



September 26, 2022

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580,

Re: Endorsement Guides, P204500

Truth in Advertising, Inc. (“TINA.org”) welcomes the opportunity to submit the following in conjunction with the Federal Trade Commission’s (“Commission,” “Agency” or “FTC”) July 26, 2022 request for comments regarding its proposed revisions to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”).¹ Given the continuing prevalence of endorsement marketing,² the popularity of digital advertising,³ and the multitude of ways digital marketing has evolved and expanded since the FTC last revised the Guides in 2009,⁴ it is prudent for the Commission to update the Guides so that they remain relevant and effective. While TINA.org supports many of the FTC’s proposed revisions to the Guides, it urges the Commission to make certain edits and additions to better educate advertisers and consumers, and reincorporates by reference its June 22, 2020 Comment to the FTC regarding the Guides.⁵

INTEREST OF COMMENTER

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations, self-regulatory bodies and government agencies to advance countermeasures that effectively prevent and stop deception in our economy. At the center of TINA.org’s efforts is its website, www.tina.org, which provides information about common deceptive advertising techniques, consumer protection laws and alerts about specific deceptive marketing campaigns—such as nationally advertised “Built in the USA” vans manufactured abroad;⁶ pillows and essential oils falsely marketed as being able to treat chronic diseases;⁷ and a delivery meal kit service that falsely advertises free meals.⁸

The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates and, when appropriate, takes up with businesses and regulatory authorities. The website is also a repository of information relating to consumer protection lawsuits and regulatory actions. Through its collaborative

approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud, and has testified before Congress on issues related to consumer protection, deceptive marketing and economic justice.⁹

TINA.org regularly draws on its expertise to advocate for consumer interests before the FTC and other governmental bodies and appears as *amicus curiae* in cases raising important questions of consumer protection law.¹⁰ Since its inception, TINA.org has filed legal actions against hundreds of companies and entities, published more than 1,200 ad alerts, written over 900 news articles, and tracked more than 4,000 federal class actions alleging deceptive marketing. Notably, since 2015, state and federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org legal actions and evidence, and returned millions in ill-gotten gains to consumers.

For years, TINA.org has taken an active role in working to hold companies, brands, and endorsers accountable for marketing campaigns that use deceptive testimonials and endorsements. The nonprofit has documented and made publicly available on its website thousands of examples of deceptive endorsements and testimonials used by advertisers to mislead consumers in a multitude of ways, including, but not limited to, failing to properly disclose material connections, deceptively advertising atypical results, and making unsubstantiated disease-treatment claims.

Specifically, with respect to social media endorsement marketing that fails to properly disclose material connections, TINA.org has issued warning letters to more than 40 brands and influencers,¹¹ and has filed complaints with federal and state regulators regarding more than 100 companies and influencers.¹² As for deceptive endorsements and testimonials that promote atypical results – frequently in the form of unusual income and earnings claims – TINA.org has issued warning letters to more than 135 companies,¹³ and has filed more than 20 complaints with federal, state, and self-regulatory agencies.¹⁴ And with respect to testimonials making unsubstantiated disease-treatment claims, TINA.org has issued warning letters to more than 100 companies,¹⁵ and has filed more than a dozen complaints with federal, state, and self-regulatory agencies.¹⁶

As TINA.org's work makes clear, the use of deceptive endorsements and testimonials in marketing has been and continues to be a serious problem and one that effectively deceives millions of consumers, including members of susceptible populations such as seniors, veterans and children, among others.¹⁷ Such deceptive tactics will continue to flourish if not effectively reined in by regulators.

SUGGESTED ADDITIONS TO THE FTC'S PROPOSED REVISIONS

While TINA.org generally supports the FTC's proposed updates and revisions to the Guides to better educate marketers and further protect consumers, TINA.org nevertheless believes that certain revisions are necessary to increase the Guides' utility and impact.

I. The Guides Should Include and Define the Term “Fabricated Endorsers”

The proposed revisions to Section 255.0 of the Guides (Purpose and definitions) state, among other things, that an “endorsement” means “any advertising, marketing, or promotional message...that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser...” and that an “endorser” is the “party whose opinions, beliefs, findings, or experience the message appears to reflect.”¹⁸ According to the FTC (in its discussion of the proposed revisions), this language indicates that the Guides apply to endorsements by “fabricated endorsers.” However, the Commission does not include this term in the proposed revisions or provide any context or definition for the term.¹⁹

To avoid the risk of confusion and misunderstanding, TINA.org urges the FTC to include specific language or illustrative examples (or both) in the Guides to make clear what types of endorsers are covered by this revised definition, and to include, at a minimum, the following types of endorsers: virtual influencers, which TINA.org discussed at length in its June 2020 Comment to the FTC,²⁰ as well as AI-controlled avatar influencers, an emerging issue recently flagged by TINA.org in its April 2022 Roblox complaint.²¹

Specifically, a TINA.org investigation of Roblox revealed that brands are using undisclosed AI-controlled avatars within games to engage with users in promotional interactions. For example, in Nikeland (Nike’s advergame on Roblox that has been visited more than 21 million times since its creation last September²²), agenda-driven artificial influencers, which look just like other avatars, give away promotional items such as backpacks and caps, while others act as barkers that try to attract users to the Nikeland stores.



In addition to the generic staff bots found in Nikeland, there are also avatar bots for real-life NBA stars Giannis Antetokounmpo and LeBron James. Antetokounmpo tweeted to more than 2 million followers and posted to more than 12 million Instagram fans late last year that they should “[c]ome find me” in Nikeland because he was giving away “free

gifts.” However, it appears that neither Antetokounmpo nor James ever controlled their avatars in Nikeland – rather the look-a-like avatars interacting with other users were simply AI-controlled agents of Nike.

