inc., Civ. No. 03 1907 (D.D.C. Sept. 12, 2003) (stipulated final order) (alleging that largest company that provides domain name registration services to consumers unlawfully tricked consumers into transferring their Internet domain name registrations to the company)

- America Online, Inc., 137 F.T.C. 117 (2004) (consent order) (challenging company's practice of continuing to bill internet service subscribers after they asked to cancel their subscriptions)

- Palm, Inc., 133 F.T.C. 715 (2002) (consent order) (challenging ads for personal digital assistants that represented that products came with built-in wireless access to the Internet and e-mail while revealing in a four-point disclosure "Application software and hardware add-ons may be optional and sold separately. Applications may not be available on all Palm handhelds")

- FTC v. Netpliance, Inc., No. A-01-CA 420SS (W.D. Tex. July 2, 2001) (consent decree) (challenging deceptive claims about performance capabilities of the Netpliance internet access device, requiring clear and conspicuous disclosure of additional internet service fees and long-distance telephone charges, imposing $100,000 civil penalty for violations of the Mail and Telephone Order Rule, and ordering company to refund amounts illegally charged to consumers' credit cards)

- Gateway Corp., 131 F.T.C. 1208 (2001) (consent order) (challenging deceptive ads for free or flat-fee internet services that disclosed in a fine-print footnote that many consumers would incur significant additional telephone charges)

- Juno Online Services, Inc., 131 F.T.C. 1249 (2001) (consent order) (challenging deceptive representations about the actual cost to consumers of the company's free and fee-based dial-up Internet access services, including the failure to honor cancellations during a purported free trial period)

- Hewlett-Packard Co., 131 F.T.C. 1086 (2001), and Microsoft Corp., 131 F.T.C. 1113 (2001) (consent orders) (challenging deceptive claims that personal digital assistance came with built-in wireless access to the Internet and email while revealing in fine print "Modem required. Sold separately.")

- Sharp Electronics Corp., 131 F.T.C. 560 (2001) (consent order) (challenging deceptive upgradability claims for handheld personal computers and requiring company to provide low-cost upgrade to purchasers)

- WebTV Networks, Inc., C-3988 (Dec. 12, 2000) (consent order) (challenging deceptive claims about performance capabilities of the WebTV system and requiring clear and conspicuous disclosure of long distance telephone charges that some consumers may incur, reimbursement to subscribers for phone charges they incurred in the past, and a consumer education campaign to inform consumers about how to determine the advantages and disadvantages of using Internet access devices as compared to computers)

- BUY.COM, Inc., C-3978, Value America, Inc., C-3976, and Office Depot, Inc., C-3977 (Sept. 8, 2000) (consent orders) (challenging promotions for free and low-cost computer systems that failed to disclose the true costs of and important restrictions on the offers, including that consumers had to sign a contract for three years of service from a particular Internet service provider)

- Tiger Direct, Inc., 128 F.T.C. 517 (1999) (consent order) (alleging that mail order seller of computers misrepresented terms of warranties)

- Apple Computer, Inc., 128 F.T.C. 190 (1999) (consent order) (challenging practice of charging computer purchasers for technical support despite advertising that services were free)

- Dell Computer Corp., 128 F.T.C. 151 (1999) (consent order) (challenging under Section 5 and the Consumer Leasing Act television, print and Internet ads for consumer leases that placed material cost information in inconspicuous fine print)

- Micron Electronics, Inc., 128 F.T.C. 137 (1999) (consent order) (challenging under Section 5 and the Consumer Leasing Act television, print and Internet ads for consumer leases that placed material cost information in inconspicuous fine print)

- Gateway 2000, Inc., 126 F.T.C. 888 (1998) (consent order) ($290,000 redress for deceptive claims regarding company's money-back guarantee policy and on-site warranty services)

- America Online, Inc., 125 F.T.C. 403 (1998); Prodigy Services Corp., 125 F.T.C. 430 (1998); and CompuServe, Inc., 125 F.T.C. 451 (1998) (consent orders) (challenging deceptive representations about terms and conditions of free trial offers for online services)

- Apple Computer, Inc., 124 F.T.C. 184 (1997) (consent order) (challenging claims that PCs were presently upgradeable to PowerPC technology)

- Hayes Microcomputer Products, Inc., 118 F.T.C. 1159 (1994) (consent order) (challenging claims that use of competitors' modems creates a substantial risk of data transmission failure)

XIII. INFOMERCIALS

A. Program-length commercials were illegal until a 1984 change to FCC law lifted regulations limiting the number of commercial minutes per hour. To date, the Commission has brought more than 125 cases against infomercial marketers challenging one of more of the following practices:

1. Deceptive format: Do consumers know that the program they are watching is a commercial?

2. Unsubstantiated claims: Infomercial advertisers must possess the same level of substantiation that would be required to support claims disseminated in any other media. Deceptive use of expert endorsements and consumer testimonials have been an area of particular concern.

3. Other violations: Mail Order Rule, Telemarketing Sales Rule, unordered merchandise, unauthorized use of credit cards, etc.

B. Representative infomercial cases:

- FTC v. Window Rock Enterprises, Inc., No. CV04-8190 DSF (JTLx) (C.D. Cal. Oct. 5, 2004) (complaint filed) (challenging allegedly deceptive format of defendants' infomercials and allegedly deceptive claims that CortiSlim and CortiStress can cause weight loss and reduce the risk of, or prevent, serious health conditions)

- FTC v. Kevin Trudeau, No. 98 C 0168 and No. 03 C 904 (N.D. Ill. Sept. 4, 2004) (stipulated final order) (banning defendant for life from most infomercials and ordering $2 million redress for deceptive claims that Coral Calcium Supreme can treat cancer, multiple sclerosis, heart disease, and other serious diseases). See also FTC v. Kevin Trudeau, (N.D. Ill. Jan. 15, 2009) (order denying reconsideration) (imposing $37 million redress judgment).

- United States v. Goodtimes Entertainment, Ltd., No. 03 CV 6037 (S.D.N.Y. Aug. 11, 2003) ($300,000 redress and civil penalties for deceptive efficacy claims for Copa hair straightening product, unauthorized enrollment of consumers in continuity programs, and Mail Order Rule violations)

- FTC v. Blue Stuff, Inc., No. Civ-02-1631W (W.D. Okla. Nov. 18, 2002) (stipulated final order) ($3 million redress for deceptive claims for Blue Stuff pain reliever and two dietary supplements advertised to reduce cholesterol and reverse bone loss)

- FTC v. Kevin Trudeau, (N.D. Ill. Jan. 13, 1998) (stipulated order for permanent injunction and final order) ($1 million redress for deceptive claims about memory program, speed reading program, addiction treatment product, and other merchandise)

- Kent & Spiegel Direct, Inc., 124 F.T.C. 300 (1997) (holding infomercial producer liable for deceptive weight loss and spot reduction claims for abdominal exerciser)

- Synchronal Corp., 116 F.T.C. 1189 (1993) (consent order) ($3.5 million redress for deceptive claims for baldness remedy and cellulite treatment, and for unauthorized charges to consumers' credit cards)

- National Media Corp., 116 F.T.C. 549 (1993) (consent order) and Michael Levy, 116 F.T.C. 885 (1993) (consent order) ($275,000 redress for deceptive claims and products demonstrations)

XIV. TELEMARKETING, 900 NUMBERS, and TELECOMMUNICATIONS

A. Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. § 6101. Pursuant to this statute, the Commission has promulgated and amended the ***Telemarketing Sales Rule***, 16 C.F.R. § 310. See also Section XVI infra. To protect consumers from deceptive and abusive telemarketing practices, the Rule and subsequent amendments:

1. Requires telemarketers promptly to disclose to consumers the fact that it is a sales call, the identity of the seller, the nature of the goods or services being offered, and if it is a prize promotion, the fact that no purchase is necessary to win, as well as to make certain disclosures before asking consumers for any credit card or bank account information or before they make arrangements for a courier to pick up payment.

2. Contains broad prohibitions against misrepresentations regarding any of the information required to be disclosed and regarding any material aspect of the performance, efficacy, or nature of the goods or services.

3. Prohibits telemarketers from debiting checking account without the consumer's express, verifiable authorization, and from making misleading statements to induce consumers to pay for goods or services.

4. Bars anyone from giving substantial assistance to a telemarketer when the person knows or consciously avoids knowing that the telemarketer is engaged in conduct that would violate certain provisions of the rule

5. Prohibits telemarketers from calling before 8 a.m. and after 9 p.m., and from calling consumers who have said they do not want to be called.

6. Bars telemarketing calls that deliver prerecorded messages, unless a consumer previously has agreed to accept such calls from the seller.

7. Provides that violations of the rule may result in civil penalties of up to $11,000. The rule is enforceable by the FTC, and also by the 50 state attorneys general, who can get orders that apply nationwide against fraudulent telemarketers.

B. ***Law Enforcement:*** The FTC has undertaken a vigorous program of law enforcement against telemarketers who violate the TSR and Section 5. On May 20, 2008, the FTC – along with 30 international, federal, state, and local agencies – announced Operation Tele-PHONEY, a 180-case law enforcement sweep against deceptive telemarketing operations.

C. ***Do Not Call*****:** On December 18, 2002, the Commission announced final amendments to the TSR, including a National Do Not Call Registry, 16 C.F.R. § 310 (2003). Registration began on June 27, 2003 and now exceeds 150 million phone numbers. The United States Court of Appeals for the Tenth Circuit upheld the constitutionality of the Registry in Mainstream Marketing Services v. FTC, 358 F.3d 1228 (10th Cir.), cert. denied, 125 U.S. 47 (2004). Telephone numbers will remain on the Registry permanently due to the Do Not Call Improvement Act of 2007, which became law in February 2008. On September 1, 2009, an amendment to the Rule took effect, banning "robocalls" – prerecorded commercial telemarketing calls placed without consumers' express written agreement.

1. The Rule and subsequent amendments:

- allows consumers to enroll in National Do Not call Registry, requires telemarketers to scrub lists regularly of consumers who do not wish to receive such calls, and impose civil penalties for violations;
- imposes new restrictions on the practice of call abandonment;
- requires telemarketers to transmit Caller ID information;
- pursuant to the USA PATRIOT Act, requires telemarketers calling to solicit charitable contributions to disclose promptly the name of the organization making the request and that the purpose of the call is to ask for a charitable contribution;
- bans unauthorized billing and prohibits telemarketers from processing any billing information for payment without the express informed consent of the customer or donor; and
- bans the use of prerecorded messages except in very narrow circumstances.

2. Representative Do Not Call Rule cases:

- United States v. New Edge Satellite, Inc., No. 2:09-CV-11100-MOB-PJK (E.D. Mich. Sept. 22, 2009) ($570,000 suspended civil penalty against authorized dealer of Dish Network for Do Not Call violations)

- United States v. Vision Quest, LLC, No. 2:09-CV-II I02-AJT-VMM (E.D. Mich. Sept. 22, 2009) ($690,000 suspended civil penalty against authorized dealer of Dish Network for Do Not Call violations)

- FTC v. Transcontinental Warranty, Inc., No. 09CV2927 (N.D. Ill. Sept. 1, 2009) ($24 million suspended judgment for placing millions of deceptive robocalls to sell consumers vehicle service contracts under the guise that they are extensions of original vehicle warranties)

- United States v. Global Mortgage Funding, Inc., No .SA CV 07-1275 DOC (PJW) (C.D. Cal. July 23, 2009) (five-year ban for telemarketer who called thousands of numbers on the National Do Not Call Registry and failed to transmit accurate caller ID information)

- FTC v. Voice Touch, Inc., No. 09CV2929 (N.D. Ill. May 14, 2009) (complaint filed) (challenging company's role in placing millions of allegedly deceptive robocalls to sell consumers vehicle service contracts under the guise that they are extensions of original vehicle warranties)

- United States v. DirecTV, Inc., No. 09-02605 PA (FMOx) (C.D. Cal. Apr. 16, 2009) (stipulated judgment) ($2.31 million civil penalty for calling numbers on the Do Not Call Registry and placing or causing an affiliate to place pre-recorded outbound calls, in violation of the Telemarketing Sales Rule)

- United States v. Comcast Corp., No. 2:09-CV-01589-HB (E.D. Pa. Apr. 16, 2009) (stipulated judgment) ($900,000 for violations of the entity-specific provisions of the Do Not Call Registry)

- United States v. Dish Network, LLC, No. 3:09-CV-03073-JES-CHE (C.D. Ill. Mar. 25, 2009) (complaint filed) (in case brought in cooperation with California, Illinois, North Carolina, and Ohio, alleging that company illegally called consumers whose numbers are on the Do Not Call Registry and violated the Telemarketing Sales Rule by assisting dealers in advertising services via "robocalls")

- United States v. Westgate Resorts, Ltd., No. 6:09-CV-104-ORL-19-GJK (M.D. Fla. Jan. 27, 2009) (stipulated judgment) ($900,000 civil penalty for timeshare seller's calls to numbers on the Do Not Call Registry after buying those numbers from an Internet-based lead generator that collected the information from consumers without disclosing they would be receiving telemarketing calls, except in language buried in its "terms and conditions" or "privacy policy" pages)

- United States v. All in One Vacation Club, No. 6:09-CV-103-ORL-31DAB (M.D. Fla. Jan. 27, 2009) (stipulated judgment) ($275,000 civil penalty for vacation seller's calls to numbers of the Do Not Call Registry they had received when consumer filled out sweepstakes forms that included a

purported fine-print "waiver" on the back that defendants claimed gave them the right to call consumers on the Registry)

- United States v. ADT Security Services, Inc., FTC File No. 042-3091 (S.D. Fla. Nov. 7, 2007); United States v. Ameriquest Mortgage Co., FTC File No. 042-3082 (C.D. Cal. Nov. 7, 2007); United States v. Craftmatic Industries, Inc., FTC File No. 042 3094 (E.D. Pa. Nov. 7. 2007; United States v. Guardian Communications, Inc., FTC File No. 052-3166 (C.D. Ill. Nov. 7, 2007); United States v. Direct Security Services, Inc., FTC File No. 042 3091 (D. Kan. Nov. 7, 2007); United States v. Alarm King, Inc., FTC File No. 042 3091 (C.D. Cal. Nov. 7, 2007) (stipulated judgments) and United States v. Global Mortgage Funding, Inc., No.: SA CV 07-1275 DOC (PJW) (C.D. Cal. Nov. 7, 2007) (complaint filed) ($7.7 million total civil penalties for violation of Do Not Call Rule)

- United States v. The Broadcast Team, No. 6:05-CV-01920-PCF-JGG (M.D. Fla. Feb. 2, 2007) ($1 million civil penalty for telemarketer's improper use of prerecorded messages, in violation of Do Not Call Rule)

- United States v, Scorpio Systems, No. 06-1928 (MLC) (D.N.J. May 6, 2008) (stipulated judgment) ($530,000 civil penalty for telemarketer's violation of Do Not Call Rule by using bogus caller ID information)

- United States v. Bookspan, No. 06 786 (E.D.N.Y. Feb. 23, 2006) (stipulated judgment) ($680,000 civil penalty to settle charges that Book-of-the-Month Club Partnership called over 100,000 consumers on Do Not Call Registry and continued calling customers who specifically asked not to be called)

- United States v. Entrepreneurial Strategies, Ltd., No.: 2:06-CV-15 (WCO) (N.D. Ga. Jan. 24, 2006) (stipulated final order) ($13,454 civil penalty in first case for violations of the "Assisting and Facilitating" provision of the Telemarketing Sales Rule by setting up sham nonprofit corporation to evade requirements of the Do Not Call Registry)

- United States v. FMFG, Inc., No.: 3:05-CV-00711(D. Nev. Jan. 6. 2006) (complaint filed) (alleging that company called consumers on the Do Not Call Registry purporting to be conducting a sleep survey when, in fact, it was selling beds)

- United States v. DirecTV, Inc., No. SACV05 1211 (C.D. Cal. Dec. 13, 2005) ($5.3 million civil penalty for Do Not Call violations by satellite television company and companies it hired to engage in telemarketing)

- United States v. Braglia Marketing Group, No. CV-S-04-1209- DHW-PAL (D. Nev. Feb 15,) (stipulated judgment) ($3500 civil penalty and suspended judgment of $526,000 for Do Not Call violations)

- United States v. Flagship Resort Development Corp., No. CV-S-04-1209-DHW-PAL (D. Nev. Feb 15, 2005) (stipulated judgments) ($500,000 civil penalty for Do Not call violations)

D. Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. § 5701. Pursuant to this statute, the FTC promulgated the 900 Number Rule, 16 C.F.R. § 308, requiring specific disclosures for 900 numbers, such as the cost of the call and that individuals under 18 must have parental permission to call; and banning advertising directed to children under 12. Representative cases:

- FTC v. 800 Connect, Inc., No. 03-60150 (S.D. Fla. Feb. 3, 2003) (stipulated final judgment) ($735,000 redress for charging consumers without their consent for directory information services after callers misdialed toll-free numbers for companies such as Federal Express or Sovereign Bank)

- FTC v. Access Resource Services, Inc., No. 02-60226-CIV (S.D. Fla. Nov. 4, 2002) (stipulated final judgment) ($500 million in debt forgiveness and $5 million in additional disgorgement from operators of Miss Cleo psychic lines for violations of the Pay-Per-Call Rule)

E. ***Joint FTC-FCC Policy Statement on the Advertising of Dial-Around and Other Long-Distance Services to Consumers:*** On November 4, 1999, the FTC and the Federal Communications Commission co-sponsored a Joint Forum on the Advertising and Marketing of Dial-Around and Other Long-Distance Services to Consumers. The agencies issued a joint policy statement on March 1, 2000, offering guidance on the application of well-settled truth-in-advertising principles to advertising for long-distance services.

F. Prepaid Phone Cards: The FTC has taken action against deceptive practices in the marketing of prepaid phone cards, including the failure to disclose additional fees to consumers. In addition, the FTC has challenged deceptive earnings representations made by companies selling business opportunities involving prepaid phone cards. Representative cases:

- FTC v. Diamond Phone Card, Inc., No. 09-CV-3257 (E.D.N.Y. Aug. 5, 2090) (complaint filed) (alleging that marketer of prepaid phone cards failed to adequately disclose fees that reduced the value of the cards and mislead consumers about the cards' value)

- FTC v. Clifton Telecard Alliance One LLC, No. 08-CV-1480 (PGS) (D.N.J. June 29, 2009) (stipulated final order) ($1.3 million redress for false claims regarding the number of minutes of service prepaid calling cards would provide)

- FTC v. Alternatel, Inc., No. 1:08-CV-21433-AJ (S.D. Fla. Feb. 10, 2009) (stipulated final order) ($2.25 million redress for misrepresenting the number of calling minutes consumers would get on prepaid phone cards and for failing to disclose adequately fees that reduced the value of the cards)

- FTC and State of New York v. Trans-Asian Communications, Inc., Civ. No. 97 Civ. 5764 (S.D.N.Y. Mar. 17, 1998) (stipulated final judgment and permanent injunction) (challenging representations made by seller of prepaid phone cards, requiring defendant to post $1 million performance bond, and ordering payment of $40,000)

- FTC v. PT-1 Communications, Inc., (S.D.N.Y. Feb. 25, 1999) (stipulated order) (ordering $300,000 monetary relief for deceptive representations that pre-paid phone cards provided 19¢ per minute long-distance calling within the United States while imposing undisclosed connect fees)

- ***Operation Vend Up Broke:*** On September 3, 1998, the FTC and law enforcement officials from 10 states announced 40 actions against the purveyors of fraudulent vending business opportunities, included vending machines that sell pre-paid telephone cards, that made groundless promises of substantial profits.

XV. INTERNET ADVERTISING and MOBILE MARKETING

A. The Commission applies the same well-established principles of substantiation to Internet advertising and mobile marketing as it applies in any other medium. On May 3, 2000, FTC staff issued a working paper, ***Dot Com Disclosures: Information about Online Advertising***, providing guidance to businesses on how the Commission's rules and guides apply to advertising and sales on the Internet. On April 22, 2009, FTC staff issued ***Beyond Voice: Mapping the Mobile Marketplace***, a report exploring consumer protection issues arising in the mobile commerce marketplace.

B. Representative cases:

- FTC v. Ticketmaster L.L.C. and TicketsNow.com, Inc., No. 10-CV-01093 (N.D. Ill. Feb. 18, 2010) (stipulated final judgment) (alleging that Ticketmaster and its affiliates used deceptive bait-and-switch tactics by telling online customers attempting to get tickets for Bruce Springsteen concerts that no tickets were available and then steering them to TicketsNow, where tickets were sold at double, triple, or quadruple the face value)

- FTC v. Balls of Kryptonite, LLC, d/b/a Bite Size Deals and Best Priced Brands, No. 09-CV-5276 (C.D. Cal. Aug. 6, 2009) (in the first case the FTC has brought against a U.S. company exclusively doing business abroad, challenging practices of tricking consumers into thinking they were buying electronic from a U.K. company and misleading them about their warranty rights and their right to return or exchange goods under U.K. law)

- FTC v. Digital Enterprises, Inc. d/b/a movieland.com, No: CV06-4923 CAS (AJWx) (C.D. Cal. Sept. 13, 2007) (stipulated final order) ($500,000 redress for company's practice of falsely claiming that consumers owed money for

downloading movies and then barraging consumers with pop-ups demanding payment to make the pop-ups go away)

- FTC v. D Squared Solutions, L.L.C., No. AMD 03 CV310 (D. Md. Aug. 9, 2004) (stipulated final order) (challenging company's practice of sending Windows Messenger Service pop-up ads to sell pop-up blocking software)

- United States v. Toysrus.com, Inc., (D.N.J.); United States v. Kay-Bee Toy, Inc., (D. Minn.); United States v. Macys.com, Inc., (D. Del.); United States v. CDnow, Inc., (E.D. Pa.); United States v. MiniDiscNow, Inc., (N.D. Cal.); United States v. The Original Honey Baked Ham Company of Georgia., (N.D. Ga.); and United States v. Patriot Computer Corp., (N.D. Tex.) (July 26, 2000) (consent decrees) (as part of Project TooLate.com, charging online marketers with violations of the Mail Order Rule for shipping delays during the 1999 holiday season and imposing $1.5 million in civil penalties)

- FTC v. J.K. Publications, Inc., No. CV-99-0044 ABC (AJWx) (C.D. Cal. Sept. 4, 2000) ($37.5 million judgment against company that bought lists of credit card numbers from a California bank and fraudulently charged consumers – many of whom did not own computers – for visits to adult websites they had not made)

- FTC and State of New York v. Crescent Publishing Group, No. 00-CV-6315 (S.D.N.Y. Nov. 5, 2001) (stipulated final judgment) ($30 million redress against operators of adult websites such as playgirl.com and highsociety.com for advertising free tour of websites while billing consumers' credit cards unauthorized monthly fees)

- FTC v. Rennert, No. CV-S-00-0861-JBR (D. Nev. July 6, 2000) (stipulated final order) (challenging deceptive representations about purported online pharmacy)

- FTC v. Lane Labs-USA, Inc., No. 00 CV 3174 (D.N.J. June 28, 2000) (stipulated final order) (challenging deceptive use of embedded terms such as "non-toxic cancer therapy," "cancer treatment" and "cancer survivor" in metatags for website featuring unsubstantiated cancer treatment claims for BeneFin, a shark cartilage product)

- Natural Heritage Enterprises, C-3941 (May 23, 2000) (consent order) (challenging company's deceptive use of metatags, mouseover text, and hyperlinks in online ads representing that essiac tea, a combination of herbal ingredients, could treat cancer, diabetes, and HIV/AIDS)

- FTC v. Periera, (E.D. Va. Sept. 22, 1999) (preliminary injunction ordered) (challenging practice of "pagejacking" – duplicating legitimate websites and involuntarily diverting Internet users to sexually explicit adult websites – and "mouse trapping" – disabling browsers' "back" and "exit" commands so that

users' efforts to leave the adult sites opens additional windows of explicit material)

- FTC v. iMall, Inc., (C.D. Cal. Apr. 12, 1999) (stipulated final judgment) ($4 million redress and imposing lifetime ban on participation in Internet-related business venture for promoters of deceptive Internet business opportunities)

- FTC v. Audiotex Connection, C97-0726 (E.D.N.Y. Nov. 4, 1997) (granting consumers credit for $2.7 million in unauthorized charges stemming from modem "hijacking" scheme in which defendants switched consumers from local Internet service provider to international telephone lines in Moldova)

- FTC v. Fortuna Alliance, L.L.C., No. C96-0799 (W.D. Wash. Oct. 30, 1997) (civil contempt action for company's failure to pay $2 million in redress pursuant to settlement stemming from Internet pyramid scheme)

- FTC v. Hare, No. 98-8194-CIV (S.D. Fla. Sept. 8, 1998) (stipulated permanent injunction) (challenging practices of marketer who advertised nonexistent merchandise through online auction houses and imposing lifetime ban on any form of online commerce)

- FTC v. Corzine, No. CIV-S-94-1446 (E.D. Cal. Sept. 12, 1994) (stipulated permanent injunction) (first FTC law enforcement action involving deceptive claims conveyed to consumers via the Internet)

C. ***Spam:*** The FTC has challenged practices related to the sending of unsolicited commercial email as violations of Section 5. The agency held a public workshop in April 2003 to address law enforcement and technological challenges pursuant to the passage of the CAN-SPAM Act. On July 2, 2004, the FTC announced a Memorandum of Understanding with law enforcement agencies in the UK and Australia to cooperate on the fight against spam. On September 16, 2004, the Commission published ***A CAN-SPAM Informant Reward System: A Federal Trade Commission Report to Congress***, a consideration of whether a reward system could be designed to improve the effectiveness of CAN-SPAM enforcement. On October 11, 2004, 19 agencies from 15 countries announced the Action Plan on Spam Enforcement. In addition, the FTC and National Institute of Standards and Technology hosted an ***Email Authentication Summit*** on November 9-10, 2004, to explore the development of technology that could reduce spam. On December 16, 2004, the Commission issued final regulations to facilitate the determination of whether an e-mail message has a commercial primary purpose and is subject to the provisions of the CAN-SPAM Act. See 16 C.F.R. § 316. With the cooperation of 35 law enforcement partners from 20 countries, the FTC announced on May 24, 2005, Operation Spam Zombies to target illegal spammers who tap into consumers' home computers and use them to send millions of pieces of illegal spam. According to an FTC staff report issued on November 28, 2005, ***Email Address Harvesting and the Effectiveness of Anti-Spam Filters***, ISP filters block as much as 95% of unsolicited e-mail. On April 23-24, 2007, the FTC convened a public workshop, ***Proof Positive: New Directions in ID Authentication***, to explore methods

to reduce identity theft through enhanced authentication. On May 12, 2008, the FTC issued four new rules under CAN-SPAM. Representative spam cases:

- FTC v. Atkinson, No. 08CV5666 (N.D. Ill. Nov. 30, 2009) ($15 million default judgment for New Zealand citizen and Australian resident's role as mastermind of international spam operation, selling sex pills, prescription drugs, and weight loss pills advertised through an affiliate program called "Affking" and sent with false header information and without an opt-out link or list a physical postal address, in violation of the CAN-SPAM Act)

- FTC v. Spear Systems, Inc., No. 07C-5597 (N.D. Ill. July 2, 2009 and July 15, 2008) (default judgment and stipulated order) (in first case using US SAFEWEB Act, $3.7 million judgment against some defendants and $29,000 disgorgement from others who violated the CAN-SPAM Act by initiating commercial e-mails that contained false "from" addresses and deceptive subject lines, and failed to provide an opt-out link or physical postal address)

- United States v. Cyberheat, Inc., No. CIV 05-0457 (D. Ariz. Mar. 4, 2008) (order granting joint motion for entry of proposed order for permanent injunction) ($413,000 civil penalty for adult website operator's violations of CAN-SPAM Act and Section 5 for paying affiliates to drive traffic to its site through the use of illegal email)

