

## CLIENT ALERT

### In a Bellwether FTC Settlement, Advertiser Agrees to Pay Consumer Redress for Product Claims Made During Talk Shows

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Last week, the Federal Trade Commission (FTC) reached a [\\$9 million settlement](#) with the advertiser of a green coffee bean extract (GCBE) supplement whose founder and owner, during appearances on *The Dr. Oz Show* and *The View*, touted the results of a dubious scientific study and promised rapid weight loss without diet or exercise. Identified and interviewed by Dr. Oz and other talk show hosts as a natural health expert and certified nutritionist, the company's owner recommended that viewers purchase GCBE supplements that matched the composition and brand attributes of his company's own product. While it is not surprising that the FTC would bring an enforcement action against these kinds of weight loss claims and endorsements, the context is somewhat unique. The settlement addresses an emerging frontier in FTC enforcement—what constitutes advertising in the context of news and talk shows and endorsements on-air (and on-line)—and also reinforces the FTC's long-standing commitment to intervene when deceptively formatted advertisements (including newspaper advertorials, television infomercials, and blog posts) might cause consumers to accord more credence to product claims than they would if they were aware that they were viewing an advertisement for a product.

#### The FTC's Complaint

The [complaint](#) tells a mostly familiar story about a weight loss supplement marketer that violated many of the FTC's established advertising rules and guidelines regarding weight loss products. They claimed their GCBE supplement was clinically proven to cause rapid and substantial weight loss (loss of 10 percent body weight, 16 percent total body fat, and 17 pounds after only 12 weeks) without diet or exercise. The clinical study was separately challenged by the FTC as flawed and scientifically unreliable, which resulted in a [\\$3.5 million settlement](#) with the company that sponsored the study in September 2014, and was [later retracted](#) by the U.S. authors who published it. In addition to the unsupported and deceptive claims, the company used an aggressive online marketing strategy that included numerous "fake news" websites, "press releases," and product endorsements, testimonials and videos that appeared to be made by ordinary consumers but were actually paid endorsements or made by employees of the company.

What sets this story apart from others, however, is the opportunity seized by the company from an invitation to appear on *The Dr. Oz Show* in early 2012. The founder and principal owner of the company, Lindsay Duncan, introduced as a "naturopathic doctor" and certified nutritionist, had appeared as a guest on *The Dr. Oz Show* a number of times in 2011 and 2012 to discuss "cancer-fighting" supplements and natural food issues. The producers then invited him to appear on the show, as an expert, to discuss the purported weight-loss benefits of GCBE. According to the complaint, Duncan had no familiarity with the subject when the invitation was received in early April 2012, but nonetheless he agreed to appear as an expert on the show, which was taped only five days after he accepted the invitation. Before the show was aired just two weeks later, Duncan's companies had purchased a large supply of GCBE raw material, created websites that started to promote their "Pure Health" GCBE capsule product, and devised an online search and optimization strategy that would be in place once *The Dr. Oz Show* segment aired on

TV. Notably, none of these activities or business interests were disclosed to Dr. Oz, producers of the show, or viewers of the show.

The GCBE show started with Dr. Oz stating: "You may think magic is make believe – but this bean (holding [green] coffee bean) has scientists saying . . . they found the magic weight loss cure for every body type." Calling it "breaking news," he stated that: "As a supplement, this miracle pill can burn fat fast!" During his interview, Duncan stated "I usually don't recommend weight-loss supplements, but this one has got me really, really excited." After citing the rapid weight loss results from the "recent study" where "the participants took the capsules and did nothing else, they didn't exercise, they didn't change their diet," he opined that GCBE has "this synergistic effect that basically burns and blocks and stops fat, but is also natural and safe." Duncan then advised viewers to search online for "Pure Green Coffee Bean Capsules" and to "take two 400 mg vegetarian capsules."

Two weeks before the segment aired, Duncan's companies had started marketing and selling "Pure Health" GCBE vegetarian 400 mg capsule products. Capitalizing on the "Oz Effect" that increased consumer demand for the product following broadcast of the show, defendants sold more than \$90 million of GCBE products during the roughly two and half year period that followed.

For his part, Dr. Oz appeared before Congress during a memorable hearing in which he was questioned strongly regarding his support for GCBE. At the hearing, Dr. Oz admitted that the scientific support for GCBE had been lacking, but denied that he or his show had profited from the resulting sales.

