

FTC Bugged by Unsubstantiated Mosquito Repellant Claims and Endorsements With Undisclosed Material Connections

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by Fara Sunderji and Sandra Edelman



The FTC announced an enforcement action last week that focused on two hot button issues – unsubstantiated health claims and failure to disclose material connections between endorsers and product marketers. *In re Mikey & Momo, Inc. et al.*

The Complaint and Proposed Consent Order involve a business named Aromaflage, which markets sprays and candles advertised as DEET-free mosquito repellants containing essential oils and fragrance. Aromaflage advertised its products, which were

sold at \$30 for an 8 milliliter spray bottle and \$40 for a 7.5 ounce candle, “as effective as 25% DEET over 2.5 hours.” More specifically, Aromaflage claimed that the products were “scientifically tested,” “rigorously tested at one of the world’s leading Universities and found to be as effective at repelling mosquitos as the leading brand” and would repel mosquitos “that may carry Zika, Dengue, Chikungunya and Yellow Fever.” By expressly mentioning product testing, Aromaflage was required to meet a stringent standard for making what are called “establishment claims” – ad claims that specifically refer to tests having been conducted to support the advertising claims.

Turns out that the testing had two significant problems – the test methodology was not scientifically rigorous and reliable and the results did not support the company’s positive claims. Here’s what bugged the FTC about the methodology: the testing did not include candles, even though the advertising claims were made for both sprays and candles; no human subjects were used, even though the products were intended to overcome mosquitoes’ attraction to human odors; and Aromaflage did not use more than one species of mosquito, even though other species can carry many of the diseases specifically mentioned in Aromaflage’s advertising material and could react differently to the same repellent. And the actual test results? Among other things, the data showed that at the 30 minute mark, more mosquitoes were in the Aromaflage-treated half of the testing chamber than in the untreated half and performed worse than water. Unsurprisingly, the 25% DEET product performed better than the Aromaflage sprays for at least the first ninety minutes.

Aromaflage compounded its regulatory problems as a result of glowing testimonials on Amazon that were posted as independent reviews when in fact they were written by one of the company’s officers, her mother and two of her aunts – without disclosing these material connections to Aromaflage.

The FTC proposed consent order details an onerous 20-year compliance monitoring program that we are sure that defendants didn’t contemplate when they talked about their own “rigorous testing.” In fact, the order mandates that the defendants have “competent and reliable scientific evidence” to support their claims going forward – meaning:

tests, analyses, research, or studies that (1) have been conducted and evaluated in an objective manner by experts in the field of insect repellency; (2) are generally accepted by such experts to yield accurate and reliable results; and (3) are human clinical testing of the covered product, when such experts would generally require such human clinical testing to substantiate that the representation is true.

If that wasn’t enough, the order goes on to require that:

when such tests or studies are human clinical testing, all underlying or supporting data and documents generally accepted by such experts as relevant to an assessment of such testing as set forth in the Provision entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission.

While the order did not include a monetary judgment, it looks like defendants will be spending a pretty penny if they want to continue advertising their candles and sprays as beneficial.

Takeaways:

1. Making health-related advertising claims? – The FTC is watching and focused on protecting consumers from false or misleading claims relating to products advertised to prevent, treat or cure diseases from Alzheimer's to Zika.
2. If your ad says that your product was scientifically tested, that testing better be reliable and the methods should be well accepted in the relevant scientific community.
3. On the subject of testing, make sure that your ad claims fit your testing – the claim should be designed based on what the testing shows and nothing more.
4. The FTC isn't saying your mom can't go on Amazon and review your company's products, but you'll need to tell her that she's going to have to tell everyone that she's your mom when she writes her glowing review.