

CLIENT ALERT

Advertisers in the Ring — A Roundup of This Month's Competitor Advertising Challenges: Resolve to Watch the Scope of Claims — and NAD Jurisdiction

Jan.29.2016

Below, we provide a high-level summary of some of the NAD decisions from the past month. A summary of last month's [NAD decisions](#) can be found [here](#).

New Year's Trim Down? Not for NAD's Docket of Dietary Supplement Matters

In 2015, dietary supplements dominated NAD's issued decisions. We saw NAD criticize overly broad performance claims related to weight-loss products, *see, e.g., Slimgenics, LLC: SlimGenics Weight-Loss Clinic*, Case No. 5807 (Feb. 3, 2015). And we saw NAD recommend the addition of qualifying language to establishment claims for muscle-growth supplements. *See, e.g. Iovate Health Sciences International, Inc.: Six Whey Protein Plus*, Case No. 5831 (April 14, 2015).

As consumers gear up for reinvigorated diet and fitness regimes in early 2016, advertisers will be competing to get their messages out. Whether about diet and fitness supplements, or products touting other benefits, advertisers should keep in mind the lesson from NAD's prior decisions. Claims that exceed available support will face negative scrutiny. Two recent NAD decisions illustrate this very point:

In *Brock Beauty, Inc.: Hairfinity Hair Vitamin*, Case No. 5904 (Nov. 23, 2015), the maker of a competing hair health supplement challenged claims by Brock Beauty that its Hairfinity vitamin was "clinically proven" to decrease the number of hairs shed, and also that it "nourished hair from inside out." The advertiser did cite a clinical study to support the claims, but the study had no placebo and the products in the study were not blinded. NAD found these two study flaws to be particularly significant and determined that the study was an insufficient basis for the claims at issue. NAD also rejected the methodology used to evaluate hair shedding, in which study participants were required to keep and count hairs they shed over a 90-day period. NAD questioned the ability of participants to keep an accurate count of individual hairs lost, and to do so consistently for 90 days straight. Accordingly, NAD recommended that Brock Beauty discontinue the challenged claims. The takeaway? A "clinically proven" claim cannot be supported by a *flawed* clinical study.

NAD also examined another dietary supplement matter as part of its ongoing monitoring function. In *Neuracel.com LLC: Neuracel Pain Relief*, Case No. 5907 (Dec. 7, 2015), NAD examined claims that the Neuracel product relieved nerve pain, including a variety of testimonials such as "his tingling, numbness and pain are COMPLETELY GONE! And even more, he has been able to go off Lyrica" and "no longer takes meds at night." NAD expressed great concern that the ads implied that Neuracel eliminated nerve pain so effectively that consumers on prescription medication could obtain better results with Neuracel. NAD noted that such claims were unsupported, and potentially dangerous. In response to the advertiser's proposed disclaimers, NAD concluded that advising consumers to consult a physician first or indicating that results may vary would be insufficient to cure the potentially deceptive nature of the advertising. NAD also noted that, even though the ads at issue appeared on a website

owned and operated by Neuracel's prior owner, "advertisers apprised of inaccurate or unsupported claims being made about their product that appear in third-party advertising should take steps to ensure that such claims are promptly discontinued."

Powering Into 2016, NAD Asserts Its Jurisdiction

Two recent NAD cases involved challenges to NAD's jurisdiction, in addition to the substance of the underlying advertisements.

In *DirectTV, Inc.: 4K, Wireless, Price, Free Upgrade*, Case No. 5906 (Nov. 30, 2015), Chart Communications, a competing cable operator, challenged various claims made in a series of DirectTV ads. Before addressing the substantive issues in the case, NAD concluded that it retained jurisdiction to decide the matter even though the television commercials were no longer airing, because the ads were available on DirectTV's website and its YouTube channel, and DirectTV had not represented that it would permanently discontinue its claims.

NAD then turned to the merits. Chart Communications took issue with several claims in the DirectTV ad campaign, including claims about 4K technology, wireless service, and \$19.99/month pricing.

