

**Dissenting Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright**  
***Federal Trade Commission v. Genesis Today, Inc., Pure Health LLC, and Lindsey Duncan***  
**January 26, 2015**

Although we support the complaint against the Genesis Today defendants,<sup>1</sup> we dissent from the proposed stipulated order settling this matter because the majority does not adequately take into account two critical considerations in calculating redress. As a result, the \$9 million collected by the order exceeds significantly the harm caused by defendants' deceptive advertising and marketing. First, the redress improperly includes sales attributable to protected non-commercial speech by Dr. Oz and defendant Lindsey Duncan (Duncan).<sup>2</sup> Thus, the redress amount inappropriately penalizes the defendants for some speech that is fully protected under the First Amendment. Second, the redress amount fails to take into consideration evidence that green coffee bean extract (GCBE) has some mild efficacy with respect to weight loss and thus threatens to deter the free flow of truthful information into the marketplace to the detriment of consumers.

The Commission has a laudable history of bringing enforcement actions against deceptive advertising claims using its authority over unfair or deceptive acts or practices. In its zeal to protect consumers from false or misleading advertising, however, the Commission must not attempt to suppress *all* speech about a public concern simply because the Commission considers that speech unreliable or unproven. Doing so would far exceed the government's proper role in regulating commercial speech. We are particularly approach

<sup>4</sup> and refrain from attempting to classify as advertising protected non-commercial

---

<sup>1</sup> We support the complaint allegations that defendants made exaggerated claims about the efficacy and clinical support for Green Coffee Bean Extract as a weight loss product and failed to disclose Duncan's financial interest in the product. These claims were made in advertising, marketing, and promotional materials that referenced Duncan's

such as type, price, or quality; (4) the means used to publish the speech, including whether it is paid-for advertising; and (5) the speaker's economic or commercial motivation. *In the Matter of POM Wonderful*, 2013 FTC Lexis 6, \*147 (2013) (citing *In re Matter of R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 544-46 (1988)), *appeal docketed on other grounds*, No. 13-1060 (D.C. Cir. Mar. 8, 2013).

<sup>3</sup> *Riley v. National Federation of the Blind*, 487 U.S. 781, 791 (1988).

<sup>4</sup> Letter from William C. MacLeod, Director, Bureau of Consumer Protection, to James F. Rill, Counsel for R.J. Reynolds (May 12, 1989) ("Communications, including press conferences, with independent news media" and "statements made on independent broadcast news or talk shows" "do not constitute advertising or promotion . . . that constitute commercial speech."). The majority disputes that it is the FTC's traditional approach "to refrain from

speech, including non-product specific statements on independent news and talk outlets. Such venues are today's town square, and as such they must remain open to wide-ranging debate about emerging areas of science or other areas of public concern, free from the threat of government control and censure.<sup>5</sup>

The First Amendment protects Dr. Oz's speech. Yet the record shows that discussion of GCBE on the Dr. Oz Show was the single biggest driver of sales of defendants' product. Dr. Oz's claims about GCBE during the April 26, 2012 episode of the show were enthusiastic, calling it a "miracle pill" and "a magic weight loss bean to melt away unwanted pounds." Importantly, Dr. Oz continued to promote GCBE separately. For example, he discussed a brand name GCBE product (not sold by Duncan) for a full fifteen minutes during his fall 2012 season premiere. Duncan played no part in these subsequent discussions, although his sales increased significantly every time Dr. Oz subsequently discussed GCBE. The defendants should not be held liable for the effects of Dr. Oz's statements about GCBE.

Moreover, we are concerned about the majority's characterization of Duncan's speech on the Dr. Oz Show as commercial, despite the fact that it lacked many of the factors that traditionally identify speech as commercial.<sup>6</sup> During the show, Duncan never proposed a commercial transaction nor mentioned the price of any product. Nor did Duncan pay to appear on the program. Instead, Duncan addressed an issue of public concern (weight loss) in a non-commercial context with no mention of any specific product<sup>7</sup> – indeed, Dr. Oz prohibits discussions of specific products.

Furthermore, the complaint in this case – which, again, we support – does *not* allege that Duncan's speech on the Dr. Oz Show was commercial speech in violation of the FTC Act. Yet

the majority statement argues that Duncan's speech was commercial speech,<sup>8</sup> and the redress amount appears to reflect that constitutionally questionable conclusion.

Extracting such a high amount of redress in this case could chill the speech of future speakers on television news or talk shows. Food industry representatives who would otherwise discuss health or nutrition topics and mention

rather mild weight loss effects.<sup>11</sup> The preliminary evidence indicates that GCBE, which has no known adverse side effects, may produce similarly mild, yet valuable, weight loss effects.

Redress must be calibrated to deter harmful conduct while maintaining incentives for industry participants to supply truthful information to the marketplace about products, including their potential health benefits.<sup>12</sup> For this reason, where a product otherwise provides tangible benefit to consumers, the Commission has often brought an administrative action without pursuing consumer redress.<sup>13</sup> In other instances, where the product at issue has no plausible consumer benefit, the Commission has typically agreed to settle an action for less than full consumer redress.<sup>14</sup> Accordingly, in cases where the product provides a benefit to consumers, even if that benefit may be modest,<sup>15</sup> we believe the Commission should seek redress more carefully calibrated to balance the need to -pTd [63vneue h -6(e)4 on ww 8.044rs