



**National
Programs**
National Advertising
Division®

U.S. advertising self-regulation and recent cosmetics advertising cases

.....
Annie M. Ugurlayan
Assistant Director, NAD

Where businesses turn to
enhance consumer trust and
consumers are heard.



National Advertising Division

The National Advertising Division (NAD), a division of BBB National Programs, provides independent self-regulation and dispute resolution services, guiding the truthfulness of advertising across the United States. NAD reviews national advertising in all media and its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business.

Anyone can file an NAD challenge.

Approximately 80% of our cases are competitor challenges; 20% are self-monitoring cases.

Review various types of claim substantiation depending on the claim.

Decision phase:

- ◆ What are the messages that are reasonably conveyed?
- ◆ Is there a “reasonable basis” for the claims?

Case decisions available by subscription: www.bbbtnp.org

Is it an ad or an article?

<https://www.aol.com/article/lifestyle/2019/07/04/say-goodbye-to-wrinkles-with-these-10-miracle-products/23385884/>

Aol.


Enter City/ZIP
Mail
Login / Join
News
Entertainment
Finance
Lifestyle
Style
Beauty
Wellness
Food
Travel
Living
Shop
Video
Games

SEARCH

Say goodbye to wrinkles with these 10+ miracle products

AOL.COM EDITORS
Jul 4th 2019 3:03PM

SHARE




Our editorial team is dedicated to finding and telling you more about the products and deals we love. If you love them too and decide to purchase through the links below, we may receive a commission.

Wrinkles, be gone!

One of the worst parts about aging is that your skin is always the first to go. You might not feel old, but the sagging, wrinkles, dark circles and spots may say otherwise. Even if you're not hitting "that" age for another few years, but have spent a lot of time in the sun and are stressed or exhausted, your skin will be the first to take a hit.

But it doesn't have to be that way. If you're looking to hide those wrinkles and cover up those fine lines, we've got you covered. From \$11.00 gems to splurge-worthy serums, here are the miracle products you need for ageless skin.



<https://www.aol.com/article/lifestyle/2019/07/04/say-goodbye-to-wrinkles-with-these-10-miracle-products/23385884/>


Aol.

Enter City/ZIP
Mail
Login / Join
News
Entertainment
Finance
Lifestyle
Style
Beauty
Wellness
Food
Travel
Living
Shop
Video
Games

SEARCH

Drunk Elephant Shaba Complex Eye Serum
\$60.00


BUY IT



Tackles major signs of aging with powerful antioxidants.

The Inkey List Retinol Serum
\$5.99


BUY IT



Powerful retinol is released slowly to erase fine lines and wrinkles.

Clarins Double Serum
\$124.00

BUY IT



Verizon Media/Division of Verizon Communications, Inc. (Inkey List Retinol Serum), Case #6313 (Oct. 2019)

What are the factors to consider?

1) Is the content motivated by commercial considerations—i.e., which links are monetized, revenue from affiliate links, and/or input from the advertiser? Would an editor have an incentive to promote one product over another?

2) Is there input from the business staff of the publisher? Are editorial and business considerations completely separated?