- United States v. Member Source Media, Inc., No.: CV-08 0642 (N.D. Cal. Jan. 30, 2008) (stipulated final judgment) ($200,000 civil penalty for deceptive representation that recipient of spam email had won "free" prizes)

- FTC v. Sili Neutraceuticals, LLC, No. 07C 4541 (N.D. Ill. Aug. 23, 2007) (stipulated preliminary injunction) (challenging violations of the CAN-SPAM Act and Section 5 for allegedly using illegal email to disseminate deceptive claims for hoodia weight-loss products and human growth hormone anti-aging products)

- FTC v. Yesmail, Inc., No. 06-6611 (N.D. Cal. Nov. 6, 2006) ($50,717 civil penalty for company's violation of CAN-SPAM Act when company's own anti-spam software filtered out certain "reply to" unsubscribe requests from recipients, which resulted in company's failure to honor unsubscribe requests)

- FTC v. Cleverlink Trading Limited, No. 05C 2889 (N.D. Ill. Sept. 14, 2006) (stipulated final judgment) ($400,000 disgorgement for sending "date lonely wives" spam that contained misleading headers and subject lines, did not contain a link to allow consumers to opt out of receiving future spam, did not contain a valid address, and did not contain the disclosure that it was sexually explicit, in violation of the CAN-SPAM Act)

- United States v. Kodak Imaging Network, Inc., No. C-06-3117 (N.D. Cal. May 11, 2006) ($26,331 civil penalty for sending commercial e-mail message that failed to contain an opt-out mechanism, failed to disclose in the e-mail

message that consumers have the right to opt-out of receiving further mailings, and failed to include a valid physical postal address, in violation of the CAN-SPAM Act)

- United States v. Jumpstart Technologies, No. C-06-2079 (MHP) (N.D. Cal. Mar. 23, 2006) ($900,000 civil penalty for disguising commercial e-mails as personal messages and for misleading consumers as to the terms and conditions of its FreeFlixTix promotion, in violation of the CAN-SPAM Act)

- FTC v. Matthew Olson and Jennifer Leroy, No.C05-1979 (JCC) (W.D. Wash. Dec. 20, 2005) (complaint filed); FTC v. Brian McMullen, No. 05C 6911 (N.D. Ill. Dec. 20, 2005) (complaint filed); and FTC v. Zachary Kinion, No. 05C 6737 (N.D. Ill. Dec. 20, 2005) (complaint filed) (alleging that defendants hijacked consumers' computers and used them to send spam with false "from" information and misleading subject lines)

- FTC v. Global Web Promotions Pty Ltd., No.: 04C 3022 (N.D. Ill. Sept. 20, 2005) ($2.2 million redress for deceptive claims for purported human growth hormone product sold via spam)

- FTC v. Global Net Solutions, Inc., No. CV-S-05-0002-PMP-LRL (D. Nev. Aug. 5, 2005) (TRO issued) ($621,000 penalty and imposition of affiliate monitoring program for violating the CAN-SPAM Act and the FTC's Adult Labeling Rule by failing to include the required label for sexually explicit content; displaying sexually explicit content in the e-mail itself; using misleading header information; using misleading subject lines; failing to include the required opt-out notice; failing to have a functioning opt-out mechanism; failing to identify e-mails as advertisements or solicitations; and failing to provide a valid physical postal address)

- FTC v. Phoenix Avatar, LLC, No. 04C 2897 (N.D. Ill. Mar. 31, 2005) (stipulated final judgment) (in FTC's first CAN-SPAM Act case, $230,000 suspended judgment for illegal spam advertising bogus diet patches)

- FTC v. GM Funding, Inc., No. SACV 02-1026 DOC (MLGx)(C.D. Calif. Nov. 20, 2003) (stipulated judgment) (challenging spoofing – the use of forged e-mail headers – as a violation of Section 5)

- FTC v. Walker, No. C02-5169 RJB (W.D. Wash. Oct. 28, 2002) (stipulated final order) (challenging bogus cancer cure marketed via spam)

- ***Operation Netforce:*** On April 2, 2002, the Commission joined eight state law enforcers and four Canadian agencies in bringing Operation Netforce, a combined 63 law enforcement actions targeting deceptive spam and Internet fraud. The agencies sent more than 500 warning letters to the senders of deceptive spam. Netforce partners also tested whether "remove me" or "unsubscribe" options in spam were being honored and sent letters to more

than 75 spammers warning them that deceptive removal claims in unsolicited e-mail are illegal.

- FTC v. Universal Direct, No. C-3-02-145 (S.D. Ohio Sept. 26, 2003) (stipulated final judgment) (challenging deceptive pyramid chain letter scheme marketed via spam)

XVI. PRIVACY and DATA SECURITY

A. The Commission continues to examine consumer privacy issues raised both by Internet advertising and advertising in other media through Reports to Congress, public workshops, and law enforcement.

B. ***Do-Not-Call Registry:*** On June 27, 2003, amendments to the Telemarketing Sales Rule establishing a national Do-Not-Call registry, 16 C.F.R. § 310 et seq. (2003), became effective. See infra, Section XIV.

C. ***Spyware and Adware.*** On April 19, 2004, the FTC convened a public workshop to consider the consumer protection and privacy implications of the use of spyware, adware, and related technologies. On March 7, 2005,the FTC issued a staff report, ***Monitoring Software on Your PC: Spyware, Adware, and Other Software***, summarizing the issues and drawing some conclusions from information presented at the workshop. Representative cases:

- FTC v. Pricewert LLC, No. 09-CV-2407(N.D. Cal. June 4, 2009) (complaint filed) (challenging internet service provider's alleged practice of recruiting, hosting, and actively participating in the distribution of spyware, viruses, spam, child pornography, and other harmful electronic content as a violation of the FTC Act)

- DirectRevenue LLC, C-4194 (Feb. 16, 2007) (consent order) ($1.5 million disgorgement for company's unfair and deceptive practice of downloading adware onto consumers' computers without clear and conspicuous disclosure and obstructing its removal)

- Sony BMG Music Entertainment, C-4195 (Jan. 30, 2007) (consent order) (challenging company's practice of selling CDs without telling consumers they contained software that limited the devices on which the music could be played, restricted the number of copies that could be made, and contained technology that monitored consumers' listening habits to send them marketing messages)

- Zango, Inc., C-4186 (Nov. 3, 2006) (consent order) ($3 million disgorgement to settle charges that company formerly known as 180solutions, Inc., used unfair and deceptive methods to download adware and obstruct consumers from removing it)

- FTC v. ERG Ventures, No. CV-00578-LRH-VPC (D. Nev. Oct. 1, 2007) (stipulated final order) ($330,000 redress for company's practice of downloading Motor Media spyware programs onto millions of computers without consumers' consent, degrading their computers' performance, tracking their Internet activity, and exposing them to disruptive ads)

- FTC v. Enternet Media, No. CV05-7777CAS (AJWx) (C.D. Cal. Sept. 6, 2006) (stipulated final order) ($2 million redress for company's practice of downloading spyware and adware on consumers' computers through the promise of free lyric files, browser upgrades, and ring tones and affiliates' promise of free background music for blogs)

- FTC v. Seismic Entertainment Productions, Inc., No. 04-CV-0377-JD (D.N.H. May 4, 2006) (stipulated final order) ($4 million redress to settle charges that spyware company used a purported anti-spyware program to hijack computers, change their settings, barrage them with pop-up ads, and install adware and other software programs that monitor consumers' web surfing)

- FTC v. Odysseus Marketing, Inc., No.: 1:05-CV-00330-SM (D.N.H. Oct. 5, 2005) (stipulated final order) (imposing $500,000 performance bond and $1.75 million suspended judgment for company's practice of offering free software that claimed to make consumers anonymous when using peer-to-peer file sharing programs without disclosing that program installed other harmful software). See FTC v. Odysseus Marketing, Inc., Opinion No. 2008 DNH 183 (D.N.H. July 30, 2009) (held three defendants in contempt for flouting court order that barred them from deceptive business practices) (civil contempt order)

- Advertising.com, Inc., C-4147 (consent order) (Sept. 16, 2005) (challenging company's free distribution of SpyBlast, software advertised to protect consumers against hacker attacks, without clearly and conspicuously disclosing that adware was bundled with the software)

- FTC v. Trustsoft, Inc., Civ. No. H 05 1905 (S.D. Tex. Jan. 5, 2006) (stipulated final order) ($1.9 million redress for deceptive claims that Spykiller software had remotely "scanned" computers for spyware)

- FTC v. Maxtheater, Inc., No. 05 -CV-0069-LRS (E.D. Wash. Dec. 5, 2005) (stipulated final order) ($76,000 redress for practice of offering spyware detection scans that falsely detected spyware in an effort to sell consumers ineffective anti-spyware products)

D. Other activities related to consumer privacy:

1. ***Behavioral Advertising and Online Profiling.*** On November 8, 1999, the FTC and the Department of Commerce convened a workshop on the consumer privacy implications of online profiling, the practice of tracking information about consumers' preferences and interests and using that information to create targeted

advertising. The FTC followed up with two reports to Congress about online profiling. The Report called for Congress to enact legislation to provide privacy protection for consumers with regard to online profiling practices to serve to complement the NAI self-regulatory structure by guaranteeing compliance by non-member network advertising companies. On March 13, 2001, the Commission held a workshop to explore how businesses merge and exchange detailed consumer information and how such information is used commercially. On November 1, 2007, the FTC sponsored a town hall meeting, ***Ehavioral Advertising: Tracking, Targeting, and Technology***, to address consumer protection issues raised by tracking consumers' online activities to target advertising. On February 12, 2009, the FTC issued a staff report, ***Self-Regulatory Principles For Online Behavioral Advertising: Tracking, Targeting, and Technology***.

2. ***Health Privacy.*** On August 17, 2009, the FTC issued the Health Breach Notification Rule, 16 C.F.R. Part 318, requiring companies that provide online repositories that people can use to keep track of their health information and related businesses to notify consumers when the security of their health information has been breached

3. ***RFID Technology.*** On June 24, 2004, the FTC convened a workshop to explore the emergence of radio frequency identification (RFID) technology and its implications for businesses and consumers. Based on the proceedings of the workshop, the FTC issued a report titled ***Radio Frequency Identification: Applications and Implications for Consumers***. On September 23, 2008, the FTC sponsored a transatlantic workshop on the emerging applications of radio frequency identification technology and their implications for consumer protection policy.

4. ***Peer-to-Peer File Sharing Technology: Consumer Protection and Competition Issues.*** On December 15-16, 2004, the FTC convened a public workshop to explore consumer protection and competition issues associated with the distribution and use of peer-to-peer (P2P) file-sharing and followed up with a June 23, 2005, staff report. Representative cases:

   - FTC v. MP3downloadcity.com, No. CV-05-7013 CAS (FMOx) (C.D. Cal. May 25, 2006) (stipulated final judgment) ($15,000 redress for deceptive claims that service would allow users of peer-to-peer file-sharing programs to transfer copyrighted materials without violating the law)

5. ***OnGuardOnline.gov:*** The FTC – in partnership with cybersecurity experts, online marketers, consumer advocates, and other federal agencies – launched a new multimedia, interactive education campaign to help consumers stay safe online.

6. ***Privacy Online: Fair Information Practices in the Electronic Marketplace: A Federal Trade Commission Report to Congress*** (May 2000). Issuing the third in a series of Reports to Congress about online privacy, the Commission announced the results of a national survey demonstrating that only 20% of the busiest commercial sites implement all four fair information practices – **Notice**, **Choice**, **Access** and **Security**. The FTC recommended that Congress enact legislation to ensure a minimum

level of privacy protection for online consumers and to establish basic standards of practice for the collection of information online.

7. ***Report to Congress on Privacy Online:*** On June 4, 1998, the Commission reported the results of privacy policies of more than 1400 websites, raised concerns about the adequacy of current self-regulatory efforts, and called for legislation to address specific concerns about children's privacy online. The Report also identified four core principles of fair information practices: Notice, Choice, Access, and Security.

E. Representative law enforcement action related to consumer privacy and data security:

- FTC v. LifeLock, Inc., Robert J. Maynard, Jr., and Todd Davis, No. 2:10-CV-00530-NVW (D. Az. Mar. 9, 2010) ($11 million to the FTC and $1 million to 35 state Attorneys General to settle charges that company used false claims to promote its purported identity theft protection services)

- FTC v. ControlScan, Inc., FTC File No. 072 3165 (D.D. Ga. Feb. 25, 2010) (alleging that company that issued purported privacy and security certifications for online retailers misled consumers about how often it monitored the sites and the steps it took to verify their practices)

- FTC v. Gregory Navone, No. 2:08-CV-01842 (D. Nev. Jan. 20, 2010) (stipulated final order) ($35,000 civil penalty from mortgage broker who discarded consumers' tax returns, credit reports, and other sensitive personal and financial information in an unsecured dumpster)

- United States v. ChoicePoint Inc., No.1-06-CV-198 (N.D. Ga. Oct. 19, 2009) (stipulated final judgment) ($275,000 judgment for failing to implement a comprehensive information security program protecting consumers' sensitive information, as required by 2006 court order, resulting in a data breach that compromised the personal information of 13,750 people)

- World Innovators, Inc., File No. 092 3137; ExpatEdge Partners, LLC, File No. 092 3138; Onyx Graphics, Inc., File No. 092 3139; Directors Desk LLC, File No. 092 3140; Progressive Gaitways LLC, File No. 092 3141; and Collectify LLC, File No. 092 3142 (Oct. 6, 2009) (proposed consent orders issued for public comment) (alleging that companies falsely claiming they were abiding by an international privacy framework that provides a means for U.S. companies to transfer data from the European Union to the United States in keeping with EU and U.S. law)

- Sears Holdings Management Corp., C-4264 (June 4, 2009) (consent order) (challenging company's practice of inviting consumers' to download software that would allow their "online browsing" to be monitored without adequately disclosing that software would monitor nearly all of Internet behavior that occurs on the computer)

- James B. Nutter & Co., C-4258 (May 5, 2009) (consent order) (alleging that mortgage company engaged in practices that failed to provide reasonable and appropriate security for sensitive consumer information, in violation of the FTC's Safeguards Rule, and failed to provide privacy notices or provided inaccurate notices, in violation of the Privacy Rule)

- United States v. Rental Research Services, Inc., (D. Minn. Mar. 5, 2009) (consent order) (alleging that company that sells reports to landlords about potential renters failed to have procedures in place to verify new customers and as a result, sold sensitive information to identity thieves, in violation of the Fair Credit Reporting Act and the FTC Act)

- CVS Caremark Corp., C-4259 (Feb. 18, 2009) (consent order) (alleging that pharmacy chain failed to implement reasonable procedures for securely disposing of personal information, did not adequately train employees, did not use reasonable measures to assess compliance, and did not employ a reasonable process for discovering and remedying risks to personal information)

- Compgeeks.com, C-4252 (Feb. 5, 2009) (consent order) (alleging that consumer electronics company routinely stored sensitive information in unencrypted text on its network and did not adequately assess that its applications and network were vulnerable to reasonably foreseeable risks, such as SQL injection attacks)

- Premier Capital Lending, Inc., C-4241 (Nov. 6, 2008) (consent order) (alleging that company fail to provide reasonable security to protect sensitive customer data when it allowed a third-party home seller to access data that a hacker then used to illegally access consumers' credit reports)

- FTC v. Action Research Group, No. 6:07-CV-0227-ORL-22JGG (M.D. Fla. May 28, 2008) (stipulated final order) (more than $600,000 in disgorgement for defendants' "pretexting" scheme – obtaining consumers' confidential phone records under false pretenses and without their knowledge or consent and selling the records to third parties)

- TJX Companies, Inc., C-4227 (consent order) (Mar. 27, 2008) (alleging that company created an unnecessary risk by storing and transmitting personal information in plain text, failing to use readily available security to limit wireless access, and failing to use strong passwords, firewalls, and security patches)

- Reed Elsevier Inc., C-4226 (consent order) (Mar. 27, 2008) (alleging that companies created an unnecessary risk to personal information by failing to require periodic changes of user credentials, failing to suspend credentials after a certain number unsuccessful log-in attempts, allowing customers to store credentials in a vulnerable format in cookies on their computers, and

failing to implement simple, low-cost, and readily available defenses to foreseeable computer attacks)

- United States v. ValueClick, Inc., No. CV08-01711 MMM (Rzx) (C.D. Cal. Mar. 17, 2008) (alleging that company published online privacy policies claiming they encrypted customer information, but either failed to encrypt the information or used a non-standard and insecure form of encryption)

- Goal Financial, LLC, C-4216 (consent order) (Mar. 4, 2008) (alleging that student loan company's failure to take reasonable security measures to protect sensitive customer data violated the Safeguards Rule, the Privacy Rule, and Section 5)

- FTC v. Accusearch, Inc., No. 06-CV-0105 (D. Wyo. Jan. 28, 2008) (court decision ordering $200,000 disgorgement from information broker who advertised and sold confidential consumer telephone records to third parties without the consumers' knowledge or consent)

- Life is good, Inc., C-4218 (consent order) (Jan. 17, 2008) (alleging that retailer unnecessarily risked the security of consumers' credit card information by storing it indefinitely in clear, readable text on its network, and by storing credit security card cods, failed to implement simple, free or low-cost, and readily available defenses to foreseeable computer attacks, and failed to employ reasonable measures to detect unauthorized access to credit card information)

- United States v. American United Mortgage Co., No. 07C 7064 (N.D. Ill. Dec. 18, 2007) ($50,000 civil penalty for mortgage company's practice of leaving loan documents with consumers' sensitive information in and around an unsecured dumpster)

- Guidance Software, C-4187 (consent order) (Nov. 16, 2006) (alleging that company's failure to take reasonable security measures to protect sensitive customer data contradicted the security promises made on its website)

- FTC v. Integrity Security & Investigation Services, Inc., No.: 2:06-CV-241-RGD-JEB (E.D. Va. Oct. 4, 2006) (stipulated final order) (challenging company's selling of confidential customer phone records to third parties as an unfair trade practice)

- FTC v. Information Search, Inc., No. 1:06-CV-01099-AMD (D. Md. May 3, 2006) (complaint filed) (alleging that defendants – and additional defendants in separate actions filed in United States District Court in Wyoming, Florida, and California – obtained and sold consumers' confidential telephone records in violation of federal law)

- CardSystems Solutions, Inc., C-4168 (Feb. 23, 2006) (consent order) (challenging as an unfair trade practice companies' failure to take appropriate

security measures to protect the sensitive information of tens of millions of consumers, resulting in millions of dollars in fraudulent purchases)

- United States v. ChoicePoint Inc., No.1-06-CV-198 (N.D. Ga. Jan. 26, 2006) (stipulated final judgment) ($10 million civil penalty and $5 million redress for data security breach that led to the compromise of the financial records of more that 163,000 consumers and violations of the Fair Credit Reporting Act)

- DSW, Inc., D-4157 (Dec. 1, 2005) (consent order) (challenging as an unfair trade practice shoe store's failure to take appropriate security measures to protect sensitive consumer information)

- Superior Mortgage Corp., 140 F.T.C. 926 (2005) (consent order) (challenging mortgage company's failure to provide reasonable security for sensitive customer data and false claim that it encrypted data submitted online as violations of FTC Safeguards Rule and Section 5 of the FTC Act)

- BJ's Wholesale Club, 140 F.T.C. 465 (2005) (consent order) (challenging as an unfair trade practice warehouse store's failure to take appropriate security measures to protect sensitive consumer information)

- CartManager International, C-4135 (Apr. 26, 2005) (consent order) (alleging that company that provides "shopping cart" software to online merchants rented personal information about merchants' customers to marketers, knowing that such disclosure contradicted merchants' privacy policies)

- Petco Animal Supplies, Inc., 139 F.T.C. 102 (2005) (consent order) (challenging security flaws on company's website that allowed access to consumers' personal information, including credit card numbers)

- FTC v. Seismic Entertainment Productions, Inc., No. 04-CV-0377-JD (D.N.H. Oct. 12, 2004) (complaint filed) (challenging spyware company's alleged practice of hijacking computers, changing their settings, barraging them with pop-up ads, and installing adware and other software programs that monitor consumers' web surfing)

- Bonzi Software, Inc., 138 F.T.C. 738 (2004) (consent order) (challenging deceptive representations that InternetALERT software significantly reduced the risk of Internet attacks and unauthorized access into computers)

- Gateway Learning Corp., 138 F.T.C. 443 (2004) (consent order) (alleging that marketer of Hooked On Phonics products promised in its privacy policy to protect consumers' personal information and then changed its policy and sold personal information without consumers' consent)

- Tower Records/Books/Video and TowerRecords.com, 137 F.T.C. 444 (2004) (consent order) (challenging security flaws on company's website that allowed access to consumers' personal information)

- Guess?, Inc., and Guess.com, Inc., 136 F.T.C. 507 (2003) (consent order) (alleging that security flaws on company's website placed consumers' credit card numbers at risk to hackers)

- Educational Research Center of America, Inc., 135 F.T.C. 578 (2003) (consent order) (alleging that companies' practices of collecting personal information from students as young as ten claiming that it would be used solely for education-related services and then selling it to commercial marketers was a violation of Section 5)

- National Research Center For College and University Admissions, 135 F.T.C. 13 (2003) (consent order) (alleging that companies' practices of collecting personal information from millions of high school students claiming that they would share it only with colleges, universities, and others providing education-related services and then selling it to commercial marketers was a violation of Section 5)

- Microsoft Corp., 134 F.T.C. 709 (2002) (consent order) (challenging deceptive claims regarding the privacy and security of personal information collected from consumers through Microsoft's Passport web services)

- Eli Lilly and Co., 133 F.T.C. 763 (2002) (consent order) (challenging unauthorized disclosure of sensitive personal information collected from consumers through company's Prozac.com website)

- FTC v. Toysmart.com, No. 00-11341-RGS (D. Mass. July 21, 2000) (stipulated consent agreement) (settling request to enjoin a bankrupt company from selling confidential information collected from customers on its website after representing in its published privacy policy that information would never be disclosed to third parties)

- FTC v. Rennert, No. CV-S-00-0861-JBR (D. Nev. July 6, 2000) (stipulated final order) (requiring company operating a purported online pharmacy to post a privacy policy that discloses the types of personal identifying information it is collecting, the uses that will be made of the data, and the means by which a consumer may access, review, modify, or delete his or her personal information, and prohibiting the defendants from selling, renting, or disclosing personal information that was collected from their customers)

- Liberty Financial Companies, Inc., 128 F.T.C. 240 (1999) (challenging company's practice of collecting identifiable personal information about family finances from children at its "Young Investors" website despite representing that information would be compiled anonymously)

- GeoCities, 127 F.T.C. 94 (1999) (consent order) (alleging the company misrepresented purposes for which it collected personal identifying information from children and adults on its website)

F. Children's Privacy Online: Passed in 1998, the Children's Online Privacy Protection Act, 15 U.S.C. § 6501 (1999), requires websites to obtain verifiable parental consent before collecting, using, or disclosing personal information from children. COPPA directed the FTC to promulgate rules and approve guidelines that would serve as safe harbors. On February 27, 2007, the FTC issued ***Implementing the Children's Online Privacy Protection Act: A Report to Congress.***

1. ***Children's Online Privacy Protection Act Rules:*** Pursuant to the Children's Online Privacy Protection Act, the FTC issued rules in 2000 outlining the procedures for websites to use in getting parental consent before collecting, using, or disclosing personal information from children. 16 C.F.R. § 312. The rules apply to operators of commercial websites and online services directed to children under 13, and general audience sites that know they are collecting personal information from a child. Pursuant to the rules, sites must provide parents notice of their information practices, get verifiable parental consent before collecting a child's personal information, give parents a choice of whether their children's information will be disclosed to third parties, allow parents the opportunity to review their children's personal information and have it deleted, give parents the opportunity to prevent further use or collection of information, not require a child to provide more information than is reasonably necessary to participate in an activity, and maintain the confidentiality, security, and integrity of information collected from children.

2. ***COPPA Safe Harbors:*** On February 1, 2001, the FTC approved the Children's Advertising Review Unit of the Council of Better Business Bureaus as the first "safe harbor" program under the terms of COPPA. Safe harbor programs are industry self-regulatory guidelines that, if adhered to, are deemed to comply with the Act. The Commission has since approved safe harbors for the Entertainment Software Rating Board, TRUSTe Internet privacy seal program, and Privo, Inc.

3. Representative COPPA cases:

- United States v. Iconix Brand Group, No. 09 Civ. 8864 (MGC) (S.D.N.Y. Oct. 20, 2009) ($250,000 civil penalty from marketer of Candie's, Bongo, and Mudd apparel for violations of COPPA, including practices that allowed children to share personal information and photos online)

- United States v. Sony BMG Music, No. 08 CV 10730 (S.D.N.Y. Dec. 11, 2008) ($1 million civil penalty for collecting personal information from 30,000 registrants who were under 13 and allowing them to create personal fan pages, post comments on message boards and in online forums, and engage in private messaging)

- United States v. Industrious Kid, Inc., No. CV-08-0639 (N.D. Cal. Jan. 30, 2008) (consent decree) ($130,000 civil penalty for COPPA violations by social networking website specifically targeting kids and "tweens")

- United States v. Xanga.com, Inc., No. 06-CIV-6853(SHS) (S.D.N.Y. Sept. 7, 2006) ($1 million civil penalty for allowing visitors to create more than 1.7 million accounts on social networking site although they provided a birth date indicating they were under 13)

- United States v. UMG Recordings, Inc., No. CV-04-1050 JFW (Ex) (C.D. Cal. Feb. 17, 2004) (consent decree) ($400,000 civil penalty for music company's knowing collection of personal information from children online without first obtaining parental consent and for engaging in the same activities on a website directed to children)

- United States v. Bonzi Software, No. CV-04-1048 RJK (Ex) (C.D. Cal. Feb. 17, 2004) (consent decree) ($75,000 civil penalty for interactive software marketer's knowing collection of personal information from children online without first obtaining parental consent)

- United States v. Hershey Foods Corp., No. 4:CV03-350 (M.D. Pa. Feb. 26, 2003) (consent decree) ($85,000 civil penalty for company's use of a method of obtaining parental consent that did not meet COPPA Rule standards)

- United States v. Mrs. Fields Famous Brands, Inc., No. 2:03CV205-JTG (D. Utah Feb. 26, 2003) (consent decree) ($100,000 civil penalty for company's collection of personal information from more than 84,000 children, without first obtaining parental consent)

- United States v. The Ohio Art Co., (N.D. Ohio Apr. 22, 2002) (consent decree) ($35,000 civil penalty for company's violation of COPPA by collecting personal information from children on its Etch-a-Sketch website without obtaining parental consent)

- United States v. American Pop Corn Co., No. C02-4008DEO (N.D. Iowa Feb. 14, 2002) ($10,000 civil penalty for company's violation of COPPA by collecting personal information from children on its Jolly Time Popcorn website without obtaining parental consent)

- United States v. Lisa Frank, Inc., No. 01-1516-A (E.D. Va. Oct. 2, 2001) (consent decree) ($30,000 civil penalty for website operator's violation of COPPA by collecting personally identifying information from children under 13 years of age without parental consent and requiring operators to delete all personally identifying information collected from children online at any time since the COPPA Rule's effective date)

- United States v. Monarch Services, Inc. and Girls' Life, Inc. (D. Md. Apr. 19, 2001); United States v. BigMailbox.com, Inc., No. 01-605-1 (E.D. Va. Apr. 19, 2001); and United States v. Looksmart, Ltd., No. 01-606-A (E.D. Va. Apr. 19, 2001) (consent decrees) ($100,000 civil penalty for website operators' violations of COPPA by collecting personally identifying information from children under 13 years of age without parental consent)

XVII. GLOBAL COMMERCE

A. **US SAFE WEB ACT.** In December 2006, Congress recognized the increasing threats posed by fraud in the global marketplace and passed the US SAFE WEB Act, which gives the FTC expanded powers to protect U.S. consumers from spam, spyware, cross-border fraud, etc.

