

Case #5023 (05/26/09)

DOMINO'S PIZZA, Inc.

Oven Baked Sandwiches

Advertising Agency:

Undisclosed

Challenger:

Subway Franchisee Advertising Fund Trust

Basis of Inquiry: Comparative taste preference claims made by Domino's Pizza, Inc. in television commercials for its oven baked sandwiches were challenged by Subway Franchisee Advertising Fund Trust. The following are representative of the claims that served as the basis for this inquiry:

“Domino’s oven baked sandwiches beat the taste of Subway’s 2 to 1.”

“The scrumptious taste of Domino’s oven baked sandwiches beat Subway’s in a national taste test 2 to 1.”

“Domino’s oven baked sandwiches beat Subway’s in a national taste test 2 to 1.”

The Challenger’s Position:

I. The Challenger’s Position that the Advertiser makes Unsupported Line Claims:

The challenger explained that Domino’s sells five sandwich varieties: Philly Cheese Steak, Chicken Parm, Italian, Chicken Bacon Ranch, and Veggie, all of which are oven baked and sold at Domino’s retail locations throughout the United States.

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In its advertising, Domino's expressly compares its line of sandwich products to the Subway sandwich product line. The challenger asserted that such comparative claims require adequate substantiation meeting NAD standards for consumer taste preference claims but noted that the advertiser bases its product line comparisons on a taste test which tested some, but not all, of the Domino's sandwiches to only three Subway sandwiches out of the 16 to 20 sandwiches that are typically available at Subway restaurants. As such, the challenger asserted, the taste test does not support the advertiser's comparative taste claims.¹ Indeed, the challenger noted, the advertiser did not test every product in its own product line (the Chicken Parm sandwich).

The challenger rejected the advertiser's position that its use of the possessive form of the word "subway" (i.e., "Subway's), in its claim makes clear that, in context, the comparison being made is to the challenger's Fresh Toasted sandwiches. The challenger argued that a cursory viewing of the challenged commercials reveals that this assertion is patently false. In the commercials, the use of the possessive form of Subway is used by the announcer in the opening sequence of the commercial and again by a voiceover later in the commercials. However, both commercials close with a shot of Domino's products (including a pizza that was not tested) with a super in large font at the top of the screen that reads: "[DOMINO'S PIZZA LOGO] BEAT SUBWAY [sic] IN A NATIONAL TASTE TEST 2 TO 1."

Further, the challenger noted, the commercials employ a variety of imagery unconnected to the products tested. In the "dog jumping" sequence, the announcer states: "This jump represents the number of people who prefer Subway [sic]" and in the "IQ" commercial, the announcer states: "an average 5th grader's IQ represents the number of people who prefer Subway". In the "choir" commercial, the choir director simply compares "Domino's Oven Baked Sandwiches" to "Subway". Even if the advertiser's strained grammatical argument were credible (which the challenger asserted it is not), it is simply not true that use of the possessive form of Subway was used in each instance. Indeed, one commercial ends with the voiceover: "Who beat Subway in a national taste test? Domino's!" (emphasis added). Thus, the most impactful visuals and voiceovers in the commercials used the word Subway not in the possessive form.

Further, the commercials consistently display four of Domino's Oven Baked Sandwiches even though only three were tested and the closing product shot which displays the super: "[DOMINO'S PIZZA LOGO] BEAT SUBWAY [sic] IN A NATIONAL TASTE TEST 2 TO 1" features not only the four Oven Baked Sandwiches but one of Domino's *pizzas* as well. Clearly, the challenger maintained, this visual conveys a broad product line comparison to any reasonable observer. The challenger asserted that if the advertiser genuinely wanted to make it obvious that its comparison claims related to Subway's Fresh Toasted line, it could have simply and expressly referred to the Fresh Toasted line in the advertisements (e.g., "Domino's oven baked sandwiches beat the taste of Subway's Fresh Toasted sandwiches 2 to 1."). Instead, the challenger argued, the advertiser left it to consumers to connect the dots by following a chain of deductions.

¹ Indeed, the challenger asserted that the claim "Domino's oven baked sandwiches beat Subway's in a national taste test 2 to 1," is an establishment claim that conveys the message that the taste test establishes the truth of the taste preference claim but, given its fatal flaws, fails to meet the very high standard of proof required for such claims.

II. The Challenger's Position that the Advertiser does not Possess Adequate Substantiation for its Taste Preference Claims or its Establishment Claims:

A. Consumer Preference Claims

i. *The Taste Test does not Adequately Simulate the Consumer Experience of a Subway Customer*

According to the challenger, the Taste Test Summary provided by the advertiser establishes that it is fatally flawed with respect to the manner in which the tested sandwiches were provided to respondents. Although carefully designed to closely simulate the typical experience of a consumer ordering and consuming a Domino's sandwich, the challenger stated that it did not simulate the typical experience of a Subway customer.

In the first instance, the challenger contended, the Subway sandwiches were not ordered and delivered in a customary manner, which undermined the overall quality of the sandwiches. According to the Taste Test Summary, the sandwiches were purchased in large quantities at Domino's and Subway locations that were equidistant to the testing facility, or Domino's was placed at a slight distance disadvantage", presumably meaning that the Domino's location was at times slightly farther from the facility than the Subway location.

The challenger explained, however, that the typical product order and delivery process for parties' respective products is markedly different. Generally, consumers call a Domino's store and order food for delivery over the phone. The order is then delivered to the consumer's location within 30 minutes. Further, Domino's sandwiches are "super-heated" to 450 degrees to account for delivery time. In contrast, Subway customers typically visit a Subway store to order food, and the food is consumed at the store immediately after it is ordered, or the consumer transports the food from the store and consumes it shortly thereafter.² Therefore, the time between food preparation to consumption is typically less for Subway sandwiches than Domino's sandwiches.

In the taste test, the Subway sandwiches were delivered to the testing facility in much the same manner and generally in the same amount of time as the Domino's sandwiches, placing the Subway sandwiches at a disadvantage, the challenger argued, because its sandwiches are not delivered in this fashion, and they are prepared for immediate consumption, not for delivery, as are Domino's sandwiches. Thus, the delay in serving the Subway sandwiches to the respondents unfairly compromised the hotness and overall quality of the sandwiches.

