

**AMERICAN MEDIA, INC.**

**Shape Water Boosters**

*Challenger: National Advertising Division*

*Product Type: Dietary Supplement*

*Issues: Implied Claims/Consumer Perception*

*Disposition: Modified/Discontinued*

- **Advertising that appears in a format that makes it look like editorial content has the potential to mislead or confuse consumers because consumers may attach a different weight or significance to editorial content than to pure advertising content.**

**Basis of Inquiry:**

As part of its routine monitoring program, NAD reviewed an article in Shape Magazine, published by American Media, Inc. (the “advertiser” or “AMI”), which promoted the benefits of SHAPE-branded products in a context that appeared to be an editorial news article. NAD was concerned that promoting SHAPE-Branded products in a format that makes it look like editorial content blurs the line between editorial content and advertising in a way that can confuse consumers.

Implied Claim:

Embedded within what appeared to be an editorial article in shape magazine about the health value of hydration was an advertisement for Shape Water Boosters. NAD was concerned that consumers may give more credence to the advertiser’s objective claims about the product’s attributes because of the context in which the claims appeared.

**Advertiser’s Position:**

American Media, Inc. (“AMI”) is the owner and publisher of SHAPE magazine and other popular, life-style publications. A SHAPE-branded product, “SHAPE Water Boosters – was promoted in an article in the September 2013 issue of SHAPE magazine. The advertiser contended that SHAPE readers are sophisticated, well-educated and experienced consumers and are likely to understand that a product sold under the SHAPE trade name is connected to SHAPE magazine and its publisher.

The advertiser advised and documented to NAD that the typical reader of Shape magazine is an established, professional woman, who is highly educated, with a college or more advanced degree, and a concomitant significant income. AMI contended that its sophisticated readers have significant experience about how to make decisions about consumer products, arguing that its readers can and do understand the SHAPE-branded products are connected to SHAPE magazine. Because the relationship between the magazine and SHAPE-branded products is obvious, AMI argued that it is under no further obligation to define the promotion of its product separately as an advertisement. AMI argued that its magazines can promote themselves or their associated product lines as long as consumers understand the relationship between the magazine and the service or product, referring NAD’s attention to the FTC Guidelines for endorsements and testimonials. AMI contended that where a consumer understands the relationship between a product and the reviewer’s relationship to the product, no disclosure is necessary.

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Because SHAPE Magazine and SHAPE Water Boosters share the same branded and trademarked name, AMI maintained that the relationship between the product and the publisher is clear. In fact, the advertiser maintained that the decision to brand the Water Boosters and other products with the SHAPE trademark was to leverage the SHAPE magazine's brand equity and benefit from consumer awareness of SHAPE magazine. Further, the advertiser argued that its recommendation of SHAPE Water Boosters within an article on hydration does not change the obvious connection between the advertiser and the product. It contended that product recommendations are ubiquitous in SHAPE magazine, where information content often contains product recommendations. AMI advised NAD that readers buy the magazine to learn about healthy products, beauty tips and supplies, hot trends and designer clothing, healthy life-style choices, and fitness advice. It contended it would be odd if it could not recommend its own products in the same manner as other companies' products in editorial content.

AMI further contended that the context of the advertisement makes clear that SHAPE is promoting its own products. The editor's note on page 22 of the September issue explains:

Whether you're a superstar athlete like Maria [Sharapova] or simply a super-busy everywoman, it's no secret that you need a well-rounded diet to stay healthy and strong. But unfortunately many women don't get enough nutrients from what they eat and drink. While the simple solution is to supplement your diet with protein powder, vitamins, and the like, SHAPE recognized there was a gaping hole in the market: Products that truly addressed the nutritional needs of the active woman simply weren't available. To that void, *we've* launched a line of products made to do just that. The first are featured on page 134, but there's much more to come – see the pic below for a sneak peek. We'll be sure to keep you posted. (Emphasis added.)