B. ***OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace:*** On April 19-20, 2005, the FTC hosted a workshop to examine approaches to consumer dispute resolution and redress around the world. Co-sponsored by the Organization for Economic Cooperation and Development (OECD), the workshop examined ways in which consumers in the 30 OECD member countries can resolve disputes and seek redress for problems that arise in transactions with foreign merchants.

C. ***Surf Days:*** Since 1997, the FTC has undertaken numerous coordinated health claims surf days with FDA and law enforcement and public health partners from around the world. These surf days – and follow-up law enforcement – have targeted questionable claims for products advertised to treat cancer, AIDS, SARS, heart disease, diabetes, arthritis, and multiple sclerosis.

D. ***Partnerships to Combat Cross-Border Fraud:*** On February 19, 2003, the Commission convened a two-day international workshop on cross-border fraud and issued ***Cross-Border Fraud Trends***, a report compiled from complaints received by the FTC's Consumer Sentinel database. On June 17, 2003, the Commission and representatives of OECD announced new guidelines for combating cross-border fraud.

E. ***Operation Top Ten Dot Cons:*** On October 31, 2000, the FTC announced 251 law enforcement actions against online scammers brought by five federal agencies, 23 state attorneys general, and nine foreign countries. The top ten scams were culled from Consumer Sentinel, a database containing millions of consumer complaints established by the FTC and accessible to more than 250 consumer protection agencies in the U.S., Canada, and Australia.

F. ***U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace:*** In June 1999, the Commission held a national workshop on consumer protection ramifications of the emerging digital economy. Participants included the Secretary of Commerce, the U.S. Trade Representative, and panelists from more than 60 companies and organizations.

G. ***Conference on Global Commerce and Innovation:*** The October 1995 conference examined the FTC's consumer protection role in the emerging high-tech, global marketplace. In May 1996, Commission staff issued a report based on the conference, ***Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace.***

XVIII. SELF-REGULATORY INITIATIVES

A. Voluntary Self-Regulatory Initiatives: The FTC has expressed long-standing support for industry efforts to encourage effective self-regulation and has acknowledged referrals from

groups such as the National Advertising Division, the Children's Advertising Review Unit, and the Electronic Retailing Self-Regulation Program of the Council of Better Business Bureaus. See, e.g., FTC v. Chinery, No. 05-3460 (GEB) (D.N.J. Jan. 4, 2007) (stipulated final order); FTC v. Great American Products, Inc., No. 3:05-CV-00170-RV-MD (N.D. Fla. May 20, 2005), aff'd, 200 Fed. Appx. 897 (4th Cir. 2006); Cytodyne, LLC, 140 F.T.C. 191 (2005) (consent order); United States v. Lisa Frank, Inc., No. 01-1516-A (E.D. Va. Oct. 2, 2001) (consent decree); Bogdana Corp., 126 F.T.C. 37 (1998) (consent order).

B. Advertising Clearance: The Commission staff has taken steps to encourage media to adopt effective in-house clearance procedures for screening out facially deceptive ads before they run. In 1995, the FTC co-sponsored with the FDA, the National Association of Attorneys General, and the American Association of Advertising Agencies a national conference, ***Preventing Fraudulent Advertising: A Shared Responsibility***, to encourage effective self-regulation by print and broadcast media. In addition, the Commission issued ***Screening Advertisements: A Guide for Media***, a brochure on developing effective in-house ad clearance procedures, published with the United States Postal Inspection Service and the Direct Marketing Association.

C. Voluntary Screening of Weight Loss Advertisements: The Commission sponsored a workshop in November 2002 to consider initiatives to combat deception in weight loss advertising, including more effective in-house screening by broadcasters and publishers. In December 2003, the FTC issued ***Red Flags: A Reference Guide for Media on Bogus Weight Loss Claim Detection***, a brochure to assist publishers and broadcasters screen out patently false ads before they are disseminated. As part of ***Operation Big Fat Lie***, a November 2004 law enforcement sweep of companies selling allegedly bogus weight loss products, the FTC contacted the newspapers and magazines that disseminated ads for the products encouraging them to adopt more effective in-house clearance standards. In April 2005, the FTC released a report studying industry compliance with Commission calls for more effective self-regulation. According to ***2004 Weight-Loss Advertising Survey: A Report From the Staff of the Federal Trade Commission***, the percentage of ads for weight loss products that contain representations the Commission considers to be patently false – "red flag" claims – dropped from almost 50% in 2001 to 15% in 2004.

D. Marketing Practices of the Entertainment Industry: In June 1999, the President and members of Congress asked the FTC to conduct a study to determine whether members of the entertainment industry market violent adult-rated material to children. On September 11, 2000, the Commission issued ***Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries***, which concluded that members of the industry promote products they acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience and that the advertisements are intended to attract children and teenagers. The Report further found that while the entertainment industry has taken steps to identify content that may not be appropriate for children, companies routinely target children under 17 in the marketing of products their own ratings systems deem inappropriate or warrant parental caution due to violent content. The FTC found evidence of marketing and media plans that expressly target children under 17, and promote and advertise products in media outlets most likely to reach that age group. The Report concluded that the industry should establish or expand codes that prohibit target marketing to children and impose

sanctions for violations, increase compliance at the retail level, and increase parental understanding of the ratings and labels.

1. The Commission issued a follow-up report on April 24, 2001, stating that the motion picture and electronic game industries had made some progress in limiting ads in popular teen media and in providing rating information in advertising, but raising continued concerns about the music industry.

2. At the request of members of Congress, an additional report was issued on December 5, 2001. The report concluded that the motion picture and electronic game industries have "made commendable progress in limiting their advertising to children of R-rated movies and M-rated games and in providing rating information in advertising." The Commission's review of ad placements by the music industry, however, found that "it has continued to advertise explicit content recordings in most popular teen venues in all media," although there were "improvements in the music industry's disclosure of parental advisory label information in its advertising."

3. The Commission issued a third follow-up report on June 28, 2002, finding progress in advertising disclosures by the marketers of movies, music, and electronic games, but continued placement of ads in some media with large teen audiences.

4. On October 14, 2003, the Commission issued the results of a "mystery shopper" survey investigating the effectiveness of self-regulatory programs designed to prevent the sale to children of entertainment products deemed by the industries to be unsuitable for them. According to the survey, 69% of the teenage shoppers were able to buy M-rated games; 83% were able to buy explicit-labeled recordings; 81% were successful in purchasing R-rated movies on DVD; and 36% were successful in purchasing tickets for admission to an R-rated film at movie theaters.

5. The Commission sponsored a public workshop on October 29, 2003, to discuss the state of self-regulation in the entertainment industry and children's access to products rated as potentially inappropriate for them or have been labeled with a parental advisory. On March 17, 2004, the Commission announced the expansion of its consumer complaint system to track complaints about media violence, including complaints about the advertising, marketing, and sale of violent movies, electronic games, and music.

6. The Commission issued a fourth follow-up report on July 8, 2004. The report observed continued progress in providing rating information in ads and improvement in limiting sales of R-rated movie tickets, but little overall change in industry ad placement.

7. On March 30, 2006, the FTC issued the results of its latest mystery shopper survey. Forty-two percent of the secret shoppers – children between the ages of 13 and 16 – who attempted to buy an M-rated video game without a parent were able to purchase one, compared with 69% in the 2003 mystery shopper survey.

8. On April 12, 2007, the FTC issued ***Marketing Violent Entertainment to Children: A Fifth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress***. According to the FTC, despite general compliance with voluntary industry standards, entertainment companies continue to market some R-rated movies, M-rated video games, and explicit-content recordings on television shows and websites with substantial teen audiences. In addition, the FTC found that while video game retailers have made significant progress in limiting sales of M-rated games to children, movie and music retailers have made only modest progress limiting sales.

9. On May 8, 2008, the FTC issued another mystery shopper survey, reporting that 20% of underage teenage shoppers were able to buy M-rated video games – down from 42% in 2006 – and that roughly half of the undercover shoppers were able to purchase R-rated and unrated DVDs and music CDs with parental advisory labels.

10. On December 3, 2009, the FTC issued ***Marketing Violent Entertainment to Children: A Sixth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries***. According to the report, the music industry has not adopted objective marketing standards limiting ad placement for explicit-content music. As a result, the industry still advertises music labeled with a Parental Advisory Label on TV shows viewed by a substantial number of children. The report also found that movie studios intentionally market PG-13 movies to children under 13, and the movie industry does not have explicit standards in place to restrict this practice. The report concluded that the videogame and movie industries can do more to limit ad placement on websites that disproportionately attract children and teens.

11. Representative cases:

- Take-Two Interactive Software, Inc. and Rockstar Games, Inc., File No. 052-3158 (June 8, 2006) (consent orders) (alleging that marketers of videogame *Grand Theft Auto: San Andreas* failed to disclose that game discs contained potentially viewable material that was sexually explicit, resulting in its subsequent re-rating by the Entertainment Software Ratings Board from "Mature" to "Adults Only")

E. Marketing Practices of the Alcohol Industry

1. In September 1999, the Commission issued a Report to Congress, ***Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers***, evaluating the effectiveness of voluntary industry codes and self-regulatory programs and recommending specific improvements in code standards and implementation. The Commission recommended that the industry:

- create independent review boards to consider complaints from consumers and competitors;

- raise the current standard that permits advertising placement in media where just over 50% of the audience is 21 or older; and

- adopt a series of best practices to curb on-campus and spring break sponsorships, block underage access to websites, disallow placement on television shows with large underage audiences, and restrict paid product placements to R-rated or NC-17 movies.

2. On September 9, 2003, the Commission issued ***Alcohol Marketing and Advertising: A Federal Trade Commission Report to Congress***. In response to congressional inquiries about flavored malt beverages, the Commission concluded that marketers have generally complied with 2002 voluntary alcohol codes regarding ad placement. According to the report, the Commission will continue to monitor new placement standard requiring that adults constitute 70% of the audience for advertising and the effectiveness of third-party and other external review programs.

FEDERAL TRADE COMMISSION
16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

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This document includes only the text of the Revised Endorsement and Testimonial Guides. To learn more, read the Federal Register Notice at **www.ftc.gov/opa/2009/10/endortest.shtm.**

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§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.

The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

Example 1: A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser's opinion. [*See* § 255.1(b).]

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.

Example 4: A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Example 6: An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

Example 7: A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit

and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [*See* §§ 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [*See* § 255.1(b) regarding the "good reason to believe" requirement.]

(d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [*see* § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

Example 1: A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of Section 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, "We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best." The advertisement portrays X typing on each keyboard and then picking the advertiser's brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser's keyboard at work. In addition, the endorsement also may be required to meet the standards of Section 255.3 (expert endorsements).

Example 3: An ad for an acne treatment features a dermatologist who claims that the product is "clinically proven" to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [*See* Section 255.3 regarding the product evaluation that an expert endorser must conduct.]

Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

Example 5: A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated

representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [*See* § 255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.[1]

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[1] The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either "Results not typical" or the stronger "These testimonials are based on the experiences of a few people and you are not likely to have similar results." Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

The ad will also likely communicate that the endorsers' experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, "Notice: These testimonials do not prove our product works. You should not expect to have similar results," the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company's heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save $100 or more. A disclosure such as, "Results not typical" or, "These testimonials are based on the experiences of a few people and you are not likely to have similar results" is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, *e.g.*, "the average homeowner saves $35 per month," "the typical family saves $50 per month during cold months and $20 per month in warm months," or "most families save 10% on their utility bills."

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (*i.e.*, a 120-point drop in serum cholesterol without any lifestyle changes).

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, "Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds." The advertisement accurately describes the woman's

experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (*e.g.*, that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features "before" and "after" pictures of a woman who says "I lost 50 pounds in 6 months with WeightAway," the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.,* "most women who use WeightAway for six months lose at least 15 pounds").

If the ad features the same pictures but the testimonialist simply says, "I lost 50 pounds with WeightAway," and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.,* "most women who use WeightAway lose 15 pounds").

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

Example 6: An advertisement purports to portray a "hidden camera" situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though the words "hidden camera" are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed. [*See* § 255.5.]

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.

(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (*e.g.*, matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer's use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert's evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. [*See* § 255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an "engineer" implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as "Doctor" during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical "doctor" (*e.g.*, an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as "doctor," the advertisement must make clear the nature and limits of the endorser's expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the "American Institute of Science." From its name, consumers would infer that the "American Institute of Science" is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization

(*e.g.*, if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital's choice – convenience of packaging – is neither relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

Example 5: A woman who is identified as the president of a commercial "home cleaning service" states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand's performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president's statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors to the advertised cleanser, the service must, in fact, have such experience, and, on the basis of its expertise, it must have determined that the cleaning ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors' products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service's president makes no mention that the endorsed cleanser was "chosen," "selected," or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

Example 6: A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product's safety and efficacy.

§ 255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its

expertise in evaluating the product under § 255.3 (expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. [*See* § 255.1(d) regarding the liability of endorsers.]

> **Example**: A mattress seller advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

> **Example 1:** A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (*e.g.*, to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the "findings" of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement.

> **Example 2:** A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star's compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

> **Example 3:** During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball

better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company's clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

Example 4: An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

Example 5: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein "steak." This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the "hidden camera" only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6: An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as "extras" in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer's infomercial, they will receive a small payment. Viewers would not expect that these "consumer endorsers" are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a "street team" program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

Revised March 8, 2010

THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION

Policies and Procedures by
The National Advertising Review Council
(NARC)

Administered by
The Council of Better Business Bureaus
(CBBB)

Procedures for:
The National Advertising Division
(NAD)

The Children's Advertising Review Unit
(CARU)

The National Advertising Review Board
(NARB)

NARC PARTNERS

1.1 Definitions

A. The term "national advertising" shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser.

B. The term "advertiser" shall mean any person or other legal entity that engages in "national advertising."

C. The term "advertising agency" shall mean any organization engaged in the creation and/or placement of "national advertising."

D. The term "public or non-industry member" shall mean any person who has a reputation for achievements in the public interest.

2.1 NAD/CARU

A. Function and Policies

The National Advertising Division of the Council of Better Business Bureaus (hereinafter NAD), and the Children's Advertising Review Unit (CARU), shall be responsible for receiving or initiating, evaluating, investigating, analyzing (in conjunction with outside experts, if warranted, and upon notice to the parties), and holding negotiations with an advertiser, and resolving complaints or questions from any source involving the truth or accuracy of national advertising, or consistency with CARU's *Self-Regulatory Program for Children's Advertising.*

B. Advertising Monitoring

NAD and CARU are charged with independent responsibility for monitoring and reviewing national advertising for truthfulness, accuracy and, in the case of CARU, consistency with CARU's *Self-Regulatory Program for Children's Advertising.*

C. Case Reports

The Council of Better Business Bureaus shall publish at least ten times each year the Case Reports, which will include the final case decisions of NAD, CARU and NARB, and summaries of any other matters concluded since the previous issue. Each final NAD, CARU and NARB case decision shall identify the advertiser, challenger, advertising agency, product or service, and subject matter reviewed. It shall also include a summary of each party's position, NAD, CARU or the NARB's decision and its rationale, and a concise Advertiser's Statement, if any (See Section 2.9). CARU shall publish in the Case Reports a summary of CARU's actions, other than formal cases, during the preceding month. Included in this Activity Report, shall be the following:

(i) Inquiries—summaries of informal inquiries under CARU's Expedited Procedures (see Section 2.13 below);

(ii) Pre-Screening/Submissions—summaries of story-boards or videotapes of proposed advertising submitted to CARU for prescreening; and

D. Guidance to the Public

(i) From time to time, after consultation with the General Counsel, NAD/CARU may inform the public, through the *Case Reports* and other media, of trends, principles and interpretations derived from previously published case decisions.

(ii) After consulting with the General Counsel, CARU may also inform the public of new interpretations of its guidelines that it believes would provide appropriate advance notice of the application of CARU guidelines to existing industry practices maintained by multiple advertisers. Prior to publication of any such interpretation, CARU will prepare appropriate explanatory materials for the National Advertising Review Council (NARC), and may publish the interpretation in the *Case Reports* and other media if, after 30 days, NARC has not scheduled a meeting to consider the matter. If such a meeting is scheduled, CARU may publish the interpretation after NARC's consideration unless NARC revises

CARU's *Self-Regulatory Program for Children's Advertising* in a manner that moots the interpretation

E. Confidentiality of NAD/CARU/NARB Proceedings

(i) NAD/CARU/NARB proceedings are confidential except for (a) publication of final case decisions and summaries of other actions, as provided by these Procedures; (b) NAD/CARU/NARB press releases announcing final case decisions and summaries; (c) referrals by NAD/CARU/NARB to government agencies as provided by these Procedures; and (d) actions taken by NAD/CARU under Section 2.1(F)(2) of these Procedures.

(ii) Published NAD/CARU/NARB decisions are the only permanent records required to be kept as to the basis of an inquiry, the issues defined, the facts and data presented, and the conclusions reached by NAD/CARU/NARB.

(iii) By participating in a NAD/CARU/ NARB proceeding, parties agree:

(a) To keep the proceedings confidential throughout the review process;

(b) Not to subpoena any witnesses or documents regarding the review proceeding from NAD, CARU, NARB, NARC or the Council of Better Business Bureaus in any future court or other proceeding (except for the purposes of authentication of a final, published case decision); and

(c) To pay attorneys fees and costs if a subpoena is attempted in violation of Section (b) above.

F. Parties' Agreement/Referrals to Law Enforcement Agencies

(i) It is the policy of the NAD, CARU, NARB, NARC and the Council of Better Business Bureaus not to endorse any company, product, or service. Any decision finding that advertising has been substantiated should not be construed as an endorsement. Correspondingly, an advertiser's voluntary modification of advertising, in cooperation with NAD/CARU/ NARB self-regulatory efforts, is not to be construed as an admission of any impropriety.

(ii) By participating in a NAD/CARU/NARB proceeding, parties agree (a) not to issue a press release regarding any decisions issued, and/or (b) not to mischaracterize any decision issued or use and/or disseminate such decision for advertising and/or promotional purposes. NAD/CARU/NARB may take whatever action it deems appropriate if a party violates this provision, including the issuance of a public statement for clarification purposes.

(iii) When NAD/CARU commences a review pursuant to Section 2.2 of these Procedures, and the advertiser elects not to participate in the self-regulatory process, NAD/CARU shall prepare a review of the facts with relevant exhibits and forward them to the appropriate federal or state law enforcement agency. Reports of such referrals shall be included in the Case Reports.

G. Academic and Other Expert Advisors

CARU may establish a panel of academic and other experts as needed from which CARU may obtain advice pertinent to advertising, cognitive ability, nutrition and other matters, and on the application of CARU's *Self-Regulatory Program for Children's Advertising.*

2.2 Filing a Complaint

A. Any person or legal entity, including NAD/CARU as part of their monitoring responsibility pursuant to Section 2.1 (B) of these Procedures, may submit to NAD/CARU any complaint regarding national advertising, regardless of whether it is addressed to consumers, to professionals or to business entities. All complaints (except those submitted by consumers), including any supporting documentation, must be submitted in duplicate hard copy and in an electronic format (including evidentiary exhibits when possible.) To help ensure a timely review, challengers should strive to limit the length of their submissions to 8 double-spaced typewritten pages (excluding evidentiary exhibits) and limit the number of issues

raised in a challenge to those that are the most significant. A challenger may further expedite the review of the contested advertising by waiving its right to reply (see Section 2.6 B) or by requesting an "Expedited Review" pursuant to Section 2.11 of these Proceedings.

(i) CBBB Corporate Partner Filing Fees – Competitive challenges before NAD by CBBB Corporate Partners shall be filed together with a check, made payable to the Council of Better Business Bureaus, Inc., in the amount of $3,500.

(ii) Non-Corporate Partner Filing Fees – Competitive challenges before NAD by companies that are not Corporate Partners of the CBBB shall be filed together with a check, made payable to the Council of Better Business Bureaus, Inc., for:

(a) $6,000, if the challenger's gross annual revenue is less than $400 million;
(b) $10,000, if the challenger's gross annual revenue is more than $400 million and less than $1 billion;
(c) $20,000, if the challenger's gross annual revenue is $1 billion or more.

The filing fee shall be accompanied by a statement indicating the category into which the challenger's revenues fall. In the case of a challenge filed by a subsidiary, the filing fee is determined by the gross annual revenue of the parent company.

(iii) CARU Filing Fees – Competitive challenges before CARU shall be filed together with a check made payable to the Council of Better Business Bureaus, Inc., in the amount of $2,500 (for CBBB Corporate Partners) or $6,000 (for non-Corporate Partners or CARU Supporters).

(iv) The President of the National Advertising Review Council (NARC) shall have the discretion to waive or reduce the fee for any challenger who can demonstrate economic hardship. If a CARU or NAD case is administratively closed, the filing fee will be $1,500 for CBBB Corporate Partners or CARU Supporters and $2,500 for non-partners. The difference between these administrative closing fees and the initial filing fee will be refunded to the challenger.

B. Upon receipt of any complaint, NAD/CARU shall promptly acknowledge receipt of the complaint and, in addition, shall take the following actions:

(i) If, at the commencement or during the course of an advertising review proceeding, NAD/CARU concludes that the advertising claims complained of are: (a) not national in character; (b) the subject of pending litigation or an order by a court; (c) the subject of a federal government agency consent decree or order; (d) permanently withdrawn from use prior to the date of the complaint and NAD/CARU receives the advertiser's assurance, in writing, that the representation(s) at issue will not be used by the advertiser in any future advertising for the product or service; (e) of such technical character that NAD/CARU could not conduct a meaningful analysis of the issues; or (f) without sufficient merit to warrant the expenditure of NAD/CARU's resources, NAD/CARU shall advise the challenger that the complaint is not, or is no longer, appropriate for formal investigation in this forum. Upon making such a determination, NAD/CARU shall advise the challenger that a case will not be opened, or in the event that an advertising review proceeding has already been commenced, shall administratively close the case file and report this action in the next issue of the Case Reports. When it can, NAD/CARU shall provide the challenger with the name and address of any agency or group with jurisdiction over the complaint.

(ii) If the complaint relates to matters other than the truth or accuracy of the advertising, or consistency with CARU's ***Self-Regulatory Program for Children's Advertising***, NAD/CARU shall so advise the challenger, as provided above, and where a significant national advertising issue is raised, shall forward a copy of the complaint to the NARC President who, in consultation with the NARB Chair, shall consider whether the complaint is appropriate for a consultive panel.

(iii) If, in its discretion, NAD/CARU determines that a complaint is too broad or includes too many issues or claims to make resolution within the time constraints proscribed by these Procedures feasible, NAD/CARU may request that the challenger limit the issues or claims to be considered in the review proceeding, or, in the alternative, advise the challenger that the matter will require an extended schedule for review.

(iv) If a complaint challenges advertising for more than one product (or product line) NAD/CARU may return the complaint to the challenger and request that separate complaints be submitted for each of the advertised products.

(v) If the complaint relates to the truth or accuracy of a national advertisement, or consistency with CARU's ***Self-Regulatory Program for Children's Advertising***, NAD/CARU shall promptly forward the complaint by facsimile, overnight, or electronic mail to the advertiser for its response.

(vi) Complaints regarding, specific language in an advertisement, or on product packaging or labels, when that language is mandated or expressly approved by federal law or regulation; political and issue advertising, and questions of taste and morality (unless raising questions under CARU's ***Self-Regulatory Program for Children's Advertising***), are not within NAD/CARU's mandate. If the complaint, in part, relates to matters other than the truth and accuracy of the advertising, or consistency with CARU's ***Self-Regulatory Program for Children's Advertising***, NAD/ CARU shall so advise the challenger.

(vii) NAD/CARU reserves the right to refuse to open or to continue to handle a case where a party to an NAD/ CARU proceeding publicizes, or otherwise announces, to third parties not directly related to the case the fact that specific advertising will be, is being, or has been, referred to NAD/CARU for resolution. The purpose of this right of refusal is to maintain a professional, unbiased atmosphere in which NAD/CARU can affect a timely and lasting resolution to a case in the spirit of furthering voluntary self-regulation of advertising and the voluntary cooperation of the parties involved.

C. Complaints originating with NAD shall be considered only after the General Counsel of the NARB has reviewed the proposed complaint and has determined that there is a sufficient basis to proceed. Complaints originating with CARU that would apply a new interpretation or application of CARU's ***Self-Regulatory Program for Children's Advertising*** shall be considered only after the General Counsel of NARB has reviewed the proposed interpretation or application and has determined that there is a sufficient basis to proceed.

D. In all cases, the identity of the challenger must be disclosed to NAD/CARU who shall advise the advertiser of the identity of the challenger.

2.3 Parties to NAD/CARU/NARB Proceedings

The parties to the proceeding are (i) NAD/CARU acting in the public interest, (ii) the advertiser acting in its own interest, and (iii) the challenger(s), whose respective rights and obligations in an NAD/CARU/NARB proceeding are defined in sections 2.2, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, 3.1, 3.2, 3.3, 3.5, and 4.1 of these Procedures.

2.4 Information in NAD/CARU Proceedings

A. All information submitted to NAD/CARU by the challenger and the advertiser, pursuant to Sections 2.4 through 2.11 of these Procedures, shall be submitted in duplicate hard copy and in an electronic format (including evidentiary exhibits when possible). Upon receipt of a filing by any party, NAD/CARU shall forward a copy to the other party by messenger, facsimile, electronic or overnight mail. All transmittals by NAD/CARU during the course of an advertising review proceeding shall be paid for by the challenger, unless the challenger is a consumer or otherwise demonstrates economic hardship, in which case all transmittals shall be paid for by NAD/CARU.

B. Time periods for all submissions to NAD, CARU and NARB shall commence on and include

the first day of business following the date of delivery of the triggering document and shall not include Saturdays, Sundays or Federal holidays.

C. NAD/CARU shall not consider any data submitted by a challenger that has not been made available to the advertiser, and any materials submitted by a challenger on condition that they not be shown to the advertiser shall promptly be returned. In the case of studies, tests, polls and other forms of research, the data provided should be sufficiently complete to permit expert evaluation of such study, poll, test or other research. NAD/CARU shall be the sole judge of whether the data are sufficiently complete to permit expert evaluation. If a party initially submits incomplete records of data that is then in its possession, and later seeks to supplement the record, NAD/CARU may decline to accept the additional data if it determines that the party's failure to submit complete information in the first instance was without reasonable justification.

D. An advertiser may submit trade secrets and/or proprietary information or data (excluding any consumer perception communications data regarding the advertising in question) to NAD/CARU with the request that such data not be made available to the challenger, provided it shall: (i) clearly identify those portions of the submission that it is requesting be kept confidential in the copy submitted for NAD/CARU's review; and (ii) redact any confidential portions from the duplicate copy submitted to NAD/CARU for NAD/CARU to forward to the challenger; (iii) provide a written statement setting forth the basis for the request for confidentiality; (iv) affirm that the information for which confidentiality is claimed is not publicly available and consists of trade secrets and/or proprietary information or data; and (v) attach as an exhibit to NAD/CARU's and the complainant's copy of the submission a comprehensive summary of the proprietary information and data (including as much non-confidential information as possible about the methodology employed and the results obtained) and the principal arguments submitted by the advertiser in its rebuttal of the challenge. Failure of the advertiser to provide this information will be considered significant grounds for appeal of a decision by a challenger. (See Section 3.1)

E. Prior to the transfer of data to the advertiser or challenger, NAD/CARU shall obtain assurances that the recipients agree that the materials are provided exclusively for the purpose of furthering NAD/CARU's inquiry; circulation should be restricted to persons directly involved in the inquiry, and recipients are required to honor a request at the completion of the inquiry that all copies be returned.

