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FTC TRIMS FAT FROM ADVERTISEMENTS IN THE NEW YEAR

*Joseph Axelrod**

I. INTRODUCTION

In 2014, the Federal Trade Commission (“FTC”) launched a campaign, “Operation Failed Resolution,” against false advertising in the weight loss industry.¹ By January 2014, the FTC already settled with four weight loss companies over false advertising allegations. The settlements totaled approximately \$34 million.²

II. FTC’S AUTHORITY TO CRACK DOWN ON DECEPTIVE ADVERTISING

The Federal Trade Commission Act (the “Act”) makes false advertising illegal.³ The Act prohibits “unfair or deceptive acts or practices in or affecting commerce.”⁴ The FTC can use any remedy granted to them in their general powers to provide direct economic relief for harmed consumers.⁵ The FTC frequently issues cease and desist letters and restraining orders or injunctions.⁶ The Act also gives the FTC the authority to launch “Operation Failed Resolution” and other similar campaigns to combat false advertising.⁷

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¹ *Sensa and Three Other Marketers of Fad Weight-Loss Products Settle FTC Charges in Crackdown on Deceptive Advertising*, FED. TRADE COMM’N (January 7, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/01/sensa-three-other-marketers-fad-weight-loss-products-settle-ftc> [hereinafter FED. TRADE COMM’N, *FTC Press Release*].

² *Id.*

³ 15 U.S.C. § 52(a) (2014).

⁴ 15 U.S.C. § 45(a)(1) (2006).

⁵ 15 U.S.C. § 45(a)(1) (2006).

⁶ 15 U.S.C. § 53 (2014).

⁷ See FTC Compl., *FTC v. HCG Diet Direct, LLC*, case 2:14-cv-00015-

Under federal law, there are three elements to a deceptive advertisement claim: (1) the advertisement must have a representation, omission or practice that is likely to mislead consumers; (2) the representation must be likely to mislead a reasonable consumer in similar circumstances; and (3) the representation, omission, or practice must be “material.”⁸

III. THE FTC HAS A HISTORY OF REGULATING THE WEIGHT LOSS INDUSTRY

The FTC has a long history of regulating deceptive advertising, particularly in the weight loss industry. The FTC’s first action against a weight loss company for deceptive advertising was in 1927 and the FTC has continued to bring similar actions ever since.⁹ A 2002 study by the FTC stated that it had filed over one hundred and sixty cases since 1927 related to unsubstantiated weight loss claims.¹⁰ The FTC filed over half of these cases after 1990, illustrating that the issue is becoming more and more relevant as time goes on.¹¹

Since 1990, the FTC has had at least three different designated operations to go after the weight loss industry and deceptive advertising.¹² In the early 1990’s a concentrated effort resulted in more than 20 consent orders; in 1997 the FTC launched “Operation Waistline;” and from 2002-2004 the FTC published three studies regarding advertising in the weight loss industry.¹³ At the beginning of 2014, the FTC announced “Operation Failed

NVW (D. Ariz. 2014) [hereinafter HCG Compl.]; FTC Compl., *FTC v. Leanspa, LLC*, case 3:11-cv-01715-VLB (D. Conn. 2011) [hereinafter Leanspa Compl.]; FTC Compl., *In Re of L’Occitane, Inc.*, case 122 3115 (F.T.C. 2014) [hereinafter L’Occitane Compl.]; FTC Compl., *FTC v. Sensa Products LLC*, case 14-cv-72, (N.D. Ill. 2014) [hereinafter Sensa Compl.].

⁸ *HCG Compl.*, *supra* note 7, at 15.

⁹ Richard L. Cleland et al., *A Report of the Staff of the Federal Trade Commission*, 25-26 (September 2002), available at <http://www.ftc.gov/reports/weight-loss-advertising-an-analysis-current-trends>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 27; See FED. TRADE COMM’N, *Deception in Weight Loss Advertising Seizing Opportunities and Building Partnerships to Stop Weight Loss Fraud* (December 2003), available at <http://www.ftc.gov/reports/deception-weight-loss-advertising-workshop-seizing-opportunities-building-partnerships-stop>; See also FED. TRADE COMM’N, *2004 Weight-Loss Advertising Survey* (April 2005), available at <http://www.ftc.gov/reports/2004-weight-loss-advertising-survey-report-staff-federal-trade-commission>.

¹³ FED. TRADE COMM’N, *FTC Press Release*, *supra* note 12.

Resolution,” as well as settlements with four major weight loss companies.¹⁴ The settlements totaled almost \$34 million in restitution.¹⁵ The companies involved were Sensa, L’Occitane, LeanSpa and HCG Diet Direct.

