

Breakout 2A:

# Marketing of Beauty/Cosmetic Products

2024 ANA Masters of Advertising Law Conference, 11 Nov 24

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# Overview

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1. Hot Areas in Beauty & Cosmetics Advertising
2. Endorsements & Testimonials
3. Marketing to Generation Alpha
4. Claim Substantiation: Best Practice for Product Testing

# 1. Hot Areas in Beauty & Cosmetics Advertising

# Hot Areas

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- “Clean”/“Natural”
- Sustainability/“Green”
- PFAS
- Slack Fill
- “Fake” Collagen

# “Natural” / “Clean” Claims

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK		
_____		X
Jeannie Patora, individually on behalf of herself and all others similarly situated,	:	Case No.
	:	
Plaintiff,	:	
v.	:	
	:	CLASS ACTION COMPLAINT
Tarte, Inc.,	:	
	:	<u>JURY TRIAL DEMANDED</u>
Defendant.	:	
_____	:	X

Plaintiff, Jeannie Patora (hereinafter “Plaintiff”), individually and on behalf of all others similarly situated, by her attorneys, alleges the following upon information and belief, except for those allegations pertaining to Plaintiff, which are based on personal knowledge:

**NATURE OF THE ACTION**

1. This action seeks to remedy the deceptive and misleading business practices of Tarte, Inc. (hereinafter “Defendant”) with respect to the marketing, labeling and sales of all products from Tarte’s “high-performance naturals” line of products (“Products”) throughout the State of New York and throughout the country:

2. Defendant manufactures, sells, and distributes the Products using a marketing and advertising campaign centered around claims that appeal to health-conscious consumers, *i.e.*, that their Products are natural. Moreover, Defendant’s website states that, “We believe in high performance AND natural.... We never compromise when it comes to what we put on our skin and neither should you... It’s time to rethink Natural.” However, Defendant’s advertising and

At tarte, we believe in *breaking down beauty boundaries,* shattering stereotypes & being kind. We believe in *high-performance AND natural.*

What does **HIGH PERFORMANCE NATURALS™** mean to us?

All tarte products are formulated with a blend of naturally-derived & other ingredients designed to perform.

# “Natural” / “Clean” Claims

Case 7:18-cv-11760-KMK Document 21-1 Filed 08/13/19 Page 1 of 70

## CLASS SETTLEMENT AGREEMENT

This Class Settlement Agreement (“Agreement”) is entered into this \_ day of December, 2018 by and between Plaintiff Jeannie Patora (“Plaintiff”), on behalf of herself and each of the members of the Settlement Class, on the one hand, and Defendant Tarte, Inc. (“Tarte” or “Defendant”), a New York corporation with its principal place of business at 1375 Broadway, New York, New York, 10018, on the other (collectively, Plaintiff and Defendant are the “Parties”). The Parties intend for this Agreement to fully, finally, and forever resolve, discharge, and settle all released rights and claims, subject to the terms and conditions set forth herein.

### **I. RECITALS**

1.1 On November 13, 2017, the Sultz Law Group, P.C., counsel for Plaintiff (“Plaintiff’s Counsel”) sent a pre-suit notice letter to Defendant alleging that the marketing of Defendant’s products that bear the trademark “high-performance naturals” was false and misleading because the products contain certain ingredients Plaintiff alleged were non-natural. The letter enclosed a draft complaint for a civil action to be filed in the United States District Court for the Southern District of New York, and demanded that Defendant preserve certain records related to the allegations in the draft complaint.

1.2 The draft complaint sought certification of a nationwide class and a New York subclass under both Rule 23(b)(3) and 23(b)(2), and alleged seven counts of wrongdoing: (i) violation of New York GBL § 349; (ii) violation of New York GBL § 350; (iii) violation of consumer protection statutes of more than forty states; (iv) breach of express warranty; (v) violation of the Magnusson-Moss Warranty Act; (vi) breach of implied warranty of merchantability; (vii) breach of implied warranty of fitness for a particular purpose.

At tarte, we believe in  
*breaking down beauty  
boundaries,*  
shattering stereotypes & being kind.  
We believe in *high-performance  
AND natural.*

What does  
**HIGH PERFORMANCE NATURALS™**  
mean to us?

All tarte products are formulated with a  
blend of naturally-derived & other  
ingredients designed to perform.

