Advertising Compliance Service™

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Page 1

Comprehensive advertising compliance™ information emphasizing the practical analysis of government, industry and media restrictions on advertising

FROM THE EDITOR IN CHIEF

Our lead article, "`Havana Club' Defense Against Surveys: A New Battleground in Lanham Act False Advertising Cases," by Randall K. Miller, Esq., examines this important Lanham Act development.

A federal judge ruled in favor of FTC, finding a supplement marketer and its president in contempt of a court order that bars them from making deceptive health claims. Our next article, "Supplement Marketer Found in Contempt of Court Order Barring Deceptive Health Claims," examines this FTC case.

Our next article, "Social Media Roundup," is a review of ad actions reported via Twitter and other social media. This roundup consists of representative examples of updates (or "tweets") from Twitter via **Advertising Compliance Service** at "AdvertisingLaw" and updates from LinkedIn.

The staff of FTC's Division of Advertising Practices conducted an investigation into whether representations made by the Blue Buffalo Company, Ltd. regarding its pet foods violated Section 5 of the FTC Act. Our next article, "FTC Staff Won't Recommend Enforcement Action in Pet Foods Case," examines this FTC matter.

This FTC staff opinion letter responded to an October 28, 2011 request on behalf of General Motors Company (GM) concerning a fuel economy label. Our next article, "FTC Staff Won't Recommend Enforcement in New Fuel Economy Labeling Matter," examines this FTC opinion letter.

Our "Roundup of Recent State Attorneys General Ad Actions" summarizes recent actions across the U.S., which affect various aspects of ad compliance.

Our NAD article examines recent NAD cases in these two categories: (1) Comparative Advertising, and (2) Dietary Supplement Claims.

**FILING INSTRUCTIONS** ARE ON LAST PAGE OF THIS BULLETIN.

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BRIEF NEWS OF NOTE

FTC SENDS REFUNDS TO CONSUMERS ALLEGEDLY DECEIVED IN ONLINE MARKETING OPERATION—FTC is mailing some 75,000 refund checks to consumers allegedly deceived by an online marketing operation that sold work-at-home opportunities. FTC brought the case as part of its ongoing efforts to protect financially strapped consumers from scams that falsely promise job opportunities. FTC alleged that Abili-Staff Ltd., Equitron LLC, Pamela Jean Barthuly, and Jorg Wilhelm Becker falsely promised consumers that, for a fee of up to $89.99, they would have access to job listings and get a full refund if they did not get a job. The refunds are a result of a court order.

Approximately $729,700 is being returned to consumers; the average payment will be about $9.70.

(FTC v. Abili-Staff, Ltd., et al., United States District Court for the Western District of Texas, San Antonio Division, Civil Action No.: 5:10-cv-00088-OLG, FTC File No. 092 3196, December 7, 2011.)

FILING INSTRUCTIONS FOR CONTENTS OF THIS ISSUE

File all articles behind existing articles in the tabs noted:

File, "Havana . . ." under Tab #8, Remedies (Private), Article #115.

File, "Supplement . . ." under Tab #17, Food, Drugs, Cosmetics, Article #202.

File, "Social Media Roundup . . ." under Tab #15, New Media, Article #348.

File, "FTC Staff [Pet Foods]. . ." under Tab #17, Food, Drugs, Cosmetics, Article #203.

File, “FTC Staff [Fuel Economy] . . ." under Tab #11, Labeling, Article #47.

File, "Roundup (Attorneys General) . . ." under Tab #9, State Law, Article #155.

File, "NAD . . ." under Tab #3, Self-Regulation, Article #540.

File, Bulletin #729 (pages 1-2) under Tab #1, Bulletins.

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# "HAVANA CLUB" DEFENSE AGAINST SURVEYS: A NEW BATTLEGROUND IN LANHAM ACT FALSE ADVERTISING CASES

By

Randall K. Miller*

## INTRODUCTION

The Third Circuit's recent decision in *Pernod Ricard USA, LLC v. Bacardi U.S.A.*[1] about "Havana Club" rum establishes a new battleground in Lanham Act cases. In *Havana Club*, the defendant successfully urged the court to disregard a survey because the advertising claim (arguably) was unambiguously truthful on its face (the "Havana Club" defense). Prior to *Havana Club*, the only case that stood for such a proposition was the Seventh Circuit's decision in *Abbott Labs. v. Mead Johnson & Co.*,[2] which was corrected, criticized as an outlier, and not followed by other courts. Now, *Havana Club* has revitalized *Mead Johnson* and given the defense greater credibility, not only in the Third Circuit, but in all Circuits. The Havana Club defense is sure to spawn new battles in future Lanham Act cases and litigants should anticipate these issues. This article reviews (1) the use of survey evidence in Lanham Act cases; (2) the *Mead Johnson* and *Havana Club* cases; and (3) the significance of *Havana Club* to litigants in future cases.

## BACKGROUND: SURVEY EVIDENCE IN LANHAM ACT CASES

Competitor false advertising claims under the Lanham Act fall into two categories: literal falsity and implied falsity.[3] Many of the most prevalent and powerful advertising messages are communicated by implication. Advertising professionals are trained to construct an advertising campaign to communicate on many levels, including implicit messages. When a challenger pursues a claim of implied falsity, the challenger must prove two things: (1) the implied claim exists; and (2) the implied claim is false.[4] In step 1, a challenger must demonstrate the existence of the implied claim "by extrinsic evidence"[5]– typically in the form of a survey–showing the target audience's reaction to the advertising. Courts increasingly have relied on surveys as reliable proof of "exactly what message ordinary customers received in the ad."[6] "The success of a plaintiff's implied falsity claim

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* Randy Miller is a Partner at Arnold & Porter, LLP. Mr. Miller represents both plaintiffs and defendants in Lanham Act false advertising cases. Mr. Miller participated in a mock argument based on *Havana Club* along with Steve Zalesin of Patterson Belknap, Randi Singer of Weil Gotshal, and moderator Rebecca Tushnet of Georgetown University Law School in an event sponsored by the ABA's Private Advertising Litigation Committee. The audio for this program is *available at* http://apps.americanbar.org/dch/comadd.cfm?com=AT311570&pg=2.





