



VENABLE[®]_{LLP}

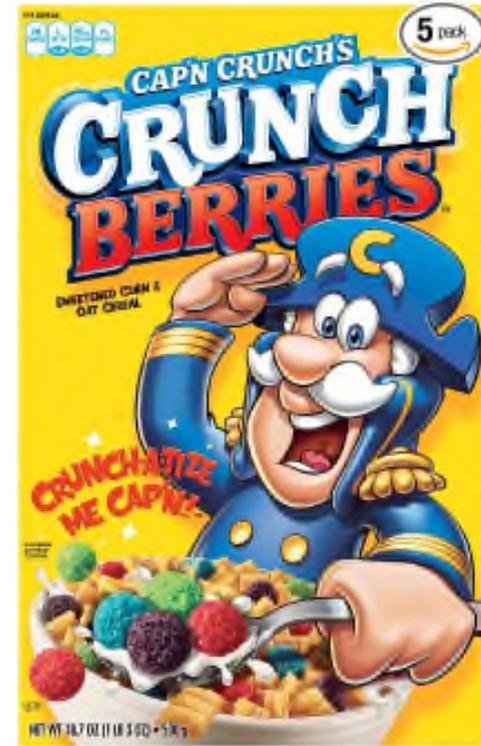
2nd Annual Venable Advertising Law Symposium
Is Calling Puff a Magic Dragon Puffing?

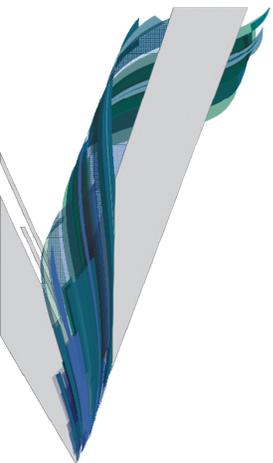
April 29, 2015

Daniel S. Blynn, Counsel, Venable LLP
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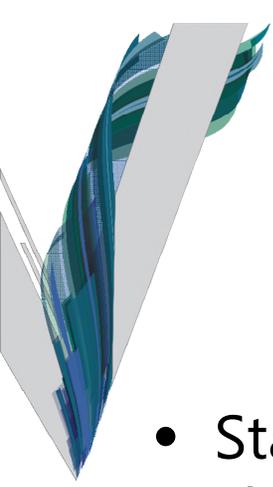
False Advertising Class Actions Continue to Rise...





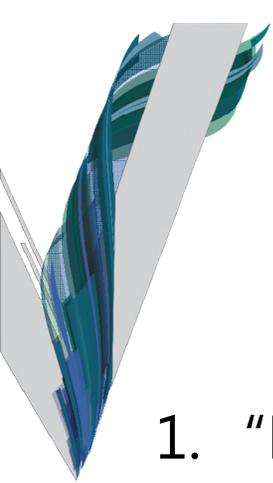
...and It's a "Major" Pain





Puffery

- Statements in advertising that do not convey facts or measurable claims, but mere opinion
- Why puff?
 - Gain attention for brand
 - Use humor/provide entertainment value for consumers
 - Say something positive about your product/service, without making a claim of literal truth
- If statement is puffery:
 - Not actionable in a false advertising lawsuit
 - Does not require substantiation (e.g., NAD challenge)



