



**University of  
New Hampshire**

Franklin Pierce School of Law

# **False Influencing**

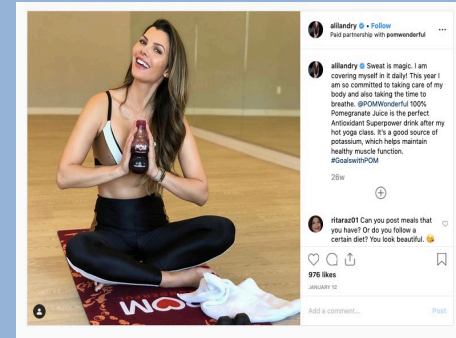
**Alexandra J. Roberts**

**IPSC at DePaul College of Law**

**August 8, 2019**

# Influencers

- **Who**
  - Mega-, macro-, micro-, or nano-
  - Lifestyle, fashion, parenting, fitness, cooking, etc.
  - Receive payment, commission, free goods/services, or other material benefit to promote products
- **What**
  - Projected \$10-20B industry in 2020
  - 86% of industry professionals to spend on IM in 2019
  - Co.'s that used IM got a 520% return on every dollar\*
- **Why**
  - Followers: authenticity, trust, friendship, story
  - Brands: reach, engagement, low cost, loyal followers



# FTC Guides

- § 255.1(a): Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser...and may not convey any express or implied representation that would be deceptive if made directly by the advertiser.
- § 255.1(c): When the ad represents that the endorser uses the product, she must have been a bona fide user of it when she endorsed it.
- § 255.5: If there is a material connection between an endorser and an advertiser, that connection should be clearly and conspicuously disclosed.

# Lanham Act § 43(a)

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which...

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

# False or Misleading Advertising

To establish a false/misleading ad claim, a  $\pi$  must prove:

- (1) a false statement of fact by  $\Delta$  in a commercial advertisement about its own or another's product (or business);
- (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience;
- (3) the deception is material, i.e. likely to influence the purchasing decision;
- (4)  $\Delta$  caused its false statement to enter interstate commerce;
- (5)  $\pi$  has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to  $\Delta$  or by a loss of goodwill.

# Types of false/misleading ad claims

- False
  - Literally false on its face
    - Establishment
    - Efficacy (non-establishment)
  - Literally false by necessary implication
- Misleading



# Types of influencer ad claims

- False or misleading verbal claims
- False or misleading visual claims
- False or misleading personal testimonials
- Nondisclosure of material benefit





# Verbal claims (efficacy)



alilandry • Follow

Paid partnership with pomwonderful



alilandry Sweat is magic. I am covering myself in it daily! This year I am so committed to taking care of my body and also taking the time to breathe. @POMWonderful 100% Pomegranate Juice is the perfect Antioxidant Superpower drink after my hot yoga class. It's a good source of potassium, which helps maintain healthy muscle function. #GoalswithPOM

26w



ritaraz01 Can you post meals that you have? Or do you follow a certain diet? You look beautiful. 🥰



976 likes

JANUARY 12

Add a comment...

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# Verbal claims (establishment)



jera.bean • Following



Here's a super brief breakdown:

👉 Aluminum: Found in antiperspirants. Block pores to reduce sweat. Some research has found links between aluminum and diseases, like Alzheimer's and breast cancer.

👉 Parabens: Type of preservative allowing products to have a long shelf life. This means parabens can enter through our skin and remain inside us. Parabens can act like the hormone estrogen in the body and disrupt normal hormone systems. States like California are reviewing legislation that would ban certain parabens.

👉 Sulfates (SLS and SLES): Types of detergent that makes your products foamy when you use them. Can be harsh or irritating on skin and eyes. Can strip hair of natural oils.



Liked by ashleymelka and 4,681 others

JUNE 20

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# Visual claims (physical falsity)



**lillyghalichi** • Following



**lillyghalichi** Ladies you won't need fillers or boob jobs anymore if you just gain 22 pounds 🍷 and it's a lot more fun too 🍷🍷

👤 Wearing 3D @LillyLashes in style "Mykonos", natural hair growing like crazy thanks to all my new growth from using @HAIRtamin Hair Vitamins and Prenatals.

