

CLIENT ALERT

Advertisers in the Ring – A Roundup of Year End Competitor Advertising Challenges: 2015 Closes With Dietary Supplements & Green Claims

December 2015

Below, we provide a high-level summary of some of the NAD decisions from the past few months. A summary of September and early October NAD decisions can be found [here](#).

2015 ended with a slew of monitoring cases targeted at dietary supplements and green claims about environmental friendliness, biodegradability, and recycled content. NAD also issued decisions in competitive challenges regarding credit cards, wireless services, and contact lenses.

Dietary Supplement Monitoring – and Federal Referrals

As in past months, NAD brought a number of routine monitoring cases against dietary supplement advertisers in collaboration with the Council for Responsible Nutrition (CRN). Of five recent dietary supplement matters in the CRN initiative, three were referred to federal agencies after the advertiser refused or failed to participate. In *American Dream Nutrition, LLC: PhytoZon Dietary Supplement*, Case No. 5890 (Oct. 7, 2015), the advertiser claimed its product could help manage serious conditions such as breast cancer and macular degeneration. In *Health Energetic Labs: HeightGrowth Plus*, Case No. 5895 (Oct. 13, 2015), NAD sought support for the advertiser's claims that its product would increase bone growth and make a user "grow taller." In *Steuart Laboratories: Steuart's Pain Formula*, Case No. 5900 (Nov. 2, 2015), the advertiser claimed "significant and rapid relief of joint and muscle pain." The first two advertisers refused to participate in NAD proceedings, while in the Steuart matter, the advertiser failed to submit any substantive reply. Accordingly, NAD submitted all three to the Federal Trade Commission or other federal agencies for review and possible enforcement proceedings.

In *Advanced Orthomolecular Research, Inc.: UTI Cleanse, Now with Cranberry*, Case No. 5891 (Oct. 8, 2015), the advertiser also declined to participate on the basis that its sales were in Canada, but it agreed to request that bottles labeled with "helps prevent urinary tract infections" no longer be used as the image accompanying on-line sales via Amazon, which could reach U.S. consumers. NAD concluded that the advertising was targeted at Canadians and thus not "national in character" as necessary for NAD proceedings. NAD administratively closed the matter.

In *EOK Marketing, LLC DBA Marine Essentials: OmegaFlex Dietary Supplements*, Case No. 5892 (Oct. 8, 2015), rather than refusing to participate, the advertiser agreed to permanently discontinue claims such as "62 percent reduction in joint pain" and "less joint pain in seven days" following NAD's request for substantiation.

In another dietary supplement monitoring case, *New Nordic USA: Skin Care Collagen Filler*, Case No. 5901 (Nov. 9, 2015), NAD requested substantiation for an advertiser's claims that its supplement "reduces formation of wrinkles," "promotes skin health," and "promotes the skin's own formation of collagen," among other performance claims and testimonials. The advertiser defended its claims by citing ingredient studies performed *in vitro* and in animals. The NAD criticized the support because it

lacked human clinical trials and further noted that, even if the ingredient studies had generally been sufficient, the ones cited by the advertiser contained serious flaws. For instance, one cited collagen study used five times the amount of collagen contained in the advertiser's supplement. Several other studies were only available as abstracts, and thus lacked the detail necessary for proper evaluation. In conclusion, NAD recommended that the advertiser discontinue the claims.

Eco-Friendly Claims Under Scrutiny

Dietary supplements claims are not the only category of claims monitored by NAD. Several of the recent decisions involved NAD scrutiny of green claims. In one, NAD initiated an examination of claims made by Energizer about its EcoAdvanced recycled batteries. *See Energizer Holdings, Inc.; EcoAdvanced Recycled Batteries*, Case No. 5893 (Oct. 19, 2015). Energizer's advertising included claims such as "contain 4 percent recycled batteries for less impact on the environment" and Energizer EcoAdvanced creates less impact on the planet." Based on Energizer's description of the process by which it recycles one of the metal elements of alkaline batteries for use in its EcoAdvanced batteries, together with other supporting evidence such as a life-cycle analysis showing reduced energy demands and natural resources impact, NAD concluded that Energizer had reasonably supported its claims. NAD did, however, recommend that Energizer display disclosures describing the amount of recycled content in the batteries (4 percent) in closer proximity to the main claim.