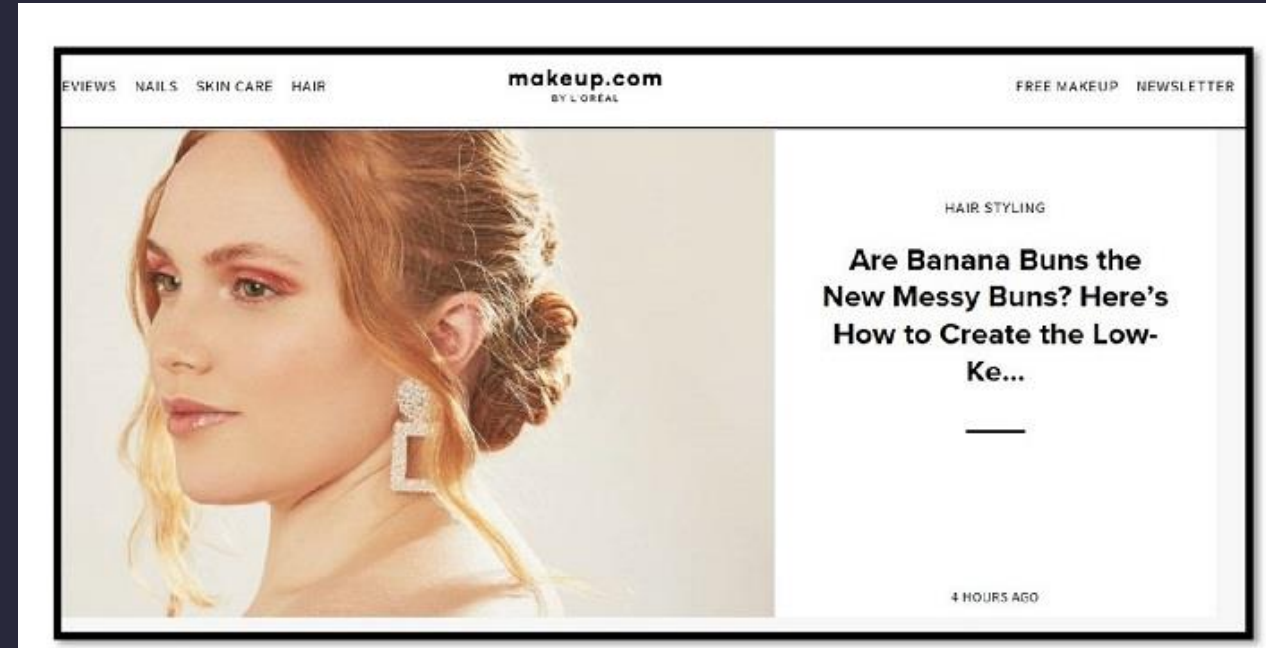
NAD administratively closed the matter because the content was not an ad.

- no paid commercial message – Verizon Media separated editorial and business considerations and no input from the advertiser.

Disclosure of Material Connection



BEFORE



AFTER

L'Oréal USA, Inc. (Makeup.com, Skincare.com, and Hair.com websites), Report #6370 (May 2020)

Consumers should easily understand whether the content they are viewing is an advertisement or editorial content.

FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements: Regardless of an advertisement's format or medium of dissemination, "deception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material" particularly if consumers' actions will be impacted by the manner in which the advertising material is presented.

The reference to L'Oréal's sponsorship was inadvertently removed from the top of the website (appeared only at the bottom of the webpage) such that consumers think it was editorial content and not a L'Oréal-sponsored website promoting L'Oréal' products.

NAD appreciated L'Oréal's immediate modifications to embed "By L'Oréal" and "Powered by L'Oréal" on every webpage in conjunction with the brand logos for makeup.com, skincare.com, and hair.com which were clear and conspicuous and made clearer that the content is written by or on behalf of L'Oréal.

Claim Substantiation Pitfalls

Common Mistakes

1. Overstatement of the product's capabilities or competitor's product's shortcomings
2. Unreliable test methodology (e.g., not consumer relevant)