F. Whenever CARU has consulted an expert from the panel established under 2.1 G, or otherwise, in connection with the filing of a complaint, consideration of a complaint, or pre-screening, the expert's opinion shall be in writing, or summarized in writing by CARU. The expert's opinion and a brief description of the expert's qualifications shall be made available to the parties promptly. The advertiser or challenger may respond to the expert's opinion in any submission under 2.5, 2.6, 2.7. or 2.8. When furnished to the advertiser or challenger, CARU shall inform the parties that there has been no final determination by CARU on any matter contained in the expert's opinion.

2.5 The Advertiser's Substantive Written Response

The advertiser may, within 15 business days after receipt of the complaint, submit to NAD/CARU, in duplicate hard copy and an electronic format (including exhibits when possible), a written response that provides substantiation for any advertising claims or representations challenged, any objections it may have to the proceedings on jurisdictional grounds, as defined in Sections 2.2(B)(i)-(v), together with copies of all advertising, in any medium, that is related to the campaign that includes the challenged advertising. The advertiser may not include a counter challenge (i.e., a request that NAD/CARU review advertising claims made by the challenger) in its response. Such a request must be filed as a separate complaint as described in Section 2.2 of these Procedures. To help ensure a timely review, advertisers should strive to limit the length of their submissions to 8 double-spaced typewritten pages (excluding evidentiary exhibits). Advertiser responses addressed to the issue of NAD/CARU jurisdiction should be submitted as soon as possible after receipt of the complaint, but in any event, must be submitted no later than 15 business days after the advertiser receives the initial complaint. (See also Section 2.10 Failure to Respond.)

2.6 The Challenger's Reply

A. If the advertiser submits a written response, NAD/CARU shall promptly forward the copy of

that response prepared by the advertiser for the challenger, that shall have any material designated as confidential redacted, and shall include, as an exhibit, a comprehensive summary of the redacted information in the manner set forth in Section 2.4 above. Within ten business days of receipt of the advertiser's response, the challenger shall submit in duplicate hard copy and an electronic format (including exhibits when possible) its reply, if any, to NAD/CARU. To help ensure a timely review, challengers should strive to limit the length of their reply to 8 double-spaced typewritten pages (excluding evidentiary exhibits). This reply should include a short Executive Summary summarizing the key points in the challenger's position on the case and cite to the supporting evidence in the record. If the challenger does not submit a reply, NAD/CARU shall proceed to decide the challenge upon the expiration of the complainant's time to reply, subject to a request by NAD/CARU for additional comments or data under Section 2.8 (A).

B. *Expediting Review by Waiving the Reply* –

After the challenger has reviewed the Advertiser's first substantive written response, the challenger may notify NAD/CARU in writing that it elects to waive its right to add to the record thereby expediting the proceeding. In the event that a challenger waives its right to reply, additional information from either party may be submitted only upon request from NAD/CARU and shall be treated in the same manner as requests for additional comments or data under Section 2.8(A) of these procedures and any meetings with the parties will be held at the discretion of the NAD/CARU.

2.7 Advertiser's Final Response

If the challenger submits a reply, NAD/CARU shall promptly forward a copy of that reply to the advertiser. Within ten business days after receipt of the complainant's reply, the advertiser shall submit a response, if any, in duplicate hard copy and an electronic format (including exhibits when possible). To help ensure a timely review, advertisers should strive to limit the length of their response to 8 double-spaced typewritten pages (excluding evidentiary exhibits). This response should include a short Executive Summary summarizing the key points in the advertiser's position on the case and cite to the supporting evidence in the record.

2.8 Additional Information and Meetings with the Parties

A. In the event that NAD/CARU deems it necessary and request further comments or data from an advertiser or challenger, the written response must be submitted within six business days of the request. NAD/CARU will immediately forward the additional response to the advertiser or challenger, who will be afforded six business days to submit its own response to the submission. Unless NAD/CARU requests further comments or data under this paragraph, no additional submissions will be accepted as part of the case record, and any unsolicited submissions received by NAD/CARU will be returned.

B. NAD/CARU, in its discretion, may, in addition to accepting written responses, participate in a meeting, either in person or via teleconference, with either or both parties. In the event that NAD/CARU participates in a meeting in which only one party participates, NAD/CARU shall notify the other party that a teleconference or meeting has been scheduled to take place and after the meeting shall summarize the substance of the information exchanged for the other party (or have such a summary provided by the attending party). Where feasible, upon request, an advertiser shall be afforded the opportunity to schedule its meeting with NAD/CARU after the date of challenger's meeting. All meetings with the parties shall be held within 15 business days of NAD's receipt of the Advertiser's Final Response (Section 2.7).

C. Except upon request by NAD, as provided in Section 2.8(A) of these procedures, no new evidence may be submitted for inclusion in the record at these meetings. Any non-requested information provided during a meeting that is not already in the submissions of the party (including visual demonstrations, summaries and other documentary evidence) will not be included in the record and will not be considered by NAD/CARU in making its decision or by an NARB Panel in reviewing NAD's decision on appeal.

D. The period of time available for all communications, including meetings and written submissions, shall not exceed the time limits set forth in Sections 2.4 through 2.8 above except upon agreement of NAD/CARU and the parties.

2.9 Decision

A. The Final Case Decision

Within 15 business days of its receipt of the last document authorized by Sections 2.5 to 2.8, above, NAD/CARU will formulate its decision on the truth and accuracy of the claims at issue, or consistency with CARU's ***Self-Regulatory Program for Children's Advertising***; prepare the "final case decision"; provide a copy to the advertiser and; invite the advertiser to add an Advertiser's Statement within five business days of receipt.

B. Advertiser's Statement

In the event that NAD/CARU decides some or all of the advertising claims at issue are not substantiated, the advertiser shall, within five business days of receipt of the decision, submit an Advertiser's Statement stating whether the advertiser agrees to modify or discontinue the advertising or chooses to take the issues to appeal, as specified in Section 3.1. The Advertiser's Statement should be concise and may not exceed one double spaced page in length. Whether an advertiser intends to comply or appeal, an advertiser may include in this statement an explanation of why it disagrees with NAD/CARU. However, this is not the venue to reargue the merits of the case, bring in new facts, or restate or summarize NAD/CARU's conclusions. NAD/CARU reserves the right, following consultation with the advertiser, to edit for length or inappropriate material. In the event that the advertiser fails to submit an Advertiser's Statement as required by this Section, NAD/CARU may refer the matter to an appropriate government agency for review and possible law enforcement action.

C. Publication of the Decision

Upon receipt of the final version of the Advertiser's Statement, NAD/CARU shall provide copies of the "final case decision" to the advertiser and the challenger, by facsimile, electronic or overnight mail or messenger, and make the decision available to the public through press announcements and publication of the decision in the next Case Reports.

D. Case Report Headings

NAD/CARU's decisions in the Case Reports shall be published under the headings:

- Advertising Substantiated
- Advertising Referred to NARB
- Advertising Modified or Discontinued
- Advertising Substantiated/Modified or Discontinued
- Administrative Closing
- Advertising Referred to Government Agency
- No Substantiation Received
- Compliance

E. Annual Summary

The first issue of the Case Reports each calendar year shall include a summary, prepared by NAD/CARU, which includes the number, source and disposition of all complaints received and cases published by NAD/CARU during the prior year.

2.10 Failure to Respond

A. If an advertiser fails to file a substantive written response within the period provided in Section 2.5 above, NAD/ CARU shall release to the press and the public a "notice" summarizing the advertising claims challenged in the complaint, and noting the advertiser's failure to substantively respond.

B. If the advertiser fails to file a substantive written response within an additional 15 business days, NAD/CARU may refer the file to the appropriate government agency and release information regarding the referral to the press, the public, and the media in which the advertising at issue has appeared, and shall report the referral in the next issue of the Case Reports.

C. If a challenger fails to file a reply within the time provided by Section 2.6, or an advertiser fails to file a response within the time provided in Section 2.7, the untimely document shall not be considered by NAD/CARU, or by any panel of the NARB.

2.11 Expedited Proceeding

A challenger may, with the consent of the advertiser, request that the NAD/CARU engage in an expedited review of the contested advertising. This request must be made in the challenger's initial challenge letter to NAD/CARU, which shall not exceed four double-spaced typewritten pages. Based on the complexity of the challenge, NAD/CARU shall determine whether the matter is appropriate for an expedited review. If a challenger's request for an expedited proceeding is

accepted, the challenger automatically waives its right to reply to the Advertiser's substantive written response. The advertiser will have 15 business days in which to respond to NAD/CARU's inquiry. NAD/CARU will forward the advertiser's response to the challenger. Thereafter, NAD/CARU may, in its discretion, request additional information from either party. NAD/CARU will issue a summary decision within 15 business days after the close of the evidentiary record. If NAD/CARU determines that the advertising should be modified or discontinued, the advertiser may then request a full review (with any additional submissions permitted by these Procedures) and a detailed decision. In such a case, the advertiser will be required to discontinue the challenged advertising until the final decision is issued. In an expedited proceeding, the parties' rights to appeal (as described in Sections 3.1A and 3.1B of these Procedures) attach only in the event that the advertiser requests a full review and after a detailed decision is issued on the merits.

2.12 Request for Product

When CARU's monitoring identifies an advertisement which may raise concerns under the Guidelines, but only physical inspection of the product or packaging can determine whether such concerns exist, CARU will request a sample of the product from the advertiser. If the advertiser complies with CARU's request within five business days, and inspection of the product reveals no questions of non-compliance with the Guidelines, no inquiry will be opened.

2.13 CARU Expedited Procedure

Notwithstanding 2.2 through 2.11 above, in instances of incorrect commercial placement or technical error, if the advertiser responds within five business days of receipt of an inquiry regarding non-compliance with CARU's Guidelines and the advertising is substantiated, or if within an additional five business days any violation of the Guidelines is remedied, no formal case will be opened, and the results will be published in the CARU Activity Report.

3.1 Appeal

A. When an advertiser does not agree to comply with NAD/CARU's decision on one or more issues involved in a case, the advertiser shall be entitled to panel review by the NARB. To appeal an NAD/CARU decision, an advertiser shall make a request for a referral to the NARB and specify any and all issues for its appeal in the Advertiser's Statement it prepares in response to NAD/CARU's decision pursuant to Section 2.8(A). All advertiser requests for an appeal to NARB shall be submitted together with a check made payable to the Council of Better Business Bureaus, Inc. in the amount of $1500 (for CBBB Members) or $2500 (for non-members). In such cases, NAD/CARU shall publish its decision and the Advertiser's Statement in the next Case Reports under the heading "Advertising Referred to NARB".

B. Within ten business days after the date of receipt of a copy of NAD/CARU's final case decision, the challenger may request review by the NARB by filing a letter, not to exceed 20 double spaced pages plus any relevant attachments from the NAD/CARU case record, explaining its reasons for seeking review. The letter should be addressed to the Chair, NARB, Attention: NARB Director, 70 West 36th Street, 13th Floor, New York, NY 10018. The challenger shall send a copy of this letter to the advertiser and to NAD/CARU. Within ten business days after receipt of the copy of the request for review, the advertiser may and NAD/CARU shall submit a response to the NARB Chair, not to exceed 20 double spaced pages plus any relevant attachments from the NAD/CARU case record. A copy of the advertiser's and NAD/CARU's responses shall be sent by the advertiser and NAD/CARU, respectively, to the other parties, except that portions of the case record that were submitted to NAD/CARU on a confidential basis shall not be sent to the challenger unless the advertiser consents. No other submissions shall be made to the NARB Chair. These letters, together with the relevant sections of the case record provided by the parties, will be reviewed by the NARB Chair, who within ten business days after the time for the last submission under this rule has expired shall (1) determine if there is no substantial likelihood that a panel would reach a decision different from NAD/ CARU's decision; or (2) proceed to appoint a review panel as outlined in Section 3.2. The NARB Chair shall return the record to NAD/CARU after (s)he makes his or her determination. With the exception of the time period within which a challenger must file a request for NARB review of an NAD/CARU decision, the NARB Chair reserves the right to extend the time intervals provided in this Section for good cause, notifying all interested parties of such extension.

C. When an advertiser appeals to the NARB pursuant to Section 3.1(A), or if the NARB Chair grants a complainant's request for NARB review pursuant to Section 3.1(B), the appellant shall pay a filing fee by check made payable to the Council of Better Business Bureaus, Inc. in the amount of $1500 (for a CBBB member) or $2500(for a non-member). NAD/CARU shall prepare the relevant portions of the case record and forward them to the NARB within five business days of the issuance of the press release. The NARB shall thereafter make copies of and mail the case record to the parties, except that portions of the case record that were submitted to NAD/CARU on a confidential basis shall not be sent to the challenger unless the advertiser consents. The appellant shall pay for all NARB copying and transmittal costs incurred as a result of an appeal or request for appeal pursuant to Sections 3.1 through 3.6 of these Procedures. Where the advertiser and the challenger both appeal, these costs shall be divided equally between them. In any event, NARB shall pay these costs for any party that can demonstrate economic hardship. The party appealing shall, within ten business days of receipt of the case record prepared by NAD/CARU, submit to the NARB Chair, addressed as indicated in Section 3.1(B), a letter not to exceed 30 double spaced pages explaining its position. The appellant shall send a copy of the letter to the opposing party and NAD/CARU who shall each have ten business days of receipt of which to submit a response, not to exceed 30 double spaced pages, to the NARB Chair, with copies to the other parties. No other submissions shall be made.

D. In the event that the advertiser shall exercise its right to an appeal under Section 3.1(A), the challenger shall have the right to appeal any additional issues considered by the NAD/CARU that have not been appealed by the advertiser. In the event that a challenger's request to appeal is granted by the NARB Chair under Section 3.1(B), the advertiser may appeal any additional issues considered by the NAD/CARU that have not been appealed by the challenger, notwithstanding that its time to file an appeal as of right has expired. The challenger or advertiser may exercise the right to appeal under this paragraph by submitting a letter to the NARB at the address listed in Section 3.1(B), requesting the appeal and specifying the additional issues it wishes to appeal. The cross-appellant shall also pay a filing fee by check made payable to the Council of Better Business Bureaus, Inc. in the amount of $1500 (for a CBBB member) or $2500 (for a non-member). In the case of the challenger, the letter shall be due within five business days of receipt of the final case decision with the advertiser's statement indicating the advertiser's election to appeal; in the case of the advertiser, the letter is due within five business days of the date of receipt of the NARB Chair's determination granting the challenger's request to appeal. Copies of these letters shall be sent by the issuing party to all of the other parties. The advertiser shall be deemed thereafter to be the appellant for purposes of the order of submissions.

3.2 Content of Submissions to NARB

The written submissions to NARB may not contain any factual evidence, arguments or issues that are not in the case record forwarded to NARB pursuant to Section 3.1(C) of these Procedures. In the event that the NARB Chair, after consultation with the parties, determines that a party has included evidence, facts or arguments outside this record in its submission to NARB the NARB Chair, may in his/her discretion:

(a) return the brief to the party with a request that it redact any information that NARB has identified as outside the record and resubmit its brief within 3 business days. If the party fails to submit a properly redacted brief within 3 business days it shall be deemed to have defaulted on its appeal; or

(b) remand the matter to NAD/CARU for a determination on whether the additional information constitutes "newly discovered evidence" sufficient to warrant NAD's reopening of the case under the "extraordinary circumstances" provisions of Section 3.8 of these Procedures. If NAD/CARU determines that it is not appropriate to reopen the case, NAD/CARU shall return the brief to the NARB Chair who shall handle any information outside the record in the manner provided by Section 3.2 (a) above.

3.3 Appointment of Review Panel

The Chair, upon receipt of an appeal by an advertiser, or upon granting a request to appeal by a challenger, shall appoint a panel of qualified NARB members and designate the panel member who will serve as panel Chair.

3.4 Eligibility of Panelists

An "advertiser" NARB member will be considered as not qualified to sit on a particular panel if his/her employing company manufactures or sells a product or service which directly competes with a product or service sold by the advertiser involved in the proceeding. An "agency" NARB member will be considered as not qualified if his/her employing advertising agency represents a client which sells a product or service which directly competes with the product or service involved in the proceeding. A NARB member, including a non-industry member, shall disqualify himself/herself if for any reason arising out of past or present employment or affiliation (s)he believes that (s)he cannot reach a completely unbiased decision. In addition, the Executive Director shall inform the advertiser, challenger, and the Director of NAD/CARU of their right to object, for cause, to the inclusion of individual panel members, and to request that replacement members be appointed. Requests will be subject to approval by the NARB Chair. If the NARB Chair is unable to appoint a qualified panel, (s)he shall complete the panel by appointing one or more alternate NARB member(s).

3.5 Composition of Review Panel

Each panel shall be composed of one "public" member, one "advertising agency" member, and three "advertiser" members. Alternates may be used where required. The panel will meet at the call of its chair, who will preside over its meetings, hearings and deliberations. A majority of the panel will constitute a quorum, but the concurring vote of three members is required to decide any substantive question before the panel. Any panel member may write a separate concurring or dissenting opinion, which will be published with the majority opinion.

3.6 Procedure of Review Panel

A. As soon as the panel has been selected, the Executive Director will inform all parties as to the identity of the panel members. At the same time, (s)he will mail copies of all submissions under Section 3.1(C) to each of the panel members, and will, in like manner, send them any response or request submitted by any other party or parties. Within ten days after receiving copies of the appeal, the panel members shall confer and fix the time schedule that they will follow in resolving the matter.

B. The panel, under the direction of its chair, should proceed with informality and speed. If any party to the dispute before NAD/CARU requests an opportunity to participate in the proceedings before the panel, (s)he shall be accommodated. All parties to a matter before the panel shall be given ten days notice of any meeting at which the matter is to be presented to the panel. Such notice shall set out the date and place of the meeting, and the procedure to be followed.

C. The case record in NAD, CARU and/or NARB proceedings shall be considered closed upon the publication of the "final case decision" as described in Section 2.8. No factual evidence, arguments or issues will be considered within the case record if they are introduced after that date.

D. The decision of the panel will be based upon the portion of the record before NAD/CARU which it has forwarded to the panel, the submissions under Section 3.1 (C), and any summaries of the record facts and arguments based thereon which are presented to the panel during its meeting with the parties. A party may present representatives to summarize facts and arguments that were presented to NAD/CARU, and members of the panel may question these persons. If the advertiser has declined to share any of its substantiation with the challenger, the panel will honor its request for confidentiality, even though the challenger may have instituted the appeal. The challenger will therefore be excluded from the meeting during the time when such confidential substantiation is being discussed by the panel with NAD/CARU and the advertiser. The panel will consider no facts or arguments if they are outside the facts presented to, or inconsistent with the arguments made before, NAD/CARU.

3.7 Timing and Reporting of Panel Decisions

A. When the panel has reached a decision, it shall notify the NARB Chair of its decision and the rationale behind it in writing and shall endeavor to do so within 15 business days. The Chair, upon receipt of a panel's decision, shall transmit such decision and rationale to NAD/CARU and then to the advertiser. The advertiser then has five business days to respond indicating its acceptance, rejection or any comments it may wish to make on the panel's decision and shall state whether or not it will comply with the panel's decision. Thereafter, the Chair shall notify other parties to the case of the

panel's decision, incorporating therein the response from the advertiser, and make such report public.

B. In the event that a panel has determined that an advertising claim has not been substantiated or is untruthful and/ or inaccurate, and the advertiser fails to indicate that the specific advertisement(s) will be either withdrawn or modified in accordance with the panel's findings within a time period appropriate to the circumstances of the case, the Chair will issue a Notice of Intent to the advertiser that the full record on the case will be referred to the appropriate government agency. If the advertiser fails to respond or does not agree in writing to comply with the decision of the panel within ten days of the issuance of the Notice of Intent, the Chair shall so inform the appropriate government agency by letter, shall offer the complete NARB file upon request to such government agency, and shall publicly release his/her letter. The Chair and/or Executive Director of the NARB shall report to the NARB at its annual meeting on, among other things, the number, source and disposition of all appeals received by the NARB.

3.8 Closing a Case

When a case has been concluded with the publication of a NAD/CARU decision or, when a panel has turned over a decision to the Chair, and when the Chair has executed the procedures in Section 3.6 of these "Procedures," the case will be closed and, absent extraordinary circumstances, no further materially similar complaints on the claim(s) in question shall be accepted by NAD/CARU, except as provided for in Section 4.1.

4.1 Compliance

A. After an NAD, CARU or NARB panel decision requesting that advertising be "Modified or Discontinued" is published, together with an Advertiser's Statement indicating the advertiser's willingness to comply with NAD, CARU or the NARB panel's recommendations, or an advertiser agrees to modify or discontinue advertising pursuant to §2.12 CARU Expedited Procedure, NAD/CARU, either on its own or at the behest of a challenger or a third party, may request that the advertiser report back, within five (5) business days, on the status of the advertising at issue and explain the steps it has taken to bring the advertising into compliance with the decision. Any evidence that NAD/CARU relies on as a basis for its request for a report on compliance shall be forwarded to the advertiser together with the request for a status report.

B. If, after reviewing the advertiser's response to a request for a status report on compliance, pursuant to Section 4.1, or, if the advertiser fails to respond, after NAD/CARU independently reviews the current advertising, NAD/CARU determines that the advertiser, after a reasonable amount of time, has not made a bona fide attempt to bring its advertising into compliance with NAD, CARU or the NARB panel's recommendations and/or the representations with respect to compliance made in its Advertiser's Statement, NAD/CARU may refer the file to the appropriate government agency and release information regarding the referral to the press, the public, and to the media in which the advertising at issue has appeared, and shall report the referral in the next issue of the *Case Reports.* The amount of time considered reasonable will vary depending on the advertising medium involved.

C. If NAD/CARU determines that the advertiser has made a reasonable attempt to comply with an NAD, CARU or NARB panel decision, but remains concerned about the truthfulness and accuracy of the advertising, as modified, NAD/CARU will notify the advertiser, in writing, detailing these concerns. The advertiser will have ten business days after receipt of NAD/CARU's notice to respond, unless NAD/CARU expressly agrees to extend the advertiser's time to answer. Within 15 days of receipt of the advertiser's response, NAD/CARU will make a determination regarding the advertiser's compliance, and:

(i) if NAD/CARU concludes that the advertising is in compliance with NAD, CARU or the NARB panel's decision, NAD/CARU will notify the advertiser and close the compliance inquiry;

(ii) if NAD/CARU recommends that further modifications be made, to bring the advertisement into compliance with NAD, CARU or the NARB panel's original decision, NAD/CARU will notify the advertiser of its findings and any further recommendations for compliance.

(a) If the advertiser accepts NAD/CARU's compliance findings, and agrees to discontinue the advertising at issue until it makes the further modifications recommended by NAD/CARU, NAD/CARU shall report this in the next

issue of the Case Reports and shall continue to monitor for compliance.

(b) If the advertiser indicates that it disagrees with NAD/CARU's compliance findings and refuses to make the further modifications recommended by NAD/CARU, the advertiser may, within five business days of receiving NAD/CARU's letter, submit a statement documenting its disagreement. Upon receipt of such statement, or in the event an advertiser fails to respond within five days, NAD/CARU:

(1) shall, where compliance with an NARB panel decision is at issue, refer the matter to the NARB Chair for review under Section 3.6 above; and

(2) may, where compliance with an NAD/CARU decision is at issue, refer the matter to the appropriate government agency and report this action to the press, the public, and any medium in which the advertising at issue appeared; and shall report its findings in the next issue of NAD Case Report.

GENERAL PROVISIONS

5.1 Amendment of Standards

Any proposals to amend any advertising standards which may be adopted by NARB may be acted on by a majority vote of the entire membership of the NARB at any special or regular meeting, or by written ballot distributed through the United States mails, provided that the text of the proposed amendment shall have been given to the members 30 days in advance of the voting date. Once NARB voting is completed and tallied, the NARC President shall take it to the NARC Board of Directors for their approval.

5.2 Use of Consultive Panels for Matters Other Than Truth and Accuracy, or Consistency with CARU's *Self-Regulatory Program for Children's Advertising*

From time to time, NARB may be asked to consider the content of advertising messages in controversy for reasons other than truth and accuracy, or consistency with CARU's ***Self-Regulatory Program for Children's Advertising***, or the NARC or the NARB may conclude that a question as to social issues relative to advertising should be studied. In such cases the following procedures shall be employed to deal with such issues:

5.3 Consultive Panels

The NARB Chair may consult regularly with the NARC President, the NARC Board of Directors or with the NARB to determine whether any complaints have been received, or any questions as to the social role and responsibility of advertising have been identified, which should be studied and possibly acted upon. If so, a consultive panel of five NARB members shall be appointed, in the same proportions as specified for adjudicatory panels in Section 3.4 above.

5.4 Panel Procedures

Consultive panels shall review all matters referred to them by the Chair and may consult other sources to develop data to assist in the evaluation of the broad questions under consideration. No formal inquiry should be directed at individual advertisers.

5.5 Confidentiality

All panel investigations, consultations and inquiries shall be conducted in complete confidence.

5.6 Position Paper

If a consultive panel concludes that a position paper should be prepared to summarize its findings and conclusions for presentation to the full NARB, the paper shall be written by one or more members of the panel, or by someone else under its direction. The contents of the paper should reflect the thinking of the entire panel, if possible, but any panel member may write a separate concurring or dissenting opinion, which will be published with the panel report, if it is published.

5.7 Voting on Publication

Any such report prepared by a consultive panel will be submitted to the NARB Chair, who will distribute copies to the full NARB for its consideration and possible action. The members of the NARB will be given three weeks from the date of such distribution within which to vote whether to publish the report or not. Their votes will be returned to the Executive Director of the NARB If a majority of the NARB members vote for its publication the report will be distributed to NARC for its review and will be published only if a majority of NARC vote for its publication.

5.8 Publication

If a majority of the NARB and NARC vote for publication, the paper will be published promptly with appropriate publicity.

National Advertising Division of
The Council of Better Business Bureaus
Environmental Claims Digest

- The National Advertising Division of the Council of Better Business Bureaus is an investigative arm of the U.S. advertising industry's self-regulatory process. NAD seeks to ensure that claims made in national advertising are truthful, accurate and not misleading. NAD requires that objective product performance claims made in advertising be supported by competent and reliable evidence.

- NAD cases can be initiated through staff monitoring of advertising claims or through "challenges" to advertising claims filed by competitors, consumers, or public interest groups.

- Between 1988 and 2009, NAD issued nearly 40 decisions involving a wide range of environmental, "green marketing" claims, often requiring that the claims be modified or discontinued. Excerpts from several 2009 NAD cases follow; each case involves consideration of the claims made in the advertising and labeling and the supporting evidence provided by the advertiser.

- Compliance with NAD decisions is voluntary. Nevertheless, NAD enjoys a high rate of compliance. Advertisers that either refuse to participate in the self-regulatory process or do not implement the NAD's recommendations are referred to the government.

Elanco Animal Health Division
Comfortis Chewable Tablets
Case #5134 (01.08.)

The National Advertising Division of the Council of Better Business Bureaus noted that unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers.

Claim at issue: Comfortis is "Environmentally Friendly."

NAD Findings: NAD noted that while the advertiser has a right to tout the fact that the active ingredient in its product won the 1999 EPA Presidential Green Chemistry Challenge Award, the mere existence of this award is insufficient to support the advertiser's general description of its product as "environmentally friendly." For these reasons, NAD recommended that the advertiser discontinue the claim.

Heartland Sweeteners
Ideal
Case #5125 (12.14.09)

Because the Ideal product contains sucralose, an artificial sweetener, The National Advertising Division of the Council of Better Business Bureaus recommended that the advertiser discontinue its "natural", "natural sweetener", "more than 99% natural" claims as well as its claim that Ideal is "different from the other no calorie sweeteners on the market.