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usually turns on the persuasiveness of a consumer survey."[7] The survey allows the plaintiff to prove that the advertising statement "actually conveyed the implied message and thereby deceived a significant portion of the recipients."[8] For example, in *McNeil-PPC, Inc. v. Pfizer Inc.,*[9] the court enjoined Pfizer's advertising campaign that "Listerine's as effective as floss at fighting plaque and gingivitis."[10] Pfizer defended the claim on the basis that it had clinical data to substantiate the equivalence claim regarding "plaque and gingivitis"; however, McNeil's survey showed that 26-31 percent[11] of consumers interpreted the phrase as a broader "replacement" message (that is, one "can replace floss with Listerine" and receive all of the same benefits), which could not be substantiated.[12]

The reliability of surveys to prove the existence of an implied claim has matured over the past 10-15 years. Litigants and courts now are conversant with the commonly accepted scientific principles to ensure that surveys are reliable.[13] Litigants routinely use these principles to attack proffered survey methodology, including through cross examination and rebuttal expert testimony. Courts also are more willing and able to substantively analyze surveys, including admissibility questions through a *Daubert* process.[14]

### *Mead Johnson*

Until *Havana Club*, Judge Easterbrook's decision *in Abbott Labs. v. Mead Johnson* stood alone as an exception to the survey rule.[15] In *Mead Johnson*, the challenger used a survey to show that consumers interpreted the advertising statement "1st Choice of Doctors" to mean that a *majority* of doctors preferred the product, which was allegedly false claim because only a *plurality* of doctors preferred the product with many not expressing a preference. Judge Easterbrook refused to even consider the survey, because he determined that the phrase "1st Choice of Doctors" was unambiguous and simply meant that more doctors preferred the advertiser's product to the competitive product. Having made this determination, Judge Easterbrook would not allow a survey to be used to offer a different meaning to the advertising statement, holding that surveys should not be "used to determine the meaning of words or to set the standard to which objectively verifiable claims must be held."[16] Judge Easterbrook's decision was grounded in First Amendment principles, and the opinion noted that a contrary ruling would have the effect of chilling commercial speech. The opinion also indicated that there must be a limit to the use of surveys. *Mead Johnson* has not been followed, and many judges and commentators that cite to *Mead* have distinguished or criticized the case.[17]

### *Havana Club*

*Havana Club*[18] resurrects *Mead Johnson*. In Havana Club, Pernod Ricard alleged that Bacardi's "Havana Club" name falsely implied that the rum was





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made in Cuba. Bacardi defended on the basis that the bottle itself prominently disclosed the product as a "Puerto Rican Rum." Pernod sought to rely on a survey showing that approximately 18% of consumers who viewed the bottle believed that the rum was made in Cuba. The Third Circuit affirmed the victory for Bacardi and rejected the survey. The Third Circuit held that "there are circumstances under which the meaning of a factually accurate and facially unambiguous statement is not open to attack through a consumer survey."[19] Because "no reasonable person could be misled by the advertisement," the court could "disregard" the survey as "irrelevant" and "immaterial."[20] Perhaps recognizing the implications of its ruling, the Third Circuit cautioned that any future decision to reject a survey in favor of the court's subjective determination about an advertising claim should be "rare."[21]

SIGNIFICANCE AND ISSUES FOR FUTURE CASES

Notwithstanding the Third Circuit's attempt to limit Havana Club to the "rare" circumstance, its joining of the Seventh Circuit on this issue is significant. The Third Circuit has issued many of the leading Lanham Act false advertising cases, and it can no longer be said that the principle discussed here is limited to the Seventh Circuit. It remains to be seen what another leading circuit–the Second Circuit–will do on this issue. But it is sure to come up, and quickly. Defendants will argue that advertising statements in Lanham Act cases are so obviously truthful that even a survey showing a substantial portion of a target audience receiving an implied false message should be ignored. Plaintiffs will emphasize that the Havana Club defense is wrong as a matter of law or, alternatively, it should be extremely limited. Both arguments will include themes central to Lanham Act litigation, discussed below.

***Interpretation by the judge or the "target audience."*** The Havana Club defense invites a court to substitute its view of implied claims for the view of the target audience. Courts have long held that that a judge's subjective view should not interfere with the determination of implied claims. The "court's reaction is at best not determinative and at worst irrelevant. The question in such cases is–what does the person to whom the advertisement is addressed find to be the message?"[22] "It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive"[23] Judges are also consumers and there is risk that a judge's subjective reaction could differ significantly from that of the more typical (and therefore relevant) consumer. Significantly, a Judge may not even qualify to participate in a survey–surveys ordinarily are limited to those in the target audience, of a certain demographic, who actually used or





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purchased the product recently.[24] The impressions of other consumers are "irrelevant."[25] Even the opinion of a trained and experienced market researcher is irrelevant absent a survey.[26] This concept is well established, but plaintiffs may be reluctant to offend judges by making this argument too forcefully.

***Importance / over-importance of survey experts***. One argument in favor of the Havana Club defense is that it diminishes the dominance of survey experts in Lanham Act cases. Survey experts arguably have become too important in these cases. The minute a party wants to discuss implied messages from advertising, it first must shell out several hundreds of thousands of dollars–or more–to pay a survey expert and to collect survey data. Once one party presents such evidence, the opponent often is advised to then develop rebuttal survey testimony that may include a counter survey. The escalation in costs can be substantial and can erect a financial obstacle to challenging an obvious implied claim. This fact distinguishes a Lanham Act court from agency and self-regulatory organizations; as one commentator notes: "the FTC, the NAD, ERSP and CARU have their own expertise and do not necessarily require survey evidence to establish implied advertising claims, whereas such proof is an essential element in Lanham Act litigation."[27] In its winning appellate brief, Bacardi argued that the amici (survey organizations) "predictably wants all of § 43(a) to devolve into a battle of handsomely paid survey experts mediated by the courts."[28] Against this backdrop, a litigant might be able to persuasively ask whether the court "really needs" these experts, and litigants can be expected to employ this theme in future cases. On the other hand, the Havana Club defense threatens to short-circuit a case by essentially barring consideration of scientific data that courts consistently have held to be admissible and reliable. One can imagine a case involving a "gold standard" survey–large, well-controlled, with a bullet-proof design showing implied falsity. Defendants who ordinarily would have to confront the survey on the merits may seek sanctuary under *Havana Club*. Under this circumstance, the court would have to balance (a) the purported clarity of the advertising claim; against (b) the "power" of the survey.

***Whose implied claim?*** Defendants who have favored the Havana Club defense often themselves attribute their own implied claims–or at least "interpretations"–to the advertising statement. For example, Bacardi argued that "Havana Club" refers to the fact that a Cuban family created the original Havana Club recipe. The district court stated that "Havana Club has a Cuban heritage and, therefore, depicting such a heritage is not deceptive"[29] and "Bacardi should have a First Amendment right 'to accurately portray where its product was historically made–as opposed to claiming that the product is still made there.'"[30] Of course, the advertising does not say anything about





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family heritage; all of that information–allegedly suggested by the slogan "Havana Club"–was supplied by the counsel for the Defendant. Similarly, in the Splenda case,[31] McNeil offered that "made from sugar" really "means" that Splenda is made through a multi-step process that starts with sugar but then is, through a chemical process, altered, resulting in an artificial sweetener that does not contain sugar. McNeil argued (unsuccessfully) that "made from sugar" is not susceptible to proof, by a survey, that Splenda "contains" sugar, "is" sugar, or is more "natural" than competing products. The court held that it was a factual dispute, and denied summary judgment.[32] In future cases in the wake of Havana Club, defendants can be expected to argue that they are offering only reasonable interpretations of an unambiguous/truthful claim; plaintiffs will argue that the minute the court has to depart from the literal words to understand the claim, the court is in the realm of "implied" claims where surveys must be considered.