57w



**thedemielse** Lol I'm trying to gain 22 pounds!!



56w Reply



49,273 likes

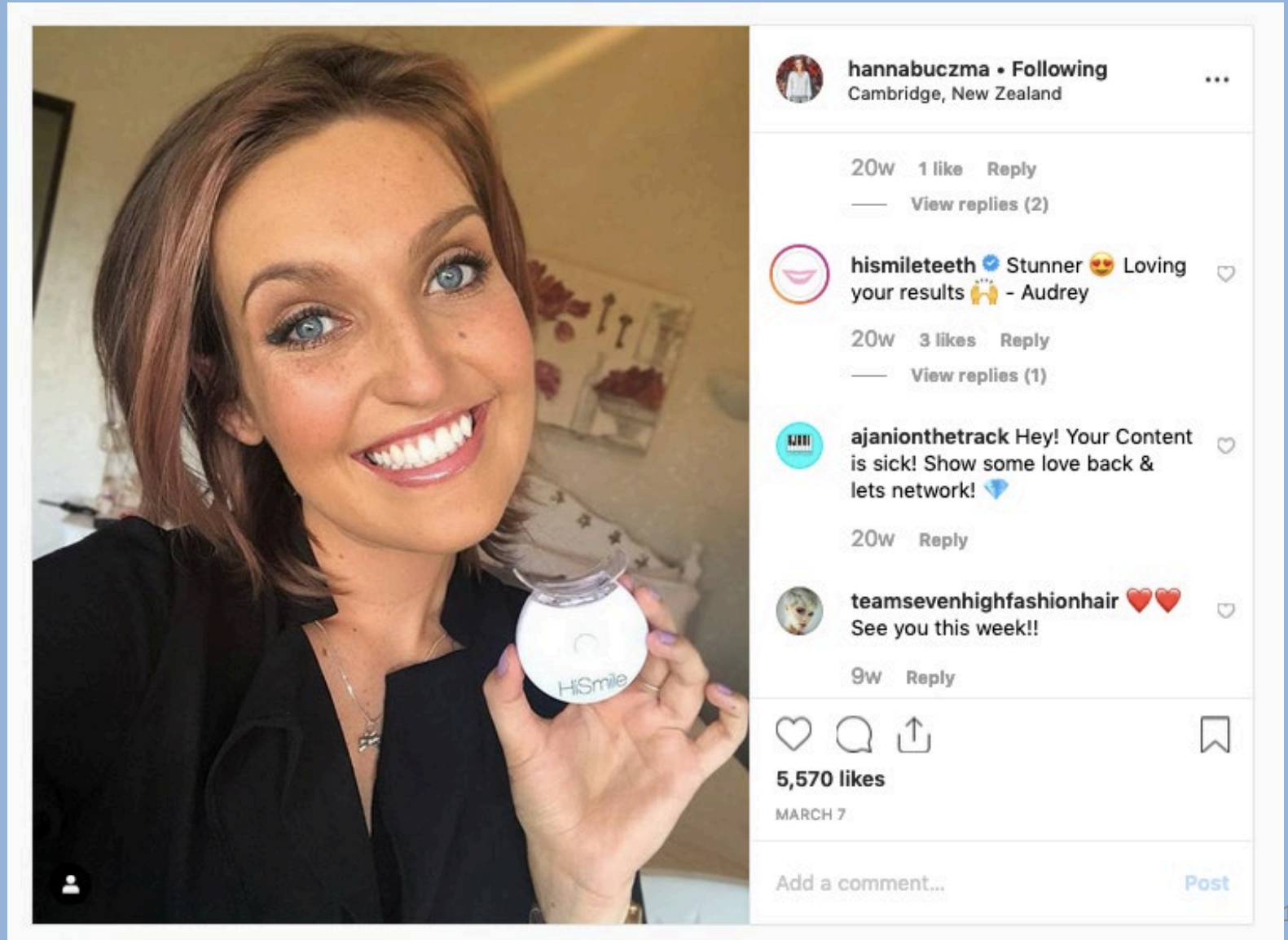
JUNE 7, 2018

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# Visual claims (photoshop falsity)