Types of Puffery

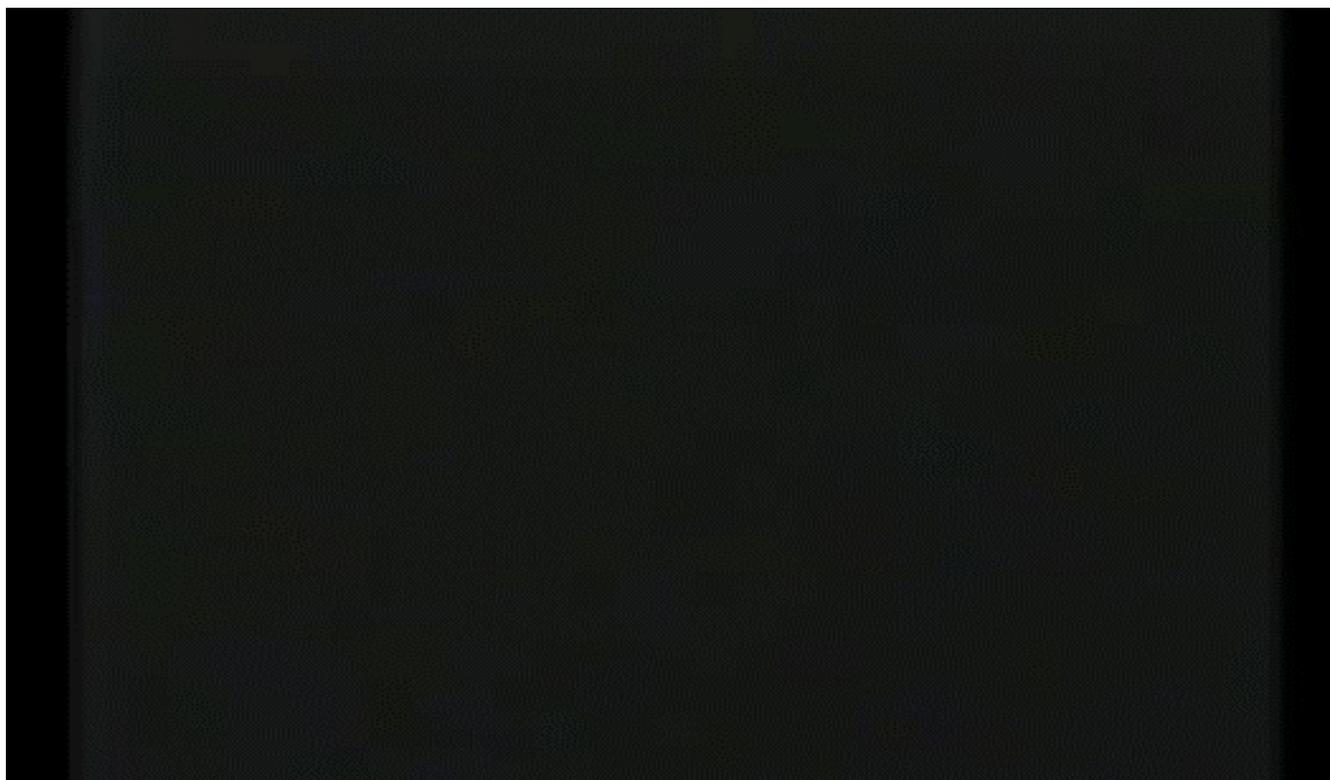
1. "Exaggerated statements of bluster or boast"
 - Objective, factual, provable and false, BUT nobody will believe it

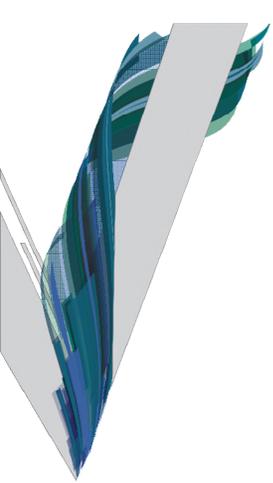




The “Pepsico Points” Case

***Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff’d*, 210 F.3d 88 (2d Cir. 2000)**





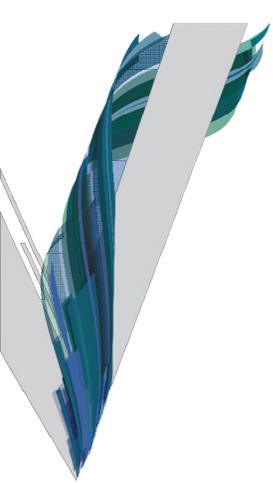
Postscript: Pepsi Decides to Play It Safe



