




Advertising Claims Litigation: FTC Actions and the NAD Process

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Advertising Claims Litigation: FTC Actions and the NAD Process

FDLI' s Food Advertising,
Labeling, and Litigation
Conference

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Crowell & Moring LLP

Washington DC.

Richard Cleland, Assistant Director
Division of Advertising Practices
Federal Trade Commission



My comments reflect my own views, and do not necessarily reflect the views of the Commission or any individual Commissioner.



Learn more here.



The Gerber Generation



says "I love Mommy's eyes, not her allergies,"

If you have allergies in your family, breastfeeding your baby can help reduce their risk. And, if you decide to introduce formula, research shows the formula you first provide your baby may make a difference. In the case of Gerber® Good Start® Gentle Formula, it's the Comfort Proteins® Advantage that is easy to digest and may also deliver protective benefits. That's why Gerber® Good Start® Gentle Formula is nutrition inspired by breastmilk.



Nourishing Generation Healthy™



V.

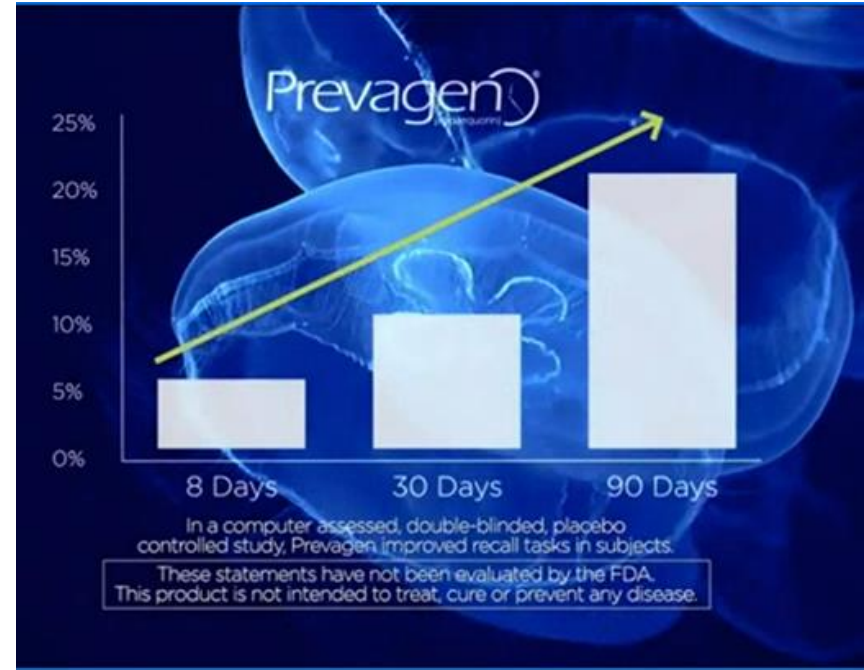


FTC v. Gerber Products Co. d/b/a Nestlé Nutrition, et al., No. 2:14-cv-06771-SRC-CLW (D. N.J. Stipulated Order filed 07/15/19)

- The Federal Trade Commission filed a complaint in October 2014 alleging that Gerber Products Company deceptively advertised that:
 - feeding Good Start Gentle formula to infants with a family history of allergies prevents or reduces the risk that they will develop allergies, and
 - misrepresented that its Good Start Gentle formula qualified for or received approval for a health claim from the U.S. Food and Drug Administration.
- Settlement approved in July 2019 with standard injunctive relief requiring substantiation for future claims.

FTC v. Quincy Bioscience Holding Company, Inc., No. 1:17-cv-00124 (S.D. N.Y. filed Jan. 9, 2017)

- Complaint charged defendants with making false and unsubstantiated claims that Prevacen improves memory, provides cognitive benefits, and is “clinically shown” to work.
- New York State AG is co-plaintiff.
- Critical issue involves p-hacking.



