Statement of Chairwoman Edith Ramirez, Commissioner Julie Brill, and Commissioner Terrell McSweeny
Federal Trade Commission v. Genesis Today, Inc., Pure Health LLC, and Lindsey Duncan
January 26, 2015

This statement describes our support for the complaint and order against defendants Genesis Today, Inc., Pure Health LLC, and Lindsey Duncan ("Duncan") (collectively, "defendants"). As alleged in the Commission's complaint, the defendants deceptively advertised and promoted their green coffee bean extract ("GCBE") supplements by claiming that consumers could lose 17 pounds and 16 percent of body fat in just 12 weeks, without diet or exercise. The launching pad for their GCBE advertising was Duncan's appearance on *The Dr. Oz Show*, which first aired on April 26, 2012, and during which Duncan touted the results of a scientific study that he claimed demonstrated these results. Duncan made similar claims on other television programs, including ABC's *The View*, and highlighted the study results in other media, including his companies' websites.

As detailed in the complaint, the defendants' television appearance on *The Dr. Oz Show* was part of a calculated strategy to create and then promote their GCBE product to consumers. When Duncan first learned he had been invited to appear on the show's segment on GCBE, he was unfamiliar with this product. Nonetheless, he immediately agreed to appear as a purported "expert,"[1] and the defendants immediately created their own GCBE supplement to promote during the show. In the weeks between when Duncan agreed to appear on the show and when the show was taped and aired, the defendants took extraordinary steps to use Duncan's appearance as a vehicle for selling their product. Among other things, they placed large wholesale orders for GCBE, edited the show script to instruct consumers to use certain search terms when looking for GCBE, highlighted Duncan's upcoming appearance to sell their product to retailers, and bid on online search terms that Duncan used on the show to lead to the defendants' websites. On the show, Duncan touted the purportedly dramatic weight loss that GCBE could produce, and instructed viewers to look for GCBE capsules of a specific dosage and to use online search terms that would lead them to the defendants' product.[2] In the process, Duncan also exaggerated the results of the scientific study on which the defendants claimed to rely. The defendants have sold over $50 million dollars in GCBE supplements since April 2012.

The defendants' representations that GCBE would cause rapid and substantial weight loss without diet or exercise had no scientific support. The study the defendants continually

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[1] Duncan used the title "Naturopathic Doctor" in his television appearances and marketing of his companies' products, which likely led consumers to give his recommendation of GCBE added weight. His home state of Texas has now alleged that his use of that title was deceptive because Texas does not recognize the degree of "Naturopathic Doctor," and because the now defunct Clayton College of Natural Health that awarded him that degree was never accredited in any state during its existence. Plaintiff's Original Petition, *Texas v. Duncan*, No. D-1-GN-14-004288 (Dist. Ct. Travis Cnty. Tex. Oct. 15, 2014), *available at* https://www.texasattorneygeneral.gov/files/epress/files/RobertDuncanStateLawsuit.pdf.

[2] For example, Duncan urged viewers to search for "pure" GCBE in capsules for 800 mg servings, a dosage size easily adapted to the 400 mg capsules that the defendants, prior to the taping, had begun preparing to produce and sell under the "Pure Health" brand.

referenced in their advertising, even absent Duncan's mischaracterizations of it, suffered from serious facial flaws that should have been evident to the defendants.[3] Accordingly, our complaint alleges that the defendants' efficacy claims were false or unsubstantiated, and that their clinical proof claim was false. The proposed order approved by the Commission includes appropriately strong injunctive relief and requires the defendants to pay $9 million in equitable monetary relief.

Commissioners Ohlhausen and Wright do not object to the order's injunctive provisions or to the fact that the order includes a monetary judgment. They believe, however, that the amount of monetary relief is excessive. They contend that Duncan's initial representations on *The Dr. Oz Show* were not commercial speech, but instead fully protected speech under the First Amendment. They also argue that requiring the defendants to pay $9 million does not adequately take into account the effect of Dr. Oz's fully protected speech, or what they believe to be evidence of GCBE's modest weight-loss effect. We respectfully disagree.

