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.**
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> 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)**