Second, the challenger offered, its restaurants typically prepare small orders of sandwiches at a relatively fast rate compared to Domino's and are not equipped to prepare large orders of toasted sandwiches as quickly as Domino's stores. Thus, the Subway sandwiches used in the Domino's

² Given that Subway has between 3 and 4 restaurant locations for every Domino's location, the challenger maintained that many consumers who take an ordered Subway sandwich home have a relatively short distance to travel, and likely will begin to consume their sandwich within less time than a Domino's customer.

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taste test sat idle longer before being transported to the testing facility which, undoubtedly had an adverse effect on the hotness and perceived quality of the tested Subway sandwiches.

The fact that Subway restaurants' business has a significant carry-out element does not alter this point. Further, although the advertiser cites efforts to follow traditional in-store procedures in food preparation, the taste test methodology fails to evidence these procedures. Further, the challenger argued that the advertiser's suggestion that the test method involving in-store ordering of items not placed in heating packs, simulates its own sandwich delivery process is misplaced as the bulk of the advertiser's business is delivery-oriented.

Similarly, to the extent that the advertiser argues that the differences in temperature at which the tested sandwiches were consumed reflects a flaw in the preparation of toasted Subway sandwiches, the challenger countered that its sandwiches are prepared for consumption within a relatively short period of time because customers typically consume the sandwiches soon after preparation. This is not a flaw in the production of Subway sandwiches. Subway's process of preparing toasted sandwiches aims to ensure that most customers eat their sandwiches at an optimal temperature and the challenger contended that most of the participants in the taste test may have preferred the Subway sandwiches had they all been served 10-15 minutes after preparation instead of 25 minutes. Had such been the case, participants might have found that the advertiser's sandwich was too hot and that the temperature undermined the taste, whereas the temperature of the Subway sandwich was just right. Using the advertiser's logic, the challenger argued, this would reflect a flaw in the preparation of Domino's sandwiches.

The challenger further argued that the taste test methodology recommends that sandwiches not be cut, noting that this is inconsistent with the consumer preparation of the sandwich which are cut in half and additionally affects the heat level of the sandwiches (i.e., not cutting them preserves internal heat.)

Lastly, the challenger explained that it offers various types of bread and numerous "fixings", whereas Domino's offers only one type of bread and fewer fixings. Subway customers select exactly what they want on their sandwich, and servers only put what the customer has selected on the sandwich. By contrast, specific ingredients are included on Domino's as a default, and consumers can have certain items removed from the sandwich upon request. Thus, Subway sandwiches are made-to-order, Domino's sandwiches essentially are ready-made.

The Taste Test Summary does not indicate which type of bread was used on the Subway sandwiches. Presumably, the challenger argued, the advertiser did not test all or a sufficiently representative sample of Subway's various bread types such that it cannot substantiate the unqualified taste preference claims made by Domino's. Further, the Subway sandwiches used in the test were prepared with the fixings as specified on Subway's website for each sandwich. However, Subway's website provides a list of sandwiches with particular fixings merely as an example of sandwich components, not as a specification of the default sandwich compositions or even as a suggestion. In fact, the website states that the customer can alter this formula by choosing different vegetables, condiments and breads.

The challenger noted that participants in the advertiser's taste test were not given these choices. Rather, each was given a Subway sandwich that was prepared according to the testers', not the respondents', discretion. As participants were not able to choose their own bread and fixings, and because the Domino's taste test did not include a sufficiently representative sample of the various sandwich components, the taste test is unreliable and inadequate to support the advertiser's taste preference claims.

ii. The Sample Consumer Universe in the Taste Test was too Broad

The challenger noted that, with respect to consumer history, the criteria used in selecting qualified respondents for the taste test was that they (1) must have purchased and eaten a sandwich in past month from a fast food or quick serve restaurant; (2) must eat a sandwich from a fast food or quick service restaurant at least once a month; and (3) must consider eating the ingredients in at least one of the tested sandwiches. These criteria, the challenger averred, did not sufficiently limit the universe of qualified respondents. The tester should have developed criteria that would require respondents to have previously consumed at least one of the specific types of sandwiches involved in the test, not just any sandwich from a fast food or quick serve restaurant.

In support of its position, the challenger relied on the case of Int'l Home Foods, Inc., wherein the advertiser presented a taste test as support for its 2 to 1 preference claim regarding its solid white tuna in water product.³ In that case, NAD observed that a consumer was qualified to be a respondent if he or she was "the primary grocery shopper in the household who has served canned tuna in the past 30 days."⁴ NAD was not only concerned that the sample universe included consumers who merely purchased and served the product, it was also concerned that the sample universe included consumers who may have consumed a variety of tuna that is significantly different from the advertised product, but who have never actually consumed the advertised product (i.e., NAD mentioned chunky tuna in vegetable oil as an example of a variety of tuna that is significantly different from the advertised product – i.e., solid tuna in water).⁵ In the end, NAD found that the taste test was unreliable in part because the sample universe "may well have included respondents unfamiliar with the advertised product."⁶

Here, the challenger argued, the taste test similarly failed to sufficiently limit the sample universe to consumers who are familiar with at least one of the tested sandwiches. The criteria employed did not ensure that the respondents have actually consumed, for example, a chicken bacon ranch, Italian, or Philly cheese steak sandwich. Indeed, the sample universe in the advertiser's test may well have included consumers who consumed only hamburgers or breakfast sandwiches from a fast food restaurant, but never one of the types of sandwiches tested. Given that the sample universe of consumers in the taste test was too broad, the results are unreliable.

³ Int'l Home Foods, Inc. (Bumble Bee Tuna), Report #3486, *NAD/CARU Case Reports* (Sept. 2008).

⁴ Id.

⁵ Id.

⁶ Id.

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The challenger rejected the advertiser's contention that its sample universe was not overbroad because potential respondents were screened to ensure that each had previously purchased a sandwich from a sandwich restaurant, and because 91% of the participants reported that they had purchased from Subway within the previous three months. The challenger asserted that NAD precedent makes clear that taste tests should be designed so that all of the participants have previously consumed at least one of the *specific types* of food tested or a sufficiently similar type of food.⁷ It is not sufficient that all of the respondents have previously consumed an item in the same broad food category as the tested foods (e.g., sandwiches), or consumed food products from the particular companies involved (and, in any event, not all of the respondents in the taste test reported that they consumed either parties' sandwiches).

Accordingly, the sample consumer universe was overbroad because it was not limited to consumers who have previously consumed at least one of the types of sandwiches tested or a substantially similar sandwich, thereby undermining the reliability of the taste test.

iii. The Taste Test Did Not Test a Sufficiently Wide Segment of the Subway Sandwich Product Line to Support a Broad, Product Line Comparison.

