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June 18, 2007

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-135 (Annex S)
Washington, D.C. 20580

Re: ENDORSEMENT GUIDES REVIEW, PROJECT NO. P034520

The Association of National Advertisers (“ANA”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC”) for public comments on the overall costs, benefits, and regulatory and economic impact of its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”), consumer research it commissioned regarding the messages conveyed by consumer endorsements, and other specific endorsement-related issues. *See Guides Concerning the Use of Endorsements and Testimonials in Advertising: Request for Public Comments*, 72 Fed. Reg. 2214 (Fed. Trade Comm’n (Jan. 18, 2007) [hereinafter “COMMENT REQUEST”].

- I -

OVERVIEW OF THE ASSOCIATION OF NATIONAL ADVERTISERS AND THE INTERESTS OF THE ADVERTISING INDUSTRY

A. The Role of the Association of National Advertisers

The ANA is a leader in the marketing community that strives to communicate best practices, coordinate industry initiatives, and influence industry practices. Its membership includes approximately 400 companies with 9,000 brands in every commercial industry sector that collectively spend over \$150 billion in advertising and marketing communications.

The ANA fully recognizes the importance and role of advertising in the commerce and economy of the United States. Advertising provides consumers with useful information about the features and benefits of goods and services in making informed purchasing decisions. Advertising alerts consumers to product availability and purchase locations. Advertising helps consumers differentiate among competitive choices. Advertising advises consumers of pricing information and promotional opportunities. Ultimately, advertising assists consumers in saving money by encouraging competition in a defined market that exerts downward pricing pressures.

As a result of these considerations, the ANA believes that the strongest force for honest and fair advertising is not extensive governmental regulation, as, in the final analysis, advertisers are dependent for their success on sales that can be accomplished and maintained only through repeat business and the development of consumer trust. As the Commission frequently has

noted, the self-regulation model - - as demonstrated by the success of organizations like the National Advertising Division, the National Advertising Review Board of the Council of Better Businesses, and the Children's Advertising Review Unit - - is quite effective.

B. The Wide Use of Testimonials and Endorsements by the Advertising Industry

Testimonials and endorsements are a long-established and effective marketing practice. They are used by every industry sector - - being found in advertisements for a wide and diverse range of products and services. They are utilized in a variety of media and targeted to many categories of consumers. Annexed hereto as Exhibit "A" is a sampling of current or recent ads using testimonials and endorsements.

- II -

BACKGROUND TO THE GUIDES, THEIR HISTORY AND USE BY THE FTC, AND THE COMMENT REQUEST

A. Overview of the Current FTC Guides to Testimonials and Endorsements

The Guides define endorsements and testimonials broadly to mean any marketing message that consumers are likely to believe and that reflects the honest opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser. The endorsements may not contain any representation that (i) would be deceptive, or (ii) could not be substantiated if made directly by the advertiser.

An advertisement employing a consumer endorsement on a key attribute of a product will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve. If an advertiser does not have adequate substantiation that the endorser's experience is representative, the advertisement should contain a clear and conspicuous disclosure to that effect.

An expert endorser is someone who, as a result of experience, study, or training, possesses knowledge of a particular subject that is superior to that generally acquired by the ordinary consumer. An expert endorser's qualifications must, in fact, give him or her the expertise that he or she is represented as possessing. Moreover, an expert endorsement must be supported by an actual exercise of expertise, and the expert's evaluation of the product must have been at least as extensive as someone with the same degree of expertise normally needed to support the conclusions presented.

When there is a connection between the endorser and the seller of the product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the consumer or target audience), that connection must be fully disclosed.

Accordingly, on their face, the current Guides attempt to strike an appropriate balance between:

- (i) a governmental interest in preventing consumers from receiving deceptive or misleading information when making their commercial decisions;
- (ii) the advertiser's interest in communicating as creatively as possible useful information about their products and services in the context of a competitive and price-sensitive economic system; and

(iii) the burden on the business community of conducting appropriate pre-publication studies to address the substantiation of certain claims.

B. History of the Guides and FTC Enforcement

On May 21, 1975, after receiving extensive Comments, the Commission promulgated the Guides as set forth in Sections 255.0, 255.3, and 255.4. Slightly less than five years later, on January 18, 1980, the Commission added additional sections to the Guides and modified some existing ones after receiving additional comments, as set forth in Example 4 to Section 255.0, and Sections 255.1, 255.2, and 255.5.

As noted in the Overview above, with respect to consumer endorsements, if an advertiser does not have adequate substantiation that the endorser's experience is representative, the advertisement must contain a clear and conspicuous disclosure. 16 C.F.R. § 255.2(a). When this section of the Guide was promulgated in 1980, the Commission concluded that extensive regulation is unnecessary in connection with clarity or conspicuousness of disclosures due to the practical realities relating to the expertise in the advertising industry:

[T]he advertiser must insure that the disclosures required by these Guides are designed and presented in a manner that attracts consumers' attention and communicates the required information. . . . Based upon its experience from regulating advertising, the Commission believes that advertisers and their advertising agencies possess the communications expertise necessary to design clear and conspicuous disclosures and the Commission expects them to do so. Therefore, the Commission believes it unnecessary to specify the exact wording that must be used in the particular disclosure required by these guides, nor set standards for the manner in which this information must be presented in broadcast or print.

45 Fed. Reg. 3870 (1980).

As noted in the Comment Request, although the Guides are interpretive and advisory in nature, the FTC has the authority to enforce their requirements under the FTC Act and has done so since their inception. 72 Fed. Reg. at 2215 (2007). Indeed, as illustrated in the chart annexed hereto as Exhibit "B," for the past ten years, the FTC has not been shy in effectively and forcefully pursuing enforcement actions pertaining to endorsements and testimonials.

C. The Comment Request

By the Comment Request, the Commission is seeking input on three categories of questions. The first category relates to a general inquiry into the overall benefits and impact of the Guides as part of the Commission's periodic review of regulations and guides. The second category relates to two studies it commissioned regarding the messages conveyed by consumer endorsements. The third category relates to the required disclosure of connections between advertisers and endorsers that may materially affect the weight and credibility of the endorsement.