## **The Terms of the Settlement**

The settlement order requires defendants to substantiate any future weight-loss claims with at least two well-controlled human clinical studies,<sup>1</sup> imposes restrictions regarding any health benefit and efficacy claims for dietary supplement or drug products (which must also be substantiated by competent and reliable scientific evidence), limits any future scientifically proven claims, and requires clear and conspicuous disclosure of the status of any endorsers of the company in any media and limitations on the use of purportedly independent users or ordinary consumers. Along with the standard 20-year FTC monitoring and reporting obligations, the defendants are required to pay a consumer redress penalty in the amount of \$9 million, which was calculated based upon all sales of their GCBE products.

## **Did the Settlement Unfairly Penalize Non-Commercial Speech?**

This settlement raises questions about free speech, the potential expansion of the definition of advertising in news and talk shows, and the blurring of the line between non-commercial and commercial speech. Commissioners Ohlhausen and Wright dissented from the proposed settlement because they felt that the amount of the harm was overstated as the "redress improperly includes sales attributable to protected non-commercial speech" by Dr. Oz and the defendant. The facts that Duncan did not pay to appear on the show, propose a commercial transaction, or mention the price of any product – and that Dr. Oz's speech on an independent talk show was protected by the First Amendment – were identified as supporting factors by the dissent. Ohlhausen and Wright went on to state that, "[i]n its zeal to protect consumers from false or misleading advertising. . . the Commission must not attempt to suppress *all* speech about a public concern simply because [it] considers that speech unreliable or unproven. Doing so would far exceed the government's proper role in regulating commercial speech."

The majority of the Commissioners, however, disagreed, noting that "the content of [defendant's] speech clearly promoted [his] products." Substantial weight was placed on the evidence that the defendant's appearance on *The Dr. Oz Show* was part of a calculated and undisclosed strategy to launch and promote their own GCBE product to consumers. Based upon what it called "manipulative commercial speech," the majority concluded that increased sales resulting from Dr. Oz's favorable statements about GCBE—even those made during other segments of his show where the defendant played no part and did not appear—should be included in the consumer redress calculation. While not expressly included in their published statement, Dr. Oz's appearance before Congress last summer to address concerns regarding the promotion of consumer health products and their efficacy on his talk show may have added some context to the majority's decision in this case.

### Lessons for Advertisers

1. Obviously, underlying substantiation for product claims must meet basic FTC standards. For weight-loss and other health claims, at least one randomized, double-blind, placebo controlled human clinical study is strongly recommended. Even if, as mentioned in footnote 1, the FTC backs down from requiring two randomized controlled studies, expect it to continue requiring rigorous substantiation for scientific claims, particularly for unlikely health claims such as the rapid weight-loss claims at issue here.
2. The FTC's Endorsement and Testimonial Guides require disclosure of material connections between endorsers and the advertiser. At least part of the liability here stems from the violation of those guidelines, and even the dissent agreed that this part of the settlement was well founded. As this case and more than 4 years of enforcement of the FTC Guides clearly demonstrate, using paid or employee product endorsements without clear disclosure will get an advertiser in hot water.
3. Third-party endorsers who appear on TV news and talk shows need to disclose their material connection to the advertiser and should be given a very clear script, with guardrails for what not to say. The producers of the show should also agree to adhere to these guidelines, so that the show does not convey false impressions about the product. These issues should be covered in a written agreement with the endorser and documented in writing with the producer in order to protect the brand.
4. The use of experts who have a material connection with the advertiser on TV news and talk shows just got even riskier. Special consideration needs to be given before any owner, investor, officer or strategic partner of a brand appears on such a program as an expert to discuss issues that are likely to influence the demand for the brand's products or services. Disclosure of the material connection alone may not be enough to protect the advertiser from statements made by the expert and others, even on independently produced TV shows.

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<sup>1</sup> The requirement for two clinical studies in this and other FTC settlements may be in doubt, given the D.C. Circuit's recent decision in *POM Wonderful, LLC, et al. v. Federal Trade Commission*, No. 12-1060 (decided Jan. 20, 2015). We will be publishing a separate alert on this case.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

#### **Christopher A. Cole**

Partner – Washington, D.C.

Phone: +1 202.624.2701

Email: [ccole@crowell.com](mailto:ccole@crowell.com)

**David Ervin**

Partner – Washington, D.C.

Phone: +1 202.624.2622

Email: [dervin@crowell.com](mailto:dervin@crowell.com)