UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ROCA LABS, INC., a corporation,
ROCA LABS NUTRACEUTICAL USA,

Motion for Partial Summary Judgment as to Count Three of the Amended Complaint. (Dkt. 212)

I. BACKGROUND

C. Factual Background

On September 24, 2015, the FTC

obesity and achieve substantial weight loss. (Id.) Defendants have used the terms "Gastric Bypass No Surgery" or "Gastric Bypass alternative" in the promotions of their products. (Id. ¶¶ 19, 23) Defendants also have used illustrations, such as the one below, to depict how the formula is used.

(Id. at 10; Dkt. 2 at 2, 5) Defendants also stated that the products are safe for children as young as six years old, although they recommended parental supervision and consultation with a doctor. (Dkt. 48 at 13 ¶ 27h)

Defendants promoted their products in a variety of ways, such as through their websites, including RocaLabs.com and Mini-Gastric-Bypass.me ("Roca Labs Websites"), and by using online advertisements to direct consumers to the Roca Labs Websites. (Id. ¶¶ 19, 22–24) In videos on the Roca Labs Websites and Defendants' social media pages, Defendants also made representations about the Roca Labs products, such as:

> What is the Formula? Roca Labs' Formula is a medical innovation that creates a natural gastric bypass effect in the stomach. It's based on healthy fibers, and it's classified as a food supplement. Just mix with water, take it each morning, and it immediately expands to physically fill your stomach. For the next 10 to 16 hours, only 20% of your stomach will be available for food intake. Your new, small stomach will force you to eat 50% less from

day one.

(Id. ¶ 28a) The Roca Labs Websites also included links to documents, such as "Letter to Your Doctor V1-Aug12," purportedly written by a doctor or other medical professional, that describe the benefits of Roca Labs products and summarize scientific literature regarding those benefits. (Id. ¶¶ 30–31) At times, the Letter to Your Doctor segment was attributed to "Dr. Ross Finesmith, Director of Medical Team" or "Ross Finesmith, M.D. Medical Consultant." (Id. ¶ 31) Finesmith made statements regarding his experience with the Formula and the products' efficacy. (Id.) The Roca Labs Websites used medical images, such as the Caduceus symbol and people dressed in white lab coats, and medical terminology, including "medical team," "medical innovation," and "research center." (Id. ¶ 33) In fine print, as part of the "Terms and Conditions" section of the RocaLabs.com Website, Defendants stated that "[n]o clinical study has been conducted

features a "Surgical Alternatives" page devoted to positive commentary on Roca Labs products and which also sells the Roca Labs products. (Id. ¶ 40) Defendants did not disclose that Gastricbypass.me is affiliated with RLI or RLNU. (Id.)

Defendants advertised that the basic package of Roca Labs products costs $480.00 with p "valid he[alth2 Tc86(tpcoha-2D3 Tl Alt h)a-2.3 Tl A6 Ad witte([(D)6 (6f / 0.0804 Tc -

insert listed the rules: eat between 11 a.m. and 8 p.m. only or any nine-hour interval; eat a healthy, 100-calorie snack before 11 a.m.; and eat vegetables or occasionally low-calorie popcorn as a snack between 8 p.m. and 10 p.m. (Id. ¶ 46) Customers also were advised that "[t]o maintain the gastric bypass effect, [they should] drink at least six ½ liter bottles of water a day," exercise at least five times a week, and document their success by video weekly. (Id.) The "Roca Labs Procedure Rules & Diet" insert also was available online at Roca Labs Websites to prospective customers. (Id.)

Since at least September 2012, Defendants have included a non-disparagement clause, also known as a "gag clause," in the Terms and Conditions that prohibited customers from publishing disparaging comments about Roca Labs products. (Id. ¶¶ 47–53) The Terms and Conditions also indicated that the purchase price was "conditional," "discounted," or "subsidized" in exchange for the customer's agreement to the gag clause and other provisions in the Terms and Conditions. (Id. ¶ 51) The Terms and Conditions stated that the purchaser agrees to pay the full price of the product, $1,580.00, if the purchaser breached the gag clause. (Id. ¶¶ 49, 51) In the September 2012 version, the Terms and Conditions stated that customers would have to compensate Defendants $100,000 for talking "badly about the Formula." (Id. ¶ 52; Dkt. 2-1 at 56) In the August 2014 version of the Terms and Conditions, customers were subject to being sued for an injunction and being billed $3,500.00 for legal fees and court costs for publishing any negative comments about the Defendants' products, services, or employees. (Dkt. 48 ¶ 52; Dkt. 2-1 at 26) That version also provided that Defendants could force purchasers to sign a notarized affidavit stating that the disparaging remarks were incorrect, contained factually incorrect material, and breached the Terms and

Conditions. (Dkt. 48 ¶ 52; Dkt. 2-1 at 26–27) These alleged acts form the basis of the FTC's seven-count Complaint.