FTC v. Jason Cardiff, No. CV18-2104-JGB(KKX) (C.D. Cal. filed Oct. 24, 2018)



Cardiff/Redwood Scientific

- Complaint charged Jason Cardiff, two other individuals, and seven closely related corporate entities orchestrated a scheme under the name Redwood Scientific Technologies, through which they deceptively marketed the three products and engage in a host of illegal marketing practices such as unauthorized billing.
- The three products challenged are:
 - TBX-FREE, a purported smoking-cessation claimed to be “Clinically Proven” to be effective in studies published in several well-known scientific journals, including the New England Journal of Medicine;
 - Eupepsia Thin, a purported weight-loss product allowing users to “lose 10, 20, even 100 pounds without giving up your favorite foods or adding any exercise;” and
 - Prolongz strips purported to be “first of a kind sexual performance product” that will “increase overall performance” and are “proven to effectively increase [intimate encounters] for 97% of the Thousands of Men” who have tried them.

Joint FTC/FDA Warning Letters (Alzheimer's) (02/05/2019)

- Gold Crown Natural Products
 - New Ultra Colostrum, Melatonin with Valerian, Anamu & Llanten, and Circulation Max
 - Colostrum, melatonin, & more
 - Arthritis, cancer, Alzheimer's, lupus, & more
- Pure Nootropics
 - Alpha GPC, Lion's Mane, CDP Choline Capsules, Piracetam, Vitamin D3, Turkey Tail Mushroom Powder, and Ginkgo Biloba Capsules
 - Alzheimer's, Parkinson's, depression, brain injury recovery, & more
- TEK Naturals
 - BURN4Her, BurnerTEK, Mind Ignite, TEK Male, and TestoTEK
 - Mind Ignite “is a safe and highly effective alternative to Adderall”
 - Sixteen individual ingredients (Bacopa Monnieri, Gingo Biloba, L-Tyrosine, Huperzine A, St. John's Wort Extract)
 - Alzheimer's, ADD, ADHD

Joint FTC/FDA Warning Letters (CBD)

(03/28/2019)

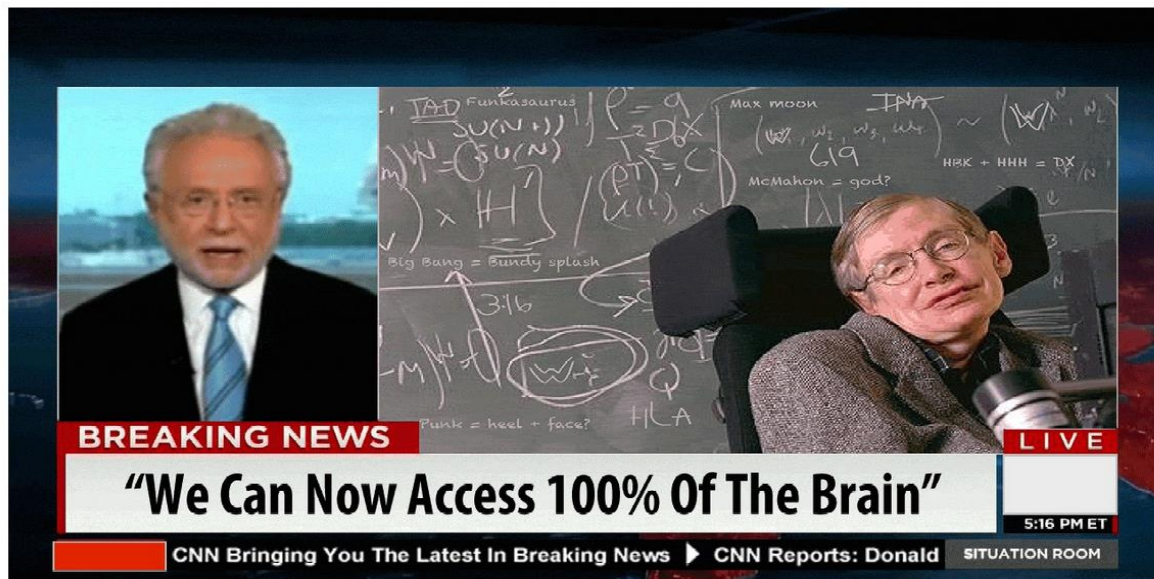
- Advanced Spine and Pain, LLC
 - Cancer, Alzheimer’s, schizophrenia, substance abuse, Parkinson’s, rheumatoid arthritis, & more
- Nutra Pure LLC
 - Alzheimer’s, neuropsychiatric disorders, PTSD, OCD, & more
- PotNetwork Holdings, Inc.
 - Liquid Gold Gummies & “blue CBD Crystals Isolate”
 - Alzheimer’s, Lou Gehrig’s disease, arthritis, diabetes, & more

