

NARB PANEL #329 – April 30, 2024

**SWIFT Appeal of NAD's Final Decision #7309 Regarding Claims for
The Glad Products Company, Glad ForceFlex MaxStrength Drawstring Bags**

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REPORT OF NARB PANEL 329

Decision Issued: April 30, 2024

SWIFT Appeal of NAD’s Final Decision #7309 Regarding Claims for The Glad Products Company, Glad ForceFlex MaxStrength Drawstring Bags

This is an appeal to a panel of the National Advertising Review Board (“NARB”) from a Fast-Track SWIFT decision¹ of the National Advertising Division (“NAD”), NAD Case #7309 (3/21/2024). The advertiser is The Glad Products Company (“Glad”) and the challenger is Reynolds Consumer Products LLC (“Reynolds”).

A. Background

The claim at issue is that Glad’s ForceFlex MaxStrength tall kitchen bags are “25% more durable.” There is no dispute in this proceeding concerning whether Glad’s ForceFlex MaxStrength bags are 25% more durable than Glad’s own ForceFlex bags. Rather, the dispute centers on whether Glad’s disclosures of the basis for the comparison are sufficiently clear and conspicuous that consumers will not be misled into interpreting the message as a claim of superiority compared to competing brands of tall kitchen bags.

In the challenge, Reynolds argued that Glad’s disclosures concerning the nature of the comparison were not clear and conspicuous. According to Reynolds, the 25% more durable claim misleads consumers as one reasonable interpretation of the claim is that it is a comparison to competitive products.

NAD concluded that the challenged presentations of the 25% more durable claim did not clearly and conspicuously disclose the nature of the comparison, and recommended modification. Glad accepted NAD’s decision and recommendations except to the extent they applied to the 25% more durable claim appearing on certain packaging for the ForceFlex MaxStrength tall kitchen bag.

The ForceFlex MaxStrength tall kitchen bag product is sold in containers with varying quantities of bags. The package for the 120-bag size is not at issue on this appeal, as NAD reports that it was not challenged. See NAD Decision at 4. Nevertheless, as discussed below, NAD’s comments on the disclosure on the 120-bag-size package is useful as a guide to understanding NAD’s conclusions.

¹ Fast-Track SWIFT matters typically involve a single, well-defined issue that does not require review of complex legal arguments or complex factual evidence. The question of whether a challenged claim is appropriate for review in a SWIFT proceeding is determined by NAD and is not reviewed by NARB.

Glad provided the panel members with physical examples of the packaging for the 45-, 34-, and 20-unit package sizes.² On each of these, consumers are led to the disclosure of the nature of the durability comparison by means of a footnote symbol. In all of the package panels containing the challenged claim, the disclosure language is on the same panel as the claim.

NAD concluded that the challenged package disclosures were generally in small font and separated from the 25% more durable claim by graphics and other text that acted, in NAD's view, to distract the attention of consumers. NAD noted that while certain package panels contained appropriate disclosures, it concluded that other panels (including the facing panel) did not. NAD concluded that many consumers, reviewing the packaging in retail outlets, would not examine panels other than the facing panel in making a purchase decision.

NAD recommended that the 25% more durable claim be modified to "include disclosures that are clear and conspicuous in close proximity or incorporated into the claim itself that indicate that the object of the claim's comparison is Glad's own 13-gallon Force Flex bags" (to the extent that the existing disclosures did not already accomplish this). See NAD Decision at 5. In the decision, NAD had pointed out that the 120-bag packaging disclosed the nature of the comparison in an asterisked disclosure immediately below the 25% more durable claim with no intervening graphics or text.

B. Arguments of the Parties

The arguments of the parties are briefly summarized below.

1. Glad's Arguments On Its Appeal

Glad does not dispute the legal tests applied by NAD, but rather argues that the packaging communicated the disclosure explaining the nature of the comparison in a clear and conspicuous manner, i.e. (according to Glad) easily noticed and understood by consumers.

As a preliminary matter, Glad argues that space on packaging is dear: very expensive, carefully planned, and every inch of it matters. Glad argues that at issue are lightweight packages sold in retail stores. Accordingly, according to Glad, consumers can easily pick up the packages and examine them, and in fact do so. Based on these observations, Glad contends that the disclosures on all of the panels should be considered in analyzing what information is available to consumers when evaluating whether they will be misled.

² Reynolds protested allowing Glad to provide product samples to the panelists, arguing that the packaging was not in the record. The NARB Chair, with the concurrence of NAD, denied the protest, given that Reynolds had challenged the package claims and copies of various panels of the packaging were in the record.

