

NUTRO PRODUCTS, INC.

“Lite” Dry Pet Food Packaging

Advertising Agency: Undisclosed

Challenger: Hill’s Pet Nutrition, Inc.

- **NAD will often take industry guidelines into consideration when reviewing challenges to advertising.**
- **When claims are based on the nutritional content of a product, it is essential for manufacturers to make sure that they have quality controls and good manufacturing practices in place to ensure that the claims are consistently truthful.**

Basis of Inquiry: Advertising claims on product packaging and related web page claims for Nutro Products, Inc.’s (“Nutro”) “Lite” dry pet foods were brought to the attention of NAD by Hill’s Pet Nutrition, Inc. (“Hill’s”), makers of Hill’s Science Diet pet food products. The following claims were at issue:¹

“Lite” Product Designation Claims:

- Nutro’s dry pet foods, Natural Choice® Lite and Natural Choice® Small Bites Lite, are inaccurately described as “lite” products on labels and product web pages.

Challenger’s Position:

The challenger argued that Nutro lacked a reasonable basis for its “lite” dry product claims for certain of its dry dog food products, Natural Choice® Lite (“Natural Choice Lite”), and Natural Choice® Small Bites Lite (“Small Bites Lite”).² The challenger stated that on packaging (as well as on the advertiser’s website) the pet food products at issue here were promoted as “lite” formulations, but that such designation was false and misleading because the products substantially exceeded the maximum calorie allowance for “lite” pet food according to certain industry guidelines.

The Challenger’s Argument that the Pet Food Industry’s Leading Standard-Setting Organization

¹ The challenger originally included other claims regarding Nutro’s “Mealtime” website (and related print advertising) in its challenge, which were identified in NAD’s opening letter. The claims were that: (1) Nutro’s chicken meal ingredient is safer and healthier for pets than the chicken by-product ingredients that its competitors (including Hill’s) use; (2) Nutro’s chicken meal ingredient is less likely to cause allergies in dogs than the chicken by-product ingredients that its competitors (including Hill’s) use; (3) Nutro’s chicken meal ingredient is more digestible than the chicken by-product ingredients that its competitors (including Hill’s) use; and (4) Nutro’s chicken meal ingredient is a more concentrated source of protein than the chicken by-product ingredients that its competitors (including Hill’s) use. The advertiser has represented in writing that these claims were permanently discontinued independent of this challenge, and therefore NAD did not review these claims on the merits.

² The challenge originally took issue with MAX® Cat Gourmet Classics Lite Roasted Chicken Flavor (“MAX Cat Lite”), in addition to the two dog food products considered here, as exceeding the relevant maximum calorie allowance. The advertiser has represented in writing that “lite” claims regarding MAX Cat Lite were permanently discontinued, and therefore NAD did not review these claims on the merits.

Has Established Maximum Calorie Contents for Dry Dog Food Products Marketed as “Lite”

The challenger explained that the Association of American Feed Control Officials (“AAFCO”), a standard-setting organization composed of federal and state animal feed regulators and industry representatives, develops model laws and regulations to promote the safe use of animal feeds.³ Pertinently here, the model laws and regulations include uniform feed ingredient definitions and labeling requirements.

AAFCO lacks direct regulatory authority, noted the challenger, but the FDA and state regulators work together through it to develop and implement uniform policies for regulating animal feed (including pet food products). According to the challenger, AAFCO’s model regulations are authoritative in the pet food industry.⁴

AAFCO publishes the Pet Food and Specialty Pet Food Labeling Guide, promulgating a set of model regulations (“Regulations”) governing claims and information on pet food labels, stated the challenger. The Labeling Guide includes guidelines concerning the designation “lite,” and under what circumstances a manufacturer may promote a product as “lite,” the challenger noted. Under these guidelines, a manufacturer must substantiate a “lite” pet food claim with evidence that the product has a metabolizable energy content (“MEC”) below a designated level; for a dry dog food to be labeled “lite,” it may not have an MEC greater than 3100 kcal/kg, argued the challenger.⁵

The Challenger’s Argument that the Advertiser’s Testing Did Not Substantiate its Lite Claims

The challenger argued that the advertiser failed to present sufficient evidence according to AAFCO Model Regulations to substantiate its claims. First, the challenger asserted that the Regulations require that “lite” claims be substantiated using the average calculated calorie content from at least four relevant test runs, and that the advertiser had submitted test data from only three. Second, argued the challenger, the average result from the three tests that the advertiser submitted did not meet AAFCO’s “lite” standard. Additionally, the challenger explained that “AAFCO requires pet food manufacturers to possess very specific testing to substantiate their calorie content claims”; and that “NAD precedent requires advertisers to possess adequate substantiation for their claims at the time the claims are made.” Because Nutro advised that it was still “in the process” of trying to generate supporting data for its “lite” claims during this challenge, argued the challenger, these claims were unsubstantiated when made.

