

BBB NATIONAL PROGRAMS, INC.
The Direct Selling Self-Regulatory Council

Case Number: 9-2020 – Monitoring Inquiry – MyDailyChoice, Inc. DBA HempWorx

COMPANY DESCRIPTION

MyDailyChoice, Inc. DBA HempWorx (“Hempworx” or “Company”) is a multi-level direct selling company that was founded in November 2014 and is headquartered in Las Vegas, NV. Hempworx offers a variety of products made from industrial hemp plants grown on Kentucky farms including a portfolio of products containing Cannabidiol (CBD).

BASIS OF INQUIRY

The Direct Selling Self-Regulatory Council (DSSRC), is a national advertising self-regulation program administered by BBB National Programs, Inc. (BBB NP) This inquiry was commenced by the DSSRC pursuant to its ongoing independent monitoring of advertising and marketing claims in the direct selling industry.

More specifically, DSSRC identified several core income and product performance claims being disseminated on Facebook as well as on the Company website, including the following representative claims.

I. Product Claims:

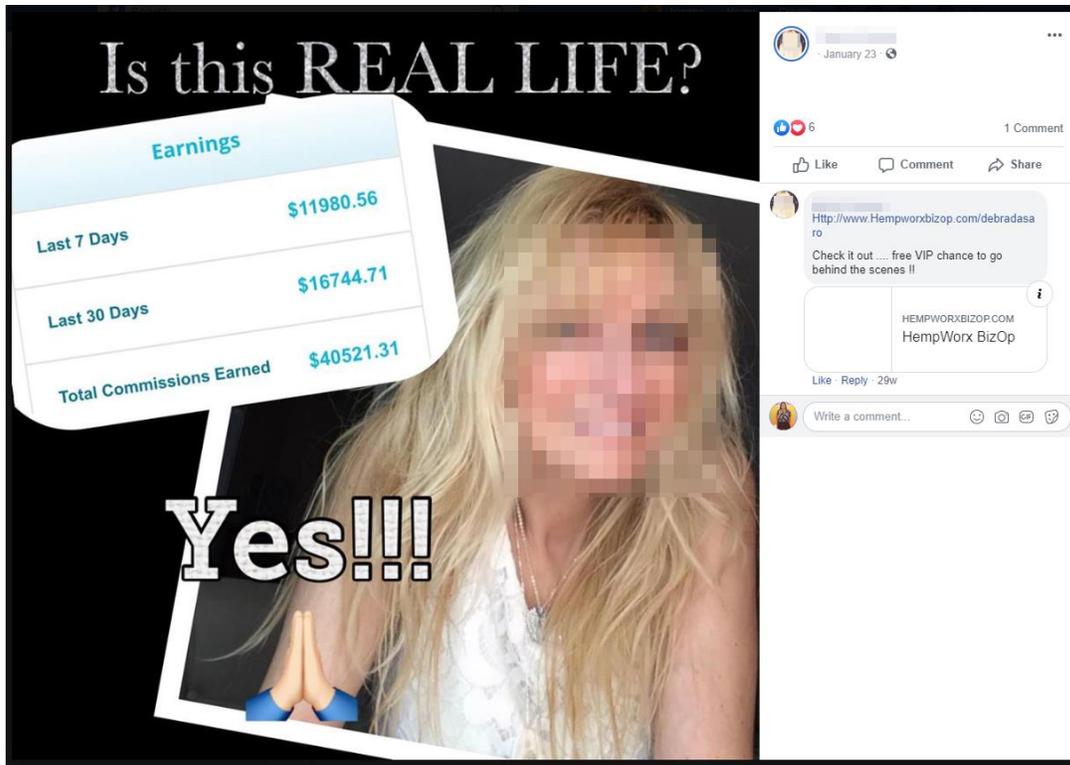
- Facebook image with copy stating CBD’s medical uses for the body (fibromyalgia, menstr[u]al, arthritis, diabetes, chronic pain, nausea) and mind (depression, anxiety, autism, epilepsy, OCD, alz[h]eimer’s)



- “Great for the Skin
Our Renew Anti-Aging cream may help the skin look younger, tighter, and brighter. Additionally, this product can help increase the longevity of skin cells.”
- “Great for Anti-Aging
Our Renew Anti-Aging cream may help reduce wrinkles and fine lines.”
- “Soothes Muscles
Customers have states that Relief helps to soothe and relax muscles.”
- “Infused with Collagen Retinol
Our Revive Cream is infused with Collagen Retinol which has incredible benefits for the skin.”
- “Great For The Skin
Customers have stated that this product helps reverse the visible signs of aging as well improves overall texture & complexion.”