As an initial matter, we believe that Duncan's speech on *The Dr. Oz Show* was squarely commercial and read the complaint to allege as much. While the "core notion" of commercial speech is speech that "does no more than propose a commercial transaction," *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983), commercial speech can also include "material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product." *U.S. v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143-44 (D.C. Cir. 2009) (per curiam).[4] Additionally, communications discussing commercial products may "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . [A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger*, 463 U.S. at 67-68 (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 n.5 (1980)). At issue in *Bolger*, for instance, were "informational pamphlets," including an eight-page pamphlet discussing "the problem of venereal disease and the use and advantages of condoms." The only reference to the seller or its products was at the bottom of the last page of

[3] Most notably, the study data reveal that most of the reported weight loss occurred during washout periods (when participants were taking neither the supplement nor a placebo), rather than during the treatment periods. This and the study's other major flaws are detailed in the Commission's complaint in *FTC v. Applied Food Sciences, Inc.*, Civ. No. 1-14-cv-00851 (W.D. Tex. Sept. 8, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140908afscmpt.pdf. The study's U.S. authors have since retracted it. Joe A.Vinson et al., *Randomized, Double-Blind, Placebo-Controlled, Linear Dose, Crossover Study to Evaluate the Efficacy and Safety of a Green Coffee Bean Extract in Overweight Subjects [Retraction]*, 2014:7 Diabetes, Metabolic Syndrome and Obesity: Targets and Therapy 467 (2014), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4206203/.

[4] *See also Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 63 (D.D.C. 1998) ("The mechanisms by which a commercial transaction may be 'proposed' can vary widely."; "[T]here are certain instances in which a manufacturer promotes and induces the purchase of its products by directing attention to favorable information generated by wholly independent organizations."); *id.* at 64 (finding that sponsorship of professional conferences and distribution of reprints of scientific articles discussing off-label drug uses propose a commercial transaction, as the activities suggest that a physician should prescribe, and a consumer therefore will purchase, the subject drug), *vacated in part on other grounds*, 202 F.3d 331 (D.C. Cir. 2000).

the pamphlet, which stated that "the pamphlet has been contributed as a public service by [the seller], the distributor of [a specific brand name of] prophylactics." 463 U.S. at 62 n.4. Although the informational pamphlets could not "be characterized merely as proposals to engage in commercial transactions," the Supreme Court nevertheless held that they constituted commercial speech.[5] *Id.* at 66, 67-68. In short, as the Supreme Court has emphasized, the distinction between commercial and other varieties of speech is one of "commonsense" and as dictated by the facts. *Id*. at 64.

Based on Supreme Court precedent, the Commission considers the following factors in evaluating whether speech is commercial: "(1) the content of the speech, *i.e.*, whether it contained a message promoting the demand for a product or service; (2) whether the speech referred to a specific product or service; (3) whether the speech included information about attributes of a product or service, such as type, price, or quality, including information about health effects associated with the use of a product; (4) the means used to publish the speech, including whether it is paid-for advertising; and (5) the speaker's economic or commercial motivation." *POM Wonderful, LLC*, 155 F.T.C. 1, 74-75 (citing *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).

The application of these factors in this case demonstrates that Duncan's speech on *The Dr. Oz Show* was commercial. First, the content of Duncan's speech clearly promoted the defendants' GCBE products. Specifically, he recommended that consumers use GCBE, discussed the reasons consumers should obtain the product, and instructed them on how to find GCBE online in a manner that Duncan knew would lead consumers to the defendants' supplements. Second, Duncan referred to a specific product, GCBE, and he took a variety of steps to ensure that consumers watching the show would purchase the defendants' GCBE supplement. For example, he advised consumers to use specific online search terms to lead them to his websites, and recommended that consumers purchase a capsule dosage adapted to the capsule size the defendants were preparing to sell online and in thousands of retail stores. Third, Duncan described GCBE's attributes in great detail, including how it purportedly worked, as well as the rapid and substantial weight loss it allegedly could produce. Finally, the evidence of Duncan's economic motivation in promoting GCBE is overwhelming, as detailed above and in the complaint.[6] The Commission aims to protect consumers from this type of manipulative commercial speech rather than, as the dissent asserts, "suppress *all* speech about a public concern." Dissenting Statement at 1.