Hot Topics

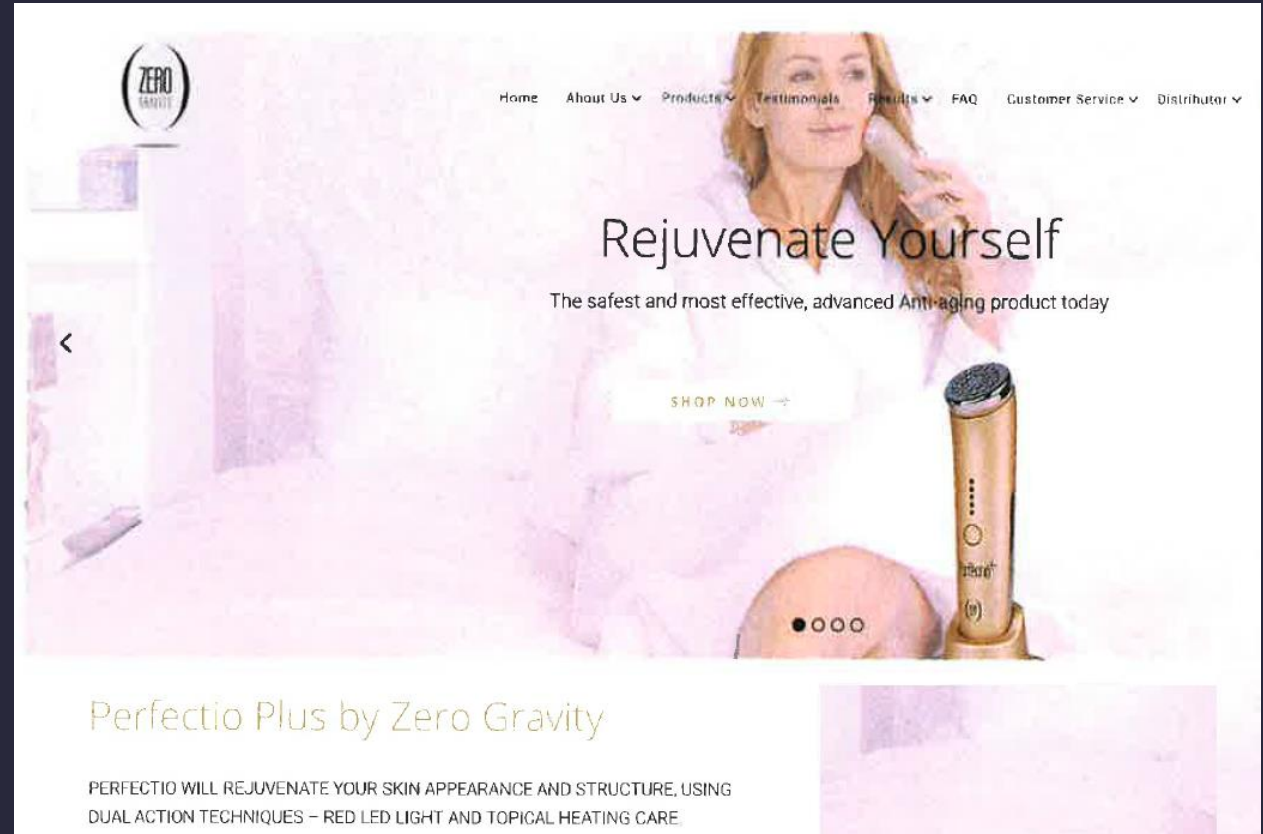
- Product reviews/ratings
- CBD
- COVID-19
- Clean beauty

Overstatement



ase
#6325
(12/0
4/ 2019)

Zero Gravity (Perfectio™), Report #6325R (July 2020)



Zero Gravity (Perfectio™), Report #6325R (July 2020)

Scientifically proven.

“...you can achieve younger, firmer skin in as little as 2 weeks.”

Within a period of seven weeks, dramatic visible improvement was reported by 100% of the subjects [in the Princeton clinical trial]

[LED facial technology] is based on the science of stimulating collagen production, naturally filling and erasing fine lines and wrinkles.

LED light improves sunspots, age spots, dull complexions, uneven pigmentation, large pores, sun damaged skin, and early signs of aging.

Before and after photographs.

Implied Claim: Perfectio+ provides anti-aging results that are akin to cosmetic procedures.

Support:

A product use study -- “Usability Study”

A copy of the Perfectio device’s Section 510(k) submission package and related clearance letter issued by the Food and Drug Administration.

An unpublished clinical trial (“the PCR Study”)- a three-arm study compared the efficacy and safety of the Perfectio device, when used alone and in combination with two marketed creams, to untreated sites on the face.

A product safety test.

Several published third-party clinical studies related the clinical use of LED light therapy.

Rules of the Road

Claims that product's performance is “scientifically proven” or “clinically proven” are entablement claims, which are traditionally held to a high standard of scientific proof because they are, in essence, a promise that there is scientific evidence that “establishes” the truth of an advertiser's claims.

“Before” and “after” photographs are product performance claims and, therefore, they must be supported, accurate, and representative of the level of product efficacy that a reasonable consumer can expect to achieve when using the product according to its use instructions.

