

Using Self-Regulation (NAD) For Advertising Disputes

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Today's Speakers

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Today's Agenda

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- False Advertising Disputes and Introduction to NAD
- Issues in Claim Substantiation and Recent Cases at NAD
- Use of Survey Evidence at NAD
- Navigating the NAD Process
- Questions



Types of Statements that May Give Rise to False Advertising Liability

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- Advertisements and promotional materials
- Product names and slogans
- Corporate press releases
- Training materials and scripts provided to sales associates
- Statements posted by corporate employees on Internet message boards
- Statements made by street team members and bloggers who are promoting a company's product at the company's request



Consequences of False Advertising

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- Network refuses to run advertisement
- Court declares advertisement false and orders company to immediately cease any further distribution
- Fines paid to FTC and state Attorneys General
- Damages in competitive lawsuits
- Settlements/damages in consumer class actions



Enforcement of Laws Against False Advertising

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- The FTC and other federal agencies
- State Attorneys General
- Competitors, through lawsuits under federal and state law (such as the Lanham Act and state consumer protection laws)
- TV Networks, through their Broadcast Standards Departments
- Consumers, through individual suits and class actions under federal and state law
- And... self-regulatory programs



Self-Regulation of the Advertising Industry

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NAD

National Advertising
Division

CARU

Children's Advertising
Review Unit

ERSP

Electronic Retailing Self-
Regulation Program

Online Interest-
Based
Accountability
Program (with DAA)

NARB

National Advertising
Review Board

Self-Regulatory Governance

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The Board of the Advertising Self-Regulatory Council is composed of representatives from:



NAD (National Advertising Division)

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- Created in 1971
- Industry funded
- Voluntary dispute resolution
 - Between competitors
 - Consumer complaints
 - NAD-initiated proceedings
- Some unresolved cases are referred to the FTC



Competitive Challenge Options: Court

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- Harder to prove false advertising
 - Survey required to prove implied claims
 - Challenger must prove claim is false

- Broader remedies
 - Preliminary injunction possible in 4 to 6 weeks, maybe less
 - Monetary damages, corrective advertising, and disgorgement of profits
 - Attorney's fees and costs

- Greater publicity, risk and expense
 - Proceedings are public from day complaint is filed
 - Counterclaims permitted
 - Discovery permitted



Competitive Challenge Options: NAD

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- Easier to prove false advertising
 - NAD free to discern implied messages, even without survey
 - Advertiser must demonstrate claim is adequately substantiated

- Limited remedies
 - 4 to 6 months for decision
 - Sole remedy is NAD recommendation, although threat of FTC referral creates strong incentive for compliance
 - Each side bears its own costs

- Less publicity, risk and expense
 - Proceedings are confidential until NAD publishes decision
 - Counterclaims not permitted
 - No discovery permitted and parties retain discretion as to what materials they submit



Issues in Claim Substantiation

An Advertiser Must Substantiate All Claims

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- Advertiser must be able to “substantiate” all claims communicated by an advertisement.
- Claims may be expressly stated or implied.
- Intent to deceive is irrelevant – even an unintended claim requires substantiation if the claim is being communicated to a significant percentage of reasonable consumers.
- Consumer surveys are often used to demonstrate what claims are being implied by advertisements.



Substantiation: General Rules

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- General rule is that advertiser must have a “reasonable basis” for each claim communicated by its advertisement.
- Substantiation must exist prior to dissemination of the claim.
- What is the express claim?
- What are the implied claims?
- Is there a good fit?