FTC CBD Warning Letters 09/09

- One company's website claims CBD "works like magic" to relieve "even the most agonizing pain" better than prescription opioid painkillers. To bolster its claims that CBD has been "clinically proven" to treat cancer, Alzheimer's disease, multiple sclerosis (MS), fibromyalgia, cigarette addiction, and colitis, the company states it has participated in "thousands of hours of research" with Harvard researchers.
- Another company's website claims that CBD products are proven to treat autism, anorexia, bipolar disorder, post-traumatic stress disorder, schizophrenia, anxiety, depression, Alzheimer's disease, Lou Gehrig's Disease (ALS), stroke, Parkinson's disease, epilepsy, traumatic brain injuries, diabetes, Crohn's disease, psoriasis, MS, fibromyalgia, cancer, and AIDS. The company also advertises CBD as a "miracle pain remedy" for both acute and chronic pain, including pain from cancer treatment and arthritis.
- The third company's website promotes CBD gummies as highly effective at treating "the root cause of most major degenerative diseases, including arthritis, heart disease, fibromyalgia, cancer, asthma, and a wide spectrum of autoimmune disorders." The company also claims its CBD cream relieves arthritis pain and that its CBD oil may effectively treat depression, PTSD, epilepsy, heart disease, arthritis, fibromyalgia, and asthma.
- The letters instruct the companies to notify the FTC within 15 days of the specific actions they have taken to address the agency's concerns.

FTC v. Global Community Innovations LLC

Geniux: “Viagra for the brain”



FTC v. Nobetes Corp.

D&K Foods 9/15/16



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
BUREAU OF CONSUMER PROTECTION
WASHINGTON, D.C. 20580

DEPARTMENT OF HEALTH
AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION
SILVER SPRING, MD 20993

WARNING LETTER

SEPT 15, 2016

VIA EXPRESS MAIL

Mr. Martin Silver
Side Effect Solutions Corporation dba NoBetes Corporation
13428 Maxella Ave
Suite 631
Marina del Rey, CA 90292

RE: 499092

Dear Mr. Silver:

This is to advise you that the U.S. Food and Drug Administration (FDA) reviewed your website at the Internet address <http://www.nobetes.com> in June 2016 and has determined that you take orders there for the product NoBetes. The claims on your website establish that this product is a drug under section 201(g)(1)(B) of the Federal Food, Drug, and Cosmetic Act (the Act) [21 U.S.C. § 321(g)(1)(B)] because it is intended for use in the cure, mitigation, treatment, or prevention of disease. As explained further below, introducing or delivering this product for introduction into interstate commerce for such uses violates the Act. You can find the Act and FDA regulations through links on FDA's home page at www.fda.gov (<http://www.fda.gov>). In addition, the Federal Trade Commission reviewed your website for potential violations of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

Your website contains numerous personal testimonials providing evidence that your product is intended for use as a drug. These testimonials recommend or describe the use of NoBetes for the cure, mitigation, treatment, or prevention of disease. Examples of such testimonials include:

On your home page, in a YouTube video titled "NoBetes Commercial":



FTC v. Cure Encapsulations, Inc.

- Weight Loss product containing garcinia cambogia
- Fake Amazon reviews



FTC v. Regenerative Medical Group (Oct 2018)

multiple sclerosis, cerebral palsy, traumatic brain injury, heart disease, macular degeneration, chronic kidney disease, osteoarthritis, stroke, Parkinson's, autism