Support:

A copy of the Perfectio device's Section 510(k) submission package and related clearance letter issued by the Food and Drug Administration.

An unpublished clinical trial ("the PCR Study")- a three-arm study compared the efficacy and safety of the Perfectio device, when used alone and in combination with two marketed creams, to untreated sites on the face.

The Russell which assessed the efficacy of combination light therapy in photo rejuvenation of facial skin.

Several published third-party clinical studies related the clinical use of LED light therapy.

Supported claims

“[LED facial technology] is based on the science of stimulating collagen production, naturally filling and diminishing fine lines and wrinkles.”

The advertiser’s modifications adequately avoided conveying the implied claim that Perfectio+ provides anti-aging results that are akin to cosmetic procedures.

Modified

“Scientifically Proven” to be an effective anti-aging treatment is supported by modify its use of the claim to avoid conveying a broader message regarding claims based on other data taken from the PCR Study, such as the results of the study’s subjective questionnaire, which NAD determined to be unsupported.

“you can achieve younger, firmer skin in as little as 2 weeks” to avoid the message that the product is capable of generating “younger” skin.

Discontinued

“Within a period of eight weeks, dramatic visible improvement was reported by 100% of the subjects.”

“LED light may improve sunspots, age spots, dull complexions, uneven pigmentation, large pores, sun damaged skin, and early signs of aging.”

“Before” and “after” photographs (or modify the advertising in a manner than conveys to the consumer whether the results depicted are typical and, if not, also discloses the results that a consumer may typically expect to experience).

Overstatement

Guthy-Renker, LLC Crepe Erase®
Anti-Aging Body Care Treatment
System, Case #6298 (July 2019)



Guthy-Renker, LLC (Crepe Erase® Anti-Aging Body Care Treatment System), Case #6298 (July 2019)

“Crepe Erase is the leading anti-aging body care system clinically shown to reverse crepey-looking skin. Results are instantly visible, and they improve with continued use.” “Improvement is immediately visible!”

“After 1 Use** -82% of users reported that skin was instantly smoother.” ** Based on a 50-person consumer use survey. Individual results will vary.

“After 4 Weeks† -- 90% of users showed improvement in skin firmness on arms.” † Based on a 49-person evaluation by an expert clinical grader. Individual results will vary.

“After 8 Weeks‡ -- 95% of users experienced a lifted appearance of skin.” ‡Based on average results of a 50-person evaluation by an expert clinical grader measuring décolleté, arms and knees & legs. Individual results will vary.

“Crepe Erase is enriched with TruFirm Complex to treat and improve the visible signs of aging while helping to promote healthy collagen and elastin. Contains 3 powerful phytonutrients – apple, dill and sage, clinically shown to combat weakened, crepey skin, revealing a smoother, tighter, more youthful-looking texture.”

Rules of the Road

It is well-established that the nature and extent of the claims in question should be directly analogous to the precision and specificity of the data used to substantiate them.

Reliable ingredient studies must demonstrate that the ingredient in the same amount found in the product confer the stated benefits in the target population.

Guthy-Renker, LLC (Crepe Erase® Anti-Aging Body Care Treatment System), Case #6298 (July 2019)

IRSI Study:

8-week monadic clinical study

50 women ages 48-69 with minimal signs of aging.

Clinical grading, self-assessments, instrumental measurements, silicone replicas, ultrasound analysis and subjective questionnaires.

Statistically significant results for all time points and parameters

Subjective questionnaire -- percentages of positive responses increased over time for nearly all of the questions.

Key issue: the fit between the claims (and images) which convey a near elimination in skin crepiness and support: the best result with respect to reduced crepiness was 54.24 percent improvement at eight weeks for elasticity for the arms based on a cutometer.

Guthy-Renker, LLC (Crepe Erase® Anti-Aging Body Care Treatment System), Case #6298 (July 2019)

Ingredient studies

No testing on the TruFirm complex

Testing on the ingredients is not reliable

A) apple and sage extracts

- wrong dose
- incomplete information

B) dill extract

- testing not done on the body
- donor skin not representative of the larger population
- no evidence that the results on cellular level translate to smoother, tighter skin with a more youthful looking texture.