Claim at issue: "What makes Ideal different than the other no calorie sweeteners on the market currently? …

NAD Findings: NAD acknowledged that the advertiser, seeking to capitalize on consumer demand for natural ingredients, intended to distinguish its product on the basis of a particular ingredient, Xylitol. NAD noted, however, that the advertiser was selling the sweetening product *as a whole.* NAD noted that the majority of product's sweetness – according to the only objectively provable testing in the record – derived from an artificial ingredient. NAD recommended that the advertiser discontinue claims distinguishing its product from other sugar substitutes on the market on the grounds that it is a natural sweetening product.

MasterNet Ltd.
Plastic Netting Products
Case #5092 (10.02.09)

The National Advertising Division of the Council of Better Business Bureaus recommended that MasterNet Ltd. discontinue certain environmental claims for its plastic netting packing products. NAD found, however, that the company could support a "more environmentally friendly" claim in a limited context.

Claim at issue: "MasterNet's 'Wattle Netting' is biodegradable"

NAD Findings: In support of its claims, the advertiser submitted a "Certificate of the Biodegradability of Plastic Products Made by MasterNet Ltd." and an Ecological Assessment for a component of MasterNet's plastic products. NAD determined that the Certificate and

the testing upon which it appears to be based do not support a finding that the plastics meet the standard for biodegradable as set forth by the Federal Trade Commission's (FTC) Green Guides or what a reasonable consumer would expect regarding the degradation of the product.

Clorox
Green Works Natural Cleaning Wipes
Case #5099 (9.25.09)

The National Advertising Division of the Council of Better Business noted its appreciation that Clorox discontinued a biodegradability claim for the Green Works Natural Cleaning Wipes and recommended the company discontinue advertising claims that suggest the product disinfects.

Challenged claims: *"99% natural and biodegradable."*
"[C]leans with the power of Clorox."

NAD's Findings: NAD noted that for most products that enter the solid waste stream, "customary disposal" typically means disposal in a landfill. Although the advertiser presented evidence in support of its biodegradability claim, Clorox asserted that it would permanently discontinue the claim as it transitions to new packaging. Regarding the implied claim that Green Works All Purpose Cleaner "disinfects," NAD determined that it would be reasonable for consumers to also perceive the "power of Clorox" to refer to disinfecting capability and recommended that the advertiser discontinue the claim and modify its advertising to avoid conveying the message that Clorox Green Works wipes disinfect.

Solo Cup Company
Bare Disposable Dinnerware
Case #5036 (6.19.09)

The National Advertising Division of the Council of Better Business Bureaus determined that the Solo Cup Company took necessary and appropriate steps in discontinuing certain "green" advertising claims for the company's Bare Disposable Plates.

Challenged claim: *"Made from bamboo and other renewable resources!"*

NAD findings: The advertiser informed NAD that it would modify all future Bare Plate advertising to remove any reference to bamboo content until the product formulation or manufacturing processes were modified so that the bamboo fibers are more readily identifiable – a course of action that NAD deemed necessary and proper given the evidence presented in the record.

Apple, Inc.
Apple Notebook Computers
Case #5013 (6.3.09)

The National Advertising Division of the Council of Better Business
Bureaus recommended that Apple Inc. modify advertising for the company's MacBook laptop computers to clarify the basis for its comparative advertising claim and avoid overstatement.

Challenged claim: *"World's Greenest Family of Notebooks."*

NAD findings: NAD reviewed supporting evidence provided by the advertiser that included the Electronic Product Environmental Assessment Tool (EPEAT) rating on which Apple relied as support for its "world's greenest family of notebooks" claim and determined that EPEAT is a recognized industry methodology to identify the "green" characteristics of a computer product.

Dispoz-O
"Enviroware" tableware products
Case #4990 (3.27.09)

The National Advertising Division of the Council of Better Business Bureaus recommended that Dispoz-O, the maker of "Enviroware" plastic tableware, discontinue certain environmental claims for the products.

Challenged claim: *"Enviroware cutlery, straws, hinged containers, plates, bowls and trays are 100% biodegradable and come with a certificate of biodegradability."*

NAD findings: NAD determined that the advertiser did not establish, by means of competent and reliable scientific evidence that its products will completely break down and return to nature within a reasonable short period of time after customary disposal. NAD found that a "certification" of a product or additive as biodegradable by a supplier is not a substitute for competent and reliable scientific evidence.

LIABILITY FOR COMMERCIAL SPEECH

Liability for Commercial Speech:

A Guide to False Advertising, Commercial Disparagement, and Related Claims

FALL 2010

Driving Business Advantage

Julia Huston, Foley Hoag LLP

This volume summarizes related bodies of law – false advertising, commercial disparagement, and defamation – that govern the conduct of business communications. It sets forth elements, damages, and related defenses for each of these causes of action and suggests ways to reduce the risk of liability in business communications, advertising, and marketing. Related claims, such as trademark infringement, copyright infringement, and interference with contractual relations, are also addressed. Risk management procedures, a checklist for compliance training, and a sample complaint, answer and jury instructions are provided.

Table of Contents

"The very first law in advertising is to avoid the concrete promise and cultivate the delightfully vague."

- Stuart Chase (1888-1985)

"Never write an advertisement which you wouldn't want your family to read. You wouldn't tell lies to your own wife. Don't tell them to mine."

- David Ogilvy (1911-1999)

"False words are not only evil in themselves, but they infect the soul with evil."

- Socrates

I. Introduction to Claims Based on Commercial Speech

The loosely related causes of action of false advertising, defamation, and commercial disparagement together have a significant impact on business communications.

False advertising is advertising that is either literally false or is likely to mislead and confuse consumers.

- *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272-73 (4th Cir. 2002).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 311 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).

Defamation encompasses the torts of libel (written defamation) and slander (spoken defamation).

- *Keohane v. Stewart*, 882 P.2d 1293, 1297 n.5 (Colo. 1994).
- *Draghetti v. Chmielewski*, 626 N.E.2d 862, 866 n.4 (Mass. 1994).

Commercial disparagement, which is closely related to defamation, concerns false statements made with the intent to call into question the quality of a competitor's goods or services and to inflict pecuniary harm.

- *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) ("A business disparagement claim is similar in many respects to a defamation claim. The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests.").
- *Allcare, Inc. v. Bork*, 531 N.E.2d 1033, 1037 (Ill. App. Ct. 1988) ("Defamation and commercial disparagement are two distinct causes of action. Defamation lies when a person's integrity in his business or profession is attacked while commercial disparagement lies when the quality of his goods or services is attacked.").

A sample complaint and sample answer for these causes of action are attached as Exhibit 6 and Exhibit 7. Sample jury instructions are attached as Exhibit 8. Other causes of action that may arise from false or misleading statements in commercial speech, such as trademark infringement and copyright infringement, are set forth in Section IV.

II. False Advertising

False advertising is prohibited by federal statute. The Lanham Act § 43(a), as amended in 1989, provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,… shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (emphasis added).

Claims for false advertising under the Lanham Act § 43(a) may be brought in either federal or state court. 28 U.S.C. § 1338(a). Because the vast majority of false advertising cases are brought in federal court, state courts generally look to federal case law for guidance regarding the interpretation of Lanham Act § 43(a).

False advertising may also be actionable under state law to the extent that it violates a specific state statute or amounts to fraud or unfair competition. Note that some states have statutes and regulations prohibiting untrue, deceptive or misleading advertising, which are enforced by the Attorney General and do not provide a private right of action for damages. In order to assert a false advertising claim under some state statutes for unfair competition, in addition to proving the elements of false advertising under Lanham Act § 43(a), a plaintiff may also have to prove that the defendant knew or should have known that its statement was false or misleading.

- *People ex. rel. Bill Lockyer v. Freemont Life Ins. Co.*, 128 Cal Rptr. 2d 463, 467-68 (Cal. Ct. App. 2002) (addressing claims for deceptive marketing techniques under California Bus. and Prof. Code 17500).

"…the vast majority of false advertising cases are brought in federal court, state courts generally look to federal case law for guidance…"

- *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 120 n. 3 (D. Mass. 1996) (addressing claims for false advertising under Mass. Gen. Laws c. 93A).

A. Elements of False Advertising

In order to prevail on a false advertising claim under the Lanham Act, a plaintiff must prove:

1. The defendant made a false or misleading statement in a commercial advertisement about its own or the plaintiff's product;
2. The deception is material (*i.e.*, it is likely to influence the purchasing decision);
3. The statement actually deceives or has the tendency to deceive a substantial segment of its audience;
4. The defendant placed the statement into interstate commerce; and
5. The plaintiff has been or is likely to be injured as a result of the statement, either by direct diversion of sales to the defendant or by a lessening of goodwill associated with the plaintiff's products.

- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272 (4th Cir. 2002).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 310- 11 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).

In some circuits, the order of the second and third elements are reversed, but the test is otherwise identical.

- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000)
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).
- *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129 (3rd Cir. 1994).

1. False or misleading statements

In order to prevail on the first prong of the false advertising test, a plaintiff must demonstrate that the defendant's statement was either literally false, literally true or ambiguous but likely to mislead or confuse consumers.

- *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 (2d Cir. 2010) (citing *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007)).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272-73 (4th Cir. 2002).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 311 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000)
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).
- *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1088-89 (7th Cir. 1994).
- *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129 (3rd Cir. 1994).

A statement can be literally false either on its face or by necessary implication. A statement is false by necessary implication if, when considered in the context in which it is presented, it implies a false message which would be recognized by the audience as readily as if it had been explicitly stated.

- *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 n.19 (2d Cir. 2010) (citing *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153, 158 (2d Cir. 2007)).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 315 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

Some courts refer to statements that are literally true but likely to mislead and confuse consumers as "impliedly false" or "implicitly false." Despite the closeness

of the terminology, such statements must be distinguished from statements that are literally false by necessary implication.

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 315 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002) (explaining distinction).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002).

If the statement can reasonably be interpreted in more than one way, and one of those ways is not literally false, then the statement cannot be literally false.

- *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 275-76 (4th Cir. 2002).
- *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000).

Although a statement may be found false or misleading by implication, the greater the degree to which the consumer is required to integrate the components of the advertisement in order to draw the false conclusion, the less likely it is that falsity will be found.

- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002).
- *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1181 (8th Cir. 1998).

Visual images as well as words can be false or misleading under Lanham Act § 43(a).

- *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 159 (2d Cir. 2007).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180-81 (8th Cir. 1998).

2. Proof of consumer reaction

If the statement is literally false, courts will grant relief without requiring evidence of consumer reaction.

- *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 (2d Cir. 2010).
- *Schering-Plough Healthcare Prods. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 512 (7th Cir. 2009).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 314- 15 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002) (summarizing cases and applying rule in damages context).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273 (4th Cir. 2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000)
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).

If the statement is literally true or ambiguous but likely to mislead and confuse consumers, the plaintiff must present evidence that consumers were actually misled or confused.

- *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112-13 (2d Cir. 2010) (citing *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007)).

"If the statement is literally true or ambiguous but likely to mislead and confuse consumers, the plaintiff must present evidence that consumers were actually misled or confused."

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 311 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000)
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999).

As a general rule, the plaintiff must show how consumers actually reacted, as opposed to how they could have reacted, to the statement. Evidence of consumer reaction is most often presented through consumer surveys.

- *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 33, 36 (1st Cir. 2000).
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 616 (6th Cir. 1999).
- *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129-30 (3rd Cir. 1994).

If the defendant made the accused statements in bad faith or with intent to harm the plaintiff, many courts will not require evidence of consumer reaction and will instead apply a presumption that consumers have been misled.

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 316 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 281 (4th Cir. 2002).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998).

Courts often do not require survey evidence at the preliminary injunction stage, if there is other evidence that consumers have been misled.

- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 276 (4th Cir. 2002).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998).

3. Commercial advertising or promotion

By its express terms, Lanham Act § 43(a)(1)(B) applies only to "commercial advertising or promotion." When confronted with statements that appear in forms other than traditional advertisements, some courts have applied a four-part test to determine whether a statement constitutes commercial advertising or promotion. The statement must be:

1. Commercial speech;
2. By a defendant who is in commercial competition with plaintiff;
3. For the purpose of influencing consumers to buy defendant's goods or services; and
4. Disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within the industry, regardless of whether the representations are made in a "classic advertising campaign" or more informal types of "promotion."

- *Podiatrist Assoc., Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 19 (1st Cir. 2003) (noting that "this test bears the imprimatur of several respected circuits").
- *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996) (finding sales presentations to constitute commercial advertising or promotion).
- *But see First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 803 (7th Cir. 2001) (expressing doubts as to test).

If the statement is not conveyed to the purchaser prior to the actual purchase, it will not constitute "advertising or promotion" within the meaning of the statute.

- *Brown v. Armstrong*, 957 F. Supp. 1293, 1302 (D. Mass. 1997), aff'd, 129 F.3d 1252 (1st Cir. 1997) (statements contained in videotape products were not advertising or promotion).
- *Gillette Co. v. Norelco Consumer Prods., Co.*, 946 F. Supp. 115, 134-35 (D. Mass. 1996) (statements contained in product package inserts were not advertising or promotion).
- *Marcyan v. Nissen Corp.*, 578 F. Supp. 485, 506-07 (N.D. Ind. 1982) (user manual did not constitute advertising).

4. Establishment claims

An "establishment" claim is a statement claiming that tests or studies prove a certain fact. In order to prove that an establishment claim is false or likely to mislead, the plaintiff may show that either (1) the defendant's tests were not sufficiently reliable to conclude

with reasonable certainty that they support the claim; or (2) the defendant's tests, even if reliable, did not support the proposition asserted by the defendant.

- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1181-82 (8th Cir. 1998).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).
- *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1090 (7th Cir. 1994).

B. Damages and Remedies for False Advertising

In order to obtain an injunction against false advertising in violation of Lanham Act § 43(a), the plaintiff must demonstrate that he or she "believes that he or she is likely to be damaged by such [advertising]." 15 U.S.C. § 1125(a)(1). Thus, evidence of specific harm is not necessary to obtain an injunction.

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 311 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000)
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 618 (6th Cir. 1999).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145-46 (9th Cir. 1997).

"…the plaintiff must demonstrate that he or she "believes that he or she is likely to be damaged by such [advertising]."… Thus, evidence of specific harm is not necessary to obtain an injunction."

In order to recover damages, unless a presumption applies, a plaintiff must show that customers were actually deceived by the false advertising and that the plaintiff was harmed as a result. Some courts presume harm where liability is based on literally false statements, false comparative advertising, or statements made in bad faith or with an intent to harm the plaintiff.

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 314-17 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000)
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 618 (6th Cir. 1999).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997).

The types of damages available for false advertising include recovery of lost profits, disgorgement of the defendant's wrongful profits, compensation for injury to the plaintiff's reputation, and compensation for any corrective advertising necessary to counter the false statements in the marketplace.

- *BASF Corp. v. Old World Trading Co. Inc.*, 41 F.3d 1081, 1092-95 (7th Cir. 1994) (affirming district court's award of $2.5 million in lost profits based on market share analysis).
- *U-Haul Int'l Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) (upholding district court's award for plaintiff's corrective advertising expenses).
- *Castrol, Inc. v. Pennzoil Quaker State Co.*, 169 F. Supp. 2d 332, 343 (D.N.J. 2001) (finding that disgorgement of profits would be a permissible remedy for false advertising when defendant's conduct was intentional and willful).

C. Defenses to False Advertising

In addition to any general defenses that may be applicable, the following specific defenses are available to a defendant in a false advertising case under Lanham Act § 43(a).

1. Opinion

A statement in an advertisement cannot be false or misleading in violation of Lanham Act § 43(a)(1)(B) if it expresses an opinion rather than a fact. In distinguishing between opinion and fact, courts in false advertising cases turn to defamation jurisprudence. *See* Section III(G)(3), above. Generally speaking, a claim that is not capable of being verified is likely to be protected as a non-actionable opinion. A statement predicting a future event is generally a non-actionable opinion, but it may be actionable if the speaker has knowledge of facts not warranting the opinion, *i.e.*, that it knew at the time the statement was made that it was false or did not have a good faith belief in the truth of what was said.

- *Photomedex, Inc. v. Irwin*, 601 F.3d 919, 931-32 (9th Cir. 2010) (finding statement predicting date on which product would be available for purchase to be actionable where product was not actually available until over a year after projected sale date, and where evidence suggested speaker knew or should have known that the predicted timeline was impossible).

- *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051-52 (2d Cir. 1995) (finding statement "guilty of misleading the American public" to be non-actionable opinion that could not be reasonably interpreted as stating provable facts).

- *Gillette Co. v. Norelco Consumer Prods., Co.*, 946 F. Supp. 115, 136-37 (D. Mass. 1996) (finding statement by razor blade manufacturer that "anything closer could be too close for comfort" constitutes opinion rather than statement of fact).

2. Puffery

A statement will not constitute false advertising if a court finds that it is mere "puffery." Courts have recognized two kinds of puffery: (1) a general statement about a product's superiority that is so vague as to be perceived as a mere expression of opinion; and (2)

"Generally speaking, a claim that is not capable of being verified is likely to be protected as a non-actionable opinion."

an exaggerated statement, often made in a blustering or boasting manner, upon which no reasonable buyer would rely. Note, however, that a claim of product superiority which is specific and measurable is not puffery.

- *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 38-39 (1st Cir. 2000) (finding statement "Compare with your detergent . . . Whiter is not possible" capable of measurement, and therefore not puffery).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 498-99 (5th Cir. 2000) (finding statement "Better Ingredients. Better Pizza.", standing alone, to be puffery).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998) (finding statements about operation of roach killer product to be insufficiently explicit or unambiguous to be actionable).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (finding "Less is More" in relation to crabgrass control product to be puffery, but "50% Less Mowing" to be too specific and measurable to constitute puffery).
- *See also Schering-Plough Healthcare Prods. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 512 (7th Cir. 2009) (collecting cases and explaining well-known examples of puffery)

The concept of puffery has been applied to negative comments made about the products of a competitor. Such negative puffery is not actionable where no reasonable consumer would rely upon the exaggerated claims.

- *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 160 (2d Cir. 2007) (finding grossly exaggerated images of competitor's television service as "unwatchably blurry, distorted, and pixelated" to be puffery).
- *Gillette Co. v. Norelco Consumer Prods., Co.*, 946 F. Supp. 115, 131 (D. Mass. 1996) (finding visual images exaggerating the pain and danger of shaving with a regular razor blade, including a swarm of bees stinging a face and animated razors that spit out flames and turn into sharp-toothed animals, to be puffery).

III. Defamation and Commercial Disparagement

A. Elements of a Defamation Claim

A party may have a claim for defamation if he or she can demonstrate that the prospective defendant has made a defamatory statement of fact, of or concerning the complaining party, that is false and causes economic harm.

- *Smith v. Maldonado*, 85 Cal. Rptr. 2d 397, 402 (Cal. Ct. App. 1999) ("Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.").

- *Dillon v. City of New York*, 704 N.Y.S. 2d 1, 5 (N.Y. App. Div. 1999) ("The elements [of defamation] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se.").

In most states, certain statements are considered defamatory on their face. Such statements constitute defamation *per se* if they impute: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct. If a statement is defamatory *per se*, harm will be presumed.

- *Dugan v. Mittal Steel USA Inc*., 929 N.E.2d 184, 187 (Ind. 2010) (statement made by plaintiff employee's supervisor that employee was "stealing time" and working on a "scheme with her boss…allegedly an attempt to defraud the Company" constituted defamation *per se*).

- *Baker v. Tremco Inc.,* 917 N.E.2d 650, 657-58 (Ind. 2009) (statement that former employee had engaged in "inappropriate sales practices" did not constitute defamation *per se* because it was too vague to conclude that it was so obviously and naturally harmful that proof of its injurious character was unnecessary).

Showing a defamatory statement to just one person is sufficient to prove publication.

- *Dube v. Likins*, 167 P.3d 93, 104-105 (Ariz. Ct. App. 2007) (two letters sent internally from university president only to post-graduate student's advisor were "published" for defamation purposes).

- *Hecht v. Levin*, 613 N.E.2d 585, 587 (Ohio 1993) ("It is sufficient that the defamatory matter is communicated to one person only, even though that person is enjoined to secrecy.").

Note that the plaintiff must also prove "fault," as described in Section III(D), below.

Even where the plaintiff is not mentioned by name, a statement is deemed to be about the plaintiff if it could reasonably be understood to refer to him or her.

- *Eyal v. Helen Broad. Corp.*, 583 N.E.2d 228, 230-31 (Mass. 1991) (plaintiff stated a claim for defamation, even though he was not expressly named in the offending news reports, because the statement that a Brookline deli owner was involved in an "Israeli mafia" cocaine operation could reasonably be understood to refer to him).

The First Amendment defines the boundaries of defamation law. Therefore, the applicable law for a defamation claim filed in a state court may include federal court decisions as well as state court decisions and statutes.

B. Defamation Defined

It is well established that a statement is "defamatory" if it tends to injure a person's reputation in the community and exposes that person to hatred, ridicule, or contempt.

- *Mercer v. Cosley*, 955 A.2d 550, 561 (Conn. App. Ct. 2008) ("A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

- *Manfredonia v. Weiss*, 829 N.Y.S.2d 508, 509 (N.Y. App. Div. 2007) ("Defamation is the making of a false statement that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'") (quoting Sydney v. MacFadden Newspaper Publ. Corp., 151 N.E. 209 (N.Y. 1926)).

Some courts note that the statement must discredit the plaintiff in the minds of any considerable, respectable class of the community.

- *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1114 (Fla. 2008) ("[A] communication is defamatory if it prejudices the plaintiff in the eyes of a 'substantial and respectable minority of the community.'")

- *Tonnessen v. Denver Publishing Co.*, 5 P.3d 959, 963 (Colo. App. 2000) ("To be defamatory, a statement need only prejudice the plaintiff in the eyes of a substantial and respectable minority of the community.")

- *Touma v. St. Mary's Bank*, 712 A.2d 619, 621 (N.H. 1998) ("To be defamatory, language must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority.")

C. Examples of Defamatory Statements

The following are examples of statements that plaintiffs have alleged defamed them:

1. Dishonesty or fraud

- *Swengler v. ITT Corp. Electro-Optical Prod. Div.*, 993 F.2d 1063, 1070- 71 (4th Cir. 1993) (applying Virginia law) (statements by terminated employee that government contractor was defrauding the government and mismanaging government funds constituted defamation).
- *Ricciardi v. Latif*, 323 N.E.2d 913, 914 (Mass. 1975) (letters sent by defendants to plaintiff's customers falsely stating that plaintiff had refused to pay for defendant's product were found defamatory).

2. Mental disorder

- *Kryeski v. Schott Glass Tech., Inc.*, 626 A.2d 595, 601 (Pa. Super. Ct. 1993) (statements that employee was "crazy" did not rise to the level of defamation, consistent with other cases where words such as "paranoid," "schizophrenic," "crazy," and "nuts" did not rise to the level of defamation).
- *Bratt v. Int'l Bus. Mach. Corp.*, 392 Mass. 508, 517, 467 N.E.2d 126, 133 (1984) (statements made by employer that plaintiff has a specified mental disorder may be defamatory).

3. Crime or immorality

- *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 769 (1986) (plaintiff businessman sued newspaper for defamation for publishing article alleging links to organized crime).
- *Prozeralik v. Capital Cities Communications, Inc.*, 626 N.E. 2d 34, 36-37 (N.Y. 1993) (prominent businessman brought suit against radio station for falsely reporting that he had been abducted and beaten due to unpaid debts to organized crime boss).

4. Injurious to business reputation

- *Costello v. Hardy*, 864 So.2d 129, 142 (La. 2004) (attorney filed defamation claim against client's mother for accusing him of legal malpractice).
- *Atlantic Mutual Ins. Co. v. J. Lamb. Inc.*, 123 Cal. Rptr. 2d 256, 270 (Cal. App. Ct. 2002) (finding that company's statements to competitor's customers that competitor's products infringed its patents were defamatory).

5. Potential for bad behavior

- *Smith v. Suburban Rests., Inc.*, 373 N.E.2d 215, 217 (Mass. 1978) (letter sent by defendant's lawyer to plaintiff – and also to the police – advising plaintiff that she was no longer permitted to enter defendant's restaurant was defamatory because the potential for bad behavior on the part of plaintiff could be inferred from the letter).

6. Careless omission of a significant fact or name in a publication

- *Mohr v. Grant*, 108 P.3d 768, 773-77 (Wash. 2005) (recognizing that omission of material facts can rise to the level of defamation, but refusing to find defamation where inclusion of material facts would not have changed the overall impression from television report that shopkeeper had caused a mentally handicapped customer to be arrested).
- *Scripps Texas Newspapers, L.P. v. Belalcazar*, 99 S.W.3d 829, 835-837 (Ct. App. Tex. 2003) (denying defendant's motion for summary judgment on defamation claim when newspaper published stories regarding medical malpractice claims and omitted the fact that earlier lawsuits against surgeon had been voluntarily dismissed).

D. Proving Fault Within a Free Speech Framework

U.S. Supreme Court jurisprudence defines the contours of defamation law within the protections of the First Amendment. To balance the right of free speech with the right to recover damages for defamation, the Supreme Court has held that a plaintiff must prove "fault" on the part of the defendant in addition to proving each of the elements described above. The burden of proof varies depending on the status of the plaintiff. If the plaintiff is a public official or public figure, he or she must prove that the defendant acted with "actual malice."

A "public official" is generally a government employee who has substantial responsibility or control over the conduct of government affairs. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). A "public figure" is an individual who has assumed a role of prominence in the affairs of society. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

A corporation can also be a public figure under certain circumstances. *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. 358, 365 (D. Mass. 1985), aff'd, 814 F.2d 775 (1st Cir. 1987) (collecting cases).

A statement is published with "actual malice" if it is published with knowledge that it is false or with "reckless disregard" as to whether it is false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). A statement is made with "reckless disregard" if it is published with serious doubts as to its truth. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

"A statement is published with 'actual malice' if it is published with knowledge that it is false or with 'reckless disregard' as to whether it is false."

Malice must be proved by clear and convincing evidence. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (1990) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

Practitioners representing clients in a defamation action should be acquainted with the following Supreme Court cases:

- *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964). The Court held that a plaintiff must prove "actual malice" to prevail in a defamation action against a public official or public figure.
- *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 133-34 (1967). The Court affirmed the actual malice standard for defamation actions brought by public figures against news organizations.
- *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). The Court held that private plaintiffs need not make the *New York Times* malice showing in actions involving media defendants; states may not impose liability without requiring some showing of fault; and a private plaintiff must prove malice to obtain presumed or punitive damages.

- *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985). The issue before the Court was whether the holding of Gertz applied to a private plaintiff with respect to a statement that is not a matter of public concern. The Court held that Gertz does not apply; thus, a private plaintiff does not have to prove malice with respect to such statements to obtain presumed and punitive damages.
- *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986). The Court held that a statement on a matter of public concern must be provable as false before there can be liability under state defamation law, at least where a media defendant is involved.
- *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990). The Court held that an "opinion" may be actionable if it implies a false assertion of fact. An excellent discussion of *Milkovich* appears in *Phantom Touring, Inc. v. Affiliated Publ'n*, 953 F.2d 724, 727-28 (1st Cir. 1992).

The Supreme Court has held that private figures are afforded greater protection than public figures under the First Amendment. State law establishes the burden of proof for a private figure plaintiff. In a majority of states, a private figure need prove only that the defendant acted with negligence. J. Thomas McCarthy; *McCarthy on Trademarks and Unfair Competition* § 27:108 at 27-249 (4th ed. 2010); *see, e.g.*, *Schrottman v. Barnicle*, 437 N.E.2d 205, 208 (Mass. 1982); *Stone v. Essex County Newspapers, Inc.* 330 N.E.2d 161, 164 (Mass. 1974).

