National Programs
National Advertising Division®

SELECTED NATIONAL ADVERTISING DIVISION & NATIONAL ADVERTISING REVIEW BOARD PRESS RELEASES & CASE DECISIONS

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National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

National Advertising Division Finds Certain Apartments.com Website Claims Supported; Advertiser CoStar Group Appeals Other Findings

New York, NY – May 4, 2022 – The National Advertising Division (NAD) of BBB National Programs determined that CoStar Group, Inc. has a reasonable basis for its claims that "Apartments.com has successfully helped get over 40 million leases signed by happy renters nationwide" and that Apartments.com helps landlords "[k]eep [their] property leased at a great ROI," however NAD recommended that CoStar modify or discontinue certain popularity claims, discontinue several of the challenged conversion and web prevalence claims, and modify or discontinue certain website/service feature claims.

The claims, which appeared on videos and through direct mail solicitations, were challenged by Zillow, Inc. The parties operate competing real estate websites that offer a platform for landlords and tenants to list and find rental units including apartments, condos, and single-family homes. CoStar operates the Apartments.com network of nine rental websites including Apartments.com, For Rent.com, ApartmentFinder.com, and After55.com. Each site in the Apartments.com network focuses exclusively on rentals. Zillow's real estate website provides a platform for selling, buying, and renting homes and apartments.

During the proceeding, the advertiser agreed to permanently discontinue the claim "We deliver the highest quality, ready-to-move renters," and to permanently modify several claims. NAD did not review the discontinued or pre-modification claims on the merits.

Popularity Claims

NAD determined that in advertising that clearly refers to renters and renting, the advertiser's tag line, "Most Popular Place to Find a Place," is limited to rentals. However, when the advertising does not limit the claim to renters or renting, consumers could reasonably take away the message that the popularity claims refer to finding a home generally. As a result, NAD recommended that the advertising be modified to clearly and conspicuously disclose that the "Most Popular Place to Find a Place" claims are limited to the rental market.

NAD noted that understanding the volume of unique visitors is "an important indicator of popularity" but is not necessarily a measure of the #1 or "most popular" website. Without a direct measure of "sales" (or here converting a person's search for an apartment to renting an apartment) metrics such as unique visitors, website visits, time on the website, and listings on the website are all metrics that can indicate whether a website is #1 or the "most popular."

NAD concluded that while the advertiser established that it has the most unique visitors, such evidence is not a good fit for the claims:

- "The Most Popular Place to Find a Place"
- "The Most Popular Place to Lease Your Place"
- "Apartments.com puts more renters in new homes than any other website"
- "#1 site for renters"
- "Apartments.com is the "#1 listing network for houses, townhomes, condos and apartments"

NAD concluded that the advertiser has a reasonable basis for its claim that it has the #1 listing network based on listing volume. However, NAD recommended that the basis of the claim, listing volume, be clearly and conspicuously disclosed to avoid conveying the message that it is the #1 network based on popularity.

NAD recommended that the advertiser discontinue the claim "We're the nation's #1 rental network, with more than 25 million visitors to our sites each month searching for a new apartment," or modify it to better fit the support provided, that its online rental network has the most visitors of any rental network.

Conversion Claims

NAD noted that data relied on by the advertiser to support its conversion claims provides information on only a subset of property owners, not the entire rental market. Further, there was no evidence that the segment of property owners that use the software are representative of the entire marketplace. Therefore, NAD recommended that the advertiser discontinue its conversion claims:

- "most popular place to find a place"
- "Apartments.com puts more renters in new homes than any other website"
- "More People Find Their Place on Apartments.com than any other website"
- "We deliver at least 2.7x more leases for our advertisers than the competition"

NAD determined that the advertiser has a reasonable basis for the claim that "Apartments.com has successfully helped get over 40 million leases signed by happy renters nationwide." NAD concluded that the 40 million claim was substantiated and determined that the "happy" renters claim, in context, does not convey a general consumer satisfaction message but refers to the satisfaction that renters experience when they have signed a lease for a new home.

Web Prevalence Claims

Although the advertiser maintained that, in context, its "7x more exposure" claim refers to the seven websites that provide exposure for its listings, NAD determined that one reasonable takeaway is that the additional websites provide 7x more exposure than competing websites by volume of visitors, not limited to 7x more websites where rentals can be viewed. Because the advertiser did not provide website traffic data related to the seven websites or other evidence to support the claim, NAD recommended that it be discontinued.

NAD determined that the advertiser's evidence was not sufficiently robust to provide a reasonable basis for its claim that "the Apartments.com network also ranks in the #1 Google organic search position 91% of the time" and recommended it be discontinued.

NAD noted that the advertiser's claim "Millions More Renters Reaching millions of prospective renters though additional engagement and rental tools" touts that property owners and landlords who list and advertise on Apartments.com reach more renters due to additional listing on ForRent.com. Without evidence related to the additional renters on ForRent.com, NAD concluded that the claim was unsupported and recommended it be discontinued.

Website/Service Features Claims

- NAD recommended that the advertiser's "most advanced search tools that renters want" and "most innovative rental technology" claims be modified to avoid conveying a comparative superiority message.
- NAD also determined that the advertiser did not support the broad comparative claim that it provides the "Most Marketing Support" and recommended that the claim be discontinued.
- Zillow challenged the claim "Keep your property fully leased at the greatest return on your investment" on the Apartments.com Commercial Subscribers webpage, a claim that was modified during the course of the challenge to state, "Keep your property leased at a great ROI." NAD concluded that the modified claim was no longer comparative and was supported by the evidence.
- NAD further determined that the claim that Apartments.com helps customers "build a customized lease backed by experts and lawyers in every state" can reasonably be interpreted to mean that Apartments.com leases are built and customized for individual renters. NAD recommended that the claim be discontinued or modified to better fit the support, that it provides a template lease that has been customized to state and local leasing laws.
- NAD noted that premium services are touted in close proximity to the advertiser's claims that Apartments.com provides "Fast, Easy and Free" service that is "100% free, with absolutely no cost for you." Therefore, NAD recommended that claims be modified to avoid conveying the message that premium services are free by, for example, disclosing that premium services are an additional cost or disclosing the specific services that are "free."
- Regarding the claim, "Unlike other websites, we never sell or share your leads," NAD found that use of the phrase "unlike other websites," transforms the truthful and monadic claim, "we will never sell or share your leads" into a comparative claim. NAD recommended that this claim be discontinued or modified to avoid conveying a comparative message that its leading competitors sell or share leads.

In its advertiser statement, CoStar thanked NAD "for its time and careful review of this matter," and stated that it is "pleased with NAD's favorable findings regarding various of its claims." However, the advertiser further stated that it "respectfully disagrees with the NAD's findings as to the other claims addressed in the decision" and "will appeal the NAD's decision with respect to these claims in part – specifically with respect to its conclusions that CoStar's advertising is not necessarily directed at the rental market and that CoStar's claims regarding the popularity of Apartments.com is not supported by unequivocal website traffic data regarding unique visitors to the site."

Such appeals of NAD decisions are made to the BBB National Programs' National Advertising Review Board (NARB), the appellate-level truth-in-advertising body of BBB National Programs.

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programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Case #7045 (04/15/2022)
CoStar Group, Inc.
Apartments.com
Challenger: *Zillow, Inc.*
Product Type: *Websites/Web Services*
Issues: *Performance Claims; Quantified Claims; Superiority Claims*
Disposition: *Substantiated In Part/Modified-Discontinued In Part*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

CoStar Group, Inc.,
Advertiser,

Zillow, Inc.,
Challenger.

Case No. 7045
Closed: 04/15/2022

- Most popular claims send a powerful message that the brand is preferred over all others, and it weighs heavily in consumer buying decisions.
- The evidence supporting a website popularity claim should match the message that consumers take away from such a claim.

FINAL DECISION

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971, as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger Zillow, Inc. ("Zillow" or "Challenger") challenged express and implied claims made by Advertiser CoStar Group, Inc. ("Apartments.com" or "Advertiser") for its Apartments.com website network. The following are representative of the claims that served as the basis for this inquiry:

A. Express claims

- "The Most Popular Place to Find a Place."
- "The Most Popular Place to Lease Your Place."
- "Apartments.com puts more renters in new homes than any other website."
- "#1 site for renters."
- Apartments.com is the "#1 listing network for houses, townhomes, condos and apartments."
- "More People Find Their Place on Apartments.com than any other website."
- "The most renters on the web."
- "We are the most visited online rental network with more than 75 million renter visits per month across 11 leading sites."

- "Apartments.com has successfully helped get over 40 million leases signed by happy renters nationwide."
- "Apartments.com also ranks in the #1 Google search position 94% of the time."
- "Keep your property fully leased at the greatest return on your investment."
- "The most advanced search tools that renters want."
- "The most innovative rental technology."
- "We deliver the highest quality, ready-to-move renters." "Our leads convert to leases 2X more than our nearest competitor."
- "The Most Marketing Support."
- "7X More Exposure on the Web."

B. Implied Claims

- Apartments.com claims: "Millions More Renters. Reaching millions of prospective renters through additional engagement and retention tools." The claim necessarily implies that Apartments.com can reach millions more renters than Zillow and can do so because it offers tools that Zillow does not have.
- By claiming to convert leases "2X more than our nearest competitor," Apartments.com is implying a lease conversion rate that is twice as high as Zillow's.
- Apartments.com claims: "Unlike other websites, we never sell or share your leads," which necessarily implies that Zillow shares or cross-sells leads with competitors.
- By claiming its customers' ability to "build a customized lease backed by industry experts and lawyers in every state," Apartments.com promises a level of legal expertise that it cannot offer and a product that it does not deliver.
- Apartments.com's claim that it provides "Fast Easy and Free" service that is "100% free, with absolutely no cost for you," fails to properly disclose that customers need to pay a fee to obtain the benefits of its premium service.

II. Evidence Presented

The Advertiser provided website images from its website and from the Challenger's website and a Federal Trade Commission administrative complaint in an unrelated matter. The Advertiser also provided website traffic data from Comscore that includes Zillow Rentals, Apartments.com and other rental networks. The Advertiser provided confidential information including Nozzle keyword rank tracker data, Anyone Home data that shows the number of listings, leads, and leases and Apartment Management Consultants data showing traffic to particular rental sources. In addition, the Advertiser provided internal data including listing data, as well as leads and leases and conversion rates since 2011 and financial information supporting marketing expenditures.

The Challenger provided five video commercials, website marketing materials, and a direct mail piece where the alleged claims appeared. In addition, the Challenger provided other Comscore media trend data as well as a 2021 USA Today Network Renters Survey.

III. Decision

The parties operate competing real estate websites that offer a platform for landlords, and tenants to list and find rental units including apartments, condos, and single-family homes. CoStar operates the Apartments.com network of nine rental websites including Apartments.com, For Rent.com,

ApartmentFinder.com and After55.com. Each site in the Apartments.com network focuses exclusively on rentals. Zillow's real estate website provides a platform for selling, buying, and renting homes and apartments and includes Zillow Rentals for listing a rental on Zillow and its partner sites. Two types of "consumers" use the parties' websites: renters seeking a trusted and extensive list of potential rental properties and landlords looking to list properties that will be seen and considered by potential renters. Both parties also offer a suite of tools for property owners.

A. Introduction

Advertisers must possess a "reasonable basis" for claims disseminated in advertising.[1] What constitutes a "reasonable basis" depends on several factors, including the type of product, the type of claim, the consumer benefit from a truthful claim, the ease of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation experts in the field believe is reasonable.[2] It is well settled that advertisers are responsible for all reasonable interpretations of claims made in its advertising, including those messages they may not have intended to convey.[3]

Zillow challenges claims made by Apartments.com on videos, online, and through direct mail solicitations that are directed to renters and landlords. The challenge focuses on popularity claims, conversion claims, web prevalence claims, website/service features claims and other claims.

B. Permanently Discontinued or Modified Claims

The Advertiser stated that it permanently discontinued its use of the claim "We deliver the highest quality, ready-to-move renters." Based on the Advertiser's assurances that the claim will be discontinued, NAD did not review the claim on its merits. Rather, it will treat the claim for compliance purposes as if NAD had recommended discontinuance and the Advertiser agreed to comply.

The Advertiser also stated that it has permanently modified several claims as follows:

- The claim "We are the most visited online rental network with more than 75 million renter visits per month" has been modified to state: "We're the nation's #1 rental network, with more than 25 million visitors to our sites each month searching for a new apartment."
- The claim "Apartments.com also ranks in the #1 Google search position 94% of the time" has been modified to state: "The Apartments.com network also ranks in the #1 Google organic search position 91% of the time."
- The claim "We deliver the highest quality, ready-to-move renters. Our leads convert to leases 2X more than our nearest competitor." has been modified to state: "We deliver at least 2.7X more leases for our advertisers than the competition."
- The claim "Keep your property fully leased at the greatest return on your investment." has been modified to state: "Keep your property leased at a great ROI."

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[1] *Guardian Technologies, LLC (GermGuardian and PureGuardian Air Purifiers and Replacement Filters)*, Report #6319, NAD/CARU Case Reports (November 2019).

[2] *Pfizer Inc.*, 81 F.T.C. 23 (1972). *See also* FTC, *Policy Statement Regarding Advertising Substantiation* (Nov. 23, 1984), https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation.

[3] *See*, *e.g.*, *Glad Products Company (ForceFlex Plus with Clorox Tall Kitchen Drawstring Bags)*, Report #6996, *NAD/CARU Case Reports* (January 2022).

NAD reviewed these claims as modified.

C. Popularity Claims

Zillow challenged a number of popularity claims that appear in a series of video advertisements, online and in a direct mail piece as misleading or unsubstantiated. Some of the challenged claims are directed toward renters while others are directed to landlords. The claims include both "most popular" claims and #1 claims:

- "The Most Popular Place to Find a Place."
- "The Most Popular Place to Lease Your Place."
- "Apartments.com puts more renters in new homes than any other website."
- "#1 site for renters."
- Apartments.com is the "#1 listing network for houses, townhomes, condos and apartments."
- "More People Find Their Place on Apartments.com than any other website."
- "The most renters on the web."
- "We are the nation's #1 rental network with more than 25 million visitors to our sites each month search for a new apartment."

The "Most Popular Place to Find a Place" claim appears as the tag line in an advertising campaign featuring the actor Jeff Goldblum that appeared on national television, social media, radio and streaming services, outdoor billboards, and direct mail. The campaign features a fictional character, "Brad Bellflower," the inventor of the "Apartminternet." The Brad Bellflower commercials are humorous vignettes, and each includes the tagline "The Most Popular Place to Find a Place." In one commercial Mr. Bellflower explains that Apartments.com has the most listings because they are willing to "scout them out no matter how far away" followed by a video feed from an intern on Mars who has nothing to report. In another commercial Mr. Bellflower begins by saying "some may wonder how Apartments.com has helped more renters find their place than any other site" and explains that it is because their employees have been digitally upgraded physically so they can give 110%. Another short commercial begins with the statement "Apartments.com makes getting into a new home easier than ever" and shows a leaf falling from a house plant and hitting "apply" on an Apartments.com screen. In another commercial Mr. Bellflower describes how Apartments.com has found over 40 million people homes or new homes. Each commercial includes voiceovers and text identifying Apartments.com and concludes with the tagline that Apartments.com is "The Most Popular Place to Find a Place."[4]

1. Messages Conveyed

The Challenger argued that Apartments.com's "Most Popular Place to Find a Place" claim is not limited to the rental market but extends to all real estate listings including real estate sales. The Advertiser argued that its advertising is directed to renters and includes the prominent use of the terms "renters" and "apartments" in the advertising. In addition, the Advertiser noted that its corporate brand and domain, Apartments.com, are synonymous with renting. Further, the Advertiser argued that "place" means a place to rent, not to purchase.

[4] A direct mail piece includes claims directed to both renters and landlords and shows a picture of Mr. Bellflower with a modified tag line, "The most Popular Place to Lease Your Place."

As neither party submitted evidence to support its respective position concerning the messages that consumers could reasonably take away from the Brad Bellflower commercials and other advertising, NAD used its own expertise to evaluate the messages reasonably conveyed by the advertising.[5] While all of the Brad Bellflower commercials include audio and visual references to Apartments.com, not all of them refer to renters or renting but to people generally.[6] In addition, not all the commercials reference apartments, but homes or new homes. In advertising that clearly refers to renters and renting, the claim "Most Popular Place to Find a Place" is limited to rentals. However, when the advertising does not limit the claim to renters or renting, consumers could reasonably take away the message that the popularity claims refer to finding a home, generally. As a result, NAD recommended that the advertising be modified to clearly and conspicuously disclose that the "Most Popular Place to Find a Place" claims are limited to the rental market.

2. The Fit Between Most Popular Claims and Support Provided

NAD next examined the "Most Popular" claims and the claims that Apartments.com is the "#1 site for renters" and has "the most renters on the web" to determine whether there was a good fit between the support provided and the challenged claims. Most popular claims send a powerful message that the brand is preferred over all others, and it weighs heavily in consumer buying decisions.[7] The popularity of the Advertiser's website is difficult to measure by products sold, the typical measure for the popularity of products. The "sold" product in the apartment rental market would be a successful rental -- a transaction that does not occur on the Advertiser's websites. The evidence supporting a website popularity claim should match the message that consumers take away from such a claim.

The Advertiser relied on Comscore website traffic data to support its "Most Popular" claim. The data indicated that Apartments.com has the most unique visitors. The Challenger relied on other Comscore data that indicated that its websites have the most "visits" and argued that visits is a better metric than unique visitors because it indicates a more engaged audience and more attempts to seek out a rental unit on its network. The Advertiser responded that while visits may be a significant engagement metric for some websites, in the rental context it could indicate that consumers are having trouble finding what they are looking for on the website.

NAD concluded that website traffic is not a good fit for the "Most Popular" claims. When an advertiser makes a broad superiority claim, it must establish superiority with respect to "all reasonable interpretations of its claim."[8] While the number of unique visitors measures how many consumers visit Apartments.com when searching for a place to rent, the Advertiser's unqualified claims that Apartments.com is "#1" or "most popular" tells consumers that the website is used by more consumers than

[5] *Charter Communications, Inc. (Spectrum Mobile)* Report #6940, NAD/CARU Case Reports (April 2021).

[6] The parties disagreed about whether any advertising used the "most popular" claim without referring to renters or renting. In at least one commercial Mr. Bellflower states that Apartments.com has helped over 40 million people find homes and includes the "Most Popular Place to Find a Place" claim but failed to limit the claim to rentals. Although Advertiser argued that the commercial was "old," it did not agree to permanently discontinue the commercial or the claim.

[7] *Perrigo PLC (Plackers Dental Flossers),* Report # 7065, NAD/CARU Case Reports (November 2021); NARP Panel #299 (December 2021) ("#1 claims are powerful claims that can impact consumer decisions and attitudes and should be evaluated carefully."

[8] *eHarmony.com, Inc. (www.eHarmon.com)* Report # 4485 NAD/CARU Case Reports (April 2006).

any other website to find a rental. Renting a home is often a lengthy process and usually requires more than a single visit to a website. As a result, the total number of visits to a website is another important indicator of popularity.

The Advertiser argued that "popularity" is defined by the volume of "people" that visit the website and, as a result, its higher number of unique visitors should provide a reasonable basis for its advertising claims. The argument cuts both ways, however, because depending on the context of the claim and the category of the product or service, the number of "people" that visit a website, a store, a museum or an amusement park include people who visit the site more than once. For example, a museum or an amusement park measures popularity based on the number of visitors per day. Understanding whether the visitors were first time visitors or returning visitors would be an important metric to understand marketing and growth, but not the sole metric for measuring popularity.

The Challenger provided evidence that website traffic is a frequently used metric for measuring website popularity.[9] The Advertiser countered with evidence that Yelp and TripAdvisor rely on "unique users" as key metrics for measuring popularity. Both Yelp and TripAdvisor, however, can be visited once to either make a purchase or review information. By contrast, the process for renting an apartment is likely to require multiple visits to a website to review listings. The Advertiser's quotation of Vroom, an online auto marketplace, in its report to investors is particularly instructive. Vroom explains, "We use average monthly unique visitors to measure the quality of our customer experience, the effectiveness of our marketing campaigns and customer acquisition as well as the strength of our brand and market penetration." Understanding the volume of unique visitors helps measure website reach but is not necessarily a measure of the #1 or "most popular" website. Without a direct measure of "sales" (or here converting a person's search for an apartment to renting an apartment) metrics such as unique visitors, website visits, time on the website, and listings on the website are all metrics that can indicate whether a website is #1 or the "most popular." For the foregoing reasons, NAD concluded that while the Advertiser established that it has the most unique visitors, such evidence is not a good fit for the "most popular" claims.

In addition, Zillow challenged the claim that Apartments.com is the "#1 listing network for houses, townhomes, condos and apartments." The Advertiser argued that Apartments.com's rental network has the broadest reach on the market, as supported by the Comscore data that shows that it reaches the most unique visitors, more than competing rental networks. It also argued that the claim, "#1 listing network, conveys a message related to listing volume" and that message is supported. Apartments.com provided evidence of its number of listings, based on internal data, as compared to a lower number of listings on Zillow, based on its review of Zillow's website, and calculated that it consistently has more listings than Zillow.

[9] The Challenger submitted evidence that website popularity claims are measured by visits rather than visitors, citing Google's practices for Investopedia's ranking for "Best Rental Sites" that relies upon site traffic (visits) and inventory, as well as a statistics blog that discusses the difference between unique visitors and website visits in evaluating the ultimate conversion rate, the number of consumers who come to the site and make a purchase, or here, find a rental. The Challenger also pointed out that USA Today Network performed a survey that asked respondents how likely they were to use certain sources in an apartment search which provides another datapoint, examining popularity not on the basis of visits or visitors but on the opinions and attitudes of prospective renters.

While Zillow questioned whether the data compared currently available units or counted on a per unit or per property basis, the Advertiser responded that with respect to its own data, it includes only currently available units as compared to listings available on Zillow, filtering and counting those listed as "For Rent." Based on the evidence provided, NAD concluded that the Advertiser had a reasonable basis for its claim that it has the #1 listing network based on listing volume, but recommended that the basis of the claim, listing volume, be clearly and conspicuously disclosed to avoid conveying the message that it is the #1 network based on popularity.

With respect to the modified claim, "We're the nation's #1 rental network, with more than 25 million visitors to our sites each month searching for a new apartment," NAD reviewed the confidentially submitted data provided to support the claim that Apartments.com has more than 25 million visitors each month. The visitor data, together with the Comscore data demonstrates that Aparments.com had 25 million visitors to its sites and the most unique visitors. As discussed more fully above, the Advertiser's popularity claims were not supported, but the evidence supports a more limited claim regarding the number of visitors to a website. As a result, NAD recommended that the Advertiser discontinue the claim "We're the nation's #1 rental network, with more than 25 million visitors to our sites each month searching for a new apartment," or modify it to better fit the support provided, that its online rental network has the most visitors of any rental network.

D. Conversion Claims

Zillow challenged several claims that specifically state that Apartments.com is where most renters find a rental or convert from being apartment seekers to apartment renters such as, "Apartments.com puts more renters in new homes than any other website," "More People Find Their Place on Apartments.com than any other website," and the modified claim "We deliver at least 2.7X more leases for our advertisers than the competition."

The Advertiser argued that the conversion claims are supported by robust internal and external data and relied on confidentially submitted data from Anyone Home, a leading CRM provider for multi-family home property owners. The Anyone Home data shows that the Apartments.com network averages over twice as many leases as the Zillow network (for example, it shows for May 2021 685 v. 243). The Advertiser argued that the Anyone Home data is reliable because it contains data from a majority of the largest residential property owners in the country. The Challenger maintained that the Anyone Home data does not provide reliable support for the challenged conversion claims because it is not representative of the entire rental market as it is used by only a fraction of property owners and managers and does not include single family homes for rent. The Challenger acknowledged that single-family homes represent 33% of rental units generally in the United States.

NAD concluded that the Anyone Home data provides information on only a segment of the rental market, those that manage multi-family rental buildings and choose to use a specific CRM provider. It does not purport to include the entire rental marketplace, but only a subset of property owners. There was no evidence that the segment of property owners that use the software are representative of the entire marketplace. Further, evidence shows that it is not representative of the entire marketplace because it is used primarily for multi-family rentals and does not reflect the 33% of rentals for single-family homes. As a result, NAD recommended that the Advertiser discontinue its conversion claims, "most popular place to find a place," "Apartments.com puts more renters in new homes than

any other website," More People Find Their Place on Apartments.com than any other website," and "We deliver at least 2.7X more leases for our advertisers than the competition."

The Challenger also took issue with the claim that "Apartments.com has successfully helped get over 40 million leases signed by happy renters nationwide" asserting that the 40 million leases must be adequately substantiated and that the term "happy renters" is an objective claim that requires substantiation. The Advertiser argued that the 40 million leases claim is substantiated by internal data, confidentially submitted and that although "happy" may be considered puffery, it is self-evident that renters who sign leases are happy. NAD reviewed the confidentially submitted data and concluded that that the 40 million claim was substantiated. NAD next considered the "happy" renters claim and determined that in this context it does not convey a general consumer satisfaction message but refers to the satisfaction that renters experience when they have signed a lease for a new home. As a result, NAD concluded that the Advertiser has a reasonable basis for the claim, "Apartments.com has successfully helped get over 40 million leases signed by happy renters nationwide."

E. Web Prevalence Claims

Zillow also challenged claims directed to landlords related to the exposure its website provides for rentals and its Google search ranking.

1. 7X More Exposure on the Web

Zillow challenged the claim "7X More Exposure on the Web" and argued that it is a dangling comparative which can be reasonably understood to compare Apartments.com to Zillow. Apartments.com maintained that, in context, the claim refers to the seven websites that provide exposure for its listings. The full claim is "7X more exposure on the web. Get more qualified leads with your listing placed on seven leading websites that get over 70 million visits each month." Below this claim are the logos of the seven Apartments.com websites.

Relying on *France Media, Inc. (Commercial Real Estate Publishing Platform)*[10] the Advertiser argued that this claim refers to its network of other websites and not its competitors such as Zillow. In *France Media*, the advertiser promoted its ability to provide "more exposure" to sponsors of its conferences due to the number of its publications in which the conferences and sponsorships are advertised. NAD determined that France Media had a reasonable basis for the "more exposure" claim because, in context, it referred to the higher number of publications used to promote conferences (and their sponsorships).

Unlike France Media, the Advertiser's "7x More Exposure" claim is a quantified claim that conveys a specific message quantifying the extent of additional exposure with Apartments.com. The depiction of the logos of the Advertiser's seven leading websites shows where the additional exposure will be. One reasonable takeaway is that the additional websites provide 7x more exposure than competing websites by volume of visitors, not limited to 7x more websites where rentals can be viewed. The Advertiser did not provide website traffic data related to the seven websites or other evidence to

[10] *France Media, Inc. (Commercial Real Estate Publishing Platform)*, Report #6419, *NAD/CARU Case Reports* (October 2020).

support the claim. NAD determined that the Advertiser did not have a reasonable basis for its "7X more exposure" claim and recommended that be discontinued.

2. The Apartments.com Network also ranks in the #1 Google organic search position 91% of the time.[11]

Zillow challenged another claim related to the "exposure" the Advertiser provides landlords that list on their website network, specifically that "The Apartments.com Network ranks in the #1 Google organic search position 91% of the time." The Advertiser argued that the claim was supported by data from Nozzle, a widely recognized online keyword rank tracker tool that allows companies to track search engine rank positions of various brands. Nozzle provided the search results in response to a list of approximately 10,000 keyword searches in Google and used the data to compare the Google search position of various other rental websites. The Advertiser stated that organic search results (i.e., not paid placements) tracked using the software found that Apartments.com network sites were the first result, ranking first far more than any other rental network—91% of the time in the most recent quarter at the time (Q3 2021). Zillow responded that it had not been provided the underlying data, with the only support being provided confidentially. It noted that there was no indication of what search terms were used or that the data was sufficiently reliable to support the "#1" claim.

Upon review of the confidentially submitted substantiation for this claim, the evidence was not sufficiently robust to provide a reasonable basis for the claim. For example, it was not clear that the Nozzle data represents all consumer searches in the rental home market. While at first glance, the sheer number of searches—10,000—seems large, the possible variety of searches in this marketplace is much broader. For example, the term "rentals in [municipality]," for each U.S. municipality with a population over 10,000 would account for over 4,000 possible searches alone. Without more information about the underlying methodology, including information related to how Nozzle chooses the 10,000 search terms and how they represent consumer searches, NAD could not rely on the confidentially submitted data. Accordingly, NAD determined that the Advertiser did not have a reasonable basis for its claim that "the Apartments.com network also ranks in the #1 Google organic search position 91% of the time" and recommended it be discontinued.

3. "Millions More Renters" Claim

Zillow argued that the Advertiser has not supported the claim "Millions More Renters. Reaching millions of prospective renters though additional engagement and rental tools." Both parties argue that the claim is being considered out of context. The context of the claim relates to the benefits of ForRent.com, one of the websites that is part of the Apartments.com network, to property owners and landlords. The claim touts that property owners and landlords who list and advertise on Apartments.com reach more renters due to the additional listing on ForRent.com. Without evidence related to the additional renters on ForRent.com, NAD concluded that the "Millions More renters Reaching

[11] The claim "We are the most visited online rental network with more than 75 million renter visits per month" has been modified to state: "We're the nation's #1 rental network, with more than 25 million visitors to our sites each month searching for a new apartment."

millions of prospective renters though additional engagement and rental tools." claim was unsupported claim and recommended it be discontinued.

F. Website/Service Features

Zillow challenged a number of claims that touted Apartments.com's technology and the features of its network, arguing that the claims are comparative and disparaging to Zillow suggesting that Zillow's technology is less advanced. Examples of the challenged claims include "The most advanced search tools that renters want" and "The most innovative rental technology."

The Advertiser argued that the claims are not comparative and do not suggest that Apartments.com is the only website that uses the "most advanced search tools" or "most innovative technology." In addition, the Advertiser argued that the claims are supported because the Apartments.com network offers the most advanced features currently available such as 3D tours.

Claims like "the most advanced search tools that renters want" and "The most innovative rental technology" can, depending on context, be comparative or monadic and highlight the use of the "most advanced" tools or "most innovative" technology available. While the qualifying language, "that renters want," implies that the tools are ones with which renters are familiar with and used by others,[12] the context of the advertising further states that the Advertiser "leads the industry in providing advanced tools and technology" and reasonably conveys the message that the Advertiser is claiming that, as compared to its competitors, it offers the "most advanced tools" and "most innovative rental technology." The Advertiser did not provide any support that its rental technology is more innovative than its competitors. Therefore, NAD recommended the "most advanced search tools that renters want" and "most innovative rental technology" claims be modified to avoid conveying a comparative superiority message.

G. The "Most Marketing Support" Claims

Zillow next challenged the claim that Apartments.com provides "The Most Marketing Support" and asserted that the claim conveys a message that it provides more marketing support than Zillow provides. The Advertiser argued that the claim is not comparative and that the claim was taken out of context and that "The Most Marketing Support" is followed by the sentence "We invest heavily in national advertising on your behalf to drive more leads to your listing" that qualifies the claim. As support for this claim, Apartments.com provided data showing that it spends more on advertising than any other listing website.

NAD found that the claim "The Most Marketing Support" is a broad comparative claim and that the qualifying sentence about investing in national advertising could reasonably convey that national advertising is an example of how Apartments.com provides marketing support, but not necessarily the exclusive way support is provided. Marketing support could include other investments such as providing data on rental trends or pricing trends in a particular region. The Advertiser's advertising and marketing expenditures are impressive and could support a claim tailored to its investment in national

[12] The Advertiser argued that it uses technology like 3D tours, that are a recent innovation and one that has not be superseded.

advertising. As a result, NAD determined that the Advertiser did not support the broad comparative claim that it provides the most marketing support and recommended that the claim be discontinued.

Zillow challenged the claim, "Keep your property fully leased at the greatest return on your investment," on the Apartments.com Commercial Subscribers webpage, a claim that was modified during the course of the challenge to state, "Keep your property leased at a great ROI." The Advertiser argued that the claim is puffery, but that if it is not, it has a reasonable basis for the claim. It argued that the claim is directed to landlords and property owners and is not comparative but promotes the benefits of using its listing service to advertise and lease properties. The Advertiser maintained that the "return" landlords and property owners receive for their "investment" in advertising spend with Apartments.com, is its success in converting leads to leases. NAD concluded that the modified claim "Keep your property leased at a great ROI," was no longer comparative and was supported by the evidence.

H. Customized Lease Claims

In addition, Zillow challenged the claim that Apartments.com helps customers "build a customized lease baked by experts and lawyers in every state." This claim appears on a number of pages on the Apartments.com website. The Advertiser explained that it hired a leading national law firm to research state lease laws, drafted a template for each jurisdiction using advice and counsel from a network of local real estate law practitioners and continued to monitor developments in the lease laws in each jurisdiction. Nevertheless, the Advertiser argued that it provides a disclosure on the lease tool that prospective tenants should consult their own counsel.

The claim, however, can reasonably be interpreted to mean that the Apartments.com leases are built and customized for individual renters. While the advertising discloses that renters should consult their own counsel, the disclosure does not limit the claim to the message that leases customized based on state and local lease laws. NAD recommended that the customized lease claim be discontinued or modified to better fit the support, that it provides a template lease that has been customized to state and local leasing laws.

I. Fast, Easy and Free Claims

Zillow also takes issue with Apartments.com's claims that it provides "Fast, Easy and Free" service that is "100% free, with absolutely no cost for you," and that the Advertiser fails to properly disclose that customers need to pay a fee to obtain the benefits of its premium service. Apartments.com argued that listing rentals is 100% free but that it charges listers for other additional services.

NAD reviewed the claims, in context, and noted that premium services are touted in close proximity to the "Fast, Easy and Free" claims. NAD recommended that the claims be modified to avoid conveying the message that premium services are free by, for example, disclosing that premium services are an additional cost or disclosing the specific services that are "free."

J. "We Never Share or Sell Your Lead" Claim

Finally, Zillow challenged Apartments.com's claim, "Unlike other websites, we never sell or share your leads" and argued that the claim implies that Zillow shares or cross-sells leads. Apartments.com asserted that the claim is not directed to Zillow, but directed to "other websites" that are lead generation-style websites which share or cross-sell leads.

NAD found that the use of the phrase, "unlike other websites," transforms the truthful and monadic claim, "we never sell your share your leads" into a comparative claim. Without referencing the "other websites" that share or sell leads, the claim reasonably conveys the message that "other websites" refers to leading competitors, including Zillow. NAD recommended that the claim, "Unlike other websites, we never sell or share your leads" be discontinued or modified to avoid conveying a comparative message that its leading competitors sell or share leads.

IV. Conclusion

NAD recommended that the Apartments.com's advertising be modified to clearly and conspicuously disclose that the "Most Popular Place to Find a Place" claims are limited to the rental market.

NAD concluded that while the Advertiser established that it has the most unique visitors, such evidence is not a good fit for the "The Most Popular Place to Find a Place," "The Most Popular Place to Lease Your Place," "Apartments.com puts more renters in new homes than any other website," "#1 site for renters," and "Apartments.com is the "#1 listing network for houses, townhomes, condos and apartments" claims.

NAD concluded that the Advertiser had a reasonable basis for its claim that it has the #1 listing network based on listing volume, but recommended that the basis of the claim, listing volume, be clearly and conspicuously disclosed to avoid conveying message that it is the #1 network based on popularity.

NAD recommended that the Advertiser discontinue the claim "We're the nation's #1 rental network, with more than 25 million visitors to our sites each month searching for a new apartment," or modify it to better fit the support provided, that its online rental network has the most visitors of any rental network.

NAD concluded that the Advertiser had a reasonable basis for its claim that it has the #1 listing network based on listing volume, but recommended that the basis of the claim, listing volume, be clearly and conspicuously disclosed to avoid conveying the message that it is the #1 network based on popularity.

NAD recommended that the Advertiser discontinue its conversion claims, "most popular place to find a place," "Apartments.com puts more renters in new homes than any other website," "More People Find Their Place on Apartments.com than any other website," and "We deliver at least 2.7X more leases for our advertisers than the competition."

NAD concluded that the Advertiser has a reasonable basis for the claim, "Apartments.com has successfully helped get over 40 million leases signed by happy renters nationwide."

NAD determined that the Advertiser did not have a reasonable basis for its "7X more exposure" claim and recommended that be discontinued.

NAD determined that the Advertiser did not have a reasonable basis for its claim that "the Apartments.com network also ranks in the #1 Google organic search position 91% of the time" and recommended it be discontinued.

NAD concluded that the "Millions More renters Reaching millions of prospective renters though additional engagement and rental tools." claim was unsupported claim and recommended it be discontinued.

NAD recommended the "most advanced search tools that renters want" and "most innovative rental technology" claims be modified to avoid conveying a comparative superiority message.

NAD determined that the Advertiser did not support the broad comparative claim that it provides the "Most Marketing Support" and recommended that the claim be discontinued.

NAD concluded that the modified claim "Keep your property leased at a great ROI," was no longer comparative and was supported by the evidence.

NAD recommended that the customized lease claim be discontinued or modified to better fit the support, that it provides a template lease that has been customized to state and local leasing laws.

NAD recommended that "Fast, Easy and Free" claim be modified to avoid conveying the message that premium services are free by, for example, disclosing that premium services are an additional cost or disclosing the specific services that are "free."

NAD recommended that the claim "Unlike other websites, we never sell or share your leads" be discontinued or modified to avoid conveying a comparative message that its leading competitors sell or share leads.

V. Advertiser's Statement

CoStar thanks the NAD for its time and careful review of this matter. CoStar is pleased with the NAD's favorable findings regarding various of its claims including that "Apartments.com has successfully helped get over 40 million leases signed by happy renters nationwide," that Apartments.com helps landlords "[k]eep [their] property leased at a great ROI," and that Apartments.com is the "#1 listing network based on listing volume." CoStar respectfully disagrees with the NAD's findings as to the other claims addressed in the decision because those claims are truthful and supported by the evidence, and the NAD's decision with respect to those claims is inconsistent with the evidence in the record and NAD precedent. CoStar will appeal the NAD's decision with respect to these claims in part – specifically with respect to its conclusions that CoStar's advertising is not necessarily directed to the rental market and that CoStar's claims regarding the popularity of Apartments.com is not supported by unequivocal website traffic data regarding unique visitors to the site. Notwithstanding its partial appeal of the NAD decision, CoStar will take the NAD's recommendations and guidance on all of its claims into account and intends to discontinue or modify the applicable advertising consistent with such recommendations and guidance at least while such an appeal is pending. CoStar appreciates the opportunity to participate in the self-regulatory process and looks forward to resolving this matter with the National Advertising Review Board. **(#7045 KA, closed 04/15/2022)**

National Programs
National Advertising Review Board®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703-247-9330 / press@bbbnp.org

National Advertising Review Board Recommends CoStar Group Discontinue Apartments.com Claim "The Most Popular Place to Find a Place"

New York, NY – Aug. 24, 2022 – A panel of the National Advertising Review Board (NARB), the appellate advertising law body of BBB National Programs, recommended that CoStar Group, Inc. discontinue the claim "The Most Popular Place to Find a Place" and that it modify certain advertising to make clear that it is directed only to the rental market.

The advertising at issue had been challenged before the National Advertising Division (NAD) by Zillow, Inc., operator of a competing real estate website platform for selling, buying, and renting homes and apartments. CoStar Group had agreed to comply with the NAD's ruling, but appealed NAD's decision on certain issues (Case No. 7045).

The NARB panel determined that one reasonable message conveyed by the "Most Popular" tagline is that the advertiser's site is the preferred site for researching available rental properties, a subjective standard. Because the advertiser did not have consumer research to support that message, the panel recommended that the "Most Popular" tagline be discontinued. The panel noted that nothing in its decision would preclude the advertiser from making a properly supported claim that specifies the specific data point, such as "most unique visitors."

The NARB panel also concluded that prominent references to the brand name "Apartments.com," in CoStar Group's commercials that use the "Most Popular" tagline, reasonably convey that the advertising messages are directed to the rental market. To ensure that the ads do not also convey a message about purchases, however, the panel recommended that advertising that refers to "find a place" or comparable phrases should also include at least one conspicuous reference to renters, renting, or a visual that conveys a rental-market message.

CoStar Group stated that while it respectfully disagrees with the panel's ultimate conclusions, it will accept all of the panel's recommendations.

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs is where businesses turn to enhance consumer trust and consumers are heard. The non-profit organization creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective

third-party accountability and dispute resolution programs. Embracing its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, BBB National Programs today oversees more than a dozen leading national industry self-regulation programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Review Board (NARB): The National Advertising Review Board (NARB) is the appellate body for BBB National Programs' advertising self-regulatory programs. NARB's panel members include 85 distinguished volunteer professionals from the national advertising industry, agencies, and public members, such as academics and former members of the public sector. NARB serves as a layer of independent industry peer review that helps engender trust and compliance in NAD, CARU, and DSSRC matters.

National Programs
National Advertising Review Board®

NARB PANEL #302 – July 25, 2022

Appeal of the NAD Final Decision #7045 Regarding Claims for CoStar Group, Inc., Advertising by Apartments.com

Panel Members

Margaret (Meg) C. Campbell (Chair)
Professor of Marketing
University of California

David Dobbins
Media Consultant
Pro Unlimited, Inc.

Glenn Roginski
Director, Marketing Lab
Pfizer

Tom Stein
Chairman and Chief Client Officer
Stein IAS

Representing the National Advertising Review Board
Kenneth A. Plevan, Chair
Saveeta Dhanai, Coordinator

Representing the BBB National Programs
Mary Engle, Executive Vice President, Policy

Representing the National Advertising Division
Laura Brett, Vice President
Katherine Armstrong, Deputy Director
Howard Smith, Attorney

Representing CoStar Group, Inc.
Nicholas J. Boyle, Partner, Latham & Watkins LLP
Marissa R. Boynton, Partner, Latham & Watkins LLP
Meryl E. Bartlett, Associate, Latham & Watkins LLP
Grant E. Strother, Associate, Latham & Watkins LLP
Blake Page, Associate, Latham & Watkins LLP
Dan McCallum, Associate General Counsel, Head of Litigation, CoStar Group, Inc.

Representing Zillow, Inc.
David Mallen, Partner, Loeb & Loeb LLP
Dani Spencer, Associate, Loeb & Loeb LLP
Paul Kriloff, Director, Product Marketing, Zillow, Inc.
Lyndsay Spiking, Lead Counsel, Zillow, Inc.

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REPORT OF NARB PANEL 302

Decision Issued: July 25, 2022

Appeal of the NAD Final Decision #7045 Regarding Claims for CoStar Group, Inc., Advertising by Apartments.com

A. Background

This is an appeal from the decision of the National Advertising Division ("NAD") in NAD Case No. 7045, dated April 15, 2022. The advertiser is CoStar Group, Inc., doing business as Apartments.com. The challenger is Zillow, Inc. ("Zillow").

As explained by NAD, the parties operate competing real estate websites that offer a platform for landlords to list, and tenants to try to find, rental units, including apartments, condos, and single-family homes. NAD Decision at 2. The Apartment.com network employs nine rental websites, and each site focuses exclusively on rentals (as contrasted with purchases/sales of residential property). Zillow's real estate website provides a platform for selling/buying transactions as well as renting.

B. Issues on Appeal

At the NAD, Zillow challenged a total of 16 express claims and five implied claims. See NAD Decision at 1-2. NAD documented its findings and recommendations in 16 separate paragraphs. Id. at 12-13. In brief summary, NAD found certain of the challenged claims (or claims modified by the advertiser during the NAD proceeding) to be supported, and recommended others be either discontinued or modified.

There is no cross-appeal, and accordingly the only issues before the panel are those designated for appeal by the advertiser in its NAD Advertiser's Statement, which states in pertinent part,

> specifically, with respect to [NAD's] conclusions that CoStar's advertising is not necessarily directed to the rental market and that CoStar claims regarding the popularity of Apartments.com is not supported by unequivocal website traffic data regarding unique visits to the site.

NAD Decision at 13. As a result of the limited scope of the appeal, a total of only three of the 16 paragraphs in NAD's findings and recommendations are relevant on this appeal.

C. Whether Consumers Understand that Apartments.com Advertising Is Directed Only to the Rental Market

Apartments.com has been running a series of humorous commercials featuring actor Jeff Goldblum as the fictional character "Brad Bellflower." Each commercial ends with the tagline stating that Apartments.com is the "Most Popular Place to Find a Place" (the "Most Popular" tagline). Several of these commercials make an express and clear reference to "renters," but others do not.

NAD concluded as a preliminary matter that the tagline was ambiguous, in that, by itself, the tagline could refer to sales transactions as well as rentals. The advertiser, however, offered no support for a claim of being most popular for real estate transactions when sales are included, but rather argued that the message conveyed by the tagline was understood by consumers in the context of the Brad Bellflower commercials to be limited to rental properties. NAD further concluded that when the Most Popular tagline appeared in a commercial accompanied by an express reference to renting or renters, the tagline did not mislead consumers because in that context, "place" in the phrase "find a place" would be understood by consumers as referring to a residential rental property. NAD Decision at 4-5; see also NAD Decision at 12, first Conclusion paragraph.

The advertiser argues on appeal that reasonable consumers would understand all of the Jeff Goldblum commercials as referring to only rental transactions. It argues, first, that the tagline by its very words is understood to refer exclusively to the rental market. Second, it argues that its business name, Apartments.com, is also invariably understood as a reference to the rental market, because apartments are mostly rental properties.

In response, Zillow argues that consumers often purchase, or own, apartments, and therefore references to apartments are not necessarily references to rentals. It notes, moreover, that brand names are often "fanciful and hyperbolic," and therefore are not interpreted literally by consumers. Finally, Zillow points out that Apartments.com on several of its websites does offer properties for sale.

On this issue, the panel concludes that prominent references to the brand name "Apartments.com" convey to most reasonable consumers that the advertising messages are directed to the rental market. To ensure that the ads do not also convey a message about purchases, however, the panel recommends that commercials referring to "find a place" or a comparable phrase should also include at least one conspicuous reference to renters, renting, or a visual reference that would be understood as referring to the rental market.

D. Whether Apartments.com Has Supported a "Most Popular" for Rental Properties Claim Based on Showing that Its Website Has the Most "Unique" Visitors

At the NAD, to support its Most Popular tagline, the advertiser relied on confidential data showing that it had more "unique" visitors to its rental websites than any competitor had unique visitors

looking for rentals. However, NAD concluded that this support was not a "good fit" for the advertiser's Most Popular claim. NAD Decision at 5-7.

As noted, NAD's conclusions and recommendations are set forth in 16 separate paragraphs. See NAD Decision at 12-13. The dispute regarding the Most Popular tagline and comparable claims are addressed in the second and sixth paragraphs. In the second paragraph, NAD sets forth its conclusion that unique-visitor data is not a "good fit" for the claims. In the sixth paragraph, NAD recommended discontinuance of the advertiser's "conversion claims."

In resolving this issue, NAD concluded initially that the Most Popular tagline, as well as other claims that conveyed a comparable message, communicated that the rental website resulted in the largest number of completed rental transactions (or "conversions"). Conversion data, however, is unavailable to the websites. NAD accordingly concluded that the issue for resolution was whether the total number of unique visitors was the proper proxy for completed rental transactions.

Accepting the challenger's arguments, NAD concluded that other available data, such as total website visits, provided alternative methods for estimating which website resulted in the most conversions. See NAD Decision at 6. NAD reasoned that a renter who visited the website only once might not have completed a transaction as a consequence of that visit, whereas a person who visited the site numerous times might have been more likely to have done so.[1]

On appeal to this panel, the advertiser argues that it is the total of unique visitors that in fact makes it the "most popular" website because popularity in this context means the total number of individuals. It further argues that NAD erred in construing the tagline as a "conversion" claim when the message relates to looking for an available location, not completing a rental transaction. It further argues that the advertising at issue is primarily directed to property owners, yet NAD mistakenly relied on its understanding of the consumer interpretation of the tagline. The advertiser also argues that the promotional material of its competitors, including the challenger, show how important and relevant the industry considers unique-visitor data.

Zillow in turn makes several arguments as to why, in its view, NAD was correct in finding that, in the rental market, a measure of most visits is more relevant to popularity than is a measure of most unique visitors.[2] Among other arguments, Zillow contends that, as NAD found, it is unlikely that a renter will find a suitable apartment after one visit to a website. The challenger offers the analogy of visits to pediatrician—if a doctor is "popular," patients will return many times, and not just visit once.

In resolving this issue, the panel notes at the outset that the advertiser points out that all it need do

[1] The panel notes that NAD indicated that it would have had no issue with Apartments.com promoting itself as having the most unique visitors.

[2] Zillow submitted evidence showing that its website is number one in "most visits."

is provide a reasonable basis for its claims, and argues that NAD did not apply the proper standard in holding it to a standard of "perfection." However, the panel notes that "most popular" claims are powerful claims, and the issue here is ultimately whether the advertiser has support for all reasonable interpretations of the claim, rather than the quality of the evidence it submitted for its intended interpretation.

The issue to be resolved is a complicated and subtle one, in part because both websites are available for free. Accordingly, total website traffic, whether measured by total unique visitors or total visits, is not directly analogous to total unit sales of a typical consumer good or service, which data has traditionally been used to support popularity claims in a category.

The panel notes that the advertiser is responsible for all reasonable messages conveyed by its advertising. The panel concludes that one reasonable message conveyed by the Most Popular tagline is that the advertiser's site is the preferred site for researching available rental properties, a subjective standard. Because the advertiser does not have any consumer research to support that message, the panel recommends that the Most Popular tagline be discontinued.

In view of the foregoing, the panel does not agree with NAD's analysis that concluded that the Most Popular tagline was necessarily a "conversion" claim. If one of the category participants were able to support a most popular claim with a consumer research study, proper qualification of the claim as based on a consumer study could ensure that consumers would not receive an unintended "conversion" message.

For clarification, addressing the sixth paragraph on page 12 of the NAD Decision, the claims addressed there in addition to the Most Popular tagline were not appealed by the advertiser and are therefore governed by the NAD Decision. For further clarification, nothing in this decision would preclude the advertiser from making a properly supported claim that specifies the specific data point, such as "most unique visitors."

E. Recommendations

The panel recommends that the advertiser discontinue the claim "The Most Popular Place to Find a Place."

The panel further recommends that advertising that refers to "find a place" or comparable phrase should include, in addition to prominent references to Apartments.com, at least one conspicuous reference to renters, renting, or a visual that conveys a rental-market message.

The panel thanks CoStar Group, Inc. and Zillow, Inc. for participating in industry self-regulation in the interests of promoting truth in advertising.

F. Advertiser's Statement

While CoStar Group respectfully disagrees with the Board's conclusions, it will accept the Board's recommendations.

National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

National Advertising Division Finds BestCompany.com "Moderated Reviews" Claim Supported; Recommends Other Claims be Modified or Discontinued

New York, NY – Jan. 27, 2022 – The National Advertising Division (NAD) of BBB National Programs determined that BestCompany.com, LLC provided a reasonable basis for the claim that all reviews posted on BestCompany.com are "moderated through a tech-enabled, proprietary, 7-point moderation process to ensure they are real and authentic."

However, NAD recommended that the advertiser discontinue certain express and implied claims related to the advertiser's message that Best Company is an independent and impartial review site. NAD also recommended that Best Company limit its use of the "100% verified" claim to only those reviews where the individual writing the review is verified as a bona fide purchaser of the product.

These claims, which appeared on BestCompany.com, were challenged by SmileDirectClub, LLC (SDC), a national provider of clear aligner therapy ("invisible braces") that uses a tele-dentistry platform and sells related goods and services. Best Company offers general information, reviews, and recommendations for a variety of products and services, including in the "invisible braces" category and for specific brands within the category such as SDC and its competitors.

NAD determined that the advertiser has a reasonable basis for the claim that all reviews posted on BestCompany.com are "moderated through a tech-enabled, proprietary, 7-point moderation process to ensure they are real and authentic." NAD was satisfied that the advertiser takes reasonable measures to avoid publishing incentivized reviews such that it may reasonably claim that it has a process to ensure that posted reviews are "real and authentic."

Nevertheless, NAD determined that Best Company did not support express claims and implied messages that its website is independent and impartial because its ranking criteria results in a higher score for businesses that have a partnership with Best Company. NAD noted that an independent and impartial ranking of products, even one based on consumer reviews, should be based on reviews that are representative of the universe of consumer reviews for all companies reviewed and ranked. Further, NAD found that a disclosure explaining the ranking methodology cannot cure the express and implied misleading message that the rankings are independent.

Therefore, NAD recommended that the advertiser discontinue express claims that:

- Rankings on the BestCompany.com website "cannot be bought" or otherwise influenced to "unfairly favor one company over another, not based on merit."
- Best Company does not have "any relationships with companies that guarantee their ranking or score and we never will."

- "Best Company never has and never will take payment in exchange for an unmerited rank on BestCompany.com."
- Best Company's rankings of various companies and their products on BestCompany.com are "honest and unbiased."
- Best Company is a "Truly Independent and Impartial Review Site," as well as the modified version that Best Company offers "Truly Independent and Impartial Rankings and Reviews."

NAD also recommended that the advertiser discontinue implied claims that:

- Best Company does not and never will have any improper relationships with featured companies, and rankings or scores on BestCompany.com cannot be purchased or obtained through a direct relationship.
- Best Company is not "pay to play."
- Best Company ranks the clear aligner brand "Byte" over all other brands based on its "expert recommendation" and not due to Best Company's undisclosed true relationship with Byte.

NAD determined that a reasonable takeaway from the claim "100% Verified," as used to describe Best Company's review verification process, is that all reviews posted on BestCompany.com receive the same level of scrutiny. While the advertiser demonstrated that all reviews go through a pre-publication moderation process to confirm that the review is from a person and not a bot, not all published reviews go through the process to become "Verified Customer Reviews," i.e., further confirmation that the individual is a paying customer of the reviewed business.

Thus, NAD recommended that the advertiser modify its advertising to label only those reviews that have passed through additional verification ("Verified Customer Reviews") as "100% verified" and to use the claim exclusively when it has verified that the individual writing the review is a bona fide purchaser of the product.

Finally, during the proceeding the advertiser voluntarily agreed to remove and modify two videos about SDC and its products and programs. Accordingly, NAD did not review the claims in those videos on the merits.

In its advertiser statement, Best Company stated that it "will comply with NAD's decision." Further, the advertiser stated that although it "disagrees with NAD's views that Best Company cannot advertise itself as a 'Truly Independent and Impartial Review Site' . . . Best Company respects the NAD and its role in regulating national advertising and will comply with its recommendations."

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs is where businesses turn to enhance consumer trust and consumers are heard. The non-profit organization creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. Embracing its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, BBB National Programs today oversees more than a dozen leading national industry self-regulation programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness

of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Case #6999 (01/14/2022)
BestCompany.com, LLC
BestCompany.com
Challenger: *SmileDirectClub, LLC*
Product Type: *Websites/Web Services*
Issues: *Express Claims; Implied Claims/Consumer Perception; Online Advertising; Testimonials*
Disposition: *Substantiated in Part/Modified-Discontinued in Part*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

SmileDirectClub, LLC, Challenger, BestCompany.com, LLC, Advertiser.	Case No. 6999 Closed (01/14/2022)

FINAL DECISION

- Product rankings that appear on independent, third-party websites have a powerful effect on purchasing decisions, and consumers often rely on and trust these sites that appear to offer accurate, unbiased information favoring one product or brand over another.

- An independent and impartial ranking of products, even one based on consumer reviews, should be based on reviews that are representative of the universe of consumer reviews for all companies reviewed and ranked.

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger SmileDirectClub, LLC ("SDC" or "Challenger") challenged express and implied claims made by Advertiser BestCompany.com, LLC ("Best Company" or "Advertiser") on its BestCompany.com website. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

- "100%," or "all," of the reviews posted on the Best Company website are "verified" and "moderated through a tech-enabled, proprietary, 7-point moderation process to ensure they are real and authentic."

- Rankings on the BestCompany.com website "cannot be bought" or otherwise influenced to "unfairly favor one company over another, not based on merit."

- Best Company does not have "any relationships with companies that guarantee their ranking or score and we never will."

- "Best Company never has and never will take payment in exchange for an unmerited rank on BestCompany.com."

- Best Company's rankings of various companies and their products on BestCompany.com are "honest and unbiased."

- Best Company is a "Truly Independent and Impartial Review Site."

- SDC "does not accept direct payments from insurance companies" in connection with clear aligner services.

- "SmileDirectClub doesn't really offer any money back or anything like that, but within thirty days of completing your treatment plan, if you are dissatisfied in any way, then they can match you up with an orthodontist or dentist that will review your results, and if approved, you can get additional aligners at no extra cost to fix anything that went wrong."

- A "major distinction" between SDC and Byte is Byte's lifetime guarantee program.

- SDC's clear aligner kit comes with "teeth whitening products" that rely on the clear aligners as carriers.

B. Implied Claims

- Best Company does not and never will have any improper relationships with featured companies, and rankings or scores on BestCompany.com cannot be purchased or obtained through a direct relationship. In other words, Best Company is not "pay to play."

- Best Company ranks the clear aligner brand "Byte" over all other brands based on its "expert recommendation" and not due to Best Company's undisclosed true relationship with Byte.

- Reviews and testimonials of Byte on BestCompany.com and Byte's webpage reflect independent, honest opinions and are not incentivized endorsements.

- SDC does not have a guarantee or money back program for its clear aligner services.

- SDC's refund and guarantee programs are lacking as compared to Byte.

- SDC's guarantees its services only after treatment has been completed.

- SDC and its goods and services are defective (not "solid" because not ranked as highly as Byte on BestCompany.com).

II. Evidence Presented

The Challenger submitted two declarations from its VP of Digital Acquisitions and Growth which detailed the Challenger's experience with the Advertiser's website. The Challenger also submitted e-mails between the Challenger and the Advertiser regarding services offered by the Advertiser.

The Advertiser submitted three declarations from its Chief Operating Officer detailing the services it offers businesses, its ranking system, and its moderation and verification process for reviews. The Advertiser also submitted e-mails between the Challenger and the Advertiser regarding services offered by the Advertiser.

III. Decision

SDC is a national provider of clear aligner therapy ("invisible braces") that uses a teledentistry platform and sells related goods and services. The Advertiser's website, BestCompany.com, offers general information, reviews, and recommendations for a variety of products and services, including in the "invisible braces" category generally and for specific brands within the category such as SDC and its competitors.[1] SDC challenged advertising on BestCompany.com related to reviews for "invisible braces."

The Challenger contended that much of the content on BestCompany.com is advertising but the website communicates the overall broad and misleading message to consumers that it is an impartial, independent review site that is not paid or influenced by the companies it features on its

[1] In the Invisible Braces category, Best Company has a "Top Recommended" page, accessible through a paid search, as well as a separate "organic" ranking of companies in that category on its website. In practice, this distinction is not significant as the two pages typically correspond in how companies are ranked.

site. The Challenger submitted that Best Company is not an impartial review site because its relationships with other companies determines such companies' scores and rankings against competitors like SDC.

The Challenger argued that the Advertiser's ranking criteria ensures that its preferred partners are ranked higher in their category and that companies that partner with Best Company receive increasing benefits based on the services provided. For example, if Best Company solicits reviews, the partner company gets a higher ranking because the partner company will have more reviews and more verified reviews than non-partner companies. Best Company's scores each company in the "invisible braces" category based on their consumer reviews but gives higher scores to companies with more reviews and gives greater weight to verified reviews it collects, as compared to other organic reviews published on the site. The Challenger also argued that the group of reviews that form the basis for the Advertiser's ranking are not representative of actual U.S. clear aligner consumers. The Challenger further maintained that in its own dealings with the Advertiser, the Advertiser represented that "a significant payout increase" from SDC to Best Company and "full brand" bidding rights to SDC's most valuable keywords in favor of Best Company would make SDC #1 in the clear aligner category on the Best Company website.

The Advertiser argued it that it collects independent reviews from consumers and that its website does not mislead consumers but instead properly discloses the criteria and weights it uses to rank businesses. To the extent that its rankings give greater weight to verified customer reviews, such reviews are verified to insure they are unbiased, honest, and independent, and are thus more reliable.

A. Discontinued Claims

The Advertiser voluntarily agreed to remove and modify the two videos about SDC and its products and programs. The claims include those stating that SDC "does not accept direct payments from insurance companies" in connection with clear aligner services; "SmileDirectClub doesn't really offer any money back or anything like that, but within thirty days of completing your treatment plan, if you are dissatisfied in any way, then they can match you up with an orthodontist or dentist that will review your results, and if approved, you can get additional aligners at no extra cost to fix anything that went wrong."; a "major distinction" between SDC and Byte is Byte's lifetime guarantee program; and that SDC's clear aligner kit comes with "teeth whitening products" that rely on the clear aligners as carriers, along with the related implied claims that: SDC does not have a guarantee or money back program for its clear aligner services; SDC's refund and guarantee programs are lacking as compared to Byte; SDC's guarantees its services only after treatment has been completed; and SDC and its goods and services are defective (not "solid" because not ranked as highly as Byte on BestCompany.com). Those claims will be treated for compliance purposes as though NAD recommended their discontinuance and the Advertiser agreed to comply.

