

## Advertiser Self-Regulation And Class Actions: Part 1

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When an advertiser agrees to voluntarily participate in industry self-regulation before the National Advertising Division, it does so expecting to avoid litigation. Yet there has been a consistent concern among advertisers that NAD participation may actually make consumer class action litigation more, rather than less, likely.

In 2012, the Advertising Self-Regulatory Council amended NAD procedures to provide that “[a]n advertiser’s voluntary modification of advertising, in cooperation with NAD ... self-regulatory efforts, is not to be construed as an admission of impropriety.”[1] This amendment was, in part, a response to those who claimed that NAD decisions provide “fodder” to plaintiffs class action attorneys.[2] But is that a valid concern? Are attorneys really scouring NAD decisions for their next litigation target?

The answer is probably not. Let’s look at the numbers.

### Correlating NAD and Class Action Filings

There have been 474 cases closed at the National Advertising Division since January of 2013. Of those filings, 384 resulted in an adverse NAD decision, defined as either (1) a finding that the challenged claim or claims should be discontinued or modified, or (2) referral of the matter to the Federal Trade Commission.

In this same time period, there were 57 false advertising complaints filed against companies whose advertising was challenged before the NAD.[3] We note that these 57 post-2013 actions are fewer than the 63 we found when we first analyzed this issue in 2013. However, there were 32 more adverse NAD decisions in our current analysis than in 2013.[4]

These numbers suggest that an adverse NAD decision is not likely to lead to the filing of a consumer class action, or at least that the likelihood is trending downward. A look at the cases in more detail strengthens this conclusion.

Of the 57 false advertising complaints filed subsequent to an adverse NAD decision, one was not a



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consumer class action, but rather was brought by an NAD challenger against its competitor.[5] We can therefore eliminate that complaint from our analysis.

Moreover, many of the 56 remaining consumer class action complaints were duplicated in other jurisdictions. In other words, there were multiple copycat class actions across jurisdictions involving the same advertisers, the same products and the same advertising claims. Indeed, removing duplicates, there were only 20 unique products or services that were the subject of class action complaints following an adverse NAD decision filed since Jan. 1, 2013.

At first blush, it appears that FanDuel Inc. and DraftKings Inc. were, by far, the most impacted by an adverse NAD decision. FanDuel and DraftKings are competitors operating daily fantasy sports websites.[6] In an NAD proceeding, FanDuel challenged the express claims made by DraftKings declaring itself the “largest U.S.-based destination for daily fantasy sports” and “the largest U.S.-based online gaming destination where players engage in daily fantasy sports competitions across fantasy professional football, baseball, golf, basketball, hockey, soccer and college football and basketball.”[7]

FanDuel also argued that DraftKings’ claims implied that FanDuel is not a U.S.-based fantasy sports website.[8] The NAD decision focused on whether FanDuel was based in Scotland, where it maintained certain of its offices and departments. Because DraftKings’ claims appeared to suggest that FanDuel, the larger entity, “had no appreciable presence in the United States — a message that is not truthful or accurate,” the NAD recommended DraftKings discontinue its claims.[9]

In the months following the NAD’s decision, issued in March 2015, there were at least 20 class actions filed against DraftKings, FanDuel or both. This would seem to indicate the NAD decision had something to do with these filings. Upon closer examination, however, it appears unlikely.

Despite the timing of the filings, a review of the FanDuel/DraftKings complaints illustrates that those class actions did not focus on the advertising subject to the NAD decision, but rather centered on allegations that the daily fantasy sports websites’ competitions were “rigged.”[10] Indeed, none of the FanDuel/DraftKings class actions that we were able to locate during our research mentioned the NAD, the NAD’s decision or even the advertisements that were the subject matter of the NAD proceeding.

The DraftKings and FanDuel class action lawsuits, therefore, do not appear to stem from the NAD decision, but, rather, most likely resulted from subsequent negative media attention surrounding the companies and/or government investigations into the entities’ business practices. Because there are no FanDuel/DraftKings class actions based on the topic of the NAD decision, we exclude them from our analysis.

