

Recent Cases and Developments before the National Advertising Division

SPLINTEK, INC., Sleep Right Dental Guards, Case #5803 (1/20/15)

Claims that a product is the “#1 Brand Prescribed by Dental Professionals” must be supported by highly reliable evidence, namely well-conducted surveys of dental professionals based on their actual experience and what they do in their daily practice.

Summary:

Prestige Brands, Inc., maker of The Doctor’s NightGuard products challenged claims made by Splintek in print and digital advertising and on product packaging for its “Dura-Comfort” and “Slim-Comfort” dental guards. NAD considered but was not persuaded by the advertiser’s argument that because it is the only brand of dental guard available by prescription, the “#1 Brand Prescribed by Dental Professionals” is supported. NAD noted in its decision that a claim that a product is the #1 brand prescribed by a professional reasonably conveys the implied message that professionals have a choice in prescribing brands, and choose one brand over another.

NAD also examined the results of the advertiser’s survey of 1,000 “dental professionals” and determined it was insufficient to support the claim. NAD noted that the survey, conducted by Splintek employees, was not blinded and did not screen to assure respondents were dental professionals. Of the 111 individuals who responded, most reported that they did not prescribe dental guards. Of those who did prescribe the products, only 14 said they prescribed SleepRight dental guards.

THE PROCTER & GAMBLE COMPANY, Swiffer Sweeper, Case # 5795 (12/23/14)

Claims that the advertiser’s product cleans floors “50% more” and “leaves floors up to 3X cleaner” than brooms on “dirt, dust and hair” imply that the product significantly outperforms all brooms on all household surfaces, a message that was not supported by the evidence in the record.

Summary:

The Libman Company, maker of Libman brooms challenged comparative claims made by Procter & Gamble for its Swiffer Sweeper including: “Swiffer Sweeper Leaves your floors up to 3X cleaner than a broom” on dirt, dust and hair” and Swiffer Sweeper “Pick[s] up 50% more dirt, dust, and hair than with a broom.”

NAD determined that the challenged claims, which appeared prominently in the challenged advertising and on product packaging, conveyed the unsupported message that the Swiffer Sweeper significantly outperforms all brooms on all household surfaces. Procter & Gamble attempted to qualify this claim with the disclosure “on dirt, dust & hair,” but, according to NAD, the testing offered to support the claim, even with the qualification, was too limited. Notably, NAD said, the advertiser tested only two brooms. There was no evidence in the record that the two brooms represent or perform similarly to the vast majority of the brooms in the marketplace. Further, the advertiser tested only hardwood, vinyl, and ceramic tile. While Swiffer

Sweeper may not be intended to be used on all surfaces, the challenged advertising failed to limit the claim to any of the tested surfaces.

Even if the challenged claims were qualified to specify the brooms against which the advertiser tested, NAD had concerns that consumers would not understand the material characteristics of the advertiser's test soil, which was sifted to eliminate larger particles. Further, NAD was troubled by the small test area used in its comparative performance study – 9 ft – which constitutes a small fraction of the size of the rooms in which the Swiffer Sweeper or a broom would typically be used.

NAD found the advertiser's evidence to be materially flawed and recommended that P&G discontinue the challenged claims.

ADD-CARE, LLC, ADD-Care Dietary Supplements, Case #5785 (11/12/14)

In a challenge to a dietary supplement maker's express and implied claims, NAD reminds advertisers that they must support health-related claims with by competent and reliable scientific evidence.

Summary:

ADD-Care sells homeopathic dietary supplements purporting to alleviate the conditions of attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD), enhancing users' clarity and focus and providing a natural alternative to prescription stimulants. In addition to making general claims that the supplements help with various symptoms of ADD/ADHD, such as impulsivity and concentration, ADD-Care advertised that brain imaging tests demonstrated the supplements' efficacy. The ads included scientific-sounding statements such as: "[T]he ADD-care® supplement seemed to indicate overall performed 25% as well as the stimulant with the cerebellum, and was 100% better with the cingulate system, 90% better with the basal ganglia, and 75% better with the limbic system"; and "During each scan the Connors ADD test was administered ... [and] ADD-care® matched the popular stimulant on performance." The company also ran YouTube video testimonials, featuring individuals who claimed to have successfully treated ADD symptoms with the supplements.