Guthy-Renker, LLC (Crepe Erase® Anti-Aging Body Care Treatment System), Case #6298 (July 2019)

Claims that were supported:

- Skin crepiness “Improvement is immediately visible!”
- “After 1 Use** -82% of users reported that skin was instantly smoother - ** Based on a 50-person consumer use survey”
- “[i]ntense hydration clinically shown to keep your skin moisturized all day in just one application” were supported.
- “Results ... improve with continued use”

Claims that needed to be modified/discontinued:

- “After 4 Weeks” and “After 8 Weeks” claims – include % from the cutometer readings to avoid overstatement
- discontinue ingredient claims
- **modify before and after photographs to reflect the results consumers can reasonably expect to achieve when using the product as directed.**

Guthy-Renker, LLC (Crepe Erase® Anti-Aging Body Care Treatment System), Case #6298 (July 2019)

Advertiser appealed nearly all of the adverse findings to NARB which reversed NAD on all but one point: the panel recommended that Guthy-Renker label before-and-after photo comparisons illustrating the performance of Crepe Erase with a clear and prominent disclosure of the time of use of the product (e.g., “after 30 days”; “after three months”).

BOTTOM LINE: The substantiation bar is not lowered for cosmetics products. Words and images matter and the rules remain the same for product performance and ingredient claims.

Vital Proteins LLC (Vital Proteins Collagen Peptide Products), Report #6337 (Jan. 2020)



Express Claim: “Perfect for on-the-go, each pack contains 10 g of collagen for healthy hair, skin, nails, bones, joints and gut.”

Implied Claim: 10 g of collagen consumed as a drink provides consumers meaningful anti-aging benefits in the form of stronger and healthier hair, skin, bones, joints and digestion.

Vital Proteins LLC (Vital Proteins Collagen Peptide Products), Report # 6337 (Jan. 2020)

One ingredient—collagen peptides of bovine derivation

Support: Human clinical, *in vitro* and animal studies

Two human clinical studies tested bovine collagen

Studies on porcine and marine collagen could not be extrapolated to the support the challenged claims.

Other issues: wrong type of collagen other than animal form (collagen hydrolysate), wrong dose, wrong test population, dated studies, and combination treatments.

1) Skin claim

Supplier-commissioned study

eight-week, double-blind, single-center randomized, placebo-controlled study (10g bovine collagen)

82 Caucasian women ages 35-55 with dry skin and moderate wrinkling.

primary endpoint -- impact of the collagen protein found in Vital Proteins on various skin properties (e.g., skin sensitivity, moisture, elasticity, firmness and tone).

secondary endpoint -- self-assessment

Vital Proteins LLC (Vital Proteins Collagen Peptide Products), Report #6337 (Jan. 2020)

What's appropriate: 1) methodology; 2) right dose and type of collagen; 3) endpoints

What's not appropriate:

comparison of results to baseline not placebo - no reliable evidence demonstrating that statistically significant differences for the 5 g and 10 g collagen groups at day 56 versus baseline were not due to chance.

2) Joint claim

Kumar Study

- double-blind, randomized, placebo-controlled study assessed the impact of pork and bovine collagen peptides in men and women 30-65 years of age suffering from knee osteoarthritis.

What was appropriate- double-blind, placebo-controlled trial, an appropriate test population, well-defined endpoints, an adequate sample size to elicit statistically significant and consumer meaningful results.

Vital Proteins LLC (Vital Proteins Collagen Peptide Products), Report # 6337 (Jan. 2020)

What was not appropriate: results do not match the claim: individuals with knee osteoarthritis who consume 10g of bovine collagen peptides per day will feel less joint discomfort but the claim is that Vital Proteins confers “healthy joints.”

NAD recommended that the advertiser discontinued the claim “Perfect for on-the-go, each pack contains 10 g of collagen for healthy hair, skin, nails, bones, joints and gut” and the implied claim that 10 g of collagen consumed as a drink provides consumer-meaningful benefits in the form of stronger and healthier hair, skin, bones, and joints.

BOTTOM LINE: it’s essential to test the right ingredient (form, extract) in the right amount on the right population assessing an appropriate endpoint for a sufficient length of time to elicit statistically significant and consumer meaningful results.