The challenger asserted that the comparative taste claims refer to entire the Domino's and Subway product lines, not specific products. For example, one commercial claims: "Domino's oven baked sandwiches beat the taste of Subway's 2 to 1." However, a super at the bottom of the screen states: "Taste preference based on a national taste test by an independent research company of Domino's oven-baked sandwich varieties; Philly Cheese Steak, Chicken Bacon Ranch and Italian vs comparable Subway fresh toasted sandwich varieties – Steak & Cheese, Chicken & Bacon, Italian BMT."

It was the challenger's position that a taste test involving only these products does not support a broad product line comparative claim. The challenger explained that each of its restaurants has a minimum of 16 sandwiches varieties, and most offer 20 or more sandwiches. In addition to the sandwiches that were tested, the Subway line of fresh toasted sandwiches also includes Meatball Marinara, Spicy Italian, and Subway Melt. Moreover, *any* of the 16 or more sandwiches at a given Subway location can be toasted upon request. As such, the challenger argued, the advertiser's taste test did not test a sufficient sample of its sandwiches to substantiate a product line taste preference claim.

The challenger asserted that this conclusion is consistent with NAD precedent noting that in the case of General Mills, Inc., NAD found that the advertiser's product line taste preference claim was not supported by testing on less than one quarter of the challenger's relevant product flavors.⁸ The advertisements in that case compared the advertiser's Toaster Strudel product with the challenger's Pop-Tart product and NAD determined that testing on a larger sample of the challenger's product line was necessary to substantiate the taste preference claim:

⁷ Int'l Home Foods, Inc., NAD Case Report No. 3486 (Sept. 2008).

⁸ General Mills, Inc. (Pillsbury Toaster Strudel Frozen Toaster Pastries), Report #4867, *NAD/CARU Case Reports* (June 2008).

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Although there are 39 different flavors of Pop-Tarts, the advertiser tested only 9 of those flavors. While NAD understood the advertiser's rationale in seeking to test like flavors between brands, NAD determined that comparative testing on less than one quarter of Pop-Tarts' flavors was not sufficient to support a brand-wide taste preference. NAD noted that Pop-Tarts come in a wide variety of flavors . . . With such a broad and varied product line, NAD would expect testing on – if not all – at least a much wider and more representative segment of the line.⁹

Similarly, the challenger asserted, in Papa John's International, NAD found that the advertiser's taste test, which compared only the advertiser's and challenger's regular and thin crust pizzas, did not support a broad claim that the advertiser's pizza was superior to all of the challenger's pizzas.¹⁰ NAD observed that the challenger's pan pizza, which was not subjected to the taste test, was its best selling pizza, and thus the advertiser could not make an unqualified comparative claim targeting the challenger because it did not test its pizza against the challenger's pan pizza.¹¹

Here, the challenger pointed out, the advertiser tested only three of the minimum 16 sandwiches that each Subway location offers and which come in a wide range of flavors and types, from Flatbread Chicken Florentine to an all-vegetable sandwich to sandwich wraps. The percentage of Subway sandwiches that were tested (at most 18.75%), is less than the percentage of Pop-Tart varieties that were tested in General Mills, Inc. (23%).

Additionally, the challenger maintained, the advertiser's taste test wrongly compared the Domino's Philly Cheese Steak sandwich to Subway's Steak & Cheese sandwich, although Subway has a more comparable Philly Cheese Steak sandwich which uses an entirely different type of steak than the Subway Steak & Cheese sandwich, is more popular, and sells at a much lower rate than the Philly Cheese Steak.

As such, the challenger contended, the taste test did not test an adequate segment of the Subway sandwiches product line to substantiate the broad, comparative product line taste preference claims made.

To the extent that the advertiser repeatedly refers to a distinct line of Subway "Fresh Toasted" sandwich products, the challenger asserted that no such distinct line exists. Although acknowledging that there exists a "fresh toasted" section on subway.com site and on certain in-store menu materials, the challenger asserted that this is merely to suggest certain subs which are recommended for toasting. In fact, the challenger noted, *any* sub on its menu can be toasted, and each Sandwich Artist customarily asks at the time of ordering if the customer would care to have the sub toasted. As early as 2004-2005, when the toasted option was launched in its current form, in-store materials noted both the recommendation of certain subs as good options for toasting and customers' concurrent ability to have *any* sub "Fresh Toasted". The challenger asserted that, in this respect, the advertiser improperly alters the universe of the taste test.

⁹ Id.

¹⁰ Papa John's International (Papa John's Pizza), Report #3450, *NAD/CARU Case Reports* (March 1998).

¹¹ Id.

Insofar as the advertiser contends that a static standard build must be used in taste testing, lest customizable products be shielded from competitive scrutiny to the detriment of other advertisers who have been subject to testing analysis, the challenger countered that the advertiser mischaracterizes its position. First, rather than claiming the sandwiches are “untestable” (as the advertiser suggests), the challenger asserted that the advertiser failed to expose the test pool to a large enough number or range of available Subway sandwiches to substantiate its overly broad, unqualified comparative taste claim.¹² In the instant case, however, the challenger asserted that the products being compared were not clearly identified. The advertiser opted to employ a taste test as a basis for its claim of general preference, but only identified the narrow range of tested products in an inadequate disclosure (discussed below).

Contrary to the advertiser’s assertion, the taste test did not involve an apples-to-apples comparison. For example, the advertiser tested Subway’s Italian B.M.T. sandwich without cheese against its own Italian sandwich, which contains melted provolone cheese. To the extent that the advertiser asserted it did so based upon the challenger’s listing of specific ingredients for its sandwiches on its web site, the challenger countered that the web page cited by the advertiser is an informal description of the and noted that a comprehensive “Sandwich Components” chart is available on a different sub-page of www.subway.com and is readily accessible on that website. As described in that chart, Subway’s Italian B.M.T. comes with “Genoa salami, pepperoni, ham, *cheese* and standard vegetables”¹³ (emphasis added). Further, although the web page cited by the advertiser does not specifically list cheese in the *textual* description of the sandwich, the photograph of the sandwich immediately above that text on the very same page clearly depicts melted cheese.

