

Case #6238 (01/11/2019)

Advanced Purification Engineering Corporation

Water Filter Systems

Challenger: Aquasana, Inc.

Product Type: Household Products

Issues: Express Claims; Testimonials; Online Advertising

Disposition: Substantiated

- **In certain circumstances advertisers apprised of inaccurate or unsupported claims being made about their products that appear in third-party advertising should take steps to ensure that such claims are modified or discontinued.**

Basis of Inquiry: Claims made by Advanced Purification Engineering Corporation (“the advertiser” or “APEC”) for its water filter systems in internet advertising were challenged by Aquasana, Inc. (“the challenger” or “Aquasana”), a maker of water filtration products. The following are representative of the claims that served as the basis for NAD’s inquiry:

Express Claims:

“Made in the USA”

“Built in the USA”

“Top rated U.S. Manufacturer”

“#1 U.S. Manufacturer of Reverse Osmosis Water Systems.”

“Great RO System!! I bought it to replace my older Watts RO Pure System purchased at Costco a few years ago ... The APEC System is made in the USA, which is why I chose over other comparable systems on Amazon.”

“The filter works great. I like that it’s USA made because I don’t trust the chemicals used in products coming out of China. Reverse osmosis is the best way to filter water also.”

“Dragging around 5 gallon water bottles got to be tiresome I decided on a R.O. system. There were too many brands with too many features so I went with Amazon’s pick. Also, the high review ratings and the made in USA claim confirmed my choice.”

Challenger’s Position:

Aquasana is a maker of water filtration products. Reverse osmosis (RO) is a technology used to purify tap water. APEC is the manufacturer of residential RO drinking water filtration systems it markets and sells to consumers. Aquasana argued that APEC misleads consumers with claims that its RO water filters are of domestic origin. APEC designs and assembles its water filter systems in the United States, but those systems incorporate significant foreign parts. Aquasana argued that APEC’s advertising does not comply with the FTC’s “Made in the USA” standard. That standard requires that, to support an unqualified claim that a product is made in the USA,

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advertisers demonstrate that “all or virtually all” of a product, including all significant parts and processing that go into a product are of U.S. origin.¹

According to a March 2017 closing letter from the FTC to APEC, the FTC reviewed APEC’s claims that its products are “made in USA” or “built in the USA” and determined that APEC’s systems “incorporate significant imported parts.”² APEC advised the FTC that it implemented a remedial action plan to qualify its representations. This plan included: (1) removing all “Built in USA” or “Made in USA” claims for water filtration systems from marketing materials, including websites and social media; (2) updating claims on third-party sales platforms; and (3) making all diligent efforts to identify and correct improper claims made by third-party marketers.³

Aquasana argued that, notwithstanding the FTC closing letter and APEC’s subsequent removal of the “Built in USA” language from its product description on Amazon and on its own website, APEC continues to benefit from the repetition of false domestic origin claims via the customer reviews posted on third-party retail sites like Amazon.com. The many reviews identified by Aquasana were posted both before and after the language in the Amazon product descriptions and APEC’s website was changed to read that the products are “designed and assembled” in the USA instead of “built” or “made” in the USA. Those reviews speak positively with respect to the APEC systems being “made” in the USA. For example, reviewers write that “The APEC System is made in the USA, which is why I chose over other comparable systems on Amazon,” “I like that it’s USA made because I don’t trust the chemicals used in products coming out of China,” and “the made in USA claim confirmed my choice.”

Aquasana asserted that the reviews confirm that APEC’s false advertising had the desired effect of convincing consumers that its products are “Made in the USA” and that consumers’ false belief that APEC’s products are made in the USA has resulted in purchase decisions and influenced consumers to review and rate the APEC products highly because of it. Having first disseminated unsupported domestic origin claims on its own website and on the pages of third party retailers and because it is on notice that the claims are unsupported, Aquasana contended that APEC is responsible for the domestic origin claims made in the reviews. Aquasana also contended that APEC has a degree of control over the reviews and suggested that APEC could delist its products from Amazon, which would eliminate all prior reviews, and then relist them, allowing new reviews to be posted. Aquasana noted that APEC actively engages in cultivating and managing the consumer review profile of its products by routinely responding to negative reviews with a template response suggesting that the reviews may be fake and the work of a competitor. In contrast, Aquasana observed that APEC does not comment on or correct false favorable repetitions of its made in the USA claims. Aquasana urged that APEC’s willingness to “correct the record” with respect to some reviews, but not others, illustrates its conscious and active use of false and unsupported “Made in USA” claims.