But it works on the cellular level...



Taking Basis provides noticeable physical health and anti-aging benefits without the need for diet and exercise.

The Basis supplement is a B3 vitamin (250 mg) of nicotinamide riboside combined with pterostilbene (50 mg).

Elysium Health (Basis Dietary Supplement), Case #6339 (January 2020)

Product or ingredient claims about noticeable improvements in aging and general physical health must be supported by competent and reliable scientific evidence.

- well-controlled, well-conducted human clinical studies on the product or the ingredient in the amount found in the actual product which elicit statistically significant and clinically meaningful results.

Scientific consensus that NAD⁺, which has a role in cellular metabolism, decreases with age, that more NR, as its precursor, and pterostilbene (which reduces oxidative stress), assist in cellular metabolism.

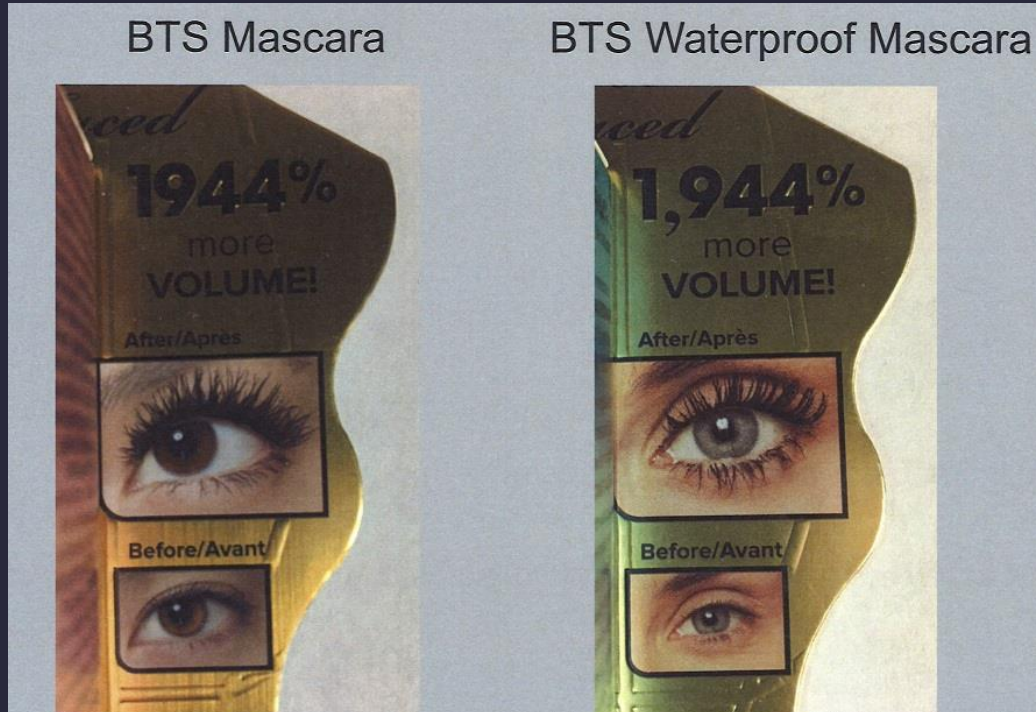
Bioavailability study demonstrated that 1 serving of Basis increases NAD⁺ levels in whole blood in 40-60 year-olds.

Can make narrowly tailored claims describing cellular metabolism and the role that NR and pterostilbene supplementation can play in the cellular metabolism of aging.

Can't expressly state or imply any noticeable aging-related benefits from taking Basis or its ingredients.

BOTTOM LINE: results that are limited to showing what an ingredient can do on a cellular level cannot support actual performance claims relating to that ingredient or the product – tailor your claims to the support.

Consumer Relevance



Too Faced Cosmetics, LLC (Better Than Sex Mascara), Report #6131 (Oct. 2017)

“1944% more volume!”

Before and after depictions

Support:

1) *In vitro* testing of both the original and waterproof mascara products.

- digital micrometer was used to determine a “volume score” based on mean length and width of human eye lashes at baseline and after each successive application of the BTS Mascaras.