NBA player Giannis Antetokounmpo’s avatar bot giving away Nike earmuffs⁴⁷



NBA player LeBron James’ avatar bot giving away NBA All-Star Rewards after users complete certain challenges⁴⁸



AI-controlled bots have also appeared in other experiences throughout Roblox, including, but not limited to, Jailbreak, a game that has more than 6 billion visits²³; Hot Wheels Open World, which has been visited more than 45 million times²⁴; and Kellogg’s Froot Loops World, which has more than 3 million visits.²⁵ And Roblox, which is used daily by more than 50 million consumers,²⁶ is just one example of a closed metaverse platform where such artificial bot influencers exist.

While the FTC’s proposed revised definition of “endorser” would presumably cover virtual influencers and AI-controlled avatar influencers, among others, TINA.org urges the Commission to be more definitive in its Guides as the proposed language is currently too ambiguous to be effective.

II. The Guides Should Inform Marketers How to Properly Disclose Information When Typical Disclosure Tools are Unavailable

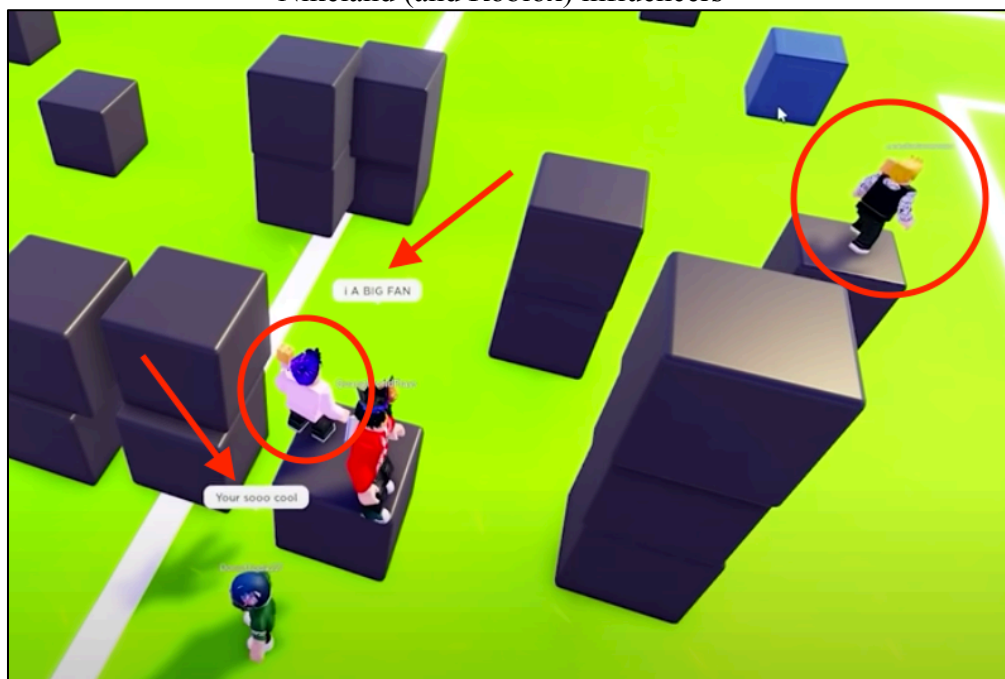
The proposed revisions to Section 255.0 of the Guides provide, among other things, new examples that illustrate when endorsement disclosures do and do not meet the clear and conspicuous standard. While these new examples are helpful additions to the Guides, TINA.org urges the FTC to include further examples in order to highlight two unaddressed scenarios: avatar influencers within advergames and closed metaverse platforms (both AI-generated, as discussed above, and human-created) and tile views on certain social media platforms.

A. Avatar influencers within advergames

Proposed Example 8 that accompanies Section 255.0 of the Guides addresses the need for a popular video game player and live streamer to disclose their connection when a game developer pays the player to play and livestream its game. However, none of the proposed examples address how such an influencer should disclose the connection when they are *in* the game itself as an avatar.

This should be addressed by the Guides as numerous companies not only use the type of AI-bots discussed above, but also enlist social media influencers to promote their brands within video games and metaverse experiences (in addition to on their social media platforms, as Example 8 suggests).²⁷ Returning to Roblox's Nikeland as an example, Nike enlisted a fleet of influencers who not only promoted the game on social media platforms, but also promoted it within the Roblox metaverse through their avatars. These avatar influencers, sporting Nike gear, spent time in Nikeland and interacted with other player avatars – playing games, “buying” Nike gear and communicating with fans²⁸ – yet none of them appeared to disclose their material connection to Nike in the advergame. The below screenshots highlight some examples.