¹ Federal Trade Commission, *Complying with the Made in the USA Standard* (1998) at <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>.

² FTC closing letter to APEC, March 22, 2017.

³ *Id.*

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Aquasana also argued that APEC makes unsubstantiated unqualified domestic origin claims about its products by using search engine results to communicate that APEC is the “top rated U.S. manufacturer” and the “#1 U.S. Manufacturer of Reverse Osmosis Water Systems.”

Advertiser’s Position:

APEC’s principal place of business is in City of Industry, California. At one time, APEC’s water filtration systems were made in the United States from primarily domestic parts. Due to changes in supply side sourcing, many parts for APEC products are now made abroad. APEC still, however, designs and assembles its products in California.

According to the March 2017 closing letter, the FTC “decided not to pursue [its] investigation any further” based on APEC’s remedial strategy to update certain advertising to make clear that certain products were “designed” or “assembled” in the USA if those products contained foreign-made components.⁴ Specifically, APEC’s plan included: (1) removing all “Built in USA” or “Made in USA” claims for water filtration systems from marketing materials, including websites and social media; (2) updating claims on third-party sales platforms; and (3) making all diligent efforts to identify and correct improper claims made by third-party marketers. APEC has updated its advertising to ensure compliance. This includes modifying claims on its website and in the descriptions for its products on retail sites. The products are described as being “designed and assembled in the USA” or “designed, engineered, and assembled in the USA.”

APEC maintained that consumer reviews are distinct from “third-party advertising” and also “third-party marketers,” which are referenced in the FTC closing letter. APEC submitted that no authority holds that an advertiser has a duty to correct misperceptions in an online review. APEC further contended that, although it does not encourage misperceptions by consumers, it does not control the reviews posted on third-party retail sites.⁵

Decision:

I. Customer Review Claims

Claims that a product are “made in the USA” are compelling to consumers who wish to make buying choices that are helpful to the American economy and which help create and support manufacturing jobs in the United States. Customer reviews – and any product claims in the review – impact consumers who rely on peer-to-peer recommendations when making buying decisions. False claims made in online customer reviews can disseminate quickly and may then “live forever” regardless of whether an advertiser intends for those messages to spread.

In this challenge, Aquasana argued that customer reviews of APEC’s RO systems that claim they are “made in the USA” on third-party retail websites like Amazon are misleading consumers. APEC’s RO systems are assembled in the United States but they do not meet the FTC’s standard

⁴ Id.

⁵ APEC noted that it no longer has the ability to respond to reviews on Amazon of its best-selling product, the Essence ROES-50, because Amazon removed the reviews.

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for “made in USA” claims, which requires that “all or virtually all” of a product, including all significant parts and processing that go into a product, are of U.S. origin.⁶

In March 2017, APEC advised the FTC that it implemented a remedial action plan which included: (1) removing all “Built in USA” or “Made in USA” claims for water filtration systems from marketing materials, including websites and social media; (2) updating claims on third-party sales platforms; and (3) making all diligent efforts to identify and correct improper claims made by third-party marketers.⁷ Consistent with the closing letter, APEC modified the claims on its website to no longer claim that its products are “built in the USA” or “made in the USA.” APEC’s website now advertises that its products are “designed, engineered and assembled in the USA.” Aquasana argued that APEC continues to benefit from the repetition of false domestic origin claims via the customer reviews posted on third party retail sites like Amazon.com because many reviews remain posted which describe APEC systems as being “made” in the USA.

An advertiser may not make claims through consumer testimonials that could not be substantiated if made independently by the advertiser.⁸ Additionally, advertisers apprised of inaccurate or unsupported claims being made about their products which appear in third-party advertising should take steps to ensure that such claims are modified or discontinued.⁹ NAD has not, however, had occasion to address the extent to which an advertiser is responsible for claims made by consumers via reviews posted on third-party retail sites and known by the advertiser to be inaccurate or unsupported. Because it was not disputed that the reviews are independent and that the “made in USA” claims about APEC’s RO water filtration systems in the reviews are unsupported, the only question before NAD was whether or not APEC is responsible for those claims.