Issues in Claim Substantiation

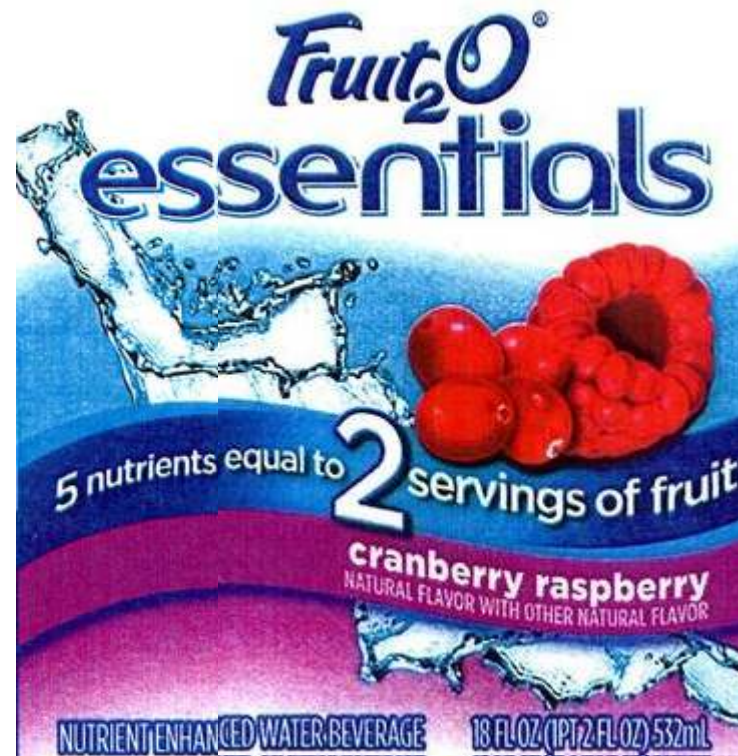
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- Implied Claims
- Product Testing
- Health Claims
- Product Disparagement
- Consumer Relevance
- Green Claims
- Use of Disclosures
- Social Media and Digital Media



Literally Truthful but Misleading?

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Sunny Delight Beverage Co (Fruit 2O Essentials), NAD Case #5182 (May 2010).



Literally Truthful but Misleading?

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Implied Claims: Verizon Smartphone Internet Ad

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The advertisement features a red header with the text "4G LTE" in large white letters. To the right of this, it says "VERIZON 4G LTE SMARTPHONES. Twice as fast as any AT&T smartphone." Below the header, three smartphones are displayed on a grey, textured background. From left to right: the LG Revolution with a red screen and "NETFLIX" text; the Samsung Droid Charge with a red circular graphic; and the HTC Thunderbolt with a lightning bolt graphic and "THUNDER BOLT by htc" text. Below each phone is a red "BUY NOW" button.

Verizon Wireless, Inc. (Verizon 4G LTE Smartphones),
NAD Case #5411 (Feb. 2008).

Implied Claims: Verizon Smartphone Internet Ad

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- **Advertiser's position:** Verizon's 4G LTE network transmits data to and from Verizon cellphones and other mobile devices at speeds that are twice as fast as those available from AT&T's network, which challenger admitted was true.
- **Challenger's position:** Claim also communicates that the internal processor speed of Verizon's 4G LTE smartphones is twice as fast, which advertiser admitted was false.
- **Decision:** Advertisement could reasonably communicate that smartphones operate twice as fast.

Verizon Wireless, Inc. (Verizon 4G LTE Smartphones),
NAD Case #5411 (Feb. 2008).



NAD and Health-related Claims

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- “Smooth dark chocolate covered real fruit juice pieces.”
- “Natural Source of Flavanol Antioxidants”

The Hershey Company, NAD Case #5688 (2014).

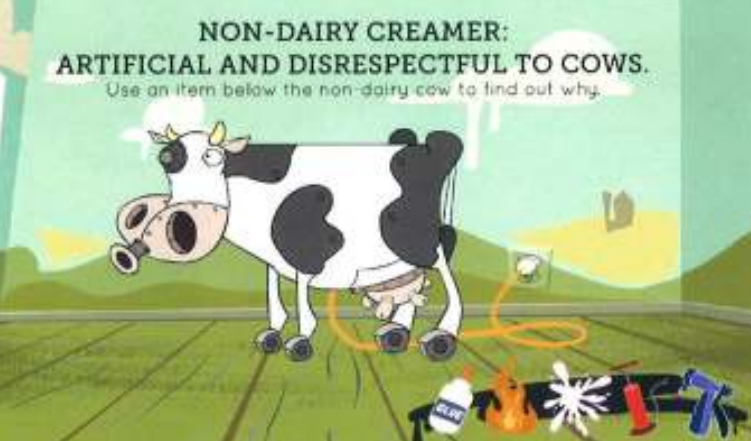
Product Disparagement

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La Crème® ASKS:
where does non-dairy creamer come from?
✓ time to find out. click here.

