

“A Beautiful Friendship”

problematic ads – we found 36 ads in total to contain false or deceptive claims that POM will prevent, treat, or reduce the risk of disease.⁵ We ordered the POM defendants to cease all such false and deceptive claims.⁶ In order to ensure that the respondents don't bypass the Commission order, as fencing in relief we required the POM defendants to have two well-designed, well-conducted, double-blind randomized controlled clinical trials to back-up any assertion that a food, drug, or dietary supplement is – and I quote – “effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease.”⁷

I know many of you are paying close attention to the POM case. The details of the particular ads in question are interesting, and may provide some important lessons regarding how we draw the lines between appropriate claims and inappropriate claims in the context of particular ads. And of course the broader lesson is that the FTC takes substantiation requirements seriously, in particular when they involve health claims.

But you in this room already know that; that is why you are here. Indeed, far from talking to you about POM to scold you, I am talking about POM, in part, so you understand that I come to these sorts of enforcement decisions – as Ronnie Milsap sang back in the 1980's – “hat(ing) the lies but lov(ing) the liar.”⁸ As someone who has long been in the business of enforcing advertising law, I find myself both deeply concerned about POM's particular false and deceptive ads, and at the same time in deep admiration

Department of Commerce-led effort to come up with a self-regulatory code of conduct. Though we crafted specific recommendations for the different players in the mobile ecosystem, the underlying principles for each are the same: use your creativity to provide consumers with accessible, understandable, and relevant disclosures about how their personal data will be handled, and recognize that providing such disclosures and other privacy protections should be a shared responsibility among all businesses operating in the mobile marketplace.

The importance of proper online and mobile disclosures also drove the agency to issue our revised guidance on dot com disclosures — another topic I know is of great interest to you.¹¹ We published the original guidance 13 years ago to help advertisers understand how the FTC would enforce the prohibition on deceptive and unfair practices in the then-new realm of online advertising.¹² But since then, we’ve seen the mass migration of online commerce to small screens in the mobile space and to social media. Clearly, our original concepts needed a little sprucing up.

So, after almost two years, a public workshop, and three public comment periods, we have a new dot com disclosure guidance, issued just last week – on my birthday I might add, so my copy was wrapped with a bow.¹³ The main principles will not surprise anyone, because they are no different than the principles that underlie all our efforts to guard against deceptive advertising — and to protect market integrity and viability.¹⁴ Consumer protection laws that apply to commercial activities in traditional media apply equally online, including in the mobile environment.¹⁵ That means that when information is needed to prevent a claim from being misleading, the advertiser should, when practical, incorporate relevant limitations and qualifying information into the underlying claim, rather than having a separate disclosure.¹⁶

If a separate disclosure is absolutely necessary, it must be clear and conspicuous, often not an easy task in the mobile space where some ads are no larger than a thumbprint.¹⁷ If a particular platform does not provide an opportunity to make clear and conspicuous disclosures, that platform should not be used to disseminate advertisements

¹¹ .Com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 12, 2013), *available at* <http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

¹² Dot Com Disclosures: Information about Online Advertising (May 3, 2000), *available at* <http://www.ftc.gov/os/2000/05/0005dotcomstaffreport.pdf>.

¹³ *Supra* note 11.

¹⁴ *Supra* note 11 at i.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Supra* note 11 at i-iii.

that require such disclosures.¹⁸ In other words, to quote my mother: if you can't do it right, don't do it at all.

The guidance also states that disclosures should be placed as close to the triggering claim as possible, and advertisements should be designed so that “scrolling” isn't necessary in order to find a disclosure.¹⁹ We recommend making certain disclosures “unavoidable” – that is, placing them where the consumer has no choice but to see them.²⁰ And we discuss the circumstances under which disclosures through hyperlinks will work, and circumstances under which they may not work.

hope they can reach an agreement that will require upfront Whois verification for the contact information of those buying a website name, before the website is launched.

If ICANN is successful in addressing these issues, it will prove itself an effective regulator of the domain name industry; law enforcement agencies will have a better chance at fighting online abuse; consumers will be able to contact businesses directly to resolve disputes; and businesses will have a way to pinpoint quickly who may be behind a site that is infringing their brands. In short, we all win. On this issue, we are clearly allies *and* friends.

To paraphrase a different – and more long-standing – classic: with respect to the advertising industry and the FTC, this should be the beginning of a beautiful friendship. We want the same thing: confident customers fueling a thriving and growing marketplace – online and off, mobile and stationary. And the only way we are going to get there is working together, bringing all our energy and creativity to helping consumers understand the facts behind the marketing and feel in control of their personal information.