B. Product Reviews in Advertising

Consumers carefully consider product rankings and consumer reviews when deciding whether to purchase products. Consumer reviews "can inspire trust in a brand or product, and influence consumer confidence and buying habits." However, consumer reviews both online and otherwise, are only as valuable as their authenticity as well as the transparency and accuracy in the means by

which they are gathered and used."[2] Product rankings that appear on independent, third-party websites have a powerful effect on purchasing decisions, and consumers often rely on and trust these sites that appear to offer accurate, unbiased information favoring one product or brand over another.[3]

The Federal Trade Commission ("FTC") has made clear that consumers should know the source of an advertisement in any context because of its impact on the weight and credibility of the content. The FTC's Enforcement Policy Statement on Deceptively Formatted Advertisement, states:

> "[A]dvertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself. Knowing the source of an advertisement or promotional message typically affects the weight or credibility consumers give it. Such knowledge may also influence whether and to what extent consumers choose to interact with content containing a promotional message."[4]

Further, advertisers must disclose whether there is a material connection between themselves and their endorsers. The FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising states:

> "Where there exists a connection between the endorser and the seller of the advertised product that might affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."[5]

NAD has addressed matters involving the disclosures of relationships between advertisers and sellers. For example, in *Amerisleep, LLC (SleepJunkie.org and SavvySleeper.org)*, the challenger, a manufacturer and marketer of mattresses, asserted that two websites appearing to be independent mattress review sites were in fact advertising by Amerisleep, a manufacturer and marketer of competing mattresses. Separate from the sufficiency of the advertiser's disclosure of material connection, however, NAD explained that the content and format of the advertiser's messaging inherently conveyed the message that the sites are independent – not advertising. A disclosure that contradicts a main message of an advertisement cannot cure that misleading message. NAD further elaborated: "…[W]hen such recommendations are made in native advertising that takes the form of a rating and review website, consumers can more easily be misled as to the nature of such

[2] *Pyle Audio, Inc. (NutriChef Vacuum Sealers)*, Report #6265, NAD/CARU Case Reports (August 2019).

[3] *Amerisleep, LLC (SleepJunkie.org and SavvySleeper.org)*, Report #6369, NAD/CARU Case Reports (May 2020).

[4] FTC Enforcement Policy Statement on Deceptively Formatted Advertisements.

[5] Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §255.5.

recommendations. The format of the content itself may convey the message that the recommendations are independent, editorial content."[6]

NAD has also examined how consumers understand ratings or rankings that are built upon consumer reviews.[7] In *TaxSlayer LLC*, claims made by the advertiser for being "number one rated" in the tax preparation software category on Trustpilot's public ranking website were challenged by Trustpilot. By touting its "number one" rating, the advertiser reasonably conveyed to consumers a message not only that Trustpilot rated the advertiser number one, but also that this rating was based on a reliable and representative survey of consumers.[8] NAD then found that Trustpilot's collection of user reviews did not provide reliable evidence to support the challenged claim or the message it conveyed to consumers about the meaning of the #1 rating.[9]

Recently, in *Straight Smile, LLC (Byte)*, NAD reviewed SDC's challenge to advertising for SDC's competitor Byte on BestCompany.com and concluded that Byte has a relationship with Best Company to promote its products.[10] There too SDC alleged that Best Company's ranking of Byte over all other brands conveys the unsupported message that the ranking was based on Best Company's "expert recommendation" and not due to Best Company's undisclosed relationship with Byte. NAD determined that "Consumers understand rankings and recommendations to reflect honest assessments of the products based on the experience or expertise of the reviewer. When the ranking or recommendation is based upon a relationship between the parties and is not based on an honest assessment of the product or products compared, consumers are misled." Specifically with respect to the rankings also at issue in this challenge, NAD concluded that:

> Best Company rankings for the "Invisible Braces" product category are influenced by the material connection between Best Company and the company ranked. For example, the number and recency of reviews as well as whether reviews are from verified purchasers will increase when there is a relationship with Best Company. Companies with a material connection to Best Company will thus get a higher ranking, not based on the experience of consumers with the product, but because the relationship with Best Company will increase metrics that form the basis of the ranking. In fact, according to the Best Company website, only 52% of the ranking is based on consumer reviews and even that ranking is weighed in favor of recent reviews. Additionally, part of the ranking is based specifically on the ranked company's relationship with Best Company, including 5% based on whether the company has claimed their profile on Best

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[6] Similarly, in *Pyle Audio, Inc.*, the advertiser, manufacturer of NutriChef brand vacuum sealers, was alleged to have encouraged consumers to write positive reviews about their experience with NutriChef vacuum sealers in exchange for free product. The challenger argued that this practice is contrary to FTC law and related guidance providing endorsements must reflect the endorser's actual experiences with the products, and that Pyle failed to disclose the material connection created by reviewers' receipt of free product. NAD recommended that Pyle take reasonable measures to disclose the existence of the material connection between Pyle and the reviewers.

[7] *TaxSlayer LLC (TaxSlayer Tax Preparation Software)*, Report #6286, NAD/CARU Case Reports (June 2019).

[8] *Id.*

[9] *Id.*

[10] *Straight Smile, LLC (Byte)*, Report #6998, NAD/CARU Case Reports (November 2021).

Company and another 5% based on whether the company responds to negative reviews on Best Company.[11]

NAD recommended that Byte discontinue advertising its ranking on BestCompany.com or modify the advertising to ensure that consumers clearly understand that Best Company's ranking is advertising for Byte and not an honest review from an independent third party.[12]

As set forth below, NAD reached similar conclusions in this challenge to advertising by Best Company.

C. The Independence and Accuracy of Best Company's Ratings and Rankings

At issue is the Advertiser's message that Best Company is an independent and impartial review site, where consumers can go to examine product reviews, ratings, and rankings in various product and service categories. Specifically, the Best Company website states:

- Rankings on the BestCompany.com website "cannot be bought" or otherwise influenced to "unfairly favor one company over another, not based on merit;"
- Best Company does not have "any relationships with companies that guarantee their ranking or score and we never will:"
- "Best Company never has and never will take payment in exchange for an unmerited rank on BestCompany.com;"
- Best Company's rankings of various companies and their products on BestCompany.com are "honest and unbiased;" and
- Best Company is a "Truly Independent and Impartial Review Site."

The Challenger asserted that these messages are unsupported based on Best Company's relationships with other companies and how they impact scores and ranks on Best Company's website. Additionally challenged is the implied message that "Best Company ranks the clear aligner brand "Byte" over all other brands based on its "expert recommendation" and not due to Best Company's undisclosed true relationship with Byte. The Challenger asserted that these express and implied claims are unsupported based on Best Company's relationships with other companies and how they impact scores and ranks on Best Company's website.

Best Company scoring criteria allocates 52.5% of its score to the "Star Rating of Reviews." Within this portion of the score "Verified Customer Reviews" are given greater weight than other reviews.[13] The next most significant portion of the score, 17.5%, is based upon "Number of Reviews," the total number of reviews that have been published about a company on BestCompany.com. Additionally, "Responsiveness to Reviews" and "Verification of Data" are each 5% of the score and give weight to businesses that confirm their information and respond to reviews on BestCompany.com that are three stars or lower. The Business terms of the relationship

[11] *Id.*

[12] *Id.*

[13] The Advertiser explained that Verified Customer Reviews carry slightly more weight in the ranking system because Best Company confirms that each review was submitted authentically, by a real customer who does not directly associate with the subject business.

between the consumer and the provider comprise 15% of the score, including 5% each for "Recurring Fees," "One-Time-Fees," and "Contract or Warranty Length." Other factors in Best Company's ranking formula include "Brand Search Volume" (2.5%) and "Time in Business" (2.5%).

Best Company provides various services at various price levels to assist companies to obtain and manage reviews on BestCompany.com. Companies that partner with Best Company can use multiple different services. One service Best Company provides to its partners is to conduct a review-generation campaign. In conducting such campaigns, companies, either internally or through their Best Company Business Suite Account, contact current or former customers and invite them to respond with an unbiased review. Partners can also have Best Company solicit customer reviews over the telephone, which the Challenger argued generates significantly more positive feedback in comparison to email reviews. Although users can independently submit reviews, such reviews may not be verified by Best Company.

Best Company's ranking criteria results in a higher score for businesses that have a partnership with Best Company for several reasons. First, a review generation campaign with Best Company will produce more verified reviews that hold more weight in the 52.5% of the score allocated to the "Star Rating of Reviews." If the challenger is correct that phone reviews result in more positive reviews, that too could contribute to a higher score. Additionally, 17.5% of the score is impacted by the number of reviews, a number that will be much higher if a company engages Best Company for review generation. Further, the score takes into account "Responsiveness to Reviews" and "Verification of Data" (5% each). Companies that partner with Best Company are likely to both verify their data on Best Company and respond to reviews, resulting in a higher score.

A significant effect of Best Company's review-generating partnership with certain companies is that it results in more reviews for those companies than others. An independent and impartial ranking of products, even one based on consumer reviews, should be based on reviews that are representative of the universe of consumer reviews for all companies reviewed and ranked.[14] For these reasons, NAD concluded that Best Company did not support the express and implied messages that its website is independent, and impartial.

The Advertiser submitted that its contractual arrangements with companies do not provide any promises of improved or guaranteed rankings. While there was some evidence that the Advertiser represented to SDC that it could improve SDC's ranking on BestCompany.com, or even ensure that SDC would obtain the #1 ranking in the Invisible Braces category, the evidence in this challenge did not demonstrate that Best Company systematically guarantees top rankings to companies in any category, or that it directly ranks in favor of preferred partners. However, as set forth above, the record demonstrated that Best Company's rating criteria is not impartial but biases rankings in favor of preferred partners. From the perspective of the consumer who believes that they are relying on an unbiased ranking system, the ranking is not what it appears to be because preferred partner relationships impact the rank. Thus, while companies may not be able to literally "buy" rankings, the message that Best Company's ranking are independent and free from bias are nonetheless unsupported.

[14] *See TaxSlayer LLC (TaxSlayer Tax Preparation Software)*, Report #6286, NAD/CARU Case Reports (June 2019).

While the Advertiser maintained that its methodology in the Invisible Braces category are adequately disclosed, disclosures, however, cannot contradict the claim they qualify. Here, the rankings expressly and impliedly claim to be independent but the scoring and ranking biases Best Company's partners.[15] A disclosure explaining the ranking methodology cannot cure the express and implied misleading message that the rankings are independent.

The Advertiser stated that it would modify its claim that Best Company is a "Truly Independent and Impartial Review Site" to instead say it has "Truly Independent and Impartial Rankings and Reviews." Although the intent of the modified version may seek to reasonably convey a narrower message about the reviews and rankings themselves apart from the overall nature of the Best Company website, NAD found that the modified version still reasonably conveys an unsupported message that the consumer is viewing a presentation of rankings and reviews that is free from bias and partiality. As set forth below, this message is distinct from a message that each individual review is free from bias and partiality.

Based on the foregoing, NAD recommended that the Advertiser discontinue the express claims:

(i) rankings on the BestCompany.com website "cannot be bought" or otherwise influenced to "unfairly favor one company over another, not based on merit;"
(ii) Best Company does not have "any relationships with companies that guarantee their ranking or score and we never will;"
(iii) "Best Company never has and never will take payment in exchange for an unmerited rank on BestCompany.com.;" and
(iv) that Best Company's rankings of various companies and their products on BestCompany.com are "honest and unbiased";

and the implied claims that:

(i) Best Company does not and never will have any improper relationships with featured companies, and rankings or scores on BestCompany.com cannot be purchased or obtained through a direct relationship;
(ii) that Best Company is not "pay to play;" and
(iii) that Best Company ranks the clear aligner brand "Byte" over all other brands based on its "expert recommendation" and not due to Best Company's undisclosed true relationship with Byte.

NAD further recommended that the Advertiser discontinue the claim that Best Company is a "Truly Independent and Impartial Review Site" as well as the modified claim that Best Company offers "Truly Independent and Impartial Rankings and Reviews."

D. Best Company's Verification of Reviews and Incentivized Reviews

SDC also challenged the Advertiser's express claim "100%," or "all," of the reviews posted on the Best Company website are "verified" and "moderated through a tech-enabled, proprietary, 7-point moderation process to ensure they are real and authentic."

[15] *See, e.g., Amerisleep, LLC (SleepJunkie.org and SavvySleeper.org), supra*.

The Advertiser explained that regardless of how a user submits a review to Best Company, every review must pass its moderation process before it is published on the site to confirm that the review is from a person and not a bot. The process includes an authentication of the reviewer's IP address, other activity by the same reviewer, and publicly available information associated with the reviewer's email address. Best Company also classifies certain reviews as "Verified Customer Reviews." These reviews must pass the initial phase to confirm that the review is from a person and not a bot and also further confirmation that the individual is a paying customer of the reviewed business. This confirmation is made through direct questioning on the phone with the reviewing customer.

NAD considered the messages reasonably conveyed by Best Company's claims regarding how it moderates individual reviews.

In certain advertising, claims regarding Best Company's review verification process appear under the heading "100% Verified." A reasonable takeaway from such advertising is that all reviews posted on BestCompany.com receive the same level of scrutiny. While the Advertiser demonstrated that all reviews go through the initial phase of the moderation process, not all published reviews go through the process to become "Verified Customer Reviews."

The Challenger also noted that some of the reviews published were incentivized reviews for which Byte provided free product in exchange for getting a review. The Challenger argued that the site reasonably conveys the implied message that reviews and testimonials of Byte on BestCompany.com and Byte's webpage reflect independent, honest opinions rather than incentivized endorsements. The Advertiser explained it has a policy of excluding incentivized reviews and that these were a small handful that made it through its moderation process that have now been removed from the site. NAD was satisfied that the Advertiser takes reasonable measures to avoid publishing such reviews from posting such that it may reasonably claim that it has a process to ensure that the posted reviews are "real and authentic." NAD also determined that with such measures the website does not reasonably convey any unsupported implied message that individual reviews are biased due to incentivization. NAD cautioned the Advertiser, however, that any incentivized reviews which might get published should clearly identify material connections provided in exchange for a review. Any ranking or score with incentivized reviews must also include a disclosure that some reviews were provided in exchange for incentives.

Based on the foregoing, NAD determined that the Advertiser has a reasonable basis for the claim that all of reviews posted on BestCompany.com are "moderated through a tech-enabled, proprietary, 7-point moderation process to ensure they are real and authentic." With respect to the claim "100% Verified." NAD recommended that the Advertiser modify its advertising to label only those reviews the reviews that have passed through additional verification, i.e., those it classifies as "Verified Customer Reviews," as "100% verified" and to use the claim exclusively when it has verified that the individual writing the review is a bona fide purchaser of the product.

IV. Conclusion

The Advertiser voluntarily agreed to remove and modify the two videos relating information about SDC and its products and programs. The claims include those stating that SDC "does not accept direct payments from insurance companies" in connection with clear aligner services;

"SmileDirectClub doesn't really offer any money back or anything like that, but within thirty days of completing your treatment plan, if you are dissatisfied in any way, then they can match you up with an orthodontist or dentist that will review your results, and if approved, you can get additional aligners at no extra cost to fix anything that went wrong."; a "major distinction" between SDC and Byte is Byte's lifetime guarantee program; and that SDC's clear aligner kit comes with "teeth whitening products" that rely on the clear aligners as carriers, along with the related implied claims that: SDC does not have a guarantee or money back program for its clear aligner services; SDC's refund and guarantee programs are lacking as compared to Byte; SDC's guarantees its services only after treatment has been completed; and SDC and its goods and services are defective (not "solid" because not ranked as highly as Byte on BestCompany.com). Those claims will be treated for compliance purposes as though NAD recommended their discontinuance and the Advertiser agreed to comply.

NAD recommended that the Advertiser discontinue the express claims that (i) rankings on the BestCompany.com website "cannot be bought" or otherwise influenced to "unfairly favor one company over another, not based on merit;" (ii) Best Company does not have "any relationships with companies that guarantee their ranking or score and we never will;" (iii) "Best Company never has and never will take payment in exchange for an unmerited rank on BestCompany.com.;" and (iv) that Best Company's rankings of various companies and their products on BestCompany.com are "honest and unbiased," and the implied claims that (i) Best Company does not and never will have any improper relationships with featured companies, and rankings or scores on BestCompany.com cannot be purchased or obtained through a direct relationship; (ii) that Best Company is not "pay to play;" and (iii) that Best Company ranks the clear aligner brand "Byte" over all other brands based on its "expert recommendation" and not due to Best Company's undisclosed true relationship with Byte. NAD further recommended that the Advertiser discontinue the claim that Best Company is a "Truly Independent and Impartial Review Site" as well as the modified version that Best Company offers "Truly Independent and Impartial Rankings and Reviews."

NAD determined that the Advertiser has a reasonable basis for the claim that all of reviews posted on BestCompany.com are "moderated through a tech-enabled, proprietary, 7-point moderation process to ensure they are real and authentic."
With respect to the claim "100% Verified." NAD, recommended that the Advertiser modify its advertising to label only those reviews the reviews that have passed through additional verification, i.e., those it classifies as "Verified Customer Reviews," as "100% verified." and to use the claim exclusively when it has verified that the individual writing the review is a bona fide purchaser of the product. NAD also determined that measures to avoid the publication of incentivized reviews, the Best Company website does not reasonably convey any unsupported implied message that individual reviews are biased due to incentivization.

V. Advertiser's Statement

Best Company will comply with the NAD's decision. However, Best Company disagrees with the NAD's views that Best Company cannot advertise itself as a "Truly Independent and Impartial Review Site" simply because Best Company also offers review generation services (both free and paid). The majority of reviews on BestCompany.com are **not** solicited through Best Company's review generation services. And of the small amount of reviews that are solicited by Best

Company, 70% come from Best Company's email review solicitation services, which are completely free to use for any company on BestCompany.com. Less than 8% of the 325,000+ reviews on BestCompany.com come from a Best Company review solicitation service that requires payment. And that payment is only to offset the costs incurred by Best Company to solicit the reviews. Despite these disagreements, Best Company respects the NAD and its role in regulating national advertising and will comply with its recommendations. **(#6999 ELU, closed 01/14/2022)**

National Programs
National Advertising Division

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

In Two Fast-Track SWIFT Cases, NAD Recommends Advertiser Claims be Discontinued in One, and Advertiser Voluntarily Discontinues Claims in the Other

New York, NY – Nov. 10, 2021 – The National Advertising Division (NAD) of BBB National Programs closed two Fast-Track SWIFT cases in October.

- Stokely-Van Camp, manufacturer of Gatorade flavored sports drinks, challenged BA Sports Nutrition's social media posts about the comparative taste of its BodyArmor flavored sports drinks vs. Gatorade's.
- The Procter & Gamble Company (P&G), manufacturer of Old Spice brand deodorant and anti-perspirant products, challenged Art of Sport Group, Inc.'s superiority and disparagement claims in its Instagram videos featuring Old Spice and Art of Sport deodorant canisters "competing" in hurdle and vault competitions.

Fast-Track SWIFT is an expedited NAD process designed for single-issue advertising cases.

Stokely-Van Camp, Inc. v. BA Sports Nutrition, LLC
Stokely-Van Camp brought the challenge to four of BA Sports Nutrition's express claims in social media posts regarding a blind "taste test," appearing on the social media accounts of BodyArmor endorser Baker Mayfield (Cleveland Browns quarterback and former Heisman Trophy winner) and was shared on BodyArmor's social media accounts. NAD recommended that the advertiser discontinue the challenged claims.

The four express claims in the Baker Mayfield taste test video included: (1) Gatorade is "awful"; (2) having to drink Gatorade is "not cool"; (3) Gatorade is nauseating (as depicted via nauseated emoji); and (4) people spit Gatorade out after drinking it.

NAD determined that these claims were appropriate for Fast-Track SWIFT because the issue was limited to the advertiser's alleged disparagement of Gatorade and whether any unsupported messages about Gatorade are reasonably conveyed through express statements and images in the video.

In the "taste test," Mr. Mayfield samples three flavors of BodyArmor, which he is familiar with, and proudly identifies them. After being handed a fourth bottle, which unbeknownst to him contains Gatorade, Mr. Mayfield sips it and immediately exclaims, "Yo, that is not cool. That's awful," while removing his blindfold, spitting out the Gatorade, and shaking his head. As this occurs, the Nauseated Face Emoji and the Face with Tears of Joy Emoji appear together prominently on the screen.

NAD noted that emojis frequently substitute for the written word in contemporary communications and some emojis more clearly communicate feelings or emotions than others. The Nauseated Face Emoji, for example, communicates a clear message that something is gross. The Face with Tears of Joy Emoji is used as a reaction to a joke that one enjoys. NAD concluded that the synchronized appearance of the Nauseated Face Emoji with Mr. Mayfield's reaction conveys a negative message about Gatorade. When the green Nauseated Face Emoji is paired with the Face with Tears of Joy Emoji, the use of emojis in this context expresses Mr.

Mayfield's reaction to a foul, nauseating beverage, after being pranked by his taste test partner.

NAD determined that the advertising makes an expressly disparaging statement that Gatorade is "awful," nauseating, or undrinkable. Because the advertiser did not have any support for the messages about Gatorade, NAD recommended that the advertiser discontinue the express claims made in the video.

In its advertiser's statement, BA Sports Nutrition stated that although it "vehemently disagrees with the NAD's decision, because the post is two months old, BODYARMOR will remove the post from its social media pages."

The Procter & Gamble Company v. Art of Sport Group, Inc.
The challenged claims appeared in video advertisements on the Art of Sport's Instagram page and included:

- "We'd call 'em competition, but it's lonely on this podium."
- ". . . don't flop with ✓✓✓✓. "

Although mooted by the advertiser's permanent discontinuance of the challenged claims, this case was appropriate for Fast-Track SWIFT disposition because the issue of whether the advertiser's superiority and disparagement claims about Old Spice products were supported was not likely to require the review of complex evidence or substantiation.

In response to P&G's SWIFT challenge, the advertiser informed NAD that it had voluntarily taken down both challenged advertisements and affirmed that it would permanently discontinue their use going forward. Because the advertiser did not permanently discontinue the claims until the challenge had been filed, NAD did not review the claims on their merits, but maintained jurisdiction so that it may review the matter for compliance.

Learn more about the NAD Fast-Track SWIFT challenge process and how to file a challenge. All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

NAD Fast-Track SWIFT Case #7047 (10/06/2021)

Parties: BA Sports Nutrition, LLC / Stokely-Van Camp, Inc.
Product: BodyArmor Sports Drink
Product Type: Food/Beverage
Disposition: Modified/Discontinued
Claim: Disparagement Claims

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

STOKELY-VAN CAMP, INC., *Challenger*, BA SPORTS NUTRITION, LLC, *Advertiser*.	Case No. 7047 Closed 10/06/2021

FAST-TRACK SWIFT CASE

- Emojis frequently substitute for the written word in contemporary communications and some Emojis more clearly communicate feelings or emotions than others.

- Exaggerated images and humor can be used to emphasize a message provided, however, that the underlying message is truthful.

Basis of Inquiry: As part of NAD's Fast-Track SWIFT program designed to quickly and efficiently review advertising claims that involve a single well-defined advertising issue, Stokely-Van Camp, Inc. ("SVC" or "Challenger") challenged BA Sports Nutrition, LLC's ("BodyArmor" or "Advertiser") claims in social media posts that (1) Gatorade is "awful"; (2) having to drink Gatorade is "not cool"; (3) Gatorade is nauseating (as depicted via nauseated emoji); and (4) people spit Gatorade out after drinking it.

I. Fast-Track SWIFT Eligibility Determination[1]

NAD thanks the Advertiser for its voluntary participation in the NAD Fast-Track SWIFT process. The Advertiser's BodyArmor flavored sports drinks compete with the Challenger's Gatorade flavored sports drink.

The Challenger alleged that certain social media posts from August 2021 communicated falsely disparaging messages about Gatorade. The posts first appeared on the social media accounts of Baker Mayfield, Cleveland Browns quarterback and former Heisman Trophy winner. Mr. Mayfield is one of many prominent athletes who are BodyArmor endorsers and the video in his original post was shared by BodyArmor's social media accounts shortly thereafter.[2]

The short video at issue begins with the caption "BLIND BODYARMOR TASTE TEST WITH BAKER MAYFIELD [eyes emoji]." Standing on a practice football field dressed in workout attire, Mr. Mayfield engages in a blind "taste test", attempting to identify which of BodyArmor's various flavors he has been handed by an individual who is off-screen. As Mr. Mayfield correctly verbally identifies the first three BodyArmor SuperDrink and BodyArmor Lyte flavors he samples, a green checkmark appears on the screen after each correct answer. He is then handed what is clearly a bottle of Gatorade's Orange Thirst Quencher drink. After taking a sip, a green emoji depicting a face holding back vomit is displayed on the screen (the "Nauseated Face Emoji"), alongside the popular yellow laughing "Face with Tears of Joy Emoji." Mr. Mayfield spits the Gatorade out on to the ground, and says to the camera, "Yo, that is not cool. That's awful," while removing his blindfold and shaking his head. Mr. Mayfield's accounts caption the video with, "I'm not sure I'll ever forgive you for this." As shared by BodyArmor, the video is captioned "C'mon @BakerMayfield, please return our calls! We're very sorry!!! [3 Face with Tears of Joy emojis] #TeamBODYARMOR."[3]

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[1] A challenge is appropriate for determination in SWIFT if it involves a single, well-defined issue such as an express claim that does not require review of complex legal argument or evidence and is capable of resolution within the SWIFT timeline. NAD/NARB Procedures Sec. 1.1(E)(2). NAD has also designated specific categories of cases that it considers for SWIFT: (1) the prominence or sufficiency of disclosures, including disclosure issues in influencer marketing, native advertising, and incentivized reviews; (2) misleading pricing and sales claims; and (3) misleading express claims that do not require review of complex evidence or substantiation such as a review of clinical or technical testing or consumer perception evidence. To ensure that the challenged claim meets this criteria, NAD/NARB Procedures require an initial review by NAD when the SWIFT challenge is first filed and then again in response to an advertiser's objection to the challenge being resolved in SWIFT. NAD/NARB Procedures, Sec. 6.1(C) and 6.2 (A). Further, if it becomes clear at any point during the pendency of a challenge that it is no longer appropriate for SWIFT, NAD will administratively close the case and it may be transferred to standard or complex track. NAD/NARB Procedures 6.2(C).

[2] As of this writing, Baker Mayfield has approximately 1.7 million Instagram followers.

[3] The video was shared on BodyArmor's Twitter, Facebook, Instagram, and TikTok accounts.

The Advertiser objected to the Challenger's request that the matter be heard under the Fast-Track SWIFT process for three reasons. BodyArmor argued that (i) SVC asked NAD to address implied claims, which are not appropriate for resolution under the SWIFT process; (ii) the challenge will require review of complex legal arguments, which are not appropriate for resolution under the SWIFT process; and (iii) the challenge involves more than a single issue, which is not appropriate for resolution under the SWIFT process.

NAD determined that the challenge was appropriate for Fast-Track SWIFT review, concluding that there was a single issue presented relating to intertwined express claims identified by the Challenger. The single issue is the Advertiser's alleged disparagement of Gatorade and whether any unsupported messages about Gatorade are reasonably conveyed through express statements and images in the video.[4] Further, NAD determined that it would not have to review complex evidence or legal arguments as the Advertiser's arguments on whether any messages about Gatorade were non-actionable puffery or Mr. Mayfield's properly expressed personal opinions could be resolved within the Fast-Track SWIFT process.

II. Decision

The Challenger sought review of four express claims in the Baker Mayfield taste test video; (1) Gatorade is "awful"; (2) having to drink Gatorade is "not cool"; (3) Gatorade is nauseating (as depicted via nauseated emoji); and (4) people spit Gatorade out after drinking it. The Challenger argued that the video falsely disparaged Gatorade.

The Advertiser contended that the video is merely a "social media joke" and not truly an advertisement. The Advertiser denied that the video is disparaging because it asserted that it does not advance any claim concerning BodyArmor or Gatorade products, comparative or otherwise. The Advertiser argued that reasonable viewers would understand Mr. Mayfield's verbal statements to be his subjective opinion about being given Gatorade to drink, while blindfolded, instead of a bottle of BodyArmor that he expected. Even if some viewers believe that Mr. Mayfield is in fact stating an opinion about Gatorade, the Advertiser asserted that he is entitled to express that opinion on social media. The Advertiser additionally argued that the

[4] Other examples of challenges with multiple claims or contexts that NAD has determined constituted a single issue were (1) variations of national and local "lowest prices" claim for a grocery store chain (*ALDI, Inc. (Aldi Groceries),* Report #6962, NAD/CARU Case Reports (February 2021); (2) "A better performing bar for sustained energy" claim appearing as a paid result when consumers googled KIND bars or energy bars *(Clif Bar & Co. (Clif Energy Bars)*, Report #6738, NAD/CARU Case Reports (June 2020)); and (3) whether a wireless coverage map truthfully and accurately identified the differences between its 4G and 5G services as the map appeared in several social media contexts *(Verizon Wireless (Verizon 5G Wireless Service*), Report #6910, NAD/CARU Case Reports (December 2020).

emojis and Mr. Mayfield's physical reactions in the video are obvious hyperbole (i.e., puffery) for which viewers do not expect substantiation.

Consumers will likely perceive the playful tone of the video and the social media interactions between BodyArmor and Mr. Mayfield and understand that the "taste test" video has some degree of hyperbole to it. Nevertheless, it is also clear that the video reasonably conveys a message about Gatorade through express statements and imagery.

In the "taste test," Mr. Mayfield samples three flavors of BodyArmor, which he is familiar with, and proudly identifies them. After being handed a fourth bottle, which unbeknownst to him, contains Gatorade, Mr. Mayfield sips it and immediately exclaims, "Yo, that is not cool. That's awful," while removing his blindfold, spitting out the Gatorade, and shaking his head. As this occurs, the Nauseated Face Emoji and the Face with Tears of Joy Emoji appear together prominently on screen. NAD concluded that the express statements that being surprised with Gatorade "is not cool" and "That's awful" are unmistakable negative references to Gatorade. The video's express message that Gatorade is undesirable is emphasized by a context in which Mr. Mayfield reacts physically by spitting out the Gatorade and otherwise conveying his displeasure through body language.

The Advertiser argued that use of emojis is inherently subjective and open to different interpretations as they depict human emotions, thoughts, and actions sometimes in exaggerated forms, and are thus less likely to cause consumers to believe that a literal, factual message is being conveyed. Emojis, however, also frequently substitute for the written word in contemporary communications and some Emojis more clearly communicate feelings or emotions than others. The Nauseated Face Emoji, for example, communicates a clear message that something is gross. The yellow Face with Tears of Joy Emoji is used as a reaction to a joke that one enjoys. In the video, the Nauseated Face Emoji's appearance is synchronized with Mr. Mayfield's reaction and conveys a negative message about Gatorade. When the green Nauseated Face Emoji is paired with the yellow Face with Tears of Joy Emoji the use of emojis in this context expresses Mr. Mayfield's reaction to a foul, nauseating beverage, after being pranked by his taste test partner.

The disparaging message about Gatorade is further reinforced by the fact that the Gatorade Orange Thirst Quencher drink, a well-established Gatorade flavor, is plainly visible and identifiable in the video. Thus, there is no ambiguity about the object of Mr. Mayfield's disgust. It is a harshly negative statement about a specific BodyArmor competitor, characterized as "awful," "uncool," "gross" or "nauseating" (via emoji) and undrinkable.

NAD considered the Advertiser's argument that the video should be construed entirely as puffery. In determining whether or not a claim constitutes puffery, NAD considers several factors including 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 test, or whether the wording uses expressions of opinion that will be discounted by consumers.[5] Specifically, NAD considers whether the challenged advertising "refers to specific attributes which are likely to suggest that a product is comparatively better in some recognizable or measurable way."[6] If the advertisement communicates this message, "even in a humorous way, such message requires substantiation."[7]

In support of its puffery argument, the Advertiser cited *Reynolds Consumer Products (Hefty Slider Bags)*, Report #6105, NAD/CARU Case Reports (August 2017) and *Dollar Shave Club, Inc. (Dollar Shave Club Razors)*, Report #5843, NAD/CARU Case Reports (May 2015), two cases in which NAD concluded that humorous advertisements did not reasonably convey disparaging messages about a competitor's products.

In *Reynolds Consumer Products*, NAD found that a commercial depicting a cashier and a customer wildly throwing around the challenger's plastic bags in a store did not convey a comparative performance message because it was "an attempt by the advertiser to humorously illustrate the cost advantage of purchasing Hefty slider bags and makes no specific mention of product attributes or storage bag performance."[8]

In *Dollar Shave Club*, the advertiser sought to highlight the low prices for its razors. One commercial depicted a man purchasing a competing brand of razor blades being kicked in the groin by the supposed "free gift" that came with the razors. Another commercial features a man buying razors who is then demanded to turn over his money, his grandfather's watch, and all his clothes. NAD found that the commercials were not falsely disparaging because there were "no comparative messages (express or implied) about the performance of competing products."[9] Rather, the commercial "humorously conveys a message about the high prices paid for competing razors in retail stores without criticizing the specific performance benefits that such razors offer."[10]

Reynolds Consumer Products and *Dollar Shave Club* are distinguishable from the present challenge because NAD here found that there is an express message

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[5] See, *French's Food Company (French's Tomato Ketchup and French's Mustard)*, Report #6119, NAD/CARU Case Reports (September 2017).

[6] *Dollar Shave Club, Inc. (Dollar Shave Club Razors)*, Report #5843, NAD/CARU Case Reports (May 2015).

[7] *Id.*

[8] *Reynolds Consumer Products (Hefty Slider Bags), supra*.

[9] *Dollar Shave Club, Inc. (Dollar Shave Club Razors)*, *supra*.

[10] *Id.*

reasonably conveyed about a competing product, Gatorade The fact that the Baker Mayfield video may be humorous does not impact that conclusion.

Also instructive is *Traeger Pellet Grills LLC (Traeger Grills)*, Report #6327, NAD/CARU Case Reports (December 2019), where the express claim at issue also involved the alleged disparagement of a competitor's products. In *Traeger Pellet Grills* a commercial promoting the advertiser's wood pellet-burning grills depicted a scene at barbecue, contrasting their performance with the performance of competing gas grills. The commercial showed party-goers tasting hamburgers cooked off of a gas grill, with looks of disgust on their faces, and stating one after the next that their food "tastes like gas." NAD observed:

> The claim at issue here is an express one—communicated in both language and via the facial expressions of the party-goers—that food cooked on a gas grill…results in food that 'tastes like gas' (or 'tastes like ass') —that is to say that use of propane imparts distasteful flavor to the food. This is an inherently objectively provable claim which requires reliable taste testing as support.[11]

NAD concluded that consumers would reasonably take away the message that gas/propane grills impart an undesirable flavor to cooked food. While the commercial contained several humorous notes, as NAD stated, "No amount of humor, however, can rectify an expressly false claim."[12]

Exaggerated images and humor can be used to emphasize a message provided, however, that the underlying message is truthful. Here the advertising makes an expressly disparaging statement that Gatorade is "awful," nauseating, or undrinkable. Because the Advertiser did not have any support for the messages about Gatorade, NAD recommended that the Advertiser discontinue the express claims made in the video.[13]

III. Conclusion

NAD recommended that the Advertiser discontinue the challenged express claims, that (1) Gatorade is "awful"; (2) having to drink Gatorade is "not cool"; (3) Gatorade is nauseating (as depicted via nauseated emoji); and (4) people spit Gatorade out after drinking it.

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[11] *Id.*

[12] *Id.*

[13] Because NAD determined that the video reasonably conveyed an unsupported disparaging message about Gatorade and not merely Mr. Mayfield's personal opinion, it was not necessary for NAD to reach the question of whether the video included a properly expressed opinion about a product from an endorser.

IV. Advertiser's Statement

The short Baker Mayfield Instagram post was an obvious joke that was not intended to convey any express claims about Gatorade or BodyArmor products. Because SVC stated that the challenged claims were based on "implications," BODYARMOR is disappointed that NAD agreed to review them on the SWIFT fast track schedule. Though BODYARMOR vehemently disagrees with the NAD's decision, because the post is two months old, BODYARMOR will remove the post from its social media pages. **(#7047 ELU, closed 10/06/2021)**

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

Genexa Appeals NAD Recommendation to Discontinue or Modify Pediatrician Preference and Ingredient Claims for OTC Kids' Pain & Fever Medicine

New York, NY – Nov. 14, 2022 – The National Advertising Division (NAD) of BBB National Programs recommended that Genexa Inc. discontinue certain pediatrician preference claims and ingredient claims for its over the counter (OTC) Kids' Pain & Fever medicine. Genexa will appeal NAD's decision.

The challenged claims appeared on the advertiser's website, in social media posts, on physical point-of-sale displays, and in digital video advertising.

The claims were challenged by Johnson & Johnson Consumer, Inc., McNeil Healthcare Division, manufacturer of competing OTC pain and fever medications for children. Both parties' products contain the active ingredient acetaminophen but differ in the formulation of their inactive ingredients.

At issue for NAD was whether the challenged pediatrician preference claims were supported by a survey of pediatricians (the FRC Survey) and whether the challenged ingredient claims, which contrast the advertiser's product with other children's OTC medications including formulations of Johnson & Johnson's Children's TYLENOL Pain + Fever Oral Suspension, were falsely disparaging.

Pediatrician Preference Claims

Johnson & Johnson challenged the following pediatrician preference claims:

- "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients"; and
- "The doctors have spoken."

Stepping into the shoes of a reasonable consumer, NAD found that one message conveyed by the challenged claims is that the pediatricians prefer the advertiser's product and not that such preference is limited to "ingredients." NAD also found that another reasonable consumer message conveyed is that pediatricians recommend the advertiser's product in their own

practices and use it to treat their own children. NAD determined that the advertiser's FRC survey was not a good fit for the challenged claims.

NAD recommended that the claims be discontinued or modified to make clear that the surveyed pediatricians expressed a preference only as to "ingredients." NAD further recommended that the advertiser avoid stating or implying that pediatricians prefer or use the advertiser's product over the challenger's product in their practices or for their own children.

Ingredient Claims

NAD has recognized that there is a distinction between claims that underscore a product's claimed benefit versus claims that state or reasonably imply that other products are unsafe or pose potential risks or dangers.

NAD found that the following challenged claims convey the message to a reasonable consumer that there are ingredients in competitors' products, including Johnson & Johnson's, that are dangerous and unsafe by indicating that the ingredient is in or made from products that would be harmful if ingested.

Because there was no evidence in the record to support claims that the FDA-approved non-active ingredients in competitors' products, including Children's TYLENOL, are harmful or unhealthy, NAD recommended that these claims be discontinued.

NAD also recommended that the advertiser discontinue the "MADE WITH REAL INGREDIENTS" claim in the context presented in the now discontinued video advertisement and avoid conveying the message that competing products with different inactive ingredients are generally unsafe, harmful, or dangerous. NAD noted that nothing in its decision prevents the advertiser from highlighting the "real ingredients" in its product provided, however, that the advertising does not otherwise convey the message that competing products contain inactive ingredients that are generally unsafe, harmful, or dangerous.

NAD determined that several remaining ingredient claims did not constitute mere puffery, but instead compared Genexa's products to competitor's products in a measurable way such that substantiation for the claims is required.

Therefore, NAD recommended that the advertiser discontinue the following claims in the context in which they appear in the challenged advertising:

- "When we looked around the medicine aisle, we found something that made us sick."
- "Your kid's pain medicine shouldn't give you a headache."
- "Things that shouldn't exist, with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine," and "parabens in medicine."

Finally, the advertiser informed NAD that it had previously discontinued the use of four additional claims "EWWW," "SERIOUSLY?!," "JUST WOW . . .." "Ditch the dirty," and "#pediatricianapproved" prior to the date of the challenge. During the challenge, the advertiser advised NAD and the Challenger that it permanently discontinued these claims. Therefore, NAD did not review these claims on the merits.

In its advertiser statement, Genexa stated that it will appeal NAD's decision. The advertiser stated that although it is "pleased that NAD found that the FRC Survey supported an ingredient-based preference claim (e.g. 'Pediatricians prefer the ingredients in Genexa's Kids'

Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children')" and that "nothing in NAD's decision prevents Genexa from highlighting the 'real ingredients' in its product," it "fundamentally disagrees with the balance of NAD's decision," including the recommendations to modify or discontinue the challenged claims.

Appeals of NAD decisions are made to BBB National Programs' National Advertising Review Board (NARB), the appellate-level truth-in-advertising body of BBB National Programs.

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About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Case #7108 (10/27/2022)
Genexa Inc.
OTC Kids' Pain & Fever Medicine
Challenger: *Johnson & Johnson Consumer, Inc., McNeil Healthcare Division*
Product Type: *Drugs / Health / Health Aids*
Issues: *Disparagement Claims; Puffery*
Disposition: *Modified / Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

JOHNSON & JOHNSON CONSUMER, INC.,
MCNEIL HEALTHCARE DIVISION,
Challenger,

GENEXA INC.,
Advertiser.

Case No. 7108
Closed 10/27/2022

FINAL DECISION

- **There is a distinction between claims that underscore a product's claimed benefit versus claims that state or reasonably imply that other products are unsafe or pose potential risks or dangers.**

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger Johnson & Johnson Consumer, Inc., McNeil Healthcare Division ("Johnson & Johnson" or "Challenger") challenged express and implied claims made by Advertiser Genexa inc. ("Genexa" or "Advertiser") for its OTC kids' Pain & Fever medicine. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

Pediatrician Preference Claims

- "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's TYLENOL Pain + Fever liquid products for their own children based upon comparing the ingredients."
- "The doctors have spoken."

The Ingredient Claims[1]

- "When we looked around the medicine aisle, we found something that made us sick."
- "Your kid's pain medicine shouldn't give you a headache."
- Genexa Kids' is "MADE WITH REAL INGREDIENTS" in contrast to competing children's OTC medicines.
- "PARABENS is stuff you'll find in ALL PURPOSE CLEANER. And, for some reason, in kids' fever medicine."
- "Un-Fun Fact: Red dye no. 40 is made from petroleum."
- Propylene Glycol is "ALSO FOUND IN ANTIFREEZE."
- "Things that shouldn't exist," accompanied by a list of OTC medicine ingredients, including "all artificial dyes in medicine" and "parabens in medicine," interspersed with phrases like "showers that make you dirty" and "food that makes you hungry."

B. Implied Claims

- Pediatricians recommend Genexa Kids' in their daily practice.
- Pediatricians use Genexa Kids' to treat their own children's fevers and headaches.
- Children's TYLENOL and other competing OTC medicines contain inactive ingredients that are harmful for human consumption and for children.

II. Evidence Presented

The Advertiser submitted a survey by FRC, A Lieberman Company that was commissioned by the Advertiser to determine pediatricians' preference between Genexa Kids' Pain & Fever and Children's Tylenol Pain + Fever Oral Suspension for their own 2-11 year old children's pain or fever, based solely on their ingredients (the "FRC Survey").[2] The Advertiser also submitted a 2019 study conducted by research teams from Harvard and the Massachusetts Institute of Technology[3] regarding the amount of inactive ingredients in OTC medicines and sub-populations that have sensitivities to these commonly used artificial inactive ingredients i.e., artificial fillers. The Advertiser also submitted results from a study published by a team at the University of Queensland that it alleged showed that commonly used artificial sweeteners can contribute to increased antibiotic tolerance.[4]

The Challenger submitted copies of advertising depicting the challenged claims in various mediums and locations. In addition, the Challenger submitted copies of correspondence between the parties reflecting their respective positions regarding the challenged claims and certain efforts to resolve the dispute between the parties. The Challenger also submitted a copy of the FRC Survey.

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[1] The Advertiser informed NAD that it had previously discontinued the use of four additional claims: "EWWW", "SERIOUSLY?!", and "JUST WOW...", "Ditch the dirty" and "#pediatricianapproved" prior to the date of the challenge. During the pendency of the challenge, the Advertiser advised NAD and the Challenger that it permanently discontinued these claims.

[2] FRC, *A Survey to Determine Pediatricians' Preference Between Genexa Kids' Pain & Fever and Children's Tylenol Pain + Fever Oral Suspension for Their Own 2-11 Year Old Children's Pain or Fever, Based Solely on Their Ingredients*, (May 24, 2021).

[3] Reker et al., *"Inactive" Ingredients in Oral Medications*, Science Translational Medicine 11 eaau6753 (2019).

[4] Yu and Guo, *Non-caloric artificial sweeteners exhibit antimicrobial activity against bacteria and promote bacterial evolution of antibiotic tolerance*, Journal of Hazardous Materials 433 (2022) 128840.

The Challenger also submitted the results of a recurring ProVoice survey fielded by IQVIA regarding pediatricians' average weekly recommendations for children's fever and pain reducing products.

III. Decision

The parties are competing manufacturers of over-the-counter ("OTC") pain and fever medication for children. Both the Advertiser's and the Challenger's products contain the same active ingredient: acetaminophen. The parties' respective products differ in the formulation of their inactive ingredients.

The express claims at issue in this challenge include the Pediatrician Preference Claims that "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's TYLENOL Pain + Fever liquid products for their own children based upon comparing the ingredients" and "The doctors have spoken." Also at issue in this challenge are the Ingredient Claims which contrast the Advertiser's product with other OTC medications including formulations of the Challenger's Children's TYLENOL® Pain + Fever Oral Suspension ("Children's TYLENOL"). The claims appeared in various locations including the Advertiser's website, in social media posts, in a video advertisement, on physical point-of-sale display, and in digital video advertising.

A. The Pediatrician Preference Claims

Johnson & Johnson challenged several express and implied pediatrician preference claims. The Advertiser argued that the claims "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients" and "the doctors have spoken" are supported by the FRC Survey. Specifically, the Advertiser maintained that the Pediatrician Preference Claims are literally true and that the pediatricians surveyed by FRC preferred Genexa Kids' Pain & Fever over Children's TYLENOL for their own children based upon comparing the ingredients.

The Advertiser argued that NAD considers the following criteria: "1) the proper universe must be examined; 2) a representative sample must be chosen; 3) persons conducting the survey must be experts; 4) data must be properly gathered and accurately reported; 5) sample design, questionnaires and manner of interviewing meet the standards of objective surveying and statistical techniques; 6) survey must be conducted independently of the attorneys involved in the litigation (if applicable); 7) interviewers or sample designers should be trained and unaware of the purposes of the survey or litigation; and 8) respondents should be similarly unaware."[5] The Advertiser argued that the FRC Survey is methodologically valid, the results are statistically significant, and that the challenged claims are narrowly tailored to reflect the exact question put to the pediatrician-respondents.[6]

The Advertiser commissioned the FRC Survey to determine pediatricians' preferences between its Kids' Pain & Fever and Children's TYLENOL based on a comparison of their ingredients. The survey was designed and implemented by FRC, A Lieberman Company under the supervision of Linda

[5] *InterHealth Nutraceuticals, Inc. (Zychrome Dietary Supplement)*, NAD Case Reports, Case #5569, at 24 (Apr. 2013).

[6] The Advertiser noted that Johnson & Johnson did not challenge the actual results of the FRC Survey.

Waldman. The Advertiser contended that Ms. Waldman has specific expertise in advertising and claims substantiation research.[7]

The FRC Survey was a double-blind survey that used a questionnaire with screening questions followed by questions pertinent to the objectives of the survey and was conducted online using a national sample of 301 pediatricians with one or more children ages 2–11 living in their homes, at least one of whom had experienced pain or fever. The pediatricians surveyed had to either have used or would consider using an OTC acetaminophen remedy to relieve their children's pain or reduce their fever.[8]

After completing the screening questions to ensure that they met the survey requirements, participating pediatricians were shown images of the front of the package and the list of active and inactive ingredients for Genexa Kids' Pain & Fever and five flavor offerings of Children's TYLENOL. The six products were presented in random order to avoid the possibility of bias created by the order in which the products were presented. The Advertiser noted that the images of the packages were copied from the websites of various online vendors of each product, and the list of ingredients for each product were copied from their respective product websites.

The participating pediatricians then proceeded to the next screen where they were asked the following:

> Now, basing your decision **ONLY** on your review of the **ingredients** in each product, which one of these products, if any, would you prefer to give to your own children ages 2-11 to relieve their pain or reduce their fever? **Again, please make sure your decision is based SOLELY upon the ingredients contained in the products.**
>
> Please scroll down the entire screen again and **select one response**.

The same six packages and ingredient lists for Genexa Kids' Pain & Fever and five different flavors of Children's TYLENOL were presented to the participating pediatricians and they were asked to select which product they would prefer to give their children and were told that they could answer that they would choose none of the products or that they were not sure.[9] The Advertiser maintained that the FRC Survey results established that pediatricians prefer Genexa Kids' Pain & Fever over Children's TYLENOL by 68.1% to 26.3% based on a review of the products' ingredients and that the results were at a 95% confidence level, which is widely accepted by statisticians, researchers, and marketers as reliable for this type of survey.[10] In addition, the Advertiser argued that the results of the FRC Survey

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[7] The Advertiser maintained that Ms. Waldman is an industry leader with over 40 years of experience in the field of marketing research, during which time she has been involved in thousands of studies covering a broad range of consumer and business-to-business issues.

[8] The FRC Survey's sample of pediatricians was sourced from two major providers of healthcare professional samples, Survey Healthcare Globus and Sermo, which the Advertiser maintained together include approximately 67,000 U.S. pediatricians who opted to complete market research surveys online.

[9] The five flavors of Children's Tylenol presented were the Grape, Bubblegum, and Strawberry flavors, as well as both the standard and "dye-free" versions of the Cherry flavor.

[10] The Advertiser contended that the error range around the percentages was plus or minus 5.4 percentage points and, thus, if all 5.4 percentage points were subtracted from Genexa Kids' Pain & Fever and added to Children's Tylenol, then results would show 62.7% preferring Genexa Kids' Pain & Fever and 31.7% preferring Children's Tylenol overall, leaving an overwhelming percentage still favoring Genexa.

that the "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients" is clearly conveyed by the claim itself.

The Challenger argued that the Advertiser fails to meet its burden of providing reliable substantiation for all reasonable interpretations of the Pediatrician Preference Claims and, thus, they should be discontinued.

Specifically, the Challenger maintained that the Pediatrician Preference Claims reasonably communicates that pediatricians "recommend" or "prefer" the product Genexa Kids' over Children's TYLENOL, which "require[s] reliable evidence in the form of well-conducted physician survey which base conclusions on their actual practice."[11] The Challenger also argued that the "doctors prefer" its product over Children's TYLENOL claim conveys a doctor recommended message and that NAD has characterized the phrase "doctor recommended" as an example of "claims concerning the preferences of medical professionals" more generally. *Rexall Sundown, Inc.*, NAD Case Report No. 4692, at 4.[12] The Challenger also argued that NAD precedent does not hold that the word "recommended" must be explicitly included in a doctor recommended claim and that the absence of the word "recommended" does not absolve the Advertiser of its responsibility to support all reasonable interpretations of the Pediatrician Claim.[13] The Challenger also argued that because claims concerning the preferences of medical professionals "connote the actual exercise of doctors' professional judgment in their current daily practice . . . [i]t is well established that evidence of actual practice is necessary to support such claims."[14]

Further, the Challenger argued that the FRC Survey did not probe pediatricians' actual practice and its results are based solely on a comparison of the ingredients listed in the surveyed products' labels and that the FRC Survey did not allow pediatricians to review the products in their entirety or to rely on any other factors, such as brand reputation or whether the taste was palatable to children.[15] Therefore, the Challenger argued, the FRC Study does not support the challenged claims.

NAD noted that neither party provided consumer perception evidence and, therefore, NAD stepped into the role of the consumer to determine what reasonable messages were conveyed by the net

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[11] *Capillus, Inc. (Capillus 82)*, NAD Case Report No. 6107, at 10 (Aug. 18, 2017) (recommending discontinuing "the 'preferred choice of doctors worldwide' portion of the claim" used in advertising for laser comb devices).

[12] *InterHealth Nutraceuticals, Inc. (Zychrome Dietary Supplement),* NAD Case Report No. 5569, at 24 (Apr. 8, 2013) ("NAD determined that the advertiser's claim that diabetes educators prefer Zychrome is tantamount to a 'doctor recommended' (or 'endorsed' or 'preference' claim).") (emphasis added).

[13] *Bayer Corp. (Aleve)*, NAD Case Report No. 4126 (Dec. 16, 2003).

[14] *Johnson & Johnson (Johnson's Bedtime Bath)*, NAD Case Report No. 3692 (Sept. 1, 2000).

[15] The Advertiser also argued that The Pediatrician Claim reasonably communicates the unsupported message that surveyed pediatricians actually use Genexa Kids' to treat their own children's headaches and fevers. According to the Challenger, if the Advertiser were telling customers only that pediatricians prefer the ingredients contained in Genexa Kids', there would be no need for the phrase "for their own children" and no reason to limit the survey population to pediatricians who have children between the ages of 2-11 living in their homes, as opposed to pediatricians generally. The Challenger stressed that in the Advertiser's video the voiceover emphasizes the phrase "for their own children" and that the messaging is reinforced in other executions with the phrase, "PEDIATRICIANS ARE PARENTS TOO!"

impression of the advertising.[16] Advertisers must provide a reasonable basis for all the messages reasonably conveyed by their claims, whether they intended those messages or not.[17] In evaluating the messages reasonably conveyed by an advertisement, NAD reviews the overall net impression created by the advertisement, taking into consideration both the words and the visual images as a whole.[18] NAD will identify the messages reasonably conveyed to consumers by the challenged claims, examine the reliability of the evidence submitted in support of the challenged claims, and if reliable, determine whether the evidence is a good fit for the reasonably conveyed messages.[19] The strength of the messages drive the level of support required to support the claim.

NAD found that one reasonable message conveyed by the challenged claims is that the pediatricians surveyed prefer the Advertiser's product to the Challenger's products and not only the limited message that the surveyed pediatricians prefer the "ingredients" in the Advertiser's product to the Challenger's products.

NAD also found that another reasonable message conveyed by the Pediatrician Preference Claims is that the surveyed pediatricians recommend the Advertiser's product in their own practices and use it to treat their own children.[20] These takeaways are reinforced by the wording of the challenged claim itself. The claim states that pediatricians prefer the Advertiser's product over the Challenger's "liquid products for their own children" before clarifying that such preference is "based upon comparing the ingredients." The claim, as phrased, states that pediatricians prefer the product and, as a result, reasonably implies both that the pediatricians prefer the Advertiser's product and that the product is recommended and used to treat their own children. The message is further underscored in certain iterations of the challenged claims including on an in-store installation that begins with "The doctors have spoken" and concludes with the words "Pediatricians Are Parents Too!"[21] In another iteration of the claim that appeared in a video advertisement, the words "Pediatricians prefer Genexa over Children's Tylenol for their own children" appears on screen in large font for 4-5 seconds while a voiceover stresses the phrase "for their own children" before the words "after comparing their ingredients" appears briefly on the next screen.

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[16] *Nature's Way Brands, LLC (Alive! Multivitamins)*, Report #5739, *NAD/CARU Case Reports* (July 2014); *Alde Associates, LLC (daniPro Nail Polish)*, Report #5565, *NAD/CARU Case Reports* (March 2013).

[17] *Mars Petcare US (PEDIGREE® DENTASTIX® Chews)*, Report #5707, *NAD/CARU Case Reports* (April 2014).

[18] *The Gillette Company (Venus & Olay Razor)*, Report #5547, *NAD/CARU Case Reports* (January 2013).

[19] *Creekside Natural Therapeutics, LLC (Focused Mind Jr. Dietary Supplement)*, Report #6334, *NAD/CARU Case Reports* (December 2019). In addition, the strength of the messages drive the level of support required to support the claim. *Mommy's Bliss Inc. (Cough Syrups and Probiotic Drops)*, Report #6257, NAD/CARU Case Reports (March 2019).

[20] NAD notes that it has long held that "physician recommended" claims carry a great deal of weight with consumers and, consequently, must be supported by well-constructed physician surveys in which doctors base their conclusions on their actual experience and what they actually recommend in their practices. *Guardian Technologies, LLC (GermGuardian Air Purifiers and Replacement Filters)*, Report #6151, NAD/CARU Case Reports (January 2018); *Unilever (Promise® Brand Soft Spreads)*, NAD Case Report No. 4958, at 6 (Jan. 16, 2009).

[21] NAD agreed with the Challenger that the words "Pediatricians Are Parents Too!" reasonably implies that the preference claim is probative of what such pediatricians prefer or would use for their own children in their role as parents.

NAD next examined whether the FRC Survey provided support for the challenged claims. NAD determined that the FRC Survey was not a good fit for the challenged claims because the FRC Survey's question and the challenged claims differ in subtle but material respects. Specifically, while the FRC Survey question and instructions begin and conclude with clear guidance that the FRC Survey is probing the "ingredient" preferences of survey participants,[22] the challenged claim expressly states that pediatricians prefer Genexa's Kids' Pain & Fever over Children's TYLENOL "products for their own children" before clarifying that such preference is "based upon comparing the ingredients." Accordingly, NAD recommended that the Advertiser discontinue the claim "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients" or modify it to make clear that the surveyed pediatricians expressed a preference solely as to "ingredients"[23] as expressly noted in the FRC Survey instructions.[24]

The FRC Survey did not test what pediatricians prefer or recommend in either their practices or for treatment of their own children's pain and fever. Accordingly, NAD recommended that the Advertiser discontinue the claims "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients" and "the doctors have spoken" or modify them to make clear that the surveyed pediatricians expressed a preference solely based upon the ingredients contained in the products. NAD further recommended that the Advertiser avoid stating or implying, in the absence of supporting evidence, that pediatricians prefer or use the Advertiser's product over the Challenger's products in their practices or for their own children.

B. The Ingredient Claims

The Challenger argued that the Advertiser makes false and disparaging claims about the Challenger's products as compared to the Advertiser's own product based on their respective non-active ingredients (the "Ingredient Claims"). While recognizing an advertiser's right to promote a product benefit or distinction offered by its product as compared to a competitor, the Challenger maintained that the Advertiser's Ingredient Claims run afoul of NAD precedent.[25] The Challenger maintained that Genexa's Ingredient Claims compare ingredients between Genexa Kids' and Children's TYLENOL and other OTC medicines in a misleading context and does so "in a way that instills unnecessary fears

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[22] "Now, basing your decision **ONLY** on your review of the **ingredients** in each product, which one of these products, if any, would you prefer to give to your own children ages 2-11 to relieve their pain or reduce their fever? **Again, please make sure your decision is based SOLELY upon the ingredients contained in the products.**"

[23] NAD has previously recognized the distinction between product recommendations and ingredient recommendation. *Sanofi Consumer Healthcare (Zantac 360)*, Report #7088, *NAD/CARU Case Reports* (June 2022).

[24] The FRC Survey states: **"Again, please make sure your decision is based SOLELY upon the ingredients contained in the products."**

[25] *Dyson B2B, Inc. (Airblade™ Hand Dryer)*, NAD Case Report No. 6022, at 25 (Nov. 9, 2016) (noting that "a delicate line sometimes exists between an advertiser's right to tout the benefits of its own products and, at the same time, not to unfairly or inaccurately disparage a competitor's products." *ACH Food Companies, Inc. (Mazola Pure Cooking Spray)*, NAD Case Report No. 4539, at 25 (Aug. 7, 2006) (citing *Calip Dairies, Inc. (T & W Royal Ice Cream)*, NAD Case Report No. 2938, at 1 (Mar. 1, 1992)).

about products that contain those ingredients."[26] The Challenger further argued that the Advertiser's Ingredient Claims are particularly improper given Children's TYLENOL is an established OTC monograph product, including inactive ingredients generally recognized as safe and thus considered lawfully marketed by the FDA.[27]

In addition, the Challenger argued that the Advertiser's Ingredient Claims conveyed the same misleading messages regarding "dirty" ingredients as the Discontinued Claims. The Challenger further argued that while the Advertiser maintains that its advertising is meant to be lighthearted or humorous, it does not relieve an advertiser of its obligation to support all reasonable interpretations of its claims and that by combining humor with disparagement, Genexa underscores the implied message that other products contain unhealthy or unwholesome ingredients.[28]

The Advertiser countered that certain of the Ingredient Claims are true, meaningful to consumers, key to its product mission, and do not falsely disparage other products. Specifically, the Advertiser contended that four of the Ingredient Claims are literally true and based solely on the ingredients of the products at issue: (1) that Genexa Kids' is "MADE WITH REAL INGREDIENTS"; (2) that "PARABENS is stuff you'll find in ALL PURPOSE CLEANER. And, for some reason, in kids' fever medicine"; (3) "Un-Fun Fact: Red dye no. 40 is made from petroleum"; and (4) that Propylene Glycol is "ALSO FOUND IN ANTIFREEZE."[29] The Advertiser maintained that these Ingredient Claims highlight the Advertiser's use of natural inactive ingredients which is how it distinguishes its products from its competitors and are important to inform consumers about what makes Genexa different from the traditional branded and generic OTC medicines, which according to the Advertiser, is that it offers consumers efficacious medicine with no unnecessary artificial ingredients or fillers.

The Advertiser further argued that its "real ingredients" claim flags for consumers that its product is made with natural, non-artificial inactive ingredients, which is a core distinguishing aspect of its product line and brand identity.[30] It argued that advertisers are allowed to tout their use of natural

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[26] *Better Life (All Purpose Cleaner)*, NAD Case Report No. 6090, at 20 (June 14, 2017).

[27] The Challenger cited to NAD precedent such as *LALA-USA, Inc. (La Crème Real Dairy Creamer)*, NAD Case Report No. 5359, at 22 (Aug. 08, 2011) (NAD agreed it was appropriate to discontinue claim that "highlight[s] ingredients that have been approved for use in foods by the FDA . . . in a way that instills unnecessary fears about consuming products that contain [those] ingredients"); and *ACH Food Companies, Inc.*, NAD Case Report No. 4539 at 24, 28 (claim reasonably conveyed falsely disparaging message that competing products contained "harmful, unhealthy or unwholesome ingredients" that were "approved as safe for human consumption by the FDA").

