

# National Legal and Policy Center

*"promoting ethics in public life"*



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**VIA CERTIFIED MAIL #70051160 0004 8557 8997**

January 18, 2007

The Honorable Deborah Platt Majoras  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chairman Majoras:

On behalf of the National Legal and Policy Center, a legal foundation promoting ethics and accountability in public life, I urge that the Federal Trade Commission immediately enjoin a highly deceptive Subway<sup>1</sup> ad campaign which is currently reaching national audiences through its appearance on televised NFL games.

The Subway ad in question is titled "John Cena More Meat, Jared Less Fat." A story board with text and outtakes appears as Exhibit A to this complaint.

The Subway ad compared eating a Subway Club sandwich to a McDonald's Big Mac with the audio message of the ad stating:

**Everyone knows Subway restaurants for delicious low fat subs, like this six inch Subway Club. Order a footlong and it's still less than half the fat of a McDonald's Big Mac.<sup>2</sup>**

The brief 30-second ad drives home the comparison several more times:

**JOHN CENA: The real surprise, it's got twice the meat. So it fills me up without slowing me down.**

<sup>1</sup> SUBWAY is a registered trademark of Doctor's Associates, Inc. The corporate headquarters of Subway Restaurants is 325 Bic Drive, Milford, CT 06460.

<sup>2</sup> See Exhibit A, Subway Club commercial aired 12/24/2006.

**JARED: Wow.**

**JOHN CENA: Yeah.**

**JARED: Less fat.**

**JOHN CENA: More meat.**

**JARED: Less fat.**

**JOHN CENA: More meat. (MUSIC OUT)**

**(MUSIC IN) MALE ANNCR: The delicious footlong Subway Club:  
less than half the fat of McDonald's Big Mac but twice the meat.**

The Subway ad just cited is clearly misleading to health conscious consumers in a number of important ways. Using the nutritional information provided by both Subway and McDonald's on their official web sites as of January 2007 when the advertising was in effect, the deceptiveness of the Subway ad is readily apparent.<sup>3</sup>

#### **Calories – Subway's Footlong Club Has More Calories than the Big Mac**

The Subway footlong Club has more calories (640) than the Big Mac (560). This is an important distinction for anyone seeking to lose weight.

Aside from the obvious point that the entire multi-year Subway ad campaign involving Jared Fogle is based on his purported weight loss through a diet heavy on Subway products, the point of the 30-second ad in question is the "half the fat" claim for the footlong Club compared to the Big Mac. It certainly would undercut the purpose of the comparison ad if Subway were to reveal that the Big Mac actually has fewer calories than the Club.

Put simply: Subway made the "half the fat claim" twice and the "less fat" claim twice in just 30 seconds yet never revealed that the product being touted had more calories than the comparison product.

#### **Carbohydrates – Subway's Footlong Club Has Twice the Carbohydrates as a Big Mac**

The Subway footlong Club has 94 grams of carbohydrates while the Big Mac has just 47 grams. The fact that the Club has twice the carbohydrates as the Big Mac is never mentioned, yet it – like the calorie content – is information a health-conscious audience may want to know.

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<sup>3</sup> See [www.subway.com](http://www.subway.com) and [www.mcdonalds.com](http://www.mcdonalds.com). The nutritional information pages are attached as Exhibits B and C.

### **Sodium – Subway’s Footlong Club Has More Than Two and a Half Times the Sodium as the Big Mac**

The Subway footlong Club has an incredible 2,620 milligrams of sodium compared to 1,010 milligrams for the Big Mac, more than two and a half times that of the Big Mac.

The Subway ad with its repeated claim of less fat is clearly appealing to a weight-conscious audience. Such individuals frequently suffer from high blood pressure and virtually all the national health organizations focusing on heart and blood pressure issues recommend lowering consumption of sodium as a way to lower blood pressure.

The American Heart Association is on record as stating, “Healthy American adults should not eat more than 2,300 milligrams of sodium a day.”<sup>4</sup>

Incredibly, Subway’s ad appealing to weight-conscious individuals recommends the footlong Club containing more than the daily recommended amount of sodium for an adult.

### **Sugar – Subway’s Footlong Club Has Twice the Sugar As the Big Mac**

The Subway Footlong Club has twice the amount of sugar (16 grams) as the Big Mac (8 grams).

