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ABA Section of Antitrust Law
Consumer Protection Update May 2012

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FTC Developments

FTC v. Skechers USA, Inc. (d/b/a Skechers) FTC File No. 102 3069

- Allegations
  - Skechers made deceptive claims that its Shape-Ups, Resistance Runner, Toners and Tone-Up shoes, including that the shoes would help people lose weight and strengthen and tone their buttocks, legs, and abdominal muscles.
  - Skechers made unsupported claims that Shape Ups would provide more weight loss and muscle toning and strengthening than regular fitness shoes.
    - *"Shape up while you walk"; "Get in shape without setting foot in a gym"*
    - Celebrity endorsements featuring Kim Kardashian and Brooke Burke; Kardashian ad showed her dumping her personal trainers for Skechers.
  - Clinical Studies
    - An allegedly "independent" clinical study by a chiropractor did not produce the results claimed in the ad and failed to disclose that the chiropractor was paid to conduct the study and was married to a Skechers marketing executive.
    - Skechers cherry-picked the results of a study and failed to substantiate its claims that consumers who wear "Resistance Runner" shoes will increase muscle activation by up to 85 percent for posture-related muscles, 71 percent for one of the muscles in the buttocks, and 68 percent for calf muscles, compared to regular running shoes and Skechers.
    - One study showed consumers actually gained weight or had an increase in body fat.

FTC v. Skechers (cont'd)

- Settlement:
  - Part of broader agreement resolving multi-state investigation, which included AGs from over 40 states and the District of Columbia, entered in Ohio federal court
  - Imposes a $40 million dollar monetary judgment for consumer redress
  - Bars Skechers from making claims about strengthening, weight loss, and any other health or fitness-related benefits claims (caloric expenditure, calorie burn, blood circulation, aerobic conditioning, muscle tone and muscle activation) regarding its toning shoes unless they are non-misleading and backed by competent and reliable scientific evidence.
    - Competent and Reliable Scientific Evidence
      - *For strengthening claims*: One adequate and well-controlled human clinical study
      - *For weight loss claims*: Two independent, adequate and well-controlled human clinical studies
      - *For health or fitness related claims*: Tests, analyses, research or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results

FTC v. Skechers (cont'd)

- Settlement (continued)
  - Bars Skechers from misrepresenting any tests, studies, or research results, including but not limited to misrepresenting that wearing any of its toning shoes will result in a quantified percentage or amount of muscle activation, toning or strengthening.
  - Imposes compliance and recordkeeping requirements.

- "The FTC's message for Skechers and other national advertisers is to shape up your substantiation or tone down your claims." – David Vladeck.
  - Recent FTC settlements reflect that the agency is imposing a higher standard for substantiating health benefit claims

In the Matter of POM Wonderful et al., FTC File No. 082-3122

- Background
  - September 2010: POM filed declaratory judgment. FTC moved to dismiss and filed an administrative Complaint alleging that Respondents' claims that POM prevents, reduces the risk of, or treats heart disease, prostate cancer or erectile dysfunction were false and misleading because they were not supported by competent and reliable evidence.
    - FTC alleged the heart disease studies did not produce the results claimed, the prostate studies were not double-blinded or adequately controlled, and the erectile dysfunction studies failed to show that POM outperformed the placebo.
  - May 21, 2012: FTC announced its 335-page initial decision authored by Chief Administrative Law Judge D. Michael Chappell, upholding FTC Complaint against POM, its sister corporation Roll International, and three of its principals. Although the decision confirms that food marketers need clinical evidence to substantiate their claims, in some respects, the decision rejects the FTC's position that double blind placebo controlled clinical studies are required.
  - What's Next? The Initial Decision is subject to full review by the FTC on its own or at the request of a party. Initial Decision becomes the final decision after 30 days unless a timely notice of appeal is filed.

In the Matter of POM Wonderful et al. (cont'd)

- Initial Decision
  - POM products constitute "food" or "drugs" within the meaning of the FTC Act; the nature of the POM products as food or food-derived do not outweigh the overall net impression conveyed by the alleged claims.
  - Claims that a food or food-derived product treats, prevents, or reduces the risk of heart disease must be based on competent and reliable scientific evidence, which must include clinical studies.
  - Studies involving food, beverages, and supplements are not subject to the double-blind, randomized, placebo controlled requirements imposed on pharmaceuticals.
    - ALJ cited POM's expert testimony that such studies are not necessarily the gold standard for efficacy for dietary substances, whose effects are subtle, gradual, and population-based.
    - A lesser standard of substantiation is required in the context of safe food products [derived from fruit that has been around for thousands of years] than pharmaceutical drugs, which are "not known to be safe and have toxicities and side effects."
    - Such trials are prohibitively expensive and not feasible because unlike pharmaceutical drugs, foods are not patentable and manufacturers cannot recoup the costs of conducting these trials through profits from exclusive IP rights.