Similarly, if the statement relates to a matter of public concern, a private plaintiff may need to prove malice to obtain presumed damages. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

In jurisdictions where private figures or matters of private concern are subject to a negligence standard, which is a majority of states, the following table shows how the burden of proof applies:

STATUS OF PLAINTIFF	BURDEN OF PROOF
Private figure	Negligence
Pervasive public figure (such as a nationally known celebrity)	Clear and convincing evidence of actual malice for almost all statements concerning the plaintiff, including statements relating to his or her personal life (sex life, drug use, etc.)
	In very limited circumstances, such as when the defendant falsely fictionalizes the plaintiff's life and presents it as the truth, negligence may apply
Limited purpose public figure (one who has thrust himself or herself into the forefront of a public controversy to influence the outcome of the issues involved)	Clear and convincing evidence of actual malice for statements concerning the plaintiff's public activities
	For other defamatory statements, negligence
Public official (but note that not all government employees are considered "public officials" for the purpose of defamation law)	Clear and convincing evidence of actual malice for statements relating to plaintiff's status as a public official, including plaintiff's fitness for public office
	For other defamatory statements, negligence

E. Elements of a Commercial Disparagement Claim

Commercial disparagement is a common law tort closely related to defamation. It has been defined as a false statement intended to call into question the quality of a competitor's goods or services in order to inflict pecuniary harm. The states have several designations for what is essentially the same tort:

"Commercial disparagement"

- *Pro Golf Mfg. Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 246 (Pa. 2002) (commercial disparagement is shown where "(1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity") (quoting Restatement (Second) of Torts § 623(A) (1977)).

- *Picker Int'l, Inc. v. Leavitt*, 865 F. Supp. 951, 964 (D. Mass 1994) (defining commercial disparagement as "a false statement intended to bring into question the quality of a rival's goods or services in order to inflict pecuniary harm").

"Business disparagement"

- *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.2d 167, 170 (Tex. 2003) ("To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff.").

"Product disparagement"

- *Teilhaber Manu. Co. v. Unarco Materials Storage*, 791 P.2d 1164 (Colo. App. 1989) ("The tort of product disparagement requires proof of the following elements: (1) a false statement; (2) published to a third party; (3) derogatory to the plaintiff's business in general; (4) through which the defendant intended to cause harm to the plaintiff's pecuniary interest, or either recognized or should have recognized that it was likely to do so; (5) with malice; (6) thus, causing special damages.")

"Trade libel"

- *Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp. 2d 1330, 1348 (M.D. Fla. 2006) (applying Florida law) ("To state a valid claim of trade libel, plaintiffs must allege: (1) a falsehood; (2) has been published, or communicated to a third person; (3) when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff; (4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and (5) special damages are proximately caused as a result of the published falsehood.").

Not every jurisdiction recognizes this tort, whatever name it may take. The courts in Illinois, in particular, raise uncertainty whether commercial disparagement is a viable cause of action.

- *Becker v. Zellner*, 684 N.E.2d 1378, 1388 (Ill. App. Ct. 1997) (finding that commercial disparagement is not a viable cause of action in the Second District of Illinois).

- *Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 702-703 (Ill. App. Ct. 2002) (noting that "it is disputed as to whether a cause of action for commercial disparagement remains viable in Illinois," and holding that even if commercial disparagement is a viable cause of action, plaintiff hot dog stand owner failed to show that defendant's television program made false and demeaning statements regarding the quality of plaintiff's hot dogs).

Tennessee is another state that casts doubt on the availability of this count.

- *Kansas Bankers Surety Co. v. Bahr Consultants, Inc.*, 69 F. Supp. 2d 1004, 1014-15 (E.D. Tenn. 1999) ("To date, disparagement of quality or trade libel has not been recognized in Tennessee as a separate cause of action.").

It is useful to distinguish corporate defamation from commercial (or product) disparagement. Defamation of a corporation injures the reputation of the corporation itself, while commercial disparagement injures the reputation of the corporation's products or services.

- *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.2d 167, 170 (Tex. 2003) ("A business disparagement claim is similar in many respects to a defamation action. The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests.").

- *Allcare, Inc. v. Bork*, 531 N.E.2d 1033, 1037-38 (Ill. App. Ct. 1988) (defendant's statements that medical supply company's president was paying bribes and that medical supply company was under investigation for fraud might constitute corporate defamation but did not constitute commercial disparagement because the quality of the company's goods and services was not attacked).

This tort shares the elements of defamation, with the notable exception that, as reflected in the cases described above, the commercial disparagement plaintiff must also prove special damages (economic loss). *See* Section III (F)(2), below.

1. Privileged statements

Statements that would otherwise constitute commercial disparagement are often protected as conditionally privileged.

- *KBT Corp., Inc. v. Ceridian Corp.*, 966 F. Supp. 369, 374 (E.D. Pa. 1997) (applying Pennsylvania law) ("A conditional privilege attaches to a commercially disparaging statement when the statement involves

some interest of the person who publishes it, some interest of the person to whom it is published or some other third person, or a recognized interest of the public.").

- *Picker Int'l, Inc. v. Leavitt*, 865 F. Supp. 951, 964 (D. Mass. 1994) (as a public policy matter, courts acknowledge that "[m]any buyers … recognize disparagement [of a rival] as non-objective and highly biased") (quoting 3 Philip Areeda & Donald F. Turner, Antitrust Law § 738c, at 281 (Little, Brown 1978)); *see also* Restatement (Second) of Torts §§ 623A, 626 (1979)).

2. Corporations as public figures

A corporation may be deemed a public figure under certain circumstances. In that event, the corporation must establish actual malice on the part of the defendant to prevail in a commercial disparagement case.

- Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.2d 167 (Tex. 2003) (Granada failed to establish actual malice arising from a Forbes magazine article discussing financial problems at several corporate subsidiaries that contained multiple misstatements and failed to distinguish among the corporations).

F. Damages and Remedies for Defamation and Commercial Disparagement

1. Damages

A plaintiff prevailing at trial in a defamation or commercial disparagement case is entitled to actual or compensatory damages.

- *Weller v. American Broadcasting Cos., Inc.*, 283 Cal. Rptr. 644, 658-659 (Cal. Ct. App. 1991) (upholding jury damages for actual injury to business and to antique dealer's reputation when television broadcast suggested that antiques dealer had knowingly sold stolen property).

- *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172 (Minn. Ct. App. 1991) (affirming compensatory damages for business defamation when competitor circulated advertisements falsely stating that plaintiff was going out of business).

According to one legal resource, in recent years there has been "an alarming trend towards high jury verdicts in defamation cases," including a record $222.7 million verdict against Dow Jones in 1997 based on a *Wall Street Journal* article (the verdict was later reduced to $22.7 million and was never paid due to subsequent case developments).

E. Gabriel Perle, John Taylor Williams & Mark A. Fischer, *Perle & Williams on Publishing Law* § 5.13, at 5-75–76 (3d ed. 2010) (discussing damages).

Actual damages may include (1) the value of the plaintiff's reputation; (2) lost business opportunities; and (3) medical expenses and other costs related to remedying emotional injuries such as mental anguish, embarrassment, and humiliation.

- *Weller v. American Broadcasting Cos., Inc.*, 283 Cal. Rptr. 644, 658-659 (Cal. Ct. App. 1991) (affirming $2.3 million in damages for injury to reputation, lost potential business, and emotional distress when television station broadcast report suggesting that antiques dealer had knowingly sold stolen property).

- *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172 (Minn. Ct. App. 1991) (upholding compensatory damages of $517,752 for loss in sales, reputation, opportunity, and business).

2. Special damages

In cases involving libel (written defamation), proof of general damages is sufficient because damages are presumed. However, in cases of slander (spoken defamation) or commercial disparagement, the plaintiff must prove special damages (economic loss) to recover a monetary award.

- *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. App. 2007) ("To prove special damages, the plaintiff must prove that the disparaging communications played a substantial part in inducing third parties not to deal with the plaintiff, resulting in a direct pecuniary loss that has been realized or liquidated, such as specific lost sales, loss of trade, or loss of other dealings.").

"… in cases of slander (spoken defamation) or commercial disparagement, the plaintiff must prove special damages (economic loss) to recover a monetary award."

- *Atlantic Mutual Insurance Co. v. J. Lamb, Inc.*, 123 Cal. Rptr. 2d 256, 270 (Cal. Ct. App. 2002) ("The plaintiff must prove in all cases that the publication has played a material and substantial part inducing others not to deal with him, and that as a result he has suffered special damages ... Usually, the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers.").

3. Presumed damages

In cases involving defamation *per se*, the plaintiff is entitled to presumed damages as a natural and probable consequence of the *per se* defamation. The plaintiff must prove the amount of those damages, however.

- *Baker v. Tremco Inc.*, 917 N.E.2d 650, 657 (Ind. 2009).

4. Retraction

Generally, retraction statutes require that the defendant be given an opportunity to retract, but do not specify timing.

- Ariz. Rev. Stat. Ann. § 12-653.02 ("The plaintiff shall serve upon the publisher at the place of publication, or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demand that the same be corrected.").

- Cal. Civ. Code § 48a(1) ("Plaintiff shall serve upon the publisher, at the place of publication or broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected.").

- Mass. Gen. Laws c. 231, § 93 ("Where the defendant in an action for libel, at any time after the publication of the libel hereinafter referred to, either before or after such action is brought, but before the answer is required to be filed therein gives written notice to the plaintiff or to his attorney of his intention to publish a retraction of the libel, accompanied by a copy of the retraction which he intends to publish, and the retraction is published, he may prove such publication, and, if the plaintiff does not accept the offer of retraction, the defendant may prove such non-acceptance in mitigation of damage.").

- Wash. Rev. Code § 9.58.040 ("In any prosecution or action for libel it shall be an absolute defense if the defendant shows that the matter complained of . . . was promptly retracted by the defendant with an equal degree of publicity upon written request of the complainant.").

5. Punitive damages

Plaintiffs must cross a high threshold to recover punitive damages.

- *Swengler v. ITT Corp. Electro-Optical Prod. Div.*, 993 F.2d 1063, 1072 (4th Cir. 1993) (applying Virginia law) ("We note that Virginia law presumes actual damages under a claim for defamation per se, but that a plaintiff must establish that the defendant made the statements with 'actual malice' before punitive damages can be recovered.").
- *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172, 176-177 (Minn. Ct. App. 1991) (upholding award of punitive damages when defendant knew that false statements in flyers suggesting that plaintiff was going out of business "created a high probability of injury to [plaintiff's] business, and yet [defendant] acted with disregard for [plaintiff's] probable injury," and noting the standard for punitive damages in Minnesota as "clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others").
- *Galarneau v. Merrill Lynch*, 504 F.3d 189, 205 (1st Cir. 2007) (applying Maine law) (even if defendant employer knew that defamatory statements would injure terminated employee, "Maine requires more where punitive damages are concerned: [Defendant's] knowledge must have motivated its statement, or its actions must have been so outrageous as to imply malice.").

Several states do not allow punitive damages.

- *Wheeler v. Green*, 593 P.2d 777, 788-89 (Or. 1979) (holding that punitive damages in defamation cases violate the Oregon constitution).
- *Spokane Truck & Dray Co. v. Hoefer*, 25 P. 1072, 1074 (Wash. 1891) (abolishing punitive damages in Washington State civil cases).
- Mass. Gen. Laws c. 231, § 93 ("In no action of slander or libel shall… punitive damages be allowed.").

6. Prior restraint

While injunctions are available in defamation and commercial disparagement cases, the willingness of courts to enter injunctions depends on the type of speech at issue. It is easier to obtain an injunction against commercial statements than against political and other types of speech.

As a rule, commercial speech garners a lower level of constitutional protection, and is accordingly subject to greater restriction, than non-commercial speech.

- *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) ("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it").

Bans on commercial statements usually take the form of permanent injunctive relief issued against statements found libelous after trial. The prior restraint doctrine can make it more difficult to obtain preliminary injunctive relief against commercial statements that are allegedly false.

- *New.Net, Inc. v. Lavasoft*, 356 F. Supp.2d 1071, 1084 (C.D. Cal. 2003) ("the question of the actual truth or falsity is not appropriate on this motion for preliminary injunctive relief," because "making predictions ex ante as to what restrictions on speech will ultimately be found permissible is hazardous and may chill protected speech") (citing *Latino Officers Ass'n, New York, Inc. v. City of New York*, 196 F.3d 458, 465 (2d Cir. 1999)).

- *Castrol v. Pennzoil Co.*, 987 F.2d 939, 949 (3d Cir. 1993) (even in context of permanent injunction, defendant is barred from publishing only statements that were found "literally false" at trial and therefore unprotected by the First Amendment).

"The prior restraint doctrine can make it more difficult to obtain preliminary injunctive relief against commercial statements that are allegedly false."

- *Cornwell v. Sachs*, 99 F.Supp.2d 695, 708-709 (E.D. Va. 2000) (preliminary injunction is available against statements shown at evidentiary hearing to be false, because "the Lanham Act's prohibition of false and misleading advertising does not arouse concerns under the free speech clause of the First Amendment").

In the non-commercial sphere, by contrast, it is more difficult to obtain an injunction preventing the publication of potentially defamatory statements.

- *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).
- *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (holding that prior restraint was not justified to guarantee a criminal defendant a fair trial, even in a highly sensationalized and publicized case).
- *Near v. State of Minnesota*, 283 U.S. 697, 716 (1931) (recognizing that injunction may be appropriate where national security is at stake).
- *Stone v. Essex County Newspapers, Inc.*, 311 N.E.2d 52, 63 (Mass. 1974) (a court will grant prior restraint only in extraordinary circumstances, such as where publication will implicate national security or the right to a fair trial.)

G. Defenses to Defamation and Commercial Disparagement

With certain statutory limitations, truth is an absolute defense to a defamation or commercial disparagement action. Other common defenses include the following:

- The statement is an opinion and therefore not actionable,
- The plaintiff is "libel proof," or
- The defendant has a conditional or absolute privilege.

1. Truth

If the plaintiff states a claim for defamation, the defendant will likely argue that the statement at issue is true.

- *Cyprien v. Bd. of Sup'rs for the Univ. of La. Sys.*, 5 So.3d 862, 867 (La. 2009) (plaintiff employee failed to establish defamation where defendant employer's statement that employee misrepresented his qualifications in his resume was true).
- *Dillon v. City of New York*, 704 N.Y.S.2d 1, 6 (N.Y. App. Div. 1999) (plaintiffs failed to establish defamation when employer stated that they had been "terminated," because the statement was true).

- *Mercer v. Cosley*, 955 A.2d 550, 562-563 (Conn. App. Ct. 2008) (plaintiff failed to prove defamation when defendant's statements were true, based on plaintiff's own admissions).

Even if a statement is true, it may be defamatory by implication if it gives a false impression.

- *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008) (recognizing a cause of action for defamation by implication).

The plaintiff has the burden of proving falsity if he or she is a public official or public figure, or the defamatory statement involves a matter of public concern.

- *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (plaintiff has burden of proving falsity if defamatory speech at issue is a matter of public concern).

- *Prozeralik v. Capital Cities Communications, Inc.*, 626 N.E.2d 34, 38 (N.Y. 1993) (well-known businessman had burden of proving that radio broadcast reporting that he had been kidnapped was false).

In most states, truth is an absolute bar to recovery.

- *Commonwealth Motor Parts Ltd. v. Bank of Nova Scotia*, 355 N.Y.S.2d 138, 141 (N.Y. App. Div. 1974) ("Truth is an absolute, unqualified defense to a civil defamation action.").

- *Stuempges v. Parke, Davis, & Co.*, 297 N.W.2d 252, 255 (Minn. 1980) ("Truth, however, is a complete defense [to defamation], and true statements, however disparaging, are not actionable.").

- *Campanelli v. Regents of the Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 897 (Cal. App. Ct. 1996) ("Truth, of course, is an absolute defense to any libel action.").

In other states, truth is a bar to recovery for defamation only if the communication is published with "good motives" and "without malice."

- *Noonan v. Staples, Inc.*, 556 F.3d 20 (1st Cir. 2009) (holding that executive's email sent to 1500 employees truthfully stating plaintiff employee was fired could have been made with actual malice sufficient to show defamation) (applying Massachusetts law and citing Mass. Gen. Laws c. 231, § 92).

- Del. Code Ann. Tit. 10, § 3919 ("In actions for damages for the writing or publishing of a libel, where the truth is pleaded and given in evidence, if it is found that the same was written or published properly

for public information, and with no malicious or mischievous motives, the court may find for the defendant.").

- *LRX, Inc. v. Horizon Assoc. Joint Venture*, 842 So. 2d 881, 886-87 (Fla. Dist. Ct. App. 2003) ("Under Florida law, truth 'is only a defense to defamation when the truth has been coupled with a good motive.'") (quoting *Lipsig v. Ramlawi*, 760 So.2d 170, 183 (Fla. Dist. Ct. App. 2000)).
- *Young v. First United Bank of Bellevue*, 516 N.W.2d 256 (Neb. 1994) ("The truth in itself and alone shall be a complete defense [to libel] unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.").

Truth is always an absolute defense to defamation if the plaintiff is a public figure or the matter is an issue of public concern.

- *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-490 (1974) ("The defense of truth is constitutionally required where the subject of the publication is a public official or public figure.").
- *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (plaintiff bears burden of proving falsity when plaintiff is a private figure but publication is of public concern).

2. Opinion

An opinion is constitutionally protected speech and therefore not actionable as defamation.

- *Teilhaber Mfg. Co. v. Unarco Materials Storage*, 791 P.2d 1164, 1167 (Colo. 1989) ("The constitutional protections afforded a defendant in a defamation action are applicable to a defendant in a product disparagement action ... In general, a statement of opinion, as opposed to a statement of fact, will be protected expression under the First Amendment.").
- *Campanelli v. Regents of the Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 894 (Cal. App. Ct. 1996) ("Even if they are objectively unjustified or made in bad faith, publications which are statements of opinion rather than fact cannot form the basis for a libel action.").

Simply couching such statements in terms of opinion does not dispel these implications; a statement couched as an opinion may be defamatory if it conveys facts that are untrue.

- *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'").

The relevant question is not whether the statement is an opinion, but rather whether it would reasonably be understood to declare or imply provable assertions of fact.

- *Franklin v. Dynamic Details, Inc.*, 10 Cal.Rptr.3d 429, 441 (Cal. Ct. App. 2004) ("Statements of opinion that imply a false assertion of fact are actionable ... The question is not strictly whether the published statement is fact or opinion. Rather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.").
- *Swengler v. ITT Corp. Electro-Optical Prod. Div.*, 993 F.2d 1063, 1071 (4th Cir. 1993) (applying Virginia law) ("Statements clearly implying the existence of facts are actionable as defamation.").

"Simply couching such statements in terms of opinion does not dispel these implications". . . "the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'"

In determining whether a statement is one of fact or opinion, the statement must be considered as a whole. Factual portions of an allegedly defamatory statement may not be evaluated for their truth or falsity in isolation; they must be considered in the context of any accompanying opinion and other stated facts.

- *Hyland v. Raytheon Tech. Servs. Co.*, 670 S.E.2d 746, 751-52 (2009) (defamation analysis requires not just analyzing factual portions of defendant's allegedly defamatory statement, but also considering the statement as a whole, including any implications that one could reasonably draw from the statement).

The Constitution protects the following types of statements as opinion:

Statements that cannot be proven false.

- *Schmalenberg v. Tacoma News, Inc.*, 943 P.2d 350, 357 (Wash. Ct. App. 1997) ("A defamation claim must be based on a statement that is provably false. A statement meets this test to the extent it falsely expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion. A statement does not meet this test to the extent it does not express or imply provable facts; necessarily, such a statement communicates only ideas or opinions.").

- *Aviation Charter, Inc. v. Aviation Research Group*, 416 F.3d 864, 868 (8th Cir. 2005) (applying Minnesota law) ("Statements about matters of public concern that are not capable of being proven true or false and statements that cannot be reasonably interpreted as stating facts are protected from defamation actions by the First Amendment.").

Statements that cannot be reasonably interpreted as stating actual facts about an individual.

- *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) ("loose, figurative or hyperbolic language" weighs against concluding that a defamatory assertion of fact was made).

- *Schmalenberg v. Tacoma News, Inc.*, 943 P.2d 350, 357 (Wash. Ct. App. 1997) ("A defamation claim must be based on a statement that is provably false. A statement meets this test to the extent it falsely expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion. A statement does not meet this test to the extent it does not express or imply provable facts; necessarily, such a statement communicates only ideas or opinions.").

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- *Phantom Touring, Inc. v. Affiliated Publ'n*, 953 F.2d 724, 727 (1st Cir. 1992) (theater critic who wrote that "the producer who decided to charge admission for that show is committing highway robbery" would be immune from liability because no reasonable reader would understand the critic to be accusing the producer of an actual crime).

Statements that, from their context, negate the impression that they are factual.

- *Jewell v. NYP Holdings*, 23 F. Supp. 2d 348, 385 (S.D.N.Y. 1998) (cartoon not actionable as defamation because "a reasonable reader would not view such a cartoon as a statement of fact; rather, given the inherent nature of a cartoon, a reasonable reader would view it as a statement of pure opinion not based on undisclosed facts").

- *Garvelink v. Detroit News*, 522 N.W.2d 883, 886-87 (Mich. App. 1994) (context of satirical editorial column about local school superintendent means that editorial "cannot reasonably be interpreted as stating actual facts about plaintiff").

Courts may state pragmatically that all circumstances are considered in determining whether a statement is an opinion.

- *Campanelli v. Regents of the Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 895 (Cal. Ct. App. 1996) ("California courts have developed a totality of the circumstances test . . . The court must put itself in the place of an average reader and decide the natural and probable effect of the statement . . . The court must look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.").

- *Phantom Touring, Inc. v. Affiliated Publ'n*, 953 F.2d 724, 727 (1st Cir. 1992) (court undertakes an independent examination of all constitutionally required factors to guard against "a forbidden intrusion on the field of free expression").

3. The libel-proof plaintiff

Even where the challenged statement is found to be false, a plaintiff may be deemed "libel-proof" and therefore unable to prevail. Defendants frequently assert this defense

against plaintiffs whose reputations are already so tarnished that they cannot be defamed. For example, a mass murderer cannot be defamed by being falsely described as a tax evader. Defendants can also assert this defense in noncriminal contexts where the defamatory statement cannot harm the plaintiff's reputation beyond the harm already caused by disclosure of the truth.

- *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742, 750-5 1 (S.D.N.Y. 1981) (electric-car maker has no libel claim against Consumer Reports for an article that truthfully reported the car's abysmal performance ratings and poor safety record but mistakenly claimed that the car failed to meet federal safety regulations; the plaintiff was libel-proof because the car's poor performance and safety record had already dented its reputation).

- *Lamb v. Rizzo*, 242 F. Supp. 2d 1032, 1037-38 (D.Kan. 2003) (applying Kansas law) (prisoner serving three consecutive life terms for kidnapping and murder was libel-proof because his criminal activity had destroyed his reputation).

- *Kevorkian v. American Medical Ass'n*, 602 N.W.2d 233, 239 (Mich. App. 1999) (well-known proponent of physician-assisted suicide was libel-proof with respect to implications of being a murderer).

4. Absolute privileges

In certain circumstances, an absolute privilege may operate as a defense and protect the maker of an otherwise defamatory statement from liability. Absolute privileges apply to certain statements made in connection with litigation or the legislative process.

a. Litigation privilege

Attorneys, parties, and witnesses participating in a judicial proceeding have an absolute privilege – sometimes referred to as the litigation privilege – to publish statements that are related to the proceeding, so long as the proceeding is contemplated in good faith.

- *Oparaugo v. Watts*, 884 A.2d 63, 79 (D.C. 2005) ("This jurisdiction, like the majority of other jurisdictions, has long recognized an absolute privilege for statements made preliminary to, or in the course of, a judicial proceeding, so long as the statements bear some relationship to the proceeding.") (quoting *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 338 (D.C. 2001)).

- *Collins v. Red Roof Inns, Inc.*, 566 S.E.2d 595, 603 (W.Va. 2002) ("Prior to the filing of a prospective judicial proceeding, a party to a dispute is absolutely privileged to publish defamatory matter about a third person who is not a party to the dispute only when

(1) the prospective judicial action is contemplated in good faith and is under serious consideration; (2) the defamatory statement is related to the prospective judicial proceeding; and (3) the defamatory matter is published only to persons with an interest in the prospective judicial proceeding.").

- *Abromats v. Wood*, 213 P.3d 966, 971 (Wyo. 2009) (statements made by crime victim to crime victim service provider for submission to court were absolutely privileged because they were made in the course of a judicial proceeding).

Statements made in a quasi-judicial proceeding are also privileged.

- *Kocontes v. McQuaid*, 778 N.W.2d 410, 424 (Neb. 2010) (statement made in letter to Board of Pardons absolutely privileged).

- *But see Hill v. Ky. Lottery Corp.*, – S.W.3d —, Nos. 2006-SC-000748-DG, 2008-SC-000380-DG, 2010 WL 1636870, at *10-11 (Ky. 2010) (statement not absolutely privileged where it was not made by the head of an agency exercising quasi-judicial and regulatory authority and was made maliciously).

The litigation privilege – although "absolute" and broad in scope – is not without limits, particularly with regard to activities preceding litigation or outside the scope of litigation.

- *Medical Informatics Eng'g, Inc. v. Orthopaedics Ne, P.C.*, 458 F. Supp. 2d 716, 728 (N.D. Ind. 2006) (applying Indiana law) ("Although Indiana Courts recognize the litigation privilege in regards to communications made in the course of judicial proceedings, they have not extended the privilege to communications made preliminary to a proposed judicial proceeding.").

- *Thompson v. Frank*, 730 N.E.2d 143, 146 (Ill. App. 2000) (absolute privilege does not apply to statements made by attorney to third parties outside the litigation).

- *Lindeman v. Lesnick*, 604 S.E.2d 55, 58-59 (Va. 2004) (absolute privilege does not apply when litigation was merely contemplated but was not pending).

- *But see Clark Co. Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 503 (Nev. 2009) (extending absolute privilege to allegedly defamatory statement made by potential party in response to threatened litigation).

b. Legislative privilege

Most states have provisions that grant absolute immunity to statements that would otherwise be defamatory made during a legislative proceeding.

- *Cooper v. Glaser*, 228 P.3d 443, 444-45 (Mont. 2010) (statement made by state legislator during session of state House of Representatives absolutely privileged).
- *Voigt v. State*, 759 N.W.2d 530, 533 (N.D. 2008) (statement made by special assistant attorney general before a legislative worker's compensation review committee was absolutely privileged because it was made during a legislative proceeding).

5. Conditional privileges

Courts have recognized a number of conditional privileges, as described below. If one of these privileges applies, the defendant is generally found not liable for statements that would otherwise be defamatory, so long as the defendant reasonably believed that the statements were true and acted in good faith. To overcome a defense involving such a privilege, the plaintiff must show an abuse of the privilege or that the statements were made with malice.

- *Kennedy v. Children's Service Soc. of Wisc.*, 17 F.3d 980, 985 (7th Cir. 1994) (applying Wisconsin law) ("A conditional privilege is abused if: (1) the defendant knows or recklessly disregards the truth; (2) the defamatory matter is published for a purpose other than that for which the privilege is given; (3) the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege; (4) the defamatory statements are not reasonably believed to be necessary to accomplish the purpose for which the publication is privileged; or (5) the publication includes unprivileged matter.").

"…the defendant is generally found not liable for statements that would otherwise be defamatory, so long as the defendant reasonably believed that the statements were true and acted in good faith."

- *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57, 62 (2nd Cir. 1993) (applying New York law) ("A plaintiff may demonstrate abuse of the privilege by proving that defendant acted (1) with common law malice, or (2) outside the scope of the privilege, or (3) with knowledge that the statement was false or with a reckless disregard as to its truth.").

Simple negligence, lack of sound judgment, or hasty action will not cause the loss of the privilege in these circumstances.

- *Jacron Sales Co., Inc. v. Sindorf*, 350 A.3d 688, 699-700 (Md. 1976) (holding that actual malice or reckless disregard of the truth is enough to defeat a conditional privilege, but not mere negligence).

However, some states require that the speaker have at least a reasonable basis for believing the truth of the defamatory statement in order to maintain the privilege.