Nikeland (and Roblox) influencers²⁹



Avatar influencers @LankyBoxGamesJustin and @LankyBoxGamesAdam (circled in red above) playing and interacting with other avatar players in Nikeland (user to influencer, “*I A BIG FAN*,” “*Your sooo cool*”)

Nikeland (and Roblox) influencer³⁰



Avatar influencer @TW_Dessi (circled in yellow above) communicating with other players in the chat bar in Nikeland (users to influencer, *"how doyou get the gear," "that nike hat is drippy," "TW dessi???" omgomg"*)

Nikeland (and Roblox) influencer³¹



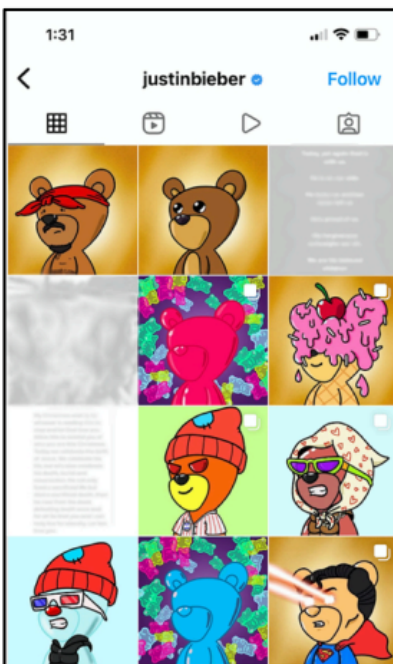
Avatar influencer @notiamsanna playing The Floor is Lava with other players in game she created in Nikeland

TINA.org urges the FTC to address the need to clearly and conspicuously disclose material connections in such contexts, particularly as advergames and metaverse experiences continue to increase in popularity.³²

B. Tile views on certain social media platforms

Proposed Example 9 that accompanies Section 255.0 of the Guides lays out three different social media scenarios to illustrate how proper disclosures should be made in certain contexts, and makes clear that disclosures made only on influencer profile pages, as well as those made below the “more” button (i.e., below the fold) in captions are inadequate. Example 9 also illustrates that disclosures made using built-in social media platform disclosure tools may be insufficient if not conspicuous, such as in TikTok videos or Instagram Reel videos.

TINA.org supports these additions. However, given that social media influencer marketing is frequently in the form of images and videos, it would be helpful if the Guides addressed how endorsement disclosures should be made when promotional images and videos can be viewed without accompanying captions. For example, and as explained in TINA.org’s August 2, 2022 Comment to the FTC regarding its .com Disclosure guidance,³³ disclosures made in captions are not visible to consumers when viewing the posts in tile view. The below screenshot is from TINA.org’s investigation into Justin Bieber’s undisclosed promotions for an NFT company. Even if Bieber had properly disclosed his material connection to the promoted company in the post captions (which he did not), they would not be visible to consumers looking at the NFT images in the tile view.



View of Justin Bieber’s Instagram account from an iPhone 12 Pro showing many of his undisclosed NFT promotions

TINA.org urges the FTC to address these types of scenario in the Guides.

III. The Guides Should Make Clear that Intangible Material Connections are Still Material Connections

The proposed revised text of Section 255.5 of the Guide (Disclosures of material connections) explains that material connections can include a business, family or personal relationship; monetary payment; the provision of free or discounted products or services to the endorser; early access to a product; or the possibility of winning a prize, of being paid, or of appearing on television or in other media promotions.³⁴ However, recent TINA.org investigations counsel in favor of the FTC expanding this language so that it makes clear to marketers and influencers that the list is not exhaustive and that material benefits may also include less circumscribed gains, such as enhancements to intangible assets.

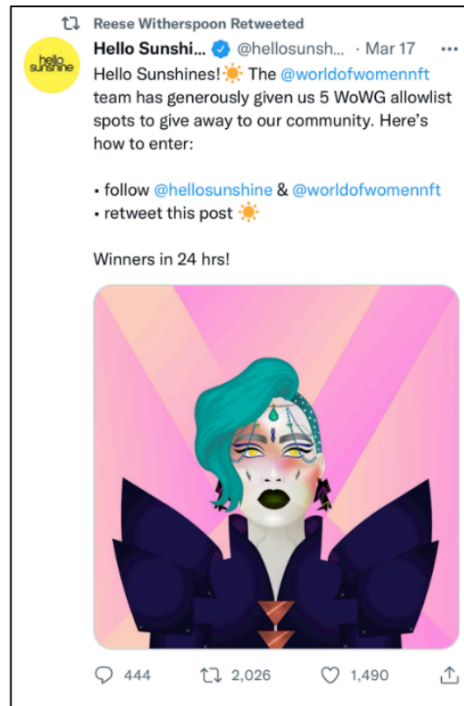
Specifically, in June 2022, as part of an ongoing investigation into DJ Khaled's undisclosed social media promotions for Diageo's Ciroc vodka, TINA.org notified Khaled's legal team of several Instagram posts in which he promoted the brand's new flavor.³⁵ In response, Khaled's legal team took the position that he did not have a material connection with Diageo because his contractual relationship with the company had ended years prior and that he "now has no contractual, financial or any other relationship with Diageo," and that he "made the posts on his own volition."³⁶ His legal team took this position despite the fact that Diageo was simultaneously airing a Ciroc commercial on national television featuring Khaled, as well as Sean "Diddy" Combs, including during the Billboard Music Awards on NBC and the BET Awards on VH1, which were seen by millions of consumers.

As TINA.org explained to Khaled's legal team, the opportunity to be featured in a nationally televised commercial with Combs and the Ciroc brand provided Khaled with a plethora of material benefits, including but not limited to, increasing his brand awareness with a vast audience, building on his brand image, attracting more fans and followers, and the potential to increase sales of his own products.³⁷ These types of benefits are indeed material and thus Khaled's relationship to Diageo must be properly disclosed.³⁸

Similarly, TINA.org also recently notified Reese Witherspoon's legal team of her undisclosed promotions for an NFT company, World of Women (WoW), a company with which she and her company Hello Sunshine have a partnership.³⁹ In response, Witherspoon's legal team took the position that she is under no obligation to disclose her relationship because her and Hello Sunshine's partnership with WoW was created altruistically by Witherspoon to encourage women to engage in the NFT industry and without any expectation of deriving a benefit in return, and that the partnership does not provide any financial or other material benefits to Witherspoon.⁴⁰

However, the absence of direct compensation from WoW to Witherspoon is not determinative of whether a material connection between the two exist. Witherspoon's company Hello Sunshine derives material benefits from the WoW partnership, which has been publicly announced as a business venture to jointly develop entertainment

properties, by attracting new social media followers and increasing consumer engagement with the Witherspoon and Hello Sunshine brand, as shown below.



