



NAD at 50 Years: Regulation and Self-Regulation Over the Past 50 Years

Spring 2021 Edition: Not a Symposium, but a Virtual Ad Law CLE Bonanza

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Disclaimer:

This presentation is intended as a summary of the issues presented and is not intended to provide legal advice. It is provided for the general information of the attendees. Legal counsel and advice should be sought for any specific questions and before taking any action in reliance on the information presented.

Agenda

- National Advertising Division: Background
- National Advertising Division: Then and Now
- National Advertising Division: Recent Developments
- Looking Ahead: The Next 50 Years

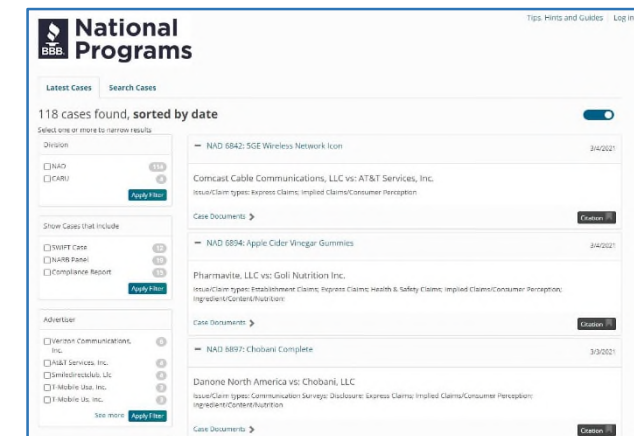
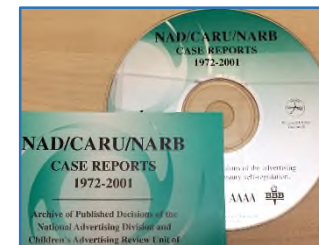
National Advertising Division: Background

National Advertising Division: Background



National Advertising Division: Background

- The National Advertising Division (NAD) monitors national advertising in all media, enforces high standards of truth and accuracy, and efficiently resolves disputes to build consumer trust and support fair competition.
- NAD reviews advertising based on challenges from businesses or complaints from consumers, or on its own monitoring initiative, covering a wide variety of both industries and issues.
- NAD's decisions represent the single largest body of advertising decisions in the United States. [BBB National Programs Online Archive](#)



National Advertising Division: Background

- The majority of NAD cases today result from competitor challenges.
- NAD pursues a monitoring program where it reviews advertising via its own initiative.
- The NAD process resolves advertising disputes efficiently and quickly.
 - There is no document discovery and there are no depositions and no counterclaims.
 - [NAD Procedures](#)

National Advertising Division: Background

- NAD provides advertisers with certainty:
 - NAD has a published body of case precedent that provides advertisers with guidance on claim substantiation and how NAD reviews certain types of claims.
 - NAD is staffed by decision makers with experience in resolving advertising disputes.
 - NAD provides a process for appealing adverse decisions to the National Advertising Review Board.
- NAD is a mechanism for resolving disputes, regardless of the size of the company.
- NAD has experience adjudicating advertising disputes across many industries.

National Advertising Division and FTC Interplay

- The FTC encourages the self-regulation process.
 - After cases are referred to the FTC, the FTC generally encourages the advertiser to participate in the NAD process.

- The FTC will sometimes open an inquiry or investigation, including issuing a civil investigative demand, to advertisers that do not participate in the proceeding or who do not comply with NAD's recommendations.
 - *COORGA*: After COORGA refused to participate in NAD's process, the FTC sued the company and its principal in federal district court for making false and deceptive claims that their dietary supplement could reverse and prevent gray hair.

- NAD often analyzes claims that are later the subject of FTC action:
 - *Pom Wonderful, Supple, Sensa, Pantron 1 Corp. (Helsinki Formula Shampoo)*

Interplay: National Advertising Division and Federal Trade Commission

- Advertisers that refuse to participate in the NAD process, or who refuse to comply with NAD recommendations, are referred to the applicable government agency.
 - Federal Trade Commission (FTC)
 - Federal Food and Drug Administration (FDA)
 - Federal Communications Commission (FCC)
- FTC chooses whether to open an investigation or otherwise take action against the advertiser.