NAD also brought a monitoring case in *Hydro Toys: Zorbz Water Balloons*, Case No. 5897 (Oct. 27, 2015). Hydro Toys advertised Zorbz as "environmentally friendly" and "100 percent biodegradable" water balloons. The advertiser noted that almost every competing company advertised latex balloons as environmentally friendly and biodegradable, but admitted that the balloons are only U.V. biodegradable and thus not biodegradable in landfills, and agreed to discontinue its claims.

In another case involving eco-friendly claims, *Gobble, Inc: Gobble Meal Delivery Service*, Case No. 5896 (Nov. 16, 2015), NAD examined claims by a meal delivery service that its packaging materials were "100 percent eco-friendly." The advertiser maintained that it made the claims in good faith, but agreed to discontinue them based upon NAD's concerns about the breadth of the environmental claims conveyed by broad, unqualified eco-friendly claims.

In addition to cases brought by NAD itself, NAD also heard a competitive challenge focused on environmental marketing. In *New WinCup Holdings, Inc.: Vio Cups*, Case No. 5902 (Nov. 9, 2015), the advertiser touted the biodegradability of its cups, describing them as a "breakthrough biodegradable foam cup" with a superscript explaining that the cups had been "shown to biodegrade 84.3 percent after 1154 days under conditions of a wetter, biologically active landfill, using the ASTM D5511-11 test." NAD concluded that the advertiser's ASTM testing was adequate substantiation because it was a narrowly tailored claim, and therefore did not require testing a broad variety of moisture levels as the challenger had suggested. NAD further found that the advertiser had sufficient support, using information such as EPA data on the percentage of U.S. populations living in areas with "wetter" landfills, to rely upon its qualifying language, but recommended adding the additional qualifier "wetter, biologically active landfills may not exist in your area. NAD also recommended that the disclaimer appear more conspicuously and in closer proximity to the biodegradable claim, rather than at the very bottom of the advertiser's webpage.

Competitive Challenges of Implied Claims

In addition to the numerous recent monitoring cases, NAD also resolved several traditional competitive challenges.

In *Transitions Optical, Inc.: Transitions Signature VII Flat Top 28 Polycarbonate Composite Lenses*, Case No. 5894 (Oct. 20, 2015), the maker of a competing contact lens challenged implied claims that Transitions Signature "Polycarbonate Composite Lenses" were comprised almost entirely of polycarbonate. (Polycarbonate is noted as a desirable substance for contact lenses because of its functionality and high durability.) NAD agreed with the advertiser that the target audience of optical laboratories and other professionals were unlikely to be misled into thinking that the "composite" lenses were 100 percent polycarbonate, and thus that the advertiser's claims were reasonably supported.

In *T-Mobile USA: T-Mobile Wireless Services*, Case No. 5899 (Oct. 28, 2015), AT&T challenged T-Mobile's "ditch and switch" advertising campaign. The T-Mobile advertisements claimed that T-Mobile would "pay off your phone ... every last cent" for consumers who switched from a current competing plan to T-Mobile. AT&T contended that the ads falsely implied that T-Mobile would promptly cover all costs of the switch, when in fact the actual plan only provided a delayed and partial reimbursement of costs. NAD agreed, finding that the ad's disclaimers that reimbursements would be "up to \$650 per phone" failed to correct the implication that consumers would receive cash to directly pay off their prior phone contract, rather than credits toward the new phone that might not become available until well after their prior obligations had to be paid. Accordingly, NAD determined that T-Mobile's claims that it would pay off "every last cent" were literally false, and recommended they be discontinued.

Takeaways for This Month

One lesson from this final round of NAD cases for 2015 is to remember that NAD maintains its own very active monitoring role, especially around highly sensitive claims involving dietary supplements and environmental benefits. In addition, advertisers need to continue to be on the lookout for the implied claims that can be associated with strong competitive claims, and, in particular, recognize that a competitor need not be identified by name to be considered the target of an advertisement or to trigger an NAD challenge.

Other Articles in This Month's Edition:

- [CPSC Civil Penalty News: Philips Lighting N.A. Agrees to Pay \\$2 Million Penalty](#)
- [Revised EU Novel Foods Regulation Simplifies Approval Process, Increases Food Innovation, and Maintains High Food Safety Standards](#)
- [Highlights of OEHHA's New Draft Warning Regulation – A Win for California Businesses?](#)
- ['Tis the Season ... For Supplements](#)

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