

phrase. (Ex. B, p. 31). The BBB determined this unsubstantiated advertising constituted a false and misleading advertising claim. (Ex. A, pp. 136-137). AC acknowledged the advertising claims were incorrect and agreed to stop making such claims. (Ex. A17). Thus, as the Third Complained of Statement says, AC did not substantiate its advertising claim that "Millionaire Mindset Conference Income Producing System" was protected by trademark.

Further, AC also advertised the following:

"FEDERALLY PROTECTED COMP PLAN -
Added to this incomparable product is our
Trademarked Compensation *structure* that was
purposely designed and structured to pay you Huge
Commissions, both at the front end and the back
end."

- Trademark
"Reverse Margin"

(Ex. B5) (italics added). AC's 1-800 number script used for the "\$7,000.00 Call" emphasizes to recruits "...our *compensation plan, federally trademarked by Advantage Conferences*, with the main premise being that the common, average, not necessarily experienced Rep can make \$7,000 Over & Over & Over Again." (Ex. B6). (emphasis added). The intent of this advertising claim was to inform recruits that the *structure* of AC's compensation plan was protected by a federal trademark. (Ex. B, pp. 94-95). This, of course, was an attempt to reassure recruits that the business model itself had government approval and, therefore, was legal. A trademark, however, is a distinctive mark, symbol, or emblem used by a producer or manufacturer to identify his goods from those of others. *Educational Development Corp. v. Economy Co.*, 552 F.2d 26 (10th Cir. 1977); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 3:1 (2005). A plan, structure or design cannot be protected by trademark. AC admits that advertising the structure of the plan as "trademarked" was incorrect. (Ex. B, p. 90). Thus, just as the Third Complained of Statement says, AC's advertising claims that its "compensation plan" and its "marketing method" were somehow protected by federal trademark law were never substantiated.

(ii) AC's Failure to Substantiate Earnings Claims.

The earnings claims made by AC in its advertising likewise were not substantiated. AC advertised that a recruit may simply and easily earn \$7,000.00 "every few days" and make "Tens of Thousands of Dollars QUICKLY." (Ex. A35; Ex. E52).⁹ AC's advertising repeatedly suggests earnings of six figures or greater within a year are realistic. (Ex. B24). The BBB asked AC to substantiate these earnings claims by providing the names of ten individuals earning "\$7,000.00 Over & Over & Over Again" as advertised. (Ex. A14). AC provided ten names, but not all ten of the individuals had actually earned the stated amount at that time. (Ex. A, p. 156, 168; Ex. B, pp. 175-176).

Further, certain AC representatives (primarily Jack Weinzierl), repeatedly give the same income testimonial. (Ex. F9). These earnings claims, however, are atypical.¹⁰ The use of atypical earnings data in advertising is misleading without specific disclosure that the representation is atypical. *In re: Amrep Corp.*, 102 F.T.C. 1362, 1652 (1983). 16 C.F.R. § 255.2(a) reads:

An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's

⁹ Ex. E52 states: "The answer and truth is that "\$7,000.00 Over & Over & Over Again is not only possible, it is absolutely predictable....Our system is simply ingenious. You are simply the one who turns it on and receives the money."

¹⁰ AC claims the average "earnings" (not net profit) per representative as of June 1, 2006 is only \$3,056.65. (Ex. F4). The BBB submits that even this number is inflated but accepts it for purposes of this motion only.

experience to what consumers may generally expect to achieve.

In *National Dynamics*, the court stated:

If a truthful testimonial represents a performance that has been achieved by only one or a handful of purchasers out of thousands, it is likely to convey a misleading impression even in the presence of a disclosure that it is a "better than average result."

See *National Dynamics Corp.*, 82 F.T.C. 488, *aff'd in part and remanded in part*, 492 F.2d 1333, 1335 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974) reconsideration, 85 F.T.C. 1052, 1053-54 (1975).

At the time the Third Complained of Statements were made, many of AC's marketing pieces contained no disclaimer whatsoever. (Ex. E56-58; Ex. B2, 4).¹¹ Thus, AC did not substantiate its earnings claims when challenged by the BBB.

4. The Fourth Complained of Statement

Beginning November 4, 2005, the BBB's report on AC stated the following:

Based on BBB files, this company previously had an unsatisfactory record with the Bureau due to failure to discontinue advertising claims. Specifically, on portions of its Web site the company used the term "copyright" and the symbol for "trademark" with the name "Millionaire Mindset Conference Income Producing System." However, the company stated the name was in fact not copyrighted or trademarked. The company has recently modified its claims. On November 4, 2005 Bureau staff reviewed the site and confirmed the change had been made.

(a) The Fourth Complained of Statement is Substantially True.

It is undisputed that AC used trademark symbols on portions of its website in connection with the name "Millionaire Mindset Conference Income Producing System" from January 2005 through October 2005. (Ex. B, pp. 166-167). In October 2005, AC stated to the BBB that its

¹¹ AC did not require a disclaimer until January 2006. (Ex. F7). AC's current disclaimer is buried in fine print and does not clearly and conspicuously disclose the generally expected performance. (Ex. E55, F8).