In the Matter of POM Wonderful et al. (cont'd)

- Initial Decision (continued)
  - Found POM violated federal law by making deceptive claims that their products would treat, prevent or reduce the risk of heart disease, prostate cancer and erectile dysfunction. Respondents failed to support their health benefit claims with adequate competent and reliable scientific evidence.
    - Reasonable consumers would interpret some of the ads as conveying these health benefit claims. Some of the ads even stated that these benefits were "clinically proven"
  - Found although some of Respondents' ads made the unsubstantiated claims, the preponderance of the evidence failed to demonstrate that other POM ads would reasonably be interpreted by consumers as containing the unsubstantiated claims.
  - Rejected FTC's proposal, which would have prohibited POM from making any disease claims about its products unless the claim had prior approval from the FDA.
    - Rejected FTC's argument that prior approval would provide clear and concise guidance, finding that it would constitute "unnecessary overreaching."
    - "The complexity of the scientific issues, the unquestioned expertise of the FDA to evaluate scientific evidence relating to disease claims and the Commission's interest in harmonizing with the FDA do not constitute sufficient reasons to create a new level of substantiation . . ."
    - Order provides safe harbor for claims approved by FDA.

In the Matter of POM Wonderful et al. (cont'd)

- Order
  - Bars Respondents from making any representation about the "health benefits, performance, or efficacy" of POM products *or any other food, drug or dietary supplement* unless the representation is not misleading and Respondents possess competent and reliable scientific evidence to substantiate the representation.
    - ALJ explained the multi product order as being necessary since Respondents' judgment "has not always been exercised appropriately."
  - Bars Respondents from making any representation that any product is effective in the diagnosis, cure, mitigation or prevention of a disease, *unless* the representation is not misleading and Respondents possess competent and reliable scientific evidence to substantiate the representation.
    - Defines "competent and reliable scientific evidence" as tests, analyses, research or studies that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
    - Notably also rejects FTC position that FDA approval is required
  - Bars Respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study or research . . .
  - Imposes various monitoring, recordkeeping, notification and reporting requirements, including a 20-year order requiring scientific research to back up health benefit claims.

In the Matter of Myspace LLC, FTC File No. 102-3058 (2012)

- Allegations
  - Despite promises in its privacy policy that it would not share users' personally identifiable information, use information in a way that was inconsistent with the purpose for which it was submitted without first receiving permission to do so, identify users to third parties, or share non-anonymized browsing activity, Myspace provided advertisers with the Friend ID of users who viewed particular pages, which the advertiser could then use to obtain PII available on a user's profile, including the user's full name.
  - Myspace falsely represented that it complied with U.S.-EU Safe Harbor Framework.
  - Myspace falsely represented that it complied with the Safe Harbor Principles, including the requirements that consumers be given notice of how their information will be used and the choice to opt out.

In the Matter of Myspace LLC (cont'd)

- Proposed Settlement
  - Bars Myspace from misrepresenting the extent to which it protects the privacy of users' personal information or the extent to which it belongs to or complies with any privacy, security or other compliance program, including the US-EU Safe harbor.
  - Requires Myspace to implement a comprehensive privacy program to address privacy risks and protect privacy and confidentiality of covered information. Specifically, the program must:
    - Designate an employee(s) to be responsible
    - Identify reasonably foreseeable, material risks, internal and external, that could result in the unauthorized collection, use, or disclosure of covered information; assess the sufficiency of any safeguards to control these risks
    - Design and implement reasonable privacy controls and procedures to control the risks and regular test or monitor those safeguards
    - Select and retain service providers capable of appropriately protecting the privacy of covered information
    - Evaluate and adjust privacy program in light of testing results
  - Requires Myspace to obtain biennial assessments of its privacy program by independent auditors for the next 20 years.