[FTC Resolution of Referrals from BBB National Programs](#)



The screenshot displays the Federal Trade Commission (FTC) website. The header includes the FTC logo, the text "FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS", and navigation links for "Contact", "Stay Connected", "Privacy Policy", and "FTC en español". A search bar is also present. The main navigation menu includes "ABOUT THE FTC", "NEWS & EVENTS", "ENFORCEMENT", "POLICY", "TIPS & ADVICE", and "I WOULD LIKE TO...". The breadcrumb trail reads: "Home » Enforcement » Cases and Proceedings » Letters and Statements » Resolution of Referrals from BBB National Programs, including NAD, CARU, DSSRC, and ERSP". The "Letters and Statements" section is active, showing a list of documents. The first document is "Resolution of Referrals from BBB National Programs, including NAD, CARU, DSSRC, and ERSP", dated November 10, 2020, by Carolyn L. Hann. The second document is "MASK, LLC (Spotless Blemishes & Oily Skin Soothing CBD Sheet Mask)", dated October 27, 2020, by Carolyn L. Hann. A "FILTERS" section on the left includes input fields for "Keyword" and "Documents".



National Advertising Division: Then and Now

NAD Case Decisions: Then....

and Now....

Case #1769 (12/15/80)
CAPITOL EXPORT CORPORATION
(Waterford Irish Stoves/Heaters)

Basis of Inquiry - Magazine advertising made the claim: "And Waterford Laboratories, Inc.) approved." The advertiser was asked for clarification of the Waterford Laboratories, Inc. does not use this designation for a product. After a product-specific hazards affecting public safety, its performance under specified codes or other standards, NAD works with the National Advertising Review Board on national advertising.

Underwriters Laboratories, Inc. will authorize the manufacturer to use the appropriate designations may be "Listed," "Recognized," "Classified," or "Certified,"

The advertiser submitted proof that it had received a UL "Listed" designation for Heaters, documenting that its products conformed to UL standards under which assured NAD that the use of the term "approved" would be discontinued at an appropriate "Listed" designation.

With this assurance, NAD closed its file.

POM WONDERFUL, LLC
POM Wonderful® Pomegranate Juice
Page: 47

accordance herein¹⁴⁰ or discontinue this claim. Similarly, NAD recommended that the advertiser discontinue its claim that POM Wonderful "has more antioxidants than any other drink."

As concerns the advertiser's once fanciful headlines, "Outlive Your Age," "Life Preserver," "Life Guard," "Relax You'll Live Longer," "For Your Protection," etc., NAD determined that when accompanied by a disclaimer of radical fighting antioxidants, POM Wonderful prevents or reduces the risk of Alzheimer's, stroke, heart disease, premature aging, cancer, etc., as a whole, these claims are beyond the realm of puffery and are objectively provable claims requiring substantiation and recommendation to be discontinued in accordance herein. Likewise, with respect to its "The Antioxidant Superpower," NAD determined that when accompanied by language or language touting the superior antioxidant *power* of POM Wonderful, these were similarly objective provable claims requiring substantiation and they be modified or discontinued in accordance herein. At the same time, this decision precludes the advertiser from using these headlines in the accompanying body copy regarding the benefits of its free-radical fighting respect to heart disease, premature aging, stroke, Alzheimer's, cancer,

With respect to its claims that daily consumption of eight ounces of pomegranate juice can reduce the risk or otherwise prevent heart disease, reduce blood pressure, increase blood flow, and other heart-related benefits, NAD determined that while perhaps the evidence might permit a carefully worded disclaimer, preliminary research suggests that pomegranate juice may help reduce the risk of heart disease¹⁴¹ when consumed as part of a balanced diet, the studies do not support such broad claims as the advertiser has promoted here. NAD recommended that the advertiser's claims regarding POM Wonderful and its benefits be *substantially* modified to clearly disclose the limitations of the science and the emerging nature of the scientific findings as they concern the benefits of pomegranate juice on one's diet and the association between antioxidants and heart health.

The Procter & Gamble Company
Tide purclean Laundry Detergent
Page: 11

the product is "75% plant-based" instead of "plant-based." However, NAD concluded that the "purclean" brand name, by itself, was not misleading.

