

**BEFORE THE
SENATE SUBCOMMITTEE ON
CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE**

**HEARING ON
ADVERTISING TRENDS AND CONSUMER PROTECTION**

July 22, 2009

**TESTIMONY OF
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PRODUCT PARTNERS LLC**

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Mr. Chairman, Ranking Member, and members of the Subcommittee, it is an honor to appear before you today. My name is Jon Congdon, and I am the President and Co-Founder of Product Partners LLC, a leading provider of health and wellness solutions under its brand name Beachbody. Product Partners provides consumers with realistic and proven ways to transform their health, wellness, and lives. We offer several well-known consumer fitness programs, such as our P90X® home fitness training system, as well as easy-to-follow diet guidelines and superior nutritional supplements. Our mission is to help people lead healthy and fulfilling lives by motivating and educating consumers about long-term fitness and the benefits of maintaining a healthy body and lifestyle. Our dynamic online support community provides customers with the assistance they need to help them stay focused from the start to the finish of our programs, and beyond. I am proud to say that our products have helped millions of American consumers to lose weight and improve their health.

At Product Partners, our slogan is “Decide. Commit. Succeed.” In our advertising, we emphasize the fact that individual effort is necessary to obtain the benefits of our products. We believe that it is critical to be honest with our customers so that they fully accept the challenge of better health, and will not be disappointed or misled by any “quick fix” or “it’s so easy” promise. Because of our commitment to consumers, we embrace industry self-regulation, and we staunchly support the mission of the Federal Trade Commission. A strong Commission strengthens legitimate businesses, like ours, by ensuring that unscrupulous companies are not eroding consumer trust or competing on unfair terms. We know when we advertise our products that we have to

overcome a general mistrust from the public toward companies that promise to help them lose weight. As a company that goes to great lengths to earn and maintain the trust of its customers, and that deals with countless people who have been falsely duped into buying into the latest diet fad promise only to be let down, we applaud the Commission's efforts to protect consumers and ensure fair advertising.

Although we share common goals with the Federal Trade Commission, we have concerns regarding the Commission's proposed modifications to its guidelines on the use of testimonials in advertising. In particular, as the Subcommittee knows, the Commission proposes to require companies that use testimonials in advertising to disclose the average result experienced by consumers that use a given product or service. I am certain that the Commission acted with the best of intentions in suggesting modifications to its longstanding guidelines. However, I fear that the Commission's proposal will have significant unintended and negative consequences for marketers and consumers. I am glad to be able to share my perspective with the Subcommittee, because I believe that the products and services of my company provide an excellent example of the difficulties that could arise under the Commission's proposed approach.

First, the Commission's proposal would not provide the Commission with any additional tools to prevent an unscrupulous company from manipulating the facts and misleading consumers by simply falsifying the average result or by devising a flawed or "loaded" study that creates an average that fits the company's advertising claims.

On the other hand, companies that strive to comply with the Commission's requirements, as we do, will find it extremely challenging to satisfy the proposed guidelines. The cost of conducting detailed valid studies will be prohibitive, keeping many new companies out of the marketplace. The fact is that some products simply cannot be reduced to an average figure that will be meaningful to consumers. As I mentioned earlier, the Product Partners slogan emphasizes that customers must commit to improving their own health and wellness in order to benefit from our fitness tools. A customer's experience with our product will depend on countless immeasurable factors, such as that customer's level of effort, weight, and level of fitness before using the product. The customer's age, gender and even genetics will also cause significant fluctuations. In addition, many of our customers use multiple fitness strategies at the same time. To illustrate these difficulties, suppose that I am selling a treadmill. I can give you the average results with respect to the durability and electrical pull of the treadmill. But if each of us takes home a treadmill and uses it as we please, how can I calculate meaningful average health effects associated with using the treadmill, given that each of us is different and used the treadmill differently? Given these complexities, how could Product Partners begin to calculate an average result for our products that everyone would agree is accurate? And even if we could collect the information to make a basic calculation, it would tell individual consumers very little about what they might personally experience with one of our products, since the average result for a significantly overweight 48-year-old man will be drastically different than for a very fit 28-year-old female using the same fitness program even if they spend exactly the same amount of time exercising.

Some of our customers are individuals who have led unhealthy lifestyles for a long time, and we all know from personal experience how difficult it is to change old habits. A person who faces a challenge like losing 100 pounds is more likely to be inspired to change his life if he can see, through a testimonial and real-life experience, that someone else has succeeded in achieving that goal. Product Partners and companies like ours aim to inspire our customers to change their lives for the better, which is a critical decision to make, but not always an easy one. Testimonials that meet the existing standards that the Federal Trade Commission has long imposed are a meaningful way to reach out to interested consumers about products that can benefit them.