IV. OPERATION FAILED RESOLUTION

A. *Sensa*

Among the four companies targeted in Operation Failed Resolution, Sensa’s settlement will have the biggest impact in terms of the amount of consumer relief. Sensa, a California based company, sold \$364 million of inventory in the last four years.¹⁶ Sensa sells a powder product that it alleged would make users feel full faster when sprinkled on their meals; and therefore caused them to eat less and lose weight.¹⁷

The FTC claimed in its complaint against Sensa that the company misled its customers by promising 30 pounds of weight loss in six months without having to change their diet or their exercise habits.¹⁸ Typically, Sensa’s advertisements highlighted a former customer’s weight loss, and underneath the amount of weight loss Sensa printed in small type that the person adhered to a “sensible diet and exercise plan.”¹⁹ The complaint also alleged Sensa made false and material representations by stating that the endorsers in their advertisements were satisfied users of Sensa.²⁰ Sensa offered the endorsers cash and vacation incentives to give those endorsements and did not adequately disclose that fact in the advertisements.²¹

Further, the FTC’s complaint accused Sensa of publishing false data to substantiate their weight loss claims, as well as claiming one study was independent when in fact it was not.²² Sensa argued that it conducted studies that proved the product

¹⁴ See FED. TRADE COMM’N, *Operation Failed Resolution* (January 2014), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/sensa-three-other-marketers-fad-weight-loss-products-settle-ftc-charges-crackdown-deceptive/slides.pdf>.

¹⁵ FED. TRADE COMM’N, *FTC Press Release*, *supra* note 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Sensa Compl., *supra* note 7, at 16.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 18.

²¹ *Id.* at 13-14.

²² *Id.* at 17, 19.

resulted in 30 pounds of weight loss over six months.²³ It based this representation on three separate studies detailed in the complaint.²⁴ In the first study the subjects lost an average of more than five pounds.²⁵ In the second study, the subjects lost an average of more than 30 pounds but were encouraged to diet and exercise.²⁶ In Sensa's last study, the one that it claimed was independent, the subjects lost an average of 27.5 pounds.²⁷ However, the FTC alleged the diet and exercise regimens of the subjects were not monitored in the study and that Sensa financed the group that performed the study.²⁸

The United States District Court of the Northern District of Illinois ordered Sensa to pay \$46.5 million.²⁹ Sensa was only required to pay \$26.5 million of the settlement due to their inability to pay the full settlement amount.³⁰

B. *L'Occitane*

L'Occitane, a New York Corporation, sold almond inspired skin cream that it claimed to have a slimming effect when rubbed on one's body.³¹ The FTC argued that L'Occitane misled consumers through claims made in print advertisements.³² The company claimed that its products would "trim a person's thighs [one and three tenths] inches with four weeks of use. . . slim one's thighs and buttocks. . . significantly reduce cellulite. . . [and] significantly slim them in four weeks."³³ The FTC claimed L'Occitane did not have a reasonable basis to make these claims.³⁴

Further, L'Occitane made representations in its advertisements that scientific tests substantiated its claims.³⁵ Specifically, L'Occitane represented that its product slimmed user's thighs one and one-third inches in three weeks.³⁶ The FTC at-

²³ *Id.* at 14-15.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Stipulated Final J. and Order at 13-14, *FTC v. Sensa Products LLC*, case 14-cv-72 (N.D. Ill. 2014).

³⁰ FED. TRADE COMM'N, *FTC Press Release*, *supra* note 1.

³¹ *Id.*

³² L'Occitane Compl., *supra* note 7, at 4.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 5.

³⁶ *Id.*

tacked L'Occitane's scientific tests by providing contrary evidence showing that the average reduction of a participants' thigh was only a quarter of an inch, not the one and one-third inch reduction that L'Occitane represented.³⁷ Additionally, the FTC attacked the overall objectiveness of the study.³⁸

The FTC and L'Occitane reached a settlement agreement requiring the company to pay \$450,000.³⁹

C. *LeanSpa*

LeanSpa, a Connecticut company, owns a number of subsidiaries selling many different weight loss supplements.⁴⁰ The FTC filed a complaint against LeanSpa in 2011 and the two parties reached a settlement agreement in November, 2013.⁴¹

The FTC complaint alleged that LeanSpa committed several potentially fraudulent practices.⁴² First, the complaint stated that LeanSpa made deceptive "free or risk-free" trial offers.⁴³ The offers included hidden fees and automatic enrollment in a program in which consumers were charged monthly for LeanSpa products.⁴⁴ The FTC believed the offers contained material omissions and lacked material disclosures.⁴⁵

Next, the FTC alleged LeanSpa promised full refunds to consumers who requested them, but did not follow through on that promise.⁴⁶ In the FTC's estimation, only consumers who complained to the Better Business Bureau received refunds, while other consumers did not.⁴⁷

The FTC questioned the form of LeanSpa's advertisements as well.⁴⁸ LeanSpa printed the advertisements in the form of newspaper articles.⁴⁹ LeanSpa claimed independent reporters wrote the articles, and that those reporters performed independent tests demonstrating the effectiveness of the products.⁵⁰ The

³⁷ *Id.*

³⁸ *Id.*

³⁹ L'Occitane Compl., Inc., *supra* note 7.