1. Category One: Regulatory Review Program

The Commission seeks commentary on six (6) general questions (with several additional subparts) with respect to the Guides:

1. Is there a continuing need for the Guides?
2. What changes, if any, should be made to the Guides?
3. What burdens or costs - - including the costs of compliance - - have the Guides imposed on businesses?
4. What changes, if any, should be made to the Guides to reduce the burdens or costs?
5. Do the Guides overlap or conflict with other federal, state, or local laws or regulations?
6. Since the Guides were issued, what effects, if any, have changes in relevant technology, such as e-mail and the Internet, had on the Guides?

2. Category Two: Studies Commissioned by the FTC

a. Study No. 1

The first report, "The Effect of Consumer Testimonials and Disclosures on Ad Communication for a Dietary Supplement," is dated September 30, 2003, and provides the results of a consumer survey conducted in the course of a law enforcement investigation that examined the communication effects of a promotional booklet for a dietary supplement. The booklet consisted of three pages of consumer endorsements touting the product's efficacy for treating diseases and conditions. The survey was designed to examine whether consumer endorsements by themselves communicate product efficacy (*i.e.*, whether the product works for the uses discussed in the testimonials) and typicality (*i.e.*, whether the endorsers' experiences are representative of what consumers will generally achieve with the advertised product) and whether any of several prominent disclosures qualify the claims conveyed by the advertisements.

The study used a mall-intercept design and was conducted in seven geographic areas. The study sample consisted of 200 dietary supplement users who reported suffering from breathing problems, low energy, or chronic pain. The sample was half male and half female - - and 80% of the respondents were 60 years of age or older.

According to the authors, "multiple testimonials about a product effectively communicate efficacy claims, *i.e.*, that the product works for the uses discussed in the testimonials. Testimonials also appear to communicate that the product will work for all, most, or about half of the people who use it [and that] prominent disclosures in ads containing multiple testimonials may be ineffective in limiting the communication of efficacy and typicality claims."

The authors acknowledged the limitations of their study which, in their view "may limit its generalizability." These limitations included:

- The sample consisted of only 200 dietary supplement users.
- 80% of the respondents were 60 years of age or older.
- The results were based on a single product, a dietary supplement.
- The study booklet contained a relatively large number of testimonials, 18.

b. Study No. 2

The second report, “Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements,” is dated September 22, 2004, and provides the results of a consumer survey examining the messages conveyed to consumers by one-page print advertisements containing consumer endorsements for a weight loss program, a cholesterol-lowering dietary supplement, or a business opportunity.

The study consisted of 1,624 interviews in 12 geographic markets. 582 interviews were conducted for the weight loss program, 522 interviews were conducted for the dietary supplement, and 520 interviews were conducted for the business opportunity (a vending machine business). Interviews were conducted in shopping malls, and the study was “double blind” (neither the interviewers nor the respondents were aware of the identity of the client or the purpose of the study). Respondents were paid \$2.00 for their participation in the study.

The authors concluded that:

- “Consumer testimonials communicated to a substantial percentage of consumers that the advertised products would enable new users to achieve results similar to those portrayed by the testimonialists in the advertisements for those products (ad communication).”
- “Consumer testimonials communicated to a substantial percentage of consumers that the advertised products would enable a substantial proportion (half or more) of new users to achieve results similar to those portrayed by the testimonialists in the advertisements for those products (“typicality”).”
- “Two of the disclosures (“results not typical” and “experiences of a few”) failed, in most cases, to significantly reduce these effects on ad communication and “typicality.” A third disclosure (“average 10 pounds” [which stated how much weight the average user loses in three months]) significantly reduced, in most cases, ad communication and typicality effects.”

c. The Questions Presented for Comments from these Studies

In its Comment Request, the Commission focused on nine (9) general questions (with several additional subparts) with respect to the studies. Several of these questions relate to the implications and limitations of the studies and whether any other research or evidence exists that would be relevant in addressing the issues of efficacy, typicality, and disclosures. Moreover, as a general matter, the Commission asks whether there is any research (i) on the role of consumer endorsements in marketing, (ii) that assesses the effectiveness of disclaimers in limiting communications, or (iii) that would be relevant in assessing the messages communicated by consumer testimonials.

ANA believes that one of the questions presented in the Comment request is particularly noteworthy, as it suggests a potential significant change to the Guides that would require pre-publication proof for “generally expected results” or “typicality:”

The current Guides allow advertisers to use testimonials that are not generally representative of what consumers can expect from the advertised product so long as the advertisers clearly and conspicuously disclose either (1) what the generally expected performance would be in the depicted circumstances, or (2) the limited applicability of the depicted results to what consumers can generally expect to receive *i.e.*, that the depicted results are not representative.

(a) What would be the effects on advertisers of requiring clear and conspicuous disclosure of the generally expected performance whenever the testimonial is not generally representative of what consumers can expect from the advertised product?

(b) What information, other than what is required to substantiate an efficacy or performance claim, would be required for an advertiser to determine generally expected results? How difficult would it be for the advertiser to make this determination? Do the answers to these questions vary by product type and, if so, how?

3. Category Three: Material Connections between the Advertisers and Endorsers

The Commission also seeks commentary on two questions relating to celebrity endorsements. These questions apparently flow from a September 2003 Petition submitted to the FTC by Commercial Alert, which suggests an exception to the principle that consumers will ordinarily expect that endorsers who are well-known personalities are compensated for their endorsements. In that Petition, Commercial Alert cited to an August 11, 2002 *New York Times* article which stated, “dozens of celebrities . . . have been paid hefty fees to appear on television talk shows and morning news programs and to disclose intimate details of ailments that afflict them or people close to them. Often, they mention brand-name drugs without disclosing their financial ties to the medicine’s maker.”

- III -

THE EFFECTIVENESS OF THE CURRENT GUIDES

The ANA submits that the current Guides provide useful and meaningful criteria for compliance evaluation. They appropriately reflect the core values concerning deception and unfairness. As noted above, the current Guides attempt to strike an appropriate balance between:

- (i) a governmental interest in protecting consumers from receiving deceptive information when making their commercial decisions;
- (ii) the advertiser’s interest in communicating as effectively as possible useful information about their products and services; and
- (iii) the burden of conducting appropriate pre-publication studies to address the substantiation of certain claims.

