

# NAD Holds Puffery Analysis Depends on Material Connection Disclosure

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Church & Dwight ran ads for TheraBreath Mouthwash that featured a dentist in a white lab coat identifying him as Dr. Harold Katz. In some of the ads, Dr. Katz holds the product and states: “It’s a better mouthwash. I guarantee it.”

P&G challenged the ads, making two key arguments. First, P&G pointed out that the ads should clearly disclose that Dr. Katz is the founder of TheraBreath, rather than suggest he’s an independent dentist. Second, P&G argued that Dr. Katz’s statement conveyed an unsubstantiated claim that TheraBreath is better than other mouthwashes. Church & Dwight countered by arguing that the statement was puffery.

In an interesting decision, NAD held that the answer to the question of whether Dr. Katz’s statement conveyed an objective claim – which would require substantiation – or whether it was puffery – which would not require substantiation – depended, in part, on whether Church & Dwight clearly disclosed Dr. Katz’s connection to TheraBreath.

NAD noted that the FTC’s Endorsement Guides require endorsers to clearly disclose any connections they have to the brands they endorse and that the FTC’s new Rule on the Use of Consumer Reviews and Testimonials states that endorsements by company insiders must clearly disclose the insider’s relationship to the company, unless that’s otherwise obvious to the audience. In this case, NAD didn’t think Dr. Katz’s connection was obvious and recommended that Church & Dwight include a disclosure.

Turning to the puffery issue, NAD noted that although defining puffery is more art than science, “obvious hyperbole” and “exaggerated displays of a manufacturer’s pride in its product” may constitute puffery. “When uttered by its creator, a superlative statement about a product is understandably laced with personal pride.” Thus, NAD determined that if Church & Dwight were to clearly disclose that Dr. Katz is the product’s creator, the statement would most likely come across as puffery.

It also helped that the term “better” was “not connected to any measurable product attributes such as taste or the concentration of a key ingredient.” Had the ads connected the “better” claim to any measurable attributes, Church & Dwight would likely have been required to substantiate the claim that TheraBreath was better than competing mouthwashes with respect to those attributes, notwithstanding Dr. Katz’s connection to the company.