II. Income Claims

-  Our mission, at MyDailyChoice, is to bless the lives of thousands of families across the globe with good health, life-changing income and freedom by empowering people with smart daily choices.”
- Facebook image exhibiting earnings:
 - “Last 7 Days \$10865.96”
 - “Last 30 Days \$22064.56”
- Facebook image exhibiting earnings:
 - “Last 7 Days \$11980.56”
 - “Last 30 Days \$16744.71”
 - “Total Commissions Earned \$40521.31”



- “but we are one of the only companies in the world that has a monthly earning potential of \$1,000,000 per month with NO FLUSHING!”
- “At MyDailyChoice, we’ve put together an aggressive VIP Auto Club to let our affiliates drive away in the car of their dreams! Do you have your heart set on a dream car? Look no further - the MDC VIP Auto Club will make your dream car become a reality! When you qualify for the VIP Auto Club, we send you branding materials to put on your vehicle, and we pay the bill!”
- “Welcome to our 2% Global Bonus Pool program where you can earn a piece of total company revenue globally! We set aside 2% of our total company revenue each month and pay it to those who qualify in our global bonus pool program. This lets you recruit new affiliates, customers, and rank advance in the company earning you shares in the global bonus pool! At the end of each month, we take 2% of total revenue divided by the number of shares to determine the share value.”

COMPANY’S POSITION

I. Product Claims

According to Hempworx, the distributor’s Facebook post impliedly claims specific benefit from cannabidiol (CBD) which the reasonable and prudent consumer would likely interpret as curing, treating, prevent or mitigating certain conditions that are considered by the Food and Drug

Administration (FDA) to be diseases. While the Company did not dispute that fibromyalgia, arthritis, diabetes, depression, autism, epilepsy, obsessive compulsive disorder (“OCD”) and Alzheimer’s (disease) are diseases, according to Hempworx, the FDA does not consider some of the conditions cited in the subject Facebook post to be diseases. For example, with respect to conditions associated with the menstrual cycle, the Company noted that the FDA stated in its final rule regarding structure function claims for dietary supplements that:

Common conditions associated with natural states or processes that do not cause significant or permanent harm will not be treated as diseases under the final rule. For example, hot flashes, *common symptoms associated with the menstrual cycle*, ordinary morning sickness associated with pregnancy, mild memory problems associated with aging, hair loss associated with aging, and non-cystic acne will not be treated as diseases under this provision.¹ (emphasis added)

Accordingly, Hempworx informed DSSRC that it located the owner of the Facebook page and demanded that these claims be removed.

Hempworx also maintained that claims related to “nausea” are claims that the FDA has recognized may or may not be drug claims;

“All of the claims listed in the comment from the “Antiflatulents” (antigas) monograph are acceptable structure/function claims, because the symptoms in the claims are not sufficiently characteristic of specific diseases: “Alleviates the symptoms referred to as gas”, “alleviates bloating”, “alleviates pressure”, “alleviates fullness”, and “alleviates stuffed feeling”. The claim listed in the comment from the “Antiemetics” monograph, “for the prevention and treatment of the *nausea*, vomiting, or dizziness associated with motion”, is also a permitted structure/function claim.”²

The Company stated that, if the nausea is related to a disease (e.g., gall bladder disease, stomach flu, ulcers, etc.), claims to cure, treat, prevent or mitigate such nausea would unquestionably be drug claims. According to Hempworx, the ultimate issue is whether the nausea is caused by a disease (as defined in 21 CFR 101.93) or a non-disease related effect on the body. Specifically, Hempworx referenced the FDA language below in support of its assertion:

The primary purpose of the rule is to provide a consistent standard for distinguishing between claims that may be made in labeling without prior review by FDA and claims that require prior authorization as health claims or prior review as drug claims. ***The larger goal is to ensure that information about non-disease-related effects of a dietary supplement on the body may be freely disseminated in labeling***, while at the same time guaranteeing that claims for use of a dietary supplement to treat or prevent disease are not made without prior review to ensure that the supplement is safe and effective for that use.³ (emphasis added)

¹ *Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body; Final Rule* (Vol. 65, No. 4, January 6, 2000), page 1000.

² *Id.* at 1031

³ *Supra* at 1.

Accordingly, Hempworx then turned its attention to the four product performance claims regarding Hempworx cosmetic products that DSSRC identified in its opening letter.

A. Renew Anti-Aging Cream

Hempworx agreed that a claim to increase the longevity of skin cells (“Great for the Skin. Our Renew Anti-Aging cream may help the skin look younger, tighter, and brighter. Additionally, this product can help increase the longevity of skin cells.”) is not appropriate for a cosmetic, and informed DSSRC that this claim has been removed from the Company website.

