

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

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

The Commission has a laudable history of bringing enforcement actions against deceptive advertising claims using its authority over unfair or deceptive acts or practices. In its zeal to protect consumers from false or misleading advertising, however, the Commission must not attempt to suppress *all* speech about a public concern simply because the Commission considers that speech unreliable or unproven. Doing so would far exceed the government's proper role in regulating commercial speech. We are particularly concerned that, by expanding the definition of advertising and by imposing an inappropriately high redress amount on Duncan, the majority risks impinging upon speech fully protected by the Constitution. As the Supreme Court has observed, the purpose of the First Amendment is to "foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion."³ To avoid imposing its own preferences upon the public mind, the Commission should follow its traditional approach⁴ and refrain from attempting to classify as advertising protected non-commercial

¹ We support the complaint allegations that defendants made exaggerated claims about the efficacy and clinical support for Green Coffee Bean Extract as a weight loss product and failed to disclose Duncan's financial interest in the product. These claims were made in advertising, marketing, and promotional materials that referenced Duncan's appearance on the Dr. Oz Show. These materials are traditional forms of advertising and clearly qualify as commercial speech. Thus, as the majority acknowledges, the Commission did not need to reach fully-protected speech to hold defendants to account in this matter. Majority Statement at 4.

² As the Commission has recognized, the factors that determine whether speech is commercial are (1) the content of the speech, i.e., whether it contained a message promoting 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; (4) the means used to publish the speech, including whether it is paid-for advertising; and (5) the speaker's economic or commercial motivation. *In the Matter of POM Wonderful*, 2013 FTC Lexis 6, *147 (2013) (citing *In re Matter of R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 544-46 (1988)), *appeal docketed on other grounds*, No. 13-1060 (D.C. Cir. Mar. 8, 2013).

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

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

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

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

Moreover, we are concerned about the majority's characterization of Duncan's speech on the Dr. Oz Show as commercial, despite the fact that it lacked many of the factors that traditionally identify speech as commercial.⁶ During the show, Duncan never proposed a commercial transaction nor mentioned the price of any product. Nor did Duncan pay to appear on the program. Instead, Duncan addressed an issue of public concern (weight loss) in a non-commercial context with no mention of any specific product⁷ – indeed, Dr. Oz prohibits discussions of specific products.

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

challenging non-product specific statements on independent news and talk outlets," and yet fails to cite even one case where the FTC has found such statements to violate the FTC Act. In fact, in the recent *POM* case, the Commission "followed a precedent of restraint ... where liability has been found on other grounds" by declining to rely upon statements made by defendants during media interviews as a basis of liability. *POM Wonderful*, 2013 FTC LEXIS at *144-53.

⁵ Notably, the complaint contains no allegations challenging the Dr. Oz Show's status as an independent news and talk outlet and this matter is distinguishable from the Commission's initiative pursuing fake news sites. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Seeks to Halt 10 Operators of Fake News Sites from Making Deceptive Claims About Acai Berry Weight Loss Products (Apr. 19, 2011), <http://www.ftc.gov/news-events/press-releases/2011/04/ftc-seeks-halt-10-operators-fake-news-sites-making-deceptive>.

⁶ As noted *supra* note 2, in 1988, the FTC provided guidance determining what factors are relevant for identifying commercial speech in *R.J. Reynolds Tobacco Co.* In recent years, the clear direction of the courts has been to afford even more protection to speech, even speech that has an economic motivation. *See, e.g., United Foods, Inc. v. United States*, 533 U.S. 405, 409 (2001) (commercial speech is "usually defined as speech that does no more than propose a commercial transaction."); *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011) (holding that a state law restricting the sale and use of information detailing which doctors prescribe what drugs violated the First Amendment).

⁷ *See, e.g., Board of Trustees v. Fox*, 492 U.S. 469, 482 (1989); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995).

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

Extracting such a high amount of redress in this case could chill the speech of future speakers on television news or talk shows. Food industry representatives who would otherwise discuss health or nutrition topics and mention generic substances or ingredients in a news or talk venue may fear being held liable for failing to meet the FTC's rigorous advertising substantiation requirements. The majority's ultimate goal in imposing such an expansive interpretation of advertising and high level of redress may be to chill the speech of Dr. Oz's future guests. But the First Amendment forbids this objective.

The redress amount also fails to account for the fact that, unlike many weight-loss product claims challenged by the FTC, there is preliminary scientific evidence that GCBE is mildly effective as a weight-loss supplement.⁹ Even mild weight-loss effects are valuable. For example, prescription weight-loss medications, which can have significant side effects,¹⁰ have

⁸ For its commercial speech analysis, the majority relies heavily upon *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). There the Court concluded an advertisement mentioning a specific company's product remained commercial speech even when additional speech that addressed a public concern was included with the advertisement. Thus, *Bolger* discusses when the combination of clearly commercial speech *and* additional speech may become noncommercial speech. It does not address the issue here: when does otherwise non-commercial, non-advertising speech become commercial speech? Indeed, *Bolger* expressly refrains from answering this question. See 463 U.S. at 68 n.14 ("Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech."). Notably, in *Bolger*, the Supreme Court struck down as unconstitutional the application of the commercial speech restriction at issue. *Id.* at 75.

