



“The World’s Most Trusted Article on Puffery”: Non-Actionable Puffery or Misleading?

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Puffery is commonly defined as “publicity or acclaim that is full of undue or exaggerated praise.”¹ Commercial entities use puffery as a key marketing strategy allowing them to advertise their product as “the best,” “the better choice” or even “the world’s most effective.” Some obvious questions come to mind such as, “How do we know if this product is really the best or the better choice?” or “Are there any measuring guidelines that manufacturers must undertake in order to advance such claims?” The use of such boastful claims may fall within the realm of false advertising and be governed by section 43(a) of the Lanham Act.² Furthermore, the Federal Trade Commission (FTC) and the National Advertising Division (NAD) of the Council of Better Business Bureaus also provide guidelines for what companies may include within their marketing schemes.

This article provides insight as to which kinds of claims are generally accepted while advertising a product and which claims require the presence of further substantiation, whether it is scientific data or results determined through consumer surveys.

Federal Courts

The Lanham Act establishes a distinct, two-part standard with respect to false

advertising practices. This standard includes: 1) whether or not the manufacturer has made a false or misleading representation of fact,³ and 2) whether the misrepresentation of fact is likely to confuse and/or deceive the general public.⁴ The false or misleading representation of fact may either be literally false or implicitly conveying a false impression.⁵ Moreso, the statements at issue must be quantifiable and capable of being proven false using scientific methods.⁶ A representation by a manufacturer that does not fall into one of the two aforementioned categories and cannot be scientifically measured may be characterized as non-actionable puffery. The Third and Ninth Circuits define puffery as “exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely.”⁷

The 9th Circuit in *Southland* determined that a claim that “Less is More” with respect to fertilizer seeds was non-actionable puffery on the basis that no reasonable buyer would assume such

a claim to be actually true. On the other hand, the court concluded that the defendant’s “50 percent Less Mowing” claim is a specific and measurable element; its accuracy of which may be substantiated using scientific testing.

Similarly, in *Pizza Hut, Inc. v. Papa John’s Intern., Inc.*,⁸ the Fifth Circuit concluded that in addition to the “exaggerated, blustering and boasting” definition established by the Third and Ninth Circuits, puffery could best be described as “a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”⁹ Papa John’s claim, “Better Ingredients. Better Pizza” was found to have epitomized the very type of boasting and exaggeration that companies are almost expected to advance while marketing their products. The court noted that both terms, “Better Ingredients” and “Better Pizza” were so generic in that they did not identify any specific reasons for “better” or did not offer any comparisons between their



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product and a competitor's.

The Ninth Circuit has also recognized claims that are highly subjective to be non-actionable puffery, noting that consumers are far more likely to be deceived by specific assertions rather than general, vague or opinionated statements.¹⁰ Coincidentally, statements that may be proven true or false through experimentation and thus are objective in nature are not considered non-actionable puffery and may be violative of the Lanham Act.¹¹

The Federal Courts approach the puffery concept from a statutory standpoint. Their analysis entails the application of provisions of the Lanham Act to determine whether or not claims by manufacturers are misleading and likely to deceive the public. The courts have established a fairly lenient standard in which non-actionable puffery is classified as obviously exaggerated statements that are unlikely to mislead consumers, while statements that can be proven true or false are considered to be beyond the scope of puffery.

FTC and NAD

While the courts have engaged in a fair amount of discussion on “puffing,” the concept of non-actionable puffery is more eminent within the field of advertising and is closely scrutinized by the FTC and the NAD. NAD considers the following factors when determining the presence of puffery within any given advertisement: 1) whether the representations concern general matters that cannot be proven or disproved, 2) whether the statements are distinguishable from representations of specific characteristics that are measurable by research or test, 3) whether the wording uses expressions of opinion that will be discounted by the buyer.¹²

In the analysis of Vital Pharmaceutical's (Vital) use of “The World's Most

Effective Energy Drinks” as an advertisement slogan, NAD noted that the slogan was not correlated with any specific product performance claim. Vital marketed their energy drinks as capable of enhancing moods, energy and fat loss; however, they never attributed performance of their product to its world-wide rank in effectiveness. Thus, NAD certified Vital's “general” use of “The World's Most Effective” slogan on their website while also suggesting that such a claim should remain independent from any specific product attribute.

NAD continues to apply its three part test in determining which advertisements amount to non-actionable puffery. In deciding whether W. Wrigley Jr. Company's (Wrigley) use of “For Whiter Teeth, no matter what” was proper, NAD determined that reasonable consumers would not understand such a claim to be unconditional and without limits.¹³ Wrigley's slogan was thought to have been an obvious exaggeration that consumers were unlikely to take seriously. Similarly, Dr Pepper Seven Up, Inc.'s use of “it tastes so good, you can feel it in your bones” was determined by NAD to be an obvious exaggeration of a new drink created with increased amounts of calcium.¹⁴ A reasonably prudent person would not purchase the drink expecting to feel something in their bones. ConAgra Food's claims that “Better Tomatoes Make Better Ketchup” and “Only the Best Tomatoes Grow Up to Be Hunt's” were also found to be obvious exaggerations,¹⁵ with NAD noting that both statements were not only mere exaggerations, but both also made no reference to any quantifiable aspect of the Hunt's Ketchup product.

