

National Legal and Policy Center

"promoting ethics in public life"



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November 4, 2004

The Honorable Deborah Platt Majoras
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 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 two SUBWAY¹ television ads which are running as part of a multi-million dollar advertising campaign. Among the stated objectives of the current SUBWAY advertising campaign is to compare SUBWAY sandwiches "to those other popular fast food choices."²

The SUBWAY ads compare eating a McDonald's Big Mac with eating a SUBWAY Sweet Onion Teriyaki Chicken footlong sub and state that the sub has only 10 grams of fat compared to the 33 grams of fat in the Big Mac. Both ads go on to have spokesman Jared Fogle state, "Which means you can eat another and another over the course of three different meals and still not equal the fat content of one Big Mac."³ To further underscore the explicit health claims being made, one of the ads has a voiceover stating, "Who else but SUBWAY really cares that you live a long and healthy life?"

The SUBWAY ads are clearly misleading to weight-conscious consumers in a number of important ways when they compare eating three footlong Sweet Onion Teriyaki Chicken subs to one Big Mac. While the statement that the sub has just 10

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

² See SUBWAY web page at <http://www.subway.com/subwayroot/MenuNutrition/comm/index.aspx>; October 31, 2004; "Three of the four currently running spots feature Jared Fogle. See how some SUBWAY subs compare to those other popular fast food choices."

³ See Exhibits A and B, SUBWAY television advertisement storyboards

grams of fat compared to 33 grams in the Big Mac is true, the comparison only slightly favors SUBWAY (30 grams for three subs v. 33 for the Big Mac). What SUBWAY has left out – and what dramatically changes the comparison – are the other risk-increasing nutritional values a weight-conscious consumer might want to know and which clearly undercut SUBWAY’s health claims.

Using the nutritional information disclosed by the two companies on their respective web pages, as of October 2004 when the advertising was in effect, the SUBWAY comparison is extremely misleading.⁴

Calories - More Than 3½ Times More Calories for the Subs

The three Sweet Onion Teriyaki Chicken subs total 2,220 calories compared to just 600 calories for the Big Mac – more than three and a half times as many. Such a huge disparity fundamentally undercuts the misleading message of the SUBWAY ads and so was simply not disclosed.

Cholesterol - More Than 3½ Times More Cholesterol for the Subs

The three Sweet Onion Teriyaki Chicken subs total 300 milligrams of cholesterol compared to just 85 milligrams of cholesterol in the Big Mac. This represents more than three and a half times as much cholesterol for the SUBWAY product. Certainly, individuals seeking to reduce cholesterol in their diet are would be well-advised to think carefully before consuming subs containing 300 milligrams of cholesterol.

From a public health standpoint, the deceptiveness of the SUBWAY “Jared 3 to 1” commercial, as the ad is named on the SUBWAY web page, is especially egregious in that the American Heart Association web page states, **“Still, the American Heart Association recommends that you limit your average daily cholesterol intake to less than 300 milligrams.”**⁵ SUBWAY prominently displays the American Heart Association symbol in its marketing and published reports have indicated that SUBWAY has donated millions of dollars to the American Heart Association.⁶

The fact that SUBWAY advertising recommends eating three subs totaling 300 milligrams of cholesterol because “it really cares that you live a long and healthy life” is fundamentally deceptive and misleading.

Sodium - More Than 6 Times the Sodium for the Subs

⁴ See www.subway.com and www.mcdonalds.com. The Nutritional Information pages of each company in effect in October 2004 are attached as Exhibits C and D.

⁵ See <http://www.americanheart.org/presenter.jhtml?identifier=4488>

⁶ See “Subway to Give \$10 Million to American Heart Association,” *Corporate Crime Reporter*, July 13, 2004

The three Sweet Onion Chicken Teriyaki subs contain an incredible 6,540 milligrams of sodium compared to just 1050 milligrams for the Big Mac, more than six times the sodium.

Weight-conscious consumers frequently suffer from high blood pressure and virtually all national health organizations recommend lowering intake of sodium as a way to combat high blood pressure. The American Heart Association is on record as stating that, "Healthy American adults should eat no more than 2,400 milligrams of sodium a day."⁷

Carbohydrates - More Than 7 Times the Carbohydrates for the Subs

The three Sweet Onion Chicken Teriyaki subs contain 354 carbohydrates compared to just 50 carbohydrates for the Big Mac, more than seven times as many for the SUBWAY product.