***First Amendment freedoms versus protecting competitive interests***. At its core, Havana Club appears to be a pro-First Amendment decision that tends to reduce a challenger's ability to bring a Lanham Act claim. The Lanham Act provides a company a private right of action to protect against competitive harm caused by a literally truthful yet "misleading" promotional statement. Havana Club raises the question of how far courts are willing to go in trimming this statutory right in favor of the constitutionally-protected marketplace of ideas.[33] This theme will be sure to be used in future litigation over the Havana Club defense.

***Flip-side of Havana Club: the "necessary implication" doctrine***. Havana Club arguably is the analog to the necessary implication doctrine, which holds that some implied claims are so obvious that a court can determine their existence without a survey.[34] Most courts view "necessary implication" as a subset of literal falsity even though the actionable advertising claim is implied from–and therefore different than–the express words used. The necessary implication doctrine permits a plaintiff to prove implied falsity without a survey.[35] Therein lies the similarity to Havana Club: the court is using its subjective judgment about what an advertising statement does or does not communicate without reliance on a survey. Perhaps both doctrines may be limited to extreme (or "rare") cases. For example, in *Schering Plough Healthcare Products, Inc. v. Schwarz Pharm., Inc.*,[36] Judge Posner commented that litigants should not be permitted to use necessary implication to avoid presenting evidence. Posner suggested that a claimant asserting a necessary implication claim (with the associated benefit of not needing a survey) requires a clear "lie" that is "bald-faced, egregious, undeniable, [and] over the top."[37] Perhaps the same kind of narrow





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opportunity should apply to clearly "truthful" claims at the other end of the spectrum under the Havana Club defense.

***Procedural issues***. The Havana Club defense could arise in a variety of procedural settings. For example, a defendant may attempt to avoid the pains and burdens of litigation altogether by raising the Havana Club defense at the threshold of a case–such as on a motion to dismiss–and suggest that no discovery should be had until the Havana Club issue is resolved. The issue also could come up as an evidentiary motion–such as a motion in limine before trial–to exclude a survey. In a bench trial setting, the Havana Club defense may not preclude the admissibility of a survey but suggest it should be entitled to no weight (Havana Club, for example, was decided after a bench trial).

## CONCLUSION

As litigants prepare to apply the Havana Club defense, expect to see arguments and judicial opinions that address foundational issues in Lanham Act cases, including the proper role of the court in using its own judgment about advertising, the acceptable influence of survey experts, and the evidentiary reliability of surveys themselves. As the door opens further to judges applying their "own expertise" in these cases, litigants may find that "what's good for the goose is good for the gander": plaintiffs can be expected to use this opportunity to invite judges to find potentially actionable implied claims in advertising based on their subjective views, and without a survey.

## LAWYER's REFERENCE SERVICE

**Footnotes**

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[1] 653 F.3d 241 (3d Cir. 2011).

[2] 201 F.3d 883 (7th Cir. 2000), amended, 209 F.3d 1032 (7th Cir. 2000).

[3] *See*, *e.g.*, *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 940, 948 (N.D. Ill. 2009) ("Federal false advertising claims generally fall into two categories: literal falsity and implied falsity. Where a statement or claim made in advertising is literally false, 'the plaintiff need not show that the statement either actually deceived customers or was likely to do so.' Where a statement or claim is literally true or ambiguous, however, a plaintiff must prove that the statement 'implicitly convey[s] a false impression, [is] misleading in context, or likely to deceive consumers.'") (citations omitted).





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[4] *Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 229 (2d Cir. 1999) (observing that a plaintiff pursuing an implied falsity theory must prove that the advertising statement "has left an impression on the listener that conflicts with reality" and that courts must compare "the impression, rather than the statement, with the truth.").

[5] *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226, 250 (S.D.N.Y. 2005).

[6] *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310 n.6 (1st Cir. 2002).

[7] *Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992).

[8] *See also Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256 (11th Cir. 2004); *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 37 (1st Cir. 2000).

[9] 351 F. Supp. 2d 226 (S.D.N.Y. 2005).

[10] *Id*. at 231.

[11] 31 percent of those who saw the television commercial and 26 percent of those who viewed the shoulder label. *Id*. at 244.

[12] *Id*. at 252-53.

[13] The leading treatise recently has been updated, *see* Shari Seidman Diamond, Reference Guide on Survey Research, in Reference Manual on Scientific Evidence at 359 (Federal Judicial Center 3d ed.2011). In his forthcoming article, Gerald L. Ford analogizes the development of surveys to human growth, and he argues that surveys have passed through the infant and adolescent stages, and are now in the adult stage, with courts now understanding the scientific need for controls and other survey design features necessary for survey reliability. *See* Gerald L. Ford, "Survey Percentages In Lanham Act Matters," in *Trademark and False Advertising Surveys* (S. Diamond and J. Swann, eds.) (American Bar Association, forthcoming 2012).

[14] *See, e.g., Scotts Co. v. United Indus. Corp*., 315 F.3d 264, 278-80 (4th Cir. 2002); *see also Scott Fetzer Co. v. House of Vacuums Inc*., 381 F.3d 477 (5th Cir. 2004); *Starter Corp. v. Converse, Inc*. 170 F.3d 286, 297 (2d Cir. 1999).





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[15] 201 F.3d 883 (7th Cir. 2000), amended, 209 F.3d 1032 (7th Cir. 2000).

[16] *Id*. at 886.

[17] *See* Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law,* 159 U. PA L. REV. 1305, 1319 n.54 (2011); *see also id*. at 1349, noting the corrected opinion in *Mead*, which is sometimes overlooked and which limits the initial opinion); R.J. Leighton, *Making Puffery Determinations in Lanham Act False Advertising Case: Surveys, Dictionaries, Judicial Edicts and Materiality Tests*, 95 Trademark Rptr. 615, 626 (2005). *But see American Italian Pasta Co. v. New World Pasta Co,* 371 F.3d 387 (8th Cir. 2004), a puffery case, which commented favorably on *Mead*.

[18] *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc*., 653 F.3d 241 (3d Cir. 2011).

[19] *Id*. at 252.

[20] *Id*. at 252, 253.

[21] *Id.* at 254-55 (emphasis added). The court stated as follows:

> We hasten to add that cases like the present one should be rare, for one hopes that a case with truly plain language will seldom seem worth the time and expense of contesting in court. That this particular case, and related ones, have been litigated so intensely is due, it seems, to the unusual political baggage and branding potential involved. A word of caution is nevertheless in order, so that our holding today is not taken as license to lightly disregard survey evidence about consumer reactions to challenged advertisements. Before a defendant or a district judge decides that an advertisement could not mislead a reasonable person, serious care must be exercised to avoid the temptation of thinking, "my way of seeing this is naturally the only reasonable way." Thoughtful reflection on potential ambiguities in an advertisement, which can be revealed by surveys and will certainly be pointed out by plaintiffs, will regularly make it the wisest course to consider survey evidence.