In addition, Witherspoon's partnership with WoW increases her brand image and attracts new fans, much like Khaled's relationship with Diageo. As such, Witherspoon should clearly and conspicuously disclose her relationship to WoW in her promotional posts.

TINA.org urges the FTC to address these types of benefits to intangible assets head on in the Guides in order to eliminate this novel defense of deceptive influencer marketing.

Relatedly, with respect to the FTC's position in the Guides that an endorser's material connection need not be disclosed when it is understood or expected by all but an insignificant portion of the audience, TINA.org urges the FTC to explicitly require that marketers who take the position that a material connection need not be disclosed on such a basis be able to substantiate their position. Otherwise, it is simply too easy to claim that an audience is aware of a particular relationship in order to protect deceptive posts.

IV. The Guides Must Effectively Address Endorsement Marketing Targeted at Children

As TINA.org stated in its June 2020 Comment, the Guides must address endorsements in marketing targeted at children. The proposed revisions do not adequately do so. Simply stating that endorsements in marketing addressed to children *may* be of special concern and *might* be questioned does not give any guidance to marketers or protect minors from deceptive influencer marketing.

It is beyond dispute that children do not interpret and/or understand marketing material in the same ways that adults do – not all children have the ability to recognize advertising messages, and even those that do may not be able to critically evaluate the underlying marketing message. While more focused research on children’s capacity to recognize and understand various forms of marketing and distinguish it from other content would be helpful, there is a large repository of research at this time to guide the FTC to establish some bright-line rules with respect to when and how marketing messages, including endorsements, should be conveyed to children. Below is some of the pertinent information relating to the cognitive capabilities of children to identify and critically understand various forms of marketing that has been gleaned from the literature.

- Children under the age of five are unable to identify advertising, including television commercials with clear ad breaks, or distinguish them from other forms of content.⁴¹
- At age five, the distinction between commercials and other content is only possible when there are perceptual cues (as there are in television programming), such as verbal separators (“We’ll be right back after this message”) or because commercials are shorter.⁴²
- Even at age five – when children begin to be able to at least identify traditional ads – the selling intent behind the ads is not understood.⁴³
- Children seven years old and younger do not have the ability to detect persuasive intent in advertising.⁴⁴
- Children under age eight may believe they are really interacting with branded characters.⁴⁵
- “Less than 40 percent each of 8- and 10-year-old children were able to identify the persuasive goal of advertisements.”⁴⁶
- “[C]hildren demonstrated a significantly more sophisticated understanding of television advertising compared with all five examples of non-traditional advertising. Even the 10-year-old children failed to recognize the persuasive intent of nontraditional techniques in the same way they did with TV advertisements. Instead many children asserted that the non-traditional techniques were merely something to enjoy and to be entertained by.”⁴⁷
- Children under twelve are unable to recognize the promotional nature of advergames.⁴⁸
- “Even if they recognize advertising, however, children’s understanding of persuasive intentions may not be fully developed until their teenage years.”⁴⁹

The scientific data referenced above makes clear that marketers should be held to a different standard when it comes to advertising directed at children, especially as it pertains to nontraditional advertising formats on the internet.

TINA.org urges the FTC to use this information, as well as any other research and data it collects in connection with its May 2022 request for comments and its October 2022 event regarding ways to protect children from stealth advertising in digital media⁵⁰ to provide more specificity in the Guides with respect to endorsement marketing directed at children.

V. The FTC’s Proposed Addition Regarding Endorser Liability Must be Consistent with Other Commission Guidance and Must be Enforced

The FTC is proposing adding a new section to the Guides – Section 255.1(e) – to make clear that endorsers may be liable for their marketing statements, an addition that TINA.org supports. However, the language used in this proposed new section and the accompanying example suggests that the Commission is proposing a position that is inconsistent with other FTC guidance.

Specifically, proposed Section 255.1(e) and accompanying Example 5 state, in relevant part:

...an endorser who is not an expert may be liable for misleading or unsubstantiated representations regarding a product’s performance or effectiveness when the representations: (1) are inconsistent with the endorser’s personal experience; or (2) were not made or approved by the advertiser and go beyond the scope of the endorser’s personal experience.

...

Example 5: A skin care products advertiser hires an influencer to promote its products on the influencer’s social media account. ... [B]elieving that the lotion cleared up their eczema, the influencer says in their review, ‘This lotion cures eczema....’ ... [T]he influencer, who did not limit their claims to their personal experience and did not have a reasonable basis for their claim that the lotion cures eczema, is subject to liability for the misleading or unsubstantiated representation in endorsement...

As currently drafted, this proposed language may be interpreted as implying that a disease-treatment claim is permissible if it is made by an influencer who limits their claim to their personal experience and has a reasonable basis for their claim. This interpretation would not only run counter to other FTC guidance with respect to disease-treatment claims, which require competent and reliable scientific evidence to substantiate such claims,⁵¹ but U.S. Food & Drug Administration regulations as well.⁵² TINA.org urges the FTC to reexamine its proposed language and ensure it is not inadvertently lowering the standard for disease-treatment claims made by endorsers as such a position would open the floodgates for deceptive health claims.