The Council on Responsible Nutrition (CRN) challenged the advertiser's express and implied claims that the supplements treat symptoms of ADD/ADHD. The CRN expressed concerns that the ads could cause consumers to forgo conventional treatment (prescription stimulants), and criticized the medical claims as misleading and lacking scientific support. The ads pointed to case studies using the Connors ADD test, but the sample consisted of only four subjects.

NAD agreed with CRN that the individual case studies lacked validity and reliability: "Here, the observational study of four subjects after a dose of ADD-care is not sufficiently reliable to support the claims made here." NAD reaffirmed that well- controlled clinical studies are the most reliable form of evidence; it further noted that softening a health claim by adding words such as "helps to" or "may help" (to deliver certain health benefits) does not remove the need for competent scientific evidence.

NAD recommended that the advertised discontinue its claims that ADD-Care improves focus,

clarity, and alertness and relieves symptoms of hyperactivity, impulsiveness, inattention, forgetfulness, anxiety, as well as claims that it relieves “symptoms consistent with ADD and ADHD.” NAD also recommended that the advertiser take down its links to the YouTube testimonials, noting the FTC’s warning that advertisers not use consumer testimonials to make claims it could not make directly, due to a lack of reliable scientific evidence.

**Fareportal Inc. (CheapOair.com and OneTravel.com), Case #5789 (12/08/14)
Short Summary**

NAD finds that online travel agency’s Google’s ads were misleading and recommended their discontinuation. Some of the contested ads referred to low-priced airfares to the destination referenced in a user’s search (e.g., “Houston \$149 airfares”) even though the listed airfares did not correspond to available fares between the cities included in the user’s Google query (e.g., “flights from Miami to Houston”), while others advertised discounted fees, without disclosing that the discounts only applied to the travel agency’s own, fairly steep, fees.

Summary:

The online travel agency, Expedia, challenged a number of search engine advertisements run by the competing travel agency Fareportal Inc. The NAD decision addressed several different ads, each of which NAD found to be misleading.

First, Fareportal pays for certain Google ads which include fares for flights to destination locations, such as “Houston \$149 Airfares – CheapOair.com,” and which appear when a user searches for fares between specific destinations on Google. Clicking on the ad directs the user to the CheapOair.com home page, where a user may then search fares and discover that the advertised fare is not available for those cities. Expedia argued that the ads are misleading as they suggest that the listed fare (e.g., \$149) applies to the searched flight segment. NAD agreed that the ads were misleading, because a consumer might reasonably assume that the listed price refers to prices for flights between the origin and destination included in the search.

Second, Expedia challenged ads that announced: “Save up to \$15 OFF fees. Book Now!” and “Best Price Guarantee... Find our lowest price to destinations worldwide, guaranteed.” NAD agreed that the fees, although technically accurate, were misleading because they did not clarify that the fees were fees charged by the advertising travel agency, rather than airline fees. Again, although the express claims as to discounted fees were not false, they were misleading; a consumer might assume that the discounts applied to airline fees and believe that they would be receiving a discount over the lowest published fare, as opposed to discounted booking fees charged by the agency. (Many online travel agencies do not charge booking fees at all.) Consistent with an earlier decision by NAD involving Fareportal, NAD recommended that the ads be discontinued unless they clearly disclosed that the discounts applied only to booking fees.

Finally, NAD considered the terms of the advertiser’s “Best Price Guarantee.” The challenged guarantee gives Fareportal, rather consumers, the option of refunding the price difference or refunding the entire ticket price if the consumer finds a lower fare within 24 hours of booking. NAD found that this policy does not necessarily give the consumer the expected benefit—“the ability to purchase a lower priced ticket.” NAD therefore recommended that the guarantee be discontinued or modified so that consumers can, at their own option, receive either a full refund or require a matching fare.

Sumo Logic, Inc. (Cloud Log Management), Case #5788 (12/02/14)

Although the advertiser, a manufacturer of software for computer log management and analytic systems, voluntarily discontinued its comparative claims prior to a full NAD examination, NAD affirmed that comparative claims “must be narrowly drawn to avoid falsely disparaging a competitor’s product.”

Summary:

This challenge was brought by Splunk, a “machine data” analytics company, against certain advertisements run by its competitor, Sumo Logic. Splunk contended that Sumo Logic’s advertisements falsely claimed that the Sumo Logic software product had a variety of capabilities beyond those offered by Splunk. Most particularly, the advertisements included comparison charts depicting various capabilities that the competing products had in common, as well as listing a number of extra functions performed by the Sumo Logic product. Among other things, Splunk contended that Sumo Logic misleadingly omitted from the chart capabilities offered by Splunk but not by Sumo Logic. The comparison charts, in essence, created the impression that the Sumo Logic product offered more functionality and therefore more value.