In addition to classifying obvious exaggerations as non-actionable puffery, NAD also stresses the importance of

separation between boastful claims and other quantifiable aspects of the marketed product. For example, Metabolife International's use of a “#1 in Weight Loss” claim was found by NAD to be misleading and therefore not puffery.¹⁶ NAD determined that the claim “#1 in Weight Loss” appeared directly below and in close proximity to other product claims such as “Promotes Weight Loss” and “Increases Energy,” suggesting that “the #1” portion of the claim was also scientifically tested and proven along with the physical attributes of the product. NAD also faced a similar scenario in their deliberations over Pom Wonderful's (Pom) use of several claims for their new line of juices.¹⁷ Pom used “Cheat Death,” “Life Preserver,” “Outlive Your Spouse,” “Life Guard” amongst various other claims in efforts to project a healthy image for their new beverage product. NAD determined that using these claims independently may constitute non-actionable puffery. However, when combined with a statement describing the horrors of cancer, such claims would mislead consumers as to the relation between the marketed product and the treatment and/or prevention of cancer.

Finally, NAD puffery analysis entails a review of comparative product claims. NAD recognizes that effective marketing campaigns require manufacturers to set their products apart from their competitors and thus recognize certain comparative claims as non-actionable puffery. Liability for unfair trade practice may arise when the comparative claims directly identify certain competitors and address various characteristics of the competitor's products. Brigham, Inc. used a “taste the best at a sensible price” slogan in a photo advertisement depicting its product alongside the product of many of its competitors.¹⁸ NAD deter-

mined that when using a comparative claim that identifies certain competitors, the factors being compared (i.e., price, taste, appearance) may be objectively quantified. Thus, Brigham’s use of this claim required further substantiation and was not classified as non-actionable puffery. On the other hand, Beech Nut Corporations’ use of the comparative claim “Beech-Nut is a better choice” for their baby food products was determined by NAD to be non-actionable puffery.¹⁹

Beech-Nut’s decision to not include a competitor’s product in their advertisement as a basis for comparison distinguished their slogan from that of Brigham’s.

NAD and FTC closely scrutinize various marketing and advertising campaigns advanced by manufacturers. When determining whether or not any given advertisement is false or misleading, NAD looks to the degree

of exaggeration of the claim as well as the presence of any quantifiable aspect within those fantastic claims (see Table 1 below for NAD examples and analysis). Claims which a reasonable purchaser is unlikely to take seriously are considered non-actionable puffery, while claims that may be proven true or false are generally not considered non-actionable puffery.

Conclusion

It is well understood that manufacturers seek to distinguish their products from their competitors’ in hopes that they capture a substantial share of their particular market. However, various guidelines imposed by the courts, FTC and NAD limit the extent to which manufacturers can boast about their products. As a general principle, those statements that are so generic or exaggerated and are unlikely to deceive the public are ones that will be freely used as

non-actionable puffery. Statements that require substantiation or assert superiority as to specific ingredients or performance attributes of a product cannot be freely used and may be liable under the Lanham Act. Ultimately, a successful “puffer” will be one whose statements flirt both with an appropriate amount of sincerity towards their consumer while also incorporating extreme, outrageous exaggerations that are sure to grab the consumer’s attention. ▲

- 1 “Definition of Puffery”; <http://dictionary.reference.com/browse/puffery> (last visited Aug. 12, 2008).
- 2 15 U.S.C. § 1125 (a) (2000).
- 3 15 U.S.C. § 1125 (a) (1) (2000).
- 4 15 U.S.C. § 1125 (a) (1) (A) (2000).
- 5 United Industries Corp. v. Clorox Corp., 140 F.3d 1175 (8th Cir. 1998).
- 6 Coastal Abstract Serv. Inc. v. First Am. Title Ins. Co., 173 F.3d 725 (9th Cir. 1999).
- 7 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997). See also, Castrol Inc. v. Pennzoil Co., 987 F.2d 939 (3rd Cir. 1993).
- 8 Pizza Hut, Inc. v. Papa John Intern., Inc., 227 F.3d 489 (5th Cir. 2000). See Also, In re Boston Beer Co.,