Finally, with respect to endorser liability generally, such an addition, while supported by TINA.org, is of little import if it is not rigorously enforced. Though influencers may be aware of the Guides, to date they have had little incentive to follow the Commission’s guidance because the risk of enforcement has been almost nonexistent. Only through direct enforcement against influencers will the Commission increase specific deterrence and influencer compliance with the Endorsement Guides.

* * *

Given the ubiquity of endorser advertising, particularly in continuously evolving digital formats, it is crucial that the Commission update its Endorsement Guides to be as relevant and effective as possible. TINA.org strongly urges the Commission to update the Guides and to implement the above suggestions.

Sincerely,



Bonnie Patten
Laura Smith
Truth in Advertising, Inc.

¹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 Fed. Reg. 44288 (proposed July 26, 2022), <https://www.federalregister.gov/documents/2022/07/26/2022-12327/guides-concerning-the-use-of-endorsements-and-testimonials-in-advertising>.

² See, e.g., *Montefiore Ads Pollute NYC Highways*, Truth In Advertising, Aug. 24, 2022, <https://truthinadvertising.org/blog/montefiore-ads-pollute-nyc-highways/>; *HelloFraud: TINA.org Files Complaint against Meal Kit Giant*, Truth In Advertising, June 22, 2022, <https://truthinadvertising.org/articles/hellofraud-what-to-know-about-tina-orgs-complaint-against-meal-kit-giant/>.

³ See, e.g., TINA.org's Comment to the FTC Regarding Digital Advertising (Aug. 2, 2022), https://truthinadvertising.org/wp-content/uploads/2022/08/8_2_22-TINA-Comment-to-FTC-re-Digital-Advertising-P114506.pdf.

⁴ *Id.* See also TINA.org's Complaint to FTC Regarding Deceptive Marketing on Roblox (Apr. 19, 2022), https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf; TINA.org's Comment to the FTC regarding Endorsement Guides (June 22, 2020), <https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf>.

⁵ TINA.org's Comment to the FTC Regarding Endorsement Guides (June 22, 2020), <https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf>.

⁶ TINA.org's Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz/>.

⁷ TINA.org's MyPillow Investigation, <https://truthinadvertising.org/brands/mypillow/>; TINA.org's doTerra Investigation, <https://truthinadvertising.org/brands/doterra/>; TINA.org's Young Living Investigation, <https://truthinadvertising.org/brands/young-living/>.

⁸ TINA.org's HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>.

⁹ Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic Before the Subcomm. on Consumer Prot. and Com. of the Comm. on Energy and Com., 117th Congress (Feb. 4, 2021) (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/house-testimony-2021-summary-action/>; Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams, and Swindles Before the Subcomm. on Consumer Prot., Prod. Safety, and Data Sec. of the Comm. on Com., Sci., & Transp., 117th Congress (Apr. 27, 2021), (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/senate-testimony-2021-summary-action/>.

¹⁰ For example, TINA.org participated as amicus curiae in *AMG Capital Management, LLC v. Federal Trade Commission*. Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, No. 19-508 (U.S. Dec. 7, 2020), https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf. TINA.org also filed an amicus curiae brief in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement to the elderly as clinically proven to improve memory. Brief of Amici Curiae Truth In Advertising, Inc. et al. in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745), https://truthinadvertising.org/wp-content/uploads/2018/03/Prevagen_Amici-Curiae-brief.pdf.

¹¹ See e.g., Letter from TINA.org to Justin Bieber and copying Gianpiero D'Alessandro, InBetweeners (June 10, 2022), https://truthinadvertising.org/wp-content/uploads/2022/08/6_10_22-TINA.org-Letter-re-J-Bieber-NFT-Promotions.pdf; Letter from TINA.org to Reese Witherspoon and copying Julia Loiseau, Legal Counsel, World of Women (June 10, 2022), https://truthinadvertising.org/wp-content/uploads/2022/08/6_10_22-TINA.org-Letter-re-R-Witherspoon-NFT-Promotions.pdf; Letter from TINA.org to DJ Khaled and copying Diageo, Bacardi, and Sovereign Brands (Mar., 29, 2018), https://truthinadvertising.org/wp-content/uploads/2018/03/3_29_18-Ltr-re-Khaled-Deceptive-Advertising_Redacted.pdf; Letter from TINA.org to Kardashian/Jenner family and copying 27 involved brands and companies (Aug. 17, 2016), https://truthinadvertising.org/wp-content/uploads/2016/08/8_17_16-ltr-from-TINA-to-K_Jenner-and-M_Kump_Redacted.pdf.