In Count I, the FTC asserts deceptive weight-loss claims. The FTC alleges that Defendants have made deceptive weight-loss claims by representing that:

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In Count III, the FTC contends that Defendants' s2 0 Td2(f)h30 Tw 2.93 Tdt I s2 0 Td2(f)h

In Count VII, the FTC asserts a deceptive discount claim. The FTC challenges

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When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. Porter v. Ray, [illegible]

dissemination of false advertisements for food, drugs, devices, services, or cosmetics in or affecting commerce. 15 U.S.C. §§ 52, 55. The dissemination of such false advertisement is an unfair or deceptive practice as outlined in Section 5(a). 15 U.S.C. § 52(b). "Thus, a violation of Section 12, dissemination of false advertising, constitutes a violation of Section 5(a)." FTC v. Nat'l Urological Group, Inc., 645 F. Supp. 2d 1167, 1188 (N.D. Ga. 2008), aff'd, 356 F. App'x 358 (11th Cir. 2009). Under the statute, a "false advertisement" is "an advertisement, other than labeling, which is misleading in a material respect." 15 U.S.C. § 55(a)(1).

To demonstrate liability for unfair and deceptive commercial practices under Section 5 or Section 12 of the FTC Act, the plaintiff must establish that "(1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances, and (3) the representation was material." FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003) (citations omitted); 15 U.S.C. § 45.

Under this standard, courts first evaluate whether the advertisement made the purported claims. Nat'l Urological Group, Inc., 645 F. Supp. 2d at 1189. The determination is made by evaluating either the terms of the advertisements or "evidence of what consumers interpreted the advertisement to convey." Id. To determine the meaning and representations of an advertisement, the court must consider the overall net impression of the advertisement and whether reasonable consumers would interpret a particular message. Id.

Under the second element of the standard, the FTC may establish that the representation was likely to mislead customers under a "falsity theory" or a "reasonable basis theory." Id. at 1190. In other words, the FTC may demonstrate (a) that the

substantiation, for their claims. (Dkt. 210 at 40–41) See Nat'l Urological Group, Inc., 645 F. Supp. 2d at 1190; FTC v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994) (claim may be deemed deceptive if the advertiser had no reasonable basis to assert the claims as true or if the claim is demonstrably false).

claims existed. (Dkt. 210-3) To prove a weight-loss claim, "experts in the field of obesity treatment and weight loss would require well-designed and properly conducted clinical trials." (Dkt. 210-3 at 14) Dr. Heymsfield explained that a trial should be double-blind and placebo-controlled so that the testers and participants are unaware of who is assigned to a

affidavit of Dr. Marcus Free ("Dr. Free"), who is a board-certified surgeon and was recently hired as medical director for MCO, as evidence that the Regimen "does appear to be safer, more effective, and superior in several ways to currently available bariatric surgical procedures." (Dkt. 201-1 ¶¶ 6, 9–13) Defendants have not established that Dr. Free

are presumptively material and inherently misleading); Thompson Med., 791 F.2d at 194 (affirming the FTC's ruling that an unsubstantiated establishment claim was misleading).

As to Counts I and II, the FTC has established no competent or reliable scientific evidence substantiates Defendants' express claims, which are material misrepresentations likely to mislead reasonable customers. Defendants offer no evidence to raise a dispute of fact. Consequently, the FTC is entitled to summary judgment on Counts I and II.

2. Defendants' Representations About Gastricbypass.me (Counts IV, V)

The FTC is entitled to summary judgment on Counts IV and V. The FTC alleges that Defendants deceived consumers by failing to disclose that the testimonials were made by peop 16.762 (es)4 ()7ante.10 (t)a3 (ad1usI2d (m)-3 (1 .12 0 a4 (52 E-(a)-10 (l d [(s)l (

products were discussed favorably on the site, although there was no disclosure of the affiliation with Defendants. (Id. at 59, 175:15–17) Juravin stated that Gastricbypass.me was controlled by Roca Labs and that he was responsible for the content, but he did not see any value in letting consumers know "[h]ey we are Roca Labs." (Id. at 59–60, 175:22–177:4)

