

Proskauer on Advertising Law

Key 2020 Decisions from the
NAD and NARB

Now that 2020 is in the rearview mirror (*collective sigh of relief*), we wanted to share our perspective on notable decisions and trends from this past year at the National Advertising Division and the advertising self-regulation industry's appellate body, the National Advertising Review Board.

2020 was another busy year at NAD, with more than 100 closed cases. Over 20 of those were monitoring cases NAD initiated. In its monitoring role, NAD unsurprisingly focused on COVID-related claims, including disinfecting and immune support claims that reasonably implied some form of protection against infection from or symptoms caused by the coronavirus. NAD also initiated monitoring cases in other areas, including dietary supplements and household products.

2020 continued NAD's track record as a challenger-friendly forum. The high percentage of outcomes favoring the challenger is a reflection of the burden of proof — in contrast to litigation, in NAD proceedings the burden of proof is on the advertiser, and it is a heavy burden: the advertiser must substantiate all reasonable takeaways from its advertising, not just the messages the advertiser intends to convey or contends are the most reasonable takeaways. In addition, following the FTC's lead, NAD gives particularly intensive scrutiny to health-related and product performance claims. As a result, challengers won, in whole or in substantial part, in over 90% of 2020 NAD cases. That said, advertisers making non-health and non-performance claims (e.g., savings claims and comparisons of product features or ingredients) fared somewhat better overall, as they were more likely to receive a recommendation to modify their claims, rather than discontinue them altogether. We expect these trends to continue in 2021 and beyond.

Last year was also notable for procedural changes at NAD. In addition to NAD's existing "standard track," it introduced Fast-Track SWIFT for challenges that present a single and well-defined issue that does not require complex substantiation. NAD also introduced its Complex Track for cases that do require particularly complex claim substantiation evidence. While NAD has not issued any Complex Track decisions to date, it has published nine Fast-Track SWIFT decisions and we expect to see more soon. According to NAD, it has successfully kept its promise to resolve Fast-Track SWIFT cases within 20 business days, with the average time a speedy 10 business days from case opening to decision.

Over 20 NARB appeals were filed in 2020, with 15 decisions published to date. Hot areas included the telecommunications space, household products, and health-related claims. As discussed below, one trend we observed, and frankly find concerning, is NARB's consistent deference to NAD on procedural issues. This deference is inconsistent with the directive in NARB's Procedures that "In making its decision, the panel shall exercise its own independent judgment on the issues presented and shall not give deference to NAD's findings and recommendations."

In 2020, NARB panels affirmed NAD's recommendations in their entirety in seven out of fifteen published decisions. In four cases, NARB reversed a core part of NAD's decision and allowed an advertiser to continue making claims that NAD had recommended be modified or discontinued. And in the other four cases, NARB reversed NAD to some lesser extent (e.g., recommending an advertiser modify a claim instead of discontinuing it altogether). Given that an NARB appeal affords a party a second bite at the apple, at least on substantive issues, we expect the number of NARB appeals to continue to grow.

Below are cases that caught our eye during 2020 for one reason or another, grouped into categories to help you find cases that may be of particular interest. We hope you find this report helpful as you plan for 2021. As always, we welcome all questions and comments.



Lawrence I. Weinstein
Partner
+1.212.969.3240
lweinstein@proskauer.com



Jennifer Yang
Associate
+1.212.969.3394
jyang@proskauer.com



Baldassare Vinti
Partner
+1.212.969.3249
bvinti@proskauer.com



Anisha Shenai-Khatkhate
Associate
+1.212.969.3574
ashenai@proskauer.com



Jeffrey H. Warshafsky
Associate
+1.212.969.3241
jwarshafsky@proskauer.com

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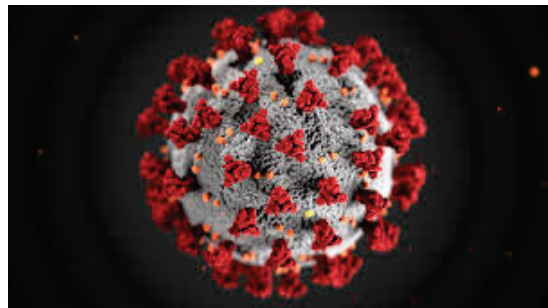
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Hot Topics

NAD Takes Aim at Express and Implied COVID-19 Claims

Most NAD challenges originate from a competitor filing a complaint. But NAD also regularly initiates challenges as part of its responsibility to monitor and review national advertising for truthfulness and accuracy. See NAD Procedures § 2.1.B.

These days, not surprisingly, a major focus of NAD is monitoring claims that a product can protect consumers from the coronavirus that causes COVID-19. NAD initiated more than 10 monitoring cases in this area in 2020. In each one, either the advertiser voluntarily discontinued its challenged COVID-19 related claims in response to the inquiry or NAD recommended the advertiser do so.



Notably, NAD has construed even oblique references to an increased need for immune support as reasonably conveying a message about COVID-19. Below are a few of the closer calls:

- *Provezza Health (Provezza Elderberry Syrup)*, Report #6380, *NAD/CARU Case Reports* (June 2020): Social media post stating, “Potent Immune Support During A Severe Season” and “Provezza is highly concentrated to deliver antioxidant action for immune defense.”
- *INID Research Lab (Continual-G Glutathione Enhancer)*, Report #6381, *NAD/CARU Case Reports* (June 2020): Social media post stating, “Strong IMMUNITY Needs Glutathione” and “Building your immunity during these times is more important than ever.”
- *Nomolustus d/b/a Truvani (Immune Support)*, Report #6391, *NAD/CARU Case Reports* (June 2020): Social media post stating, “Support Your Immune Health Now . . . Or Kick Yourself Later” and “Right now everyone is thinking about their immune health.”

- *Vitamin Bounty/Matherson Organics (Vitamin Bounty Elderberry Immune Support)*, Report #6397, *NAD/CARU Case Reports* (June 2020): Social media post stating, “As restrictions are gradually lifting, it’s more important than ever to keep your immune system strong. Our Elderberry Immune Support keeps you protected with vitamin C, zinc, elderberries, garlic and echinacea; a powerful immune-boosting combo.”

Takeaway»

Advertisers of products that theoretically could provide some measure of protection or relief from viruses, like dietary supplements, cold/flu treatments and air filters, should be on heightened alert to avoid conveying any messages that reasonable consumers could view as applying to COVID-19. Advertisers should be especially cautious when advertising products for flu season, as NAD likely will view language like “this season” or “these times” as reasonably referring to the COVID-19 pandemic, regardless whether that was the advertiser’s intention.

Mobile Wireless Carriers’ Move Towards 5G Continues to Spark Advertising Challenges

As cell phone carriers race to bring mobile wireless 5G networks to consumers across the country, and to tell consumers they are doing so, 2019 and 2020 have seen a slew of NAD challenges related to “5G” claims. NAD has recognized the large-scale investment the mobile wireless industry has made to roll out and advertise 5G technology, and continues to carefully scrutinize advertising about 5G availability. And, in a pair of decisions from 2020, NARB provided some guidance for how carriers can and cannot communicate their efforts to roll out 5G networks.

In *AT&T (AT&T’s Best Wireless Network)*, NARB Panel #264 (April 2020), NARB agreed with NAD’s recommendation that AT&T discontinue its claims “5G Evolution” and “5G Evolution, The First Step to 5G.” AT&T argued the term “Evolution” signaled to consumers that 5G Evolution was not 5G, but rather represented the improvements AT&T had made to its network in moving towards the creation of a 5G network. NARB disagreed, and found the term “Evolution” was “not likely to alert consumers to the fact that the service is not 5G,” and consumers may interpret “Evolution” as indicating AT&T’s technology “has already evolved into 5G.”



By contrast, in *Verizon Communications (Verizon 5G Stadium Access)*, NARB Panel #269 (August 2020), NARB disagreed with NAD’s conclusion that the claim “Verizon is building the most powerful 5G experience for America” communicated a “present tense message” that a Verizon 5G network is already generally available to consumers in the U.S. Instead, NARB found that the challenged commercials, which depict Verizon installing its 5G network in sports stadiums, “call the consumer’s attention to Verizon’s commitment to build a first-rate 5G network.” (The panel nonetheless recommended Verizon discontinue this claim for other reasons)

Takeaway»

As wireless carriers continue to expand their 5G networks, they should make sure their advertising clearly distinguishes between what is currently available to consumers, and what may be available in future once the rollout is complete. This includes claims about the general availability of 5G to U.S. consumers, as well as claims about 5G performance, network speed, coverage, and reliability, where we have also seen much recent activity at NAD.

Personal Care

OrganiCare (FemiClear Vaginal Yeast Infection Treatment), Report #6347, NAD/CARU Case Reports (February 2020)

FemiClear is a homeopathic yeast infection treatment. Organicare claimed on pack, online and on television that FemiClear is “proven” to kill more yeast than other OTC products, including Monistat, and is the “shortest yeast infection treatment on the market.” Prestige Consumer Healthcare, which makes Monistat, challenged these and similar claims.

NAD explained that OrganiCare had made establishment claims, which NAD holds to a very high standard of proof. NAD rejected the advertiser’s argument that by merely saying “proven,” without the word “clinically” (as in “clinically proven”), the standard should be any lower. Further, the advertiser made health-related claims, which must be supported by competent and reliable scientific evidence. Typically, for such claims, NAD demands human clinical trials with statistical significance to the 95% confidence level with consumer meaningful results.