¹² TINA.org's Complaint to FTC Regarding HelloFresh's Deceptive Advertising and Illegal Business Practices (June 22, 2022), https://truthinadvertising.org/wp-content/uploads/2022/06/6_22_22-TINA-complaint-to-FTC-re-HelloFresh.pdf; TINA.org's Complaint to FTC Regarding Deceptive Marketing by Forever Living (May 4, 2022), https://truthinadvertising.org/wp-content/uploads/2021/12/5_4_22-ltr-from-TINA-to-FTC-re-Forever-Living_Redacted.pdf; TINA.org's Complaint to FTC Regarding Deceptive Marketing on Roblox (Apr. 19, 2022), https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf; TINA.org's Complaint to FTC Regarding FabKids' Deceptive Advertising and Illegal Business Practices (Aug. 30, 2021), https://truthinadvertising.org/wp-content/uploads/2021/08/8_30_21-FabKids-complaint-to-FTC_Redacted.pdf; TINA.org's Complaint to FTC Regarding Savage X Fenty's Deceptive Advertising and Illegal Business Practices (Feb. 10, 2020), https://truthinadvertising.org/wp-content/uploads/2020/02/2_10_20-TINA-ltr-to-FTC-re-Savage-X-Fenty_Redacted.pdf; TINA.org's Complaint to FTC Regarding Ryan ToysReview's Deceptive Native Advertising (Aug. 28, 2019), https://truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-FTC-re-Ryan-ToysReview_Redacted.pdf; TINA.org's Complaint to FTC regarding Social Media Influencers Ignoring FTC Direction (Marc. 4, 2019), <https://truthinadvertising.org/wp-content/uploads/2019/03/TINA-letter-to-FTC-Influencers-Redacted.pdf>; TINA.org's Complaint

to FTC Regarding Deceptive Advertising by Diageo (Dec. 10, 2018), https://truthinadvertising.org/wp-content/uploads/2018/12/12_10_18-letter-from-TINA-to-FTC-re-Diageo-Ciroc_Redacted.pdf; TINA.org's Complaint to FTC regarding Warner Bros. Home Entertainment Inc.'s Violation of 2016 FTC Order (Oct. 30, 2017), https://truthinadvertising.org/wp-content/uploads/2017/10/10_30_2017-ltr-from-TINA-to-FTC-re-Warner-Bros_Redacted.pdf; TINA.org's Complaint to FTC Regarding Deceptive Native Advertising by the Kardashian/Jenner Family (Aug. 25, 2016), https://truthinadvertising.org/wp-content/uploads/2016/08/8_25_16-ltr-from-TINA-to-FTC-re-Kardashian-Jenner-Instagram-posts.pdf.

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¹⁶ Letter from TINA.org to DSSRC Regarding Illegal Health Claims by Young Living Essential Oils, LC (Feb. 7, 2022), https://truthinadvertising.org/wp-content/uploads/2022/03/2_7_22-Young-Living-Complaint-to-DSSRC.pdf; Letter from TINA.org to FTC Regarding Violations of Stipulated Order in *FTC v. Agora Financial, LLC, et al.* (June 16, 2021), https://truthinadvertising.org/wp-content/uploads/2021/06/6_16_21-ltr-to-FTC-re-Agora-Order-Violations_Redacted.pdf; Letter from TINA.org to DSSRC Regarding Le-Vel Brands, LLC’s Use of Illegal Income and Health Claims to Promote the “Thrive Experience” (Mar. 11, 2020), https://truthinadvertising.org/wp-content/uploads/2020/09/3_11_20-TINA-complaint-to-DSSRC-re-Le_Vel-Thrive.pdf; Letter from TINA.org to FTC Regarding Neurocore, LLC’s Use of Unsubstantiated Medical Treatment Claims (Nov. 12, 2019), https://truthinadvertising.org/wp-content/uploads/2019/11/11_12_19-Neurocore-complaint-letter-to-FTC.pdf; Letter from TINA.org to DSSRC Regarding Illegal Health Claims by doTerra International (Oct. 16, 2019), https://truthinadvertising.org/wp-content/uploads/2020/04/10_16_19-ltr-to-DSSRC-re-doTerra_Redacted.pdf; Letter from TINA.org to FTC and FDA Regarding New U Life’s Deceptive Marketing of Somaderm Gel (Sep. 5, 2019), https://truthinadvertising.org/wp-content/uploads/2019/09/9_5_19-ltr-re-New-U-Life-to-FTC-and-FDA.pdf; Letter from TINA.org to DSSRC Regarding Illegal Health Claims by Young Living Essential Oils, LC (June 3, 2019), https://truthinadvertising.org/wp-content/uploads/2020/04/6_3_19-ltr-to-DSSRC-re-Young-Living_Redacted.pdf; October 22, 2018 Complaint to FTC regarding Cancer Treatment Centers of America Global, Inc., https://truthinadvertising.org/wp-content/uploads/2018/10/10_22_18-Complaint-Letter-to-FTC-re-CTCA_Redacted.pdf; Letter from TINA.org to Jusuru International, Inc. (June 6, 2016), https://truthinadvertising.org/wp-content/uploads/2016/06/6_6_16-ltr-from-TINA-to-Jusuru_Redacted.pdf; Letter from TINA.org to FTC Regarding Deceptive Marketing for Kyani Business Opportunity and Products (Apr. 5, 2016), https://truthinadvertising.org/wp-content/uploads/2016/04/Kyani-FTC-Complaint_Redacted.pdf; Letter from TINA.org to Idaho Att’y Gen Regarding Deceptive Marketing for Kyani Business Opportunity and Products (Apr. 5, 2016), https://truthinadvertising.org/wp-content/uploads/2016/04/Kyani-Idaho-AG-Complaint_Redacted.pdf; Letter from TINA.org to FTC Regarding Deceptive Marketing by Jeunesse Business Opportunity and Products (Oct. 19, 2015), <https://truthinadvertising.org/wp-content/uploads/2015/10/10-19-15-Letter-from-TINA-to-FTC-re-Jeunesse.pdf>; Letter from TINA.org to Fla. Att’y Gen Regarding Deceptive Marketing by Jeunesse Business Opportunity and Products (Oct. 19, 2015), https://truthinadvertising.org/wp-content/uploads/2015/10/10-19-15-Letter-from-TINA-to-FL-AG-re-Jeunesse_Redacted.pdf.