Conversely, Hempworx argued that claims that a product can “help the skin look younger, tighter, and brighter” are appropriate cosmetic claims. The Company pointed to Section 201(i) the Federal Food, Drug and Cosmetic Act (“FD&C Act”) which defines a “cosmetic” as: a product, except soap, intended to be applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance. Furthermore, according to the Company, the FDA in its Cosmetic Labeling Guide states:

“In short, one may say that a cosmetic is a product intended to exert a physical, and not a physiological, effect on the human body.”⁴

In addition, the Company explained, the FDA has noted that:

Products intended to make people more attractive are generally cosmetics. For example, moisturizing is a cosmetic claim. *So, if a product is intended to make lines and wrinkles less noticeable, simply by moisturizing the skin, it’s a cosmetic. Similarly, makeup or “primers” intended to make the signs of aging less noticeable just by hiding them are also cosmetics.* But, products intended to affect the structure or function of the body, such as the skin, are drugs, or sometimes medical devices, even if they affect the appearance. So, if a product is intended, for example, to remove wrinkles or increase the skin’s production of collagen, it’s a drug or a medical device.⁵ (emphasis added)

The Company acknowledged that the claim, “Our Renew Anti-Aging cream may help reduce wrinkles and fine lines” should be revised and, as such indicated to DSSRC that it would revise the claim to state that, “Our Renew Anti-Aging cream *will help reduce the appearance of wrinkles and fine lines.*” <https://www.fda.gov/cosmetics/cosmetic-products/wrinkle-treatments-and-other-antiaging-products> (emphasis added)

B. Revive Collagen Cream

According to Hempworx, language stating that Revive Collagen Cream is “Infused with Collagen Retinol” is not a claim that asserts any effect on the structure or function of the body but,

⁴ FDA Cosmetic Labeling Guide, page 3.

⁵ <https://www.fda.gov/cosmetics/cosmetic-products/wrinkle-treatments-and-other-antiaging-products> (emphasis added)

instead, is merely a true statement regarding one of the ingredients in the product. As such, the Company stated that this claim is neither a cosmetic nor a drug/device claim.

Regarding the claim, “Customers have stated that this product helps reverse the visible signs of aging as well improves overall texture & complexion”, Hempworx informed DSSRC that it would modify the claim to state “Customers have stated that this product helps reverse the *appearance of* visible signs of aging as well improves overall *look of their skin’s* texture & complexion.” (emphasis added)

With respect to the part of the claim which communicates that Collagen Retinol “... has incredible benefits” and is “Great for the skin,” Hempworx argued that such statements are considered puffery as this term is defined by the Federal Trade Commission (FTC) and federal case law. Moreover, the Company contended that it makes no claims that assert any effect on the structure or function of the body.

Hempworx, stated that “puffing” is defined as the making of advertising claims that are not measurable and of the type upon which consumers would not normally rely. Puffing can be a powerful tool to build a brand’s image with consumers. The Company added that puffery is valuable precisely because it allows marketers to grab the attention of consumers with bold advertising claims that do not require substantiation

Hempworx also argued that when outlandish or exaggerated marketing claims move closer to something that can be measured, the risk the claim will be considered actionable false advertising under the Lanham Act increases. The Company stated that, in addition to being verifiable and “capable of being prove[n] false” by scientific methods more, Section 43(a) of the Lanham Act establishes the standard under which false advertisement claims are reviewed and the standard consists of the following questions:

- (1) whether the advertiser made a false or misleading statement of fact about a product;
- (2) whether the misrepresentation of fact deceived or had the capacity to confuse the general public;
- (3) whether the deception is material, in that it is likely to influence the consumer’s purchasing decision; and
- (4) whether the plaintiff has been or is likely to be injured as a result of the statement at issue.⁶

⁶ According to Hempworx, the legal definition of puffery depends slightly on one’s geographic location. Not all courts employ the same definition of puffery. It noted that the U.S. Court of Appeals for the Third Circuit, for instance, defines puffery as marketing “that is not deceptive, for no one would rely on its exaggerated claims.” The Ninth Circuit, on the other hand, describes puffery as “exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely.” The Company added that the Fifth Circuit established a more exacting meaning, defining puffery to be “a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion. The FTC has established its own definition of puffery, limiting the defense to marketing claims “that ordinary consumers do not take seriously.”

In sum, the Company agreed to modify the claim “Customers have stated that this product helps reverse the visible signs of aging as well improves overall texture & complexion” and maintained that claims stating that Collagen Retinol “... has incredible benefits” and is “Great for the skin” were statements of puffery.

C. Relief Icy Pain Rub

The Company explained that its Relief Icy Pain Rub (Relief) is a non-prescription drug product, more precisely, it is an external analgesic product. Hempworx stated that the FDA is in the process of developing a monograph for non-prescription external analgesic drug product and that although it has not published a final monograph, it did publish a Tentative Final Monograph (“TFM”).⁷

Hempworx further informed DSSRC that Relief contains menthol, which is an active ingredient under Sections 348.10 and 348.12 of the TFM and that with respect to the claims that the FDA has approved for topical analgesics, Section 348.50(b) provides:

(b) Indications. The labeling of the product contains a statement of the indications under the heading "Indication(s)" that is limited to the following:

(1) For products containing any external analgesic active ingredients identified in §348.12. "For the temporary relief of minor aches and pains of muscles and joints" [which may be followed by: "associated with" (select one or more of the following: "simple backache," "arthritis," "sprains," "bruises," and "sprains.")]

