UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Andrew N. Ferguson

Concurring Statement of Commissioner Andrew N. Ferguson

In the Matter of Arise Virtual Solutions, Inc.
Matter Number 2223046
July 1, 2024

Arise Virtual Solutions (Arise) operates a two-sided platform. On one side of the platform are individuals seeking work as customer-service representatives.[1] We often call these folks "gig workers"—a neologism describing independent contractors who perform part-time or task-based jobs usually obtained through internet platforms. Arise calls them "agents."[2] On the other side of the Arise platform are businesses seeking customer-service representatives.[3] Arise's platform matches people seeking work with businesses seeking workers.[4]

Arise advertised to potential agents that they could expect to make "up to $14/hour" (until March 2020) and "up to $18/hour" (thereafter) if they signed up for Arise.[5] After enrolling on the platform, new agents had to spend hundreds of dollars on fees and office equipment before beginning work.[6] The Commission alleges that Arise's earning claims were misleading because only a small minority of agents in fact achieved such earnings.[7] It further alleges that these misrepresentations violated the Business Opportunity Rule and that Arise also violated other disclosure requirements imposed by the Rule.[8]

I vote to approve this complaint and stipulated order because I have reason to believe that Arise has committed these violations, and because the terms of the settlement are reasonable.[9] I write separately, however, to clarify why I have voted to authorize a complaint and stipulated order regarding claims that the respondent failed to substantiate its "up to" claims under Section 5 of the Federal Trade Commission Act.[10] Although the stipulated order requires Arise to substantiate that future "up to" claims are "typical for consumers similarly situated to those to whom the Claim is made,"[11] I withhold judgment on what Section 5 requires for substantiation of "up to" advertising

[1] Complaint for Permanent Injunction, Monetary Relief, and Other Relief ("Complaint") at 2.
[2] Complaint at 6.
[3] *Id.* at 5.
[4] *Id.* at 5–6.
[5] *Id.* at 9.
[6] *Id.* at 2, 14.
[7] *Id.* at 3, 11, 23–24.
[8] *Id.* at 24–28.
[9] The Chair ties the complaint to the Department of Labor's ongoing lawsuit against Arise for mischaracterization of employees as independent contractors. Arise's characterization of its agents as independent contractors, and the Department's suit against Arise, are irrelevant to the claims in the Commission's complaint. I vote for the complaint and stipulated order because I have reason to believe that Arise committed the legal violations alleged in that complaint, not because of anything the Department has alleged.
[10] 15 U.S.C. sec. 45(a).
[11] Stipulated Order for Permanent Injunction, Monetary Judgment, and Other Relief ("Stipulated Order") at 6.

claims—a question on which the Commission appears to have articulated at least three inconsistent standards.

The meaning of "up to" claims is highly contextual. Consider some examples. The first is a claim that a particular truck can "tow up to 12,000 pounds." A reasonable person would read such a claim as promising that the truck can safely and reliably tow loads of 12,000 pounds or less—and that towing heavier loads would exceed the truck's capacity and could be dangerous. Similarly, a claim that a car seats "up to five people" would ordinarily be understood to mean that the car can safely and reliably seat a driver and four passengers. By contrast, a claim that consumers "can save up to $500" would mean that a consumer can expect savings of $500 or less, and that the exact amount of savings between $0 and $500 will probably depend on the consumer's individual circumstances—for example, the price of the product or service from which the consumer would be switching. "Up to" therefore does not have a fixed meaning; its meaning and the message a reasonable consumer would take from any "up to" claim depends on context.

Of course, part of the context for an "up to" claim is where it appears, such as in an advertisement rather than a scientific journal. It seems intuitively dishonest for a company to advertise prominently over and over again that consumers "can save up to $500" if only one consumer ever achieved those savings, while the overwhelming majority never cleared $100 in savings. I do not think the average reader would find it dishonest, however, for the Bulletin of Atomic Scientists to warn that nuclear weapons may produce a yield of "up to 50 megatons of TNT"—even though only a single tested weapon has ever done so.