**NON-DAIRY CREAMER:
ARTIFICIAL AND DISRESPECTFUL TO COWS.**
Use an item below the non-dairy cow to find out why.



NON-DAIRY COW TIP:
Some non-dairy creamers contain ingredients also used in paint.

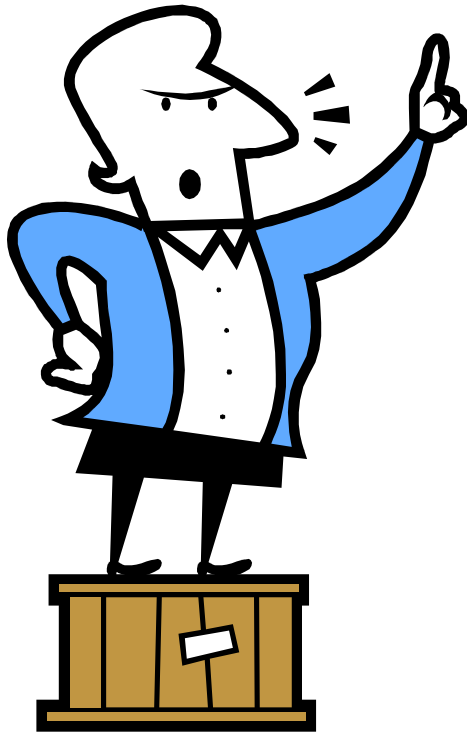


SHARE THE TRUTH.
LEARN ABOUT LA CRÈME.
POST ON FACEBOOK.

[LaLa USA \(La Crème\)](#), NAD Case # 5359

Puffery

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“...a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk.”

Prosser and Keeton on the Law of Torts § 109, at 757 (5th ed. 1984).

Sensory Claims

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What is the message reasonably conveyed by claims that Refresh paint “eliminates household odors” and has “odor eliminating technology”?

The Sherwin-Williams Company (Dutch Boy Refresh Paint, Inc.), Case #5148 (March 2010), NARB Panel Report #165 (November 2010).



Sensory Claims

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- “Helps control everyday garbage odors”
- “Reduce the odors associated with everyday household trash”

Pactiv Corporation (Hefty OdorBlock Trash Bags),
NAD Case #5105 (November 2009).

Claim Substantiation with a Body of Evidence

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- Reasonable Basis

- Pfizer Factors
 - Type of product
 - Type of claim
 - Benefits of the claim if it is true
 - Consequences if the claim is false
 - Ease and cost of developing substantiation
 - Level of substantiation experts in the field would agree is reasonable

- Industry Standard or Expert Consensus

- Consumer Relevance



Issues in Claim Support

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- Laboratory Testing?
- Descriptive Panels?
- Consumer Testing?

- Is there an industry standardized test?
- Is the methodology sound?
- Did the study test the actual products at issue?
- Can a correlation be drawn between the test results and the challenged claims?
- Is the test consumer relevant?



Green Claims

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mark.
clean up time

CONDITIONING BATH SOAP
SAVON REVITALISANT POUR LE BAIN

Made with Fair Trade Certified™ ingredients:
SHEA BUTTER, COCOA BUTTER, WHITE TEA EXTRACT
Fabriqué à partir d'ingrédients certifiés équitables
selon le label Fair Trade Certified™
**BEURRE DE KARITÉ, BEURRE DE CACAO,
EXTRAIT DE THÉ BLANC**

Contains 3 Bar Soaps / Contient 3 savons
96.4 g NET WT 3.4 OZ EA/CH.