(4) Other allowable statements. In addition to the required information specified in this paragraph and in paragraphs (a), (b), (c), and (d) of this section, the labeling of the product may contain any of the following statements, as appropriate for the product's formulation, provided such statements are neither placed in direct conjunction with information required to appear in the labeling nor occupy labeling space with greater prominence or conspicuousness than the required information.

(i) For products containing any ingredient identified in §348.12.

(a) (optional: "provides") "penetrating pain relief."

(b) (optional: "provides") "warming pain relief."

(c) (optional: "provides") "cooling pain relief."

In sum, the Company asserted that the claims “Soothes Muscles” and “Customers have stated that Relief helps to soothe and relax muscles” are appropriate and legal for a topical analgesic.

Notwithstanding Hempworx’s assertion regarding Relief, the Company informed DSSRC that it removed all of the drug claims (i.e., those set forth in the *TMF*) from its labeling for the product and will be marketing Relief as a cosmetic product.

II. Income Claims

⁷ Federal Register, Vol. 48, No 27, February 8, 1983, page 3852.

The Company advised DSSRC that it removed all of the income claims and photographs at issue from the Facebook page of the distributor that was brought to its attention pursuant to this inquiry. Moreover, the company also removed the one income claim (i.e., "... monthly earning potential of \$1,000,000 per month") and the two claims regarding Company incentives from the Hempworx website.

Separate and apart from the voluntary actions taken by the Company to address the income and affiliate incentive claims identified by DSSRC, the Company provided its perspective regarding the permissibility of income claims in the direct selling industry.

Hempworx stated that contrary to a great deal of mistaken information and widely held erroneous beliefs, the FTC and the federal courts do allow direct selling companies and their independent contractors to make income and earnings representations provided that certain criteria are met.

The Company contended that, generally, income testimonials, hypothetical income claims, and lifestyle claims are permissible as long as they are accompanied by a proper income disclosure Statement ("IDS"). As support for its position, Hempworx cited to *National Dynamics Corporation*,⁸ and its progeny, *In the Matter of Amway Corporation*,⁹ cases which the Company maintained articulate different categories of multi-level-marketing income claims and address the legal requirements for them.

The Company asserted that the *National Dynamics Corporation* case sets forth six different types of income claims: (1) statements of average or median earnings; (2) statements of non-average, non-median earnings achieved by a substantial number of distributors; (3) statements of earnings ranges; (4) income testimonials; (5) "lifestyle" claims (i.e., big homes, trips, and expensive toys); and (6) hypothetical examples. The Company added that each type of claim requires slightly different disclosure requirements to cure their potential deception.

1. Statements of Average or Median Earnings

- (1) a true statement;
- (2) of the average or median earnings;
- (3) actually achieved;
- (4) by ***ALL*** distributors; and
- (5) during any stated recent time period.

2. Statements of Non-Average, Non-median Earnings Achieved by a Substantial Number 10 of Distributors

- (1) a true statement;
- (2) of any particular amount of earnings;
- (3) actually achieved or exceeded;

⁸ *In re National Dynamics Corporation, et al.*, 82 F.T.C. 488 (Feb. 16, 1973).

⁹ 93 F.T.C. 618 (1979)

- (4) by a substantial number of distributors¹⁰;
- (5) during any stated time period; and
- (6) provided that it is accompanied by;
 - (a) a clear and conspicuous disclosure of the percentage of the total number of distributors who have achieved or exceeded such results; and
 - (b) is printed in a type size at least equal to that of the statement of sales, profits, or earnings of the percentage of the total number of distributors who have achieved such results.

3. Statements of Earnings Ranges

- (1) an accurate representation;
- (2) of a particular range or ranges of earnings;
- (3) actually achieved;
- (4) during any stated time period;
- (5) *provided that it is accompanied by*;
 - (a) a clear and conspicuous disclosure of the percentage that such distributors achieving results within the range constitute of the entire number ALL distributors; or
 - (b) in the event that the company employs ranges beginning with \$0 and proceeding continuously upward, it need only indicate either the number or the percentage of distributors within each range; and (6) the disclosure [5(a) or 5(b) above] is printed in type size at least equal to that of the statement of ranges of the distributors who have achieved such results.

4. Income Testimonials

The Company argued that that to make income testimonials, the company must ensure that any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (if printed, in boldface type at least equal in size to that of any sales, profits, or earnings figure stated in the testimonial):

- (1) an accurate statement of the average amount of time per day, week, or month required by the distributor to achieve the stated results;
- (2) an accurate statement of the year or years during which, and the geographical area(s) in which, the stated results were achieved;
- (3) if the results achieved by the distributor providing the testimonial have not been achieved by at least 10 percent of *ALL* distributors during the time period covered by the testimonial:
 - (i) a statement of the average or median sales (or profits or earnings, whichever is included in the testimonial) of *ALL* distributors during the time period covered by the testimonial; *or*
 - (ii) the following statement: **IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY**

¹⁰ Hempworx noted that The FTC has not attempted to define the term “substantial” for the purpose of income claims within the context of direct selling.