The Challenger further argued that, for example, propylene glycol is included on the FDA's list of Generally Recognized as Safe ("GRAS") substances, and red dye no. 40 is included in the agency's Inactive Ingredient Database.

[28] *ACH Food Companies, Inc.*, NAD Case Report No. 4539, at 26 (citing *Sanderson Farms*, NAD Case Report No. 4289)

[29] The Advertiser also contended that three of the Ingredient Claims are consumer-friendly puffery: (1) "When we looked around the medicine aisle, we found something that made us sick"; (2) "Your kid's pain medicine shouldn't give you a headache"; and (3) "Things that shouldn't exist," with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine" and "parabens in medicine."

[30] The Advertiser cited to NAD precedent such as *Beech-Nut Nutrition Company (Beech-Nut Baby Foods)*, NAD Case Reports, Case #6070, at 16–17 (Apr. 2017) (allowing the advertiser's claim that its product was made with

ingredients as compared to artificial ingredients used in competing products as long as these claims are true. The Advertiser analogized the claims in this Challenge to those in *ConAgra Foods, Inc. (Hebrew National Beef Franks)*, NAD Case Reports, Case #4581, at 6 (Oct. 2006), where NAD concluded that claims comparing the advertiser's ingredients to lower-quality competitor ingredients and a claim that the advertiser's products "contain[ed] no fillers or by-products" were "truthful and not misleading" and did not convey the implied message that the advertiser's product was "more nutritious or healthier" than competing products. Genexa maintained that its claims follow the same formula as those in *ConAgra Foods* in that they provide truthful information about the artificial inactive ingredients used in competing products in conjunction with information about Genexa's ingredients to highlight Genexa's natural inactive ingredients without fearmongering or portraying competitor's products as dangerous.[31]

Here, the record is devoid of consumer perception evidence and, therefore, NAD stepped into the role of the consumer to determine what reasonable messages were conveyed by the net impression of the advertising.[32] Advertisers must provide a reasonable basis for all the messages reasonably conveyed by their claims, whether they intended those messages or not.[33] In evaluating the messages reasonably conveyed by an advertisement, NAD reviews the overall net impression created by the advertisement, taking into consideration both the words and the visual images as a whole.[34] Active visual depictions through the style and manner in which they are shown can reinforce implied or express messages.[35]

With these standards in mind, NAD considered the Ingredient Claims. There is a distinction between claims that underscore a product's claimed benefit versus claims that state or reasonably imply that other products are unsafe or pose potential risks or dangers.[36] Here, NAD concluded that certain of the Ingredient Claims convey the message that other products are unsafe or pose potential risks or dangers.

NAD found that the claims that "PARABENS is stuff you'll find in ALL PURPOSE CLEANER. And, for some reason, in kids' fever medicine," "Un-Fun Fact: Red dye no. 40 is made from petroleum," and that Propylene Glycol is "ALSO FOUND IN ANTIFREEZE" each reasonably convey the message that there are ingredients in competitors' products, including the Challenger's, that are dangerous or

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"real whole fruits and vegetables" to continue) and *Insurgent Brands LLC, a division of the Kellogg Company (RXBAR Protein Bars)*, NAD Case Reports, Case #6324, at 18 (Dec. 2019) (allowing for the continuation of a claim stating "No B.S." in reference to the ingredients in the advertiser's product advertiser's explanation that it uses no artificial ingredients and that the bars contained relatively few ingredients as compared to the nutrition bar/protein bar market).

[31] In this regard, the Advertiser maintained that the claims at issue here were distinguishable from those at issue in *LALA-USA, Inc. (La Crème Real Dairy Creamer)*, NAD Case Reports, Case #5359 (Aug. 2011).

[32] *Nature's Way Brands, LLC (Alive! Multivitamins)*, Report #5739, *NAD/CARU Case Reports* (July 2014); *Alde Associates, LLC (daniPro Nail Polish)*, Report #5565, *NAD/CARU Case Reports* (March 2013).

[33] *Mars Petcare US (PEDIGREE® DENTASTIX® Chews)*, Report #5707, *NAD/CARU Case Reports* (April 2014).

[34] *The Gillette Company (Venus & Olay Razor)*, Report #5547, *NAD/CARU Case Reports* (January 2013).

[35] *Dr. Pepper Seven Up, Inc. (7-Up Plus with Calcium)*, Report #4446, *NAD/CARU Case Reports* (January 2006).

[36] *WaterWipes UC (WaterWipes Line of Baby Wipe Products)*, Report #7086, *NAD/CARU Case Reports* (July 2022).

unsafe.[37] The claims call out ingredients and indicate that the ingredient is in or made from products that would be harmful if ingested.

Accordingly, NAD disagreed with the Advertiser's contention that these claims followed the formula of the claims at issue in *ConAgra Foods, Inc. (Hebrew National Beef Franks)*, in that they only provide truthful information about the artificial inactive ingredients used in competing products without portraying competitor's products as dangerous. Rather, NAD agreed with the Challenger's argument that these Ingredient Claims are more analogous to those at issue in *LALA-USA, Inc. (La Crème Real Dairy Creamer)* and *ACH Food Companies, Inc.* because the claims convey a message that reasonably instills fear about consuming products that contain these ingredients and convey the message that the FDA-approved ingredients in the Challenger's products are harmful or unhealthy. There is no evidence in the record to support claims that the FDA approved non-active ingredients in competitors' products, including Children's TYLENOL, are harmful or unhealthy.[38] Accordingly, NAD recommended that these Ingredient Claims be discontinued.

1. The "MADE WITH REAL INGREDIENTS" Claim

With respect to the Ingredient Claim "MADE WITH REAL INGREDIENTS," the Advertiser argued that the Challenger would have NAD improperly restrict its right to advertise a feature that is its brand ethos i.e. that its product is made with all-natural, or "real" non-active ingredients. Genexa maintained that its "real ingredients" claim highlights for consumers that its product is made with natural, non-artificial inactive ingredients, which is a core distinguishing aspect of its product line.[39] The Advertiser further maintained that the "made with real ingredients" claim in the challenged digital video advertisement includes the words "MADE WITH REAL INGREDIENTS" with an arrow pointing to a drawing of a Genexa-branded bottle which it argued is not disparaging or fearmongering.

For its part, the Challenger argued that Genexa's right to advertise "that its product is made with natural, non-artificial inactive ingredients" does not give it license to falsely disparage Children's TYLENOL. Specifically, the Challenger maintained that it does not dispute Genexa's right to advertise that its product is "made with real ingredients." Rather, the Challenger argued that the Advertiser has crossed the line because it falsely disparages its competitors, including Children's TYLENOL.

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[37] An infant given such products would consume ingredients parents instinctually would know to be poisonous to their children i.e. "ALL PURPOSE CLEANER," "petroleum" and "ANTIFREEZE."

[38] While the Advertiser maintained that it claims do not imply that competitors' ingredients are harmful for human consumption, it also stated that it "does not agree that the ingredients in Tylenol's medicines are not harmful" and cited to, among other items, a study that identifies adverse reactions triggered by inactive ingredients in medications, including lactose and artificial dyes. The Advertiser also noted that other countries have implemented regulations to ensure that consumers are informed about the potential harmful effects of certain artificial ingredients. While the research submitted by the Advertiser may shed light on possible reactions triggered by inactive ingredients including among certain populations with certain allergies such as lactose or gluten, there is no evidence in the record to suggest that the FDA approved non-active ingredients in competitors' products, including Children's TYLENOL, are harmful or unhealthy to the general population.

[39] Citing NAD precedent, the Advertiser maintained that its "MADE WITH REAL INGREDIENTS" claim was similar to the claims at issue in case such as *Beech-Nut Nutrition Company (Beech-Nut Baby Foods)*, NAD Case Reports, Case #6070, at 16–17 (Apr. 2017), *Insurgent Brands LLC, a division of the Kellogg Company (RXBAR Protein Bars)*, NAD Case Reports, Case #6324, at 18 (Dec. 2019), *ConAgra Foods, Inc. (Hebrew National Beef Franks)*, NAD Case Reports, Case #4581, at 6 (Oct. 2006).

Here, the "made with real ingredients" claim is made in a now discontinued video advertisement and the words "MADE WITH REAL INGREDIENTS" appear onscreen with an arrow pointing to a drawing of a Genexa-branded bottle while the words "Your kids medicine shouldn't give *you* a headache." appears on screen. The Genexa-branded bottle then appears on screen alongside a bottle labeled "THE OTHER GUYS" while a voiceover states that Genexa's product has the "same active ingredients kids need but without the artificial dyes, flavors, preservatives, and… whatever this is." During the voiceover, the Genexa-branded bottle is depicted knocking over "THE OTHER GUYS" bottle which then proceeds to roll past imagery of ingredients depicted in a laboratory setting labelled "EWWW," "Seriously?!" and, ultimately, past a smoking beaker with the words "JUST WOW" on screen and an arrow pointed at the beaker.

In the context in which the "MADE WITH REAL INGREDIENTS" claim appears in the challenged video, NAD determined that one reasonable message conveyed is that competitors' formulations contain ingredients that are dangerous, harmful, or unsafe.[40] This interpretation is reinforced by both the words of the voiceover as well as the accompanying imagery which convey the message that products with different inactive ingredients are unsafe, harmful, or dangerous. There is no evidence in the record to support the claim that the ingredients in competitors' products are unsafe, harmful, or dangerous. Accordingly, NAD recommended that the Advertiser discontinue the "MADE WITH REAL INGREDIENTS" claim in the context presented in the challenged video advertisement and avoid conveying the message that competing products with different inactive ingredients are generally unsafe, harmful, or dangerous. Nothing in this decision prevents the advertiser from highlighting the "real ingredients" in its product provided, however, the advertising does not otherwise convey the message that competing products contain inactive ingredients that are generally unsafe, harmful or dangerous.

2. The Remaining Ingredient Claims

The Advertiser argued that the remaining Ingredient Claims were merely consumer-friendly puffery,[41] because they do not link to specific attributes of competing OTC medicines but instead provide humorous context highlighting Genexa's founding story and company ethos.

According to the Advertiser, the three challenged claims are merely hyperbolic and do not compare Genexa's products to competitors' products in a measurable way. Instead, the Advertiser maintained that these claims are funny representations of the metaphorical "pain" and discomfort that come from not having access to Genexa's product, as well as sardonic depictions of Genexa's origin story and promise to not have artificial fillers in its products, which the Advertiser argued are allowable puffery under NAD precedent.

The Advertiser argued that the claim that "when we looked around the medicine aisle, we found something that made us sick" expresses a key aspect of the founders' story in that it conveys their discomfort with the established branded and generic OTC medicines, which is what drove them to

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[40] *WaterWipes UC (WaterWipes Line of Baby Wipe Products)*, Report #7086, *NAD/CARU Case Reports* (July 2022).

[41] The Ingredient Claims that the Advertiser maintained are merely puffery are: (1) "When we looked around the medicine aisle, we found something that made us sick"; (2) "Your kid's pain medicine shouldn't give you a headache"; and (3) "Things that shouldn't exist," with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine" and "parabens in medicine,").

found Genexa. According to the Advertiser, the founders' expression of why they started the company is not a claim about their products that can be proved or disproved, nor is it tied to specific attributes of their products. Similarly, the Advertiser maintained that the claim that "your kid's pain medicine shouldn't give you a headache" is directed to parents and expresses the notion that having to review OTC labels to decipher ingredients in their children's medicine can be taxing.[42] Likewise, the Advertiser argued that the claim "Things that shouldn't exist," with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine" and "parabens in medicine,"), is merely a sardonic depiction of Genexa's vow not to have artificial fillers in its products and that the list of items represents a metaphorical depiction of Genexa's feelings towards using artificial fillers in its products, and that such claims are merely fanciful. According to Genexa, it is entitled to advertise its strong aversion to artificial fillers which is at the core of its company mission.

The Challenger argued that these claims are not puffery and refer to specific attributes which are likely to suggest that the Advertiser's product is comparatively better in some recognizable or measurable way — namely, the relative safety of its inactive ingredients. While the Advertiser argued that its claim listing inactive ingredients that "shouldn't exist" mixed in with humorous examples is merely puffery, the Challenger argued that humor cannot excuse a falsely disparaging message.[43]

With respect to the claim "when we looked around the medicine cabinet, we found something that made us sick," the Challenger argued that Genexa concedes a link to specific attributes of competing OTC medicines and communicates the message that Genexa's product is comparatively better in a recognizable or measurable way because it conveys Genexa's founders' discomfort with the use of artificial fillers that are in branded and generic OTC medicines. According to the Challenger, based upon Genexa's founders' reaction of disgust, it is reasonable for consumers to take away the message that there is something undesirable about competing medicines like Children's TYLENOL.

For similar reasons, the Challenger argued that the claim "your kid's pain medicine shouldn't give you a headache" cannot be dismissed as puffery. According to the Challenger, this claim is made in an overwhelmingly negative context in the challenged video including imagery of a bottle of Genexa Kids' knocking over competing medicine along with images of artificial dyes labeled "EWWW", flavors and preservatives labeled "SERIOUSLY?!", as well as "whatever this is," appearing on screen while an image appears of a smoking flask filled with a red, ominous fluid labeled "JUST WOW. . .").

According to the Challenger, none of the Advertiser's puffery arguments excuse the false and maligning nature of the Ingredient Claims at issue.

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

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[42] With respect to the claims "When we looked around the medicine aisle, we found something that made us sick" and "Your kid's pain medicine shouldn't give you a headache," the Advertiser maintained that neither claim is conveying the message that children's medicine is literally going to make adults sick or give parents a headache and that no consumer would reasonably take away that parents or other adults are ingesting children's medicine and in turn getting nauseous or a headache.

[43] The Challenger also argued that it cannot credibly be argued that it is "vague and fanciful" for a manufacturer of children's OTC medicines to claim that specific inactive ingredients found in competing products "shouldn't exist," while evoking a sense of ineffectiveness and that such is a strong admonition that parents will reasonably take seriously.

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. Generally speaking, these are claims for which reasonable consumers will not expect substantiation. "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."[44] In determining whether a claim is puffery or an objective, measurable claim, NAD considers several factors including: 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 test; or whether the wording uses expressions of opinion that will be discounted by the buyer.[45]

With respect to the claim "When we looked around the medicine aisle, we found something that made us sick," NAD concluded that such claim references specific attributes of competing OTC medicines and reasonably communicates that Genexa's product is comparatively better in a recognizable or measurable way and that it is reasonable for consumers to take away the message that there is something undesirable about competing medicines like Children's TYLENOL. This impression is reinforced by the fact that the claim appears on the Advertiser's website above a video of one of Genexa's founders expressly stating that Genexa replaces the "synthetic binders" in other products with "better for you ingredients."

Similarly, the claim "Your kid's pain medicine shouldn't give you a headache" appears in the video advertisement discussed above regarding the "MADE WITH REAL INGREDIENTS" claim. In the context in which the claim is presented in the video, NAD concluded that the claim compares Genexa's products to competitors' products in a measurable way; specifically, that the ingredients in Genexa's products are superior to those in competitors' products which the claim reasonably conveys are dangerous, harmful, or unsafe. Here too, this interpretation is reinforced by both the words of the voiceover and the accompanying imagery. The net impression of the video reasonably conveys the message that the ingredients in Genexa's product are superior and safer than those found in the products of competitors such as Children's TYLENOL.

Finally, NAD turned to the claim "Things that shouldn't exist," with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine" and "parabens in medicine." While NAD acknowledged that statements such as "showers that make you dirty" and "food that makes you hungry" may be viewed as fanciful, NAD nonetheless concluded that other statements in the challenged advertisement are not mere puffery. Specifically, the Advertiser expressly claims that certain ingredients in medicines "should not exist" including, among other items, "Red Dye #30 in Medicine," "All Artificial Dyes in Medicine," "Parabens in Medicine." Here too, NAD concluded that one reasonable message conveyed is that when comparing Genexa's products to competitors' products, Genexa's products are superior and its competitors' products are dangerous, harmful, or unsafe. As noted above, there is no evidence in the record to support the claim that the ingredients in competitors' products are unsafe, harmful, or dangerous.

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[44] *Comcast Cable Communications, LLC (Xfinity Mobile)*, Report #7116, *NAD/CARU Case Reports* (August 2022).

[45] *Lenovo (United States), Inc. (Personal Computers)*, Report #4820, *NAD/CARU Case Reports* (March 2008). (internal citation omitted).

Based on the foregoing, NAD recommended that the Advertiser discontinue the following Ingredient Claims in the context in which they appeared as described above: (1) "When we looked around the medicine aisle, we found something that made us sick"; (2) "Your kid's pain medicine shouldn't give you a headache"; and (3) "Things that shouldn't exist," with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine" and "parabens in medicine,").

IV. Conclusion

NAD recommended that the Advertiser discontinue the claims "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients" and "the doctors have spoken" or modify them to make clear that the surveyed pediatricians expressed a preference only as to "ingredients." NAD further recommended that the Advertiser avoid stating or implying, in the absence of supporting evidence, that pediatricians prefer or use the Advertiser's product over the Challenger's products in their practices or for their own children.

NAD also recommended that the Advertiser discontinue the claims that "PARABENS is stuff you'll find in ALL PURPOSE CLEANER. And, for some reason, in kids' fever medicine," "Un-Fun Fact: Red dye no. 40 is made from petroleum," and that Propylene Glycol is "ALSO FOUND IN ANTIFREEZE."

NAD recommended that the Advertiser discontinue the "MADE WITH REAL INGREDIENTS" claim in the context presented in the now discontinued challenged video advertisement and avoid conveying the message that competing products with different inactive ingredients are generally unsafe, harmful, or dangerous. Nothing in this decision prevents the advertiser from highlighting the "real ingredients" in its product provided, however, the advertising does not otherwise convey the message that competing products contain inactive ingredients that are generally unsafe, harmful or dangerous.

NAD also recommended that the Advertiser discontinue the claims: (1) "When we looked around the medicine aisle, we found something that made us sick"; (2) "Your kid's pain medicine shouldn't give you a headache"; and (3) "Things that shouldn't exist," with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine" and "parabens in medicine,") in the context in which they appear in the challenged advertisement.

V. Advertiser's Statement

Genexa, Inc. will appeal NAD's decision. Genexa is pleased that NAD found that the FRC Survey supported an ingredient-based preference claim (e.g., "Pediatricians prefer the ingredients in Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children"). Genexa is further pleased that nothing in NAD's decision prevents Genexa from highlighting the "real ingredients" in its product.

Genexa fundamentally disagrees with the balance of NAD's decision, including NAD's recommendation to either discontinue the claims "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients" and "the doctors have spoken" or modify them to make clear that the surveyed pediatricians expressed a preference only as to "ingredients." Genexa's existing preference messaging specifies, in compliance with NAD's recommendation, that the preference is "based upon comparing the ingredients." Therefore, no modification to those claims is necessary. Genexa further disagrees with

NAD's recommendation to discontinue the supported ingredient claims that "PARABENS is stuff you'll find in ALL PURPOSE CLEANER. And, for some reason, in kids' fever medicine," "Un-Fun Fact: Red dye no. 40 is made from petroleum," and that Propylene Glycol is "ALSO FOUND IN ANTIFREEZE." Genexa believes these claims are literally true and not otherwise misleading. Genexa also disagrees with NAD's recommendation that Genexa discontinue the "MADE WITH REAL INGREDIENTS" claim in the context presented in the now discontinued challenged video advertisement. Finally, Genexa disagrees with NAD's recommendation that the Advertiser discontinue the claims: (1) "When we looked around the medicine aisle, we found something that made us sick"; (2) "Your kid's pain medicine shouldn't give you a headache"; and (3) "Things that shouldn't exist," with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine" and "parabens in medicine") in the context in which they appear in the challenged advertising. **(#7108 HJS, closed on 10/27/2022)**

National Programs
National Advertising Review Board®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703-247-9330 / press@bbbnp.org

National Advertising Review Board Recommends Genexa Discontinue or Modify Pediatrician Preference and Ingredient Claims for "Kids' Pain & Fever" Medicine

New York, NY – Feb. 14, 2023 – A panel of the National Advertising Review Board (NARB), the appellate advertising law body of BBB National Programs, recommended that Genexa Inc. discontinue certain pediatrician preference claims and ingredient claims for its acetaminophen-based children's analgesic sold over the counter as "Kids' Pain & Fever."

The advertising at issue had been challenged before the National Advertising Division (NAD) by Johnson & Johnson Consumer, Inc., McNeil Healthcare Division. Following NAD's decision (Case No. 7108), Genexa appealed NAD's findings and recommendations.

While the active ingredient in both parties' medications (acetaminophen) is the same, Genexa has disseminated superiority claims for Kids' Pain & Fever compared to competing brands based on asserted advantages attributable to its product's inactive ingredients.

Pediatrician Preference Claims

Johnson & Johnson challenged the following pediatrician preference claims:

- "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients"; and
- "The doctors have spoken."

In agreement with NAD, the NARB panel concluded that one message conveyed by the "pediatricians prefer" claim is that pediatricians prefer the Genexa product for use by their own children. Further, the NARB panel concluded that the "doctors have spoken" claim communicates to reasonable consumers that pediatricians prefer Genexa's medication to competitive products on the market, including recommending the Genexa medicine in their practice.

Finding no support for either of these messages, the NARB panel recommended that the claims be discontinued or modified to make clear that the surveyed pediatricians expressed a preference only as to "ingredients," and avoid stating or implying that pediatricians prefer or use the advertiser's product over the challenger's product in their practices or for their own children.

Ingredient Claims

In the underlying decision, NAD found that the challenged claims convey the message that there are inactive ingredients in competitors' products, including Johnson & Johnson's, that are dangerous and unsafe. NAD recommended that these claims be discontinued for lack of support.

The NARB panel affirmed NAD's conclusions and recommendations concerning the challenged ingredient claims. Among the claims the panel recommended be discontinued was the claim "PARABENS is stuff you'll find in ALL PURPOSE CLEANER. And, for some reason, in kids' fever medicine."

The NARB panel also recommended that the advertiser discontinue the "MADE WITH REAL INGREDIENTS" claim in the context presented in the now-discontinued challenged video advertisement and avoid conveying the message that competing products with different inactive ingredients are generally unsafe, harmful, or dangerous. The panel noted that nothing in its decision prevents the advertiser from highlighting the "real ingredients" in its product, provided, that the advertising does not otherwise convey the message that competing products contain inactive ingredients that are generally unsafe, harmful, or dangerous.

Genexa stated that it "is deeply troubled by the implications of NARB's decision on both Genexa and the industry more broadly, but Genexa will comply with NARB's recommendations."

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs, a non-profit organization, is the home of U.S. independent industry self-regulation, currently operating more than a dozen globally recognized programs that have been helping enhance consumer trust in business for more than 50 years. These programs provide third-party accountability and dispute resolution services that address existing and emerging industry issues, create a fairer playing field for businesses, and a better experience for consumers. BBB National Programs continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-and-teen-directed marketing, data privacy, dispute resolution, automobile warranty, technology, and emerging areas. To learn more, visit bbbprograms.org.

About the National Advertising Review Board (NARB): The National Advertising Review Board (NARB) is the appellate body for BBB National Programs' advertising self-regulatory programs. NARB's panel members include 85 distinguished volunteer professionals from the national advertising industry, agencies, and public members, such as academics and former members of the public sector. NARB serves as a layer of independent industry peer review that helps engender trust and compliance in NAD, CARU, and DSSRC matters.

NARB PANEL #307 – Jan. 30, 2023

Appeal of NAD's Final Decision #7108 Regarding Claims for Genexa Inc., OTC Kids' Pain & Fever Medicine

Panel Members

Nancy Gray (Chair)
Clinical Assistant Professor
W. P. Carey School of Business, Department of Marketing
Arizona State University

Maya Battle
Director, Marketing Intelligence
Macmillan Publishers

Amy Bytell
Digital Marketing, Communications Sr. Manager
Cox Automotive

Meredith Vaughan
CEO
Vladimir Jones

Tom Stein
Chairman and Chief Client Officer
Stein IAS

Representing the National Advertising Review Board
Kenneth A. Plevan, Chair
Saveeta Dhanai, NARB Coordinator

Representing the BBB National Programs
Mary Engle, Executive Vice President, Policy

Representing the National Advertising Division
Laura Brett, Vice President
Katherine Armstrong, Deputy Director
Howard Smith, Attorney
Nick Pung, Intern

Representing Genexa Inc.
John Villafranco, Partner, Kelley Drye & Warren
Jennifer Fried, Special Counsel, Kelley Drye & Warren
David Johnson, Co-founder and CEO, Genexa Inc.
Janet Spielberg, Vice President of Legal Affairs, Genexa Inc.

Representing Johnson & Johnson Consumer, Inc., McNeil Healthcare Division
Norman C. Simon, Partner, Kramer Levin Naftalis & Frankel LLP
Harry Morgenthau, Associate, Kramer Levin Naftalis & Frankel LLP
Samantha Alman, Associate, Kramer Levin Naftalis & Frankel LLP
Robert Pineda, Assistant General Counsel, Johnson & Johnson Consumer Inc.
Joseph A. Sena, Jr., Senior Counsel, Johnson & Johnson Consumer Inc.
Jennifer Cullen, Vice President, U.S. Pain, Scientific Education & Patient Advocacy, Professional Strategy, Johnson & Johnson Consumer Inc.

REPORT OF NARB PANEL 307

Decision Issued: Jan. 30, 2022

Appeal of NAD's Final Decision #7108 Regarding Claims for Genexa Inc., OTC Kids' Pain & Fever Medicine

Genexa Inc. ("Genexa"), the advertiser, manufactures an acetaminophen-based children's analgesic sold as "Kid's Pain & Fever." The challenger is Johnson & Johnson Consumer, Inc., McNeil Healthcare Division ("McNeil"), the manufacturer of "Children's TYLENOL Pain & Fever Oral Suspension" ("Children's Tylenol").

While the active ingredient in both medications (acetaminophen) is the same, Genexa has disseminated superiority claims for Kids' Pain & Fever compared to competing brands (including Children's Tylenol) based on asserted advantages attributable to its product's **inactive** ingredients. For example, Genexa promotes its product as preferred by pediatricians over Children's Tylenol "for their own children based upon comparing the ingredients."

McNeil challenged at the National Advertising Division ("NAD") nine express and three allegedly implied claims being disseminated for the Genexa product. See NAD Case #7108 (10/27/2022). NAD recommended that all 12 claims be discontinued or modified, and Genexa sought review of NAD's decision and recommendations by a panel of the National Advertising Review Board ("NARB"). There is no cross-appeal.

A. Background

Genexa asserts that it is the first and only OTC medicine company that uses only natural (not artificial) inactive ingredients in its products. Thus, the inactive ingredients in Kid's Pain & Fever are all natural, not artificial. The advertiser argues that this is a point of difference between its children's analgesic product and competitive products that is of interest to many consumers.

Children's Tylenol has been on the market for over 60 years. McNeil argues that certain of the challenged ingredient claims imply that Children's Tylenol contains unhealthy or unwholesome ingredients. These claims are unsupported, McNeil argues, because the challenger's medication "is an established OTC monograph product, including inactive ingredients generally recognized as safe and thus considered lawfully marketed by the FDA." See NAD Decision at 9. The advertiser, however, citing literature references, argues that artificial inactive ingredients do present health risks to some categories of consumers.

In support of its claim that pediatricians prefer Kid's Pain & Fever, the advertiser relies on a survey that sought to determine pediatrician preferences based solely on comparing the ingredients in the

advertiser's product with ingredients in the various flavors of Children's Tylenol. In the survey, a national sample of 301 pediatricians (who indicated that they lived with children ages 2-11) were shown images of the Kid's Pain & Fever and five flavors of Children's Tylenol, as well as a listing of the ingredients from each product taken from website disclosures. The survey participants were then asked to indicate, based solely on their review of the ingredients in each product, which they would "prefer to give to [their] own children ages 2-11 to relieve their pain or reduce their fever." The results in the survey favored the advertiser's product by 68.1% to 26.3%, a statistically significant difference.

McNeil has not challenged the survey design or methodology. Rather, it argued to NAD (and argues on appeal) that the survey results do not support the claim, i.e., were not a "good fit" for the advertiser's pediatricians prefer claim, because the survey did not measure actual practice, i.e., whether the surveyed physicians actually gave Kid's Pain & Fever to their own children and/or recommended the medication to their patients.

B. Challenged Claims/NAD's Conclusions

Set forth below are the twelve challenged claims (see NAD Decision at 1-2), with a brief summary of NAD's analysis and recommendations as to each. (Given the absence of consumer perception evidence, NAD determined the reasonable messages that were conveyed by the challenged claims.)

1. Express Claims:

   i) Pediatrician Claims

   - **"Pediatricians prefer Genexa's Kids' Pain & Fever over Children's TYLENOL Pain + Fever liquid products for their own children based upon comparing the ingredients."**

NAD concluded that the pediatricians prefer claim conveyed the message that doctors recommend Kid's Pain & Fever to their patients and that they give the product to their own children. The advertiser's survey, however, did not measure actual physician conduct, and therefore, according to NAD, did not support the pediatricians prefer claim. NAD recommended that the claim be discontinued, or modified "to make clear that the surveyed pediatricians expressed a preference only as to 'ingredients.'" NAD Decision at 16.

   - **"The doctors have spoken."**

NAD's analysis of "the doctors have spoken" claim was similar to its analysis of the pediatricians prefer claim. NAD concluded that the "doctors have spoken" claim communicated the implied

message that pediatricians recommend the advertiser's product to their patients. NAD recommended that this claim be discontinued, or modified "to make clear that the surveyed pediatricians expressed a preference only as to 'ingredients.'" NAD Decision at 16.

ii) The Ingredient Claims

With respect to the ingredient claims, the advertiser argued to NAD that they were "true" and "meaningful to consumers." See NAD Decision at 9. NAD, however, concluded that the challenged ingredient claims "reasonably imply that other products are unsafe or pose potential risks or dangers." NAD Decision at 11.

- **"When we looked around the medicine aisle, we found something that made us sick."**

The advertiser argued that the "made us sick" claim was puffery because it expressed the opinion of the company's founders and could not be measured or quantified. NAD, however, concluded that in the context of the advertising in which it appeared, the claim "references specific attributes of competing OTC medications and reasonably communicates that Genexa's product is comparatively better in a recognizable or measurable way and that it is reasonable for consumers to take away the message that there is something undesirable about competing medicines like Children's Tylenol." NAD Decision at 15.

NAD recommended that, in the context in which it appeared, the "made us sick" claim be discontinued. NAD concluded that "[t]here is no evidence in the record to support the claim that the ingredients in competitors' products are unsafe, harmful, or dangerous." NAD Decision at 13.

- **"Your kid's pain medicine shouldn't give you a headache."**

The advertiser also argued that the "give you a headache" claim constituted puffery, and that consumers would recognize that the reference to a "headache" should not be taken literally. NAD, however, concluded that, in the context in which it was used, the "headache" claim conveyed a comparative message to the effect that the ingredients in the advertiser's medicine are superior and that competitor's products are dangerous, harmful, or unsafe. NAD recommended that, in the context in which it appeared, this claim be discontinued.

- **Genexa Kids' is "MADE WITH REAL INGREDIENTS" in contrast to competing children's OTC medicines.**

NAD recommended that, in the context of the commercial in which the "real ingredients" claim

appeared,[1] the claim communicated that "competitor's formulations contain ingredients that are dangerous, harmful, or unsafe" and should be discontinued in the context in which it appeared. See NAD Decision at 13. NAD further recommended that the advertiser "avoid conveying the message that competing products with different inactive ingredients are generally unsafe, harmful or dangerous." Id. at 14. Assuming compliance with these standards, NAD concluded that the advertiser was free to highlight in advertising the "real ingredients" in its product. Id.

- **"PARABENS is stuff you'll find in ALL PURPOSE CLEANER. And, for some reason, in kids' fever medicine."**

The advertiser defended its parabens claim by arguing inter alia that it was literally true. NAD concluded that the claim communicated that inactive ingredients in competitive products are dangerous or unsafe, and recommended that the claim be discontinued. See NAD Decision at 11.

- **"Un-Fun Fact: Red dye no. 40 is made from petroleum."**

As with the parabens claim discussed above, NAD concluded that the red dye claim conveyed the message that competitive products used ingredients that are dangerous or unsafe, and recommended discontinuance.

- **Propylene Glycol is "ALSO FOUND IN ANTIFREEZE."**

Applying an analysis similar to the analyses of the claims containing references to parabens and red dye, NAD recommended that the propylene glycol claim be discontinued.

- **"Things that shouldn't exist," accompanied by a list of OTC medicine ingredients, including "all artificial dyes in medicine" and "parabens in medicine," interspersed with phrases like "showers that make you dirty" and "food that makes you hungry."**

Analyzing the "things that shouldn't exist" advertisement, NAD rejected the advertiser's argument that the references to ingredients in competitive products were puffery. Rather, NAD concluded that one reasonable message conveyed by the claim is that the Genexa product is superior to competitive products and further that competitive products are dangerous, harmful, or unsafe. NAD Decision at 16. NAD specifically noted that the challenged language referred to the ingredients in competitors' products as "things that shouldn't exist." NAD recommended that the interspersed ingredient claims be discontinued "in the context in which they appear in the challenged advertisement."

[1] The claim appeared in a commercial that was no longer running. See NAD Decision at 2, n. 1. The withdrawn commercial is described at NAD Decision at 12-13.

2. Implied Claims:

- **Pediatricians recommend Genexa Kids' in their daily practice.**

NAD found that the challenged "pediatricians recommend" implied claim was communicated by the challenged advertising, and further that there was no support for the claim. NAD recommended that "the Advertiser avoid stating or implying, in the absence of supporting evidence, that pediatricians use the Advertiser's product over the Challenger's products in their practices." NAD Decision at 8.

- **Pediatricians use Genexa Kids' to treat their own children's fevers and headaches.**

NAD found that this "pediatricians use" implied claim was communicated by the challenged advertising and recommended that this claim be discontinued "in the absence of supporting evidence." As with the "daily practice" claim discussed above, NAD found that there was no support for this implied claim.

- **Children's TYLENOL and other competing OTC medicines contain inactive ingredients that are harmful for human consumption and for children.**

NAD found that this "harmful ingredient" implied claim was communicated by Genexa's advertising. NAD recommended that the claim be discontinued and that the advertiser "avoid conveying the message that competing products with different inactive ingredients are generally unsafe, harmful, or dangerous." NAD Decision at 17.

C. The Advertiser's Arguments on Appeal

In support of its appeal, Genexa argues that the core value proposition of its brand is that it offers to consumers clean but effective medicine without the artificial inactive ingredients that many consumers seek to avoid. It argues that its ingredient claims are an essential, and a proper, means of communicating to consumers its brand point-of-difference. It also argues that its ingredient claims are literally true, and that this is not disputed.

Genexa maintains that a number of its claims, such as the ones with references to finding something that "made us sick" or gave a consumer "a headache" are puffery, in that they can't be quantified and/or represent expressions of opinion of the founders of the company.

As concerns the claim "Made from Real Ingredients," Genexa argues that it is factually true. It further argues that the claim is "inherently monadic" and therefore NAD should not have

concluded that it communicated a superiority message, even in context. The advertiser also argues that no reasonable consumer would interpret the Made from Real Ingredients claim as communicating that Children's Tylenol is "dangerous, harmful, or unsafe," given the latter product's prominent presence on the market for many decades. Finally, Genexa argues that because the advertisement analyzed by NAD had been withdrawn, NAD should not have evaluated the Made From Real Ingredients claim in that context.

Further defending its ingredient claims, Genexa argues that all comparative advertising conveys a message that competitive products are "undesirable," and that the allegedly implied messages that competitor products are "harmful" or "dangerous" are not defensible interpretations of the challenged ingredient claims. Citing standards applied to consumer perception studies to determine whether a surveyed claim misleads consumers, Genexa contends that NAD misapplied the well-established "reasonable consumer" standard in finding implied health-risk messages directed at competitive products. Alternatively, the advertiser argues that the record includes studies demonstrating that artificial inactive ingredients in competitor products can lead to health issues for certain categories of individuals.

Turning to the pediatricians prefer claim, Genexa principally argues that NAD misinterpreted the claim language in finding that the claim conveys implied messages regarding doctor practices. The advertiser asserts that its survey in fact directly supports the pediatricians prefer claim because the claim is properly qualified with the phrase "based upon comparing the ingredients." Genexa argues that NAD ignored the quoted qualifying phrase notwithstanding the phrase's prominence.

D. The Challenger's Arguments In Support of the NAD Decision

In responding to the advertiser, the challenger makes the following arguments, among others:

- The challenger contends that the ingredient claims cross the line from truthful comparative advertising to denigrating claims that are false and unsubstantiated.

- As concerns Genexa's claim that inactive ingredients in competitive products can elicit adverse reactions in certain individuals, McNeil argues that all of the inactive ingredients in Children's Tylenol (and in other competitive medications as well), given their GRAS (generally recognized as safe) status, have been shown to be safe in the general population, and only may present concerns for individuals with special medical conditions such as lactose intolerance.

- McNeil argues that the advertiser's puffery position in defense of certain of the advertiser's ingredient claims is not credible because the claims are conveying messages denigrating the safety of FDA-approved ingredients in competitive children's

analgesic products.

- In response to the argument by Genexa that reasonable consumers will not interpret its ingredient claims as conveying that Children's Tylenol products are unsafe because McNeil's product has been on the market for years, the challenger contends (among other arguments) that Genexa contradicts itself when it argues in support of the same claims that the safety assessment of inactive ingredients can change over time with new scientific evaluations.

- McNeil argues that the pediatricians prefer claim is not supported by the survey because (i) the survey did not measure actual pediatrician conduct, whereas (ii) NAD has long recognized that physician recommendation or preference claims hold tremendous sway over consumers and should be supported with highly reliable evidence that reflects actual physician experience and daily practice.

- McNeil argues that NAD's analysis of the pediatricians prefer claim was correct in that the claim is not qualified by the ending phrase "based upon comparing the ingredients." Rather, as NAD found, that clause (according to the challenger) simply offers a reason for the alleged preference by pediatricians, and therefore does not limit the claim as asserted by Genexa to an analysis of ingredients only.

E. Discussion

The panel will begin its analysis of the issues with the study published in 2019 entitled "Inactive Ingredients in Oral Medications" (see NAD Decision at 2, n. 3), cited by the advertiser to support any implied claims communicating that there are health risks from the consumption of competitive children's medication products due to their inactive ingredients. The panel concludes that this article does not provide the advertiser with support for any such implied claim. It is not disputed that the inactive ingredients in the competing children's pain and fever medications, in the concentration included in these formulas, have been approved for use by the Food and Drug Administration and found to be generally recognized as safe.

The advertiser also argues that future scientific analyses may determine that there are risks from the use of the inactive ingredients. However, the panel agrees with the challenger's view that this is speculation that does not constitute proper support for an implied claim that such ingredients are unsafe, harmful, or dangerous.

With this preliminary issue addressed, the remainder of the issues concerning Genexa's ingredient claims principally depend on an assessment of the consumer communication, i.e., whether the challenged advertising conveys the message that the inactive ingredients in competitive products

are unsafe, harmful, or dangerous. As recognized by NAD and is well-accepted, the context in which claims are made contribute to the message consumers take away from an ad.

After carefully reviewing the arguments of the parties and the challenged advertising, the panel concludes that NAD's conclusions and recommendations concerning the challenged ingredient claims should be affirmed. Key points in the panel's analysis are set forth below:

With respect to the "made us sick" claim, the advertiser as noted argues that the claim should be considered puffery as the expression of the opinion of the Genexa founders, and therefore cannot be measured or quantified. The panel, however, agrees with NAD that one message communicated by the claim to reasonable consumers is that there are health risks associated with the inactive ingredients in competing medications. The panel finds that "made us sick" is strong and inflammatory language when used in the context of medicines for children, and conveys a message that disparages competitive products and associates them with health risks.

The "give you a headache" claim is not puffery in part because it is not presented as expressing the views of Genexa's founders. The claim, moreover, appears in a commercial (described by NAD in its Decision at 12-13) that includes representing competitor products as "THE OTHER GUYS," referring to a competitive inactive ingredient as "whatever this is," having a Genexa-branded bottle "knocking over" the bottle labelled "THE OTHER GUYS," and a depiction of the inactive ingredients in competitive products in a laboratory setting which includes a smoking beaker. In this context, the "headache" message communicates a concern over safety.

Turning to the "Made with Real Ingredients" claim, the panel notes at the outset that NAD concluded that the claim could be used in a proper context, specifically one not conveying a message that inactive ingredients in competitive children's medicines are unsafe, harmful, or dangerous. The panel agrees with NAD's analysis, and also agrees with NAD that, in the context of the use considered by NAD, the claim conveys an unsafe message.[2]

Next, the panel considered the claims: (i) referring to parabens ("stuff you'll find in ALL PURPOSE CLEANER"); (ii) Red dye No. 40 ("made from petroleum"); and (iii) propylene glycol (ALSO FOUND IN ANTIFREEZE"). The panel agrees with NAD that these three claims, each referring to substances that would be dangerous if consumed, also convey a message that the

[2] That context is described above in the discussion concerning the "give you a headache" claim. The panel notes that, in addition to disputing that the consumer communication conveys an "unsafe" message, Genexa argues that NAD should not have considered the commercial because the video at issue had been permanently withdrawn before the filing of the challenge. NAD apparently concluded that it was informed by Genexa that certain claims in the commercial (not the commercial itself) had been withdrawn. See NAD Decision at 2, n. 1; 12-13. In any event, the argument that the "now discontinued video" (id. at 12) should not have been considered by NAD is a procedural issue not properly raised before this panel. See NARB Policies and Procedures Section 2.1-O, Appeal of Non-Merits Issues.

inactive ingredients referred to are unsafe.

Finally, on the ingredient claims, the panel considers the advertising presentation that identifies "things that shouldn't exist." Among those "things" are "all artificial dyes in medicine" and "parabens in medicine." The panel agrees with NAD that one message communicated to reasonable consumers is that the inactive ingredients referred to present health risks. The panel notes that the advertising does not present the rationale that Genexa represents was the motivation for the founding of the company – to offer consumers OTC drugs with natural, not artificial, inactive ingredients. Without a reference to that rationale, consumers are left to reach their own conclusions as to why artificial inactive ingredients are "things" that should not exist, and health risks to children is a likely "why."

Next, the panel considers the pediatricians prefer claims. The first is the claim set forth that Genexa argues is supported by its survey of pediatricians. The second is "the doctors have spoken."

The panel concludes that the "doctors have spoken" claim communicates to reasonable consumers that pediatricians prefer Genexa's medication to competitive products on the market. That preference includes recommending the Genexa medicine in their practice. Genexa, however, has no support for this communication.

As concerns the "pediatricians prefer" claim, the panel agrees that one message communicated is that pediatricians prefer the Genexa product for use by their own children, a claim for which there is no support. The advertiser argues that the phrase at the end of the claim, "based upon comparing the ingredients," qualifies the claim and limits it to a preference for the ingredients, not the product. While some consumers may interpret the claim that way, another reasonable interpretation is that pediatricians prefer the product, and that an analysis of the ingredients is the reason given for the product preference. The panel notes that it finds support for its conclusion that the survey is not a "good fit" for the claim in Genexa's having left out of the claim the words "**SOLELY**" and "**ONLY**," which were used in the survey instructions to the pediatricians. The advertiser also changed the tense from "would you prefer" (survey questionnaire) to "prefers" (advertising claim).

Finally, the panel considered the three challenged allegedly implied claims. The panel agrees that all three are conveyed, and all three are unsupported.

In conclusion, the panel notes that it has considered the advertiser's argument that the challenged claims support its "core value proposition," which is that consumers may prefer "effective medicine without the artificial inactive ingredients that many seek to avoid." Based on the record evidence, it does appear to the panel that Genexa's medications offer a point of difference that may resonate with consumers. NAD was careful in its recommendations to not proscribe advertising that promotes this difference, without unsupported disparagement of competing children's pain

and fever medications containing FDA-approved inactive ingredients.

Because NAD carefully, and in the panel's view properly, made narrowly-tailored recommendations to discontinue or modify the challenged claims, the panel's recommendations, set forth in the next section of this decision, will closely track NAD's recommendations.

F. Recommendations

The panel recommends that Genexa discontinue the claims "Pediatricians prefer Genexa's Kids' Pain & Fever over Children's Tylenol Pain + Fever liquid products for their own children based upon comparing the ingredients" and "the doctors have spoken," or modify them to make clear that the surveyed pediatricians expressed a preference only as to "ingredients." The panel further recommends that the advertiser avoid stating or implying, in the absence of supporting evidence, that pediatricians prefer or use the advertiser's product over the challenger's products in their practices or for their own children.

The panel also recommends that the advertiser discontinue the claims that "PARABENS is stuff you'll find in ALL PURPOSE CLEANER. And, for some reason, in kids' fever medicine," "Un-Fun Fact: Red dye no. 40 is made from petroleum," and that Propylene Glycol is "ALSO FOUND IN ANTIFREEZE."

The panel recommends that the advertiser discontinue the "MADE WITH REAL INGREDIENTS" claim in the context presented in the now-discontinued challenged video advertisement and avoid conveying the message that competing products with different inactive ingredients are generally unsafe, harmful, or dangerous. Nothing in this decision prevents the advertiser from highlighting the "real ingredients" in its product, provided, that the advertising does not otherwise convey the message that competing products contain inactive ingredients that are generally unsafe, harmful, or dangerous.

The panel also recommends that the advertiser discontinue the claims: (1) "When we looked around the medicine aisle, we found something that made us sick"; (2) "Your kid's pain medicine shouldn't give you a headache"; and (3) "Things that shouldn't exist," with a list of items like "showers that make you dirty," "food that makes you hungry," "all artificial dyes in medicine" and "parabens in medicine," in the context in which they appear in the challenged advertisement.

G. Advertiser's Statement

Genexa is deeply troubled by the implications of NARB's decision on both Genexa and the industry more broadly, but Genexa will comply with NARB's recommendations. Genexa is the first and the only company to provide families with effective over-the-counter medicine that does not contain any artificial fillers. This ingredient profile is the reason for Genexa's existence, and what sets it

apart from the competition. NARB's decision effectively bars Genexa from informing consumers of this critical distinction by prohibiting claims that truthfully describe ingredients that are found in competing medicines. Genexa is also disappointed that NARB failed to recognize that some statements in its advertising are clearly puffery. Genexa appreciates, however, that nothing in NARB's decision prevents Genexa from touting the "real ingredients" in Genexa's medicines, provided that such a claim does not convey the message that competing products are harmful or dangerous. Finally, Genexa appreciates NARB's finding that Genexa can make a "pediatricians prefer" claim as to the products' ingredients. Genexa is a supporter of the self-regulatory process and appreciates NARB's time and attention in this matter.

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National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

National Advertising Division Finds Glad Trash Bags Product Packaging Not Misleading; Recommends Glad Discontinue or Modify Other Advertising Claims

New York, NY – Jan. 19, 2022 – The National Advertising Division (NAD) of BBB National Programs determined that product packaging for Glad Products Company's ForceFlex Plus with Clorox Tall Kitchen Drawstring Bags appropriately ties the Clorox brand to its odor elimination role, and that product packaging for Glad's Quick-Tie Tall Kitchen CloroxPro Trash Bags does not have the potential to confuse consumers.

Reynolds Consumer Products LLC challenged express and implied claims on Glad's product packaging, product webpages, and commercials associated with co-branding Clorox and Glad's ForceFlex Plus and Quick-Tie Tall Kitchen CloroxPro trash bags. At issue was whether such claims conveyed an unsupported cleaning or disinfecting message.

NAD recommended that Glad:

- Discontinue the claims that Glad ForceFlex Plus with Clorox bags help consumers "maintain a clean and healthy home" and "keep your home feeling clean & healthy" or modify its website and third-party retail website advertising to avoid conveying the message that ForceFlex Plus with Clorox trash bags contain disinfecting attributes that contribute to a clean and healthy home.
- Discontinue or modify the depiction of the "germ-fighting" style imagery and use of the term "with Clorox protection" in its Amazon video to make clear that the benefit being promoted is an odor elimination benefit and not a disinfecting one.
- Discontinue its "Cleaning Commercial."

Product Packaging

NAD reviewed Glad's ForceFlex Plus with Clorox product packaging to determine whether it clearly ties the Clorox brand to its odor elimination role. NAD found that packaging, which features the Clorox logo in close proximity to the claim "Eliminates Food & Bacterial Odors" along with "Lemon Fresh Bleach Scent," did not require modification. NAD noted that the Clorox logo is appropriately tied to the odor elimination benefit it provides and the reference to bleach clearly refers to bleach as part of the scent of the product.

Although one challenged digital image featured the Clorox logo and the "Lemon Fresh Bleach Scent" label without any connection to odor elimination, NAD did not review the image on its merits due to the advertiser's assurances that the image was permanently discontinued.

Further, NAD determined that product packaging for Glad's Quick-Tie bags with the CloroxPro logo did not convey a disinfecting message because the CloroxPro logo is a brand extension distinct from Clorox's traditional consumer product logo.

Website Claims

Regarding claims that Glad ForceFlex Plus with Clorox trash bags help consumers "maintain a clean and healthy home" and "keep your home feeling clean & healthy," NAD found that by stating that the products contribute to a "healthy" home, consumers could interpret that the product provides a "health" benefit, i.e., that it has disinfecting properties. Further, the focus on "clean" in the context of the word "healthy" conveys a message that the Clorox in the product cleans, and not simply that consumers use trash bags to clean.

Because such claims could reasonably convey the unsubstantiated message that Glad ForceFlex Plus with Clorox trash bags contain disinfecting properties, NAD recommended that they be discontinued or that Glad modify its website and third-party retail website advertising to avoid conveying such a message. NAD noted, however, that nothing in its decision prevents the advertiser from describing the odor elimination benefits provided by its trash bags.

Amazon Video Advertisement

NAD found that a 20-second video advertisement for the ForceFlex Plus with Clorox trash bags that appears on Amazon's product page conveys both an odor elimination message and an unsupported disinfecting message. Specifically, NAD determined that the combination of visuals of a typical germ-fighting scenario along with the words "with Clorox protection" could reasonably be interpreted by a consumer to mean that there is an added cleaning or disinfecting benefit provided by the trash bags.

Therefore, NAD recommended that Glad discontinue or modify the depiction of the "germ-fighting" style imagery and use of the term "with Clorox protection" in its Amazon video to make clear that the benefit being promoted is an odor elimination benefit and not a disinfecting one.

Cleaning Commercial

While the consumer perception study submitted by the challenger was found unreliable, NAD found that a reasonable consumer could take away an unsupported cleaning and disinfection message from Glad's 30-second "Cleaning Commercial" for its ForceFlex Plus with Clorox bags. Further, NAD determined that the brief, small-font visual disclosure "this product is bleach-free" does not cure the message that Glad ForceFlex bags provide cleaning and disinfecting benefits of Clorox. Therefore, NAD recommended that Glad discontinue its "Cleaning Commercial."

However, NAD noted that nothing in its decision prevents Clorox from partnering with other brands to tout its innovative odor elimination technology, but that it should do so in a manner that makes clear what benefits are provided by the co-branding.

In its advertiser statement, Glad stated that it "agrees to comply with NAD's recommendations." Further, the advertiser stated that although it "disagrees with NAD's criticism of certain advertisements, as a strong supporter of self-regulation, it will take NAD's recommendations into account in future advertising."

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About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Case #6996 (01/03/2022)
Glad Products Company
ForceFlex Plus with Clorox Tall Kitchen Drawstring Bags
Challenger: *Reynolds Consumer Products LLC*
Product Type: *Household Products*
Issues: *Health & Safety Claims; Implied Claims/Consumer Perception*
Disposition: *Modified/Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

REYNOLDS CONSUMER PRODUCTS LLC, *Challenger*, GLAD PRODUCTS COMPANY, *Advertiser*.	Case No. 6996 Closed 1/3/2022

FINAL DECISION

- When companies co-brand their products, it is important that the advertising make clear each brand's role in the co-branded product.

- Market research to determine consumer behavior for corporate business decisions is not necessarily sufficient for claim substantiation.

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger Reynolds Consumer Products LLC ("Reynolds" or "Challenger") challenged express and implied claims made by Advertiser Glad Products Company ("Glad" or "Advertiser") for its ForceFlex Plus with Clorox Tall Kitchen Drawstring Bags and Quick-Tie Tall Kitchen CloroxPro Trash Bags. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

- "Glad with Clorox garbage bags work as hard as you do to maintain a clean and healthy home"
- "These innovative bags eliminate food & bacterial odors to keep your home feeling clean & healthy"
- "It's all clean with Clorox"
- "Clorox"; "CloroxPro"; "CloroxPro, where clean means everything"

- "with Clorox"; "Glad with Clorox garbage bags"; "It's all Glad with Clorox"; "ForceFlex Plus with Clorox Bags"; "Glad Tall Kitchen Trash Bags ForceFlex Plus with Clorox"; "Glad Quick-Tie Tall Kitchen CloroxPro Trash Bags"
- "Glad ForceFlex Plus with Clorox eliminates food & bacterial odors with Clorox protection"
- "Clorox Eliminates Food & Bacterial Odors"
- "Clorox helps you take control of the toughest food and bacterial odors, eliminating bad trash smells for good"
- "Glad and Clorox have joined forces to create a trash bag with the strength of Glad and the odor-fighting power of Clorox"
- "Clorox Odor Protection"

B. Implied Claims

- Glad Bags are coated in a Clorox agent that provides antibacterial and microbe protection and makes consumers' homes cleaner
- Glad Bags are coated in a Clorox agent that is the source of food and odor elimination

II. Evidence Presented

In support of the challenged claims, the Advertiser provided two expert declarations:

(1) Jeff Stiglic, Associate Research Fellow and Pillar Lead for Actives & Chemistry for the Glad business, explaining the development of ODOGard for use on Glad ForceFlex Plus trash bags and;

(2) Dr. Bruce Isaacson, critiquing the consumer perception study submitted by the Challenger.

The Advertiser also provided a list of Clorox and CloroxPro products that are bleach free and/or non-disinfecting.

In support of its arguments, the Challenger submitted a consumer perception survey on Glad's Cleaning Commercial, as well as evidence of consumer reviews from Glad's and third-party retailers' websites.

III. Decision

A. Introduction

Glad and Clorox have achieved great success and brand recognition over the years. Glad for its trash bags and food storage products and Clorox for its cleaning, disinfecting (such as bleach), laundry and pet products. The Glad and Clorox brands have joined forces to create a new product seeking to combine the strength and leak protection of Glad ForceFlex trash bags with Clorox odor protection to effectively eliminate the odors associated with trash.

The odor elimination benefit in Glad's ForceFlex bags consists of two components: (1) the interior of the bag is coated with ODOGard, a patented formula that chemically and physically eliminates odors and (2) customized fragrances designed to be stable when used with ODOGard. Clorox licensed ODOGard from Rem Brands, Inc. and spent several years testing and optimizing its application to the interior of trash bags, to ensure the odor protection would stick to the bag even after the consumer

fluffed the bag open. The unique ODOGard technology transforms sulfur-based odorants into odorless molecules, instead of merely masking the odor.

While companies may tout partnerships that bring innovative technologies together it must do so in an accurate manner.[1] This challenge concerns whether express claims on product packaging, product webpages and commercials associated with co-branding Clorox and Glad's ForceFlex Plus and Quick-Tie Tall Kitchen CloroxPro trash bags convey an unsupported cleaning or disinfecting message.[2]

A similar dispute between these same parties was addressed in *The Clorox Company (Glad Tall Kitchen Drawstring Bags)*.[3] In that case, Reynolds contended that the claim "Antimicrobial Protection of the Drawstring from Odors" for Glad trash bags, when viewed in the context of the product packaging and other advertising conveyed a health-related disinfecting message. NAD found that the combined design elements of the challenged advertising, including the claim, the use of the Clorox logo, and the prominence of each element, reasonably conveyed a confusing message as to the specific benefit offered by the product and the nature of Clorox's partnership with Glad on the product. NAD recommended that the advertiser modify the advertising to more accurately and clearly ensure that consumers understood the benefit of the Clorox co-branding as one of odor protection and not disinfection.

When companies co-brand their products, it is important that the advertising make clear each brand's role in the co-branded product. Because consumers can reasonably associate a brand with specific benefits, co-branding can create consumer confusion if the benefit associated with the brand is not part of the co-branded product. Clorox is often associated with cleaning and disinfecting benefits because of its bleach. Clorox is free to co-brand with Glad to advertise trash bags with innovative odor technology; however, when advertising the co-branded product Clorox should clearly tie its name and logo to the benefit it provides (i.e., odor elimination technology) in order to avoid conveying a message that Clorox is in the product for cleaning or disinfecting purposes. Accurate advertising for co-branded products is essential so that consumers can identify the benefit each company brings to the product.

B. Product Packaging

NAD reviewed Glad's ForceFlex Plus with Clorox product packaging to determine whether it clearly ties the Clorox brand to its odor elimination role. The Challenger argued that the prominent display of the Clorox logo on the product packaging sends an implied message that the trash bags contain a Clorox bleaching/disinfecting agent which reduces or eliminates bacteria.[4] The Advertiser maintained

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[1] *The Clorox Company (Glad Tall Kitchen Drawstring Bags)*, Report #5951, NAD/CARU Case Reports (May 2016) (NAD stated Glad should be able to tout its partnership with Clorox that brought zinc pyrithione to control odor on the drawstring of the trash bag, but that it must do so in an accurate manner).

[2] The Challenger's submission included the image of a product called "Glad with Clorox Tall Kitchen Quick-Tie bags" that featured the claim "Resists Bacterial Odors" on its packaging. Reynolds did not specifically include this product or claim in its challenge; therefore, NAD did not review this product packaging or any claims relating to it.

[3] *The Clorox Company (Glad Tall Kitchen Drawstring Bags)*, supra n. 1

[4] Reynolds also argued that even if the Clorox logo is always tied to the benefit that Clorox provides to the product it is still misleading because it is Rem-Brand's ODOGard that provides the odor elimination benefit. NAD disagreed with this premise as Clorox's expert explained that Clorox licensed Rem-Brand's ODOGard technology but then spent a significant amount of time and money on perfecting that technology to apply to trash bags and

that the packaging highlights the co-branded nature of the ForceFlex Plus product, with Glad contributing to the trash bag technology and Clorox contributing to the odor control technology.

The Challenger pointed to consumer reviews from product pages on both Glad and third-party retailer sites as evidence of consumer confusion.[5] NAD has found that evidence based solely on the experience of individual consumers is anecdotal and is not sufficient to establish that a claim causes consumer confusion.[6] Accordingly, NAD did not consider the submitted consumer reviews as consumer perception evidence that the Advertiser's label is misunderstood by consumers.

In the absence of reliable consumer perception evidence NAD steps into the shoes of the consumer and uses its expertise to determine the messages reasonably conveyed by an advertisement.[7] In analyzing the messages conveyed, NAD typically reviews the net impression created by the advertisement as a whole, not merely words, phrases or visual images standing alone.[8]

NAD determined that Clorox's logo should appear in close proximity to the claim "Eliminates Food & Bacterial Odors" to clearly communicate to consumers the odor elimination benefit that Clorox brings to Glad's trash bags. NAD noted that some product packaging features the Clorox logo in close proximity to the odor elimination claim and additionally features a "Lemon Fresh Bleach Scent" claim. NAD found that this product packaging did not require modification because the Clorox logo is appropriately tied to the odor elimination benefit it provides and the reference to bleach clearly refers to bleach as part of the scent of the product.

In one challenged image, the Clorox logo is featured alongside the "Lemon Fresh Bleach Scent" claim without language tying the Clorox brand to the odor elimination technology it provides. The Advertiser explained that the image is a digital image and is not representative of product packaging. In any event, the Advertiser stated that the image was permanently discontinued. Based on this assurance, NAD did not review the image on its merits. The discontinued image will be treated, for compliance purposes, as though NAD recommended its discontinuance and the Advertiser agreed to comply.

NAD found that product packaging for the Quick-Tie bags with the CloroxPro logo did not have the potential to confuse consumers because the CloroxPro logo is a brand extension, distinct from Clorox's traditional consumer product logo, and is not necessarily associated with bleach.

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to create new scents that are stable with the ODOGard technology. This is not simply a case of Clorox licensing and using Rem-Brand's technology.

[5] The Challenger submitted consumer reviews that state "having trash bags with clorox infused into the bag gives me peace of mind knowing that my trash cans are cleaner," "perfect trash bag if you have kids in diapers. The power of clorox plus a very nice smell," "Glad force flex is one of the best garbage bags. I love that it has Clorox to help with the germs," and "I was concerned about the Clorox thing, too. But when you open them up and put them in the trash can, they really don't smell. Maybe it's just some sort of additive to the plastic, like chlorine is to pvc piping?".

[6] The Sherwin-Williams Company (Krylon CoverMaxx Spray Paints), Report #6074, *NAD/CARU Case Reports* (April 2017).

[7] *The Clorox Company (Glad Tall Kitchen Drawstring Bags), supra* n. 1.

[8] Id.

C. Website Claims

Reynolds also challenged claims that appear on Glad's product website and on third-party retailer websites. The description on Amazon's product page for the ForceFlex Plus with Clorox bags includes a list of five bullet points, with the third bullet point stating "Glad with Clorox garbage bags work as hard as you do to maintain a clean and healthy home with a versatile design for both kitchen trash and tackling household chores." On Glad's website, the product page for ForceFlex Plus with Clorox bags shows the product packaging for the 34-count bags and states "these innovative bags eliminate food challenge. and bacterial odors to keep your home feeling clean & healthy." Below this statement it shows the product's availability in two scents "Lemon Fresh Bleach Scent" and "Mountain Air" scent.

