

“Reconsidering Advertising Substantiation Forum and Remedy Policies”

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Remarks of Thomas Pahl  
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I. Introduction<sup>1</sup>

Good afternoon. I would like to start by thanking the ANA for inviting me to speak at the ANA/BAA's 39<sup>th</sup> Marketing Law Conference. This conference brings together the nation's leading advertising counsel and major brands to discuss consumer protection topics. I am pleased to be here today to present my views about how and why I think the Federal Trade Commission should reconsider its current approach to forum and remedies in advertising substantiation cases. During the last decade, the FTC has increasingly brought advertising substantiation cases in federal court under Section 13(b) of the FTC Act and obtained millions of dollars in settlements.

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and our actions, including commencing efforts to base our privacy and data security work on a solid economic foundation. Through these and many other measures, we have begun changing the direction of the FTC's consumer protection program. My hope is that under Acting Chairman Ohlhausen's continued leadership and future FTC leadership, we will be able to accelerate reforms so that we can protect consumers without imposing unnecessary or undue burdens on industry.

As counsel for many of the nation's leading advertisers, you likely noticed a significant omission from my list of topics we have addressed, namely, advertising substantiation. I firmly believe – consistent with FTC's long-held view – that truthful, non-misleading advertising is beneficial to consumers and competition. We need to adopt, adapt, and implement consumer protection policies that eliminate unnecessary disincentives for advertisers to make truthful and substantiated advertising claims. In particular, we should reconsider the costs and benefits of the FTC's current approach of bringing advertising substantiation cases not involving dishonesty or fraud in federal court and obtaining monetary relief for those unsubstantiated claims, because it may unnecessarily chill truthful, non-misleading advertising claims.

### III. Value of Truthful, Non-misleading Advertising

In considering our approach to advertising substantiation cases, we must begin with a keen understanding and appreciation of the role of advertising in our economy and economics. Both have long recognized the value of commercial speech, including advertising, to consumers. The Supreme Court has explained that commercial speech is "indispensable" to helping consumers make "intelligent and well-informed" decisions about market choices.<sup>3</sup> Economic theory recognizes that truthful, non-misleading advertising allows consumers to make the best

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<sup>2</sup> Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

<sup>3</sup> Virginia Bd. of Pharmacy, 425 U.S. at 765.

use of their resources by finding products whose price, quality, and other attributes best match their needs<sup>4</sup>. In addition, truthful, non-misleading advertising reduces the costs to consumers of seeking and evaluating information from a variety of sources. Relatedly, as former BCP Director Howard Beales has articulated truthfully, non-misleading advertising helps buyers “locate preferred products [which] gives sellers an incentive to compete to improve their offerings by allowing

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and a former BCP Director cogently explained, “to best protect consumers, the government must consider the costs of both ~~not~~ prohibiting and allowing particular claims.

Government should err on the side of protecting consumers, but doing so depends on which risk is more serious – mistakenly prohibiting truthful claims or mistakenly allowing false ones.”<sup>10</sup>

When ~~ad~~vertisers make unsubstantiated claims for products, the FTC has the authority to bring law enforcement actions ~~ag~~ainst them. Under Section 5 of the FTC Act, the FTC can challenge in an administrative proceeding unfair or deceptive acts and practices ~~in~~ making unsubstantiated advertising claims. If the FTC determines in that proceeding that an advertiser has engaged in unfairness or deception, Section 19 of the FTC Act allows the

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Some commentators have argued that as a matter of law “proper cases” under Section 13(b)

proceedings to obtain cease and desist orders and no monetary relief in its advertising substantiation cases, including cases involving national advertisers.<sup>17</sup>

In the last decade, however, the Commission has changed dramatically its traditional approach to advertising substantiation cases. As explained by one of the architects of that change, the rationale for the new approach was that “the market remains rife with advertisements that lack substantiation or, even worse, are contradicted by the company’s substantiation.”<sup>18</sup> To respond to the perceived prevalence of unsubstantiated claims in the marketplace, the Commission often has commenced challenging unsubstantiated advertising claims in federal court pursuant to Section 13(b) of the FTC Act. In many of these cases, the Commission has obtained millions of dollars from advertisers, sometimes tens of millions of dollars, as consumer redress or disgorgement.

As I discussed earlier, the great weight of the case law indicates the Commission has the legal authority to challenge unsubstantiated claims in an administrative proceeding or federal court. The FTC now has a decade of experience filing Section 13(b) actions in federal court to challenge unsubstantiated advertising claims in the absence of dishonesty or fraud, and obtaining monetary relief in these actions. In light of this experience and consistent with a good government philosophy of periodically evaluating the effectiveness of our policies, I believe the time has come to assess the costs and benefits of this approach and determine an alternative approach would be better for consumers and competition. Any such change of course is up to the Commission.

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<sup>17</sup> See, e.g., *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); *Removatron Int’l Corp.*, 111 F.T.C. 206 (1988), *aff’d*, 884 F.2d 1489 (1st Cir. 1989); *Honeywell, Inc.*, 126 F.T.C. 202 (1998); *The Dannon Corp.*, 151 F.T.C. 62 (2010); *POM Wonderful, LLC*, 155 F.T.C. 1, *aff’d*, 777 F.3d 478 (D.C. Cir. 2015).

<sup>18</sup> D. Vladecksupra note 16, at 2112.

Let me discuss first the issues of seeking monetary relief in advertising substantiation cases. The FTC rarely has brought actions in federal court under Section 19 of the FTC Act following FTC administrative proceedings to obtain redress from advertisers in advertising substantiation cases. Rather, the FTC commonly has brought actions in federal court under Section 13(b) of the FTC Act to challenge unsubstantiated advertising claims, and sought and obtained consumer redress or disgorgement as part of the permanent injunctions entered in those actions.

Monetary relief of course can have benefits in terms of deterring false or misleading advertising claims and returning money to injured consumers. Monetary relief, however, also certainly has costs in terms of chilling truthful, non-misleading advertising claims that would be beneficial to consumers and competition. The optimal approach to monetary relief would maintain sufficient deterrence of false or misleading claims while minimizing the chilling effect



On the other hand, in cases in which an advertiser's making of unsubstantiated claims was not dishonest or fraudulent, the FTC seeking monetary relief poses a much greater risk of chilling truthful, nonmisleading claims. As discussed above, determining if an advertiser has a reasonable basis for its establishment



solid foundation [to exercise substantive expertise on consumer protection] matter<sup>21</sup>The

Commission can apply its institutional expertise more readily in administrative proceedings

forum and seeking monetary relief in these cases. Today, I ask national advertisers, consumer advocates, and other stakeholders to work with us in making this assessment so that we can develop and implement policies that protect consumers without imposing undue or unnecessary costs on advertisers.

Thankyou.