Purportedly satisfied customers—"Carla" and "Roxie"—depicted in the videos posted on RocaLabs.com were actually Defendants' employees. (Dkt. 210-19 at 8, 36:3–18; Dkt. 210-19 at 40, 193:11–194:10; Dkt. 210-19 at 33–34, 168:11–169:20; Dkt. 210-23 at 10, 39:20–24) Defendants directed their employees to create blogs or fictitious posts. For example, Roca Labs General Manager Sharon King ("King") testified that she wrote a Roca Labs product review under the name of "Fran," which was a fictitious name, and that Juravin edited the review. (Dkt. 210-19 at 48, 238:24–239:23; Dkt. 210-19 at 48, 239:3–14) Juravin also directed King to instruct "the Customer Service people" to write posts or reviews and comment on Roca Labs Facebook advertisements. (Dkt. 210-8 at 69, 237:16–238:8, 238:16–17; Dkt. 210-8 at 72, 281:24–282:24; Dkt. 210-19 at 45, 226:15–227:8) Defendants did not instruct the employees to disclose their affiliation with Defendants. (Dkt. 210-19 at 45, 227:5–8) Roca Labs employee Sharon Hensley ("Hensley"), who appeared on video as "Roxie," testified that she was asked to post positive comments monthly on Facebook about Roca Labs monthly and did not state her association with Defendants. (Dkt. 210-23 at 19, 138:13–140:10; Dkt. 210-19 at 7, 27:20–24)

Defendants admit that Gastricbypass.me did not state its affiliation with RLI. (Dkt. 221 at 30) Yet, they argue that Roxie's testimonial is valid because the weight loss

occurred prior to her employment, although Roxie's video was recorded after she was employed by Defendants. (Dkt. 221 at 30–31; Dkt. 210-23 at 8, 30:9–18; Dkt. 210-23 at 8, 32:17–33:3) Defendants' argt91.004 Tc T(s)4 ((pl)16deo w('.hia 0 Td [Tw -32.31 -2

regarding why they wanted to lose weight, such as "[b]ecause I want to feel good and stop being sick and tired." (Id.)

Defendants admit that customers' information from the Questionnaire or Health Application was included in communications with credit card payment processors. (Dkt. 221 at 33) Defendants argue that the information was publicly available and was necessarily disclosed to address disputes with the credit card payment processors. (Id. at 33–34) Defendants also contend that in 2014 the Terms and Conditions stated: "Your information will not be shared or sold for as long as you do not breach the Terms and we will have to use the information provided." (Dkt. 210-10 at 3) These arguments are without merit. Defendants offer no evidence that the customers' current weight, desired weight loss, and other health information was publicly available. Defendants also offer no supporting evidence that disclosure of customers' sensitive information was necessary to respond to disputes regarding the credit card charges. Further, the 2014 Terms and Conditions that Defendants cite is dated June 2014, and Alice King and the Broward Custand dants20 (and)10 (t)2 (20 ei)-4ad(ne 2)1222 (ow)16 (ar) fkne3434

4. Defendants' Discount Claim (Count VII)

The FTC is entitled to summary judgment on Count VII because Defendants' post-packaging materials misrepresented that consumers had agreed to pay hundreds of dollars more for the Roca Labs products than what they actually paid if they posted negative reviews about the products or Defendants. Defendants do not dispute that they made the discount claim or that it is material. Instead, Defendants argue that the discount claim is not deceptive because customers agreed to the discount and its associated requirements.

When customers received the package of Roca Labs products, two documents were included in the package. In the "Summary" of the Terms and Conditions and a "Thanks for purchasing" packaging insert, customers were told they were given a "discount off the unsubsidized price of $1580 in exchange for [their] agreement to promote [Defendants'] products" and would owe the full price of $1,580 if they did not honor the agreement. (Dkt. 210-14 at 84; Dkt. 58 ¶ 53; Dkt. 2-1 at 61–62; Dkt. 6-3 at 30)

Defendants argue that the discount claim is not deceptive because customers were aware of and agreed to the discount and the non-disparagement clause prior to purchase. They contend that customers were provided sufficient notice in the Terms and Conditions prior to purchase and after the purchase in the documents shipped with the products. (Dkt. 221 at 36–37) Defendants suggest that the prior notice in the Terms and Conditions dispels the deception. These arguments fail for two reasons.