Billing Services Group (BSG), FTC File No. X980069

- Allegations
  - Placed more than $70 million in bogus “cramming” charges on consumers’ phone bills that consumers never authorized or even knew about in violation of a previous court order.
  - Failed to investigate either the highly deceptive marketing for the services or whether consumers even used them.
  - Continued billing for services despite voluminous complaints from consumers and even after major telephone companies refused to do so.
- Contempt Motion
  - FTC asked a federal court to make BSG pay more than $52.6 million, representing the total amount the company billed to consumers and failed to refund.

North American Marketing & Assoc., et al., FTC File No. 1023247

- Allegations
  - Defendants violated the FTC Act and TSR by misrepresenting that consumers who spent thousands of dollars for Internet websites and advertising and marketing expertise could make money by linking to sites of major retailers.
  - Some consumers who complained were sold additional advertising services.
  - After receiving consumer complaints, Defendants shut down and renewed the business opportunity under new business names.
- Order granted FTC's application for TRO, ordering Defendants to stop the allegedly deceptive practices and freezing their assts pending further litigation. The injunction enjoins Defendants from:
  - Falsely representing that consumers who purchase and use the websites or advertising packages are likely to earn substantial income or that cost of ad package will be recovered;
  - Misrepresenting that business experts will provide substantial assistance or any fact to a consumer's decision to purchase a home-based business opportunity;
  - Making false or misleading statements to induce consumers to pay for home-based business opportunities.

North American Marketing & Assoc., et al., (cont'd)

- Sellers must comply with the FTC's Business Opportunity Rule (16 C.F.R. § 437)
  - Requires sellers to provide consumers with one-page disclosure document.
  - If seller makes claim about how much money consumers can make, they are required to provide a separate earnings claim statement that includes, among other things, the specifics of the claim, the number and percentage of people who got those results or better, and any information about those people that may differ from the consumer.
  - Makes clear that certain practices are against the law.

U.S. v. Luebke, et al., FTC File No. 082-3206

- Allegations
  - Defendants violated the FTC Act, FDCPA and TSR by seeking payment for bogus magazine subscriptions
  - In violation of the TSR, Defendants marketed a credit repair CD, which allegedly collected an up-front fee before providing any goods or services
  - Defendants Illegally masked their identity and sent false information over caller id, falsely told consumers that magazine subscription debts are exempt from the statute of limitations, and illegally threatened to garnish wages and take other unintended legal actions
- Settlement
  - Imposes over $3 million in penalties and monetary relief
  - Bars Defendants from representing a consumer owes a debt without having a reasonable basis to do so, and from making any other misrepresentations when collecting debts or selling services Requires Defendants to conduct reasonable investigation when a consumer disputes a debt or when the Defendants otherwise have reason to question whether the debt is valid
  - Requires Defendants to provide consumers with disclosures about their rights under the FDCPA and inform collection employees of personal obligations under the Act
  - Requires Defendants to comply with the TSR Rule
  - Imposes compliance, monitoring, notice and recordkeeping obligations

FTC v. Green Millionaire, LLC, et al.
FTC File No. 1023204

- Allegations
  - Defendants marketed a “green millionaire book” that falsely promised the book would describe “how to get free gas for life” as well as other similar claims.
  - Defendants’ websites asked consumers to provide credit card information or bank account number and charged them without their authorization and without clearly disclosing they would be charged for magazine subscriptions, that they would have to cancel to avoid additional charges, the program’s cost, how to cancel it and when they must cancel to avoid the charges.

FTC v. Green Millionaire, LLC, et al. (cont'd)

- Settlement
  - Defendants required to pay nearly $2 million in consumer refunds
  - Bars Defendants from misrepresenting specific aspects of negative option transactions, including:
    - That any product/service is offered on a "free", "trial", "no obligation" or "discounted" basis;
    - The purpose for which a consumer's payment information will be used;
    - The amount a consumer will be charged/billed or that a consumer will not be charged or billed;
    - The timing of any charge or the length of any trial period
    - That the consumer will be charged without authorization
    - The material terms of any cancellation and/or refund policies or practices
  - Requires Defendants to obtain express consent before billing, including for written/online offers by providing a check box disclosing the most critical terms of the negative option program, which consumers must affirmatively select before the defendants can process any billing information
  - Requires Defendants to provide consumers with written confirmation of a transaction and renewal of a membership, with disclosure on how to cancel or obtain a refund
  - Requires Defendants to disclose the materials term of any refund/cancellation policy or if the policy is not make refunds/cancellations, before a consumer consents to pay
  - Bars Defendants from making any material misrepresentation in the sale of any good/service and using endorsements and testimonials unless they are true an substantiated.