Additionally, there are two full page advertisements for SHAPE Nutritionals and specifically SHAPE Water Boosters on pages 120 and 123 of the September issue. The advertiser argued that these messages can be viewed as disclosures made in the context of the advertising for SHAPE Water Boosters or as evidence that SHAPE magazine was in no way trying to hide the relationship between SHAPE magazine and its branded products. The advertiser submitted that its audience of well-educated women is unlikely to be misled as to the connection between the magazine, its publisher and the SHAPE-branded products.

### **Decision:**

NAD opened this monitoring case because of a concern that an article in SHAPE magazine captioned "news" that focused on the importance of hydration promoted the benefits of SHAPE Water Boosters which blurred the line between advertising and editorial content in a way which could confuse consumers. SHAPE magazine is well-known for providing information related to health and fitness. The September 2013 issue of SHAPE Magazine also introduces new SHAPE-branded products including SHAPE Water Boosters. News articles in the September 2013 issue included an article reporting on a recent study on the benefits of combining changes in both diet and exercise to lose weight; three new choices for protective wear glasses or goggles for fitness activities; and an article recommending four technology tools for reducing stress. An article

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titled, *Water Works*, bearing the caption “News” discussed the importance of staying hydrated and recommends SHAPE Water Boosters as an aid to staying hydrated, “The obvious solution is to stick with water, but about 20 percent of Americans reportedly don’t like the taste. If that sounds like you, check out the new SHAPE Water Boosters ... Just a single squeeze ... adds delicious flavor – but not calories – along with a concentrated punch of nutrients that offer some important bonus benefits.”<sup>1</sup> NAD considered whether the context in which SHAPE recommended its SHAPE-branded product could mislead or confuse consumers to believe that the recommendation is an independent editorial assessment.

NAD has often expressed concern about advertising in deceptive formats, particularly when the content in question recommends a product or service.<sup>2</sup> Advertising that appears in an editorial context has the potential to mislead or confuse consumers because consumers may attach a different weight or significance to editorial content than to pure advertising content.<sup>3</sup> In 1968, the FTC considered a restaurant review that appeared as a news article. The FTC reviewed “the question of whether it is deceptive to publish an advertisement in the format of a news article without disclosing it is an advertisement” and concluded that “since the column consists of a series of commercial messages which are paid for by the advertisers, the Commission is of the opinion that it will be necessary to clearly and conspicuously disclose it is an advertisement.”<sup>4</sup>

Here, the advertiser argued that because consumers are aware of the connection between the magazine and the SHAPE-branded product, it has no obligation to disclose that its promotion of SHAPE-Branded products is advertising. The advertiser directed NAD’s attention to the FTC Guidelines to Endorsements and Testimonials and maintained that the connection between the content and the magazine is obvious to consumers.<sup>5</sup> NAD does not disagree. NAD’s concern, however, was not the disclosure of a financial connection between SHAPE Magazine and

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<sup>1</sup> The advertising in question makes claims about the benefits of SHAPE Water Boosters, and thus is not like a product placement where no objective claims about product attributes are made. See <http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf>. (Reviewing product placement and brand integration programs and determining if such promotion could mislead consumers, the FTC noted that “the rationale for disclosing that an advertiser paid for a product placement (i.e. that consumers will give more credence to objective claims about a product’s attributes when made by a party independent from the advertiser), is absent.”)

<sup>2</sup> See generally *eSalon (Custom Formulated Hair Color)*, #5645 NAD/CARU Case Reports (October 2013); *NourishLife (SpeechNutrients Speak)*, #5620 NAD/CARU Case Reports (August 2013); *Herbal Groups Inc. (Prostalex Plus)*, NAD/CARU Case Reports, Report #5005 (July 2009)(citing *JS&A Group*, 54 F.Reg 12593, March 28, 1989, Corporation ordered to cease and desist from “misrepresenting, either directly or indirectly, that an advertisement is an independent consumer or news program and not a paid advertisement.”)

<sup>3</sup> The FTC has advised that advertising can be deceptive if, (1) there is a representation or omission of information that is likely to mislead the consumer acting reasonably under the circumstances; and (2) the representation or omission is ‘material’ – defined as “likely to affect the consumer’s conduct or decision with regard to a product or service.” FTC Letter to Commercial Alert, <http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf>, quoting FTC Deception Policy Statement, appended to *Cliffdale Associates, Inc.* 103 F.T.C. 110, 175 (1984).

