



Oregon

Theodore R. Kulongoski, Governor

Oregon Board of Chiropractic Examiners

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www.oregon.gov/OBCE

April 28, 2010

Thomas F. Miller, DC
15962 Boones Ferry Rd.
Lake Oswego, OR 97035

Re: Case # 2009-5012, Letter of Reprimand

Dear Dr. Miller,

The Oregon Board of Chiropractic Examiners has voted to issue you this Letter of Reprimand in regards to violations found in the Stipulated Final Order.

The Board notes that this is your second disciplinary action in which advertising issues are addressed. They also noted the Agreement of Voluntary Compliance you have signed with the Oregon Department of Justice and the practice restrictions in that agreement.

The Board requests that you take this opportunity to evaluate your practice and make changes that will benefit your patients and keep you in compliance with all relevant statutes and rules regarding advertising.

Sincerely,

Original signature on file at OBCE

Dave McTeague
Executive Director



BEFORE THE
BOARD OF CHIROPRACTIC EXAMINERS
STATE OF OREGON

In the Matter of)
) Case # 2009-5012
Thomas F. Miller, D.C.)
)
)
) FINAL STIPULATED
Licensee.) ORDER
_____)

The Oregon Board of Chiropractic Examiners (hereafter "Board" or "OBCE") is the state agency responsible for licensing, regulating and disciplining chiropractic physicians and certified chiropractic assistants in the State of Oregon. Thomas F. Miller, D.C. (hereafter "Licensee") is currently licensed by the Board to practice as a chiropractic physician in Oregon.

Findings of Fact

1.

A complaint was filed in the fall of 2009 regarding several newspaper and website ads issued by Licensee.(August 24, 2009 and September 21, 2009). The advertisements included the following inaccuracies:

1. The advertisement claimed that spinal decompression represents a "breakthrough" but didn't explain or provide evidence to support that claim. Earlier in 2009 the Board asked Licensee to support that claim. Since that time, the ad again includes that notation.

2. The reference to the 2008 Macario case study is inconsistent with the actual study as published in the journal Pain Practice.

3. Licensee made the following statements;

"eliminate your sciatica while you sleep"

"While [patients] sleep, their sciatica and pain are being eliminated."

"It's all because of 15 recent medical studies on spinal decompression."

"revolutionary new therapy"

"Explosion aftermath leads to mysterious and unexpected health and vitality of all involved."

"... you see, there's a very small percentage we can't help."

When asked to support these statements, Licensee was unable to.

4. Licensee fails to identify himself as a chiropractor or chiropractic physician as required by the Oregon Doctor's Title Act. The August 24, 2009 Oregonian advertisement had in large type in the lower right hand corner the designation "Spinal Decompression Center of

Oregon.” The Oregon Doctors Title Act states there should have been a designation after the assumed name, the designation being chiropractor or chiropractic physician.

5. On his website Licensee fails to inform the audience of any potential conflict of interest; one or more of the website advertisements were provided by Axiom Worldwide Inc. yet they do not state that. A potential patient should know that the promotional information on the website is being provided by the manufacturer of the equipment being touted.

6. A comparison chart contrasting spinal decompression with other medical options leaves out discussion of other chiropractic care.

7. Licensee has previously been subject to discipline for advertising issues in case number 2006-1039 which resulted in a stipulated final order that he receive a civil penalty and make certain changes to his advertising

Conclusions of Law

2.

Licensee failed to include the designation “chiropractor”, “chiropractic physician,” or “chiropractic” following the designation “Spinal Decompression Center of Oregon” in his August 24, 2009 advertisement in the Oregonian. By failing to do so Licensee failed to fulfill the requirements of the Oregon Doctors’ Title Act, ORS, 676.110 , and OAR 811-015-0045 (3) which says, “A Chiropractic physician shall adhere to the Doctors’ Title Act, ORS 676.110(2).”

Licensee provided information in his advertisements which was not accurate and was not conclusively proven to the satisfaction of the Board. This is in violation of ORS 684.100(1)(i),(L), and OAR 811-015-0045.

Stipulations

3.

Therefore, pursuant to ORS 183.415(5) and ORS 684.100(9)(e) the OBCE orders:

1. The parties have agreed to enter this stipulated final order. Licensee agrees to the entering of this final order. Licensee agrees that he is aware of his right to a hearing with his attorney present to contest the charges and hereby waives that right and agrees to entry of this order. The signature of this order also waives any right to appeal. The parties wish to settle and resolve the above matter without further proceedings.
2. Licensee agrees to the attached letter of reprimand.
3. Licensee agrees to pay a civil penalty in the sum of \$2,000 payable to the Board within 90 days of this final order.
4. Licensee agrees to abide by the law entitled “Dr’s Title Act” found in ORS 676.110 and OAR 811-015-0045(3).
5. Licensee agrees to abide by the law and rules regarding Chiropractic Advertising found in ORS 684.100(1)(i),(L), OAR 811-015-0045(2) and (3).

