

Statement

**STATEMENT OF COMMISSIONER PAMELA JONES
HARBOUR**

The Commission has accorded final approval to a consent agreement with KFC Corp. (“KFCC”) to settle allegations that the company deceptively advertised its fried chicken as being compatible with low-carbohydrate weight loss programs, among other claims. I concur with the Commission’s admirable results in obtaining strong injunctive relief, and I applaud staff for bringing a national advertising case. I believe, however, that an even stronger remedy is warranted. KFCC is fully aware of our nation’s struggle with obesity, yet has cynically attempted to exploit a massive health problem through deceptive advertising. Companies should not be allowed to benefit monetarily from this kind of deception, especially where the health and safety of consumers are compromised. Therefore, I encourage the Commission to find ways to seek monetary relief in future cases like this one.

Our nation’s obesity rate has “reached epidemic proportions, afflicting 6 out of every 10 Americans.”¹ Being overweight or obese is “the second leading cause of preventable death, after smoking, resulting in an estimated 300,000 deaths per year. The costs, direct and indirect, associated with [being] overweight and obes[e] are estimated to exceed \$100 billion a year.”² Obesity has been described as both an “epidemic” and a “crisis.”³ Many

¹ *Weight-Loss Advertising: An Analysis of Current Trends, A Report of the Staff of the Federal Trade Commission* (Sept. 2002), at vii (“Executive Summary”), available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

² *Id.*

³ See *The Time/ABC News Summit on Obesity* (Preliminary Agenda for June 2-4, 2004), available at <http://www.time.com/time/2004/obesity>; *America’s Obesity Crisis*, TIME (June 7, 2004).

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consumers are interested in controlling their weight, and they rely heavily on the nutritional information in food advertisements to help them make choices about which foods to eat.

In the fall of 2003, KFCC apparently was suffering from decreased fried chicken sales, perhaps as a result of consumers' interest in a healthier diet.⁴ In October 2003, KFCC embarked on an ad campaign in which it deceptively advertised that eating KFC fried chicken is compatible with a "low carbohydrate" weight loss program, even though "low carbohydrate weight loss programs such as the Atkins Diet and the South Beach Diet advise against eating breaded, fried foods."⁵ In another ad, KFCC advertised that eating two of its "Original Recipe" fried chicken breasts was better for a consumer's health than eating a Burger King Whopper – even though the chicken is nearly equivalent to the Whopper in fat grams and is actually higher in trans fat, cholesterol, sodium and calories.⁶ Both ads also promote an entire bucket of chicken, even though the voiceovers in the ads

⁴ See *20/20: Fast Not Fat: Fast Food Chains Will Go to Any Lengths to Keep People Eating Their Food* (ABC News television broadcast, Oct. 31, 2003); *Editorial, KFC blunders in "health" ads*, ADVERTISING AGE (Nov. 3, 2003), at 22; Bob Garfield, *Garfield's AdReview: KFC serves big, fat bucket of nonsense in "healthy" spots*, ADVERTISING AGE (Nov. 3, 2003), at 61.

⁵ *In the Matter of KFC Corporation*, File No. 042-3033, Complaint at ¶¶ 5, 8-9 (June 2, 2004).

⁶ *Id.* at ¶ 7 ("While compared to Burger King's Whopper, two KFC Original Recipe fried chicken breasts have slightly less total fat (38 g. v. 43 g.) and saturated fat (12 g. v. 13 g.), they have more trans fat (3.5 g. vs. 1 g.), more cholesterol (290 mg. v. 85 mg.), more sodium (2300 mg. vs. 980 mg.), and more calories (760 v. 710).").