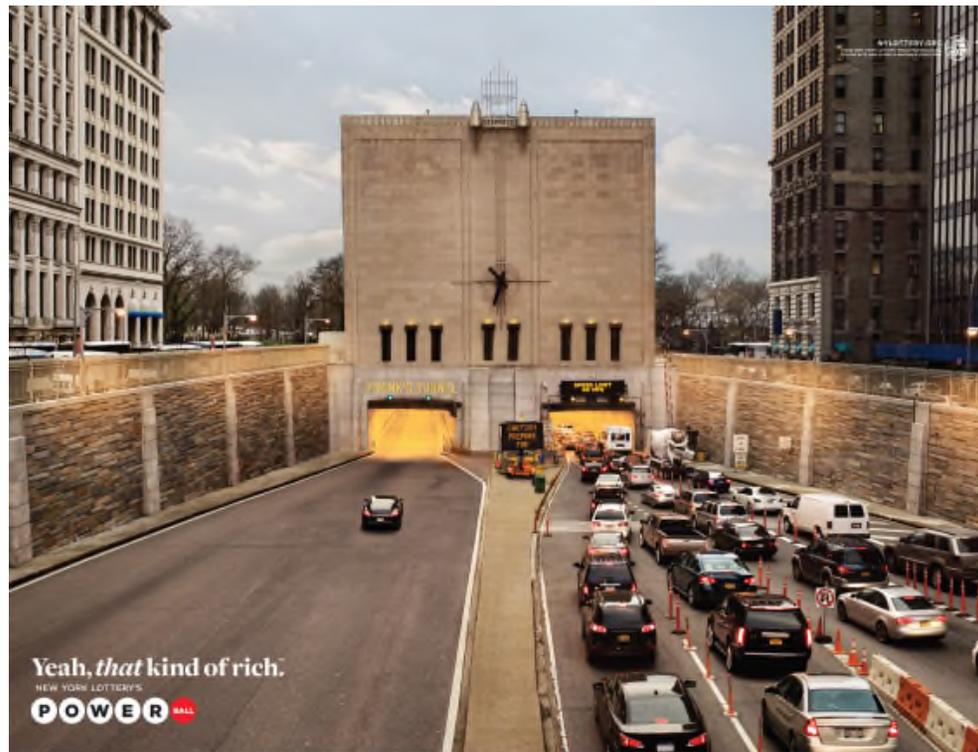


Nissan's Frontier Hill-Climb Commercial: A Cautionary Tale



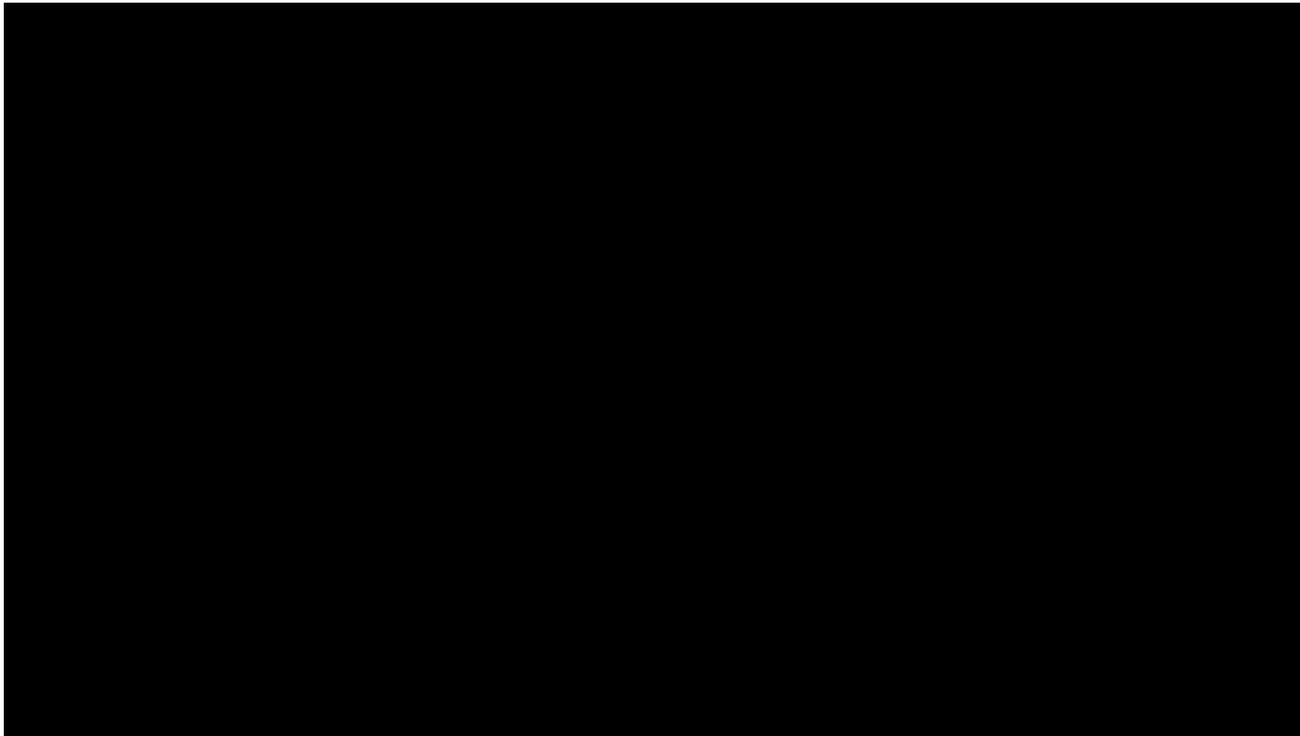


Hyperbole-Type Puffery Is Alive and Well





And, Advertisers Use it Time After Time





Types of Puffery

2. Vague or highly subjective

- Not capable of proof (i.e., substantiation) or disproof
- Bald assertions of superiority



“World’s Best”



Context Matters in Superiority Puffing

- Is the claim expressly comparative?
 - Is the product featured alongside competing products?
- Does the ad discuss specific product attributes?
 - Are they measurable?
- Are statements very general and/or couched in opinion?

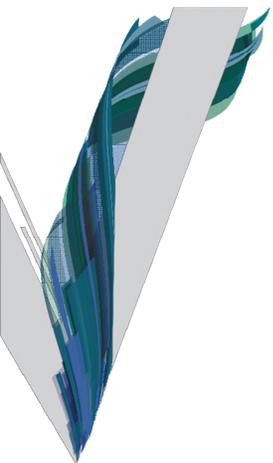


America's Favorite Pasta

(Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387 (8th Cir. 2004))