- Results: statistically significant lash volume increases following each application of BTS mascara, with a mean lash volume increase of 1,944% after the third coat of mascara.

Before and after depictions

consumer use study – subjective rating of various aspects of BTS original mascara’s product performance after self-application of three coats of BTS original mascara once a day for a week.

2) Company president affidavit attesting to photographs’ truthfulness and accuracy.

Finding: Claims and images must be discontinued because the testing is not consumer relevant.

no evidence to determine if micrometer is a reliable tool for assessing the length and width of eyelashes in the cosmetics industry

2) BTS Mascaras were not evaluated on the human eye and its attendant lashes.

3) Insufficient number of eyelashes tested.

4) Consumer use study and affidavit are not sufficient to support the before & after photographs.

Product Ratings



“4.4/5 stars”

Reviews are from consumers who purchased the Dimensions product at full price or with an initial discount.

NAD recommended that the advertiser discontinued the claim “4.4/5 stars” or modify its advertising to clearly and conspicuously disclose that it is based on reviews from consumers who had received free or discounted products.

Reckitt Benckiser, LLC (Dimensions Home Fragrance), Report #6290
(June 2019)

CBD

Talyoni Professional, LLC (Cannabis Sativa
Cosmetic & Wellness Products), Report #6359
(April 2020)

“Deeply nourishes, repairs and strengthens with CBD, olive and flaxseed oils.”

Packaging Claims:

Talyoni products contain 850MG per ounce of CBD.

Ecoco products contain 25 PPM of CBD



Evidence in support

A fact sheet and certificate of analysis from the supplier of the CBD oil ingredient used in its products.

A description of the manufacturing specifications for the supplier's "Hemp Extract Classic Concentrated" oil and a certificate of analysis for a bottle of Talyoni Labs Repair & Strengthen Shampoo.

The challenger provided several test reports and a supportive expert declaration.

Talyoni Professional, LLC (Cannabis Sativa Cosmetic & Wellness Products), Report #6359 (April 2020)

Claims must be discontinued.

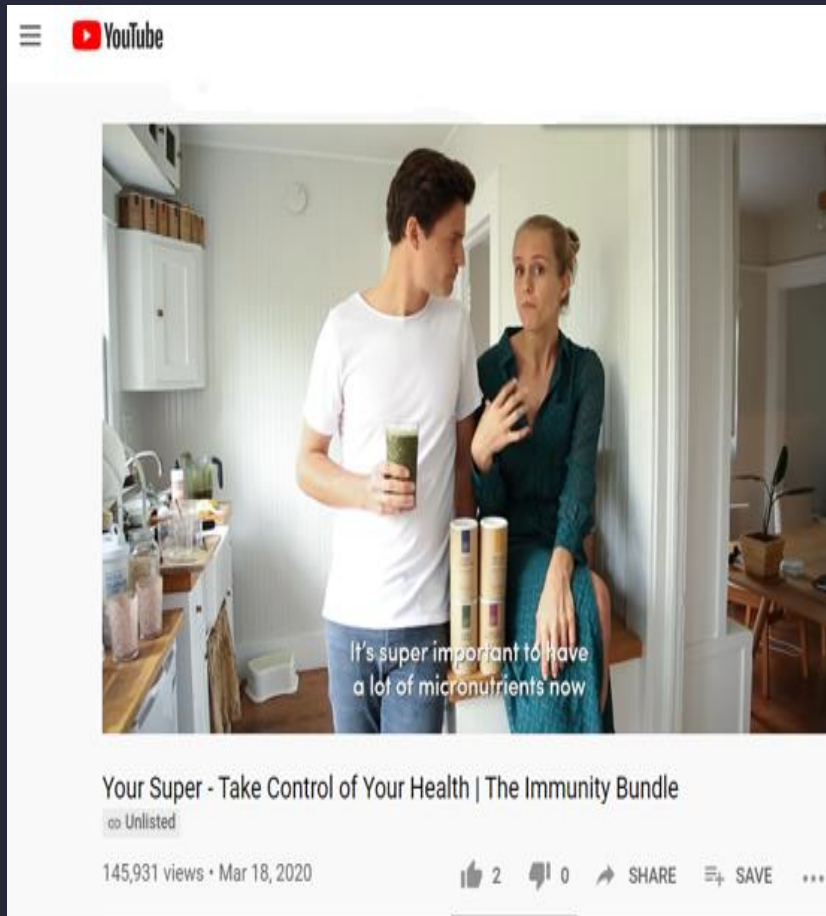
Supplier's CBD oil may contain CBD but that does not mean the finished products that are advertised contain CBD.