In support of its superiority claims, the advertiser provided NAD with the results of *in vitro* testing, showing that FemiClear killed more colony forming units (CFUs) of the most common infection-causing yeast strain in a petri dish than various Monistat products. NAD recognized that some health-related claims can be supported without human testing on the advertised product where the advertiser demonstrates that results observed *in vitro* would also occur with normal consumer usage. But OrganiCare failed to make this showing, as it lacked evidence that superiority in a petri dish would translate to superiority in humans under real-world conditions. NAD raised other concerns with OrganiCare’s testing too, including that the laboratory was not blinded from the products’ identities when it counted the CFUs of yeast remaining after treatment.



OrganiCare also argued it did not need human clinical trials because FemiClear is a homeopathic product. NAD disagreed. First, the FTC’s [Enforcement Policy Statement on Marketing Claims for OTC Homeopathic Drugs](#) requires an advertiser to disclose that (1) there is no scientific evidence that the product works, and (2) the product’s claims are based only on theories of homeopathy from the 1700s that are not accepted by most modern medical experts. OrganiCare did not include any explanatory statement on product packaging, and the statement on its website deviated from the FTC’s required language. Second, the FTC’s policy statement is clear that “Efficacy and safety claims for homeopathic drugs are held to the same standards as similar claims for non-homeopathic drugs” and thus require “competent and reliable scientific evidence.”

Takeaway»

NAD holds health-related claims, especially those phrased as establishment claims (e.g., “proven” and “clinically proven”), to a high standard. Advertisers making such claims generally should possess reliable human clinical testing on their product that demonstrates a consumer meaningful benefit. Advertisers relying solely on *in vitro* testing should have separate proof that it is scientifically sound to extrapolate their results to real-world human usage.

[Ava Science \(Ava Ovulation Bracelet\), Report #6348, NAD/CARU Case Reports \(February 2020\)](#)

Ava Science makes the Ava Ovulation Bracelet, an FDA-registered fertility tracker. As part of its routine monitoring program, NAD requested substantiation for Ava’s “1 year pregnancy guarantee.” The claim originally appeared in a “stamp” graphic on Ava’s social media advertising next to a picture of a pregnant woman with a caption stating “Get pregnant within a year using Ava, or get money back.” Ava subsequently modified the wording from “1 year pregnancy guarantee” to “1 year guarantee.”

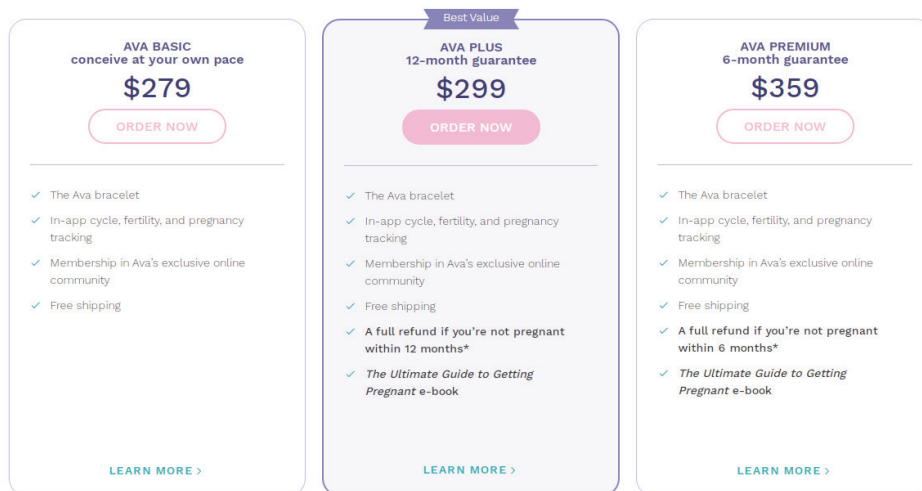
Ava explained the “guarantee” claim was intended to convey that customers who purchased the Ava Plus Bundle and wore the bracelet continuously for at least one year, but did not get pregnant during that time, could get a full refund of their initial purchase, subject to various terms. But NAD noted that consumers might interpret the claim as a guarantee that a woman using Ava’s bracelet will actually become pregnant within a year.

NAD then considered how consumers reasonably would understand the modified “1 year guarantee” in Ava’s social media advertising. While that claim standing alone might convey a performance message, the post’s text referencing the ability to “get money back” dispelled any confusion. NAD found the post’s disclaimer complied with the FTC’s “Dot Com Disclosures”

because it appeared on the same screen as and in close proximity to the main claim, and was clear and concise.

NAD reached a different conclusion about Ava’s website. There, Ava advertised two “bundles” – a basic tier without any guarantee, and a “Plus” package with a “one-year guarantee of pregnancy*.” The asterisk hyperlinked to a disclosure describing the money-back guarantee’s terms. However, NAD was concerned it was not clear the asterisk was a hyperlink. Further, the asterisk re-directed consumers to another page altogether, and gave no indication it was re-directing to the terms of a money-back guarantee. NAD noted that under FTC’s Dot Com Disclosures, when an advertiser uses a hyperlink to lead to a disclosure, it should clearly label the hyperlink to communicate the importance, nature, and relevance of the disclosure available at the link. NAD recommended Ava modify the hyperlink to fix these issues.

Rather than offering a “1 year pregnancy guarantee,” Ava’s website now offers “A full refund if you’re not pregnant within 12 months**” accompanied by the terms of the money-back guarantee at the bottom of the same screen.



Takeaway»

Advertisers making money-back “guarantee” claims should be cautious not to inadvertently imply a performance guarantee. And more fundamentally, advertisers should make sure disclaimers appear clearly and in close proximity to the claims they modify. In online advertising, this means they should appear on the same screen as the claim, or by way of a hyperlink that is clearly and adequately labeled in conformity with the FTC’s Dot Com Disclosures.

The Procter & Gamble Company (Always Discreet Incontinence Pads), Report #6350, NAD/CARU Case Reports (February 2020)

Kimberly-Clark, the maker of Poise incontinence pads, challenged television and print advertising describing and depicting P&G's Always pads as "less bulky." For example, P&G's print and television ads juxtaposed a stack of Always pads next to a noticeably higher stack of Poise pads. Both ads also depicted "before and after" images of a woman wearing an unnamed incontinence pad under clothing, hiding her backside by trying to pull her shirt down, and then confidently not making such efforts while wearing Always.



P&G argued these claims and imagery merely communicate the truthful message that Always Discreet pads are less thick, and therefore less bulky than Poise pads, and the commercial's "before and after" shots conveyed a monadic message about a consumer's confidence when wearing Always Discreet. Kimberly-Clark argued however that by combining the "before and after" images with the side-by-side visual of stacked pads and claims about "bulkiness," the ads reasonably implied that the pads' relative thickness translates to a visibility difference when worn.

NAD agreed with Kimberly-Clark, finding the commercial's side-by-side presentation of Always and Poise stacks, alongside "before and after" imagery of a woman expressing new confidence with Always Discreet, reasonably implied that the woman's previous pad was Poise. Additionally, the woman's behavior (for example, in covering up her backside) implied that her concern was not just comfort, but also visibility – *i.e.*, that because Poise is thicker, it was more likely to be seen under clothing.

As there was no evidence that Always Discreet is less visible than Poise under form-fitting clothing, NAD recommended P&G discontinue or modify the advertising to avoid conveying an implied comparative visibility message.

Takeaway»

Advertisers should remember that even if their claims may not be deceptive in isolation, this isn't necessarily enough. In some cases, claims closely paired with images or visuals may convey an unintended implied message in combination. This risk is especially high where, as here, the visuals may fill in an information gap left by the spoken or written claims, or vice versa.

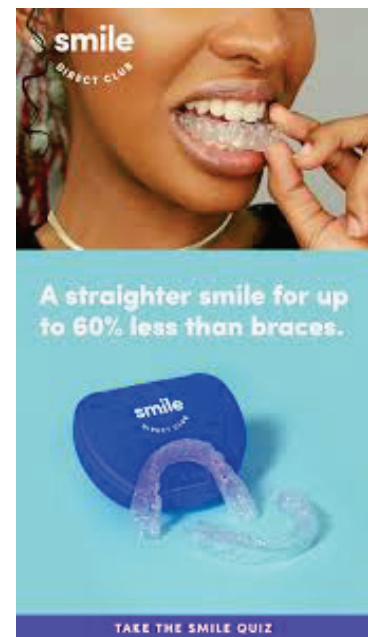
[SmileDirectClub \(Smile Direct Club Clear Aligners\), Report #6360, NAD/CARU Case Reports \(April 2020\)](#)

SmileDirectClub is an at-home dental care company known for its clear aligners. Competitor Align Technology challenged SmileDirectClub's advertising that claimed SmileDirectClub's clear aligners straighten "most smiles," and compared the speed and price of SmileDirectClub's aligners to Align's Invisalign and other competing products. Align argued that this advertising misleadingly conveyed that SmileDirectClub's clear aligners were capable of correcting severe dental issues, or achieving results comparable to those of Invisalign or braces.

NAD found the claim that SmileDirectClub's aligners "straighten out most smiles in an average of 6 months" reasonably conveyed that this product could straighten *most* smiles—and not just the mild issues it is intended to treat. NAD therefore recommended that the advertiser discontinue this claim. For similar reasons, NAD recommended that SmileDirectClub modify a "smile assessment" online quiz that allowed consumers to rate their dental problems up to a level of "moderate+," and encouraged *every* consumer (even those with "moderate+" problems) to try its clear aligners. NAD found this quiz misleadingly implied all consumers can be treated with SmileDirectClub's clear aligners.

