

JOYUS, INC.

Dr. Brandt's Needles No More Wrinkle Relaxing Cream

Challenger: National Advertising Division

Product Type: Dietary Supplement

Issues: Implied Claims/Consumer Perception

Disposition: Modified/Discontinued

- **Advertising that appears in a format that makes it look like editorial content has the potential to mislead or confuse consumers because consumers may attach a different weight or significance to editorial content than to pure advertising content.**

Basis of Inquiry:

As part of its routine monitoring program, NAD reviewed advertising by Joyus, Inc., an online shopping retailer (the "advertiser" or "Joyus"), for a product sold by Joyus that appeared in the online version of People Magazine. NAD was concerned that advertising for Joyus products appears in a format that makes it look like the advertising is editorial content and blurs the line between editorial content and advertising in a way that can confuse consumers.

Express Claims:

"Instant Wrinkle Relaxing Cream"

"Botox in a bottle"

"Younger looking skin in just 60 seconds"

"Skin will feel and look smoother in 60 seconds."

"84% of people see visible smoother skin in just one minute."

"96% of people see visible smoother skin after 60 minutes."

"100% of people report diminished lines and wrinkles after 4 weeks."

Implied Claim:

Embedded within editorial content in the online edition People Magazine, on its style page, is a regular feature called "Stuff We Love." NAD was concerned that consumers may review the products on "Stuff We Love" with the expectation that it represents independent editorial selections by People Magazine editors rather than advertising for Joyus.

Advertiser's Position:

Joyus is an e-commerce platform for lifestyle products including fashion, beauty, personal care, fitness and home products. Joyous brings consumers online shopping using videos to showcase new products. The claims in a promotional video for Dr. Brandt's Needles No More Wrinkle Relaxing Cream were discontinued by Joyus after the commencement of this challenge.

Joyus explained that it continues to feature Joyus products in the "Stuff We Love" section of People magazine, which appears in the Style Watch section of People's website. This "Stuff We Love" section contains a list of items for sale through the Joyus e-commerce platform with descriptions of the items, including the description, "Get Younger Looking Skin in Just 60 Seconds with this Cream" for Dr. Brandt's Needles No More. Along with the description of

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products, consumers can click to watch a video, produced jointly by Joyus and People, which advertises products for sale.

Joyus contended that its videos featured in People Magazines "Stuff We Love" section make clear that the videos are advertisements for Joyus products when evaluated as a whole and in context. The embedded videos include the Joyus logo depicted in the upper-left corner of the frame of the video player for each video. Consumers can see the logo before the video is played and the entire time the video is playing because the logo appears in the video-player frame, rather than in the video itself. Joyus also explained that a discount or special offer also appears in the upper left corner of each video player frame, immediately after the Joyus logo. For example many of the videos include the text "Register now to get 10% off + free shipping on first orders over \$50." The text appears in bright magenta to distinguish it from other text and draw the consumer's eye.

Other features that make it clear that video is an advertisement for a Joyus product include that (1) a price for each product is visible on the video; (2) there is an "add to bag" button which consumers can click to add the product to their shopping cart; (3) there is a visible shopping bag icon in the upper right corner of the video. Joyus also explained that each video makes clear that the products are for sale and are told in the first person and offer new shoppers on Joyus a 10% discount on orders over \$50 with a discount code. Each video also includes a call to action for prospective purchasers to encourage them to add the product in the video to their cart. Joyus argued that all of these elements make it clear to consumers that Joyus is describing a product that is offered for sale. Because consumers understand that the product in the video is for sale, it is transparent and clear to consumers that there is a material connection between People and Joyus.