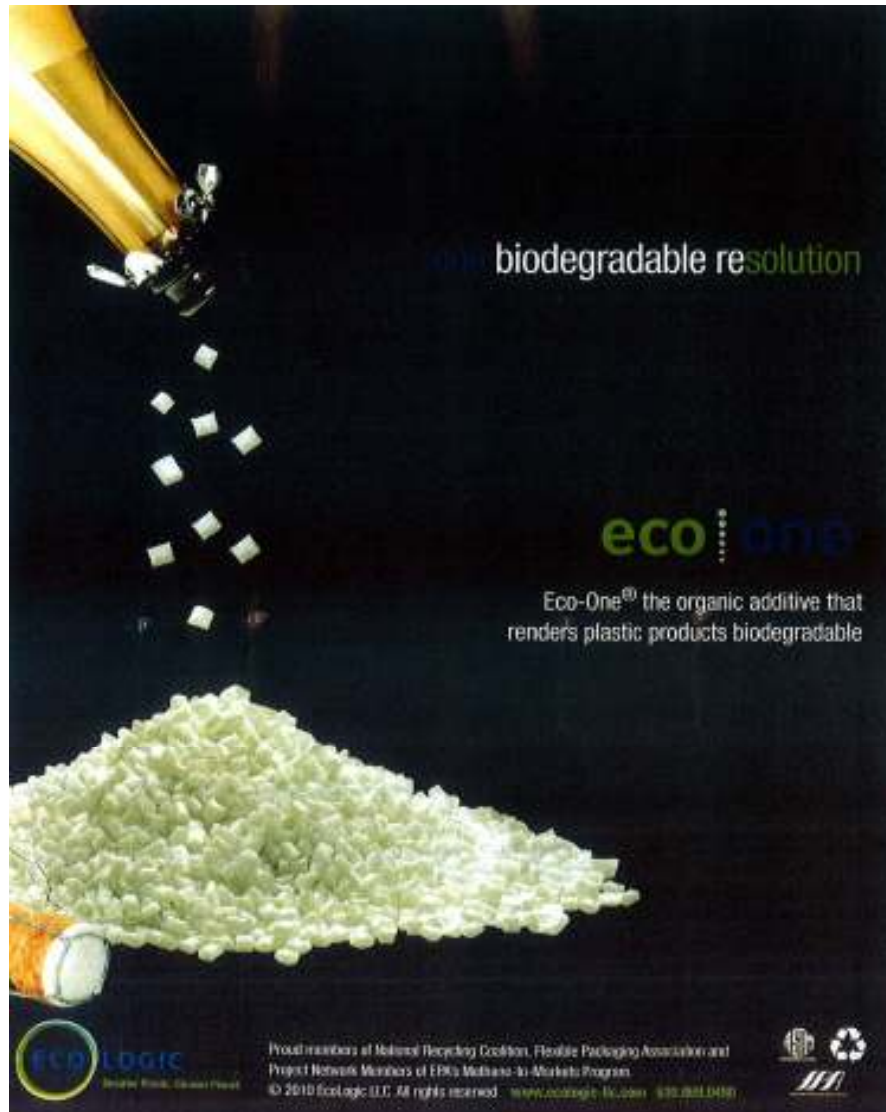


TransFair USA (Fair Trade Certified Ingredients Seal), NAD Case #5337 (2011).



B2B Advertising

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... biodegradable resolution

eco...one

Eco-One[®] the organic additive that renders plastic products biodegradable

ecologic
Recycle. Reuse. Reclaim. Repeat.