# Personal testimonial claims



kendalljenner • Follow  
Paid partnership with proactiv



kendalljenner I've been able to maintain clear skin thanks to Proactiv. I'm on the ProactivMD system. Try the one that's right for you! link in my bio. #proactiv\_ambassador

8w



creativitybyla I've been using it forever but when you stop using it you break out. And I stopped using it a long time ago but I had to use it again cuz I started breaking out because it was in my bag and the face wash a literally bleaches your clothes so I figured it was bad for my skin. But back to using it as a 35 yo.



1,870,797 likes

MAY 21

Log in to like or comment.



# Personal testimonial claims



**lesleyannemurphy** • Following  
Bali, Indonesia



**lesleyannemurphy** I've had implants inside my chest for over a year now and have zero regrets. The upside to all of this: I now have a 1% chance of being diagnosed with breast cancer. The downside? I lost all feeling in my breasts and, well, let's just say they aren't the most natural looking things all the time.

I wrote about it all today on Breast Reconstruction Awareness Day :) I also wrote about what no one talks about - what it's really like to be intimate after a double mastectomy. Lastly - I discuss a new technique designed to restore sensation in breasts after surgery (mine are completely numb). Science is so cool. Link in bio. @resensation #resensation



Liked by **yoga\_girl** and 11,497 others

OCTOBER 17, 2018

Add a comment...

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# Nondisclosure



alyssalynch • Following



alyssalynch Always an advocate for self confidence! However I will admit a nice natural & long lasting tan REALLY helps me in that department. I have @bondisands new aero self tanning foam to thank for that. ⚠️ not only will you have a deep bronzed color but you'll also smell like a tropical island. Got mine from @walgreens Let me know what you think!

5w



lilrichmcperson @rentherr  
hmmmm 🤔?



5w Reply



Liked by helenowen and 24,377 others

MAY 2

Add a comment...

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# Nondisclosure



**librteaustin** • Follow

Austin, Texas



**librteaustin** Every day is an opportunity to start over and live the best life you can. Diets suck and living in a gym is boring... change your thinking, change your lifestyle and play outside as often as possible.. FYI- Soccer is absolutely the best cardio and so much fun... try new things and break away from the norm @midwaylabsusa #soccer #outdoorlover #midwaylabs

63w



**the.ruben** Girl of my dreams lol



63w 8:11



6,242 likes

APRIL 1, 2018

Add a comment...

Post



# Nondisclosure + affirmative statement



thedeveloperswife • Follow

Phoenix, Arizona

always need to Shave ( #Collagen ).  
Once Summer time hits I always switch  
up my lotion to @Jergens & add in their  
Wet Skin Moisturizer! It's perfect to use  
right after shaving to get the soft silky  
glow ✨, while keeping your skin  
moisturized & hydrated throughout the  
day. Also my all time favorite razor is  
"Sensitive Extra Smooth" by  
@gillettevenus They now have a home  
direct program where you can save on  
Razors & get them 📦 straight to your  
🏠 So you'll never run out of Razors &  
forget to shave🔪 Use code SHAVE5 at  
checkout for \$5 off your first order!  
Now let's all get that glowing soft skin,  
we've always wanted ✨💕💕  
<http://liketk.it/2DICT> #liketkit  
@liketoknow.it #LTKbeauty #LTKswim  
#LTKstyletip #LTKwedding #LTKfamily  
#NotAnAd #ButItShouldBe



























43 likes

1 DAY AGO

Add a comment...

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# Applying § 43(a)(1)(B) to influencer advertising claims

	Verbal claims	Visual claims	Testimonials	Nondisclosure
In commercial advertising				
Interstate commerce				
False/misleading statement of fact				
Deceptive				
Material				
Injury				



# Questions?