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[5] The *Bolger* Court ultimately concluded that a law prohibiting the mailing of unsolicited pamphlets discussing prophylactics violated the First Amendment on the grounds that the pamphlets were non-misleading and the state interests proffered by the government were insufficient to support the broad prohibition. 463 U.S. at 68, 75. Here, by contrast, we allege that Duncan's commercial speech was deceptive; therefore, it was outside of First Amendment protection.

[6] Although Duncan did not pay to appear on *The Dr. Oz Show*, the law does not require that speech be paid-for to qualify as advertising. *See Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 113-14 (6th Cir. 1995) ("Neither the Lanham Act nor Supreme Court precedent requires that consideration be paid for something to constitute advertising. . . . The phrase 'free advertising,' far from being an oxymoron, aptly describes the publicity manufacturers may receive in press releases, news interviews, or trade publications.").

Although we agree that not every discussion of a product by a seller on a talk show is necessarily commercial speech, we reject our colleagues' suggestion that such statements can *never* be commercial speech if they do not mention a specific brand name. The law does not impose such a requirement,[7] and Duncan's appearance on *The Dr. Oz Show* did not occur in a vacuum. The facts of this case sharply distinguish it from the hypothetical scenario posed by Commissioners Ohlhausen and Wright, involving industry executives engaging in a general discussion about health or nutrition topics on a news or talk show. *See* Dissenting Statement at 3. Nor does our approval of the settlement negotiated here with Duncan and his companies subject independent news and talk outlets to "the threat of government control and censure." *Id.* at 2. We agree that the Commission should not exceed its proper role in overseeing commercial speech, but neither should it abdicate its statutory role in "insuring that the stream of commercial information flow[s] cleanly as well as freely"[8] when marketers use such outlets to promote their products.[9]

Moreover, even if we assumed *arguendo* that some of Duncan's statements on *The Dr. Oz Show* and other programs were not commercial speech, the $9 million figure still would be more than justified by the defendants' persistent use of more traditional advertising and marketing venues to repeat those same deceptive claims. For example, the defendants sold millions of dollars of GCBE product through their websites, which contained deceptive claims that GCBE would cause significant weight loss with no diet or exercise. These claims persisted well into 2013. In addition, the defendants generated significant retail sales by heavily promoting Duncan's appearance on *The Dr. Oz Show* to retailers, including by sending them clips of the episode, to induce them to carry the product.[10] They also used "As Seen on TV"

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[7] *See Bolger*, 463 U.S. at 67 n.13 ("That a product is referred to generically does not, however, remove it from the realm of commercial speech."); *R.J. Reynolds*, 111 F.T.C. at 547 ("The advertisement refers to a specific product, cigarettes.").

[8] *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976). Furthermore, as the Supreme Court has noted, commercial speech is less likely to be chilled than other forms of speech:

> [O]rdinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.

Id. at 771 n.24 (citations omitted).

[9] Commissioners Ohlhausen and Wright assert that the Commission's "traditional approach" to commercial speech issues has been to refrain from challenging "non-product specific statements on independent news and talk outlets." Dissenting Statement at 1. As support for this, they cite only a 1989 FTC staff letter that expressed the personal opinion of a Bureau Director. The Commission's actual approach was expressed in the decision of the Commission in that case. *R.J. Reynolds*, 111 F.T.C. at 543-46 (citing relevant legal analysis). We have applied the same legal framework in this case.

[10] The courts routinely have held that the secondary use of speech fully protected by the First Amendment to induce consumers to purchase a product constitutes commercial speech. *See, e.g.*, *Semco*, 52 F.3d at 114 (holding that even

point-of-sale displays, including those sent to Walmart to coincide with the initial airing of the April 26 episode of *The Dr. Oz Show*, in retail stores throughout the country.[11]

Commissioners Ohlhausen and Wright further contend that the $9 million amount should be reduced to account for the effect of Dr. Oz's fully protected statements on the sales of the defendants' GCBE products. Again, we respectfully disagree. Defendants chose to use Dr. Oz's popularity in order to maximize their ill-gotten gains. The defendants are not entitled to a reduction simply because they chose a popular talk show as the vehicle to begin making their deceptive claims.

