The Independent Reviewer of the Rulings of the ASA Council

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By email to michael@es-uk.info

Dear Mr Bevington

ASA Case A17-388045: Request for Review

I have now been able to complete my work on your request to me to review this ruling by the ASA Council about your poster advertising. I explained the procedure to you in my letter of 5 April. I have considered the points you have put to me in the light of my reading of all the papers on the ASA file. This letter sets out my findings and my decision, and the reasons for them.

I will comment first on each of the points you have made in your review request, then offer you a general assessment of the case they have and of my view of what may be problematic about the claims and implied claims in the ad, and how the Assessment section of the ASA Council's ruling has handled the issues involved.

I think it was a mistake for the ASA, when it wrote to Electrosensitivity on 27 June last year, to include a sentence which said, in terms, "we do not think it is likely that you will be able to substantiate direct links between electromagnetic radiation, associated products and the symptoms highlighted so we ask that you do not address that point specifically …". But I do not think, in the light of what I can conclude from my reading of the ASA file, that this led to a subsequent substantial flaw of process. This passage in the letter followed one in which the ASA asked you to let it have your view of how readers would interpret the claim. The executive

concerned must have thought initially that interpretation of the ad, rather than substantiation of the claims, might well be the main issue. I note from my reading of the file that you did not appear to react adversely to that letter but sent in a very full letter about substantiation on 4 July. From then on the ASA, on the one hand, and Electrosensitivity, on the other, concentrated on the type and quality of the evidence that you were providing. There is no suggestion I have seen, from my reading of the voluminous papers on the file, that any form of pre-judgement or bias came into the investigation. You did not appear to raise such a concern during the investigation nor in the 1000 word submission which you sent to the Council. Had you wished to place serious weight on this argument about pre-judgement I believe you would have done so before the case reached the independent review stage, particularly as you took the opportunity to address the Council directly in writing.

Your second point, about the provision of evidence for the ASA's view, the question of peer review and a level playing field is both about process but also implies issues of substance as well. In my view this limb of your argument in part misunderstands the way the burden of proof works under the advertising regulatory system. Substantiation of claims in an ad is the responsibility of the advertiser. The ASA is not obliged to disprove claims; the advertiser concerned must provide the substantiation for them. There can therefore be no substance in your level playing argument as the burden of proof lies with an advertiser. In this part of your request, and elsewhere, and in the investigation itself, you also strongly criticise the WHO and its work. However, the WHO is a recognised expert scientific body and the ASA is entitled to take that into account whether some its work has been peer-reviewed or not. I recognise that you clearly have a poor opinion of the WHO but that is your opinion rather than evidence. (However, I have to say that I note that when it comes to whom you wish rely on in supporting your arguments, in the review request you choose a study from the WHO specialised International Agency for Research on Cancer.)

Your review request letter then goes on to state that the requirement for full studies is unusual and in any event the ASA could not have assessed them because it lacks the necessary scientific expertise. However, the requirement for full studies is not at all unusual; it is the ASA's normal practice. This was made quite clear to Electrosensitivity as early as 31 July 2017 in an email which said: *"we are unlikely to consider evidence provided that does not conform to the requested format i.e. an explanation of why the evidence supports your advertising claims, and a copy of the relevant paper in full. As a portion of your initial submission included links to abstracts without explanation or a full paper attached, we will not be able to consider this a sufficient substantiation"*. As to your criticism of the ASA's capacity to assess such studies it is, in my experience, misplaced. The long penultimate paragraph of the Assessment section of the ruling goes into detail, and persuasive detail in my view, about the nature of the assessments undertaken. ASA staff are trained to understand the strengths and weaknesses of study methodologies, sample sizes and research techniques, and the quality of their work is, in my view, underlined by the careful precision of the Assessment in the ruling. The ASA does occasionally reach out for independent scientific expertise where it feels

that the issue involved is beyond their training, experience and the application of intelligent common-sense. I recall one case which I reviewed where the key evidential issue turned on the accuracy, predictability and assumptions contained in a highly complex mathematical model. The ASA then sensibly reached for external expertise. But I am not persuaded that it was necessary for it to do so in this case.

Your review request letter then makes two allegations which I have to say are in my view very far-fetched. The first is that the ruling was made for political reasons because it is scientifically invalid. The second is that the ASA is conflicted in this case because it is funded, in part, by mobile-phone operators. On the first, I would only observe that the ASA is a regulator of very long standing and recognised as authoritative by the Courts. If it had ever indulged in making politically motivated rulings over so many years the damage to its reputation for independent and objective analysis of the work it does on the complaints it receives would have been considerable. You may not accept what I say given your opinion but this is not in my view a relevant or rational argument. On your second point, the work of the ASA is indeed funded at arms-length by a levy on advertisers. However, that is done by an independent body and the ASA does not know what funds flow from what sectors of the economy. The independence of the ASA from this process is a bulwark against this sort of criticism which, I note, is often loosely applied by critics to the concept of self-regulation generally. I can therefore place no weight at all on these two allegations.

Your letter then argues that the claim in the ad follows the same wording as the WHO/IARC study which states that health risks are “possible”. On that basis you say the claim cannot be misleading. This study, done in 2011 but released in 2013, is not very recent/up-to-date and dealt with RF fields and cancer. It said that they were “possibly” carcinogenic to humans on limited evidence from some studies of mobile phones but also described the evidence as “inadequate”. It recommended further research. This does not seem to me a sufficiently robust basis to underpin a claim that links electromagnetic fields and “Cancer Risk Raised” on one of the phone icons in the ad.

The review request’s final substantive point is about there being hundreds of peer reviewed studies which have validated the claims. This was, of course, the central issue in the investigation and the whole point of the nature of the ruling. The issue for me is not whether there is some possible health risk but whether the Council’s ruling, in the light of all the work that had been analysing the substantiation offered, is irrational or indefensible. That is the test I must apply as the Independent Reviewer and I cannot, on this occasion, find that the Council’s ruling was either of those. I recognise that the ad is quite carefully phrased in talking of “potential health risks” but its problem, it appears to me, is in relying also on the reference to “more and more research” and linking these two descriptors to a set of alarmingly titled phone icons. If you are going to put to the public a story of potential health risks such as “damaged immune system”, “cancer risk raised”, “memory loss”, “brain tumour”, and “MS”, for example, then it is understandable that the ASA should set a high evidential hurdle for

substantiation for such claims. This, it seems to me, is what it did in this case in the public interest and, as I have already said, it included in the ruling a detailed exegesis of the weaknesses it found in the studies it assessed. In such a sensitive field of public concern it seems to me therefore to have made a reasonable and defensible precautionary ruling rather than one which is substantially flawed in itself or in the process by which it was made.

Finally, your letter concludes by saying that there is now extra relevant evidence that has become available. What you list in your section 3 is of no help to me as a list. The Code will only enable extra relevant evidence to be submitted for review where it was available at the time the ad appeared or shortly after, but could not [my emphasis] have been submitted during the investigation. This could have been done during the investigation process if you had wished to rely the points you list in your letter to me but it is now too late, as I must make my decision on the material which was before the ASA during the investigation.

As you will have gathered, I am not persuaded that you have made out a compelling case that the Council has made a substantially flawed decision or that the process underpinning it was similarly flawed. It seems to me that the Council has come to a reasonable judgement in the light of the evidence presented to it and within the proper limits of its regulatory responsibilities. The review process under the advertising Code has therefore been concluded and I shall proceed to close my file on the case. I realise my decision will be a disappointment to you as I recognise you feel very strongly about this case.

Yours sincerely

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