



Insights: Alert

NAD's Scrutiny of Non-Standard Testing Protocols: A Cautionary Tale

May 23, 2024

Written by **Bryan J. Wolin**

A recent decision by the National Advertising Division (“NAD”) serves as a helpful reminder that companies should generally adhere to accepted industry protocols when testing their products. Using non-standard testing to support your claims drastically increases the risk of NAD finding those claims unsubstantiated.

Chosen Foods (“Chosen”), a prominent seller of avocado-based cooking products, challenged Lily of the Desert Nutraceuticals, Inc.’s (“Lily”) claim of “100% Pure Avocado Oil” marketed under the Tropical Plantation brand. In support of its challenge, Chosen produced industry-standard third-party testing demonstrating that Lily’s oil did not meet industry-standard purity requirements—meaning it was likely adulterated with other non-avocado oils and the “100%” claim was false.

In NAD cases, advertisers bear the initial burden of substantiating their claims. That burden is heightened in the case of “100%” claims because they are highly compelling to consumers and require mathematical perfection.

Lily argued that some industry standards used by Chosen were still in draft form, and that all of Chosen’s standards were applicable only to a narrow range of avocados grown by certain growers in Mexico. Lily then offered its own internally developed testing results, manufacturer assurances, and third-party test results. Unfortunately for Lily, NAD found that Lily’s tests and assurances weren’t up to snuff. Among other issues, NAD explained that Lily’s tests did not adequately define what 100% avocado oil was supposed to look like in the first place, so the tests simply didn’t fit the challenged claim. Ultimately, NAD rejected Lily’s evidence and recommended that the “100%” claim be discontinued.

If you have any questions or concerns about advertising challenges at the NAD, or any advertising claims, please feel free to contact us. [Kilpatrick’s Advertising and Marketing team](#)

Related People



Bryan J. Wolin

t 212.775.8735

bwolin@ktslaw.com