As for the back panel of the product packaging, NAD recommended that the advertiser modify the claim that the "powerful plant-based clean you can feel good about" to avoid the implication that the product is 100% plant-based or that the "powerful cleaning power" is derived solely from plant-based ingredients.

Regarding the line in the challenged video, "Tide purclean, it has nothing to hide. It's made with plants..." NAD recommended that the advertiser discontinue this claim or modify it to more clearly disclose the amount of plant-based content and avoid the implication that Tide purclean is 100% plant-based. NAD further recommended that the disclaimer at the end of the commercial, "75% plant-based per USDA bio-based program," be modified to more clearly and conspicuously disclose the amount of plant-based content included in the product, 75%.

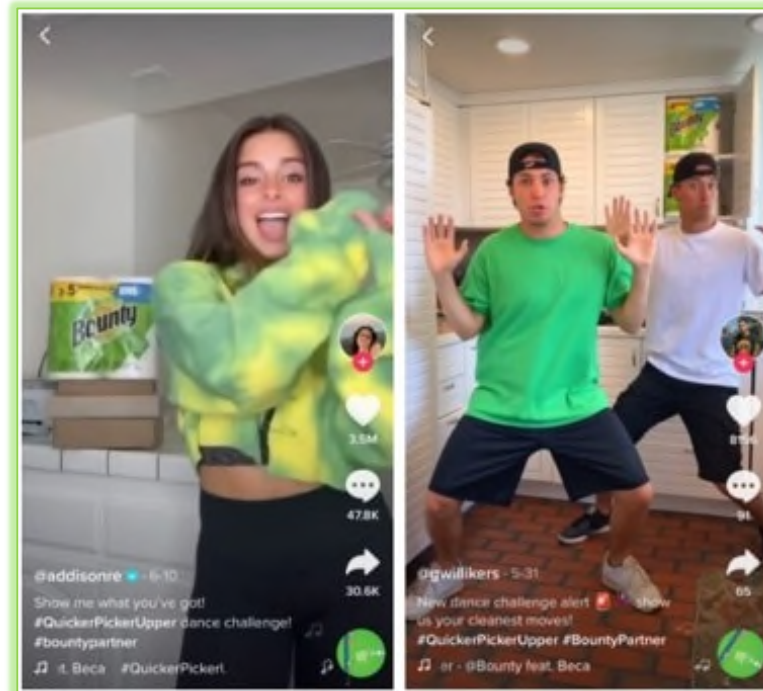
As for the challenged website claim, NAD determined that the advertiser properly supported its plant-based claims and that the omission of the petroleum-based products from the product description section was not misleading so long as those products are adequately disclosed in the accompanying ingredients tab.

NAD concluded that the advertiser provided a reasonable basis for its claims that Tide Purclean is the "1st Plant-Based Detergent With The Cleaning Power of Tide," "Finally, Plant-Based Power that Cleans Like Tide," "Tide purclean is the first plant-based liquid laundry detergent that has the cleaning power that you expect and deserve from Tide, even in cold water," and "Tide purclean performs as well as Tide Original liquid detergent regarding stain removal."

NAD further concluded that the advertiser provided a reasonable basis that Tide purclean outperformed the leading "natural" laundry detergents and that these competing detergents are not

Advertising Channels: Then and Now

- Social media and influencer marketing
 - **The Procter & Gamble Company (Bounty Paper Towels) Report #6403 (August 2020):**
 - NAD inquired about P&G's influencer disclosure practices in a TikTok "dance challenge." Used hashtag #BountyPartner.
 - NAD's chief concern was that the TikTok videos **when shared to Instagram** did not include the hashtag indicating the paid partnership between P&G and the influencer.
 - Following the NAD's concerns, P&G took steps to ensure that its influencers, who promote its Bounty Paper towels in TikTok videos, embed material connection disclosures in the videos to ensure that clear and conspicuous disclosure appears on any platform where they are shared.