The challenger took issue with the advertiser’s 1998 MEC test results, labeling the results “old.”

³ AAFCO’s web address is: <http://www.aafco.org>. AAFCO publications, including regulations and guidelines, can be ordered through its website.

⁴ The challenger also noted that NAD has relied on AAFCO guidelines to determine whether pet food claims have been substantiated in prior cases.

⁵ The challenger explained that MEC is calculated using a formula (the “Modified Atwater” formula) based on measurements of crude protein, crude fat, crude fiber, moisture and ash in the product.

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Further, the challenger stated that these test results for Natural Choice Lite revealed an average calculated MEC of 3106 kcal/kg, above AAFCO’s maximum allowable threshold of 3100 kcal/kg for “lite” dry dog food products. Rather than substantiating “lite” claims, commented the challenger, the 1998 data indicated that the advertiser “knowingly made false ‘Lite’ claims” as early as 1998.⁶

Next, the challenger considered Nutro’s more recent test results (May 17, 2007) for “a single lot each of its ‘Lite’ dry dog . . . products” inadequate: these data showed an MEC of 3128 kcal/kg, stated the challenger, a value that the advertiser had recognized exceeds AAFCO ME limits. Even if the May 2007 test results had met AAFCO’s limits, they would not substantiate the “lite” claims, because “AAFCO requires the Modified Atwater calculation to be conducted based on analyses of at least four different production lots of a product, not just one lot, as Nutro offered” with the May 2007 results.

The challenger noted that in response to a request for additional information from NAD, the advertiser submitted further test results from two additional production runs of Natural Choice Lite. Thus, stated the challenger, in total the advertiser had submitted MEC figures from three recently conducted tests of Natural Choice Lite: May 17, June 15, and June 21, 2007. The challenger argued that, constituting “one less than the four data points Nutro must have to substantiate its ‘Lite’ claims using the Modified Atwater calculation,” this evidence was insufficient under AAFCO guidelines. Moreover, contended the challenger, the advertiser’s three tests brought the average calculated MEC for Natural Choice Lite to 3118 kcal/kg – still over AAFCO’s maximum allowable threshold.⁷

⁶ The challenger further noted that the “3090 . . . kcal/kg calorie statement[] that appear[s] on current bags of Nutro’s Natural Choice® Lite dog food . . . d[id] not correspond to any of the test results Nutro submitted in this challenge, including its old data.”

⁷ Taking issue with the advertiser’s testing protocol, the challenger argued:

The testing protocol that Nutro attached [to its submission] indicates, without support, that any product samples created at least twenty minutes apart constitute separate “production batches.” This statement seems to suggest that the average MEC for the individual samples from a *single* production run—such as the 3057 kcal/kg result Nutro obtained on June 21—could, by itself, substantiate Nutro’s “Lite” claim, even though Nutro averages the results from *three* separate production runs and cites this as its support in its submission. Nutro’s “20-minute” definition finds no support in AAFCO’s guidelines, nor is there any authority to support it. In practice, samples from different production batches—as is required by AAFCO—are most easily identified on the retail shelf by looking for products that bear different date codes, as Hill’s did in its testing. In fact, AAFCO has issued a guidance memorandum, which is available to the public at <<http://www.aafco.org/Portals/0/Public/Guidance%20DocFinal.pdf>>, describing how animal feed manufacturers should identify different “production batches” (a term the document uses interchangeably with “production lots”) using such codes on the packaging. According to the guidance memo, “All feed and feed ingredients should contain a code that links the individual production lot to production records so as to provide a history of such product. The code should be contained either on the product packaging, labeling, or other distribution records. . .” In any event, Nutro itself cites the average MEC from *three* data points, *one for each production run* it tested—not the average from the individual samples within any single production run—as the relevant final “number” that it claims relates to AAFCO’s “Lite” standard. Nutro’s own method thus recognizes these three results as the relevant data.