To the extent that the advertiser asserted that all sandwiches tested were prepared with their *traditional* ingredients” the challenger contended that it is widely understood that a traditional Italian sandwich contains cheese as a standard ingredient. Further, as a matter of practice, the Sandwich Artist asked each customer ordering an Italian B.M.T. at Subway if they would like cheese added to their sandwich. Thus, one would have to ignore all evidence that the Subway Italian B.M.T. is typically made with cheese and specifically decline the Sandwich Artist’s inquiry about cheese in order to obtain the sandwich tested by the advertiser

The reality is that despite multiple images on Subway’s website depicting the Italian B.M.T. with melted cheese, despite the official “Sandwich Components” page on the Subway website listing cheese as a standard ingredient in the Italian B.M.T., and despite the traditional understanding that an Italian sandwich contains cheese, the advertiser selected a less favorable composition for Subway’s Italian B.M.T., one that would put it at an obvious disadvantage to a its own sandwich with melted provolone cheese in a comparison based solely on taste.

¹² The challenger asserted that the advertiser is free to draw comparisons between its sandwiches and Subway’s – including dissimilar sandwiches but that, consistent with NAD standards, it must clearly and conspicuously disclose the objects of the comparison. Given the numerous fixings Subway offers, and given that its customers choose the fixings that are included in their sandwiches prior to purchase, the advertiser must disclose the ingredients of the tested sandwiches when it makes taste comparison claims based on its taste test.

¹³ See <http://www.subway.com/subwayroot/MenuNutrition/Nutrition/sandwichComps.aspx>.

Likewise, the challenger also rejected the advertiser explanation of why it chose to test against the Subway Steak and Cheese instead of the Big Philly Cheesesteak, on the logic that the Big Philly Cheesesteak was (a) not nationally available at the time of the test; and (b) not analogous to a "Fresh Toasted" item. Each of these assertions, the challenger contended, is wrong.

The taste test was conducted between October 13 and October 29, 2008. According to the challenger's sales information The Big Philly Cheesesteak was available for sale during that time period and therefore available for inclusion in Domino's taste test. Further, the challenger asserted, its Big Philly Cheesesteak is an analogous product, more suitable for comparative testing.

Further, to the extent that the advertiser claims that the Big Philly Cheesesteak and the Domino's steak offering are similar only in terms of their names (or similar "in name only") the challenger countered that this is to disregard the fact that a name is a very powerful indicator to consumers, who would very likely assume that two sandwiches, both named "Philly Cheese Steak" would be similar products and, indeed, the ingredients match and to suggest that the Big Philly Cheesesteak is not a suitable point of comparison is ridiculous.

iv. The Super Disclosing the Names of the Sandwiches Tested Contradicts and Inadequately Qualifies the Taste Preference Claims Made

Noting that a disclaimer intended to qualify a claim is inadequate to prevent inaccurate consumer perceptions if it contradicts the main message of the advertising, the challenger asserted that the taste preference claims being made here (e.g., "Domino's oven baked sandwiches beat the taste of Subway's 2 to 1.") are unqualified and that the super intended to limit the comparison to certain sandwiches substantially contradicts this broad, product line comparison claim. The commercials contain a disclaimer stating, "Taste preference based on a national taste test by an independent research company of Domino's oven-baked sandwich varieties; Philly Cheese Steak, Chicken Bacon Ranch and Italian vs comparable Subway fresh toasted sandwich varieties - Steak & Cheese, Chicken & Bacon, Italian BMT."

The disclosure is inadequate for several reasons. First, it appears in small text super at the bottom of the screen during approximately the first five seconds of the fifteen-second commercial and only the first eight seconds of the thirty-second commercial. Second, the text is in white font against a silver background (a stainless steel counter) rendering it extremely difficult to read. Third, throughout the commercials, voiceovers, images, and significantly more prominent text communicates the broad product line comparison. Fourth, the commercials end with a shot that includes a Domino's pizza and a super that reads – "[DOMINO'S PIZZA LOGO] BEAT SUBWAY [sic] IN A NATIONAL TASTE TEST 2 TO 1." NAD precedent establishes that the disclosure is woefully inadequate in terms of prominence and contradicts the unqualified claim that Domino's oven baked sandwiches are preferred 2 to 1 over Subway's. As such, the challenger maintained, the disclosure does nothing to cure the inaccurate product line taste preference message conveyed.

Advertiser's Position:

The advertiser explained that in September 2008, in an effort to expand its brand, it entered a new market by introducing a special line of Oven Baked Sandwiches. Each of the challenged commercials begins by featuring an announcer in front of a large pizza oven who communicates that, per the advertiser's taste test, consumers prefer Domino's Oven Baked Sandwiches over Subway's 2 to 1. Then, each commercial shows various humorous demonstrations of the ratio of 2 to 1. The advertiser added that each commercial contains prominent disclosures that qualify the preference claim by listing the particular sandwich products that were tested.

I. The Challenged Advertisements do not Constitute Product Line Comparison as Against all Subway Sandwiches:

To the extent that the challenger asserts that the comparison being made is to the complete Subway sandwich product line, the advertiser countered that the specific comparison to Subway's Fresh Toasted product line is clear from a simple grammatical analysis of the challenged claims. In every instance, the possessive form of Subway ("Subway's") is used in the claim "Domino's oven baked sandwiches beat the taste of Subway's 2 to 1." The word "Subway's" refers to the sandwiches that Subway customarily heats in an oven in comparison to those that Domino's heats in an oven. The obvious comparison here, the advertiser averred, is to Subway's Fresh Toasted sandwiches product line. Moreover, the advertisements specifically disclose the sandwiches compared in a conspicuous and simple disclosure.

II. Domino's has Reliable Substantiation for its Taste Preference Claims:

The advertiser explained that the researchers conducting the taste test used industry-standard protocols, including the ASTM Standard Guide for Sensory Claim Substantiation, in designing the test that serves as the basis for the challenged taste preference claims. The advertiser noted that, as the challenger pointed out, NAD requires taste tests to: (1) be double blind; (2) test comparative products; (3) involve a geographically dispersed sample that reflects the target market; (4) compare products with a similar shelf life; (5); purchase tested products in the test market; (6) prepare both products according to instructions; (7) present and test products in the same way; (8) require test subjects to cleanse their palate prior to tasting each product; (9) produce statistically significant results; (10) offer test subjects a "no preference" option.¹⁴ The advertiser stated that its taste test comports with these guidelines for taste test protocols and methodology.

