

Case #5739 (07/01/14)

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Challenger: Bayer Healthcare, LLC

Product Type: Dietary Supplements

Issues: Performance and Establishment Claims

Disposition: Modified in Part; Discontinued in Part

- **In evaluating the messages reasonably conveyed by an advertisement, NAD reviews the overall net impression created by the challenged advertising, taking into consideration both the words and visual images as a whole.**

Basis of Inquiry: Television, print, label and internet claims made by Nature's Way Brands, LLC ("the advertiser") for its Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins were challenged by Bayer HealthCare, LLC ("the challenger"), a manufacturer of a competing line of products, Bayer One-A-Day multi-vitamins. The challenged claims include:

"Made with 26 fruits and vegetables"

"There's nothing like feeling Alive!"

"Nothing beats feeling Alive!"

"Alive! is nutrition you can feel."

"Get More from Your Multi-Vitamin. A Lot More"

"Superior Potency – 100%+ daily value of 20 vitamins/minerals."¹

Implied Claim: Taking Alive! multivitamins will result in a tangible, physical effect or cause an acute physical benefit.

In the Alive! multivitamin television commercial, women wear bright yellow clothing and dance to a song that plays in the background. One dances in a kitchen while serving orange juice to two children; the second woman dances while shopping in a grocery store; the third while in the middle of a yoga class; and the fourth, and final woman while waiting tables in a diner. The words to the song in the background discuss "music and magic and sunshine and colors everywhere" and how "it's good to be alive." Towards the end of the commercial, an Alive! bottle appears encircled by whole fruits and vegetables while an announcer states: *"Alive! multivitamins. Made with 26 fruits and vegetables plus high potency B vitamins for energy."*

In another challenged print advertisement, a cornucopia of fruits and vegetables appear with the claim "More than your garden variety multi-vitamins. *Made with 26 fruits and vegetables plus extra B-vitamins for energy.* Alive! is more than just a multivitamin. *It's nutrition you can feel*"

¹ The advertiser agreed to permanently discontinue the following claims, an action NAD determined was necessary and appropriate: *"Whole Food Energizer"* and *"Extra B Vitamins for Energy."*

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 2

A print advertisement with two Alive! multivitamin packages with a burst of light behind them and the claim "*nothing beats feeling Alive!*" Underneath the packages appear the claims "New and Improved Alive! multivitamins provide 100% or more of the recommended daily value of 20 vitamins and minerals, including high potency B-vitamins for energy."

A print advertisement with a halo of fruit and vegetables surrounding the top half of the page and the claim "*There's nothing like feeling Alive!*" Underneath two packages of Alive! multivitamins are the claims "Multivitamins made with fruits and vegetables plus high potency B-vitamins for energy."

In another print advertisement with the claim "*there's nothing like feeling Alive!*" a woman grins widely and appears to be in the middle of a dance move while wearing business attire in an elevator. She is surrounded by other people in business attire who appear to be tired. Towards the bottom of the page reads: "*Alive! is nutrition you can feel.* That's because new and approved Alive! multivitamins give you 100% or more of the daily value of 20 vitamins & minerals. *Plus they are made with fruits & vegetables* and high-potency B-vitamins for energy."

Another print advertisement depicting two packages of Alive! multivitamins surrounded by a halo of whole fruits and vegetables and the claim "*Get More from Your Multivitamin. A Lot More.*" Underneath reads: "Boost your daily nutrition with Alive! multivitamins. *Made with 26 fruits and vegetables* plus high potency of B-vitamins for energy, *Alive! is nutrition you can feel.*" The advertisement also contains a disclaimer that Alive! vitamins provides 100% or greater of the recommended daily value of 18+² vitamins and minerals.

The packaging includes the box front and top panel with depictions of fruits and vegetables in conjunction with the "*made with 26 fruits and vegetables*" claim. Some formulations of the Alive! multivitamin packaging also includes the claim "*superior potency – 100% daily value of 20 vitamins and minerals.*"

Challenger's Position

The challenger argued that the advertiser's television commercial, print advertisements, label and Internet claims convey the unsupported messages that Alive! multivitamins are unique multivitamins that deliver an acute energy boost, offers superior nutrition and are made with twenty-six whole fruits and vegetables.

² This number will vary from 17 to 19 depending on the formula of Alive! multivitamins (Women's Energy, Women's 50+, Men's Energy, etc.).

I. **“Made With 26 Fruits and Vegetables” Claim is Misleading.**

The challenger contended that by claiming that its multivitamins are “*made with 26 fruits and vegetables*” next to large drawings and images of multiple fruits and vegetables throughout its commercial, print advertisements and labels and packaging, the advertiser conveys the message that whole fruits and vegetables are the actual ingredients in Alive! multivitamins. However, in reality, the challenger argued, Alive! multivitamins contain a *de minimis* 50 mg of vegetable juice powder and 50 mg of fruit juice powder.³ In looking at the packaging and advertising, reasonable consumers would not be aware that the multivitamins consist of juice powders until (and unless) they reviewed the ingredient list which appears in very small print at the back of the packaging. Indeed, looking at the lush, lifelike fruits and vegetables parading across the packaging, the unsupported message cannot be avoided – Alive! multivitamins are made with whole fruits and vegetables.

The challenger argued that NAD and the courts have found claims with similar visual imagery to be misleading. In Sunny Delight Beverages Co., (Fruit20 Essentials), Report #5182, *NAD/CARU Case Reports (May 2010)*, where the bottle label depicted whole fruits alongside the claim that Fruit20 Essentials has nutrients equal to two servings of fruit, NAD determined that while it was literally true that the nutrient-enhanced water beverage contained some specific nutrients found in two servings of fruit, the beverage did not contain the health benefits of two servings of whole fruits and recommended that the advertiser discontinue its claim.⁴

In response to the advertiser's reliance on NAD precedent, the challenger maintained that the cases cited by the advertiser more accurately support the challenger's position that the visual imagery of whole fruits and vegetables conveys the unsupported message that the products contain whole fruits and vegetables. In Suncore Products, LLC (WhoNu? Nutrition Rich Cookies), Report #5418, *NAD/CARU Case Reports (January 2012)*, NAD determined that the advertiser had provided a reasonable basis for its claims that its cookies contained as much fiber as a bowl of oatmeal or as much vitamin C as a cup of berries. The challenger argued, however, that in relying on this case that the advertiser neglected several crucial distinguishing facts. NAD had noted that Suncore had avoided making health claims, refrained from expressly comparing the product to whole fruits and vegetables and did not depict fruits and vegetables in the advertisements. Further, in Gerber Products Company (Gerber Finger Foods: Fruit & Veggie Puffs), Report #4449, *NAD/CARU Case Reports (February 2006)*, also cited by the advertiser, in determining that the challenged claims did not imply that the product was actually puffed fruit and vegetables (as opposed to puffed grains with fruit and vegetable flavoring), NAD noted that no fruits or vegetables were depicted in the advertisements. In yet another case relied upon by the advertiser, Dr. Pepper Seven Up, Inc. (7 Up Plus with Calcium), Report #4446, *NAD/CARU*

³ The challenger argued that Alive! multivitamins, including excipients, is 2000 mg and 100 mg of the fruit and vegetable juice blends is equal to only five percent of the total pill.

⁴ Similarly, in Kraft v. FTC, 970 F.2d 311 (7th Cir. 1992), the 7th Circuit held that the visual image in a television commercial of five ounce of milk being poured into an imitation cheese slice could reasonably convey the unsupported message that a single slice of imitation cheese contains the same calcium found in five ounces of milk.