The effectiveness of the current Guides and their core principles was recently demonstrated by the staff opinion dated December 7, 2006, responding to the Petition by Commercial Alert, which requested investigations into companies that engage in “buzz

marketing.” In concluding that guidelines are not necessary and that the determinations for law enforcement actions will be made on a case-by-case basis, the staff pointed to the Guides:

The main question the petition presents is whether it is deceptive in violation of Section 5 of the FTC Act to fail to disclose that a marketer is paying a sponsored consumer to make claims to other consumers about the marketer’s products.

In addressing similar concerns, the Commission’s Endorsement Guides state that “[w]hen there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement . . . , such connection must be fully disclosed.”

The Endorsement Guides look to whether the connection between the seller and the endorser is likely to have a material effect on the weight or credibility of the endorsement, that is, if the “connection [between them] is not reasonably expected by the audience.”

Letter from Mary K. Engle, Associate Director for Advertising Practices, to Gary Ruskin, Executive Director, Commercial Alert (Dec. 7, 2006), at 2-3 (footnotes omitted).

As noted above, the Commission has aggressively pursued enforcement actions pertaining to endorsements and testimonials, and the framework for the Guides has been the basis for the determination of Section 5 violations in this area. To be sure, as demonstrated in the chart below, the FTC has not been alone in challenging deceptive or unfair advertising concerning the use of testimonials and endorsements. As demonstrated in the chart annexed hereto as Exhibit “C,” over the past few years, state attorneys general, private parties (through litigation under the Lanham Act), and the NAD also have addressed similar issues presented by the framework of the Guides in challenging the use of testimonials and advertisements. These facts demonstrate the multiple layers of regulatory and self-regulatory enforcement that already exist to carry out the goals of the Guides.

In summary, the Guides - - and their criteria forming the basis for deception analysis - - have been utilized by the Commission in enforcement actions and staff opinion letters, state enforcement actions, private parties in Lanham Act litigation, and self-regulatory proceedings or the NAD. ANA strongly believes that the Guides strike an appropriate balance between the governmental and business interests presented. Therefore, we respectfully submit that structural changes to the Guides are not warranted.

- IV -

THE INADEQUACIES OF THE TWO STUDIES IDENTIFIED IN THE FEDERAL REGISTER NOTICE

The following chart provides a comparative summary of the two studies set forth in the Comment Request, and identifies the nature of participants, the nature of the study, the product categories at issue, and medium or the form of communication involved:

	Study 1	Study 2
# of participants	200	1,624
# of geographic markets	7	12
age of participants	80% over 60 years old	over 50% over 45 years old
selection/qualifications of participants	dietary supplement users who reported suffering from breathing problems, low energy, or chronic pain	
location of study	shopping malls	shopping malls
product category	dietary supplements	over 60% involved dietary supplements or weight loss products; other involved business opportunity for vending machine business
Medium	promotional booklet for dietary supplements containing 18 testimonials	one page print advertisement

The structural flaws and inadequacies of these studies are evident. *See generally* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, FEDERAL JUDICIAL CENTER, REFERENCE GUIDE ON STATISTICS at 85-87 (2d. ed. West Group 2000) (studies must meet threshold admissibility requirements, including scientific reliability measures, like sample and control sufficiency, to ensure the integrity of the data collected and theories drawn therefrom).

The studies - - primarily dealing with dietary supplements and with a targeted vulnerable population - - cannot be extrapolated to apply to the many diverse industry sectors that utilize testimonials and endorsements as a marketing practice, and they cannot be generalized to address consumer perceptions of the many forms of testimonials and endorsements used in a wide variety of media. Therefore, the ANA concludes that these studies fail to provide an adequate evidentiary basis for a finding of deception or unfairness concerning the utility of the current Guides, and they do not justify any amendments to the current Guides.

- V -

CONSTITUTIONAL CONSTRAINTS TO POTENTIAL AMENDMENTS TO THE GUIDES

As the Commission is well-aware, the First Amendment doctrine of commercial speech provides fundamental constraints on governmental regulations that are overly restrictive and not narrowly tailored to serve substantial governmental interests.

In 1976, the Supreme Court affirmatively extended First Amendment protection to commercial advertising. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (declaring a law unconstitutional that precluded price advertising for prescription drugs). In rejecting arguments that price advertising would foster a lower level of professional conduct by pharmacists and harm the customer-pharmacist relationship, the Court instructed that both the individual consumer and society in general have strong interests in the free flow of commercial information: "As to the particular consumer's interest in the free flow of information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 770. The Court also noted that the free flow of information is

also indispensable to the proper allocation of resources in a free market system and to the debate about how that system should be regulated or altered. *Id.*

Since 1976, the Court has strengthened the First Amendment protections for advertising in a long series of cases. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), for example, the Court established a four-part test defining the permissible boundaries of government regulation of advertising: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; and if so, (3) whether the regulation directly advances in a material way the governmental interest asserted; and (4) whether it is not more extensive than is necessary to serve that interest.

Under the *Central Hudson* analysis, the government bears the burden of identifying a substantial interest to justify the challenged restriction and is required to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Furthermore, to meet the *Central Hudson* requirement that the regulation be narrowly tailored to achieve the government's interest, the government must examine the availability of other alternatives to achieve its goal in determining whether the regulation at issue is no more extensive than necessary. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 507 (1996) (striking down a state law that banned all price advertising for alcohol beverage products).

Accordingly, governmental regulations are unconstitutional under *Central Hudson* when the justifications offered by the government are insufficient to warrant the prohibitions of the regulation, or when alternatives to the regulation were available that would prove less intrusive to the First Amendment's protections for commercial speech. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 376-77 (2002) (striking down a restriction on advertising and promoting particular compounded drugs because the government's interest could be satisfied in less restrictive ways); *Greater New Orleans Broadcasting Association v. U.S.*, 527 U.S. 173 (1999) (striking down a 1934 federal law that banned broadcast advertising of casino gambling, concluding that "the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426-27 (1993) (holding that the city's refusal to allow the distribution of publications through freestanding news racks located on public property was not consistent with the First Amendment and had no justification other than the city's naked assertions that commercial speech had a "low value").