Excluding the DraftKings decision, of the 19 remaining NAD decisions that potentially had subsequent class actions, two were not decisions on the merits and can be discounted. One case featured an advertiser that refused to participate and was referred to the FTC.[11] The other was administratively closed and referred to the FTC because it involved advertising claims that were subject to an FTC consent order from 2004 — nearly a decade earlier.[12]

With respect to the former, after declining to participate, the advertiser at issue, Obesity Research Institute, was then faced with a consumer class action regarding its advertising.[13] However, it should be noted that Obesity Research Institute was already facing at least two other similar class actions concerning advertising statements made about its Lipozene dietary supplement that were filed well over a year before the NAD decision.[14]

The class action at issue was subsequently consolidated with the previously-filed federal action.[15] Since an adverse NAD decision, regardless of whether the advertiser participated in the NAD proceeding, cannot have possibly influenced a class action that was filed before the NAD proceeding, we exclude this case from our calculus.[16]

With respect to the case that was administratively closed, during the course of the NAD proceeding, “it came to NAD’s attention that Bremmen Clinical [the advertiser] is associated with Basic Research LLC[,]” which had entered into a 20-year consent order with the FTC “regarding advertising weight-loss claims for several of its dietary supplements,” similar to the claims challenged in the NAD proceeding.[17] Because the advertising claims were subject to an FTC consent order entered into nearly a decade before the NAD decision, we find it necessary to exclude this decision from our calculus as well, as it is highly unlikely that this NAD decision influenced a follow-on class action.

Indeed, we note that, while the subsequent class action (filed nearly two and a half years after the NAD referral) briefly references the NAD’s decision, the complaint extensively discusses the permanent injunction entered by the FTC that prohibits the marketing of the weight loss products at issue without competent and reliable scientific evidence to support the advertising statements.[18]

When we remove these two cases, we are left with 17 adverse NAD decisions during this five-year period that were followed by consumer class actions. Those cases are listed in the table below.[19] We note again that this number is smaller than the 27 NAD decisions followed by consumer class actions identified in our 2013 analysis, supporting the conclusion that the fear of a consumer class action resulting from participation in an NAD proceeding is greatly overstated, and diminishing.

<b>Case Caption</b>	<b>Product</b>
Organic Consumers Association et al. v. Sanderson Farms Inc., No. 3:17-cv-03592 (N.D. Cal.)	Sanderson Farms Chicken
Weeks et al. v. Google Inc., No. 5:18-cv-00801 (N.D. Cal.)	Pixel phone
De Lacour v. Colgate-Palmolive Co. et al., No. 1:16-cv-08364 (S.D.N.Y.)	Tom’s of Maine “Naturally Dry” Antiperspirant
Leggett et al. v. Rust-Oleum Corporation, No. 1:17-cv-01449 (N.D. Ill.)	Painter’s Touch Ultra Cover 2X Spray Paint
Franjul et al. v. Kimberly-Clark Corporation et al., No. 1:15-cv-06200 (S.D.N.Y.)	Huggies Natural Care Wipes
Dapeer v. Neutrogena Corp., No. 1:14-cv-22113 (S.D. Fla.)	Neutrogena Beach Defense Sunscreen
Basque et al. v. NourishLife LLC, No. 4:15-cv-00025 (N.D. Fla.)	Speak dietary supplements
Darisse v. Nest Labs Inc., No. 3:14-cv-01363 (N.D. Cal.)	Nest Learning Thermostat

Melgar v. Zicam LLC et al., No. 2:14-cv-00405 (C.D. Cal.)	Zicam
Velasquez et al. v. USPLabs LLC et al., No. 4:13-cv-00627 (N.D. Fla.)	Jack3d supplements
Weisblum et al. v. Prophase Labs Inc. et al., No. 1:14-cv-03587 (S.D.N.Y.)	Cold-EEZE
Forrest v. Innovation Ventures LLC et al., No. 4:13-cv-00172 (E.D. Mo.)	5 Hour Energy
Dean v. Colgate-Palmolive Co., No. 5:15-cv-00107 (C.D. Cal.)	Colgate Optic White Toothpaste
Muir v. Playtex Products LLC, No. 1:13-cv-03570 (N.D. Ill.)	Diaper Genie
Tsan et al. v. Seventh Generation Inc., No. 3:15-cv-00205 (N.D. Cal.)	Seventh Generation natural labeled products
Delre v. The Blue Buffalo Company Ltd., No. 5:14-cv-00768 (D. Conn.)	Blue Buffalo pet food products
Karhu v. Vital Pharmaceuticals Inc., No. 0:13-cv-60768 (S.D. Fla.)	VPX Meltdown Fat Incinerator

The second installment of this article will examine the timing of specific class action filings to get a better sense of whether adverse NAD decisions may have been substantial contributing factors. The third installment will consider which firms are filing class actions, and whether an NAD decision can have any impact on a federal court's analysis of a cause of action.

