Franchising Is Good for Your Health, Right? Health Claims in Advertising in the Franchise Industry

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Franchise brands are everywhere in the booming health and fitness industries. From traditional health care delivery systems like urgent care centers and in-home senior care, to health-related products and supplements, to fitness studios and traditional gyms, this market is only expected to continue to grow.[1] And as consumer-facing enterprises, advertising is crucial to the success of these health-related concepts. That advertising includes franchisor-directed advertising efforts that support the system as a whole; advertising franchisees conduct in a specific geographic market (which the franchisor must review and approve, or which otherwise must comply with a franchisor's detailed standards); and advertising campaigns that a franchisor and a franchisee jointly undertake.

This connection between health and advertising compels a greater focus on the legal issues surrounding health claims in marketing. In fact, the Federal Trade Commission (FTC), already well-known in the industry due to the Franchise Rule,[2] recently issued new authoritative guidance on health claims in marketing,[3] which only underscores the FTC's renewed commitment to policing unsubstantiated health claims in the marketplace. At the same time, a growing body of case law under the Lanham Act[4] and state law has increased the risk that franchisors could face contributory liability or vicarious liability for the false or illegal advertising of its franchisees.

1. As of November 2023, the "global health and wellness market is expected to grow from $4,951.16 billion in 2022 to $5,319.44 billion in 2023 at a compound annual growth rate (CAGR) of 7.44%." *See Health and Wellness Global Market Report 2023*, Business Rsch. Co., https://www.reportlinker.com/p06479742/Health-And-Wellness-Global-Market-Report.html?utm_source=GNW (last visited Nov. 20, 2023).

2. 16 C.F.R. pts. 436, 437.

3. Fed. Trade Comm'n, Health Products Compliance Guide (Dec. 2022), https://www.ftc.gov/business-guidance/resources/health-products-compliance-guidance.

4. 15 U.S.C. § 1051 *et seq*.

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To help articulate best practices towards achieving compliant health-related advertising, Part I of this article will begin by briefly summarizing the presence of franchised concepts in the health and fitness industries and the mechanics of advertising within the franchise industry generally. Part II will then detail the legal landscape surrounding health claims in marketing, including the FTC's role in policing those claims and its new authoritative guidance, civil litigation under the Lanham Act for false advertising, and the role that state law plays in this space, with special attention to the risk that a franchisor could face contributory liability under the Lanham Act or vicarious liability under state law for a franchisee's false or misleading advertising. Part III will then conclude with a summary of best practices that franchisors could implement to achieve compliant health-related advertising while also reducing the risk of incurring contributory liability or vicarious liability.

I. Presence of Franchised Concepts and Mechanics of Advertising

A. *Franchising in the Health and Fitness Industries*

Franchising in the health and fitness industries may be booming, but it is not new. As aptly summarized by John Gilliland, Mark A. Kirsch, and Mark Siebert for the American Bar Association's (ABA) 2014 Annual Forum on Franchising, the "first wave" of franchising in the health industry focused on what the authors refer to as "product-based systems," such as Miracle-Ear and Pearle Vision, and would include those systems today that focus on product distribution such as McKesson.[5] The "second wave" then aimed to capitalize on the rise of senior healthcare.[6] Today, the "third wave," which is still continuing today, is one of "entrepreneurial growth in franchising within the health care services professions."[7] This model continues to evolve, and, through this third wave, "franchising is witnessing the application of the franchise business model to medical services."[8] These systems in the third wave (such as brands like American Family Care or OrthoNow) "fall into traditional health care services or practices," including dental clinics, urgent care centers, or chiropractic clinics.[9] Franchise systems in the health industry provide healthcare-related services, such as senior care (e.g., BrightStar Care) or health-related products, such as hearing aids or other medical supplies.[10] Other franchise systems may offer weight-loss programs, nutrition products, or other ancillary health-related services (e.g., MassageEnvy).[11]

5. John Gilliland, Mark A. Kirsch & Mark Siebert, *Legal Complexities of Franchising in the Healthcare Industry*, ABA 37th Annual Forum on Franchising W-16, at 2–3 (2014).
6. *See id.* at 3–4.
7. *Id*. at 4.
8. *See id*; *see also* Jesse A. Berg, *Let's All Go to the McClinic: Franchising in Health Care Delivery*, 20160627 AHLA Seminar Papers 54 (2016).
9. Gilliland, Kirsch & Siebert, *supra* note 5, at 2.
10. *See id*.
11. *See id*.

"[S]ome of the most successful fitness franchises are a part of the 'boutique fitness franchise' trend."[12] This trend encompasses franchise systems that offer programs based on a range of narrow interests such as "Bikram yoga, trampolines or boot camps."[13] Other brands in this space include those that offer group training, kickboxing-themed workouts, high-intensity interval training, workouts for new moms and their babies, 24/7 gym access, and automated personal training.[14]

Healthcare and fitness have been also two of the fastest growing sectors in franchising.[15] Seven franchise systems in the healthcare and fitness sector made Entrepreneur's list of the Top 50 Fastest Growing Franchises in 2023.[16] And internationally, healthcare and fitness franchise systems are likewise poised for tremendous growth.[17]

B. *Advertising Practices in the Franchising Industry*

As Lauren Smith Madden explained in a prior article in the *Journal*: "Advertising is the lifeblood of consumer-facing businesses. . . . Franchising is not an exception to this principle."[18] Given this importance, "virtually every franchise system requires advertising contributions by franchisees, and these contributions are then spent on advertising on behalf of the franchise system."[19] This approach enables franchisees "to pool their funds and outsource their advertising needs to the franchisor or a third party."[20] As a result, "[r]ather than hundreds of franchisees producing and placing their own advertisements (which may be inconsistent, confusing, or of varying quality), franchise systems can enjoy a cohesive advertising strategy funded by franchisee contributions."[21] For this reason, the lion's share of advertising in the franchising industry is done by the franchisor on a national basis for the purposes of promoting the entire system.