# “Natural” / “Clean” Claims

“Plaintiff’s complaint leaves the Court guessing as to how a reasonable consumer could mistake the ‘Clean at Sephora’ labeling and/or marketing to reasonably believe that the cosmetics contain no synthetic or harmful ingredients whatsoever.”

*Finster v. Sephora USA Inc.*, 2024 WL 1142014, at \*2 (N.D.N.Y. Mar. 15, 2024)



# “Natural” / “Clean” Claims

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*Amyris Clean Beauty, Inc. (Advertising for Biossance), NAD Case #7132 (Mar. 2024)*

- Challenged Claim
  - *“Clean ingredients and clean formulas – we ban over 2,000 ingredients that are known to be toxic to you and the environment.”*
- Advertiser Evidence
  - Statements by regulatory bodies, laws, trade associations and non-profit organizations concerning substances deemed toxic to human health and/or the environment
- NAD Recommendation
  - Modify claim to reflect only ingredients banned typically used in cosmetics products



# Sustainability Claims

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*Amyris Clean Beauty, Inc. (Advertising for Biossance), NAD Case #7132 (Mar. 2024)*

- Challenged Claim
  - *“Our 100% sugarcane derived squalene is ethically and sustainably sourced, keeping 2 million sharks every year safe from liver harvesting.”*
- Advertiser Evidence
  - Bloom Association - Third Party Report
  - Bonsucro certification
- NAD Recommendation
  - Discontinue or modify claim to avoid reference to specific number of sharks saved
  - “ethically and sustainably sourced” adequately supported

# Sustainability Claims

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*Amyris Clean Beauty, Inc. (Advertising for Biossance), NAD Case #7132 (Mar. 2024)*

- Challenged Claim
  - *“All of our ingredients are also ethically and sustainably sourced.”*
- Advertiser Evidence
  - Supplier Code of Conduct
- NAD Recommendation
  - Discontinue or modify claim

# PFAS Claims

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*Hicks v. L'Oreal*, 2024 WL 4252498, at \*1 (S.D.N.Y. Sept. 19, 2024)

- Plaintiffs allege L'Oreal waterproof mascara products contain PFAS despite being marketed as safe, effective, and high-quality



# PFAS Claims

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*Hicks v. L'Oreal*, 2024 WL 4252498, at \*1 (S.D.N.Y. Sept. 19, 2024)

- Court found plaintiff Hicks adequately alleged standing by alleging testing of products she purchased:
  - “Where, as here, the misbranding allegations are that a product contained PFAS but was not labeled to reveal that presence, a plaintiff must plausibly allege that the purchased product was in fact misbranded, i.e., that it contained PFAS, to support a price-premium theory of injury.”
  - “An obvious way to do this is by testing the actual product that the plaintiff purchased; if the purchased product did not disclose the presence of PFAS yet testing revealed PFAS in that same product, then the plaintiff has sufficiently alleged that the product was misbranded. . . . Such direct proof is the cleanest and most effective way to establish such an injury. Thus, there is no dispute here that Hicks has standing.”

# PFAS Claims

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*Hicks v. L'Oreal*, 2024 WL 4252498, at \*1 (S.D.N.Y. Sept. 19, 2024)

- Court found testing supported inference of wide-spread contamination:
  - “Combining the results from the Late 2021 Testing and October 2023 Testing, thirty-two tubes of the Products were tested, with all of them revealing the presence of PFAS and twenty-seven of those tubes (or 84.375%) revealing the presence of significant levels of PFAO.”
  - “Plaintiffs’ allegations pertaining to the October 2023 Testing, considered along with the allegations pertaining to the Late 2021 Testing, allow for the plausible inference at this stage that there was a pervasive PFAS presence in the Products going back to ‘late 2021.’”
- Standing of other named plaintiffs turned on which products they bought and when they bought them.

