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REF: Comparative advertising in Mexico

Dear clients and friends:

Hoping that this email finds you well, please be advised that due to a large number of concerns related to the comparative advertising in our country we would like to inform you the legal provisions and parameters that shall be observed when conducting a survey involving trademarks as follows:

The Federal Law for Consumers Protection (FLCP) provides in Article 32 that advertisement of products or services must be truthful, verifiable and it must not contain texts, dialogs, sounds, images, trademarks, geographical indications or other descriptions that could induce consumers to error or confusion. This law is enforced by the Federal Consumers Protection Agency (FCPA).

Thus, comparative advertising is allowed by the FLCP if such is not "deceptive" or "abusive". The FCPA has issued a Directive that provides the guidelines for the analysis and verification of the advertisement and information. Articles SEVENTH and EIGHT provide:

- "SEVENTH.** The FCPA will monitor that the advertising published is truthful and verifiable accordingly to the Article 32 of the Law, for which it must comply with the following:
- I. It shall not show qualities of the goods, products or services that do not correspond to their function or use.
 - II. It shall not use messages that suggest that purchasing the product represents having superior personal qualities or features in comparison to those who do not buy it.
 - III. It shall not lead to believe that the product has ingredients, composition, origin, purpose, benefits, or properties of which it lacks.
 - IV. It shall refrain from explicitly or implicitly infer through images, text or audio that the benefits of using the product or service will be obtained immediately or within a certain period if the advertiser does not have the technical and scientific evidence that may prove it.
 - V. It shall not induce consumers to perform unlawful or contrary to public order conducts or that violates the dignity or integrity

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of human beings, and neither against the principles of fairness, certainty and good faith acts in accordance with applicable laws and international treaties in which Mexico is a signatory.

- VI. It shall avoid using categorical or superlative terms unless they are properly supported and where appropriate, scientifically proven. Categorical term means that which is affirmed or denied in absolute form.
- VII. It shall not cause discredit, denigrate or direct or indirect contempt of a person or company, its products, services, activities or circumstances or of its trademarks, trade names or other distinctive signs through its contents, or in the form of presentation or dissemination . This, in accordance with Article 1, Section VII of the Law, 23 of its Regulations; as well as the provisions of the guidelines issued by the Prosecutor's Office in the matter of comparative advertising.
- VIII. It shall not use phrases or slogans aimed at obtaining undue advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor, designations of origin or geographical indications, specific names or traditional knowledge that protect products of competitors. This, in accordance with Article 1, Section VII of the Law."

"EIGHTH. In order for consumers to have adequate and clear information about the products and services information, any advertisement shall:

- I. Be in Spanish language in accordance with the provisions of the Article 34 of the Law, regardless of whether it is presented in other languages; without prejudice to the provisions applicable to intellectual property.
- II. Report specifications of use, method, time, concentration, and any type of procedure to be followed by the consumer, in the case of real products or services, which by their nature they require it in accordance with the Articles 7, 33 and 41 of the Law.
- III. Contain clear and consistent phrases or slogans with the characteristics of the product, good or service that does not mislead the consumer.
- IV. Contain phrases or slogans to prevent the use and correct handling of the product or guidance on the risks of consumption, in accordance to the laws, regulations and Mexican Official Standards for the product or service concerned.
- V. Report if the advertised product or service carries a guarantee, what does such consists of and the way in which the consumer can enforce it, in accordance to Articles 7, 33, 40 and Chapter IX of the Law.

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- VI. Precise, in a clear, legible and comprehensible manner, which are all the restrictions, terms, conditions or limitations applicable where legends report "restrictions apply", "terms and conditions apply" or "subject to change without notice" in terms of Article 38 of the Law.
- VII. Include the duration of the promotion, the number of units offered or the validity of the offer, in accordance with Article 48 of the Law.
- VIII. Comply with the provisions of law, regulation, these guidelines and other applicable regulations."