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 4

Case Reports (January 2006), NAD determined that the copious amounts of fruit in the print and television commercials reasonably conveyed the message that the product contained significant amounts of fruit, a message that was not supported by the evidence in the record.⁵

Additionally, the challenger maintained that the advertiser's "*made with*" claim also reasonably conveys the unsupported message that consumers will receive the same nutritional benefit from taking Alive! multivitamins as they would from consuming twenty-six whole fruits and vegetables. However, the challenger argued, the advertiser failed to produce evidence that its fruit and vegetable juice blends provide any nutritional benefit whatsoever. While the advertiser posited that the fruit and vegetable juice powders provide phytonutrients which are found in whole fruits and vegetables, the challenger noted that no documentation establishing what and how much, if any, phytonutrients are present in Alive! multivitamins as a result of the fruit and juice blends and what, if any, health benefits they confer.

Further, in the context in which this claim appears, the challenger contended that it conveys a superiority message that the nutritional benefit obtained from Alive! multivitamins can not be realized from multivitamins that do not contain the purported twenty-six fruits and vegetables. Again, the challenger contended, there is no evidence that the addition of the fruit and vegetable powders provides any superior benefit above and beyond the vitamins and minerals in Alive! multivitamins. It is undisputed that the vitamins and minerals present in Alive! are not even obtained from the de minimis amount of vegetable and juice powder.⁶ The challenger argued -- and the advertiser did not dispute -- the line of Alive! multivitamins derive their vitamins and mineral from traditional synthetic sources and not from the 100 mg of fruit and vegetable juice powder. The challenger asserted that this superiority message is unequivocally conveyed when the claim is made together and conjunctively with claims about the usual vitamins minerals in multivitamins "Alive! multivitamins give you 100% or more of the daily value of 20 vitamins and minerals. Plus they are made with fruits and vegetables."

II. Energy Claims

The television commercial shows users singing, dancing, working, shopping and exercising and states that Alive! multivitamins leaves them "*feeling alive*." The challenged print advertisements include one Alive! multivitamin user smiling in a elevator surrounded by droopy, tired-looking passengers and Alive! vitamin bottles with claims that Alive! has "high-potency B-vitamin for energy."⁷ The challenger argued that the advertiser's energy claims ("*nothing beats feeling Alive!*," "*there's nothing like feeling Alive!*," and "*it's nutrition you can feel*") and these depictions of dancing, singing and working in the advertisements convey the unsupported message that Alive! multivitamins provide an acute energy boost after such as one would expect

⁵ Further, federal courts have weighed in on this issue. In Cocoa-Cola Co. v. Tropicana Products, 690 F.2d 312 (2d Cir. 1982), the court held that the visual of squeezing an orange into a cartoon falsely misrepresented the pasteurized juice product.

⁶ The challenger argued that the 100mg of juiced powder is equivalent to five percent of the total 2000mg Alive! multivitamins pill. The 2000mg includes vitamins and minerals plus excipients.

⁷ The "high potency B-vitamins for energy claims" are not the subject of this challenge.

from ingesting a stimulant such as caffeine. The challenger noted that it is undisputed that the B-vitamins in Alive! are present to help convert food to energy and that Alive! does not provide an energy boost.

The challenger contended that the energy claims are not, as the advertiser argued, examples of puffery because claims that a product will enhance the consumer's physical or mental state are objective, quantifiable claims for which consumers would expect the advertiser to have evidence. The challenger further maintained that the claims and visual imagery in the advertisements communicate an energy boost that is palpable and not, as the advertiser claimed, representative of the conversion of food to energy via the B vitamins in Alive! multivitamins. The challenger maintained that NAD had previously determined that it is misleading to communicate an immediate energy boost when that is not what the product offers.⁸

III. "More" and "Superior Potency" Claims

The challenger argued that the claims "*Get More from Your Multi-Vitamin. A Lot More*" and "*superior potency*" are nutrient content claims prohibited by FDA regulations, which delineates and defines the only permissible nutrient content claims allowed on product labels.

Specifically with regard to the claim "*Get More from Your Multi-Vitamin. A Lot More,*" the challenger argued that it is a relative nutrient content claim, which the FDA defines as containing at least 10% of the daily value more of a given nutrient as compared to an appropriate reference product. The challenger maintained that the advertiser offered no evidence that Alive! multivitamins have at least 10% more of the DV of any nutrient as compared to other multivitamins.

In response to the advertiser's argument that its "*more*" claim is not subject to this particular FDA regulation because the claims appears in advertising and not on labels, the challenger cited the FTC Policy Statement on Food Advertising to support its position, arguing that the FTC examines advertising to ensure claims characterizing the level of a nutrient, including unauthorized synonyms not provided for in FDA regulations, are consistent with FDA definitions.⁹ For example, according to the FTC, "depending on the context of the ad, uses of the phrase 'packed with' or 'lots of' to describe the level of fiber in a food could convey to some reasonable consumers that the food is 'high' in fiber. Because FDA's regulations define the terms "good source" and "high" with respect to fiber, consumers are likely to be misled if a high fiber claim is implied by an ad for a food that is only a "good source."¹⁰ The challenger contended that the advertiser's "*more*" claim is inconsistent with FDA regulations. The

⁸ In *DreamBrands, Inc. (Add Lib)*, Report #5451, *NAD/CARU Case Reports* (March 2012), NAD determined that the advertiser's clinical trials, even with evidence concerning vitamin B12, did not reasonably demonstrate that the product increased or sustained energy. The challenger argued that the advertiser's energy claims are similarly unsupported.

⁹ FTC, Enforcement Policy Statement on Food Advertising (1994) at <http://www.ftc.gov/enforcement-policy-statement-on-food-advertising>.

¹⁰ *Id.*

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 6

challenger noted that NAD has a policy of attempting to harmonize its decisions with FDA and FTC regulations.

The challenger further maintained that because "*superior potency*" is not defined by the FDA, the claim is prohibited.

Equally as important, the challenger argued that the advertiser had not submitted any evidence for its "*superior potency*" claim or that "*more*" levels or higher levels of individual vitamins or minerals above the 100% DV is superior in potency, superior to other brands or that consumers will obtain a greater health benefit from levels above the 100% daily value. As a result, the challenger argued that the advertiser's "*Get More from Your Multi-Vitamin. A Lot More,*" and "*superior potency*" claims are unsubstantiated.

Advertiser's Position

The advertiser maintained that its claim "*made with 26 fruits and vegetables,*" as well as the accompanying depictions of fruit and vegetables, truthfully and accurately conveys that Alive! multivitamins provide ingredients derived from a variety of fruits and vegetables, in addition to the vitamins and minerals typically present in multivitamins. With regard to its energy claims, the advertiser noted in all the challenged advertising that it highlights the presence of the substantial amount of B vitamins in its multivitamins by claiming that Alive! multivitamins have "high potency B-vitamins for energy,"¹¹ which truthfully conveys the role that B vitamins play in supporting energy metabolism. Further, the Alive! "*more*" and "*superior*" claims truthfully and accurately convey that Alive! multivitamins provide a higher overall level of essential vitamins and minerals than its leading competitors.

I. The Alive! Labeling and Advertising Accurately Describes and Depicts the Fruit and Vegetable Content of Alive! Multivitamins.

The advertiser explained that the Alive! multivitamin products contain two fruit and vegetable blends. The proprietary Orchard Fruit blend is present at 50 mg in each Alive! capsule and pill and is comprised of powders and extracts of fourteen different fruits. The proprietary Garden Veggie blend is also present at 50 mg and is comprised of the powders from twelve different vegetables. The advertiser maintained that the blends constitute from 10.1 and 14.8 percent of the overall weight, excluding excipients, of the Alive! capsules and pills – a significant and meaningful amount. Thus, the advertiser argued that the claim "*made with 26 fruits and vegetables*" is literally true.

¹¹ This claim is not the subject of this challenge.

A. Alive! Multivitamins Need Not Contain Whole Fruits and Vegetables to Substantiate a "Made With" Claim.

The advertiser maintained that the claim "*made with 26 fruits and vegetables*" does not reasonably convey the message that Alive! multivitamins are made of twenty-six real, whole fruits and vegetables. The advertiser noted that the challenger offered no consumer perception evidence to support its argument that this is one of the messages conveyed by the advertising. The advertiser argued that no rational consumer would receive the message that a multivitamin pill that is "*made with 26 fruits and vegetables*" actually contains twenty-six whole fruits and vegetables. Instead, consumers received the intended message that Alive! multivitamins contain powder or extract from twenty-six fruits and vegetables. The advertiser contended its argument is consistent with the position that NAD has consistently adopted -- that "*made with*" claims may be based on ingredients derived from the highlighted ingredient. In other words, the highlighted ingredient itself need not have been added directly to the product.