Advertising Channels: Then and Now

- Social Media and Influencer Marketing




- MillerCoors Company (Miller Lite Beer), Report #6227 (December 2018)



- Native Advertising

- AmeriSleep (SleepJunkie.org and SavvySleeper.org), Report #6369 (May 2020)

A screenshot of the SleepJunkie website. The top navigation bar includes 'sleepjunkie', 'Mattress Guides', 'Reviews', 'Mattress Resources', 'Bedding Guides', 'Sleep Health', and 'Sleep Research'. Below the navigation is a disclaimer: 'We may receive financial compensation for products purchased through links or codes on this website. SleepJunkie.org is owned by Healthy Sleep, LLC, which is affiliated with Amerisleep, LLC. Learn more.' The main content area features an article titled 'Best Mattress for Back Pain: Reviews & Buyer's Guide' by Meg Riley, updated on February 18, 2020. The article text discusses chronic back pain and mattress recommendations. To the right of the article is a table titled 'Best Mattresses for Couples' with columns for 'MATTRESS', 'HIGHLIGHTS', and 'PRICE'. The table lists three mattresses: Amerisleep AS3 (\$1199), Original Purple (\$1099), and Avocado Green (\$1399).

MATTRESS	HIGHLIGHTS	PRICE
 Amerisleep AS3	Plant-based Bio-Pur® molds to your body to offer cushioning comfort. Plus, clinically proven HIVE® technology promotes healthy posture for a variety of sleeping positions.	\$1199 BUY NOW
 Original Purple®	Features proprietary Purple Grid™ to relieve pressure points and isolate motion.	\$1099
 Avocado Green	Made with eco-friendly, organic materials and is perfect for green shoppers.	\$1399

National Advertising Division and Federal Trade Commission: Then and Now

The screenshot shows the Federal Trade Commission website. The header includes the FTC logo, the text "FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS", and navigation links for "Contact", "Stay Connected", "Privacy Policy", and "FTC en español". A search bar is also present. The main navigation menu includes "ABOUT THE FTC", "NEWS & EVENTS", "ENFORCEMENT", "POLICY", "TIPS & ADVICE", and "I WOULD LIKE TO...". The breadcrumb trail reads: "Home » Enforcement » Cases and Proceedings » Letters and Statements » Resolution of Referrals from BBB National Programs, including NAD, CARU, DSSRC, and ERSP". The page title is "Resolution of Referrals from BBB National Programs, including NAD, CARU, DSSRC, and ERSP". A sidebar on the left lists various categories under "Letters and Statements". The main content area displays a list of resolutions, with two examples shown: "Leptitox Nutrition (Leptitox dietary supplement)" and "MASK, LLC (Spotless Blemishes & Oily Skin Soothing CBD Sheet Mask)". Each entry includes the date, author, and a link to the text of the letter.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Contact | Stay Connected | Privacy Policy | FTC en español

Search

ABOUT THE FTC | NEWS & EVENTS | **ENFORCEMENT** | POLICY | TIPS & ADVICE | I WOULD LIKE TO...

Home » Enforcement » Cases and Proceedings » Letters and Statements » Resolution of Referrals from BBB National Programs, including NAD, CARU, DSSRC, and ERSP

Letters and Statements

COMMISSION CLOSING LETTERS

COMMISSION AND COMMISSIONER PUBLIC STATEMENTS AND LETTERS

STAFF CLOSING LETTERS

STAFF PUBLIC STATEMENTS AND LETTERS

RESOLUTION OF REFERRALS FROM BBB NATIONAL PROGRAMS, INCLUDING NAD, CARU, DSSRC, AND ERSP

FILTERS

Keyword

Documents

Resolution of Referrals from BBB National Programs, including NAD, CARU, DSSRC, and ERSP

Displaying 1 - 20 of 116

1 2 3 4 5 6 next › last »

Leptitox Nutrition (Leptitox dietary supplement)

Response to NAD Referral

DATE: November 10, 2020

BY: Carolyn L. Hann

Text of Letter (126.58 KB)

MASK, LLC (Spotless Blemishes & Oily Skin Soothing CBD Sheet Mask)

Response to NAD referral

DATE: October 27, 2020

BY: Carolyn L. Hann

Text of the Letter (119.63 KB)

[FTC Resolution of Referrals from BBB National Programs](#)

Advertising Substantiation Expectations: Then and Now

Establishment and development of advertising standards have provided more guidance to advertisers, and expectations have adjusted accordingly.