- DirectTV advertised that its service "has 4K, the best picture format available." The challenger argued that DirectTV only provided a limited number of 4K programs, and that its disclaimer was insufficiently conspicuous to defray the impression that 4K would be widely available. NAD noted that DirectTV is one of the first to offer any 4K content, and that advertisers should be able to convey technological benefits. However, NAD was concerned about limitations of the still-emerging 4K technology. Ultimately, NAD recommended that DirectTV modify its message to better communicate the developing nature of the 4K format, such as "Introducing 4K, a new and growing innovation in TV picture quality."
- DirectTV advertised its product as wireless, and urged consumers to "say goodbye to messy cable wires and boxes." NAD disagreed with the challenger's position that reasonable consumers would understand a claim of "wireless" to mean totally wire free. However, NAD did recommend clarifying the claims about eliminating boxes and wires, because DirectTV's small, sleek box could be hidden from view, but the "say goodbye" claim might suggest to consumers that no box was needed or that it could be hidden in all configurations, when it actually could only be hidden from view when placed behind a wall-mounted TV.
- DirectTV concluded its commercial with the statement "get rid of cable and upgrade to DirectTV" followed by the price of \$19.99/month. The price included a "plus add'l fees" disclaimer. NAD acknowledged the need, when advertising multi-faceted pricing plans, to balance disclosing information with conveying an understandable message. However, NAD found that the "plus add'l fees" disclaimer was insufficient, and recommended instead a clear statement that \$19.99/month was the price for the base package, which did not include the 4k or the wireless features touted in the same commercial.

In a decision about a very different product—string cheese—NAD again analyzed the scope of its own jurisdiction. In *Saputo Cheese USA, Inc.; Cheese Heads String Cheese Products*, Case No. 5909 (Dec. 9, 2015), the advertiser argued that NAD lacked jurisdiction to decide a case involving a complex FDA standard for product identity. NAD conceded that it has no authority to determine if a product is misbranded under FDA regulations, but found that it could use regulatory guidance when considering the truth and accuracy of advertising messages. NAD then proceeded to examine whether Saputo falsely advertised certain of its

string cheese as "low moisture, part-skim mozzarella" and as "naturally nutritious." Challenger Lactalis American Group alleged that Saputo's product contained artificial phosphates and thus that, in accordance with the FDA regulation, this "filler" precluded the product from being labeled "low moisture part-skim mozzarella."

NAD disagreed that the mere presence of phosphate, or a certain level of phosphate, proved that the product contained synthetic filler that was prohibited by the FDA definition. NAD also did not believe consumers would have any expectations regarding phosphate inclusion or absence when buying a product identified as "low moisture, part-skim mozzarella." Accordingly, NAD found the product description to be reasonably supported based upon the moisture and milk fat content of the cheese. NAD also concluded that, unlike Saputo's previously discontinued claim of "100% natural," Saputo's claim of "naturally nutritious" did not suggest that the product was entirely natural, and thus could be upheld.

Takeaways for This Month

Kicking off 2016, be prepared to see challenges to overly broad claims, especially for dietary supplements, on NAD's docket. In addition, NAD's jurisdiction can't be defeated by partial removal of an advertisement, without a promise to cease further use, or by the mere existence of a related federal regulation.

Other Articles in This Month's Edition:

- [Sports Stars Take on Video Game Makers: Right of Publicity or First Amendment? The Supreme Court May Decide](#)
- [Sluggers Hit News Network with Defamation Suit Over Reports of Performance-Enhancing Drugs](#)
- [Spurned St. Louis Rams Fans Sue L.A.-Bound Team for Deceptive Marketing](#)
- [Battling Counterfeits: Supply Chain Management and Regulatory Tools Help Protect against Harmful Counterfeit Products](#)
- [Hoverboards: Gliding Toward Oblivion?](#)
- [Supreme Court Limits Effect of Rule 68 for Class Actions in *Campbell-Ewald*](#)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.