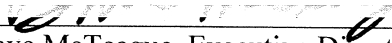
6. Licensee agrees to make the necessary changes to any media television, web or news advertisements to come into compliance with the statutes and rules mentioned in numbers 4 and 5 above.
7. Licensee agrees to comply with the Assurance of Voluntary Compliance entered into on or about April 23, 2010 with the Oregon Department of Justice, Financial Fraud/Consumer Protection Section.
8. Failure to complete this final stipulated order with the terms so stated, may result in further discipline, up to and including, revocation.

DATED this ^{28th} day of April 2010

BOARD OF CHIROPRACTIC EXAMINERS
State of Oregon

Original signature on file at OBCE

By:


Dave McTeague, Executive Director

Original signature on file at OBCE

By:


Thomas Miller D.C., Licensee

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STATE OF OREGON
Marion County Circuit Courts
MAY 03 2010
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STATE OF OREGON
MARION COUNTY COURTS
MAY 03 2010
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CIRCUIT COURT OF OREGON

MARION COUNTY

IN THE MATTER OF:
THOMAS MILLER D.C.,
RESPONDENT

Case No. 10015079
ASSURANCE OF VOLUNTARY
COMPLIANCE

1

Thomas Miller D.C. does business in Oregon and is respondent herein. This agreement is between respondent and the Oregon Department of Justice (DOJ) acting pursuant to ORS 646.632.

PROCEDURE

2.

This Assurance of Voluntary Compliance (AVC) is a settlement of a disputed matter. It shall not be considered an admission of a violation for any purpose.

3.

Respondent waives receipt of a notice from the State of Oregon pursuant to ORS 646.632(2) of the alleged unlawful trade practice and the relief to be sought.

4

Respondent understands and agrees this AVC applies to respondent, respondent's principals, officers, directors, agents, employees, representatives, successors and assigns, jointly and severally, while acting personally, or through any corporation or other business entities, whose acts, practices or policies are directed, formulated or controlled by respondent.

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5.

Respondent and respondent's attorney agree and understand that following acceptance of the AVC by DOJ, DOJ may communicate directly with respondent for the purpose of executing and enforcing the terms of this agreement, resolving future complaints, and conducting undercover investigations of respondent to the extent permitted by law.

6.

Respondent understands and agrees that if this AVC is accepted by DOJ, it will be submitted to the Circuit Court of the State of Oregon for County for approval, and, if approved, will be filed with the court pursuant to ORS 646.632(2).

7.

Respondent waives any further notice of submission to and filing with the court of this AVC. Respondent agrees to accept service of a conformed or court certified copy by prepaid first class mail sent to the address following respondent's signature or to respondent's attorney.

8.

If monies which are ordered to be paid in this AVC are not paid timely, DOJ may convert the AVC to a money judgment under ORS 646.632(2) without notice to respondent. Respondent agrees a copy of the money judgment may be sent to respondent, first class mail to the address following respondent's signature.

9.

Respondent understands that, in addition to any other sanctions which may be imposed under this AVC or under the law, violation of any of the terms of this AVC may result in contempt of court proceedings, civil penalties of up to \$25,000 for each violation, and such further relief as the court may deem appropriate. ORS 646.632(4), ORS 646.642(1) and ORS 646.642(2).

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10.

The parties acknowledge that no other promises, representations or agreements of any nature have been made or entered into by the parties. The parties further acknowledge that this AVC constitutes a single and entire agreement that is not severable or divisible, except that if any provision herein is found to be legally insufficient or unenforceable, the remaining provisions shall continue in full force and effect.

REMEDIES

11.

Respondent shall obey Oregon's Unlawful Trade Practices Act, ORS 646.605 to ORS 646.656.

12.

Respondent shall not represent or imply that DOJ acquiesces or approves of respondent's past business practices, current efforts to reform its practices, or any future practices which respondent may adopt or consider adopting. DOJ's decision to settle this matter or to otherwise unilaterally limit current or future enforcement action does not constitute approval or imply authorization for any past, present, or future business practice.

13.