# Slack Fill Claims

*Ebner v. Fresh*, 838 F.3d 958 (9th Cir. 2016)

- Alleged nonfunctional slack fill in Fresh Sugar Lip Treatment product line
  - Label accurately depicted net weight of included lip product, but screw mechanism of packaging design only allowed 75% to advance up the tube
- Ninth Circuit affirmed dismissal with prejudice under 12(b)(6)
  - Lip product that remained in the bottom of the tube did not constitute actionable “slack fill,” which was defined as empty space within the container



# Slack Fill Claims

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- *Bimont v. Unilever US, Inc.*, 2015 WL 5256988, at \*6 (S.D.N.Y. Sept. 9, 2015)
  - “[T]he FDA was given a specific invitation to regulate slack-fill in foods, drugs, and cosmetics, but chose to regulate only slack-fill in foods. Under a strict approach to FDCA preemption, this is sufficient to bar Plaintiffs’ claims[.]”
  - “The FDA’s failure to regulate in this area constitutes strong evidence that the FDA considered the issue of slack-fill in drugs and cosmetics and decided that slack-fill in those products is insufficiently misleading to warrant regulation. It is, in other words, ‘tantamount to a conscious decision by the agency to permit’ slack-fill.”
- *O’Connor v. Henkel Corp.*, 2015 WL 5922183, at \*6 (E.D.N.Y. Sept. 22, 2015)
  - Plaintiffs’ slack-fill claims preempted where “the prohibition on nonfunctional slack-fill that plaintiffs seek would impose requirements different from or additional to those required by federal law and usurp the role of the FDA in determining what if any slack-fill requirements are necessary to protect consumers.”

# Slack Fill Claims

*Krause-Pettai v. Unilever U.S., Inc.*, 696 F. Supp. 3d 916 (S.D. Cal. 2023)

- Alleged nonfunctional slack fill present at top and bottom of deodorant stick dispensers
- Motion to Dismiss Denied
  - Reasonable consumer may expect amount of deodorant to correlate with size of dispenser, despite net weight disclosure
- Defendant’s Motion for Summary Judgment Granted
  - Plaintiffs failed to produce sufficient evidence of actual consumer deception
  - Court denied preemption argument, noting “mere deliberate agency inaction – an agency decision *not* to regulate an issue – will not alone preempt state law.”





# Slack Fill Claims

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## CA District Attorney Slack-Fill Settlements

- L'Oreal, Olay products – \$509,700
  - Mar. 21, 2013 (Shasta; Fresno; Sacramento; LA)
- Johnson & Johnson, Neutrogena products - \$506,000
  - Jan. 13, 2015 (Yolo; San Joaquin; Fresno; Shasta)
- Unilever, Axe hairstyling products - \$777,900
  - Apr. 23, 2015 (Orange)
- Walmart, various health & beauty products - \$495,000
  - Apr. 3, 2019 (Placer; Santa Cruz; Shasta; Tulare; Yolo)

# “Fake” Collagen Claims



**CONFIDENTIAL Settlement Communication (FRE 408)  
June 14, 2024**

**Class Action Settlement Agreement**

This Settlement Agreement and Release (“Agreement”), effective upon the date of the last signature below, is made by and between Dr. Dennis Gross Skincare, LLC (“DDG” or “Defendant”) and Plaintiffs Mocha Gunaratna, Renee Camenforte, and Jami Kandel, individually and as representatives of the Settlement Class as defined below) (individually a “Party,” and collectively the “Parties”), in the matters of *Gunaratna v. Dr. Dennis Gross Skincare, LLC*, Case No. 2:20-cv-02311-MWF-GJS (C.D. Cal.) (“*Gunaratna*”) and *Kandel et al. v. Dr. Dennis Gross Skincare LLC*, Case No. 1:23-cv-01967-ER (S.D.N.Y.) (“*Kandel*”) (collectively, the “Actions”).

**WHEREAS**, on March 10, 2020, Plaintiff Mocha Gunaratna filed *Gunaratna* alleging various claims regarding Defendant’s C+Collagen Deep Cream, C+Collagen Serum, C+Collagen Mist, C+Collagen Mask, and C+Collagen Eye Cream (collectively, the “Class Products”);

**WHEREAS**, on March 7, 2023, Plaintiff Jami Kandel filed *Kandel*, alleging similar claims as in the *Gunaratna* Action;

**WHEREAS**, on April 4, 2023, the Hon. Michael W. Fitzgerald, U.S. District Judge, certified the following class in the *Gunaratna* Action:

All persons who purchased the Products in the State of California, for personal use and not for resale during the time period of four years prior to the filing of the complaint through the date of court order approving or granting class certification.

**WHEREAS**, in the *Kandel* Action, no class has yet been certified, but Plaintiff has sought to represent a class comprising:

All persons who purchased the Products in the United States, excluding California purchasers, for personal use and not for resale during the time period of six years prior to the filing of the complaint through the date of court order approving or granting class certification; and a subclass of individuals who purchased the Products in the State of New York.