- Consumer Preference Claims
- Comparative Performance Claims
- Taste/Sensory Claims
- Disparagement Claims
- Claims Interpretation and Survey Evidence
- Testimonials & Endorsements
- Demonstrations
- Establishment Claims
- Influencer Marketing
- Health-Related Claims



NAD and FTC Guides: Then and Now

- NAD often looks to FTC’s guides when analyzing advertising claims.
- NAD provides additional guidance when applying FTC guides to cases.
 - [Endorsement and Testimonial Guides](#)
 - [Native Advertising Guide](#)
 - [Dietary Supplements: An Advertising Guide for Industry](#)
 - [Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising](#)
 - [Guide Concerning Use of the Word “Free” and Similar Representations](#)
 - [Guides for the Use of Environmental Marketing Claims \(“Green Guides”\)](#)

NATIVE ADVERTISING: A GUIDE FOR BUSINESSES

FEDERAL TRADE COMMISSION

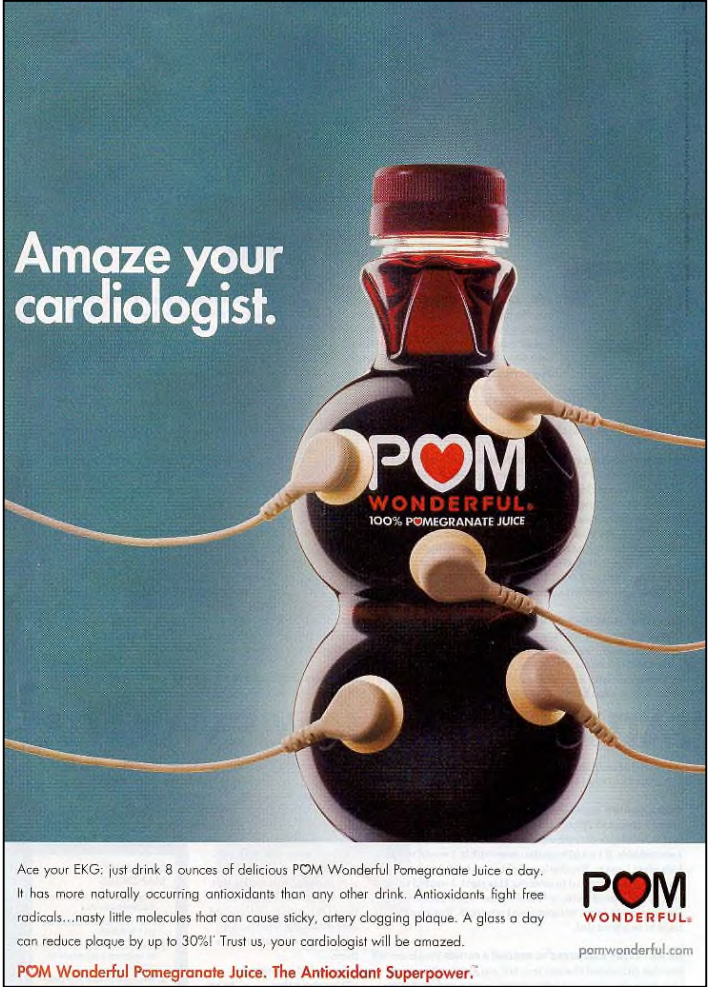
16 CFR Part 260

Guides for the Use of Environmental
Marketing Claims

.com
Disclosures

How to Make Effective Disclosures
in Digital Advertising

Defenses to NAD Challenges: It's Puffery



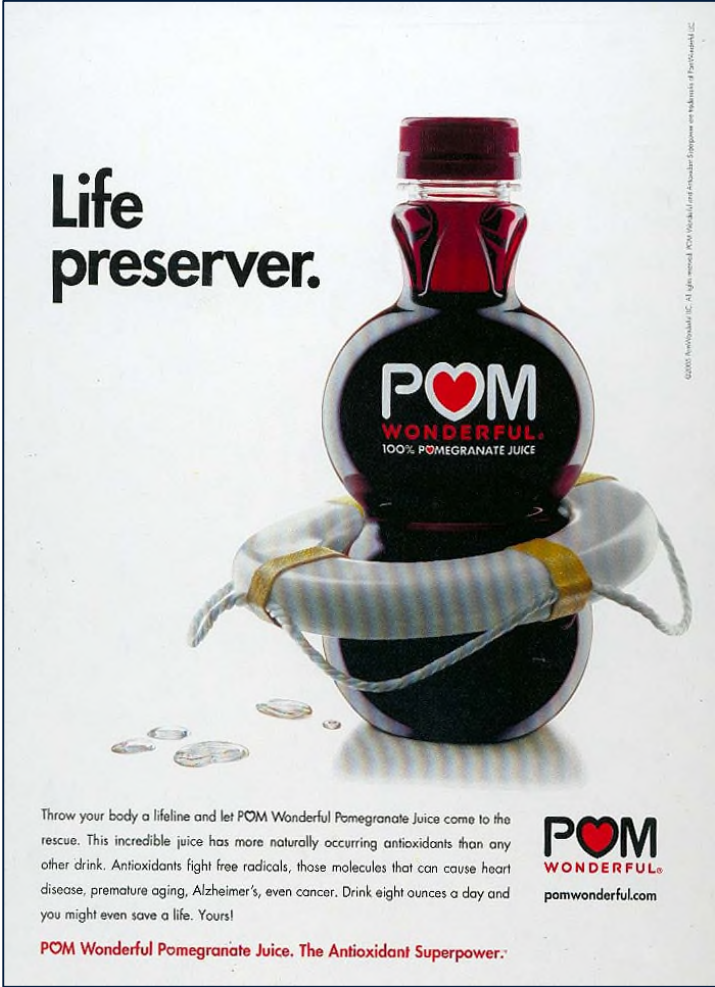
POM Wonderful

Report #4303 (March 2005)
Monitoring



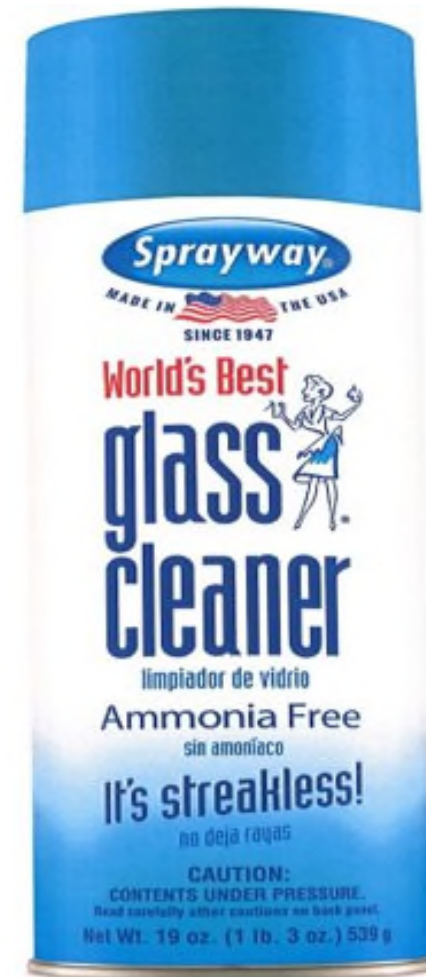
Report #4468 (April 2006)

Challenge



Defenses to NAD Challenges: It's a Trademarked Claim

- “*World’s Best Glass Cleaner*”: Sprayway had trademarked this phrase and used on its product label for decades.
 - The advertiser argued that its trademarked product name is not subject to NAD review.
 - NAD noted that “the registration and promotion of a trademark does not obviate the need for the advertiser to have substantiation for a trademarked expression when it conveys an objectively provable message.”
- **PLZ Aeroscience Corporation (Sprayway Glass Cleaner), Report #6092 (June 2017)**



Defenses to NAD Challenges: It's Funny!

- Humor does not relieve an advertiser of its obligation to support messages that their advertisements might reasonably convey.
- **Traeger Pellet Grills LLC, Report # 6327 (December 2019)**





National Advertising Division: Recent Developments

NAD Single Well-Defined Issue Fast Track (SWIFT)

- Developed to meet the need for quick resolution of truth and transparency issues that arise in advertising.
- The expedited process reviews advertising truth and transparency issues that **do not** require complex claim substantiation.
- Fast-Track SWIFT challenges are limited to **a single issue**.
- Submissions are made online and only one substantive submission is permitted per party.
- The Fast-Track SWIFT process allows parties to receive an NAD decision within 20 business days from the opening of the case.