Because the advertiser, Sumo Logic, voluntarily modified its marketing campaign and discontinued the ads (even while maintaining their accuracy), NAD did not analyze the substantive merits of the claim. However, NAD reminded that advertisers bear the responsibility of ensuring that comparative claims are accurate and not misleading. They must be “narrowly drawn to avoid falsely disparaging a competitor’s product.” This is especially true, NAD warned, in an environment such as technology, where consumers have no means of independently verifying the accuracy of an advertiser’s claims.

The MOM Brands Company (Malt-O-Meal Cereals), NAD Case No. 5782 (11/5/14)

Cereal brand must support taste superiority and preference claims with taste tests that sample consumers who customarily use the products being compared and that comply with ASTM Guide’s recommendations concerning the geographical diversity for test sites.

Summary:

This case resulted from a challenge by Post Food, LLC (Post) to taste-preference claims used by MOM Brands Company (MOM) for four of its Malt-O-Meal brand cereals, such as “MOM Oat Blenders with Honey & Almonds Preferred Over Post Honey Bunches of Oats with Almonds!” and “National Taste Test WINNER Fruity Dyno-Bites preferred over Post Fruity Pebbles.” Post asserted that the preference claims were not properly substantiated by taste tests that met NAD’s standards or guidelines set forth in ASTM’s Standard Guide for Sensory Claim Substantiation, E1958 (ASTM Guide). NAD agreed, finding two major flaws with the taste tests MOM brand commissioned: the constitution of the surveyed population and number of test centers within each geographic region.

The MOM’s taste tests involved the target market for *purchasers* of the products – men and women between 30 and 64 – rather than individuals who actually consumed the cereals, and therefore excluded a high percentage of actual consumers of the product. NAD found that the

MOM's "National Taste Test Winner" claims conveyed the message that a representative sample of sweetened breakfast cereal users preferred its products over the Post's but, by limiting the taste test to breakfast cereal purchasers, the advertiser excluded more than half of the actual product *users* in the product category, including consumers younger than 30 and older than 64. As a result, NAD determined that the taste tests were insufficiently reliable to serve as a reasonable basis for MOM's taste preference claims and recommended that the advertiser discontinue the claims.

Post also argued that the test violated the ASTM Guide's recommendation concerning the geographical diversity for test sites since the test by only including one test market in the Northeast region. The ASTM Guide recommends a minimum of two markets in each of four major census regions. While the advertiser countered that it conducted testing in 10 distinct geographic locations, and that its use of only one testing center in the Northeast was reasonable due to its lower market share in that area, NAD found the use of only one Northeast testing center was "a significant deviation from the industry standard." In addition, while MOM may have less market penetration in the Northeast, its advertising claimed that its products won a "National Taste Test," sending "a broad, strong message regarding the taste preferences of the overall population of sweetened breakfast cereal consumers." NAD also noted that, although MOM's products may have less of a presence in the Northeast, this may not necessarily be true for Post's products. Nor does it mean that the region does not have a significant population of consumers of sweetened breakfast cereal.

NAD disagreed with Post's contention that MOM's commercial for Fruity and Cocoa Dyno-Bites, which included the statement "[i]n a national taste test, Malt-O-Meal Dyno-Bites are preferred over Post Pebbles Cereal" conveyed an unsupported taste preference claim for the entire product line. NAD determined that the images accompanying the claim – two of the MOM's cereals (Fruity and Cocoa Dyno-Bites) and two of Post's cereals (Fruity and Cocoa Pebbles), adequately limited the advertising message to those cereals pictured and, in that context, conveyed no line claim.

Finally, NAD concluded that MOM provided a reasonable basis for its product volume comparison claims, which included claims that MOM's Cocoa and Fruity Dyno-Bytes packages contained "50% More – Compared to Fruity [or Cocoa] Pebbles cereal 15 oz. box." The advertiser's 22.5 oz. cereal bags, which are 50 percent larger than Post's 15 oz. cereal boxes, are the most relevant package sizes for comparison purposes. NAD rejected Post's argument that its 40 oz. bags compete with the MOM 22.5 oz. cereal bag as unsupported by the record. While it agreed with parts of NAD's decision, MOM Brands plans to appeal to the NARB on the issue regarding the age groups sampled as well as the required number of taste test locations.