[22] *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 156 (2d Cir. 2007).

[23] *Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp*., 960 F.2d 294, 297-98 (2d Cir. 1992); *see also Clorox Co. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 37 (1st Cir. 2000); (citation omitted); *see also Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d





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489, 497 (5th Cir. 2000) (the "plaintiff may not rely on the judge or the jury to determine, 'based solely upon his or her own intuitive reaction, whether the advertisement is deceptive' "); *Castrol Inc. v. Pennzoil Co*., 987 F.2d 939, 947 (3d Cir. 1993).

[24] *See, e.g., Georgia-Pacific Consumer Prods. LP v. Kimberly-Clark Corp*., No. 09 C 2263, 2010 WL 1334714, at *2 (N.D. Ill. Mar. 31, 2010) ("In order to qualify for participation in the study the respondent had to indicate that Northern or Quilted Northern was the brand or among the brands of toilet tissue he/she had used in the past three months.").

[25] *See, e.g.*, *Kournikova v. Gen. Media Commc'ns.*, *Inc.,* 278 F. Supp. 2d 1111, 1125 (C.D. Cal. 2003) (discarding a survey that did not sample "the appropriate target group" and noting that "[t]o be probative and meaningful . . . surveys . . . must rely upon responses by potential customers of the products in question.") (citations omitted); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1272 (S.D.N.Y. 1990) ("[S]ome of the respondents may not have been in the market for diet food of any kind, and the study universe was therefore too broad.").

[26] *See, e.g., Fed. Trade Comm'n v. Wash. Data Res.*, No. 8:09-cv-2309-T-23TBM, 2011 WL 2669661, at *2 (M.D. Fla. July 7, 2011) (striking an expert's opinion in absence of a survey and stating: "Maronick's conclusion as to the perception of a 'reasonable consumer' appears purely speculative, apart from any scientific or technical knowledge or method, and unhelpful because the speculation rests entirely on Maronick's unlearned prediction of consumer reaction and consumer perception. Maronick's proposed testimony concerns a matter within the ken of the fact finder, subject to primary evidence from consumers, and to which Maronick adds not reliable expert opinion but only one person's opinion, which is no better than another person's opinion.").

[27] David H. Bernstein, False Advertising Challenges: A Review of Available Fora, Practicing Law Institute, 1041 PLI/Pat 41 (Mar. 21, 2011).

[28] Case 10-2354, Appellee Br. at 34.

[29] *Pernod Ricard*, 653 F.3d at 250.

[30] *Id*.

[31] *Merisant Co. v. McNeil Nutritionals, LLC*, 515 F. Supp. 2d 509 (E.D. Pa. 2007).

[32] *Id*. at 526-28.





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[33] As the Supreme Court noted in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."

[34] *See, e.g.*, *Castrol Inc. v. Pennzoil Co*., 987 F.2d 939, 946-47 (3d Cir. 1993); *Johnson & Johnson-Merck Consumers Pharms. Co. v. Proctor & Gamble Co*., 285 F. Supp. 2d 389, 391-92 (S.D.N.Y. 2003).

[35] "[C]onsumer survey evidence is not required when the allegedly false claim is a 'necessary implication' of the explicit language in the advertisement." *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, No. 01 Civ. 2775(DAB), 2001 WL 588846, at *8 (S.D.N.Y. Jun. 01, 2001) (citing *Gillette Co. v. Wilkinson Sword, Inc.*, No. 89 CIV. 3586 (KMW),1989 WL 82453 (S.D.N.Y. July 6,1989)).

[36] 586 F.3d 500 (7th Cir. 2009).

[37] *Id*. at 513.

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# SUPPLEMENT MARKETER FOUND IN CONTEMPT OF COURT ORDER BARRING DECEPTIVE HEALTH CLAIMS

## FEDERAL JUDGE RULES IN FTC's FAVOR

A federal judge ruled in favor of FTC, finding supplement marketer Lane Labs-USA Inc., and its president Andrew Lane in contempt of a court order that bars them from making deceptive health claims.

## ORIGINAL FTC CHARGES

In 2000, FTC originally charged Lane Labs with making unsupported and false claims that BeneFin and Skin Answer--a shark cartilage product and a skin cream--could prevent, treat, or cure cancer, and were clinically proven to do so. Lane Labs and Andrew Lane settled the charges by agreeing to a court order that barred them from making unsupported health claims about any food, drug or dietary supplement.

## FTC FILED CIVIL CONTEMPT CHARGES IN 2007

*Advertising and Marketing of Calcium Supplement*

In 2007, FTC filed civil contempt charges against the defendants. FTC alleged that they violated the 2000 order based on their advertising and marketing of AdvaCAL. AdvaCAL is a calcium supplement the defendants promoted as vastly superior to competing calcium products and prescription drugs used to treat osteoporosis. Those charges were filed in the U.S. District Court for the District of New Jersey.

*Unsupported Claims*

In November, 2011, the district court ruled that defendants violated the 2000 order by making unsupported claims that AdvaCAL is three-to-four times more absorbable than other calcium supplements, and distorting the results of tests and studies on AdvaCAL and competing calcium supplements. In addition, the district court rejected defendants' claim that they substantially complied with the order, because their violations were not merely technical or inadvertent.

## RECENT DECISION FOLLOWS OCTOBER 2010 RULING FROM THIRD CIRCUIT

The recent decision follows an October 2010 ruling from the Third Circuit Court of Appeals. That ruling overturned the district court's original denial of FTC's contempt motion. The Third Circuit found that the defendants had violated the order by making unsupported claims that AdvaCAL was comparable or superior to prescription drugs. The appeals court then sent the case back to the district court, which ruled last month that the defendants were in contempt. The district court will rule later on the amount of monetary damages for which the defendants are liable.

Volume XXXII
Issue 1
January 2, 2012
Page 13



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FTC v. Lane Labs-USA, Inc., Cartilage Consultants, Inc., and I. William Lane and Andrew J. Lane**,** United States District Court for the District of New Jersey, Case No. 00CV3174, FTC File No. 982 3558, FTC File No. X000086, December 14, 2011.

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Volume XXXII
Issue 1
January 2, 2012
Page 14



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SOCIAL MEDIA ROUNDUP
A Review of Ad Actions Reported Via Twitter and Other Social Media

UPDATES FROM TWITTER, LINKEDIN, FACEBOOK AND GOOGLE+

**Advertising Compliance Service** continues to have a fast-growing presence on Twitter with over 10,800 followers (as of December 12, 2011). Why not join **ACS** on Twitter at: "AdvertisingLaw".

While Twitter updates are limited to 140 characters, this rapidly-growing social medium is an excellent way to keep up-to-date in the period between **Advertising Compliance Service**'s twice-monthly issues. The following roundup consists of representative examples of updates (or "tweets") from Twitter via **Advertising Compliance Service** at "AdvertisingLaw" and LinkedIn (500+ connections), Facebook (1,400+ friends) and - the newest social media entrant - Google+ (600+ in others' circles, 500+ in my legal circle).