First, Defendants created an overall net impression that the price of the product

$480 for purchasers with a "valid health insurance." (Dkt. 6-2 at 64) In multiple online advertisements, including those that appeared on Google, Bing, and Facebook, Defendants advertised the cost as simply $480, at least for a basic package of Roca Labs products. (Dkt. 210-11, Dkt. 210-12; Dkt. 210-13) At the top of the "Roca Labs Procedure Cost" page of Defendants' Websites, Defendants state "Only $480 and NO surgery to gastric bypass cost of $8,000 + health insurance paymenc 0.258 Tw Dc2

212 at 11–14) Defendants contend that the gag clause was part of the Terms and Conditions that customers agreed to because they were required to click on a box next to a sentence stating, inter alia, that they had read and agreed to the terms before buying the product. (Id. at 13) Defendants cite to a plethora of cases about the enforceability of online "clickwrap" contracts•2 0 Td [(Id)-2 (.)]TJ EMC /952Tc 0 Tw -10.86 -2.3 Td m4 /952Tcc 0

also prevents future customers from learning about potential problems. (Id. at 8, 12) Consequently, Dr. Pavlou stated, prospective customers are encouraged to buy products that ultimately may not be desirous or appropriate. (Id. at 8) Without any, or even with very few, negative reviews, it is likely that "[c]onsumers are more inclined to purchase Roca Labs' products due to their inflated perceptions of product quality, misled by the manipulated absence of negative reviews that artificially inflate[s] their expectations of product quality," according to Dr. Pavlou. (Id. at 13) The FTC asserts that Juravin's testimony supports its claim. Juravin testified that he paid a company $40,000 to "make the false comments not show up up front" because false comments "create the wrong impression" and hurt Defendants' sales by at least $40,000. (Dkt. 210-8 at 29–31, 56:22–62:7)

The FTC also argues that Defendants' threats to sue and filing of lawsuits caused

with Roca Labs, and you are violating the Federal Lanham Act. Additionally, your actions amount to criminal extortion, which is defined as follows: “The obtaining of p (x)15S3.29 -1.15 u.18 0 Td og of p (x)12a

Defendants contend that the FTC provided no evidence of tangible harm, either economic or physical, and relies solely on intangible harm to make its claim. Their contention is without merit. Defendants offer no factual or legal basis to support their argument that the FTC is required to provide evidence of tangible harm. Defendants cite to the FTC Act's legislative history, which explained "[i]n most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks. Emotional impact and more subjective types of harm alone are not intended to make an injury unfair." S. Rep. No. 103-130, at 13,

b. Not Reasonably Avoidable by Consumers

The FTC contends that Defendants' practices related to the gag clause cause were likely to cause injury that was not reasonably avoidable because prospective customers who search for information about Roca Labs products would not necessarily be made aware of previous buyers' negative but truthful experiences. (Dkt. 210 at 48) For example, in her declaration, customer Rolisa Harper ("Harper") stated that, after watching YouTube videos, she was interested in the products. (Dkt. 210-32 at 2 4

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c. Countervailing Benefits to Consumers or Competition

The FTC contends that there is no countervailing benefit to competition or consumers that outweighs the injury caused or likely to be caused by Defendants' gag clause practices. (Dkt. 210 at 49) As discussed, the FTC has presented evidence that consumers were injured or likely to be injured by the absence of negative reviews. Defendants present no evidence to the contrary, only arguing that the practices benefited consumers or competition and that a cost-benefits analysis is required.

Defendants assert that consumers benefited from the products by losing weight, increasing their confidence, and taking steps toward a healthier lifestyle. (Dkt. 212 at 18) Defendants also argue that the FTC has provided no cost-benefit analysis, which they assert is required by 15 U.S.C. § 45(n). (Dkt. 221 at 28) Specifically, Defendants contend that the statute requires courts to

> compare (1) the sum of (a) the costs to Defendants of false negative reviews and (b) the additional costs associated with Defendants' compliance with any order forbidding the disparagement clause going forward (collectively, the "Relevant Costs"), with (2) the magnitude of any substantial consumer injury caused or likely to be caused by the disparagement clause and the attempts to enforce same (the "Relevant Benefits").

(Dkt. 221 at 28–29)

Their arguments fail two primary reasons. First, Defendants' recitation of the benefits they claim consumers received from using the products ignores the issue presented in this claim, which is whether Defendants' gag clause practices, not their products and services, presented a countervailing benefit. Second, the Court is unpersuaded that such a quantitatively precise cost-benefits analysis is required. The statute, 15 U.S.C. § 45(n), does not provide for such a detailed analysis. The case cited by Defendants to support their contention that a detailed cost-benefit analysis is required

it raises a significant risk of concrete harm." Id. at p.5, n.12 The Policy StatemenS19.09 57.65 T8.2

said he told his Facebook boot camp customers: "I'm allowed to tell you anything I want; to do anything I want with you that would lead you to a healthy weight . . ." (Dkt. 210-16 at 24, 542:1–17) He also testified that he will show the customers "any images I want. I will do anything I want for them for as long as I lead them to achieve a healthy weight." (Id.) Based on Defendants' extended history of deceptive and unfair practices and Defendants' continued promotion of their products and comparisons to gastric bypass surgery, the FTC has proven that a cognizable danger of recurrent violation exists. Thus, a permanent injunction prohibiting Defendants' deceptive and unfair practices is justified.