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FTC Workshop

- On May 30, 2012, the FTC hosted workshop about advertising and privacy disclosures in online/mobile media.
- The Workshop addressed online disclosure challenges, including making clear and conspicuous disclosures in social media and mobile marketing and making mobile privacy disclosures in a manner that would be more readable for consumers.
- Panelists included consumer advocates, representatives of marketers and industry groups, and academics.
- Panelists emphasized the need for general principles, rather than hard-and-fast or one-size-fits-all rules, the need for greater flexibility and leniency in disclosures given the challenges of limited real estate and cross platform limitations and the importance of industry self-regulation.

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State AG Developments

Multi-State Developments

- 33 state Attorneys General filed a lawsuit in the Southern District of New York alleging that Apple conspired with publishers Penguin and Macmillan to artificially raise the price of e-books, resulting in more than $100 million in overcharges to consumers nationwide.
- Letter signed by 38 states and territorial attorneys general urges movie studios to adopt published policies to eliminate tobacco depictions in youth-rated movies.

Washington

- Attorney General Rob McKenna announced settlement with RealNetworks over “free to pay conversions”
  - $2.4 million in restitution
  - Requires RealNetworks to comply with ROSCA, and obtain customers’ express consent before charging them with a free trial that converts into a paid subscription.
  - Requires RealNetworks to, among other things, (i) stop using pre-checked boxes; (ii) stop offering free-to-pay conversions that do not clearly and conspicuously disclose the terms of the offer, including a statement that by accepting the offer, the consumer is enrolling in ongoing subscription program that will automatically be charged to his or her account at the end of the trial period if the consumer does not cancel during the trial period; (iii) provide an online method of cancellation; (iv) send email reminders that consumers are enrolled in free-to-pay conversions along with instructions on how to cancel; (v) cancel subscriptions within two days of a consumer’s request to do so; (vi) inform consumers who have called to cancel of additional subscriptions on their account.

Ohio

- Attorney General Mike DeWine sued a California company, CTI Group, which offers and sells investment and trading software programs, alleging violations of state and federal telemarketing laws
- Allegations:
  - Repeatedly called Ohio consumers on the national Do Not Call Registry
  - Failed to obtain a certificate of registration
  - Charged consumers' credit cards without obtaining written approval
  - Made false or misleading statements to induce a purchaser to pay for goods or services
  - and failed to issue refunds despite representations to the contrary.
- "Even if telemarketers are located in another state, they still need to comply with Ohio consumer laws if they do business in Ohio" - Dewine

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Private Litigation

Consumer Class Actions
Lanham Act Litigation

Curtis v. Altria Group
2012 WL 1934726 (Minn. May 30, 2012)

- Class Action against Philip Morris: "Light" and "Lowered tar and nicotine" to market and sell cigarettes were unfair and deceptive practices.
- 1994 Minnesota AG settlement
  - Broad release language: "any and all manner of civil claims . . . known or unknown . . ."
  - Included "future conduct" – Monetary claims arising out of use or exposure to tobacco products
- Minn. Supreme Court held that the AG "unambiguously released" Philip Morris from claims relating to prior and future conduct.

Hairston v. South Beach Beverage Co. 2012 WL 1893818 (C.D. Cal. May 18, 2012)

- Claims regarding label for SoBe 0 Calorie Lifewater Beverages:
  - "All natural" label but some ingredients are synthetic or created via chemical processing.
  - Names of fruits used to describe flavors but no actual fruit or juice.
  - Use of common vitamin name allegedly misleading because the added vitamins are synthetic or created via chemical processing.
  - Claimed breach of express warranty under the MMWA.
- Court dismissed Complaint without leave to amend.
  - Nutrient and "all natural" claims preempted by FDCA and FDA labeling requirements.
  - Label did not convey warranty claims.