Of note, TINA.org complaints to regulators will frequently involve more than one deceptive marketing issue. As such, some of the complaints cited above are also cited in other endnotes regarding TINA.org complaints about other false or misleading advertising issues.

¹⁷ See, e.g., TINA.org’s Complaint to FTC Regarding Deceptive Marketing for Prevagen (Sept. 17, 2015), <https://truthinadvertising.org/wp-content/uploads/2015/09/Complaint-ltr-from-TINA-to-FTC-re-Prevagen.pdf> and TINA.org’s 2019 Prevagen database, <https://truthinadvertising.org/evidence/prevagen-2019-marketing/> (highlighting testimonials used in the deceptive marketing campaign targeted at the elderly, and specifically those with memory loss concerns); *Neurolumen*, Truth In Advertising, Sept. 5, 2018 (updated May 13, 2022), <https://truthinadvertising.org/articles/neurolumen/>; TINA.org’s Complaint to FTC regarding Deceptive Marketing on Roblox (Apr. 19, 2022), https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf (highlighting deceptive influencer marketing directed at young children). See also TINA.org’s Complaint to FTC Regarding Cancer Treatment Centers of America Global, Inc. (Oct. 22, 2018), https://truthinadvertising.org/wp-content/uploads/2018/10/10_22_18-Complaint-Letter-to-FTC-re-CTCA_Redacted.pdf (highlighting deceptive testimonials directed at cancer patients and their

families); *LuLaRoe Distributors in Bankruptcy as Founder Touts Financial Freedom*, Truth In Advertising, Apr. 30, 2019 (updated June 10, 2019), <https://truthinadvertising.org/articles/lularoe-distributors-face-bankruptcy-as-founder-touts-financial-freedom/> (discussing deceptive testimonials portraying atypical income claims and the number of deceived consumers who filed for bankruptcy).

¹⁸ Guides Concerning the Use of Endorsements and Testimonials in Advertising (proposed changes and request for comments) (to be codified at 16 C.F.R. pt. 255), https://www.ftc.gov/system/files/ftc_gov/pdf/P204500%20Guides%20Concerning%20Endors%20and%20Testimonials.pdf.

¹⁹ *Id.* at 9.

²⁰ TINA.org's Comment to the FTC Regarding Endorsement Guides (June 22, 2020), <https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf>.

²¹ TINA.org's Complaint to FTC Regarding Deceptive Marketing of Roblox (Apr. 19, 2022), https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf.

²² Roblox Nikeland, <https://web.roblox.com/games/7462526249/NIKELAND-NEW-3V3>.

²³ Roblox Jailbreak, <https://web.roblox.com/games/606849621/Jailbreak>.

²⁴ Roblox Hot Wheels Open World, <https://web.roblox.com/games/5652023420/NEW-CAR-Hot-Wheels-Open-World>.

²⁵ Roblox Froot Loops World, <https://web.roblox.com/games/8212312901/Froot-Loops-World>.

²⁶ TINA.org's Complaint Regarding Deceptive Marketing on Roblox (Apr. 19, 2022), https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf.

²⁷ Duncan MacRae, *More Than Half of Social Media Influencers Participate in the Metaverse*, MarketingTech (Jan. 17, 2022), <https://www.marketingtechnews.net/news/2022/jan/17/more-than-half-of-social-media-influencers-participate-in-the-metaverse/>.

²⁸ Typically, avatar influencers (i.e., those with a material connection to Roblox and/or a brand advertising on Roblox) are Roblox users who have large followings on YouTube and/or other social media platforms. Therefore, their avatars are frequently recognizable by their fans.

²⁹ LankyBox, *Can We Get The RAREST SHOES In ROBLOX NIKELAND?*, YOUTUBE (Dec. 11, 2021), <https://www.youtube.com/watch?v=p0bRigaWiAA>; LankyBoxGamesAdam Roblox Profile, <https://web.roblox.com/users/1214936771/profile>.

³⁰ TW Dessi Gaming, *I Took a Trip to the Grand Opening of NIKELAND Amusement Park and Bought Some New Shoes!*, YOUTUBE (Nov. 20, 2021), <https://www.youtube.com/watch?v=68g7Ge8Z5FQ>; @TW_Dessi Roblox Profile, <https://web.roblox.com/users/298668030/profile>.

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- ³³ TINA.org's Comment to the FTC Regarding Digital Advertising (Aug. 2, 2022), https://truthinadvertising.org/wp-content/uploads/2022/08/8_2_22-TINA-Comment-to-FTC-re-Digital-Advertising-P114506.pdf.
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- ³⁵ TINA.org's Letter to DJ Khaled and Diageo (June 27, 2022), https://truthinadvertising.org/wp-content/uploads/2021/12/6_27_22-ltr-from-TINA-re-Khaled-Ciroc-ads.pdf.
- ³⁶ Letter from DJ Khaled to TINA.org (July 8, 2022), https://truthinadvertising.org/wp-content/uploads/2021/12/7_8_22-Khaled-to-TINA.pdf.
- ³⁷ Letter from TINA.org to DJ Khaled (July 12, 2022), https://truthinadvertising.org/wp-content/uploads/2021/12/7_12_22-TINA-to-Khaled.pdf.
- ³⁸ Following TINA.org's investigation and communications with Khaled's legal team, the posts at issue were removed from Khaled's Instagram account.
- ³⁹ Letter from TINA.org to Reese Witherspoon (June 10, 2022), https://truthinadvertising.org/wp-content/uploads/2022/08/6_10_22-TINA.org-Letter-re-R-Witherspoon-NFT-Promotions.pdf.
- ⁴⁰ *TINA.org Sends Notification Letters to Celebrities Promoting NFTs*, Truth In Advertising, Aug. 8, 2022 (updated Aug. 17, 2022), <https://truthinadvertising.org/articles/tina-org-sends-letters-to-celebrities-promoting-nfts/>.
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⁴³ *Id.*