In addition to the *Central Hudson* inquiry relating to the nature of the relationship between the regulation and governmental interest, the Supreme Court has also instructed that a regulation which *compels* commercial speech may run afoul of the First Amendment - - especially when the means chosen are unduly burdensome. In *Riley v. Nat'l Fed. Of the Blind*, 487 U.S. 781 (1988), the regulation at issue required professional fundraisers when soliciting charitable contributions to disclose to potential donors the gross percentage of revenues retained by the fundraiser in prior charitable solicitations. *Riley*, 487 U.S. at 784. Finding that the state had chosen means that were unduly burdensome and "more benign and narrowly tailored options" were available, the Supreme Court held that the law violated the First Amendment. *Id.* at 799-800. This principle concerning the constitutional implications of compelled speech has been followed in the federal courts. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996) (noting that certain violations may impinge on First Amendment rights when it "indisputably requires them to speak when they would rather not").

In light of these constitutional restraints, amendments to the Guides that require advertisers to (a) conduct pre-publication proof of “generally expected results” and (b) disclose the typical experience a consumer can expect to receive are certain to face serious First Amendment challenges for the following eight important reasons:

First and foremost, false or deceptive claims in the area of endorsements and testimonials are already regulated comprehensively by the FTC, state attorneys general, numerous self-regulatory bodies and through lawsuits brought under the Lanham Act. Therefore, the record is woefully insufficient to justify the proposed substantial modifications to the Guides. These modifications would not “directly advance” a substantial government interest in “a material manner” as required by the First Amendment.

Second, the governmental interest of preventing deceptive and misleading information to consumers is not advanced by requiring advertisers to obtain pre-publication proof of typicality or to disclose a typical experience. Consumers can receive non-deceptive information that assists them in making their purchasing decisions through testimonials that provide honest beliefs of a consumer’s experience and disclosures already provided for under the current Guides. If these claims are not adequately substantiated or are inaccurate, the Commission presently has sufficient power to step in and effectively penalize these claims under section 5 of the FTC Act.

Third, the two studies carried out for the FTC regarding testimonials and endorsements do not provide justification for the proposed modifications to the Guides. As noted, the studies are methodologically and procedurally flawed, rendering them unreliable. They do not provide adequate evidence of the ineffectiveness of the Guide’s present approach concerning testimonials, endorsements or disclaimers. As pointed out earlier, the authors of the first study underlined that the methodological concerns inherent in the study’s structure “may limit its generalizability.” Therefore, the extensive and burdensome changes proposed for the Guides must rest primarily on the second study, which itself is highly limited in focus and only examines testimonials and endorsements in the context of the print media. Clearly, these studies fail to satisfy the evidentiary burdens the government must meet when seeking to restrict broad categories of commercial speech.

Fourth, these restrictions would be overbroad or more extensive than necessary to achieve the goal of non-deceptive consumer information. The proposed amendments would target not just advertisers who transmit potentially misleading information, but would also significantly burden advertisers who transmit truthful and non-misleading testimonial and endorsement information as well.

Fifth, such requirements would prevent a substantial amount of truthful and informative speech, thereby precluding useful information from getting into the hands of consumers. As a practical matter, showing typicality for certain products or services cannot be measured. Therefore, claims about products that rely upon subjective variables associated with individual consumers could not be made under such amendments, as it would be impossible for an advertiser to obtain objective performance measurements of a statistically significant population of consumers to determine what would constitute the “typical experience.”

Sixth, such requirements could chill substantial quantities of truthful speech. Businesses could conclude that the time and costs involved in determining typicality in some instances would be so unduly burdensome that the use of testimonials and endorsements would be

discontinued or rejected, even though these testimonials were truthful and provided useful information to consumers.

Seventh, amendments requiring the disclosure of a typical consumer's experience could constitute compelled speech, necessarily forcing businesses to conduct expensive and extensive studies to determine typical results. Some industry members note that the costs of proof of such studies could run into the hundreds of thousands of dollars. Without strong and compelling evidence that requiring such information is the least restrictive means to avoid deception, such an imposition of substantial economic burdens is impermissible.


Eighth and finally, the imposition of disclosures that require complex and detailed disclaimers may actually increase consumer confusion rather than assist consumers, and thereby fail to advance a substantial government interest relating to consumer welfare. For many product categories, determining what a typical result is would require complex analysis. To avoid consumer deception, companies would have to provide disclaimers that detailed the various criteria and assumptions upon which the claim was based. It is far from clear that this approach would afford more protection for consumers than the current Guides provide. In many cases where the disclosures required would be particularly complex, such an approach may provide consumers with even less protection.

For all of these reasons, ANA urges the Commission to reject the proposed amendments to the existing Guides.

The ANA looks forward to assisting the Commission in evaluating the utility of the current Guides and the impact of any proposed changes to the Guides on the advertising industry.

DATED: Washington, D.C.
June 18, 2007

Respectfully Submitted,

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Exhibit "A"

CONSUMER TESTIMONIALS

INDUSTRY	COMPANY	PRODUCT/SERVICE	DESCRIPTION	MEDIA
FINANCIAL PLANNING	Wachovia	Retirement Planning & Investment Advice	Dr. Ramona Houston consulted with a Wachovia representative to begin her retirement plan.	Print
FOOD	Kellogg	Smart Start® Cereal	A female endorser asserts that Smart Start® cereal is beneficial for the heart.	Television
	Kraft	Maxwell House Coffee	A married couple urges viewers to "make your house a Maxwell house."	Television
HOUSEHOLD ITEMS	Reckitt Benckiser	Woolite Pod	One consumer shares with another just how easy it is to clean up a spill by saying, "just squeeze, rub, groom and done!"	Television
INSURANCE	Geico	Auto Insurance	A woman (regular customer) describes how impressed she was with the way the Geico representative processed her claim after she was rear-ended in a car accident. The commercial ends with slogan: "Geico, real service, real savings."	Television
	State Farm	Homeowners' and Auto Insurance	A variety of consumers describe State Farm's quality claims processing service for homeowners' and auto insurance. Dr. Ian Smith, a medical and diet expert on VH-1's celebrity fit club also endorses State Farm for its partnership with a beneficial health initiative.	Television, Print
INTERNET	Ask.com	Ask Search Engine	A man sings "I Got What I Was Looking	Television