**WHEREAS**, Plaintiffs filed an amended complaint in *Kandel* to facilitate the *Gunaratna* and *Kandel* Plaintiffs’ pursuit and resolution of all claims on behalf of all Settlement Class Members in a single action in the Southern District of New York;

**WHEREAS**, collectively, the Actions allege claims under the consumer fraud laws of California and New York (specifically, Cal. Bus. & Prof. Code §§ 17200 and 17500, Cal. Civ. Code § 1750, and N.Y. Gen. Bus. Law §§ 349 and 350), breach of express warranty, breach of implied warranty and unjust enrichment; the Parties in the Actions engaged in substantial direct settlement discussions, and conducted several full-day mediations, the third of which was overseen by the Hon. Peter D. Lichtman on February 8, 2024, at which time they reached an agreement in principle to resolve all claims in both Actions. Because Defendant is headquartered in New York, the parties intend to pursue a nationwide settlement in federal court in the State of New York, subject to approval by the Honorable Edgardo Ramos of the United States District Court for the Southern District of New York, and stay the *Gunaratna* action accordingly;

# “Fake” Collagen Claims



**Acacia Seyal Gum Extract**  
**Cocoyl Hydrolyzed Collagen**

## 2. Endorsements & Testimonials

## The FTC Defines Endorsements Broadly

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- “[A]n endorsement means **any advertising message** (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that **consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser**, even if the views expressed by that party are identical to those of the sponsoring advertiser.”

# Use of Endorsements and Testimonials

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- Endorsements can take the form of:
  - Verbal statements
  - Demonstrations
  - Name/signature/image of a person
  - Seal of an organization
  - Fake positive reviews
  - Social media tags
  - Statements by virtual influencers

# Use of Endorsements and Testimonials

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- Cannot make a claim that the advertiser itself cannot **substantiate**.
- Must reflect endorser's **honest** opinions, findings, beliefs, or experiences.
- Must reflect the **typical** experiences of users of the product or service.
- The endorser must be a **true user** of the product or service at the time he or she is giving the endorsement.

# Use of Endorsements and Testimonials

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- Any **material connections** between an endorser and the company that are unclear or would not be expected by a customer seeing the ad **must be disclosed**.
  - Where payment is rendered for an award or a license to use an award seal, that should be disclosed.
- For “expert” endorsements, the person **must truly be an expert in the field** on which they are giving the endorsement.



# ***NourishMax (NourishMax Diamond Infused Eye Cream), NAD Case #7296 (Mar. 2024)***

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- Challenged Express Claims:

- “After researching and testing hundreds of eye cream products, we kept coming back to NourishMax Diamond Infused Eye Cream. This top pick features a comprehensive list of hardhitting ingredients that target every eye concern, from dark circles, fine lines, wrinkles, and puffiness to telltale signs of aging like crow’s feet.

Overall Rating (4.9)

Quality Rating: 10/10

Expert Rating: 9.9/10

Users Rating: 9.8/10”

- Implied Claim:

- The skincarebrandsreviews page featuring these claims reflects independent, honest opinions of the reviewers.



# Disclosure of Material Connections

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*Drunk Elephant, LLC (Drunk Elephant Skincare), NAD Case #7328 (Oct. 2024)*

- NAD monitoring case related to influencer TikTok posts promoting Drunk Elephant products
- Video 1 featured text stating #drunkelephantpartner on the fifth line of the caption, only visible if viewer clicks “more.”
  - Disclosure that appears only when viewer clicked on “more” was insufficient
  - Endorsement was made visually but the disclosure only appeared in the text description and not the video itself
- Video 2 was from an unpaid influencer who received free product in exchange for her review.
  - Receiving free product from a brand is a material connection that must be clearly and conspicuously disclosed.
- Found “safe for kids and tweens to use” conveyed that these products meet safety standards for cosmetics intended to be applied to the skin of teens and tweens, which was supported.