Recently, in BuzzFeed, Inc. (Shopping Guides – St. Ives Renewing Collagen & Elastin Moisturizer), Report #6210, *NAD/CARU Case Reports* (September 2018), NAD observed that:

“...consumers have broadened the sources from which they acquire information about the products and services they purchase, regularly looking to consumer reviews, social media and influencers, and online publications spanning from trusted media sources to specialized blogs and websites. In this widely diverse information environment, the line between what is advertising and what is not often gets blurred.”

⁶ See Federal Trade Commission, *Complying with the Made in the USA Standard* (1998); see also, Capillus, Inc. (Capillus 82), Report #6107, *NAD/CARU Case Reports* (August 2017).

⁷ Id.

⁸ See e.g., Stoner, Inc. (Invisible Glass Window, Windshield & Mirror Cleaner), Report #5764, *NAD/CARU Case Reports* (September 2014).

⁹ Neuracel.com, LLC (Neuracel Nerve Pain Relief), Report #5907, *NAD/CARU Case Reports* (December 2015) (recommending discontinuance of claims made on website formerly owned by advertiser); Too Faced Cosmetics (Lip Injection Extreme Lip Plumping Treatment), Report #4276, *NAD/CARU Case Reports* (January 2005) (recommending discontinuance of claims made in third-party publication that added verbiage to advertising placed by the advertiser in the publication).

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In BuzzFeed, Inc., NAD reviewed content in an online publication which was identified as editorial and which recommended certain skincare products. The article at issue included “affiliate links” allowing consumers to purchase the products discussed and informed consumers that the publisher may collect a share of sales generated from the links. NAD did not require the publisher to substantiate any claims about the skincare products because it determined that the content was created independently of the “economic or commercial motivation” introduced by affiliate marketing revenue.¹⁰ NAD concluded that the article was true editorial content not “controlled” by an advertiser.

Similarly here, consumers posting the reviews with claiming APEC’s RO Systems are “made in the USA” did not have any “economic or commercial motivation” to do so. The critical question here is whether the advertiser exercises control over the messages conveyed through customer reviews. A third-party retail site can include content that is advertising, while other content may not be, with the lines separating them often becoming blurry. Content may be provided by the retailer, the manufacturer of the product being sold, and a consumer posting a review; each having a varying degree of control over the content. The manufacturer provides a product description and may also have other sections where it can post its own content advertising the product. Third-party retail sites like Amazon often allow manufacturers the opportunity to respond to customer reviews, and a manufacturer may be found to “advertise” or promote its product when responding to the review by echoing positive statements made by the customer or by otherwise responding in a manner which validates any claims made by the customer. When that occurs, the manufacturer is responsible for substantiating those claims.

Here, NAD determined that APEC did not exercise sufficient control over the messages conveyed by the product reviews at issue and that it is not responsible for the truthfulness of reviews including the “Made in USA” claims. APEC did not respond to these reviews by making express unqualified domestic origin claims or by otherwise conveying an unsupported message through its response. APEC’s silence and decision to refrain from responding to reviews does not convey a message that the domestic origin claims are accurate. APEC’s practice in responding to reviews also did not give rise to an obligation to correct the unsupported “Made in USA” claims. In general, APEC responded to negative reviews with a boilerplate statement urging the consumer to contact APEC so that APEC could address its concerns.

To the extent APEC can control the messages conveyed through customer reviews, NAD observed that APEC has taken reasonable measures to prevent unsupported domestic origin claims from being made through customer reviews. After the FTC closing letter, in addition to modifying claims on its own platforms, APEC took corrective action by changing the product description on Amazon, which is the most prominent location on Amazon where APEC can control the message. Rather than describing the filtration systems as “built in the USA,” it now effectively conveys the accurate claim that APEC’s RO systems are “designed and assembled” in

¹⁰ NAD declined to retain jurisdiction over the matter in BuzzFeed. NAD’s jurisdiction is limited to “national advertising,” defined as: “any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction...; and if the content is controlled by the advertiser.” NAD Policy & Procedure § 1.1(A).

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the United States. The “designed and assembled” claim appears where consumers looking for fundamental information about the product (e.g., price and key product specifications) will land.