The “less fat” message of Subway appeals to individuals watching their weight. When Subway’s ads fail to inform this audience that the footlong Club has twice the sugar content of the Big Mac, it is difficult to interpret the result as anything other than a calculated deception based on the omission of key facts.

### **Half the Fat? – Read the Fine Print**

Even the repeated claim of the footlong Club having “half the fat” of a Big Mac is deceptive. It is based on the Club being served without cheese or any condiments containing fat, such as mayonnaise. However, if a customer has mayonnaise and cheese on a footlong Club, the “half the fat” claim is false. Customers are routinely asked what they want on the sub and there is no additional charge for cheese or mayonnaise.

Potential customers may learn of this little adjustment of the comparison only if they can speed read the fine print. The fact that the comparison is based on no cheese and no condiments containing fat appears for a few seconds as fine print on the screen.

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<sup>4</sup> See American Heart Association web page at <http://www.americanheart.org/presenter.jhtml?identifier=4708> under “Sodium – AHA Recommendation.”

As noted, the factual parallels between KFC's misleading claims in its national television advertising campaign are strikingly similar to the misleading claims of Subway in its national television campaign.

In short, if the KFC ads were misleading to the public – as the FTC stated in its complaint against KFC earlier this year – the Subway ads are similarly misleading using the very same criteria applied to the FTC case.

Moreover, the announcement of the decision in the KFC case in June 2004 should have put Subway on notice that the FTC would not tolerate such misleading advertising. Lest there be any doubt, the Associated Press account of the KFC case stated:

**FTC chairman Timothy Muris said the settlement is a signal to advertisers that the commission will not tolerate “misleading advertisements” to weight-conscious consumers.**

**“For consumers to obtain healthier choices, we must make sure that companies promote their products honestly,” he said.<sup>7</sup>**

### Analysis

Section 5(a) of the Federal Trade Commission Act states that it is unlawful to engage in “deceptive acts or practices in or affecting commerce.” 15 U.S.C. 45(a) (1995)

The Commission has defined *deception* as being a material representation, omission, or practice that is likely to mislead consumers acting reasonably in the circumstances of the matter.

A deceptive omission occurs when the advertiser fails to disclose “qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading.”<sup>8</sup>

The failure to disclose that the Subway footlong Club sandwich has more than 2½ times the sodium, twice the carbohydrates and sugar and more calories than the Big Mac is a material omission likely to mislead reasonable consumers and is therefore deceptive.

An omission is material when it is likely to affect the consumer's decision with respect to a product because it involves some particular characteristic of the product that is important to the consumer.<sup>9</sup> When the claim affects an important subject such as health, materiality may be presumed.<sup>10</sup>

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<sup>7</sup> See “KFC Banned from Running Misleading Ads,” Associated Press, June 4, 2004

<sup>8</sup> Federal Trade Commission Policy Statement on Deception, 103 F.T.C. 174 (1984).

<sup>9</sup> *In Re: Cliffdale Assocs., Inc.*, 103 F.T.C. 110, at 169.

<sup>10</sup> *Thompson Medical*, 104 F.T.C. 648, 816-817.

The materiality of the omission of the fact that the Subway footlong Club contained more than the recommended daily sodium intake for a healthy adult is further buttressed by the growing consensus regarding sodium as a health issue by the government. The Dietary Supplement Health and Education Act of 1994 underscored this view when it stated as a finding that “clinical research has shown that several chronic diseases can be prevented simply with a healthful diet” and further stated that such a healthful diet is low in sodium.<sup>11</sup>

In the instant matter, reasonable consumers are being pitched for a low-fat product by a professional athlete and a company spokesman whose public image is that of someone who lost more than 200 pounds using a company’s food products. Yet the truth of the matter is that the touted product contains more sodium, sugar, carbohydrates and calories than the competitor’s product with which it is being compared.

Even more egregious is the fact that the 2,620 milligram sodium content of the supposedly healthier Subway footlong Club sandwich exceeds the recommended daily amount (2,300 milligrams) for a healthy adult. But not all people most interested in low-fat diet choices are healthy American adults. Many are overweight and suffer from high blood pressure. These individuals should be eating considerably less than 2,300 milligrams of sodium on a daily basis. As such, an ad selling a product as a low-fat choice which fails to inform consumers of its exceptionally high sodium content is an ad practicing deception through omission of key facts.