____% OF OUR DISTRIBUTORS HAVE EQUALED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD; and

(4) if the results achieved by the distributor providing the testimonial have been achieved by 10 percent or more of all distributors during the time period covered by the testimonial, but are in excess of the average or median results achieved by all distributors:

- (i) a statement of the percentage of all the company's distributors who, according to its records, have achieved equal or better results during the same time period; or
- (ii) a statement of the average or median results achieved by all distributors during the same time period.

5. Lifestyle and Hypothetical Claims

Hempworx noted that in addition to express income claims, two popular marketing techniques for promoting a compensation plan are “lifestyle” and hypothetical income representations.

According to the Company, a lifestyle claim typically includes pictures or statements involving large homes, luxury cars, exotic vacations, or other items suggesting or implying wealth. Hempworx provided examples of “lifestyle” claims, including: “My XXXX income exceed my salary after six months in the business,” and “Our XXXX business has allowed my wife to come home and be a full-time mom.”

The Company also noted that Lifestyle” claims were addressed in the *Amway* case which the Court defined as “claims . . . which generally consist of vague references to the achievement of one's dreams, having everything one always wanted, etc. — are phrased in terms of 'opportunity' or 'possibility' or 'chance.’”¹¹

Hempworx stated that a hypothetical claim exists when a company or distributor attempts to explain the operation of the compensation plan through the use of a hypothetical example. It contended that certain assumptions are made regarding the: (1) number of distributors sponsored; (2) number of downline distributors; (3) average product volume per distributor; and (4) total organizational volume. Creating these assumptions through the compensation plan yields an income figure.

According to the Company, regulators have made abundantly clear that lifestyle and hypothetical income statements are, at a minimum, implied claims and, thus, constitute income claims. Hempworx asserted that they trigger the same disclosure requirements as do express earnings representations and posited, moreover, that to use a hypothetical income example in which the amount of stated profits, earnings, or sales are in excess of the average profits, earnings, or sales of all distributors, the company must clearly and conspicuously disclose (if printed, in boldface type at least equal in size to that of any sales, profits, or earnings figure stated in the example): (1) the average profits, earnings, or sales for all distributors; or (2) the percent of *all* distributors who actually achieved such stated profits, earnings, or sales.

¹¹ *Supra* at 9.

Regarding the *Amway* case, Hempworx noted that, among other things, the FTC alleged that Amway falsely represented that it was “easy to recruit distributors” and that “distributors will receive substantial earnings” and also alleged that Amway misrepresented the profitability of a distributorship by failing to disclose that there was substantial turnover among its distributors, and that substantial expenses are incurred in the business of being an Amway distributor. The Company stated that, in addition, Amway’s Career Manual” trained distributors to recruit prospects by appealing to their financial goals of prospects.

Accordingly, the Company argued that the *Amway* makes clear that the FTC and the federal courts allow direct selling companies and their independent contractors to make: (1) statements of average or median earnings; (2) statements of non-average, non-median earnings achieved by a substantial number of distributors; (3) statements of earnings ranges; (4) income testimonials; (5) lifestyle claims; and (6) hypothetical claims.

Hempworx added that because of the potential for deception, each of these claims must be accompanied by a disclosure that provides all of the information the FTC and federal courts have set forth in the *National Dynamics* case.

The Company emphasized to DSSRC that for more than two years, Hempworx has provided the public, consumers, prospective Affiliates and Affiliates with its income disclosure statement (IDS) (a copy of which was provided to DSSRC). Hempworx contended that its IDS encompasses each and every one of the elements required by the FTC and federal courts for every type of income claim and that proper use of its income disclosure statement is mandated by the Company’s Policies and Procedures.¹²

The Company also advised DSSRC that it utilizes a third-party monitoring service to ensure that its is diligently monitoring the entirety of the Internet, and, in particular, social media. Hempworx added that when violations of federal or state laws or regulations, or in its Policies and Procedures, are discovered, it opens and conducts a compliance investigation.¹³ The Company stated that where it was appropriate to do so, it has suspended or terminated numerous affiliates for their compliance violations and that over the last 12 months, it has conducted training seminars in 17 states where it provided extensive training regarding the proper use of its income disclaimer and IDS.