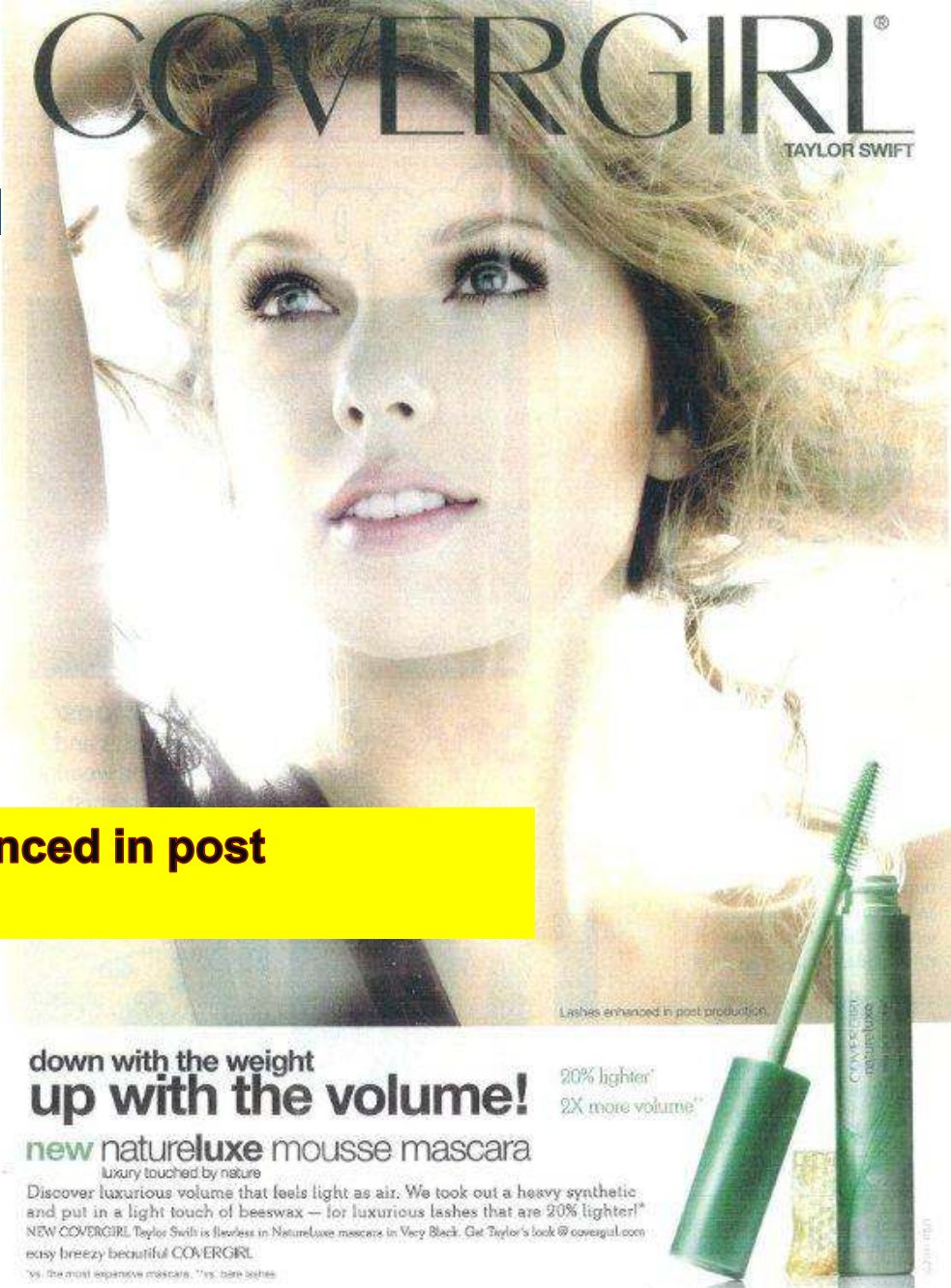
Proud members of National Recycling Coalition, Flexible Packaging Association and Project Network Members of EPA's Multistate-to-Markets Program
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“The organic additive that renders plastic products biodegradable”

Ecologic, NAD Case # 5388 (2011).

Disclosures

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COVERGIRL®
TAYLOR SWIFT

“lashes enhanced in post production.”

Lashes enhanced in post production.