NAD also agreed with Align that a number of SmileDirectClub's ads communicated misleading comparative messages. For example, the claim "Our average smile plan gets you a smile you will love 3x sooner" appeared alongside the text "Forget the tortuous time of braces." In context, NAD found this communicated that SmileDirectClub's clear aligners provide similar results to braces, but "3x sooner." Similarly, NAD found the claims "60% less than other brands" and "60% less than braces" implied the costs being compared were for a similar quality treatment. Finding no evidence that SmileDirectClub's aligners were a comparable treatment to braces or other brands of aligners (including Invisalign), NAD recommended discontinuing these claims.

For comparative claims, if the products being compared are not of similar quality or effectiveness, advertisers should clearly disclose this fact, or avoid comparing them. For advertisers of at-home dental and medical treatments, this means avoiding positioning their product as an alternative to professional treatments, unless it is actually comparable in performance.



Takeaway»

Advertisers should be upfront about the limitations of their products, and should avoid intentionally directing consumers to their products who fall outside the scope of these limitations.

Qf Systems, LLC (Fillerina Dermo-Cosmetic Replenishing Gel), Report#6373, NAD/CARU Case Reports (June 2020)

QF Systems makes Fillerina Dermo-Cosmetic Replenishing Gel and an accompanying Nourishing Gel. Together, these products are an at-home skincare treatment intended to reverse the appearance of aging on a user's skin. As part of its routine monitoring program, NAD requested substantiation for some of QF Systems' performance claims. Specifically, NAD challenged claims that Fillerina "fills in fine lines and wrinkles, revealing a more radiant complexion," and "corrects visible wrinkles and expression lines." NAD also considered whether, in context, the advertising implied Fillerina is comparable or an alternative to professional cosmetic procedures.



In reviewing the study QF provided to support its product performance claims, NAD found that though the results showed some effect, the advertiser failed to show that these were consumer meaningful or noticeable results. As a result, NAD found the data could not support claims like "fills in fine lines and wrinkles" or "corrects visible wrinkles and expression lines." Nevertheless, based on the study's own conclusion that Fillerina "is able to provide an improvement in the appearance of chronoaged skin in subjects showing mild-to-moderate clinical signs of skin aging," NAD noted that the advertiser could make this claim, which NAD found was "far more tempered than the challenged claims promising dramatic and long-

lasting improvements in wrinkles and sagging skin."

NAD also found that the advertiser's images of product vials and syringe-like applicators with claims referring to the "filling in" or "plumping of wrinkles (including deep wrinkles)" and "adding volume to cheeks and lips" implied Fillerina was comparable to professional plastic surgery procedures. NAD recommended discontinuing this implied message.

Takeaway»

When making cosmetic performance claims, evidence that a product has some effect is generally not enough—typically advertisers must be able to show this effect is consumer meaningful or noticeable. Where an advertiser has a reliable study, it may be able to make claims consistent with the conclusions of the study, but should exercise caution in trying to extrapolate from those conclusions, particularly without evidence of consumer meaningful or noticeable effects.

SmileDirectClub (Bright On Tooth Whitening Kit), Report #6387, NAD/CARU Case Reports (July 2020)

SmileDirectClub appeared again before NAD, this time for claims related to its “Bright On” at-home tooth whitening kit. Specifically, P&G challenged claims that Bright On is “3x faster to use” than white strips, and provides “premium whitening” and the “brightest bright” smile.

SmileDirectClub’s Bright On kit contains a whitening pen and a blue light device. Consumers use the pen to paint a whitening gel on their teeth, and then apply the blue light to the gel for five minutes, twice a day, for a total wear time of ten minutes per day. Crest Whitestrips, the leading whitening strips on the market, require a wear time of 30 minutes per day. The advertiser argued this difference supported its “3x faster” claims.

However, P&G argued (and NAD agreed) that the claim “3x faster to use than strips” conveyed a comparative message about the overall “use” time of the products, not just the “wear” time. This comparative message was unsupported. NAD noted even though consumers only need to wear Bright On for 10 minutes a day, they likely spend longer actually using it, because of the time it takes to paint the whitening gel onto their teeth. NAD also found that even if Bright On did work “3x faster” than strips, the claim would nonetheless be misleading if the results are not comparable. Since there was no evidence that Bright On offers results comparable to strips, and the advertising did not disclose any material differences between the products, NAD recommended that SmileDirectClub discontinue its “3x faster” claims.

Everything you need for 6 months of your brightest bright.

You hold in your hands the whole teeth whitening kit and caboodle. So bid farewell to a smile that isn't bright, and go forth and shine.

- 3x faster to use than strips – only 5 minutes twice daily.**
- Same enamel-safe whitening agent used by dentists.**
- Helps remove years of tough stains in 1 week.**
- Patented smartphone-compatible 20-LED light enhances the bright.**

Smile satisfaction guaranteed.*
*If you follow the instructions, of course.

THINGS WE HAVE TO SAY:
Keep out of reach of children • Avoid swallowing • If product comes in contact with your eyes, rinse immediately • Consult your dentist before use if you have sensitive teeth or sore gums • Some people may experience temporary gum sensitivity when using • If irritation of gums or mouth occurs, discontinue use and consult your dentist • For deeper, darker stains, approved use for up to 14 days in a row • Avoid contact with fabrics, as gel may alter the color • This product will whiten only natural teeth • Women who are pregnant or breastfeeding should not use • Avoid direct contact of the gel with gums or salivary flow. **DO NOT USE!** If you are younger than age 12 • If you are allergic to any ingredient in this product • If you have dental braces • When sleeping

INGREDIENTS: Polyethylene glycol, aqua, hydrogen peroxide, polyacrylate, 18.8, 1,1-bis(4-hydroxyphenyl)ethane, sodium stannate, EDTA, potassium hydroxide, methyl p-aminobenzoate (parapermethyl oil)

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NAD did find that, without the “3x faster” claim, SmileDirectClub’s “Premium whitening” and “Brightest Bright Smile” claims were mere puffery. In other words, these claims on their own convey simply that Bright On provides a high quality “premium whitening,” allowing users to achieve *their* “brightest bright.”

Takeaways»

This case reinforces the importance of ensuring comparative claims are of products that yield comparable results or, at minimum, disclosing any material differences. This is true even where the comparative claim is not about product performance, but rather some other attribute of the products.

Whether a claim is puffery can depend heavily on the context and surrounding claims. A claim that may otherwise be puffery can become an actionable comparative claim if placed in close proximity to a claim inviting consumers to draw a concrete comparison with another product.

[*Arcadia Consumer Healthcare \(Fungi-Nail Products\), Report #6400, NAD/CARU Case Reports \(August 2020\)*](#)

NAD had previously recommended the advertiser, Arcadia Consumer Healthcare, discontinue a “#1 Pharmacist Recommended” claim for its Fungi-Nail athlete’s foot treatments because the survey evidence on which the claim was based was unreliable.

Arcadia requested to reopen the matter based on new survey evidence. In the new survey, 400 retail pharmacists responsible for recommending OTC medications were asked which of five brands (including Fungi-Nail) they would recommend to treat fungus on the skin around the toenail. Fungi-Nail was the most frequently recommended option.



However, NAD found that this new survey likewise was inadequate to support Arcadia's claim. Importantly, NAD noted the five brands the survey asked about did not include any of the three leading brands. NAD explained that to support a claim that a product is "#1 recommended", an advertiser should compare itself to at least 85% of the relevant marketplace. Here, the advertiser lacked evidence the five surveyed products had a significant market share of the antifungal product category, let alone 85%.

Arcadia argued there was no need to compare Fungi-Nail against the entire antifungal market because it is a "specialty" product. NAD rejected this argument, as there was no evidence consumers understand Fungi-Nail to be a specialty product distinct from "general" antifungals. NAD emphasized Fungi-Nail treats the same condition (athlete's foot) and contains the same ingredients as the leading antifungal brands, making it part of the same antifungal market. If it walks like a duck and talks like a duck, it's a duck (or an antifungal, as it were).

In another attempt to fix this issue, Arcadia noted it provided pharmacists with an "Other" option, creating ample opportunity to recommend other brands (including the leading brands excluded from the survey). However, NAD found that the write-in option did not make up for failing to include the leading brands in the survey as answer choices.

Takeaway»

This case is an important reminder of what advertisers must do to support a "#1 Recommended" claim. Surveys that compare the product to less than 85% of the relevant market will carry little to no weight. Further, advertisers should make sure to define their relevant market accurately. Where products treat the same general condition and contain the same types of ingredients, NAD likely will consider them to be part of the same market absent consumer perception evidence showing otherwise.

[VGH Solutions \(Dr. Ho's Circulation Promoter\), Report #6404, NAD/CARU Case Reports \(September 2020\)](#)

VGH Solutions makes Dr. Ho's Circulation Promoter, an FDA-cleared device that purports to transmit small electrical impulses to improve circulation. In a challenge brought by competitor Actegy Health, NAD rejected VGH's argument that FDA clearance of this device supported

certain performance claims about its capabilities, but found that FDA clearance supported the advertiser’s safety claims.

Although NAD acknowledged evidence of FDA-clearance can be a “relevant factor in considering whether an advertiser provided a reasonable basis in support of challenged claims,” it found VGH’s claims went *beyond* the purposes for which the FDA cleared the product. The FDA cleared the product for “temporary relief of pain” in healthy muscles. However, VGH advertised the Circulation Promoter as providing “total pain relief,” without indicating this relief is temporary. VGH also did not limit its claims to use on healthy muscles, and in fact claimed the product could be used to treat certain medical conditions. NAD found FDA’s clearance of the product could not be used to support performance claims that were outside the scope of this clearance, and recommended that VGH discontinue these claims.



