

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION

on

DECEPTIVE MARKETING OF DIETARY SUPPLEMENTS
FTC ENF

In these pre-for-delay patent settlements, also known as exclusion or reverse

enforcement program to combat such fraud in the dietary supplement marketplace.³ The agency coordinates these efforts closely with the Food a

³The Commission's authority in this area derives from Section 5 of the Federal Trade Commission Act, which prohibits "unfair deceptive acts or practices in or affecting commerce," and Section 12, which prohibits the false advertisement of "food, drugs, devices, services, or cosmetics." 15 U.S.C. §§ 45, 52.

⁴"NBJ Reviews the \$25 Billion U.S. Supplement Market," *Nutrition Business Journal* (Oct. 16, 2009).

⁵*Id.*

⁶See Working Agreement Between FTC and FDA, 3 Trade Reg Rep. (CCH) ¶ 9,859.01 (1971), <http://www.ftc.gov/bcp/menus/resources/guidance/36FR18539.PDF>

⁷The FTC and FDA, for instance, worked together to provide clear and consistent guidance to the supplement industry on how to adequately substantiate advertising and labeling claims. See Guidance for Industry: Substantiation for Dietary Supplement Claims Made Under Section 403(r)(6) of the Federal Food, Drug, and Cosmetic Act (FDA Dkt. No. 2004-D-0303) (Dec. 2008), <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/Guidanc>

to stop fraud and deception, using the strongest tools available to each agency. The FTC, for example, has the power to compel supplement companies to provide documents relating to the substantiation of claims. When appropriate, the FTC can also take quick action in federal court to obtain a temporary restraining order, appointment of a receiver to take control of a fraudulent business, and asset freeze. The DA has the power to conduct seizures a

¹⁰One example of a coordinated effort using all of these tools is the action against Seasilver USA, Inc. for the marketing of a supplement purported to treat or cure cancer, AIDS, diabetes, and 650 other diseases. *FTC v. Seasilver USA, Inc.*, No. CV-S-0676-RHLRL (D. Nev. final order Mar. 4, 2004.) After the FTC obtained a temporary restraining order and asset freeze and the DA seized the defendants' product, the FTC reached a settlement with the defendants that included \$4.5 million in consumer redress. The DA's companion settlement included the destruction of \$5.3 million worth of misbranded supplements.

Section 20 of the FTC

In addition, the F

of ill-gotten gains.¹⁸ In case of outright fraud or repeated law violations, the Commission has sought bans on marketing of certain categories of products and the posting of performance bonds.¹⁹

The Commission works to make sure its enforcement actions hold accountable not just the supplement manufacturer but also other parties involved in the creation or dissemination of the deceptive claims, including company owners and key officers, advertising agencies, infomercial producers, distributors, and retailers.

B. Recent Examples of Enforcement Efforts

In the past two years alone, the FTC has filed or settled 30 cases involving supplements promoted with false or unsubstantiated claims for everything from the common cold to cancer. The Commission has also worked with FDA and foreign authorities to conduct internet sweeps targeting especially pervasive or pernicious trends. Recent sweeps have resulted in more than 130 warning letters by the FTC, followed by targeted law enforcement against those failing to stop or modify claims.

1. Representative Cases

Airborne Health, Inc. and Other Cold and Flu Products: In 2008, the Commission settled charges of false and unsubstantiated claims for Airborne effervescent tablets.²⁰ The marketers of Airborne engaged in a nationwide television and print campaign promoting

¹⁸See, e.g., *FTC v. Airborne Health, Inc.*, No. CV-08-05300 (C.D. Cal. final order Sept. 5, 2008) (up to \$30 million for consumer redress program in connection with deceptive cold prevention and treatment claims).

¹⁹See, e.g., *FTC v. 7 Day Mktg., Inc.*, No. CV08-01094-ER-FM (C.D. Cal. final order Feb. 17, 2008) (banning marketers of herbal colon cleanse to cure cancer from involvement in any infomercial marketing).