- *Stockstill v. Shell Oil Co.*, 3 F.3d 868, 872 (5th Cir. 1993) (applying Louisiana law) (qualified privilege requires good faith and lack of malice, meaning that "the person making the statement must have reasonable grounds for believing that it is true and he must honestly believe that it is a correct statement.").

- *But see Ferguson v. Williams & Hunt, Inc.*, 221 P.3d 205 (Utah 2009) (abandoning lack-of-reasonable grounds threshold and stating that plaintiff can only show abuse of conditional privilege where statement made knowing it to be false, or acting in reckless disregard as to its falsity).

a. Employer privilege

Conditional privilege often arises in the employment context, because the courts recognize the legitimate need of employers to determine their employees' capacity to perform their duties.

- *Dillon v. City of New York*, 704 N.Y.S.2d 1, 6-7 (N.Y. App. Div. 1999) ("To the extent that memoranda are prepared for internal use in connection with an employee review, or are placed in a personnel file, or statements are made about an employee in an employment context, they are qualifiedly privileged as having been made by one person to another upon a subject in which they have a common interest.").

- *Schrader v. Eli Lilly and Co.*, 639 N.E.2d 258, 262-63 (Ind. 1994) (finding that statements by management to 1500 employees explaining why six employees were terminated were privileged).

Similarly, statements made by an employer to an employee's supervisor or coworkers are conditionally privileged if the statements were reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job.

- *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009) (statement made in course of investigating harassment complaint conditionally privileged because it concerned investigation of an employee's misconduct).
- *Nodar v. Galbreath*, 462 So.2d 803, 809-810 (Fla. 1984) (statements by student's father at school board meeting regarding teacher's performance were privileged, as "[u]nder the common law of Florida, a communication to an employer regarding his employee's performance is conditionally privileged").

A conditional privilege may also apply to statements about an employee's performance made by former employers to prospective employers, for example, in an employment reference.

- *Delloma v. Consol. Coal Co.*, 996 F.2d 168, 171-72 (7th Cir. 1993) (applying Illinois law) ("Generally, a former employer who gives a negative reference to a prospective employer holds some qualified privilege against defamation suits ... An employer may invoke a conditional privilege to respond to direct inquires by prospective employers.").
- *Trail v. Boys and Girls Clubs of Northwest Indiana*, 845 N.E. 2d 130, 136-37 (Ind. 2006) ("Indiana recognizes a qualified privilege for communications between former and prospective employers. Like privilege afforded intracompany communications, that privilege protects human resource needs by permitting former employers 'to give sincere yet critical responses to requests for an appraisal of a prospective employee's qualifications without fear of a defamation action.").

As a practical matter, however, employers often provide only basic factual information to prospective employers (such as hire and termination dates) to reduce the risk of litigation.

With regard to the publication element, courts are split on whether intra-corporate communications can constitute publication. In some states, it is a defense to publication if the statement is made between employees of a corporation, since it is considered a corporation merely "talking to itself." A growing number of states hold otherwise, however.

- *Thornton v. Holdenville Gen. Hosp.*, 36 P.3d 456, 460 (Okla. Civ. App. 2001) ("Communication inside a corporation, between its officers, employees, and agents, is never a publication for the purposes of actions for defamation.").

- *Popko v. Cont'l Cas. Co.*, 823 N.E.2d 184, 189 (Ill. App. Ct. 2005) (recognizing that a communication between employees of a corporation can constitute publication).

b. Fair reporting privilege

A report or article must be full, fair, and accurate, and made without malice to be subject to a fair reporting privilege. Statements that contain minor inaccuracies but are substantially true are privileged.

- *Howell v. Enterprise Publ'g Co., LLC*, 920 N.E.2d 1, 13 (Mass. 2010) (newspaper reports must be full, fair, and accurate to enjoy the fair report privilege, but the privilege may be vitiated by misconduct amounting to more than negligence on the newspaper's part).

- *Nichols v. Moore*, 477 F.3d 396, 399 (6th Cir. 2007) (applying Michigan law) ("If the gist, the sting, of the article is substantially true, the defendant is not liable ...").

- *Pritt v. Republican Nat. Committee*, 557 S.E.2d 853, 861-62 (W.Va. 2001), *cert. denied*, 537 U.S. 812 (2002) ("The law of libel… overlooks minor inaccuracies and concentrates upon substantial truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.").

With regard to reporting on the contents of complaints filed in court, the modern trend among courts is that such reports are absolutely privileged, regardless of malice, so long as the report is a full, fair, and accurate account of the contents of the complaint.

- *Salzano v. N. Jersey Media Group Inc.*, 993 A.2d 778 (N.J. 2010) (newspaper publisher not liable for defamation for article containing full, fair, and accurate account of a filed complaint) (collecting cases and discussing trend among courts).

c. Common interest privilege

Overlapping some of the other privileges described here, the so-called common interest privilege may apply where the publisher and the recipient have a common interest, and the communication is reasonably intended to promote it.

- *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184, 189 (Ind. 2010) (statement from plaintiff employee's supervisor to company's security chief was privileged because it was made in good faith and without abuse, as it concerned the theft of company property, a subject on which they shared a common interest and duty).

- *Nodar v. Galbreath*, 462 So.2d 803, 809-810 (Fla. 1984) (statements by student's father at school board meeting regarding teacher's performance were privileged, as "[t]he remarks of the defendant, addressed in person to a school board at a school board meeting concerning the curriculum and instruction in an English class at a public high school in which his son was enrolled and his son's difficulties with the class clearly came within the scope of the privilege based on mutuality of interest of speaker and listener").

d. Public interest privilege

A legal duty imposed for the protection of a particular class of persons carries with it an absolute or conditional privilege to make statements of a kind that are reasonably necessary to the performance of the legal duty.

- *Becker v. Kroll*, 494 F.3d 904, 927-28 (10th Cir. 2007) (applying Utah law) (statements by members of state investigatory body were privileged under Utah law concerning the making of reports required by state or federal law, and therefore would have provided immunity from suits for libel or slander, except that plaintiffs provided sufficient evidence of malice to overcome privilege).

- *Butler v. Town of Argo*, 871 So.2d 1, 23-24 (Ala. 2003) (statements made by city council member during city council meeting were privileged, stating, "In order to promote the public welfare, Alabama law has conferred upon members of legislative bodies an absolute privilege from certain causes of action stemming from performance of their legislative functions.").

- *Dexter's Hearthside Rest., Inc. v. Whitehall Co.*, 508 N.E.2d 113, 117 (Mass. App. Ct. 1987) (where the defendant was under a legal duty to report delinquent accounts to the Alcoholic Beverages Control Commission, its erroneous report regarding one of its customers was found to be conditionally privileged).

e. Credit report privilege

- *Morris v. Equivax Info. Services, LLC*, 457 F.3d 460, 471 (5th Cir. 2006) (applying Texas law) ("Reports of mercantile or other credit-reporting agencies, furnished in good faith to one having a legitimate interest in the information, are privileged.").
- *County Vanlines, Inc. v. Experian Info. Solutions, Inc.*, 317 F. Supp. 2d 383 (S.D.N.Y. 2004) (applying New York law) ("Credit investigation and reporting agencies enjoy this qualified privilege and are 'not liable for defamation unless the defamatory matter was uttered with malice or such a wanton and reckless disregard of the rights of another as is ill will's equivalent.'").

f. Law enforcement privilege

- *Williams v. Tharp*, 914 N.E.2d 756 (Ind. 2009) (statement made to law enforcement officer that a customer had "pulled a gun" inside a store was protected by qualified privilege).
- *Richmond v. Nodland*, 552 N.W.2d 586, 589 (N.D. 1996) ("Important public policy supports recognizing a qualified privilege for communications between citizens and law enforcement. In order for an investigation to be effective, there must be an open channel of communication between citizens and public officials.").
- *Fridovich v. Fridovich*, 598 So.2d 65, 69 (Fla. 1992) (holding "as a majority of the other states have held in this context, that defamatory statements voluntarily made by private individuals to the police or the state's attorney prior to the institution of criminal charges are presumptively qualifiedly privileged").

g. Competitive privilege

- *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 924 (3rd Cir. 1990) (applying Pennsylvania law) ("Where the publication on its face is directed against the goods or product of a corporate vendor or manufacturer, it will not be held libelous per se as to the corporation, unless by fair construction and without the aid of

extrinsic evidence it imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct in its business in relation to said goods or product.")

- *Picker Int'l, Inc. v. Leavit*, 865 F. Supp. 951, 964 (D. Mass. 1994) ("Generally, where the discussion involves a rival's services or product, it is not considered libelous unless it 'imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct.' . . . many buyers . . . recognize disparagement [of a rival] as non-objective and highly biased.") (quoting 3 Philip Areeda & Donald F. Turner, *Antitrust Law* § 738c, at 281 (Little, Brown 1978)); *see also* Restatement (Second) of Torts §§ 623A, 626 (1979)).

- *Polygram Records, Inc. v. Sup. Ct.*, 216 Cal.Rptr. 252 (Cal. App. Ct. 1985) (comedian's statements indicating that wine producers goods were of poor quality were not defamatory because the statements did not accuse the producer of "dishonesty, lack of integrity or incompetence nor even imply any reprehensible personal characteristic").

IV. Other Claims

A. Trademark Infringement or Dilution

The use of a trademark (such as a brand name or logo) in an advertisement or other commercial speech may give rise to a claim for trademark infringement or dilution by the trademark owner. Trademark claims may be asserted under both federal and state laws. It is not necessary for a trademark to be registered by the Patent and Trademark Office in order to be infringed or diluted.

"Trademark claims may be asserted under both federal and state laws. It is not necessary for a trademark to be registered by the Patent and Trademark Office in order to be infringed or diluted."

In order to prove trademark infringement, a trademark owner must prove that there is likely to be confusion, mistake or deception as between the parties or their respective goods and services. That is, consumers must be likely to believe that the accused goods and services are coming from the trademark owner, or are affiliated with, endorsed by, or sponsored by the trademark owner.

- 15 U.S.C. § 1125(a).
- *Audi AG v. D'Amato*, 469 F.3d 534 (6th Cir. 2006) (automobile manufacturer sued website operator for trademark infringement and dilution for use of manufacturer's trademark and logo on website to sell goods).
- *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477 (5th Cir. 2004) (vacuum cleaner manufacturer sued independent vacuum cleaner sales and repair shop for trademark infringement, dilution, and unfair competition for use of trademark in advertisement).

In evaluating whether there is a trademark infringement, most courts employ a multi-factor balancing test which considers the similarity of the marks, similarity of the goods and services, overlap in consumers, overlap in channels of trade, the existence of any actual confusion, the strength of the plaintiff's trademark, the intent of the defendant in adopting the mark, and other factors.

- *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 115 (2d Cir. 2009) (applying eight-factor test).
- *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 10 n.6 (1st Cir. 2008) (applying eight-factor test).
- *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1026 (9th Cir. 2004) (applying eight-factor test).

The use of another party's trademark constitutes fair use if the challenged use is not actually a trademark use as such, but is instead use of a descriptive word or phrase, provided that the designation is being used to fairly and accurately describe some aspect of the goods and services. Use of a party's individual name in his or her own business is also fair use, provided that the name is not being used as a trademark.

- 15 U.S.C. § 1115(b)(4).
- *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 612 (6th Cir. 2009) (applying fair use defense to use of HENSLEY, last name of trailer hitch designer, in advertising for purposes of identifying designer of products being sold).

In addition, the doctrine of nominative fair use provides that a party may use a trademark owner's mark to identify the trademark owner itself or the trademark owner's own goods and services. In determining whether nominative fair use applies, many courts consider whether there is a legitimate need to use the trademark (as opposed to some more descriptive word or phrase), whether the party used more of the trademark than was necessary to identify the trademark owner of its products (such as a logo), and whether the defendant has engaged in any other acts that would falsely suggest sponsorship or endorsement by the trademark owner.

- *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302 (9th Cir. 1992) (articulating oft-cited three-part test for nominative fair use).
- *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211 (3rd Cir. 2005) (employing variation of *New Kids* test for nominative fair use in the context of an affirmative defense to trademark infringement).
- *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 489 (5th Cir. 2008) (finding no nominative fair use where sportswear manufacturer sold t-shirts using universities' color schemes and logos in a way that improperly suggested affiliation, sponsorship, or endorsement).

Trademark dilution, in contrast to trademark infringement, requires the unauthorized use of a famous mark in a manner that is likely to blur or tarnish the famous mark in the eyes of consumers even in the absence of any likely confusion. The federal dilution statute, as amended in 2006, expressly provides that it shall be a defense to a claim of trademark dilution if the accused use is "fair use . . . , including use in connection with advertising or promotion that permits consumers to compare goods or services; or identifying, parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner." 15 U.S.C. § 1125(c)(3)(A). In order to qualify for the statutory defense, the accused use of the mark must not be used as a designation for the party's own goods or services.

- 15 U.S.C. § 1125(c)(3)(A).
- *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009) (finding CHARBUCKS name not protected as parody under federal statute where it was used as a brand for the defendant's own coffee).

The use of another's trademark for purposes of parody may be protected, even if the requirements for the statutory defense of parody are not met (because, for example, the accused mark is being used as a designation for the party's own goods or services and not just to identify the famous trademark owner).

Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252 (4th Cir. 2009) (affirming finding that CHEWY VUITON as a brand for dog toys did not dilute LOUIS VUITTON for designer goods despite inapplicability of statutory parody defense).

B. Copyright Infringement

The use of another's copyrighted material in one's own advertisement or commercial communication may give rise to a claim for copyright infringement. Copyright protects original, creative works, and may extend to corporate logos and characters as well as text and images. Copyright does not extend to any idea or method of operation, but only to the original and creative expressions of such ideas or methods. Copyright infringement occurs when a copyrighted work is copied (which may be inferred based on access to the copyrighted work plus probative similarity) and the two works are substantially similar in the eyes of an ordinary observer once the protectable elements are filtered out.

- 17 U.S.C. §§ 101, *et seq.*
- *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361-64 (1991) (publication of information copied from phone book did not constitute copyright infringement because compilation of factual data in phone book did not meet standard for obtaining copyright protection).
- Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.12 (2007) (discussing extension of copyright protection to characters).

Fair use is a defense to copyright infringement. Generally speaking, the use of a copyrighted work for purposes of criticizing, commenting upon, or parodying the work itself is likely to constitute fair use. Each case must be decided on its own facts, however, taking into account (1) the purpose and character of the use, including whether for commercial or nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the market value of the copyrighted work, including whether the copyright owner is likely to experience any diverted sales or other monetary losses.

- 17 U.S.C. § 107.
- *On Davis v. Gap, Inc.*, 246 F.3d 152, 173-76 (2d Cir. 2001) (use of photo showing individual wearing copyrighted eyewear in advertising campaign constituted copyright infringement that was not protected as a fair use).

- *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1030 (9th Cir. 2000) (use of screen shots from a video game in comparative advertising constituted fair use).

C. Interference with Contractual Rights

False or misleading statements in commercial speech may give rise to claims for interference with existing or prospective contractual relations pursuant to state law.

- *Dube v. Likins*, 167 P.3d 93, 97-103 (Ariz. Ct. App. 2007) (graduate student filed defamation and tortious interference with business expectancy claims against advisor for reporting incorrect information to the INS).

- *Franklin v. Dynamic Details, Inc.*, 10 Cal.Rptr.3d 429, 441 (Cal. Ct. App. 2004) (plaintiff alleged trade libel and interference with contractual and prospective economic relationships when defendant suggested in a series of emails that plaintiff had stolen copyrighted materials).

D. Intentional Infliction of Emotional Distress

In some circumstances, a party believed to be harmed by false or misleading statements may bring a claim for intentional infliction of emotional distress under state law.

- *Oman v. Davis School District*, 194 P.3d 956 (Utah 2008) (terminated worker sued school district for defamation and intentional infliction of emotional distress for school district's actions surrounding his termination).

- *Gunn v. Mariners Church, Inc.*, 84 Cal.Rptr.3d 1 (Cal. Ct. App. 2008) (former church member and worship director filed defamation and intentional infliction of emotional distress suit against church when he was fired for being homosexual).

E. Breach of Contract

Depending upon the relationship between the parties, false or misleading statements may give rise to claims for breach of contract.

- *Pandian v. New York Health and Hospitals Corp.*, 863 N.Y.S.2d 668 (N.Y. App. Div. 2008) (anesthesiology resident sued medical school for breach of contract and defamation when medical school submitted negative evaluation of resident to American Board of Anesthesiologists).

- *Kamaka v. Goodsill Anderson Quinn & Stifel*, 176 P. 3d 91 (Haw. 2008) (terminated attorney sued former law firm for breach of contract and defamation when she was fired after being on a leave of absence due to pregnancy and childbirth).

F. Unfair or Deceptive Practices in Violation of State Law

Claims may often be brought under state statutes prohibiting unfair and deceptive trade practices. Many states also recognize common law claims for unfair competition, misappropriation, and similar torts.

- *Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp. 2d 1330, 1338- 39 (M.D. Fla. 2006) (defendant dog trainer and military contractor brought counterclaim against former employee for, inter alia, defamation, trade libel, and misappropriation of trade secrets in violation of Florida law).

G. Violation of Federal Trade Commission Statutes and Regulations

The Federal Trade Commission (FTC) prohibits "unfair or deceptive acts or practices in or affecting commerce" and specifically prohibits "any false advertisement… for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, services, or cosmetics." 15 U.S.C. §§ 45(a)(1) & 52(a); 16 C.F.R. §§ 1.1, *et seq*. While enforcement actions may be brought by the FTC, either at its own initiative or at the request of a competitor or another aggrieved party, there is no private right of action under the statute.

"Parties may also be subject to liability for false or misleading statements that violate industry regulations."

H. Violation of Industry Statutes and Regulations

Parties may also be subject to liability for false or misleading statements that violate industry regulations. For example, the Food, Drug, and Cosmetic Act (FDCA) prohibits false or misleading statements on labels for food, drugs, and certain medical devices and other products. 21 U.S.C. §§ 301, *et seq*. There is no private right of action under the FDCA, and courts will often dismiss Lanham Act claims where they perceive that the Lanham Act is being used merely as a vehicle for enforcing the FDCA. *See* 21 U.S.C. §§ 337(a); *Photomedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010); *Schering-Plough Healthcare Prods. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 508-10 (7th Cir. 2009).

V. Forums for the Enforcement of False Advertising Claims

A company that is aggrieved by the allegedly false or misleading advertisement of a competitor has a number of options available to it, some of which are not widely known.

A. Civil Lawsuit in Federal or State Court

A lawsuit for false advertising under the Lanham Act may be brought in either federal or state court. 28 U.S.C. §§ 1331, 1338. There is a right to a jury trial, and an injunction and monetary damages are available.

B. Enforcement Action by Federal Trade Commission or State Attorney General

As an alternative to a civil lawsuit, a company may inform the Federal Trade Commission (FTC) or a state Attorney General (AG) of an allegedly false advertisement. The FTC or AG may take action against the advertiser, in which case a formal proceeding will be commenced. The FTC or AG has the discretion to commence proceedings against more than one advertiser, such as all companies within an industry that are engaged in similar advertising practices.

In an FTC enforcement proceeding, the FTC determines whether the advertisement constitutes an "unfair or deceptive acts or practices in or affecting commerce" or is "any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, services, or cosmetics." 15 U.S.C. §§ 45(a)(1) & 52(a); 16 C.F.R. §§ 1.1, *et seq.*

The FTC or AG is likely to take action if it appears that consumers, as opposed to competitors, are being harmed by the advertisement in question. The FTC is principally concerned with advertisements that are national in nature or otherwise widespread. A competitor who brings a matter to the attention of the FTC or AG is not normally entitled to participate in any resulting proceeding against a third party or receive any monetary damages.

Detailed information about enforcement proceedings by the FTC is set forth in the applicable regulations (16 C.F.R. §§ 1.1, *et seq.*) and at www.ftc.gov.

C. Enforcement Through the National Advertising Division of the Council of Better Business Bureaus

The Council of Better Business Bureaus operates several self-regulating programs relating to nationwide advertisements, principally through the National Advertising Division (NAD). The policies and procedures for NAD are established by the National Advertising Review Council (NARC). NARC also governs the Children's Advertising Review Unit (CARU), which addresses advertisements directed towards children, and the Electronic Retailing Self-Regulation Program (ERSP), which addresses direct response marketing.

Any party may file a complaint with NAD, alleging that a national advertisement is not truthful or accurate. NAD will investigate the claim and, provided that the complaint meets

certain basic criteria, commence a case against the advertiser. The advertiser and challenger each have an opportunity to make up to two submissions, which may include confidential material. If the advertiser declines to participate in the NAD process, NAD will refer the matter to the appropriate federal or state authorities (such as the Federal Trade Commission), and publicize the fact that it has done so.

NAD adheres to detailed procedures with strict deadlines, and ordinarily delivers a written decision within 60 business days of the filing date of the complaint. This accelerated procedure often allows for a case to be resolved while the accused ad campaign is still running.

At the conclusion of the case, the challenger's and advertiser's positions, NAD's decision, and a statement by the advertiser are made public. NAD decisions may be appealed to the National Advertising Review Board (NARB). The reviewing NARB panel consists of one public member, one advertising agency member, and three advertiser members. If an advertiser fails to comply with a decision of NAD or NARB, this fact will ordinarily be reported to the appropriate federal or state authorities.

Detailed information about NAD is available at www.nadreview.org.

VI. Minimizing the Risk of Liability

Advising clients on how to minimize risks associated with business communications, advertising, and public relations involves understanding the elements of each cause of action and implementing procedures to minimize the risk of unanticipated claims. This risk management process may be especially important if your client is of a type that is susceptible to liability for defamation (*e.g.*, publishers, news organizations or other media clients, advertising or public relations firms, or Internet service providers), or engages in extensive advertising activities.

However, even "low risk" clients have business groups that engage in activities that could expose their company to liability. Such activities include human resources, sales and marketing, public communications (such as advertising, press releases or newsletters), and hosting a website. Therefore, you may want to advise these clients that they should provide basic procedures and compliance training for representatives from the business groups that engage in such activities. Risk management procedures are suggested in Exhibit 1, and checklists for compliance training are provided in Exhibits 2 through 5.

VI. Treatises and Other Sources of Information

This publication is intended to provide only a brief summary of the law relating to the claims of false advertising, defamation, and commercial disparagement. The following treatises may be useful for providing a more in-depth analysis in these areas of law, and for providing further information and resources that may be useful in a particular case.

- J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:24 *et seq.* (4th ed. 2010) (concerning false advertisement).
- Gabriel Perle, John Taylor Williams & Mark A. Fischer, *Perle & Williams on Publishing Law* § 5.01 *et seq.* (3rd ed. 2010).
- Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (4th ed. 2010).
- Steven G. Brody and Bruce E.H. Johnson, *Advertising and Commercial Speech: A First Amendment Guide* (2nd ed. 2010).
- Restatement (Second) of Torts, §§ 558 *et seq*. (concerning defamation), and §§ 623A, 626 (concerning commercial disparagement).

Exhibit 1: Checklist for Risk Management Procedures

Training high-risk clients is the single most important procedure for minimizing risk. Basic training should include teaching your clients the elements of the business communications and advertising torts described in this chapter. Other procedures for minimizing risk are suggested below. Obviously, each client should develop its own procedures that take into account its business philosophy, budget and tolerance for risk.

1. Develop and implement a training program for your client, as described in Exhibits 1 through 5, to train management and high-risk departments to identify and prevent the disclosure of potentially defamatory statements.

2. Assign one person to review all public communications that contain statements about competitors. Limit the number of people who are authorized as spokespersons for the client. Make sure that they are all well-trained.

3. Send questionable material to outside counsel for review before release.

4. Include a corporate communications policy in the employee handbook.

5. Develop a policy regarding communications on the company's website, particularly if employees, customers, or the public are able to post messages on the website. Such policy should include requirements for posting content, and provide notice that the company does not review content posted on the site by third parties and reserves the right to remove any content for any reason at its sole discretion. The policy should also disclaim all liability for posting.

6. Maintain corroborating information for statements made about third parties or competitors that may be actionable (or that may result in legal action).

7. If an action for false advertising, defamation, or commercial disparagement is threatened or filed, consider publishing a retraction of the statement at issue.

8. Require all employees to sign a nondisclosure agreement prohibiting the improper disclosure of confidential information. A nondisclosure agreement safeguards a client's proprietary information generally. In addition, a nondisclosure agreement that expressly prohibits employees from improperly disclosing personnel and other sensitive information could reduce the risk of a defamation suit.

9. Obtain appropriate insurance coverage for business communications and advertising liability. Promptly report any claims to the insurer.

Exhibit 2: Checklist for Compliance Training

Basic compliance training should include teaching your clients the elements of the business communications torts described herein. The following concepts should also be part of a training program:

1. Clients should be informed that false or misleading communications may result in liability whether spoken, printed in correspondence, posted on the Internet, or published in advertising or editorial content.

2. Clients should be informed that, under certain circumstances, even truthful statements can result in liability if made with the malicious intent of injuring another party.

3. Your client's website administrator should be trained to identify suspect statements before they are published on the Internet. You may want to suggest an audit if you suspect that a client's website contains false advertising or potentially defamatory or disparaging content.

4. Clients should remind their human resources departments that even internal dissemination of potentially defamatory information about an employee may result in liability. Confidentiality is crucial to minimizing risk.

5. Clients should scrutinize statements they plan to make about competitors that could injure their competitors' contractual relations with existing customers, or cause financial loss. Sales and marketing groups in particular should be trained to identify such statements, and to request a legal evaluation if there is any question about whether the statement could constitute defamation, commercial disparagement or false advertising.

6. With respect to recognizing actionable statements made by third parties about your clients, you should remind your clients that the U.S. Constitution protects "free expression." Therefore, opinions, hyperbole, and name-calling (*e.g.*, your client is a "silly, stupid, senile bum") may be upsetting, but such statements are generally not actionable. Further, unflattering statements about your client's products or services will likely not be actionable unless the statements are literally false, are likely to mislead or confuse consumers, or allege "fraud, deceit, dishonesty, or reprehensible conduct" on the part of your client, and are likely to cause direct economic loss.

Exhibit 3: Checklist for False Advertising

1. Is the statement literally false?

2. If the statement is literally true, is it nonetheless likely to mislead and confuse a substantial number of consumers? If so, is there evidence that consumers were actually misled or confused? What would a consumer survey be likely to show?

3. Is the statement material, in that it is likely to influence purchasing decisions?

4. Will the statement be placed in interstate commerce?

5. Will the statement be sufficiently disseminated to the purchasing public for the purpose of influencing purchasing decisions (as opposed to, for example, a statement in a product insert that would only be discovered after the purchase was complete)?

6. Could a party in commercial competition with the client be injured by the statement?

7. Is the statement "puffery" (*i.e.*, an exaggeration or boast about the client's products upon which no reasonable consumer would rely, rather than a measurable claim of product superiority)?

8. Is the statement "reverse puffery" (*i.e.*, an exaggeration of the qualities of the products of the client's competitor, which is so unrealistic or playful that no reasonable consumer would take it seriously)?

9. Is the statement one of opinion rather than fact? If opinion, did the speaker have knowledge of facts not warranting the opinion?

Exhibit 4: Checklist for Defamation

1. Does the statement imply or contain any fact concerning a living individual or an existing company that is substantially false? Will the statement be "published" to one or more people, either orally or in writing?

2. Would a reasonable member of the community form a lower opinion of the individual or company as a direct result of the statement? Will the statement cause the public to avoid the individual or company? If an individual, will the statement injure his or her professional status?

3. Does the statement accuse an individual or company of dishonesty or fraud, mental disease, crime or immorality, or potential for bad behavior? Or does a statement delete important facts about an individual or company in such a way as to injure them?

4. If the statement is true but potentially damaging, what is the client's reason for publishing the statement?

5. Does the statement concern a public official or figure? Is it about a matter of public concern?

6. Is the statement an opinion? One way to tell the difference between an opinion and a fact is that an opinion cannot be proven false.