Reynolds argued that claims regarding a "clean and healthy" home along with the pictured Clorox chevron logo on the product packaging conveys the message that Glad ForceFlex Plus trash bags incorporate a Clorox agent that contributes to odor removal and that the trash bags have additional cleaning and disinfecting benefits.

The Advertiser argued that the claim on the Amazon product page when viewed in context is not a disinfecting claim but rather communicates a message that the bags are a useful tool to throw away trash as you clean your home because the bags are strong, eliminate odor and have a great scent.[9] Likewise, Glad argued that the claim on Glad's own website that the bags "keep your home feeling clean and healthy" is a subjective claim that ties the feeling of a cleaning and healthy home to the odor elimination that Clorox provides. Glad contended that consumers associate a home with the trash neatly controlled and smelling pleasant with a clean and healthy home.

Health and safety claims, especially those pertaining to disinfecting capabilities are of utmost importance to consumers. Such importance is only heightened considering that the Covid-19 virus remains a threat in our communities.

It is well settled that advertisers are responsible for all reasonable interpretations of claims made in its advertising, including those messages they may not have intended to convey.[10] NAD recognized that while these claims are worded differently they both convey the message that Glad's ForceFlex Plus with Clorox trash bags contribute to a "clean and healthy" home. By stating that the products contribute to a "healthy" home, consumers could interpret that the product provides a "health" benefit, i.e., that it has disinfecting properties. Further, the focus on "clean" in the context of the word "healthy" conveys a message that the Clorox in the product cleans, and not simply that consumers use trash bags to clean. For these reasons, NAD concluded that the "clean and healthy" home claim could reasonably convey the unsubstantiated message that the Glad ForceFlex Plus with Clorox trash bags contain disinfecting properties.

As a result, NAD recommended that Glad discontinue the claims that Glad ForceFlex Plus with Clorox trash bags help consumers "maintain a clean and healthy home" and "keep your home feeling clean & healthy" or modify its website and third-party retail website advertising to avoid conveying the message that ForceFlex Plus with Clorox trash bags contain disinfecting attributes that contribute to a

[9] Glad argues that the first bullet point touts the strength of the bags, the second bullet highlights the odor elimination benefits and the third touts the specifically developed clean scent.

[10] *Charter Communications, Inc. (Spectrum Internet Speed),* Report #6948, NAD/CARU Case Reports (May 2021).

clean and healthy home. However, nothing in this decision prevents the Advertiser from describing the odor elimination benefits provided by its trash bags.

D. Amazon Video Advertisement

Reynolds also challenged a 20-second video advertisement for the ForceFlex Plus with Clorox trash bags that appears on Amazon's product page. The video opens with a beauty shot of the product packaging[11] and the voiceover states, "For the first time ever get the odor-fighting power of Clorox and Glad's strongest kitchen trash bag." The visual then shows a Glad ForceFlex Plus bag with both a Glad logo and Clorox logo on it, as well as three horizontal electrified rings that surround the bag.

The visuals then change to animation illustrating the exterior of the trash bag with small green and brown solid balls and blue "molecular structure" balls. One of the green balls labeled "leftover pizza" gets captured by a blue "molecular structure" ball and a clear ring labeled Clorox surrounds it. The green ball turns blue and the label changes to "clean smell" as it is released by the "molecular structure". During the animation the voiceover states "Glad Force Flex Plus with Clorox eliminates food and bacterial odors with Clorox Protection" and the visual shows the claim "eliminates food and bacterial odors with Clorox Protection." The visuals then change to feature the RipGuard and LeakGuard logo and the voiceover states "and provides superior strength against rips and leaks." The commercial ends on the same beauty shot of the product packaging from the beginning of the video and the voiceover states "Buy Glad ForceFlex Plus with Clorox today."

The Challenger argued that Clorox-labeled "molecular structures" transforming the green balls appear as germ-transforming technology and communicate to consumers that the ForceFlex Plus bag contains a protective Clorox agent that provides health and safety benefits, namely protection from germs and other microbes. Reynolds maintained that the prevalence of the Clorox logo created a Clorox-related halo effect that consumers could associate with the germ-killing benefits of Clorox bleach products.

Glad argued the animation is narrowly focused on odor elimination and does not convey the message that the "molecular structures" in the video kill bacteria. Rather, they are clearly shown to change a bad smell of leftover pizza into a clean smell.

NAD found that the advertisement conveys both an odor elimination message and a disinfecting message. The opening language explains that consumers can get "the odor-fighting power of Clorox" in Glad's ForceFlex Plus bags and clearly ties the Clorox brand to the odor elimination benefit it provides. However, the animation that follows depicts a typical germ-fighting scenario that consumers could reasonably interpret as a shift from a message of odor elimination to one of disinfection. At least one reasonable takeaway from the animation is that the "molecular structure" balls labeled with the Clorox logo capture brown and orange balls that represent bacteria and change them into something blue and clean. The animation moves quickly and consumers may reasonably miss the small type identifying the green ball as "leftover pizza" being turned into a "clean smell."

[11] The packaging featured has the Glad logo at the top of the label along with the product name. The Clorox logo appears at the bottom of the pictured trash bag with the claim "eliminates food & bacterial odors" immediately below the Clorox logo. Immediately below the claim on a yellow bar "Lemon Fresh Bleach Scent" appears.

NAD also determined the voiceover during the animation which states "Glad ForceFlex Plus with Clorox eliminates food and bacterial odor with Clorox protection" contributes to the dual message of odor elimination and disinfection. The pause between "Glad ForceFlex Plus with Clorox eliminates food and bacterial odor" and "with Clorox protection," along with the visuals, could reasonably convey the message that "with Clorox protection" refers to an additional disinfecting benefit, not just odor elimination. Additionally, the double reference to Clorox within the claim could be confusing to consumers. At least one reasonable interpretation in context with the visuals, is that the first mention of Clorox refers to odor elimination and the second refers to an additional germ-fighting benefit.

NAD determined that the combination of visuals of a typical germ-fighting scenario along with the words "with Clorox protection" could reasonably be interpreted by a consumer to mean there is an added cleaning or disinfecting benefit provided by the trash bags, a message that is not supported by the record. NAD recommended that Glad discontinue or modify the depiction of the "germ-fighting" style imagery and use of the term "with Clorox protection" to make clear that the benefit being promoted is an odor elimination benefit and not a disinfecting one.

E. Cleaning Commercial

Reynolds also challenged Glad's 30-second television commercial for its ForceFlex Plus with Clorox bags titled "Cleaning Commercial." The commercial begins in a kitchen with two men moving their stove. On screen text states "It's all Glad with Clorox," featuring both the Glad and Clorox logos in place of the words. The voiceover states, "New Glad with Clorox keeps all your trash all under control even when deep cleaning freaks you out, freaks your cat out and somehow freaks great Uncle Ruben out."

The music becomes dramatic as the camera shows a filthy mess of dirt and debris behind the stove, including a stuffed bear's head in the middle of the mess. The cat then spills milk onto the mess and a picture falls off the wall and shatters onto the mess. One of the men recoils with disgust at the scene. As the men clean the mess with gloved hands and toss the debris into the trash can the voiceover states, "Even when everyone is freaking out, all your trash is all under control." The visuals show one of the men picking up the bear head and a young girl is revealed holding her headless stuffed bear. Superimposed over the action is a Clorox logo with the claim "eliminates food & bacterial odor." A super appears on the bottom of the screen that states "This product is bleach-free." The commercial ends with a product shot, showing a package of the ForceFlex Plus bags and a large visual of a full trash bag with the words "It's all Clean, with Clorox." The word "Clean" then changes to read "Glad", so that it reads "It's all Glad with Clorox." The voiceover states "It's all Clean, it's all Glad." The last 2 seconds of the commercial shows the young girl holding her stuffed bear with its head, previously brown and dirty, now clean, spotless and white, re-attached to its body.

The Challenger argued that the commercial bombards the viewer with images and audio cues about cleaning and sanitizing so that the consumer takeaway is that the Glad bags contain a protective Clorox-related agent that protects against germs and other harmful microbes. Reynolds added that the visual of the electrified rings surrounding the ForceFlex Plus bags also represents a force field of sanitizing power and protection associated with the Clorox co-branding. Likewise, the stuffed bear shown at the end of the commercial with a clean, seemingly bleached, re-attached head conveys the message that the trash bags are able to sanitize and clean items that are put inside the bags. Reynolds further argued that the text "It's all Clean with Clorox" that switches to read "It's all Glad with Clorox"

does not convey a mere co-branding partnership but rather that the bags contain a sanitizing Clorox bleach agent.

Glad argued that such an interpretation was unreasonable and that no reasonable consumer would think that a trash bag cleans or sanitizes items that are put inside the bags. Further, Glad noted that the commercial also contains a visual disclosure stating "this product is bleach-free" to make clear to viewers that the product does not contain bleach. Reynolds argued that the disclosure does not cure the issue and actually contradicts the visuals of the commercial.[12]

In support of its interpretation of the challenged commercial, Reynolds commissioned a nationwide online consumer perception survey of 520 respondents from Ace Metrix to assess consumers' understanding of and reaction to Glad's "Cleaning Commercial". The Challenger contended that the survey results demonstrate consumer confusion and that a substantial number of consumers take away a message that ForceFlex Plus trash bags contain bleach and provide a cleaning, disinfecting or antibacterial function.

The survey began with a series of standard screening questions after which the consumers were shown five commercials, one of them being Glad's "Cleaning Commercial".[13] After viewing the flight of commercials, the consumers were asked a series of more general questions about their reaction to the "Cleaning Commercial". The consumers were then asked seven additional "custom questions" related to the challenged messages. Respondents were asked "Do you think Clorox is used on the product advertised in this commercial?", with 71% answering "Yes". When consumers were asked "which of the following messages, if any, were communicated in the ad?;" 49% of them responded "Glad Force Flex contains Clorox bleach in the bag."[14] When asked about the primary message of the advertisement, the top two responses were "Glad ForceFlex contains Clorox bleach in the bag" (33%) and "Glad ForceFlex provides protection from germs and harmful microbes" (32%).[15]

Glad submitted a report from marketing research expert Dr. Bruce Isaacson critiquing the consumer survey and finding it was fatally flawed. Here, NAD agreed that the Challenger's survey suffered from a number of flaws that render it unreliable to support the Challenger's interpretation of the commercial as the survey does not accurately assess whether consumers take away a misleading message from the commercial.

The survey lacked a control cell which made it impossible to judge how much the survey results are impacted by noise. The survey also asked a series of leading questions that did not distinguish between

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[12] Reynolds argued that the super does not make an appearance until 22 seconds into the 30 second commercial after the Clorox logo appears several different times.

[13] The record does not identify the other four ads shown to the consumers, nor does it reveal in what order the consumers viewed the five ads.

[14] (39% responded "Glad ForceFlex provides protection from germs and harmful microbes" and 35% responded "Glad Force Flex controls odor in the bag").

[15] In answering an open-ended question such as "What was the main message of this ad?", consumers responded with comments such as "Trash bags with bleach infused or somehow in the bag to disinfect the trash as you throw it away[]," "The main message was telling you about glad trash bags now has clorox bleach inside" and "The message of the ad was to show that Glad trash bags now contain Clorox to help hide odors coming from the trash bin."

Clorox as a company, a brand and as a product, creating the potential that the questions themselves biased consumers to think of the Clorox bleach product, rather than the company or brand. Additionally, the survey population included consumers who do not purchase trash bags for their home and 18 out of 20 survey questions did not offer respondents a "don't know/no option".

Although Reynolds maintained that this type of consumer behavior survey is routinely used by major companies to yield data that provides the foundation for critical and costly decisions by marketing and business executives, NAD has found that market research to determine consumer behavior for corporate business decisions is not necessarily sufficient for claim substantiation.[16]

Absent reliable consumer evidence, NAD stepped into the shoes of the consumer to determine the message relayed by the advertisement.[17] NAD found that a reasonable consumer could take away an unsupported cleaning and disinfecting message from Glad's "Cleaning Commercial". The opening visuals and voiceover all refer to cleaning and, in fact, do not mention odor elimination until 22 seconds into the commercial. When odor elimination is mentioned, it is only in the visual claim "eliminates food and bacterial odors"—never in the audio.

In addition, the cleaning messages continued to dominate the end of the commercial when the Clorox logo is pictured without the odor elimination claim and phrases like "It's all Clean, with Clorox," "It's all Glad with Clorox," and "It's all Clean, it's all Glad" come together to end the commercial. The overall message of cleanliness focuses consumers not just on using trash bags to clean, but that this trash bag has added cleaning benefits usually associated with the Clorox brand because of its bleach. Further, a message related to the ability of Clorox bleach to clean and disinfect is reenforced in the last 2 seconds of the commercial by showing the young girl holding the stuffed bear with its head, previously brown and dirty, now bright white, clean and re-attached to its body. While consumers might not think the trash bag itself cleaned the stuffed bear head, the imagery reinforces consumers' association with using Clorox bleach for cleaning and disinfection.

NAD determined that the brief, small-font visual disclosure "this product is bleach-free" does not cure the message that the Glad ForceFlex bags provide cleaning and disinfecting benefits of Clorox.[18] It is well settled that a disclosure cannot contradict the main message of an advertisement.[19]

NAD recommended that Glad discontinue its "Cleaning Commercial" as it conveys an unsupported cleaning and disinfecting message. NAD noted that nothing in this decision prevents Clorox from partnering with other brands to tout its innovative odor elimination technology, but that it should do so in a manner that makes clear what benefits are provided by the co-branding.

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[16] *See, e.g.*, Bausch & Lomb Incorporated (ULTRA Contact Lenses with MoistureSeal Technology), Report #5944, *NAD/CARU Case Reports* (April 2016) (noting that a study method can be valuable for developing and marketing products, but nonetheless be insufficiently accurate to measure consumer behavior to the level of specificity required as claim support).

[17] *Comcast Cable Communications, LLC (Xfinity Mobile 5G Wireless Service),* Report #6833, NAD/CARU Case Reports (March 2021).

[18] The super does not make an appearance until 22 seconds into the 30 second commercial after the Clorox logo has been pictured several different times.

[19] *Novartis Consumer Health, Inc. (Theraflu Multi-Symptom Severe Cold)*, Report #5792, NAD/CARU Case Reports (December 2014).

IV. Conclusion

NAD found that Glad's ForceFlex Plus with Clorox product packaging that features the Clorox logo in close proximity to the claim "Eliminates Food & Bacterial Odors" along with the "Lemon Fresh Bleach Scent" did not require modification. NAD will treat the permanently discontinued digital image featuring the Clorox logo and the "Lemon Fresh Bleach Scent" label, without any connection to odor elimination, as though NAD recommended its discontinuance and the Advertiser agreed to comply.

NAD determined that the product-packaging for Glad's Quick-Tie bags with the CloroxPro logo did not convey a disinfecting message and therefore did not require modification.

NAD recommended that Glad discontinue the claims that Glad ForceFlex Plus with Clorox bags help consumers "maintain a clean and healthy home" and "keep your home feeling clean & healthy" or modify its website and third-party retail website advertising to avoid conveying the message that ForceFlex Plus with Clorox trash bags contain disinfecting attributes that contribute to a clean and healthy home.

NAD recommended that Glad discontinue or modify the depiction of the "germ-fighting" style imagery and use of the term "with Clorox protection" in the Amazon video to make clear that the benefit being promoted is an odor elimination benefit and not a disinfecting one.

NAD recommended that Glad discontinue its "Cleaning Commercial" as it conveys an unsupported cleaning and disinfecting message. NAD noted that nothing in this decision prevents Clorox from partnering with other brands to tout its innovative odor elimination technology, but that it should do so in a manner that makes clear what benefits are provided by the co-branding.

V. Advertiser's Statement

Glad agrees to comply with NAD's recommendations.

We thank NAD for their careful consideration of the Glad + Clorox advertising and for agreeing that Clorox and Glad are free to partner to deliver products that offer consumer innovative technology, upholding the fact that Clorox equity stands for a number of consumer benefits inside and outside the home. Glad and Clorox have invested heavily in their partnership to bring advanced odor elimination technology to Glad ForceFlex plus trash bags and we are pleased that NAD upheld Glad's right to claim that its Glad + Clorox product eliminates food and bacterial odors. We further appreciate NAD's finding that the packaging for Glad ForceFlex Plus with Clorox is not misleading and that the CloroxPro logo is reasonably understood to be a brand extension distinct from Clorox's traditional consumer product logo. Although Glad disagrees with NAD's criticism of certain advertisements, as a strong supporter of self-regulation, it will take NAD's recommendations into account in future advertising. **(#6996 JS, closed 01/03/2022)**

National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

JBS Appeals National Advertising Division Recommendation to Discontinue "Net Zero" Emissions by 2040 Claims

New York, NY – Feb. 15, 2023 – In a challenge brought by the Institute for Agriculture and Trade Policy (IATP), a not-for-profit organization with the stated mission of working for fair and sustainable food and farm systems, the National Advertising Division (NAD) of BBB National Programs recommended that JBS USA Holdings, Inc., discontinue claims relating to its goal of achieving "net zero" emissions by 2040.

JBS is the second-largest food company and the largest animal protein producer in the world, with products that include boxed beef, ground beef, fresh pork, bacon, poultry, lamb, seafood, meat-based snack foods, and plant-based protein.

Aspirational environmental benefit claims create reasonable expectations on the part of consumers and, as a result, they require substantiation. When aspirational claims are tied to measurable outcomes an advertiser must be able to demonstrate that its goals and aspirations are not merely illusory and to provide evidence of the steps it is taking to reach its stated goal.

The challenged claims include:

- "JBS is committing to be net zero by 2040";
- "Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040";
- "Bacon, chicken wings and steak with net zero emissions. It's possible;" and
- "Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge. Anything less is not an option."

NAD determined that JBS' "net zero" claims reasonably create consumer expectations that the advertiser's efforts are providing environmental benefits, specifically "net zero" emissions by 2040 a measurable outcome. Net-Zero is a recognized standard that guides companies in defining and establishing short and long-term science-based greenhouse gas emission reduction goals aligned with the legally binding 2015 Paris Agreement.

JBS provided evidence of a significant preliminary investment toward reducing emissions by 2040, including steps towards each of the stated "net zero" commitments, however, NAD concluded that the record did not support the broad message conveyed that JBS has a plan that it is implementing today to achieve net zero operational impact by 2040. Therefore, NAD recommended that JBS discontinue each of the challenged "net zero" claims.

NAD noted that nothing in its decision precludes JBS from making narrower truthful and not misleading claims regarding its efforts at researching potential methods for reducing emissions and any efforts it is undertaking to reduce emissions.

Further, regarding the claim "the SBTi recognized the Net Zero Commitment of JBS," NAD found that the record demonstrates JBS' notable, but preliminary efforts to establish SBTi-approved science-based greenhouse gas emission targets, but not an approved strategy to allow it to achieve net-zero climate impact by 2040. Therefore, NAD recommended that the claim be discontinued, but noted that nothing in its decision precludes JBS from making narrower truthful and not misleading claims regarding the steps it is taking to align its activities with SBTi criteria and its engagement with the SBTi process.

During the proceeding, JBS voluntarily permanently discontinued one challenged "net zero" claim, therefore, NAD did not review this claim on the merits.

In its advertiser statement, JBS stated that it "will appeal NAD's decision" based on its disagreement that "the challenged aspirational claims communicate a message that it has a detailed plan in place today to achieve net-zero by 2040—17 years from now" and JBS' belief that its claim are substantiated by "the foundational work" it has done to date.

Appeals of NAD decisions are made to the National Advertising Review Board (NARB), the appellate-level truth-in-advertising body of BBB National Programs.

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

Case #7135 (02/01/2023)
JBS USA Holdings, Inc.
Net Zero 2040
Challenger: *Institute for Agriculture & Trade Policy*
Product Type: *Food / Beverage*
Issues: *Environmental Claims*
Disposition: *Modified / Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

INSTITUTE FOR AGRICULTURE & TRADE POLICY, *Challenger*, JBS USA HOLDINGS, INC., *Advertiser*.	Case No. 7135 Closed (02/01/2023)

FINAL DECISION

- An aspirational "net zero" emissions claim reasonably creates high expectations on the part of consumers and requires significant evidence that the advertiser's efforts are providing environmental benefits with a very specific measurable outcome.

A. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger Institute for Agriculture & Trade Policy, ("IATP" or "Challenger") challenged express and implied claims made by Advertiser JBS USA Holdings, Inc. ("JBS" or "Advertiser") for its Net Zero 2040 claims. The following are representative of the claims that served as the basis for this inquiry:

A. *Express Claims*

- "JBS is committing to be net zero by 2040"
- "Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040."
- "the SBTi recognized the Net Zero Commitment of JBS."
- "Bacon, chicken wings and steak with net zero emissions. It's possible."
- "Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge. Anything less is not an option."
- "JBS will achieve Net Zero greenhouse gas emissions, reducing its direct and indirect (scopes 1,2 and 3) emissions"

B. Evidence Presented

The Challenger provided:

- Information from the United Nations about the Paris Agreement, climate change and global food agriculture[1]
- Reports from the Intergovernmental Panel on Climate Change[2]
- United States Environmental Protections Agency ("EPA") information about greenhouse gas emissions[3]
- information about the Science Based Targets Initiative ("SBTi")[4]
- JBS Institutional Presentation 2Q22[5]
- 2020 JBS Sustainability Report[6]
- 2019 JBS Annual and Sustainability Report[7]

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[1] *The Paris Agreement*, United Nations: Climate Change, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement ;

State of the World's Forests, U.N. Food and Agriculture Organization, https://www.fao.org/3/cb9360en/cb9360en.pdf;

Antony J. Blinken, The United States Officially Rejoins the Paris Agreement, U.S. Department of State: Press Release (Feb. 19, 2021), https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement.

[2] S*pecial Report: Global Warming of 1.5ºC: Summary for Policy Makers*, Intergovernmental Panel on Climate Change (IPCC) (2018), https://www.ipcc.ch/sr15/chapter/spm;

I*PCC Sixth Assessment Report: Technical Summary*, Intergovernmental Panel on Climate Change (Oct. 1, 2021)at 88, https://www.ipcc.ch/report/ar6/wg2/;

Rajendra Pachauri, et al., Climate Change 2014: Synthesis Report, Intergovernmental Panel on Climate Change, 87 (2015), https://archive.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf;

[3] *GHG Inventory Development Process & Guidance; Scope 1,2, &3 Inventory Guidance,* EPA Center for Corporate Climate Leadership, https://www.epa.gov/climateleadership/ghg-inventory-development-process-and-guidance;

EPA, Overview of Greenhouse Gasses, https://www.epa.gov/ghgemissions/overview-greenhouse-gases.

[4] *The Net-Zero Standard, Science Based Targets,* https://sciencebasedtargets.org/net-zero;

SBTi Business-Ambition FAQ, Science Based Targets Initiative, (Nov. 2021) at 4, https://sciencebasedtargets.org/resources/files/Business-Ambition-FAQ.pdf;

FAQs, Science Based Targets Initiative, https://sciencebasedtargets.org/faqs#:~:text=The%20SBTi%20requires%20that%20companies,)%20or%20net%2Dzero%20target;

Tom Dowdall, Science-Based Net Zero Targets: *'Less Net, more Zero'*(Oct. 7, 2021), https://sciencebasedtargets.org/blog/science-based-net-zero-targets-less-net-more-zero;

Science Based Targets Initiative Commitment Letter, SBTi, (Nov. 2021), https://sciencebasedtargets.org/resources/files/SBT-Commitment-Letter.pdf;

[5] Institutional Presentation2Q22, JBS, at 9, https://api.mziq.com/mzfilemanager/v2/d/043a77e1-0127-4502-bc5b-21427b991b22/48d5ab4b-7b04-7b53-66b9-8b1f7ce8f5e7?origin=1

[6] 2020 Sustainability Report, JBS USA, https://sustainability.jbsfoodsgroup.com/

7 Annual and Sustainability Report 2019, JBS, https://jbs.com.br/wp-content/uploads/2020/05/ras-jbs-2019-eng-final.pdf

- Information from JBS's websites[8]
- several peer reviewed articles on agricultural sustainability issues[9]
- Several peer reviewed articles on the United States meat and poultry industry[10]

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[8] *Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040*, JBS Food Group (March 23, 2021), https://jbsfoodsgroup.com/articles/jbs-makes-global-commitment-to-achieve-net-zero-greenhouse-gas-emissions-by-2040 ;

JBS Net Zero 2040, JBS, https://jbs.com.br/netzero/en/net-zero-2040/;

JBS is committing to be net zero by 2040, JBS, https://jbs.com.br/netzero/en/;

Sustainability, Pilgrim's USA, https://www.pilgrimsusa.com/sustainability-3/;

Sustainability, JBS, https://jbsfoodsgroup.com/our-purpose/sustainability;

Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040, JBS Food Group (March 23, 2021), https://jbsfoodsgroup.com/articles/jbs-makes-global-commitment-to-achieve-net-zero-greenhouse-gas-emissions-by-2040

[9] *Matthew N. Hayek & Scot M. Miller, Underestimates of methane from intensively raised animals could undermine goals of sustainable development*, 16 Env. Res. Letters (2021) at 2, https://iopscience.iop.org/article/10.1088/1748-9326/ac02ef/pdf;

Richard Waite & Alex Rudee, 6 Ways the US Can Curb Climate Change and Grow More Food, World Resources Institute (Aug. 20, 2020), https://www.wri.org/insights/6-ways-us-can-curb-climate-change-and-grow-more-food;

Jennifer Morgan, Why carbon offsetting doesn't cut it, World Economic Forum (Sept. 22, 2021), https://www.weforum.org/agenda/2021/09/greenpeace-international-carbon-offsetting-net-zero-pledges-climate-change-action/;

Meat, dairy and a net-zero emission future, Livestock, Environment and People, https://www.leap.ox.ac.uk/meat-dairy-and-net-zero-emission-future (last visited Sept. 19, 2022);

Dan Blaustein-Retjo, et al., The Clean Cow: Executive Summary, Breakthrough Instit.(Oct. 21, 2021), https://thebreakthrough.org/issues/food-agriculture-environment/the-clean-cow;

Michael Gerrard & John C. Dernbach, Legal Pathways to Deep Decarbonization in the United States (2019);

Ben Lilliston, Latest Agriculture Emissions Data Show Rise of Factory Farms, Inst. Agric. & Trade Pol'y (Mar. 26, 2019), https://www.iatp.org/blog/201904/latest-agriculture-emissions-data-show-rise-factory-farms;

Manuela Andreoni, Spot the greenwashing, The New York Times (May 20, 2022), https://www.nytimes.com/2022/05/20/climate/climate-change-greenwashing.html;

Monica Crippa et al., Food Systems Are Responsible for A Third of Global Anthropogenic GHG Emissions, 2 Nature Food 198 (2021);

Peter H. Lehner & Nathan A. Rosenberg, Farming for our Future: The Science, Law, and Policy of Climate-Neutral Agriculture (2021);

Sonja J. Vermeulen et al., Climate Change and Food Systems. Annual Review of Environment and Resources, 37 Ann. Rev. Env't & Res. 195 (2012);

[10] *M. Shahbandandeh, Leading meat and poultry processing companies in the United States in 2021, based on sales*, Statista (Sept. 29, 2021), https://www.statista.com/statistics/264898/major-us-meat-and-poultry-companies-based-on-sales/;

Daniel P. Bigelow & Allison Borchers, U.S. Dep't of Agric., Major Uses of Land in the United States, 2012, at 4 tbl.1 (2017);

- News articles about agriculture[11]
- Several articles about JBS[12]
- IATP published articles about greenhouse gas emissions,
- IATP published articles about JBS and its global operations. [13]

Matthew Hayek et al., The Carbon Opportunity Cost of Animal-Sourced Food Production on Land, 4 Nature Sustainability 21 (2021);

Lucy Koch, Sustainability Is Factoring into 2019 Holiday Purchases, eMarketer (Oct. 14, 2019), https://www.emarketer.com/content/sustainability-is-factoring-into-2019-holiday-purchases?_ga=2.170357734.731468461.1617378067-462530432.1615825431

Report shows a third of consumers prefer sustainable brands, Unilever (May 1, 2017) https://www.unilever.com/news/press-releases/2017/report-shows-a-third-of-consumers-prefer-sustainable-brands.html

Sam Danley, Consumer interest in sustainability is still growing, Food Business News, https://www.foodbusinessnews.net/articles/17988-consumer-interest-in-sustainability-still-growing (last visited June 24, 2022)(attached as Exhibit 40).

Sally Pattern, Why companies should track consumer understanding of net zero, BOSS (Aug. 16, 2021), https://www.afr.com/policy/energy-and-climate/why-companies-should-track-consumer-understanding-of-net-zero-20210811-p58hz0

Hana V. Vizcarra, The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures, 50 Envtl. L. Rep. (ELI) 10106, 10109 (2020)

[11] *Charlie Mitchell & Austin Frerick*, The Hog Barons, Vox (Apr. 19, 2021), https://www.vox.com/the-highlight/22344953/iowa-select-jeff-hansen-pork-farming;

Ula Chrobak, The World's Forgotten Greenhouse Gas, BBC (June 3, 2021), https://www.bbc.com/future/article/20210603-nitrous-oxide-the-worlds-forgotten-greenhouse-gas;

What's Driving Deforestation? Union of Concerned Scientists (Feb. 8, 2016), https://www.ucsusa.org/resources/whats-driving-deforestation;

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[12] *Marion Nestle, Least credible food industry ad of the week: JBS and climate change*, Food Politics (Apr. 26, 2021);

Jaydee Hanson & Julie Ranney, JBS is destroying the Amazon, The Ecologist (Mar. 30, 2020), https://theecologist.org/2020/mar/30/jbs-destroying-amazon;

Aurora Sola, JBS Promises to Stop Destroying the Environment—in 14 Years, Sentient Media (Apr. 13, 2021), https://sentientmedia.org/jbs-promises-to-stop-destroying-the-environment-in-14-years/;

Katie Nelson, JBS extends immunity to forest criminals to feed its supply chain until at least 2035 in surreal 'global commitment' Greenpeace (Mar. 25, 2021), https://www.greenpeace.org/usa/news/jbs-extends-immunity-to-forest-criminals-to-feed-its-supply-chain-until-at-least-2035-in-surreal-global-commitment/.

[13] *Shefali Sharma, The great climate greenwash: Global meat giant JBS' emissions leap by 51% in five years*, The Institute for Agriculture & Trade Policy (Apr. 20, 2022), https://www.iatp.org/jbs-emissions-rising-despite-net-zero-pledge ;

Shefali Sharma & Ben Lilliston, From Net Zero to Greenwash—Global Meat and Dairy Companies, Institute for Agriculture & Trade Policy (Oct. 4, 2021), https://www.iatp.org/net-zero-greenwash-global-meat-and-dairy-companies

The Advertiser provided:

- Copies of research commitments JBS has made with the University of Minnesota and Colorado State University
- Information about JBS USA and its global operations[14]
- information from its websites[15]
- 2021 JBS Sustainability Update[16]
- JBS Acquisitions Timeline
- JBS NZO Background Internal Presentation
- Verified Emission Reductions Purchase and Sale Agreement
- Confirmation and Business Ambition Document from Science Based Target initiative ("SBTi")
- SBTi Commitment Letter
- Provided to NAD on a confidential basis information about its scope of work with the Carbon Trust (U.K.)
- Nebraska Today article

C. Background

A. Climate Change

Since 2015 the global community has attempted to address environmental impacts via the Paris Agreements.[17] The Paris Agreements acknowledge that people contribute to climate change by releasing excess greenhouse gases into the atmosphere from activities such as burning fossil fuels for energy, cultivating crops, raising livestock, and clearing forests.

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[14] *Our Brands*, JBS Foods, https://jbsfoodsgroup.com/our-brands

[15] *Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040, JBS Food Group* (March 23, 2021), https://jbsfoodsgroup.com/articles/jbs-makes-global-commitment-to-achieve-net-zero-greenhouse-gas-emissions-by-2040;

JBS Net Zero 2040, JBS, https://jbs.com.br/netzero/en/net-zero-2040/;

JBS is committing to be net zero by 2040, JBS, https://jbs.com.br/netzero/en/

[16] https://sustainability.jbsfoodsgroup.com/

17 The Paris Agreements attempt to reduce the risks and impacts of climate change by limiting the increase in the global average temperature to well below 2°C above pre-industrial levels by pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.

The Paris Agreement also encourages countries to develop climate resilience strategies which address the current changes and foster low greenhouse gas emissions development, in a manner that does not threaten food production. More specifically, the Paris Agreement and Intergovernmental Panel on Climate Change ("IPCC") reports note that achieving the collective goal of limiting global warming requires drastic, rapid, and sustained reduction in GHG emissions by 2050 or sooner.

See, The Paris Agreement, United Nations: Climate Change, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement

Increasingly consumers choose products based in part on the environmental benefits touted by advertisers. Consumers eager to reduce their impact on the environment can be misled by advertisers due to the complex nature of environmental benefit claims, ambiguous terms, and less than expert environmental knowledge.

B. Parties

The Challenger, IATP is a not-for-profit organization founded in 1986 with the mission of fostering sustainable rural communities and regions. IATP conducts research and advocacy that promotes sustainable food, farm, and trade systems. IATP's mission is to work locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems. Some of IATP's work includes advocating for credible and transparent corporate disclosure of greenhouse gas emissions at the Securities and Exchange Commission and at international bodies, including the Science Based Target Initiative ("SBTi").

The Advertiser, JBS, is the second-largest food company and the largest animal protein producer in the world. With a global platform diversified by geography and products, JBS has a workforce of more than 245,000 and offers an extensive portfolio of brands, including Swift, Pilgrim's Pride, Seara, MoyPark, Friboi, Primo, and Just Bare, that can be purchased by consumers in more than 190 countries around the world. The Advertiser's products include boxed beef, ground beef, fresh pork, bacon, poultry, lamb, seafood, meat-based snack foods, and plant-based protein. JBS is also engaged in leather tanning, aluminum can production, industrial waste management, soap, glycerin, and biodiesel production, and transportation.

D. Decision

A. Standard of Review

Advertisers must possess a "reasonable basis" for claims disseminated in advertising whether they intended those messages or not.[18] What constitutes a "reasonable basis" depends on several factors, including the type of product, the type of claim, the consumer benefit from a truthful claim, the ease of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation experts in the field believe is reasonable.

Advertising plays an important role in raising consciousness about sustainability and informing consumers of a company's environmental activities and commitments. However, images and terms suggesting sustainability give rise to different meanings and consumer expectations making such advertising claims difficult to substantiate.[19] When analyzing sustainability and other environmental benefits claims, NAD relies on guidance set forth by the appropriate regulatory authorities. The Federal Trade Commission's ("FTC") Guides for the Use of Environmental Marketing Claims (the

[18] *Guardian Technologies, LLC (GermGuardian and PureGuardian Air Purifiers and Replacement Filters)*, Report #6319, NAD/CARU Case Reports (November 2019).

[19] *Georgia-Pacific Consumer Products LP (Quilted Northern Ultra Soft & Strong Bathroom Tissue),* Report #7018, NAD/CARU Case Reports (September 2021).

"Green Guides")[20] caution against the use of broad or unspecified claims about environmental product benefits. Specifically, the Green Guides provide:

> "Unqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings. In many cases, such claims likely convey that the product, package, or service has specific and far-reaching environmental benefits and may convey that the item or service has no negative environmental impact. Because it Is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims."[21]

Qualified general environmental benefit claims are permissible as they can "prevent deception about the nature of the environmental benefit being asserted" by using "clear and prominent qualifying language that limits the claim to a specific benefit or benefits." [22]

B. The Challenged "Net Zero" Claims

During the pendency of this proceeding, the Advertiser informed NAD that it would voluntarily permanently discontinue the claim, "JBS will achieve Net Zero greenhouse gas emissions, reducing its direct and indirect (scopes 1,2 and 3) emissions." The voluntarily discontinued claim will be treated, for compliance purposes, as though NAD recommended its discontinuance and the Advertiser agreed to comply.

The remaining challenged claims each relate to JBS's goal of achieving "net zero" emissions. Most broadly, JBS claims that it is "committing to be net zero by 2040." Other variations of the "net zero" focus on greenhouse gas emissions specifically ("Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040"), "net zero" meat production ("Bacon, chicken wings and steak with net zero emissions. It's possible."), JBS's aspiration to be an industry leader in moving towards "net zero" emissions, (Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge. Anything less is not an option."), and third-party recognition of its "net zero" goal ("the SBTi recognized the Net Zero Commitment of JBS.").

The claims appear on multiple national advertising platforms, including websites, social media, newspapers, YouTube, and publicly accessible corporate reports. Many of the advertisements feature the JBS or JBS brands logo and direct consumers to their respective websites for more information. The express claims are often accompanied by bucolic images of pristine farmland, smiling families and groups of people enjoying meals which include various animal products.

The Challenger argued that the express claims are misleading because they convey a message that JBS has an operational plan in place to achieve its net zero goals and is implementing such a plan.

JBS argued that the challenged claims are aspirational in nature and are intended to communicate the message JBS has set a goal to achieve net zero emissions by 2040 and are not intended to convey a

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[20] 16 CFR Part 260.

[21] 16 CFR 260.1, *et seq.*

[22] Id.

present-tense message that the aspirational future benefits from JBS are presently available to consumers.

In analyzing the messages conveyed by an advertisement, NAD reviews the net impression created by the advertisement as a whole, not merely words or phrases standing alone. As neither party presented consumer perception evidence for the reasonably conveyed messages, NAD relied on its expertise to determine the messages reasonably conveyed.

Aspirational environmental benefit claims may reasonably convey different messages to consumers, messages that require substantiation.[23] As NAD noted in a prior decision, "consumers…understand that there is no certainty that one's aspirations will ultimately be realized…[T]he question comes down to what, if any, particular expectations are created."[24] In the context of aspirational environmental benefit claims, NAD has stated that"[E}ven if the advertisement's message of sustainability is merely aspirational, the advertising claim is nevertheless one that requires substantiation. It is incumbent on the advertiser to demonstrate that its goals and aspirations are not merely illusory and to provide evidence of its commitments."[25]

In *Chipotle*, NAD reviewed several environmental benefit claims and found that some conveyed an aspirational message, while others conveyed a more specific message regarding current activities. NAD reviewed Chipotle's claims that its suppliers would be "more organic" and "less carbon emitting." NAD determined that one of the messages reasonably conveyed in the context of the television commercial in which the claims appeared was a forward-looking aspirational message that Chipotle was in fact engaged in genuine efforts that "could make our farmers . . . more organic . . . less carbon emitting" and that this message required substantiation.

With this background, NAD addressed each of the remaining "net zero" claims.

(1) *"JBS is committing to be net zero by 2040"*

NAD first reviewed the Advertiser's broad and unqualified claim that "JBS is committing to be net zero by 2040" which appears prominently as the title page on the JBS website dedicated to its sustainability efforts.

IATP argued the claim is definitive and that JBS's broad assertions create a net impression that it is actively reducing its emissions and building more sustainable operations. JBS argued that the claim was aspirational.

As noted above, aspirational claims which create reasonable expectations on the part of consumers require substantiation. NAD has found that when aspirational claims are tied to measurable outcomes an advertiser must be able to demonstrate that its goals and aspirations are not merely illusory and to provide evidence of the steps it is taking to reach its stated goal. For example, In *Georgia-Pacific*

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[23] *Chipotle Mexican Grill (Advertising by Chipotle Mexican Grill),* Report #7020, NAD/CARU Case Reports (February 2022).

[24] *T-Mobile USA, Inc. (Post-Merger 5G Service)*, Report #6422, NAD/CARU Case Reports (October 2020).

[25] *Chipotle Mexican Grill (Chipotle Restaurants),* Report #5450, NAD/CARU Case Reports (April 2012).

Consumer Products LP,[26] NAD examined several environmental benefit claims made by the advertiser on its website and product packaging and determined that the paper manufacturer had a reasonable basis for its aspirational tree planting claim (a claim that its goal was to plant two million trees by the end of 2021) because it provided evidence of contemporaneous application of operational plans which substantiated the Advertiser's environmental claims.

In *Chipotle*, with respect to Chipotle's aspirational claims regarding making its suppliers more organic and less carbon emitting, NAD found that evidence demonstrating specific actions and significant actions that Chipotle had taken toward each goal, including evidence that it was purchasing organic ingredients on a large scale and that it was sourcing a significant portion of the beef it uses from grass-fed, grass-finished animals, was sufficient to support those claims. NAD noted that these efforts were "growing and evolving" and there was no dispute that that the efforts were consistent with making its suppliers more organic and less carbon emitting. In *Chipotle*, the aspirational claim at issue created a reasonable expectation of relative change, i.e., "more organic" and "less carbon emitting."

JBS's "net zero" claims reasonably creates consumer expectations that the advertiser's efforts are providing environmental benefits, specifically "net zero" carbon emissions by a specified date, a measurable outcome. The JBS website where the challenged claim appears that "JBS is committing to be net zero by 2040" includes multiple specific targets with measurable outcomes. Notably the "How will JBS achieve net zero by 2040" each section of the website explains that in order reach its net zero 2040 goal it will achieve a "30% reduction of scopes 1 and 2 emissions by 2030, against base year 2019." JBS also explains that its beef cattle supply chain will be free of illegal deforestation in the Amazon and the other Brazilian biomes by 2025, including the suppliers of our suppliers.

Net-Zero is a recognized standard that guides companies in defining and establishing short and long-term science-based greenhouse gas emissions reductions goals which align with the Paris Agreement.[27] JBS's website detailed list of specific strategies and targeted outcomes contributes to the

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[26] *Georgia-Pacific Consumer Products LP (Quilted Northern Ultra Soft & Strong Bathroom Tissue)*, Report #7018, NAD/CARU Reports (September 2021).

[27] See: *The Net-Zero Standard*, SBTi, https://sciencebasedtargets.org/net-zero; and *What We Do,* SBTi, https://sciencebasedtargets.org/about-us#:~:text=The%20Science%20Based%20Targets%20initiative%20(SBTi)%3A,with%20the%20latest%20climate%20science.

Reproduced, in part:

> SBTi launched the world's first Corporate Net-Zero Standard (also referred to as the Net-Zero Standard), to ensure that companies' net-zero targets translate into action that is consistent with achieving a net-zero world by no later than 2050.
>
> SBTi is a partnership between Carbon Disclosure Project ("CDP"), the United Nations Global Compact, World Resources Institute ("WRI") and the World Wide Fund for Nature ("WWF"). SBTi is a global body enabling businesses to set greenhouse gas emissions ("GHG") reductions targets in line with the latest climate science. SBTi defines and promotes best practice in science-based target setting, offers resources and guidance to reduce barriers to adoption, and independently assesses and approves companies' targets. GHG emissions reduction targets are considered science-based if they are aligned with the goals of the 2015 Paris Agreement.
>
> SBTi's Corporate Net-Zero Standard provides guidance, criteria, and recommendations to support companies in setting net-zero targets through the SBTi. The main objective of this standard is to provide

message reasonably conveyed that JBS is acting toward specific objectives and measurable outcomes that will enable its operations to have net-zero impact on the environment by 2040.

NAD examined the support offered to support the claim. JBS explained that in December 2021, it signed a contract with Carbon Trust Advisory Limited to provide a detailed "Global Footprinting and Net Zero" plan for JBS. The Carbon Trust Advisory Limited proposal, agreed to by both parties, details the steps that the parties will take together to set targets in line with SBTi inclusive of Scope 1, 2 and 3 emissions across the entirety of JBS's operations. JBS explained that it issued a $1 billion Sustainability-Linked Bond, linked to its net zero climate goals. In addition, JBS explained that it has partnered with experts to help it reach its net-zero by 2040 goal and provided information about its research projects with the University of Minnesota and Colorado State University. JBS argued that its efforts demonstrate that it is taking concrete steps to be net-zero by 2040.

NAD reviewed the supporting materials and determined that the Advertiser has demonstrated that it is taking certain steps which may be helpful towards achieving net-zero by 2040. However, the evidence did not support the broad message conveyed by the challenged advertising that JBS is on a path towards net zero, which would include a plan with specific objectives and measurable outcomes likely to be achieved. The record shows JBS has undertaken steps to begin learning how to address the operational and scientific challenges it will face achieving net zero impact on the environment by 2040 including partnering with sustainability experts to establish feasible goals. These steps may enable the company to work toward its net zero goal in the near future after science-based targets are established and implemented.

While the record provides evidence of a significant preliminary investment JBS has made toward reducing emissions by 2040, it does not support the message conveyed by the claim that JBS has a plan

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a standardized approach for companies to set net-zero targets that are aligned with climate science because the definition of net-zero itself, as well as the path to get there, has been interpreted in different, and often inconsistent ways. The Net-Zero Standard addresses this problem by providing a clear, science-based definition of net-zero.

Companies adopting the Net-Zero Standard commit to the following requirements:

> Companies adopting the Net-Zero Standard will implement rapid, deep cuts to value-chain emissions in order to limit global temperature rise to 1.5°C. The reductions must cover a company's entire value chain emissions, including those produced by their own processes (scope 1), purchased electricity and heat (scope 2), and generated by suppliers and end-users (scope 3).
>
> Companies adopting the Net-Zero Standard are required to set both near-term (2030) and long-term science-based targets.
>
> Companies adopting the Net-Zero standard must refrain from making any net-zero claims until long-term targets are met because a company is only considered to have reached net-zero when it has achieved its long-term science-based target.
>
> SBTi recommends Companies make investments outside their science-based targets to help mitigate climate change elsewhere.

it is implementing today to achieve net zero operational impact by 2040. Based on the foregoing, NAD recommended that the Advertiser discontinue the claim that "JBS is committing to be net zero by 2040." Nothing in this decision precludes the Advertiser from making narrower truthful and not misleading claims regarding its efforts at researching potential methods for reducing emissions and any efforts it is undertaking to reduce emissions.

(2) *"Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040*

Next, NAD reviewed a version of the Advertiser's "net zero" claim, which references greenhouse gas emissions. The claim "Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040" appears in numerous social media posts, corporate communications and prominently as the title of JBS' website dedicated to explaining the organization's environmental sustainability plans to achieve net-zero greenhouse gas emissions by 2040.

IATP argued that the claim conveys the message that JBS's net zero commitment is comprehensive and that it will reduce emissions across its entire supply chain – meaning it will reduce its scope 1, 2, and 3 emissions. IATP argued that JBS's representations that it is reducing these emissions is misleading because JBS net zero plans do not count its scope 3 emissions, which likely account for 90-97% of its total emissions. IATP argued that by failing to account for the "vast majority of its greenhouse emissions," any claim of reaching net zero is thus meaningless and not in line with how that term is understood by reasonable consumers.

NAD reviewed the challenged claim and found that it reasonably conveys the message that JBS has committed to achieving net-zero greenhouse gas emissions by 2040 because the claim is broad and unqualified. By including language that it will achieve net-zero greenhouse gas emissions by 2040, the advertising conveys the message that JBS has a plan that will result in the achievement of the goal.

JBS argued that this aspirational claim is supported and explained that it has taken numerous steps to establish baseline greenhouse gas emissions which include Scope 3 emissions and has taken steps toward Scope 3 reductions. JBS explained that it recognizes that in order to achieve its net-zero 2040 goal it must address Scope 3 emissions and that while its 2021 Sustainability Report addresses the challenges associated with accurately calculating and addressing Scope 3 emissions it also presents a path forward. Specifically, JBS noted that since announcing the 2040 net-zero committed in 2021, it has invested in research or commissioned studies with:

- The Foundation for Food and Agriculture;
- The University of Minnesota to create a model for assessing "JBS's animal and feedstock supply chains as well as their associated GHG [greenhouse gas] impacts;"
- The Ecosystem Services Market Consortium ("ESMC") to fund a pilot program focused on the sale of "credits and assets for greenhouse gas reduction, water quality and quantity and biodiversity" in the United States;
- Colorado State University for "collaborating with the supply chain to demonstrate how beef producers can reduce their impact on climate and achieve climate neutrality;

- University of Nebraska to support its Feedlot Innovation center dedicated to "science-driven innovation in the development of resilient systems for food animal production;"[28]
- The Institute of Animal Science (IZ), linked to the São Paulo State Department of Agriculture and Food Supply, and Silvateam, a world-leading producer of plant-based extracts used in animal feed.

In addition, JBS explained that it has partnered with science-based companies and research centers to develop and expand the use of feed additives to help reduce methane emissions in the beef value chain and signed an agreement with Royal DSM to use Bovaer® in its beef chain, which is a feed additive for cows that will reduce methene emissions In addition, JBS noted that it has committed funds to the Partnerships for Climate-Smart Commodities proposal submitted by the Iowa Soybean Association in partnership with the Soil and Water Outcomes Fund, signed an agreement to purchase verified emission reductions and committed to creating targets in line with the SBTi Forest, Land and Agriculture project.
NAD carefully considered the evidence JBS provided to support its global commitment to greenhouse gas emissions by 2040. NAD found that JBS's research and financial investments demonstrate steps towards the stated commitment to net zero greenhouse gas emissions. However, NAD found that the evidence did not support the message that JBS's efforts are part of an operational plan that will result in net-zero greenhouse gas emissions by 2040. Therefore, NAD recommended that the Advertiser discontinue the claim "Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040."

(3) *"Bacon, chicken wings and steak with net zero emissions"*

Another version of JBS's "net zero" advertising references "net zero" meat production, stating "Bacon, chicken wings and steak with net zero emissions. It's possible." This claim appeared prominently as a full-page advertisement in the *New York Times* under the main title of the advertisement titled, "Agriculture Can Be Part of the Climate Solution." The advertisement included the logo of JBS brand Pilgrim's.

IATP argued that the advertising conveys the message that JBS has a concrete plan to achieve net zero emissions animal proteins and is executing on the plan. JBS maintained that the advertisement is aspirational and does not convey an objective message that JBS will achieve net zero emissions for these animal proteins by 2040.

While the word "possible" can be used to indicate some uncertainty, here the word underscores that net zero emissions can be achieved in JBS's meat production, by stating "It's possible" and under a headline attesting that "Agriculture Can Be Part of the Climate Solution." Thus, one message reasonably conveyed by this claim is the same broad message as JBS's other "net zero" claims. Namely, that JBS has developed a plan for "net zero" meat production and is implementing such a plan.

JBS provided no support for specific emissions reduction action taken related to these animal proteins, and instead explained that the evidence of JBS's investment in research related to its net-zero 2040

[28] *JBS USA supports new Feedlot Innovation Center with $700,000 gift*, Nebraska Today, April 12, 2022, https://news.unl.edu/newsrooms/today/article/jbs-usa-supports-new-feedlot-innovation-center-with-700000-gift/

goal is inclusive of bacon, chicken wings and steak to the extent the research will yield results which will enable JBS to produce the animal proteins with net zero climate impact. NAD noted the research is ongoing but has not yet produced any results that would satisfy consumers' reasonable expectations that JBS has successfully demonstrated an approach to meat production which would result in "net zero" emissions. Accordingly, NAD recommended that the Advertiser discontinue the claim that "Bacon, chicken wings and steak with net zero emissions. It's possible."

(4) *"Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge. Anything less is not an option"*

NAD next reviewed the claim "Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge. Anything less is not an option" which appeared in the same April on a full-page advertisement in the *New York Times* in April 2021.

IATP argued that the message conveyed by this claim is that JBS, as a leader in the food industry, has a concrete plan to achieve net- zero and is executing on the plan. JBS argued that the claim is truthful because it is the largest animal protein producer in the world and that it has in fact committed to leading change in the industry.

NAD examined the challenged claim and found that the first part of the claim conveyed the message that JBS is committed to leading change in the industry and that such a claim is supported by its public commitment and financial investments in research. However, NAD found, that the "anything less is not an option" portion of the claim conveys the unsupported message that JBS is engaged in concrete efforts to achieve its goal. As discussed more fully above, the evidence in the record does not support such a claim. NAD therefore recommended that JBS discontinue the claim, "Anything less is not an option" claim when combined with the claim, "Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge."

(5) *"The SBTi recognized the Net Zero Commitment of JBS"*

Lastly, NAD reviewed a claim relating to SBTi's recognition of JBS's "net zero" goal. The claim that "SBTi recognized the Net Zero Commitment of JBS" appears on JBS's "Net Zero 2040" website. IATP argued that JBS's reliance on the SBTi commitment letter is misleading because signing a letter of commitment is not the same as having developed or implemented science-based targets to achieve net zero impact on the environment.

JBS explained that "SBTi maintains publicly-accessible dashboard which displays several categories of companies and the stage of their respective commitments such as companies with targets or commitments. Companies with "Targets" have produced clearly-defined pathways . . . to reduce greenhouse gas ("GHG") emissions, which have been validated by SBTi. Companies with "Commitments" have demonstrated their intention to develop targets and submit these for validation within 24 months. JBS acknowledged that it has made a commitment, which is the first step in setting a science-based target.

NAD found that the message conveyed by the claim is that SBTi has reviewed and approved JBS's net zero goals and objectives underpinning its commitment to have net zero impact on the environment by 2040. JBS has demonstrated that it has begun the process to become SBTi certified. NAD determined, however, that while it is literally true that SBTi has recognized JBS' submission of the

SBTi Commitment Letter, it does not substantiate the message that SBTi has certified approved JBS' strategy to achieve net-zero climate impact by 2040 based on science-based targets.[29] Further, JBS acknowledged that it engaged Carbon Trust Advisory Limited to help provide a greenhouse gas footprint and Science Based Targets, both aligned with SBTi criteria, and that these efforts are underway, but not yet complete. Specifically, both the greenhouse gas footprint and corresponding targets include Scope 3 efforts that will likely be available in the near future.[30] The record established demonstrates JBS's notable, but preliminary efforts to establish SBTi approved science-based greenhouse gas emission targets, but not an approved strategy to allow it to achieve net-zero climate impact by 2040.

Based on the foregoing, NAD recommended that the Advertiser discontinue the claim that "the SBTi recognized the Net Zero Commitment of JBS." Nothing in this decision precludes JBS from making narrower truthful and not misleading claims regarding the steps it is taking to align its activities with SBTi criteria and its engagement with the SBTi process.

E. Conclusion

The Advertiser voluntarily permanently discontinued the claim that "JBS will achieve Net Zero greenhouse gas emissions, reducing its direct and indirect (scopes 1,2 and 3) emissions." The voluntarily discontinued claim will be treated, for compliance purposes, as though NAD recommended its discontinuance and the Advertiser agreed to comply.

NAD recommended that JBS discontinue each of the challenged "net zero" claims, including the claims that:

- "JBS is committing to be net zero by 2040";
- "Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040.";

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[29] *Butterball, LLC (Butterball Turkey Products)*, Report #6930, NAD/CARU Case Reports (August 2021).

In, *Butterball, LLC* NAD examined multiple environmental claims including several that were aspirational in nature. NAD determined that the aspiration claims that were made in close proximity to the American Humane Certified seal communicated a narrower message that Butterball complies with a specific set of independent standards. Butterball provided evidence that the practices required by the AH seal are set by a scientific advisory committee comprised of veterinarians and scientific experts in the relevant field and are consistent with their standards for humane treatment. NAD observed that those claims spoke to the advertiser's "recognition" of its "responsibility" and "commitment" to environmental stewardship, without expressly stating objective measures by which it has, does, or will put that recognition into action.

Moreover, in *Butterball*, NAD provided guidance on the use of certifications in supporting claims without misleading consumers. NAD explained that claims tied to a clear and conspicuous third-party certification—a certification that is independent and based on scientific standards, enforced and audited by the certifier, with the origins of the seal clearly identified—reasonably convey the message that the advertiser's practices are consistent with the certification even if consumers do not necessarily know the specific standards that certification requires. When an advertiser makes claims in close proximity to a claim about or description of a specific certification consumers would understand that the advertiser's practices are consistent with the reputable, third-party standards represented by the seal.

[30] See, Set *a Target,* SBTI: https://sciencebasedtargets.org/set-a-target.

- "Bacon, chicken wings and steak with net zero emissions. It's possible.;" and
- "Leading change across the food industry and achieving our goal of net zero by 2040 will be a challenge. Anything less is not an option." and
- "the SBTi recognized the Net Zero Commitment of JBS."

Nothing in this decision precludes the Advertiser from making narrower truthful and not misleading claims regarding its efforts at researching potential methods for reducing emissions and any efforts it is undertaking to reduce emissions. Nothing in this decision precludes JBS from making narrower truthful and not misleading claims regarding the steps it is taking to align its activities with SBTi criteria and its engagement with the SBTi process.

F. Advertiser's Statement

JBS will appeal NAD's decision to the National Advertising Review Board.

JBS appreciates NAD's recognition of its "significant preliminary investment . . . toward reducing emissions by 2040" as well as NAD's acknowledgment that JBS can advertise those specific efforts. JBS disagrees that the challenged aspirational claims communicate a message that it has a detailed plan in place today to achieve net-zero by 2040—17 years from now. We continue to believe that the express messaging in the challenged claims, and our entire net-zero by 2040 campaign, truthfully communicates our intent to achieve net-zero emissions by 2040. The foundational work we have done to date substantiates those communications. In addition, JBS's claim that its net-zero commitment has been recognized by SBTi is literally true and employs the exact language provided by SBTi. JBS disagrees with NAD that its literally true claim communicates a much more specific and detailed message that SBTi has reviewed and approved JBS's science based targets. **(#7135 WF, 02/01/2023)**

National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

National Advertising Division Recommends Merck Discontinue "Best in Show" Commercial for Bravecto Flea and Tick Preventative for Dogs; Merck to Appeal

New York, NY – Feb. 3, 2022 – The National Advertising Division (NAD) of BBB National Programs recommended that Merck Animal Health discontinue its "Best in Show" commercial and take steps to ensure that when making an "apples-to-oranges" comparison between its BRAVECTO® (Bravecto) flea and tick preventative for dogs and a rival company's NexGard, that the material dosing difference between the compared products is sufficiently disclosed. Merck will appeal NAD's decision.

Boehringer Ingelheim Animal Health USA Inc., maker of NexGard, challenged Merck's 30-second "Best in Show" television commercial comparing the Bravecto and NexGard products, which featured John Michael Higgins (actor from the movie *Best in Show*). The challenger also alleged that the commercial included the express claim that NexGard users will experience "a rejection in protection at week 5," as well as implied claims that:

- Bravecto is "best in show," i.e. better than NexGard at preventing flea and tick infestations when both products are used as directed.
- NexGard does not provide long lasting flea and tick prevention when used as directed.
- NexGard is ineffective, even when dosed according to the package directions, at preventing flea infestations after week five.

NexGard is administered monthly while Bravecto is administered every 12 weeks. NAD noted that when making "apples-to-oranges" comparisons to highlight features or attributes of products, advertising should disclose material differences between the products. NAD found that the challenged commercial did not clearly communicate the basis of comparison, i.e., the difference in the products' respective duration of action.

Further, NAD determined that, when viewed in its entirety, the commercial blends duration of action claims with a comparative superiority message and that one reasonable interpretation of the commercial is that Bravecto is superior to NexGard in protecting dogs from flea infestations, not merely that Bravecto is dosed for 12 weeks as compared to 30 days for NexGard. The advertiser did not submit any evidence that Bravecto provides superior protection against fleas than NexGard, generally.

For these reasons, NAD recommended that the "Best in Show" commercial be discontinued, and that the advertiser take steps to ensure that when making an "apples-to-oranges" comparison between its Bravecto flea and tick preventative for dogs and NexGard, that the material dosing difference between the compared products is sufficiently disclosed.

NAD noted that nothing in its decision prevents the advertiser from describing that one dose of Bravecto will protect a dog from fleas longer than one dose of NexGard.

In its advertiser statement, Merck stated that it will appeal NAD's ruling that the challenged commercial compares Bravecto and NexGard on any point other than their relative duration of action because it "respectfully disagrees with NAD's conclusion that any reasonable consumer could understand Merck's Bravecto commercial to communicate a product distinction other than that one dose of Bravecto lasts nearly 3x longer for flea protection than one dose of NexGard."

Such appeals of NAD decisions are made to the BBB National Programs' National Advertising Review Board (NARB), the appellate-level truth-in-advertising body of BBB National Programs.

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs is where businesses turn to enhance consumer trust and consumers are heard. The non-profit organization creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. Embracing its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, BBB National Programs today oversees more than a dozen leading national industry self-regulation programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Case #7029 (01/20/2022)
Merck Animal Health
BRAVECTO®
Challenger: *Boehringer Ingelheim Animal Health USA, Inc.*
Product Type: *Pet Products*
Issues: *Product Performance*
Disposition: *Modified/Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

BOEHRINGER INGELHEIM ANIMAL HEALTH USA, INC,
Challenger,

MERCK ANIMAL HEALTH,
Advertiser.

Case No. 7029
Filed 1/20/2022

- When making "apples-to-oranges" comparisons in order to highlight features or attributes of their products, the advertising should disclose the material differences between the products.

FINAL DECISION

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger Boehringer Ingelheim Animal Health USA, Inc. ("BI" or "Challenger") challenged express and implied claims made by Advertiser Merck Animal Health ("Merck" or "Advertiser") for its BRAVECTO(R) (*Bravecto*) flea and tick preventive for dogs. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

- NexGard users will experience "a rejection in protection at week 5".

B. Implied Claims

- BRAVECTO is "best in show," i.e. better than NexGard at preventing flea and tick infestations when both products are used as directed.
- NexGard does not provide long lasting flea and tick prevention when used as directed.
- NexGard is ineffective, even when dosed according to the package directions, at preventing flea infestations after week 5.