<sup>4</sup> FTC Advisory Opinion No. 191, [http://www.ftc.gov/os/decisions/docs/Vol%2073/ftcd-vol73\(JANUARY-JUNE1968\)PAGES1289-END.pdf](http://www.ftc.gov/os/decisions/docs/Vol%2073/ftcd-vol73(JANUARY-JUNE1968)PAGES1289-END.pdf); see also *In the Matter of JS&A Group, Inc.*, 111 F.T.C. 522 (1989).

<sup>5</sup> The FTC Guidelines to Endorsements and Testimonials, <http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>, define as endorsement as “any advertising message ... 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.

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SHAPE-Branded products. Rather, NAD was concerned that the “*Water Works*” article was formatted and titled and appeared to be a news article yet it promoted SHAPE Water Boosters as part of the news. The article was preceded by the headline “News” and included information about the importance of hydration and recommended SHAPE Water Boosters as a healthful way to stay hydrated. Although consumers reading SHAPE magazine may be aware that SHAPE Water Boosters are related to SHAPE magazine, those same consumers can reasonably attach different weight to recommendations made in an editorial context than recommendations made in an advertising context. Put another way, consumers may reasonably believe that editorial recommendations in SHAPE magazine are independent of the influence of a sponsoring advertiser.

NAD considered, but was not persuaded by, the advertiser’s argument that the editor’s note on page 32 of the magazine and disclosed the connection between SHAPE Magazine and SHAPE Water Boosters was sufficient to alert consumers that the article was an advertisement.<sup>6</sup> NAD precedent is clear that effective disclosures must be in close proximity to the main claim, meaning that they can be read at the same time a consumer reviews the claim.<sup>7</sup>

As the advertiser aptly pointed out, SHAPE’s well-educated and sophisticated readership “have become accustomed to [the informational/endorsement] format and expect and utilize the recommendations in the magazines they purchase to help them make validated lifestyle decisions.” Readers, however, generally attach different significance to recommendations made in an editorial news article than they would if the same recommendations were made in an advertising format. For all of the foregoing reasons, NAD recommended that the advertiser clearly and conspicuously designate content as advertising when it promotes SHAPE-branded products.

### **Conclusion**

NAD recommended that the advertiser clearly and conspicuously designate content as advertising when it advertises SHAPE-branded products.

### **Advertiser’s Statement**

America Media, Inc. (“AMI”), the publisher of SHAPE magazine and other popular, life-style publications, respects NAD’s goal of ensuring truth and accuracy in advertising. The SHAPE

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<sup>6</sup> NAD noted that SHAPE Water Boosters were promoted in separate, clearly delineated advertisements, including on pages 120 and 123.

<sup>7</sup> Digital Capital Advisors (Representative Transactions), Report #5593 *NAD/CARU Case Reports* (May 2013); 3M Company (Nexcare Comfort Ultra Fabric Bandages), Report # 4596 *NAD Case Reports* (November 2006); Windmill Health Products (Chitosol Chitosan Fat Binding Diet System), Report # 3900 at 5 *NAD Case Reports* (April 2002); see also <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf> at 8; <http://www.business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking>. (“As for where to place a disclosure, the guiding principle is that it has to be clear and conspicuous. Putting disclosures in obscure places – for example, buried on an ABOUT US or GENERAL INFO page, behind a poorly labeled hyperlink or in a terms of service agreement – isn’t good enough. The average person who visits your site must be able to notice your disclosure, read it and understand it.”)

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editorial team values greatly the trust instilled in it by its sophisticated and highly-educated readers and works hard to maintain such trust. We are pleased that NAD appears to agree that the connection between SHAPE magazine and the SHAPE-branded product is obvious and that any potential, reader confusion that might have occurred was caused by the “News” heading and the editorial nature of the article. We note your concern that the format in which the product was presented might cause some readers to weigh objective product claims differently. With the goal of full cooperation with advertising self-regulation, AMI will modify the format in which it promotes its branded products, including discontinuing the association of the label “News” with copy that discusses its products. **(#5665 LB, closed 12/18/2013)**