As an example, in a recent visit to members of Congress to discuss this issue, we brought Dallas Carter, who was morbidly obese at the age of only 25, even after his doctor told him that he would likely not live to see his new daughter's tenth birthday unless he made a drastic change in his lifestyle. It wasn't until Dallas saw the true story of Earl Broffman in a P90X infomercial discussing his 140-pound weight loss and health transformation that Dallas decided to make a change – a change that has led to him losing 190 pounds, leading a healthy life, and even being an example for his community. Dallas told us, “When I saw Earl do it, I knew I could do it too.” And when Dallas told Earl this story directly, Earl replied that he himself only tried P90X after seeing another of our longtime customers, Aaron Mathis, describing his 110-pound weight loss. As you can see, as long as these testimonials are truthful and disclose that the testimonial's experience is not necessarily typical, they provide critical motivation and inspiration to

others in a similar position. I believe that if we had somehow been able to determine that the average weight loss using our product was 25 pounds but had been prohibited from showing our more “extraordinary” results, it is unlikely that the customers I just mentioned would have been inspired to start their journeys to a healthy lifestyle.

We know that this country is in crisis with regard to the health of its citizens. The obesity figures are staggering, and the costs to care for overweight Americans and their related conditions are overwhelming – quite possibly the largest financial threat we may face in the coming years. Imagine if we could turn the tide and get Americans moving again and eating healthier foods. I truly believe that our company and others like it are beginning to make a difference as the customers who change their own lives also change lives of the people around them – particularly their children.

As our rates of obesity and Type 2 diabetes grow daily, I think the need to reach out and inspire others, with proven products and truthful advertising, is absolutely critical. I want to be clear, though – it takes something big to get a person who feels hopeless and has really let his health get out of control to take the step to change all that – and often the catalyst is seeing someone who was exactly where he is now, who accomplished something extraordinary. Not average – extraordinary.

Again, we share in the Commission’s desire to prevent unfair and deceptive advertising. My belief, however, which is shared by others in industry, is that there are more effective ways of addressing the problem identified by the Commission that would

not have the same type of negative impact on legitimate offerings. The Commission has articulated a concern that, in some cases, a group of extraordinary testimonials accompanied by disclaimers will give an impression that the product works far better than any substantiation in the possession of the marketer. In such situations, the combination of large testimonials plus disclaimers can give an impression that is misleading to consumers. I agree that if any elements of an advertisement are deceptive, there should not be any “safe harbor” or special protection, but there is another alternative that may help address this problem. The Commission has, for many years, followed a well established so-called “net impression” rule in which they look at any advertisement, determine what it means to reasonable consumers, and then require substantiation of the claims that arise naturally from a commonplace interpretation of the advertisement.

I believe this net impression rule is an appropriate standard that is widely understood in the advertising industry and already provides an effective solution to the Commission’s concerns. If an advertiser is using testimonials (even with disclaimers) that give a misleading impression of what the product or service is capable of doing, the Commission can and should go after the marketer under existing law. The Commission already has the necessary legal authority and enforcement tools to address the concerns raised in the Commission’s Notice.

It is important that we protect consumers from bad actors – but I strongly believe that it is equally important that legitimate companies providing effective solutions to

consumers are allowed to succeed without arbitrary or unfair constraints. I am concerned that the guidelines in their current proposed format could hurt good players, and I don't think that is the Commissioners' intent. Given the Commission's existing tools, and the substantial negative impact that the Commission's proposal would have on endorsements and testimonials that benefit consumers, I believe that the Commission can and should achieve its important goals without requiring a marketer to provide information on an anticipated average result which may actually mislead consumers as to what is really average given that their individual experiences, almost by definition, will rarely be average. The comments of the Electronic Retailing Association, which are attached to my testimony, discuss these issues in detail, and I commend those comments to the Subcommittee.

In addition to the Commission's enforcement efforts, our industry is vigilantly monitoring and policing the marketplace through self-regulatory programs such as the National Advertising Review Council's Electronic Retailing Self-Regulation Program and the Direct Marketing Association's testimonials and endorsements standards provided in the *Guidelines for Ethical Business Practice*.¹ These self-regulatory programs provide the direct response industry with effective guidelines that require truthful and responsible advertising and provide the marketplace with meaningful mechanisms for evaluating accuracy of product claims that are communicated in national direct response advertising. In addition, many self-regulatory programs include

¹ See The Direct Marketing Association's *Guidelines for Ethical Business Practice*, Article 21, Testimonials and Endorsements, available at <http://www.dmaresponsibility.org/Guidelines/>.

enforcement mechanisms to bring about compliance and, if necessary, report violators to an appropriate government agency.

In my experience, industry self-regulation is the most effective way to address concerns that arise in an evolving marketplace, particularly for an industry that relies on emerging digital advertising channels such as the Internet, including tools such as blogs, message boards, social networks, and online video. These mediums are constantly and rapidly evolving in directions that bring new value to consumers. Industry self-regulation is effective because it is flexible and adaptable in a timely manner. Such programs can more efficiently evolve to address bad practices and target bad actors without unnecessarily restraining legitimate companies and online innovation. As with most other industries, the legitimate actors take extraordinary steps to maintain consumer confidence and their own legitimacy by constraining and eliminating the bad actors. I believe that industry self-regulation is the appropriate approach to addressing problems in the marketplace and encourage that any solution, whether formulated by this Subcommittee or the Federal Trade Commission, preserve a strong role and effective incentives for strong self-regulatory programs.

Thank you for this opportunity to present my views. I welcome your questions.

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