Decision:

NAD opened this monitoring case because of a concern that content appeared under the heading "Stuff We Love" in People Magazine (found under the tab Style) blurred the line between advertising and editorial content in a way which could confuse consumers. People Magazine and Joyus partner to create content and videos which appear under "Stuff We Love" in People Magazine. Consumers viewing People Magazine online and reading "Style Watch" can click on a tab labeled "Stuff We Love." This brings readers to a list of videos, each of which is described with a teaser like, "Watch: Get Younger Looking Skin in 60 Seconds with This Cream." Viewers who click on the "Watch" link will view a video promoting a product available for purchase. Once the video begins playing, the video itself is labeled "Joyus" and contains elements which indicate that it is a shopping video including an offer to get 10% off and free shipping as well as an icon of a shopping bag.

I. Disclosure Required When Linking Consumers to Advertising Content

The descriptions of products on the "Stuff We Love" page of People Magazine online as well as the video itself promote products sold by Joyus. People Magazine editors choose which products are featured on this page and help create the descriptions and videos that promote Joyus

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products. While this section of People magazine's online edition blends editorial and advertising content, the featured products are being promoted for sale. Both the descriptions of the products on the People Stuff We Love page as well as the videos promote the sale of Joyus products.¹ This content is national advertising and subject to NAD's jurisdiction which defines national advertising to include, "any paid commercial message, in any medium (including labeling) it is has the purpose of inducing a sale or other commercial transaction."²

FTC recently issued an Enforcement Policy Statement on Deceptively Formatted Advertisements that reaffirms the FTC's longstanding guidance that advertising should be identifiable as advertising to avoid misleading consumers into believing that an advertisement is independent and impartial. The FTC advised that consumers should not be misled about an advertisement's "nature or source [when] such misleading impression is likely to affect their decision or conduct regarding the advertised product or the advertising."³ The FTC explained further that, "a misleading representation is material if it is likely to affect consumers' choices or conduct regarding the advertised product or the advertisement, such as by leading consumers to give greater credence to advertising claims or to interact with advertising with which they otherwise could not have interacted."⁴ NAD has often expressed concern about advertising in deceptive formats, particularly when the content in question recommends a product or service.⁵

NAD agrees with Joyus that the Joyus videos themselves contain visual and audio cues that make it clear that consumers are viewing a shopping video, including the Joyus brand logo in the upper left corner of the screen, a banner with an offer to get 10% off and free shipping, as well as an icon of a shopping bag, and a link to "add to bag." The pages and links the consumers see before the viewing a Joyus video, however, reasonably convey the message that the linked content is editorial content. The "Style" page link to "Stuff We Love" does not disclose that "Stuff We Love" feature is a partnership between People and Joyus and promote products for purchase. When on the "Stuff We Love" page, the list of items on the page, with "Watch" links that lead to videos, describes products without indicating that the products or services described

¹ Such content is generally deemed to be "commercial" in nature because it proposes a commercial transaction. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)(quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) ("Commercial speech is 'speech which does no more than propose a commercial transaction.'"); see also Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 56, 57-58 (2d Cir. 2002) (holding that to qualify as "commercial advertising or promotion," under the Lanham Act, the advertising must be (1) commercial speech; (2) "for the purpose of influencing consumers to buy defendant's goods or services"; and, (3) "although representations less formal than those made as part of a classic advertising campaign may suffice, they must be disseminated sufficiently to the relevant purchasing public.").

² ASRC Procedures §1.1A.

³ https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf at 2.

⁴ https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf at 10.

⁵ See generally, American Media, Inc. (Shape Water Boosters), Report #5665 *NAD/CARU Case Reports* (December 2013); eSalon (Custom Formulated Hair Color), #5645 *NAD/CARU Case Reports* (October 2013); NourishLife (SpeechNutrients Speak), #5620 *NAD/CARU Case Reports* (August 2013); Herbal Groups Inc. (Prostalex Plus), *NAD/CARU Case Reports*, Report #5005 (July 2009)(citing JS&A Group, 54 F.Reg 12593, March 28, 1989, Corporation ordered to cease and desist from "misrepresenting, either directly or indirectly, that an advertisement is an independent consumer or news program and not a paid advertisement.")