The Challenger’s Argument that the Advertiser’s Production Facility Switchover Did Not Undermine the Challenger’s Testing

The challenger took issue with the advertiser’s explanation that the high MEC values obtained by the challenger’s testing might be linked to temporary product irregularities caused by Nutro’s switchover from its Wilson Way production facility to new factories. The challenger argued that it was unlikely that the samples it tested all came from the Victorville, CA plant, as opposed to Nutro’s other production facility in Lebanon, TN, which, argued the challenger, the advertiser admitted has produced its “lite” dry products continuously since 1996. Moreover, argued the challenger, the advertiser had not provided evidence that there were, in fact, such temporary irregularities in its “lite” dry products’ MEC levels at the Victorville facility.

Had the advertiser provided such evidence, argued the challenger, it still had not shown that such irregularities affected any of the specific product samples tested by the challenger; this should have been possible using the date codes the challenger had provided for each test sample.⁸

The Challenger’s Argument that Its Test Results Were More Reliable Than the Advertiser’s, and Proved that the Advertiser’s “Lite” Claims Were False

The challenger argued that its testing was significantly more reliable than the advertiser’s. First, its independent testing followed AAFCO procedures by analyzing samples from more than four different date codes of the products in question, whereas the advertiser submitted only “three relevant data points, two of which (and the average of which) exceed[ed] AAFCO’s maximum allowable MEC.”⁹

Second, argued the challenger, the samples it tested came from products actually available to the public for purchase (which was how it acquired them). It selected the products to be tested based on the date codes printed on the bags, to ensure a range of unique production lots, argued the challenger, and reported these codes with the test results. On the other hand, contended the challenger, the advertiser apparently tested samples coming straight off the production line at one of its facilities (without specifying which one). Additionally, the advertiser did not state whether it tested samples of the same product formula that is now on store shelves and available to

(Citations omitted.)

⁸ Date codes, noted the challenger:

which are found on Nutro’s product packaging, not only indicate a “best before” or expiration date for use by consumers, but also should provide information about the product’s origin to aid the manufacturer in identifying specific production batches in the event of a recall. Nutro should be able to tell from these codes when and where each sample was made, including whether it was produced at the Victorville plant during the alleged relevant timeframe. However . . . Nutro apparently did not analyze the date codes for such information about the samples’ origins.

⁹ The challenger noted that it tested 17 samples from ten different date codes of Nutro’s “Lite” dry canine products.

consumers. Based on such information, argued the challenger, it is impossible to know exactly what the advertiser tested, including whether the three production runs tested were of the same formula and, if so, whether this was the reformulation described by the advertiser.¹⁰

Third, while the challenger submitted samples of the products to an independent laboratory for testing, the advertiser conducted its own testing in-house. The challenger contended that “although in-house testing may be proper in some circumstances and is not per se less reliable, in light of the other deficiencies in Nutro’s data and in light of the delays in Nutro’s submissions and the shifting statements Nutro has made to NAD, this is an additional reason to credit Hill’s results.”

The challenger’s independent testing found that for Natural Choice Lite, the average MEC was 3447 kcal/kg; for Small Bites Lite, it was 3752 kcal/kg. Based on these results the actual average MEC for these products, designated “lite” by Nutro, substantially exceeded (by as much as 20%) the maximum level permitted by AAFCO Regulations (3100 kcal/kg), the challenger contended.

The challenger disputed the advertiser’s interpretation of a specific Regulation, Regulation PF9 (an argument which is described in the Advertiser’s Position section below). Essentially, the challenger disagreed with the advertiser’s position the Regulations “allowed the [caloric] value stated on the label to ‘understate the value determined in accordance with [the AAFCO testing methodology] by [no] more than 15%’.” Rather, contended the challenger, because the advertiser tested its products using the Modified Atwater Formula (instead of an alternative “feeding method”), it was not entitled to this 15% margin.