These distinctions matter when we are enforcing Section 5. Section 5 prohibits unfair or deceptive acts and practices, which has long been understood to prohibit deceptive advertising.[12] Whether a particular advertisement is "deceptive," outside of the rare case involving bald-faced, unequivocal lies, "rests heavily on inference and pragmatic judgment."[13] To guide our pragmatic judgment, we have long interpreted Section 5 to require companies to substantiate certain claims they make in their advertisements—that is, to have ready at hand evidence demonstrating the accuracy of the claims made in an advertisement.[14] The question in almost every substantiation case is the quantum of evidence an advertiser must have in order to satisfy Section 5's substantiation requirement.[15] That question is complicated enough when the claim being made is unambiguous. But it is much more difficult when the advertiser makes an "up to" claim in the sense of designating a maximum achievable performance that an individual consumer may, but is not guaranteed to, realize.

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[12] Indeed, the very first cease-and-desist order issued by the Commission concerned the advertising of a silk-substitute, "Cilk," with the Commission finding that "purchasers were misled into the belief that such goods were made entirely of silk." Clarence N. Yagle, et al., 1 F.T.C. 13 (1916).

[13] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

[14] *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 490–91 (D.C. Cir. 2015) (discussing the Commission's distinction between efficacy, specific establishment claims, and non-specific establishment claims, but repeating for each that "the advertiser must possess" the appropriate kind of evidence for the claim).

[15] For efficacy claims, the Commission applies the *Pfizer* factors, including "the type of product," "the type of claim," "the benefit of a truthful claim," "the ease of developing substantiation for the claim," "the consequences of a false claim," and "the amount of substantiation experts in the field would consider reasonable." *Id.* at 490–91 (quoting Pfizer Inc., 81 F.T.C. 23, 62 (1972)). For specific establishment claims, the "advertiser must possess the specific substantiation claimed." *Id.* at 491. For non-specific establishment claims, "the advertiser "must possess evidence sufficient to satisfy the relevant scientific community of the claim's truth." *Id.*

For a long time, the Commission treated such "up to" claims as substantiated if "the maximum level of performance claimed can be achieved by an *appreciable number* of consumers."[16] The Commission never defined what proportion of consumers constituted an "appreciable number," but the word "appreciable" indicates that it has to be a noticeable, nonnegligible, amount.[17] Then in February 2012, in a settlement involving the energy-saving claims of five window companies, the Commission said those companies "must have competent and reliable scientific evidence to substantiate that *all or almost all* consumers are likely to achieve the maximum savings claimed."[18] I am not sure what the juxtaposition of "all or almost all" with "likely to achieve" was supposed to mean. Regardless, this was a monumental shift. Companies went from having to show a relatively small minority had achieved the maximum benefit to having to show that almost every consumer was likely to achieve it. Finally, in June 2012, the FTC released a report from a study it commissioned as to how consumers interpret "up to" claims.[19] That study found that, confronted with claims that they could save "up to 47%" on their heating and cooling bills by purchasing a particular line of windows, almost a third of participants interpreted the advertising to suggest that the windows would in fact deliver 47% savings, and that an additional fifth of participants believed that the window would deliver such savings to "most" or "about half" of consumers.[20] The press release accompanying the report claimed that the report "reinforce[d] the FTC's view that advertisers using ["up to"] claims should be able to substantiate that consumers are *likely to achieve* the maximum results promised under normal circumstances."[21]

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[16] Plaskolite, Inc., 101 F.T.C. 344, 344 (1983) (emphasis added). See California-Texas Oil Co., 104 F.T.C. 268, 278 (1984); Cynex Mfg. Corp., 104 F.T.C. 464, 475 (1984); GCS Elecs., Inc., 108 F.T.C. 158, 166 (1986); Solar Age Indus., Inc., 109 F.T.C. 23, 31 (1987); Nutronics Corp., 113 F.T.C. 97, 118 (1990); Agreement Containing Consent Order to Cease and Desist, Russel J. Osborn, et al., FTC File No. 9223262 (Nov. 9, 1992); Agreement Containing Consent Order to Cease and Desist, William E. Taylor, et al., FTC File No. 9223265 (Dec. 31, 1992); The Hairbow Company, 117 F.T.C. 112, 119 (1994); Homespun Prod., Inc., 117 F.T.C. 122, 130 (1994); Sandcastle Creations, 117 F.T.C. 133, 143 (1994); New Mexico Custom Designs, Inc., 117 F.T.C. 146, 153 (1994); Lifestyle Fascination, Inc., 118 F.T.C. 171, 174 (1994); Quick Weight Loss Centers, Inc., 118 F.T.C. 320, 323 (1994); Drs. Med. Weight Loss Centers, Inc., 118 F.T.C. 259, 263 (1994); Formu-3 International, Inc., 119 F.T.C. 449, 452 (1995); The Diet Workshop Inc., 121 F.T.C. 726, 730–31 (1996); Dean Distributors Inc., 123 F.T.C. 1596, 1601–02 (1997).