⁹ There are three key clinical trials providing, in aggregate, preliminary evidence that GCBE can assist with weight loss. See O. Dellalibera et al., *Svetol Green Coffee Extract Induces Weight Loss and Increases the Lean to Fat Mass Ratio in Volunteers with Overweight Problem*, 4 PHYTOTHERAPIE. no.4, 194 (2006); E. Thom, *The Effect of Chlorogenic Acid Enriched Coffee on Glucose Absorption in Healthy Volunteers and its Effect on Body Mass When Used Long-Term in Overweight and Obese People*, 35 J. INT. MED. RES. no.6, 900 (Nov-Dec 2007); Ayton Global Research, *Independent Market Study on the Effect of Chlorogenic Acid Enriched Coffee (Coffee Shape) on Weight When Used in Overweight People* (2009); See also I. Onakpoya et al., *The Use of Green Coffee Extract as a Weight Loss Supplement: A Systematic Review and Meta-Analysis of Randomised Clinical Trials*, 2011 GASTROENTEROL RESEARCH AND PRACTICE (2011) (meta-study of the Ayton, Dellalibera, and Thom studies finding a statistically significant weight-loss effect but urging further study). These clinical studies are consistent with a wide range of laboratory, animal, and human studies demonstrating a plausible mechanism and effect for GCBE. See, e.g., Caroline Henry-Vitrac et al., *Contribution of Chlorogenic Acids to the Inhibition of Human Hepatic gGlucose-6-Phosphatase Activity in Vitro by Svetol, a Standardized Decaffeinated Green Coffee Extract*, 58 J. AGRIC. FOOD CHEM. no.7, 4141 (2010) (lab study showing chlorogenic acids found in GCBE decrease liver glucose production); Hiroshi Shimoda et al., *Inhibitory Effect of Green Coffee Bean Extract on Fat Accumulation and Body Weight Gain in Mice*, 6 BMC COMPLEMENTARY ALTERNATIVE MED. 9 (2006) (animal study demonstrating effects consistent with weight-loss effect of GCBE); Noriyasu Ota et al., *Consumption of Coffee Polyphenols Increases Fat Utilization in Humans*, 56 J. HEALTH SCI. (JAPAN) no.6, 745 (2010) (human study supporting plausible mechanism for how chlorogenic acids could promote weight loss).

¹⁰ Such side effects may include increased blood pressure and heart rate, nervousness, insomnia, dry mouth, constipation, headache, dizziness, nausea, suicidal thinking and behavior and seizures. See *Common weight-loss drugs*, MAYO CLINIC (Oct. 14, 2014), <http://www.mayoclinic.org/healthy-living/weight-loss/in-depth/weight-loss-drugs/art-20044832?pg=2>.

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

Redress must be calibrated to deter harmful conduct while maintaining incentives for industry participants to supply truthful information to the marketplace about products, including their potential health benefits.¹² For this reason, where a product otherwise provides tangible benefit to consumers, the Commission has often brought an administrative action without pursuing consumer redress.¹³ In other instances, where the product at issue has no plausible consumer benefit, the Commission has typically agreed to settle an action for less than full consumer redress.¹⁴ Accordingly, in cases where the product provides a benefit to consumers, even if that benefit may be modest,¹⁵ we believe the Commission should seek redress more carefully calibrated to balance the need to prevent deception and the desire to avoid deterring the supply of valuable products or information to consumers. The Commission's overzealous approach to redress in this matter – in the face of preliminary evidence that GBCE has modest but real benefits – deviates from an economically-sound approach to redress and is therefore not in the best interests of consumers.

For the reasons stated above, we respectfully dissent.

¹¹ See, e.g., *Prescription weight-loss drugs: Can They help you?*, MAYO CLINIC (Oct. 10, 2014) (noting that “When combined with a low-calorie diet and regular exercise, weight-loss drugs produce an average weight loss of 5 to 10 percent of total body weight within a year, which is a typical weight-loss goal”), <http://www.mayoclinic.org/healthy-living/weight-loss/in-depth/weight-loss-drugs/art-20044832>.

¹² See, e.g., Paul H. Rubin, *5110: Information Regulation (Including Regulation of Advertising)*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 271, 286 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (“While it may appear that it is impossible to have ‘too little’ deception, it is nonetheless possible to overdeter deceptive advertising. This is because . . . the line between deception and useful information is not always clear and one result of overdetering deception through excessive penalties would be the suppression of provision of information that many consumers will find useful”). On the general issue of optimal sanctions and deterrence, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Steve Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45 (2000).

¹³ See, e.g., *In the Matter of The Dannon Company, Inc.*, FTC File No. 082-3158, Administrative Proceedings, <http://www.ftc.gov/enforcement/cases-proceedings/0823158/dannon-company-inc>, and accompanying Press Release, “Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink” (Dec. 15, 2010); *In the Matter of Tropicana, Inc.*, FTC File No. 042-3154, Administrative Proceedings, <http://www.ftc.gov/enforcement/cases-proceedings/042-3154/tropicana-products-inc-matter>, and accompanying Press Release (noting that “[o]range juice contains many nutrients important to a healthy diet, and advertising can be an important source of information about the health benefits of foods But it is essential that such advertising be truthful. In this case Tropicana’s claims went well beyond its scientific support.”) (June 2, 2005).

¹⁴ See, e.g., *FTC v. Sensa Products, LLC*, No. 14cv72, Stipulated Final Judgment and Order (N.D. Ill. Jan. 8, 2014) (judgment of \$46.5 million suspended upon the payment of \$26.5 million); *FTC v. HCG Diet Direct, LLC*, No. CV-14-00015-PHX-NVW, Stipulated Final Judgment and Order (D. Ariz. Jan. 8, 2014) (judgment of \$3.2 million suspended due to inability to pay).

¹⁵ Consumers might value significantly small amounts of weight loss.