BATTLING THE REAL "FAKE NEWS": FTC REACHES MULTI-MILLION DOLLAR SETTLEMENT WITH INTERNET MARKETERS FOR FALSE CELEBRITY ENDORSEMENTS

Unfortunately, the unauthorized use of a celebrity's name and image has become a deceptive advertising practice frequently used by dishonest online marketers. This type of ad typically claims (falsely) that a public figure has used or endorsed what is billed as the latest miracle weight loss supplement or wrinkle-reducing cosmetic. Going after these bad actors to protect one's right of publicity and intellectual property rights can be a challenge, as it can be difficult to identify the responsible parties, and even if they can be found, they may be outside of the reach of U.S. laws or a small operation that appears not worth pursuing. A recent action by the Federal Trade Commission (FTC), however, serves as a reminder that those who peddle in false online endorsements may be part of a larger network that can be identified and stopped.

Earlier this month, the FTC announced that it had reached an agreement to settle charges against a network of internet marketers who for years had allegedly used false and deceptive advertising and billing practices — including the use of fake magazine and news articles and phony celebrity endorsements — to sell its alleged weight loss, muscle-building and wrinkle-reducing products to consumers. The settlement is notable not only for the substantial financial award achieved by the FTC, but also for the breadth of the marketing network involved. Public figures seeking to combat the unauthorized use of their names or images in internet advertisements should take comfort from the FTC's settlement that it is possible to identify the parties responsible for such misconduct and put a stop to their deceptive schemes.

THE BOTTOM LINE

The FTC's settlement with the Defendants allegedly engaged in these deceptive marketing practices serves as a reminder that the parties responsible for online advertising using public figures' names and images without authorization can be identified and stopped, and that those parties may include the operators of large marketing networks. In other words, the FTC did not just find the parties responsible for the unlawful advertising practices; it also found parties within the United States with assets significant enough to disgorge millions of dollars in deceptively-acquired profits.

THE NETWORK

According to the FTC's complaint, three individuals used a complex network of 19 corporate entities (collectively, the Defendants) to market and sell a variety of purported weight loss, muscle-building and wrinkle-reducing products. The Defendants allegedly marketed and sold their products "through an interrelated network of companies" that were under common control and ownership, and shared officers, managers, employees, call centers, recordkeeping systems, commingled funds and sales practices. The FTC alleged that the three individual defendants controlled each of the corporate defendants, some of which they owned themselves, and others which were owned by family, friends, employees and unpaid interns.

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The Defendants marketed and sold their products on their own websites and on those operated by "affiliate marketers," independent marketers hired through third parties known as "affiliate networks." When a consumer bought one of the Defendants' products after visiting an advertisement hosted by an affiliate marketer, the Defendants would pay a fee to the affiliate network. The FTC alleged that in 2015 alone, those fees amounted to more than $19 million.

THE "FAKE NEWS"

The FTC's complaint describes a variety of deceptive advertising and billing practices that were utilized by the Defendants that, by now, may be familiar to many. Most notably, the FTC alleged that the Defendants — and the affiliate marketers working on their behalf — hosted "websites designed to look like legitimate and independent news reports or magazine articles about one of Defendants' Products." The fake media sites used domain names and mastheads that falsely appeared to be from legitimate news, magazine or health websites and engaged in numerous deceptive practices, including falsely claiming that celebrities such as Kim Kardashian, Jennifer Aniston, Will Ferrell and others had used and/or endorsed the products.

The FTC also alleged that the Defendants failed to properly disclose the terms of sale, including that their "risk-free" trial offers would in fact lead to negative option renewal programs unless cancelled within a short amount of time. In addition, the FTC alleged that the Defendants attempted to conceal their misconduct from regulators, banks and payment processors by creating "alternate 'cleaner' versions" of websites that had more prominent disclosures than the "landing page" websites that consumers would typically see.

Based on the alleged misconduct, the FTC charged the Defendants with violations of the FTC Act, the Restore Online Shoppers' Confidence Act and the Electronic Funds Transfer Act.

THE SETTLEMENT

Earlier this month, the FTC announced that the Defendants had agreed to settle the FTC's charges in a stipulated order that included a substantial monetary component.

The order, which was entered by the U.S. District Court for the Southern District of California, imposes extensive injunctive relief, including prohibitions on certain negative option sales and other sales practices. Of particular note, the order prohibits further deceptive advertising through the use of fake media sites, false endorsements and other phony testimonials and claims, and requires the Defendants to more strictly monitor the advertising materials of affiliate marketers to ensure their compliance with the order.

In addition, a $179 million judgment was entered for the FTC against the Defendants; a staggering amount which the FTC alleged was paid by consumers to the Defendants over a period of more than five years. That judgment is suspended upon the Defendants' payment of approximately $6.4 million to the FTC, paid directly and by relinquishing title to assets held by dozens of payment processors and other financial services companies.

FOR MORE INFORMATION

Marc J. Rachman
Partner, Litigation
212.468.4890
mrachman@dglaw.com

Brooke Erdos Singer
Partner, Intellectual Property
212.468.4940
bsinger@dglaw.com

Jacklyn M. Siegel
Associate, Litigation
212.468.4821
jsiegel@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com

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