Respondent shall pay the sum of twenty-five thousand dollars (\$25,000) to DOJ for deposit to the Account established pursuant to ORS 180.095. Said sum shall be used by DOJ as provided by law. The monies due under this paragraph are payable as follows: (a) three thousand dollars (\$3,000) of said twenty-five thousand dollars shall be paid to DOJ within 30 days of the execution of this AVC; (b) five thousand dollars (\$5,000) shall be paid to DOJ within six months of the execution of this AVC; (c) DOJ agrees to suspend the remaining seventeen thousand dollars (\$17,000) provided that Respondent fully complies with all conditions of this AVC, including making all payments on time. If the DOJ determines in good faith that Respondent has failed to comply with the conditions of this AVC, DOJ may convert

1 the suspended seventeen thousand dollars into a money judgment. Prior to taking such action,
2 DOJ shall provide 10 days notice to Respondent of his noncompliance and DOJ's intent to
3 convert the suspended payment into a money judgment. The notice to Respondent shall identify
4 and describe the basis for DOJ's determination that Respondent has not complied with the AVC.
5 If Respondent believes DOJ has not made a good faith determination under this paragraph, then
6 Respondent shall be entitled to seek from the Court a review of such determination by DOJ
7 and/or declaratory relief regarding such determination by DOJ. Five years after execution of this
8 AVC, the suspended payment shall be irrevocably suspended and DOJ may no longer convert
9 any suspended payment into a money judgment.

10 14.

11 The suspension of payment for \$17,000 of the \$25,000 payment required by paragraph
12 13 and the requirement for DOJ to provide notice before converting the suspended payment into
13 a money judgment shall not be construed to exonerate any contempt or failure to comply with
14 any provision of this AVC after the Effective Date; to compromise the authority of DOJ to
15 initiate a proceeding for any contempt or sanctions for failure to comply; or to compromise the
16 authority of the court to punish as contempt any violation of this AVC. Furthermore, nothing in
17 this subsection shall be construed to limit the authority of DOJ to protect the interest of the State
18 of Oregon.

19 15.

20 In addition to the payments described in paragraph 14 above, Respondent agrees to pay
21 at least two thousand dollar (\$2,000) penalty to the Oregon Board of Chiropractic Examiners as
22 part of a larger settlement with the Board regarding Respondent's promotional practices. If
23 Respondent has not made said two thousand dollar payment to the Oregon Board of
24 Chiropractic Examiners within six months of the execution of this AVC, Respondent shall make
25 an additional payment of two thousand dollars (\$2000) to DOJ for deposit to the Account
26 established pursuant to ORS 180 095. Said sum shall be used by DOJ as provided by law. This

1 paragraph creates no obligation or limitation on the part of the Oregon Board of Chiropractic
2 Examiners who may exercise its own discretion regarding any settlement with Respondent.

3 16.

4 Restitution shall be paid as provided in this paragraph:

5 A. Upon execution of this AVC, respondent shall pay \$6,911 restitution to
6 Lawrence H. Spiegel. As a condition to this payment, respondent may require Mr. Spiegel to
7 execute a reasonable release of his claims against Respondent. If Mr. Spiegel should decide not
8 to execute a release, respondent shall add the \$6,911.00 payment that would have otherwise
9 gone to Mr. Spiegel to the \$8,000 to be paid pursuant to paragraph 13 (a) so that a total of
10 \$15,911 shall be paid into the Account established by ORS 180.095.

11 B. Upon execution of this AVC, respondent shall refund \$336.00 to Ms. Lanae
12 Ladd.

13 C. Upon payment, Respondent shall provide DOJ with a copy of the payment and
14 any cover letter that accompanies the payment.

15 17

16 Effective immediately upon execution by Respondent of this AVC, Respondent
17 agrees to adhere to each of the following requirements:

18 A. Respondent shall not make any express or implied statements in the offer or sale
19 of Respondent's products or services that have the capacity, tendency or effect of deceiving or
20 misleading or that fail to state any material fact, the omission of which deceives or tends to
21 deceive.

22 B. Respondent, in connection with the labeling, advertising, promotion, offering for
23 sale, sale, or distribution of his products and services, shall not make any representation,
24 expressly or by implication, concerning such product or services' efficacy, performance, safety
25 or benefits, unless, the representation is non-misleading, and, at the time of making such
26 representation, the Respondent possesses and relies upon competent and reliable scientific

1 evidence that is sufficient in quality and quantity based on standards generally accepted in the
2 relevant scientific fields, when considered in light of the entire body of relevant and reliable
3 scientific evidence, to substantiate that the representation is true. For purposes of this
4 paragraph, competent and reliable scientific evidence means tests, analyses, research, or studies
5 that have been conducted and evaluated in an objective manner by qualified persons and are
6 generally accepted in the profession to yield accurate and reliable results.