# Disclosure of Material Connections

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- Do:
  - Clearly disclose a family or financial relationship between advertiser and endorser
  - Ensure sponsorship disclosure is hard to miss
  - Treat sponsored tags, including tags in pictures, like any other endorsement
  - On image-only platforms like Snap, superimpose disclosures over the images
- Don't:
  - Don't assume followers are aware of a relationship between an advertiser and endorser
  - Don't assume disclosures built into social media platforms are sufficient
  - Don't assume disclosures from one platform will adequately share to another
  - Don't use ambiguous disclosures like "Thanks," #collab, #sp, #spon, or #ambassador
  - Don't rely on disclosures that people will see only if they click "more"

# FTC Ban on Fake Reviews

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- Prohibits fake reviews by someone who does not exist (e.g. AI-generated) or who does not have actual experience with the product or service, or that misrepresents user's experience.
- Prohibits buying positive or negative reviews.
- Prohibits buying followers and "views."
- Prohibits negative review suppression.
- Prohibits failure to disclose material connections.

<https://www.ftc.gov/news-events/news/press-releases/2024/08/federal-trade-commission-announces-final-rule-banning-fake-reviews-testimonials>

# Consumer Reviews

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- Endorsement Guides prohibit advertisers from “procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, or editing” consumer reviews in a way that distorts what consumers think of products.
- Advertisers are not required to display reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content; the personal information or likeness of another person; content that is inappropriate with respect to race, gender, sexuality, or ethnicity; or reviews that the seller reasonably believes are fake, ***so long as the criteria for withholding reviews are applied uniformly to all reviews submitted*** (positive and negative).
- Advertisers are not required to display reviews that are unrelated to their products or services.
  - A seller’s customer service, delivery, returns, and exchanges are related to its products and services
- Even if an incentivized review is accompanied by a sufficiently clear and conspicuous disclosure, “the practice could still be deceptive if the solicited reviews contain star ratings that are included in an average star rating for the product and including the incentivized reviews materially increases that average star rating.”
  - The average star rating would also need to include a clear and conspicuous disclosure.

# It's Not Just the FTC

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*Vitamins Online v. Heartwise*, 2016 WL 538458, at \*7 (D. Utah 2016):

- “[T]he **Lanham Act is broad enough to cover** a wide range of deceptive practices, potentially including **voting on and incentivizing online reviews**, and that the conduct of NatureWise may qualify as representations that convey a false impression or are misleading in context.”

*Interlink Products International v. F & W Trading*, 2016 WL 1260713 (D.N.J. 2016):

- “As alleged, Defendants **purposefully drive up Amazon product ratings** by enlisting inherently biased professional reviewers intending for consumers to rely on the misleading heightened reviews when selecting a product for purchase. The Court finds these allegations sufficient to state a claim on implied falsity grounds.”

# 3. Marketing to Generation Alpha

# Characteristics of Gen Alpha

Los Angeles Times SUBSCRIBE  
Gen Alpha kids are obsessed with skin care thanks to 'skinfluencers' and TikTok. Some adults are concerned



- **Born 2010–2024**
  - On track to be the largest generation by 2025 (more Gen Alphas than baby boomers)
  - Children of mostly millennials
- **Digital natives**
  - More connected to digital media and technology than prior generations
  - Influenced by social media virality & content creators
- **Image conscious**
  - Brand-sensitive
  - Prioritize new trends to remain up-to-date
  - Prefer brands that align with their values
- **Significant Beauty Consumers**
  - “Sephora Kids”
  - \$4.7 billion on skincare & makeup in 2023
  - Rely on their parents to make purchases on their behalf, with brand and product choice mostly a mix of both the parent and child.



# Where to Find Gen Alpha Consumers

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**You**  **Tube**



**TikTok**



**SnapChat**



**Instagram**

**\$69 billion**

is estimated to be the current value of social commerce in the US.

**\$33 million**

US customers are projected to make a purchase on TikTok this year. This is unsurprisingly considering #TikTokMadeMeBuy it currently has 70.2B views, furthering product discovery on the app.

Source: Piper Sandler 47<sup>th</sup> Semi-Annual Taking Stock With Teens Survey, Spring 2024

Digital Voices What's Next in Influencer Marketing 2024

# Considerations: Business

## Product

- **Ingredients**

e.g., active ingredients (retinoids, acids, and antioxidants) vs. non-active

- **Benefits**

e.g., “anti-aging”(incl. exfoliating) vs. hydration, cleansing

**First things first... What exactly is an active ingredient?**

Skincare products can be formulated with any number of ingredients — humectants, extracts, preservatives and active ingredients, just to name a few. Simply speaking, actives are the ingredients in a formula that are scientifically-proven to address specific skin concerns.

