

Case #7069 (03/24/2022)
Clif Bar & Company
Energy Bars
Challenger: Kind LLC
Product Type: Food/Beverage
Issues: Puffery; Superiority Claims
Disposition: Modified/Discontinued

BBB NATIONAL PROGRAMS

NATIONAL ADVERTISING DIVISION

KIND LLC,
Challenger,

CLIF BAR & COMPANY,
Advertiser.

Case No. 7069
Closed 03/24/2022

FINAL DECISION

- The juxtaposition of an “ultimate” claim immediately proximate to a claim regarding “an optimal blend” of specific ingredients takes both claims out of the realm of puffery and makes them objective, measurable claims that require substantiation.

I. Basis of Inquiry

The advertising industry established the National Advertising Division (“NAD”) and the National Advertising Review Board (“NARB”) in 1971 as an independent system of self-regulation designed to build consumer trust in advertising. NAD reviews national advertising in all media in response to third-party challenges or through inquiries opened on its own initiative. Its decisions set consistent standards for advertising truth and accuracy, delivering meaningful protection to consumers and leveling the playing field for business. Challenger, Kind LLC (“Kind” or “Challenger”) challenged express and implied claims made by Advertiser, Clif Bar & Company (“Clif” or “Advertiser”) in an online commercial for its Energy Bars. The following are representative of the claims that served as the basis for this inquiry:

A. Express Claims

- “The Ultimate Energy Bar” with “an optimal blend of protein, fat and carbs”

B. Implied Claims

- CLIF Energy Bars are better than all other energy bars on the market to provide energy for the physical activities shown in the commercial.
- All CLIF Energy Bars provide an “optimal blend of protein, fat and carbs” for all of the physical activities shown in the ad.

- The blend of protein, fat and carbs in all CLIF Energy Bars is better than the blend in competitive energy bars when it comes to providing energy for the physical activities shown in the ad.

II. Evidence Presented

In support of the challenged claims the Advertiser provided:

- multiple examples of products that use “ultimate” slogans
- a declaration from Christopher Mohr, a registered dietician and nutrition consultant and founder of Mohr Results, Inc.

In support of its arguments the Challenger submitted:

- a letter dated August 15, 2020 from the United States Patent and Trademark Office (“USPTO”) refusing Clif’s trademark application for “The Ultimate Energy Bar”
- Clif’s response to the USPTO’s refusal of its trademark application dated February 16, 2021
- the USPTO’s final refusal of Clif’s trademark application for “The Ultimate Energy Bar” dated February 19, 2021
- print outs from Clif’s website on product offerings and recommendations

III. Decision

In recent years, energy bars have grown in popularity among athletes, fitness enthusiasts and young adults who are looking for a nutritious snack. The energy bar market has become increasingly competitive as many new players introduce innovative products. NAD recognizes that it is important for advertisers in a competitive market to be able to tout what makes their product unique; however, it is also imperative that they do so with truthful, non-misleading messaging.

The parties are makers of competitive energy bars that aim to provide consumers with a product that combines fat, protein and carbs for a nutritious snack or in some cases a meal replacement that also provides energy. The question in this challenge involves whether Clif’s claim “The Ultimate Energy Bar” with “an optimal blend of protein, fat and carbs” in the context of an online commercial falls into the realm of puffery or is an express claim that requires substantiation and whether that claim is a comparative superiority claim.

A. Challenged Advertising

The 30-second online commercial “Let’s Move the World” was launched by Clif on Hulu, Roku and YouTube as part of a campaign to inspire people to move more often. The commercial features upbeat music and opens with men and women skateboarding, running, practicing lacrosse, working out together and weightlifting. The voiceover states “Let’s explore the world. Let’s chase it and change it. Let’s lead it and lift it up.” Celebrities Meghan Rapinoe and Venus Williams are pictured playing soccer and tennis.

The challenged claim “The Ultimate Energy Bar” appears on screen and the voiceover states, “Let’s keep moving with the ultimate energy bar purposefully crafted with an optimal blend of protein, fat and carbs to keep you moving.” In the background men and women are featured skateboarding and those who were running and weightlifting are now seen eating CLIF Energy Bars.

The end of the commercial features men and women dancing in the street as well as a product shot of a CLIF Energy Bar while the voiceover states “because the more we move the more the world moves with us. Clif Let’s move the world.”