Nevertheless, NAD noted that nothing in its decision prevented VGH from making performance claims within the scope of its FDA clearance. In addition, NAD found the FDA 510(k) clearance, which did not raise any new safety concerns for users with metal implants, was persuasive evidence in determining if the product was “safe” for such users. Relying on this FDA clearance and the fact that the device was manufactured to all FDA safety standards, NAD determined the advertiser provided a reasonable basis for its claims that the device is safe for users with metal implants.

Takeaway»

FDA-clearance only takes an advertiser so far. It should not be used as a free pass to claim that a product is effective for *any* use. However, it may be persuasive for substantiating safety claims, and can be used to support performance claims within the scope of the clearance.

[Procter & Gamble \(Oral-B Precision Clean Interdental Picks\), Report #6378, NAD/CARU Case Reports \(June 2020\) and NARB Panel #271 \(September 2020\)](#)

NAD recommended P&G discontinue its #1 shield on packaging and online advertising for its Oral-B Precision Clean Interdental Picks. On pack, P&G clarified next to the shield that Oral-B is the #1 dentist recommended floss brand. But NAD did not believe consumers would link this disclaimer to the shield because the shield and the text had different sizes, colors, and prominence.



In addition, according to NAD, “[a] claim that an advertiser is #1 in a distinct category does not necessarily preclude an understanding that the advertiser may be #1 in another category.” NAD was therefore concerned consumers might not realize from the reference to Oral-B’s #1 position in the floss category that it is not also #1 in the interdental pick category.

In short, NAD agreed with challenger Sunstar, maker of GUM Soft-picks, that consumers would reasonably understand the shield as claiming Oral-B is the #1 dentist recommended *and the best-selling floss and interdental pick*. Oral-B is not. Sunstar beats Oral-B in dentist recommendations and sales when it comes to interdental picks.

On appeal, the NARB panel interpreted P&G’s advertising differently. Unlike NAD, the panel believed the disclaimer was adequately connected to the shield and that it effectively limited the shield’s message to dentist recommendations in the floss category.

However, the panel rejected P&G’s argument that the #1 shield standing alone constituted puffery. Because the #1 claim was made on a health-related product, reasonable consumers could associate it with the product’s attributes. NARB therefore recommended P&G include the disclosure everywhere it used the shield.

Takeaways»

NAD takes its consumer protection mission seriously and gets most decisions right. But sometimes, in our view, NAD doesn’t give consumers enough credit. Here, both the shield and the disclaimer contained the text “#1,” so consumers should have minimal difficulty linking those directly proximate ad elements. Unlike NAD, which is staffed by lawyers, NARB panels consist of non-lawyer industry members, including marketers from major companies.

When an advertising challenge boils down to a matter of claim interpretation, taking a second bite at the apple before a panel with a marketing background can be a wise move, as was the case here for P&G.

Consumer Products

FCA US (Jeep Gladiator), Report #6345, NAD/CARU Case Reports (February 2020).

How do you define a “class” of products when making a “Best-in-Class” claim? NAD provided an answer for the automotive industry in a challenge by Ford against FCA, the manufacturer of Jeep vehicles. FCA advertised its 2020 Jeep Gladiator as having “Best-in-Class Payload” and “Best-in-Class Towing.” FCA argued the relevant “class” was midsize pickup trucks of a certain configuration, namely with a 4x4 drivetrain and crew cab. NAD, however, agreed with Ford that this definition was too narrow and consumers would reasonably understand a “class” of pickup trucks to mean trucks of a similar size—in this case all midsize pickup trucks. Since the 2020 Jeep Gladiator did not in fact have the best payload or best towing of all midsize pickup trucks, NAD recommended that FCA discontinue these claims.

In determining consumers’ reasonable understanding of the relevant “class,” NAD paid particular attention to the classes of vehicles recognized by the automotive industry. NAD noted that the “class” of midsize pickup trucks is “defined generally by the industry both in advertising for midsize pickup trucks and by prominent third-party automotive publications,” whereas there was no evidence that a “class” of 4x4 crew cab midsize pickup trucks was recognized by the industry generally. There was also no evidence that consumers understand there to be such a “class.”



NAD also found that FCA’s disclaimer— “FCA US LLC 4x4 Crew Cab Segment”—did not cure the misleading message. Besides being insufficiently clear and conspicuous, this disclaimer could not be used to contradict the main message “that the Jeep Gladiator has the best payload and towing capacity among all midsize pickup trucks.” NAD made clear its decision did not preclude FCA from making truthful comparative claims regarding the 2020 Jeep Gladiator’s superiority in payload or towing capacity versus other vehicles within its class of midsize pickup trucks that have the same configuration as the Gladiator, “so long as the basis of the comparison is clearly disclosed as part of the main claim.”

Takeaway»

When making comparative claims in relation to a “class” of products, advertisers should be careful not to define the class too narrowly, and cannot narrow the “class” definition using a disclaimer. Advertisers making such claims should look to whether their “class” definition can be supported within the relevant industry, including, for example, by industry marketing practices and third party industry publications.

Molekule (Molekule MH1 Air Purifier), NARB Panel #263 (February 2020)

Molekule markets the Molekule Home One Air Purifier (or MH1), which uses a filter that purifies air using Photo Electrochemical Oxidation (or PECO) technology. In a challenge brought by Dyson concerning Molekule’s advertising of the benefits of PECO technology and comparing those benefits to HEPA-filter technology (used in Dyson home air purifiers), NAD reiterated its oft-repeated rule that testing should replicate real-world conditions. On this basis, NAD rejected lab studies proffered by Molekule in support of its claims that the MH1 completely “eliminates,” “destroys,” or “permanently removes” all indoor air pollution or any specific bioaerosol, and recommended that MH1 discontinue these claims.

On appeal, NARB agreed with NAD’s conclusion that Molekule’s proffered studies did not support claims that its MH1 device removes or destroys all pollutants in a room or completely eliminates such pollutants. NARB also agreed that, to support such claims, the advertiser would have needed to conduct studies on the device in a way that replicates real-world conditions. However, NARB

— *Testing report video series* —

Bacteria Was Completely
Destroyed on the Surface
of Molekule’s PECO-Filter

MOLEKULE



was careful to note that these proffered studies could support more limited advertising claims and, to the extent NAD rejected the studies for purposes of supporting those claims, NARB disagreed with NAD's analysis. In particular:

- NAD criticized some of Molekule's proffered studies because they tested a prototype, rather than the MH1 marketed to consumers. The NARB panel noted that it "does not agree that the advertiser's data generated by evaluating prototypes in a variety of tests should be rejected in their entirety."
- NAD rejected some of Molekule's proffered studies because they used a torture test, in which pollutants were injected into the MH1 at higher concentrations than one would expect in a contaminated indoor environment. NARB noted that "while 'torture' tests have to be carefully scrutinized, the panel finds that here these results also help support the advertiser's position."
- NAD rejected a number of Molekule's proffered studies because they were "single-pass" tests in which the pollutants were applied directly to the filter material, rather than into a larger surrounding room-sized chamber to replicate real-world conditions of cleaning the air in a room. NARB noted that NAD had previously relied on single-pass filter testing to uphold performance claims for air purifiers with HEPA filters, and saw no reason PECO technology should not be assessed using the same standard.

NARB therefore concluded that Molekule's studies properly supported a claim that the PECO filter was effective at addressing air pollution. With this in mind, NARB reviewed each of the 17 pollution elimination claims NAD recommended that Molekule discontinue, to determine whether they communicate messages that went beyond the "valid support that the advertiser has presented." While NARB agreed with NAD that some of these claims should be discontinued, it found others were properly supported, and provided Molekule with specific guidance on how several could be revised.

Takeaways»

While testing to substantiate product performance claims generally should replicate real-world conditions, laboratory testing that fails to do so may nonetheless provide support for more limited performance claims.

Since the publication of NAD and NARB's decisions, several putative class actions have been filed against Molekule, which largely track (and in some cases directly cite) NAD and NARB's findings. The plaintiffs' class action bar is actively monitoring NAD and NARB decisions for potential follow-on class action suits. Advertisers should therefore keep in mind when assessing risk that the consequences of an adverse decision at NAD are not limited to discontinuation of the challenged advertising.

P.S. – This decision has sparked quite the flame war between Molekule and Wirecutter, which [reported on the decision](#). Interested readers can find Molekule's detailed response to Wirecutter's coverage on [Molekule's blog](#).

[Trek Bicycle \(Bontrager WaveCel Helmets\), Report #6351, NAD/CARU Case Reports \(February 2020\)](#)

As part of its routine monitoring program, NAD requested substantiation for Trek Bicycle's claims that its WaveCel helmet is "up to 48x" more effective than traditional foam helmets in protecting riders' heads from injuries caused by certain cycling accidents.

Trek provided a study that tested four impact scenarios at different speeds and angles of impact. Trek's study demonstrated that WaveCel head injury protection performance exceeded that of the traditional foam helmet in all tested scenarios. The problem for Trek, however, was that in only one of the four tested scenarios was the WaveCel helmet **48x** more effective than the traditional foam helmet. The four test scenarios together demonstrated a wide distribution of results of between 5x and 48x improved head injury protection as compared to traditional foam helmets. Based on this distribution, the study concluded that the relative head injury protection



performance of the WaveCel helmet “depends on impact angle and velocity.”