7 C. Respondent shall not use endorsements or testimonials to advertise and promote
8 his products and services unless use of the endorsement or testimonial fully complies with the
9 then current FTC Guide Concerning Use of Endorsements and Testimonials in Advertising. A
10 copy of FTC's current Guide is attached as Exhibit 1. Respondent agrees that violation of
11 FTC's Guide Concerning the Use of Endorsements and Testimonials in Advertising shall be a
12 violation of this AVC.

13 D. When Respondent presents information in detailing pieces, brochures, booklets,
14 mailing pieces, published journals, magazines, other periodicals and newspapers, and broadcast
15 through media such as radio, television, the Internet, and telephone communications systems,
16 that references a clinical study, Respondent shall (1) accurately reflect the methodology used
17 to conduct the clinical study; (2) shall not present favorable information or conclusions from a
18 study that is inadequate in design, scope, or conduct to furnish significant support for such
19 information or conclusions; (3) shall not use statistical analyses and techniques on a
20 retrospective basis to discover and cite findings not soundly supported by the study, or to
21 suggest scientific validity and rigor for data from studies the design or protocol of which are
22 not amenable to formal statistical evaluations; (4) shall not present information from a study in
23 a way that implies that the study represents larger or more general experience with the product
24 than it actually does; (5) shall not use statistics on numbers of patients, or counts of favorable
25 results or side effects, derived from pooling data from various insignificant or dissimilar
26 studies in a way that suggests either that such statistics are valid if they are not or that they are

1 derived from large or significant studies supporting favorable conclusions when such is not
2 the case.

3 E. Respondent shall not accept or require pre-payment for spinal decompression
4 treatments unless Respondent complies in full with the rules regarding prepayment attached as
5 Exhibit 2 and incorporated herein by this reference. Respondent may not avoid this
6 requirement by front loading payment for the initial sessions of a treatment plan; respondent
7 shall charge the same amount for each spinal decompression treatment that is part of a single
8 treatment plan.

9 **APPROVAL BY COURT**

10 APPROVED FOR FILING and SO ORDERED this 3 day of May, 2010.

11 Original signature on file at OBCE

12
13 [Signature]
Circuit Court Judge

14 **REVIEW BY RESPONDENT'S ATTORNEY**

15 Approved as to form.

16 Original signature on file at OBCE

17 [Signature]
David Campbell
Attorney for Respondent

18 **RESPONDENT'S SIGNATURE AND ACKNOWLEDGMENT**

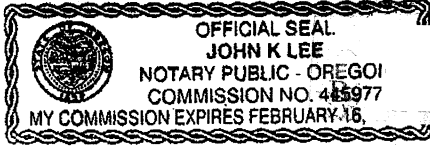
19 Respondent has read and understands this agreement and each of its terms. Respondent
20 agrees to each and every term.

21 Original signature on file at OBCE

22 [Signature]
Original signature on file at OBCE

23
24 Address 19626 Dorch Ct
Lake Oswego, OR 97034

25 SUBSCRIBED AND SWORN to before me this 23rd day of
26 April, 2010.



Original signature on file at OBCE

Notary Public for Oregon

ACCEPTANCE OF DOJ

Accepted this 3rd day of May, 2010

JOHN R KORGER
Attorney General

Original signature on file at OBCE

David A Hart OSB #00275
Senior Assistant Attorney General
Department of Justice
Of Attorneys for Plaintiff
Financial Fraud/Consumer Protection Section
1162 Court Street NE
Salem, OR 97301-4096
Phone: (503) 934-4400
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FEDERAL TRADE COMMISSION
16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

* * * *

This document includes only the text of the Revised Endorsement and Testimonial Guides. To learn more, read the Federal Register Notice at www.ftc.gov/opa/2009/10/endortest.shtm.

* * * *

§ 255.0 Purpose and definitions

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FIC Act (15 U S C 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.

The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

Ex
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Page 1 of 12

Example 1: A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser's opinion [See § 255 1(b)]

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.

Example 4: A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Example 6: An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

Example 7: A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit.

Exhibit 1
Page 2 of 12

and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [See §§ 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.]

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [See § 255.1(b) regarding the "good reason to believe" requirement.]

(d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

Exhibit 1
Page 3 of 12

Example 1: A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of Section 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, "We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best." The advertisement portrays X typing on each keyboard and then picking the advertiser's brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser's keyboard at work. In addition, the endorsement also may be required to meet the standards of Section 255.3 (expert endorsements).

Example 3: An ad for an acne treatment features a dermatologist who claims that the product is "clinically proven" to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [See Section 255.3 regarding the product evaluation that an expert endorser must conduct.]

Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

Example 5: A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated

representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services [See § 255.5]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.¹

¹ The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either "Results not typical" or the stronger "These testimonials are based on the experiences of a few people and you are not likely to have similar results." Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

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(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth

The ad will also likely communicate that the endorsers' experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, "Notice: These testimonials do not prove our product works. You should not expect to have similar results," the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by \$100, \$125, and \$150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company's heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save \$100 or more. A disclosure such as, "Results not typical" or, "These testimonials are based on the experiences of a few people and you are not likely to have similar results" is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, e.g., "the average homeowner saves \$35 per month," "the typical family saves \$50 per month during cold months and \$20 per month in warm months," or "most families save 10% on their utility bills."

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (i.e., a 120-point drop in serum cholesterol without any lifestyle changes)

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, "Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds." The advertisement accurately describes the woman's

experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features "before" and "after" pictures of a woman who says "I lost 50 pounds in 6 months with WeightAway," the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., "most women who use WeightAway for six months lose at least 15 pounds").

If the ad features the same pictures but the testimonialist simply says, "I lost 50 pounds with WeightAway," and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (e.g., "most women who use WeightAway lose 15 pounds").

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

Example 6: An advertisement purports to portray a "hidden camera" situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though the words "hidden camera" are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed [See § 255.5]

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement

(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (e.g., matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer's use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert's evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority [See § 255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an "engineer" implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as "Doctor" during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical "doctor" (e.g., an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as "doctor," the advertisement must make clear the nature and limits of the endorser's expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the "American Institute of Science." From its name, consumers would infer that the "American Institute of Science" is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization

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(e.g., if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital's choice -- convenience of packaging -- is neither relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

Example 5: A woman who is identified as the president of a commercial "home cleaning service" states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand's performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president's statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors to the advertised cleanser, the service must, in fact, have such experience, and, on the basis of its expertise, it must have determined that the cleaning ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors' products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service's president makes no mention that the endorsed cleanser was "chosen," "selected," or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

Example 6: A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product's safety and efficacy.

§ 255.4 Endorsements by organizations

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its

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expertise in evaluating the product under § 255.3 (expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products [See § 255.1(d) regarding the liability of endorsers]

Example: A mattress seller advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

Example 1: A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (*e.g.*, to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the "findings" of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement.

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star's compensation for the commercial is a \$1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

Example 3: During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball.

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better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company's clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

Example 4: An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

Example 5: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein "steak." This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

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Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the "hidden camera" only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6: An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as "extras" in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer's infomercial, they will receive a small payment. Viewers would not expect that these "consumer endorsers" are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a "street team" program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

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EXHIBIT TWO

Pre-Paid Treatment Plans: If the respondent accepts pre-payment for services planned but not yet delivered, the respondent must establish an escrow account to hold all pre-payment funds.

(a) Funds may be removed from the escrow account following the delivery of services in such amounts equal to the respondents usual and customary charges for like services with any discounted percentage contained in the pre-paid agreement for the contracted treatment plan.

(b) Funds received in advance of the day that services are delivered must be deposited into the escrow account in a timely manner.

2) a) The patient's file must contain the proposed treatment plan including enumeration of all aspects of evaluation, management and treatment planned to therapeutically benefit the patient relative to the condition determined to be present and necessitating treatment.

(b) The patient's financial file must contain documents outlining any necessary procedures for refunding unused payment amounts in the event that either the patient or the respondent discharge the others services or therapeutic association.

(c) The treatment plan in such cases where prepayment is contracted must contain beginning and ending dates and a proposed breakdown of the proposed treatment frequency, types of modalities and procedures included in the contracted treatment and methods of evaluating the patient's progress or serial outcome assessment plan and method of recording or assessing patient satisfaction.

3) A contract for services and consent for treatment document must be maintained in the patient's file It must specify the condition(s) for which the treatment plan is formulated, prognosis and alternate treatment options.

4) The respondent is responsible for providing all treatments appropriate and necessary to address and manage the condition including unforeseen exacerbations or aggravations, within the respondent's chiropractic physician's licensure, that may occur during the course of time for which the contract is active. This does not include alternative services procured by the patient or treatment by providers other than respondent or those under the respondent's direct supervision. At any time during the course of the contract, referrals to outside providers shall be made when warranted.

4) If nutritional products or other hard goods including braces, supports or patient aids are to be used during the proposed treatment plan, the patient documents must state whether these items are included in the gross treatment costs or if they constitute a separate and distinct service and fee. Any additional fees must be explained to the patient in advance and noted in the chart notes.