

Legitimate Product Review or Paid Product Promotion? Ninth Circuit Says Commercial Speech Plausibly Alleged

Ariix LLC v. NutriSearch Corp., Nos. 19-55343 (9th. Cir. Jan. 22, 2021)

By: Lisa Holubar & Victoria Hanson | February 1, 2021

Ariix, a nutritional supplement company, brought action against NutriSearch, the publisher of the *NutriSearch Comparative Guide to Nutritional Supplements* (the “Guide”), which NutriSearch expressly claims is an evidence-based comparison of nutritional supplements without any particular bias. Not so said Ariix, NutriSearch’s Guide is merely a sophisticated marketing sham designed to promote Ariix’s competitor in exchange for NutriSearch’s financial gain. Ariix filed a complaint, which it later amended, against NutriSearch for false advertising under Section 43(a) of the Lanham Act. The Southern District of California granted NutriSearch’s motions to dismiss the first and the amended complaints because (1) the Guide as a whole and any statements therein were not commercial advertising within the scope of the Lanham Act, and (2) the alleged false statements were unactionable statements of opinion. On January 22, 2021, the Ninth Circuit (the “Court”) reversed and remanded the case for further consideration.

According to the allegations in the amended complaint, NutriSearch portrays itself as an independent and neutral third-party reviewer of various nutritional supplement brands and claims to use objective data and scientific analyses to compile rankings of nutritional supplement products. NutriSearch, however, has been funded by one of Ariix’s competitors, Usana, who has paid hundreds of thousands of dollars in speaking and promotion fees in exchange for being the top-rated supplement company in the NutriSearch Guide. Further, NutriSearch has refused to give Ariix the top medal certification despite having admitted that Ariix met the medal criteria.

On appeal, the Ninth Circuit considered whether the Guide or the statements therein were false or misleading commercial speech, made for the purpose of influencing consumers to buy defendant’s goods or services, and sufficiently disseminated to the relevant purchasing public. The Court overruled the district court’s conclusion that the Guide was not commercial speech. The Court focused on NutriSearch’s economic motivation in making the statements in its Guide. Specifically, it determined that Ariix “plausibly alleged that NutriSearch... published the Guide mainly with the economic goal of furthering their own self-interests beyond simply benefiting from sales of the publication. Specifically... to reap the financial benefits of a hidden marketing arrangement with Usana rather than to inform consumers about nutritional supplements.” Next, the Court easily found that the Guide was sufficiently disseminated.

The Court also remanded for a determination of whether Guide was issued for the purpose of influencing consumers to buy *Defendant’s* goods because the district court did not decide that issue. The Court noted that, although the Guide is intended to help sell Usana’s goods, not more Guides, it might be the case that the Defendants were acting as agents of Usana and therefore had a vested interest in the goods Usana sold, potentially satisfying this element. Finally, the Court reversed the district court’s conclusion that the statements in the Guide were merely unactionable statements of opinion. Instead, Ariix plausibly alleged that NutriSearch: (i) falsely asserted it was not associated with any manufacturer listed in the Guide and (ii) falsely implied to consumers that Ariix did not meet the NutriSearch medal criteria of compliance with certain FDA regulations and possession of appropriate laboratory certification.

This case illustrates how new forms of advertising and promotion may arise in today’s marketplace and acts as a reminder that such speech is not entitled to robust protection under the First Amendment.