⁴⁴ Matthew Lapierre et al., *The Effect of Advertising on Children and Adolescents*, 140 *Pediatrics* S152, S153 (2017), <https://doi.org/10.1542/peds.2016-1758V>. See also Deborah Roedder John, *Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research*, 26 *J. of Consumer Rsch.* 183 (1999), <https://doi.org/10.1086/209559>; Seth Stevenson, *World of Adcraft: The Government Video Game That Teaches Kids About the Perils of Advertising*, *Slate*, May 10, 2010, <https://slate.com/business/2010/05/admongo-the-government-video-game-that-teaches-kids-about-the-perils-of-advertising.html> (“The FTC says it couldn’t design the content for younger kids because at that age [younger than eight] the little moppets aren’t yet capable of understanding persuasive intent—or even the difference between advertising and editorial content. But doesn’t that suggest those younger kids are even more in need of the FTC’s protection?”).

⁴⁵ Sandra Calvert, *Children as Consumers: Advertising and Marketing*, 18 *The Future of Children* 205, 216 (2008), https://www.researchgate.net/publication/49852129_Children_as_Consumers_Advertising_and_Marketing?enrichId=rgreq-26510d809a229033cb793ba9c923d769-XXX&enrichSource=Y292ZXJQYWdlOzQ5ODUyMTI5O0FTOjk3NjM2NDAxMDI1MDMzQDE0MDAyODk3NDk0NjM3D&el=1_x_3&_esc=publicationCoverPdf.

⁴⁶ Fran Blumberg et al., *Linkages Between Media Literacy and Children’s and Adolescents’ Susceptibility to Advertising in Advertising to Children: New Directions*, *New Media* 158, 163 (Mark Blades et al. eds., Palgrave Macmillan, 2014).

⁴⁷ Laura Owen et al., *Under the Radar: How Embedded Commercial Messages in TV and the New Media Influence Children Without their Conscious Awareness in Advertising to Children: New Directions*, *New Media* 178, 182 (Mark Blades et al. eds., Palgrave Macmillan, 2014).

⁴⁸ See Soontae An & Susannah Stern, *Mitigating the Effects of Advergaming on Children*, 40 *J. of Advert.* 43, 50 (2011); Rita-Marie Cain Reid, *Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach*, 51 *Am. Bus. L. J.* 721, 727-28 (2014), <https://doi.org/10.1111/ablj.12038> (“By blurring the boundaries between advertising and entertainment, advertisers may simply overwhelm the defenses children are still in the process of building,” quoting Elizabeth Moore, *Children and the Changing World of Advertising*, 52 *J. of Bus. Ethics* 161 (2004)). See also Katarina Panic et al., *Comparing TV Ads and Advergaming Targeting Children: The Impact of Persuasion Knowledge on Behavioral Responses*, 42 *J. of Advert.* 264, 266 (2013); Soontae An & Hannah Kang, *Korean Children’s Understanding of Social Media Advergaming: An Exploratory Study of Ad Recognition and Skeptical Attitudes Toward Advertising*, 18 *J. Consumer Behav.* 387, 389 (2019) (“in a survey of Canadian children in Grades 4 to 11, over three quarters answered that advergaming are just games, not mainly advertisements (Media Awareness Network, 2005).”).

⁴⁹ Soontae An & Hannah Kang, *Korean Children’s Understanding of Social Media Advergaming: An Exploratory Study of Ad Recognition and Skeptical Attitudes Toward Advertising*, 18 *J. Consumer Behav.* 387, 389 (2019) (citations omitted). See also Agnes Nairn & Cordelia Fine, *Who’s Messing With My Mind? The Implications of Dual-Process Models for the Ethics of Advertising to Children*, 27 *Int’l J. of Advert.* 447, 458-460 (“The phenomenon of ‘implicit persuasion’—together with the modern formats of advertising to children—provides a compelling explanation for why cognitive defence (as traditionally understood) does not protect older children with more developed cognitive capacities any better than it does younger children in an

earlier stage of cognitive development. An age-stage approach no longer provides the right ethical benchmark for assessing the fairness of advertising to children. Instead, the ethically appropriate question for contemporary advertising formats is, at what age can children resist implicit persuasion?” (“[W]e have outlined data to suggest that not only will pre-adolescent children fail to possess sufficient cognitive control capacities to resist implicit persuasion, but that even adolescents may have difficulty, relative to adults.”)

⁵⁰ Press Release, Fed. Trade Comm’n, Protecting Kids from Stealth Advertising in Digital Media (Oct. 19, 2022), <https://www.ftc.gov/news-events/events/2022/10/protecting-kids-stealth-advertising-digital-media>.

⁵¹ FTC’s Advertising Substantiation Principles, <https://www.ftc.gov/sites/default/files/attachments/training-materials/substantiation.pdf>.

⁵² FDA’s Warning Letters Address Drug Claims Made for Products Marketed as Cosmetics, <https://www.fda.gov/cosmetics/warning-letters-related-cosmetics/warning-letters-address-drug-claims-made-products-marketed-cosmetics>.