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[1] Rule 2.1 F(1), Rules of the Advertising Self-Regulatory Council (ARSC), available at: <http://www.ascreviews.org/wp-content/uploads/2012/04/NAD-CARU-NARB-Procedures-Effective-2-1-16.pdf>.

[2] See, e.g., Jack Neff, NAD Decisions Become Fodder For Class-Action Lawyers, AdAge (Apr. 23, 2012), <http://adage.com/article/news/nad-decisions-fodder-class-action-lawyers/234273/>.

[3] To identify the complaints, we first pulled all NAD decisions since 2013 where the NAD either recommended that an advertising claim be discontinued or modified or referred the matter to the FTC. We then compiled a list of companies and products involved in the adverse NAD decision. We conducted searches to determine whether these products or companies were subject to class action complaints

filed after Jan. 1, 2013, based on similar false advertising allegations, regardless of whether these complaints referenced the NAD decision. We also used Lexis Advance to research class actions filed since 2013 that referenced the NAD or an NAD decision. We note that our analysis does not include demand letters that plaintiffs class actions attorneys may have sent threatening litigation in response to an NAD action. Because those letters are nonpublic, they cannot be tracked.

[4] See John E. Villafranco and Donnelly L. McDowell, *The National Advertising Division, Class Actions and Federal Courts: The Increasingly Busy Intersection of Advertising Self-regulation and Litigation* (Fall 2013), *What's In Store: Newsletter of the Section of Antitrust Law's Consumer Protection Committee, Privacy and Information Security Committee and Advertising Disputes and Litigation Committee*, American Bar Association, Volume 19, No. 1, Spring 2014. We note that since our starting point for this analysis is January 2013, there may be some overlap in the actions.

[5] *Dyson Inc. v. Euro-Pro Operating LLC*, No. 1:14-cv-09442 (N.D. Ill. Nov. 25, 2014).

[6] NAD Case #5816 (Mar. 10, 2015).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] See, e.g., *Belton v. FanDuel Inc.*, No. 1:15-cv-08234 (S.D.N.Y. Oct. 19, 2015); *Berg v. FanDuel Inc.*, No. 1:15-cv-08612 (S.D.N.Y. Nov. 2 2015); *Martin v. DraftKings Inc.*, No. 1:16-cv-10232 (C.D. Cal. Oct. 20, 2015).

[11] NAD Case #5786 (Nov. 21, 2014).

[12] NAD Case #5660 (Dec. 10, 2013).

[13] *Bozic v. Uijl, et al.*, No. 3:16-cv-00733-BTM-RBB (S.D. Cal. Mar. 29, 2016).

[14] See *Duran v. Obesity Research Inst. LLC*, No. 37-2013-00048664-CU-BT-CTL (Cal. Super. Ct. May 13, 2013); *Fernandez v. Obesity Research Inst. LLC*, No. 13-cv-00975-MCE-KJN (E.D. Cal. May 16, 2013).

[15] *Bozic v. Uijl*, No. 3:16-cv-00733-BTM-RBB (Dkt. No. 42).

[16] As of the date of this writing, it appears that the litigation is ongoing. The Bozic plaintiff appealed the transfer and consolidation to the Eastern District of California, but ultimately was not successful in that endeavor.

[17] NAD Case #5660 (Dec. 10, 2013); see also *In the Matter of Basic Research*, F.T.C. Docket No. 9318, available at: <https://www.ftc.gov/sites/default/files/documents/cases/2006/06/060619decisionandorder.pdf>.

[18] See *Spence v. Basic Research LLC*, No. 2:16-cv-00925-CW (S.D.N.Y. June 24, 2015).

[19] Where a product was involved in duplicate lawsuits, we have listed only the earlier filed action.