Aquasana suggested that APEC take the step of “delisting” its product from Amazon and the “relisting” so that all of the prior customer reviews are deleted. Considering the high volume of reviews (around 1,000 for some products), the vast majority of which do not say anything about the product’s origin, requiring APEC to delist all reviews was not necessary to avoid conveying a misleading message about its product.¹¹ Under these circumstances, NAD was satisfied that APEC’s corrective measures to modify its “Made in the USA” claims in its product description were reasonable.

While NAD did not recommend that APEC take additional action with respect to the “Made in USA” customer reviews, it cautioned APEC against interacting with any such reviews in any manner which may seem to validate an unsupported domestic origin claim.

II. The Advertiser has a Reasonable Basis to Describe Itself as a “U.S. Manufacturer”

Aquasana argued that APEC also makes unsubstantiated domestic origin claims about its products through search engine results which state that APEC is the “top rated U.S. manufacturer” and the “#1 U.S. Manufacturer of Reverse Osmosis Water Systems.” Neither party submitted consumer perception evidence. In the absence of reliable consumer perception evidence, NAD steps into the shoes of the consumer and uses its expertise to evaluate the messages reasonably conveyed.¹²

NAD determined that these claims, as they appear standing alone in search engine results, do not convey a message that all of APEC’s RO systems or any particular products are “made” in the United States, i.e., the products are “all or virtually all” of domestic origin consistent with the FTC’s standard. Rather, because “U.S.” modifies “manufacturer” in these claims, they convey a general message about APEC itself and the message is that APEC is a U.S.-based manufacturer with a significant manufacturing presence in the United States.¹³

¹¹ Cf. Coastal Contacts, Inc. (Coastal Contacts, Inc. Advertising), Report #5387, *NAD/CARU Case Reports* (October 2011) (declining to recommend that advertiser remove bona fide Facebook “likes” although they were obtained in connection with misleading offer of free merchandise which required modification).

¹² See, e.g., Comcast Cable Communications, LLC (AT&T U-Verse Wireless Receiver), Report #5730, *NAD/CARU Case Reports* (June 2014).

¹³ NAD seeks to harmonize its recommendations with relevant federal regulations; however, the FTC’s guidance on U.S. origin claims does not address claims that a manufacturer is a “U.S. manufacturer.” To the extent the FTC’s guidance may relate to claims about a manufacturer, it suggests that a manufacturer who manufactures products which fall short of the standard for unqualified domestic origin claims may still be considered a “U.S.-based manufacturer.” Discussing the use of U.S. symbols or U.S. geographic references, the FTC states: “Whether any particular symbol or phrase, including an American flag, conveys an implied U.S. origin claim, will depend upon the circumstances in which the symbol or phrase is used. Ordinarily, however, the Commission will not consider a marketer’s use of an American brand name or trademark, without more, to constitute a U.S. origin claim, even though some consumers may believe, in some cases mistakenly, that a product made by a *U.S.-based manufacturer* is made in the United States.”(emphasis added). See FTC Enforcement Policy on U.S. Origin Claims.

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Although APEC imports parts of its systems, APEC is headquartered in California where it designs, engineers, and assembles RO water filtration systems. It is a California corporation, does not manufacture its products abroad, employs individuals in the United States, and maintains a significant manufacturing presence in the United States.¹⁴ Accordingly, NAD determined that APEC has a reasonable basis to describe itself as a “U.S. manufacturer” in search engine results.

Conclusion:

NAD determined that the advertiser was not responsible for substantiating the challenged domestic origin claims made by customers in reviews on third-party retail websites. NAD further determined that the advertiser has a reasonable basis for the claim that it is a “U.S. manufacturer” as that claim appears in search engine results.

Advertiser’s Statement

APEC values its customers and strives to make a consistent, high quality water filtration system that is truthfully marketed to consumers. As NAD's decision recognizes that APEC is a US manufacturer that is headquartered in California where it designs, engineers and assembles reverse osmosis water filtration systems, APEC would like to thank NAD for its thoughtful consideration of this inquiry. (#6238 EU, closed 01/11/2019)

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¹⁴ See DraftKings, Inc. (DraftKings.com), Report #5816, *NAD/CARU Case Reports* (March 2015) (finding that advertiser’s characterization of a competing website as not “U.S.-based” reasonably conveyed a message that it had no appreciable presence in the United States).