Moreover, argued the challenger, of the three production runs tested by the advertiser, the results from two of them (May 17 and June 15) were over AAFCO’s maximum allowable MEC of 3100 kcal/kg, as was the average of all three (3118 kcal/kg). The advertiser had admitted, argued the challenger, that it thus did not meet AAFCO’s standard, but contended that the 3100 kcal/kg limit was only suggested and not an absolute limit. The challenger stated that, to the contrary, the plain language of the Regulation indicated that 3100 kcal/kg was “a bright-line threshold.”¹¹

¹⁰ The challenger further noted that, while the advertiser claimed that a reformulation of its Natural Choice Lite recipe “achieved full implementation on or about June 15, 2007,” it did not confirm which of the three production runs it tested contained the reformulated product, if any; nor did it indicate whether the formula(s) tested were currently available on store shelves. Thus, argued the challenger, “[i]f all three production runs that Nutro tested do not represent the currently commercially-available product, then Nutro may not even have three valid data points, let alone the minimum of four that AAFCO requires in order to employ the Modified Atwater formula.”

¹¹ The challenger further noted:

Hill’s understands that Nutro continues to contend that Regulation PF9 allows a 15% “fudge factor” because, Nutro argues, Modified Atwater is a subset of the “testing procedure[s] established by AAFCO” referred to in Regulation PF9(a)(3)(B) and hence is included in the 15% rule set forth in PF9(a)(5)(B). This interpretation is strained and misleading. For instance, PF9(a)(3) uses the disjunctive word “or” to plainly distinguish between the Modified Atwater formula that is described in subpart (A) and the other “testing procedure[s] established by AAFCO” referred to in subpart (B). Similarly, PF(a)(4) requires pet food makers to submit upon

Advertiser’s Position:

In response to the challenge, the advertiser argued that all claims were substantiated and that its “lite” pet food products were labeled in accordance with the standards promulgated by the AAFCO.

Nutro Natural Choice Lite

Caloric Content at Market Introduction

The advertiser explained that when it first introduced Natural Choice Lite into the pet food market in 1994, there were no AAFCO regulations specifying requirements for pet food products designated “light” or “lite.” The challenged products were designated as light by the advertiser because they were lower in fat and protein than other Nutro dry dog foods, both then and now.

In its 1997 Official Publication, AAFCO first published light product requirements in Model Bill Pet Food Regulations, as Regulation PF8(a)(1). These Regulations, noted the advertiser, are currently published under different numbers in the AAFCO Model Regulations for Pet Food and Specialty Pet Food: Regulation PF8 is now PF10, and Regulation PF7 is now PF9.¹² At the time of original publication, the AAFCO Board of Directors delayed implementation of the pertinent Regulations until 1998, stated the advertiser.

Also at that time, PF8 provided that “[d]og food products bearing the terms ‘light’, ‘lite’, ‘low calorie’, or words of similar designation shall contain and state on the label no more than 3,100 kcal ME/kg for products containing less than 20% moisture . . .”; and required that such product’s label bear a calorie content statement in accordance with the format provided in Regulation PF7. PF7, argued the advertiser, “allowed the value stated on the label to ‘understate the value determined in accordance with [the AAFCO testing methodology] by [no] more than 15%’.” This allowance, the advertiser surmised, was in recognition of “the inherent statistical variations produced in metabolic testing.”

The advertiser stated that it completed testing of Natural Choice Lite in early March 1998, according to AAFCO’s methodology contained in the Regulations, to determine the

request an affidavit stating that their product’s calorie content was determined *either* (i) via “calculation” using the Modified Atwater method per Regulation PF9(a)(3)(A) “*or*” (ii) via a metabolizable energy test protocol per Regulation PF9(a)(3)(B). The model regulation’s language thus plainly indicates that PF9(a)(3)(A) and (B) describe alternative, not overlapping, test methods.

(Citations omitted.)

¹² Because the advertiser referred to the 1997 publication, where the Regulations were labeled PF7 and PF8 (instead of the current PF9 and PF10), and because differences exist between the former and current publication, the Regulations are referred to in this section according to the advertiser’s designation.

Metabolizable Energy (“ME”), measured in kilocalories per kilogram (“kcal/kg”), by calculation (*i.e.*, using the Modified Atwater formula).¹³ The results of that testing, explained the advertiser, showed that Natural Choice Lite’s calorie content was 3,106 kcal/kg (calculated). Thus, in further accordance with the Regulations, the advertiser argued that it had listed a caloric value on the product’s label that was no more than 15% less than the calculated ME value, satisfying Regulation PF7(c)(2).