The advertiser asserted that, contrary to the challenger's arguments, there is no quantifiable threshold to support a "*made with*" real fruits and vegetable claim, and as always, context -- including the type of product at issue -- matters." In Gerber Products Company (Gerber Finger Foods: Fruit & Veggie Puffs), Report #4449, *NAD/CARU Case Reports* (February 2006), NAD determined that the claim, "Made with Real Fruits and Veggies," was supported based on the inclusion of fruit and vegetable powders and purees in Gerber snack foods. In Dr. Pepper Seven Up, Inc. (7 Up Plus with Calcium), Report #4446, *NAD/CARU Case Reports* (January 2006), NAD, likewise, determined that the claim, "With real fruit juice," was supported based on the inclusion of apple juice from concentrate in the beverage. Further in Suncore Products, LLC (WhoNu? Nutrition Rich Cookies), Report #5418, *NAD/CARU Case Reports* (January 2012), NAD determined that the depictions of fruits and vegetables alongside claim such as "as much vitamin C as a cup of berries" did not convey the message that the cookies contained whole fruits and vegetables.

B. The Alive! Advertising and Labeling in No Way Conveys Equivalency to Fruits or Vegetables.

The advertiser further argued that the claim "*made with 26 fruits and vegetables*" does not reasonably convey the message that consumers will get the same nutrients from taking Alive! multivitamins as they would from consuming twenty-six whole fruits and vegetables.

According to the advertiser, NAD has found that nutritional equivalency is conveyed only where different and much stronger language and imagery is used than just the simple "*made with*" claim or ingredient depictions in the Alive! campaign.¹² For instance, in Gerber Products

¹² The advertiser also argued that federal courts have come to the same conclusions. In Cocoa-Cola Co. v. Tropicana Products, 690 F.2d 312 (2d Cir. 1982), the court found that a television commercial conveyed equivalency as between Tropicana orange juice and fresh squeezed orange juice. The advertiser maintained that the court based its finding on the visual depicting fresh squeezed orange juice being poured directly into a carton of

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 8

Company (Gerber Baby Foods), Report #5409, NAD/CARU Case Reports (January 2012),NAD determined that, given the image of fruits and vegetables disappearing into a bag of Gerber Melts and an accompanying voiceover stating that the "Gerber generation is making their fruit and veggies disappear," the Gerber Melts commercial conveyed a message of nutritional equivalency as between Gerber Melts and fruits and vegetables.

By contrast, argued the advertiser, the Alive! "*made with*" claim, as well as the fruit and vegetable depictions, are far milder and entirely distinct from the claims and imagery that have been found to convey nutritional equivalency. According to the advertiser, to find that the Alive! claims and images convey nutritional equivalency would require an unreasonable – and unprecedented – leap. The Alive! labeling and advertising clearly distinguishes its products' vitamin and mineral content from the fruit and vegetable content, thereby avoiding any suggestion that fruits or vegetables are the source of all vitamins and minerals in Alive! multivitamins. For example, one of the print advertisements includes the following language: "Alive! Multivitamins give you 100% or more of the daily value of 20 vitamins and minerals. *Plus* they're made with fruits and vegetables . . ." (emphasis added). The vitamin and mineral content is both distinguished and presented disjunctively from the fruit and vegetable content. Thus, the "*made with*" claim is merely presenting the added fruit and vegetable blends as an added benefit of Alive! multivitamins.

Further, the fruit and vegetable blends that the advertiser adds to its Alive! products provide healthy phytonutrients from fruits and vegetables. Experts generally agree that the addition of phytonutrients and other substances from fruits and vegetables to the diet is beneficial, and no threshold amounts have been determined. Thus, there is no basis for a finding that 100 mg of the Alive! fruit and vegetable-derived blends (50 mg of each blend) is too little too matter.¹³

II. Alive! Energy Claims

A. Puffery

The Alive! advertising and labeling includes the claims that: "*There's nothing like feeling Alive!*" "*Nothing beats feeling Alive!*" and "*Alive! is nutrition you can feel.*" While the challenger contended that these statements, as well as images of dancing and singing, "imply that

Tropicana's juice, with the accompanying voiceover stating, "[P]asteurized juice as it comes from the orange." In Kraft v. FTC, 970 F.2d 311 (7th Cir. 1992), the court found that television commercials conveyed equivalency as between the calcium content of five ounces of milk and the calcium in Kraft Singles. The court based its finding on repeated references to the amount of milk added to the Kraft product (e.g., "Kraft has five ounces [of milk] per slice. Five ounces.") and a visual image of milk being poured into a glass with the Kraft Singles packaging superimposed over the glass.

¹³ The USDA, for instance, explains that phytonutrients "are thought to promote human health" and "may serve as antioxidants, enhance immune response, enhance cell-to-cell communication, alter estrogen metabolism, convert to vitamin A (beta-carotene is metabolized to vitamin A), cause cancer cells to die (apoptosis), repair DNA damage caused by smoking and other toxic exposures, [and] detoxify carcinogens through the activation of the cytochrome P450 and Phase II enzyme systems." <http://www.ars.usda.gov/aboutus/docs.htm?docid=4142>.

taking Alive! will result in a tangible, physical effect” or “cause an acute physical benefit,” the advertiser maintained that these statements and images amount to nothing more than puffery.

In interpreting the reasonable takeaway from an advertising claim, the advertiser contended that NAD considers the totality of the communication, including both the words and the visual images. The advertiser argued that NAD has routinely determined that whimsy in television commercials, such as dancing, campy music and exaggerated facial expressions of the actors, make it unlikely that consumers would take away the message that such a scene was meant to be a realistic depiction.¹⁴ Similarly, the depictions of dancing and singing in the Alive! commercial and print advertisement in no way affect the meaning of any of the claims or statements that are made.

Instead, the claims, “*Nothing beats feeling Alive!*” “*Alive! is nutrition you can feel*” and “*There's nothing like feeling Alive!*” are precisely the type of highly subjective, blustering proclamations that cannot be proved and must be deemed puffery. NAD, in particular, considers obvious hyperbole and “exaggerated displays of a manufacturer's pride” to be puffery. It obviously cannot be measured or proved whether something else may actually “*beat[] feeling Alive!*” or whether there is actually anything else “*like feeling Alive!*” or that nutrition can be “felt” (“*Alive! is nutrition you can feel*”).”

B. Alive! Labels and Advertising Convey the Supported Message that Vitamin B Provides Energy Through Their Role in the Body's Metabolic Function.

The advertiser maintained that its energy claims and accompanying imagery convey the supported message that Alive! vitamins provide energy through the role that vitamin B plays in converting food into energy. The National Institutes of Health's National Library of Medicine states that thiamin (vitamin B1) “helps the body's cells change carbohydrates into energy,” explaining that the main role of carbohydrates is “to provide energy for the body, especially the brain and nervous system.” Furthermore, because B vitamins are water-soluble vitamins – i.e., leftover amounts of the vitamin leave the body each day through the urine – continuous B vitamin intake is necessary to replenish the body's supply. The advertiser explained that vitamin B12 supplementation is especially important for consumers over the age of fifty, because people lose the ability to absorb vitamin B12 from foods as they age.

The current formulations of Alive! multivitamins all contain at least 100% of the recommended daily value of eight different B vitamins – thiamin (B1), riboflavin (B2), niacin (B3), vitamin B6, vitamin B12, biotin (B7), pantothenic acid (B5), and folic acid (B9). Thus, the B vitamins in Alive! assist with the body's metabolic function and contribute to its conversion of food to energy.