In other words, they're the ingredients that really help a product do what it promises to do. For example, if a spot treatment claims to clear up acne, it will probably contain an active ingredient like benzoyl peroxide or salicylic acid.

Make sense? Let's break down some of the most popular active ingredients in skincare.

Select an ingredient to learn more

- Alpha-hydroxy Acids (AHAs)
- Tartaric Acid
- Niacinamide (Vitamin B3)
- Lactic Acid
- Malic Acid
- Hyaluronic Acid
- Benzoyl Peroxide
- Vitamin C
- Polyhydroxy Acids (PHAs)
- Retinol
- Mandelic Acid
- Kojic Acid
- Beta-hydroxy Acids (BHAs)
- Glycolic Acid

# Considerations: Business

## Messaging

**BUBBLE**  
SKINCARE

Account

### PRODUCT QUESTIONS

#### Are your products safe for all ages? —

While all of our products are safe for anyone over the age of 14, some of our formulas contain powerful active ingredients that should be avoided if you are under 14 (or in some cases under 13). The products that younger faces should avoid are Moon Walk (14+), Deep Dive (14+), Morning Rays (13+), Super Clear (13+), Day Dream (13+), Knock Out (13+), Fade Away (13+), Come Clean (13+). If you are too young for one of these products, but you still feel you need to use it, talk to a dermatologist before use.



**BUBBLE**  
SKINCARE

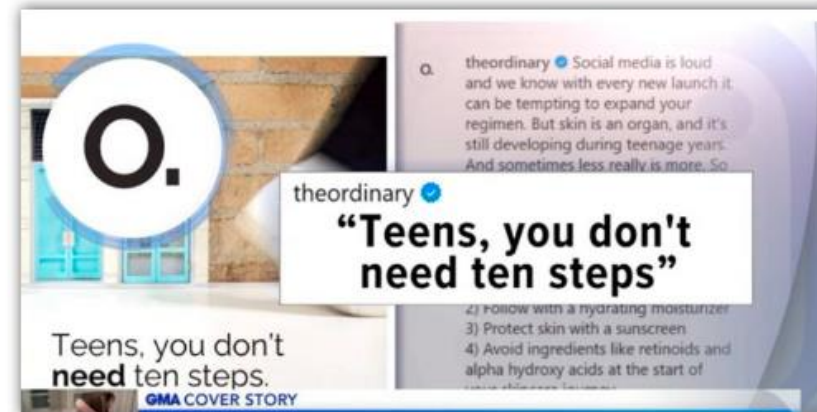


Start gradually and don't overdo it with exfoliation. Try patch-testing and start slow. If you are younger than 14, talk to a dermatologist before using Moon Walk.



# Considerations: Business

## Messaging



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# Considerations: Business

## Messaging



Search products and more



MOST WANTED

## Skin care (tween and teen-safe)

Your cheat sheet for a healthy and happy glow. This fun, easy routine uses buzz-worthy products that are gentle enough for young skin.

### Should teens use retinol?

Retinol can be a game-changer for some teens struggling with acne, but it's important to understand its pros and cons. Ulta's skincare experts can help you navigate this powerful ingredient and the variety of retinol products we offer.

Our experts recommend considering these factors:

#### Potential Benefits:

- **Clearer Skin:** For teens with moderate acne, retinol helps unclog pores and reduce inflammation, potentially reducing breakouts.
- **Scar Minimization:** By reducing inflammation and promoting cell turnover, retinol may help minimize the appearance of acne scars.
- **Long-Term Benefits:** While not a main focus for teens, retinol can help reduce the appearance of fine lines and wrinkles in the future.
- **Oil Regulation:** For teens with oily skin, retinol can help regulate oil production and minimize shine. Ulta also offers a variety of oil-free moisturizers to use alongside retinol.

#### Potential Drawbacks:

- **Irritation:** Retinol can be irritating, especially for sensitive skin. It might cause dryness, redness, and peeling. If your teen has sensitive skin, it may be best to hold off on retinol.
- **Sun Sensitivity:** Retinol increases sun sensitivity, so daily sunscreen with SPF 30 or higher is crucial. Ulta has a wide range of broad-spectrum sunscreens to choose from!
- **Patience is Key:** It can take weeks or even months to see results, and it might not work for everyone.