Caloric Content at Present Market Formulation

The advertiser explained that it had recently reformulated Natural Choice Lite and therefore performed caloric testing on it to ensure conformity with AAFCO Regulations. The new test results, stated the advertiser, reflected an ME of 3,128 kcal/kg; however, the results were “culled from the analysis of a single product sample and do not reflect the average ME value of the AAFCO’s recommended four testing samples.” The advertiser highlighted the fact that this result exceeded the AAFCO’s specified ME limit of 3,100 kcal/kg by less than 1.00%. The advertiser argued that calculation of ME is especially sensitive to fat content as well as moisture, fiber and ash content; and that sampling and analysis error in any one of these attributes can be as high as 10%. In addition, the advertiser stated that it continued to conduct further testing to obtain additional data points to determine the ME content more precisely, because it was confident that final test results would evince that the average ME value of Natural Choice Lite satisfied the AAFCO guidelines.

Nutro Natural Choice Small Bites Lite

Small Bites Lite, explained the advertiser, is identical in formulation to Natural Choice Lite, the only material difference being the size of the food pieces. Because of this identical formulation, the advertiser noted that it had performed neither independent market introduction testing nor any reformulation caloric value testing for Small Bites Lite. Rather, the advertiser contended that the analysis for Small Bites Lite paralleled that given for Natural Choice Lite.

Additional Results from and Methodology of Testing

Upon NAD’s request, the advertiser provided additional test results, in the form of a chart of the results of Modified Atwater calorie content analyses performed on batches of Natural Choice Lite. This, noted the advertiser, added to previously submitted (May 2007) caloric content test results from the “first run” of Natural Choice Lite; thus, these additional test results constituted data from the “second and third runs” of Natural Choice Lite. Data from the second run reflected an average ME or calorie content of 3,170 kcal/kgram. Data from the third run reflected an average ME or calorie content of 3,057 kcal/kgram. Together, explained the advertiser, the average calorie content over the second and third runs resulted in 3,118 kcal/kgram for Natural Choice Lite. The advertiser highlighted that, significantly, this number is less than 1.00% over AAFCO’s suggested 3,100 kcal/kgram.

¹³ The advertiser used the Modified Atwater method throughout its calorie content testing, as did the challenger.

The advertiser also explained its testing methodology. It provided a document containing a chart setting forth the advertiser’s “protocol for determining the caloric content of its pet foods products by calculation from proximate analyses.” This document indicated that product samples are collected from a minimum of four production batches, and that in order to assure that the samples are from separate batches (on a continuously-operating packaging line), they are collected in intervals of a minimum of 20 minutes.¹⁴ Further, the advertiser submitted a document containing a “summary of official methods promulgated by the Association of Official Analytical Chemists by which Nutro or an independent testing laboratory determines the proximate analyses that form the baseline for the Modified Atwater calorie content.”

Correction of Opportunity for Personnel to Increase Manufacturing Through-Put

In addition to its explanation that the challenger’s test evidence of caloric values exceeding AAFCO recommendations was a result of product reformulation, the advertiser contended that these high caloric results were partly due to manufacturing anomalies in either or both of Nutro’s manufacturing plants. Specifically, explained the advertiser, certain employees at its production facilities were adding extra fat at the extruder to increase manufacturing through-put, and this practice affected Natural Choice Lite MEC values. In order to end this practice immediately, the advertiser “implemented a strict protocol at its manufacturing plants that completely eliminated the possibility of production fat addition” in an April 5, 2007 memo and, it explained, “[a]s a result, this protocol effected a reformulation of all of Nutro’s pet food products manufactured at Nutro-operated facilities.” Further, explained the advertiser, it “also altered the ingredient ratios of Natural Choice Lite, increasing fiber and decreasing fat, thereby reformulating this product at the recipe level. This reformulation achieved full implementation on or about June 15, 2007.”¹⁵

Decision:

¹⁴ In relevant part, the Protocol document reads:

Finished product samples are collected from a minimum of four (4) production batches. The packaging line operates continuously. To assure that samples are from separate batches, a minimum of 20 minutes needs to pass between samples. . . . Using [results of analysis on protein, fat, fiber, moisture and ash content], the calorie content for each sample is determined by calculation using the “Modified Atwater” formula as outlined in Regulation PF9 – Statements of Calorie Content of the AAFCO Official Publication. The calorie content averaged over the samples is then reported.