SERVICES			For" based on his success with this internet search tool.	
PHARMACEUTICAL	Allergan	Botox Cosmetic (Botulinum Type A)	A print ad contains the question "Why ask your doctor about BOTOX Cosmetic?" and the consumer holds up a sign that reads "I was curious."	Print
	Bayer	Levitra® (Vardenafil HCl)	Various men attest to the effectiveness of Levitra® in treating erectile dysfunction.	Television, Print
	GlaxoSmithKline	Vatrex®	Consumer couples give testimonials about being able to maintain an intimate relationship by keeping genital herpes outbreaks under control with Valtrex.	Television, Print
	Sanofi Aventis	Insulin	Consumer Joann Collins, a Type 2 diabetes patient since 1991, appears in ads stating, "At first I thought insuiin? Not me. I'm glad I changed my mind."	Internet, Print
	Sepracor	Lunesta®	Various consumers demonstrate and discuss how Lunesta helps them fall asleep quickly and remain asleep throughout the night.	Television

CELEBRITY TESTIMONIALS				
INDUSTRY	COMPANY	PRODUCT/SERVICE	DESCRIPTION	MEDIA
ATHLETIC APPAREL	Adidas	Adidas	David Beckham, Lionel Messi, Gilbert Arenas, and Yelena Isinbayeva endorse Adidas in various versions of the "Impossible Is Nothing Campaign." Each athlete describes personal challenges they faced on their rise to the top.	Television
	Nike	Nike Tennis Shoes	LeBron James replaced Michael Jordan as the face of Nike for basketball shoe advertisements.	Television

AUTOMOTIVE & ACCESSORIES	Chevrolet	Impala, Trailblazer, HHR, Silverado, Monte Carlo, Corvette, etc.	A popular Chevy ad features Mary J. Blige, Johnny O'Connell, Big & Rich, T.I., Dale Earnhardt, and a few unnamed actors encouraging customers to "Go Buy You a Chevrolet." Mary J. Blige also appears in various print ads which read: "My new business partner makes sure I always get around town in style."	Television, Print
	Ford	Edge	Ford uses "genre buster" Kelis in an ad urging consumers to break the rules by purchasing an Edge SUV.	Print
	Garmin	Nuvi Navigation System	A couple gets lost while driving and Yao Ming hands them the Garmin Navigation System. The phrase "Go with a Pro" is visible during the commercial.	Television
BANKING & FINANCIAL SERVICES	Ameriprise Financial	Financial Planning (Dream Plan Track Program)	Actor Dennis Hopper endorses Ameriprise, saying "powerful dreams need more than just a little weekend gardening. Flower power was then, dreams are now."	Television
	Capital One	Credit Cards	Actor/comedian David Spade plays the role of "Mr. No" in a series of humorous ads for the "No to No Hassle" Campaign. Most commercials end with the question: "What's in your wallet?"	Television
	TD Ameritrade	Investment Services	Law and Order star Sam Waterston encourages independent investors to take advantage of TD Ameritrade's straightforward pricing and quality services.	Television
CELLULAR SERVICE	T-Mobile	Mobile Phones	Until this year, Catherine Zeta-Jones was the face of this wireless phone provider's ad campaigns.	Television
CLOTHING	Gap®	Various Clothing Items	Claire Danes and Patrick Wilson don the latest Gap styles in the "Anything you can do, I can do better" ad.	Television
COMPUTERS	HP	Pavilion Entertainment Notebooks	Designer Vera Wang discusses how her	Television

			<p>computer holds everything she cherishes, and how she designs new landscapes, and is inspired to create new images with her HP.</p> <p>Hip-Hop Artist Jay-Z has also appeared in commercials endorsing these computers.</p>	
COSMETICS	L'Oréal	Cosmetics, Beauty Products, and Perfumes	Both Penelope Cruz, Scarlett Johansson endorse L'Oréal beauty products.	Television, Print
	Proctor & Gamble	Cover Girl Advanced Radiance Age Defying Liquid Makeup	Christie Brinkley appears in an ad for Advanced Radiance and is quoted as saying, "I don't want to be younger, I just want to look it."	Print
		Cover Girl Queen Collection	Queen Latifah endorses this popular make-up brand in a print ad saying, "Every woman is a queen . . . and deserves makeup that celebrates her beauty."	Print
Revlon	Super Lustrous Lipstick	Eva Mendes wears Super Lustrous Lipstick in the shade Goldpearl Plum. The ad includes the quote "Plumalicious? Berry Rich? Think I'll try all 72."	Television, Print	
		Various make-up products	Halle Berry and Julianne Moore are also spokeswomen for Revlon products.	
CREDIT CARDS	American Express	AMEX Card Membership	Martin Scorsese, Shaun White, Ellen DeGeneres, Sheryl Crow, Alecia Keys, and Andre Agassi all appear in a commercial promoting the AMEX Members Project. The commercial ends with a voice saying "you don't have to be famous to make a difference Just a card member."	Television
FOOD AND DRINK	Gatorade	Gatorade	Harvey Keitel coaches Derek Jeter on how to steal bases. At the end a message flashes asking, "Is it in you?"	Television
	Nabisco	Wheat Thins Toasted Chips	Actor George Hamilton appears in an ad with Stacy Keibler and assures viewers that "[He] knows	Television, Print