II. Evidence Presented

The Challenger submitted the Declaration of Dean Daily, the Senior Associate Director, Pet Veterinary Technical Marketing for BI regarding dosing differences between *Bravecto* and BI's *NexGard* as well as the products' efficacy. The Challenger also submitted its Package Insert for *NexGard* and scientific literature regarding the active ingredients in *NexGard* and *Bravecto*.[1] In addition, the Challenger submitted an image of packaging for its own topical flea and tick control product Frontline Plus and marketing materials for the Advertiser's topical product Activyl.

The Advertiser submitted copies of the FDA labeling for both *Bravecto* and *NexGard*. The Advertiser also submitted the Challenger's own advertising which touts its product's dosing as an advantage because its "monthly dosing that's easy to coordinate with other medications" and noted that *NexGard's* "active ingredient works for a month, after which your dog is vulnerable to flea infestations again. That's why it's important to give your dog their flea protection on a regular schedule." The Advertiser also submitted Freedom of Information Summaries for both *Bravecto* and *NexGard*.

In addition, the Advertiser submitted a Declaration from Dr. Frank Guerino, the Executive Director of Global Pharmaceutical Development at Merck in response to the flea control-related data submitted by the Challenger. The Advertiser also submitted various other scientific literature, articles, and regulatory guidance regarding parasitic protection for animals and the efficacy of protection products and ingredients.[2]

III. Decision

The parties are competing manufacturers of, among other products, oral flea and tick preventatives for dogs. The Challenger argues that the Advertiser's television commercial conveys the false, misleading, and disparaging messages that *Bravecto* is more efficacious at killing fleas and ticks than *NexGard* or that *NexGard* fails to provide long lasting protection against fleas and ticks when used as directed. According to the Challenger, the only consumer-relevant difference between the two products is that *NexGard* is administered monthly while *Bravecto* is administered every 12 weeks.[3]

A. Challenged Advertising

The challenged advertising is the 30-second television commercial ("Best in Show") featuring a comparison of the *Bravecto* and *NexGard* products with the actor John Michael Higgins who starred

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[1] Letendre, et al., Vet Parasit. 201 (2014) 190-97; Dryden, et al., Parasites & Vectors (2016) 9:365; Beugnet, et al., Vet. Parasit. 207 (2015) 297-301; Beugnet, et al., Vet. Parasit. 209 (2015) 142-145.

[2] A.A. Marchiondo et al., World Association for the Advancement of Veterinary Parasitology (W.A.A.V.P.) second edition: Guidelines for evaluating the efficacy of parasiticides for the treatment, prevention, and control of flea and tick infestations on dogs and cats, Veterinary Parasitology 194 (2013) 64-87; Lavan et al., Dog owner flea/tick medication purchases in the USA, Parasites and Vectors (2018); Guidance for Industry, Effectiveness of Anthelmintics, U.S. Department of Health and Human Services, Food and Drug Administration, Center for Veterinary Medicine (Oct. 11, 2001); European Medicines Agency, Science Medicines Health, Guideline for the testing and evaluation of the efficacy of antiparasitic substances for the treatment and prevention of tick and flea infestation in dogs and cats (Jul. 14, 2016); FDA Letter to Inspire Pharmaceuticals, Inc., RE: NDA # 050810, AzaSite® (azithromycin ophthalmic solution) 1%, MACMIS #18525, Apr. 14, 2011; Credit Suisse, Figure 92: Companion Animal Parasiticide Landscape (Jul. 13, 2021); R. Armstrong, Letter to the Editor, Veterinary Parasitology (2015).

[3] *Bravecto* is to be administered every 8 weeks for full protection again lone star ticks.

in the film “Best in Show.” Higgins states “Welcome. It’s time to see which chew is best in show for long-lasting flea and tick protection.” Higgins is depicted overseeing two dogs on each side of a fence. An image of *NexGard* packaging appears above the dog on the left-hand side of the screen, indicating that the dog was given *NexGard*. The dog on the right is similarly shown to have been given *Bravecto*. “Week 1” appears on the top left of the screen inside of a large circle. A disclosure appears on the bottom the screen stating “BRAVECTO Chews for Dogs kills fleas, prevents flea infestations, and kills ticks (black-legged tick, American dog tick, and brown dog tick) for 12 weeks. BRAVECTO Chews also kills lone star ticks for 8 weeks. NexGard is approved for 30 days.”

Higgins follows with “we may be here for weeks, even months,” while winking at the camera. The next frame shows “Week 5” on the top left of the screen inside of a large white circle indicating the passage of time. The dog on the left that had been given *NexGard* is shown scratching for four to five seconds suggesting that it has been bitten by fleas while Higgins exclaims “Holy smokes, a rejection in protection at week 5!” The *Bravecto*-treated dog puts its paws up on the fence to look into the other yard, while wagging its tail.

The commercial then continues with Higgins saying “But Bravecto just won’t quit.” The *Bravecto*-treated dog is shown hopping in the air happily, as the circle on the upper left of the screen is updated to “Week 8” to illustrate the further passage of time.

Higgins then states, "Let's hear from our veterinarian expert." An actor portraying a veterinarian appears and states, "Bravecto is our clear winner. 12 weeks of powerful protection, nearly 3 times longer than any other chew" while the *Bravecto*-treated dog continues to wag its tail and the *NexGard*-treated dog places its paw over its eyes in apparent disappointment. Higgins states, “Now that’s what I’m talking about! Bravo, Bravecto. Bravo," while the *Bravecto*-treated dog sits on top of a winner's podium. The veterinarian stands to the side holding a trophy labeled "#1 Long Lasting Chew."

The Challenger argued that the challenged claims should either be discontinued, or at a minimum, modified to make clear that *NexGard* is to be administered monthly to achieve long-lasting flea protection. Specifically, the Challenger maintained that the commercial makes an unfair apples-to-oranges comparison of the efficacy of a 12-week chew and a monthly chew by focusing on the difference in efficacy between weeks 5 to 12, while failing to explain the dosing difference. According to the Challenger, this violates the rule that advertisers comparing dissimilar products must disclose the material differences between the products being compared and that failing to adequately disclose material information regarding the differences between the compared products can render the comparison misleading to consumers. According to the Challenger, the commercial compares products that differ in one material respect: dosing instructions. The Challenger argued that the advertisement is expressly comparative, naming both *NexGard* and *Bravecto* specifically. In comparing *NexGard* to *Bravecto*, the Challenger argued that the Advertiser fails to disclose the fundamental difference in the product’s dosing.

The Challenger noted that the voiceover says nothing about the fact that *NexGard* is directed to be given every month. The Challenger also argued that the disclosure that appears on the bottom of the

screen is ineffective.[4] The Challenger asserted that the disclosure is not conspicuous, is presented in faint letters on top of moving images that would distract a viewer and that the disclosure with respect to *NexGard* is buried inside a dense paragraph of text and thus difficult to read. The Challenger also argued that the language of the disclosure itself is ineffective at communicating the material dosing difference between the two products. The Challenger contended that the statement that "NexGard is approved for 30 days" does not clearly convey the material fact that the product is directed to be administered every month, and that one can simply re-dose each month, as directed, to obtain similar or better efficacy as *Bravecto*. At best, the Challenger argued that the Best in Show commercial's disclosure is ambiguous and is subject to a number of interpretations, including the interpretation that *NexGard* can only offer a maximum of 30 days of flea and tick protection.

The Challenger also maintained that the claim that dogs treated with *NexGard* will experience a "rejection in protection at week 5" is false. While the product is labeled to be administered monthly, the Challenger maintained that a dog treated with *NexGard* will not experience a "rejection in protection" after 5 weeks.[5]

According to the Challenger, the Best in Show commercial also implies that *Bravecto* is more effective than *NexGard* at killing fleas and ticks, even when both products are dosed as directed. In the context presented in the advertisement, the Challenger argued that one reasonable interpretation of the commercial is that *Bravecto* is more effective at protecting dogs from fleas and ticks, not just that *Bravecto* lasts longer.[6] The Challenger also contended that the commercial disparages *NexGard* by implying that it fails to provide long-lasting flea and tick protection or that it is ineffective at preventing flea infestations after 5 weeks, even when used as directed.

The Advertiser countered that its commercial provides a truthful and accurate comparison of the two products' duration of action, without making any comparative efficacy representations. According to

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[4] The disclosure states: "BRAVECTO Chews for Dogs kills fleas, prevents flea infestations, and kills ticks (black-legged tick, American dog tick, and brown dog tick) for 12 weeks. BRAVECTO Chews also kills lone star ticks for 8 weeks. NexGard is approved for 30 days."

[5] The Challenger maintained that at 35 days after administration, *NexGard* demonstrates 100% efficacy against fleas as stated on its product labeling ("In a separate well-controlled laboratory study, *NexGard* demonstrated 100% effectiveness against adult fleas 24 hours post-infestation for 35 days."). The Challenger argued that the continued efficacy of afoxolaner at Day 35 and beyond is confirmed by pharmacokinetic studies, which show a long, linear elimination curve after administration. According to the Challenger, after 5 weeks, dogs treated with NexGard have been shown to have a blood concentration of the active ingredient, afoxolaner, to be effective against fleas through at least day 55 and therefore NexGard does not simply stop being effective against fleas after one month or even after 5 weeks. weeks. The Challenger argued that its *NexGard* product is efficacious against fleas after 5 weeks and that the label directions to dose monthly are based on the need for optimal performance against ticks. The Advertiser, however, noted that the FDA approved labeling of NexGard states that "On Day 28, NexGard was 81.1% effective 12 hours post-infestation" which is below the 90% effectiveness generally required to establish the efficacy of an antiparasitic product.

[6] The Challenger argued that *NexGard* may be more effective than *Bravecto* at flea and tick prevention when each product is administered in accordance with the schedules described in their respective labels because the monthly dosing regimen of afoxolaner better maintains blood plasma concentrations of the active over time, when compared with a single pill-per 12 (or 8) week regiment for fluralaner and that, at a minimum, *NexGard* offer similar protection against fleas and ticks when used as directed. Accordingly, the Challenger argued that Merck cannot substantiate the reasonably-implied claim that *Bravecto* provides superior protection against fleas and ticks as compared to *NexGard*.

the Advertiser, the commercial provides material information regarding the differing duration of action for *Bravecto* and *NexGard*, based on the information provided in the products' FDA-approved labels. Merck noted the language in the disclosure that appears on the bottom of the screen during the commercial is based on information from the products' FDA-approved labeling that *Bravecto* is approved for use as a flea preventative on a 12-week schedule, while *NexGard* is approved for use for treating fleas on a one-month schedule.

The Advertiser maintained that several elements in the commercial reinforce the message that the commercial is comparing the relative duration of action of the two products. Specifically, the Advertiser argued that the commercial contains several pronounced oral, visual, and contextual cues to clearly convey that the commercial is comparing the duration of action of a dose of each product, including beginning the commercial with a reference to "long-lasting" relief, providing consistent visual illustrations of the passage of time, reiterating that "we could be here for weeks, even months," displaying the relative dosing indications for the products without any comparative efficacy language, and utilizing multiple voiceover references to "weeks of" and "long-lasting" protection. According to the Advertiser, no reasonable consumer could understand the commercial to reference anything but the two products' relative duration of action.

B. Messages Conveyed

It is well-established that an advertiser is responsible for all reasonable interpretations of its claims conveyed by advertising, not simply the messages it intended to convey.[7]

NAD noted that the relative efficacy of the parties' products in terms of their preventing flea infestations is not in dispute. Rather, the sole issue here is whether the challenged commercial communicates a product distinction beyond a difference in duration or otherwise implies a claim of comparative superiority. As neither party submitted evidence to support its respective position concerning messages that consumers could reasonably take away from the Best in Show commercial, NAD used its own expertise to evaluate whether any implied messages were conveyed.[8] In the absence of reliable consumer perception evidence, NAD routinely steps into the shoes of the reasonable consumer to determine the messages reasonably conveyed by an advertisement.[9] In analyzing the messages conveyed by a particular advertisement, NAD typically reviews the totality or overall net impression created by an advertisement as a whole, including the words and the visual images, not merely words or phrases standing alone.[10]

Therefore, NAD considered whether the Best in Show commercial reasonably conveys the message that *Bravecto* provides more efficacious protection against fleas than *NexGard* or if the commercial conveys only a message about the two products' relative duration of action. NAD acknowledged that some elements of the challenged commercial, such as the depiction of the passage of time and the statement "nearly 3 times longer than any other chew," are suggestive of a comparison of the two

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[7] *Johnson & Johnson Consumer Inc. (Neutrogena Personal Care Products),* Report #6926, NAD/CARU Case Reports (June 2021).

[8] Bayer Healthcare, LLC (Aleve® Naproxen Sodium Tablets), Report #4418, *NAD/CARU Case Reports* (October 2005)

[9] *Charter Communications, Inc. (Spectrum Mobile)*, Report #6940, NAD/CARU Case Reports (April 2021).

[10] *Id.*

products' duration of action. The commercial also contains a disclosure on the bottom of the screen stating "BRAVECTO Chews for Dogs kills fleas, prevents flea infestations, and kills ticks (black-legged tick, American dog tick, and brown dog tick) for 12 weeks. BRAVECTO Chews also kills lone star ticks for 8 weeks. NexGard is approved for 30 days."

When viewed in its entirety, however, NAD determined that the commercial blends duration of action claims with a comparative superiority message and that one reasonable interpretation of the commercial is that *Bravecto* is superior to *NexGard* in protecting dogs from flea infestations.[11] Specifically, NAD noted that the commercial depicts product failure with the *NexGard* dog scratching for several seconds while Higgins states "Holy Smokes! A rejection in protection at week 5!" The commercial also depicts a veterinarian declaring *Bravecto* is "our clear winner" and presenting the *Bravecto*-treated dog with a "#1 Long Lasting Chew" trophy with the *NexGard*-treated dog covering its eyes with its paw. When viewed in its entirety, NAD determined that one reasonable interpretation of the commercial is that *Bravcecto* is more effective than *NexGard* at protecting dogs from fleas and not merely that one dose of *Bravecto* lasts longer than one dose of *NexGard*.

1. "Apples-to-oranges" comparison

When making "apples-to-oranges" comparisons in order to highlight features or attributes of their products, the advertising should disclose the material differences between the products.[12] Here, NAD found that the challenged commercial did not clearly communicate the basis of the comparison, i.e., the difference in the products' respective duration of action.[13] While the commercial contains a disclosure that appears on screen for several seconds, NAD determined that the disclosure did not clearly communicate the basis of the product comparison depicted in the commercial with the disclosure stating that *Bravecto* "kills fleas, prevents flea infestations, and kills ticks… for 12 weeks" while *NexGard* is "approved" for 30 days.

NAD has recognized that effective disclosures, regardless of format, must be "clear and conspicuous" such that the disclosure is "displayed in a manner that is readily noticeable, readable and/or audible, and understandable to the audience to whom it is directed."[14] In order to assess the adequacy of the disclosure, NAD reviews "the size of the font, the duration that the disclosure appears on screen, the

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[11] Any message that NAD finds to be implied by an advertisement need not be the only message conveyed or even the main message conveyed – it need only be one of the messages reasonably conveyed by the advertiser, even if unintentionally. Snapple Beverage Corporation (Snapple-A-Day Meal Replacement), Report #4132, NAD Case Reports (January 2004).

[12] Behr Process Corporation (Paints and Stains), Report #6148, *NAD/CARU Case Reports* (January 2018); Reckitt Benckiser LLC (Air Wick Scented Oil), Report #6283, *NAD/CARU Case Reports* (June 2019).

[13] The disclosure states "BRAVECTO Chews for Dogs kills fleas, prevents flea infestations, and kills ticks (black-legged tick, American dog tick, and brown dog tick) for 12 weeks. BRAVECTO Chews also kills lone star ticks for 8 weeks. NexGard is approved for 30 days."

[14] Bank of America (1-2-3 Cash Rewards Advertising Campaign), Report #5522, *NAD/CARU Case Reports* (November 2012)

extent to which it contrasts with the background, as well as surrounding visuals and sounds that may distract a viewer's attention away from the super (disclosure)."[15]

NAD found that the disclosure was not clear and conspicuous because it is in small print, in light font, against a dynamic background and the language itself is not easy to understand. The disclosure appears on screen, while Higgins is speaking, the dogs are shown side-by-side as well as individually, "Week 1" appears on the top left of the screen in much larger font, and the packaging for both the *Bravecto* and *Nexgard* appears prominently on screen. The disclosure also appears in small print, in white font against a dynamic background. As a general rule, NAD considers that visuals moving above or behind a small text message are likely to distract consumers' attention away from the intended message.[16] NAD determined that the disclosure in this case was not sufficiently prominent for consumers to notice, read and understand the basis of the apples-to-oranges comparison being depicted in the commercial.[17] For these reasons, NAD recommended that the Advertiser discontinue the commercial and take steps to ensure that when making an "apples-to-oranges" comparison between *Bravecto* and *NexGard*, that the material dosing difference between the compared products is sufficiently disclosed.

2. Comparative efficacy

The Challenger argued that the Best in Show commercial conveyed a comparative efficacy message. The Advertiser maintained that the challenged commercial, when viewed in the context of NAD's decision in Bayer Healthcare, LLC (Aleve® Naproxen Sodium Tablets), Report #3915, *NAD/CARU Case Reports* (June 2002) and similar precedent, indicates that no comparative efficacy claim is being made. The Advertiser argued that such precedent established clear rules for effectively comparing the duration of action of products without making an implied efficacy claim including avoiding imagery of subjects in need of relief at the beginning of an advertisement and referencing symptoms or ailments only as a nod to the types of symptoms for which the products are indicated. According to the Advertiser, the challenged commercial follows this formula with the dogs appearing asymptomatic at the beginning of the commercial and the *NexGard*-treated dog scratching being an isolated reference to confirmation of the product category and not a comparative efficacy message. The Advertiser maintained that any reference to product efficacy is so remote that when the *NexGard*-treated dog is shown at the end of the commercial, it is shown without any symptoms.

NAD disagreed. The commercials at issue in Bayer Healthcare, LLC (Aleve® Naproxen Sodium Tablets) differ from the challenged commercial in several material respects. Those commercials included clear indications that limited the comparative claim to the dose and duration of Aleve versus Advil such as a voiceover that "Only two Aleve can stop pain all day – that would take twice as many Advil" and a close up of two hands, one holding two Aleve capsules and another holding four Advil capsules. Thus, NAD determined that the commercials properly limited the comparative claim to the dose and

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[15] SPD Swill Precision Diagnostics GMBH (Clearblue Easy Digital Home Pregnancy Test), Report # 5283 NAD Case Reports (January 2011); see also Sanofi-Aventis, Sanofi-Aventis U.S. and Chattem, Inc. (Allegra), Report # 5384 NAD Case Reports (October 2011).

[16] SPD Swiss Precision at 18, citing Novartis Consumer Health, Inc. (Lamisil AT Gel Advanced), Report #4796 NAD Case Reports (February 2008).

[17] NAD also noted that this disclosure appears in the beginning of the commercial but no longer appears on screen when the *NexGard*-treated dog is shown scratching.

duration of Aleve versus Advil. NAD specifically noted that "[t]he voiceover, coupled with the disclosure 'based on minimum label dosing' and the two hands holding two Aleve and four Advil can reasonably be interpreted as that both Advil and Aleve can stop pain all day but that the effects of Aleve last longer, a claim that is supported by the products' FDA-approved labels." NAD further determined that "[i]n every other regard the commercials are monadic… without any other reference to another product that Aleve helps them bowl, play basketball, go to work or experience relief from minor pain."

In contrast, the Best in Show commercial contains no voiceover comparing the dosing differences of *Bravecto* and *NexGard,* and the commercial is expressly comparative, not monadic, showing a side-by-side comparison of the two products. Further, far from being an isolated reference, the commercial's depiction of the *NexGard*-treated dog vigorously scratching is shown for several seconds. The commercial cuts away from a side-by-side comparison to a full screen shot of the *NexGard*-treated dog vigorously scratching while the *NexGard* packaging appears prominently on screen. In addition, once the NexGard-treated dog is shown scratching, the only other time the *NexGard*-treated dog is shown is at the end of the commercial when it covers its eyes with its paw in apparent disappointment. NAD determined that one reasonable takeaway from the commercial's depiction of the *NexGard*-treated dog scratching from flea bites (while the *Bravecto*-treated dog happily wags its tail) is that *Bravecto* is more effective than *NexGard* at protecting dogs from fleas and not merely that *Bravecto* is dosed for 12 weeks as compared to 30 days for *NexGard*. As the Advertiser did not submit evidence that *Bravecto* provides superior protection than *NexGard*, NAD recommended that the Best in Show commercial be discontinued. NAD noted that nothing in this decision prevents the Advertiser from describing that one dose of *Bravecto* will protect a dog from fleas longer than one dose of *NexGard.*

IV. Conclusion

NAD recommended that the Advertiser discontinue the Best in Show commercial and take steps to ensure that when making an "apples-to-oranges" comparison between *Bravecto* and *NexGard*, that the material dosing difference between the compared products is sufficiently disclosed.

V. Advertiser's Statement

Merck Animal Health will appeal the NAD's decision to the NARB. Merck respectfully disagrees with NAD's conclusion that any reasonable consumer could understand Merck's Bravecto commercial to communicate a product distinction other than that one dose of Bravecto lasts nearly 3x longer for flea protection than one dose of NexGard. NAD disregards the numerous indicia that the commercial is comparing the duration of one dose of Bravecto to one dose of NexGard. NAD also ignores that the depiction of NexGard failing to provide adequate flea protection after 35 days is supported by FDA's approved indications for the product and Boehringer Ingelheim's own statements that NexGard "works for a month, after which your dog is vulnerable to flea infestations again." For this reason, Merck Animal Health will appeal NAD's ruling that the commercial compares Bravecto and NexGard on any point other than their relative duration of action. **(#7029 HJS, closed 01/20/2022)**

National Programs
National Advertising Review Board®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703-247-9330 / press@bbbnp.org

National Advertising Review Board Recommends Merck Discontinue "Best in Show" Commercial for Bravecto Flea and Tick Preventative for Dogs

New York, NY – May 05, 2022 – A panel of the National Advertising Review Board (NARB), the appellate advertising law body of BBB National Programs, has recommended that Merck Animal Health discontinue its "Best in Show" commercial for Bravecto brand flea and tick preventative based on the NARB panel's finding that the 30 second commercial reasonably communicates an implied misleading and unsupported message that a rival company's NexGard brand flea preventative fails to protect against fleas for twelve weeks because of a lack of efficacy.

The advertising at issue had been challenged before the National Advertising Division (NAD) by Boehringer Ingelheim Animal Health USA Inc., maker of NexGard. Following NAD's decision (Case No. 7029), Merck appealed NAD's recommendation that it discontinue its 30-second "Best in Show" television commercial.

In agreement with NAD, the NARB panel determined that Merck's commercial in its current form is not sufficiently clear in conveying that Bravecto's longer lasting performance in preventing fleas as compared to NexGard is due solely to the fact that Bravecto is a chew designed to last 12 weeks, while NexGard is a chew designed to last for one month.

The NARB panel found that this lack of clarity results in a reasonable interpretation by consumers that the NexGard single dose product failed to continue working through the 12-week time period portrayed in the commercial because it is less efficacious, a claim which both parties agree is not supported. The panel noted that there is nothing in the record to indicate that NexGard when used as directed with monthly dosing is less effective than Bravecto at preventing fleas and ticks over a 12-week period.

For these reasons, the NARB panel recommended that Merck discontinue its 30 second "Best in Show" advertisement.

The NARB panel also found that nothing in the NAD decision prevents Merck from advertising a truthful message that a single dose of Bravecto is designed to last 12 weeks compared to NexGard's one-month dosing design, and any benefit that may come from that, such as convenience to pet owners.

Merck stated that it "will comply with the NARB's decision." The advertiser further stated that it "respectfully disagrees with the majority's ruling that the Bravecto 30 second 'Best in Show' commercial reasonably conveys a message other than that one dose of Bravecto has a longer duration of action than a dose of NexGard. Nonetheless, Merck Animal Health will consider the NARB's recommendations in future advertising."

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About BBB National Programs: BBB National Programs is where businesses turn to enhance consumer trust and consumers are heard. The non-profit organization creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. Embracing its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, BBB National Programs today oversees more than a dozen leading national industry self-regulation programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Review Board (NARB): The National Advertising Review Board (NARB) is the appellate body for BBB National Programs' advertising self-regulatory programs. NARB's panel members include 85 distinguished volunteer professionals from the national advertising industry, agencies, and public members, such as academics and former members of the public sector. NARB serves as a layer of independent industry peer review that helps engender trust and compliance in NAD, CARU, and DSSRC matters.

National Programs
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NARB PANEL #301 – April 13, 2022

Appeal of the NAD Final Decision #7029 Regarding Claims for Merck Animal Health USA, BRAVECTO®

Panel Members

Daniel J. Petek (Chair)
Education Board of Directors, AAF
Advertising Instructor, Washington State University

Ivy Brown
Former VP, Head of Global Brand Marketing
DXC Technology

Jason Chebib
Co-Chair
The Marketing Society New York

Simona Rabsatt Butler
Sr. Director Global Strategic Sourcing, Marketing
Visa

Cassidy Sehgal
Data Protection Officer, Vice President, and Associate General Counsel
L'Oréal USA

Representing the National Advertising Review Board
Heather Hippsley, Vice Chair
Saveeta Dhanai, Coordinator

Representing the BBB National Programs
Mary Engle, Executive Vice President, Policy

Representing the National Advertising Division
Laura Brett, Vice President
Katherine Armstrong, Deputy Director
Howard Smith, Attorney

Representing Merck Animal Health USA
Raqiyyah R. Pippins, Partner, Arnold & Porter
Danait Mengist, Associate, Arnold & Porter
Barry McCoy, Vice President, Legal, Merck & Co. Inc.
David P. Jones, Legal Director, Merck Animal Health
Dr. Frank Guerino, Executive Director of Global Pharmaceutical Development, Merck Animal Health

Representing Boehringer Ingelheim Animal Health USA Inc.
Christopher Cole, Partner, Crowell & Moring LLP
Holly Melton, Partner, Crowell & Moring LLP
Randolph Legg, Head of BI Animal Health
Dean Dailey, Senior Associate Director, Pet Veterinary Technical Marketing, BI Animal Health
Jill Wasserman, Director, Senior Counsel, Animal Health Business Law, BI
Nina Dillon, Director & Senior Counsel, Litigation, Government Investigations and Risk Management, BI

National Programs
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REPORT OF NARB PANEL 301

Decision Issued: April 13, 2022

Appeal of the NAD Final Decision #7029 Regarding Claims for Merck Animal Health USA, BRAVECTO®

Merck Animal Health ("Merck") appeals a decision of the National Advertising Division ("NAD") dated January 20, 2022, Case # 7029. The challenger is Boehringer Ingelheim Animal Health USA Inc. ("BI"). The advertiser and challenger sell competing flea and tick preventive oral medication for dogs, Bravecto and NexGard, respectively.

A. Background

At issue in this appeal is one 30-second television advertisement that compares Merck's Bravecto brand flea preventative oral prescription medication to BI's NexGard brand flea preventative oral prescription medication.

The ad features the actor John Michael Higgins, who starred in the movie "Best in Show." Higgins is depicted overseeing two dogs on each side of a fence. An image of NexGard packaging appears above the dog on the left-hand side of the screen, indicating that the dog was given NexGard. The dog on the right is similarly shown to have been given Bravecto. "Week 1" appears on the top left of the screen inside of a large circle. Higgins states "Welcome. It's time to see which chew is best in show for long-lasting flea and tick protection." He follows with "we may be here for weeks, even months," while winking at the camera. The next frame shows "Week 5" on the top left of the screen inside of a large white circle indicating the passage of time. The dog on the left that had been given NexGard is shown scratching for four to five seconds, suggesting that it has been bitten by fleas, while Higgins exclaims, "Holy smokes, a rejection in protection at week 5!" The commercial continues with Higgins saying "But Bravecto just won't quit." The circle on the upper left of the screen is updated to "Week 8" to illustrate the further passage of time. Higgins then states, "Let's hear from our veterinarian expert." An actor portraying a veterinarian appears and states, "Bravecto is our clear winner. 12 weeks of powerful protection, nearly 3 times longer than any other chew." Higgins states, "Now that's what I'm talking about! Bravo, Bravecto, Bravo," while the Bravecto-treated dog sits on top of a winner's podium. The veterinarian stands to the side holding a trophy labeled "#1 Long Lasting Chew."

The parties agree that the Bravecto product's approved FDA dose is one chew every twelve weeks, while the NexGard product's approved FDA dose is one chew every month. The parties do not dispute that both products offer similar efficacy for preventing fleas when used as directed. While the parties dispute the messages conveyed by the challenged advertising, neither party offered consumer survey evidence supporting its interpretation.

In its Decision, NAD recommended that Merck discontinue its "Best in Show" 30-second television commercial. NAD found that one reasonable interpretation of the commercial is that Bravecto is more effective than NexGard at protecting dogs from fleas, which is an unsupported claim.

NAD also advised the advertiser "to take steps to ensure that when making an apples-to-oranges comparison between Bravecto and NexGard, that the material dosing difference between the compared products is sufficiently disclosed." NAD Decision at 9.

B. Discussion

In its presentation to the panel, Merck argues that any reasonable consumer would understand that Merck's Bravecto commercial communicates *only* that one dose of Bravecto lasts nearly 3x longer for flea protection than one dose of NexGard. Merck argues that its depiction of Bravecto providing adequate flea protection at weeks 5, 8 and 12, while NexGard does not, is a truthful and non-misleading depiction of FDA's determination of each product's respective duration of action for a single dose. Merck argues that the commercial does not create a misleading "apples to oranges" message that its longer lasting performance in preventing fleas is based on superior efficacy rather than its longer single dose duration of action.[1]

The majority of the panel finds that Merck's commercial in its current form is not sufficiently clear in conveying that Bravecto's longer lasting performance in preventing fleas as compared to BI's NexGard is due solely to the fact that Bravecto is a chew designed to last twelve weeks rather than one month, which is the design of the NexGard chew.[2] The advertisement never states or provides a visual cue (e.g., showing the number of doses needed) that one product is designed for monthly use and the other is designed for use every 12 weeks.

The majority of the panel finds that the lack of clarity results in a reasonable interpretation by consumers that the NexGard single dose product failed to continue working through the twelve-week time period portrayed in the commercial because it is less efficacious. The image of the NexGard dog scratching for four to five seconds depicting that it has been bitten by fleas, while the voiceover states, "Holy smokes, a rejection in protection at week 5!," conveys a strong message that a NexGard chew leaves a dog completely unprotected at the start of week five, which is unsupported by any data submitted by the advertiser, who bears responsibility for providing a

[1] The commercial includes a print dosing disclosure that NAD found inadequate. Because Merck's position in its presentation to the panel is that the disclosure is not intended to, nor necessary to, clarify the duration-of-action message, the panel disregarded the disclosure in its claims analysis.

[2] One panel member agrees with the advertiser that the challenged advertisement reasonably conveys *only* a message that one Bravecto chew lasts longer than one NexGard chew in preventing fleas.

reasonable basis for its claim.[3] This unsupported message, combined with the voiceover stating "But Bravecto just won't quit," and the image of the NexGard dog appearing to cover its head in shame at the end of twelve weeks while the Bravecto dog receives its #1 long lasting chew trophy, conveys an implied misleading and unsupported message that a NexGard chew fails to protect against fleas for twelve weeks because of a lack of efficacy, rather than because the product's protection has simply run its course.

Although some consumers may understand that the NexGard chew fails the twelve-week test *only* because it is designed to last a month, a majority of the panel concludes that reasonable consumers would interpret the portrayal of the products competing in a contest to determine which product works best over a twelve-week cycle as showing that Bravecto delivers superior flea protection based on efficacy, a claim that both parties agree is not supported. There is nothing in the record to indicate that NexGard when used as directed with monthly dosing is less effective than Bravecto at preventing fleas and ticks over a twelve-week period.

C. Conclusion

The panel recommends that Merck discontinue its "Best in Show" advertisement. The panel also finds that that nothing in the NAD decision prevents Merck from advertising a truthful message that a single dose of Bravecto is designed to last 12 weeks compared to NexGard's one-month dosing design, and any benefit that may come from that, such as convenience to pet owners.

The panel thanks Merck and BI for participating in industry self-regulation in the interests of promoting truth in advertising.

D. Advertiser's Statement

Merck Animal Health will comply with the NARB's decision. Merck Animal Health thanks the panel for its attention to this matter and acknowledging Merck Animal Health's right to share that a dose of Bravecto lasts 12 weeks compared to NexGard's one-month dosing design. Merck Animal Health also appreciates the Panel reiterating Merck's right to share any benefit that comes from Bravecto's longer duration of action, including, convenience to pet owners.

Merck Animal Health respectfully disagrees with the majority's ruling that the Bravecto 30 second "Best in Show" commercial reasonably conveys a message other than that one dose of Bravecto has a longer duration of action than a dose of NexGard. Nonetheless, Merck Animal Health will consider the NARB's recommendations in future advertising.

[3] Data submitted by BI shows that after a single dose, protection continues at least until the 35th day of treatment.

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

Molson Coors Appeals National Advertising Division Recommendation to Discontinue "Light Beer Shouldn't Taste Like Water" Claim

New York, NY – Feb. 23, 2023 – In a Fast-Track SWIFT challenge brought by Anheuser-Busch Companies LLC, the National Advertising Division (NAD) of BBB National Programs recommended that Molson Coors Beverage Company discontinue the claim that "light beer shouldn't taste like water. It should taste like beer."

Fast-Track SWIFT is an expedited challenge process designed for single-issue advertising cases brought to NAD. Anheuser-Busch challenged Molson Coors's claim that "light beer shouldn't taste like water. It should taste like beer" in advertising promoting Miller Lite.

In this challenge, NAD determined that, in context, "light beer shouldn't taste like water. It should taste like beer" is not puffery or a mere opinion. Although no specific competing light beer is identified by name in the challenged videos, NAD determined that tasting "like water" is a measurable attribute. Reliable sensory testing could demonstrate whether consumers detect a watery taste or the complete absence of taste. Consumers may also reasonably expect that the statement is supported by such evidence.

Because Molson Coors did not submit evidence supporting the claim that any other light beers "taste like water," NAD recommended that the claim be discontinued.

NAD noted that nothing in its decision precludes Molson Coors from making other truthful and not misleading claims relating to consumers' taste preferences or other claims pertaining to the taste qualities of its beers or competing beers.

NAD determined that the Anheuser-Busch challenge was appropriate for Fast-Track SWIFT because it presented the single issue as to whether the challenged claim was misleading.

In its advertiser statement, Molson Coors stated that it "disagrees with the decision and recommendation of the National Advertising Division and will appeal the decision to the National Advertising Review Board" based on its belief that "the ads do not expressly identify Michelob Ultra or any other light beers" and it should not be precluded from publicly sharing its "opinion" that light beer should not taste like water.

Appeals of NAD decisions are made to BBB National Programs' National Advertising Review Board (NARB), the appellate-level truth-in-advertising body of BBB National Programs.

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About BBB National Programs: BBB National Programs, a non-profit organization, is the home of U.S. independent industry self-regulation, currently operating more than a dozen globally recognized programs that have been helping enhance consumer trust in business for more than 50 years. These programs provide third-party accountability and dispute resolution services that address existing and emerging industry issues, create a fairer playing field for businesses, and a better experience for consumers. BBB National Programs continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-and-teen-directed marketing, data privacy, dispute resolution, automobile warranty, technology, and emerging areas. To learn more, visit bbbprograms.org.

About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

NAD Fast-Track SWIFT Case #7183 (02/03/2023)

Parties: Molson Coors Beverage Company / Anheuser-Busch Companies LLC
Product: Miller Lite
Product Type: Food / Beverage
Disposition: Modified / Discontinued
Claim: Express Claims

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

ANHEUSER-BUSCH COMPANIES LLC , *Challenger*, MOLSON COORS BEVERAGE COMPANY, *Advertiser*.	Case No. 7183 Closed 02/03/2023

FAST-TRACK SWIFT CASE

- NAD has found that claims that foods or beverages have a bad taste or no taste require substantiation.

- In the context in which it appears, "light beer shouldn't taste like water. It should taste like beer" is not puffery or a mere opinion.

Basis of Inquiry: As part of NAD's Fast-Track SWIFT program designed to quickly and efficiently review advertising claims that involve a single well-defined advertising issue, Anheuser-Busch Companies LLC ("A-B" or "Challenger") challenged Molson Coors Beverage Company's ("Molson Coors" or "Advertiser") claim in television and online video advertising that "light beer shouldn't taste like water. It should taste like beer."

I. Fast-Track SWIFT Eligibility[1]

[1] A challenge is appropriate for determination in SWIFT if it involves a single, well-defined issue such as an express claim that does not require review of complex legal argument or evidence and is capable of resolution within the SWIFT timeline. NAD/NARB Procedures Sec. 1.1(E)(2). NAD has also designated specific categories of cases that it considers for SWIFT: (1) the prominence or sufficiency of disclosures, including disclosure issues in influencer marketing, native advertising, and incentivized reviews; (2) misleading pricing and sales claims; and (3) misleading express claims that do not require review of complex evidence or substantiation such as a review of clinical or technical testing or consumer perception evidence. To ensure that the challenged claim meets this criteria, NAD/NARB Procedures require an initial review by NAD when the SWIFT challenge is first filed and then again in response to an advertiser's objection to the challenge being resolved in SWIFT. NAD/NARB Procedures, Sec. 6.1(C) and 6.2 (A). Further, if it becomes clear at any point during the pendency of a challenge that it is no longer appropriate for SWIFT, NAD will administratively close the case and it may be transferred to standard or complex track. NAD/NARB Procedures 6.2(C).

NAD thanks the Advertiser for its voluntary participation in the NAD Fast-Track SWIFT process.

The parties each manufacture competing light beers. Among others, A-B manufactures Bud Light and Michelob Ultra and Miller Coors manufactures Miller Lite. A-B challenged Molson Coors's claim that "light beer shouldn't taste like water. It should taste like beer." in advertising promoting Miller Lite.

One video features a male cyclist pedaling hard to reach the top of mountain. When he reaches the summit, he opens a blue slender can labeled "Extremely Light Beer" (which A-B argued is similar in appearance to a Michelob Ultra can). The tired cyclist refreshes himself by pouring the beer over his head and the announcer says "light beer shouldn't taste like water. It should taste like beer" The next shot shows a can of Miller Lite and concludes "More taste, 96 calories. Miller Lite." Another video features a female athlete strenuously exercising at a "boot camp" who also refreshes herself at the end of a workout by pouring a beer labeled "Extremely Light Beer" over her head. The announcer also says "light beer shouldn't taste like water. It should taste like beer" before concluding with "More taste, 96 calories. Miller Lite."[2]

The Challenger argued that the videos falsely disparage Michelob Ultra and other light beers by claiming that consumers find them to be tasteless or having a taste similar to water. The Challenger argued that the videos go even further than false disparagement into the realm of ash canning or false denigration by communicating that competing light beers are of little or no value to drink and only good for pouring out of the can to shower oneself as with water.

Molson Coors objected to A-B's request that the matter be considered under the Fast-Track SWIFT process on the grounds that the challenge is not actually predicated on an express claim, but rather whether there are any potential implications stemming from the entire content of the videos. Molson Coors also noted that its "more taste" claim had previously been the subject of an NAD proceeding, and in that case, the "more taste" claim necessitated the review of complex and voluminous evidence.[3]

NAD carefully considered Molson Coors's objection and determined that the challenge could proceed in SWIFT as it presents a single issue relating to the claim "light beer shouldn't taste like water. It should taste like beer" and whether it is misleading. NAD noted, however, that its review in this Fast-Track SWIFT challenge would be limited to this single issue and not a review of any potentially implied messages of a general taste preference.

I. Decision

The Challenger argued that the videos, with their words — "light beer shouldn't taste like water. It should taste like beer" —and their imagery — tired athletes pouring beers on themselves to cool off — tell consumers that light beers other than Miller Lite taste like water. The Challenger contended that there is no evidence to suggest that its Michelob Ultra or other light beers are tasteless or taste like water.

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[2] In at least one version of the videos, the sentence "It should taste like beer" is not included. The Advertiser noted that the videos had stopped airing on television months prior to the filing of the challenge. The videos, however, remained available on YouTube.

[3] *MillerCoors, LLC (Miller Lite Beer)*, Report #6227, NAD/CARU Case Reports (December 2018).

The Advertiser argued that the challenged tagline is not an express claim but rather a subjective opinion about what beer should and should not taste like which cannot be objectively proved or disproved. The Advertiser also contended that the statement is puffery because it is not sufficiently specific and material enough to create expectations in consumers. The Advertiser did not submit any tests or other evidence supporting the claim that any competing light beers "taste like water."[4]

NAD has found that claims that foods or beverages have a bad taste or no taste require substantiation.[5] In *Traeger Pellet Grills LLC (Traeger Grills)*, Report #6327, NAD/CARU Case Reports (December 2019), NAD reviewed advertising promoting wood burning grills. In a commercial, a man says that the meat cooking on his gas grill "tastes like gas." NAD determined that this was an "unsupported objectively provable (and falsely denigrating) taste claim" as it would have been possible for the advertiser to test whether propane cooking made food taste like gas. As NAD explained in *Traeger Grills*, if the advertising "refers to specific attributes which are likely to suggest that a product is comparatively better in some recognizable way," even if the claim is "communicated in a humorous way, such a message requires substantiation."

Although no specific competing light beer is identified by name in the videos, NAD determined that tasting "like water" is a measurable attribute. Reliable sensory testing could demonstrate whether consumers detect a watery taste or the complete absence of taste. Consumers may also reasonably expect that the statement is supported by such evidence. In the context in which it appears, "light beer shouldn't taste like water. It should taste like beer" is not puffery or a mere opinion. It appears in an advertisement where Miller Lite's own taste is referenced ("More taste") and a generic competing product is depicted. Thus in this context it is not a stray opinion because it appears where the subject is the relative taste attributes of Miller Lite versus other light beers. The activity depicted, athletes cooling off their bodies by showering themselves with a can of light beer rather than drinking it, is exaggerated and humorous, but speaks to the attribute of taste and serves to bolster the specific express message about other light beers tasting "like water."[6]

As the Advertiser did not submit evidence supporting the claim that any other light beers "taste like water," NAD recommended that the Advertiser discontinue the claim that "light beer shouldn't taste like water. It should taste like beer." Nothing in this decision precludes the Advertiser from making other truthful and not misleading claims relating to consumers' taste preferences or other claims pertaining to the taste qualities of its beers or competing beers.

II. Conclusion

NAD recommended that the Advertiser discontinue the claim that "light beer shouldn't taste like water. It should taste like beer." Nothing in this decision precludes the Advertiser from making other

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[4] Molson Coors submitted a declaration from its Director of Research and Development and Innovation in which he stated that market research and his experience indicates that consumers want their beer to taste like beer and not water, an opinion which he shares.

[5] *See, e.g., BA SPORTS NUTRITION, LLC (BodyArmor Sports Drink)*, Report #7047, NAD/CARU Case Reports (October 2021) (recommending that claim that Gatorade is "gross" be discontinued).

[6] As there was no evidence in the record relating to the taste qualities of any competing light beer or whether they taste "like water," NAD did not reach the question of whether the blue "Extremely Light Beer" can in the videos signified a specific competitor such as Michelob Ultra.

truthful and not misleading claims relating to consumers' taste preferences or other claims pertaining to the taste qualities of its beers or competing beers.

III. Advertiser's Statement

Molson Coors Beverage Company disagrees with the decision and recommendation of the National Advertising Division and will appeal the decision to the National Advertising Review Board. Anheuser-Busch took issue with a statement in the contested ads that "Light beer shouldn't taste like water. It should taste like beer." A-B argued that this statement disparaged Michelob Ultra. However, as NAD found, the ads do not expressly identify Michelob Ultra or any other light beers. Nevertheless, as part of its decision, NAD recommended that Molson Coors refrain from publicly stating that "light beer shouldn't taste like water." Molson Coors vehemently disagrees. It is our firm belief – one we believe is shared by our customers – that light beer should not taste like water, and we should not be precluded from sharing that opinion. **(#7183 ELU, closed 02/03/2023)**

National Programs
National Advertising Review Board®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703-247-9330 / press@bbbnp.org

National Advertising Review Board Recommends Molson Coors Discontinue "Light Beer Shouldn't Taste Like Water" Claim in Two Advertisements

New York, NY – April 11, 2023 – A panel of the National Advertising Review Board (NARB), the appellate body of BBB National Programs, recommended that Molson Coors Beverage Company discontinue the claim that "light beer shouldn't taste like water. It should taste like beer" in the context of two challenged advertisements promoting Miller Lite.

The advertising at issue, which appeared in two 15-second advertisements, had been challenged by Anheuser-Busch Companies, LLC. Following NAD's decision (Case No. 7183), Molson Coors appealed NAD's recommendation that it discontinue the claim that "light beer shouldn't taste like water. It should taste like beer."

In agreement with NAD, the NARB panel concluded that in the context in which the claim is used in the challenged ads, the ad slogan is not puffery but is a comparative claim requiring substantiation in the form of a well-conducted consumer taste test.

Further, the NARB panel found that Molson Coors did not provide substantiation for the claim, nor did it provide any consumer research regarding its argument that reasonable consumers would *not* take away a comparative claim. The NARB panel concluded that, in context, the compare-and-contrast visuals and voiceover placement of the slogan at issue likely communicates a comparative claim to at least a significant minority of reasonable consumers.

The NARB panel recommended that Molson Coors discontinue the claim that "light beer shouldn't taste like water. It should taste like beer" in the context of two challenged advertisements, but noted that nothing in its decision precludes the advertiser from making claims relating to consumers' taste preference or other claims pertaining to the taste qualities of its beer or competing beers as long as they are properly substantiated.

Molson Coors stated that it "supports the NAD and NARB self-regulatory process and will comply with the recommendation of the NARB," although it "continues to disagree that the phrase 'light beer shouldn't taste like water. It should taste like beer' is anything but puffery, even in this context."

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs, a non-profit organization, is the home of U.S. independent industry self-regulation, currently operating more than a dozen globally recognized programs that have been helping enhance consumer trust in business for more than 50 years. These programs provide third-party accountability and dispute resolution services that address existing and emerging industry issues, create a fairer playing field for businesses, and a better experience for consumers. BBB National Programs continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-and-teen-directed marketing, data privacy, dispute resolution, automobile warranty, technology, and emerging areas. To learn more, visit bbbprograms.org.

About the National Advertising Review Board (NARB): The National Advertising Review Board (NARB) is the appellate body for BBB National Programs' advertising self-regulatory programs. NARB's panel members include 85 distinguished volunteer professionals from the national advertising industry, agencies, and public members, such as academics and former members of the public sector. NARB serves as a layer of independent industry peer review that helps engender trust and compliance in NAD, CARU, and DSSRC matters.

NARB PANEL #315 – March 20, 2023

Appeal of NAD's Final Decision #7183 Regarding Claims for Molson Coors Beverage Company, Miller Lite

Panel Members

Daniel Petek (Chair)
Education Board of Directors, AAF
Advertising Instructor
Washington State University

Allen Garcie
Associate Professor of Digital Arts
Louisiana State University Shreveport

David Lane
Co-Founder
LevLane

Representing the National Advertising Review Board
Heather Hippsley, Vice Chair
Saveeta Dhanai, NARB Coordinator

Representing the BBB National Programs
Mary Engle, Executive Vice President, Policy

Representing the National Advertising Division
Laura Brett, Vice President
Katherine Armstrong, Deputy Director
Eric Unis, Attorney

Representing Molson Coors Beverage Company
Christopher A. Cole, Partner and Chair, Advertising, Marketing and Promotions, Katten Muchin Rosenman LLP
Michael R. Justus, Partner, Katten Muchin Rosenman LLP
Eric Carlson, Associate General Counsel, Molson Coors Beverage Company
Dale Johnson, Associate General Counsel, Molson Coors Beverage Company

Representing Anheuser-Busch Companies LLC
Amy R. Mudge, Partner, Baker Hostetler LLP
Randal M. Shaheen, Partner, Baker Hostetler LLP
John P. Ferry, Associate, Baker Hostetler LLP
Molly Jones, Senior Associate General Counsel, Anheuser-Busch Companies LLC
Caroline Rutledge, Associate General Counsel, Anheuser-Busch Companies LLC
Brian Meli, Associate General Counsel, Anheuser-Busch Companies LLC

REPORT OF NARB PANEL 315

Decision Issued: March 20, 2023

Appeal of NAD's Final Decision #7183 Regarding Claims for Molson Coors Beverage Company, Miller Lite

The advertiser is Molson Coors Beverage Company ("Molson Coors" or "Advertiser"), which owns Miller Lite. The challenger is Anheuser-Busch Companies LLC ("A-B" or "Challenger"), which owns Bud Light and Michelob Ultra.

A-B challenged Molson Coors's advertising claim that "light beer shouldn't taste like water. It should taste like beer," which the National Advertising Division ("NAD") recommended be discontinued (Case # 7183, 2/03/2023). The claim appeared in two 15-second advertisements promoting Miller Lite that ran on television early last year and still appear on the Miller Lite website.

A. Background/SWIFT Appeal

NAD's Decision in this matter was issued as part of NAD's Fast Track SWIFT procedures. Footnote 1 in NAD's Decision contains a useful summary of SWIFT proceedings, which are limited to challenges that involve "a single, well-defined issue . . . that does not require review of complex legal arguments or evidence." The question of whether a challenged claim is appropriate for review in a SWIFT proceeding is determined by NAD and is not reviewed by NARB.

B. Discussion

The basic issue is whether or not the slogan "light beer shouldn't taste like water. It should taste like beer," is considered "puffery" as the advertiser argues, or is a comparative claim about competing light beers that lacks substantiation and is misleading, as the challenger argues and NAD found.

The advertiser argues that the challenged statement that light beer should not taste like water but should taste like beer is an opinion and truism – puffery. The advertiser states that the two ads depicting athletes pouring a can of a generic "extremely light beer" over their heads are humorous exaggerations illustrating its opinion. The opinion is used to emphasize its unchallenged slogan that Miller Lite has "more taste."

The advertiser argues that consumers will understand that "by comparing itself to a fictional beer that is so watery as to be dumped on your face after exercise, Molson Coors makes the humorous and obviously exaggerated point that Miller Lite will not chase the evermore-light concept at the

expense of taste." The advertiser argues that "no reasonable consumer will think that the statements [Light beer shouldn't taste like water. It should taste like beer], in the context of the two challenged ads, is a factual claim that competing beers actually taste like water," which would require substantiation.

The challenger argues and NAD found that the ad slogan is not puffery but is a comparative claim requiring substantiation in the form of a well-conducted consumer taste test. The challenger argues and NAD found that the claim, although humorous and exaggerated, conveys to reasonable consumers that competing light beers have a watered-down taste or no taste at all. The challenger argues that the light beer "tastes like water" statement is not mere puffery when placed in the context of the 15-second commercials using a generic "extremely light" labeled beer can that mimics a Michelob Ultra beer can in color and shape, and then contrasts that can with the Miller Lite beer can while the screen and voiceover states "more taste." The challenger argues and NAD found that a comparative claim regarding a key attribute (taste) of a food/drink product or an entire category of competing food/drink products requires substantiation.

NAD recommended the claim "Light beer shouldn't taste like water. It should taste like beer," be discontinued and the advertiser brought this NARB appeal.

C. Panel Findings

The panel agrees with NAD and the challenger that in the context in which it is used in the challenged ads, the ad slogan is not puffery but is a comparative claim requiring substantiation in the form of a well-conducted consumer taste test. The panel finds that the advertiser did not provide substantiation for the claim nor did it provide any consumer research regarding its argument that reasonable consumers would *not* take away a comparative claim.[1] In addition, the panel finds the challenger's evidence that the advertiser's intent was "to take a jab" at the challenger's brand as part of a long-running advertising rivalry targeting existing beer drinkers ages 25 to 45 relevant in determining whether a comparative claim would likely be conveyed to reasonable consumers.

In the context of the two commercials challenged, the panel concludes that the compare-and-contrast visuals and voiceover placement of the slogan at issue likely communicates a comparative claim to at least a significant minority of reasonable consumers. The panel finds that the ads' voiceover stating "light beer shouldn't taste like water" while depicting pouring a royal blue slender can of "extremely" light beer ("extremely" being a synonym for "ultra") over the athlete's head, followed by a close-up screen shot of a can of Miller Lite while the voiceover states "light beer should taste like beer; more taste" in one ad, and "more taste" in the other ad, creates a comparative claim requiring substantiation.

[1] The NARB panel notes that nothing in NAD's SWIFT procedures prevents an advertiser from presenting non-complex substantiation evidence or consumer research in its defense.

The panel recognizes and agrees with NAD that nothing in this decision precludes the advertiser from making claims relating to consumers' taste preferences or other claims pertaining to the taste qualities of its beers or competing beers as long as they are properly substantiated.

D. Conclusion and Recommendation

The Panel recommends that Molson Coors discontinue the claim "light beer shouldn't taste like water. It should taste like beer," in the context of the two challenged advertisements.

The Panel thanks Molson Coors and A-B for participating in industry self-regulation in the interests of promoting truth in advertising.

E. Advertiser's Statement

Molson Coors supports the NAD and NARB self-regulatory process and will comply with the recommendation of the NARB. Molson Coors appreciates the significant change that NARB made to NAD's recommendation to expressly note that the recommendation is limited to the "context of the two challenged advertisements." Notwithstanding, Molson Coors continues to disagree that the phrase "light beer shouldn't taste like water. It should taste like beer" is anything but puffery, even in this context. Finally, Molson Coors notes that this decision does not impact its longstanding "more taste" claim, which NAD upheld in a prior challenge.

National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

National Advertising Division Finds Novartis Breast Cancer Drug Claim Supported in Physician-Directed Messaging, But Not in Ads to Consumers

New York, NY – Jan. 19, 2023 – The National Advertising Division (NAD) of BBB National Programs determined that Novartis Pharmaceutical provided a reasonable basis for the claim that its Kisqali breast cancer treatment drug is "The only CDK4/6 inhibitor with statistically significant overall survival proven across 3 phase III trials" when directed to an audience of health care professionals (HCPs).

However, NAD recommended that a substantially similar claim in consumer-facing advertising, along with several implied comparative superiority claims, be discontinued.

Eli Lilly, manufacturer of the competing Verzenio drug to treat metastatic breast cancer, had challenged survival benefit claims made in Novartis' advertising campaign for Kisqali.

Metastatic breast cancer is presently incurable, however, current treatments can reduce the spread of cancer to other parts of the body, consequently extending time without disease progression (known as progression-free survival) and enabling patients to live longer—an outcome referred to as "overall survival." Treatments include blocking the estrogen pathway (hormonal therapy), chemotherapy, and targeted treatments, including treatments that function as CDK4/6 inhibitors.

At issue before NAD was whether Novartis' claims about Kisqali's overall survival outcomes in clinical trials convey a message of superior survival benefits over other CDK4/6 inhibitors and imply that patients will live longer with Kisqali than when taking any other competitor's drug in class.

HCP-Directed Advertising

NAD considered the claim that Kisqali is "The only CDK4/6 inhibitor with statistically significant overall survival proven across 3 phase III trials" that appears in health care professional-directed advertising. NAD has long recognized that health care providers and specialists are a sophisticated audience and are better equipped to decipher the advertised results of clinical data than the general consumer, especially when provided with appropriate context and detail.

NAD concluded that clinical experience and the context provided in the advertiser's HCP-directed brochures would both inform the physician's takeaway of the claim and limit it to the recited facts, and that this audience would interpret the comparative claim here simply as

reporting that Kisqali is unique in achieving a statistically significant overall survival benefit across Novartis' three phase III clinical trials.

After assessing the results of the advertiser's three clinical trials published in the New England Journal of medicine, NAD determined that the advertiser had provided a reasonable basis for the HCP-directed claim.

Consumer-Directed Advertising

With respect to the consumer-directed claim, "Only drug in class with consistently proven survival benefit in HR+/HER2- metastatic breast cancer"* *"across three Phase III trials," NAD determined that the claim was inherently comparative. NAD therefore concluded that one message reasonably conveyed to consumers, who NAD determined lack the medical knowledge or experience to understand nuances in clinical trial design or outcomes, is that Kisqali is more effective and provides superior survival benefits.

Further, NAD determined that due to the numerous variations in trial design and other key metrics across clinical trials, the studies submitted are not similar enough to compare the overall survival data or other results. NAD noted that where express or implied comparative performance claims are being made, head-to-head studies of the products at issue constitute the most reliable and persuasive substantiation.

NAD therefore recommended that in consumer-facing advertising, the advertiser discontinue the claim "Only drug in class with consistently proven survival benefit in HR+/HER2- metastatic breast cancer" * *"across three Phase III trials" as well as the implied claims that:

- Kisqali provides superior survival benefits as compared to any other available treatment in the CDK4/6 inhibitor class generally and to Verzenio specifically.
- Patients will live longer with Kisqali as compared to any other available treatment in the CDK4/6 inhibitor class generally and to Verzenio specifically.

During the proceeding, the advertiser permanently discontinued several challenged express and implied survival benefit claims. Therefore, NAD did not review these claims on the merits.

In its advertiser statement, Novartis stated that although it respectfully disagrees with NAD's findings, pursuant to NAD's recommendation, Novartis plans to discontinue the claim in consumer-facing advertising.

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Case #7137 (12/30/2022)
Novartis Pharmaceuticals Corporation
Kisqali
Challenger: *Eli Lilly and Company*
Product Type: *Drugs/Health/Health Aids*
Issues: *Comparative Performance Claims; Establishment Claims; Express Claims; Health & Safety Claims; Implied Claims/Consumer Perception; Superiority Claims*
Disposition: *Modified / Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

ELI LILLY AND COMPANY,
Challenger,

NOVARTIS PHARMACEUTICAL CORPORATION
Advertiser.

Case No. 7137
Closed 12/30/2022

FINAL DECISION

- The degree of sophistication of the target audience is a factor in determining the reasonable message conveyed by the advertising.

- Where express or implied comparative performance claims are being made, head-to head studies of the products at issue constitute the most reliable and persuasive substantiation.

I. Basis of Inquiry

The advertising industry established the National Advertising Division (NAD) and the National Advertising Review Board (NARB) in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger Eli Lilly ("Lilly" or "Challenger") challenged express and implied claims made by Advertiser Novartis Pharmaceutical ("Novartis" or "Advertiser") in physician and patient directed advertising for its breast cancer treatment drug, Kisqali. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

- Live Longer with KISQALI - The Longest Overall Survival Data Ever Reported in HR+, HER2- mBC.

- "The longest survival data ever reported in HR+, HER2- mBC."
- "KISQALI - the longest median overall survival ever reported in HR+/HER2- mBC.

- "Kisqali has the longest median overall survival ever reported in HR+/HER2- metastatic breast cancer."
- "[O]nly drug in class with consistently proven overall survival benefit in HR+/HER2- metastatic breast cancer."

B. Implied Claims

- Kisqali® provides the longest overall survivability as compared to any other available treatment in the CDK4/6 inhibitor class generally and to Verzenio® specifically.
- Patients will live longer with Kisqali as compared to any other available treatment in the CDK4/6 inhibitor class generally and to Verzenio specifically.
- Kisqali provides superior survival benefits as compared to any other available treatment in the CDK4/6 inhibitor class generally and to Verzenio specifically.

II. Evidence Presented

The Challenger presented the following evidence: [1]

- Email correspondence between the parties in January and February of 2021 and June of 2022
- Samples of the challenged advertising on the patient facing section of the Kisqali website
- A video file of the challenged TV commercial "*Invest in your Future*"
- A flyer for Kisqali distributed at the ASW Annual General Meeting in June, 2022
- Novartis press release of June 3, 2022 announcing data from its MONALEESA-2 trial
- Results of the Challenger's MONARCH-2 study as presented on Lilly's website for its Verzenio drug
- Product specification annex for Verzenio
- A study entitled "*Effects of Patient Medication Requests on Physician Prescribing Behavior: Results of a Factorial Experiment*" published by the National Institutes of Health Med Care website.

The Advertiser presented the following evidence: [2]

- A PDF file of the Kisqali website with schematic overlay
- Story boards for the TV commercial *"Invest in Future"*
- Samples of HCP brochures for Kisqali
- Studies of 3 clinical trials for Kisqali published in the New England Journal of Medicine
- Conference presentation for Novartis MONALEESA-2 Trial
- Novartis press release of June 3, 2022 announcing data from its MONALEESA-2 trial
- Data summary of an online literature search of reported overall survival outcomes in clinical trials of HR+/HER2 metastatic breast cancer treatments

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[1] In its papers, the Challenger also included links to the following: October 2021 Lilly press release announcing FDA approval for Verzenio in high risk early breast cancer, the results of Lilly's MONARCH 2 study published in the Journal of the American Medical Association, and a Pfizer press release of June 4, 2022 announcing the results of its PALOMA -2 trial.

[2] In its papers, the Advertiser included links to the National Comprehensive Cancer Network's Clinical Practice Guidelines and to the FDA's Clinical Trial Endpoints for Approval of Cancer Drugs.

