Federal Trade Commission

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I. Introduction

Good morning. Thanks to the National Advertising Division and Lee Peeler for inviting me to give today's keynote address. It is a pleasure to be here. Two years ago, I spoke at this event and emphasized national advertising cases as a high priority for the Bureau of Consumer Protection. Since then, we've been busy. National advertising cases remain a high priority, and the FTC has been quite aggressive in this area, bringing numerous, high-profile cases. Let me start by highlighting a few of them.

[1] The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

II. National Advertising Cases

I'd like to begin with a case that we've just announced this morning against Phusion Projects, the makers of the fruit-flavored beer, Four Loko.[2] Four Loko is sold in 23.5 ounce non-resealable cans that contain 11-12% alcohol by volume, leading to its street name, "Blackout in a Can."

The Commission's complaint alleges that the company represented that Four Loko contains alcohol equivalent to one or two regular 12 ounce beers and can safely be consumed in its entirety on a single occasion. In fact, however, a 23.5 ounce can of Four Loko contains the alcohol equivalent of four to five regular beers – an amount that one should not drink in one sitting. Indeed, the complaint emphasizes that consuming a single can of Four Loko on a single occasion constitutes "binge drinking," which is defined by health officials as men drinking five (and women drinking four) or more standard drinks in about two hours. Drinking a single can of Four Loko typically raises a person's blood alcohol concentration to 0.08 percent or more, resulting in acute intoxication that can be harmful for a variety of reasons, including impaired brain function resulting in poor judgment, reduced reaction time, loss of balance and motor skills, and slurred speech.

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[2] *See* FTC Press Release, *FTC Requires Packaging Changes for Fruit-Flavored Four Loko Malt Beverage* (Oct. 3, 2011), *available at* http://www.ftc.gov/opa/2011/10/fourloko.shtm.

The proposed order prohibits Phusion from misrepresenting the alcohol content of its beer. The order also requires that containers of Four Loko – and similar supersized flavored beers that Phusion sells – be resealable and contain an adequate disclosure of alcohol content in terms of equivalence to regular beers. This disclosure is important so parents know the alcoholic content of these beverages.

Today's announcement about Phusion follows last week's announcement about the FTC's case against Reebok relating to claims for its "toning shoes." Over the past few years, ads for toning shoes proliferated. Unlike traditional shoes that are designed to provide support, toning shoes are designed to create slight instability, and some companies have claimed that this instability causes the muscles to work harder to stabilize the body, resulting in benefits such as muscle toning, shaping, and strengthening. Sales of the shoes skyrocketed, and by 2010, it was reported that they were approaching $1 billion.

Not surprisingly, Commission staff noticed these ads and wondered whether the toning and strengthening claims were substantiated. Our suspicions proved accurate; the claims exceeded the science. Just last week, Reebok International agreed to pay $25 million to settle Commission allegations that the company

violated Section 5 of the FTC Act by making unsubstantiated toning and strengthening claims for its EasyTone and RunTone shoes.[3]

The Commission also alleged that Reebok made false claims that its EasyTone shoes were 11 percent more effective than non-toning shoes for strengthening the hamstring and calf muscles, and 28 percent more effective for strengthening the glutes. In addition to the $25 million – which is one of the Commission's largest settlements in an advertising case – the Reebok order provides strong injunctive relief, including requiring at least one – not two, but one – clinical study to substantiate any strengthening or quantified muscle toning claims for any footwear or apparel that purports to improve or increase muscle tone, strength, or activation.

And if special sneakers won't improve your rear view, how about a skin cream? Several months ago, the Commission announced a $900,000 settlement with Beiersdorf, Inc., the makers of Nivea brand skin care products, to settle claims that regular use of its Nivea My Silhouette! skin cream can significantly reduce consumers' body size.[4]

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[3] *See* FTC Press Release, *Reebok to Pay $25 Million in Consumer Refunds to Settle FTC Charges of Deceptive Advertising of EasyTone and RunTone Shoes* (Sept. 28, 2011), *available at* http://www.ftc.gov/opa/2011/09/reebok.shtm.

[4] *See* FTC Press Release, *FTC Settlement Prohibits Marketer from Claiming that Nivea Skin Cream Can Help Consumers Slim Down* (Jun. 29, 2011), *available at* www.ftc.gov/opa/2011/06/beiersdorf.shtm.