Researchers recruited test subjects above the age of eighteen who had purchased and eaten sandwiches during the past month. Ninety-one percent of these respondents had purchased sandwiches at Subway within the past three months. The taste test consisted of over 900 interviews divided over the three sandwich types that are comparable between Domino's and Subway.¹⁵ The interviews were spread evenly over eight geographically dispersed markets

¹⁴ See, International Home Foods, Inc. (Bumble Bee Tuna), Report #3486, *NAD/CARU Case Reports* (Sept. 1998).

¹⁵ Over 300 interviews were conducted for each of the comparable sandwiches, including the Domino's Oven Baked Philly Cheese Steak versus the comparable Subway Fresh Toasted Steak & Cheese, the Domino's Oven Baked

within the United States. Further, identical procedures were established and followed in all testing locations. All sandwiches tested were purchased from actual Domino's or Subway stores, prepared with their traditional ingredients, and heated according to Subway or Domino's traditional in-store procedures. Each test subject tasted two comparable sandwiches (brand blinded), and the order in which the sandwiches were tasted was rotated. Also, each test subject was instructed to cleanse his or her palate before tasting each sandwich. Once both sandwiches were tasted, test subjects were asked which sandwich tasted better. Test subjects were provided with the option to choose either sandwich or "no preference." According to the advertiser, the final results of the taste test were significant at a 95% confidence level, and all three sandwich types that were tested were identified in the advertising that was created based on the results of the test.¹⁶

i. The Domino's Taste Test Simulates the Consumer Experience

Contrary to the challenger's assertions, the advertiser stated that the taste test was designed specifically to simulate the typical experience of a consumer ordering and consuming both parties' sandwiches.

As the challenger admits, the advertiser explained that the taste test accurately simulated a carry-out experience that is typical for a Domino's customer. However, contrary to the challenger's contention, the advertiser further maintained that its taste test was also fairly designed to simulate the carry-out experience that is typical for a Subway customer. The taste test employed runners, each of whom was given exact timing requirements for each step of the process of ordering and transporting Subway sandwiches to the testing facility. The sandwiches arrived for testing at the same time and were immediately plated for serving. Importantly, to regulate the temperature of the sandwiches to closely resemble realistic buying conditions, the strict schedule for runners was designed to ensure that all sandwiches tested could stand idle only for an amount of time that was specifically approximated to a Subway or Domino's customer's carry-out experience.¹⁷ In fact, the runners did *not* use the Domino's HeatWave bag to transport the Domino's sandwiches; rather, all sandwiches were transported in the wrappings ordinarily used by each store for carry-out purposes: Domino's wraps its sandwiches in wax paper and a cardboard box and Subway wraps its sandwiches in wax paper and a plastic bag.

Further, the researchers conducting the taste test selected store locations to ensure that Subway was never prejudiced by the time involved in transporting the sandwiches. Where necessary, if there ever was a difference between the two stores in terms of distance to the testing facility, the

Chicken Bacon Ranch versus the Subway Fresh Toasted Chicken & Bacon Ranch, and the Domino's Oven Baked Italian versus the Subway Fresh Toasted Italian BMT.

¹⁶ To the extent that the challenger argues that the claim "Domino's Oven Baked Sandwiches beat Subway's in a national taste test 2 to 1" is an establishment claim, the advertiser reiterated that it has adequate substantiation for its claim because a national taste test was conducted and the reliable results of the test demonstrate the advertised consumer preference.

¹⁷ Even though Subway clearly markets the Fresh Toasted sandwiches as a separate product line, and such sandwiches are listed under the heading "Fresh Toasted" on Subway menus, the advertiser noted that consumers may have to request that the Fresh Toasted sandwich be toasted. As this taste test was designed to replicate the consumer experience, runners were specifically instructed to request that their orders be toasted as well.

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researchers ensured that the Domino's store was further away from the testing facility and was therefore subject to any disadvantage.

The advertiser rejected the challenger's contention that the short time from the Subway stores to the testing facility may have "placed the Subway sandwiches at a disadvantage because . . . they are prepared for immediate consumption, not for delivery, as are Domino's sandwiches." Citing NPD Consumer Reports on Eating Share Trends a leading market research company, the advertiser stated that nearly 70% of Subway's business is carry-out.¹⁸ Subway restaurants may be many in number, but they offer limited seating capacity as compared to the volume of sandwiches Subway is prepared to produce. In addition, Subway wraps all of its sandwiches and provides customers with plastic bags with handles. Thus, essentially, all Subway sandwiches are wrapped to be carried out of the store. Moreover, the advertiser pointed out, as the challenger's new advertising campaign in New York City promoting delivery and pre-order via the Internet and text messaging demonstrates, its Fresh Toasted Sandwiches *are* prepared for carry-out and are even available for delivery in at least some markets. Therefore, the sandwiches certainly must be prepared for such transport time despite the challenger's declarations to the contrary.¹⁹

With respect to the challenger's argument that customers may order and take their sandwich from the restaurant, but they generally eat the sandwich reasonably soon thereafter, the advertiser countered that the challenger fails to cite any proof for this statement nor does it appear to be a reasonable conclusion based on the sheer numbers of customers that carry-out their Fresh Toasted Subway sandwiches. The advertiser asserted that the test was designed to specifically limit the transport distance and time for all of the sandwiches tested in order to replicate consumer-relevant circumstances and without proof to the contrary, that challenger has no basis to attack the relevance and appropriateness of the study's design.

To the extent that the sandwiches may have been consumed at different temperatures, the advertiser stated that this factor is not a flaw of the taste test design but, rather, is a flaw of the Fresh Toasted sandwiches' production. The advertiser explained that it entered the sandwich market because it saw that it could provide a unique value to consumers: its standard-issue pizza ovens offer unbeatable heating capabilities. Thus, the advertiser sought to offer consumers, who have neither the time nor the desire to sit and eat in a quick service restaurant a tasty and hot alternative delivered right to their home or office. As such, the independent researchers designed a sophisticated study that replicated real-world sandwich-eating conditions. The obvious reality of the situation is that the challenger's sandwiches may get cold faster because of the differing heating techniques and packaging employed by the restaurants. This is not a flaw in the taste test's design because the researchers consciously controlled the study to ensure the temperatures of the sandwiches were consistent with the consumer experience. However, the advertiser

¹⁸ Source: NPD, Consumer Reports on Eating Share Trends (CREST) (2008).