Do you have **TREMOR?**
Maybe it is **PARKINSON'S?**
If yes, **STEM CELLS Help**

Call Us Today: (888) 599-STEM


We can help you

Regenerative Medical Group
Like This Page · December 24, 2014 ·

What is Parkinson's Disease?
Parkinson's disease (PD) belongs to a group of conditions called motor system disorders, which are the result of the loss of dopamine-producing brain cells. The four primary symptoms of PD are tremor, or trembling in hands, arms, legs, jaw, and face; rigidity, or stiffness of the limbs and trunk; bradykinesia, or slowness of movement; and postural instability, or impaired balance and coordination. As these symptoms become more pronounced, patients may have difficulty walking, talking, or completing other simple tasks. PD usually affects people over the age of 50. Early symptoms of PD are subtle and occur gradually. In some people the disease progresses more quickly than in others. As the disease progresses, the shaking, or tremor, which affects the majority of people with PD may begin to interfere with daily activities. Other symptoms may include depression and other emotional changes; difficulty in swallowing, chewing, and speaking; urinary problems or constipation; skin problems; and sleep disruptions. There are currently no blood or laboratory tests that have been proven to help in diagnosing sporadic PD. Therefore the diagnosis is based on medical history and a neurological examination. The disease can be

Contact Information

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Artistic Depiction v. Product Demonstration

- Image conveys explicit or implicit information about a product.
- Context focuses on function or attribute depicted.

**Tyson Foods, Inc. (Hillshire Farm Ultra Thin
Oven Roasted Turkey Breast), Report
#6200, NAD/CARU Case Reports (June 2018)**




The Kraft Heinz Company (Heinz Real Mayonnaise), Report #6233, *NAD/CARU Case Reports* (December 2018) and Unilever United States, Inc. (Hellmann's REAL Ketchup), Report #6235, *NAD/CARU Case Reports* (December 2018)

Two “Real” Products:

When is it puffery and when is it a comparative superiority claim?



Same Idea + Different Contexts = Different Results



As we watched the foods we eat evolve to be better for us, we noticed that ketchup had not kept up. So we decided to change that. Our ketchup is made with only simple, high quality ingredients.

Put Hellmann's Real Ketchup on a juicy burger, on the side of crispy French fries, or use it to create a homemade secret sauce.

TRY IT NOW



Disparagement or Puffery?

- **Challenger argued:** Implied Superiority, Disparaging, Unsupported
- **Advertiser argued** (1) puffery; or (2) monadic, not comparative superiority
- **NAD:** Puffery (but context dependent).

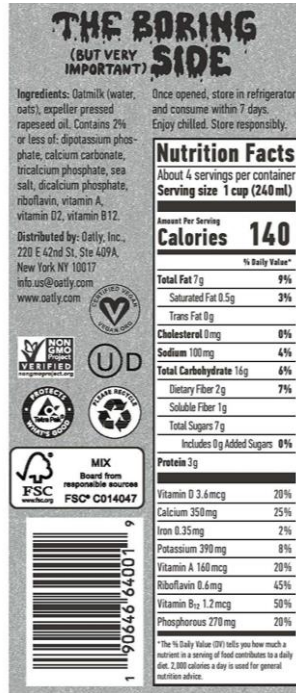
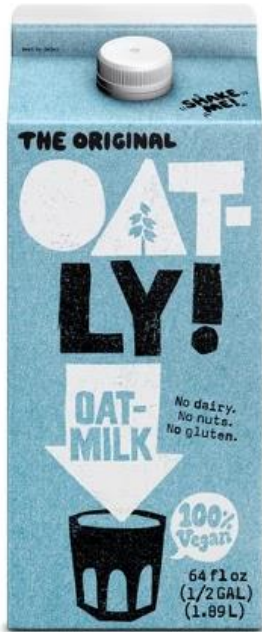


Design Element or Claim?

- Although FSIS is empowered to review “graphic matter” relating to animal-raising claims, the implied claims at issue here are allegedly derived from non-mandatory imagery.
- In all the challenged contexts in which the “open field” imagery appears, NAD concluded that its use was decorative and atmospheric.
- However, more realistic depictions of “open fields” or artwork tied to claims about animal care may signal to consumers that the images depict the actual animal care conditions.



Mandatory Element or Claim?



NAD recommended that Oatly not re-post or restate the “added sugars” line of the Nutrition Facts Panel in its advertising.

NAD Case Reports

- Available via online subscription at:
<http://www.asrcreviews.org/>
- Access to NAD/CARU/ERSP decisions including NARB appeals
- Education and guidance on emerging issues
- Revised & streamlined searching capabilities added early 2019