¹⁴ Alcoa, Inc. (Reynolds Handi-Vac Vacuum Sealer), Report #4823, NAD/CARU Case Reports (April 2008)(“if a visual representation is so grossly exaggerated that no reasonable buyer would take it at face value, there is no danger of consumer deception and hence, no basis for a false advertising claim.”).

III. “More” and “Superior” Claims Truthfully and Accurately Convey the Vitamin and Mineral Content of the Alive! Products

The advertiser maintained that the claim, “*Get More from Your Multi-Vitamin. A Lot More.*” is consistently accompanied by a clear and conspicuous disclosure explaining that “*more*” refers to the vitamin and mineral content in Alive! multivitamins which provide 100% or greater of the recommended daily value of eighteen vitamins and minerals. Thus, this claim is a truthful and non-misleading description, i.e., Alive! contains 100% or greater of the recommended daily value of at least eighteen different vitamins and minerals.

Although the challenger argued that the Alive! “*more*” claim does not satisfy the requirement for a nutrient content claim under 21 C.F.R. § 101.54, the advertiser maintained that that the claim at issue here is used in advertising, which is the purview of the FTC and is not subject to the cited FDA rule. Further, the NARB has stated that it does not consider it within its purview to recommend discontinuance of truthful claims because of an arguable failure to comply with FDA labeling requirements. That panel has further noted in past decisions that, “[s]o long as the absence of label directions does not cause an advertising claim to be untruthful or misleading, enforcement of discrete labeling requirements should be left to the FDA.”¹⁵

Given its clear and conspicuous disclosure, the advertiser argued that the only reasonable (or even likely) interpretation is that the “*more*” refers to the vitamin and mineral content. A consumer would have no reason to believe that the claims refer to any FDA standard for nutrient content claims. According to the advertiser, its “*more*” claim is entirely truthful and substantiated.

With regard to its “*superior potency*” claim, the advertiser contended that each of the Alive! multivitamin products provide more vitamins or minerals than comparable products sold by leading competitors (*i.e.*, comparable One A Day, Centrum, and VitaFusion products). Alive! Men's Energy, for instance, contains 200% or more of the recommended daily value of five ingredients, 150% or more of the recommended daily value of eleven ingredients, and 100% or more of the recommended daily value of twenty ingredients. In comparison, Bayer's One A Day Men's Health Formula contains 200% or more of the recommended daily value of only one ingredient, 150% or more of the recommended daily value of only five ingredients, and 100% or more of the recommended daily value of only twelve ingredients. Pfizer's Centrum Men's has no vitamins or minerals present at levels at or above 200% of the recommended daily value. Church & Dwight's VitaFusion Men's has only two ingredients present at levels at or above 200%, and only eight ingredients present at levels at or above 100% of the recommended daily value.

The advertiser also submitted the Supplement Facts for Bayer's One-A-Day Women's multivitamins which shows that they contain 100 % of the daily value of same eight B-vitamins in Alive! multivitamins (B1, B2, B3, B5, B6, B7, B9 and B12 vitamins).

¹⁵ Micatin Athlete's Foot Care, NARB Panel #55 (April 1992).

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 11

Decision:

The advertiser manufactures a line of multivitamins under the Alive! brand (Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins). Across the product line, Alive! multivitamins contain at least 100 percent of the recommended daily value of approximately twenty vitamins and minerals, including B vitamins.¹⁶

The challenger argued that the advertiser's claim that Alive! multivitamins are "*made with 26 fruits and vegetables*" which is made in conjunction with depictions of fruits and vegetables convey the unsupported message that Alive! multivitamins contain superior nutrition and is actually made with twenty-six whole fruits and vegetables. Also, the challenger argued that the depictions of dancing and singing in the commercial and print advertisements convey the unsupported message that Alive! multivitamins provide an acute energy boost such as one would expect from ingesting caffeine. The challenger further argued that the advertiser's "*superior potency*" and "*more*" claims are nutrient content claims prohibited by FDA regulations.

In contrast, the advertiser maintained that the "*made with 26 fruits and vegetables*" claim, as well as accompanying depictions of fruit and vegetables, convey the supported message that Alive! multivitamins contain ingredients derived from a variety of fruits and vegetables in addition to the vitamins and minerals typically present in multivitamins. Moreover, the fruit and vegetable powders contain phytonutrients which experts generally agree are important to human health. Further, according to the advertiser, the dancing and singing that accompany its energy claims highlight the literally true role that B vitamins play in energy metabolism. The advertiser argued that its "*more*" and "*superior*" claims convey the accurate message that Alive! multivitamins provide a higher overall level of essential vitamins and minerals than its leading competitors and that the FDA regulation cited by the challenger is inapplicable here because it refers to label claims and these claims appear in advertising.

I. "Made With" Claim

With regard to the advertiser's claim that Alive! multivitamins are "*made with 26 fruits and vegetables*," NAD noted that neither party submitted consumer perception evidence and therefore, NAD stepped into the role of the consumer to determine the reasonable messages were conveyed by the advertising.¹⁷ Advertisers must provide a reasonable basis for all the messages reasonably conveyed by their claims, whether they intended those messages or not.¹⁸

In evaluating the messages reasonably conveyed by an advertisement, NAD reviews the overall net impression created by the challenged advertising, taking into consideration both the words

¹⁶ This number varies slightly between the various formulations of Alive! multivitamins, however, those small variations did not have impact on any of NAD's recommendations.

¹⁷ Alde Associates, LLC (daniPro Nail Polish), Report #5565, NAD/CARU Case Reports (March 2013).

¹⁸ Mars Petcare US (PEDIGREE® DENTASTIX® Chews), Report #5707, NAD/CARU Case Reports (April 2014).

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 12

and visual images as a whole.¹⁹ In the Alive! commercial, in between scenes of several women nonsensically dancing and singing while engaging in work, yoga class, or feeding their children, an Alive! multivitamin bottle appears encircled by a large variety of lush, whole fruits and vegetables while the narrator exclaims: "*Alive! multivitamins, made with 26 fruits and vegetables and B vitamins for energy.*" NAD determined that this active visual depiction of whole fruits and vegetables reasonably conveys the message that Alive! multivitamins are made with whole fruits and vegetables and/or that the vitamins and minerals contained in Alive! multivitamins are sourced from real fruits and vegetables rather than synthetic sources.²⁰ NAD is cognizant that consumers typically purchase multivitamins to improve or sustain their health and could reasonably believe that the added fruits and vegetables (or naturally sourced vitamins and minerals) provide a health benefit above and beyond the traditional vitamins and minerals that comprise most multivitamins. The advertiser argued that a reasonable consumer would not believe that one pill contained twenty-six fruits and vegetables. NAD's concern was not that the advertiser's claim conveyed the message that the multivitamins contained twenty-six fruits and vegetables, but rather that the claim conveyed a message of nutritional equivalence to twenty-six whole fruits and vegetables. NAD determined that a consumer could reasonably take away the message that by consuming Alive! multivitamins, they could avoid what to many people is the unpleasant task of eating fruits and vegetables, yet, still reap the same nutritional rewards.²¹

NAD further determined that the advertiser's print advertising and packaging convey similar messages. One challenged print advertisement plays on the fruit and vegetable theme, picturing whole fruits and vegetables while claiming "More than your garden variety multi-vitamins. *Made with 26 fruits and vegetables plus extra B-vitamins for energy.*" Other print advertisements that contain the "*made with*" claims, as well as the packaging, have strong fruit and vegetable imagery, typically a halo of fruit and vegetables surrounding the claims or a picture of the vitamin package. With regard to the advertiser's argument that the vitamin and mineral content is both distinguished and presented disjunctively from the fruit and vegetable content (e.g. "*made with 26 fruits and vegetables plus extra B-vitamins for energy*") NAD noted that consumers are unlikely to examine the commercial with the same diligence as the parties, and do not parse components of the advertisement in order to determine the conveyed messages; rather they view the advertisement in a more fleeting fashion and take away a net impression.²²

The advertiser's packaging also carries the same fruit and vegetable imagery in conjunction with the "*made with 26 fruits and vegetables*" claim. Both the front panel and the fifth panel (the

¹⁹ The Gillette Company (Venus & Olay Razor), Report #5547, NAD/CARU Case Reports (January 2013).