NAD recognized that Trek was making an “up to” claim but, in assessing the reasonable takeaway from such a claim, NAD looks to “whether an ‘appreciable number’ of consumers are likely to attain a claimed ‘up to’ benefit.” Since there was no evidence “to demonstrate that an appreciable number of consumers will experience a cycling impact at the precise speed and head angle” that yielded the 48x more effective result, and since the proffered study “only accounts for a few of the many real-life speeds and angles in which an unfortunate cyclist’s head may experience an oblique impact,” NAD recommended that the advertiser discontinue the challenged claim.

Takeaway»

The phrase “up to” does not allow an advertiser to tout only its best study results. NAD interprets an “up to” modifier as communicating to consumers that they will generally be able to attain the advertised result, and requires evidence that an “appreciable number” of consumers are likely to attain the claimed “up to” benefit.

NAD continues to focus on safety and health-related claims in its routine monitoring program. Advertisers should be particularly wary of playing fast and loose with these types of claims.

[Amerisleep \(SleepJunkie.org and SavvySleeper.org\)](#), Report #6369, NAD/CARU Case Reports (May 2020)

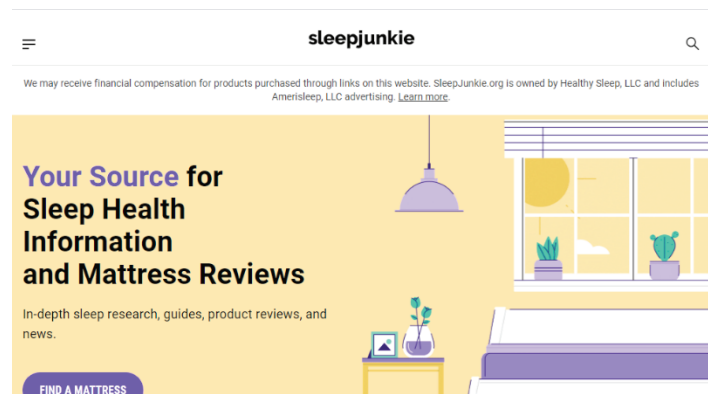
Online shopping has, unsurprisingly, soared to new heights in 2020, with total e-commerce sales for the year [expected to reach over \\$4.2 trillion](#). In this golden age of e-commerce, online reviews have become more important than ever to discerning consumers. NAD is no stranger to this fact, and continues to pay close attention to attempts to blur the line between online reviews and advertising, including in a challenge last year brought by Casper Sleep against competitor Amerisleep regarding two websites—SleepJunkie.org and SavvySleeper.org—that Casper argued appeared to be independent mattress review sites but were, in fact, owned by Amerisleep.

SleepJunkie.org and SavvySleeper.org feature “editorial-like” content and articles about sleep and mattresses, including “Mattress Guides,” “Mattress Reviews,” and mattress rankings and comparisons. Both sites are owned and operated by Amerisleep, and included a disclosure at the top of each page where Amerisleep products were referenced that “We may receive financial compensation for products purchased through links or codes on this website. [SleepJunkie.org / SavvySleeper.org] is owned by Healthy Sleep, LLC, which is affiliated with Amerisleep, LLC. Learn more.”

NAD agreed with Casper that “the content and format of SavvySleeper.org and SleepJunkie.org inherently convey the message that the sites are independent—not advertising.” In reaching this conclusion, NAD pointed to the website names and “.org” domains (which give no indication that the sites are advertising for or affiliated with Amerisleep), the fact that the sites included no Amerisleep branding, and the seemingly impartial language on the site, which included statements like “Our reviews are designed to help you choose the best bed for you from the top online bed sellers.”

NAD also found the message that these websites are independent ratings and review sites could not be cured by a contradictory disclosure. NAD therefore recommended that Amerisleep discontinue the sites in their then-current form or “modify them to ensure that consumers clearly understand the websites’ content are advertising for Amerisleep.” In doing so, NAD expressly noted that rankings and reviews on unbranded websites like those at issue are formatted in a way that could mislead reasonable consumers and, if Amerisleep wanted to continue to rate and review competing mattresses, “NAD cautioned the advertiser that the format itself poses additional challenges in ensuring that consumers are not misled to believe the content is from an independent third-party.”

To this day, SleepJunkie.org and SavvySleeper.org remain unbranded sites that purport to review, compare, and rank mattresses. The disclosure at the top of the page now reads: “We may receive financial compensation for products purchased through links on this website. SleepJunkie.org is owned by Healthy Sleep, LLC and includes Amerisleep, LLC advertising. Learn more.” This disclosure is arguably even more confusing than the one NAD reviewed and rejected. Particularly given NAD’s cautionary note, it seems doubtful this addresses NAD’s concerns, although we have yet to see a compliance proceeding in this matter.



Takeaway»

Companies engaged in native advertising should clearly disclose their connection to the advertising to ensure consumers understand it originates from the company and is, in fact, advertising. However, even a clear and conspicuous disclosure of material connection may not be enough to qualify certain forms of native advertising that NAD has found inherently communicate that the content is from an independent third-party, such as seemingly unbiased rankings and reviews.

[NanoTouch Material \(NanoSeptic Surfaces\), Report #6390, NAD/CARU Case Reports \(July 2020\)](#)

Keeping surfaces clean and disinfected is always important to businesses and operators of public spaces, but during a global pandemic, it is paramount. With this backdrop, NAD, as part of its routine monitoring program, requested substantiation for NanoTouch's claims that its nanocrystal-coated surfaces work continuously to "self-clean" high-traffic public touchpoints.

NanoTouch offers mats, tissue boxes, buttons, door handles, mouse pads and other products coated with photocatalyst nanocrystals that, it claims, react to visible light causing an oxidation reaction that kills bacteria and viruses.

The advertiser submitted to NAD six independent lab reports showing that surfaces coated with NanoSeptic crystals reduce bacteria and viruses versus a control, eliminating 99.9% of most types (including human coronavirus) over time. Based on this evidence, NAD agreed that NanoTouch had provided a reasonable basis for its claims about the product's mechanism of action—namely, that NanoSeptic continuously self-cleans, is powered by light, and oxidizes organic contaminants without the use of toxic chemicals.



Yet NAD recommended NanoTouch pare back its advertising to avoid conveying the message that NanoSeptic surfaces are always clean. For example, NanoTouch claimed its product can "turn dirty, high traffic public touchpoints into clean surfaces." While the advertiser could prove NanoSeptic crystals reduced the amount of bacteria and viruses on a surface over time, thereby making them "cleaner," it could not, in NAD's view, guarantee the surfaces always would be "clean." Each time someone touches a surface they introduce new pathogens that could take hours or longer to be eliminated. NAD was concerned the advertiser's testing did not mimic the

frequent touching and repeated contamination found in high-traffic public spaces. In short, while NanoTouch's testing was a good fit for the claim that its NanoSeptic crystals make surfaces cleaner, it was *not* a good fit for the claim that such surfaces will be clean.

Takeaway»

Robust and reliable testing only goes so far. Often overlooked, fit matters too. Advertisers must avoid communicating broader messages than they can support, and challengers should always cast a wide net in their complaint for implied messages that may exceed the scope of the advertiser's substantiation.

Procter & Gamble (Tide purclean Laundry Detergent), Report #6392, NAD/CARU Case Reports (July 2020) and NARB Panel #274 (November 2020)

Seventh Generation challenged advertising for Tide purclean, which P&G markets as a plant-based liquid detergent that is more effective than other plant-based liquid detergents. Tide purclean contains not only plant-based ingredients, but also mineral- and petroleum-based ingredients.



P&G argued its claim complies with the USDA's Bio-Based standard, which requires a product to be 75% plant-based, as noted on a seal on the purclean front label. But participating in a voluntary labeling or certification program, NAD explained, does not insulate an advertiser from a challenge.

NAD determined that the phrase "plant-based," in the context of the front label and especially in proximity to the product name "purchlean," reasonably conveys the product is 100% plant-based. The mice-type disclosure on the USDA seal that its certification threshold is 75% plant-based ingredients did not meaningfully clarify the label's overall message.

NAD also recommended P&G modify the product's back label and other purclean advertising to clarify it is not 100% plant-based. However, NAD rejected the challenger's argument that "purchlean" in isolation reasonably conveys the product is 100% plant-based. NAD emphasized it is reluctant to recommend an advertiser change a product name unless it makes an express performance claim or the challenger provides a consumer survey showing the name is misleading.

Seventh Generation also challenged P&G's claims that purclean is the "1st Plant-Based Detergent With The Cleaning Power of Tide" and has "4x Cleaning Power of Leading Natural Detergent." NAD found the former claim was substantiated by P&G's ASTM testing, but the latter claim was not. Although the 4x claim was accompanied by a disclaimer stating "1 dose Tide purclean vs 4 doses leading natural detergent," NAD was concerned that P&G's testing protocol failed to test the competing detergent in the same manner consumers use it. The leading natural detergent's usage instructions do not say to use 4 doses in a single wash. NAD also did not believe that P&G's comparison to a quadruple dose was consumer relevant.

P&G accepted NAD's recommendations as to its plant-based claims, but appealed the 4x claim. NARB agreed with NAD that P&G had failed to establish that a quadruple dose is relevant to consumers who use plant-based detergents, and thus recommended P&G discontinue the claim.

Takeaway»

NAD's and NARB's rejection of P&G's testing is consistent with NAD precedent requiring that testing follow a competitor's usage instructions and be consumer-relevant. As for P&G's plant-based claim, NAD's decision highlights that advertisers need to be vigilant about avoiding implied messages conveyed by a combination of elements in an ad, and that disclaimers (particularly tiny ones) are not a cure-all. Both advertisers and challengers should keep in mind NAD's different approach to reviewing product names.