- So vague as to be meaningless?
- So subjective as to be unprovable?
- Is context up to the advertiser?
 - What if an advertiser does not claim that its statement is factual and provable, but challengers do?
 - Does it matter whether consumers understand that your claim could be measured and proven?
 - What if there's more than one way to measure and prove?

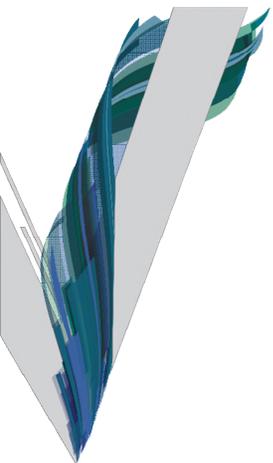




America's Favorite Pasta Sauce

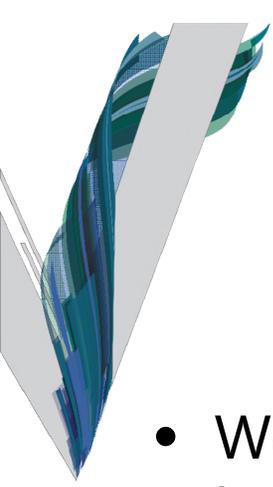






America's Favorite Meatball





A Final Word From Your Advertising Lawyers

- We hope that you have enjoyed this and all other presentations by Venable attorneys, the world's best advertising lawyers

Also note...

- Puffery may be a defense to law firm advertising
 - See *Conrad v. Russell*, 2011 WL 3877000 (W.D. Wis. 2011)