#### Remember:

- **Consult a Dermatologist:** A dermatologist can assess your teen's skin and recommend the best course of action, including whether retinol is right for them.
- **Start Slow:** Start with a gentle, low dose retinol product and use it only a few times per week.
- **Moisturize Daily:** Combat dryness with a gentle moisturizer.
- **Sunscreen Every Day:** Daily use of SPF 30+ sunscreen is essential with retinol.

### Which is the best face wash for teenage skin?

Teens and tweens come with all kinds of skin, and Ulta Beauty has the selection to match!

Take our skincare quiz for personalized recommendations or visit a store near you for recommendations from our skincare consultants.

Here's how to choose the right cleanser for their unique needs:

# Considerations: Legal

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## Children's Advertising Review Unit ("CARU")

- **CARU Advertising Guidelines**

- Applicable to national advertising primarily directed to children under 13 in any medium
- Advertising must not be deceptive or unfair to the children to whom it is directed
- All material disclosures must be clear, accounting for children's limited vocabularies and level of language skills
- Advertisements should not be presented in a manner that blurs distinction between advertising and non-advertising content
- Avoid sales pressure

- **"Compliance Warning Regarding Advertising Practices Directed to Children in the Metaverse"**

- Reaffirms and updates the foregoing advertising principles for advertising directed to children in the metaverse

# Considerations: Legal

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## Federal Trade Commission (“FTC”)

- **“Protecting Kids from Stealth Advertising in Digital Media”**
  - Do not blur advertising—ensure there is clear separation between entertainment/educational content and advertising
  - Prominent just-in-time disclosures should be provided verbally and in writing, and include important information about the ad
  - Consider implementing highly visible and easily understood icons signaling whether a content creator was compensated to advertise the product
  - Look for ways to inform kids, parents, and educators about how digital advertising works and to help kids recognize and evaluate wherever it appears

# Considerations: Legal

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- **COPPA (Children's Online Privacy Protection Act)**
  - Applies when collecting personal information from kids under 13
  - Notice, consent, parental review, and confidentiality requirements
- **NY SAFE for Kids Act**
  - Requires social media companies to restrict algorithmically driven feeds for users under 18
- **NY Child Data Protection Act**
  - Limits websites from collecting, using, sharing or selling personal data of anyone under the age of 18
- **NY's Child Performer Regulations**
  - Child Performer Permits not required for performances in a private home



## 4. Claim Substantiation — Best Practice for Product Testing

# Claim Substantiation Methods

The most common methods of substantiation in the beauty/cosmetics industry:

Analytical



Sensory



Clinical



Home Use



# Claim Substantiation Principles

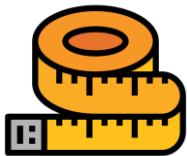
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1. Employ industry standard method.



2. Adhere to research best practice.



3. Tailor claim to fit test and results.



4. Verify consumer relevance.



## 1. Employ industry standard method

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**Preferred** — Use of an industry standard method such as ASTM's E1958-22: Standard Guide for Sensory Claim Substantiation.

**Acceptable** — A proprietary method can be adequate if a standard method does not exist. Avoid:

- Systematic advantage for advertiser.
- Test conditions that are unrealistic.
- Shortcuts to save money.





## 2. Adhere to research best practice

- Reliability, reproducibility, replicability, consistency, and accuracy cannot be gauged via a single experiment.
- Things that can be done in a single experiment —

Maintain fairness



Reduce or remove bias

Establish causality



Include control/placebo

Account for uncertainty



Apply appropriate statistics



## 2. Adhere to research best practice

Maintain fairness



Reduce or remove bias

- Bias (i.e., systematic error) is an influence that shifts all measurement in a predictable direction.
- Handling bias — **take** it out, **smear** it out, **call** it out.
- Common types of bias controllable by researcher — order bias, sampling bias, question bias.

“Native screened for study participants ... who both purchase natural products and who stated that it was [important] that ‘a product that contains natural ingredients [] really works.’ Therefore, **the audience was preconditioned** that they were testing a natural product that ‘works,’ creating a **significant potential for bias.**”

*Zenlen, Inc. (Native Deodorant), NAD Case #6284 (2019)*




## 2. Adhere to research best practice

Establish causality



Include control/placebo

- *Negative control* — no treatment
- *Positive control* — treatment with known impact
- *Placebo* — treatment with no therapeutic impact
- *Placebo effect* — therapeutic response to placebo
-  The placebo effect appears to be increasing in the US over time, perhaps because of advertising.