B. Messages Conveyed

It is well established that an advertiser is responsible for all reasonable interpretations of the messages conveyed by their advertising, not simply the messages they intended to convey. When analyzing the messages conveyed by a commercial NAD typically reviews the net impression created by the commercial as a whole, not merely words or phrases standing alone. In the absence of consumer perception evidence NAD relied on its expertise to determine the express and implied messages reasonably conveyed by the challenged commercial.¹

The Challenger contended that “The Ultimate Energy Bar” that contains “an optimal blend of protein, fat and carbs” conveys a comparative superiority message, comparing Clif to all other energy bars, that requires substantiation. The Challenger further argued that the online commercial falsely communicates to consumers that CLIF energy bars are superior to all other energy bars, have better nutrition for all activities shown in the online commercial and allow consumers to perform the depicted activities better than other energy bars. The Advertiser asserted that “the Ultimate Energy Bar” and “an optimal blend” are both puffery and that no reasonable consumer would understand the statements as objective measurable claims. Furthermore, even if “an optimal blend” was measurable the Advertiser argued that it conveyed a monadic message and not one of comparative superiority.

In analyzing the message conveyed NAD must first consider whether the claim “the Ultimate Energy Bar” in the context of the commercial conveys an express claim that requires substantiation or whether it falls into the realm of puffery. Whether a claim falls within puffery’s protective reach is largely dependent on what is communicated or what consumer expectations, if any, are created by the claim in the context of the commercial.² If a claim consists of obvious hyperbole, exaggerated displays of a manufacturer’s pride in its product or other non-provable opinion for which truth and accuracy cannot be determined, reasonable consumers generally will not expect substantiation.³ Conversely, where an objective representation is made (i.e., termed in fact rather than opinion) regarding the performance or other tangible attributes of a product that is sufficiently specific and material enough to create expectations in consumers, then substantiation for the claim is required.⁴ Although general claims of superiority may constitute puffery, linking a general claim to a specific product attribute may result in the need for substantiation.⁵

¹ *Beech-Nut Nutrition Company (Beech-Nut Baby Foods)*, Report #6070, NAD/CARU Case Reports (April 2017).

² *Sherwin-Williams Company (Krylon CoverMaxx Spray Paints)*, Report #6074, NAD/CARU Case Reports (April 2017).

³ *Id.*

⁴ *Id.*

⁵ *Lenovo #4820; LG Electronics USA, Inc. (OLED and Super UHD Televisions)*, Report #6237, NAD/CARU Case Reports (January 2019) (finding when the claim “True Color Accuracy” was featured with the phrase “see a more accurate, natural picture” consumers were likely to take away a superior color accuracy message and therefore substantiation was required).

Clif asserted that consumers are accustomed to seeing the term “ultimate” in advertising and understand it to be puffery.⁶ Consequently, consumers viewing the challenged commercial will understand the statement “The Ultimate Energy Bar” to be non-quantifiable puffery. Clif further argued that the commercial is merely aspirational in nature and has no comparative references placing the “ultimate” claim firmly in the realm of puffery. The Challenger disagreed arguing that the commercial calls out CLIF Energy Bars as the ultimate energy bar due to its optimal blend of nutrients which conveys to consumers a measurable claim that CLIF Energy Bars are better than other energy bars for the activities depicted in the commercial.⁷

NAD has previously looked at the question of whether “ultimate” claims constitute puffery or are objective claims that require substantiation and the determination largely depends on the context of the advertisement. In Sherwin-Williams Company (Krylon CoverMaxx Spray Paints), NAD found the claim “ultimate coverage” was vague and fanciful and did not make any representations about the product’s comparative paint coverage. While the product label and website listed product attributes such as “Rust Protection”, “Paint + Primer,” “Durable Adhesion” and “Fastest Dry Time,” NAD found these claims did not convey a meaningful or measurable message about the product’s paint coverage.⁸

Similarly, in Wink Naturals, LLC (Wink Naturals Cough Syrup) NAD found the claim “Zinc and Elderberry combine to form the ultimate immune system support” to be puffery because consumers would likely understand the claim “ultimate immune system support” to be hyperbole or an expression of pride rather than an unqualified superiority claim against all immune support products.⁹ In each of these cases NAD did not find that the challenged claim was linked to specific measurable factual assertions that converted the claim from puffery to a comparative, measurable superiority claim.