Lam v. General Mills
2012 WL 1656731 (C.D. Cal. May 10, 2012)

- Alleged misleading claims regarding nutritional qualities of fruit snacks.
  - Packaging conveys false impression that fruit snacks are healthy, but fruit snacks contain transfats, large amounts of added sugars, artificial food and dyes, no significant amounts of real fruit, and have no dietary fiber.
  - Claim that fruit snacks are "made with real fruit" but contain pear concentrate and not the fruit the product is supposed to taste like.
  - Use of "natural" and "all natural."
  - Use of "gluten free" might confuse consumers to think that Fruit Snacks contain no partially hydrogenated oils, low amounts of sugar or corn syrup, or that fruit snacks are otherwise healthful.
- Many claims were preempted by FDCA and FDA regulations.
  - Under FDA regulations, products can be labeled as "fruit flavored" or "naturally flavored" even if it does not contain fruit or natural ingredients.
  - Statement "gluten free" found to be objectively true and to communicate nothing more than a message about the presence of gluten. Court also dismissed the complaint with respect to "other similar products" but gave Plaintiff leave to amend to specifically identify the particular products she intends to target.
- General Mills' Motion to Dismiss denied with respect to "Made with Real Fruit" claim.

Pom Wonderful LLC v. The Coca Cola Co. 2012 WL 1739704 (9th Cir. 2012)

- Coca Cola Pomegranate Blueberry juice blend contains 99.4% apple and grape juices, 0.3% pomegranate juice, 0.2% blueberry juice, 0.1% raspberry juice.
  - Allegedly misleading because the blend is comprised almost entirely of inexpensive apple and grape juices.
- Name and labeling aspects of Lanham Act claim preempted by FDCA and FDA regulations.
  - The Court found that naming component of Pom's claim was barred because FDA regulations authorize the name Coca–Cola has chosen. However, the Court noted that name may be deceptive, but stated that the FDA can act if it agrees.
- Court affirmed the District Court's summary judgment barring the Lanham Act claim with respect to the name and label.
- The Court vacated the judgment with respect to the state claims so that the court could rule on whether Pom has statutory standing, whether the state law claims are preempted and whether California's safe-harbor doctrine applies.

Ivie v. Kraft Foods Global, Inc. CV 12-02554 (N.D. Cal. May 17, 2012)

- Putative Class Action filed against Cadberry Adams USA LLC and Kraft Foods.
- Complaint alleges that Defendants falsely conveyed to consumers that their products can be enjoyed "as part of a healthy and enjoyable diet."
  - "Sugar free" or "sugarless" gum, breath months and hard candies not low calorie.
  - All contain more than 40 calories per 50 grams.
  - Products "Misbranded Food Products."
- Alleges numerous violations of California state law and the MMWA.

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National Advertising Division of the Council of Better Business Bureaus

Developments

Lunada Biomedical, Inc./Amberen
NAD Case Report #5466 (May 2012)

- Council for Responsible Nutrition ("CRN") challenged claims for Amberen dietary supplement for menopausal women.
- Advertising claims described the product as an "effective all-in-one solution for common symptoms of menopause, including hot flashes, night sweats, irritability, mood swings, inability to concentrate, sleeplessness, lack of energy and decreased libido. Additional claims:
  - "Amberen has the unique ability to rejuvenate your hypothalamus . . . This, in turn, promotes balanced production and circulation of hormones throughout your body, supporting the optimal function of your vital organs."
  - "A better hormonal balance means less symptoms."
  - "Our proprietary technology produces perfectly shaped 'smart' molecules that your body can readily recognize and use. Inside your cells, these remarkable compounds rejuvenate mitochondria and rebalance hormone levels."
  - Only company in the world to produce "smart molecules" of succinates and fumerates.
  - "On average, you can expect the effects of Amberen to last for up to 3 months after you've completed your course."

Lunada (cont'd)

- Electronic Retailing Self-Regulation Program (ERSP) already reviewed advertising on the same product.
  - NAD refused to close the case because a prior ERSP decision does not preclude NAD review.
- NAD concluded:
  - Advertiser's study results tended to show that Amberen reduced many menopausal symptoms.
  - However, NAD recommended that the advertiser discontinue symptom relief claims for specific symptoms where the study did not show statistically significant improvement or for symptoms that were not considered in the study.
  - Evidence did not support fast relief claims or the 3-month claim.
  - No support for the claim that the effects of Amberen were "profound."
  - Testimonials properly discontinued because they contained unsubstantiated claims.

L'Oreal USA, Inc./Visible Lift Smooth Absolute Foundation
NAD Case Report #5458

- NAD-Initiated Challenge of claims regarding anti-aging benefits of Visible Lift Smooth Absolute Foundation:
  - Express Claims:
    - "See up to 10 years disappear . . . In a stroke"
    - "The Hydra-Collagen Complex formula replumps the skin from within while the High-Precision brush instantly smoothes and fills wrinkles for a dewy, youthful finish."
  - Implied Claims:
    - The Visible Lift collection will make you look 10 years younger instantly.

