

“Fastest Growing Brand” – Don’t Mix and Match Ad Claim and Substantiation

April 25, 2018 – The TMCA

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We [blogged](#) last week about a recent National Advertising Division case involving a Kimberly-Clark ad campaign that illustrated the well-known NAD maxim: *“an advertiser is responsible for all reasonable interpretations of its claims, not simply the messages it intended to convey.”* The decision also serves as a useful reminder of another frequent NAD principle of truthful advertising: *“at all times there must exist a good fit between the claim made and the evidence offered in support of that claim.”* KC ran afoul of this

principle when it advertised its Huggies diapers as “the fastest growing brand in hospitals” with a “super” disclaimer notice that stated “based on volume share growth.”

There were number of problems with these ad claims. As an initial matter, KC relied on data covering only its own products, and the NAD found this to be insufficient because a “fastest growing brand” claim is comparative in nature. NAD reasoned that to make such a strong comparative claim, data on competitors is necessary. KC argued that its substantiation was reasonable in this case because the market consists of two main players, Huggies and Pampers, so if the Huggies sales number are increasing, then it could *assume* that the Pampers numbers were decreasing. While admitting that perfect substantiation is not required, NAD found this type of “conjecture” and “assumptions” (KC’s word, not NAD’s) insufficient.

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As explained by challenger Procter & Gamble, sales and market share data for hospital products can be obtained through an independent third-party database operated by Global Healthcare Exchange. Over time, both KC and P&G had used the GHX database for the purpose of tracking hospital diaper sales and market share. Here, KC did not rely on GHX data, instead basing its advertising claim on its own internal product shipment data.

NAD also faulted KC for not considering the entire market since 100% market data was available and the ad claim was not limited to “among leading brands.” Notably, NAD allows advertisers to base claims on 85% of the market for comparative product performance claim because obtaining data from the entire market is impractical and expensive. But in this case, GHX data covered the full market and in fact showed that a smaller player had the fastest growth rate. KC tried to argue that such reasoning was unfair because smaller players could attain a faster (or the fastest) growth rate from a modest increase in sales numbers, but the NAD rejected this reasoning.

Based on past NAD precedent, P&G also argued against KC’s data on the basis that untracked, non-publicly available data is unsuitable as claim support because it is not reliable and verifiable based on sales and share data that can be vetted by a competitor. NAD agreed.

Another major problem with KC’s ad campaign was the mismatch between the claim of “fastest growing brand” with data that showed only growth in sales volume, not the rate of growth. KC’s internal data demonstrated 18% growth in sales volume on a 52 week rolling basis, but “NAD questioned whether an increase in absolute shipments is an appropriate metric for support of a claim of *faster* volume share growth (as referenced in the super) than other competitors in the market. A ‘fastest growing brand’ claim requires concrete data demonstrating that Huggies grew sales or share at a faster rate than any other brand in hospitals” – data that KC lacked. NAD emphasized, however, that “given the evidence in the record concerning Huggies impressive growth in sales in the hospital channel, nothing in NAD’s decision precludes K-C from crafting a more narrowly tailored self-referential monadic claim concerning the increasing presence of Huggies in the hospital channel (i.e., growing more than ever before).”

Several important takeaways can be gleaned from this NAD decision:

- **Third-party data is the gold standard. If you choose to use internal data, it better be reliable and complete.**
- **Comparative sales claims should be supported by reliable data on the market as a whole, not just a substantial portion.**
- **If your company has a good story to tell about sales growth, sales ranking or rate of growth, you need to tell the story in the right way – the ad claim must match the supporting data**