Drugs & Supplements

Bayer Healthcare (Aleve® Naproxen Sodium Tablets), NARB Panel #262 (March 2020)

NAD recommended Bayer discontinue claims that Aleve was “Proven Better on Pain” than “Tylenol” and “Tylenol Extra Strength.” NAD found Bayer’s claims were establishment claims that conveyed a broad and unqualified superiority message that NAD did not believe Bayer’s studies could support. Bayer appealed to NARB.



On appeal, Bayer did not dispute its claims were strong comparative superiority establishment claims. Nor did Bayer dispute that its ads referring to “Tylenol” made a line claim against all Tylenol products. Instead, Bayer’s appeal focused on NAD’s rejection of its six clinical studies. While there was no question Bayer’s studies were well-designed and properly-executed, NAD found the studies did not fit Bayer’s broad and unqualified claims.

NAD was concerned the studies were limited to patients with at least moderate pain, but consumers use Aleve and Tylenol for mild pain as well. Johnson & Johnson, the challenger, also contended that Bayer’s studies involving dental and menstrual pain relief did not account for headache pain, another type of pain for which consumers commonly use analgesics. However, the NARB panel agreed with Bayer that by proving superiority for two different types of moderate pain, Bayer had established generalizable superior pain relief across the spectrum of OTC pain.

Another flaw in Bayer’s studies, according to NAD, was that they took place over 12 hours but test subjects did not get a second dose of Tylenol Extra Strength despite that users can take it again after 6 hours. While that critique and others led NAD to recommend Bayer discontinue its superiority claims altogether, NARB took a different approach. The NARB panel concluded Bayer’s studies constituted reasonable, competent and reliable scientific support to claim that Aleve delivers superior pain relief versus Tylenol Extra Strength *for the first 6 hours after an initial dose*. Thus, rather than recommending Bayer discontinue its claims, NARB recommended that Bayer *modify* its claims to clearly and conspicuously disclose the claims are based on data from the first 6 hours after initial dosing.

Takeaway»

There were several instances in 2020, *Bayer Healthcare* included, where NAD recommended an advertiser discontinue a claim altogether and then on appeal NARB recommended the advertiser merely modify the claim. Just because scientific evidence is imperfect doesn’t necessarily make it worthless; it may support a modified or qualified claim. Advertisers who strongly believe that NAD unfairly criticized their substantiation should seriously consider an appeal to NARB. Under its procedures, NARB is supposed to review cases *de novo*, although advertisers should keep in mind that NARB does frequently defer to NAD in practice. Appeals can also be beneficial for advertisers—and frustrating for challengers—because NAD and NARB do not expect an advertiser to comply with NAD’s decision while the appeal to NARB is pending.

[GlaxoSmithKline Consumer Healthcare \(Benefiber Original and Benefiber Healthy Shape\), NARB Panel #270 \(September 2020\)](#)

How much manipulation of a natural ingredient is too much, before an advertiser can no longer call it “100% natural”? The amount involved in the manufacturing process for Benefiber, according to NAD and NARB. In a challenge brought by Procter & Gamble, NAD recommended that GlaxoSmithKline discontinue its product label claim that Benefiber is “100% Natural.” Although undisputed that Benefiber is made with a completely natural product—wheat starch—and through the manufacturing process no new ingredients are added, NAD nonetheless found that “the processing of [natural] wheat starch to yield the wheat dextrin found in Benefiber represents a significant alteration of the source ingredient that is inconsistent with a consumer’s reasonable understanding of a product that claims to be ‘100% Natural’”.

In reaching its decision, NAD acknowledged that consumers expect some degree of processing even of foods that are considered natural. However, NAD noted that consumers expect such processing to be minimal and “as a general rule, ingredients that are derived from nature and

undergo significant chemical alterations are often not ‘natural’ in the way that consumers expect them to be.”

NARB agreed with NAD’s recommendation. NARB expressed particular concern about the use of hydrochloric acid in the manufacturing process, which is added to the wheat starch to help split the chemical bonds, so that new non-digestible bonds can be created. This, together with other processes, converts the wheat starch (which is digestible and, remarkably, has 0% dietary fiber) into wheat dextrin (which is non-digestible and has 85% dietary fiber). Although no hydrochloric acid remains in the product at the end of the process, in NARB’s view, the use of this substance distinguished the manufacturing process for Benefiber from other foods such as cheese and wine, which the advertiser argued were also “natural” foods subject to processing before they were sold to consumers.

NAD’s decision noted that “quantified claims have a strong impact on consumers and that the use of the numerical ‘100%’ conveys a message of completeness and certainty that vaguer language may not. . . .

Accordingly, ‘100% Natural’ is a powerful claim that promises to deliver a substance that is entirely natural.” Picking up on this, NARB made clear that its conclusion and recommendation regarding Benefiber’s “100% Natural” claim should not be extended to “a more limited or qualified use of ‘natural’ that might be supported by the evidence.”



Takeaway»

Advertisers should be mindful that even where their product is made with all-natural ingredients, if those ingredients undergo more than “minimal processing” before they reach the consumer, they may not be able to support a “100% Natural” claim. In those instances, a more narrow or qualified “Natural” claim has a better chance of surviving an advertising challenge.

Nature’s Boost (Blood Boost Formula), Report #6375, NAD/CARU Case Reports (June 2020)

Nature’s Boost advertised its “Blood Boost Formula” as offering a variety of cardiovascular benefits such as lowering blood sugar and bad cholesterol, managing high blood pressure, and combatting insulin resistance. Responding to a challenge by the Counsel for Responsible Nutrition, Nature’s Boost cited clinical studies and review articles on ingredients found in Blood Boost, including vitamins C and E, manganese, cinnamon, and bitter melon.

You probably won't be shocked to learn NAD recommended the advertiser discontinue its miracle cure promises. But while this case's outcome may be obvious, NAD's decision is worth your attention as it gives a clinic on how *not* to substantiate a health-related claim.

In particular, this decision addresses some of the most common reasons NAD rejects purported scientific support for health-related claims:



- NAD generally requires testing on the actual product itself, absent proof that it is scientifically appropriate to extrapolate ingredient testing to the product. Here, none of the studies Nature's Boost cited involved testing of the Blood Boost Formula. Instead, as noted, they involved testing of the product's ingredients in isolation.
- Further, the studies involved testing of substantially greater amounts of the ingredients than found in the product, and therefore were not sufficiently reliable to support an efficacy claim. For example, one study concerning the impact of bitter melon on blood glucose levels involved 10-40 times the amount in a single serving of Blood Boost Formula.
- Several studies were conducted outside the U.S. on populations with materially different diets from consumers to whom Nature's Boost directed its advertising and thus were of limited relevance.
- Some studies had small sample sizes and therefore lacked the statistical power needed to detect a significant difference for relevant endpoints.
- NAD also rejected the advertiser's reliance on *in vitro* testing and animal studies, explaining that they generally have limited value in predicting the effect of a substance when consumed by humans.

Takeaway»

Advertisers should not rely solely on existing studies of a product's ingredients to support efficacy claims. Advertisers should consult scientific experts and counsel familiar with the ins and outs of NAD's substantiation standards to assess existing studies and to determine what additional testing or scientific evidence, if any, is required to make their desired claims.

Maty's Healthy Products, LLC (Maty's Cough Products), Report #6394, NAD/CARU Case Reports (July 2020)

Maty's advertised its cough syrup dietary supplements in online advertising and on packaging using health-related performance claims like "loosens troublesome mucus." Zarbee's, the maker of competing supplements, challenged these and other claims.

Maty's argued its "loosens troublesome mucus" claim was substantiated by evidence that one of the product's ingredients, thyme, has traditionally been used as an expectorant. NAD rejected this argument, because evidence about just one ingredient cannot support a claim about the



whole product. NAD also noted nothing about the claim or the context in which it is presented suggests to consumers that the claim was limited to the product's use of thyme. Without any evidence that Maty's cough syrups, as a whole, can "loosen troublesome mucus," NAD concluded there was no reasonable basis for this claim.

NAD also recommended Maty's discontinue the claim "Compare our ingredients to other leading OTC brands," or modify the claim to clearly disclose material differences between Maty's products and OTC brands. Notably, Maty's products are dietary supplements, while the products on the other side of the comparison were drugs.

NAD similarly recommended Maty's discontinue the claim "We're the better choice, and here's why," or modify the claim to limit the comparison to other *dietary supplement* cough syrup products. NAD found a reasonable consumer is likely to interpret the claim as a broad message of superiority against all competing cough syrups, whether dietary supplements or drugs. NAD found that the unqualified

comparison claim implied an apples-to-apples comparison, which may be appropriate for a comparison to other dietary supplements, but not for a comparison to a pharmaceutical product.

Takeaway»

Studies on an ingredient in a product cannot be used to support claims about the product as a whole; instead, they can only be used to support limited claims about the use of that ingredient in that product. In addition, advertisers should be careful when making apples-to-oranges product comparison, as doing so requires disclosure of material differences between the products.

Cover Three (Brain Defense), Report #6409, NAD/CARU Case Reports (September 2020)

The Council for Responsible Nutrition challenged Cover Three's claims that its drinkable dietary supplements are "doctor-formulated" to support brain health and improve focus, mental clarity, memory, and concentration. CRN also challenged claims concerning Brain Defense's ability to counteract the effects of traumatic brain injuries (e.g., concussions), which Cover Three agreed to permanently discontinue or modify while the challenge was pending.