In addition to television ads showing women fitting into their old skinny jeans, the complaint cited the company's purchase of sponsored search results from Google so that when consumers searched on the words "stomach fat," "nivea slim silhouette," or "thin waist," they found Beiersdorf ads, of course implying that Nivea My Silhouette! could tone their stomachs, thin their waists, and help them slim down. These are the kinds of claims that, when made for dietary supplements, have been a staple of law enforcement actions for decades. The Commission saw no reason a skin cream should be held to a different standard.

The injunctive relief in the Beiersdorf case is similar to the strengthened relief you have been seeing lately in Commission health settlements: it bars Beiersdorf from claiming that any product applied to the skin causes substantial weight or fat loss or a substantial reduction in body size; prohibits the company from claiming that any drug, dietary supplement, or cosmetic causes weight or fat loss or a reduction in body size, unless the claim is backed by two randomized, double-blind, placebo-controlled human clinical studies; and it requires that any claim regarding the health benefits of any drug, dietary supplement, or cosmetic be backed by competent and reliable scientific evidence.

Another notable national advertising case in the past year involved claims by The Dannon Company for its Activia yogurt and DanActive dairy drink.[5] I am sure you remember the massive Dannon national ad campaign featuring Jamie Lee Curtis that claimed that Activia could relieve temporary irregularity and help with "slow intestinal transit time." In some Activia ads, Jamie Lee Curtis told viewers that "87% of this country suffers from digestive issues like occasional irregularity" and Activia can help. The narrator stated, "With the natural culture Bifidus Regularis, Activia eaten every day is clinically proven to help regulate your digestive system in two weeks."

The FTC alleged that Dannon did not have the evidence to back up the claim that eating one serving of Activia a day relieves temporary irregularity. Instead, the evidence suggested that you really need to love eating yogurt to obtain this benefit – no less than three servings a day! The FTC's order, therefore, prohibits Dannon from claiming that Activia can relieve temporary irregularity unless the ads clearly convey this fact.

The Commission also challenged health claims for DanActive, a probiotic dairy drink. According to the FTC's complaint, Dannon claimed that DanActive

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[5] *See* FTC Press Release, *Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink* (Dec. 15, 2010), *available at* www.ftc.gov/opa/2010/12/dannon.shtm.

was clinically proven to reduce the likelihood of getting a cold or the flu. The FTC alleged that Dannon didn't have the science to back up its promises, making the company's cold or flu claim unsubstantiated and the "clinically proven" claim false.

The FTC worked in close coordination with 39 state attorneys general, who simultaneously announced that Dannon had agreed to pay the states $21 million to resolve their investigations.

And the fifth recent national advertising case I would like to discuss — involving the Halo vacuum — began as a referral from the National Advertising Division. We follow the NAD's work closely and support the NAD process. So we take these referrals seriously. Initially, when NAD referred the matter to the FTC, the company marketing the Halo vacuum went out of business, so we sent a closing letter identifying the problematic claims NAD had referred and closing our investigation because the product had been taken off the market. But then Oreck Corporation acquired the rights to market the Halo vacuum and went ahead making the same kinds of claims NAD had found unsubstantiated.

Naturally, that didn't go unnoticed; so we opened an investigation of Oreck. In short, Oreck touted the Oreck Halo vacuum– as well as the Oreck ProShield Plus portable room air cleaner – as "flu fighters" that could "help stop the flu on

virtually any surface and in the air in your home."[6] One infomercial stated that "[t]he Oreck Halo has killed up to 99.9 percent of bacteria exposed to its light in one second or less," and that the vacuum's light chamber "has been tested and shown to kill up to 99.9 percent of certain common germs, plus dangerous pathogens like E. Coli and MRSA."

The FTC's complaint alleged that the company's ads misrepresented that, through normal use, the Halo and ProShield Plus would substantially reduce the risk of ailments caused by bacteria, viruses, molds, and allergens — like colds, flu, asthma, and allergy symptoms.

In addition, the ads allegedly deceptively claimed that the Halo would eliminate all or virtually all common germs and allergens found on floors and that the ProShield Plus would eliminate all or virtually all airborne particles from a typical room. The complaint also charged that the company's statements of clinical proof were false.

To settle the FTC's lawsuit, Oreck agreed — among other things — not to make claims that its vacuums and air cleaning products could prevent illnesses caused by bacteria, viruses, molds, or allergens unless it has competent and reliable

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[6] *See* FTC Press Release, *FTC Settlement Requires Oreck Corporation to Stop Making False and Unproven Claims That Its Ultraviolet Vacuum and Air Cleaner Can Prevent Illness* (Apr. 7, 2011), *available at* www.ftc.gov/opa/2011/04/oreck.shtm.

scientific evidence. That same standard will apply to future claims about the health benefit of any other product. And given the company made the same claims that had been the subject of the NAD referral and our closing letter, the order requires Oreck to pay $750,000 in redress.