That said, many franchise agreements impose local advertising and marketing obligations on a franchisee, including expenditure obligations. These provisions typically require that a franchisee's marketing plans be approved in advance by the franchisor. These provisions also often require a franchisee's

12. Kiran G.S., *A Study on Public Perception on Fitness Studio* 4 (Apr. 2021) (B.A. project report, Sathyabama Institute of Science and Technology), https://sist.sathyabama.ac.in/sist_naac/documents/1.3.4/bba-bba-batchno-50.pdf.
13. *Id*.
14. *Id*.
15. Reneé Bailey, *Fitness Franchise Industry Report 2018*, Franchise Direct (Sept. 10, 2018), https://www.franchisedirect.com/information/fitness-franchise-industry-report-2018.
16. *2023 Fastest-Growing Franchises Ranking*, Entrepreneur, https://www.entreprenuer.com/franchises/directory/fastest-growing-ranking (last visited Oct. 27, 2023).
17. *See* Kieran McLoone, *Why Fitness Franchising Is Exploding, and How You Can Get Involved*, Global Franchise (Aug. 27, 2019), https://www.global-franchise.com/news/why-fitness-franchising-is-exploding-and-how-you-can-get-involved.
18. *See* Lauren Smith Madden, *Not Your Mama's Advertising Fund: Best Practices in the Use of Franchise System Advertising Funds*, 38 Franchise L.J. 379, 379 (2019).
19. *Id*.
20. *Id.* at 280.
21. *Id.*

advertising to conform to the franchisor's standards for media, format, and content. The franchisor will then exercise a high level of review and pre-approval of a franchisee's advertising efforts. The purpose of this process is to ensure that the franchisee's advertising is consistent with the franchisor's advertising, and is on brand, and that the franchisee's advertising complies with the franchisor's guidance.[22]

II. Legal Landscapes

A. *The Legal Frameworks Governing Health Claims in Advertising*

There are three main bodies of law that govern health claims in advertising: regulatory enforcement by the FTC; civil litigation under the Lanham Act; and state-law claims under a deceptive trade practice act or other consumer protection statute. Part II will summarize these three bodies of law while paying particular attention to the risk that a franchisor may incur contributory liability or vicarious liability for a franchisee's false or illegal advertising.

1. The Role of the Federal Trade Commission in Policing Health Claims

In the words of Professor Sarah Duranske, the FTC is in the business of "policing the claims of informational health and wellness products" and exercises its powers by "investigating product claims that arise after the product is in the marketplace."[23] It does so pursuant to its delegation of authority from Congress, which grants the FTC the authority to regulate "unfair or deceptive acts or practices in or affecting commerce."[24] As for its authority over health and wellness claims, the FTC also relies on Section 12 of the Federal Trade Commission Act, which prohibits the dissemination of "any false advertisement" to induce the purchase of "food, drugs, devices, services, or cosmetics."[25]

According to Professor Sarah Durankse, "FTC doctrine is committed to the idea that truthful advertising benefits both consumers and sellers."[26] This statement is premised on the idea that healthy competition "motivates sellers to provide truthful, useful information about their products and drives them to fulfill promises about price, quality, and other terms of sale."[27] Former FTC Chairwoman Edith Ramirez has also expressed that by engaging in truthful, non-deceptive advertising, a seller can maintain a positive brand

22. *See*, *e.g.*, F45 Training Incorporated FDD, 8-2, 11-3, 11-4 (2021), https://docqnet.dfpi.ca.gov/search; Brightstar Franchising, LLC FDD 33, 42, 45–46 (2020), https://docqnet.dfpi.ca.gov/search.

23. *See* Sarah Duranske, *This Article Makes You Smarter! (or, Regulating Health and Wellness Claims)*, 43 Am. J.L. & Med. 7, 34 (2017); *see also* 15 U.S.C. § 45(a)(1) (empowering the FTC to prevent "unfair methods of competition involving commerce").

24. 15 U.S.C. § 45(a)(1).

25. 15 U.S.C. § 52(a)(2).

26. Duranske, *supra* note 23, at 34.

27. *Id.* (quoting J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 Geo. Wash.. L. Rev. 2157, 2163 (2015)).

image.[28] On the other hand, deceptive practices may cause consumers to "lose faith" in a product or an industry.[29] Where deceptive advertising has harmed consumers, "the FTC's role is to protect consumers and restore fair competition through vigorous law enforcement."[30]

The FTC enforces these principles through its investigative authority, by administrative litigation, and in the federal courts. As explained by Anne Maher and Lesley Fair, FTC staff typically begins a law-enforcement investigation either by sending a party an informal request for information "or by asking the FTC's Commissioners to authorize the use of compulsory process."[31] The Commissioners may issue Civil Investigative Demands (CID), which require a recipient to answer written questions, produce documents, or sit for a deposition.[32] The FTC, like other agencies, may also file an enforcement proceeding in a federal district court if a company fails or refuses to comply with a CID.[33]

If the FTC has "reason to believe" that a law violation has occurred, the FTC may then take law enforcement action to challenge allegedly deceptive or unfair practices before an Administrative Law Judge (ALJ).[34] The ALJ then hears the dispute in a trial pursuant to the FTC's rules.[35] The ALJ issues an initial decision that includes findings of fact and conclusions of law.[36] The FTC may, as part of that proceeding, obtain entry of an order to cease and desist.[37] Neither the ALJ nor the FTC, however, has the authority to assess fines or impose other financial remedies such as the disgorgement of profits.[38] Either party may appeal the ALJ's initial decision to the Commissioners.[39] The Commissioners' decision is then appealable to the United States Court of Appeals.[40]

A party that violates an FTC order is liable for civil penalties of up to $10,000 per day for each violation.[41] After judicial review of an administrative

28. *Id.* (citing Edith Ramirez, Chairwoman, FTC, Remarks at the American Advertising Federation Advertising Day on the Hill (Apr. 17, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/rose-any-other-name...would-probably-violate-ftc-act-shakespeare-ftc-and-advertising/130417americanad-fed.pdf) [hereinafter Ramirez, *American Advertising Federation Remarks*]).

29. *Id.*

30. Anne V. Maher & Lesley Fair, *The FTC's Regulation of Advertising*, 65 Food & Drug L.J. 589, 590 (2010).

31. *Id.* at 592.

32. *Id.*

33. *Id.*

34. *Id.* (citing 15 U.S.C. § 45(b)).

35. *Id.* at 593 (citing 16 C.F.R. §§ 3.1–3.83).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (citing 15 U.S.C. § 45(c)).