Regarding the modified TBI claims, NAD was concerned that Cover Three could not support all reasonable takeaways from its advertising. For example, Cover Three's website showed a child wearing a football uniform with the claim "Defend your brain. Before, during, or after the season." NAD determined that this claim and other similar claims conveyed that Brain Defense will protect against or reduce TBIs sustained during contact sports. However, the sole human clinical study relating to TBIs that the advertiser cited involved doses of docosahexaenoic acid (DHA) that were 3.33-10 times the amount present in Brain Defense. Further, that study involved testing on adult football players, and thus did not address whether DHA protects against head trauma in children.



NAD likewise found Cover Three's support for its improved cognition and memory claims to be inadequate. Cover Three had not performed any human clinical studies of its own, and instead relied on a mix of existing studies on Brain Defense ingredients and *in vitro* and animal studies.

NAD rejected the application of the existing human studies to Brain Defense for various reasons, including differences in dosage and population, the presence in certain tested products of other ingredients not found in Brain Defense, small sample sizes, and mixed results in review articles and meta-analyses. NAD also explained that while *in vitro* and animal studies may provide helpful background information about a substance's biological effects, they have limited value in predicting how a product or ingredient will perform in humans.

In the absence of any product testing that supported Cover Three's health-related claims, NAD recommended they be discontinued. Cover Three agreed to comply with NAD's decision.

Takeaway»

Numerous recent NAD decisions, including this one, reflect that advertisers making health-related performance claims will have great difficulty supporting them before NAD without human clinical studies on the product itself. Existing studies concerning a product's key ingredient may support qualified ingredient claims, but advertisers still must look out for any aspects of a study that could make it inapplicable to the advertiser's product. In addition, as NAD has often noted, *in vitro* and animal studies, on their own, are not a replacement for properly-conducted human clinical studies.

Food & Beverages

“Brehaha” over Sports Drink Ingredients

Stokely-Van Camp, the maker of Gatorade, brought two challenges in 2020 against its sports drink rival BodyArmor. These decisions are significant not only because they may help you decide which sports drink to buy before your next big game or race, but also because they illustrate how advertisers can run into (or dodge) common pitfalls of comparative advertising.

1. *BodyArmor Nutrition (BodyArmor SuperDrink and BodyArmor Lyte Sports Drink)*, Report #6352, NAD/CARU Case Reports (March 2020)

In the first case, SVC took issue with advertisements claiming BodyArmor and BodyArmor Lyte are “The More Natural Sports Drink” and have “More Natural Ingredients than Gatorade Thirst Quencher & Gatorade Zero.”



To support its claims, BodyArmor pointed to the products’ overall composition and the absence of artificial sweeteners, flavors or colors in BodyArmor products, unlike with products from the Gatorade Thirst Quencher and Gatorade Zero product lines. But because BodyArmor’s claim was not clearly and conspicuously limited to these specific types of ingredients, NAD found reasonable consumers could take away a broader (and unsupported) message about all types of ingredients.

BodyArmor also offered data showing that the total number of natural ingredients in its products was greater than comparable products from the Gatorade Thirst Quencher and Gatorade Zero product lines. For example, BodyArmor provided data showing that BodyArmor Lyte Berry Punch has more natural ingredients than Gatorade Zero Berry. But having made a general line claim, BodyArmor needed to prove that *all* BodyArmor products have more natural ingredients than *all* Gatorade Thirst Quencher and Gatorade Zero products. Merely comparing a similarly-flavored product from each party’s line did not cut it. As NAD pointed out, consumers shopping for sports drinks are not necessarily looking to buy a specific flavor.

For these reasons and others, NAD recommended BodyArmor discontinue its comparative claim. BodyArmor agreed to comply with NAD’s decision and went back to the drawing board. Subsequently, BodyArmor released new comparative advertising that SVC challenged in . . .

2. *BodyArmor Nutrition (BodyArmor SuperDrink and BodyArmor Lyte Sports Drink)*, Report #6410, NAD/CARU Case Reports (September 2020)

In round two of this sports drink showdown, SVC complained about online banner ads on the ground that they implied BodyArmor is the only sports drink that is low calorie and contains no added sugar, artificial sweeteners, flavors or dyes.



NAD agreed this was a reasonable takeaway, noting the lack of separation and similar font styles for the ad’s text. In addition, NAD rejected BodyArmor’s argument that “The only sports drink” is puffery, finding that in the context of the text below that claim, consumers would reasonably understand “only” as conveying an exclusivity message as to the identified product attributes.

SVC also challenged BodyArmor’s social media videos, which began with a side-by-side shot of a BodyArmor bottle and Gatorade Thirst Quencher bottle with a “vs.” in between the products. Comparative claims about the products flashed on screen, such as “Contains vitamins” (under the BodyArmor bottle) and “Contains no vitamins” (under the Gatorade bottle). After this comparative sequence was over and the Gatorade product was no longer on-screen, the video featured additional monadic claims about BodyArmor products, like “Natural flavors and sweeteners.”

SVC contended that, given the video’s overall comparative context, consumers would reasonably take away a comparative message beyond the side-by-side shot, and would think, for example, that Gatorade’s products do not contain “natural flavors and sweetener.” On this issue, NAD sided with BodyArmor. Although the videos were just nine seconds—and thus all of the claims were in close temporal proximity—the disappearance of the Gatorade bottle and of the comparative “v.” prior to the monadic sequence indicated that these claims were not commenting on Gatorade.

Takeaway»

Comparative ads can easily convey a wide range of implied messages—some intended and some unintended—and are more likely to result in a competitive challenge than a monadic claim. When making comparative claims, advertisers should double and triple check they have accounted for *all* messages an ad reasonably could convey. Advertisers should focus in particular on how a claim in one part of an ad can affect the meaning of a claim elsewhere in the ad, and should make sure to clearly separate distinct claims when they are not supposed to interact.

P.S. – BodyArmor continues to roll out new comparative advertising targeting its chief rival. E.g., <http://comparesportsdrinks.com/> and <https://www.youtube.com/watch?v=ZC-LJDcv1Zs>. It would not be a surprise if NAD sees these parties again soon...

Petco Animal Supplies (Petco “No Artificial Ingredients” Campaign), Report #6357, NAD/CARU Case Reports (April 2020)

In consultation with a team of veterinarians, scientists and nutritionists, Petco launched an initiative to stop selling pet foods containing artificial colors, flavors or preservatives. To meet pet nutrition guidelines, Petco exempts synthetic vitamins, minerals and amino acid supplements from its policy. Petco also permits artificial substances derived from or that mimic natural compounds.



Petco advertised its initiative through TV commercials, internet ads, direct-to-consumer emails and in-store materials. The ads featured claims like “No more nasties,” “No more artificials* in any dog food or treats,” “We’ve gone artificial-free* and so can you!” and “We’re turning our back on artificial ingredients.”

Petco’s ads included a disclaimer stating “*Learn more at Petco.com/betternutrition.” At that URL, Petco explained its policy in detail, including exactly what ingredients its policy allowed and prohibited.

NAD requested substantiation for Petco’s advertising as part of its routine monitoring program.

In its decision, NAD distinguished between claims like “We’re turning our back on artificial ingredients,” on the one hand, and claims that are more absolute, like “no more artificial ingredients,” on the other hand. The former category was more vague and did not promise zero artificial ingredients, so NAD found Petco could clarify these claims with a disclosure. However, Petco’s disclosure contradicted the more absolute claims conveying that Petco was removing *all* artificial ingredients. NAD thus recommended that Petco modify its absolute claims to convey the more limited message that Petco has undertaken an initiative to remove artificial ingredients from its products, without promising it was eliminating artificial ingredients altogether.

NAD also analyzed Petco’s compliance with the FTC’s Dot Com Disclosures guidelines. NAD recognized that advertisers may direct consumers to a website to learn more about a claim’s meaning, particularly where practical limitations make it impossible to include a full explanation in the advertisement itself. However, NAD was concerned that simply pointing consumers to “Learn more at [Petco.com/betternutrition](https://petco.com/betternutrition)” did not adequately convey that this URL contained material information regarding the specific ingredients covered by Petco’s policy, and recommended Petco modify the disclosures to make this clear.

NAD also recommended Petco discontinue claims that denigrated artificial ingredients, like “No more nasties.” NAD was concerned a reasonable takeaway was that natural ingredients are healthier or more nutritious than artificial ingredients, a message Petco could not support. NAD did not agree these claims were puffery given the context of the advertisements was that Petco was removing “bad stuff” and “nasties” from its products.

Takeaway»

Disclaimers are a key part of an advertiser’s toolbox. They must be prominent, of course, but that’s not all. Disclaimers also must be clear and must not contradict an ad’s main message. Consult the [FTC’s guidance](#) when using online disclosures.

Little Spoon (Little Spoon Baby Food), Report #6368, NAD/CARU Case Reports (May 2020)

Little Spoon promotes its line of refrigerated baby food as “fresh,” contrasting it with “processed” baby food that is “typically older than your baby.” Competitor Plum Organics challenged Little Spoon’s monadic and comparative advertising claims.