> **Note**: Many of the URL's listed in this Roundup are in abbreviated form–shortened URLs–and are working URL's.

*Updates from Twitter*

On Cyber Monday, Feds Shut Down 150 Web Sites | The BLT: The Blog of Legal Times http://bit.ly/tzatBh

Supreme Court to Decide Whether Pharmaceutical Sales Reps Are Entitled to OT Pay | ABA Journal http://bit.ly/vGeQmd #scotus #pharma

TY Sandy @SandyGuerriere for RT'ing: 10 Ways to Spot Suspect Environmental Claims http://bit.ly/9yoTcb

On Cyber Monday, Feds Seized Domain Names of 150 Websites Accused of Selling Knockoff Goods | ABA Journal http://bit.ly/tThnCk

TY @MassLOMAP for RT'ing: 10 Major Advertising Law-Related Concepts http://bit.ly/h9M02f #in #advertising

Facebook Settles Privacy Complaint by FTC; Two Lawyers Will Oversee Efforts | ABA Journal http://bit.ly/syDRyM #ftc #in

RT @jeanlucr 2012 Trends: Video Leads Online Ad Growth http://j.mp/vZHAAT

RT @jaredcorreia RT @mattputvinski: RT @SecMash: Phishing scam threatens to delete Facebook accounts in 24 hours http://dlvr.it/xNxtw #in

Introducing the 'Customer Advertising Relations Digital Marketing' Firms of the Future | Social Media Today http://bit.ly/umdPPu

Volume XXXII
Issue 1
January 2, 2012
Page 15



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RT @OreLawPracMgmt @JimmyDanielsEsq: "Facebook settles with FTC over deception charges"... http://fb.me/1ijCYopDq (re: privacy settings)

Should SCOTUS Arguments Be Televised? If They Were, Would You Watch? | ABA Journal http://bit.ly/tpKwRw #scotus

RT @Adweek Is Targeting Killing Content Advertising? http://goo.gl/fb/KK4WV

RT @CakeGroup Most shared Facebook stories of 2011 http://bit.ly/sjAuBh

RT @JayFleischman 9 Reasons Google Analytics Is Critical To Marketing Your Law Firm Online http://ow.ly/1fVQAB

FTC action temporarily halts operation involving alleged fake news sites and claims about weight-loss products http://1.usa.gov/sjJygT #ftc #in

10 Tactics to Use So Your Ads Comply with Advertising Laws http://is.gd/hA8Pg #in #advertising

TY @ProcessServerIN for RT'ing: 10 Tactics to Use So Your Ads Comply with Advertising Laws http://is.gd/hA8Pg #in #advertising

Article: Lessons Learned in Interactive Advertising: E-Mail Advertising http://bit.ly/hbzaQR #email #advertising #in

Reading: "Justice Department Clears Google's $400 Million Admeld Buy" http://bit.ly/sHO3QQ

10 Ways to Spot Suspect Environmental Claims http://is.gd/hwYe0 #in #green #advertising

Reading: "ABA Panel Says No to Outside Law Firm Ownership" http://bit.ly/sw86WB

When a Brand's Visual Identity Has Serious Trademark Implications | Duets Blog http://bit.ly/uZTr8J

RT @jeanlucr The Latest 15 Facts and Figures on Facebook – Plus Infographic http://j.mp/uIiwAr

Library of Congress to receive entire Twitter archive | FederalNewsRadio.com http://bit.ly/uJOMlv

Volume XXXII
Issue 1
January 2, 2012
Page 16



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Report: Google Controls 44 Percent Of Global Online Advertising http://selnd.com/sOdw3w

Facebook Reveals 2011's Most-Popular Status Trends http://on.mash.to/tPo8jp

RT @lvanderpool Mashable: Twitter's cost-per-follower runs between $2.50 and $4 | http://on.mash.to/vTVPCZ (rt @TechZader @mashable)

TY @MassLOMAP for RT'ing: 10 Things to Do So Your Ads Comply With Advertising Laws http://bit.ly/cs1ADv #in #advertising

TY Don @dcarli for RT'ing: 10 Things to Do So Your Ads Comply With Advertising Laws http://bit.ly/cs1ADv #in #advertising

Twitter Has A Make Over! Again. [#NewLook] | Social Media Today http://bit.ly/rYIYRf

RT @vicmaranto Twitter Makes Two Major Announcements http://vsb.li/6H9r34

Federal Judge Strikes Blow to Bloggers | Social Media Today http://bit.ly/ulHQn6

I just reached the 1,000 mark on "Lists following @AdvertisingLaw"! Thank you to all who have listed me!! #appreciation

*Updates from LinkedIn*

10 Things to Do So Your Ads Comply With Advertising Laws http://t.co/gGy1hgSH #in #advertising

Five Steps to Protect Your Trademarks in the Web 2.0 World http://t.co/47lwCrin #in #trademarks

RT @jaredcorreia RT @nikiblack : Free Online and Mobile Tools for Lawyers > The Xemplar®: http://t.co/3Bz2bzS8 #in

10 Tactics to Use So Your Ads Comply with Advertising Laws http://t.co/hQqALguH #in #advertising

FTC action temporarily halts operation involving alleged fake news sites and claims about weight-loss products http://t.co/9rSW4blB #ftc #in

12 Key Advertising Related Laws that You Should Know http://t.co/A5uuI3VG #in #advertising

Volume XXXII
Issue 1
January 2, 2012
Page 17



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Reading: "Facebook settles with FTC over privacy violations" http://t.co/J8PgbXCa #ftc #in

RT @jaredcorreia RT @mattputvinski : RT @SecMash : Phishing scam threatens to delete Facebook accounts in 24 hours http://t.co/zJVBmO4h #in

Facebook Settles Privacy Complaint by FTC; Two Lawyers Will Oversee Efforts | ABA Journal http://t.co/mjqRctGs #ftc #in

TY @MassLOMAP for RT'ing: 10 Major Advertising Law-Related Concepts http://t.co/LC3P6ORy #in #advertising

10 Major Advertising Law-Related Concepts http://t.co/LC3P6ORy #in #advertising

*Updates from Google+*

As a result of recent settlements, FTC will provide refunds to "victims" of an allegedly bogus "scareware" scam.> http://www.ftc.gov/opa/2011/12/rebates.shtm

*Updates from Facebook*

As a result of recent settlements, FTC will provide refunds to "victims" of an allegedly bogus "scareware" scam. > http://www.ftc.gov/opa/2011/12/rebates.shtm

LAWYER's REFERENCE SERVICE

Selected Twitter Updates from "AdvertisingLaw" and from LinkedIn, Facebook and Google+, November 30, 2011–December 12, 2011.