The advertiser further argues that, even without the disclosure language, the 25% more durable claim considered by itself is not untrue, but at worst ambiguous. Therefore, Glad argues, consumers will ask themselves, “more durable than what?” and examine the information on the package for an answer.

Furthermore, Glad argues, the inclusion of an asterisk signals that more information is readily available and can be located. Thus, according to Glad, given that the consumer can easily pick up the package and examine the package panels, consumers will readily find the disclosure and not be misled.

Glad argues that NAD did not take into account consumers’ real-world interaction with common consumer products. It further argues that under the circumstances here, the proximity of the disclosure should be “measured in inches, not millimeters,” and therefore its package disclosures are proximate to the claim.

Glad argues that the challenger failed to introduce evidence of consumer communication. It further argues that NAD’s decision, as applied to packaging, would be inconsistent with well-accepted consumer packaging standards. Finally, Glad argues that, since it complied with well-accepted disclosure standards, it should not be required to bear the significant cost of revising its packaging.

2. Reynold’s Arguments

Reynolds points out that this NARB panel has a single issue to resolve – whether consumers interpret Glad’s 25% more durable claim as self-referential or a claim versus the competition. Reynolds argues that, as NAD found, the package disclaimer language is in small type and buried under generic identifiers, and therefore will not be noticed by many consumers and not prevent confusion.

Reynolds notes that bag durability and strength are attributes that are important to consumers. It points out that on the primary display panel, the durability claim is in white, all-caps lettering, located in a blue burst set-off that is overlaid on the image of a trash bag stuffed to capacity. This, it argues, is a prominent placement calling attention to the superior durability claim. It further argues that consumers do not normally assume that a company is cannibalizing its business by touting that one of its products is superior to another one of its own products. It further argues that consumers do not read package panels other than the facing panel before making a purchase decision.

Reynolds argues that Glad’s disclaimers do not measure up under Federal Trade Commission (“FTC”) guidance. Reynolds further argues that legal principles make it clear that merely setting forth disclaimer language on the same panel does not guarantee that the disclosure meets the clear and conspicuous standard. Here, Reynolds argues, one reasonable interpretation of the claim (not

necessarily the only one) is that the claim is making a comparison to competitive products.

Reynolds also points to the distinction between disclosures that are an integral part of the claim and those that are not integral because they provide supplemental information. Here, Reynolds argues, the disclosure information concerning the nature of the comparison is integral to the claim, and, according to Reynolds, Glad's failure to provide clear and conspicuous disclosures make the superior durability claim misleading.

Finally, Reynolds points to the placement of the disclosure on the package for the Glad 100-bag product, where the disclosure appears directly below the durability claim. This, Reynolds argues, shows that a clear and conspicuous disclosure on all of the Glad ForceFlex MaxStrength tall kitchen bag packaging is commercially feasible.

C. Discussion

The panel has carefully evaluated the arguments of the parties, and has concluded that, in the context of the three package samples provided to the panelists (45- 34- and 20-bag sizes), the 25% more durable claim is not misleading.³

One panelist views the claim, without the disclosure, as likely not misleading, concluding that consumers understand that the ForceFlex Max Strength product is a product line extension and therefore the more durable claim refers to a comparison to the standard ForceFlex product.

Another panelist is of the view that the asterisked disclosure provided appropriate qualifying information for consumers who are unsure about the nature of the comparison. This panelist agrees with the position of the advertiser that the asterisk signifies that more information is available concerning the more durable claim, and further that the disclosure is sufficient because it is placed on the same panel as the claim and below important consumer information concerning the product the consumer is considering to purchase.

All three panelists agree that the conclusions expressed herein are limited to the packaging the panel examined and are not a comment on the more durable claim as it may be presented in other forms of advertising.

The panel thanks Reynolds and Glad for participating in industry self-regulation in the interests of promoting truth in advertising.

³ This conclusion represents the views of two of the panelists. One panelist is of the view that the claim is misleading in that the disclosure concerning the nature of the comparison is not clear and conspicuous.

D. Conclusion

The panel concludes that the appeal should be granted and NAD's recommendation appealed from should be set aside.

E. Advertiser's Statement

Glad is very pleased with NARB's conclusion that its "25% More Durable*" claim is not misleading as presented on its product packaging, and Glad welcomes the Panel's decision to set aside NAD's recommendation that the claim be modified. As a strong supporter of the self-regulatory process, Glad thanks the Panel for its careful consideration of the issues in this matter.