Aside from the consent order in the case in which a KFC ad had a deceptive comparison with the Burger King Whopper, excessive sodium content was an issue in a case settled by the FTC in 1992 involving Campbell’s soup. As with the current Subway ad, Campbell’s soup was advertising some of its soups as being low in fat while failing to mention that these same soups were relatively high in sodium, a factor associated with an elevated risk for high blood pressure. The FTC required Campbell’s to disclose its sodium content per serving and the recommended daily limit of sodium.<sup>12</sup> The sodium content of the soup was far less than the 2,620 milligrams of sodium in the footlong Club that Subway advertises as a low-fat alternative.<sup>13</sup>

The Federal Trade Commission’s Enforcement Policy Statement on Food Advertising has stated, “when the context of an ad as a whole conveys to consumers the net impression that the food makes only positive contributions to a diet, the failure to disclose the presence of risk-increasing nutrients is likely to be deceptive.”<sup>14</sup>

In this case the context includes a muscular professional athlete wearing a sleeveless shirt and a large championship belt draped over his shoulder. In case anyone fails to get the point, Jared Fogle begins the commercial with the line, “Jared here with

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<sup>11</sup> *Dietary Supplement Health and Education Act of 1994*, P. Law 103-417, § 2. Findings, 3 (B).

<sup>12</sup> *In Re: Campbell Soup*, Dkt. No. 9233, final consent order (1992).

<sup>13</sup> “Campbell Soup Co. Agrees to Settle FTC Charges That It Made Deceptive and Unsubstantiated Ad Claims,” FTC News Release, April 8, 1991.

<sup>14</sup> *FTC Enforcement Statement on Food Advertising*, 59 Fed. Reg. 28,388 (1994).

the champ, John Cena.” Jared’s image as the spokesman who lost more than 200 pounds eating Subway sandwiches is also part of the context of the ad, as is the claim repeated four times in the course of a thirty-second commercial that the Subway Club sandwich has less fat than the McDonald’s Big Mac. The implied health claim of less fat permeates the ad.

The FTC’s Enforcement Policy Statement on Food Advertising explicitly states (at 22) “the failure to disclose the presence and significance of risk-increasing nutrients that are closely related to the health claim for such foods is likely to constitute an omission of a material fact and render the health claim deceptive.” This failure was cited specifically by the Center for Science in the Public Interest in its original complaint to the FTC in the KFC case and it is just as relevant to the facts presented in the instant case.

It would appear beyond dispute that marketing a sandwich as a low-fat healthy choice when the sandwich has two and a half times the sodium, twice the carbohydrates and sugar and more calories than the comparison sandwich “is likely to constitute an omission of a material fact and render the health claim deceptive.”

Finally, this television advertisement is not the first time Subway has made dubious health claims regarding its sandwiches in comparison ads with Big Mac. In November 2004, Subway promoted the fact that three of its footlong Sweet Onion Chicken Teriyaki subs had less fat than a single Big Mac.

Aside from the fact that the amount of less fat was tiny (30 grams for the sub compared to 33 grams for the Big Mac), the advertisement was very misleading because the comparison did not disclose that the three subs had more than 3½ times the calories, 3½ times the cholesterol, 7 times the carbohydrates, 14 times the sugar and 6 times the sodium as the Big Mac. These numbers speak volumes as to the deceptiveness of the advertisement – all the more so because the ad in question closed with the statement: “Who else but Subway really cares that you live a long and healthy life?”

At that time, the National Legal and Policy Center filed a complaint with the Federal Trade Commission and put out a media release critical of the misleading nature of the advertisement.<sup>15</sup> Shortly thereafter, Subway yanked the advertising campaign featuring the misleading comparisons. Whether the quick cessation of the misleading ads with their deceptive comparisons played a role in the FTC’s apparent decision to not take immediate action in that case is not known. The fact that Subway is again making dubious health claims for its products underscores the point that apparently Subway has no qualms in omitting material information from its ads for weight-conscious audiences.

In the final analysis the health claims of the Subway comparison ads are every bit as deceptive as the misleading KFC chicken ads which strained to compare that product to a Burger King Whopper by just focusing on the fat content and ignoring the high sodium content and other health factors involved.

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<sup>15</sup> See Exhibit D, NLPC Complaint to the Federal Trade Commission, November 4, 2004