¹⁹ The advertiser stated that Subway sandwiches are marketed nationwide and, therefore, must be consistently prepared across stores that do and do not offer delivery services. Also, through the subwaynow.com service, Subway sandwiches are made available for pre-ordered pick up service. One may assume that Subway is aware of the fact that such pre-ordered sandwiches must sit idle for varying periods of time depending on the consumer and the efficiency of the Subway store in processing orders.

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contended, flaws in the challenger's customer's carry-out experience (i.e., sandwich may get cold if the customer is unable to eat it right away) cannot be blamed on a well-designed taste test.

Insofar as the challenger asserts that the taste testers ordered large quantities of toasted sandwiches for use in the test, the advertiser countered that this is simply not true. The challenger argues that its stores "are not equipped to prepare large orders of toasted sandwiches," and placing large orders would cause the tested sandwiches to sit idle longer which would contribute to an adverse affect in the perceived taste." However, the advertiser noted, lрге quantities of sandwiches were not, however, purchased from a single location. Given the abundance of Subway restaurants (even as touted by the challenger), the taste testers were able to purchase sandwiches from more than one Subway location so that one store would never have to prepare more than 4 or 5 sandwiches per tasting.

The advertiser rejected the challenger's suggestion that because it permits consumers to customize their orders Subway sand wiches are not testable and noted that the challenger's own web site, in many cases, lists very specific ingredients for each Fresh Toasted sandwich option. In any event, the advertiser argued, the ability to customize sandwiches is not unique to the challenger as it, too, offers numerous fixings for its own sandwiches. Nonetheless, each Oven Baked and Fresh Toasted option comes with a standard set of ingredients, and the researchers ordered only sandwiches containing the standard ingredients from both Domino's and Subway. The advertiser asserted that to conclude that one cannot conduct a taste test using only standard ingredients of potentially customizable food products would improperly serve to shield customizable sandwich products from competitive scrutiny, and be unfair to all competitors in the industry whose customizable food products have been subject to taste testing.

According to the advertiser, the challenger's argument is insufficient to overcome the reliable results of its well-constructed study. Further, the advertiser posited, consumers can make judgments about a food product regardless of the fact that they may customize it differently at a later time and the mere fact that a food product can be customized should not preclude it from being tested.

In any event, the advertiser stated, researchers were cognizant of the fixings issue and devised a method whereby any such "fixings bias" was minimized. Consumers were screened to ensure that any of the ingredients on the sandwiches would not make the sandwiches unpalatable. The sandwiches tested included the ingredients that were listed on the website and consumers who tasted each sandwich did not have a dislike of any of the specific ingredients on the sandwich (so as not to bias the results). Test subjects were also given salt, pepper, mustard and mayonnaise packets to use at their discretion to tailor their sandwiches to their desired preference.

ii. The Sample Consumer Universe Tested Was Appropriate

The advertiser stated that the sandwich consuming universe that was included in the taste test was screened to ensure every participant had purchased sandwiches from sandwich restaurants. In fact, 91% of the respondents had purchased Subway sandwiches within the three months preceding the taste test. The testing universe was therefore appropriate for the test conducted.

The advertiser further asserted that the challenger's reliance on the case of International Home Foods, Inc. (Bumble Bee Tuna) is misplaced.²⁰ In that case, NAD was concerned that the inclusion of test subjects who only consumed significantly different tuna products from those being tested, and not products similar to those being advertised, would undermine the test results (i.e., chunky tuna in oil versus solid white tuna in water). Here, however, the vast majority of test subjects had recently purchased Subway products and all subjects had purchased and eaten sandwiches or subs in the month preceding the test. Accordingly, the taste test researchers took adequate steps to make certain that the sample universe was appropriately screened and qualified to allow for reliance on the taste test results.

Thus, the advertiser asserted, respondents were screened to ensure that they were within the category of sandwich consumers and further screened to ensure that they would consider eating all of the ingredients found in any of the sandwiches to be tested. Such techniques, the advertiser asserted, are consistent with standard testing protocol.

The advertiser rejected the challenger's contention that the taste test should have selected only those respondents who "previously consumed at least one of the *specific types* of food tested", countering that to have done so would have compromised the legitimacy of the test. According to the advertiser's expert, had there been additional filter questions regarding the specific sandwiches involved in the test, respondents may have been alerted to the identity and even the source of the tested products. Such would have compromised the validity of the taste test because (1) respondents may have brought their preconceived notions about the specific products to the testing facility, and (2) certain respondents may have even been prompted to try the products at Subway and/or Domino's stores prior to the test.²¹

iii. The Taste Test Involved a Sufficient Segment of the Subway Fresh Toasted Sandwich Product to Support the Comparative Taste Claim:

Contrary to the challenger's contention that the taste test did not account for a wide enough segment of Subway products, the advertiser asserted that the challenger ignores its own marketing strategy, which touts its Fresh Toasted sandwiches as a distinct product line. In 2004, Subway introduced a line of Fresh Toasted sandwiches, which, unlike other products offered by Subway, were advertised as being served hot. In each commercial, Subway (1) promoted the Fresh Toasted sandwiches as a new product line, (2) showed the sandwiches in carry-out situations only (none of the commercials are set in a Subway store) and (3) dramatized the fact that the sandwiches are served hot (indeed, hot enough to melt ice). In fact, the advertiser noted

²⁰ Report #3486, *NAD/CARU Case Reports* (Sept. 1998).

²¹ In this respect, the advertiser asserted that the challenger Subway's reliance on International Home Foods is misplaced. The testing at issue in that case was flawed on several accounts: (i) there was no "no preference" option; (ii) it may have included respondents who did not eat tuna at all; and (iii) it may have included consumers who had only consumed tuna canned in oil, a very different product from the single product being advertised. NAD found that because the support provided by the advertiser may only minimally meet the evidentiary threshold needed to support its 2:1 preference claim, any margin of error with respect to the reliability of test results becomes highly significant." No such concerns are present here.

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that the challenger continues to advertise the Fresh Toasted sandwiches as a separate line of products on its website and on menus in its stores, as they are featured with a special "Fresh Toasted" logo and, on the website, are described on a separate sub-page to which consumers can navigate. Further, only six sandwiches are listed under the Fresh Toasted logo on Subway menus. As such, the advertiser's independent researchers properly concluded that it was reasonable to devise a taste test against such a clearly distinct subset of sandwiches, and for the challenger to now assert that no such distinct product line exists or to claim that its Internet, broadcast, print, and even in-store menus touting its six Fresh Toasted options exist "merely to suggest certain subs which are recommended for toasting", is disingenuous.