	Vitamin Water	Vitamin Water	toasted.” Kelly Clarkson sips Vitamin Water while conducting a fictional interview about her upcoming album. The commercial ends with voice saying “Vitamin Water, Try It.”	Television
HAIR CARE	SoftSheen-Carson	Dark and Lovely Moisturizing Relaxer	In an ad for this no-lye relaxer system, former Destiny’s Child member Kelly Rowland says. “I keep it moving and moisturized with Dark and Lovely.”	Television, Print
HOTELS & VACATION PLANNING	Holiday Inn	Holiday Inn Express	Daredevil Robbie Knievel completes a dangerous feat and is injured, but finds solace in the fact that he intelligently selected Holiday Inn for his room accommodations. The commercial ends with the phrase, “Stay smart, stay at a Holiday Inn Express.”	Television
	Wyndham Hotels and Resorts	Hotel and Vacation Planning	Golf legend Arnold Palmer endorses the use of Wyndhamworldwide.com for vacation planning.	Television
INSURANCE	Allstate	Auto Insurance	Actor Dennis Haybert narrates a serious of shocking commercials with examples of real life car accidents.	Television, Print
SKIN CARE	Guthy-Renker	Proactiv® Solution	Kelly Clarkson, Sean “Diddy” Combs, Alicia Keys, Jessica Simpson, and Vanessa Williams appear in infomercial ads endorsing this popular acne treatment system. ** Ads for this product also include countless consumer testimonials.	Television, Print, Internet
	Neutrogena	Neutrogena Face Wash, Acne Treatment, Body Lotion etc.	Susie Castillo (former Miss USA), Kelly Preston, Hayden Panettiere, Gabrielle Union, Julie Bowen, Kristin Kreuk and Paola Rey attest to the quality of Neutrogena beauty/facial products in a number of ad campaigns.	Television, Print, Internet
	Olay	Oil of Olay Quench Body Lotion and Age-De	Angela Bassett appears with two other unnamed actresses in one of Oil of Olay’s popular ad	Television, Print

			campaigns targeting African American women.	
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EXPERT TESTIMONIALS

INDUSTRY	COMPANY	PRODUCT/SERVICE	DESCRIPTION	MEDIA
FITNESS	Total Gym Fitness, LLC	Total Gym	Chuck Norris, an Eighth degree Black Belt Grand Master who was previously inducted into the Black Belt Hall of Fame as Fighter of the Year, endorses the Total Gym Fitness Center.	Television
FOOD PRODUCTS	Kashi	TLC® Crackers, Autumn Wheat® Cereal, Heart to Heart® Cereal, GOLEAN Crunchy® bars	Food Developer Greg Fleishman appears beside the following quote: "I hate health food, but I love to eat." The ad continues with the statement "If Greg doesn't like it, we just don't make it."	Print
PHARMACEUTICAL	Pfizer	Lipitor®	Dr. Jarvik, inventor of the artificial heart, explains that Lipitor significantly reduces high cholesterol levels when diet and exercise are insufficient.	Television, Print
MEDICAL DEVICES	Home Diagnostics	TrackEASE Smart System® Blood Glucose Monitor	Dr. Michael Minch asserts that the TrackEASE device makes blood glucose testing fast, accurate, and easy for diabetes patients.	Television

Exhibit "B"

Date	Respondent/Defendant	Nature of Allegations	Remedies
01/1997	1554 Corp; Brainerd Mellinger	An advertising agency promoting work at home charged with making deceptive claims about earning potential including testimonials and endorsements	Civil penalty (\$25,000); injunctive relief (Defendant prevented from using endorsements and testimonials unless they reflect the honest opinions or experiences of the endorsers)
01/21/1997	Computer Business Services	Home based computer opportunity firm charged with making misleading statements about potential earnings	Civil penalty (\$5 million); injunctive relief (Defendant prevented from misrepresenting the success rates or profitability of its clients through the use of deceptive testimonials)
01/23/1997	Universal Merchants	Manufacturer of a dietary supplement was charged from making unsubstantiated claims about the supplements effectiveness	Injunctive relief (Defendant was prevented from representing that any testimonial or endorsement is the typical experience of users)
02/12/1997	Phaseout of America	Promoters of a smoking cessation device were charged with making unsubstantiated claims about its smoking cessation product including that the device made smoking safer and quitting easier	Injunctive relief (Defendant was prevented from misrepresenting any endorsement)
02/25/1997	World Media T.V.	Advertising production company charged with making pain relief claims without competent scientific evidence to support those claims	Injunctive relief (Defendant prevented from representing that any endorsement or testimonial represents the typical experience with the product unless the claim is substantiated or accompanied by a disclaimer)

02/25/1997	Natural Innovations	Manufacturer of a pain relief device was charged with making unsubstantiated claims about the effectiveness of its product	Injunctive relief (Defendant was prohibited from representing that any endorsement or testimonial represented the typical experience with their product unless the claim is substantiated or accompanied by a disclaimer)
04/28/1997	SplitFire	Spark plug manufacturer was charged with making fuel economy and emissions claims without scientific evidence to support them	Injunctive relief (Defendant was required to possess competent and reliable scientific evidence to substantiate claims in endorsements or testimonials)
05/29/1997	Jenny Craig	Using deceptive advertising about the effectiveness of its weight loss plan including consumer testimonials and endorsements	Injunctive relief (Defendant was required to ensure that customer experience testimonials reflect the general results)
08/1997	Mid-South PCM Group,	Eye care service charged with using deceptive advertisements which included false claims that consumer testimonials represented the typical or ordinary experience	Injunctive relief (Defendants were prevented from making unsubstantiated claims that the consumer testimonials represented the ordinary experience of the public)
09/1997	Icon Health and Fitness	Marketers of a stationary exercise cycle were charged with making unsubstantiated claims about the potential benefits of its exercise equipment	Injunctive relief (Defendants were required to include in close proximity to any endorsement or testimonial a statement about the generally expected results or the limited applicability of the endorser's