¹⁵ The advertiser explained that the above-described temporary manufacturing anomalies were due to a change of manufacturing facilities. Nutro pet food products were originally manufactured only at its first plant, the Wilson Way facility. Nutro has operated a manufacturing facility in Lebanon, Tennessee since 1994, it explained, and the products at issue here have been produced there since approximately January 1, 1996. The last production run of Natural Choice Lite at its original Wilson Way manufacturing plant occurred on April 18, 2005. Although the facility at Wilson Way continued to operate into early 2006, stated the advertiser, Natural Choice Lite was not produced there at the time. Another of its new facilities, the Victorville, California facility, commenced its initial production run of Natural Choice Lite on February 22, 2006.

Undoubtedly, “lite” pet food products will attract consumers in increasing numbers and become ever more important to the pet food industry as a result of the obesity pandemic, which has affected companion animals at the same rates as it has humans.¹⁶ Consumers want to ensure the health of their pets through controlling, among other things, the amount and type of food appropriate for the caloric needs of their animals; but they cannot do so if they do not have access to accurate calorie information. Truthful advertising is essential in this area, both for the health of companion animals who are dependent upon their owners who make choices for them, for consumers in making purchasing decisions, and for the pet food industry as a whole.

AAFCO, a standard-setting organization composed of federal and state animal feed regulators and industry representatives, promulgates model regulations and guidelines to provide a framework for the regulation of animal feed, including pet foods.¹⁷ AAFCO has no regulatory

¹⁶ As the FDA has opined:

Weight Control Products

Obesity in pets is probably the most common nutritional problem today. Reduced calorie products have been on the market for many years. However, following the lead of marketing niches for human foods, more and more “lite” pet food products are now available. FDA regulations promulgated under the NLEA established the rules for human products labeled as “lite,” “low calorie” or similar terms, but do not apply to pet foods.

Recent AAFCO regulations governing the use of terms such as “lite” became effective this year. Under the new rules, the term “lite” must be based on a standard reference for all products, regardless of manufacturer. For example, a “lite” or “low calorie” dry dog food cannot contain more than 3100 kilocalories per kilogram (kcal/kg), while a similarly named dry cat food cannot contain more than 3250 kcal/kg. Canned foods contain much more moisture, so the maximum allowable calories are even lower (900 and 950 kcal/kg for dog and cat foods, respectively).

For products that are reduced in calories but not enough to merit a “lite” claim, the rules also allow for comparative claims. For example, if a company makes a very high calorie product and a lower calorie alternative, it can still make statements such as “25% less calories than our regular product.” A calorie content statement must also appear on any product bearing a calorie-based claim. In addition to “lite” and “low calorie” claims, a similar set of rules were established for “lean” and “low fat” products, except based on maximum allowable fat percentages instead of calories.

A successful weight loss program takes owner involvement, too. Even a “lite” food can cause weight gain if fed to excess. Owners should follow the feeding directions suggested for weight loss, be careful not to give their pets snacks or table scraps, and even institute an exercise program as the pet’s health dictates. Involvement of the veterinarian in the process is also the most prudent in ensuring both the success of the weight loss program and avoidance of potential health risks.

See <http://www.fda.gov/cvm/labelint.htm>

¹⁷ AAFCO defines its goals and purpose in the following manner:

A basic goal of AAFCO is to provide a mechanism for developing and implementing uniform and equitable laws, regulations, standards and enforcement policies for regulating the manufacture, distribution and sale of animal feeds; resulting in safe, effective, and useful feeds. The Association thereby promotes new ideas and innovative procedures and urges their adoption by member

powers. Nevertheless, AAFCO regulations are influential in the pet food industry, and NAD recognizes that government regulators, as well as the pet food industry, accord authority and deference to AAFCO. Its regulations are frequently adopted by state regulatory entities, and the industry often voluntarily complies with AAFCO guidelines. NAD is aware, however, that such compliance is voluntary and not mandated.

The central question in this challenge was whether the advertiser had run afoul of AAFCO guidelines and regulations for “lite” pet food products, and if so, whether that constituted false and misleading advertising. NAD determined that viewing the challenged advertising in its entirety, consumers could reasonably take away the message that Natural Choice Lite and Small Bites Lite were consistently within the AAFCO caloric limits for “light,” “lite” or “low calorie” pet food products.