[17] *Appreciable*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/appreciable (last visited June 25, 2024) ("capable of being perceived or measured").

[18] Press Release, Fed. Trade Comm'n, Window Marketers Settle FTC Charges That They Made Deceptive Energy Efficiency and Cost Savings Claims (Feb. 22, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/02/window-marketers-settle-ftc-charges-they-made-deceptive-energy-efficiency-cost-savings-claims (paraphrasing the proposed orders) (emphasis added).

[19] Press Release, Fed. Trade Comm'n, FTC Report: Many Consumers Believe "Up To" Claims Promise Maximum Results ("2012 Press Release"), https://www.ftc.gov/news-events/news/press-releases/2012/06/ftc-report-many-consumers-believe-claims-promise-maximum-results; Manoj Hastak & Dennis Murphy, Effects of a Bristol Windows Advertisement with an "Up To" Savings Claim on Consumer Take-Away and Belief ("2012 Report") (Submitted to the Fed. Trade Comm'n, 2012), https://www.ftc.gov/sites/default/files/documents/reports/effects-bristol-windows-advertisement-savings-claim-consumer-take-away-beliefs/120629bristolwindowsreport.pdf.

[20] 2012 Report at 11.

[21] 2012 Press Release (emphasis added). Unclear is whether the Commission intended "likely to achieve" to be different than the "all or almost consumers are likely to achieve" standard it articulated a few months earlier. In the end, I do not think it matters. Either way, the Commission took the view that a consumer should be more likely than not to achieve the advertised performance.

Today's order requires Arise to provide substantiation to showing that future "up to" claims are "*typical* for consumers similarly situated to those to whom the Claim is made."[22] I am unclear on whether this substantiation requirement is different from "likely to achieve."

Substantiation of "up to" claims raises questions beyond the quantum of substantiation required to comply with Section 5. For example, we must determine which subset of consumer outcomes is relevant for measuring the typicality of the promised performance. Some "up to" earnings claims, for example, might reasonably be premised on some level of diligence, competence, or commitment by consumers who use the product or service, such that measuring an hourly earnings claim against the results of agents who worked only for a single hour or whose work performance was unusually poor might be unreasonable. It would similarly be odd to measure product-performance claims against the performance experienced by consumers who unreasonably misused the product. (If that misuse were the responsibility of the seller's poor design or instructions, however, then relying on those results may not be unreasonable.) Finally, we would have to determine whether an "up to" claim would be substantiated if a relatively small number of consumers achieved the maximum figure, but a much larger proportion got very close.

I do not today take a position on these perplexing questions, nor on the Commission's shifting answers.[23] I write only to ensure that my vote in favor of this complaint and stipulated order is not interpreted as having done so.

[22] Stipulated Order at 6 (emphasis added).

[23] The Chair's statement observes that in 1975, the Commission alleged that a claim that workers "earn up to $350" was deceptive because "few" individuals actually earned that amount. *Diesel Truck Drivers Training Sch., Inc.*, 86 F.T.C. 1062, 1064 (1975). And in 1996, in an unpublished opinion, a district court said that an "up to" claim implied "typical or average earnings." *FTC v. Febre*, No. 94 C 3625, 1996 WL 396117, at *2 (N.D. Ill. July 3, 1996). I do not understand how these citations contradict my observation that the Commission has failed to articulate a consistent substantiation standard over the last fifty years. On the contrary, they confirm it.