			experience)
09/1997	Weight Watchers	Violation of Section 5 of the FTC Act. (Weight loss company charged with questionable substantiation of their weight loss claims.)	Injunctive relief (Defendant was required to include a disclosure in connection with any atypical testimonial about weight loss)
05/18/1998	Eye Research Associates	Eye care service charged with using deceptive advertisements which included false claims that consumer testimonials represented the typical or ordinary experience	Injunctive relief (Defendants were prevented from making unsubstantiated claims that the consumer testimonials represented the ordinary experience of the public)
09/23/1998	Trendmark	Weight loss product marketers were charged with making unsubstantiated weight loss and health related claims. Advertisements contained consumer testimonials which came from the marketers themselves or their spouses	Injunctive relief (Defendants were prevented from misrepresenting the results of any weight loss program and required to disclose any connection between a product endorser and the defendant)
12/1998	New Vision International	Marketing company promoting nutritional supplements was charged with making unsubstantiated claims about the effectiveness of their dietary supplements which included testimonials from consumers which were supposed to represent the typical experience	Injunctive relief (Defendants were prohibited from deceptively representing that any user testimonial or endorsement represents the typical or ordinary experience of members of the public)
05/1999	Fitness Quest	Ads promoting exercise equipment contained unsubstantiated claims and testimonials of consumers that did not reflect the typical or ordinary experience of the consumer	Injunctive relief (Defendants were required to use testimonials and endorsements in their advertising materials that represented the typical or ordinary

			experience of consumers or include disclosures of what the generally expected results would be)
06/1999	Magnetic Therapeutic Technologies	Magnet therapy marketers were charged with using deceptive advertising about the effectiveness of their products including testimonials from consumers which were supposed to represent the typical customer experience	Injunctive relief (Defendant prevented from using consumer testimonials in the future that did not represent the ordinary or typical experience of consumers)
06/24/1999	Melinda R. Sneed d/b/a/ Arthritis Pain Care Center	Arthritis pain center charged with engaging in deceptive advertising which included using an endorser without disclosing that he had a material connection with the defendant's product	Injunctive relief (Defendants were prevented from making unsubstantiated claims)
11/22/1999	Prolong Super Lubricants	Motor Oil marketer charged with making unsubstantiated claims about a motor oil additive	Injunctive relief (If the defendant use consumer testimonials and endorsements in promotional material it would be required to have scientific substantiation for the representation or disclose what the ordinary consumer could expect)
04/04/2000	Dura Lube	Engine treatment marketers were making unsubstantiated claims about the performance of their engine treatments. Marketers also used an endorser who was not an expert in that specialized area	Civil penalty (\$2 million); injunctive relief (Defendant was prevented from using unsubstantiated claims for any of its products along with misrepresentations about the qualifications of product endorsers)
04/12/2000	EHP Products	Internet health companies were charged with using testimonials for a health product that misrepresented	Injunctive relief (Defendant was prevented from making

		scientific studies or the issuance of patents which proved a product's effectiveness	unsubstantiated claims and using testimonials that misrepresented studies)
04/12/2000	CMO Distribution Centers of America	Internet health companies were charged with using testimonials for a health product that misrepresented scientific studies or the issuance of patents which proved a product's effectiveness	Injunctive relief (Defendant was prevented from making unsubstantiated claims)
05/01/2000	Rose Creek Health Products	Misleading endorsements and testimonials supporting a nutritional supplement	Civil penalty (\$375,000); injunctive relief (Defendant was prevented from deceptively representing that any user testimonial or endorsement represents the typical or ordinary experience)
10/05/2000	Wade Cook Financial	Stock Market investment seminars misrepresenting earnings potential	Injunctive relief (Defendants were prevented from providing claims that testimonials or endorsements of the seminars or programs represent the typical or ordinary experience of members of the public who attend)
11/15/2001	Esrin Ve Sheva Holding	Marketers of an automotive fuel line were charged with making unsubstantiated claims about its fuel saving and emissions reducing benefits	Injunctive relief (Defendants were prevented from making misrepresentations about testimonials, endorsements, tests or research)
04/17/2003	Valuevision International	Home shopping network making unsubstantiated claims about a dietary supplement including testimonials about the	Civil penalty (\$215,000)

		products effectiveness	
08/18/2003	Goodtimes Entertainment	Makers of a hair straightening product had a celebrity host and misleading before and after pictures which could confuse consumers about the products effectiveness	Civil penalty (\$300,000); injunctive relief
03/09/2004	Levey	Direct mail marketers using deceptive endorsements for a dietary supplement	Civil penalty (\$2.2 million); injunctive Relief (Defendants were prevented from misrepresenting the identity or qualifications of any expert or other endorser)
01/13/2005	Bodywise International	Company making unsubstantiated claims about a dietary supplement	Civil penalty (\$3.5 million); injunctive relief (Defendants were prevented from making any further unsubstantiated claims about the product and the doctor was prohibited from misrepresenting the existence or results of tests or studies)
03/01/2005	Steven Patrick Garvey	Deceptive claims were used to sell weight-loss products which included misrepresentations of products effectiveness	Civil penalty (\$10 Million); injunctive relief (Defendants were prevented from misrepresenting the profession, expertise, training or education of any person who advertises promotes or endorses the product)
2006	Window Rock Enterprises	Makers of dietary supplements were making claims that their supplements caused weight loss and prevention of other serious health conditions	Civil penalty (\$25 million); injunctive Relief (Defendants agreed to limit future advertising claims and not to misrepresent that their products were supported by

			scientific studies)
12/26/2006	Chinery	Marketers of weight control pill charged with using advertisements which contained unsubstantiated weight loss and weight control claims	Civil penalty (\$25 million); injunctive relief (The order prevents misrepresentations of the actual experience of any user or endorser)

Exhibit "C"