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Volume XXXII
Issue 1
January 2, 2012
Page 18



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FTC STAFF WON'T RECOMMEND ENFORCEMENT ACTION IN PET FOODS CASE

NAD'S SELF-REGULATORY PROCESS

The staff of FTC's Division of Advertising Practices conducted an investigation into whether representations made by the Blue Buffalo Company, Ltd. regarding its pet foods violated Section 5 of the Federal Trade Commission Act. This investigation came about after a referral from the National Advertising Division of the Council of Better Business Bureaus (NAD). Blue Buffalo had participated in NAD's self-regulatory process and appealed one of NAD's adverse findings to the National Advertising Review Board (NARB), which agreed with the NAD decision.

CLAIMS BROUGHT TO FTC STAFF's ATTENTION BY NAD

FTC staff reviewed claims brought to its attention by NAD as well as some additional claims. This review included Blue Buffalo's claims that its pet foods—

- contained "no animal byproducts,"
- contained human-grade ingredients,
- helped protect pets from age-related diseases, and
- contained ingredients that had been proven to provide a number of significant health benefits for pets.

CONTINUING CLAIMS

In addition, FTC staff reviewed, at NAD's request, Blue Buffalo's continuing claims that its pet food ingredients provided superior anti-oxidant protection, after Blue Buffalo promised to stop doing so. Accordingly, FTC staff determined not to recommend enforcement action at this time. Among the factors that FTC staff considered were—

- Blue Buffalo's substantial website changes, which included the removal of age-related disease claims, establishment claims, and human-grade ingredients claims; and
- Blue Buffalo's removal of "no animal by-products" claims from its website and packaging.

Volume XXXII
Issue 1
January 2, 2012
Page 19



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**Note:** "This action is not to be construed as a determination that a violation did not occur, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may warrant."

LAWYER's REFERENCE SERVICE

Staff Closing Letter re Blue Buffalo Company, Ltd., File No. 102 3144: Letter to Lydia B. Parnes and Nathan Ferguson, Counsel for Blue Buffalo Company, Ltd. from Mary K. Engle, Associate Director, Division of Advertising Practices, Federal Trade Commission, November 30, 2011.

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FTC STAFF WON'T RECOMMEND ENFORCEMENT IN NEW FUEL ECONOMY LABELING MATTER

EPA's NEW FUEL ECONOMY LABEL v. FTC's ALTERNATIVE FUELED VEHICLE LABEL

This FTC staff opinion letter responded to an October 28, 2011 request on behalf of General Motors Company (GM). GM seeks to label its 2013 and later model dual-fueled vehicles with the Environmental Protection Agency's (EPA's) new fuel economy label and to forego using FTC's alternative fueled vehicle (AFV) label on those vehicles. In its opinion letter, FTC staff said that it will not recommend enforcement action if GM uses the EPA label, including the vehicle's driving range, in lieu of the FTC label for these vehicles.

FTC AND EPA BOTH REQUIRE LABEL FOR DUAL-FUELED VEHICLES

Currently, FTC and EPA both require a label for dual-fueled vehicles which operate on both conventional gasoline and alternative fuel *(e.g.,* E85). (See 16 C.F.R. Part 309 (FTC label) and 40 C.F.R. Part 600 (EPA label). Last summer, EPA issued new labeling requirements for these vehicles. (See 76 Fed. Reg. 39478 (July 6, 2011).) Said the FTC staff in its letter:

> "Though both labels inform consumers about vehicle fuel performance, the recently-revised EPA label contains more vehicle-specific information than the FTC's. For example, the EPA label displays fuel economy in both miles per gallon (city and highway) and gallons per 100 miles, estimated yearly fuel cost, fuel savings or costs compared to an average vehicle, greenhouse gas information, and smog ratings. In addition, the EPA label allows, but does not require, the vehicle's driving range *(i.e.,* miles traveled on a full tank) for gasoline and alternative fuel operation. Finally, the EPA label directs consumers to *www.fueleconomy.gov* which contains details about alternative fuels and AFVs. By comparison, the FTC label, required by the Alternative Fuels Rule ("Rule"), displays a vehicle's cruising *(i.e.,* driving) range but does not provide any other vehicle-specific information ... Instead, it contains general consumer information about fuel type, operating cost, vehicle performance, energy security, and emissions. It also provides telephone numbers and website addresses for additional information."

GM WANTED TO USE ONLY EPA LABEL

GM wanted to use only the EPA label on its dual-fueled vehicles. Its reason: To avoid potential consumer confusion and reduce compliance costs. Accordingly, GM asked the FTC staff to forbear enforcement of the FTC label as long as GM uses the EPA label including the vehicle's driving range. In GM's view, use of both labels could cause confusion since the

Volume XXXII
Issue 1
January 2, 2012
Page 21



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EPA and FTC labels present driving range information in different ways. FTC requires two range numbers: a lower number based on city fuel economy and an upper number based on highway fuel economy *(e.g.,* 246-378 miles on one tank). Conversely, the EPA rule requires a single range number *(e.g.,* 300 miles on one tank) based on the combined city-highway fuel economy rating. Even though the resulting numbers are similar and based on the same test procedures, GM is concerned that the differences could confuse consumers. GM also explains that a single label will save several hundred thousand dollars each model year in labeling-related costs. GM argued that its request is consistent with FTC's recent policy to forbear enforcement of current FTC labeling requirements for electric vehicles given inconsistencies between the driving range on EPA and FTC labels for those vehicles. (S*ee http://www.fie.gov/opa/2011/05/afr.shtm;* and 76 Fed. Reg. 31467 (June 1, 2011).) Because a similar inconsistency exists between the EPA and FTC labels for 2013 dual-fueled models, GM sought a similar approach.

FTC STAFF's CONCLUSION

FTC staff concluded that it won't recommend enforcement action if GM (or another manufacturer) uses the EPA fuel economy label, with driving range information, in lieu of the FTC AFV label on dual-fueled vehicles. FTC staff noted that:

> "As your request explains, a single label will avoid potential consumer confusion. The approach is also consistent with the Commission's recent enforcement policy for electric vehicles. The Commission will provide final direction on these issues when it completes its review of the Alternative Fuel Rule."
>
> **Note:** "The views expressed in this letter are those of the staff assigned to enforce the Commission's Alternative Fuels Rule. In accordance with Section 1.3(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 1.3(c), this is a staff opinion only and has not been reviewed or approved by the Commission or by an individual Commissioner. It is not binding upon the Commission and is given without prejudice to the right of the Commission later to rescind the advice and, when appropriate, to commence an enforcement proceeding."

LAWYER's REFERENCE SERVICE

FTC Staff Letter to Robert Babik, Director, Environment, Energy & Safety Policy, General Motors Company, concerning GM's use of the EPA fuel economy label in lieu of the FTC ATV label for dual-fueled vehicles, November 28, 2011.

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ROUNDUP OF RECENT STATE ATTORNEYS GENERAL AD ACTIONS

INTRODUCTION

The following "roundup" article summarizes recent actions by the state attorneys general across the United States, which affect various aspects of advertising compliance.

**Arkansas**

53 AG's ASK CONGRESS TO OPPOSE BILL THAT WOULD EASE CELL PHONE ROBOCALLING RULES--On December 7, 2011, Arkansas Attorney General Dustin McDaniel joined attorneys general from across the U.S. in asking Congress to reject a bill that would allow commercial "robocalls" to cellular phones.