As an initial matter, NAD found that the advertiser had reasonable basis for its “lite” labeling claims for its Natural Choice Lite and Small Bites Lite in 1997 when the applicable AAFCO Regulations came into effect. The advertiser was under the impression that all manufacturers were entitled to a 15% margin of error in caloric-value labeling under AAFCO Regulations. The advertiser believed that the pertinent Regulation, PF9 (then PF7), “allowed the value stated on the label to ‘understate the value determined in accordance with [the AAFCO testing methodology] by [no] more than 15%’” to allow for “inherent statistical variations produced in metabolic testing.” Regulation PF9 has been revised since its origination due to somewhat confusing wording (an unfortunate aspect of the original Regulations that both sides here have recognized). Due to ambiguous and uncertain text in the original Regulations, NAD found it reasonable to believe that the advertiser was under the impression at the time that it had the benefit of this 15% margin. Additionally, since the advertiser’s initial 1998 testing, assuming the 15% margin, showed that its Natural Choice Lite products were within the guidelines (especially because it was tested on multiple batches – four, as required by AAFCO guidelines) NAD found this argument persuasive and thus, at that time the advertiser had a reasonable basis for its “lite” claims.

Because until recently the advertiser had continuously used the same formula and ingredient ratio for the products, it saw no reason to retest its “lite” products after the revised AAFCO Regulations (with textual clarifications) were in place. While NAD considered that in light of AAFCO’s clarifications it would have been prudent for a manufacturer to review the guidelines and retest its products, given that AAFCO is in fact a guidance organization and not a regulatory

agencies, for uniformity. . . . The purpose of the corporation shall be to establish and maintain an Association through which officials of any state, dominion, federal or other governmental agency and employees thereof charged with a responsibility in enforcing the laws regulating the production, labeling, distribution, or sale of animal feeds or livestock remedies may unite to explore the problems encountered in administering such laws, to develop just and equitable standards, definitions and policies to be followed in enforcing such laws, to promote uniformity in such laws, regulations and enforcement policies, and to cooperate with members of the industry producing such products in order to promote the effectiveness and usefulness of such products.

See <http://www.aafco.org>.

body, NAD found that the advertiser’s failure to retest at that time was not fatal to its position. The advertiser also did not foresee a need for retesting when it began producing its pet food products at two new manufacturing facilities, because its formula was unchanged. Once again, while it might have been judicious to do so, NAD agreed that in the absence of knowledge of manufacturing aberrations, such retesting was not mandatory for continuing “lite” advertising claims.

Similarly, NAD found that the temporary manufacturing irregularities that occurred due to a change of manufacturing facilities were understandable. Once the advertiser had notice of the unauthorized addition of fat to increase product output by certain employees on the manufacturing line, and the corresponding recipe change to its “lite” products, the advertiser took steps immediately to correct the process (through an April 5, 2007 memo to Process Operators which removed the possibility of the practice in the future). NAD noted that this immediate action was necessary and appropriate. While no company wishes to experience such aberrations (and it would be prudent to perform periodic checks to ensure their absence), anomalies in production occur from time to time in all industries. In fact, the possibility of occasional manufacturing irregularities in any product is just one reason why it is essential for manufacturers to make sure that they have quality controls and good manufacturing practices in place.

The advertiser represented that both initially and in its 2007 testing: (i) its testing protocol ensured that “separate batches” were tested; and (ii) that it had consistently tested samples collected from a minimum of four production batches as recommended by AAFCO.¹⁸ NAD accepted the advertiser’s representation that, using its protocol, each batch tested contained a new mix of ingredients; the point of testing different samples would be rendered ineffectual if each sample or batch simply contained the same mix of ingredients, and NAD noted that it is necessary for the advertiser to ensure that each batch or sample taken does in fact contain new ingredients.¹⁹ Moreover, NAD recommended that in the future, prior to introducing reformulated (or new) products into the marketplace (and of course immediately upon knowledge of any manufacturing irregularity), the advertiser test its products strictly according to AAFCO protocol.

¹⁸ In a document setting forth Nutro protocol for caloric content testing, the advertiser represented that “[f]inished product samples are collected from a minimum of four (4) production batches” taken from a continuously-operating packaging line, and that in order to “assure that samples are from separate batches, a minimum of 20 minutes needs to pass between samples.”