Date	Respondent/Defendant	Nature of proceeding	Nature of Allegations	Remedy
05/09/05	<i>Harvey v. Cytodyne Technologies, Inc.</i> , No. MON-C-205-03, 2005 WL 1633729 (N.J. Super. Ct. 2005)	State	Deceptive advertising.	Consent order requires clear and conspicuous disclosures of varying results and ability to inspect documentation on the product for next four years
05/15/01	<i>State ex rel. Stovall v. Cooper</i> , No. 00-C-1394, 2001 WL 34117813 (Kan. Dist. Ct. 2001)	State	Tax professional testimonials promote message that product will provide instant increases in an individual's take-home pay through withholding adjustments, provide thousands of dollars of business deductions and legally lower taxes by thousands of dollars.	Injunctive relief
06/23/97	<i>People by Vacco v. Lipsitz</i> , 663 N.Y.S.2d 468 (N.Y. Supp. 1997)	State	Violation of consumer protection law falsely advertising attentive customer services and disseminating fictitious testimonial over Internet, business engaged in false advertising.	Injunctive relief and restitution
05/03/07	<i>Facenda v. NFL Films, Inc.</i> , No. 06-3128, 2007 WL 1314632, *11- 22 (E.D. Pa. May 3, 2007)	Lanham Act	Claim unauthorized use of name or likeness in connection with the use of recordings of the voice of a celebrity in the use of a film about computer-simulated games	Judgment in favor of Plaintiff
03/30/07	<i>Holland v. Psychological Assessment Resources</i> , 482 F. Supp. 2d 667, 683-85 (D. Md. 2007)	Lanham Act	Likelihood of confusion to consumer when design of website leads users to believe that they are using a product made, endorsed and approved by the expert when the expert's picture, biography, summary on test development are under a webpage whose heading claims to be a speech by the expert	Summary judgment analysis of Lanham Act

Date	Respondent/Defendant	Nature of proceeding	Nature of Allegations	Remedy
04/14/06	<i>Roth v. Naturally Vitamin Supplements, Inc.</i> , No. CV-04-2135-PHX-FJM, 2006 WL 988118, *5-6 (D. Ariz. Apr. 14, 2006)	Lanham Act	Use of expert on website, coupled with statement stating expert discusses the benefits of a product, constitutes misleading representation as to expert's endorsement of the product when expert claims he never recommended the product	Motion for Summary Judgment denied
03/10/06	<i>Amazon, Inc. v. Cannondale Corp.</i> , No. 99-CV-00571 EWN PAC, 00 CV 02063 EWN PAC, 2006 WL 650682, *11-12 (D. Colo. Mar. 10, 2006)	Lanham Act	False endorsement claim by misappropriating name and likeness of professional biker.	Defendant's Motion for Summary Judgment granted
08/02/05	<i>McBee v. Delica Co.</i> , 417 F.3d 107 (1st Cir. 2005)	Lanham Act	Unlicensed use of musician's name made a misleading and false inference that endorses, approves, or sponsors clothing retailer's line and caused musician harm	Court requires establishment of website's substantial effect on commerce before there is subject matter jurisdiction in the United States
09/07/04	<i>Marketing Products Management v. HealthandBeautyDirect.com</i> , 333 F. Supp 2d 418, 429-33 (D. Md. 2004)	Lanham Act	Depiction is literally false because at the time for the broadcast, the endorsement agreement was terminated; infomercial literally true but misleading because present broadcast of past endorsement is likely to confuse customers as a continued endorsement	Claim dismissed without prejudice.
02/10/03	<i>Barnett v. Strom</i> , 243 F. Supp. 2d 833, 834-35 (N.D. Ill. 2003)	Lanham Act	Wrongful use of endorsers name (use of unidentified photograph of company's former associate on product's packaging conveys the misinformation that the former associate is	Defendant's counterclaim dismissed because not find facts to support a Section 43(a) violation

Date	Respondent/Defendant	Nature of proceeding	Nature of Allegations	Remedy
			actually the originator of the product)	
08/16/01	<i>Patient Transfer System, Inc. v. Patient Handling Solutions, Inc.</i> , No. CIV.A. 97-1568, 2001 WL 936641, *14; 20 (E.D. Pa. 2001)	Lanham Act	Use of testimonial letters containing statements that misled or confused consumers.	Plaintiff proved actual consumer confusions and its negative effects on Plaintiff. Trial on damages ordered.
08/03/01	<i>United States Olympic Committee v. American Media, Inc.</i> , 156 F. Supp. 2d 1200, 1203-04; 1209-10 (D. Colo. 2001)	Lanham Act	Use of alleged marks and photograph layouts of American athletes in a magazine to falsely denote affiliation with or endorsement by the U.S. Olympic Committee.	Plaintiff's allegation were close to making a Lanham Act claim. Therefore, the court granted Plaintiff 20 days to amend its complaint.
04/01/01	<i>Pelton v. Rexall Sundown, Inc.</i> , v. <i>Educorp, LLC</i> , v. <i>Bielmann</i> , No. 99-CIV-4342 JSM, 2001 WL 327164, *3-4 (S.D. N.Y. 2001)	Lanham Act	Use of former <i>Sports Illustrated</i> swimsuit model's photograph to mislead customers to believe that she endorsed the product	Plaintiff's claims were barred by the statute of limitations. Defendants' Motion for Summary Judgment granted.
04/10/07	Iovate Health Sciences, Inc.	NAD	"Doctor formulated and approved" statement and photograph from well respected doctor alleged to be broad and unqualified.	NAD finds claim on box broad and unqualified because there was no connection with the photograph and statement and the doctor making them.
09/06/06	Modern Health Labs, Inc. Case #4553	NAD	Testimonials found on website/infomercial appear to guarantee and/or grossly exaggerate product's performance, having no supporting evidence and no disclosures that results may vary. Also, referring to institute where the product was developed as "prestigious" fails to disclose the connection between the endorser and the seller.	NAD allowed seller to continue advertising before and after pictures but recommended that they are modified to show that results may not be typical after each photograph. Furthermore, NAD recommended discontinuing the use of "prestigious" in describing the institute.
05/25/06	Pro Performance Sport, LLC	NAD	Advertisement with baseball star conveyed image of athletic prowess	Will stay within guidelines in the future.

Date	Respondent/Defendant	Nature of proceeding	Nature of Allegations	Remedy
	Case # 4506		and that children would reasonably believe buying the product would make them hit baseballs like the baseball star.	
04/01/99	Dura Lube Corporation Case #3532	NAD	Consumer testimonials offered to reflect the experience of individual consumers on key attributes of the product did not have independent evidence to support specific performance claims.	NAD found a chemist had sufficient expertise to offer an expert opinion. However, NAD recommended that the expertise testimonial be discontinued as the flame test was not relevant to the ordinary consumer use of the product