41. *Id.* (citing 15 U.S.C. § 45(l)); *see also* United States v. QVC, Inc., No. 04-CV-1276 (E.D. Pa. Mar. 19, 2009) (issuing in a consent decree a $1.5 million civil penalty for deceptive claims in violation of a 2000 FTC order and $6 million as redress for deceptive claims for weight loss pills).

proceeding is complete, the FTC may file suit in a United States District Court to seek consumer redress, meaning relief for consumer injury, under Section 19(b)[42] of the Federal Trade Commission Act (FTC Act).[43]

Apart from administrative litigation, Section 13(b) of the FTC Act also authorizes the FTC to file suit in a United States district court to seek preliminary and permanent injunctions to remedy a violation of "any provision of law enforced by the Federal Trade Commission."[44] Section 13(b) also authorizes federal courts to grant permanent injunctions "in proper cases."[45] In recent years, the FTC has used Section 13(b) to take action in federal court challenging allegedly deceptive practices, including misleading advertisements for health-related products.[46] The FTC "has successfully argued that the broad language of Section 13(b) authorizes federal courts not only to enter permanent injunctions barring deceptive practices, but also to impose a wide variety of equitable relief, including redress for consumers."[47]

2. The FTC's Deceptive Advertising Framework as Applied to Health Claims

To determine whether an advertisement is deceptive, the FTC engages in a well-established three-part test, which asks: (1) what claims does the advertisement convey; (2) whether those claims are false, misleading, or unsubstantiated; and (3) whether the claims are material to prospective consumers.[48] The FTC, however, presumes materiality for claims that involve health.[49]

The first step requires the FTC to "identify the claims that a 'consumer[] acting reasonably under the circumstances' would interpret the advertisement to contain."[50] The Commission looks to the "overall net impression" left by an ad.[51] Claims can therefore be express or implied.[52] For express claims, the representation itself sets the meaning.[53] For implied claims, the Commission evaluates the meaning of the claim by reviewing a number of variables, including the context of the document, other representations in the document, the nature of the claim, and the nature of the transaction.[54]

42. *Id.* (citing 15 U.S.C. § 57b).
43. 15 U.S.C. §§ 41–58.
44. *Id.* at 593–94 (citing 15 U.S.C. § 53(b).
45. *Id.* (citing 15 U.S.C. § 53(b)).
46. *Id.* at 594 n.42 (collecting cases).
47. *Id.* at 594 & n.43 (citing FTC v. Rexall Sundown, Inc., No. 00-706-CIV (S.D. Fla. Mar. 11, 2003) (awarding in a stipulated final order $12 million in redress for deceptive efficacy representations for anti-cellulite dietary supplement); FTC v. SlimAmerica, Inc., No. 97-6072-Civ (S.D. Fla. 1999) (issuing a permanent injunction and awarding $8.3 million in redress against a marketer of a weight-loss product)).
48. *See* POM Wonderful, LLC v. FTC, 777 F.3d 478, 490 (D.C. Cir. 2015).
49. *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 1984 WL 565319, at *49 (1983).
50. Duranske, *supra* note 23, at 35 (citing *POM Wonderful*, 777 F.3d at 490).
51. *POM Wonderful*, 777 F.3d at 490.
52. Maher & Fair, *supra* note 30, at 596 (citing *Cliffdale Assocs.*, 1984 WL 565319, at *37 n.4.).
53. *Cliffdale Assocs.*, 1984 WL 565319, at *37.
54. Maher & Fair, *supra* note 30, at 596 (citing *Cliffdale Assocs.*, 1984 WL 565319, at *37).

For the second step, the FTC "determines whether the claims are false, misleading, or unsubstantiated."[55] Importantly, the FTC does not need to demonstrate that the relevant claims misled any actual consumers. Instead, "it is sufficient that an advertisement has the 'capacity to deceive.'"[56] The FTC also need not show that an advertiser *intended* to mislead.[57]

The primary focus of the FTC's enforcement actions against health and wellness products has been "a lack of adequate substantiation for claims of clinical validity and utility."[58] Requiring this adequate substantiation has been a "longstanding effort[]" of the FTC.[59] According to the former chairperson of the FTC, "We will continue to be active in this area, making it clear that claims about disease treatment, weight loss, and other serious health conditions must be supported by sound and sufficient science."[60]

The required level of substantiation, however, "varies based on the claim."[61] The FTC typically distinguishes between "establishment claims" and "efficacy claims."[62] For an establishment claim, where an advertisement references a scientific study or states that "tests prove" a certain proposition or "doctors recommend" a certain treatment, the advertiser "must possess the claimed level of substantiation."[63] And, as a further requirement, the studies underlying any such claim "must be scientifically sound and the results must be statistically significant."[64] When evaluating the sufficiency of an advertiser's scientific support, the FTC first "'determines what evidence would in fact establish such a claim in the relevant scientific community' and 'then compares the advertisers' substantiation evidence to that required by the scientific community.'"[65]

By contrast, an efficacy claim "suggests that a product successfully performs the advertised function or yields the advertised benefit, but includes no suggestion of scientific proof."[66] Courts evaluate substantiation for efficacy claims based on the so-called *Pfizer* factors: the type of product, the type of claim, the benefits of a truthful claim, the consequences of a false claim, the cost of developing substantiation for the claim, and the amount of substantiation that experts in the field would consider reasonable.[67] These

55. Darunske, *supra* note 23, at 35.
56. *Id.* (quoting Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944)).
57. *Id.* (citing FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963)).
58. *Id.*
59. *Id.*
60. Edith Ramirez, Chairwoman, FTC, Keynote Address at the National Advertising Division Annual Conference (Sept. 29, 2014) [hereinafter Ramirez, *Keynote Address*] (transcript available at https://www.ftc.gov/system/files/documents/public_statements/636231/140929nadkeynote.pdf).
61. Darunske, *supra* note 23, at 36.
62. POM Wonderful, LLC v. FTC, 777 F.3d 478, 490 (D.C. Cir. 2015).
63. Darunske, *supra* note 23, at 36 (citing Maher & Fair, *supra* note 30, at 605; Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1492 n.3 (1st Cir. 1989)).
64. *Id.* (citing Maher & Fair, *supra* note 30, at 605).
65. *POM Wonderful*, 777 F.3d at 491 (quoting *Removatron*, 884 F.2d at 1498).
66. *Id.* at 490.
67. *Id.* at 490–91.