¹² Hempworx provided DSSRC with a copy of its Policies and Procedures. Section 12 of the Company Procedures states, in part, that: “MDC’s [MyDailyChoice] corporate ethics compel us to do not merely what is legally required, but rather, to conduct the absolute best business practices. To this end, we have developed the MDC Income Disclosure Statement (“IDS”). The MDC IDS is designed to convey truthful, timely, and comprehensive information regarding the income that MDC Affiliates earn. In order to accomplish this objective, a copy of the IDS must be presented to all prospective Affiliates. The failure to comply with this policy constitutes a significant and material breach of the MDC Affiliate Agreement and will be grounds for disciplinary sanctions, including termination, pursuant to Section 40 (Disciplinary Sanctions). An Affiliate, when presenting or discussing the MDC opportunity or Compensation Plan to a prospective Affiliate, may not make income projections, income claims, or disclose his or her MDC income (including the showing of checks, copies of checks, bank statements, or tax records) unless, at the time the presentation is made, the Affiliate provides a current copy of the MDC Income Disclosure Statement (IDS) to the person(s) to whom he or she is making the presentation.

¹³ MyDailyChoice has stated that it opened and investigated over 4,800 compliance cases, resolved and closed over 4,100 and currently working on more than 700 cases.

The Company further added that it has also developed a guide regarding what Affiliates cannot say in regards to product claims and has employed a full-time Compliance Director and several Compliance Analysts (investigators) for several years. Moreover, Hempworx has developed several compliance training videos for income and product claims that are posted in every affiliate's back office and the income disclosure link and income disclaimer are now affixed to every affiliate's earnings snapshot in their respective back offices.

ANALYSIS

I. Product Claims

A. Revive Cream Collagen Cream and Renew Anti-Aging Cream

DSSRC appreciated the modifications Hempworx made regarding product descriptions for Hempworx' two cosmetic products Revive and Renew to more accurately convey the effects of the products on the appearance of the skin.

Notwithstanding the position the Company articulated that the claims identified by DSSRC were defensible as puffery, DSSRC had ongoing concerns regarding the communication of the products' descriptions. Whether a specific claim falls within puffery's protective reach is largely dependent on what is communicated (i.e., what, if any, consumer expectations are created). Obvious hyperbole, exaggerated displays of a manufacturer's pride in its product and other non-provable claims, the truth and accuracy of which cannot be determined, have been found to constitute puffery. Conversely, where an objective representation is made (i.e., termed in fact rather than opinion) regarding the performance or other tangible attributes of a product that is sufficiently specific and material enough to create expectations in consumers, then substantiation for the claim is required.¹⁴ Thus, when determining whether a claim is puffery, it is important to review the claim in the context of the advertisement (or social media post) as a whole.

As has been the case with other BBB NP programs including the National Advertising Division (NAD) and the Electronic Retailing Self-Regulation Program (ERSP), DSSRC considers several factors in determining whether a claim is puffery. Whether the representations concern general matters that cannot be proven or disproved, whether the statements are distinguishable from representations of specific characteristics that are measurable by research or tests, or whether the wording uses expressions of opinion that will be discounted by the buyer. Although claims of general superiority may constitute puffery, BBB NP programs have consistently concluded that linking a general claim to a specific product attribute may result in the need for substantiation. Whether a specific claim falls within puffery's protection is largely dependent on what is communicated and what, if any, consumer expectations are created.¹⁵

¹⁴ OLED and Super UHD Televisions, Report #6237, NAD/CARU Case Reports (January 2019); The Tornado Fuel Saver, Report #67, ERSP Case Report (December 2005).

¹⁵ AT&T Services ("More For Your Thing"), Report #6212, NAD/CARU Case Reports (October 2018); PURPLE INNOVATION, LLC, ERSP Case Report (August 2018).

While DSSRC agreed that a stand-alone “Great for the Skin” statement would likely be considered a statement of puffery, it was also determined that the accompanying language on the Hempworx website with the respective “Great for the Skin” claims could reasonably create real expectations for consumers regarding the products’ efficacy.

More specifically, the online product description for Revive states:

“Infused with Collagen Retinol - Our Revive Cream is infused with Collagen Retinol which has incredible benefits for the skin.” and “Great For The Skin - Customers have stated that this product helps reverse the visible signs of aging as well improves overall texture & complexion.”

DSSRC is not persuaded that statements discussing the product’s “incredible benefits for the skin” and how it may “...reverse the visible signs of aging as well improves overall texture & complexion” are simple statements of puffery but, conversely, determined that they are substantive claims that are measurable and create expectations regarding product efficacy in the minds of consumers. Accordingly, language that simply positions a statement as being the opinion of consumers (e.g., “Customers have stated...”) does not alleviate the concern that such feedback from consumers is generally considered anecdotal and no substitute for reliable evidence for the substantive claim that the product helps “reverse the signs of aging and improve overall texture and complexion,” which are two proposed product attributes which DSSRC determined may be reasonably interpreted by consumers as measurable benefits.