NAD Single Well-Defined Issue Fast Track (SWIFT)

- Currently, NAD accepts only three types of claims for Fast-Track SWIFT challenges:
 - The prominence or sufficiency of disclosures, including disclosure issues in influencer marketing, native advertising, and incentivized reviews
 - Misleading pricing and sales claims
 - Misleading express claims that do not require review of complex evidence or substantiation, such as clinical or technical testing or consumer perception evidence

- Claims that may be worded slightly differently but still convey the same message can be brought in a single challenge.

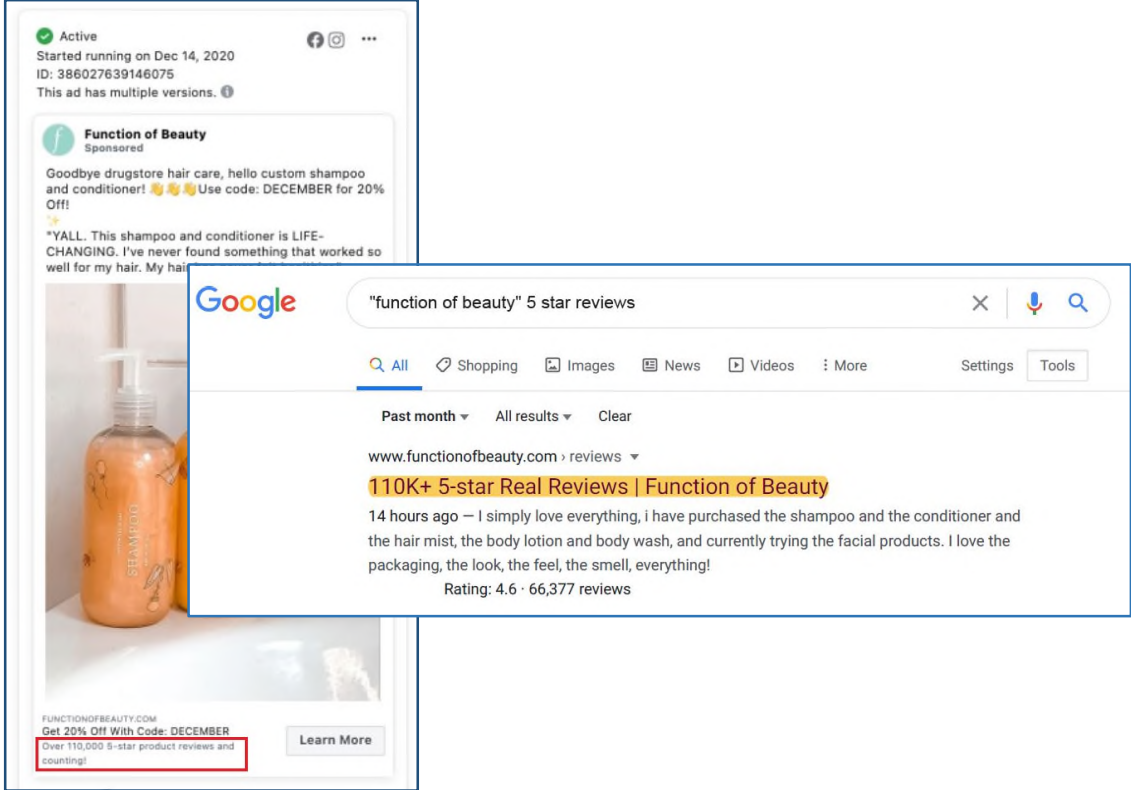
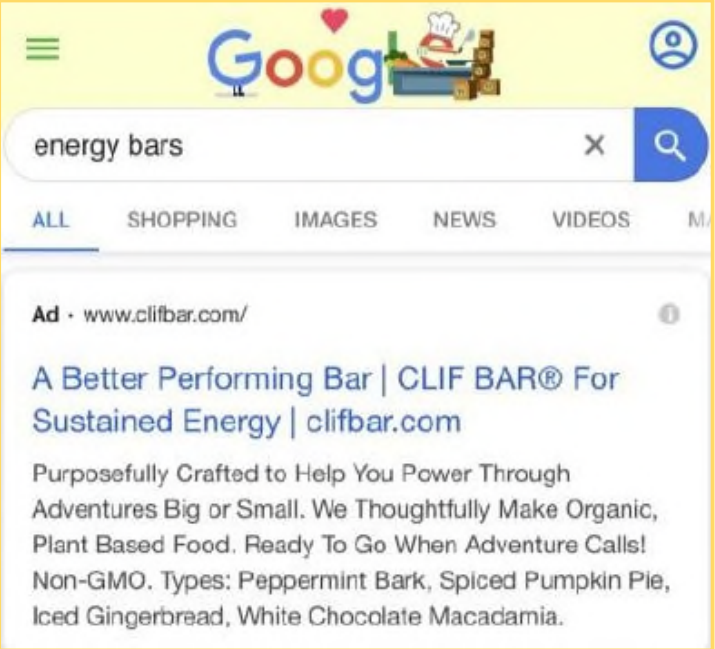
NAD SWIFT Track Cases