7. Does the statement accurately and fairly portray the facts of the matter? Are corroborating sources available?

8. Was the statement made in connection with a judicial or legislative proceeding?

9. If the statement was made in connection with an employment matter or a matter of public interest, was the statement made in good faith and reasonably believed to be true?

Exhibit 5: Checklist for Commercial Disparagement

1. In addition to the questions set forth on the checklist for defamation, Exhibit 4, could the publication of a statement regarding a competitor's product or service interfere with a contractual relationship with an existing customer?

2. Could the statement directly cause financial damages to a competitor?

3. Does the statement impute any of the following to a rival company: fraud, deceit, dishonesty, or reprehensible conduct?

Exhibit 6: Sample Complaint

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

ZEPHYR SECURITY SOFTWARE, INC., and JOHN ANDERSON,

Plaintiffs,

v.

SECUR-SPACE, INC., and DOUGLAS BALMY

Defendants.

Civil Action No. 10-0000

COMPLAINT AND JURY DEMAND

PARTIES

1. Plaintiff Zephyr Security Software, Inc. ("Zephyr") is a Delaware corporation with a principal place of business at 123 Dove Street, Boston, Massachusetts.

2. Plaintiff John Anderson is the founder and president of Zephyr, residing at 17 Reindeer Way, Brookline, Massachusetts.

3. Defendant Douglas Balmy is an individual residing at 89 Hedgehog Lane, Providence, Road Island. On information and belief, Balmy has also uses the alias "Code __Kid" when publishing information concerning Zephyr and Anderson.

4. Defendant Secur-Space, Inc. ("Secur-Space"), is a Delaware corporation owned by Balmy with a principal place of business at 2000 Birds Nest Street, Boston, Massachusetts.

JURISDICTION AND VENUE

5. The Massachusetts Superior Court has jurisdiction over this action pursuant to M.G.L. c. 223A, § 3 and G.L. c. 214, § 1. The amount in controversy exceeds twenty-five thousand dollars ($25,000), exclusive of interest and costs. Venue in this forum is proper pursuant to G.L. c. 223, § 1.

6. [If filed in federal court: The United States District Court for the District of Massachusetts has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1338, and has jurisdiction over state law and common law claims pursuant to the doctrine of pendant jurisdiction. [If diversity: The amount in controversy exceeds seventy-five thousand dollars ($75,000), exclusive of interest and costs. Venue in the United States District Court for the District of Massachusetts is proper under 28 U.S.C. § 1391.]]

FACTS

7. Zephyr is a local company that has been developing software for corporate security applications for over 15 years. Its premier software application is ZephyrSoft. Zephyr has developed a blue chip clientele over the years, and has won industry awards for innovation in the security services sector. Zephyr has also advised the city of Boston on matters relating to security of government offices and other public properties. Zephyr has established itself as a well-respected corporate citizen of Boston.

8. Balmy was hired by Zephyr as a computer engineer in June 2006. Zephyr terminated Balmy's employment on July 31, 2007.

9. When Anderson advised Balmy that his employment was being terminated, Balmy was visibly angry.

10. Balmy founded his own company, Secur-Space, on or about August 1, 2001.

11. On information and belief, Secur-Space develops custom security software for corporate clients. Accordingly, Secur-Space competes for the same clients as Zephyr.

12. An Internet site called Yippee! operates and maintains "message boards" concerning various topics. Users can post messages for the public to view on the Internet.

13. One Yippee! message board concerns Technology.

14. On or about September 20, 2008, a person using the alias Code_Kid published the following message on the Technology message board: "I know that John Anderson, the president of Zephyr Security Software, has a criminal past."

15. On information and belief, Balmy is the person who used the alias Code __Kid to publish said message on the Yippee! message board.

16. The statement that Anderson has a criminal past is wholly untrue.

17. On or about October 20, 2008, Balmy and Secur-Space published a full-page advertisement in the Boston Business Bee. The advertisement featured a photograph of Anderson and a headline that read: "Can You Entrust Your Building's Security to This Man?" The text below the headline read: "Zephyr's president has a criminal past. No wonder he considers himself an expert on security." The advertisement went on to compare the Secur-Space software product with Zephyr's: "Independent tests show that Secur-Space's software is three times more effective than ZephyrSoft in preventing security breaches. Doesn't your business deserve the security and peace of mind that only Secur-Space provides?"

18. The statement that Anderson, and by affiliation Zephyr, cannot be trusted to provide security products or services is wholly untrue.

19. The statement that Secur-Space's security software is three times more effective than Zephyr's software in preventing security breaches is also wholly untrue.

20. On or about November 20, 2008, Balmy, as a representative of Secur-Space, called one of Zephyr's long-term clients, Gizmo, Inc. ("Gizmo"), and informed Megan Charles, Gizmo's security advisor that, "ZephyrSoft has secret files embedded in it that make it possible for Zephyr to spy on your company."

21. The statement that ZephyrSoft has secret files embedded in it is wholly untrue.

22. The statement that Zephyr spies on Gizmo, or on any company, is also wholly untrue.

23. Three days later, Gizmo sent a registered letter informing Zephyr that it was terminating its security services contract and destroying Zephyr's software. The contract was for the use of Zephyr's software and support services, for which Gizmo paid Zephyr in excess of $100,000 annually.

COUNT I

(Defamation of John Anderson by Balmy and Secur-Space)

24. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 23, above.

25. Defendants' statements that the president of Zephyr, John Anderson, has a criminal past and cannot be trusted, are false and untrue, and defamed Anderson.

26. By publishing the statements on the Technology message board of Yippee! and in the advertisement placed in the Boston Business Bee, Defendants published defamatory statements to a wide range of persons in the public.

27. Defendants negligently published the false and defamatory statements about Anderson, causing him to suffer damages, including emotional distress and injury to his reputation.

28. Defendants published the false and defamatory statements with the knowledge that the statements were false, or with reckless disregard as to the falsity of the statements.

29. Defendants' defamatory statements injured the reputation of Anderson.

COUNT II

(Defamation of Zephyr by Balmy and Secur-Space)

30. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 29, above.

31. Defendants' statements that the president of Zephyr, John Anderson, has a criminal past and cannot be trusted, are false and untrue, and defamed Zephyr.

32 By publishing the statements on the message board of Yippee! and in the Boston Business Bee, Defendants published defamatory statements to a wide range of persons in the public via the Internet.

33. Defendants' statements that Zephyr's software has secret files embedded in it, and that Zephyr uses the files to spy on its clients, are false and untrue and defamed Zephyr.

34. By telling the statement to the security advisor at Gizmo, Megan Charles, Defendants published the defamatory statement to at least one other person.

35. Defendants negligently published the false and defamatory statements about Zephyr, causing Zephyr to suffer damages, including the monetary loss of an important and valuable client, Gizmo, and injury to Zephyr's reputation.

36. Defendants published the false and defamatory statements with the knowledge that the statements were false, or with reckless disregard as to the falsity of the statements.

37. Defendants' defamatory statements injured the reputation of Zephyr.

COUNT III

(Commercial Disparagement)

38. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 37, above.

39. Defendants' statement that Zephyr's software has secret files imbedded in it is false and untrue, and disparaged Zephyr's software product, ZephyrSoft.

40. By telling the statement to the security advisor at Gizmo, Megan Charles, Defendants published the disparaging statement to one or more people.

41. Defendants negligently published the false and disparaging statement concerning ZephyrSoft, causing a customer to regard ZephyrSoft as dangerous, and imputing deceit, dishonesty and reprehensible conduct to Zephyr.

42. Defendants' statement that Zephyr's president has a criminal past is false and untrue, and disparaged Zephyr's software product, ZephyrSoft.

43. By publishing the false and disparaging statement in the Boston Business Bee, Defendants published the disparaging statements to a wide range of persons in the public.

44. Defendants published the false and disparaging statements about ZephyrSoft, causing Zephyr to suffer special and general damages, including the monetary loss of an important and valuable client, Gizmo, and injury to the reputation of ZephyrSoft and Zephyr.

45. Defendants published the false and disparaging statement with the knowledge that the statement was false, or with reckless disregard as to the falsity of the statements.

COUNT IV

(False Advertising — Section 43(a) of the Lanham Act)

46. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 45, above.

47. The statements in Defendants' advertisement that, "Independent tests show that Secur-Space's software is three times more effective than Zephyr's software, ZephyrSoft, in preventing security breaches," is false and misleading, and misrepresented the characteristics and qualities of both Secur¬Space's and Zephyr's products.

48. The false and misleading statement in the advertisement deceived, and has a tendency to continue to deceive, a substantial segment of its intended audience.

49. The deception of the advertisement is material, and has influenced, and will continue to influence, the purchasing decisions of potential customers of Zephyr, specifically companies that plan to purchase security products and services.

50. The deceptive advertisement was published in the Boston Business Bee, a business newspaper distributed in Massachusetts and other states, and was thereby placed into interstate commerce.

51. The deceptive advertisement injured, and is likely to continue to injure, Zephyr.

52. The deceptive advertisement violates section 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125(a), which prohibits Defendants from using false, misleading, or disparaging representations of fact that misrepresent the nature, characteristics, or qualities of its own or Zephyr's products.

53. Zephyr has no adequate remedy at law.

COUNT V

54. [Other counts may include unfair competition, violation of statutes, intentional interference with contractual relations, breach of non-compete agreement, etc.]

THEREFORE, Plaintiffs respectfully request that this Court:

A. Preliminarily and permanently enjoin Defendants from publishing further defamatory statements about Zephyr, Anderson, and ZephyrSoft;

B. Enter judgment against Defendants on all counts of the Complaint;

C. Award Plaintiffs damages in an amount to be determined at trial;

D. Award Plaintiffs enhanced damages as permitted by law, plus its reasonable attorneys' fees and the costs of this action; and

E. Grant such other relief as the Court deems just and proper.

JURY DEMAND

Zephyr demands a jury trial on all triable issues.

Dated: _____

ZEPHYR SECURITY SOFTWARE, INC.
JOHN ANDERSON
By their attorney,

_____

Josephina Kermit, BBO #000001
KERMIT & KIBBLESTONE LLP
1 Winter Street
Boston, MA 02110
Tel. (617) 111-2222

Exhibit 7: Sample Answer

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

ZEPHYR SECURITY SOFTWARE, INC., and JOHN ANDERSON,

Plaintiffs,

v.

SECUR-SPACE, INC., and DOUGLAS BALMY

Defendants.

Civil Action No. 10-0000

ANSWER OF DOUGLAS BALMY

Defendant Douglas Balmy ("Balmy") in the above-captioned action answers the Complaint as follows:

PARTIES

1. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint.

3. Denied to the extent that the allegation in paragraph 3 of the Complaint alleges that Balmy uses an "alias." Otherwise, admitted.

4. Balmy admits the allegations contained in paragraph 4 of the Complaint.

JURISDICTION AND VENUE

5. Balmy admits the allegations contained in paragraph 5 of the Complaint.

6. [If filed in federal court: Balmy admits the allegations contained in paragraph 6 of the Complaint.]

FACTS

7. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint and therefore denies the same.

8. Balmy admits that he was hired by Zephyr Security Software, Inc. ("Zephyr") as a computer engineer in June 1989. Otherwise denied.

9. Balmy denies the allegations contained in paragraph 9 of the Complaint.

10. Balmy admits the allegations contained in paragraph 10 of the Complaint.

11. Balmy admits that he develops custom security software for clients. Balmy denies that he competes for the same clients as Zephyr.

12. Balmy admits the allegations contained in paragraph 12 of the Complaint.

13. Balmy admits the allegations contained in paragraph 13 of the Complaint.

14. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 14 of the Complaint and therefore denies the same.

15. Balmy denies the allegations contained in paragraph 15 of the Complaint.

16. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 16 of the Complaint and therefore denies the same.

17. Balmy admits the allegations contained in paragraph 17 of the Complaint.

18. Balmy denies the allegations contained in paragraph 18 of the Complaint.

19. Balmy denies the allegations contained in paragraph 19 of the Complaint.

20. Balmy denies the allegations contained in paragraph 20 of the Complaint.

21. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 21 of the Complaint and therefore denies the same.

22. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 22 of the Complaint and therefore denies the same.

23. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 23 of the Complaint and therefore denies the same.

COUNT I

24. Balmy incorporates by reference the answers set forth in paragraphs 1 through 23 of this Answer.

25. Balmy denies the allegations contained in paragraph 25 of the Complaint.

26. Balmy denies the allegations contained in paragraph 26 of the Complaint.

27. Balmy denies the allegations contained in paragraph 27 of the Complaint.

28. Balmy denies the allegations contained in paragraph 28 of the Complaint.

29. Balmy denies the allegations contained in paragraph 29 of the Complaint.

COUNT II

30. Balmy incorporates by reference the answers set forth in paragraphs 1 through 29 of this Answer.

31. Balmy denies the allegations contained in paragraph 31 of the Complaint.

32. Balmy denies the allegations contained in paragraph 32 of the Complaint.

33. Balmy denies the allegations contained in paragraph 33 of the Complaint.

34. Balmy denies the allegations contained in paragraph 34 of the Complaint.

35. Balmy denies the allegations contained in paragraph 35 of the Complaint.

36. Balmy denies the allegations contained in paragraph 36 of the Complaint.

37. Balmy denies the allegations contained in paragraph 37 of the Complaint.

COUNT III

38. Balmy incorporates by reference the answers set forth in paragraphs 1 through 37 of this Answer.

39. Balmy denies the allegations contained in paragraph 39 of the Complaint.

40. Balmy denies the allegations contained in paragraph 40 of the Complaint.

41. Balmy denies the allegations contained in paragraph 41 of the Complaint.

42. Balmy denies the allegations contained in paragraph 42 of the Complaint.

43. Balmy denies the allegations contained in paragraph 43 of the Complaint.

44. Balmy denies the allegations contained in paragraph 44 of the Complaint.

45. Balmy denies the allegations contained in paragraph 45 of the Complaint.

COUNT IV

46. Balmy incorporates by reference the answers set forth in paragraphs 1 through 45 of this Answer.

47. Balmy denies the allegations contained in paragraph 47 of the Complaint.

48. Balmy denies the allegations contained in paragraph 48 of the Complaint.

49. Balmy denies the allegations contained in paragraph 49 of the Complaint.

50. Balmy denies the allegations contained in paragraph 50 of the Complaint.

51. Balmy denies the allegations contained in paragraph 51 of the Complaint.

52. Paragraph 52 contains a legal conclusion to which no response is required. To the extent a response is deemed required, Balmy denies the allegations contained in paragraph 52 of the Complaint.

53. Paragraph 53 contains a legal conclusion to which no response is required. To the extent a response is deemed required, Balmy denies the allegations contained in paragraph 53 of the Complaint.

COUNT V

54. [Responses to other counts, as listed in Complaint.]

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because the allegedly defamatory or disparaging statement or statements set forth in the Complaint are statements of opinion.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because the allegedly defamatory or disparaging statement or statements are true.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because the allegedly defamatory or disparaging statement or statements are statements of opinion, which Balmy believed, as a matter of Balmy's opinion, to be true.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because the allegedly defamatory or disparaging statement or statements set forth in the Complaint are rhetorical hyperbole or puffery.

SIXTH AFFIRMATIVE DEFENSE

Some or all of Plaintiff's claims are barred by the First Amendment and the state and federal constitutional protections afforded free speech.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because Plaintiff has suffered no harm, to its reputation, its business or otherwise, as a result of the alleged defamatory or disparaging statement or statements set forth in the Complaint or as a result of any other conduct set forth in the Complaint.

EIGHTH AFFIRMATIVE DEFENSE

[Other defenses may be based on laches, estoppel, acquiescence, statute of limitations, jurisdiction, etc.]

WHEREFORE, with respect to the Complaint, Balmy respectfully requests that this Court:

A. Enter an Order dismissing the Complaint;

B. Enter judgment on behalf of Balmy on each count of the Complaint;

C. Grant Balmy his reasonable attorneys' fees and costs; and

D. Grant such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Balmy demands a jury trial on all triable issues.

Dated: _____

DOUGLAS BALMY
By his attorney,

_____

Francis X. Wigglesworth, BB0#000002
WIGGLESWORTH & WIGGLESWORTH
2 Winter Street
Boston, MA 02110
(617) 555-5555

Exhibit 8: Sample Jury Instructions

I. Defamation

A. Elements of Claim

In a claim for defamation, the plaintiff must prove by a preponderance of the evidence that the defendant has made a defamatory statement of or concerning the plaintiff. The statement must be one that was false and made publicly. It must also be a statement that damaged the plaintiff.[1] Making a defamatory statement to even one person is sufficient to prove publication.[2]

A statement is considered defamatory if it tends to injure the plaintiff's reputation in the community and exposes him or her to hatred, ridicule, or contempt.[3] You must determine if the statements alleged in this case, and the circumstances under which they were made, discredit the plaintiff in the minds of any considerable, respectable class of the community.[4]

Our judicial system works to balance the right of free speech with the right to recover damages for defamation. For that reason, the plaintiff must also prove "fault" on the part of the defendant by a preponderance of the evidence.

[If a private plaintiff: Private individuals, such as the plaintiff, are afforded greater protection than public figures under the First Amendment. In Massachusetts, a plaintiff who is a private figure need only prove that the defendant acted with negligence in making the defamatory statement.[5]]

[If the plaintiff is a public official or public figure: The burden of proof for proving fault varies depending on the status of the plaintiff. If you find that the plaintiff is a public official or a public figure, the plaintiff must prove that the defendant acted with "actual malice." A statement was published with "actual malice" if it was published with knowledge that it was false or with "reckless disregard" as to whether it was false.[6]]

[Choose the applicable instruction]:

1. The status of "public official" generally applies to government employees who have substantial responsibility or control over the conduct of government affairs;[7] or

2. The status of "public figure" applies to individuals who have assumed roles of prominence in the affairs of society.[8] A corporation may be a public figure under certain circumstances.[9]]

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1 *Cignetti v. Healy, 89 F. Supp. 2d 106 (D. Mass. 2000).*

2 *Shafir v. Steele, 431 Mass. 365, 372, 727 N.E.2d 1140, 1145 (2000).*

3 *Flotech, Inc. v. E.I. Du Pont de Nemours Co., 627 F. Supp. 358, 367 (D. Mass. 1985), aff'd, 814 F.2d 775 (1st Cir. 1987).*

4 *Flotech, Inc., 627 F. Supp. at 367.*

5 *Schrottman v. Barnicle, 386 Mass. 627, 630, 437 N.E.2d 205, 208 (1982); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 851, 330 N.E.2d 161, 164 (1974).*

6 *New York Times Co. v. Sullivan, 375 U.S. 254, 280 (1964). 7 Rosenblatt v. Baer, 383 U.S. 75, 85 (1996).*

7 *Rosenblatt v. Baer, 383 U.S. 75, 85 (1996).*

8 *Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).*

9 *Flotech, Inc., 627 F. Supp. at 365.*

B. Defenses

You may find that the defendant has one or more defenses to the claim of defamation [or commercial disparagement]. Truth is an absolute defense to a defamation [or commercial disparagement] action. If you find, by a preponderance of the evidence, that the statement is true, you must find for the defendant.

I will now explain some other defenses that may apply, including:

1. the statement is an opinion,
2. the plaintiff is "libel-proof," or
3. the defendant has a privilege.

An opinion is constitutionally protected speech, and therefore not actionable as defamation.[10] A defendant, however, cannot escape potential liability just by using the word "opinion" while asserting a factual untruth. For example, a statement couched as an opinion – "in my opinion, John Jones is a liar" – may be defamatory if it implies false and defamatory facts.[11] The relevant question for you to determine is not whether the statement is couched as an opinion, but rather whether the statement presents or implies the existence of facts that are capable of being proven true or false.[12]

In making this determination, you must consider whether the context in which the statement is published negates the impression that it is factual. You should consider all the words used, not merely a particular phrase. You should also consider any cautionary terms used by the defendant, the publication in which the statement was published, and the intended readers.[13]

If the statement presents or implies actual facts, the defense of opinion does not apply. On the other hand, if it is plain from the context of the statement that the defendant is merely expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, or that the statement is merely hyperbole or fiery rhetoric, you must find the statement to be a non-actionable opinion.[14]

Even where the challenged statement is found to be false and not an opinion, a plaintiff may be deemed "libel-proof" and therefore unable to prevail. If the plaintiff's reputation is already so tarnished by prior acts, it is possible that he or she cannot be defamed or

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10 *Flotech, Inc., 627 F. Supp at 368 (D. Mass. 1985); Cole v. Westinghouse Broad. Co., 386 Mass. 303, 306-09, 435 N.E.2d 1021, 1023- 25 (1982).*

11 *Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990).*

12 *Note that whether a statement is a fact or an opinion is a question of law to be decided by the court. However, if the statement could be understood by the average reader to be either, the issue of whether it is a fact or an opinion must be decided by the jury. Myers v. Boston Magazine Co., 380 Mass. 336, 339-40 (1980).*

13 *Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997); Phantom Touring, Inc. v. Affiliated Publ'n., 953 F.2d 724, 727 (1st Cir. 1992); Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 733-34 (1986).*

14 *Gray v. St. Martin's Press, Inc., 221 F.3d 243, 248 (1st Cir. 2000).*

disparaged. For example, in a criminal context, a mass murderer cannot be defamed by being falsely described as a tax evader.

Under certain circumstances, a privilege may apply. In such cases, the defendant is generally permitted to make statements that would otherwise be defamatory so long as the defendant reasonably believed the statement was true and acted in good faith. [Describe any privileges that are applicable to the specific facts of the case, such as the litigation privilege, employer privilege, fair reporting privilege, common interest privilege, public interest privilege, credit report privilege, law enforcement privilege, or competitive privilege.]

However, the defendant is not entitled to the benefit of the privilege if the plaintiff proves that the defendant abused the privilege or made the statement with malicious intent.

If you find that the defendant had a privilege in making [his or her] statement and did not abuse this privilege, you must find for the defendant.

The defendant has the burden of proof of establishing, by a preponderance of the evidence, any claimed defenses and privileges. If a qualified privilege is established by the defendant, the plaintiff must in turn prove, by a preponderance of the evidence, that the privilege was abused.

C. Damages

A plaintiff is entitled to damages if he or she prevails at trial in a defamation case. Actual damages may include the damage to the value of the plaintiff's reputation as determined by you, and costs, such as medical expenses, related to remedying emotional injuries such as mental anguish, embarrassment and humiliation.[15]

In cases involving slander, which is spoken defamation, the plaintiff must prove "special damages," rather than mere damage to reputation, to recover a monetary award. Special damages require economic loss.[16]

In a case of defamation, the plaintiff's recovery is limited to compensatory damages for actual injury resulting from the wrong done by the defendant. The plaintiff has the burden of proving the actual harm inflicted by the defamatory statement, which includes impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. The plaintiff may also recover specific economic harm caused by the defamation. However, punitive damages are prohibited.[17] That means you must not award damages based on an intent to punish defendant's conduct or attempt to deter future conduct.

15 *Dexter's Hearthside Rest., Inc. v. Whitehall Co., 24 Mass. App. Ct. 217, 220, 508 N.E.2d 113, 116 (1987)*

16 *Alba v. Sampson, 44 Mass. App. Ct. 311, 312, 690 N.E.2d 1240, 1242 (1998).*

17 *Mass. Gen. Laws c. 231, § 93.*

II. Commercial Disparagement

A. Elements of Claim

The plaintiff has charged the defendant with commercial disparagement. Commercial disparagement consists of a false statement made with the intent to call into question the quality of a competitor's goods or services in order to inflict economic harm on that competitor.[18]

[The elements the plaintiff must prove in a commercial disparagement action are the same as the elements of defamation.] The plaintiff must also prove, by a preponderance of the evidence, "special damages." Special damages require economic loss. Thus, the plaintiff must establish that the disparaging statement caused economic loss in order to recover damages for commercial disparagement.[19]

B. Defenses

[Same defenses as for defamation.]

C. Damages

The plaintiff is entitled to actual or compensatory damages if you find that the defendant made a disparaging statement that caused economic loss.[20] Actual damages may include the value of lost business opportunities.[21]

III. False Advertising

A. Elements of Claim

The plaintiff has charged the defendant with false advertising under Lanham Act § 43(a). In order to prevail on a false advertising claim under the Lanham Act, the plaintiff must prove, by a preponderance of the evidence:

1. the defendant made a false or misleading statement in a commercial advertisement about its own or the plaintiff's product;

2. the deception is material (*i.e.*, it is likely to influence the purchasing decision);

3. the statement actually deceives or has the tendency to deceive a substantial segment of its audience;

4. the defendant placed the statement into interstate commerce; and

5. the plaintiff has been or is likely to be injured as a result of the statement, either by direct diversion of sales to defendant or by a lessening of goodwill associated with the plaintiff's products.[22]

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18 *Picker Int'l., Inc. v. Leavitt, 865 F. Supp. 951 (D. Mass. 1994).*

19 *Flotech, Inc., 627 F. Supp. at 365 (D. Mass. 1985).*

20 *Flotech, Inc. v. E.I. Du Pont de Nemours Co., 627 F. Supp. 358, 365 (D. Mass. 1985), aff'd, 814 F.2d 775 (1st Cir. 1987).*

21 *Dexter's Hearthside Rest., Inc., 24 Mass. App. Ct. at 220.*

22 *Cashmere & Camel Hair Mfg., Inst. v. Saks Fifth Ave., 284 F.3d 302, 310-311 (1st Cir. 2002).*

If the statement is literally false or the defendant acted in bad faith to intentionally mislead consumers, the court will presume actual deception and the burden shifts to the defendant to prove that consumers were not actually deceived.[23]

B. Defenses

A statement in an advertisement cannot be false or misleading in violation of the Lanham Act if you find that it expresses an opinion rather than a fact.[24] Additionally, a statement will not constitute false advertising if you find that it is mere "puffery." Puffery is an exaggerated statement contained in an advertisement, often made in a blustering or boasting manner, on which no reasonable buyer would rely. While a general claim of product superiority which is too vague to be measured can also be puffery, a claim of product superiority that you determine to be specific and measurable is not puffery.[25]

Exaggerated negative comments made about the products of a competitor may also be considered puffery, but only if you find that no reasonable consumer would rely on the exaggerated claims.[26]

C. Damages

In order to recover damages, the plaintiff must show that customers were actually deceived by the false advertising and that the plaintiff was harmed as a result.[27] In that event, the plaintiff is entitled to compensation for the harm that it suffered.

If you find the statement was literally false, you may presume that deception has occurred, and the plaintiff is not required to prove that customers were actually deceived.[28]

If you find that the statement was literally true but misleading, and you also find that the defendant acted willfully or in bad faith or intentionally deceived the public, you may presume deception and the plaintiff is not required to prove that customers were actually deceived.[29]

If you presume deception for one of the reasons described above, the burden shifts to the defendant to prove that consumers were not actually deceived.[30]

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23 *Cashmere, 284 F.3d at 311-318.*

24 *Gillette Co. v. Norelco Consumer Prods. Co., 946 F. Supp. 115, 136-37 (D. Mass. 1996).*

25 *Clorox Co. P. R. v. Procter & Gamble Commercial Co., 228 F.3d 24, 38-39 (1st Cir. 2000).*

26 *Gillette Co., 946 F. Supp. at 131.*

27 *Brown v. Armstrong, 957 F. Supp. 1293, 1302 n.8 (D. Mass. 1997), aff'd, 129 F.3d 1252 (citing Aktiebolaget Electrolux v. Armatron Intl., Inc., 999 F.2d 1, 5 (1st Cir. 1993)).*

28 *Cashmere & Camel Hair Mfg., Inst. v. Saks Fifth Ave., 284 F.3d 302, 310-311 (1st Cir. 2002).*

29 *Cashmere, 284 F.3d 316-18.*

30 *Cashmere, 284 F.3d 318.*

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