factors are intended to permit the government to balance the harms that occur when false claims continue with the harms that occur when truthful claims are prohibited.[68]

The first two *Pfizer* factors—the type of product and the type of claim—reflect the FTC's belief that consumers *assume* that scientific evidence supports health-related representations.[69] In the FTC's view, claims for health-related products are often "credence claims," or claims that may be "difficult or impossible for consumers to evaluate for themselves."[70] The third *Pfizer* factor—the consequences of a false claim—is designed to protect consumers "from the dangers of deceptive health claims."[71] False or unsubstantiated health claims can cause financial injury by causing customers to buy ineffective products.[72] But even more dangerous, a misleading representation can falsely cause customers that they are protected from health hazard, thus increasing the risk of injury to a consumer.[73]

The FTC often considers the fourth and fifth *Pfizer* factors—the benefits of a truthful claim and the cost of developing substantiation for the claim—in tandem.[74] The purpose of these factors is to ensure the FTC's required substantiation does not "deter product development or prevent consumers from being told potentially valuable information about product characteristics."[75] However, commentators have noted that, as of 2010, the FTC had never exempted advertisers from the substantiation requirement for a health claim.[76]

The sixth *Pfizer* factor—the amount of substantiation that experts in the field believe is reasonable—is often the paramount factor.[77] The FTC

68. *See* Beales & Muris, *supra* note 27, at 2192.

69. Maher & Fair, *supra* note 30, at 605 (citing Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 302 n.5 (7th Cir. 1979) ("[T]here may be some types of claims for some types of products for which the only reasonable basis, in fairness and in the expectations of consumers, would be a valid scientific or medical basis. The case at bar, in which the representations concern the efficacy of a drug, is such a case.")).

70. *Id.* (citing *In re* Thompson Med. Co., 104 F.T.C. 648, 1984 WL 565377, at *102 (1984); Sterling Drug, Inc. v. FTC, 741 F.2d 1146, 1155 (9th Cir. 1984) (stating that "it is difficult for consumers to compare analgesic products effectively, so they are more likely to give credence to advertising claims"); Am. Home Prods, Corp. v. FTC, 695 F.2d 681, 698 (3d Cir. 1982) ("Another consideration in favor of holding comparative effectiveness and safety claims for analgesics to high standards of substantiation is the difficulty for the average consumer to evaluate such claims through personal experience, and the consequent tenacity of advertising-induced beliefs about superiority.").

71. *Id.* at 605–06.

72. *Id.* at 606.

73. *Id.* (citing FTC v. Vital Living Prods., Inc., No. 3:02CV74-MU (W.D.N.C. Feb. 27, 2002) (stipulated final order) (challenging efficacy claims for a do-it-yourself test kit represented to detect anthrax bacteria and spores); FTC v. Medimax, Inc., No. 99-1485-CIV (M.D. Fla. Mar. 22, 2000) (stipulated final order) (challenging representation that home HIV test kits could detect HIV virus)).

74. *Id.*

75. *In re* Removatron Int'l Corp., 111 F.T.C. 206, 1988 WL 1025512, at *14 n.20 (1988).

76. Maher & Fair, *supra* note 30, at 606.

77. *Id.* at 607 (citing *In re* Removatron, 111 F.T.C. 206, 1988 WL 1025512, at *14 n.20; *In re* Thompson Med. Co., 104 F.T.C. 648, 1984 WL 565377, at *102 (1984)).

gives substantial deference to an agency's or authoritative non-governmental body's pre-existing substantiation standard.[78] And absent any deference to an agency's standard, the FTC requires representations about a product's "health benefits, safety, performance, or efficacy" to be substantiated with "competent and reliable *scientific* evidence."[79]

The FTC's final step in determining whether an advertisement is deceptive is assessing the materiality of the claim.[80] A claim is material if it "is likely to affect a consumer's choice of or conduct regarding a product."[81] As noted earlier, the FTC presumes that claims about health and safety are material.[82]

3. The FTC's New "Health Products Compliance Guidance" Released in December 2022

To assist private parties in complying with the FTC's rules and regulations, in late December 2022 the FTC released its new *Health Products Compliance Guidance* publication, which replaces its earlier 1998 guidance entitled "Dietary Supplements: an Advertising Guide for the Industry."[83] In a blog post, the FTC published shortly after issuing the guidance, the FTC explained that its new guidance is not limited to the supplements industry, but rather it applies to all health-related claims in advertising.[84] As further explained, the new guidance draws upon key compliance points from FTC enforcement actions since 1998.[85] For example, the blog reported that since 1998 the FTC brought more than 200 law enforcement actions challenging false or deceptive health claims.[86] In its new guidance, the FTC sought to incorporate "the lessons of those cases in numerous new examples," and "add a practical gloss on long-standing compliance fundamentals."[87] The new guidance also reflects updates from other FTC guidance documents, including guidelines on endorsements and testimonials.[88]

The *Health Products Compliance Guidance* first describes the regulatory framework for the FTC's authority over health-related advertisements and then explains how the FTC coordinates its enforcement activities with the

78. *Id.* (citing Fed. Trade Comm'n, Dietary Supplements: An Advertising Guide for Industry 9 (1998), https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf).

79. *Id.* (quoting *In re* Conopco, Inc., 123 F.T.C. 131, 144 (1997) (requiring food company to possess "competent and reliable scientific evidence" to support representations that margarine will reduce the risk of heart disease)).

80. Darunske, *supra* note 23, at 36.

81. *Id.* (quoting *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 1984 WL 565319, at *49 (1983)).

82. *Id.*

83. Health Products Compliance Guide, *supra* note 3 (citing Dietary Supplements, *supra* note 78, at 9 (1998), https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf).