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are for sale in the video link.⁶ Consumers do not know that “Stuff We Love” is promoting products for sale in the videos before watching the shopping video. As a result, consumers could give greater credence to claims made in the product descriptions than they would if they were aware that this is a form of advertising for those products, and further, consumers may interact with this content because they think it is editorial and not advertising. For the foregoing reasons, NAD recommended that Joyus (in collaboration with People Magazine) revise the link so that it is clear that by clicking on the “Stuff We Love” link, consumer will be taken to a list of items for sale by Joyus. The link itself or text surrounding the link should advise consumers that the content to which consumers are linking is an advertisement or make clear that the links are “shopping” links.⁷

II. Advertising Claim Substantiation

NAD also asked the advertising to substantiate claims about the efficacy of the advertised product, Dr. Brandt's Needles No More, as advertising must be truthful accurate and not misleading.⁸ The description of the video, viewable before the video begins playing claims, “younger looking skin in one minute,” that the product is “botox in a bottle,” and that skin will be “visibly smoother in just one minute.” The video itself contains additional claims including claims that “84% of people see visible smoother skin in just one minute,” “96% of people see visible smoother skin after 60 minutes,” and “100% of people report diminished lines and wrinkles after 4 weeks.”

An advertiser has an obligation to substantiate such claims with reliable evidence that the product works as promised. The most reliable testing on anti-aging cosmetic products is testing on a representative test population that (1) quantitatively measures wrinkle reduction, skin tone or age-related skin changes using industry standard methodologies, as well as (2) qualitatively measures changes in skin condition to insure that any improvement is perceptible and consumer relevant. The best evidence to support such specific efficacy claims, like those made here, is testing on the product itself.⁹

The advertiser advised NAD that it had discontinued these claims. In reliance on the advertiser's representation that this advertising claim had been permanently discontinued, NAD did not review these claims on their merits. The voluntarily discontinued claims will be treated, for

⁶ When a user clicks on “Stuff We Love,” People takes you to a page and a video begins running immediately.

⁷ People's online magazine includes a tab labeled “Shop,” which consumers understand will link them to products being sold on the People magazine website.

⁸ NAD has held that it is the responsibility of both a retail cataloguer and a product distributor to have a reasonable basis for the product claims it disseminates. See Takari International, Inc. (Danisa Traditional Butter Cookies), Report #5823, *NAD/CARU Case Reports* (November 2015); Ranger Joe's (Antarctica & Trade's Sleeping Bag), Report #3803 *NAD/CARU Case Reports* (August 2001). Joyus is in the same position as a product distributor or cataloguer. It advertises a product for sale on its website and in People Magazine.

⁹ Unilever United States, Inc. (Dove Deep Moisture Body Wash), Report #5599 *NAD/CARU Case Reports* (June 2013); University Medical Pharmaceuticals Corp. (WrinkleFree Eyes) Report #4680 *NAD/CARU Case Reports* (May 2007); IQ Cosmetics/Intelligent Beauty, LLC (iQ RestorEyes), Report #4666, *NAD/CARU Case Reports*(May 2007).

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compliance purposes, as though NAD recommended their discontinuance and the advertiser agreed to comply.

Conclusion

NAD recommended that Joyus disclose that the "Stuff We Love" page is a shopping page and the linked videos are shopping videos before consumers reach the "Stuff We Love" page and before the video begins running. The link itself or text surrounding the link should advise consumers that the content to which consumers are linking is an advertisement or make clear that the links are "shopping" links.

Advertiser's Statement

Joyus appreciates the opportunity to participate in the self-regulatory process, and is glad NAD agrees that the content and appearance of Joyus' videos make it clear to consumers that the featured products are for sale through Joyus' e-commerce platform. In accordance with NAD's recommendations, Joyus is working with the publisher to implement changes on web pages that link to the Stuff We Love section that will help clarify to consumers that the Stuff We Love section in which Joyus' videos appear is a shopping feature. Joyus also understands and agrees that any future claims it makes about Dr. Brandt's Needles No More wrinkle relaxing cream must be adequately substantiated. **(#5956 LB, closed 05/19/2016)**