- **Similac “#1 Pediatrician Recommended Brands,” Report #6780 (August 2020).**
 - As presented, the disclosure “based on combined recommendations of Similac and EleCare” does not, in a clear and understandable manner, disclose that the basis for the “#1 Pediatrician Recommended Brands” claim is based on combining pediatrician recommendations for the various traditional infant formulas (Enfamil, Gerber Good Start, Parent’s Choice, and Similac) with pediatrician recommendations for amino acid formulas (Alfamino, EleCare, Neocate, and PurAmino).



NAD SWIFT Track Cases

- **Function, Inc., Report #6938 (February 2021)**
 - “Over 110,000 5-star product reviews”



- **Clif Bar & Co. (Clif Energy Bars), Report #6738 (June 2020)**
 - “a better performing bar . . . for sustained energy”

Online Portal

- Online challenges can be filed at <https://portal.bbbonline.org/nad-claims/>



NAD Challenges | Sign In

Home / NAD Challenges

NAD Challenges

For best results, we recommend you use Chrome. We also suggest you ask your IT Department to whitelist <https://portal.bbbonline.org> prior to any attempt to upload documents via the portal.

Challenger

File new challenges and view your existing challenges here.

Advertiser

View and respond to challenges here.



Home / NAD Challenges / My Challenges

My Challenges

Please find your full list of cases below. Once payment is received, case processing will begin. In the case of Fast-Track SWIFT, receipt of the filing fee begins NAD's initial review. The 20 business day countdown clock starts when the challenge is sent to the advertiser. If you are the Billing Contact for a Challenge, please go to your [Invoices](#) and pay by credit card online or by ACH.

All Challenges ▾

New Standard Challenge

New SWIFT Challenge

New Complex Challenge

Name	Challenge Number ↑	Challenge Type	Challenger Company Name	Advertiser Company Name	Product/Service Challenged	Status Reason
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NAD Complex Track

- An enhanced process for resolving challenges that require review of complex claim substantiation.
- Designed to improve the user experience by providing more flexible scheduling and insights into NAD's perspective on the evidence.
- NAD Complex Track is designed for challenges that require complex claim substantiation, which may include:
 - Cases involving multiple expert reports explaining and/or rebutting the evidence submitted.
 - Cases where the evidence will include consumer perception surveys or other studies or surveys that can require additional time to complete.
 - Cases involving challenges to numerous claims made for a variety of products.

Partnership with Facebook

- Partnership with Facebook to strengthen truth-in-advertising enforcement on the social network's U.S. platform.
- The partnership enables NAD to share case outcomes addressing Facebook advertising directly with Facebook, allowing Facebook enforcement teams to then act on those ads that violate their policies.



Looking Ahead: The Next 50 Years



NAD 2021: The Future of Ad Law



Save the Date to Mark 50 Years of Advertising Industry Self-Regulation and Help Us Build the Future of Ad Law

- [Sign Up Now](#)

Questions?



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Upcoming Events

Spring 2021 Edition: Not a Symposium, but a Virtual Ad Law CLE Bonanza

- April 14: What Advertisers Need to Know About Privacy
- April 15 : FTC Enforcement Priorities in the New Administration

To register: www.venable.com/AdLaw2021

Resources:

Venable's Advertising Law Blog: www.AllAboutAdvertisingLaw.com

Venable's Advertising Law Toolkit: www.Venable.com/AdlawToolkit

Venable's Advertising Law Webinar Series: www.Venable.com/VenableAdLawWebinars



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