In a previous self-regulatory inquiry, NAD reviewed a “visibly improves skin texture” claim with respect to an anti-cellulite product, concluding that it was a substantive claim requiring substantiation¹⁶. In another self-regulatory inquiry, ERSP reviewed claims made by Caper Labs, LLC for its menopause relief product Calmestra that it helps “*improve complexion*” and determined that it was a measurable claim.¹⁷

With respect to Renew, the product page on the Hempworx website states “Great for the Skin - Our Renew Anti-Aging cream may help the skin look younger, tighter, and brighter. Additionally, this product can help increase the longevity of skin cells” and “Great for Anti-Aging - Our Renew Anti-Aging cream may help reduce wrinkles and fine lines.”

Similar to the above discussion regarding the description for Revive, DSSRC remained concerned that consumers may reasonably interpret “tighter and brighter skin” to be product performance benefits that are measurable and require reliable support.

In 2016 NAD reviewed product performance claims for Freeman Beauty Lab’s ‘Renewance Anti-Aging Chemical Peel and concluded that the advertiser’s “*tighter skin*” claims were substantive claims necessitating substantiation¹⁸. Moreover, NAD has also reviewed

¹⁶ The Healing Garden Active Anti-Cellulite Treatment, Report # 4198. NAD/CARU Case Reports (June 2004).

¹⁷ Calmestra, Report# 304, ERSP Case Report December 2012).

¹⁸ Renewance Anti-Aging Chemical Peel Report # 4543. NAD/CARU Case Reports (August 2005).

advertising stating that the use of cosmetic products resulted in visibly brighter skin and required the advertiser's provide substantive support their respective claims.¹⁹

During the pendency of the inquiry, the Company advised DSSRC that it would be changing the product descriptions for its Renew and Revive products to address the concerns communicated by DSSRC during the inquiry which DSSRC found to be necessary and appropriate.

B. Relief Icy Pain Rub

Hempworx maintained that the claim on the Hempworx website that "Customers have states that Relief helps to soothe and relax muscles" is supported by consumer feedback it has received from product users and is a permissible claim pursuant to sections 348.10 and 348.12 of the FDA TFM which address the use of menthol as an active ingredient in such products.

With respect to the to section 348.10 (b)(6) of the TFM, menthol is a permitted active ingredient (i.e., with respect to the at the concentration level of 0.1 to 1 percent) and pursuant to section 348.12 (b)(2) of the TFM menthol is a considered a permitted counterirritant active ingredient at the concentration level of 1.25 to 16 percent.

Moreover, Section 348.50 of the TFM discusses the permitted claims for analgesic products containing menthol as an active ingredient and states that if the menthol ingredient concentration level is between 1.25 to 16 percent (i.e., as per section 348.12 (b) of the TFM) product labeling may include the statement that the product is indicated for "... the temporary relief of minor aches and pains of muscles and joints" [which may be followed by: "associated with" (select one or more of the following: "simple backache," "arthritis," "strains," "bruises," and "sprains.")]"

Section 348.50 (4) further provides information regarding other allowable statements. More specifically, for products containing any ingredient identified in §348.12, permissible statements include "[provides] penetrating pain relief"; "[provides] warming pain relief"; and/or "[provides] cooling pain relief."

Accordingly, Hempworx advised DSSRC that menthol is present in Relief in the concentration of 0.3% and that it removed all of the drug claims (i.e., those set forth in the TFM) from all of its labeling for Relief and will be marketing the product as a cosmetic product.

DSSRC appreciated the voluntary action taken by the Company and concluded that the Hempworx has adequately addressed the concerns communicated by DSSRC regarding the appropriateness of its claims for Relief Icy Pain Rub.

¹⁹ Garnier Nutritioniste™ Ultra Lift™ and Garnier Nutritioniste™ Skin Renew , Report # 4704. NAD/CARU Case Reports (August 2007)

C. Income Claims

1. Distributor Claims

DSSRC questioned the truthfulness and accuracy of the income and company incentive representations communicated on the Company website and by one Hempworx distributor. More specifically, DSSRC was concerned that the amount of monthly and annual income that was discussed by a certain Hempworx consultant was not typical of the amount of income that can be generally expected by Hempworx distributors. Moreover, the posts did not include any disclosure regarding the typical amount of income that can be generally expected by Hempworx distributors.

It is a long-standing principle of advertising that an advertiser has the burden to support all reasonable interpretations of its claims and not simply the messages it intended to convey. Verizon Communications, Inc. (Verizon Wireless Services (“First to 5G”)), Report #6258, NAD/CARU Case Reports (May 2019). Further, in the direct selling context, the DSSRC has made clear that the responsibility of the direct selling company extends to the claims disseminated by members of a direct selling company’s salesforce.²⁰

With respect to the use of testimonials from Hempworx distributors communicating earnings results that may not be consistent with the expectations of typical consumers or recruits, DSSRC noted that the guidance provided by the FTC Guides on the Use of Endorsements and Testimonial Testimonials in Advertising (the FTC Guides) was particularly relevant. More specifically, the FTC Guides state that:

An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation. 16 CFR § 255.2(b).