To the extent that the challenger asserts that the comparison being made is to the complete Subway sandwich product line, the advertiser reiterated its position that a grammatical analysis of the claims clearly demonstrate that the obvious comparison here is to Subway's Fresh Toasted sandwiches product line. Moreover, the advertisements specifically disclose the sandwiches compared in a conspicuous and simple disclosure.

In light of the foregoing, the advertiser asserted, the challenger's reliance on certain NAD cases for the proposition that its claim is too broad is therefore misplaced. For example, the advertiser argued, the General Mills, Inc. (Pillsbury Toaster Strudel Frozen Toaster Pastries)²² case is inapposite. In that case, Pillsbury failed to compare its Toaster Strudel products to a sufficient number of Pop Tarts flavors within a single product line. Here however, the advertiser asserted, it tested a sufficient number of varieties within the Subway Fresh Toasted product line against a sufficient number of varieties within the Domino's Oven Baked Sandwich product line. The researchers identified which Subway Fresh Toasted varieties were most similar to the Domino's Oven Baked varieties within the comparable product lines and three sandwiches were selected from the Domino's Oven Baked product line of four and from Subway's Fresh Toasted product line of six. Based on these facts, the challenger's calculations must necessarily change, as the advertiser was able to test 75% of its Oven Baked Sandwich product line against 50% of Subway's Fresh Toasted product line. Supers in the advertising materials and on the Domino's website inform consumers as to which sandwiches were compared.

To the extent that the challenger asserts that its Italian BMTs contain cheese as a standard ingredient in support of its position that the taste test was flawed, the advertiser countered that in designing the taste test, the challenger's own online menu was used to determine which ingredients were standard in each Fresh Toasted option. The advertiser rejected the challenger's contention that the study's designers should have been alerted to the presence of cheese in its Italian BMTs because "it is almost certain that the Domino's runners had to opt affirmatively for 'no cheese' when ordering the Italian BMT sandwiches from Subway restaurants." This statement is incorrect. All orders for sandwiches were placed by phone by the researchers²³, not the runners, and each ingredient listed as standard under the Subway website was requested when placing the order with the Subway Sandwich Artist. The instructions were clear, and at no

²² Report #4867, *NAD/CARU Case Reports* (June 2008).

²³ Pre-ordering Subway products via phone, text message and/or the Internet is customary. Subway has even developed a new website to encourage such pre-ordering: subwaynow.com.

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time were researchers asked whether they did not want cheese on their Italian BMTs nor at any time was it necessary to specify “no cheese” when placing the order.

Further, the advertiser asserted, the challenger’s position that cheese is listed as an ingredient of the Italian BMT in the nutritional section of its website is of no consequence. Cheese is *not* listed as an ingredient of the Italian BMT on the webpage where it is predominantly featured to consumers. The advertiser maintained that when Subway describes its sandwich without cheese in one place – the principal marketing page for the sandwich – and describes the same sandwich with cheese in another, it is irrational to assume that the sandwich does, in fact, contain cheese.

Likewise, the advertiser also rejected the challenger’s contention that it wrongly compared its Oven Baked Philly Cheese Steak to Subway’s Fresh Toasted Steak & Cheese rather than its Subway Philly Cheese Steak sandwich. Indeed, the advertiser contended that it could not and rightfully did not compare its Oven Baked Philly Cheese Steak sandwich to Subway’s Big Philly Cheesesteak because the latter (1) is not a Fresh Toasted Option and, in fact, is marketed outside of this product line, and (2) it was not nationally available at the time the taste test was conducted. The advertiser, reiterated that the challenger’s Fresh Toasted Sandwiches are marketed as a distinct product line and were the obvious choice for comparison. The primary ingredients of the advertiser’s Philly Cheese Steak are steak and cheese, and the only Fresh Toasted sandwich option that contains steak and cheese is the Subway Fresh Toasted Steak & Cheese sandwich.

According to the advertiser, the challenger’s “Philly Cheese Steak” is similar to its Oven Baked Philly Cheese steak in name only – the Subway Philly Cheese Steak is *not* part of the Subway Fresh Toasted sandwich line and is not marketed as a fully-heated sandwich. It was neither necessary nor appropriate to look beyond the distinct Fresh Toasted product line in structuring the taste test because of the test’s focus on sandwiches that Subway customarily heats.

Further, the advertiser contended, the Subway Philly Cheese Steak was not nationally available at the time of the test and therefore could not be included in a study that sought to have national relevance. The challenger supports its contention to the contrary only with evidence that the Big Philly Cheesesteak was available at the time of the test in the eight tested markets. The designers of the test, however, determined that the Big Philly Cheesesteak was not available nationwide by contacting Subway stores beyond the eight tested markets. While eight markets can provide a reliable national sampling for an overall taste test, the designers efforts to determine the national availability of a particular product rightfully went beyond the eight tested markets to get the best possible information and their inquiries into Subway stores nationwide lead them to conclude that the Big Philly Cheesesteak was not nationally available at the time of the testing.²⁴

iv. The Super in the Challenged Commercials Appropriately Qualifies the Taste Preference Claims

²⁴ Subway’s evidence regarding the sales figures comparing the market share of the Big Philly Cheesesteak versus the Fresh Toasted Steak & Cheese is irrelevant. Only the Steak & Cheese is a Fresh Toasted option and only it was nationally available at the time the taste test. The concern of the study is national availability, not Subway’s fiscal successes or failures.

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The advertiser asserted that its advertisements make clear that the comparison being made is only between its Oven Baked Sandwich line and the challenger's Fresh Toasted sandwiches and that the disclosure in the challenged commercials simply lists all of the specific sandwiches that were compared, thereby qualifying, not contradicting, the main claim.

The advertiser noted (and the challenger acknowledged) that each of the challenged commercials feature a disclosure in a super in the lower portion of the screen for about one-third of the length of each the spot. Further, while the challenger points out that super contains white font against the silver background of one of its pizza ovens, it neglects to mention that the copy is outlined in black to make it more visible to consumers.