III. Challenging Deceptive Online Commerce

Another continuing priority for the Commission is rooting out deception and fraud on the Internet. We are, as best we can, trying to clean up commerce on the Internet to level the playing field for legitimate companies that play by the rules. As fraud artists become increasingly clever and tech-savvy, the Commission has to counter appropriately.

Not too long ago, FTC staff noticed a flood of websites masquerading as news outlets reporting on investigations into acai berry weight loss products. On each website, this purported "investigation" showed that the reporter lost twenty-five pounds in four weeks by taking the acai berry supplement, in combination with another supplement, and without changing her diet or exercise habits. The websites featured the logos of national media, contained follow-up comments posted by "satisfied" consumers, and appeared to the average consumer to be legitimate.

As Commission staff started to investigate, however, we quickly realized that we were dealing with a sprawling affiliate marketing operation; that is, that the websites were advertising the products of third-party merchants. If consumers clicked on links placed on an affiliate's website, they were taken to a merchant's website where they could purchase products or sign up for a free trial, and the affiliate would then get a commission from the merchant.

Rather than bringing an individual case or two, we amassed resources and in April, announced the filing of ten lawsuits in federal courts across the United States against the operators of these fake news websites.[7] The FTC alleged that nearly everything else about these websites was fake, including the weight loss claims. And to help online shoppers spot news scams like this, the FTC issued a consumer alert, "THIS JUST IN: Fake News Sites Promote Bogus Weight Loss Benefits of Acai Berry Supplements."[8] These cases are all in active litigation with the goal of permanently ending the practices, stopping these affiliates from profiting from their deception, and assisting victimized consumers.

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[7] *See* FTC Press Release, *FTC Seeks to Halt 10 Operators of Fake News Sites from Making Deceptive Claims About Acai Berry Weight Loss Products* (Apr. 19, 2011), *available at* www.ftc.gov/opa/2011/04/fakenews.shtm.

[8] *Available at* www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt197.shtm.

Another recent – and massive – case that the Commission filed to help combat Internet trickery is our pending action against Jesse Willms and others.[9] Willms and the companies that he controls allegedly raked in more than $467 million from consumers in the US, Canada, UK, Australia, and New Zealand through an elaborate scheme of false product claims, unauthorized celebrity endorsements, forced upsells, undisclosed terms and conditions, unauthorized charges, and ruses designed to evade the credit card industry's risk management system. Willms and his co-defendants used negative options to deceptively market a host of bogus products and services, including acai berry weight loss pills, colon cleansers, teeth whiteners, and penny auctions. The FTC worked closely with Canadian law enforcement, including the Alberta Partnership Against Cross Border Fraud, in investigating this international scheme.

I am delighted to report that just a few weeks ago, the district court entered a preliminary injunction, finding that the FTC is likely to succeed on the merits of every count of the complaint, and that the FTC demonstrated that the defendants have moved funds offshore for what may be an improper purpose. The Court's order, in addition to freezing the assets of the lead defendant Jesse Willms and the

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[9] *See* FTC Press Release, *FTC Charges Online Marketers with Scamming Consumers out of Hundreds of Millions of Dollars with 'Free' Trial Offers* (May 17, 2011), *available at* www.ftc.gov/opa/2011/05/jessewillms.shtm.

companies he controls, bans all the defendants from engaging in any negative option or continuity plan marketing.[10]

IV. Other Significant Advertising Developments

During my final few minutes, I want to briefly touch on a number of significant victories and noteworthy developments. Back in 2004, the FTC brought an action against Bronson Partners and others, challenging false and unsubstantiated weight-loss claims that defendants made for their Chinese Diet Tea.[11] Just a month and a half ago – after nearly seven years of litigation – the Second Circuit affirmed the District Court's permanent injunction in that case.[12] The defendants appealed both the district court's power to award financial remedies and the formula it used to calculate them, arguing that they should be allowed to deduct from their $1.9 million in sales the amount they paid for things like advertising. The Court's eloquent response:

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[10] The FTC has brought several other cases to combat Internet scams. For example, the FTC challenged the massive iWorks enterprise that lured consumers into "trial" memberships for bogus government-grant and money-making schemes, and then repeatedly charged monthly fees without consumers' consent. *See* FTC Press Release, *Court Freezes Assets of Massive Internet Enterprise in Alleged Billing Scheme* (Jan. 27, 2011), *available at* http://www.ftc.gov/opa/2011/01/iworks.shtm.