²⁰ Dr. Pepper Seven Up, Inc. (7-Up Plus with Calcium), #4446 (Jan. 2006)(visual depictions reinforce implied and express claims).

²¹ Accord Kraft v. FTC, 970 F.2d 311 (1992). The Court of Appeals in Kraft found this same argument unpersuasive. There, while each imitation cheese slice contained five ounces of calcium, 30% of the calcium was lost in processing. According to the court the critical fact is not that reasonable consumers might believe that a $\frac{3}{4}$ ounce slice of cheese actually contains five ounces of *milk* but that reasonable consumers might believe that a $\frac{3}{4}$ ounce slice actually contains the *calcium* in five ounces of milk.

²² The Hershey Company (Brookside Chocolate-Covered Candies), Report #5688, NAD/CARU Case Reports (February 2014).

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 13

panel that allows the packaging to be hung from a hook) both have colorful fruit and vegetable depictions that draws consumers' attentions.

In considering the messages reasonably conveyed by the advertiser's "made with" claim, NAD considered the cases cited by the parties. In Gerber Products Company (Gerber Finger Foods: Fruit & Veggie Puffs), Report #4449, *NAD/CARU Case Reports* (February 2006), NAD determined that the overriding message of the commercial was not a health message like in this present case, but rather that Gerber puffed grains helped facilitate infants in developing their palates while learning to self-feed. The addition of the fruits and vegetable purees to the puffs, again, was not predominantly for health reasons but to acclimate infants to the taste of fruits and vegetables. However, in determining that the claim "made with real fruits and veggies" was supported based on the inclusion of fruit and vegetable powders and purees in the puffs, NAD did consider whether the claim would confuse consumers as to whether the puffs were a "good source" of fruits and vegetables. NAD noted that the advertiser had provided evidence that, in their dry and reconstituted forms, the puffs contained an amount of fruits and vegetables sufficient to avoid any potential consumer confusion regarding the "made with real fruits and vegetables" characterization.²³ In contrast, in the present case where there is no evidence that the fruit and vegetable juice powder in Alive! multivitamins provide any nutritional value or yield any health benefits.²⁴

In Dr. Pepper Seven Up, Inc. (7 Up Plus with Calcium), Report #4446, *NAD/CARU Case Reports* (January 2006), NAD recommended that the advertiser modify its claim "with real fruit juice," to avoid communicating the unsupported message that the product – which was comprised of five percent fruit juice -- contained a substantial amount of fruit juice. The 7-Up advertising, like the present advertising, contained visuals such as still shots of the product surrounded by an abundance of fruit. There, as it did here, NAD determined that these visual depictions overstated the amount of fruit in the product. In considering the 7-Up case, NAD determined that the challenged Alive! claims are even more likely to cause confusion because, while consumers do not drink soda to improve their health, certainly the motivation behind purchasing multivitamins is entirely health-related.²⁵

Further in Suncore Products, LLC (WhoNu? Nutrition Rich Cookies), Report #5418, *NAD/CARU Case Reports* (January 2012), NAD determined that the depictions of fruits and vegetables alongside claim such as "as much vitamin C as a cup of berries" did not convey the message that the cookies contained whole fruits and vegetables because the advertiser refrained from expressly comparing WhoNu? cookies to whole fruits and vegetables, did not depict actual

²³ The advertiser in Gerber submitted its evidence confidentially so the details of the nutritional information are not available in the published decision.

²⁴ Further, in Gerber Products Company, (Gerber Baby Foods), Report #5409, *NAD/CARU Case Reports* (January 2012), NAD did not share the challenger's concern that the claim "freeze-dried fruit and vegetable snack" suggested that the Melts are the nutritional equivalent of fruits and vegetables because, for one reason, the majority—90%—of Gerber's Melts came from fruits and vegetables. Thus, this case is not relevant to this challenge.

²⁵ Accord Sunny Delight Beverages Co. (Fruit2O® essentials), Report #5182, *NAD/CARU Case Reports* (May 2010), (claim that the juice has 4 servings of a nutrient found in two servings of fruit could reasonably be understood as being equivalent to two servings of fruit). The labels on product packaging had still images of whole fruit.

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 14

foods but rather cartoonish sketches, did not recommend its cookies as a substitute for healthy snacks, avoided making health claims and, clearly, as part of the main claim, identified the nutrient in the food that was being compared to the advertiser's product.

Turning to the advertiser's evidence, Alive! multivitamins contain 50 mg of powdered juice from fourteen different fruits, known as its Orchard Blend, and 50 mg of powdered juice from twelve different vegetables, known as its Garden Blend. It is undisputed that these blends, which the advertiser described as being made from juices, are not equivalent to eating whole fruits and vegetables.

It is also undisputed that none of the vitamins and minerals listed in the Supplement Facts come from the Alive! multivitamin proprietary Garden and Orchard blends. The vitamins in Alive! multivitamins, like most multivitamins, comes from synthetic sources. Thus the nutrition listed in the "Supplement Facts" of Alive! multivitamins do not come from the Garden and Orchard juice blends.

The advertiser argued that the juice powder blends provide a health benefit above and beyond the vitamin content through the addition of phytonutrients. Phytonutrients are certain organic compounds of plants thought to promote human health but are not essential for sustaining life.²⁶ According to the USDA, "population studies have linked fruit and vegetable consumption with lowering the risk for chronic diseases including specific cancers and heart disease."²⁷ The USDA warns that "media and consumer interest in phytonutrients and functional foods is far ahead of established proof that documents the health benefits of these . . . food components" but, nonetheless, still recommends increasing consumption of phytonutrient-rich foods including fruits, vegetables, grains and teas.²⁸

The advertiser asserted that because the FDA has not established Daily Reference Intake (DRI) values for phytonutrients that any amount of phytonutrients must be meaningful. DRIs are reference values that are quantitative estimates of nutrient intakes to be used for planning and assessing diets for healthy people. DRIs are established by the Standing Committee on the Scientific Evaluation of Dietary Reference Intakes (DRI Committee) of the Food and Nutrition Board of the Institute of Medicine, National Academies.²⁹

NAD considered but was not persuaded by the advertiser's argument regarding phytonutrients for several reasons. First, the advertiser provided no information on which phytonutrients, if any, are provided by the Garden and Orchard blends in Alive! multivitamins.³⁰ Second, simply because there are no DRI values for phytonutrients does not inexorably lead to the conclusion

²⁶ See USDA, Phytonutrients FAQs, at <http://www.ars.usda.gov/aboutus/docs.htm?docid=4142>.

²⁷ Id.

²⁸ Id.

²⁹ Institute of Medicine, Dietary Reference Intakes for Vitamins C, E, Selenium and Carotenoids (2000) at pages 1-3. Research recommendations for further study on this topic were established in this report.

³⁰ Alive! multivitamins contain the phytonutrients lycopene, boron and/or lutein. They do not come from the fruit and vegetable juice blends but are added as additional ingredients to the multivitamins. For example, marigold provides the lycopene and is not part of the Orchard and Garden Blends. See the ingredient panel label.

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 15

that any amount is meaningful to human health. Another possible conclusion is that the evidence on any one particular phytonutrient may not be robust or conclusive enough from which to form a DRI recommendation.³¹ Further, NAD noted that the government recommendations relied on by the advertiser recommends increasing whole fruit and vegetable consumption rather than recommending that people increase their phytonutrient consumption through dietary supplements.³² In sum, there is no evidence in the record demonstrating that the Orchard and Garden blends contained in Alive! multivitamins provide any meaningful benefit to consumers.

For all of these reasons, NAD recommended that the advertiser discontinue its "*made with 26 fruits and vegetables*" claim.