- An article entitled "*Kisqali Increases Overall survival in Advanced Breast Cancer Patients by 12 Months*" published in the European Pharmaceutical Review
- An article entitled "*The Rise of the Expert Patient in Cancer: From Backseat Passenger to Co-Navigator*" published in the Journal of Clinical Oncology
- Video file of a TV commercial for Verzenio "*Every Day Matters*"
- Abstract of the interim results of Lilly's MONARCH-3 trial published in the Annals of Oncology in September, 2022
- A 1965 article entitled "The Environment and Disease: Association or Causation?" published in the Proceedings of the Royal Society of Medicine

III. Decision

A. Background

The parties are global healthcare companies with pharmaceutical divisions that develop and manufacture drugs to treat metastatic breast cancer. Metastatic breast cancer, sometimes referred to as advanced or stage IV breast cancer, is cancer that has spread beyond the breast to other parts of the body. Roughly 20-30% of persons diagnosed with early breast cancer will develop metastatic breast cancer, and in the United States, it is estimated that 155,000 people are currently living with this disease. The most common form of metastatic breast cancer is HR+, HER2 breast cancer, which accounts for approximately 60% of all cases.[3] Metastatic breast cancer is presently incurable. However, current treatments can reduce the spread of cancer to other parts of the body, consequently extending time without disease progression (known as progression-free survival) and enabling patients to live longer—an outcome referred to as "overall survival". Overall survival refers to the days, months, or years that treatment may add to a patient's lifespan. Treatments include blocking the estrogen pathway (hormonal therapy), chemotherapy, and targeted treatments, including treatments that function as CDK 4/6 inhibitors.

CDK4/6 proteins are found in both healthy cells and cancer cells and control how quickly cells grow and divide. In breast cancer, these proteins can become overactive and cause the cells to grow and divide uncontrollably, causing tumor growth. CDK4/6 inhibitors are prescription medications which interrupt these proteins in order to slow or even stop the cancer cells from dividing and causing tumor growth. There are presently three CDK4/6 inhibitors approved by the FDA to treat HR+, HER2 metastatic breast cancer: Verzenio, manufactured by Lilly, Kisqali, made by Novartis and Ibrance, manufactured by Pfizer. All three drugs have been the subject of several significant clinical trials, with overall survival being a key clinical endpoint.

<u>The MONARCH Trials</u>

Lilly's MONARCH-2 study was a published, phase III randomized, double-blinded, placebo-controlled trial which evaluated the efficacy of Verzenio when taken in combination with fulvestrant – a type of hormone therapy which acts as an estrogen receptor that works to block or stop the action of estrogen on cancer cells. The results of MONARCH-2 showed that women taking Verzenio with fulvestrant

[3] "HR" is short for hormone receptor, and most cancer patients are HR+. HER2 is short for human epidermal growth factor receptor 2.

saw a 9.4 month median increase in overall survival compared to women who took fulvestrant alone. Lilly's MONARCH-3 study is an ongoing, yet unpublished, phase III randomized, double-blinded, placebo-controlled trial evaluating the efficacy of Verzenio when taken with a nonsteroidal aromatase inhibitor ("NSAI"). Nonsteroidal aromatase inhibitors are also used alone in the treatment of hormone-dependent breast cancer to inhibit the enzyme aromatase that converts testosterone to estrogen so that the hormone receptors on cancer cells that need estrogen and progesterone to grow cannot proliferate. At an interim overall survival analysis, the results of the MONARCH-3 study showed that Verzenio in combination with an NSAI improved survival outcomes, with a median overall survival of 67.1 months as compared to 54.5 months on an NSAI alone, although these results have not yet reached statistical significance.

The MONALEESA Trials

Novartis' Kisqali treatment has been the subject of three phase III randomized, double-blinded, placebo-controlled clinical trials, each of which achieved statistically significant overall survival outcomes. MONALEESA-7, published in 2019, evaluated the efficacy of Kisqali in combination with endocrine therapy (goserlin and either and NSAI or tamoxifen). Results indicated that median overall survival for patients in the Kisqali group was 58.7 months as compared to an overall survival of 47.7 months for patients receiving endocrine therapy alone. MONALEESA-3, published in 2020, evaluated the efficacy of Kisqali when taken with fulvestrant. Results indicated a median overall survival benefit of 53.7 months for patients taking Kisqali as compared to an overall survival of 41.5 months for women taking fulvestrant alone. Novartis' most recent study, MONALEESA-2, was published in March of this year. MONALEESA-2 studied the efficacy of Kisqali in combination with letrozole. Results demonstrated a median overall survival of 63.9 months for women in the Kisqali group as compared to 51.4 months for women taking letrozole alone.

In June of this year, Novartis issued a press release announcing the results of its latest MONALEESA trial as part of a new advertising campaign directed to both health care professionals and the general public. [4] It is the survival benefit claims made in this campaign that are the subject of the instant challenge. The United States is one of two countries that permits direct to consumer advertising for prescription drugs.

B. The Challenged Advertising

The challenged claims appeared singly or in combination in physician brochures and fliers, conference presentations, a press release and on both the physician and patient directed portions of the Kisqali website. The "longest survival data ever reported in HR+, HER2- mBC." claim also appeared in a minute long commercial which aired on national television. The Challenger argued that Novartis' survival benefit claims went beyond merely reporting the results of its clinical trials and conveyed false and misleading messages about the efficacy of its Kisqali treatment.

[4] Also, in June of this year, Pfizer announced the results of its latest phase III clinical trial. Paloma-2 evaluated the efficacy of Pfizer's Ibrance drug when taken with letrozole. Although patients in the Ibrance group demonstrated a numerically longer overall survival than patients taking letrozole alone, the results were not statistically significant.

C. Permanently Discontinued Claims

During the pendency of the proceedings, the Advertiser informed NAD that it had permanently discontinued the following express and implied claims:

- Live Longer with KISQALI - The Longest Overall Survival Data Ever Reported in HR+, HER2- mBC.
- "The longest survival data ever reported in HR+, HER2- mBC."
- "KISQALI - the longest median overall survival ever reported in HR+/HER2- mBC.
- "Kisqali has the longest median overall survival ever reported in HR+/HER2- metastatic breast cancer."
- Kisqali® provides the longest overall survivability as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio® specifically.
- Patients will live longer with Kisqali as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically.
- Kisqali provides superior survival benefits as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically.

In reliance on the Advertiser's representation that the challenged claims have been permanently discontinued, NAD did not review the claims on their merits. The voluntarily discontinued claims will be treated, for compliance purposes, as though NAD recommended their discontinuance and the Advertiser agreed to comply.

Novartis also informed NAD that the remaining challenged claim "Only drug in class with consistently proven overall survival benefit in HR+/HER2- metastatic breast cancer." would be modified to be accompanied by the phrase "across three phase III trials" or similar language to that effect. NAD therefore reviewed the remaining challenged claim as modified.

D. Analysis

i. The Challenged Claim

On the record provided, the claim "Only drug in class with consistently proven overall survival benefit in HR+/HER2- metastatic breast cancer." * * "across three phase III trials" (the "only drug in class" claim) appears in the headline in a press release and - in a slight variation - as one of several headers in two colored HCP brochures about Kisqali and Novartis' three clinical trials, the latter which are represented both graphically and in text. [5] Specifically, the median overall survival benefit – in years - for each trial is depicted in bold on a vertical bar, and the results of MONALEESA-2 are also displayed in a line graph showing overall survival for Kisqali + AI and overall survival for patients taking the AI + placebo. The details of each study are printed below along with clinical indications for Kisqali and safety and other information about the drug.[6] The Advertiser also indicated to NAD that the "Only

[5] The claim appears on the brochures as "The only CDK4/6 inhibitor with statistically significant overall survival proven across 3 phase III trials."

[6] The two page press release, including footnoted references, contains a brief description of MONALEESA-2 and further information about Kisqali performance, recognition and approvals. It also announces that "A matching-adjusted indirect comparison analysis shows that Kisqali plus an aromatase inhibitor (AI) is associated with better symptom - related quality of life when compared to Verzenio plus AI when used in 1L."

drug in class" claim would replace the discontinued "longest survival" claims on the patient facing section of the Kisqali website.

The Challenger argued that the use of the comparative term "only drug in class" renders the claim undeniably comparative and that in context, the claim goes beyond merely reporting Kisqali's efficacy against a placebo in clinical trials and conveys a message of superior survival benefits over other CDK4/6 inhibitors and effectively implies that patients will live longer with Kisqali than when taking any other drug in class – messages which the Challenger contended Novartis has failed to support. First, Lilly argued that the FDA, like NAD, imposes a high bar for claims of comparative clinical effect between products and that Novartis' powerful survival benefit claim must be supported by reliable clinical studies comparing the efficacy of Kisqali to other treatments *and* establishing that patients who take Kisqali will live longer than patients taking Verzenio or any other comparable drug. Lilly pointed out that Novartis had offered no head-to-head clinical study comparing the efficacy of Kisqali to competing CDK4/6 treatments. Further, Lilly argued that achieving statistical significance in certain patient populations does not equate with greater longevity in all HR+, HER2 breast cancer cases.

Secondly, the Challenger argued that given the variability in clinical trial design and the myriad of nuanced differences in the data collected in different trials, comparison of outcomes across clinical studies was fundamentally improper. Lilly pointed out that for example, the comparator arms (endocrine therapy combinations) are not the same in the studies referenced by the Advertiser. The Challenger also noted critical differences between the Lilly and Novartis trials studying Verzenio and Kisqali in combination with fulvestrant, in particular with respect to the clinical profiles of the selected patient populations. Moreover, Lilly argued that even if it was appropriate to compare survival outcomes across trials, Lilly's MONARCH-3 study reported a median overall survival of 67.1 months vs the 63.9 month median overall survival reported in Novartis' MONALEESA-2 study, thus rendering the implied message of Kisqali's superior efficacy patently false.

Finally, Lilly noted that patients with stage IV breast cancer are a particularly vulnerable audience, where a superior survival benefit is not only of utmost importance but also one which is impossible for consumers to be able to evaluate on their own. Lilly also submitted a study indicating that doctors are significantly more likely to prescribe a specific medication when patients ask for it by name and argued that it was critical that Novartis' advertising not overstate the benefits of its Kisqali treatment.

The Advertiser argued that the challenged claim is not a comparative claim but an establishment claim that accurately reports the current state of clinical research in CDK4/6 inhibitors. Secondly, the Advertiser argued that nowhere does Novartis claim superiority over a specific product let alone the entire CDK4/6 market and that the contexts in which the challenged claim appears make clear the limited message it conveys. At best, the Advertiser contended the claim is a parity claim and that Lilly had failed to meet its burden to demonstrate that consumers would take away a superiority message or were otherwise misled by the claim. The Advertiser maintained further that head-to-head testing was not required to support the claim made here, and that in the absence of head-to-head testing (of a significant portion of the market) an advertiser may utilize existing studies on competing products and compare the results against the advertiser's testing to support parity performance claims.

Novartis noted that head-to-head testing was rare in oncological trial design because the focus of clinical trials in this space was to establish the efficacy and benefits of a particular drug and further, that FDA guidance for industry on the design of clinical trials for cancer drugs explicitly envisions a

flexible approach to study designs and outlines the advantages and disadvantages of encouraging a variety of types of clinical support.

Additionally, Novartis emphasized the unique circumstances of the advertising context here and that this was not an ordinary case where advertising is aimed at a lay consumer who individually makes purchases in a supermarket or drugstore. Rather, Kisqali, like other CDK4/6 inhibitors, is prescribed to treat a serious and devastating condition and cannot be obtained without the supervision of a licensed professional. Any patient who is interested in Kisqali must consult with her health care provider, and it is the HCP who will make the ultimate decision about which medication to prescribe. Here, the prescribing physician is almost always an oncologist who will have specialized knowledge and expertise in the treatment of cancer and the sophistication to understand the clinical trial data. As such, any alleged vulnerability of the patient audience will be effectively mitigated by the required consultation with the HCP.

Further, Novartis argued that due to the life-threatening nature of metastatic breast cancer, this particular patient population is more attuned to the science of their condition than patients with less serious illnesses. The Advertiser submitted an article documenting the rise of the "e patient" and the increase in health literacy of cancer patients with the advent of social media and the unprecedented array of resources available to this population on multiples levels, enabling them to play an expanded role in their own care and in larger conversations as to practice, research and policy – in some cases, becoming experts in their own care. The Advertiser contended this sophistication helps inform the net impression target consumers will take away from Novartis' advertising and reinforces the fact that this population is more likely to meaningfully examine the context of advertising for cancer drugs. As such, the use of Kisqali, or any other cancer treatment would be more carefully considered than most other purchasing decisions patient consumers will ever make.

The Advertiser also challenged the probity of the study submitted by the Challenger as to the effects of patient requests on physician prescribing behavior. Novartis noted that the study's authors themselves acknowledged that the presentation of symptoms in an artificial environment may threaten the external validity of the study and that in any event, the real world dynamics of the relationship between the oncologist and cancer patient were much different than the scenarios simulated in the study and that the risks that patient requests could result in an increase in prescriptions for a specific breast cancer drug was not a reasonable let alone plausible concern.

ii. Messages Conveyed

In an NAD proceeding, an advertiser is responsible for all messages reasonably conveyed by the advertising, not merely the message it intended to convey. [7] In the absence of consumer perception evidence, NAD relies on its expertise to determine the messages reasonably conveyed by the challenged advertising.[8] In analyzing the express and implied messages conveyed by a particular advertisement, NAD typically reviews the totality or overall net impression created by an

[7] *i-Health (Culturelle)*, Report # 6196, NAD/CARU Case Reports (June 2018)*; Eddie Bauer, LLC (MicroTherm StormDown Jacket),* Report #5875, NAD/CARU Case Reports (August 2015); *The Proctor & Gamble Company* (*Prilosec*), Report #5261, NAD/CARU Case Reports (December 2010).

[8] *Verizon Communications, Inc. (Verizon 5G Availability,)* Report #6384, NAD/CARU Case Reports (June 2020);*Your Baby Can, LLC (Your Baby Can Read! Early Language Development System)*, Report #5313, NAD/CARU Case Reports (March 2011).

advertisement as a whole, not merely words or phrases standing alone, taking into consideration both the words and the visual images.[9] The degree of sophistication of the target audience is also a factor in determining the reasonable message conveyed by the advertising. [10] Further, NAD has recognized that a claim may be literally true but still misleading.[11]

As a threshold matter, NAD determined that, the claim "Only drug in class with consistently proven overall survival benefit in HR+/HER2- metastatic breast cancer."* * "across three phase III trials" is inherently comparative. By virtue of the phrase "only drug in class", the claim pits Kisqali against all other CDK4/6 inhibitors and posits it has an attribute that the others do not have – here, a consistently proven survival benefit across three clinical trials. [12]

It is also well settled that advertising need not mention a particular competitor specifically in order for the claim to be considered comparative to a rival company.[13] Here, because Lilly is one of Novartis' leading competitors in the manufacture of CDK4/6 treatments, the challenged claim could reasonably

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[9] *Eddie Bauer, LLC (MicroTherm StormDown Jacket*), supra at note 7; *Nurture, Inc. (Happy Family Infant and Toddler Food Products),* Report # 5710, NAD/CARU Case Reports (May2014).

[10] *Mead Johnson & Company (Enfamil NeruoPro Infant Formulas)*, Report #6260, NAD/CARU Case Reports (March 2019); *Bausch & Lomb (PeroxiClear Contact Lens Peroxide Solution)* (ECP's), Report #6025, NAD/CARU Case Reports (November 2016); *Bausch & Lomb, Inc*. (*Advertising for Alcon's OPTI-FREE RepleniSH Solution)* Report #5483, NAD/CARU Case Reports (April 2013); *Nest Labs (Nest Learning Thermostat)* Report # 5595, NAD/CARU Case Reports (May 2013); *Summit VetPharm, LLC (Vectra 3D and Vectra)*, Report #5090, NAD/CARU Case Reports (September 2009), Aff'd NARB Panel#157, (August 2010).

[11] *Chattem, Inc. (Xyzal allergy 24HR),* Report #6146, NAD/CARU Case Reports (January 2018); *ProPhase Labs, Inc. (Cold-EEZE)*, Report #5545, NAD/CARU Case Reports (January 2013); *The Coca-Cola Company (Powerade Sports Drink)*, Report #3930, NAD/CARU Case Reports (July 2002); *Aurora Foods, Inc. (Duncan Hines Chocolate Chip Muffin Mix)*, Report #3623, NAD/CARU Case Reports (February 2000).

[12] NAD also noted that the cases cited by the Advertiser to support its position that Lilly bears the burden of establishing that consumers are taking away a comparative message - a singular departure from established NAD precedent on the parties' respective burdens - are inapposite, as the circumstances prompting NAD to request consumer perception evidence from the challenger in those cases are not present here. *McNeil Consumer Products Company (Motrin IB Pain Reliever),* Report #3535, NAD/CARU Case Reports (April 1999) involved a challenge to the claim "...nothing works better than Motrin IB..." a claim NAD deemed a *"traditional"* parity claim –unlike the clearly comparative claim challenged here. In that early case, NAD acknowledged the body of precedent weighing against the contrary conclusion argued by the challenger and assessed the burden on the challenger to provide evidence that consumers were taking away a superiority message. In *Kraft Foods (Maxwell House Coffee)* Report *#3201,* NAD/CARU Case Reports (June 1995), NAD requested consumer perception evidence from the challenger where the challenger argued that there was *only one* reasonable interpretation of the challenged claim. Moreover, in *Federal Mogul Corp. (ANCO HydroClear Windshield Wipers)*, Report #4420, NAD/CARU Case Reports (August 2004), NAD affirmed that "There is no indication from the language in the Maxwell House decision that NAD's request for a consumer perception study had implications beyond the specific issues in that case, and NAD finds that it does not serve as precedent to require the challenger to submit a consumer perception study in this case. Here, NAD, as always, looked first to the advertiser who, by law, has the burden of establishing a reasonable basis for its claims."

[13] *Church & Dwight Co., Inc. (Arm & Hammer Slide Cat Litter)* Report # 6137, NAD/CARU Case Reports (December 2017); *Progressive Casualty Insurance Co. (Property and Casualty Insurance)*, Report #5577, NAD/CARU Case Reports (April 2013); *Halo Purely for Pets, Inc. (Halo Spot Stew)* Report #5423, NAD/CARU Case Reports (February 2012).

be interpreted as comparative to Lilly's product.[14] NAD next turned to consider the messages conveyed by Novartis' advertising to each of the target audiences.

a. Consumer-Directed Advertising

Clinically proven establishment claims carry great weight with consumers and as such are subject to strict scrutiny. Further, patients suffering from terminal cancer who are looking for options to extend their lived may be especially susceptible to claims about the survival benefit of Kisqali or any cancer treatment advertised to the general public. As discussed earlier, the opening phrase in the claim "Only drug in class with consistently proven survival benefit in HR+/HER2- metastatic breast cancer" * * "across three Phase III trials." sets its object apart from and above the other drugs in its class on the stated metric. Moreover, that metric – survival benefit - is a performance metric, and its unqualified performance message is strengthened by the phrase "consistently proven". Indeed, a reasonable conclusion from the statement that a drug has been consistently - and more often - proven to achieve a statistically significant survival benefit is that that product is more effective. Further, as used here, the term "consistently" implies that the results of trials of competing drugs have been *inconsistent* – a message that, without qualification, is open to negative inferences beyond the mere absence of regularly achieving a statistically significant result. As such, NAD was concerned that to the lay audience, Novartis' quantitative claim could convey a qualitative message.

NAD's decision in *i-Health (Culturelle)*, Report # 6196, NAD/CARU Case Reports (January 2018) is instructive. *i-Health* involved a challenge to a series of clinically proven uniqueness claims about i-Health's Culturelle probiotic supplement. The challenged claims included:

> "LGG is the most clinically proven effective strain*" **Based on the studies of a range of benefits throughout the lifespan.;*
>
> "LGG is the most proven effective strain*" **Based on the number of Lactobacillus rhamnosus GG clinical studies, as of May 2017;*
>
> "Culturelle supports digestive health in overall wellness with the most proven effective probiotic*" **Lactobacillus rhamnosus GG is the most proven effective probiotic strain based on studies for a range of benefits throughout the lifespan.*

[14] Further, in this context, Novartis' press release falls squarely within the definition of "national advertising'" under NAD /NARB Procedures, §1.1: 'The term "national advertising" shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser. See e.g. *Prints Made Easy, Inc. (Online Graphic Design & Customized Printing Services)*, Report #4833, NAD/CARU Case Reports (April 2008); *Brammo Motorsports, LLC (Enertia Electric Motorcycle),* Report # 4828 NAD/CARU Case Reports (April 2008); *Russian Standard Vodka, Inc. (Imperia Vodka)*, Report #4591 NAD/CARU Case Reports (November 2006); See also *Safe Catch, Inc. (Pouched and Canned Tuna),* Report #6911, NAD/CARU Case Reports (July 2021) (making recommendations on challenged claims in advertiser's press release).

NAD determined that the "most proven effective" claims were strong comparative health benefit claims, notwithstanding the absence of a reference to competing products, and that one message reasonably conveyed by the claims was that the strain of probiotic in Culturelle had been proven to be more effective than competing strains in providing the benefits associated with probiotics.[15] Similarly, here Novartis touts that Kisqali is the "only" drug "consistently" proven effective across three clinical trials.

Secondly, NAD was concerned that most consumers do not have the medical knowledge or experience to understand the nuances of clinical trials. They may not appreciate that the results of a clinical trial may be influenced by a variety of factors apart from the quality and efficacy of the tested drug, such as trial design, patient population characteristics, interactions and nature of adjuvant drugs, etc., and as such, they will not understand that outcomes across trials are difficult to compare. Further, the lay consumer will not understand that achieving statistical significance across three clinical trials does not in and of itself establish superior efficacy to other drugs which have proven effective in a smaller number of trials.

The Advertiser argued that cancer patients are a more informed and engaged audience than patients with less serious illnesses and cited an article attesting to the increased healthy literacy of this particular patient population in light of the abundance of resources available on social media, online communities and breast cancer websites. NAD recognized that cancer patients today are empowered with greater knowledge and that they may indeed be more engaged with their plan of care. However, even the totality of resources available to them cannot bridge the knowledge gap between a lay person and an oncologist in the context of understanding the nuances of clinical data and the science behind it.

Novartis also argued that because Kisqali is a prescription drug, it cannot be obtained directly by the patient and that the oncologist can correct any possible misleading messages conveyed by the challenged claim. However, the Advertiser has an obligation to support all messages reasonably conveyed by its advertising. Further, the fact that an oncologist may correct any misinterpretation of Novartis' advertising does not remove the initial impression of the claim, and the initial impression of a claim must not be misleading. [16]

NAD therefore concluded that one message reasonably conveyed to consumers by the "only drug in class" claim is that Kisqali is more effective and provides superior survival benefits to other drugs in its class, including Verzenio, and that patients taking Kisqali will live longer than when taking any other CDK4/6 treatment.

NAD next considered whether the implied message that Kisqali offers superior survival benefits over other drugs in class was supported by the evidence submitted by the Advertiser. It is well settled that

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[15] Further, where the advertiser's evidence showed only that more studies had proven the effectiveness of the LGG strain and not that the advertiser's probiotic had been proven more effective than other probiotics, NAD found that evidence did not provide a reasonable basis for the "most proven effective" claims.

[16] NAD agreed with the Advertiser that due to the artificial nature of the doctor patient encounters in the study submitted by the Challenger, and the very different doctor patient dynamics in the context of treatment of terminal breast cancer, the study was not a reasonable basis to conclude that the challenged claim could lead to increased prescriptions for Kisqali.

health benefit claims must be clear and accurate and supported by competent and reliable scientific evidence,[17] and clinically proven establishment claims are held to a very high standard of proof. [18] It is equally well settled that unqualified superiority claims require testing against all significant competitors in the category.[19] Further, where express or implied comparative performance claims are being made, head-to head studies of the products at issue constitute the most reliable and persuasive substantiation. [20] NAD has also repeatedly recognized in prior decisions that data accumulated from different tests cannot be reliably compared unless it is established that the data resulted from tests that were "essentially identical or all of the variables are accounted for." [21] NAD has thus frequently rejected cross study comparisons where the results of competing studies could not be meaningfully assessed or compared. [22]

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[17] *Mead Johnson (Enfamil NeuroPro Infant Formulas),* supra at note 10; *Wink Naturals, LLC (Zen Drops),* Report #6291 NAD/CARU Case Reports (June 2019); *Prevention Pharmaceuticals, Inc. (Omax3 UltraPure Dietary Supplement)*, Report #5966 NAD/CARU Case Reports (July 2016); *Abbott Nutrition (Similac® Advance® with OptiGRO)*, Report #5859, NAD/CARU Case Reports (June 2015); *Good Health Naturally, LLC (Serranol Supplements)*, Report # 5441 NAD/CARU Case Reports (March 2012).

[18] *OrganiCare (FemiClear Vaginal Yeast Infection Treatment)*, Report #6347 NAD/CARU Case Reports (February 2020); *Bayer Healthcare, LLC (Aleve),* Report # 6310 NAD/CARU Case Reports (September 2019); *Interceuticals, Inc. (Better WOMAN)*, Report # 5485 NAD/CARU Case Reports (July 2012).

[19] *i-Health (Culturelle)*,supra at note 7; *Glaxo Smith Kline, (Super Poligrip)*, Report # 4225 NAD/CARU Case Reports (July 2004); *Discuss Dental (Zoom! Chairside Tooth Whitening System),* Report #4009, NAD/CARU Case Reports (January 2003).

[20] *Johnson & Johnson Consumer, Inc. (Neutrogena UltraSheer Dry-Touch SPF 100+Sunscreen)* Report #6059, NAD/CARU Case Reports (March 2017); *Chattem, Inc. (Xyzal allergy 24HR),* Supra at note 11; *Bayer HealthCare, LLC (Claritin and Claritin-D)* Report #5829 , NAD/CARU Case Reports (April 2015); *Unilever US, Inc.(Vaseline Sheer Infusion)* Report #5262, NAD/CARU Case Reports (December 2010); *Colgate-Palmolive Co. (Colgate Optic White Toothpaste),* Report #5490, NAD/CARU Case Reports (July 2012).

[21] *Colgate-Palmolive Co. (Colgate Optic White Toothpaste), Id.; Discuss Dental (Zoom! Chairside Tooth Whitening System),* supra at note 19; *Procter & Gamble (Crest Whitestrips)*, Report #3918, NAD Case Reports (June 2002); *Den-Mat Corp. (Rembrandt Plus Superior Bleaching System and Dazzling White Tooth Bleaching Value Kit),* Report #3814, NAD Case Reports (September 2001).

[22] *Colgate-Palmolive Co. (Colgate Optic White Toothpaste) Id.*; (disallowing comparison of results of clinical testing on advertiser's toothpaste to results of testing on challenger's product where "studies were conducted at different sites, using different protocols, and using different criteria for participation, with different baselines.) *Unilever US, Inc. (Vaseline Sheer Infusion*), supra at note 20 (rejecting combination of advertiser's monadic sensory testing and statistical PCA (Principal Component Analysis) data to support claim advertiser's product had a "silkier feel" over other lotions); *Novus International, Inc. (Mintrex and MAAC Organic Copper Supplements for Livestock),* Report #5597, NAD/CARU Case Reports (May 2013) (rejecting series of studies on bovine liver copper values to support superiority claim in the absence of statistical analysis of performance of copper supplements as compared to each other and not to placebo); *Procter & Gamble (Crest White Strips)*, supra at note 21 (rejecting cross study comparison because of the "many differences between the [two] studies" submitted.)*; Den-Mat Corp. (Rembrandt Plus Superior Bleaching system and Dazzling White Tooth Bleaching Value Kit), Id.* (disallowing comparison of data from advertiser's product to multiple tests of challenger's Crest Whitestrips where "the methodology varied with respect to the number of people being evaluated, the accompanying dentifrice that was used by test participants and inclusion or omission of pre-test prophylaxis….made a comparison of the resulting data untenable".) *Ecofibers, Inc. (d/b/a Precision Fibers) (Hydroseeding Mulch)* Report #3905, NAD/CARU Case Reports (May 2002) (disallowing comparison of results of two separate studies due to differences in methodologies).

The Advertiser's evidence establishes that in MONALEESA-2, Kisqali had achieved the longest median overall survival outcome in a published clinical trial of CDK4/6 inhibitors. However, Novartis has presented no evidence that the methodologies in the studies it has submitted are similar enough to allow NAD to properly compare the reported overall survival data, nor any statistical analysis of those results. Additionally, Novartis has not provided any details as to the patient populations enrolled in each trial or other critical elements of the trials being compared (such as study design, period of follow-up etc.) Further, as the Challenger pointed out, the evidence in Novartis' literature survey demonstrates that the comparator arms (endocrine therapy combinations) are not the same between the studies it is comparing. There are also important differences even as between the Lilly and Novartis' studies evaluating Verzenio and Kisqali in combination with fulvestrant, especially as to the patient populations enrolled in each trial. For example, MONALEESA-3 enrolled a higher proportion of patients with advanced or metastatic breast cancer who had never received endocrine therapy as treatment for breast cancer (endocrine naïve) while MONARCH-2 excluded these patients from the intent to treat population. Additionally, MONARCH-2 enrolled more patients with clinical features suggestive of endocrine resistant disease.

For the foregoing reasons, NAD determined that the overall survival data from the MONALEESA trials and those of the published studies of competing CDK4/6 treatments did not support the implied superiority messages conveyed by the challenged claim to the lay audience. NAD therefore recommended that in consumer-facing advertising, the Advertiser discontinue the claim "Only drug in class with consistently proven survival benefit in HR+/HER2- metastatic breast cancer" * * "across three Phase III trials" and the following challenged implied claims: 'Kisqali provides superior survival benefits as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically' and 'Patients will live longer with Kisqali as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically.'

b. HCP-Directed Advertising

NAD next considered the "only drug in class" claim in the context of physician- directed advertising. Specifically, NAD considered the claim as it appears in the HCP brochures described earlier: "The only CDK4/6 inhibitor with statistically significant overall survival proven across 3 phase III trials." [23] NAD has long recognized that health care providers and specialists are a sophisticated audience and are better equipped to decipher the advertised results of clinical data than the general consumer, especially when provided with appropriate context and detail thereon.[24] NAD has also recognized that the takeaways by discerning professionals may be critically distinct from the interpretations of that same advertising by the lay consumer. For example, in *The Proctor & Gamble Company* (*Prilosec*), Report

[23] Although this iteration of the "only drug in class" claim was not specifically challenged, the claim is substantially similar to the challenged claim as it is proposed to be modified by Novartis. Additionally, NAD deemed it necessary to evaluate this claim in order to determine whether HCP-directed advertising makes the challenged implied claims.

[24] *Mead Johnson (Enfamil NeruoPro Infant Formulas)*, supra at note 10; *Abbot Nutrition* (*Similac Human Milk Fortifier),* Report #5867, NAD/CARU Case Reports (July 2015); *The Procter & Gamble Company (Prilosec OTC)* supra at note 7; *Novartis Consumer Health, Inc. (Transderm Scop Scopolamine Transdermal Patch),* Report # 3717, NAD/CARU Case Reports (January 2001).

#5261, NAD/CARU Case Reports (December 2010), NAD determined that that superior acid claims in P&G's HCP advertising would not be understood more broadly as claims of superior heartburn relief: "In so finding, NAD was again mindful of the fact that the challenged claims are presented to a sophisticated audience of healthcare professionals. Unlike the general consumer, NAD believed that this target audience – with the proper conspicuous disclosure of pertinent information as to the parameters of the [cited] study and the lack of correlation to clinical outcome, was more capable to discern that the comparative claim being made was one of superior acid control and not an implied overall superior heartburn relief claim." Critically, NAD also observed that "In this respect, NAD cautions the advertiser that it is likely, that NAD might have arrived at a different outcome had these claims been directed to the general consumer." [25]

Similarly, NAD determined that the target audience here was more capable of discerning that the comparative claim being made was as to clinical data points and not an implied claim of overall superior efficacy. First, the HCP brochures in which the claim appears contain detailed information about the parameters of all three studies, the latter also reported by a graph similar to the trial representations in Novartis' published studies, extensive drug and safety information and additional notes on toxicities, adverse reactions, lab abnormalities, etc. across all three trials and footnoted references. Secondly, NAD determined that the target audience of oncologists would be well versed in the nuances and intricacies of breast cancer research and fully equipped to appreciate both the significance *and* the limitations of the reported data, especially where, as here, they were provided with sufficient detail as to the trials' design and findings. Unlike consumers, this audience would appreciate what Lilly referred to as the "nuanced differences in data collected from different trials" and that differences in reported outcomes may be the result of factors other than the pure efficacy of the tested drug (such as differences in trial design, methodology and duration, patient population, adjuvant therapies, etc.) For the same reasons, the oncologist/professional audience would understand that although the achievement of a statistically significant survival outcome in more trials than its competitors is a promising result, it is not conclusive that Kisqali provides superior survival benefits or superior survival benefits to all classes of patients with HR+/HER2 metastatic breast cancer.

As such, NAD concluded that clinical experience and the context provided in the brochures would both inform the physician takeaway of the HCP-directed claim and limit it to the recited facts, and that this audience would interpret the comparative claim here simply as reporting that Kisqali is unique in achieving a statistically significant overall survival benefit across Novartis' three phase III clinical trials. For the foregoing reasons, NAD concluded that Novartis' HCP-directed advertising did not convey a message of superior efficacy or the challenged implied claims that 'Kisqali provides superior survival benefits as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically' and that 'Patients will live longer with Kisqali as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically.'

In support of its claim that Kisqali is "The only CDK4/6 inhibitor with statistically significant overall survival proven across 3 phase III trials", Novartis presented the results of its three MONALEESA trials

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[25] See also *Mead Johnson (Enfamil Infant formula),* Supra at note 10, where, for the same reasons, NAD advised the advertiser that the video among the challenged advertising items be published by secure portal restricting access to HCP's only.

published in the New England Journal of medicine and the results of a literature search of all reported clinical trials to date of targeted treatments for patients with HR+/HER2 metastatic breast cancer.[26] That evidence established that Kisqali had reached a statistically significant overall survival benefit in all three of its phase III clinical trials. The record also indicates that Lilly's Verzenio has been the subject of three phase III clinical trials: MONARCHplus, MONARCH-2, and MONARCH-3. The results of MONARCHplus were not reported. As described earlier, in MONARCH-2, Verzenio demonstrated a statistically significant overall survival benefit, and MONARCH-3 has reported interim results only that have not yet reached statistical significance.[27] Pfizer's Ibrance treatment, the third of the three FDA approved CDK4/6 inhibitors, has also been studied in three Phase III trials: PALOMA-4, PALOMA-3 and PALOMA-2. The results of PALOMA-4 have not been reported. In PALOMA-3 and in Pfizer's most recent study, PALOMA-2, although patients in the Ibrance group demonstrated a numerically longer overall survival than patients taking the placebo, the results in both trials were not statistically significant.

NAD therefore determined that the Advertiser had provided a reasonable basis for the claim "The only CDK4/6 inhibitor with statistically significant overall survival proven across 3 phase III trials." when directed to an HCP audience.

IV. Conclusion

NAD recommended that in consumer-facing advertising, the Advertiser discontinue the express claim "Only drug in class with consistently proven survival benefit in HR+/HER2- metastatic breast cancer."* * "across three phase III trials" and the following challenged implied claims (i) 'Kisqali provides superior survival benefits as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically' and (ii) 'Patients will live longer with Kisqali as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically.'

NAD concluded that Novartis' HCP-directed advertising did not convey a message of superior efficacy nor the challenged implied claims (i) 'Kisqali provides superior survival benefits as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically' and (ii)

[26] The evidence indicated that search terms for the Advertiser's literature review consisted of combinations including: "HR+", "HR-positive", "hormone receptor positive", "HR+/HER2", "metastatic breast cancer", "advanced breast cancer", "survival", and "overall survival". Search engines included PubMed, Google Scholar, and ASCO 2021 Meeting Library. In addition to individual trials returned through the search, a meta-analysis (Lux et al. 2019) and review (Wu et al. 2020) were used as a guide to ensure all appropriate trials that have reported median overall survival were included in the audit. Based on the foregoing, NAD determined that the Advertiser's literature search was a reliable summary of existing clinical studies of survival outcomes in HR+/HER2 metastatic breast cancer.

[27] The parties disputed the import of the interim overall survival benefits reported in MONARCH-3. However, because the weight of the MONARCH-3 results has no bearing on the question of the relative number of trials in which FDA approved CDK4/6 inhibitors have achieved statistical significance, NAD did not reach that issue.

'Patients will live longer with Kisqali as compared to any other available treatment in the CDK 4/6 inhibitor class generally and to Verzenio specifically.'

NAD also concluded that the Advertiser had provided a reasonable basis for the claim "The only CDK4/6 inhibitor with statistically significant overall survival proven across 3 phase III trials." when directed to an HCP audience.

V. Advertiser's Statement

Novartis agrees to comply with NAD's recommendation. Novartis is pleased that NAD found that Novartis provided a reasonable basis for its claim that Kisqali is "[t]he only CDK4/6 inhibitor with statistically significant overall survival proven across 3 phase III trials," and that this claim does not convey a message of superior efficacy or any of the purported implied claims, when directed to an HCP audience. However, Novartis respectfully disagrees with NAD's findings that the same or substantially similar claim, when directed at consumers, conveys a message "that Kisqali is more effective and provides superior survival benefits to other drugs in its class … and that patients taking Kisqali will live longer than when taking any other CDK4/6 treatment"—messages Novartis does not believe are either expressed or implied by the plain language of the challenged claim. Nevertheless, Novartis will comply with NAD's recommendation and discontinue this claim in its consumer-facing advertising. **(#7137 MCB, closed 12/30/2022)**

National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

In Two Fast-Track SWIFT Cases, One Voluntary Discontinuance of Claims, and One National Advertising Division Recommendation to Discontinue Claims

New York, NY – July 13, 2021 – The National Advertising Division (NAD) of BBB National Programs closed two new Fast-Track SWIFT cases in June:

- Function challenged PerSe Beauty's "over 192,000 5-star product reviews" claim.
- Nestle Nutrition challenged Reckitt Benckiser's exclusivity claims about the ingredients of the Enfamil brand's Nutramigen line of infant formula products.

Fast-Track SWIFT is an expedited NAD process designed for single-issue advertising cases.

Function Inc. v. PerSé Beauty Inc. d/b/a Prose
Function brought a challenge to Prose's claim that it had "over 192,000 5-star product reviews!" for its customizable hair care products. NAD recommended that the advertiser discontinue the challenged claim.

The "over 192,000 5-star product reviews" claim was appropriate for Fast-Track SWIFT because the issue was limited to the presentation of the advertiser's product reviews, including whether the advertiser provided a reasonable basis for the claim.

The advertiser formulates a customer's product from the result of their online hair and lifestyle survey and continuously tailors the formula based on the customer's post-purchase feedback, a process it refers to as its "Review & Refine" experience. As part of its process, Prose solicits star-ratings on aspects of the customer's experience after each purchase — overall experience, satisfaction per product, and various product attributes. It may revise its formulation after each purchase. For example, if the customer indicated that they would prefer a stronger fragrance – that adjustment is made on subsequent purchases. The iterative process of reviewing and refining happens every time the customer orders. NAD noted that nothing in the context of the challenged unqualified "192,000" claim, or the claim itself, alerts consumers that its count of 5-star reviews is based on Prose's "Review and Refine" experience.

Reasonable consumers may not expect that the number of reviews is the result of a back-and-forth process of altering and re-reviewing the product to increase consumer satisfaction. NAD determined that the "Review and Refine" process provides a meaningful consumer benefit, but any claim based on aggregated product reviews should indicate the way in which this level of customer satisfaction is achieved to avoid conveying a misleading message.

In its advertiser's statement, Prose stated that while it "respectfully disagrees with NAD's assessment of Prose's claim regarding the number of 5-star product reviews it has received, we appreciate NAD's guidance."

Nestle Nutrition v. Mead Johnson Nutrition of Reckitt Benckiser
Nestle Nutrition challenged claims that appeared in online advertising for Nutramigen infant formula. The challenged claims included:

- Nutramigen is "the only hypoallergenic formula with no sugar (sucrose) added."
- Nutramigen is "the only hypoallergenic formula with probiotics to support immune system and digestive health."
- Nutramigen is "the only hypoallergenic brand with expert recommended DHA amount."

In response to Nestle Nutrition's SWIFT challenge, the advertiser stated that for business purposes it agreed to permanently discontinue the challenged claims. NAD noted that because permanent discontinuance of the claims had not been fully completed prior to the challenge, it did not administratively close the case but instead maintained jurisdiction so that it may review the matter for compliance.

Although mooted by the advertiser's permanent discontinuance of the challenged claims, NAD nevertheless found that the challenge was appropriate for Fast-Track SWIFT because the issue of whether the advertiser's exclusivity claims about Nutramigen's ingredients was supported was not likely to require the review of complex evidence.

Learn more about the NAD Fast-Track SWIFT challenge process and how to file a challenge. All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

NAD Fast-Track SWIFT Case #6992 (05/25/2021)

Parties: PerSé Beauty Inc. ("Advertiser")/ Function Inc. ("Challenger")
Product: Prose Haircare Product Reviews
Product Type: Cosmetics/Beauty Products/Toiletries
Disposition: Modified/Discontinued
Claim: Express Claims

Basis of Inquiry: As part of NAD's Fast-Track SWIFT program designed to quickly and efficiently review advertising claims that involve a single well-defined advertising issue, Function, Inc., ("challenger") challenged PerSe Beauty, Inc.'s ("advertiser") use of product reviews, including that the advertiser only published select 5-star "Featured Reviews" on its website while also claiming that it has "over 192,000 5-star product reviews!" The express claim appeared on PerSe's website, in social media, and in Google search results.

Fast-Track SWIFT Eligibility Determination:[1] NAD thanks the advertiser for its voluntary participation in the NAD Fast-Track SWIFT process. The single issue is the advertiser's use of its product reviews.[2] NAD determined that it would not have to review complex evidence or legal argument because the issue was limited to the presentation of its product reviews, including whether the advertiser had provided a reasonable basis for its express "192,000 5-star product review" claim. Because NAD would not have to review complex evidence or legal argument, NAD determined that this challenge was appropriate for SWIFT review.

Decision: The parties are competing online purveyors of customizable hair products, both of which tout their many thousands of customer reviews. The advertiser's challenged "192,000 5-star product reviews" claim refers to Prose's entire product line[3] and appears in a banner at the top of every page on its website, and also on its Instagram account, and in Google search results. Prose does not disclose how many 1, 2, 3, or 4-star ratings their line has received, nor does it make the entirety of its product reviews publicly available. However, under the "Reviews" tab on Prose's website, the advertiser's "Featured Reviews" section contains seven 5-star testimonials exclaiming consumers' appreciation of Prose products, and some of the testimonials contain product performance claims.[4]

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[1] A challenge is appropriate for determination in SWIFT if it involves a single, well-defined issue such as an express claim that does not require review of complex legal argument or evidence and is capable of resolution within the SWIFT timeline. NAD/NARB Procedures Sec. 1.1(E)(2). NAD has also designated specific categories of cases that it considers for SWIFT: (1) the prominence or sufficiency of disclosures, including disclosure issues in influencer marketing, native advertising, and incentivized reviews; (2) misleading pricing and sales claims; and (3) misleading express claims that do not require review of complex evidence or substantiation such as a review of clinical or technical testing or consumer perception evidence. To ensure that the challenged claim meets this criteria, NAD/NARB Procedures require an initial review by NAD when the SWIFT challenge is first filed and then again in response to an advertiser's objection to the challenge being resolved in SWIFT. NAD/NARB Procedures, Sec. 6.1(C) and 6.2 (A). Further, if it becomes clear at any point during the pendency of a challenge that it is no longer appropriate for SWIFT, NAD will administratively close the case and it may be transferred to standard or complex track. NAD/NARB Procedures 6.2(C).

[2] Other examples of challenges with multiple claims or contexts that NAD has determined constituted a single issue were (1) variations of national and local "lowest prices" claim for a grocery store chain (ALDI, Inc. (Aldi Groceries), Report #6962, *NAD/CARU Case Reports* (February 2021)); (2) "A better performing bar for sustained energy" claim appearing as a paid result when consumers googled KIND bars or energy bars (Clif Bar & Co. (Clif Energy Bars), Report #6738, *NAD/CARU Case Reports* (June 2020)); and (3) whether a wireless coverage map truthfully and accurately identified the differences between its 4G and 5G services as the map appeared in several social media contexts (Verizon Wireless (Verizon 5G Wireless Service), Report #6910, *NAD/CARU Case Reports* (December 2020)).

[3] Prose sells customizable pre-shampoo hair mask, pre-shampoo scalp mask, shampoo, conditioner, hair oil, dry shampoo, curl cream, and leave-in conditioner. See https://prose.com/products (last visited May 20, 2021).

[4] For example, the reviews state that Prose "reduce[s] fizziness," makes hair "silky smooth," "the smell lasts all day" and "leave[s] my hair less greasy for days."

The challenger maintained that the advertiser did not provide a reasonable basis for its "over 192,000 5-star product reviews!" claim. The challenger expressed skepticism that the advertiser could have so many 5-star reviews because of the size of its social media presence and sales.[5] The challenger further argued that consumers lacked context for understanding the "192,000" claim when no other star counts were made public, and that the complete cache of reviews themselves were not available for consumers to view.

The advertiser represented to NAD that it formulates a customer's product from the result of their online hair and lifestyle survey and continuously tailors the formula based on the customer's post-purchase feedback, a process it refers to as its "Review & Refine" experience. As part of its process, Prose solicits star-ratings on aspects of the customer's experience after each purchase — overall experience, satisfaction per product, and various product attributes. It may revise its formulation after each purchase. For example, if the customer indicated that they would prefer a stronger fragrance – that adjustment is made on subsequent purchases. The iterative process of reviewing and refining happens every time the customer orders. The advertiser maintained that its 5-star claim is based solely on overall satisfaction.

Advertisers bear the burden for providing a reasonable basis for their claims.[6] An advertiser has met its burden when its evidence is reliable and a good fit for the claim. Product reviews may be considered reliable when they are matched to a bona fide purchaser; the solicitation gathers all opinions (for example, "tell us what you think" versus "tell us why you loved it"); counted reliably and in-line with consumers' expectations (for example the same review across multiple platforms is only counted once); and any incentives are disclosed.[7]

NAD was unable here to assess the reliability of the advertiser's evidence.[8] NAD was not provided any evidence on how the reviews were collected and maintained, nor given the opportunity to evaluate the "Review and Refine" survey instrument upon which the claim was based.[9] Although the advertiser represented through counsel that the "over 192,000 5-star product reviews claim" is based solely on a calculation of the number of 5-star reviews customers have awarded its product line, NAD could not determine who collected the reviews, whether the feedback survey was a bona fide invitation for honest opinions,[10] whether the survey questions had ever been changed (possibly rendering it unreasonable to aggregate the 5-star ratings obtained from different survey questions),[11] or that the 192,000 5-star reviews were based only on a neutral "overall satisfaction" question as argued. Nor could NAD determine the extent

[5] Both parties submitted argument and/or evidence of their respective market positions. NAD appreciated the background information, however, evidence of a large market presence is not a good fit to substantiate the challenged claim. The challenger had also raised the issue that in the past the parties had a dispute regarding deleted reviews, which had been resolved before this challenged was brought.

[6] Jetty Insurance Agency, LLC (Jetty Security Deposit Alternative Plans), Report #6919, *NAD/CARU Case Reports* (March 2021).

[7] See, e.g., Schmidt's Deodorant Company (Natural Deodorant Products), Report #6127, *NAD/CARU Case Reports* (October 2017); Fit Products, LLC. (FitTea), Report #6042, *NAD/CARU Case Reports* (December 2016); Function Inc. (Shampoo and Conditioner), Report #6938, *NAD/CARU Case Reports* (February 2021); Pyle Audio, Inc. (NutriChef Vacuum Sealers), Report #6265, *NAD/CARU Case Reports* (August 2019).

[8] Schmidt's Deodorant Company (Natural Deodorant Products), Report #6127, *NAD/CARU Case Reports* (October 2017).

[9] In this particular matter, NAD determined that it did not have to view all 192,000 reviews, but did expect evidence of how the reviews were collected, counted, and maintained by a person with personal knowledge who was responsible for their collection.

[10] Molekule Inc. (Molekule MH1 Air Purifier), Report #6314, *NAD/CARU Case Reports* (October 2019).

[11] Euro-Pro Operating, LLC (Shark-brand vacuum cleaners), Report #5717, *NAD/CARU Case Reports* (May 2014). The challenger submitted a screenshot of one question from the "Review and Refine" survey which stated, "How satisfied are you with your curl cream" with 1-to-5- star rating choices (including "skip" and "I haven't used it enough" options). The survey question is undated, and there is no evidence in this record that this is the question relied upon by the advertiser to support its claim or that this same question was asked for all 192.000 5-star reviews collected.

and frequency at which the "Review & Refine" process resulted in a substantially different formulation, a modestly altered formulation, or no difference in formulation. As a result, on this record, NAD recommended that the advertiser discontinue its unqualified claim that Prose has "over 192,000 5-star product reviews."

In addition, the "Review and Refine" experience should be part of any claim touting 5-star reviews to avoid misleading consumers about the level of its consumers' satisfaction with their initial purchase of the product. Nothing in the context of the challenged unqualified "192,000" claim, or the claim itself, alerts consumers that its count of 5-star reviews is based on Prose's "Review and Refine" experience. Reasonable consumers may not expect that the number of reviews is the result of a back-and-forth process of altering and re-reviewing the product to increase customer satisfaction. At least in part, the reviews are not based on initial satisfaction with the product. In fact, 5-star reviews are achieved as customers refine and customize the product. The "Review and Refine" process provides a meaningful consumer benefit, but any claim based on aggregated product reviews should indicate the way in which this level of customer satisfaction is achieved to avoid conveying a misleading message.

The challenger argued that the advertiser's 5-star claim should be discontinued because the advertiser did not publish all product reviews, cherry-picking its most positive reviews to share with consumers. NAD noted that Prose clearly labels the reviews as "Featured Reviews" and, as a result, the context of the reviews presented does not reasonably convey the message that Prose only has positive reviews, but features the reviews as testimonials. An advertiser may not make claims through consumer testimonials that could not be substantiated if made directly by the advertiser and that anecdotal evidence, based solely on the experiences of individual consumers, is insufficient to support product efficacy claims.[12] NAD cautioned the advertiser that it must therefore have independent evidence to support any product performance claims contained therein.[13]

For all the foregoing reasons, NAD recommended that the advertiser discontinue its claim that Prose has "over 192,000 5-star product reviews." However, nothing in this decision prevents the advertiser from making a claim based on aggregated 5-star product reviews, provided, however, that the reviews are reliably solicited from verified purchasers who are asked a neutral question about their experience with the product, and it discloses, as part of the claim, its "Review and Refine" process.

Conclusion:

For all the foregoing reasons, NAD recommended that the advertiser discontinue its claim that Prose has "over 192,000 5-star product reviews."

However, nothing in this decision prevents the advertiser from making a claim based on aggregated 5-star product reviews, provided, however, that the reviews are reliably solicited from verified purchasers who are asked a neutral question about their experience with the product, and it discloses, as part of the claim, its "Review and Refine" process.

Advertiser's Statement:

[12] Flora, Inc. (Udo's Oil 3-6-9 Blend), #5389 NAD Case Reports (October 2011); The Elations Company, LLC (Elations Liquid Supplements), Report #5196, NAD/CARU Case Reports (July 2010).
[13] See Fit Products, LLC. (FitTea), Report #6042, NAD/CARU Case Reports (December 2016).

Prose's "Review and Refine"™ experience is a unique, customer-centered process that enables a true collaboration with customers to make sure they feel listened to when they provide feedback. While Prose respectfully disagrees with NAD's assessment of Prose's claim regarding the number of 5-star product reviews it has received, we appreciate NAD's guidance and the opportunity to further highlight the "Review and Refine"™ experience for our customers. Prose stands proudly with NAD in its mission to ensure that customers receive clear, transparent, and truthful information in advertising. **(#6992 KAD, closed 05/25/2021)**

National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

National Advertising Division Recommends P&G Discontinue Odor Elimination Claims for Febreze Products; P&G to Appeal

New York, NY – June 9, 2022 – The National Advertising Division (NAD) of BBB National Programs recommended that The Procter & Gamble Company (P&G) discontinue certain "odor elimination" claims that P&G makes across the Febreze line of home fragrance products, which include the Febreze Air, Light, Fabric, Plug, Small Spaces, Candles, Wax Melts, Car, and Unstopable products. P&G will appeal NAD's decision.

The claims, which appeared in online advertisements, commercials and on the Febreze website, were challenged by S.C. Johnson & Son, Inc., manufacturer of the competing line of Glade brand of products.

NAD determined that certain commercials on the Febreze website reasonably convey the message that Febreze products physically and chemically eliminate odors on a molecular level; whereas other challenged advertisements reasonably convey a message limited to the perception of malodor (sensory odor elimination).

Although the advertiser submitted evidence of extensive testing along with reports from experts in relevant fields, NAD concluded that the advertiser's sensory testing evidence was not a good fit for claims of physically or chemically eliminating malodor on a molecular level because sensory testing, by itself, is insufficient to support a non-sensory elimination claim.

Further, NAD found that the advertiser's sensory testing, known as Difference From Control testing, was not a good fit for claims of sensory odor elimination (including instant and continuous elimination).

Therefore, NAD recommended that the advertiser discontinue the challenged express and implied claims that Febreze eliminates odors, such as:

- "Febreze Air eliminates odors in an instant,"
- "Want to eliminate odors without heavy overwhelming scents? We get it. Introducing Febreze Light. It eliminates odors with no heavy perfumes in light scents you'll love,"
- "Febreze Fabric Refresher "eliminates sunk-in-stink with long-lasting freshness,"
- "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. Luckily, there's Febreze Plug. It continuously eliminates lingering odors…,"
- Febreze Small Spaces is an "odor eliminator,"
- Febreze Car Vent Clips are the "best car air fresheners to eliminate car odors for good,"
- Every Febreze product reduces odor to an olfactory level that is not detectable to the average consumer, and

- Every Febreze product reduces all types of odor to an olfactory level that is not detectable to the average consumer.

NAD noted that nothing in its decision precludes the advertiser from making truthful and non-misleading claims that Febreze products reduce the perception of malodor or that Febreze products physically and chemically affect malodor at the molecular level, including claims that the products work instantaneously or continuously.

In its advertiser statement, P&G stated that it will appeal NAD's decision because it "fundamentally disagrees" with "NAD's conclusion that P&G has not substantiated any claim of sensory odor elimination." The advertiser maintained that the "challenged claims are substantiated by robust and reliable data" and that the "record evidence demonstrates that all in-market Febreze products, and the proprietary OdorClear™ technologies they contain, in fact, eliminate malodor molecules to an olfactory level that is undetectable to consumers."

Such appeals of NAD decisions are made to BBB National Programs' National Advertising Review Board (NARB), the appellate-level truth-in-advertising body of BBB National Programs.

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs is where businesses turn to enhance consumer trust and consumers are heard. The non-profit organization creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. Embracing its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, BBB National Programs today oversees more than a dozen leading national industry self-regulation programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Case #6977 (05/11/2022)
The Procter & Gamble Company
Febreze
Challenger: *S. C. Johnson & Son, Inc.*
Product Type: *Household Products*
Issues: *Comparative Performance Claims; Efficacy Claims; Establishment Claims; Health & Safety Claims; Implied Claims/Consumer Perception; Parity Claims; Performance Claims; Product Description; Superiority Claims*
Disposition: *Modified/Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

S. C. JOHNSON & SON, INC.,
Challenger,

THE PROCTER & GAMBLE COMPANY,
Advertiser.

Case No. 6977
Closed 05/11/2022

FINAL DECISION

- A purely sensory test, which is intended to test only perception of odors, is not sufficient to support a claim of physical or chemical odor elimination because a sensory test evaluates only the perception of malodors, and not whether the odors have been physically or chemically eliminated.
- The Advertiser's testing was not a good fit for claims of sensory elimination (including instant and continuous elimination) due to the lack of evidence bridging the laboratory testing to real world conditions.

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger S. C. Johnson & Son, Inc. ("SCJ" or "Challenger") challenged express and implied claims made by Advertiser The Procter & Gamble Company ("P&G" or "Advertiser") for its Febreze line of products. The following are representative of the claims that served as the basis for this challenge:

A. Express Claims

- "Febreze safely eliminate[s] odors."
- OK, real talk: We aren't the first air freshener. But we are the first of its kind to actually eliminate stink…thanks in part to our OdorClear technology."
- "No cover up here – Febreze has the only lineup of air fresheners that truly clean away stink. So whether you're looking for an instant burst of "ahh" or continuous freshness, you know we've got

your back (and nose). Check out all the ways we can help keep your life guest-ready and odor-free."

- "Febreze Air eliminates odors in an instant."
- "Typical air fresheners just add another smell to the mix, but Air Effects actually eliminates airborne odors and leaves an instant burst of lightly scented freshness in its wake."
- "Your go-to air freshener for any odors that arise: Air Effects doesn't just mask stinky air, it instantly eliminates it."
- "Want to eliminate odors without heavy overwhelming scents? We get it. Introducing Febreze Light. It eliminates odors with no heavy perfumes in light scents you'll love."
- Febreze Clothing is an 'Odor Eliminator."
- Febreze Fabric Refresher "eliminates sunk-in-stink with long-lasting freshness."
- "Did you know the source of odor in your home could be all your soft surfaces? Odors get trapped in your home's fabrics and resurface over time. Febreze Fabric Refresher eliminates odors. Its water-based formula safely penetrates fabrics where odors hide."
- "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. [Visuals of pets, dirty socks, and dirty sports shoes.] Luckily, there's Febreze Plug. It continuously eliminates lingering odors…"
- "Over time, you go noseblind, but others smell…this. [Visuals of pets, dirty socks, and dirty sports shoes.] That's why Febreze Plug has two alternating scents, and it eliminates odor for 1200 hours."
- Febreze Small Spaces is an "odor eliminator."
- "Unlike the leading cone, [Febreze] Small Spaces continuously eliminates odor in the air and on surfaces so they don't come back for 45 days. Just imagine what it can do with other odors."
- "For bathroom odors that linger, try Febreze Small Spaces. Just press firmly and it continuously eliminates odors in the air and on soft surfaces for 45 days."
- "Don't forget all your favorite nooks and crannies: Small Spaces prevents lingering odors for up to 45 days."
- "Strike a match on odor elimination. Shop Febreze Candles."
- Febreze Wax Melts "eliminate[] odors & freshen[]."
- Febreze Car Vent Clips are the "best car air fresheners to eliminate car odors for good."
- "With two times the scent power of regular Febreze, Unstoppable Fabric finds, neutralizes, and eliminates tough odors trapped in hard to wash fabrics like couches or smelly sports equipment…Stop sneaky odors from lingering in your home with Febreze Unstoppables."
- "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. [Visuals of pets, dirty socks, and dirty sports shoes.] Luckily, there's Febreze Plug. It continuously eliminates lingering odors…"

B. Implied Claims

- Every Febreze product reduces odor to an olfactory level that is not detectable to the average consumer.
- Every Febreze product reduces all types of odor to an olfactory level that is not detectable to the average consumer.

During the course of the proceeding, the Advertiser informed NAD that, for reasons unrelated to this challenge, it was in the process of voluntarily discontinuing the Clothing form of its Febreze product, and all Clothing-specific advertising claims. NAD will treat these discontinued Clothing claims, for the

purposes of compliance, as though NAD recommended their discontinuance and the Advertiser agreed to comply.

II. Evidence Submitted

The Challenger submitted exhibits of the challenged advertising. In addition, to support its arguments it provided the following:

- Testing on whether Febreze Air products eliminate odors;
- Expert Reports of Rebecca N. Bleibaum explaining the Challenger's odor elimination testing of Febreze Air products and opining on the Advertiser's testing;
- Expert Report of Daniel M. Ennis opining on the Advertiser's testing;
- Expert Report of Michael A. McGinley opining on the Advertiser's testing;
- An article and video from Consumer Reports about prior Febreze claims;

The Advertiser submitted the following:

- Testing on whether Febreze products eliminate odors;
- Patents on Febreze's odor blocking technology;
- Declarations of Keith Cannon explaining the Advertiser's odor elimination testing and responding to the opinions of the Challenger's experts;
- Declarations of Steve Horenziak explaining Febreze's odor elimination technology and responding to the opinions of the Challenger's experts;
- Expert Report of Gail Vance Civille opining on the Challenger's testing;
- Expert Report of Edgar Chambers IV responding to the opinions of the Challenger's experts on the Advertiser's testing;
- Expert Reports of John Castura opining on the statistical analysis used in the Challenger's and the Advertiser's testing;
- A Letter responding to various supplemental questions posed by the NAD, along with supporting documentation.

III. Decision

A. Introduction and Background

The Advertiser and the Challenger manufacture two of the largest and most well-known brands in the home fragrance industry. The Challenger's Glade brand competes with the Advertiser's Febreze brand and they each produce an array of home fragrance products.

At issue in this challenge is whether P&G's odor elimination claims for Febreze products convey the message that the products eliminate odor at the molecular level or the message that the Febreze products eliminate odor at the olfactory level. SCJ challenged numerous "odor elimination" claims that P&G makes across the Febreze line of products, which include the Febreze Air, Light, Clothing, Fabric, Plug, Small Spaces, Candles, Wax Melts, Car, and Unstoppables products. SCJ argued that P&G's odor elimination claims distinguish its products from its competitors by claiming that its products do not just "mask" odor but rather eliminate it. P&G asserted that the challenged claims are substantiated by reliable evidence demonstrating that the Febreze products and the proprietary technologies they contain eliminate malodors to an olfactory level that is undetectable to consumers.

