



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Division of Advertising Practices

December 6, 2007

Gary D. Hailey, Esq.  
Venable LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, D.C. 20007

Re: Subway Franchisee Advertising Fund Trust  
Matter No. 0723197

Dear Mr. Hailey:

As you know, the staff of the Federal Trade Commission conducted an investigation of Subway Franchisee Advertising Trust Fund, and other affiliated entities (collectively "Subway") for possible violations of Sections 5 and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45 and 52. The investigation concerned certain advertisements appearing on television and on Subway's web site as part of the Jared/Athlete campaign.<sup>1</sup>

The staff's inquiry focused on comparative fat content claims featured in various ads that were part of that campaign, including specifically the claim that a foot-long Subway club sandwich contains "less than half the fat" of a McDonald's Big Mac. The staff was concerned that the "less than half the fat" comparison is accurate only for a very specific version of the Subway club on white or wheat bread, without cheese or condiments that contain fat – a version that few customers may actually order. Unlike the Big Mac, which comes pre-assembled, Subway sandwiches are made to order. Subway customers are asked to select a type of bread, are asked if they would like cheese, and then are asked to specify other toppings, including condiments. Because every sandwich is custom made, the nutritional content can vary widely. Adding mayonnaise, for example, increases the fat content of the foot-long club sandwich from 12 grams to 36 grams – 6 grams more fat than a Big Mac.<sup>2</sup>

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<sup>1</sup>The Jared/Athlete campaign featured Subway spokesman Jared Fogle, in conversations with various celebrity athletes, including Tony Stewart, John Cena, Michael Strahan, and Kimmie Meisner. In each ad, the athlete and Jared would compare the Subway club to a Big Mac, with the athlete arguing that the Subway sandwich has "more meat" and Jared arguing that it has "less fat."

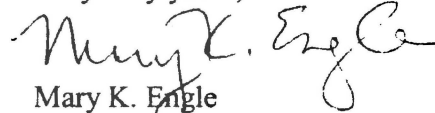
<sup>2</sup>Based on nutrition data from Subway's and McDonald's web sites.

In each of the Jared/Athlete ads, Subway's spokesman, Jared, stated the "less than half the fat" claim in dialogue that was a central feature of the ad. Jared also repeated the phrase "less fat" several times. The dialogue, however, did not include any qualification of that claim. Instead, the specific basis for the fat comparison was placed in a fine print video superscript. With some variation among ads, the superscript stated, "fat claim for footlong sub based on white or wheat bread without cheese or condiments that contain fat." The staff believes that this approach to the disclosure did not adequately convey the limitations of the claim. Although the wording of the disclosure was reasonably clear, the presentation was not conspicuous. The disclosure used a small font size in white print on a light background, sometimes with video images moving behind it. It flashed briefly in the lower part of the screen. In addition, the disclosure had no voice-over or other audio component. Overall, the staff believes that the small size, lack of contrast, short duration, and absence of any audio component made this disclosure difficult, if not impossible, for consumers to notice, read, and understand.

Subway's in-house counsel advised the staff that, during the course of our investigation, certain of the Jared/Athlete ads were discontinued and modifications were made to increase the font size of disclosures in remaining ads. We also understand that all of the ads airing as part of this campaign have now been discontinued. In-house counsel for Subway has also indicated that future ads containing comparative nutrient claims will be reviewed to ensure that disclosures of material information are substantially more prominent. As you know, there is no specific formula for determining whether a disclosure is clear and prominent. Instead, the FTC applies a performance standard. In other words, the disclosure must be one that consumers notice and understand. For that reason, we recommend that Subway conduct consumer research to confirm that any future disclosure of material information is sufficiently clear and prominent to be communicated to the consumer.

The staff has determined that no further action is warranted at this time. Given Subway's assurances that the campaign has been discontinued and that future advertising will include more prominent disclosures, as well as some uncertainty about how consumers view nutrient claims for a sandwich that is made to order, we have decided to close our investigation. This action is not to be construed as a determination that a violation has not occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take further action as the public interest may require.

Very truly yours,



Mary K. Engle  
Associate Director  
Division of Advertising Practices

cc: Mary Jane Saunders, Esq.