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referenced one or two-piece servings.⁷

KFCC knew (or certainly should have known) that its ads were false and deceptive, and that the ads would encourage consumers to believe that KFC fried chicken was much healthier for them than it actually is. Only a few days after the ads aired, an *Advertising Age* editorial strongly criticized KFCC for running them, describing the ads as “desperate and sleazy tactics.”⁸ In an interview on National Public Radio, the executive editor of *Advertising Age* stated that it was “very unusual” for the publication to run such a staff editorial, but justified it by saying that “[i]nstead of being truth well told, which is what advertising should be, it seems like not only an exaggerated claim, but basically an effort to deceive.”⁹ Consumer advocacy groups complained about the ads as well, and the ads were the subject of much discussion until they stopped airing in late November 2003.¹⁰

I voted to accept the proposed settlement because it contains very strong injunctive relief that will go a long way toward

⁷ See, e.g., *World News Tonight with Peter Jennings: Good for You? KFC Adverts* (ABC television broadcast, Nov. 19, 2003); *NBC Nightly News with Tom Brokaw: Federal Trade Commission Wanting Proof That KFC’s Chicken Can Be Called a Health Food in TV Commercials* (NBC television broadcast, Nov. 18, 2003); *KFC Corporation*, Complaint at ¶ 5 (setting forth voiceovers).

⁸ Garfield, *supra* note 4.

⁹ *Day To Day: Jonah Bloom Discusses Advertising Age Magazine’s Editorial Criticism of KFC’s New Ad Campaign* (National Public Radio broadcast, Nov. 6, 2003).

¹⁰ See, e.g., Bruce Schreiner, *KFC Ends Healthy Fried Chicken Ad Blitz*, ASSOC. PRESS ONLINE (Nov. 19, 2003); 20/20, *supra* note 4.

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preventing KFCC from engaging in similar deceptive advertising in the future. In addition to addressing the specific claims made in the KFCC ads, the consent agreement also contains more general language prohibiting KFCC from making representations about the absolute or comparative amount of fat, cholesterol, sodium, calories, or any other nutrient in any food it sells that contains chicken; about the compatibility of such food with any weight loss program; or about the health benefits of such food, unless the representation is true and, at the time it is made, KFCC possesses and relies upon competent and reliable evidence – which in certain specified cases must be competent and reliable scientific evidence – that substantiates the representation.¹¹

Accepting injunctive relief alone is reasonably consistent with the Commission's prior settlements in similar cases. However, where a company appears to have exploited a national health crisis, an even stronger response from the Commission is warranted. While I recognize that it may be difficult to calculate monetary relief in these kinds of cases, I would like to see the Commission develop methodological approaches that would support seeking such remedies in future cases of similar types of deceptive advertising, as the Commission has done in the past. For example, in 1995, the FTC settled charges with The Dannon Company that it had made false or misleading claims for its Pure Indulgence line of frozen yogurt. As part of the consent agreement, Dannon agreed to pay \$150,000 in disgorgement.¹² Similarly, in 1983, the FTC settled charges with Estee Corporation that it had misled consumers by falsely claiming that

¹¹ *In the Matter of KFC Corporation*, File No. 042-3033, Analysis of Proposed Consent Order to Aid Public Comment (June 2, 2004).

¹² FTC Press Release, *Dannon Agrees To Settle FTC Charges That Low-Fat Ad Claims for Frozen Yogurt were False and Misleading* (Nov. 25, 1995); *In the Matter of The Dannon Company, Inc.*, Dkt. No. C-3643, 121 F.T.C. 136, 139 (March 18, 1996) (consent order).

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the sweeteners in its foods had been accepted by the American Diabetes Association and the Food and Drug Administration. Estee Corporation agreed to pay \$25,000 in *cy pres* relief to the American Diabetes Association or the Juvenile Diabetes Foundation.¹³

While injunctive relief is important in deceptive advertising cases such as this one, monetary relief may further serve to correct unlawful conduct, reverse its ill effects, and deter future violations of the law. Well-formulated *cy pres* relief, in particular, may provide real benefits to consumers. It is not only reasonably related to the violation, but also reasonably likely to reach the individuals most injured by a particular deceptive advertisement. Should the appropriate case present itself in the future, I strongly encourage the Commission to consider the applicability and effectiveness of *cy pres* and other potential monetary remedies.

¹³ *In the Matter of Estee Corporation*, Dkt. No. C-3126, 102 F.T.C. 1804, 1812 (Nov. 16, 1983) (consent order). *Cy pres* relief, also known as indirect restitution or fluid recovery, is used in situations where injured persons cannot be directly compensated. Instead, under *cy pres*, restitutionary funds are awarded in some alternate way that indirectly benefits the injured persons.