B. The Challenged Advertising and the Messages Reasonably Conveyed

An advertiser is responsible for all reasonable interpretations of its claims, not simply the messages it intended to convey.[1] In analyzing the messages conveyed by a particular advertisement, NAD typically reviews the net impression created by an advertisement as a whole, not merely words or phrases standing alone, and taking into consideration both the words and the visual images. In the absence of consumer perception evidence, NAD uses its own expertise to step into the shoes of the consumer to determine the messages reasonably conveyed by the challenged advertising.

The challenged claims appear in online advertisements, commercials and on the Febreze website promoting either the line of Febreze products or one of the individual product types in the Febreze line.

SCJ argued that P&G's advertising expressly conveys the unqualified message that Febreze products eliminate odor either at the molecular level or to an olfactory level that is not perceptible to consumers. P&G argued that its advertising conveys the supported message that Febreze eliminates the perception of malodor.

As there was no consumer perception evidence presented in connection with the challenged advertisements, NAD relied on its own expertise to determine the messages reasonably conveyed. NAD found that the challenged advertisements reasonably convey a message that the Febreze products are effective in eliminating perceptible malodor. NAD also determined that some challenged advertising conveys an odor elimination message through language or imagery, that Febreze eliminates odors at the molecular level.

The word "eliminate" in the challenged advertising conveys the message that the Febreze product reduces malodor to an olfactory level that is not detectable to the average consumer.[2] NAD has previously examined odor elimination claims and has found that "[U]nlike the phrases "helps control" or "reduce odors," unqualified promises to "neutralize," "control," "block" and "prevent" are absolute and consequently require stronger supporting evidence than odor reduction evidence."[3] In *Pactiv Corporation*, NAD concluded that while the challenged odor reduction claims were sufficiently qualified and supported by evidence that demonstrated that the advertiser's OdorBlock technology reduced malodor but did not eliminate it, the evidence that the advertiser's technology reduced odor was insufficient to support the advertiser's claims that the product "neutralize[d] or control[led]" odors." In *Sherwin-Williams Company (Dutch Boy Refresh Paint, Inc)*, Report #5148, NAD/CARU Case Reports (March 2010), NAD determined that claims that the advertiser's Refresh paint "eliminates household odors" and "continuously eliminates odors day after day" convey the message that the advertiser's product did not merely reduce odors but rather reduced them "to an olfactory level that is not detectable to the average consumer during the useful life of the paint."

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[1] See *Molekule Inc. (Molekule MH1 Air Purifier)*, Report #6314, NAD/CARU Case Reports (October 2019); *White-Rodgers (a division of Emerson Electric Co) (Programmable Thermostats)*, Report #6118, NAD/CARU Case Reports (September 2017)*; Spectrum Brands, Inc. (Rayovac Fusion AA Batteries)*, Report #6012, NAD/CARU Case Reports (October 2016); *Dole Packaged Foods, LLC (Dole Fruit Bowls),* Report #5868, NAD/CARU Case Reports (July 2015).

[2] *Healthy Directions, LLC (Joint Advantage Gold Supplement)*, Report # 5512, NAD/CARU Case Reports (October 2012) ("Unqualified promises such as the one here that claims to 'eliminate' stiffness are absolute and consequently require stronger supporting evidence than is present in this record," which showed that the product reduced, but did not eliminate stiffness.").

[3] *Pactiv Corporation (Hefty OdorBlock Trash Bags)*, Report #5105, NAD/CARU Case Reports (November 2009)

1. Febreze products physically and chemically eliminate odors on a molecular level

Certain commercials and statements on the Febreze website reasonably convey the message that Febreze products physically and chemically eliminate odors on a molecular level. For example, certain commercials include the animated imagery of the odor molecule being destroyed by the Febreze product. Other advertising touts the ability of Febreze to eliminate the source of odors by "cleaning" odors. The Febreze home page includes an image of the range of Febreze products with the text, "How does Febreze safely eliminate odors? Find out how." with a link to a page with detailed information about the entire line of Febreze products, including text stating "OK. Real talk. We aren't the first air freshener. But we *are* the first of its kind to develop technology that actually eliminates stink… thanks in part to our OdorClear technology." Other text on the website reads, "Our formulas are designed to actually eliminate bad odors without just masking them." Another line claim about all Febreze products on the website states, "No cover up here – Febreze has the only lineup of air fresheners that truly clean away stink, so whether you're looking for an instant burst of "ahh" or continuous freshness, you know we've got your back (and nose). Check out all the ways we can help keep your life guest-ready and odor-free."

Several of the challenged advertisements specifically tout the ability of Febreze fabric products, including Febreze Fabric Refresher and Febreze Unstoppable Fabric, to provide long-lasting odor elimination by attacking the source of odors and reasonably convey the message that the product physically and chemically eliminates odors on a molecular level. For example, the Febreze Fabric commercial states, "Did you know the source of odor in your home could be all your soft surfaces? Odors get trapped in your home's fabrics and resurface over time. Febreze Fabric Refresher eliminates odors. Its water-based formula safely penetrates fabrics where odors hide." The commercial also includes visual depictions of pet and dirty shoe odors and Febreze Fabric Refresher working at a molecular level on fabrics after being sprayed on furniture to eliminate the pet or dirty shoe odors.

NAD found that advertising that communicates the message that Febreze does more than traditional air fresheners to mask odors but "clean" the air and address the source of odors, convey the message that Febreze physically or chemically eliminates odor at the molecular level.

2. Febreze Products Eliminate the Perception of Malodor

Other challenged advertisements reasonably convey a message limited to the elimination of a perception of malodor, rather than a message that the products physically and chemically eliminate odors on a molecular level.

For example, the Febreze Light Air commercial states, "Want to eliminate odors without heavy overwhelming scents? We get it. Introducing Febreze Light. It eliminates odors with no heavy perfumes in light scents you'll love." In the commercial, a woman is depicted spraying Febreze Light Air into the air. NAD found that such advertising that does not convey a message about the product affecting the sources of odor or cleaning odors, reasonably conveys the message that Febreze products eliminate the perception of malodor.

C. Standard of Review

Advertisers must possess a "reasonable basis" for claims disseminated in advertising.[4] What constitutes a "reasonable basis" depends on several factors, including the type of product, the type of claim, the consumer benefit from a truthful claim, the ease of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation experts in the field believe is reasonable.[5]

D. The Advertiser's Evidence

To support the challenged claims, the Advertiser submitted declarations from Keith Cannon, Steve Horenziak, Gail Vance Civille, Edgar Chambers IV, and John Castura, who explained the mechanism behind Febreze's odor elimination technology and the testing Febreze undertook to support its claims. In addition, the Advertiser submitted the results of sensory testing it conducted, known as Difference From Control ("DFC") testing, to show that consumers could not smell malodors after treatment with Febreze.

Steve Horenziak, Research Fellow in the Research and Development Department of P&G's Home Care business, explained that Febreze uses four key technologies to eliminate malodor on a molecular level: odor trappers, odor converters, odor neutralizers, and odor magnets. Odor trappers trap volatile organic compounds ("VOCs"), which form the majority of malodors and which are usually hydrophobic, in the hydrophobic core of a cyclodextrin molecule. Odor converters are reactive aldehydes that bind to VOCs to convert them into odorless molecular compounds. Odor neutralizers contain citric acid and sodium citrate to neutralize the pH of VOCs and convert them to salt forms with no odor. Odor magnets are polyamine polymers found only in Febreze Fabric sprays that attract malodors and extract them from fabrics. The Advertiser explained that at least one or more of these technologies are present in each Febreze product. Among other things, the Advertiser submitted patents P&G has held on its unique and proprietary expressions of the technologies in certain of its Febreze products, as well as evidence from scientific literature of how those technologies work to eliminate the perception of odorants from VOCs. P&G argued that the technologies used in the Febreze products work to physically or chemically alter or otherwise trap the malodor molecules so that the products "eliminate" malodors rather than merely mask them with a different fragrance.

In support of its elimination claims, the Advertiser relied on the DFC testing. P&G stated that it relied on guidelines from ASTM and HCPA (an industry trade association for chemical products companies formerly known as the Consumer Specialty Products Association ("CSPA")) to develop this testing methodology.

The DFC testing used an expert panel of ten to sixteen non-P&G employees that was asked to assess the intensity of a malodor (e.g. bacon, bathroom, body odor, fish, garlic, mold, mildew and must, pet or smoke) in a test chamber that contains a product from each line of Febreze products (Air, Candle, Car, Fabric, Plug, Small Spaces and Wax Melts, with the testing of each product type called a "pillar" in the study). The panel was asked to compare the intensity of the malodor in a chamber with only the malodor and no Febreze to a test chamber with the malodor and Febreze. The test chambers used were 12.2 cubic

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[4] *Guardian Technologies, LLC (GermGuardian and PureGuardian Air Purifiers and Replacement Filters)*, Report #6319, NAD/CARU Case Reports (November 2019).

[5] *Pfizer Inc.*, 81 F.T.C. 23 (1972). *See also* FTC, *Policy Statement Regarding Advertising Substantiation* (Nov. 23, 1984), https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation.

feet, with the exception of the test chamber for the fabric pillar, which was conducted in an 8-foot high glass-walled room.

In each test chamber with Febreze, a 3-second, 4-grams-weighted spray of product was used. The panelists conducted their test 30 minutes after the introduction of Febreze Air, 60 minutes after the introduction of each continuous use product (i.e., Candle, Car, Plug, Small Spaces or Wax Melts) and 120 minutes after introduction of the fabric pillar. After each test, the chambers were cleaned, vented and purged of all odors.

Panelists were asked to first smell an unblinded reference chamber containing malodor only and rate the intensity of odor on a scale of 0 to 100, with 100 being extremely strong and 0 being no malodor present. For all tests other than Febreze Fabric, the malodor dose introduced into the chamber was-at least 65-75 intensity initially and then maintained at an intensity grade of 40 or higher for the duration of the test. Febreze Fabric was allowed to have an intensity grade lower than 40 and above 20 because the testing was performed after 2 hours in a room instead of a chamber.

The panelists were asked to compare the malodor intensity of one of three types of chambers against the reference: (a) malodor only (negative control), (b) Febreze only (positive control) or (c) malodor + Febreze. The panelists were then asked to rate the intensity of the malodor in each chamber on a scale of -7 to +7, with -7 to -3 being described as "much weaker than identified reference control," -2 to +2 as "same as identified reference control," and +3 to +7 as "much stronger than identified reference control."

If the mean score for the malodor + Febreze test leg was both less than zero and within 2.5 points of the mean score assigned to the Product Only control, *i.e.* if the malodor intensity detected was less than that of the reference control and sufficiently statistically similar to that of the Product Only leg, then the Febreze pillar was deemed effective at eliminating malodor perception. Having a mean score below zero but not within 2.5 points of the mean score assigned to the Product Only control was interpreted as Febreze merely reducing, but not eliminating, malodor perception. The results of the DFC testing showed that for every pillar and for every type of odor, Febreze was considered to have "eliminated" the malodor.

1. The Relevance of Sensory Testing

The Challenger argued that the DFC sensory testing cannot support odor elimination claims at the molecular or chemical level. The Challenger's expert, Dr. Daniel Ennis, explained that evaluating whether a product physically or chemically eliminates malodor on a molecular level requires analytical chemistry data and an assessment of the concentration of malodor after exposure to the product. A purely sensory test, which is intended to test only perception of odors, is not sufficient to support a claim of physical or chemical odor elimination because a sensory test evaluates only the perception of malodors, and not whether the odors have been physically or chemically eliminated. NAD agreed that the evidence submitted was limited to sensory testing and was not a good fit for implied claims that Febreze eliminates the source of odor at the molecular level. Although P&G provided evidence that certain of its odor elimination technologies are designed to address odor at the chemical or molecular level, there was no consumer relevant testing in the record that demonstrated Febreze products eliminate odor at its source.[6]

The Challenger also argued that P&G should have tested its odor elimination technology without the fragrance to properly evaluate whether Febreze products eliminate odor as opposed to merely masking it.

[6] The Advertiser also argued that before it did DFC testing, it historically used "absolute testing," which it claimed also supported its elimination claims. However, the Advertiser did not submit the details of this testing.

The Advertiser explained that it was impossible to separate the fragrance in its products from key odor elimination technologies, as these products were sold containing fragrance and that some of the technology used to chemically eliminate odors are contained in the fragrance itself. Further, the Advertiser argued that to test a fragrance-free product that is unavailable for sale would not be consumer relevant. NAD agreed with the Advertiser that testing a different product than that available for purchase limits the consumer relevance of the testing.[7]

2. The ASTM and CSPA Methodology

The Challenger also argued that the Advertiser's test methodology for the DFC study inappropriately relied on guidelines from ASTM and CSPA because neither standard is intended for claim substantiation. The Challenger argued that both standards were created to provide a framework for product development, quality control and formulation changes. For example, the Challenger pointed to ASTM's own description of its guidelines which states that "this guide is not intended to support claims."

In addition, the Challenger's expert Michael McGinley, former Vice-Chair of the CSPA Deodorization Committee and a primary author of the method that the Challenger used for its testing, explained that although it is possible to reach a conclusion using the CSPA methodology that a product eliminates the perception of malodor in a very limited and highly controlled set of circumstances, such circumstances would not be meaningful to how the product is used in real world conditions. Finally, the Challenger asserted that even if the CSPA and ASTM methodology was appropriate for claim substantiation, the Advertiser deviated from the methodology in key ways by, for example, using test chambers significantly smaller than those recommended by those methods.

The Advertiser explained that there is no established industry standard for sensory testing in support of odor elimination claims and that the ASTM and CSPA standards reflect best practices in the field of sensory science. The Advertiser argued that borrowing from these standards is therefore the appropriate course of action when designing a study to evaluate odor elimination claims. Further, the Advertiser argued that any deviations from the standards were appropriately tailored for claim substantiation.

Here, the issue is not whether the Advertiser properly adhered to ASTM and CSPA standards, but whether the Advertiser's substantiation was reliable and provided a reasonable basis for its claims. ASTM tests generally reflect industry consensus and provide a controlled, consistent and standardized way to test products that may be exposed to a variety of uses in the marketplace. The ASTM and CSPA standards provide reasonable guidance on reliable testing procedures. It was therefore appropriate for the Advertiser to look to industry standards as a starting point, NAD examined whether each aspect of the chosen methodology was reliable and whether any deviations from the standards were justified.

3. Test Chamber Size, Dosage and Activation Time

The Challenger argued that one fatal departure from the standards in the Advertiser's DFC test was the size of the test chambers.[8] The Advertiser used test chambers of 12.2 cubic feet (roughly the size of a small refrigerator), but the ASTM and CSPA both recommend much larger chambers. The ASTM standards, for example, note that "air fresheners are generally intended for room air freshening and thus

[7] The Advertiser also submitted results of DFC testing of a limited SKU version of its Fabric pillar that P&G offers to consumers in a fragrance-free version.

[8] The exception is the Fabric pillar, which was conducted in a small room.

need a room-sized chamber" though it allowed some leeway to use a large jar if the product is small or intended for evaluation at close proximity. The CSPA standards are even more specific, stating that "[i]t is expected that chambers smaller than 60-ft^3 will require small doses of malodor and fragrance that would be difficult to control in a reproducible way."

The Challenger asserted that the use of undersized test chambers was even more problematic because of the high dosage of Febreze used (3 seconds or 4 grams) in each chamber along with the long activation time (30 minutes or more) that was allowed prior to testing. This combination of conditions meant that a highly concentrated dose of Febreze was allowed to sit in a small container and interact with malodors for thirty minutes or more before any panelist smelled the chamber—conditions that did not reflect actual consumer use. According to the Challenger, these conditions would be the equivalent of spraying Febreze for four straight minutes in a 1000 cubic feet room. The Challenger further argued that these errors were all compounded by the fact that the Advertiser only used malodors of moderate intensity into these chambers oversaturated with Febreze.

The Advertiser explained that it chose small test chambers because they were easier to clean and prevent contamination. The Advertiser stated that 4 grams of spray was appropriate due to consumer testing it had conducted, which concluded that 4 grams of spray was the typical amount of Febreze that consumers would use when spraying a small bathroom. Similarly, the Advertiser cited its consumer testing to support the 30-minute activation time.[9] The Advertiser also explained that because it used a dose appropriate for a bathroom-sized room in a much smaller chamber, it increased the concentration of malodor accordingly. Finally, the Advertiser conducted two additional tests, both using Febreze Air, to confirm that its methodology was reliable. One test was conducted in an 800 cubic feet room, using 8.375 grams of product; the other test was conducted in the smaller chamber, but with an activation time of only 10 minutes rather than 30. In both cases, according to the Advertiser, the results supported an elimination claim.

The small test chambers here limit the reliability of the testing to demonstrate odor elimination in consumer relevant circumstances. Although both ASTM and CSPA contemplate using chambers smaller than rooms consumers would typically encounter in some circumstances, neither standard suggests chambers as small as 12.2 cubic feet (although as noted above ASTM did allow for testing in jars in very limited circumstances not applicable here). In fact, the CSPA especially cautioned against using chambers smaller than 60 cubic feet, as this would require reducing the dose of product and malodor to levels that would affect the reliability of the testing. Although departures from industry standard testing can be justified in some circumstances, the Advertiser's test methodology was specifically disapproved and not justified by the difficulty of cleaning the larger chamber.

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[9] Consumer habits and practices data was gathered by P&G in a 2016 study that involved an online questionnaire completed by more than 3,000 consumers, of which roughly 2,500 were individuals who had used air care products within the past 6 months ("P6M users"). To the extent P6M users had used a given pillar within the past 6 months they were asked specific questions about the use of that pillar. P6M users were asked "About how long would you say each odor [recently experienced un your home] would last in your home if you did not treat it?" Across all odors 31% of P6M users who used aerosols reported that the odors would last up to 30 minutes. With respect to bathroom malodor specifically 56% of P6M users reported that bathroom odor would last up to 30 minutes in their homes if not treated. Because bathroom malodor was the number one malodor that consumers using aerosols reported and because 56% of P6M users of aerosols reported that bathroom malodor lasts up to 30 minutes if not treated P&G deemed it appropriate to judge and set the air pillar's success criteria at the 30-minute evaluation time point.

The size of the test chambers is particularly problematic when considering the dosage used. Although the Advertiser used data from consumer testing to determine the amount of product to use, the use of a test dosage typically used in rooms the size of a bathroom in a test chamber the size of a refrigerator concentrates the product in ways that are not consumer relevant.

Further, although the Advertiser claimed that an activation time of 30 minutes (or longer) reflected actual consumer habits from consumer testing it had done, it was unclear how it was determined that 30 minutes was the optimal time. The Advertiser's consumer testing asked consumers how long odors would last in their homes if untreated, with some of the responses indicating 30 minutes and others longer.[10] The fact that some odors linger for 30 minutes, however, does not necessarily mean that 30 minutes is the optimal time to test the efficacy of a product in support of an elimination claim. Even if 30 minutes could have been appropriate for a larger room, there was no evidence showing that 30 minutes would still be appropriate for a 12.2 cubic foot chamber.[11] Further, many of the challenged claims tout the "instant" elimination of odors and a 30-minute activation time is not a good fit for claims that odor is instantly eliminated.

Although the Advertiser argued that it introduced a higher concentration of malodor to account for the smaller chamber size, it was not clear whether the increased concentration of malodor matched the heavy dose of product to represent meaningful consumer use. The Challenger maintained that high concentrations of both product and malodor, enclosed in a small chamber for thirty minutes or longer, give the product and malodor opportunities to interact in ways that do not reflect real world conditions.

In response to the criticisms noted above, the Advertiser conducted additional testing of the Febreze Air pillar in a larger room and, separately, in the same small test chamber but after only 10 minutes of activation time. The additional testing also found that Febreze Air eliminated malodors. This additional testing successfully overcame the Challenger's objections as to test chamber size and activation time, but only as to the pillar that received additional testing—Febreze Air. NAD therefore concluded that, with the exception of Febreze Air and Fabric (which was tested in a larger chamber to begin with), the DFC testing did not provide reliable results because the test chamber size, dosage and activation time were not consumer relevant.

NAD also questioned whether the testing in a sterile, isolated chamber was a good fit for advertisements that claim Febreze can eliminate odors that sink into surfaces and linger when the test chambers contained no such surfaces, creating an artificial environment that would not be encountered in typical consumer use. Although testing in these chambers allowed the Advertiser to control for environmental variables, and it is impractical for an Advertiser to test every combination of rooms with different furniture and surfaces, NAD would have liked to see evidence that bridged the gap between the laboratory testing and real-world use.

4. 2.5 Point Scale

P&G's testing measured successful odor elimination by setting a 2.5 point scale for chambers with malodor + product as compared to chambers with product only. SCJ argued that P&G's 2.5 Point

[10] P&G used 60 minutes activation time for continuous-use products and 120 minute activation time for the fabric pillar.

[11] NAD noted that CSPA and ASTM Guidelines for assessing instant action aerosols, both reference 5 minutes of activation time prior to evaluation.

threshold for concluding that Febreze products eliminate odor does not demonstrate odor elimination, but odor reduction.

P&G's experts explained that they validated its malodor elimination efficacy methodology for consumer relevance by correlating its trained expert panelist results with results from testing with untrained consumers. P&G conducted product tests of several different malodor and fragrance combinations in which it asked consumers to evaluate relative malodor intensity under the same conditions and using the same scoring scale as experts. P&G found that scores reported by untrained consumers followed the same trend as exert panelists' scores but that trained sensory experts are more sensitive to odor overall and that consumers have trouble distinguishing differences when confronted with mixtures of malodor and fragrance. P&G asked consumers to rate malodor + product combinations on a pleasantness scale because they could better relate to it. P&G's statistical modeling revealed that experts rated the malodor + product chamber 2.5 to 3 points higher than consumers. Accordingly, P&G set the success criteria for malodor elimination efficacy in its DFC testing with expert panelists at a difference of 2.5 points or less.

Consumers were asked to rate odor on a scale of "pleasantness" while experts rated malodor intensity. Correlating the expert results on odor intensity to those of an untrained consumer on the pleasantness of an odor is not appropriate as experts and consumers are not rating the same quality. Assessing odor "pleasantness" does not measure whether consumers can detect malodor, but rather whether a certain odor is pleasing or not. For the foregoing reasons, NAD determined that the 2.5 scale P&G used to determine elimination of odor was not consumer relevant.

Additionally, even applying the Advertiser's own scale, the expert panel's responses indicate that malodor was not eliminated. The instructions given to the panelists indicate that only -7 on the scale was defined as the absence of "any malodor in the test chamber compared to the control chamber;" anything above -7 was merely "weaker" than the control. Only 20% of product + malodor test chambers were rated as -7, indicating that most panelists detected some malodor.[12] The Advertiser maintained that endpoint avoidance explains this result, as even trained panelists may be reluctant to select an endpoint on any scale. NAD recognized that there could be some endpoint bias, but that the testing revealed that many panelists detected malodors and, as a result, the test results are not consistent with a claim of odor elimination.

5. Blinding

SCJ argued that the Advertiser's testing was not properly blinded for all of the continuous action products (i.e. Candle, Wax, Small Spaces, Plug, Car) because the front wall of the test chambers was transparent, which allowed the evaluators to see which chambers contained a Febreze product. This provided panelists with critical information that could have impacted how they graded the aroma smelled in the test chambers. P&G's expert explained that continuous action products were left in the evaluation chambers because it is consistent with consumer use of those products. While such products are visible to expert panelists, P&G argued that the experts do not know whether the test chamber they are evaluating contains a product only or malodor + product, so the blinding would only affect the scoring of these two chambers and it would affect them equally. P&G submitted additional DFC testing of its continuous action products in which it placed a placebo or "dummy" product in each of the malodor only chambers

[12] Experts were instructed that if they do not smell any malodor in the chamber compared to the control chamber to rate it much weaker or a –7 on the scale, 22% of expert panelists rated the product + malodor as a –6, 20% as a –5, 15% as a –4 and 9% as a –3, 6% as a -2 and 3% as a -1.

to ensure all chambers featured the same visual cues.[13] The additional testing demonstrated malodor elimination efficacy against all malodors tested.

When test results are entirely subjective, lack of blinding could affect even expert evaluators and introduce bias into the test. P&G's additional testing successfully overcame the Challenger's objections with respect to blinding for the continuous action products tested; however, NAD found that, in connection with the flaws in test chamber size and the 2.5 point scale discussed above, that P&G's DFC testing was not a good fit for the challenged claims.

E. The Challenger's Testing

NAD also reviewed the Challenger's testing.

The Challenger's testing was conducted by Rebecca Bleibaum, President and Chief Sensory Intelligence for Dragonfly SCI, Inc. The study tested whether Febreze Air Linen & Sky and Febreze Light Air Sea Spray eliminated malodor. The testing included three odor evaluation chambers that were between 610-640 cubic feet and followed conditions prescribed by ASTM's Standard Guidance. A microwave was placed in each chamber so that the study participants could not see the inside of the microwave. In two of the three chambers, three pieces of bacon were microwaved, after which the microwave door was left open and the bacon was left in the microwave. One of the Febreze products was sprayed in a circular motion for 3 seconds in one of the two chambers where the bacon was cooked and also in the chamber where bacon was not cooked.

Seventy consumers were asked to evaluate and rate the intensity of the bacon aroma by smelling the sniff port for each fragrance chamber in the following order: (1) Bacon Room: cooked bacon only; (2) Febreze Room: treated with Febreze or Febreze Light, no cooked bacon and (3) Febreze and Bacon Room: cooked bacon treated with Febreze or Febreze Light. Consumers used a score card to rate each sniff port on a 9-point intensity scale ranging from "No bacon aroma" on one end (1) to "very strong bacon aroma" at the other end (9). The Dragonfly testing found that Febreze Air and Febreze Air Light reduced bacon aroma but did not reduce it to a level that is undetectable to the average consumer.[14]

P&G's expert, Gail Vance Civille, founder & President of Sensory Spectrum, Inc. argued there were three main flaws in the Challenger's testing. First, no effort was made to randomize the order in which test subjects evaluated the testing chambers which can result in adaption error where subjects become less able to accurately rate their experience of aromas after smelling a given aroma. Second, the testing conditions were not consumer relevant because the cooked bacon strips were left in an open microwave while Febreze was sprayed and while the subject evaluated the odor. Finally, the test subjects' scoring of the Febreze only and Febreze Light only rooms at 2.0 and 2.1 on average for bacon aroma intensity indicates there are several flaws with the test methodology and protocols, such as contamination of the air outside the chambers, odors lingering in the chambers and use of consumers versus trained subjects.

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[13] P&G blinded the candle pillar by placing a screen on it that prevented panelists from seeing if the candle product was lit or not.

[14] Febreze sessions were rated as follows: rooms with bacon only had a mean bacon aroma intensity of 7.7, a bacon chamber that was treated with Febreze had a mean bacon aroma intensity of 5.1, and rooms that were treated with Febreze only were rated 2.0. Febreze Light sessions were rated as follows: rooms with bacon only had a mean bacon aroma intensity of 7.3, a bacon chamber that was treated with Febreze Light had a mean bacon aroma intensity of 5.2 and rooms that were treated with Febreze only were rated 2.1.

Dragonfly, Inc. conducted additional testing in May 2021 to address P&G's criticisms of leaving bacon in the chamber and the order in which the chambers were evaluated by the consumers. This second round of testing was conducted on Febreze Air Linen & Sky and used two malodors – bacon and popcorn. This testing also showed that Febreze air Linen & Sky reduced the malodors in the room but did not eliminate them beyond perception.[15]

While the Challenger's testing used consumer evaluators instead of experts and tested only two types of malodors and only one Febreze product, it provided additional evidence and reinforces NAD concerns about whether the Advertiser testing supported its odor elimination claims.

F. Analysis and Recommendations

Having determined the messages reasonably conveyed in the challenged advertising and having assessed the evidence in the record, NAD considered its recommendations for the challenged advertising.

As set forth above, the challenged advertising conveys different messages: an odor elimination message at the molecular level or a message that perceptible odor is eliminated. The Advertiser submitted evidence of extensive testing along with reports from experts in relevant fields. However, NAD ultimately found that the Advertiser studies were not a good fit for the challenged claims.

First, NAD found that the Advertiser's evidence was a poor fit for the claims of physically or chemically eliminating malodor on a molecular level. The Advertiser's sensory testing focused entirely on perception and did not test whether malodor molecules were eliminated at a molecular level in a consumer relevant way. The sensory testing, by itself, is insufficient to support a non-sensory elimination claim.

Second, NAD found that the Advertiser's testing was also a poor fit for claims of sensory elimination (including instant and continuous elimination) due to the lack of evidence bridging the laboratory testing to real world conditions. The test chambers used to test were the size of a small refrigerator, but the amount of product used, as well as the activation time, was not proportionally adjusted to account for the small size. Although Febreze may have performed well in such conditions, this is not enough to prove that Febreze would be equally effective in larger rooms under consumer-relevant conditions.

Third, NAD found that the Advertiser did not show that its success criteria measured odor elimination. In determining, whether a product eliminated odors, the Advertiser took into account all panelist test cell responses indicating a final score within 2.5 points of the control. But according to the instructions, choosing a point other than -7 on the scale indicated merely a reduction, and not elimination of malodor.

Based on these concerns and the Challenger testing showing odor reduction on limited types of malodor and Febreze products, NAD concluded that the Advertiser has not substantiated a claim of sensory odor elimination. As a result, NAD recommended that the Advertiser discontinue the challenged express and implied claims:

- "Febreze safely eliminate[s] odors,"
- "OK, real talk: We aren't the first air freshener. But we are the first of its kind to actually eliminate stink...thanks in part to our OdorClear technology,"

[15] The Bacon Room had a mean aroma intensity of 7.6 while the Bacon & Febreze Room had a mean bacon aroma of 4.9. The Popcorn Room had a mean intensity aroma of 7.4 while the Popcorn & Febreze Room has a mean bacon aroma of 4.6.

- "No cover up here – Febreze has the only lineup of air fresheners that truly clean away stink. So whether you're looking for an instant burst of "ahh" or continuous freshness, you know we've got your back (and nose). Check out all the ways we can help keep your life guest-ready and odor-free,"
- "Febreze Air eliminates odors in an instant,"
- "Typical air fresheners just add another smell to the mix, but Air Effects actually eliminates airborne odors and leaves an instant burst of lightly scented freshness in its wake,"
- "Your go-to air freshener for any odors that arise: Air Effects doesn't just mask stinky air, it instantly eliminates it,"
- "Want to eliminate odors without heavy overwhelming scents? We get it. Introducing Febreze Light. It eliminates odors with no heavy perfumes in light scents you'll love,"
- "Febreze Fabric Refresher "eliminates sunk-in-stink with long-lasting freshness,"
- "Did you know the source of odor in your home could be all your soft surfaces? Odors get trapped in your home's fabrics and resurface over time. Febreze Fabric Refresher eliminates odors. Its water-based formula safely penetrates fabrics where odors hide,"
- "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. Luckily, there's Febreze Plug. It continuously eliminates lingering odors…,"
- "Over time, you go noseblind, but others smell…this. That's why Febreze Plug has two alternating scents, and it eliminates odor for 1200 hours,"
- Febreze Small Spaces is an "odor eliminator,"
- "Unlike the leading cone, [Febreze] Small Spaces continuously eliminates odor in the air and on surfaces so they don't come back for 45 days. Just imagine what it can do with other odors,"
- "For bathroom odors that linger, try Febreze Small Spaces. Just press firmly and it continuously eliminates odors in the air and on soft surfaces for 45 days,"
- "Don't forget all your favorite nooks and crannies: Small Spaces prevents lingering odors for up to 45 days,"
- "Strike a match on odor elimination. Shop Febreze Candles,"
- "Febreze Wax Melts "eliminate[] odors & freshen[],"
- Febreze Car Vent Clips are the "best car air fresheners to eliminate car odors for good,"
- "With two times the scent power of regular Febreze, Unstoppable Fabric finds, neutralizes, and eliminates tough odors trapped in hard to wash fabrics like couches or smelly sports equipment…Stop sneaky odors from lingering in your home with Febreze Unstoppables," and
- "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. Luckily, there's Febreze Plug. It continuously eliminates lingering odors…"
- Every Febreze product reduces odor to an olfactory level that is not detectable to the average consumer.
- Every Febreze product reduces all types of odor to an olfactory level that is not detectable to the average consumer.

Nothing in this decision precludes the Advertiser from making truthful and non-misleading claims that Febreze products reduce the perception of malodor or that Febreze products physically and chemically affect malodor at the molecular level.

IV. Conclusion

During the course of the proceeding, the Advertiser informed NAD that, for reasons unrelated to this challenge, it was in the process of voluntarily discontinuing the Clothing form of its Febreze product, and all Clothing-specific advertising claims. NAD will treat these discontinued Clothing claims, for the purposes of compliance, as though NAD recommended their discontinuance and the Advertiser agreed to comply.

NAD recommended that the Advertiser discontinue the challenged express and implied claims:

- "Febreze safely eliminate[s] odors,"
- "OK, real talk: We aren't the first air freshener. But we are the first of its kind to actually eliminate stink...thanks in part to our OdorClear technology,"
- "No cover up here – Febreze has the only lineup of air fresheners that truly clean away stink. So whether you're looking for an instant burst of "ahh" or continuous freshness, you know we've got your back (and nose). Check out all the ways we can help keep your life guest-ready and odor-free,"
- "Febreze Air eliminates odors in an instant,"
- "Typical air fresheners just add another smell to the mix, but Air Effects actually eliminates airborne odors and leaves an instant burst of lightly scented freshness in its wake,"
- "Your go-to air freshener for any odors that arise: Air Effects doesn't just mask stinky air, it instantly eliminates it,"
- "Want to eliminate odors without heavy overwhelming scents? We get it. Introducing Febreze Light. It eliminates odors with no heavy perfumes in light scents you'll love,"
- "Febreze Fabric Refresher "eliminates sunk-in-stink with long-lasting freshness,"
- "Did you know the source of odor in your home could be all your soft surfaces? Odors get trapped in your home's fabrics and resurface over time. Febreze Fabric Refresher eliminates odors. Its water-based formula safely penetrates fabrics where odors hide,"
- "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. Luckily, there's Febreze Plug. It continuously eliminates lingering odors…,"
- "Over time, you go noseblind, but others smell…this. That's why Febreze Plug has two alternating scents, and it eliminates odor for 1200 hours,"
- Febreze Small Spaces is an "odor eliminator,"
- "Unlike the leading cone, [Febreze] Small Spaces continuously eliminates odor in the air and on surfaces so they don't come back for 45 days. Just imagine what it can do with other odors,"
- "For bathroom odors that linger, try Febreze Small Spaces. Just press firmly and it continuously eliminates odors in the air and on soft surfaces for 45 days,"
- "Don't forget all your favorite nooks and crannies: Small Spaces prevents lingering odors for up to 45 days,"
- "Strike a match on odor elimination. Shop Febreze Candles,"
- "Febreze Wax Melts "eliminate[] odors & freshen[],"
- Febreze Car Vent Clips are the "best car air fresheners to eliminate car odors for good,"
- "With two times the scent power of regular Febreze, Unstoppable Fabric finds, neutralizes, and eliminates tough odors trapped in hard to wash fabrics like couches or smelly sports equipment…Stop sneaky odors from lingering in your home with Febreze Unstoppables," and

- "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. Luckily, there's Febreze Plug. It continuously eliminates lingering odors…"
- Every Febreze product reduces odor to an olfactory level that is not detectable to the average consumer.
- Every Febreze product reduces all types of odor to an olfactory level that is not detectable to the average consumer.

Nothing in this decision precludes the Advertiser from making truthful and non-misleading claims that Febreze products reduce the perception of malodor or that Febreze products physically and chemically affect malodor at the molecular level, including claims that the products work instantaneously or continuously.

V. Advertiser's Statement

The Procter & Gamble Company (P&G) will appeal NAD's decision. P&G is pleased that NAD found that certain testing P&G conducted in connection with this challenge rebutted the Challenger's criticisms as to test chamber size, dosage, activation time, and blinding; that P&G appropriately relied on industry sensory evaluation standards as a starting point for its test methodology; and that P&G appropriately tested only Febreze products actually available for purchase by consumers. P&G fundamentally disagrees with the balance of NAD's decision, including NAD's ultimate conclusion that P&G has not substantiated any claim of sensory odor elimination. P&G maintains that the challenged claims are substantiated by robust and reliable data, including but not limited to the results of its Difference From Control testing. The record evidence demonstrates that all in-market Febreze products, and the proprietary OdorClear™ technologies they contain, in fact, eliminate malodor molecules to an olfactory level that is undetectable to consumers. Notwithstanding the need to appeal, P&G continues to have great respect for and continues to support the self-regulatory process. **(#6977 ZW, closed 05/11/2022)**

National Programs
National Advertising Review Board®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703-247-9330 / press@bbbnp.org

National Advertising Review Board Recommends P&G Discontinue Odor Elimination Claims for Febreze Products

New York, NY – Sept. 15, 2022 – A panel of the National Advertising Review Board (NARB), the appellate advertising law body of BBB National Programs, recommended that Procter & Gamble Company (P&G) discontinue certain "odor elimination" claims that P&G makes across its Febreze line of home fragrance products, which include the Febreze air, candle, car, plug, small spaces, and wax melts products.

The advertising at issue had been challenged before the National Advertising Division (NAD) by S.C. Johnson & Son, Inc., manufacturer of the competing line of Glade brand products. Following NAD's decision (Case No. 6977), P&G appealed NAD's recommendation that it discontinue 19 express and two implied claims, many of which include express references to the ability of Febreze products to "eliminate" odors.

In agreement with NAD, the NARB Panel determined that air freshener claims that assert that the product "eliminates" odors should be held to a level of support high enough to show actual elimination or absence of odors, rather than simply odor reduction.

In support of its claims, the advertiser relied on sensory testing, known as Difference from Control (DFC) testing. The NARB Panel carefully reviewed the evidence concerning P&G's DFC testing and concluded that it does not support the challenged odor-elimination claims due to several areas of concern.

Therefore, the NARB Panel recommended that P&G discontinue the challenged express and implied claims that Febreze eliminates odors, such as:

- "Febreze Air eliminates odors in an instant."
- "Want to eliminate odors without heavy overwhelming scents? We get it. Introducing Febreze Light. It eliminates odors with no heavy perfumes in light scents you'll love."
- Febreze Fabric Refresher "eliminates sunk-in-stink with long-lasting freshness."

The NARB Panel noted that nothing in its decision should be interpreted as indicating that P&G does not have proper support for claims of odor reduction for its Febreze products. In addition, the Panel concluded that P&G has sufficient documentation of its OdorClear technology to support mode-of-action claims that are not combined with odor-elimination claims, including claims of instantaneous or continuous action.

P&G stated that it disagreed with NARB's decision but that it will comply with the recommendations.

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs is where businesses turn to enhance consumer trust and consumers are heard. The non-profit organization creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. Embracing its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, BBB National Programs today oversees more than a dozen leading national industry self-regulation programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Review Board (NARB): The National Advertising Review Board (NARB) is the appellate body for BBB National Programs' advertising self-regulatory programs. NARB's panel members include 85 distinguished volunteer professionals from the national advertising industry, agencies, and public members, such as academics and former members of the public sector. NARB serves as a layer of independent industry peer review that helps engender trust and compliance in NAD, CARU, and DSSRC matters.

National Programs
National Advertising Review Board®

NARB PANEL #303 – August 18, 2022

Appeal of NAD's Final Decision #6977 Regarding Claims for The Procter & Gamble Company, Febreze Air Fresheners

Panel Members

Steve Hall (Chair)
Senior Lecturer
University of Illinois

Scott Bishoff
SVP Client Director
Canvas World Wide

Cary Hatch
CEO & Brand Advocate
MDB Communications

Alice Kendrick
Professor of Advertising
Southern Methodist University

Manos Spanos
Chief Business Officer
Meta Materials, Inc.

Representing the National Advertising Review Board
Kenneth A. Plevan, Chair
Saveeta Dhanai, NARB Coordinator

Representing the BBB National Programs
Mary Engle, Executive Vice President, Policy

Representing the National Advertising Division
Laura Brett, Vice President
Eric Unis, Attorney
Jennifer Santos, Attorney
Zheng Wang, Attorney
Katherine Armstrong, Deputy Director
Daniel Range, Attorney
William Frazier, Attorney

Representing The Procter & Gamble Company
Norman C. Simon, Partner, Kramer Levin Naftalis & Frankel LLP
Seth F. Schinfeld, Associate, Kramer Levin Naftalis & Frankel LLP
Marchoe Dill Northern,SVP, North America Home Care, P&G
Thinh Ha, R&D Vice President, Air Care, P&G
Amy Dowden, R&D Senior Director, Air Care, P&G
Abbey Lopez, Director & Assistant General Counsel, P&G
George Leal, Senior Director & Assoc. General Counsel, P&G
Keith Cannon, R&D Senior Scientist, Home Care, P&G
Steve Horenziak, Research Fellow, Home Care, P&G
Edgar Chambers, IV. Ph.D. (expert), Former Director, Center for Sensory Analysis & Consumer Behavior, Kansas State University
Gail Vance Civille (expert), President, Sensory Spectrum, Inc.
John Castura (expert), Research Fellow, Compusense Inc.

Representing S. C. Johnson & Son, Inc.
Thomas Jirgal, Partner, Loeb & Loeb LLP
David Mallen, Partner, Loeb & Loeb LLP
Robert Jones, Legal Counsel, S. C. Johnson & Son, Inc.
Xuan (Sue) Tran, General Counsel, S. C. Johnson & Son, Inc.
Rebecca Bleibaum, President, Dragonfly SCI, Inc.
Daniel Ennis, President, Institute for Perception

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REPORT OF NARB PANEL 303

Decision Issued: August 18, 2022

Appeal of NAD's Final Decision #6977 Regarding Claims for The Procter & Gamble Company, Febreze Air Fresheners

The advertiser, The Procter & Gamble Company ("P&G"), is the manufacturer of a leading line of home fragrance products sold under the brand Febreze. The challenger is S.C. Johnson & Son, Inc. ("SCJ"), which sells a competing line of home fragrance products under SCJ's Glade brand. P&G reports that its Febreze brand is the market leader.

SCJ filed a challenge to Febreze's odor-elimination advertising. In a decision dated May 11, 2022 (Case # 6977), the National Advertising Division ("NAD") upheld SCJ's challenge and recommended that P&G discontinue 19 express and two allegedly implied Febreze odor-elimination claims. P&G has filed an appeal to a panel of the National Advertising Review Board ("NARB"). There is no cross-appeal.[1]

A. Background

At the time of the challenge, Febreze products were available in eight product forms (referred to by P&G as "pillars"): (i) air; (ii) candle; (iii) car; (iv) clothing; (v) fabric; (vi) plug; (vii) small spaces; and (viii) wax melts. In its initial response, P&G advised NAD that P&G was in the process of phasing out its clothing pillar, and, accordingly, no issues concerning claims for this pillar are before the NARB panel.

The Febreze line of products, launched more than 20 years ago, is based on P&G's proprietary "OdorClear" technology. That term encompasses four separate odor-blocking technologies: (i) Odor Trappers; (ii) Odor Converters; (iii) Odor Neutralizers; and (iv) Odor Magnets. One or more of these technologies is utilized in each of the Febreze products.

Certain features of P&G's OdorClear technology are covered by patents. In addition, P&G submitted scientific literature and expert testimony explaining the performance of its OdorClear technology. Each OdorClear technology is designed to address odor at the molecular level, meaning physically or chemically changing or neutralizing malodor compounds or molecules at the source of the odor so that they no longer produce malodor. See NAD Decision at 6. According to P&G, these technologies allow Febreze products to "eliminate" malodors rather than merely mask them with a pleasing fragrance. See id. at 6-7. At the same time, with apparently one

[1] The dispute at NAD was classified as "Complex" under NAD's applicable rules of procedure. This is the second time an NARB Panel has considered an appeal from an NAD decision in a Complex proceeding.

exception (see NAD Decision 8, n. 7), all Febreze products also contain fragrances.

B. Overview of Disputed Issues

SCJ challenged a total of 20 express and two implied odor-elimination claims. See NAD Decision at 1-3. One of these claims promoted the Febreze clothing pillar which, as noted, P&G is phasing out.[2] NAD recommended that P&G discontinue all of the other challenged claims.

A principal disputed issue concerns what message or messages are being communicated to consumers by the Febreze odor-elimination claims. Of the 19 express claims that NAD recommended be discontinued, 17 contain the term "eliminate" or a form of that word, and the other two use comparable terminology. As neither party submitted evidence of consumer interpretation, NAD relied on its own expertise to determine the messages reasonably conveyed by the odor-elimination message. See NAD Decision at 4.

P&G contends that its references to eliminating malodor convey to reasonable consumers a mode of action – how its Febreze air fresheners work. It further asserts that proper testing support for an eliminating-malodor claim is evidence that the product reduces malodor to a point where the offensive odor is no longer perceptible to the average person, i.e., eliminated at the olfactory level. P&G acknowledges that its testing does not separate out the contribution of malodor masking to overall Febreze product efficacy.

NAD concluded that all of the challenged claims conveyed that Febreze products rendered malodor undetectable at the olfactory level, and that a subset also conveyed the message that Febreze product performance is based on neutralizing or removing, i.e., eliminating, malodor at the molecular level. NAD gave several examples of advertising claims that, in its view, conveyed the molecular-level message. See NAD Decision at 5. These included, for example, commercials for Febreze that featured the animated imagery of odor molecules being destroyed by the Febreze product. Id.

NAD concluded that P&G's testing could not support its molecular-level elimination claims because the testing only sought to assess the perception of odor, and did not try to quantify neutralization of the causes of odor at the molecular level. See NAD Decision at 8 (evidence limited to sensory testing "not a good fit for implied claims that Febreze eliminates the source of odor at the molecular level").

P&G argues that it does not need product-performance testing to support its mode-of-action

[2] NAD's schedule of challenged express claims (NAD Decision at 1-2) lists a total of 21 claims. However, the one that begins with "Did you know that your nose gets used to the odors in your home?" appears twice.

advertising references. It is P&G's position that its technical evidence (in patents, scientific literature, and expert reports) documenting or explaining the OdorClear technology mode-of-action provides sufficient support for the advertising mode-of-action references. P&G also argues that NAD held it to an unreasonably high standard of having to show that use of a Febreze product "completely destroys" odorant molecules.

In making its recommendations to discontinue the challenged odor-elimination claims, NAD noted that Febreze product efficacy was not at issue:

> Nothing in this decision precludes the Advertiser from making truthful and non-misleading claims that Febreze products reduce the perception of malodor or that Febreze products physically and chemically affect malodor at the molecule level, including claims that the products work instantaneously or continuously.

NAD Decision at 17. Consistent with NAD's observations concerning the scope of its recommendations, SCJ acknowledged in its opposition to P&G's appeal that SCJ "did not challenge claims that Febreze products 'work' or that they reduce the perception of malodor."

C. P&G's Argument Based on the Absence of Customer Complaints

One of P&G's arguments is that NAD erred in ignoring P&G's contention that its brand records reflect a complete absence of any material level of consumer complaints about P&G's claim that Febreze products "eliminate" malodor, notwithstanding use of the challenged claims for over 20 years while sales of the brand continued to expand. In support of this position, P&G relies on a one-page summary of data submitted by one of its experts labelled "Summary of Febreze Did Not Remove/Eliminate Odor Complaints." There are no details in the record concerning how this data was collected, or what feedback P&G has received over the years about its Febreze brand.

In its Brief to this panel, P&G argued that on the basis of the record of the absence of consumer complaints alone, NAD's recommendations in the Decision should be set aside. However, at the hearing, P&G clarified that it was only offering the consumer complaint data as evidence that corroborated its testing results.

SCJ argues that P&G's no-consumer-complaints position is meritless because it is not based on testing, but rather is anecdotal in nature. SCJ argues that this type of evidence has never been accepted by NAD as claim support for product efficacy claims. SCJ further argues that the complaint data cannot be credited because P&G did not provide any information concerning how the data was compiled.

The panel concludes that an alleged absence of complaints from consumers protesting the "eliminates" advertising claims is not evidence that qualifies as support for the product efficacy

claims at issue here. The panel agrees with the challenger that, in general, consumer feedback of this type is not a substitute for product testing, and the panel does not see any reason to depart from that principle here.

D. P&G's DFC Testing

1. Overview of Testing Issues

In support of its claims, P&G relies on extensive "difference from control" (or "DFC") testing on products in each of its Febreze pillars. P&G contends that this testing provides proper support for the olfactory elimination-message, i.e., that use of Febreze products reduces malodor to a point where the malodor is not detectible by the average person. After receipt of SCJ's criticisms of the testing methodology, P&G conducted further DFC testing which, P&G argues, shows that SCJ's criticisms of the DFC test methodology were invalid.

SCJ argues that P&G's DFC testing is flawed, and cannot support olfactory-level elimination claims. SCJ also offered its own testing on selected Febreze products, which, according to SCJ, showed that the products reduced, but did not eliminate, the perception of malodor. SCJ conducted additional testing after receipt of P&G's criticisms of SCJ's testing methodology, and SCJ contends that the additional testing results show that P&G's methodological criticisms were invalid.

SCJ also argues that explanations concerning the Febreze technology and how it works are not acceptable substitutes for testing measuring the impact of the OdorClear technology at the molecular level. It argues therefore that P&G has no evidence to support any molecular-level elimination claims.

2. P&G's DFC Testing

Much of the lengthy expert statements in the record in this Complex proceeding (more than 150 pages in total) focused on P&G's DFC testing and its methodology and the significance of the results. NAD's discussion of those issues is set forth in its Decision at 6-13.

NAD concluded at the outset of its analysis that "unqualified promises" such as "eliminate" "require stronger supporting evidence than odor reduction evidence." NAD Decision at 4-5.

P&G's basic DFC test methodology is described by NAD on page 7 of the Decision. In general, the testing used panels of 10-16 expert graders, not consumers, to evaluate Febreze. The expert graders were not asked to rate the degree of the intensity of the odor, and/or whether the odor was detectible, but rather to rate the intensity of the odor after treatment with Febreze on a 15-point scale (–7 to +7) compared to a reference chamber containing malodor alone, which represented

the zero point on the scale. The numbers −1 to −7 represented odor that was less intense than the reference odor, and +1 to +7 more intense. The panelists were instructed that, on the 15-point scale, a rating of -7 to -3 indicated "much weaker than identified reference control," and that they should assign a −7 rating if there was no perceptible odor.

There are a number of disputed methodological issues concerning the DFC testing, including (i) whether the DFC test chamber on most testing (12.2 cubic feet) was too small, (ii) whether the P&G methodology followed or conflicted with published test protocols/standards, (iii) the level of initial odor and amount of Febreze product dosing, (iv) whether the expert graders were properly blinded, (v) the timing of the expert evaluation of the chamber following introduction of the Febreze, (vi) the validity of the statistical analyses performed on the data, and (vii) whether the data generated in the testing supported the challenged claims. P&G argues that its methodology was evaluated and endorsed by a leading expert in sensory science who supported its position at NAD and on the NARB appeal, while SCJ points out that testing approach was developed internally at P&G, and that P&G only sought independent review after SCJ filed its NAD challenge.

One key disputed issue concerned an adjustment factor of 2.5 units on the 15-point scale. See NAD Decision at 11. As reported by NAD, in its DFC testing P&G concluded that the Febreze product had eliminated odor when the malodor-plus-Febreze chamber was rated on the 15-point scale within 2.5 units of the ratings for the chamber with Febreze product only (no malodor in the chamber).

To illustrate the use of the adjustment factor, assume that an expert grader rated the odor in the chamber containing odor plus product as –4 and the product only chamber as –6. Even though the Febreze product was not rated at the scale-point (–7) which represented no odor, this would be recorded as showing that Febreze had eliminated the malodor.

P&G justified this 2.5 unit adjustment by contending that expert graders are more sensitive in detecting odors than typical consumers. P&G argued that the amount of the adjustment factor was determined based on testing that correlated consumers compared to experts.

NAD, however, concluded "that the 2.5 scale P&G used to determine elimination of odor was not consumer relevant," noting that in the correlation analysis the expert graders rated malodor on an intensity scale whereas consumers were evaluated on a pleasantness scale. See NAD Decision at 12.

E. SCJ's Testing

As noted, an independent expert for SCJ (from the consulting firm Dragonfly SCI, Inc.) conducted

odor-reduction tests on selected Febreze products using consumer panelists. This testing did not use the different-from-control approach, but rather asked consumer panelists to rate the odors on a scale running from no aroma at one end to strong aroma at the other. The testing, according to SCJ, showed that Febreze reduced, but did not eliminate, malodor.

After reviewing the results in the Dragonfly testing and retesting, NAD concluded that this testing "provided additional evidence and reinforces NAD's concerns about whether the Advertiser testing supported its odor elimination claims." NAD Decision at 14. P&G disputes this conclusion, arguing that because it had satisfied its initial burden of supporting the challenged claims, the evidence burden of proof shifted to SCJ and that the Dragonfly testing was too weak to satisfy SCJ's burden-of-proof obligation.

F. Schedule of Claims that NAD Recommended Be Discontinued

Before proceeding to the analysis, the panel believes that it is helpful to consider the specific claims at issue. As noted, NAD recommended that 19 express and two implied claims be discontinued, and those claims are set forth below.[3] As is apparent, many of the elimination claims are made for the entire Febreze line.

The references to "eliminate" in the express claims are highlighted in bold. Numbers 3 and 15 are the only express claims with no express reference to "eliminate."

1. "Febreze safely **eliminate[s]** odors."

2. "OK, real talk: We aren't the first air freshener. But we are the first of its kind to actually **eliminate** stink...thanks in part to our OdorClear technology."

3. "No cover up here – Febreze has the only lineup of air fresheners that truly clean away stink. So whether you're looking for an instant burst of "ahh" or continuous freshness, you know we've got your back (and nose). Check out all the ways we can help keep your life guest-ready and odor-free."

4. "Febreze Air **eliminates** odors in an instant."

5. "Typical air fresheners just add another smell to the mix, but Air Effects actually **eliminates** airborne odors and leaves an instant burst of lightly scented freshness in its wake."

[3] The schedule of claims, taken from the NAD Decision, includes No. 20 even though it is a duplicate of No. 10.

6. "Your go-to air freshener for any odors that arise: Air Effects doesn't just mask stinky air, it instantly **eliminates** it."

7. "Want to **eliminate** odors without heavy overwhelming scents? We get it. Introducing Febreze Light. It eliminates odors with no heavy perfumes in light scents you'll love."

8. Febreze Fabric Refresher "**eliminates** sunk-in-stink with long-lasting freshness."

9. "Did you know the source of odor in your home could be all your soft surfaces? Odors get trapped in your home's fabrics and resurface over time. Febreze Fabric Refresher **eliminates** odors. Its water-based formula safely penetrates fabrics where odors hide."

10. "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. Luckily, there's Febreze Plug. It continuously **eliminates** lingering odors …."

11. "Over time, you go noseblind, but others smell…this. That's why Febreze Plug has two alternating scents, and it **eliminates** odor for 1200 hours."

12. Febreze Small Spaces is an "odor **eliminator**."

13. "Unlike the leading cone, [Febreze] Small Spaces continuously **eliminates** odor in the air and on surfaces so they don't come back for 45 days. Just imagine what it can do with other odors."

14. "For bathroom odors that linger, try Febreze Small Spaces. Just press firmly and it continuously **eliminates** odors in the air and on soft surfaces for 45 days."

15. "Don't forget all your favorite nooks and crannies: Small Spaces prevents lingering odors for up to 45 days."

16. "Strike a match on odor **elimination**. Shop Febreze Candles."

17. Febreze Wax Melts "**eliminate[]** odors & freshen[]."

18. Febreze Car Vent Clips are the "best car air fresheners to **eliminate** car odors for good."

19. "With two times the scent power of regular Febreze, Unstoppable Fabric finds, neutralizes, and **eliminates** tough odors trapped in hard to wash fabrics like couches or smelly sports equipment…Stop sneaky odors from lingering in your home with

Febreze Unstoppables."

20. "Did you know that your nose gets used to the odors in your home? That's right. You go noseblind, but others smell…this. Luckily, there's Febreze Plug. It continuously **eliminates** lingering odors …."

* * *

21. Every Febreze product reduces odor to an olfactory level that is not detectable to the average consumer.

22. Every Febreze product reduces all types of odor to an olfactory level that is not detectable to the average consumer.

G. Discussion

The panel begins its analysis of the DFC testing with the observation that it agrees with NAD's premise that the advertiser's unqualified "eliminate odors" claims are absolute, and must be supported with "stronger supporting evidence than odor reduction evidence." See NAD Decision at 5. This is consistent with the principle that standards for claim support are flexible, and more impactful claims typically require the imposition of higher standards.

In addition, the challenged odor-elimination claims address the key feature of air freshener products – the reason consumers purchase them. Many of the claims, moreover, in context also promote Febreze as providing a unique product characteristic – the neutralization of malodor molecules and compounds.

A review of several of the challenged claims illustrates why a high level of support should be required for the challenged claims. For example, in claim #2 in Section G, the claim states "real talk . . . we are the first [air freshener] to actually eliminate stink," a strong unqualified claim touting a unique product characteristic. Similarly, claim #5 states that "typical air fresheners just add another smell to the mix, but [the Febreze product] actually eliminates airborne odors," another category uniqueness claim.

Claim #6 states: "Air Effects does not just mask stinky air, it instantly eliminates it." Representing that the elimination of odor occurs instantly provides another example of a dimension of the advertising claims that, in the view of the panel, calls for the imposition of strict standards of claim support. Another example is claim #8: The Febreze product "eliminates sunk-in stink," i.e. a molecular-level elimination claim. The odor-elimination messages, moreover, are reinforced in the visual presentations in commercials depicting the disappearance of malodor sources after application of the Febreze product.

For these reasons, the panel concludes that air freshener claims that assert that the product "eliminates" odors should be held to a level of support high enough to show actual elimination or absence of odors, rather than simple odor reduction. In its application of that standard, the panel does not distinguish between what NAD referred to as molecular-elimination claims and olfactory-elimination claims. The panel agrees with the NAD that a number of the challenged claims make molecular-elimination claims, for example eliminating "tough odors trapped in hard to wash fabrics like couches or smelly sports equipment" (claim #19). However, all of P&G's odor-elimination claims should be scrutinized closely by a high standard of support.

With the applicable standard in mind, the panel has carefully reviewed the evidence concerning P&G's DFC testing, and concluded that it does not support the challenged odor-elimination claims. There are a number of areas for concern with the DFC testing. To cite a few, the panel agrees with NAD's concern regarding the adjustment factor of 2.5 units on the 15-point scale. As NAD pointed out, the correlation study compared experts rating odors on an intensity scale, compared to consumers on a pleasantness scale, thereby calling into question the consumer relevance of the data.

In addition, whereas the expert graders were directed to record no odor as −7, in only about 20% of the ratings did the Febreze plus malodor chamber receive an "elimination" rating. Given that the graders were trained experts regularly used by P&G, the panel does not accept that the principle of "endpoint avoidance" allows P&G to explain away these results in its testing that undercut its elimination claims. The panel also had concerns about the amount of Febreze product introduced into the 12.2 cubic foot test chambers.

The panel understands that P&G was seeking to develop a methodology that would allow efficient testing of numerous products being tested against a variety of malodors, and concludes that P&G's efforts were in good faith. Nothing in this decision should be interpreted as indicating that P&G does not have proper support for claims of odor reduction for its Febreze products.

In addition, the panel concludes that P&G has sufficient documentation of its OdorClear technology to support mode-of-action claims that are not combined with odor-elimination claims. And, as did NAD, the panel points out that claims of instantaneous or continuous action not presented in combination with odor-elimination claims are not precluded by this decision.

H. Conclusions and Recommendations

The panel recommends that P&G discontinue the twenty express claims set forth above in Section G. The panel further recommends that P&G discontinue the two challenged implied claims (Nos. 21 and 22 in Section G above).

The panel thanks P&G and SCJ for participating in industry self-regulation in the interests of promoting truth in advertising.

I. Advertiser's Statement

P&G fundamentally disagrees with NARB's decision and maintains that Febreze odor elimination claims are supported by reliable testing and in-market data. P&G is disappointed that the NARB discounted the science and real-world experience of consumers and went against established precedent on odor elimination claims in its decision. Nonetheless, P&G will take NARB's guidance into account when developing claims in this category.

National Programs
National Advertising Division®

For Immediate Release
Contact: Jennie Rosenberg BBB National Programs
703.247.9330 / press@bbbnp.org

National Advertising Division Recommends T-Mobile Discontinue "Don't You Worry 'Bout Speed" Claim for T-Mobile Home Internet Service

New York, NY – April 25, 2023 – In a Fast-Track SWIFT challenge brought by Comcast Cable Communications Management, LLC, the National Advertising Division (NAD) of BBB National Programs recommended that T-Mobile discontinue the "Don't you worry 'bout speed" claim in reference to T-Mobile's Home Internet (T-HINT) service.

Fast-Track SWIFT is an expedited challenge process designed for single-issue advertising cases brought to NAD. NAD determined that the Comcast challenge was appropriate for Fast-Track SWIFT because it presented the single issue as to whether T-Mobile's claim "Don't you worry 'bout speed" is supported.

T-HINT operates on the same wireless network that T-Mobile smartphones run on, and thus does not use a wired infrastructure to deliver internet. Customers are provided a gateway device that acts as a router and modem which converts T-Mobile's signal to WiFi and provides a WiFi signal to devices in the home.

After considering the messages reasonably conveyed by the challenged commercial, NAD determined that, given the context which offers T-HINT as an alternative to fixed wired internet, the "Don't you worry 'bout speed" claim conveys a message that consumers can get the speed they need to do whatever they want on the internet without limitation.

