

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 line³ 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

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)**

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