**down with the weight
up with the volume!** 20% lighter*
2X more volume**

new naturelux^e mousse mascara
luxury touched by nature

Discover luxurious volume that feels light as air. We took out a heavy synthetic and put in a light touch of beeswax — for luxurious lashes that are 20% lighter!*
NEW COVERGIRL Taylor Swift is flawless in NatureLuxe mascara in Very Black. Get Taylor's look @ covergirl.com
easy breezy beautiful COVERGIRL

*vs. the most expensive mascara. **vs. bare lashes

COVERGIRL naturelux^e mascara

**Cover Girl, NAD Case Report
5400 (2011).**

Native Advertising and Social Media

- A magazine article under a “News” heading that promotes a product.
- No disclosure about who created the article.

Live Healthy

NEWS



WATER WORKS!

Quenching your thirst keeps you healthy and energized, but sometimes plain water is just so, well, plain. Here's a tasty (and nourishing) new way to be certain you're getting ample H₂O.

It gets short shrift, but staying hydrated is just as important as the rest of your health and beauty regimen: About 60 percent of your body is water, and being even mildly parched—a likely possibility, considering that fluid loss occurs throughout the day—may lead to problems such as fatigue, headaches, and weight gain.

People who are active need to be extra diligent about sipping. The American College of Sports Medicine warns that failure to drink up before, during, and after prolonged exercise puts you at risk for heat exhaustion. Losing just 2 percent of your bodily weight from fluid, which can even happen during the cooler months, impacts speed and endurance.

Drink more, slim down

Regularly wetting your whistle may also help you reach your goal weight. Researchers from Virginia Tech found that people who downed two glasses of water 20 to 30 minutes before eating consumed 75 fewer calories during each meal and shed pounds more quickly than dieters who didn't pre-hydrate. German researchers have also shown that water slightly boosts metabolism because it requires energy to process it.

Other good reasons to hit the (water) bottle include banishing bloat, warding off constipation, beating fatigue, and clearing out toxins (including those found in alcohol).

So, are you getting enough?

It's unlikely. Although the exact amount of water you need varies from person to person (dark urine is a sign you're lacking), the Institute of Medicine (IOM) suggests that women aim for nine cups a day. (For guys, it's 13 cups because of their higher muscle mass.) But 43 percent of adults get less than four!

The IOM guidelines don't strictly refer to plain H₂O: water-rich foods like soup and fruit count too, as do other beverages. But if you rely heavily on sugary drinks, your waistline is going to pay the price: A 20-ounce "single-serve" bottle of soda contains 240 calories (similar to a candy bar). And about 7 percent of the total calories in the typical American's diet come from soft drinks alone, according to the Center for Science in the Public Interest.

The obvious solution is to stick with water, but about 20 percent of Americans reportedly don't like the taste. If that sounds like you, check out the new **SHAPE Water Boosters** (\$8; CVS, Rite Aid, and drugstore.com). Just a single squeeze (equal to a half-teaspoon) adds delicious flavor—but not calories—along with a concentrated punch of nutrients that offer some important bonus benefits. The portable packaging and great taste are designed to meet the needs of the health-conscious woman on the go. Look for them in the following four varieties:

Beauty
(Grape)



Contains:
• Biotin
• Proprietary blend of herbs, collagen, and fruit extracts

Wellness
(Pomegranate)



Contains:
• Vitamin C
• Folic acid
• Acai and other superfruit extracts

Slim
(Pink Lemonade)



Contains:
• Chromium
• Raspberry ketone
• Vitamin D

Energy
(Black Cherry)



Contains:
• **31** in tea extract
• Vitamin B12
• Taurine and tyrosine

PHOTO: GETTY IMAGES; PHOTOS: ISTOCK/ALAN

Use of Survey Evidence at NAD

Perception Surveys – Overview

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- Used to test implied claims
- Not required at NAD since NAD considers itself expert on implied claims
- Important to conform to NAD guidance for any survey submitted to NAD
- Internet surveys commonly used and accepted