NAD found that viewed in its entirety and in context, the challenged claim “The Ultimate Energy Bar” with “an optimal blend of protein, fat and carbs to keep you moving” is distinguishable from the above cases. NAD has previously determined that laudatory claims combined with specific, tangible factual assertions can be understood by consumers to be an objective, measurable claim capable.¹⁰ While “The

⁶ The Advertiser submitted numerous examples of advertising that use the term “ultimate,” including for example: BMW’s “The Ultimate Driving Machine”, Gillette deodorant “Ultimate Fresh” Advanced Solid, Energizer’s “Ultimate Lithium” battery, Gold Bond’s “Ultimate” hydrating lotion, Pantene’s “Ultimate 10” Beauty Boosting Formula and Poise Overnight Pads “Ultimate Absorbency” and Revlon “Ultimate All-In-One” mascara.

⁷ The Challenger also claimed that the USPTO’s rejection of Clif’s trademark application for “The Ultimate Energy Bar” as merely descriptive confirms that the phrase is not puffery and is a descriptive term capable of verification. NAD did not find the USPTO’s rejection persuasive because the NAD’s consideration of puffery takes into account the reasonable consumers takeaway and looks at the claim in the context of the advertising as a whole, not as a standalone claim, both considerations the USPTO does not take into account in its decision.

⁸ *Sherwin-Williams Company (Krylon CoverMaxx Spray Paints)*, supra n.2.

⁹ *Wink Naturals, LLC (Wink Naturals Cough Syrup)*, Report #6296, NAD/CARU Case Reports (July 2019).

¹⁰ *Lenovo (United States), Inc. (Personal Computers)*, Report #4820, NAD/CARU Case Reports (March 2008) (finding that advertiser’s claim “Best-Engineered PC” was specifically linked to the claim “with the awards to prove it” thereby defining what the advertiser meant by the phrase making it an objective, provable claim, not puffery); *DFS Services LLC (Discover Card Cash Rewards Program)*, Report #4779, NAD/CARU Case Reports (January 2008) (finding that the advertiser’s claim “The Best Cash Rewards Card Available Today”

Ultimate Energy Bar” standing alone may convey a message of hyperbole or non-provable opinion the claim here is immediately followed by measurable product attributes (i.e. an optimal blend of protein, fat and carbs) telling the consumer why the product is the “ultimate” and rendering it an objectively provable claim requiring substantiation.

Along the same lines, NAD determined that while “an optimal blend” standing alone may convey a laudatory opinion constituting puffery, the context of the commercial features the “optimal blend” claim alongside “The Ultimate Energy Bar” and links the claim to specific measurable product attributes of protein, fat and carbs resulting in a message that it has optimized its blend of nutrients, and thus conveys an objective superiority message that requires substantiation.

The Sherwin-Williams Company (Krylon CoverMaxx Spray Paints) case is distinguishable because there the “ultimate coverage” claim was presented with product attributes that did not relate to paint coverage, but rather related to other attributes of paint. In this case, the “ultimate” claim is qualified by the optimal blend of ingredients, relating directly to the “The Ultimate Energy Bar” taking the claim out of the realm of puffery. Similarly, the Wink Naturals, LLC (Wink Naturals Cough Syrup) case is distinguishable in that there the claim “Zinc and Elderberry combine to form the ultimate immune system support” tells consumers that two ingredients combine to form the ultimate immune support which NAD found conveys a message of manufacturer’s pride or hyperbole. Here “The Ultimate Energy Bar” claim is immediately proximate to a more specific claim about how the bar is “purposefully crafted with an optimal blend” of specific ingredients, going beyond hyperbole or pride and conveying to consumers that the CLIF bar is the ultimate energy bar because of its blend of ingredients. The message is reinforced with the depiction of physical activity in the commercial.

NAD found that in this context the juxtaposition of an “ultimate” claim immediately proximate to a claim regarding “an optimal blend” of specific ingredients, attributes that are clearly measurable, conveys objective, measurable messages that require substantiation.

NAD, next turned to the question of whether the commercial conveys an implied comparative superiority message. The word “ultimate” has the ability to convey both comparative and monadic messages.¹¹ Previously, NAD has looked at two factors when considering whether a monadic or comparative message is conveyed by an “ultimate” claim: (1) whether the claim contains a provable, quantifiable message and (2) if so, what message is conveyed by the word given the overall context in which it appears.¹²

In Viewsonic Corporation (1-chip DLP Projectors), NAD found the advertiser’s claim that one of its projectors provides “the ultimate in color accuracy without compromise” tied the ultimate claim to specific advances in its technology and that the term “without compromise” could lead consumers in

appeared in close proximity to specific attributes of the cash back program and rendered the claim quantifiable, not puffery); *POWERBAR, INC. (PowerBar Perform and Perform Plus)*, Report #3695, NAD/CARU Case Reports (September 2000) (finding that claims advertiser pointed to as puffery were qualified by terms such as “optimally-formulated,” “time release,” and “optimum balance of ingredients” rendering them objectively provable claims that require support).