Nothing in this decision however prevents the advertiser from more accurately claiming that its Alive! multivitamins contain Orchard and Garden blends as long as the advertiser avoids conveying the unsupported message that the vitamins and minerals are sourced from fruits and vegetables or that Alive! multivitamins provide the nutritional equivalent of eating whole fruits and vegetables. To that end, if the advertiser continues to use depictions of fruits and vegetables on its packing, NAD recommended that the advertiser add a clear and conspicuous disclaimer in close proximity to the images indicating that Alive! multivitamins are not made with whole fruits and vegetables.

II. Energy Claims

The challenger maintained that the dancing and singing in the television commercial, in conjunction with the claim "B vitamins for energy" reasonably conveyed the message that Alive! multivitamins provide an energy boost akin to taking a stimulant like caffeine – that is, an immediate and noticeable escalation of energy. The challenger further argued that this message is echoed in the advertiser's print advertisements claims "*Nothing beats feeling Alive!*" "*There's nothing like feeling Alive!*" and "*Alive! is nutrition you can feel.*" The advertiser countered that consumers will recognize the Broadway-like dancing and singing and accompanying statements as whimsy that does not alter the reasonable, intended message that the B vitamins in Alive! multivitamins play a metabolic role in converting food into energy at the cellular level. Plus, the advertiser maintained, the claims "*Nothing beats feeling Alive,*" "*Alive! is nutrition you can feel*" and "*There's nothing like feeling Alive!*" are precisely the type of highly subjective, blustering proclamations that cannot be proved and must be deemed puffery. NAD noted that there is

³¹For example, with regard to carotenoids such as lycopene and lutein, which are found in Alive! multivitamins (but are not there as a result of the presence of the Orchard and Garden Blends), according to the DRI Committee, DRIs for carotenoids cannot yet be established because the observed positive health effects may be due other substances found in carotenoid-rich fruits and vegetables or to other behavior that correlates to increased fruit and vegetable consumption. Thus, the current science is not certain enough what contributions these carotenoids by themselves make to human health. Institute of Medicine, Dietary Reference Intakes for Vitamins C, E, Selenium and Carotenoids (2000) at page 325.

³² See USDA, Phytonutrients FAQs, at <http://www.ars.usda.gov/aboutus/docs.htm?docid=4142>. Also, Vitanergy, Inc. (Urinozinc® Supplements), Report # 5433, NAD/CARU Case Report (February 2012) (meta-analysis on lycopene results are inconclusive that lycopene helps reduce the risk of certain cancers. Also, lycopene found in foods like tomatoes may have health effects but supplemental lycopene is not as well-studied).

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 16

substantial agreement among experts that B-vitamins play a role in converting food into energy in the body. All Alive! multivitamins have 100 percent or more of the daily value of eight B-vitamins (B1, B2, B3, B5, B6, B7, B9 and B12).

A. The Television Commercial

Turning first to the television commercial, NAD noted the whimsical overtone, the campy music and the absurdity of the women hyperactively dancing and singing while engaging in otherwise quotidian activities. NAD determined that, standing on its own, the dancing and singing convey a message of general joie de vivre, an unquantifiable and unprovable puff. However, the commercial goes on to state that Alive! multivitamins have "high potency B-vitamins for energy." NAD determined that this energy claim in conjunction with the dancing and singing reasonably conveys the message that a consumer could expect to feel energized after consuming an Alive! multivitamin. While consumers probably wouldn't expect themselves to burst into song, they could reasonably assume that they would receive a boost akin to the type of energy depicted in the commercial.

Humor and whimsy do not relieve the advertiser of its obligation to possess a reasonable basis for the messages reasonably conveyed by the net impression of its advertising claims.³³ While B-vitamins do assist the metabolism in converting food into energy at the cellular level, there is no evidence that consuming an Alive! multivitamin provides an energy boost like consuming a stimulant such as a cup of coffee or an energy beverage with caffeine.³⁴ Therefore, NAD recommended that the advertiser modify its commercial to avoid that unsupported energy boosting message; for example, by simply discontinuing the use of the word "energy" in the claim "high potency B vitamins for energy" that accompanies the dancing and singing in the commercial.³⁵

B. "Alive! Is Nutrition You Can Feel" Claim

The claim "*Alive! Is Nutrition You Can Feel*" appears in several print advertisements:

*a print advertisement in which a cornucopia of fruits and vegetables appear with the claim "More than your garden variety multi-vitamins. Made with 26 fruits and vegetables plus extra B-vitamins for energy. Alive! is more than just a multivitamin. *It's nutrition you can feel;*"

*another print advertisement has two packages of Alive! multivitamins with fruits and vegetables on the boxes along with a halo of whole fruits and vegetables and the claim "Get More from Your Multivitamin. A Lot More." Underneath reads "Boost your daily

³³ Alcoa, Inc. (Reynolds Handi-Vac Vacuum Sealer), Report #4823, *NAD/CARU Case Reports* (April 2004).

³⁴ The advertiser's packaging states that Alive! multivitamins are "caffeine free-no stimulants."

³⁵ NAD does not and is not mandating any particular modification here- it is simply attempting to offer some guidance.

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 17

nutrition with Alive! multivitamins. Made with 26 fruits and vegetables plus a high potency of B-vitamins for energy, *Alive! is nutrition you can feel;*" and

*in yet another print advertisement with the claim "there's nothing like feeling Alive!" a woman grins widely and appears to be in the middle of a dance move while wearing business attire in an elevator. She is surrounded by other people in business attire who appear to be tired. The bottom of the page reads: "*Alive! is nutrition you can feel.* That's because new and approved Alive! multivitamins give you 100% or more of the daily value of 20 vitamins & minerals. Plus they are made with fruits & vegetables and high-potency B-vitamins for energy."

In each of these print advertisements, the claim "*Alive! is nutrition you can feel*" is modified by some version of the claim "high-potency B-vitamins for energy." In conjunction with this energy message, a consumer could reasonably take away the message that the "*nutrition*" supplied by Alive! multivitamins that "*you can feel*" is providing a literally palpable energy boost, a message that is not supported by the evidence in record. Consequently, NAD recommended that the advertiser discontinue its claim "*Alive! is nutrition you can feel.*"

C. "*Nothing Beats Feeling Alive!*" and "*There's Nothing Like Feeling Alive!*" Claims.

The challenger also objected to the claims "*nothing beats feeling Alive!*" and "*there's nothing like feeling Alive!*" NAD noted that one print advertisement with the claim "*nothing beats feeling Alive!*" shows two Alive! multivitamin packages with a burst of light behind them. Underneath the packages appear the claims "New and Improved Alive! multivitamins provide 100% or more of the recommended daily value of 20 vitamins and minerals, including high potency B-vitamins for energy."

Another print advertisement displays a halo of fruit and vegetables and the claim "*There's nothing like feeling Alive!* Underneath two packages of Alive! multivitamins are the claims "Multivitamins made with fruits and vegetables plus high potency B-vitamins for energy."

NAD agreed with the advertiser that, in the context of these two print advertisements, consumers were not likely to interpret these monadic catch-phrases as objectively provable claims that Alive! multivitamins will cause consumers to feel more alive. Although these two advertisements do include an express energy claim,³⁶ there is no accompanying "high energy" visual that implies a palpable energy boost. Additionally, unlike the "*nutrition you can feel*" claim previously discussed, "*nothing beats feeling Alive!*" and "*there's nothing like feeling Alive!*" claims are less likely to be interpreted by consumers as an energy boosting claim because of their nonsensical nature, e.g., feeling alive beats not feeling alive.

³⁶ The "high potency B vitamins for energy" is a literally truthful claim the Alive! vitamins have 100% or more of the daily value of vitamins B1,B2, B3, B6, B9, B7, B5 and B12.

For all the foregoing reasons, NAD determined that the advertiser's claims "*nothing beats feeling Alive!*" and "*there's nothing like feeling Alive!*" are puffery and require no objective substantiation.