84. Lesley Fair, *What's New—and What Isn't—in the FTC's Just-Published Health Products Compliance Guide*, Fed. Trade Comm'n Bus. Blog (Dec. 20, 2022), https://www.ftc.gov/business-guidance/blog/2022/12/whats-new-what-isnt-ftcs-just-published-health-products-compliance-guidance.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

Food and Drug Administration (FDA).[89] The guidance then "explains the FTC's process for identifying the express and implied claims communicated by an ad and assessing whether there is adequate scientific support for those claims."[90] The new guidance also emphasizes that one key point from the 1998 publication remains in place: "that the purported evidence a company proffers as substantiation must be relevant to the specific product and to the advertising claims."[91]

The new publication also provides more detailed guidance on the FTC's "clear and conspicuous" standard, including more information on how to adequately communicate qualified claims to consumers.[92] The new guidance also further elaborates on the FTC's view of its "competent and reliable scientific evidence" standard.[93] In particular, the FTC expanded its guidance on this topic to emphasize the general rule that it "expects companies to support health-related claims with high quality, randomized, controlled human clinical trials."[94] The revised guidance also explores more comprehensively the key elements of quality research, which should include "the use of control groups, randomization, double blinding, and the requirement that results must be both statistically significant between the treatment and control group and clinically meaningful to consumers."[95] Lastly, the new publication provides additional guidance on the use of consumer testimonials and expert endorsements.[96]

The new guidance may be lengthy, but it is packed full of examples and explanations. Franchisors and franchisees alike should therefore carefully and thoroughly review this new guidance, which provides an invaluable roadmap towards operationalizing and achieving compliance with the FTC Act. The new guidance's conclusion summarizes the key points well:

> Marketers of health-related products . . . should be familiar with the requirements under both FDA law and FTC law that labeling and advertising claims be truthful, not misleading, and substantiated. The FTC approach generally requires that health-related claims be backed by competent and reliable scientific evidence substantiating that the representations are true. To ensure compliance with FTC law, marketers of any health-related product should follow two important steps: 1) Consider what express and implied messages consumers are likely to take from your ads. Where appropriate, carefully qualify your claims—in other words, clearly explain the limited circumstances in which the advertised benefits or results apply; 2) Carefully review the support for each claim to make sure it is scientifically sound, adequate in the context of the surrounding body of evidence, and relevant to the specific product and advertising claim.[97]

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. Health Products Compliance Guide, *supra* note 3.

B. *Civil Litigation for False Advertising Under the Lanham Act*

In addition to FTC regulatory enforcement, private litigants with standing, such as competitors, may bring civil actions for false advertising under the federal Lanham Act.[98] False advertising claims under the Lanham Act may be based on a party's false or misleading statement about its *own* products or a *competitor's* product.[99] As remedies for false advertising, the Lanham Act provides for a variety of injunctive and monetary relief, including a recovery of attorney's fees in "exceptional cases."[100] As previously noted in a prior article in the *Journal*, given the importance of advertising to the industry, the ability to bring claims for false or misleading advertising is "an important weapon that, unlike other intellectual property claims such as trademark infringement, both franchisees and franchisors can use."[101]

As an example, one of the more notable false advertising cases between franchise brands involved Pizza Hut's suit against Papa John's for its use of the slogan "Better Ingredients, Better Pizza."[102] After a jury trial, the Fifth Circuit Court of Appeals held that, while the slogan standing alone was non-actionable advertising "puffery," it misleading when used in connection with Papa John's sauce and dough claims.[103] Nevertheless, the Fifth Circuit held that Pizza Hut had failed to prove that the slogan was material to any consumer decisions.[104]

Slogans aside, it also clear that the Lanham Act can provide relief to a competitor based on false or misleading health-related claims.[105] Nevertheless, a Lanham Act plaintiff "bears the burden of showing that a challenged advertisement is false or misleading, not merely that it is unsubstantiated by acceptable tests or other proof."[106] In other words, a plaintiff cannot prove a false advertising claim under the Lanham Act on lack of substantiation grounds.[107] Were it otherwise, a plaintiff could use a false advertising claim

98. Courtland L. Reichmann & M. Melissa Cannady, *False Advertising Under the Lanham Act*, 21 Franchise L.J. 187, 187 (2002) (citing 15 U.S.C. § 1125).

99. *Id.*

100. 15 U.S.C. §§ 1116–1117.

101. Reichmann & Cannady, *supra* note 98, at 187.

102. Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 491 (5th Cir. 2000).

103. *Id*. at 488–502.

104. *Id*. at 502–05.

105. *See*, *e.g.*, POM Wonderful LLC v. Coca Cola Co., 166 F. Supp. 3d 1085, 1088–89 (C.D. Cal. 2016) (alleging false claims regarding the ingredients in fruit juices); Johnson & Johnson Vision Care, Inc. v. Ciba Vision Corp., 348 F. Supp. 2d 165, 177(S.D.N.Y. 2004) (alleging false claims regarding contact lenses); ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 965 (D.C. Cir. 1990) (alleging false claims regarding health benefits of dog food).

106. Sandoz Pharms. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 228 (3d Cir. 1990) (quoting Procter & Gamble Co. v. Chesebrough-Pond's Inc., 747 F.2d 114, 119 (2d Cir. 1984)); *see also* PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 120 (4th Cir.2011) ("For liability to arise under the false advertising provisions of the Lanham Act, 'the contested statement or representation must be either false on its face, or, although literally true, likely to mislead and to confuse consumers given the merchandising context.'" (quoting C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P., 131 F.3d 430, 434 (4th Cir.1997)).

107. Fraker v. Bayer Corp., No. CV F 08–1564 AWI GSA, 2009 WL 5865687, at *7–9 (E.D. Cal. Oct. 6, 2009).

to "shoehorn an allegation of violation of the Federal Trade Commission Act," which does not allow private causes of action.[108]

Naturally, a franchisor may be held directly liable when it participated itself in any wrongs under the Lanham Act or state law.[109] It is also well-known throughout the industry that, in general, the majority rule is that a franchisor can be held vicariously liable for the torts or other wrongdoing of a franchisee when "the franchisor controls or has a right to control the specific policy or practice resulting in harm to the plaintiff."[110] Where a franchisor's supervision, however, does not extend to control of "an instrumentality of franchisee harm," then there is no franchisor liability.[111]

It is perhaps less well-known in the industry that a franchisor may be liable under the Lanham Act for the false or illegal advertising of a franchisee under a theory of contributory liability. Several recent cases illustrate these risks. In *Mini Maid Services Co. v. Maid Brigade Systems, Inc.*, for example, the Eleventh Circuit analyzed whether a franchisor was responsible for its franchisee's trademark infringement.[112] The court held that, under a theory of contributory infringement, a franchisor might be liable even if the franchisor itself did not perform any infringing act.[113] Under this theory, a franchisor can be responsible "if it intentionally induced its franchisees to infringe another's trademark or if it knowingly participated in a scheme of trademark infringement carried out by its franchisees."[114] For example, under this theory, a franchisor could be a knowing participant if it had "reason to know" of the infringement.[115]

In a later case, a district court found that eBay could not be contributorily liable for counterfeiting on its site due to the reasonable steps that eBay takes to prevent counterfeit listings and to remove those listings once eBay learns of them.[116] In doing so, however, the court suggested that knowledge of repeat offenders or willful blindness could give rise to contributory liability.[117]

Following these precedents, courts have recognized that contributory liability for a third-party (such as a franchisor) may also arise for false

108. *Id.* at *7.