⁴⁰ FED. TRADE COMM'N, *FTC Press Release, supra* note 1.

⁴¹ *Id.*

⁴² LeanSpa Compl., *supra* note 7.

⁴³ *Id.* at 17-19.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 20.

⁴⁹ *Id.*

⁵⁰ *Id.*

FTC found this to be false.⁵¹

LeanSpa claimed that their supplements caused substantial weight loss, in some cases as much as 25 pounds in four weeks.⁵² The FTC alleged that these statements were false and further alleged that LeanSpa's studies did not support its claims.⁵³

LeanSpa, its CEO, the CEO's wife, and several of its subsidiaries agreed to a settlement with the FTC for a value of approximately \$7.3 million.⁵⁴ Several other defendants involved in the case did not settle with the FTC and their disputes are still pending.⁵⁵

D. HCG Diet Direct

HCG Diet Direct, an Arizona company, sold liquid, homeopathic HCG drops.⁵⁶ The FTC's complaint against HCG Diet Direct claimed the company misbranded its product and made material misrepresentations about the product's capabilities.⁵⁷

HCG Diet Direct advertised that its product resulted in rapid weight loss; that the weight loss program was safe; that the weight loss statistics were proven in a 30 day clinical trial; and that the FDA approved the product as a method for weight loss.⁵⁸ The FTC alleged that all of these claims were unsubstantiated and violated the Act.⁵⁹

The FTC also alleged that HCG Diet Direct's testimonials were deceptive.⁶⁰ HCG Diet Direct represented that the consumers who endorsed the product were independent of the company.⁶¹ The FTC claimed the consumer endorsers were compensated financially or with free products, or were related to the company's employees or officers; and that HCG Diet Direct did not disclose those relationships.⁶² The FTC considered these

⁵¹ *Id.*

⁵² *Id.* at 15-16, 20.

⁵³ *Id.*

⁵⁴ FED. TRADE COMM'N, *FTC Press Release*, *supra* note 1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ HCG Compl., *supra* note 7, at 15.

⁵⁸ *Id.* at 16.

⁵⁹ *Id.*

⁶⁰ *Id.* at 17.

⁶¹ *Id.*

⁶² *Id.*

omissions material.⁶³

HCG Diet Direct agreed to settle with the FTC for over \$3 million;⁶⁴ however, the FTC suspended the entire agreement.⁶⁵ If the FTC finds that HCG Diet Direct has the adequate funds or assets to pay the settlement agreement, then the suspension may be lifted.⁶⁶

V. FUTURE IMPLICATIONS FOR MISREPRESENTATIONS IN WEIGHT LOSS ADVERTISEMENTS

The FTC has been addressing misrepresentations in weight loss advertisements since 1927 and there is no end in sight for the problem. The weight loss industry is a multi-billion dollar industry and business will continue to push the limits of ethical advertising, even as the FTC tries to regulation the industry.

While the FTC and the weight loss industry engage in a game of cat and mouse over weight loss claims, one must consider the ever-evolving consumer. The perspective of the reasonable consumer is an important factor in any modern deceptive advertising claim. Even if misleading advertisements stay at their current level of deception, accessibility to information for consumers will continue to expand. Thus, consumers may be held to a higher standard in the future. It seems the FTC may already be anticipating this, since they put out a guide for consumers and advertiser carriers in an attempt to help the weight loss industry self-regulate. On their website, the FTC listed seven catch phrases that are commonly used by fraudulent weight loss products and suggests consumers to be careful when they see these claims:

“Lose weight without diet and exercise;” “Lose weight no matter how much you eat of your favorite foods;” “Lose weight permanently! Never diet again;” “Just take a pill;” “Lose 30 Pounds in 30 days;” “Everybody will lose weight;” and “Lose weight with our miracle diet patch or cream.”⁶⁷

Of course, specific statements that allude to fake studies or untrue facts should never be considered reasonable. Nonetheless, the information age has increased the knowledge of the reasona-

⁶³ *Id.*

⁶⁴ HCG Compl., *supra* note 7, at 11.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Weighing the Claims in Diet Ads*, FED. TRADE COMM’N, CONSUMER INFORMATION, at <http://www.consumer.ftc.gov/articles/0061-weighing-claims-diet-ads> (last visited Feb. 21, 2014).

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ble consumer, which may force the FTC and courts, to be more lenient with embellishments in weight loss advertisements.