*Search “Schmerling Placebo” and “Tuttle Placebo”*



## 2. Adhere to research best practice

Account for uncertainty → Apply appropriate statistics

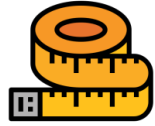
- A sample imperfectly represents a population.
- This imperfection must be accounted for.
- Three most common statistical techniques —

**A vs. B**  
Two-sample  
significance test

**A vs. #**  
One-sample  
significance test

**A% +/-**  
Margin of error  
calculation





### 3. Tailor claim to fit test and result

- Claim challenges are often won/lost based on how well the *message fits the measure*.
- Substantiation that is well-executed but not reflected in the claim is a *bridge to nowhere*.



“After using the product for two weeks, respondents were asked to complete a survey. ...Because this survey did not ask respondents about their odor until two weeks after they began using the product, this survey cannot provide reliable evidence in support of the claim that Stay Fresh Gel eliminates odor for three days with just one use.”

*Prestige Brands, Inc.* (Monistat Stay Fresh Gel), NAD Case #5955 (2016)

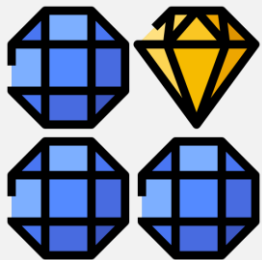


## 4. Verify Consumer Relevance

- Usage should be *typical*, i.e., according to instructions.
- Users should be *typical*, i.e., part of target audience.
- Claimed differences should be —

### Significant

Statistically better  
than comparator



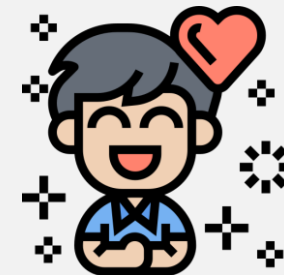
### Perceivable

Detectable by  
untrained human



### Meaningful

Of value to  
target consumer



# Too Faced Cosmetics, LLC (Better Than Sex Mascara), NAD Case #6131 (Oct. 2017)

- Challenged Claims:
  - “1944% more volume!\* \*results observed in a clinical study”
  - “In a recent study of 40 lashes after 3 coats of Better Than Sex Mascara there was a 1,944% improvement in the appearance.”
  - “Too Faced Better Than Sex Mascara is a sweat-proof, waterproof, play-proof mascara that gives you 1,944% more volume.\*\* \*\*Clinical study results”
  - Before & After Photos



# ***Too Faced Cosmetics, LLC (Better Than Sex Mascara), NAD Case #6131 (Oct. 2017)***

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- **“1,944% More Volume” Claims:**
  - Advertiser submitted *in vitro* testing of mascara products which showed mean lash volume increase of 1,944% after the third coat of mascara
  - NAD found testing insufficiently reliable to support claim:
    - Testing was designated “confidential” by Advertiser, precluding analysis by Challenger
    - Testing methodology not shown to be generally accepted in the cosmetic industry or consumer relevant

# ***Too Faced Cosmetics, LLC (Better Than Sex Mascara), NAD Case #6131 (Oct. 2017)***

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- **“Before and After” Depiction:**
  - Before and after photos = express performance claims
  - NAD found “Before and After” photo was unsupported:
    - Advertiser’s consumer use study did not reliably establish “before” and “after” images were depictions of typical customer results
    - Affidavit from company’s president attesting to truthfulness and accuracy of photographs could not be considered “proof” of product performance

# Testing in Anticipation of Litigation

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- Can be protected work product if done in anticipation of litigation

“Both facts and opinions are protected by the work product privilege . . . As a threshold matter, therefore, it is clear that the factual nature of the clinical studies does not, by itself, destroy a potential work product privilege.”

*Procter & Gamble v. Ultreo*, 574 F. Supp. 2d 334 (Jan. 2008)

- However, this testing may be discoverable if it is also used for a business purpose – e.g., claim substantiation.

“Ultreo has not met its burden to show that the studies ‘would not have been prepared in substantially similar form but for the prospect of that litigation.’ . . . the record shows that clinical and laboratory studies were a core element of Ultreo’s business plan. . . . And Ultreo’s CEO, in both his internal communications with coworkers and in his external communications with shareholders and retailers, included the Studies in his references to Ultreo’s routine clinical research.

*Procter & Gamble v. Ultreo*, 574 F. Supp. 2d 334 (Jan. 2008)

# Q & A



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