Further, as it pertains to the Hempworx earning claims at issue, DSSRC believes that in the omission of a clear and conspicuous disclosure indicating the amount of earnings that may be generally expected by consumers or incoming recruits, the presentation of a hyperlink to an income disclosure statement, by itself, will not be sufficient to satisfy its disclosure obligations.

More specifically, as stated in the FTC Dot.com Disclosure Guide:

²⁰ See DSSRC Case #2-2019 -Monitoring Inquiry- Southwestern Advantage, Inc.

Disclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information.

Notwithstanding the disclosure issue, DSSRC recommended that the Company remove the distributor's post which communicated unqualified, atypical income results. In response, the Company indicated to DSSRC that it contacted the distributor and requested that the post be removed.

2. Claims on Hempworx.com

The claim referencing Hempworx distributors as having an "...earning potential of \$1,000,000 per month with NO FLUSHING!" was troublesome for DSSRC. As the FTC has noted in its Business Guidance Concerning Multi-Level Marketing "a hypothetical earnings scenario ... may imply that the assumptions made are consistent with the actual experiences of typical participants. If the assumptions are not, the earnings scenario likely would be false or misleading to consumers."

For example, DSSRC could not ascertain if the "\$1,000,000 per month" reference in the claim pertained to distributors' income or income generated by the company itself and determined that in the omission of information indicating otherwise it would not be unreasonable for consumers to understand the claim as pertaining to distributor income and recommended that the claim be discontinued from the Hempworx website.

With respect to the bonus and incentive claims (i.e., "At MyDailyChoice, we've put together an aggressive VIP Auto Club to let our affiliates drive away in the car of their dreams! Do you have your heart set on a dream car? Look no further - the MDC VIP Auto Club will make your dream car become a reality! When you qualify for the VIP Auto Club, we send you branding materials to put on your vehicle, and we pay the bill!" and "Welcome to our 2% Global Bonus Pool program where you can earn a piece of total company revenue globally! We set aside 2% of our total company revenue each month and pay it to those who qualify in our global bonus pool program. This lets you recruit new affiliates, customers, and rank advance in the company earning you shares in the global bonus pool! At the end of each month, we take 2% of total revenue divided by the number of shares to determine the share value."), DSSRC noted that lifestyle claims are representations that either expressly state or imply through words or visual images that participation in a direct selling business is likely to result in an extravagant lifestyle. DSSRC evaluates the appropriateness of such claims based upon the context in which the language and visual imagery appears in the advertising or social media post.

As noted in section 8a(b) of the Direct Selling Association's Code of Ethics, "*Gross or net income or profits, including but not limited to representations that either explicitly or implicitly suggest that lifestyle purchases—including homes, vehicles, vacations and the like—are related to income earned.*"

DSSRC determined that if potential direct selling distributors cannot generally expect to receive bonuses and incentives (e.g., “dream cars” “2% Global Bonus Pool” etc.) that are prominently communicated in advertising and marketing materials disseminated by the direct selling company, the company should disclose the percentage of distributors that are eligible to receive such rewards.

Hempworx advised DSSRC that it was in the process of revising and/or removing the bonus and incentive claims from the Company website which DSSRC found to be necessary and appropriate.

CONCLUSION

Hempworx advised DSSRC that it is in the process of removing all of the income and incentive claims that were at issue in the inquiry and would be changing the product descriptions for its Renew and Revive products to address the concerns communicated during the inquiry regarding product performance claims. With respect to its Relief product, the Company informed DSSRC that it removed all of the drug claims from all of its labeling for Relief and will be marketing the product as a cosmetic in future advertising.

COMPANY STATEMENT

Within a few short years, MyDailyChoice has tirelessly labored to create products and practices that are consistent, if not superior to, the best and highest industry standards. Measuring itself against not only the most trusted direct selling businesses in the world, but also Fortune 500 companies, means that the work required for MyDailyChoice to lead, innovate and improve is never actually finished. Constant critical review, intelligent internal and external debate, and swift and certain remedial and preventative action are obviously key to our continued and healthy growth and success.

To that end, we trust that our response to the concerns raised by the Direct Selling Self-Regulatory Council (DSSRC) leave no doubt that MyDailyChoice takes its responsibility for regulatory compliance very seriously indeed. While we may not have always agreed with the DSSRC’s conclusions, we have nevertheless revised out practiced to meet the DSSRC’s stated standards. Frankly, the self-regulatory work of the DSSRC provides an invaluable service to not only elevate how MyDailyChoice does business, but how our competitors do too.

Accordingly, even though the DSSRC has expressed satisfaction with all of MyDailyChoice’s responsive actions, we nevertheless invite the DSSRC to periodically review our products and practices again in the future and to thereafter immediately contact us should it have any reason whatsoever to believe that MyDailyChoice’s products and/or practiced cease to serve as an example of the “best in class” in the direct selling industry.