H.R. 3035 was filed in the U.S. House. It would amend the federal Communications Act of 1934 to allow for more automated calls to cell phones. H.R. 3035 is currently before the House Committee on Energy and Commerce. "I am concerned that if this bill passes, then Arkansas consumers could be subject to intrusive and annoying calls, while bearing the cost of such calls," McDaniel said. "Our state has a strict prohibition against commercial robocalls, and I have taken businesses to court to enforce the law. This proposal could undercut our state law and lead to unwanted telemarketing disruptions for every cell phone user."

Current state and federal law permits consumer to stop most telemarketing to both cell and land lines by signing up for "Do Not Call" protection. One exception to the bar on calls is where the consumer had given express consent for calls from a specific marketer. The proposed legislation allows businesses to contact any consumer who has merely provided a telephone number during the course of a transaction, even if the number was not provided for the purpose of consenting to telemarketing calls.

State and federal efforts to shield consumers from floods of telemarketing calls would be undermined, McDaniel and others said in the letter. In addition, the proposal would preclude state attorneys general from enforcing state laws against junk faxes and text messages.

McDaniel and 53 other attorneys general from states and U.S. territories signed the letter.

(**Source:** News Release, Arkansas Attorney General, December 7, 2011.)

**Delaware**

35 STATE AG's CALL ON FEDERAL GOVERNMENT TO CRACK DOWN ON MARKETING OF "BINGE-IN-A-CAN" ALCOHOL DRINKS–Delaware Attorney General Beau Biden and Attorneys General in 34 other states recently asked FTC to impose stringent marketing guidelines on super-sized alcohol drinks. The Attorneys General, along with the San

Volume XXXII
Issue 1
January 2, 2012
Page 23



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Francisco City Attorney, want FTC to take action as part of a proposed settlement with Phusion Projects LLC, the maker of the flavored malt beverage "Four Loko," which is 12% alcohol by volume and is packaged in 23.5-ounce cans.

Because the drink is so high in alcohol compared to a single beer, and comes in a container much larger than a typical beer can or bottle, FTC believes Phusion's marketing of these super-sized drinks as single servings – i.e., as if they can be safely consumed on a single occasion – is misleading since one container contains the alcohol equivalent of almost five beers. Drinking one can of Four Loko is often referred to as a "binge-in-a-can" because it equals a dangerous "binge drinking" episode.

"This product has proven to be dangerous to consumers, and deceptive marketing has hidden its true impact on those who drink it," Biden said. "The FTC is taking a step in the right direction but should go even further to protect the public."

The FTC has charged Phusion with violating federal law by making false or misleading representations that a 23.5 ounce can of Four Loko can be safely consumed on a single occasion and by failing to disclose the number of alcohol servings in one can. To resolve these charges, the proposed settlement requires, for containers with more than two and a half servings of alcohol, that Phusion disclose on the label the equivalent number of regular beers and make the containers resealable so the drinks do not have to be consumed all at once.

Biden and his colleagues praised FTC for acting but believe the commission should do even more to address the safety risks posed by the drinks and to ensure consumers are not deceived by the labeling on Four Loko bottles.

Among the additional steps that Delaware's AG urged FTC to take include:

- Limiting the number of alcohol servings per can to two standard drinks because the label disclosure and resealability to do not eliminate binge-drinking risks. The proposed FTC settlement does not limit the servings per can.

- If FTC does not limit the number of servings per can, it should impose the disclosure and resealability requirements to cans with at least 2 servings of alcohol, instead of the proposed 2.5.

- Enlisting public health experts to study the impact of its new requirements, particularly on young persons, since the settlement would make Four Loko the first and only alcoholic beverage to display the number of servings.





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• Better defining what constitutes a resealable can and strengthening proposed prohibitions on Four Loko running ads that show the drink being consumed directly from the can;

(**Source:** Media Release, Delaware Department of Justice, November 29, 2011.)

**Missouri**

MO AG OBTAINS RESTRAINING ORDER AGAINST TELEMARKET-Er–Missouri Attorney General Chris Koster said that his office obtained a temporary restraining order against a telemarketer and his company for making solicitation calls to Missourians who had previously placed their names on the state's no-call list.

Koster said the restraining order bars Christian Serna, doing business as All in One Service (AIOS), from making any further solicitation calls to Missourians on the No-Call list. He had previously filed a lawsuit against Serna and AIOS alleging violations of the Missouri Merchandising Practices Act and the Telemarketing No-Call List Act. Koster said telephone solicitation calls were made to consumers claiming the company could reduce their credit card interest rates. Thousands of phone calls were allegedly made to consumers on the no call list. Koster seeks a civil penalty of $5,000 for each violation of Missouri law, costs of the investigation and prosecution, and all court costs.

"When Missourians register with our No-Call list, they do so with the reasonable expectation that they will not receive these unsolicited, harassing calls," Koster said. "These businesses are aware of our No-Call laws, and they are realizing that this office will enforce those laws."

(**Source:** News Release, Missouri Attorney General, December 5, 2011.)

**Texas**

NETWORK MARKETING COMPANY AGREES TO REFUND $1.3 MILLION TO TEXAS CUSTOMERS–A Kentucky-based direct sales firm agreed to repay up to $1.3 million to its Texas customers. The agreement resolves the Texas Attorney General's investigation into potential Deceptive Trade Practices Act violations by Fortune Hi-Tech Marketing, Inc. – including allegations that the firm operated an illegal pyramid scheme.

In a typical illegal pyramid scheme, a purchaser or investor pays a fee for the opportunity to receive future profits. Those payments are primarily derived by inducing others to join the operation and pay a fee–rather than from the sale of an actual product or service. Fortune Hi-Tech's customers complained that the defendant falsely represented the earnings they would achieve if they became one of the defendant's independent representatives.





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This settlement agreement bars Fortune Hi-Tech from engaging in deceptive trade practices in the future and requires the defendant to refund up to $299 to each qualified Texas customer, up to a total of $1.3 million.

(**Source:** Press Release, Attorney General of Texas, November 15, 2011.)

**Washington**

ATTORNEYS GENERAL URGE CONGRESS TO TAKE ACTION AGAINST COUNTERFEIT WEBSITES–On November 16, 2011, Washington Attorney General Rob McKenna and Mississippi Attorney General Jim Hood released a joint statement applauding Congressional action to address online counterfeiting and piracy.

In a statement circulated at the House Judiciary Committee hearing on the Stop Online Piracy Act in Washington, DC, the attorneys general commended Congressman Lamar Smith and his colleagues in the U.S. House of Representatives for their ongoing commitment and leadership in the fight against counterfeiting and piracy on rogue websites. At the same time, they urged Congress to consider concerns of leading companies to ensure the legislation addresses the problem without imposing undue burdens on legitimate, law-abiding companies.