III. "More" and "Superior Potency" Claims

The challenger maintained that the advertiser's "*superior potency*" and "*Get More From Your Multivitamin. A Lot More*" claims are nutrient content claims that are prohibited because a manufacturer may not make a claim that characterizes the level of a nutrient unless it does so in terms that FDA has defined by regulation. For a multivitamin potency claims, the FDA has only authorized the claim "high potency" which is defined as a multivitamin that contains 100 percent of the daily value for at least two-thirds of its vitamins and minerals.

The challenger further argued that the advertiser's "*more*" claim should be discontinued because it does not meet the FDA definition of "more." A "more" nutrient content claim maybe used to describe the level of a vitamin or mineral provided that it contains at least 10 percent more of the RDI for vitamins and minerals or of the DRV for protein, dietary fiber or potassium as compared to an appropriate reference (e.g., "contains 10 percent more of the daily value for fiber than white bread.").³⁷ The advertiser maintained that its "*more*" claim appears only in advertising and it does not appear on Alive! multivitamin labels and therefore FDA label regulations are not relevant. The advertiser further contended that Alive! multivitamins do indeed contain "*more*" vitamin and minerals than comparable products sold by leading competitors, for example, comparable One A Day, Centrum, and VitaFusion products.³⁸

The challenger argued that all nutrient content claims, regardless of whether they appear on the label or in advertising, must comply with FDA regulations.³⁹ The FTC and the FDA have overlapping jurisdiction to regulate the labeling and advertising of foods, which also includes dietary supplements. The FDA and FTC have a memorandum of understanding pursuant to which the FTC has primary responsibility for regulating advertising while the FDA regulates labeling.⁴⁰ The challenger cited the FTC Policy Statement on Food Advertising to support its argument that the FTC examines all advertising to ensure claims characterizing the level of a

³⁷ 21 CFR 101.54(e).

³⁸ Alive! Men's Energy, for instance, contains 200% or more of the recommended daily value of five ingredients, 150% or more of the recommended daily value of eleven ingredients, and 100% or more of the recommended daily value of twenty ingredients. In comparison, Bayer's One A Day Men's Health Formula contains 200% or more of the recommended daily value of only one ingredient, 150% or more of the recommended daily value of only five ingredients, and 100% or more of the recommended daily value of only twelve ingredients. Pfizer's Centrum Men's has no vitamins or minerals present at levels at or above 200% of the recommended daily value. Church & Dwight's VitaFusion Men's has only two ingredients present at levels at or above 200%, and only eight ingredients present at levels at or above 100% of the recommended daily value.

³⁹ Section 201(m) of the Food, Drug, and Cosmetic defines the term "labeling" to mean "all labels and other written, printed, or graphic matters (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 USC §321(m).

⁴⁰ Sills Cummis, *Dietary Supplement Health and Education Act (DSHEA) – 20 Years Later – The Good, The Bad And The Ugly*, Sills Cummis & Gross P.C (June 2014).

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 19

nutrient, including unauthorized synonyms not provided for in FDA regulations, are consistent with FDA label definitions.

By way of background, the Nutrition Labeling and Education Act of 1990 (NLEA), amended the Food, Drug and Cosmetic Act, directing the FDA to standardize and limit the terms permitted on labels, and allows only FDA-approved nutrient content claims and health claims to appear on food and dietary supplement labels.⁴¹ “The impetus behind Congress's requirement that FDA limit defined terms and synonyms may be found in the educational and public health goals of the NLEA -- to promote consumer understanding of the meaning of the terms through a limited lexicon that will allow consumers to make informed dietary choices.” The FTC, in considering the impact that the FDA's mandate to standardize nutrient content claims might have on advertising, stated that

the Commission will examine advertising to ensure that claims that characterize the level of a nutrient, including those using synonyms that are not provided for in FDA's regulations, are consistent with FDA definitions. Commission precedent establishes that an advertisement that can reasonably be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. Thus, when express or implied claims suggest that a food product meets the standard for use of an FDA-defined term, advertisers should ensure that the food actually meets the relevant FDA standard.⁴²

Similarly, NAD seeks to harmonize its efforts with those of the regulatory world. While NAD accords great weight to FDA regulations, its role is not enforce them but to consider them when making recommendations based on an analysis of the claims reasonably communicated to consumers by the challenged advertising and the substantiation offered by the advertiser.⁴³ NAD will accord great weight to FDA regulations but will still examine the advertiser's “*superior potency*” and “*more*” claims de novo.

A. “*Superior Potency*” Claim

Turning to the merits of the “*superior potency*” claim itself, NAD determined that, because the claim appeared on the box with no language or images to suggest a comparative superiority to other multivitamins, the advertiser's “*superior*” claim could reasonable be understood to be a

⁴¹ FTC, Enforcement Policy Statement on Food Advertising (1994) at <http://www.ftc.gov/enforcement-policy-statement-on-food-advertising>. See also, FDA, Dietary Supplement Labeling Guide, Guidance for Industry: A Dietary Supplement Labeling Guide (April 2005) at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/DietarySupplements/ucm2006823.htm> (“The Nutrition Labeling and Education Act of 1990 amended the Federal Food, Drug, and Cosmetic Act in a number of important ways. Notably, by requiring that most foods, including dietary supplements, bear nutrition labeling”).

⁴² FTC, Enforcement Policy Statement on Food Advertising (1994) at <http://www.ftc.gov/enforcement-policy-statement-on-food-advertising>.

⁴³ Neutrogena Corporation (Neutrogena Beach Defense Sunscreen), NARB Panel #191 (April 2014).

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 20

monadic claim of excellence.⁴⁴ More importantly, the “*superior potency*” claim is accompanied by clear and express qualifying language that explains exactly what the advertiser means by “*superior potency*,” i.e., containing “*100%+ Daily Value of 20 Vitamins/Minerals.*” This qualifying language is part of the main claim, in large text and easy to read and understand. In this context, as qualified, the “*superior potency*” claim is literally true – Alive! multivitamins contain more than 100% of the daily value of twenty vitamins and minerals.⁴⁵

Although a claim that is literally true can still be misleading, NAD did not find that to be the case here. To the extent that consumers might mistake “*superior potency*” as synonymous for “high potency,” a nutrient content label claim that is defined by FDA regulations, NAD determined that consumers would not be misled. According to the FDA, a multivitamin may be characterized as “high potency” if it contains 100 percent of the daily value for at least two-thirds of its vitamins and minerals.⁴⁶ Alive! multivitamins meet this definition of high potency as twenty out of twenty-two of the vitamins and minerals are present in at least 100 percent of the daily value.⁴⁷ NAD may have come to a different conclusion, however, if Alive! multivitamins did not meet the definition for “high potency” because consumers could reasonably assume that “superior” and “high” potency were synonymous.⁴⁸

For all the foregoing reasons, NAD determined that the advertiser had established a reasonable basis for its “*superior potency*” claim in the context in which it appears, “*superior potency – 100%+ daily value of 20 vitamins/minerals.*”

B. “*More*” Claim

The advertiser’s print advertisement with its “*more*” claim displays two packages of Alive! multivitamins with fruits and vegetables on the boxes along with a halo of whole fruits and

⁴⁴ L’Oreal USA (L’Oreal Excellence Crème), Report #4938, NAD/CARU Case Reports (December 2008). In past cases, in order to determine whether a monadic or comparative message was conveyed by a “superior” claim, NAD whether the overall context in which the claim appears is monadic or comparative context. On the L’Oreal box, “superior gray coverage” appears near the top of the box in a small banner in small text under the large L’Oreal Paris name. In larger text towards the bottom of the box is the name of the product, Excellence Crème accompanied by the phrases “Triple Protection Color Crème,” “100% Long Lasting Gray Coverage” and “Protects even the most fragile hair,” all of which are monadic statements about the advertiser’s product and do not, in toto, invite comparisons with other brands. Similarly, NAD determined that, here, the claim “*superior potency*” was accompanied by the monadic quality of having “*100%+ Daily Value of 20 Vitamins/Minerals.*”

⁴⁵ Those vitamins are: as follows: vitamins A, C, E, D, K, B1, B2, B3, B6, B9, B12, B7, B5, iodine, zinc, selenium, copper, manganese, chromium, molybdenum. The “*superior potency*” claim does not appear on every Alive! formulation because some Alive! vitamins have less than 20 vitamins and minerals at the 100% or more daily value.