Table 1: Examples from NAD Decisions

Claim Type	Analysis	Puffery	Not Puffery
Exaggerated/ Boastful	Can it be proven true or false? Is it so vague that no one will take it as a fact?	“America’s Favorite Pasta” ²⁰ “America’s Best Loved Coffee” ²¹ “The Earth’s Most Comfortable Shoes” ²²	The Antioxidant Superpower” ²³ “Trusted by Moms” ²⁴ “Leading Brand” ²⁵
Comparative Advertisement that Identifies Competitors	Does the manufacturer identify competitors or certain aspects of the competitor’s product?	“Beech-Nut is a better choice” ²⁶	“Taste the Best at a Sensible Price” ²⁷ (depicted next to three competitor products)
Comparative Advertisement that Identifies Measurable Attributes	Does the manufacturer claim that a certain attribute of their product is better than a specific attribute of another product?	“Better Ingredients. Better Pizza.” ²⁸ (when not identifying any specific ingredients)	“tastes most like butter even better” ²⁹ “the best compact coffee solution” ³⁰ “discover the better taste of Progresso” ³¹
Language Placed Near Product Performance or Disease Prevention Claims	Is the exaggerated claim located in proximity to other quantifiable claims of the product?	“World’s Most Effective Energy Drinks” ³² (found on top of product website and not next to any performance claims of any product)	“Cheat Death” “Life Preserver” ³³ The New Shape of Protection” (found next to a statement describing the horrors of Cancer)

- 198 F.3d 1370 (Fed.Cir.1999) (The court noted that the phrase “The Best Beer in America” was puffery and that a generic claim of superiority as such “should be freely available to all competitors in any given field to refer to their products or services.”
- 9 Pizza Hut, Inc. v. Papa John Intern., Inc., 227 F.3d 489 (5th Cir. 2000). *See Also*, In re Boston Beer Co., 198 F.3d 1370 (Fed.Cir.1999) (The court noted that the phrase “The Best Beer in America” was puffery and that a generic claim of superiority as such “should be freely available to all competitors in any given field to refer to their products or services.”
- 10 Sterling Drug, Inc. v. Federal Trade Commission, 741 F.2d 1146 (9th Cir. 1984).
- 11 United States v. Simon, 839 F.2d 1461, 1468 (11th Cir. 1998).
- 12 NAD Case # 4868, Vital Pharmaceuticals, Inc. (July 9, 2008).
- 13 NAD Case # 4555, Wm. Wrigley Jr. Company. (Sept. 11, 2006).
- 14 NAD Case # 4446, Dr. Pepper Seven Up, Inc. (Jan. 24, 2006).
- 15 NAD Case # 4194, ConAgra Foods, Inc. (June 9, 2004).
- 16 NAD Case # 4182, Metabolife International, Inc. (Mar. 13, 2004).
- 17 NAD Case # 4468, Pom Wonderful, LLC. (Apr. 5, 2006).
- 18 NAD Case # 3007, Brigham, Inc. (Mar. 1, 1993).
- 19 NAD Case # 4744, Beech-Nut Nutrition Corporation (Oct. 24, 2007).
- 20 American Italian Pasta Company v. New World Pasta Company, 371 F.3d 387 (8th Cir. 2004). (A court found that “America’s Favorite” was an obvious exaggeration and not a statement of fact for Lanham Act purposes).
- 21 NAD Case # 3201, Kraft Foods, Inc. (June 1, 1995). (NAD concluded that “best-loved” could not be quantifiable and the general public would see it as an obvious exaggeration).
- 22 NAD Case # 3103, Wolverine Worldwide, Inc. (Apr. 1, 1994). (NAD noted that “comfortable” is not specific and consumers would see such a claim as an obvious boast of product capabilities).
- 23 NAD Case # 4468, Pom Wonderful, LLC. (Apr. 5, 2006). (NAD concluded that “antioxidant” power could be measured and tested).
- 24 NAD Case # 4268, Arby’s, LLC. (Dec. 10, 2004). (NAD concluded that a survey could be conducted to substantiate that most mom’s preferred the product).
- 25 NAD Case # 4263, Nestle U.S.A. (Nov. 24, 2004). (NAD noted that “leading” could be proved with data).
- 26 NAD Case # 4744, Beech-Nut Nutrition Corporation (Oct. 24, 2007).
- 27 NAD Case # 3007, Brigham, Inc. (Mar. 1, 1993).
- 28 Pizza Hut, Inc. v. Papa John Intern., Inc., 227 F.3d 489 (5th Cir. 2000).
- 29 NAD Case # 4646, GFA Brands, Inc. (Mar., 9, 2007). (NAD stated that “taste” was measurable by survey).
- 30 NAD Case # 4263, Nestle U.S.A. (Nov. 24, 2004). (NAD stated “most compact” could be substantiated).
- 31 NAD Case # 4165, General Mills, Inc. (Mar. 29, 2004). (NAD stated taste superiority is measurable).
- 32 NAD Case # 4182, Metabolife International, Inc. (Mar. 13, 2004).
- 33 NAD Case # 4468, Pom Wonderful, LLC. (Apr. 5, 2006).