We also do not agree that the Commission should have accepted less than $9 million because GCBE arguably has some weight-loss benefit. We and our dissenting colleagues appear to agree that the studies cited in the dissenting statement do not support the defendants' extreme weight-loss claims detailed in the complaint. Unlike our dissenting colleagues, however, we believe that these studies fail to substantiate even a claim of modest weight loss. In fact, the meta-analysis Commissioners Ohlhausen and Wright cite noted the short duration and poor methodological quality of the three human clinical trials to which they refer. The meta-analysis concludes that the size of any weight-loss effect evidenced by the three studies "is small, and the clinical relevance of this effect is uncertain. More rigorous trials with longer duration are needed to assess the efficacy and safety of [GCBE] as a weight-loss supplement."[12] Given the tenuous state of the science behind GCBE, we are surprised that Commissioners Ohlhausen and Wright compare GCBE to prescription weight-loss drugs, all of which have been subjected to far more rigorous trials.

Additionally, even if the product did have some modest benefit, the defendants would not be entitled to a monetary offset for that benefit. Courts have consistently declined to allow such offsets to full consumer redress where fraudulent advertising taints an entire purchase. "If [consumers] had been told the truth, perhaps they would not have bought [the product] at all or only some. . . . The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds[.]" *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993);

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if an article in a trade journal were fully protected speech, a party's use of article reprints as advertising at trade shows constituted commercial speech).

[11] *Cf. In the Matter of Telebrands Corp.*, 140 F.T.C. 278, 304-06 (2005) ("The references to competitors' (admittedly deceptive) advertisements make little sense unless respondents expected and knew that significant numbers of consumers would recall the claims that respondents' competitors made in their infomercials and interpret respondents' ads with those in mind."). *See also FTC v. Trudeau*, 662 F.3d 947, 950 (7th Cir. 2011) (noting that the $37.6 million figure the district court had ordered Trudeau to pay was a "*conservative*" estimate of consumer loss, as it considered only "sales from the 800-number, not sales in bookstores carrying his 'As Seen on TV' titles") (emphasis in original).

[12] Igho Onakpoya et al., *The Use of Green Coffee Extract as a Weight Loss Supplement: A Systematic Review and Meta-Analysis of Randomised Clinical Trials*, Gastroenterology Research and Practice, Article ID 382852 (2011). *See also* European Food Safety Authority, *Scientific Opinion on the Substantiation of Health Claims Related to Coffee*, EFSA Journal 9(4):2057, 9-10 (2011) (evaluating two of the cited studies, noting their methodological limitations, and concluding: "A cause and effect relationship has not been established between the consumption of chlorogenic acids from coffee and contribution to the maintenance or achievement of a normal body weight.").

accord FTC v. Kuykendall, 371 F.3d 745, 766 (10th Cir. 2004) (holding no basis to offset gross receipts "by the value of the magazines the consumers received"); *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) (refusing to deduct the value of office toner, holding that "[w]hile it may be true that the defrauded businesses received a useful product. . . the central issue is whether the seller's misrepresentations tainted the customer's purchasing decisions").[13]

Finally, given the facts of this case, we do not believe there is any danger that this order will over-deter marketers from supplying truthful information about products. As we stated earlier, defendants falsely cast their CEO as an impartial expert and touted a facially flawed study to promote their product. Under these circumstances, we are more concerned about other marketers' incentive to emulate the defendants' conduct, believing that they will ultimately retain the lion's share of their ill-gotten gains.

For the foregoing reasons, we believe that the complaint and relief imposed against the defendants are justified and appropriate. The settlement benefits the public by requiring the defendants to disgorge their profits and allowing for meaningful redress for consumers.

[13] *See also FTC v. Lights of America*, No. SACV10-01333, 2013 WL 5230681, at *51-54 (C.D. Cal. Sept. 17, 2013) ("Whether consumers received something of value from a defendant is not relevant in determining liability of restitution under the FTC Act."; "[D]efendants are not entitled to any value which consumers may have received."); *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 245 (2d Cir. 2014) (holding that "the full amount paid by the injured consumer must serve as the baseline for calculating damages because the 'seller's misrepresentations tainted the customer's purchasing decision'") (quoting *McGregor*, 206 F.3d at 1388).