



# Federal Trade Commission

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## **National Advertising Division Annual Conference New York, NY**

### **Remarks of David C. Vladeck<sup>1</sup> Director, FTC Bureau of Consumer Protection**

**October 3, 2011**

#### **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.

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<sup>1</sup> 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 b

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<sup>2</sup> 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



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 st



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







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*See* FTC Press Release,

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<sup>9</sup> 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](http://www.ftc.gov/opa/2011/05/jessewillms).

companies he controls, bans all the defendants from engaging in any negative option or continuity plan marketing.<sup>10</sup>

#### **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.<sup>11</sup> 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.<sup>12</sup> 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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<sup>10</sup> 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>.

<sup>11</sup> 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](http://www.ftc.gov/opa/2004/11/bigfatliesweep.shtm).

<sup>12</sup> Available at [www.ftc.gov/os/caselist/0423115/110819bronsondecision.pdf](http://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."<sup>13</sup> 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 one of the consenti

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<sup>13</sup> 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](http://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 comments001TD(e)Tj6.12

I also want to mention that just a few weeks ago the Commission issued proposed changes to the Children’s Online Privacy Protection Rule.<sup>14</sup> 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](http://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](http://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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<sup>14</sup> 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](http://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.