In addition, Article NINTH provides that the FCPA can require the advertisers or providers to submit the technical-scientific grounds that prove the characteristics that they are mentioning, including those regarding quality or benefits of the goods or services. The FCPA can also require the advertisers to prove the statements about quality, origin, nature, composition or benefit of the goods, products or services, through the necessary documents.

The analysis made by the FCPA will consider the time in which the advertisement is being made, the moment in which the same is broadcasted or published, in respect to other contents in the same media and the economic or special circumstances of the market.

For purposes of Consumer Protection, the FCPA is entitled to verify and impose preliminary injunctions or penalties, such as fines, and closure of the establishments if the advertisement is in non-compliance of the FLCP. Also, under the FLCP, the FCPA can impose the following penalties:

- i. Order to the infringing party to refrain from continuing with the communication of the advertising;
- ii. Order to the infringing party to sufficiently correct the advertising and,
- iii. Impose a fine up to USD \$ 65,000.

On the other hand, the Mexican Industrial Property Law (MIPL) contains an infringement conduct related to this topic, Article 213 provides at section X the following:

"Article 213. The following shall constitute administrative infringements:

...

X. pursuing or achieving the purpose of denigrating the products or services, the industrial or commercial activity or the establishment of another party. This provision shall not apply to the comparison of products or services protected by the mark for the purpose of informing the public, provided that the comparison is not tendentious, false or exaggerated pursuant to the Federal Consumer Protection Law.

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..."

Such infringement can be started by the affected TM owner or ex officio by the Mexican Patent and Trademark Office (MPTO). A precedent establishes that this infringement is integrated with the dispositions of the FLCP, when studying what is "tendentious, false or exaggerated". Therefore, advertisement must be accurate and must not cause error or confusions on consumers by making them believe that they are acquiring a product or service under the wrong assumption that such have characteristics or elements better than the real ones or under fictitious conditions apparently better than the ones offered by competitors.

If the MPTO finds an infringing conduct under this paragraph it will issue a declaration of infringement and the order to suspend the conduct. Also, it will impose a penalty (normally a fine) that will be in accordance to Article 214 of the Mexican Industrial Property Law (MIPL), same that provides:

"ARTICLE 214.- The administrative infringements to this Law or any other dispositions related to it, will be punished with:

I.- Fine up to the amount of twenty thousand days of general minimum salary wage in Mexico City (Around USD\$ 85,000);

II.- Additional fine up to the amount of five hundred day of general minimum salary wage in Mexico City for each day that the infringement persists (Around USD\$ 2100);

III.- Temporary closure up to ninety days;

IV.- Permanent closure;

V.- Administrative arrest up to 36 hours."

The MIPL provides loses and damages, same that must be pursued once the declaration of infringement is res judicata at the MPTO:

"Art. 221 BIS. Compensation for material damages or indemnification for damages and prejudice due to violation of the rights conferred by this Law shall **in no case be less than 40 percent of the public selling price of each infringing product or the price of the rendering of services** where violation of any one or more of the industrial property rights provided for in this Law is involved.

In conclusion, there are no legal parameters to conduct a survey, but the MPTO and the FCPA study each case in particular and that the information used is in compliance. To this purpose, we suggest:

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- Perform the survey through a professional firm experienced in this kind of tests and in compliance with the common practices for this kind of tests;
- Document all the process, including places, date, general information of the participants, including name, age, address, etc.; if possible to take video of the process (back-up documents must comply with data privacy laws);
- Avoid reflecting the information gathered in "absolute" terms, like "our product is better than the other" "our product has a better taste than the other" "more people like our product", etc.
- We suggest to reflect such information as "from 100 persons that were part of our study, 70 liked our product more" (questions and answers to the test must reflect each statement), and include information as date, cities that were part of the tests and ages of the consumers. Such information must be expressed clearly, non-ambiguous and truthfully, pursuant to Article 38 of the FLCP.
- The advertisements must be directed to the general public, since the information directed to children, elders or sick people have a more restricted handling.

Should you have any comments, please do not hesitate to contact us.

Yours Truly,

Legarreta y Asociados, S.C.