²⁰*FTC v. Airborne Health, Inc.*, No. CV-08-05300 (C.D. Cal. final order Sept. 5, 2008)

Airborne as clinically proven to prevent colds and flu and protect against exposure to germs in crowded environments, like airplanes. The FTC lawsuit named not only the company, but also the inventor of the product and her husband. The settlement required that the defendants contribute up to an additional \$6.5 million to a private class-action settlement, resulting in total of \$30 million available for consumer redress.

Airborne conducted such a successful marketing campaign that it spurred several private label copycat cold remedy products. National retail chains replicated the supplement using similar package claims and placing their products next to Airborne on the shelf. In response, the Commission brought parallel cases in 2009 against three major retail chains, Rite Aid,²¹ CVS,²² and Walgreen,²³ as well as Improvita Health Products,²⁴ a contract manufacturer and distributor that sold the copycat supplement to several retail chains. Each of these additional cases has settled with orders that include permanent injunctions and funds for consumer redress.

Direct Marketing Concepts, Inc. An FTC lawsuit in federal district court against the marketer of two dietary supplements, "Coral Calcium" and "Supreme Greens," culminated in court orders in 2009 against various defendants that included monetary judgments totaling nearly

²¹*FTC v. Rite Aid Corp.*, No. 1:09-CV-01333-JE (M.D. Pa. final order July 13, 2009) (\$500,000 for consumer redress).

²²*FTC v. CVS Pharmacy, Inc.*, No. CA09-420 (D.R.I. final order Sept. 9, 2009) (\$2.8 million for consumer redress).

²³*FTC v. Walgreen Co.*, No. 1:10-CV-01813 (N.D. Ill. final order Mar. 29, 2010) (\$5.97 million for consumer redress).

²⁴*FTC v. Improvita Health Prods., Inc.*, No. 1:09-CV-00858 (N.D. Ohio final order Jan 8, 2010; order granting notice of dismissal of corporate defendant Mar. 25, 2010) (\$565,000 in monetary relief).

\$70 million.²⁵ Infomercials for the products claimed they would cure many serious diseases, including cancer, Parkinson's, heart disease, and autoimmune disease. The order also addressed the defendants' failure to disclose that the promotional programming was, in fact, paid advertising, and their practice of charging consumers on an ongoing basis without their consent.

Roex, Inc: This Commission action involved an unusual marketing technique, with products sold by means of a nationally broadcast, live call-in radio program titled "The Truth About Nutrition."²⁶ The Commission settled charges against the company's principal, and one of the radio show hosts, for allegedly deceptive claims that an infrared sauna device would treat cancer, and that various supplements would treat cancer, AIDS, diabetes, Alzheimer's, Parkinson's, and other diseases. The order required the defendants to pay \$3 million for consumer redress. In March 2010, the Commission distributed refunds to more than 5,700 consumers with the average check totaling approximately \$500.

David J. Romeo and Stella Labs, LLC: Deceptive weight loss claims have long plagued the supplement industry. The Commission often sees a variety of deceptive marketing campaigns with each new weight loss ingredient introduced to the market. In this matter, the Commission challenged claims made by a supplier of *Hoodia gordonii*, derived from a cactus plant native to southern Africa, that the ingredient was a powerful appetite suppressant proven to reduce caloric intake by 1,000 to 2,000 calories per day.²⁷ The FTC complaint also charged the company with selling fake hoodia to its trade customers who used the ingredient to manufacture weight loss

²⁵*FTC v. Direct Mktg. Concepts, Inc.*, No. 04-CV-11136-GAO (D. Mass. final order Aug. 13, 2009) (monetary judgment against multiple defendants totaling nearly \$70 million).

²⁶*FTC v. Roex, Inc.*, No. SACV09-0266 (C.D. Cal. final order Mar. 4, 2009) (\$3 million for consumer redress).

²⁷*FTC v. Romeo*, No. 2:09-CV-01262-WM-CCC (D.N.J. filed Mar. 20, 2009).

supplements. This case is currently in litigation in federal district court.

Basic Research, LLC In and

²⁸*FTC v. Basic Research, LLC*, No. 09-CV-9720. Utah filed Nov. 2, 2009).

²⁹In coordination with the FTC, FDA issued warning letters to 28 U.S. companies and two foreign individuals for marketing unapproved drugs, and the Canada Competition Bureau sent war

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³⁷*See*

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