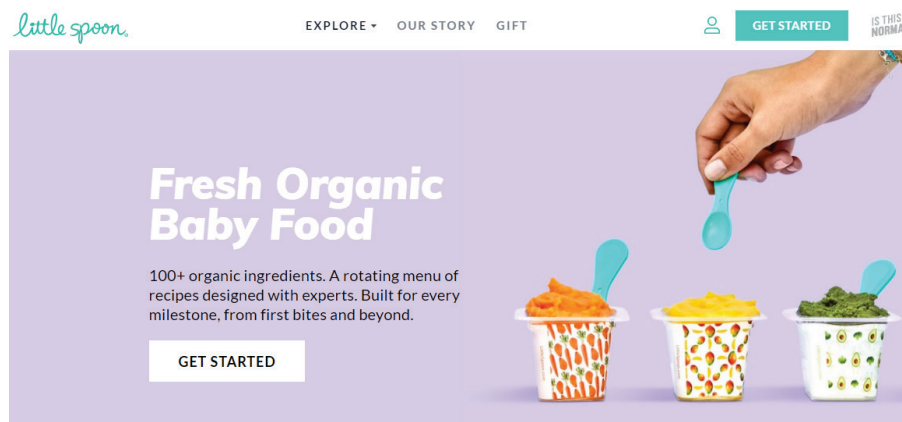
NAD noted the substantial weight and deference it gives the FDA, and looked to the FDA’s definition and guidance on the term “fresh.” According to the FDA, when used on a food label, “fresh” suggests the food is unprocessed (meaning in its raw state) and has not been frozen or subjected to any form of thermal processing or any other form of preservation.

Little Spoon baby food goes through “high pressure processing,” which the advertiser’s website says is meant to kill harmful bacteria. NAD and NARB had previously considered high pressure

processing in the context of a fresh poultry product and concluded consumers would not expect food labeled “fresh” to undergo this processing. Under FDA authority and NAD precedent, food that is thermally processed is not “fresh.” Thus, NAD found Little Spoon’s “fresh” claim was unsupported and recommended it be discontinued.

NAD similarly recommended Little Spoon discontinue its comparative claims, finding they reasonably conveyed other baby food is stale, lacking in nutritional value, or otherwise unsuitable for consumption or unpalatable. Little Spoon tried to support these claims using a research article stating that high pressure processing damages food less than conventional heat sterilization. But NAD pointed out the article also stated the results were product dependent, and Little Spoon lacked proof specific to its product or competing shelf-stable baby food.

In its advertiser’s statement, Little Spoon rejected NAD’s recommendation to discontinue its “fresh” claim, but stated it would *not* appeal NAD’s decision to NARB. NAD referred the matter to the FTC and the FDA. Interestingly, according to an FTC letter to NAD, the FTC *declined* to take additional action at this time based on its consultation with and in deference to the FDA. Little Spoon continues to claim its baby food is “fresh” on its website, as shown below.



Takeaway»

The self-regulatory process is voluntary; if an advertiser is adamant that an NAD/NARB decision is wrong, it can always roll the dice at the FTC. Advertisers should consider this risky play only as a last resort in extreme situations, as it could harm the advertiser’s reputation with consumers and its standing with NAD, and importantly, increases the odds of a class action.

New forms of online advertising have brought new challenges for advertisers and regulators. In a Google search for either the term “Kind Bars” or “energy bars,” the top Google Ad result was an ad for Clif Energy Bars that stated “A Better Performing Bar | Clif Bars For Sustained Energy.” Kind challenged this advertising as an express claim that compares the performance of Clif Energy Bars to the performance of Kind Bars or all energy bars on the market. Clif Bar, on the other hand, argued the “better performing” claim, which was separated from the “sustained energy” claim by em dashes or vertical lines, was not comparative at all, but rather mere puffery and a “monadic claim of pride in its product.”

NAD concluded that when the advertising was viewed as a whole, it tied “better” to the objectively measurable performance attribute “sustained energy,” and was not puffery. NAD also noted that the challenged advertising appeared in Google search results where, “without any additional separation between the claims in [the] form of images or other visual clues [], the em bars and vertical lines did not limit the takeaways from the express message that Clif Bars are better than Kind Bars or other energy bars at providing sustained energy.”



Finding the advertiser’s proffered evidence insufficient to support a claim that Clif Bars are better than Kind Bars or other energy bars at providing sustained energy, NAD recommended that the advertiser “discontinue its Google AdWord claim ‘A Better Performing Bar--Clif Bar For Sustained Energy’ in response to internet searches for ‘Kind Bars’ and ‘energy bars.’”

In a footnote, NAD stated it did not reach the issue of whether the context of advertising in Google search results for “Kind bars” increases the likelihood that consumers searching for information about Kind bars will reasonably take away a comparative message when Clif claims it is a “better performing bar.” However, it noted that its decision is “limited to the claim in the context in which it was challenged, a Google Ad Word (now known as Google Ads) result.” This limitation strongly signals that this context played a role in NAD’s decision.

Takeaways»

Advertisers purchasing online advertising, such as Google Ads, should be mindful of unintended messages that might reasonably be conveyed as a result of the limited real estate they are working with. A claim that might otherwise be puffery on its own can quickly turn into a comparative claim when it appears directly adjacent to another claim in a Google Ad result, without the additional spacing or visual cues to separate the claims that are typically available in other advertising mediums.

When purchasing search term keywords, particularly those tied to competitor names, advertisers should consider and be prepared to substantiate messages reasonably conveyed not just by the text of the advertising, but also by the advertising in the context of the purchased keywords and the resulting search results page as a whole, where the ad will likely appear alongside search results related to a competitor’s brand.

Procedural Issues

NARB Deference to NAD Procedural and Jurisdictional Decisions; Consent Judgment with State Attorney General Does Not Divest NAD of Jurisdiction

Section 2.1(C)(1)(b) of NAD's Procedures states that a complaint is not appropriate for formal investigation before NAD if the advertising claims at issue are "the subject of . . . an order by a court." In defending a challenge to advertising for its home warranty services, Choice Home Warranty argued NAD did not have jurisdiction because the advertising at issue was the subject of "an order by a court" stemming from litigation against Choice Home Warranty by the New Jersey Attorney General and Department of Consumer Affairs, which ended in a Consent Judgment entered in the Superior Court of New Jersey. That order covered substantially all of the claims challenged at NAD and allowed Choice Home Warranty to continue making those claims, but required that it include certain clear and conspicuous disclosures in close proximity to the claims. The advertiser argued that an NAD inquiry into these claims would therefore be duplicative and potentially inconsistent with the New Jersey court's order, and urged NAD to administratively close the case pursuant to its Policies & Procedures.



NAD determined that the court order did not divest NAD of jurisdiction because the Consent Judgment was entered as a result of a litigation settlement that did not adjudicate the truth or falsity of the challenged advertising. After assessing the advertising on the merits, NAD recommended that the advertiser discontinue or modify a number of the claims at issue. See *Choice Home Warranty (Home Warranty Service Plans)*, Report #6341, *NAD/CARU Case Reports* (January 2020).

On appeal, NARB stated simply that it “finds it unnecessary to address the specific points” related to the advertiser’s jurisdictional argument, concluding that “issues involving the interpretation of procedural rules and the discretionary exercise of NAD jurisdiction are generally best left for resolution by NAD. The panel concludes that that principle applies here, and the panel accepts NAD’s resolution of those issues.” *Choice Home Warranty (Home Warranty Service Plans)*, NARB Panel #265 (June 2020).

Takeaways»

NAD and NARB’s Policies and Procedures state that “[w]hen an advertiser appeals NAD’s decision on one or more issues involved in a case, the case will be reviewed by a panel of the NARB.” There is no carve out for procedural or jurisdictional issues. Parties who spend substantial sums for NARB review may reasonably expect that NARB will review all disputed issues, including procedural and/or jurisdictional issues, in accordance with the Policies and Procedures. However, NARB has repeatedly declined to do so, and has instead afforded NAD complete deference on procedural issues. The result is that there is effectively no avenue for appellate review of NAD’s interpretation and application of its procedures and jurisdiction. Unless and until NARB changes its stance, parties who wish to challenge on appeal NAD’s application of its procedures in or jurisdiction over a particular case should consider carefully whether their appeal is worth the substantial required filing fee.

State and federal court consent orders do not divest NAD of jurisdiction over advertising claims that are the subject of the consent order. Note, however, that pursuant to § 2.1(C)(1)(c) of NAD’s Policies & Procedures, if the challenged advertising claims are “the subject of a federal government agency consent decree or order” (e.g., a consent order with the FTC), this will divest NAD of jurisdiction over these claims.

NAD Clarifies What Is and Is Not “National Advertising”

According to NAD’s Procedures:

The term “national advertising” shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser.

Two decisions from 2020 clarify the scope of this definition. In *Sunrun Installation Services Inc. (Residential Rooftop Solar Energy)*, Report #6338, *NAD/CARU Case Reports* (January 2020), the challenger objected to energy savings claims made by Sunrun’s representatives during in-home visits. Sunrun contended that NAD lacked jurisdiction over personalized in-home conversations. NAD agreed in part, explaining that representations about local utilities in a particular state do not meet the requirement of dissemination nationally or to a substantial portion of the United States. However, the fact that Sunrun communicated its claims to consumers via in-home visits did not divest NAD of jurisdiction; to the extent Sunrun’s representatives used a common script or made the same claims across multiple states, NAD had jurisdiction over that advertising.

NAD revisited the definition of “national advertising” a few months later in *Align Technology, Inc. (Invisalign Clear Aligner System)*, Report #6365, *NAD/CARU Case Reports* (May 2020), this time focusing on the “advertising” component of the term. There, SmileDirectClub challenged “tier” designations (Bronze, Silver, Gold, Platinum, Diamond, VIP) within Align’s “Provider Locator” tool on the ground that they implied that providers possess a certain level of experience and skill. NAD rejected Align’s argument that it was merely providing factual data about Align providers, distinguishing Align’s tier designations from factual information like an office address. By including the tier designations, which were based on how frequently providers recommended Invisalign, Align crossed the threshold into “advertising” and was required to substantiate all reasonable messages conveyed by its tier designations. NAD recommended that Align modify its Provider Locator tool to make clear how it categorizes providers and that a provider’s “tier” does not correspond to their skill at treating patients with Invisalign.