¹¹ *Viewsonic Corporation (1-chip DLP Projectors)*, Report #6087, NAD/CARU Case Reports (June 2017).

¹² *Id.*

this context to contrast the projector’s color accuracy with other projector’s ability in that area; thus, NAD found in this context the ultimate claim was comparative.¹³

Here, “The Ultimate Energy Bar” claim is featured proximate to a claim that CLIF Energy Bars are purposefully made with “an optimal blend of protein, fat and carbs,” using the word “optimal,” consistent with its dictionary definition, to mean “the best possible, producing the best possible results.”¹⁴ While “ultimate” or “optimal blend” standing alone may constitute monadic claims the combination of the two claims could reasonably lead consumers to contrast the CLIF energy bars to other energy bars. Based on the foregoing, NAD found that the claim “The Ultimate Energy Bar” purposefully crafted with “an optimal blend of protein, fat and carbs” conveys an implied comparative superiority message that must be supported.

C. *Claim Substantiation*

Clif provided an expert declaration from a registered dietician and nutrition consultant, Christopher Mohr. Mohr explained that there is significant scientific evidence that athletic performance can be maintained with high carbohydrate availability. When it comes to the amount of carbohydrates required Mr. Mohr cited several scientific articles indicating that most athletes benefit from 30-60 grams of supplemental carbohydrate per hour of activity, focusing specifically on faster acting sources of sugar and that CLIF energy bars contain multiple forms of carbohydrates in amounts ranging from 38-46 grams per serving to help maintain the body’s energy stores and fuel athletic performance.

Mohr cited an article that found including protein in conjunction with carbohydrates during activity improved next day performance and stated that CLIF energy bars contain moderate amounts of protein to contribute to performance and avoid inhibiting the body’s absorption of carbohydrates. Mohr’s declaration also speaks to the importance of fat as a macronutrient that together with carbohydrates fuels aerobic metabolism during exercise. Mohr stated that when consumed in the amounts present in CLIF energy bars fat can contribute energy without delaying gastric emptying or negatively impacting the absorption of carbohydrates.

NAD’s evaluation of the Advertiser’s substantiation is guided by the specific advertising claims at issue. The message conveyed by the advertising determines the necessary level of proof required. Here the Advertiser is required to provide competent reliable substantiation for the comparative superiority claim “the Ultimate Energy Bar purposefully crafted with an optimal blend of protein, fats and carbs to keep you moving.” NAD found that Clif’s expert declaration does not support the comparative superiority message because it does not provide any information on its competitor’s energy bars. Furthermore, Clif’s expert does not provide specific details regarding the actual blend of protein, fats and carbs or an explanation as to why the CLIF energy bar’s blend is optimal or better than competitor’s energy bars for the activities depicted in the commercial.

¹³ Id.

¹⁴ *Optimal*, Oxford Advanced American Dictionary (Oxford University Press 2022)
<https://www.oxfordlearnersdictionaries.com/us/definition/english/optimal?q=optimal>

NAD was not convinced by the Advertiser’s argument that the use of the phrasing “an optimal blend” as opposed to “the optimal blend” signals that Clif is one of many optimal blends. Consumers are unlikely to notice small differences in phrasing and attach significant meaning to them. Additionally, advertisers are reasonable for *all* messages reasonably conveyed and one message reasonably conveyed is a comparative superiority message.

For the foregoing reasons, NAD determined that the challenged claim “The Ultimate Energy Bar” with “an optimal blend of protein, fat and carbs is not substantiated and should be discontinued.

IV. Conclusion

NAD found that in the context of the challenged online commercial the comparative superiority claim “The Ultimate Energy Bar” with “an optimal blend of protein, fat and carbs” is not substantiated and should be discontinued.

V. Advertiser’s Statement

Clif Bar & Company (“Clif”) will comply with NAD’s recommendation. Clif is pleased that NAD declined to find that “ultimate energy bar,” standing on its own, conveys an objective claim which requires substantiation. Clif is likewise pleased that NAD declined to find that “an optimal blend of protein, fat and carbs,” standing on its own, conveys an objective claim which requires substantiation. While Clif disagrees with NAD’s determination that juxtaposing these phrases to one another takes each “out of the realm of puffery,” Clif agrees to cease juxtaposing its “ultimate energy bar” tagline with its reference to “optimal” nutrients. **(#7069 JS, closed 03/24/2022)**