Because the Court has found Defendants liable for violating Section 5 of the FTC Act, it also finds the FTC is entitled to monetary relief under Section 13(b) for consumer redress, including disgorgement. As to the formula for calculating damages, in accord with Eleventh Circuit precedent, FTC contends that the "proper measure of disgorgement is the amount of the defendants' unjust gains." (Dkt. 210 at 53) The "amount of net revenue (gross receipts minus refunds) . . . is the correct measure of unjust gains under section 13(b)." Washington Data, 704 F.3d at 1327.

In contrast, Defendants invite the Court to calculate disgorgement by:

> . . . tak[ing]the number of complaints registered with the Better Business Bureau that are based on the customer's assertion that the product did not work as advertised from March of 2011 (the time of the first complaint lodged with the BBB) to the date of this filing, September 29, 2018. That number should then be multiplied by $350, the average selling price of the Roca Labs Product during this time period. Finally, that number should be multiplied by twenty-five (25) to account for customers that might feel the product did not work as advertised, but who did not register a complaint with the BBB.

(Dkt. 221 at 45) Defendants contend this calculation ensures that the disgorgement is "based on the customer's assertion that the product did not work as advertised." (Id.)

The Court declines Defendants' invitation. This calculation is not in accord with binding precedent. The Eleventh Circuit has held that the proper measure of disgorgement is unjust gain, not consumer loss, and the appropriate measure for unjust gains is net revenue. Washington Data, 704 F.3d at 1326. Therefore, the Court finds that the amount of damages in this action shall be calculated by the amount of gross sales revenue minus the amount of customer refunds returned to consumers.

The FTC asserts the net revenue amount is $25,246,000—totaling the gross sales revenue generated from sales minus what the FTC contends is a "reasonable approximation" of customer refunds. (Dkt. 210 at 54) The Court notes that FTC has provided sufficient evidence as to the amount of gross sales revenues, which totaled $26.6 million during the relevant time period. (See e.g., Dkt. 210 at 54-24 at 1, 4). Specifically the FTC provided Defendants' corporate tax returns for 2011-2015, as well as affidavit testimony verifying the reported revenue. (Id.; Dkt. 210, 54-9 at 153:1-154:6, 154:19-24, 167:2-168:9, 170:18-171:3, 176:22-177:15). However, regarding the $1,354,000.00 customer refund amount ($26,000,000.00 gross sales - $25,246,000.00

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been an officer of RLI and RLNU, and Whiting owns and has been an officer of RLI, RLNU, and ZCL. (Dkt. 219) The entities also have comingled funds. For example, revenues generated by MCO in 2014 and 2015 were reported on RLI's corporate tax returns. (Dkt. 210-8 at 29, 65:12–67:19; Dkt.210-24) In 2014 and 2015, JI's income was generated from either RLI, RLNU, or MCO. (Dkt. 210-16 at 18–19, 473:17–478:15) Accordingly, the FTC has demonstrated that the Corporate Defendants operated as a common enterprise.

Next, the FTC must establish that Juravin and Whiting knew of the deceptive acts and either participated directly in or had authority or control over the acts. FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (citing FTC v. Amy Travel Service, Inc., 875 F.2d 564, 573 (7th Cir. 1989)). The FTC may demonstrate that the individuals had "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." Amy Travel, 875 F.2d at 574 (citation omitted). The FTC is not required to prove intent to defraud. Id. The FTC may establish that an individual exercised control over the alleged deceptive practices with evidence that the individual controlled the daily operations. Id. at 573. Also, the "degree of participation in business affairs is probative of knowledge." Id. (citation omitted).

The FTC has established that Juravin knew of the material misrepresentations and either participated in the deceptive acts or had authority to control them. Juravin testified that anything that was on the site was his responsibility. (Dkt. 210-8 at 50, 137:5–23) Juravin controlled virtually every aspect of the Corporate Defendants' business, including marketing, websites, claim substantiation, expenditures, personnel, and lawsuits. (Dkt.