Sugars - More Than 14 Times the Sugar for the Subs

The three Sweet Onion Chicken Teriyaki subs contain 114 grams of sugar, compared to just 8 grams in the Big Mac. This is a whopping fourteen times as much sugar for the so-called "healthy choice." The fact that these ads close by running a message stating, "SUBWAY, choose well" while recommending eating three subs with fourteen times the sugar of its competitor is almost beyond parody. Indeed, if that type of comparison is not misleading, then nothing is.

...

In June 2004, the Federal Trade Commission, acting upon a complaint filed by the Center for Science in the Public Interest, entered a consent order summarized in news accounts as holding that "KFC may not run advertisements saying that eating its food is healthier than eating another food unless it can back up the claims scientifically."⁸

At issue were television ads being shown nationally by KFC which compared two KFC chicken breasts with one Burger King Whopper. The KFC claim was that the chicken breasts, when consumed skinless, had less fat than the Whopper with 38 grams of fat for the chicken and 43 grams of fat for the Whopper. That difference of 5 grams of fat is actually more than the 3 grams of fat difference between the SUBWAY Sweet Onion Chicken Teriyaki subs and the Big Mac in SUBWAY's comparison ads.

As the Federal Trade Commission pointed out in its complaint in the KFC case, there was a slight difference in both fat and saturated fat favoring KFC but, "In truth and in fact, eating KFC fried chicken, specifically two Original Recipe fried chicken breasts,

⁷ See American Heart Association web page (www.americanheart.org) under Sodium – AHA Recommendation.

⁸ See "KFC banned from running misleading ads," Associated Press, June 4, 2004

is not better for a consumer's health than eating a Burger King Whopper." The FTC complaint went on to state that the chicken:

- had more cholesterol than the Whopper (290 mg. v. 85 mg)
[Note: the SUBWAY subs have more cholesterol than a Big Mac (300 mg. v. 85 mg.)]
- had more sodium than the Whopper (2300 mg. v. 980 mg.)
[Note: the SUBWAY subs have more sodium than a Big Mac (6,540 mg. v. 1050 mg.)]
- had more calories than the Whopper (760 cal. v. 710 cal.)
[Note: the SUBWAY subs have more calories than the Big Mac (2,200 cal. v. 600 cal.)]

The FTC cited the comparisons just listed and concluded, "Therefore, the representation set forth in Paragraph 6 ["respondent has represented, expressly or by implication, that eating KFC chicken, specifically two Original Recipe fried chicken breasts, is better for a consumer's health than eating a Burger King Whopper."] was and is, false or misleading."⁹

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. If anything, the misleading disparities are significantly greater in the SUBWAY case. Specifically, the disparity of fat and saturated fat being touted in the KFC ads as making their product superior health-wise to a Burger King Whopper is actually greater than the disparity being touted by SUBWAY. At the same time, an objective comparison of three SUBWAY Sweet Onion Chicken Teriyaki subs to the Big Mac in terms of cholesterol, sodium and calories finds the subs to be higher in all three categories of risk-increasing nutrients than the Big Mac, sometimes significantly so.

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 even more 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

⁹ See "In the Matter of KFC Corporation," File No. 042 3033, Docket No. C-4118

that companies promote their products honestly,” he said.¹⁰

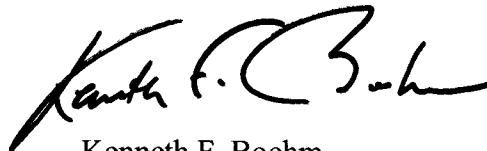
The Federal Trade Commission Act at Section 5 strictly prohibits “unfair or deceptive acts or practices.” False food advertisements are prohibited specifically in sections 12 and 15 of the Federal Trade Commission Act with the definition covering advertising “misleading in a material respect,” including “not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also to the extent to which the advertisement fails to reveal facts material in light of such representations...”

The Federal Trade Commission stated in its May 1994 Enforcement Policy Statement on Food Advertising that it will examine the levels of total fat, saturated fat, cholesterol, and sodium in food advertising making a health claim. In the SUBWAY advertisement, the core theme is a health claim and the voiceover stating “Who else but SUBWAY really cares that you live a long and healthy life?” certainly underscores the health claim which makes the advertising subject to an examination by the FTC of the levels of cholesterol and sodium.

Indeed, the 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 their original complaint to the FTC in the KFC case and it is just as relevant to the facts presented in the instant case.

I urge the Federal Trade Commission to undertake prompt consideration of this case and take enforcement action against these SUBWAY advertisements which so clearly violate the Federal Trade Commission Act’s prohibition of deceptive food advertising.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth F. Boehm". The signature is fluid and cursive, with the first name being the most prominent.

Kenneth F. Boehm
Chairman

¹⁰ See “KFC banned from running misleading ads,” Associated Press, June 4, 2004