"The sale of counterfeit products and piracy of copyrighted content online not only undermines our nation's economy, it robs state and local governments of much-needed tax revenue and jobs. Even worse, some counterfeit goods can pose serious health and safety hazards to consumers." So said Washington AG McKenna. "Rogue-sites legislation seeks to clamp down on this scourge. We commend both the House of Representatives and the Senate for their leadership on this important issue and encourage them to work with leading Internet companies to ensure this legislation does not have unintended consequences for legitimate companies."

"Rogue-sites legislation—such as the Senate's PROTECT IP Act (S. 968) and the House of Representatives' Stop Online Piracy Act (H.R. 3261)--propose measures that would enhance the tools available to fight rogue websites and the damages they cause," according to Mississippi AG Hood. "We are encouraged by Congress' commitment to combating rogue sites and creating a safer, more vibrant Internet marketplace for American consumers."

McKenna is the current President of the National Association of Attorneys General (NAAG) and a past chair of the NAAG Intellectual Property Committee. Hood serves as the co-chair of the NAAG Intellectual Property Committee. Earlier this year, Hood and McKenna joined more than 40 other state attorneys general in a letter urging Congress to take action against rogue websites.

(**Source:** News Release, Washington State Office of the Attorney General, November 16, 2011.)

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NAD INVESTIGATIONS: RECENT HIGHLIGHTS

LATEST CASES

Advertisers cooperate with the National Advertising Division (NAD) of the Council of Better Business Bureaus, Inc., to resolve challenges to their national advertising. You should be aware of the latest NAD cases because of the helpful advertising compliance information found in these decisions. The following article contains representative examples of NAD cases in these two categories:

I. COMPARATIVE ADVERTISING--Here is a recent case involving this type of claim:

NAD recommended that Verizon Communications, Inc., should discontinue the following advertising claim:

> "FiOS TV rates #1 in HD picture quality*"
> (*June 2010 Proprietary survey conducted by ChangeWave Research, based on HD picture quality ratings among a panel of educated consumers, for more on ChangeWave Research visit www.changewaveresearch.com).

The claim appeared in broadcast and Internet advertising. It was challenged before NAD by Comcast Cable Communications, Inc. In this case, NAD examined the purpose of the June 2010 ChangeWave survey and weighed whether the survey results served to substantiate the advertiser's claim.

NAD noted that the ChangeWave survey respondents asked "how would you rate the HD picture quality of your TV service provider." Respondents weren't asked to view the parties' respective HDTV services in a controlled environment and rank them accordingly, as the challenged claim implied.

NAD found that other criteria necessary for a proper evaluation of a study were absent, including information about how much and what type of HD programming respondents watch and what size and type of TV sets they use to watch HD programming.

NAD previously recognized ChangeWave as an independent, respected research company. And NAD concluded in previous cases that ChangeWave studies may, in certain circumstances, be used to support a properly crafted advertising claim.

NAD found the claim at issue here conveyed the message that Verizon FiOS' "#1" ranking resulted from a consumer preference study of HDTV picture performance, conducted with participants who viewed the picture quality offered by





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competing providers in a controlled environment and then ranked providers. "It is undisputed that no such comparative ranking was ever performed," NAD said.

NAD decided that head-to-head testing was required to substantiate a subjective comparative HD picture quality/rating claim, and that the results of ChangeWave's stand-alone questioning of survey respondents about their own service provider did not provide a reasonable basis for comparative claims of this type. Since the ChangeWave survey evidence was insufficient to provide a reasonable basis for its "Rated #1 in HD Picture Quality" claim, NAD recommended that the claim should be discontinued.

In its advertiser's statement, Verizon said that the company–

> "understands that NAD's decision concerned the specific claim at issue in this challenge, and it will consider NAD's recommendations in any future 'Rated #1 in HD Picture Quality' claim."

(Verizon Communications, Inc., NAD Release, December 1, 2011.)

II. DIETARY SUPPLEMENT CLAIMS–Here is a recent case involving this type of claim:

Flora, Inc. NAD recommended that this advertiser should discontinue certain testimonials and modify certain performance claims for Udo's Oil 3-6-9 Blend, a dietary supplement.

NAD reviewed performance claims that included:

- "42% More Endurance* * the Robert Universe 36-Week Elite Strength Athlete Study"
- "Strength. Stamina. Recovery."
- "Athletes around the world are experiencing greater strength, improved stamina and faster recovery using Udo's Oil. Now it's your turn."

These claims appeared together in a print ad showing a man running over rocks near a mountain lake.

In addition, NAD reviewed claims presented through testimonials. These claims included:





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• Performance improvements are "real and lasting"

• "Reduced joint pain, weight loss, improved digestion, faster recovery, clear skin, balanced energy, reduced food cravings and improved performance are all benefits my clients and I have gained from adding Udo's Oil to our diets.

• "Lose tremendous amounts of body fat, feel less depressed, sleep better."

• "dry itchy patchy skin…disappeared after I put her on two tablespoons of Udo's every day."

• "My skin looked brighter, more refreshed and my skin was even with no acne.

• My hair was thicker and less dull and my nail beds grew stronger."

The advertiser offered as support for its claims a 2009 study entitled "Evaluating The Effect Of A Blend Of Omega-3 And Omega-6 Oils On The Physical Endurance Of High Level Strength Athletes."

Following its review of the advertiser's evidence, NAD noted concerns with the study's methodology. NAD noted that that study's authors acknowledged that the "number of missing measurements, lack of a control group and failure to blind participants limited the validity of the findings and conceded that the results may be attributed the placebo effect."

NAD recommended that the advertiser should discontinue these unsupported claims:

• "42% More Endurance* * the Robert Universe 36-Week Elite Strength Athlete Study"

• "performance improvements are real and lasting."

• "my skin was even with no acne. My hair was thicker and less dull and my nail beds grew stronger."

• "I've seen my clients: lose tremendous amounts of body fat, feel less depressed, sleep better."

• "[r]educed joint pain, weight loss, improved digestion, faster recovery …and improved performance are all benefits my clients and I have gained from adding Udo's Oil to our diets."





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• dry itchy patchy skin…disappeared after I put her on two tablespoons of Udo's every day.

• "Athletes around the world are experiencing greater strength, improved stamina and faster recovery using Udo's Oil.

NAD noted that nothing in its decision prevents the advertiser from–

• making claims about general well-being or claims that the ingredient flaxseed oil may help skin conditions, and

• using testimonials that claim that participants believed they experienced enhanced performance.

In its advertiser's statement, the advertiser said that while it–

"disagrees with some of the conclusions reached, we fully understand the concerns raised by the NAD. As such, and in the spirit of cooperation, Flora accepts the NAD's decision in its entirety and will discontinue using the statements and testimonials identified in the decision."

(Flora, Inc., NAD Release, November 14, 2011.)

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Verizon Communications, Inc., NAD Release, December 1, 2011.

Flora, Inc., NAD Release, November 14, 2011.

By citing the NAD Reports, the Service in no way endorses or criticizes the NAD actions or findings.

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