Perception Surveys – Basic Methodology

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- Two survey groups or “cells”:
 - One sees actual advertisement
 - One sees “control” version of the advertisement that removes or corrects most misleading parts of advertisement
- Both survey cells are asked the same series of questions that progress from open-ended to close-ended
- 20% or more difference between responses in survey and control cells on critical question(s) demonstrates “confusion”



Perception Surveys – Best Practices

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- Hire a survey expert who is already familiar with NAD and court standards for surveys
- Pick advertisement(s) to survey that best represent(s) offending campaign
- Make sure that the test and control commercials are legible, and that control commercial is realistic
- Make sure you understand and take into account the advertiser's position as to what the advertisement communicates



Navigating the NAD Process

How The Process Works

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- **Complaint letter written by the “challenger”**
 - Identify the advertising and set forth why claims are false or misleading
 - Include relevant evidence such as product testing or evidence of consumer perception

- **Two Rounds of Evidentiary Submissions**

- **Meetings with NAD**

- **NAD decision**



Split Decision?

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The NARB Appeal

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- Advertiser – Automatic right of appeal
- Challenger – Must request review by NARB

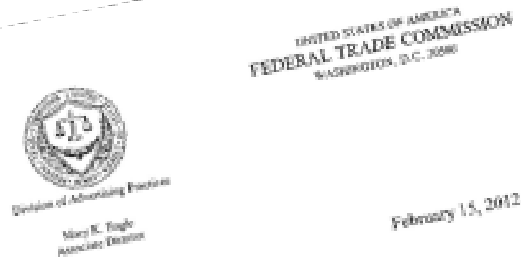


The Panel:

- One “public” member
- One “advertising agency” member
- Three “advertiser” members

What happens when companies don't comply?

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NAD Refers Advertising for Diaper Rash Product to FTC after Summers Laboratories Declines to Abide by NAD Recommendations

New York, NY – Feb. 1, 2013 – The National Advertising Division has referred advertising claims made by Summers Laboratories, Inc., for its Triple Paste Medicated Diaper Rash Ointment to the Federal Trade Commission (FTC) for further review, after the company declined to abide by NAD recommendations.

Follow Us!



Henry M. Rubenstein, Esq.
P.O. Box 648635
Miami, Florida 33164-0435

Re: Ary, Inc., d/b/a Ketomist.com

Dear Mr. Rubenstein:

Following a referral from the National Advertising Division of the Council of Better Business Bureaus ("NAD"), the staff of the Federal Trade Commission's Division of Advertising Practices sent Ary, Inc., d/b/a Ketomist.com ("Ketomist") a warning letter indicating that we were unaware of any reliable scientific evidence that would substantiate the claims being made by Ketomist about its HCG weight-loss products. The NAD referral was based on Ketomist's failure to comply with NAD's recommendation that it cease making such claims promising to do so. Our review was to determine whether the weight-loss claims of Ketomist violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 57.

Upon careful review of this matter, we have determined not to take additional action this time. Among the factors we considered are your client's decision to cease marketing biocompatible HCG products for weight loss and its discontinuation of the website and a Internet and radio advertising for this line of products in response to the warning letter. Commission reserves the right to take such further action as the public interest may require.

Very truly yours,
Mary K. Eagle

For Your Information: 03/06/2013

FTC Approves Final Orders Settling Charges Against The Sherwin-Williams Co. and PPG Architectural Finishes, Inc.; Issues Enforcement Policy Statement on "Zero VOC" Paint Claims

For Release: 01/16/2013

FTC Commissioners Uphold Trial Judge Decision that POM Wonderful, LLC; Stewart and Lynda Resnick; Others Deceptively Advertised Pomegranate Products by Making Unsupported Health Claims



Best Practices Before NAD

- Tell the “story” of your Evidence
- Distinguish Between Market Research and Claim Substantiation Evidence
- Justify your Testing Choices
- Utilize Confidentiality Provisions Judiciously
- Take Advantage of the Meeting with NAD



Questions?

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