¹⁹ The purpose of four-batch sampling appears to be an effort to account for irregularities in adding and mixing ingredients. Moreover, while NAD noted the challenger’s argument that “[i]n practice, samples from different production batches—as is required by AAFCO—are most easily identified on the retail shelf by looking for products that bear different date codes, as Hill’s did in its testing,” NAD also noted that unfortunately, for testing purposes, AAFCO does not provide definitive direction as to how a manufacturer should identify a “batch,” “lot” or “production run.” The challenger’s citation to AAFCO’s document “Guidance/Framework for Best Management Practices for Manufacturing, Packaging and Distributing Animal Feeds and Feed Ingredients,” subpart “Production and Process Controls” (at <http://www.aafco.org/Portals/0/Public/Guidance%20DocFinal.pdf>) describing “Lot Numbers,” while helpful, does not answer this question regarding identification for testing.

Regarding the issue of the 15% allowance of caloric understatement (or 15% “margin”), NAD was not persuaded that the advertiser was entitled to that benefit.²⁰ It is now clear in the updated Regulations that the 15% margin applies only to the “feeding test” and not to the Modified Atwater method of calorie content analysis; a plain reading of the revised text elucidated this point.²¹

While AAFCO is a standard-setting organization providing non-regulatory guidelines, NAD determined that its Regulations are widely accepted as authoritative. For that reason, its caloric maximums for “lite” designations should be adhered to in order to avoid misleading consumers. NAD found that numeric limits, such as the 3100 kcal/kg for dry dog food products, were in fact “bright line” limits and not merely suggestions. The challenger’s test results showed MEC values significantly above this bright line limit. The advertiser had explained that it had attempted to fix its manufacturing aberrations prior to its most recent testing, yet that testing still evinced MEC values above the AAFCO limit. In light of these facts, NAD determined that the challenged products cannot be considered accurately labeled as “lite.” Even small percentages of extra calories, over the course of time, can frustrate attempts at weight loss or weight control, and can even lead to weight gain.

For all of these reasons, NAD determined that as currently formulated, although these products may be described as reduced calorie (as compared to the advertiser’s other dry dog foods), they are not accurately described as “lite.” Consequently, NAD recommended that going forward the advertiser take immediate steps to ensure that its dry pet food products not exceed AAFCO calorie limits for “lite” products at all, and that it immediately cease labeling these products as “lite,” “light,” or any other similar designation until such steps are in place.

Conclusions:

NAD determined that viewing the challenged advertising in its entirety, consumers could reasonably take away the unsupported message that Natural Choice Lite and Small Bites Lite were consistently within the AAFCO caloric limits for “light,” “lite” or “low calorie” pet food products. To avoid the potential for any consumer confusion, NAD recommended that going forward, the advertiser take immediate steps to (i) ensure that the caloric values of its “lite” dry dog food products do not exceed pertinent AAFCO caloric limits (3100 kcal/kg) for such labeling designation; and (ii) ensure that its manufacturing practices and quality controls are precise enough to achieve consistent caloric values before labeling any Nutro dry dog food product as “lite.”

²⁰ Additionally, NAD did not find the advertiser’s argument that calculation of ME is especially sensitive to fat content as well as moisture, fiber and ash content (leading to sampling and analysis error in any one of these attributes as high as 10%, thus entitling a manufacturer to “wiggle room” for each ingredient contributing to an overall error margin) persuasive, either.

²¹ The advertiser (as well as the challenger) consistently used the Modified Atwater formula. NAD noted that use of the “feeding method” to analyze calorie content would be an odd choice, because the Regulations indicate that to calculate the 15% “margin” to which a manufacturer would be entitled, it would have to perform a Modified Atwater analysis anyway to determine the target number from which it could vary.

Advertiser’s Statement:

Nutro Products, Inc. is pleased that NAD has recognized its consistent efforts, both past and present, to comply with applicable pet food regulations, including AAFCO’s definitions regarding “lite” products. Although Nutro Products, Inc. respectfully disagrees that its current formulation of Natural Choice Lite product exceeds the caloric guidelines promulgated by AAFCO, Nutro Products, Inc. agrees that it will take all of NAD’s suggestions into account for its future advertising and make any necessary modifications in accordance with NAD’s recommendations so that its Natural Choice Lite product continues to comply with AAFCO guidelines. Nutro Products, Inc. is a strong supporter of NAD and the self-regulatory process, and wishes to express its appreciation of the care with which this case was handled by the NAD staff. (#4714 SMZ, closed 08/21/2007)