109. *See* State v. Cottman Transmissions Sys., Inc., 587 A.2d 1190, 1196, 1200 (Md. Ct. Spec. App. 1991) (holding that even where the facts do not support a finding of an agency relationship between the franchisor and franchisee, the "franchisor equally commits a deceptive practice" when it "directs [the] deceptive practices by using its economic and contractual clout to force its franchisees to commit deception").

110. Bartolotta v. Dunkin' Brands Grp., Inc., No. 16 CV 4137, 2016 WL 7104290, at *2 (N.D. Ill. Dec. 6, 2016) (quoting Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1064 (Mass. 2013)).

111. Courtland v. GCEP-Surprise, LLC, No. CV-12-00349-PHX-GMS, 2013 WL 3894981, at *6 (D. Ariz. July 29, 2013).

112. Mini Maid Services Co. v. Maid Brigade Sys., Inc., 967 F.2d 1516, 1517 (11th Cir. 1992).

113. *Id.* at 1522.

114. *Id.*

115. *Id.* at 1521 (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 854 (1982)).

116. Tiffany, Inc. v. eBay, 576 F. Supp. 2d 463, 469–70 (S.D.N.Y. 2008).

117. *See id.* at 513–17.

advertising or unsubstantiated competitive claims. For example, the Eleventh Circuit recently explicitly recognized a claim for contributory liability for false advertising under the Lanham Act.[118] According to the Eleventh Circuit, once a plaintiff establishes the elements of a direct false advertising claim against a third party, the plaintiff may then state a claim against a defendant on the argument that the defendant "contributed to that conduct."[119] To do so, the plaintiff must allege that the third party "intended to participate in" or "actually knew about" the false advertising.[120] "The plaintiff must also allege that the defendant actively and materially furthered the unlawful conduct—either by inducing it, causing it, or in some other way working to bring it about."[121]

According to the Eleventh Circuit, "a plaintiff may be able to make out the participation prong of a contributory false advertising claim by alleging that the defendant directly controlled or monitored the third party's false advertising."[122] The Eleventh Circuit also theorized that it is "conceivable that there could be circumstances under which the provision of a necessary product or service, without which the false advertising would not be possible, could support a theory of contributory liability."[123]

In determining whether a plaintiff has adequately alleged facts to support such a claim, the Eleventh Circuit stated that it would consider whether the allegations suggest knowing or intentional participation by examining

> "the nature and extent of the communication" between the third party and the defendant regarding the false advertising; "whether or not the [defendant] explicitly or implicitly encouraged" the false advertising; whether the false advertising "is serious and widespread," making it more likely that the defendant "kn[ew] about and condone[d] the acts;" and whether the defendant engaged in "bad faith refusal to exercise a clear contractual power to halt" the false advertising.[124]

As is usually the case, consideration of the risk of contributory liability under the Lanham Act presents a stark example of the dilemma facing franchisors. As courts recognize, franchisors "are in a unique position regarding potential vicarious liability, because the Lanham Act 'places an affirmative duty upon a licensor of a registered trademark to take reasonable measures to detect and prevent misleading uses of his mark by his licensees or suffer cancellation of his federal registration.'"[125] Indeed, one court has articulated

118. Duty Free Ams., Inc. v. Estée Lauder Cos., 797 F.3d 1248, 1276–77 (11th Cir. 2015). Other district courts outside of the Eleventh Circuit, however, have declined to extend the Lanham Act to such claims. *See*, *e.g.*, Healthcare Integrity, LLC v. Rehobeth McKinley Christian Health Care Servs., Inc., No. CV 20-0750 KG/LF, 2022 WL 2802564, at *1 (D.N.M. July 18, 2022).

119. *Duty Free*, 797 F.3d at 1277.

120. *Id.* (quoting Mini Maid Servs. Co. v. Maid Brigade Sys., Inc., 967 F.2d 1516, 1522 (11th Cir. 1992)).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1278 (quoting *Mini Maid*, 967 F.2d at 1522.).

125. Estate of Anderson v. Denny's Inc., 987 F. Supp. 2d 1113, 1141 (D.N.M. 2013) (quoting Rainey v. Langen, 998 A.2d 342, 348 (Me. 2010)).

a franchisor's burden to police its marks under the Lanham Act as follows: "The criteria regarding the control necessary to satisfy the Lanham Act is whether such control guarantees that third parties dealing with the franchisee will receive goods or services of the quality which they have learned to associate with the trademark."[126]

For this reason, courts have observed that franchisors "are often caught between the Scylla of failing to exercise sufficient control to protect their marks, and the Charybdis of exercising so much control they are vicariously liable for the torts of the franchisees or other licensees."[127] Put differently, "[b]ecause certain controls are necessary to protect the licensed trademarks and accompanying goodwill, a franchisor often is caught in the quandary of protecting its trademarks, while avoiding excessive controls that might lead to an unwelcome finding of vicarious liability."[128]

Franchisors must therefore take care to protect their systems from contributory liability under the Lanham Act during the exercise of their review and approval of their franchisees' advertising. Later in Part III, the author will address practical recommendations to assist in that effort.