L'Oreal (cont'd)

- NAD found:
  - "Up to" claims require the maximum level of performance to be substantiated by showing that an "appreciable number of consumers will obtain that level of performance under circumstances normally encountered by consumers."
    - Advertiser's study supported claim that "'a 10 years younger effect' was observed for skin tone evenness, fine lines and skin smoothness."
    - NAD recommended that the advertiser specify the three parameters.
- Re-plumping claim found to be unsupported.
- NAD found that the language in the advertising effectively limited the "10 years younger" claim to the Foundation and not the entire Visible Lift line.

CTI Industries, Corp./ZipVac Vacuum Sealer System & Universal Bags
NAD Case Report #5457

- Jarden Consumer Solutions, manufacturer of FoodSaver and Seal a Meal, challenged claims made by CTI for its ZipVac system.
- Many of the challenged claims had been discontinued but some products sold on third party websites used old packaging artwork.
  - NAD recommended that the advertiser contact third party websites and provide new artwork.
- NAD found the claim “keeps food fresher up to five times longer” to be unsupported.
  - Recommended that advertiser modify claim to reflect available data.

VTech Electronics North America, LLC/InnoTab Computer Tablet
NAD Case Report #5445

- LeapFrog challenged advertising claims made in connection with the sale of InnoTab tablets for children.
  - Advertiser promoted availability of downloads, including free downloads with purchase, but did not disclosed that consumers had to purchase an SD memory card to take advantage of capability.
  - InnoTab sold at lower price compared to competing LeapPad which had larger on-board memory.
- Advertiser made software update to immediately expand on-board memory but free downloads may still exceed on-board memory.
- NAD determined that advertiser must clearly and conspicuously disclose in close proximity to “free downloads” claim that the purchase of additional memory may be required.

Ocean Spray Cranberries, Inc./Ocean Spray Cranberry Juice
NAD Case Report #5453

- Campbell Soup Company, the maker of V8 vegetable juice, challenged a taste test shown in Ocean Spray advertising that compared Ocean Spray Cranberry Juice to vegetable juice.
- Characters in the commercial stated that vegetable juice contains 10 times more sodium than cranberry juice.
  - Super added to disclose “excluding low sodium juice” during course of NAD’s review.
- Character tasting vegetable juice dumped the juice in a bog upon learning of sodium content.

Ocean Spray (cont'd)

- NAD determined that while sodium levels were substantiated, the depiction of a character dumping vegetable juice after learning sodium content may:
  - Overstate the significance of the sodium content and
  - Convey the potentially misleading message that V8 contains an alarming or unhealthy amount of sodium.
- Superior taste message unsupported.
- Ocean Spray intends to appeal to NARB.

Energizer Personal Care, LLC/ Schick Hydro Razor
NAD Case Report #5287C II

- In underlying decision, NAD determined that images of "water bursts" conveyed to consumers the false message that Schick Hydro razors provide a post-hydration benefit.
- In a compliance inquiry, NAD considered a new commercial that showed visuals of "water bursts" outside of the shaving context with super stating "hydrates only during shaving."
  - A woman on a washing machine throwing a shirt at a man, which explodes into a water burst.
  - A Frisbee exploding into a water burst.
  - A boxing glove transforming into a water burst.
- The advertiser submitted a consumer perception survey that showed that the water burst imagery did not convey a post-shave hydration message.

Energizer (cont'd)

- NAD did not consider the advertisers consumer perception study. NAD concluded:
  - The study seeks to "reopen an inquiry which was already addressed and determined in the underlying proceeding."
  - Issue is not new and NAD not authorized to review it in a compliance proceeding. NAD Procedures only permit a case to be reopened in "extraordinary circumstances."
  - Although NAD has previously considered consumer preference evidence within the scope of a compliance review, the survey had been submitted by the challenger to show that the "fix" previously offered by NAD was insufficient. *See McNeil-PC, Inc./Tylenol Arthritis Pain*, NAD Case Report #4147 C IV (Feb. 2007)
  - The super "hydrates during shaving" was not sufficient because it contradicted the main message of the commercial.
- Case referred to FTC.