[11] *See* FTC Press Release, *FTC Launches "Big Fat Lie" Initiative Targeting Bogus Weight-loss Claims* (Nov. 9, 2004), *available at* www.ftc.gov/opa/2004/11/bigfatliesweep.shtm.

[12] *Available at* www.ftc.gov/os/caselist/0423115/110819bronsondecision.pdf.

> Bronson seeks to deduct from its revenue not the (negligible) costs of the products that it fraudulently sold, but the (substantial) costs of placing its fraudulent advertisements. This argument, equivalent to an armed robber's seeking to deduct the cost of his gun from an award of restitution, could stand with the classic patricide who claims mercy as an orphan as an illustration of the concept of chutzpah.

In a detailed opinion affirming the $1.9 million order, the Second Circuit concluded that Section 13(b) of the FTC Act allows courts to award both injunctive relief and monetary relief. The opinion also explains how aspects of the *Verity* decision apply — and don't apply — to the facts of this case.

And turning briefly to the endorsement guides, I would like to mention a particularly interesting aspect of the Commission's litigation against Russell Dalbey, the CEO and founder of the company behind the "wealth-building" program "Winning in the Cash Flow Business."[13] In this case, the Commission – along with the Colorado Attorney General – is challenging infomercials claiming that consumers could make large amounts of money quickly and easily by finding, brokering, and earning commissions on seller-financed promissory notes. Yes, promissory notes. The litigation is pending.

However, along with the Dalbey complaint, the FTC and the Colorado AG announced a settlement with Marsha Kellogg, one of the consumers who offered a

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[13] *See* FTC Press Release, *FTC Charges Promissory Note Pitchman With Deceiving Consumers* (May 31, 2011), *available at* www.ftc.gov/opa/2011/05/dalbey.shtm.

glowing testimonial in a Dalbey infomercial — an endorsement that we allege was deceptive. According to the complaint, Kellogg claimed that she earned almost $80,000 from just one promissory note transaction using Dalbey's program, and that her total earnings were more than $134,000. The complaint alleges that Kellogg made this statement even though she earned $50,000 less than what she claimed. Kellogg agreed to an order settling the FTC charges against her. The order is the FTC's first against a consumer charged with making misrepresentations in a testimonial.

Last time I was here, I also discussed the Interagency Work Group on Food Marketing to Children, which was directed by Congress to develop recommended voluntary nutritional standards for foods marketed to kids age 17 and younger. The Task Force includes the FTC, along with the Food and Drug Administration, the Centers for Disease Control and Prevention, and the Department of Agriculture. In April, the Working Group issued Preliminary Proposed Nutrition Principles for public comment and we received a few. As I speak, the Working Group is reviewing the almost 29,000 comments that were filed, and we hope to issue our final report by year's end.

I also want to mention that just a few weeks ago the Commission issued proposed changes to the Children's Online Privacy Protection Rule.[14] The proposed changes focus on five areas: definitions, including the definitions of "personal information" and "collection;" parental notice; parental consent mechanisms; confidentiality and security of children's personal information; and the role of self-regulatory "safe harbor" programs. The comment period for the proposed changes closes on November 28 and the Federal Register notice can be found at ftc.gov. And on Wednesday morning at the CARU Conference, FTC COPPA expert, Phyllis Marcus, will be discussing the proposed changes in far greater detail.

And last but far from least, I want to put a plug for the FTC's Business Center, which just celebrated its first anniversary and can be found at business.ftc.gov. The Business Center has gotten off to a great start. The site averages about 425,000 unique visitors each month and 16,000 visits each day. At the Business Center, you'll find practical compliance guidance on online advertising, privacy, data security, and other need-to-know topics. And for frequently updated postings that describe what you need to know about the latest

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[14] *See* FTC Press Release, *FTC Seeks Comment on Proposed Revisions to Children's Online Privacy Protection Rule* (Sept. 15, 2011), *available at* www.ftc.gov/opa/2011/09/coppa.shtm.

Commission actions, your first stop should be the Business Center blog, which had an astounding 127 postings in its first year.

Thank you for this opportunity to talk to you today, and I would be happy to take some questions.