⁴⁶ 21 CR 101.54(B)(f). This list of acceptable vitamins and minerals includes only those nutrients for which a recommended daily intake has been established in 21 CFR 101.9(c)(8)(iv).

⁴⁷ The vitamins and minerals in Alive! that are present in the amount of 100% or more of the RDA are compliant with 21 CFR 101.9(c)(8)(iv). Although different formulations of Alive! multivitamins have slightly different vitamins and minerals with different amounts, NAD determined that all the Alive! multivitamins that are the subject of this challenge meet the definition of high potency.

⁴⁸ As the FTC stated: “Thus, when express or implied claims suggest that a food product meets the standard for use of an FDA-defined term, advertisers should ensure that the food actually meets the relevant FDA standard.” See fn 27, *supra*.

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 21

vegetables and the claim "*Get More from Your Multi-vitamin. A Lot More.*" Underneath reads "Boost your daily nutrition with Alive! multivitamins. Made with 26 fruits and vegetables plus high potency of B-vitamins for energy, Alive! is nutrition you can feel." The advertisement also contains a disclaimer that Alive! vitamins provides 100% or greater of the recommended daily value or many vitamins and minerals.⁴⁹

NAD determined that the claim reasonably conveys a comparative message that Alive! multivitamins provide greater daily nutrition than other multivitamins because of its high potency B-vitamins.⁵⁰ Alive! multivitamins provide at least 100% of the daily value for its panoply of B-vitamins (B1, B2, B3, B5, B6, B7, B9 and B12) and for some B-vitamins, Alive! multivitamins contain more than 100% of the daily value.⁵¹ For example, Alive! Women's Energy contains 200% of the daily value of vitamins B1, B2, B6 and B12. However, the advertiser has offered no evidence that any amount of B-vitamins in excess of the recommended daily value provides any additional health benefit. Thus, there is no evidence in the record that Alive! multivitamins provide more of a benefit from its B-vitamins than does Bayer's One-A-Day Women's multivitamins which contains 100 % of the daily value of the same B-vitamins found in Alive! multivitamins.

The advertiser contended that it qualifies its "*more*" claim with a disclaimer stating that Alive! multivitamins provide 100% or greater of the recommended daily value of approximately twenty vitamins and minerals and, therefore, consumers will understand that the "*more*" means just that – more amounts of vitamins and minerals. NAD noted that the advertiser's disclaimer was in small type, difficult to see and not in close proximity to the main claim. Regardless of the disclaimer's readability, it would still be insufficient to cure the otherwise unsupported message that can also reasonably be taken away from the "*more*" claim, which is that Alive! multivitamins provide superior nutritional health benefits because they contain B-vitamins in excess of the recommended daily value.⁵² Therefore NAD recommended that the advertiser discontinue its claim "*Get More from Your Multi-vitamin. A Lot More.*"⁵³

⁴⁹ This number will vary from 17 to 19 depending on the formula of Alive! multivitamins (Women's Energy, Women's 50+, Men's Energy, etc.).

⁵⁰ NAD determined that in the current context, the "*more*" claim in conjunction with the "*made with 26 fruits and vegetables*" claim also conveys the unsupported message that Alive! multivitamins provide superior nutritional benefits because of the addition of its Orchard and Garden blends. However, NAD already recommended that the "*made with*" claim be discontinued.

⁵¹ Different formulations, e.g., Women's Energy and Women's 50+, have slightly different amounts of vitamins but all of the Alive! formulations have at least 100% of the dv for each B-vitamin.

⁵² Even with the "*made with 26 fruits and vegetables*" claim discontinued, the advertisement still conveys an

⁵³ While not the basis for its recommendation, NAD noted that the advertiser's "*more*" claim is inconsistent with FDA regulations. According to the FDA, "*more*" is a comparative nutrient content claim that maybe used to describe the level of a vitamin or mineral provided that it contains at least ten percent more of the RDI for vitamins and minerals or of the DRV for protein, dietary fiber or potassium as compared to an appropriate reference (e.g., "contains 10 percent more of the daily value for fiber than white bread."). The advertiser's claim "*Get More from Your Multivitamin. A Lot More.*" fails to specify which nutrient and which reference product it has "more" than, in contravention of the FDA regulations and its public policy goals "to promote consumer understanding of the meaning of the terms through a limited lexicon that will allow consumers to make informed dietary choices." 21 CFR 101.54(e). See also , FDA, Dietary Supplement Labeling Guide, Guidance for Industry: A Dietary Supplement

Conclusion

NAD recommended that the advertiser discontinue its claim that Alive! multivitamins are “*made with 26 fruits and vegetables.*” Nothing in this decision however prevents the advertiser from more accurately claiming that its Alive! multivitamins contain Orchard and Garden blends as long as the advertiser avoids conveying the unsupported message that the vitamins and minerals are sourced from fruits and vegetables or that Alive! multivitamins provide the nutritional equivalent of eating whole fruits and vegetables. To that end, if the advertiser continues to use depictions of fruits and vegetables on its packing, NAD recommended that the advertiser add a clear and conspicuous disclaimer in close proximity to the images indicating that Alive! multivitamins are not made with whole fruits and vegetables.

NAD determined that the net impression of the advertiser's television commercial conveyed the unsupported net impression that Alive! multivitamins will induce an energy response similar to consuming a stimulant like caffeine. The factors NAD considered were the energy claim “plus high potency B-vitamins for energy” in conjunction with the actors dancing and singing while engaging in otherwise quotidian activities. NAD recommended that the advertiser modify its commercial to avoid this unsupported message; for example, one modification could be to discontinue the use of the word “energy” in conjunction with the claim “high potency B-vitamins for energy.”

NAD further recommended that the advertiser discontinue its claim “*Alive! is nutrition you can feel*” because, in conjunction with the energy message that Alive! has high potency B-vitamins for energy, a consumer could reasonably take away the message that the unsupported message that consuming Alive! multivitamins will provide a palpable burst of energy.

NAD determined that the advertiser's claims “*nothing beats feeling Alive!*” and “*there's nothing like feeling Alive!*” were puffery because consumers were unlikely to interpret them claims as objectively provable claims that Alive! multivitamins will cause consumers to feel more alive.

NAD further determined that the advertiser had provided a reasonable basis for its claim that Alive! multivitamins have “*superior potency – 100%+ daily value of 20 vitamins/minerals.*”

Finally, NAD recommended that the advertiser discontinue its claim “*Get More from Your Multivitamin. A Lot More*” because there is no evidence in the record that the B-vitamins in excess of the recommended daily value provides any additional health benefit.

Nature's Way Brands, LLC

Alive! Women's Energy, Alive! Men's Energy, Alive! Women's 50+, and Alive! Men's 50+ Multivitamins

Page: 23

Advertiser's Statement:

Nature's Way is pleased that the NAD accepted its "superior potency" claim as truthful and fully substantiated and that the NAD agreed that the claims, "Nothing beats feeling Alive" and "There's nothing like feeling Alive," are puffery and do not require substantiation. Nature's Way, however, disagrees that its advertising misrepresented in any way the fruit and vegetable content of the Alive! products. The NAD breaks with its precedent in requiring an advertiser to establish an ingredient's specific nutritional benefits before being able to promote the presence of the ingredient through a "made with" claim. While Nature's Way is disappointed with this aspect of the NAD's decision, it respects the self-regulatory process and will take the NAD's decision into consideration in future advertising. **(#5739 KAD, closed 07/01/2014)**