C. *State Consumer Protection Laws and Common Law*

As noted earlier, although there is no private right of action under the FTC Act, every state has what are commonly referred to as "mini-FTC" Acts or unfair or deceptive practices laws.[129] While these laws vary, most provide state attorneys general and private litigants with an assortment of remedies to address consumer fraud and deception.[130] Private litigants have also used these statutes in class-action suits against franchise systems for alleged unfair and deceptive business practices.[131] Subway, for example, was the target of a consumer class action based on its allegedly deceptive marketing of sandwiches as "Footlongs" and "6-inch" sandwiches, when the sandwiches allegedly were shorter than their advertised lengths (although the court ultimately found the plaintiffs' complaints "did not" have merit).[132]

In recent years, consumers and public interest groups have regularly used these state laws to challenge health claims in advertising.[133] But, as with the Lanham Act, a private plaintiff under these state law statutes generally

126. Greil v. Travelodge Int'l, Inc., 541 N.E.2d 1288, 1292 (Ill. App. Ct. 1989).

127. People v. JTH Tax, Inc., 151 Cal. Rptr. 3d 728, 744 (Ct. App. 2013) (quoting the trial court opinion).

128. Judith A. Powell & Lauren Sullins Ralls, *Best Practices for Internet Marketing and Advertising*, 29 Franchise L.J. 231, 233 (2010).

129. *See* Diane Hoffmann & Jack Schwartz, *Stopping Deceptive Health Claims: The Need for a Private Right of Action Under Federal Law*, 42 Am. J.L. & Med. 53, 73 (2016).

130. *Id.*

131. *See id.*

132. *In re* Subway Footlong Sandwich Mktg. & Sales Pracs. Litig., 869 F.3d 551, 552–53 (7th Cir. 2017).

133. Hoffman & Schwartz, *supra* note 129, at 73.

must base its claim on an actual falsehood and not merely that a claim is unsubstantiated.[134]

1. A Franchisor's Vicarious Liability Under State Law for Misleading or Illegal Advertising by a Franchisee

Similar to the risk of contributory liability under the Lanham Act, franchisors also face the risk of vicarious liability under state-law prohibitions of misleading or illegal advertising. For example, in 2013 the California Court of Appeal held in *People v. JTH Tax, Inc.* that a franchisor may be vicariously liable for the misleading and illegal advertising of a franchisee even though the franchisor had not expressly approved the advertising in question.[135]

In that case, the California Attorney General filed a complaint against the Liberty Tax Service franchisor, alleging that it violated various California unfair competition and false advertising statutes.[136] After a nine-day bench trial, the trial court awarded the State of California over $1 million in civil penalties.[137] The court ordered the franchisor to pay over $100,000 in restitution to consumers.[138] The court also issued an order requiring the franchisor to police the advertising practices of its franchisees.[139]

During the trial, the trial court ruled that the franchisor simply exercised too much control over its franchisees' advertising.[140] In doing so, the trial court focused on Liberty's operations manual, which, as California argued, "showed Liberty had a right of control far in excess of what it needed to police its mark."[141] For example, the operations manual, according to the trial court, contained significant direction concerning how and when to place advertisements.[142] In the words of the trial court, the operations manual "literally provid[ed] [to the franchisees] a detailed, step-by-step guide for every aspect of marketing and advertising."[143]

The California Court of Appeal agreed and held that Liberty should be held vicariously liable for its franchisees' advertising practices.[144] In reaching this conclusion, the appellate court expressly warned that a franchisor whose controls extends beyond those necessary to protect its mark risks creating an agency relationship with its franchisees and incurring vicarious liability. Specifically, "Liberty's very extensive right of, and actual, control over

134. *See, e.g.*, Zakaria v. Gerber Prods. Co., No. LA CV15-00200 JAK (Ex), 2015 WL 3827654, at *9 (C.D. Cal. June 18, 2015) ("Under California law, a private plaintiff may not bring UCL or FAL claims based on a claim made in advertising that is merely unsubstantiated; actual falsehood in the advertising is required.").
135. People v. JTH Tax, Inc., 151 Cal. Rptr. 3d 728, 748–51 (Ct. App. 2013).
136. *Id.* at 733.
137. *Id.* at 732.
138. *Id.*
139. *Id.* at 735.
140. *Id.* at 745.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 748.

such things as pricing, advertising strategies and tactics, timing and amounts of discounts, and product offerings [demonstrates] that Liberty controlled more than was necessary to protect its trademarks and goodwill."[145]

2. *The Aftermath of* JTH Tax *and an Analysis of Similar Cases*

Few cases have followed the fact pattern of *JTH Tax*, although later joint-employment cases have cited it.[146] Commentators, however, have been keen to identify the potential problems *JTH Tax* presents. Following the California Court of Appeal's issuance of *JTH Tax* in 2013, for example, Jeffrey Wolf and Aaron Schepler explained in an earlier *Journal* article:

> [V]irtually all of the controls the trial and appellate courts deemed to be unrelated to brand protection are quite commonplace in modern franchise systems. Nearly every franchise system has rules concerning common operational issues like hours of operations, product offerings, product pricing, opening and closing practices, and the use of approved equipment.[147]

Wolf and Schepler thus criticized the *JTH Tax* opinion as creating an agency relationship between franchisor and franchisee wherever a franchisor "imposes controls that are greater than 'necessary' to protect a franchisor's mark and goodwill"—while at the same time failing "to offer a usable, practical standard by which franchisors could gauge whether they have crossed that line."[148] Separately, James Egle and Jeffrey Mandell observed that, although a franchisor must retain enough control over advertising to protect the goodwill reflected in its marks, "[i]f too much control is exerted . . . the franchisor may find itself liable for the claims arising out of its franchisees' actions."[149]

Vicarious liability cases related to a franchisee's advertising also arise in the context of cases under the Telephone Consumer Protection Act (TCPA) involving text-message advertising campaigns.[150] For example, in a TCPA case against Domino's, the franchisor set out its evidence that it did not control its franchisee's telemarketing practices, and so it could not be found vicariously liable for its franchisee's violations of the TCPA.[151] The court in that case did not rule on Domino's arguments, however, because while Domino's motion was pending, the parties reached a settlement in which

145. *Id*. at 751.

146. *See*, *e.g.*, Lomeli v. Jackson Hewitt, Inc., No. 2:17-CV-02899-ODW (KSx), 2017 WL 4773099, at *5 (C.D. Cal. Oct. 19, 2017); Patterson v. Domino's Pizza, LLC, 333 P.3d 723, 736 n.17 (Cal. 2014).