Problem: Advertiser relied on one supplier test conducted on a single bottle of one product

- CBD testing can produce varying results
- no information as to the representativeness of the test
- inability to impute test results on the wide variety of products bearing the challenged claims.

BOTTOM LINE: Always rely on robust and representative testing on the finished product (not supplier testing data) to support product claims.

COVID-19



Your Superfoods, Inc. (Your Superfoods Immunity Bundle), Report #6371 (May 2020)

NAD questioned whether dialogue in a social media video of the owners of Your Superfoods touting their Your Superfoods Immunity Bundle conveyed the implied message that taking Your Superfoods Immunity Bundle protects users against the novel coronavirus or COVID-19:

With all that's going on, with the coronavirus...there is a piece that we can control and that is our own health and building our immune system because it depends on what we eat....It's super important to have a lot of micronutrients now, so Superfoods can help. We have this amazing immunity bundle – Super Greens to up your green, Mellow Yellow which really reduces your stress because [stress] actually reduces your immunity, and then we also have immunity boosting mushrooms in our Magic Mushroom mix.”

Your Superfoods, Inc. (Your Superfoods Immunity Bundle), Report #6371 (May 2020)

Advertiser agreed to remove the video and avoid making any express or implied claims that its immunity bundle can treat or cure COVID-19.

COVID-19 claims are a top priority in NAD monitoring cases.

BOTTOM LINE: Context is key – be mindful of how you frame the immunity benefits of an ingredient or product.

CLEAN BEAUTY

NAD recognizes the consumer demand for fewer ingredients and the absence of certain ingredients.

How you posture what's in or not in your product in the context of the advertising is key.

CAN SAY: what your product does not contain and tout the few number of ingredients.

CAN'T SAY: without supporting evidence that the absence of certain ingredients (e.g., phthalates/parabens) makes your product safer; your product is more effective than X because it has fewer ingredients.

KEY GUIDANCE IN THE U.S.: FTC's Green Guides

NAD Takeaway points

- 1) Material connections between influencers and advertisers must be clearly and conspicuously disclosed.
- 2) Third parties (i.e., endorsers, influencers, and affiliate marketers) who are marketing products are advertisers and must ensure that product claims are truthful, accurate, and not misleading.
- 3) Do not rely on supplier data to support product performance claims- you must conduct testing on the product that is on the market to support your claims.

NAD Takeaway points – cont'd

4) Performance claims must always be truthful and accurate and reflect the results of product testing.

- ❖ You need reliable product testing producing statistically significant and consumer meaningful results.
- ❖ Quantified performance claims (e.g., “30% fewer wrinkles!”) require reliable clinical studies with statistically significant results that show results at or above the specified percentage.
- ❖ Performance claims based on consumer use testing should mirror the language of the attribute questions.

NAD Takeaway points – cont'd

- 5) In the absence of product testing, ingredient claims are appropriate provided:
- a) there are reliable studies that link the ingredient to a claimed product benefit;
 - b) the amount tested was the same as the amount found in the advertised product; and
 - c) the claims accurately reflect the studies' results.
- 6) Avoid likening topical cosmetic products to invasive medical procedures.

NAD Takeaway points – cont'd

7) A claim can be made without words

- Photographs and product demonstrations depict product performance and, as such, they must reflect what consumers can reasonably expect to achieve when using the product as directed.

8) A disclosure does not cure an otherwise inaccurate claim.

- However, if the claim is accurate, then a disclosure is appropriate provided it is clear, conspicuous and in close proximity to the claim it is qualifying.

“

Thank you!

”



National Programs

Questions?

augurlayan@bbbnnp.org

01-212-705-0105