In addition, NAD determined that T-Mobile's unqualified "Don't you worry 'bout speed " claim conveys the message that internet speeds are sufficient to provide worry-free internet service that will allow users to perform nearly all typical activities on the internet, including intensive uses like gaming or streaming on multiple devices at any time of day..

NAD found that T-Mobile's evidence was not a good fit for its broad unqualified performance claim "Don't you worry 'bout speed" and recommended that it be discontinued with respect to T-Mobile's T-HINT service.

In its advertiser statement, T-Mobile stated that it "will comply with NAD's recommendations, but strongly disagrees with NAD's determination that the challenged commercial communicates an unsubstantiated message."

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs, a non-profit organization, is the home of U.S. independent industry self-regulation, currently operating more than a dozen globally recognized programs that have been helping enhance consumer trust in business for more than 50 years. These programs provide third-party accountability and dispute resolution services that address existing and emerging industry issues, create a fairer playing field for businesses, and a better experience for consumers. BBB National Programs continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-and-teen-directed marketing, data privacy, dispute resolution, automobile warranty, technology, and emerging areas. To learn more, visit bbbprograms.org.

About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Parties: T-Mobile US, Inc. / Comcast Cable Communications Management, LLC
Product: T-Mobile Home Internet
Product Type: Telecommunication Products/Services
Disposition: Modified / Discontinued
Claim: Performance Claims

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC, *Challenger*, T-MOBILE US, INC., *Advertiser*.	Case No. 7201 Closed 04/17/2023

FAST-TRACK SWIFT CASE

- Don't worry" claims, especially in regard to internet service, are held to a high standard demonstrating performance.

Basis of Inquiry: As part of NAD's Fast-Track SWIFT program designed to quickly and efficiently review advertising claims that involve a single well-defined advertising issue, Comcast Cable Communications Management, LLC ("Comcast" or "Challenger") challenged T-Mobile US, Inc. ("T-Mobile" or "Advertiser") claim to T-Mobile Home Internet consumers, "Don't you worry 'bout speed."

I. Fast-Track SWIFT Eligibility Determination

In a commercial advertising its T-Mobile Home Internet ("T-HINT") service T-Mobile makes the express claim, "Don't you worry 'bout speed." Comcast alleged that T-Mobile cannot support this broad unqualified claim because multiple factors can affect speed on T-Mobile's fixed wireless network T-HINT. T-Mobile objected to SWIFT jurisdiction arguing that the challenge presented more than one issue and the evidence in the case is too complex. NAD determined that the challenge was appropriate for Fast-Track SWIFT as NAD's review did not require the review of complex evidence or substantiation and the challenge presents a single issue as to whether the Advertiser's claim "Don't you worry 'bout speed" is supported. The evidence presented to NAD by the parties consisted of screen shots of T-Mobile's website, T-Mobile's Home Internet Policy, Federal Communication Commission ("FCC") and industry reports, and a declaration by T-Mobile's Senior Vice President of National Planning, Performance & Intelligence.

II. Decision

A. The Challenged Advertising

The challenged commercial advertising T-HINT begins with John Travolta shaking his head at a cable employee drilling wires into a house. To the tune of "Summer Nights," Travolta sings "Home Internet, what a pain in the a—". Zach Braff and Donald Faison interject, encouraging their neighbor to "Try T-Mobile," home internet characterizing it as "like Wi-Fi that runs on 5G." The chorus continues with Travolta singing and Braff and Faison responding in verse with the benefits of T-HINT. The last selling point touted by Faison states, "Don't you worry 'bout speed!" While singing this line Faison holds a laptop displaying a speedometer. The speedometer's needle moves from the low end on the left to the highest speed on the right that is labeled with a magenta "5G". A ding sound is heard as the needle approaches the high end of the speedometer and then wavers in the middle of the speedometer.

T-HINT operates on the same wireless network that T-Mobile smartphones run on, and thus does not use a wired infrastructure to deliver internet. Customers are provided a gateway device that acts as a router and modem which converts T-Mobile's signal to Wi-Fi and provides a Wi-Fi signal to devices in the home. It is undisputed that due to the nature of wireless technology consumers receive a range of speeds with T-HINT and consumers cannot be guaranteed that they will experience a certain speed. It is well known that wireless speeds may be affected by overall network congestion, distance between the in-home receiver and cell tower, obstructions between the in-home receiver and cell tower (including weather), and other non-location factors including placement of a gateway in a basement office or closed cabinet (contrary to the product user guide). In addition, it is undisputed that T-HINT users are deprioritized behind mobile customers in times of network congestion.

The FCC has advised fixed wireless providers to disclose speeds as a 25th-75th percentile range. In its last public disclosure to the FCC T-Mobile reported T-HINT's speeds at 33-182 Mbps download speed and 8-25 Mbps upload speed. The declaration provided by T-Mobile states, without underlying evidence and methodology, that T-Mobile has since upgraded its network and T-HINT can now provide speeds at 72 Mbps-245 Mbps download speed.

Comcast argued that in the context of the commercial the claim "Don't you worry 'bout speed" is an assertion that T-HINT will always be sufficient for users to do anything they want on the internet without limitation. The Challenger asserted that T-Mobile cannot support such a broad performance claim because T-HINT only offers a range of speeds between the stated 25th and 75th percentile and for 25% of its customers speeds are below that range and are uncontrollable due to the nature of wireless technology which means that consumers do have to worry about speed when considering T-HINT.

T-Mobile argued that the commercial communicates only that T-HINT's speeds are delivered with 5G technology and that the speed range delivered is sufficient for typical consumer use. T-Mobile asserted that this takeaway is supported by the fact that T-Mobile delivers a range of speeds that surpasses the FCC's definition of high-speed broadband internet or 25 Mbps download and 3 Mbps upload speed. T-

Mobile further argued that its analysis shows that only a very small percentage of T-HINT users experience typical download speeds below 25 Mbps.[1]

B. Analysis

NAD evaluates all advertising claims in context with the recognition that consumers do not parse components of an advertisement to determine the message conveyed but view advertisements in a more fleeting fashion and take away a net impression.[2] Given the context of the advertisement, which offers T-HINT as an alternative to fixed wired internet and includes a speedometer that dings when it reaches the highest 5G level of speed, NAD determined that the "Don't you worry 'bout speed" claim conveys a message that consumers can get the speed they need to do whatever they want on the internet without limitation. NAD did not agree that the wavering needle on the speedometer conveys that T-HINT offers a range of speeds. Rather, the "don't worry" message communicates a broad unqualified performance claim that reassures consumers that they will not experience any issues with T-HINT's speeds. There is nothing in the visual or audio of the commercial that communicates a typicality message or otherwise limits the message that consumers do not need to worry about speed.

It is well settled that advertisers must possess a "reasonable basis" for claims disseminated in advertising.[3] What constitutes a "reasonable basis" depends on several factors, including the type of product, the type of claim, the consumer benefit from a truthful claim, the ease of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation experts in the field believe is reasonable.[4] "Don't worry" claims, especially in regard to internet service, are held to a high standard demonstrating performance.[5] Here, T-Mobile's unqualified "don't you worry 'bout speed" claim conveys the message that internet speeds are sufficient to provide worry-free internet service that will allow users to perform nearly all typical activities on the internet including intensive uses like gaming or streaming on multiple devices at any time of day.

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[1] T-Mobile asserted that their analysis showed that many of T-HINT users slowest speeds are attributable to the non-compliant and unauthorized use of a T-Mobile Gateway beyond its terms of service. If T-Mobile's analysis is limited to compliant use then the percentage that experience typical download speeds below 25 Mbps is even smaller. T-Mobile claims that this percentage changes depending on whether you are in a rural or urban area as well. NAD noted that T-Mobile did not provide any underlying details or methodology regarding their analysis.

[2] *Frontier Communications Parent, Inc. (Frontier Fiber Internet),* Report #7143, NAD/CARU Case Reports (March 2023).

[3] Guardian Technologies, LLC (GermGuardian and PureGuardian Air Purifiers and Replacement Filters), Report #6319, NAD/CARU Case Reports (November 2019).

[4] Pfizer Inc., 81 F.T.C. 23 (1972). See also FTC, Policy Statement Regarding Advertising Substantiation (Nov. 23, 1984), https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertisingsubstantiation).

[5] *See Verizon Communications, Inc. (Verizon's 4G & 5G Networks (Jenny Slate*)), Report #6414 (Sept. 2020) (finding the claim "In the gaming world, if you lag, you're done. With Verizon 5G Ultra Wideband, I don't worry about lag" to be a measurable performance claim requiring substantiation and rejecting Verizon's support as not sufficiently robust to support the broad claim); *Frontier Communications, Inc. (Internet Service)*, Report #6036, NAD/CARU Case Reports (December 2016) (recommending "…never worry about your Internet connection" claim be discontinued because some speeds did not provide sufficient connection speed to allow streaming videos or streaming multiple movies at one time, so they might not provide the worry-free, family friendly Internet service advertised).

NAD next looked at whether the unqualified message conveyed by "Don't you worry 'bout speed" is supported. It is undisputed that T-HINT offers a range of speeds and cannot promise a specific provisioned speed like a wired internet provider. T-Mobile provided evidence that T-HINT's range of speeds surpasses the FCC's definition for high-speed broadband internet (i.e., 25 Mbps/3 Mbps) for 25-75 percent of its users. T-Mobile's declaration also states that a small percentage of T-HINT users receive speeds less than the 25 Mbps/3 Mbps threshold.

While NAD does not require perfection of an advertiser when substantiating their claims, it does require that the support provided match the claim being made.[6] Evidence that 75% or more of T-HINT customers receive speeds that meet the FCC's definition of high-speed broadband internet is not a good fit for T-Mobile's unqualified "don't you worry 'bout speed" claim. Such evidence demonstrates the typical range of speeds consumers can expect with T-HINT, but that is not what a "don't worry" claim conveys. A "don't you worry 'bout speed" claim assures consumers that T-HINT provides speeds for all types of users without limitations. For example, evidence that 75% or more of T-HINT users get speeds of 25 Mbps does not substantiate whether a household with multiple users using multiple devices for different tasks during peak times can get sufficient speeds without limitations as T-Mobile's claim promises. Furthermore, Comcast pointed to the FCC Chairwoman's recent proposal to raise the threshold for high-speed internet service. While the FCC's definition of high-speed internet has not yet changed, the Chairwoman's proposal highlights that the FCC's standard for high-speed internet might not meet the needs of all users for all types of activity. As a result, evidence that T-Mobile meets the standard is not a good fit for T-Mobile's unqualified "don't you worry 'bout speed" claim.

Further, T-Mobile's declaration indicates there are some T-HINT customers who do not get the minimum speed necessary to constitute high-speed internet (the exact percentage of T-HINT users that experience typical download speeds below 25 Mbps was submitted confidentially) and demonstrates that T-HINT does not provide the unqualified worry-free speeds it is advertising for at least a small percentage of its customers.[7]

For the foregoing reasons, NAD found that T-Mobile evidence was not a good fit for its broad unqualified performance claim "Don't you worry 'bout speed" with respect to its T-HINT service. NAD recommended that T-Mobile discontinue the "Don't you worry 'bout speed" claim in reference to T-Mobile's T-HINT service. This decision does not prevent T-Mobile from making other qualified speed claims about its T-HINT service as long as they can be supported.

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[6] NAD reviews the support provided by an advertiser to determine its reliability and assess the fit between the claims made by an advertiser and its supporting evidence. *See SharkNinja Operating, LLC (Vertex and Navigator Pet Pro Vacuums*), Report #7094, NAD/CARU Case Reports (July 2022).

[7] T-Mobile offered one page from an Q4 2022 Ookla report that listed Comcast Xfinity as having a consistency of 91.8%, meaning that 91.8% of speed test results done on Xfinity showed at least a 25 Mbps download speed and a 3 Mbps upload speed. NAD was not persuaded by this evidence as NAD was not reviewing Xfinity's advertising and whether it could support a similar "worry-free" speed claim.

III. Conclusion

NAD recommended that T-Mobile discontinue the "Don't you worry 'bout speed" claim in reference to T-Mobile's T-HINT service. This decision does not prevent T-Mobile from making other qualified speed claims about its T-HINT service as long as they can be supported.

IV. Advertiser's Statement

T-Mobile will comply with NAD's recommendations, but strongly disagrees with NAD's determination that the challenged commercial communicates an unsubstantiated message. While we respectfully disagree with NAD's conclusion that the phrase "don't you worry 'bout speed" reasonably communicates anything other than a fully supported message that T-Mobile 5G Home Internet provides broadband internet at a range of speed that is sufficient for typical consumers' home internet needs, including streaming, videoconferencing, and gaming, T-Mobile is a supporter of the self-regulatory process and will take NAD's recommendations into account in future advertising. **(#7201 JS, closed 04/17/2023)**

National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

NAD Finds Verizon 5G Ultra Wideband Expansion Claim Supported; Recommends 5G Ultra Wideband "Most Reliable" Claim be Discontinued

New York, NY – Aug. 11, 2022 – The National Advertising Division (NAD) of BBB National Programs determined that Verizon provided a reasonable basis for the message in its "Verizon is Going Ultra" commercial that Verizon 5G Ultra Wideband has expanded its coverage. However, NAD recommended that Verizon discontinue the "most reliable" claim when referring to the 5G Ultra Wideband network.

NAD also recommended that, when using a disclosure that states the number of "cities" where 5G Ultra Wideband is available, Verizon modify its advertising to more clearly define "cities" for consumers. The claims at issue were challenged by AT&T Services, Inc.

Verizon's 5G Ultra Wideband has historically been associated with its high-band mmWave network, which offered fast speeds but had somewhat limited coverage, especially when reaching indoor locations. In January 2022, however, Verizon expanded the 5G Ultra Wideband brand to include its mid-band or "c-band" network. Unlike high band, mid-band 5G tends to be slower, but has broader coverage and can pass through some walls. Verizon then launched an advertising campaign promoting the inclusion of c-band to increase coverage of its 5G Ultra Wideband service.

Coverage Claim

In a 60-second commercial titled "Verizon is Going Ultra," a voiceover claims that "America's most reliable network is going Ultra with Verizon 5G Ultra Wideband, now in many more cities so you can do more." At the same time, a disclosure appears at the bottom of the screen stating, "5G Ultra Wideband available in 1700+ cities."

NAD determined that the images and voiceover used in Verizon's commercial, by themselves, reasonably convey a message of expansion and not widespread availability. Moreover, because the claim focuses exclusively on "cities" and displays images from cities, NAD concluded that the message of expansion was limited to city environments and not other geographic locations (such as rural areas, towns, and villages). NAD concluded that Verizon provided a reasonable basis for its claims that 5G Ultra Wideband is available in over 50% of all cities in the United States regardless of how a city is defined. Based on a review of a sampling of Verizon's coverage maps, NAD also concluded that 5G Ultra Wideband is also widely available within cities.

However, NAD found that consumers may believe 5G Ultra Wideband to be more widely available than it is based on the reference to "1700+ cities." Accordingly, NAD recommended that, when using a disclosure that states the number of "cities" where 5G

Ultra Wideband is available, Verizon modify its advertising to more clearly define "cities" for consumers (e.g., "5G Ultra Wideband available in 1700+ cities (pop. > 10,000)").

Reliability Claim

In the same commercial, a voiceover claims, "America's most reliable network is going ultra." A written disclosure appears stating, "Most reliable based on RootMetrics® US National RootScore® Report 1H 2021. Tested on 3 nat'l mobile networks across all available types combined, excl. c-Band. Not specific to 5G networks. Results may vary. Not an endorsement." The same claim, without the disclosure, is also made on Verizon's website. The RootMetrics analysis applies to the entire Verizon network (including 4G LTE and 5G Nationwide), not just 5G Ultra Wideband.

NAD concluded that consumers could reasonably understand the "most reliable" messaging to apply to 5G Ultra Wideband alone – a claim that is not substantiated by the RootMetrics report. NAD noted that while there are situations where older data can be used to substantiate a claim, especially in the fast-paced 5G industry where reports often lag behind innovations, this is not the case when there are major changes to a product or service that would render the older data stale. The addition of c-band to the 5G Ultra Wideband brand is a major change to Verizon's service such that older data does not apply to the current network.

NAD also determined that the disclosure stating that c-band is not included in the RootMetrics results is insufficient to clarify this claim.

Therefore, NAD recommended that Verizon discontinue the "most reliable" claim in reference to the 5G Ultra Wideband network. NAD noted that nothing in its decision would prevent Verizon from making such a claim in the future provided it has new substantiation supporting such a claim.

In its advertiser statement, Verizon stated that it is "pleased with the decision and will comply." The advertiser further stated that while it "does not agree that reasonable consumers might think that the 5G Ultra Wideband network was tested in isolation and determined to be 'Most Reliable,' Verizon appreciates NAD's acknowledgment that the decision does not prevent it from making such a claim when new testing becomes available."

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About BBB National Programs: BBB National Programs is where businesses turn to enhance consumer trust and consumers are heard. The non-profit organization creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. Embracing its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, BBB National Programs today oversees more than a dozen leading national industry self-regulation programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set

consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Case #7106 (08/02/2022)
Verizon Communications, Inc.
5G Ultra Wideband
Challenger: *AT&T Services, Inc.*
Product Type: *Telecommunication Products/Services*
Issues: *Disclosure; Implied Claims/Consumer Perception; Superiority Claims*
Disposition: *Modified/Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

AT&T SERVICES, INC.,
Challenger,

VERIZON COMMUNICATIONS, INC.,
Advertiser.

Case No. 7106
Closed 08/02/2022

FINAL DECISION

- Generally, material limitations need only be disclosed if there is some connection to the claim being made, such that the claim would be misleading without the disclosure.
- While there are situations where older data can be used to substantiate a claim, especially in the fast-paced 5G industry where reports often lag behind innovations, this is not the case when there are major changes to a product or service that would directly render the older data stale.

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger AT&T Services, Inc. ("AT&T" or "Challenger") challenged express and implied claims made by Advertiser Verizon Communications, Inc. ("Verizon" or "Advertiser") for its 5G Ultra Wideband. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

- America's most reliable network is going Ultra with Verizon 5G Ultra Wideband, now in many more cities so you can do more.
- 5G Ultra-Wideband is now in more and more places. Verizon is going Ultra so you can too.

B. Implied Claims

- Verizon's 5G Ultra Wideband connectivity and associated performance benefits are available nationwide.
- Verizon's 5G Ultra Wideband connectivity and associated performance benefits are more available than unavailable.
- The current configuration of Verizon's 5G network has been declared the most reliable as compared to other wireless networks.

II. Evidence Presented

As support for the challenged claims the Advertiser submitted:

- Data about Verizon 5G Ultra Wideband coverage across cities in the United States;
- Data about 5G Ultra Wideband coverage within cities;
- Census data about populations in cities;
- Data about 5G Ultra Wideband availability by population;
- The RootMetrics 5G Report for the first half of 2021.

The Challenger submitted the following evidence to support its arguments:

- The RootMetrics 5G Reports for the first and second half of 2021;
- 5G coverage data from Mosaic.

III. Decision

A. Background

Verizon's 5G Ultra Wideband has historically been associated with its high-band mmWave network, which offered fast speeds but had somewhat limited coverage, especially when reaching indoor locations. In January 2022, however, Verizon expanded the 5G Ultra Wideband brand to include its mid-band or "c-band" network. Unlike high band, mid-band 5G tends to be slower, but has broader coverage and can pass through some walls. Verizon launched an advertising campaign promoting the increased coverage of its 5G Ultra Wideband service (due to the inclusion of c-band). AT&T brought this challenge and argued that Verizon is making performance claims substantiated by data that does not include the new c-band network.

B. Standard of Review

Advertisers must possess a "reasonable basis" for claims disseminated in advertising.[1] What constitutes a "reasonable basis" depends on several factors, including the type of product, the type of claim, the consumer benefit from a truthful claim, the ease of developing substantiation for the claim,

[1] *Guardian Technologies, LLC (GermGuardian and PureGuardian Air Purifiers and Replacement Filters)*, Report #6319, NAD/CARU Case Reports (November 2019).

the consequences of a false claim, and the amount of substantiation experts in the field believe is reasonable.[2]

C. The Coverage Claims

1. Messages Conveyed

In a 60-second commercial titled "Verizon is Going Ultra," a voiceover claims that "America's most reliable is going Ultra with Verizon 5G Ultra Wideband, now in many more cities so you can do more." At the same time, a small disclosure in white text appears at the bottom of the screen stating, "5G Ultra Wideband available in 1700+ cities." The commercial then proceeds to depict 5G Ultra Wideband being used in different locations, including a subway station, an office building lobby, a coffee shop, a park and a hockey arena. The commercial closes with a shot of a cityscape and the voiceover stating, "5G Ultra Wideband is now in more and more places." A small disclosure in text appears at the bottom of the screen, stating, "5G Ultra Wideband available in select areas." Variations of this commercial making the same claims also aired.

The Challenger argued that the voiceovers, combined with the imagery of multiple city locations, possibly in different cities, reasonably convey the message that Verizon's 5G Ultra Wideband connectivity and associated performance benefits are available nationwide and are more available than unavailable. The Challenger argued that the disclosures are not clear and conspicuous because they are made only in small text and not orally with the voiceovers. In addition, the Challenger argued that the "1700+ cities" disclosure further exacerbates the misleading message instead of clarifying it. The Challenger argued that due to the relative unavailability of Verizon's 5G Ultra Wideband, any claims about its availability must be accompanied by a clear and conspicuous disclosure, in the body of main claim, that Verizon 5G Ultra Wideband is more unavailable than available. The Challenger also argued that even if Verizon's advertising does not convey a nationwide message or a message of availability, the very fact that it references availability means a disclosure must be made.

The Advertiser argued that these commercials do not convey a nationwide message or a message of widespread availability. Instead, they merely convey the truthful message that Verizon 5G Ultra Wideband has expanded its coverage. According to the Advertiser, such a message is unlikely to deceive consumers and does not require any additional disclosure.

In the absence of consumer perception evidence, NAD stepped into the shoes of the reasonable consumer and determined that the voiceover and imagery in Verizon's commercial did not reasonably convey a message that 5G Ultra Wideband is more available than unavailable or is available nationwide. Throughout the commercial, the overarching theme is that Verizon is expanding its network to more places and more cities. The voiceover, in fact, explains that 5G Ultra Wideband is "now in many more cities" and reasonably conveys a message that it is not available everywhere but that its availability is expanding. Nowhere does the voiceover state that the service is widely available or available nationwide. The images all depict different city locations, possibly even from different cities, but this alone does not convey a message of widespread availability—only that 5G Ultra Wideband is available in different parts of the same, or even different, cities. In this context, the

[2] *Pfizer Inc.*, 81 F.T.C. 23 (1972). *See also* FTC, *Policy Statement Regarding Advertising Substantiation* (Nov. 23, 1984), https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation.

message reasonably conveyed is one of expansion and not widespread availability. Moreover, because the claim focuses exclusively on "cities" and displays images from cities, NAD concluded that the message of expansion was limited to city environments and not other geographic locations (such as rural areas, towns and villages).

NAD disagreed with the Challenger's argument that even if the message is not one of widespread availability, an oral disclosure is still necessary. Generally, material limitations need only be disclosed if there is some connection to the claim being made, such that the claim would be misleading without the disclosure. It cannot be the case that every reference to availability, no matter how remote, triggers the requirement for a disclosure about the limited availability of Verizon 5G Ultra Wideband. Rather, a disclosure is required only if the claim is likely to mislead consumers into taking away a message of broader availability than is supported by the evidence—in such cases, the limited availability of 5G Ultra Wideband is material information that must be disclosed.

NAD was, however, troubled by the disclosure of "1700+ cities." Although this disclosure, according to the Advertiser, was intended to provide further clarity on the limits of Verizon's 5G Ultra Wideband service, a reasonable consumer could understand it to convey the exact opposite.[3] Consumers may reasonably believe 1700 to be an extraordinarily high number of cities and take away the message that 5G Ultra Wideband has widespread availability throughout the nation. Moreover, as discussed above, the fact that the disclosure specifically identifies only "cities," along with the overall message of the commercial focusing on cities, means that consumers may reasonably understand this number to include only large cities, and not villages and towns.

NAD therefore concluded that the language "1700+ cities", when combined with the overall message of the commercial, reasonably conveyed a message of widespread availability.

2. Analysis

In support of its claim that 5G Ultra Wideband was in more and more cities, the Advertiser submitted confidential data about 5G Ultra Wideband availability in cities of different populations—8000, 75,000, 150,000, 500,000 and 1,000,000. In each tier, Verizon 5G Ultra Wideband was available in over 50% of U.S. cities of that tier. In support of the claim that 5G Ultra Wideband was available in more and more places (within cities), the Advertiser referred to its publicly available coverage maps on its website, where block-by-block coverage was available for each city.

The Advertiser argued that even if messages of nationwide availability and being more available than unavailable were conveyed, those messages would be substantiated by this same evidence.

The Challenger submitted data from Mosaic about the geographic coverage, in square miles, of Verizon's 5G network. According to this data, Verizon's entire 5G network covers only 384,500 square miles, in contrast to AT&T's and T-Mobile's networks, which each covers over 1 million square miles.

NAD concluded that the Advertiser provided a reasonable basis for its claims that 5G Ultra Wideband is available in over 50% of all cities in the United States regardless of how city is defined. Based on a

[3] NAD noted that this disclosure is in tiny print, in white font on light backgrounds and may be difficult for consumers to see and read. Nevertheless, an advertiser cannot take advantage of the inconspicuousness of its own disclosure to argue that its claim is not misleading.

review of a sampling of Verizon's coverage maps, NAD also concluded that 5G Ultra Wideband is also widely available within cities. NAD was not persuaded by the Challenger's evidence, which showed coverage of Verizon's 5G network across the entire United States because this evidence was not limited to cities. Although this evidence may support the argument that Verizon's 5G Ultra Wideband is not widely available across the nation, the claim here is limited to only cities.

The same is not true of the "1700+ cities" claim. Here, Verizon explained that this number includes all geographic areas with populations greater than 10,000. But as this disclosure is expressly limited to "cities," some reasonable consumers may not consider all such municipalities to be "cities." NAD found that consumers may believe 5G Ultra Wideband to be more widely available than it actually is based on the reference to "1700+ cities."

Accordingly, NAD recommended that, when using a disclosure that states the number of "cities" where 5G Ultra Wideband is available, the Advertiser modify its advertising to more clearly define "cities" for consumers (e.g., "5G Ultra Wideband available in 1700+ cities (pop. > 10,000)").

D. The Reliability Claim

In the same commercial, a voiceover claims, "America's most reliable network is going ultra." A written disclosure appears, stating, "Most reliable based on RootMetrics® US National RootScore® Report 1H 2021. Tested on 3 nat'l mobile networks across all available types combined, excl. c-Band. Not specific to 5G networks. Results may vary. Not an endorsement." The same claim is also made on the Advertiser's website, without the disclosure. The RootMetrics analysis applied to the entire Verizon network (including 4G LTE and 5G Nationwide), not just 5G Ultra Wideband.

The Challenger argued that because the entire commercial focuses on 5G Ultra Wideband, the reasonable takeaway is that Verizon 5G Ultra Wideband has been named the most reliable network, and specifically, its 5G Ultra Wideband network that includes c-band. The Challenger argued that the RootMetrics report does not support the challenged claim because the report did not include c-band—the very focus of Verizon's commercial—and instead only included the prior iteration of Verizon's 5G Ultra Wideband network that consisted entirely of mmWave. According to the Challenger, because the main claim is about the reliability of Verizon's 5G Ultra Wideband network with the newly-released c-band, the fact that the underlying support omits c-band means that the disclosure not only is stale because it fails to account for a major change in the service, but also directly contradicts the main claim.

The Advertiser argued that the "most reliable" claim refers to Verizon as a whole, and not 5G Ultra Wideband, because it appears just once at the beginning at the commercial. The Advertiser also argued that advertising based on real-time data in the 5G world is impractical and NAD has allowed non-current data as substantiation in the past.

NAD concluded that consumers could reasonably understand the "most reliable" messaging to apply to 5G Ultra Wideband alone. Although the claim does appear at the very beginning of the commercial, the entire commercial focuses on a single service—5G Ultra Wideband. Further, the voiceover states that 'America's most reliable network is *going ultra*," (emphasis added) followed by an explanation that "going ultra" means 5G Ultra Wideband is expanding to more cities and locations. The "going ultra" language ties the "most reliable" claim to the expansion of 5G Ultra Wideband coverage,

suggesting that this is merely an expansion of the "most reliable" 5G Ultra Wideband network that is still the "most reliable."

NAD further concluded that the claim was not substantiated by the RootMetrics report. While there are situations where older data can be used to substantiate a claim, especially in the fast-paced 5G industry where reports often lag behind innovations, this is not the case when there are major changes to a product or service that would render the older data stale. The addition of c-band to the 5G Ultra Wideband brand is a major change to Verizon's service, such that older data does not apply to the current network.

Further, NAD determined that the disclosure stating that c-band is not included in the RootMetrics results is insufficient to clarify this claim. The commercial focuses on the effect of c-band on Verizon's network, and a disclosure that omits data from the network improvement being advertised contradicts that claim. Moreover, many consumers do not know what c-band means and the implications of the omission of c-band from the data supporting the "most reliable" claim.

Accordingly, NAD recommended that the Advertiser discontinue the "most reliable" in reference to the 5G Ultra Wideband network. Nothing in this decision would prevent Verizon from making such a claim in the future provided it has new substantiation supporting such a claim.

IV. Conclusion

NAD found that the images in the commercial depict different city locations, possibly even from different cities, but this alone does not convey a message of widespread availability—only that 5G Ultra Wideband is available in different parts of the same, or even different, cities. In this context, the message reasonably conveyed is one of expansion and not widespread availability. Moreover, because the claim focuses exclusively on "cities" and displays images from cities, NAD concluded that the message of expansion was limited to city environments and not other geographic locations (such as rural areas, towns and villages). NAD recommended that, when using a disclosure that states the number of "cities" where 5G Ultra Wideband is available, the Advertiser modify its advertising to more clearly define "cities" for consumers (e.g., "5G Ultra Wideband available in 1700+ cities (pop. > 10,000)").

NAD also concluded that consumers could reasonably understand the "most reliable" messaging to refer to 5G Ultra Wideband, a claim that is not supported by the RootMetrics results in the record. NAD recommended that the Advertiser discontinue the "most reliable" claim when referring to the 5G Ultra Wideband network.

V. Advertiser's Statement

Verizon is pleased with the decision and will comply. NAD correctly concluded that the images in the commercial convey the truthful message that Verizon is expanding the 5G Ultra Wideband network to more places and more cities.

By stating "America's most reliable network is going Ultra," Verizon intended to convey that Verizon -- which had been awarded the "Most Reliable" network across all network types by RootMetrics -- was introducing 5G Ultra Wideband. While Verizon does not agree that reasonable consumers might think that the 5G Ultra Wideband network was tested in isolation and determined to be "Most Reliable",

Verizon appreciates NAD's acknowledgement that the decision does not prevent it from making such a claim when new testing becomes available. **(#7106 ZW, closed 08/02/2022)**

National Programs
National Advertising Division®

For Immediate Release
Contact: Abby Hills, Director of Communications, BBB National Programs
703.247.9330 / press@bbbnp.org

National Advertising Division Recommends WaterWipes Discontinue "#1 Wipes Against the Causes of Diaper Rash" Claims for Infant Cleansing Wipes

New York, NY – March 2, 2022 – The National Advertising Division (NAD) of BBB National Programs recommended that WaterWipes discontinue claims stating:

- WaterWipes is the "#1 wipe against the causes of diaper rash"
- WaterWipes are the "#1 cleansing wipes helping against the causes of diaper rash"
- "It's official, we're clinically proven as the #1 wipe against the cause of diaper rash"

These claims, which appeared on the advertiser's website and social media channels, were challenged by Kimberly-Clark Corporation, maker of competing cleansing wipes for infants.

As support for its claims, the advertiser relied on the results of its "Baby Skin Integrity Comparison Survey" (BaSICS Study), which was designed to compare three different brands of baby wipes using parental observations of the incidence of diaper rash in infants from birth to eight weeks of age.

In considering whether the BaSICS Study was sufficiently reliable evidence to support the challenged claims, NAD expressed several concerns with its methodology, including that:

- The study universe was too narrow to support the broad #1 claims;
- The study's failure to attempt to control for the use of skin creams and lotions to treat infants with diaper rash, which could significantly impact the role of the wipes in preventing diaper rash; and
- The study did not attempt to blind the branding and marketing on the packaging itself, which could have biased the survey participants' responses.

NAD determined that the study does not provide adequate substantiation for the broad superiority claims or the establishment claim at issue in this challenge.

NAD noted that broad superiority claims such as a "#1 claim" require strong support, while a "clinically proven" claim requires reliable and well-controlled clinical testing on the advertised product. While the advertiser is free to tout the efficaciousness of its wipes generally, NAD recommended that the challenged claims be discontinued given its concerns with the reliability of the BaSICS Study.

In its advertiser statement, WaterWipes stated that while it "respects the self-regulatory process, it is disappointed with the NAD's conclusion that the '#1 wipes against diaper rash' and 'clinically proven' statements used in its US advertisements are not supported by the BaSICS study." The advertiser stated that "nevertheless, in the interest of supporting self-regulation, WaterWipes will make modifications to the impugned claims as necessary to comply with the NAD's recommendation."

All BBB National Programs case decision summaries can be found in the case decision library. For the full text of NAD, NARB, and CARU decisions, subscribe to the online archive.

About BBB National Programs: BBB National Programs is where businesses turn to enhance consumer trust and consumers are heard. The non-profit organization creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. Embracing its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, BBB National Programs today oversees more than a dozen leading national industry self-regulation programs, and continues to evolve its work and grow its impact by providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, and privacy. To learn more, visit bbbprograms.org.

About the National Advertising Division: The National Advertising Division (NAD) of BBB National Programs provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the U.S. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Case #7064 (02/23/2022)
WaterWipes
WaterWipes Baby Wipes
Challenger: *Kimberly-Clark Corporation*
Product Type: *Infant Products*
Issues: *Establishment Claims; Superiority Claims*
Disposition: *Modified/Discontinued*

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

KIMBERLY-CLARK CORPORATION,
Challenger,

WATERWIPES,
Advertiser.

Case No. 7064
Closed 02/23/2022

FINAL DECISION

-Broad superiority claims such as a "#1 claim" require strong support while a clinically proven claim requires reliable and well-controlled clinical testing on the advertised product.

I. Basis of Inquiry

The advertising industry established the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB") in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger Kimberly-Clark Corporation ("Kimberly-Clark" or "Challenger") challenged express and implied claims made by Advertiser WaterWipes ("WaterWipes" or "Advertiser") for its WaterWipes baby wipes product. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

- WaterWipes is the "#1 wipe against the causes of diaper rash"
- WaterWipes are the "#1 cleansing wipes helping against the causes of diaper rash."
- "It's official, we're clinically proven as the #1 wipe against the causes of diaper rash."

II. Evidence Presented

The Advertiser submitted the "Baby Skin Integrity Comparison Survey[1]" (the "BaSICS Study"), a peer-reviewed and published study in the *Journal of Pediatrics and Neonatology*, a scientific journal in the field of pediatrics. The study's principal author is Dr. Alan Price, a researcher at the University of Salford in Manchester, England, who performed the research in collaboration with a team of other credentialed scientists. The Advertiser submitted additional and follow-up analysis of the BaSICS Study as well as the curricula vitae of the research team members.[2]

The Advertiser also submitted documents demonstrating that use of WaterWipes has been approved by both the National Eczema Association[3] and the Skin Health Alliance.[4] In addition, the Advertiser submitted documents regarding the primary causes of diaper rash as well as a study indicating that the use of WaterWipes is associated with a decrease in the incidence of diaper rash.[5]

The Advertiser also submitted documentation regarding the use of real-time surveys and testing methodology generally[6] as well as product use and shelf-life instructions for various diaper wipe products.

The Advertiser also submitted information from public health agencies regarding what is considered clinical research.[7]

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[1] A. Price et al., *The BaSICS (Baby Skin Integrity Comparison Survey) Study: A Prospective Experimental Study Using Maternal Observations to Report the Effect of Baby Wipes on the Incidence of Irritant Diaper Dermatitis in Infants, From Birth to Eight Weeks of Age*, 62 Pediatrics & Neonatology 138 (2021).

[2] F. MacVane Phipps, A. Price et al., *698 Mothers and Babies, 38,390 Nappy Changes: What Did We Learn?*, 29 Br. J. Midwifery 150, 152 (2021) (hereinafter "What Did We Learn?"); A. Price et al., *Part 1: A Qualitative Description of Participation in an Eight-Week Infant Skin Integrity Study*, 29 Br. J. Midwifery 200 (2021); A. Price et al., *Part 2: A Qualitative Description of Participation in an Eight-Week Infant Skin Integrity Study*, 29 Br. J. Midwifery 260 (2021).

[3] National Eczema Association, *Product Directory*, https://nationaleczema.org/eczema-products/?pg=1&ppg=6&q=waterwipes (listing WaterWipes in the National Eczema Association product directory).

[4] Skin Health Alliance, *WaterWipes Receives Skin Health Alliance Dermatological Accreditation* (Nov. 3, 2020), https://skinhealthalliance.org/news/waterwipes-receives-skin-health-alliance-dermatological-accreditation/ ("WaterWipes . . . are perfect to be used on newborn and premature baby's skin. WaterWipes proved to an independent team of dermatologists that their wipes and accompanying claims are evidenced with robust scientific and clinical research.").

[5] A. Carr et al., *Diaper Dermatitis Prevalence and Severity: Global Perspective on the Impact of Caregiver Behavior*, 37 Pediatric Dermatology 130, 131 (2020); S. Rogers et al., *A Quality Improvement Approach to Perineal Skin Care*, Advances In Neonatal Care 8 (2020).

[6] Center for Disease Control, V-safe After Vaccination Health Checker, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/vsafe.html; A. Bendix & L. Lee, "Vaccine Trials Didn't Monitor One Variable: Volunteers' Behavior," *Business Insider* (Nov. 25, 2020), https://www.businessinsider.com/vaccine-trials-pfizer-moderna-didnt-regulate-participants-masks-social-distancing-2020-11 (describing how the Pfizer and Moderna COVID-19 vaccine trials did not monitor or restrict participants in their social interactions or risk-taking).

[7] National Institutes of Health, *Frequently Asked Questions: NIH Clinical Trial Definition*, https://oir.nih.gov/sourcebook/intramural-program-oversight/intramural-data-sharing/guidefdaaa-reporting-research-results/frequently-asked-questions-nih-clinical-trial; FDA, *What Are the Different Types of Clinical Research?*, https://www.fda.gov/patients/clinical-trials-what-patients-need-know/what-are-different-

The Advertiser also submitted Nielson data through June 2021 showing market share of the baby wipe category by brand and the Declaration of Emer Gilligan, Ph.D., B. Sc., the Regulatory Manager of WaterWipes, regarding alterations in formulations of baby wipes.[8]

The Challenger submitted research to support its contention that Huggies Natural Care wipes, because of their PH-adjusted formulation, performs better than WaterWipes at reducing skin irritating fecal enzymes, the leading of cause of irritant diaper dermatitis, or diaper rash, ("IDD").[9] The Challenger also submitted research and evidence regarding IDD, its causes including digestive enzymes in feces and skin pH levels.[10] The Challenger also submitted evidence indicating that use of diaper cream can

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types-clinical-research; FDA, *Step 3: Clinical Research*, https://www.fda.gov/patients/drug-development-process/step-3-clinical-research

[8] Nielsen, *Baby Wipe Market Data Through June 2021* (2021)

[9] Ngai, D., Vongsa, B., Rodriguez, KJ. Neonatal Network. 2018; 37 (6): e19. 2018FallConferenceProceeding.pdf (ymaws.com).

[10] Gregorio J, Rodriguez KJ. "Diaper dermatitis in infant skin: causes, mitigation, and treatment". Internal KC Technical Letter, TL-15555, 2014; Stamatas GN and Tierney NK. "Diaper dermatitis: etiology, manifestations, prevention, and management." Pediatric Dermatology 31(1): 1-7, 2014; Carr, AN, DeWitt, T, Cork, MJ, et al. Diaper dermatitis prevalence and severity: Global perspective on the impact of caregiver behavior. Pediatr Dermatol. 2020; 37: 130– 136. https://doi.org/10.1111/pde.14047; Park S. Fecal Digestive Enzymes and Bile Acids. Internal KC Report- Research Files TL-22525, 2018; Buckingham KW and Berg RW. "Etiologic factors in diaper dermatitis: the role of feces". Pediatric Dermatology 3(2):107-12, 1986; Andersen PH, Bucher AP, Saeed I, Lee PC et al. "Faecal enzymes: in vivo human skin irritation." Contact Dermatitis 30(3): 152-158, 1994; Sriwiriyanont S, Rodriguez KJ. Effect of Individual Fecal Enzymes on Skin Irritation. Internal KC Report-Research Files TL-23014, 2019; Sriwiriyanont S, Piccotti L. Experiment to quantify irritants from feces from 8-12 months old infants to inform the development of a fecal skin irritant mixture for diapered skin health research. Internal KC Report-Research Files TL-22602, 2018.; Introduction to Enzymes. Effects of pH (Introduction to Enzymes) (worthington-biochem.com) Worthington Biochemical Corporation. 2021. Šikić Pogačar, M., Maver, U., Marčun Varda, N. and Mičetić-Turk, D. (2018), Diagnosis and management of diaper dermatitis in infants with emphasis on skin microbiota in the diaper area. Int J Dermatol, 57: 265-275. https://doi.org/10.1111/ijd.13748; Park S. Fecal Digestive Enzymes and Bile Acids. Internal KC Report- Research Files TL-22525, 2018; Buckingham KW and Berg RW. "Etiologic factors in diaper dermatitis: the role of feces". Pediatric Dermatology 3(2):107-12, 1986; Andersen PH, Bucher AP, Saeed I, Lee PC et al. "Fecal enzymes: in vivo human skin irritation." Contact Dermatitis 30(3): 152-158, 1994; Sriwiriyanont S, Rodriguez KJ. Effect of Individual Fecal Enzymes on Skin Irritation. Internal KC Report-Research Files TL-23014, 2019; Sriwiriyanont S, Piccotti L. Experiment to quantify irritants from feces from 8-12 months old infants to inform the development of a fecal skin irritant mixture for diapered skin health research. Internal KC Report-Research Files TL-22602, 2018. Stamatas GN and Tierney NK. "Diaper dermatitis: etiology, manifestations, prevention, and management." Pediatric Dermatology 31(1): 1-7, 2014; Dey, S., Kenneally, D., Odio, M. and Hatzopoulos, I. (2016), Modern diaper performance: construction, materials, and safety review. Int J Dermatol, 55: 18-20. https://doi.org/10.1111/ijd.13333; Gustin, J, Gibb, R, Maltbie, D, Roe, D, Waimin Siu, S. The impact of diaper design on mitigating known causes of diaper dermatitis. Pediatr Dermatol. 2018; 35: 792– 795. https://doi.org/10.1111/pde.13680. Visscher MO, Chatterjee R, Munson KA, Pickens WL, Hoath SB. Changes in diapered and nondiapered infant skin over the first month of life. Pediatr Dermatol. 2000;17:45-51; Rippke F, Schreiner V, Schwanitz H-J. The acidic milieu of the horny layer: new findings on the physiology and pathophysiology of skin pH. Am J Clin Dermatol. 2002;3:261-272; Lambert RJW. A new model for the effect of pH on microbial growth: an extension of the Gamma hypothesis. J Appl Microbiol. 2011;110:61-68; Blume-Peytavi U, Lavender T, Jenerowicz D, et al. Recommendations from a European roundtable meeting on best practice healthy infant skin care. Pediatr Dermatol. 2016;33:311-321; Ehretsmann C, Schaefer P, Adam R. Cutaneous tolerance of baby wipes by infants with atopic dermatitis, and comparison of the mildness of baby wipe and water in infant skin. J Eur Acad Dermatology Venereol. 2001;15(Supplement 1):16-21; Odio M, Streicher-Scott J, Hansen RC. Disposable baby wipes: efficacy and skin mildness. DermatolNurs. 2001;13: 107-

be effective at mitigating or preventing IDD. In addition, the Challenger submitted research regarding the impact of, among other factors, infant nutrition on IDD[11] and previously validated scales used to assess the severity of IDD.

III. Decision

A. Introduction

The parties are competing manufactures of cleansing wipes for infants. The express claims at issue in this challenge are various iterations of the claim that the Advertiser's WaterWipes product is the "#1" wipe against the causes of diaper rash and that it is "clinically proven as the #1 wipe against the causes of diaper rash."[12] The claims appeared on the Advertiser's website and social media channels.

The Challenger argued that such broad superiority claims require market-wide support and that the Advertiser does not possess appropriate support for such claims. Specifically, the Challenger alleged that the Advertiser's BaSIC's Study did not support the "#1" claims at issue in this Challenge and that the BaSIC's Study suffered from serious and numerous methodological flaws. For its part, the Advertiser maintained that its claim that WaterWipes is "clinically proven as the #1 wipe against the cause of diaper rash," and substantially similar claims, are thoroughly substantiated by the BaSIC's Study which it argued sets forth objective, relevant, and verifiable scientific results. Further, the Advertiser argued that none of the Challenger's methodological criticisms of the BaSIC Study, either individually or collectively, undermine the reliability of the BaSIC's Study's results. Accordingly, the central issue for NAD to determine in this matter is whether the BaSIC's Study results provide substantiation for the Advertiser's "#1 wipes" and "clinically proven as the #1 wipe" claims.

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[11] Visscher M.O., Hoath S.B. (2006) Diaper Dermatitis. In: Chew AL., Maibach H.I. (eds) Irritant Dermatitis. Springer, Berlin, Heidelberg. https://doi.org/10.1007/3-540-31294-3_5; Gaunder BN, Plummer E. Diaper rash: managing and controlling a common problem in infants and toddlers. J Pediatr Health Care. 1987 Jan-Feb;1(1):26-34. doi: 10.1016/0891-5245(87)90153-2. PMID: 3694391; A.L. Norins (1987) Diapering and Infant Skin, Proc. Int. Symp., Hakone 1986 Pediatrician 14: suppl 1 (1987); Berg RW. Etiology and pathophysiology of diaper dermatitis. Adv Dermatol. 1988;3:75-98. PMID: 3152829; Merrill L. Prevention, Treatment and Parent Education for Diaper Dermatitis. Nurs Womens Health. 2015 Aug-Sep;19(4):324-36; quiz 337. doi: 10.1111/1751-486X.12218. PMID: 26264797; Buckley BS, Mantaring JB, Dofitas RB, Lapitan MC, Monteagudo A. A New Scale for Assessing the Severity of Uncomplicated Diaper Dermatitis in Infants: Development and Validation. Pediatr Dermatol. 2016 Nov;33(6):632-639. doi: 10.1111/pde.12988. Epub 2016 Sep 22. PMID: 27653955.

[12] The challenged express claims are that WaterWipes is the "#1 wipe against the causes of diaper rash," that WaterWipes are the "#1 cleansing wipes helping against the causes of diaper rash" as well as "It's official, we're clinically proven as the #1 wipe against the causes of diaper rash."

B. The Advertiser's BaSICS Study

Conducted in greater Manchester, England, the BaSICS Study states that it was a "prospective experimental study designed to compare three different brands of baby wipes using maternal observations" of the incidence of IDD in infants from birth to eight weeks of age. A total of 698 mother-and-infant pairs completed the eight-week study under the supervision of professionals. An unnamed "Brand 1" was used by 233 participants, 227 participants used another unnamed "Brand 2," and the remaining 238 participants used WaterWipes.[13]

The study participants received one of three brands of wipes using block randomization: all mothers received the same brand of disposable diapers. Researchers involved in analysis of the data were blind to the baby wipe brand assigned but study participants were not. According to the BaSICS Study's authors, "[i]t was not possible to blind participants as this would have necessitated re-packaging the wipes, which could have compromised the quality of the contents."[14]

Each mother received nine weeks' supply of free diaper and wipes and in return completed a short daily survey from the day of their baby's birth, up to eight weeks of age. An initial starter pack containing a week's supply of diapers and wipes was delivered to all participants when they registered (as expectant mothers) to ensure that the participants had a supply of their assigned wipes for use immediately after their baby's birth. Additional diapers and wipes were delivered to participants after they completed their first survey, and then subsequently at approximately bi-weekly intervals throughout the study period.

The daily observations were recorded using a smartphone application.[15] The study's main outcome of interest was the incidence of significant IDD in the sample, and comparisons by the researchers of IDD incidence among the three groups. IDD was measured on a scale of 1-5, with grade 1 indicating an absence of redness or rash, grade 2 some redness and a mild rash, grade 3 the point at which broken skin and discomfort were evident, and grades 4 and 5 being more severe. The study considered a grade of 3 or greater as "clinically significant IDD."

The BaSICS Study reported that 24.6% of mothers reported at least one day of clinically significant IDD (grade 3 or above). The WaterWipes group reported the lowest proportion of babies with significant IDD (19%), as compared to Brand 1 (25%) and Brand 2 (30%). The study found that for one day of clinically significant IDD in the WaterWipes test group, participants in the test groups for Brand 1 and Brand 2 self-reported 1.48 days and 1.69 days respectively.[16] The Advertiser argued that the study

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[13] During this proceeding, the Advertiser disclosed that the two competing wipes used in the BaSICS Study were certain baby wipes formulations made by Pampers and Huggies.

[14] Given that the study participants were not blinded, the BaSICS Study stated that "the potential for participants' observations of IDD to be biased based on previous perceptions or experience of brands of wipe is acknowledged."

[15] A paper survey tool was made available for the small number of participants who preferred this method.

[16] The BaSICS Study noted that this data was based on a univariate analysis of clinical IDD. The BaSICS Study also produced "a second set of models tested each covariate in turn while controlling for brand." The BaSICS Study stated that "Gender of the baby, parity, and household income remained significant. A multivariate forwards stepwise regression model produced similar results for the primary analysis. The brand of wipe remained a significant predictor of number of days of rash, with the use of Brand 2 having a significantly higher rate of rash (IRR 1.70, 95% CI 1.31e2.22, $p < 0.001$) compared to Brand 3 and although Brand 1 also had a higher rate of rash compared to Brand 3, this was no longer statistically significant."

demonstrated that the group using WaterWipes experienced less IDD and for those that did, the IDD lasted for a shorter period of time.

The BaSICS Study noted that further studies were recommended to evaluate IDD "over a longer period, ideally up to the age of toilet training." The researchers also published two follow up analyses of the BaSICS Study. The Advertiser maintained that, taken together, the BaSICS Study and its follow-up analyses provided substantiation for the #1 claims at issue in this challenge.

C. Analysis

A "#1 Brand" claim sends a strong message to consumers that the brand is preferred over its competitors and it weighs heavily in consumer buying decisions. Accordingly, NAD and NARB have recognized that #1 claims are powerful claims that can impact consumer decisions and attitudes and should be evaluated carefully.[17] Clinically proven claims, like the claim "It's official, we're clinically proven as the #1 wipe against the causes of diaper rash" require an even higher substantiation burden. Otherwise known as establishment claims, they convey the message that scientific evidence proves or "establishes" the truth of its claims.[18] Such health-related claims typically require randomized controlled studies as support.[19] NAD has consistently looked to whether an advertiser has produced reliable and well-controlled clinical testing on the advertised product in determining whether there is a reasonable basis for an establishment claim for a product. Establishment claims should be narrowly tailored to reflect the methodology and results of the clinical trial(s) offered as support.[20]

With these standards in mind, NAD carefully reviewed the BaSIC's Study to determine if it was sufficiently reliable evidence to support the challenged "#1 wipe" and "clinically proven as the #1 wipe" claims. The Challenger contended that there are numerous methodological flaws in the design and execution of the BaSICS Study. The Advertiser maintained that such critiques are meritless and that the concerns raised by the Challenger were addressed by the researchers themselves who accounted for them. NAD considered each of the Challenger's critiques, as well as the Advertiser's rebuttal arguments.

1. Study Universe

NAD noted that the BaSICS Study universe consisted only of infants ranging from newborns up until those eight weeks in age. The researchers acknowledged that "[t]his study demonstrated that wipe formulation is a significant factor in prevention or reduction of IDD during the first eight weeks of

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[17] Perrigo, PLC (Plackers Dental Flossers), Report #7065, *NAD/CARU Case Reports* (November 2021); NARB Panel #299 (December 2021)("#1 claims are powerful claims that can impact consumer decisions and attitudes and should be evaluated carefully.")

[18] POM Wonderful vs. Federal Trade Commissions, 777 F3d 478 (DC Cir. 2015) ("An establishment claim … suggest that a product's efficacy or superiority has been scientifically established."). When "an ad stating that a product's efficacy is 'medically proven' or making use of 'visual aids' that "clearly suggest that the claim is based upon a foundation of scientific evidence,' the Advertiser 'must possess evidence sufficient to satisfy the relevant scientific community of the claim's truth.").

[19] Avadim Health, Inc. (Theraworx Relief products), Report #6418, *NAD/CARU Case Reports* (October 2020); aff'd NARB Panel December 16, 2020.

[20] Slim-Fast Foods Company (SlimFast Food Products & Weight Loss Plans), Report #6952, *NAD/CARU Case Reports* (August 2021) (NARB Panel #290 November 22, 2021).

life" and that "[f]urther studies are recommended to evaluate [diaper] rash over a longer period, ideally up to the age of toilet training." Accordingly, NAD was concerned that the study universe was too narrow to support the broad #1 claims that the Advertiser's product is the #1 wipe against the causes of diaper rash.

2. Lack of Control

The Challenger criticized the BaSICS Study for failing to control for other variables such as parents use of skin creams, lotions, and ointments on their infants. The BaSICS Study found that "two thirds of participants (66.9%) reported the use of skin cream on their infant's [diaper] area at some point during the study."[21] The Challenger argued that diaper creams can be effective at mitigating and even preventing IDD.[22] Given the significant percentage of survey participants who reported using diaper creams on their infants, the Challenger argued that it was impossible to assess to what extent the results reflect the cream usage as opposed to the wipes.

The Advertiser argued that the BaSICS Study was designed to be "real-world" research and, accordingly, the researchers purposefully left decisions as to use of skin creams, diaper change frequency (with all participants using the same brand of diapers), bathing frequency, and the use of other hygiene products such as soap to the discretion of parents. According to the Advertiser, in "real life," babies get diaper rash and parents regularly use skin creams to treat diaper rash. The Advertiser analogized this protocol to the trials recently conducted to test COVID-19 vaccines where researchers did not specifically instruct participants in the trials about mask-wearing, social distancing, or other activities in between doses of the vaccine, and maintained that differences in behavior are accounted for by the randomization of the study groups. Further, the Advertiser argued that designing a study to prevent parents from treating their babies' diaper rash would be unethical since diaper rash is a common problem and healthcare professionals generally advise treating it with cream.[23]

NAD has noted that "the purpose of scientific trials is to control variables to identify and isolate a distinct causal nexus between [an advertised product or ingredient] and an outcome."[24] While it may be true that certain testing protocols, such as vaccine trials, do not instruct participants about how to conduct their lives during the trial, NAD was concerned by the BaSICS Study's failure to attempt to control for the use of skin creams and lotions to treat infants with diaper rash could significantly impact the role of the wipes in preventing diaper rash.[25] NAD was not persuaded that in order to

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[21] Alan D. Price et al., The BaSICS (Baby Skin Integrity Comparison Survey) Study: A Prospective Experimental Study Using Maternal Observations to Report The Effect of Baby Wipes On The Incidence of Irritant Diaper Dermatitis In Infants, From Birth to Eight Weeks of Age, 62 Pediatrics & Neonatology 138 (2021).

[22] See, e.g. Baldwin S, Odio MR, Haines SL, O'Connor RJ, Englehart JS, Lane AT. Skin benefits from continuous topical administration of a zinc oxide/petrolatum formulation by a novel disposable diaper. J Eur Acad Dermatol Venereol. 2001 Sep;15 Suppl 1:5-11. doi: 10.1046/j.0926-9959.2001.00002.x. PMID: 11720074.

[23] The Advertiser also argued that when the BaSICS Study's researchers analyzed the data concerning the use of creams and powders, there were no differences across the three arms of the study due to the randomization of the groups.

[24] Leiner Health Products, LLC (Starch Away®), Report #4190, *NAD/CARU Case Reports* (June 2004).

[25] Id. (While that matter involved a weight loss product, NAD's determination in analogous to this matter: "Indeed, while consumer relevant testing is generally the best type of evidence to support weight loss claims, there should be sufficient controls to ensure a causal nexus between the tested product and the results. NAD considered, but was not persuaded by, the advertiser's argument that the subject participants represented a body

control for use of skin creams or lotions the study designers would have had to prohibit parents from treating their babies' diaper rash.[26] Without some attempt to control for use of creams and lotions, and with a significant majority of participants using skin creams and lotions on their infants, it is difficult to determine to what extent the results of the BASICs Study are due solely to the type of wipe. An attempt to control of use of creams and lotions is especially relevant here given the nature of the Advertiser's claims; the Advertiser claims specifically that its wipes product is "#1" against the causes of diaper rash.

3. Failure to Blind

The Challenger also argued that the BaSICS Study is unreliable because the wipes were provided to participants in their original packaging. Thus, the Challenger argued participants would view marketing claims on the product packaging that could bias the participants whose subjective judgments formed the survey results.[27]

While the Advertiser acknowledged that double-blinding is generally preferable where possible, it argued that baby wipes cannot be removed from their packaging without potentially compromising the product's integrity. The Advertiser maintained that this is particularly true of WaterWipes which contains fewer ingredients than the products of its competitors and, thus, has a shorter shelf life. WaterWipes recommends that its wipes be used within one month of opening, a significantly shorter span than what competitors recommend for their wipes.

The Advertiser argued that blinding of the package labeling would be ineffective because the wipes themselves have brand-identifying embossing. As NAD has previously noted: "While the products at issue may ultimately have been difficult to effectively blind, it is likely that existing consumer preferences introduced some semblance of inherent bias into the study."[28] While it may not have been possible to remove brand-identifying embossing on the wipes themselves, NAD shared the Challenger's concern that the study did not attempt to blind the branding and marketing on the packaging itself which could have biased survey participants' responses.

4. Other Criticisms of the BaSICS Study

The Challenger raised several other criticisms as to the reliability of the BaSICS Study as support for the challenged claims.[29] Taken as a whole, and along with the issues discussed above, NAD

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of free-living individuals. While this may be true, the "free living" aspects of the diet proscribed in the test protocol render the test results unreliable and non-reproducible.")

[26] NAD notes that the BaSICS Study attempted to control for the type of diaper used by participant mothers by providing all mothers with the same type of diapers.

[27] The Challenger noted that in the United States such claims "The World's Purest Baby Wipes," and "99.9% water and a drop of fruit extract."

[28] Kimberly-Clark Corporation (Huggies Natural Care Wipes), Report #5866, *NAD/CARU Case Reports* (July 2015)

[29] Among issues raised by the Challenger was the study's participants lack of adherence to their assigned brand of wipe. Only 59.5% of participants reported 100% fidelity to their allocated brand of wipe while 28.3% used a different cleaning method between 1 and 5 days and: 12.2% reported using a different cleaning method on more

determined that the BaSICS Study does not provide adequate substantiation for the broad superiority claims ("#1 wipe against the causes of diaper rash" and "#1 cleansing wipes helping against the causes of diaper rash.") or the establishment claim ("clinically proven as the #1 wipe against the causes of diaper rash.") at issue in this challenge. Broad superiority claims such as a "#1 claim" require strong support while a "clinically proven" claim requires reliable and well-controlled clinical testing on the advertised product. While the Advertiser is free to tout the efficaciousness of its wipes generally, NAD recommended that the challenged claims be discontinued given its concerns with the reliability of the BaSICS Study.

IV. Conclusion

NAD recommended that the Advertiser discontinue the claims that WaterWipes is the "#1 wipe against the causes of diaper rash" and "#1 cleansing wipes helping against the causes of diaper rash" as well as the claim "It's official, we're clinically proven as the #1 wipe against the causes of diaper rash."

V. Advertiser's Statement

We thank the NAD for their time reviewing this matter. While WaterWipes respects the self-regulatory process, it is disappointed with the NAD's conclusion that the "#1 wipes against diaper rash" and "clinically proven" statements used in its US advertisements are not supported by the BaSICS study. We hold ourselves to the highest standards of transparency and integrity in how we conduct our business and this includes how we communicate with our customers. The BaSICS study's peer-reviewed and statistically significant findings are a critical contribution to the scientific literature on the efficacy of baby wipes. WaterWipes further believes that its use of the word "clinical" tracks the definitions set forth by the scientific community and the U.S. Government. Nevertheless, in the interest of supporting self-regulation, WaterWipes will make modifications to the impugned claims as necessary to comply with the NAD's recommendation. **(#7064 HJS, closed 02/23/2022)**

than 5 days. In addition, the Challenger criticized the use, manner, scaling, and validation of subjective maternal reporting to determine an objective outcome: IDD.

The Challenger also argued that the Advertiser had not established that the BaSICS Study tested against the appropriate range of wipe products noting that the testing was on wipe products in the United Kingdom as opposed to the United States and that manufacturers of wipes, such as the Challenger, have multiple product formulations. Other criticisms raised by the Challenger include that the study was not conducted by dermatologists, the use of mothers to subjectively observe and report their infant's IDD, failure to control for infant nutrition, and the use of antibiotics, study dropouts and the statistical significance of the study's findings (See supra, note 16) and whether the study constituted "clinical" research.