147. Jeffrey H. Wolf & Aaron C. Schepler, *Caught Between Scylla and Charybdis: Are Franchisors Still Stuck Between the Rock of Non-Uniformity and the Hard Place of Vicarious Liability?*, 33 Franchise L.J. 195, 213 (2013); *see also* Robert W. Emerson, *Franchisors in a Jam: Vicarious Liability and Spreading the Blame*, 47 J. Corp. L. 571, 607–08 (2022).

148. Wolf & Schepler, *supra* note 147, at 213.

149. *See* James B. Egle & Jeffrey A. Mandell, *Sweepstakes and Contests in the Digital Age*, 37 Franchise L.J. 43, 63 (2017).

150. *See* Maisa Jean Frank & Julia C. Colarusso, *Vicarious Liability May Apply: TCPA-Compliant Text Message Advertising in Franchise Systems*, 35 Franchise L.J. 421, 430 (2016).

151. Memorandum in Support of Domino's Pizza LLC's Motion for Summary Judgment, Spillman v. Domino's Pizza, LLC, No. 3:10-cv-00349 (M.D. La. May 21, 2012), ECF No. 156–56.

the franchisee and its insurer agreed to pay more than $9 million to the consumer class.[152] In a second case, a plaintiff alleged that Taco Bell franchisees had used spam text messages to market a sweepstakes and that the franchisor, Taco Bell, should be found vicariously liable.[153] The district court, however, ruled that Taco Bell was not liable.[154] The Ninth Circuit affirmed because no evidence suggested that Taco Bell had directed or supervised the text campaign for the franchisee's sweepstakes.[155]

The *JTH Tax* case and litigation under the TCPA demonstrates the material risks to a franchisor based on the exercise of too much control over a franchisee's advertising practices. In the next part of this article, the author concludes with practical recommendations on how franchisors can achieve compliance with FTC guidance and review its franchisees' advertising in a way that avoids incurring contributory liability or vicarious liability.

III. Summary of Best Practices

A. *Best Practices for Health Claims in Advertising*

It is clear that the stakes are high for health claims in advertising. So, what is a franchisor to do? To begin, franchisors should ensure that it and its franchisees are aware of and educated as to the FTC's expectation for health claims in advertising. A careful review of the FTC's new guidance on health-related advertising is an excellent place to start. And once franchisors and franchisees have educated themselves on the new FTC guidance, franchisors should set in motion a comprehensive evaluation of their own advertising to ensure that all health claims are accurate and substantiated in accordance with the FTC's guidelines. Franchisors and franchisees should also pay careful attention to identifying the *implied* health claims (as opposed to express claims).

In the words of the FTC, franchisors and franchisees should follow two important steps:

1) Consider what express and implied messages consumers are likely to take from your ads. Where appropriate, carefully qualify your claims—in other words, clearly explain the limited circumstances in which the advertised benefits or results apply;
2) Carefully review the support for each claim to make sure it is scientifically sound, adequate in the context of the surrounding body of evidence, and relevant to the specific product and advertising claim.[156]

This will help ensure that franchisors and franchisees do not face an FTC investigation or Lanham Act claims for their own advertising. But how do franchisors then exercise the necessary oversight over health claims in its

152. Settlement Agreement, Spillman v. Domino's Pizza, LLC, No. 3:10-cv-00349 (M.D. La. Nov. 7, 2012), ECF No. 222–3.
153. Thomas v. Taco Bell Corp., 879 F. Supp. 2d 1079, 1080–81 (C.D. Cal. 2012).
154. *Id.*
155. Thomas v. Taco Bell Corp., 582 Fed. App'x 678, 679 (9th Cir. 2014).
156. Health Products Compliance Guide, *supra* note 3.

franchisees' advertising to protect the goodwill of its brand, on the one hand, but avoid exposing itself to contributory liability under the Lanham Act or vicarious liability under state law, on the other hand?

The answer is for the franchisor to focus its review and approval on ensuring that all health claims in franchisee advertising are accurate and substantiated without exercising too much control over extraneous issues. For example, recall that the theory of contributory liability asks whether the franchisor knowingly supported, encouraged, or condoned a franchisee's false advertising. Contributory liability thus requires either (1) an active role by the franchisor in promoting the false advertising; or (2) evidence of "willful blindness" akin to burying one's head in the sand. For this reason, where a franchisor exercises an appropriate oversight role that proactively monitors and prevents false, misleading, or unsubstantiated health claims by its franchisees, a franchisor is mitigating its risk of contributory liability under the Lanham Act, not increasing it. A "hands-off" approach to false or misleading health claims would, by contrast, certainly backfire based on a "willful blindness" theory of contributory liability.

A similar analysis applies to the risk of vicarious liability under state laws that bar deceptive advertising. Although the court in *JTH Tax* did not provide robust guidance to the franchising industry, it did provide a legal standard to which franchise systems should aspire. In short, a franchise system should take steps to limit its review and approval of a franchisee's advertising to that necessary to protect the goodwill of its trademarks. In the author's view, ensuring that health claims made in advertising are accurate and substantiated is fundamentally a part of protecting the goodwill of a brand. For this reason, a franchise system that reviews and approves health-related claims in its franchisees' advertising should not be deemed to have created an agency relationship with its franchisee by virtue of that review and approval.

To operationalize these principles, franchisors should first consider adopting a policy that governs any health claims that a franchisee makes in its own advertising and then educating their franchisees on that policy. Any such policy should incorporate and refer heavily to the FTC's new guidance on health claims in advertising. Consistent with this policy, and in the review and approval process itself, franchisors may then ensure that a franchisee's health claims are compliant with the policy and are accurate and substantiated. To ensure quality control and consistency in that review, franchisors should consider creating and implementing a checklist for any and all health claims in their franchisees' advertising. For any health claims that are found to be false, misleading, or unsubstantiated, the franchisor can ensure that those claims do not see the light of day. The franchisor should also take care to require substantiation of health claims in accordance with the FTC's *Pfizer* factors and to review a franchisee's evidence of substantiation.

By enacting such a policy, the franchisor is protecting the system from an FTC investigation and minimizing the risk of litigation under the Lanham

Act or state law. Equally important, by implementing these steps, franchisors should be able to successfully navigate the tension between needing to protect the goodwill of their brands by reviewing their franchisees' advertising, on the one hand, and avoiding contributory liability and vicarious liability for their franchisees' actions, on the other.