Accordingly, the advertiser argued, the cases cited by the challenger are inapposite because, in those cases, a limited universe of products was tested even though a broader universe of comparable products existed. For instance, in General Mills, Inc. (Fiber One cereal),²⁵ NAD found that the claim "#1 in taste," referring to Fiber One cereal, could reasonably be interpreted as a broad comparative claim against *all* other cereals on the market, yet, the advertiser only compared Fiber One to one other type of cereal. NAD held that a disclaimer that seeks "to limit the broad "#1" comparative claim to *all* cereals to one cereal" was contradictory. Here, however, the advertiser contended that the advertisements do not make a broad claim regarding *all* sandwiches in the market but, rather, clearly communicate that the taste test is between the heated sandwich product lines offered by Subway and Domino's, specifically, and the disclaimer qualifies the claim by informing consumers of which varieties of sandwich were comparable and therefore tested.

Similarly misplaced, the advertiser maintained, is the challenger's reliance upon the case of Kraft Foods, Inc. (Tombstone Pizza).²⁶ In that case, NAD determined that a broad comparative claim that pits an entire brand against a competitor's cannot be substantiated by comparing only one particular product. The advertiser claimed that "Tombstone is preferred over Red Baron." Tombstone offers at least 39 varieties of frozen pizza and Red Baron offers at least 20, many of which are comparable, but Tombstone only compared one of its pizzas against only one of Red Baron's. As in the General Mills case, NAD held that a broad comparative claim involving an entire brand cannot be substantiated by comparing only one product. Thus, a disclosure cannot be used to contradict the broad message of the claim by including visual copy that functions solely to change that message. On the contrary, in the instant matter, the limited universe of comparable products that were clearly the subject of Domino's claim were adequately tested. Thus, the advertiser asserted, clear disclosure of the particular varieties of sandwiches tested serves only to qualify the claim, not contradict it.

Lastly, to the extent that the challenger argues that the advertisements speak to a broader brand comparison because the commercials depict all four Oven Baked Sandwich options and a

²⁵ Report #4176, *NAD/CARU Case Reports* (May 2004).

²⁶ Report # 4915, *NAD/CARU Case Reports* (October 2008).

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Domino's pizza, the advertiser countered that these visuals, however, do not function to broaden the meaning of the claimed consumer preference claim in the commercials.

The advertiser asserted that its commercials' primary purpose is to introduce to consumers its new product line. The Chicken Parm has no Subway equivalent and therefore was inappropriate for inclusion in the taste test, which was designed specifically to test comparable products. Further, it is only after consumers are presented with the disclosure of the three sandwich varieties tested that they are shown the visual image of the entire nationally available line of Domino's Oven Baked Sandwiches – a visual which is appropriate after the disclosure as to the specific sandwiches tested.

Further, the mere fact that a pizza appears at the bottom of the screen when the Oven Baked Sandwiches are shown is a simple matter of branding that helps consumers connect the Oven Baked Sandwiches with the Domino's traditional menu of mainly pizza options. According to the advertiser, no reasonable consumer would interpret the brief visual of a pizza to stand for the proposition that pizzas were one of the products tested in a taste test comparing heated submarine sandwiches.

In sum, having established a reasonable basis for its claim, the advertiser countered that the burden shifted to the challenger who has failed to present evidence of consumers' preference for Subway's Fresh Toasted Sandwiches, nor has it demonstrated that Domino's' evidence is materially flawed.

DECISION:

I. The Challenger's Position that the Advertiser makes Unsupported Line Claims:

In the challenged commercials, the announcer states, "Domino's Oven Baked Sandwiches beat Subway's in a national taste test 2 to 1" This statement is reiterated at the end of the commercial along with the words, in a prominent headline type: "BEAT SUBWAY 2 to 1 IN A NATIONAL TATES TEST." During this commercial a three line super appears at the bottom of the screen reading, "Taste preference based on a national taste test conducted by an independent research company of Domino's Oven Baked Sandwich varieties – Philly Cheese Steak, Chicken Bacon Ranch and Italian versus comparable Subway Fresh Toasted Sandwich varieties Steak & Cheese, Chicken & Bacon Ranch and Italian BMT."

It is well-established that an advertiser is responsible for all reasonable interpretations of its claims, not simply the messages it intended to convey.²⁷ In the absence of consumer perception evidence, NAD uses its expertise to determine the express and implied messages reasonably conveyed in an advertisement.²⁸ In analyzing the messages conveyed by a particular

²⁷ Johnson & Johnson Vision Care, Inc. (Acuvue Advance for Astigmatism), Report #4772, *NAD/CARU Case Reports* (December 2007); Atkins Nutritionals, Inc. (Advertising for The Atkins Food Pyramid), Report 4230, *NAD/CARU Case Reports* (September 2004).

²⁸ Johnson & Johnson Vision Care, Inc. (Acuvue Advance for Astigmatism), supra; PepsiAmericas, Inc. ("Immune" Airforce Nutrisoda), Report # 4577, *NAD/CARU Case Reports* (October 2006).

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advertisement, NAD typically reviews the totality or overall net impression created by an advertisement as a whole, not merely words or phrases standing alone.²⁹ Employing these standards, NAD determined that, on balance, consumers could reasonably be interpret the advertiser's claims that "Domino's Oven Baked Sandwiches beat Subway's in a national taste test 2 to 1" or "BEAT SUBWAY 2 to 1 IN A NATIONAL TASTE TEST" to mean that Domino's, as a whole, beat the challenger's products in a national taste test. In so finding, NAD noted that, unlike Domino's, which also serves pizza, the challenger's business is comprised predominantly of submarine sandwiches (both untoasted and toasted). Further, the advertiser tested only three of the challenger's sandwiches when, in reality, the challenger's restaurants offer 16 to 20 varieties of sandwiches. NAD did not agree with the advertiser that the possessive form of "Subway's" was sufficient to limit the comparative claim to a comparison to those sandwiches that Subway customarily heats (or toasts). Indeed, the advertiser did not, in all circumstances use the possessive but, rather, simply referred to "Subway" not "Subway's".

Further, NAD determined, the disclosure (discussed more fully below) limiting the comparison to specific sandwiches), was insufficient to adequately qualify the challenged commercials' prominent, overarching message of taste comparison between Domino's and "Subway's."

As such, NAD determined that the advertiser's unqualified claim that, "Domino's Oven Baked Sandwiches beat Subway's in a national taste test 2 to 1" or "BEAT SUBWAY 2 to 1 IN A NATIONAL TASTE TEST" could reasonably be interpreted as a line claim as between the advertiser's "Oven Baked" sandwiches and the challenger's full line of sandwiches – a message that the evidence in the record does not support. As such, NAD recommended that any such comparison be modified so as to qualify, up front, that it is the parties' respective "Oven Baked" and "Fresh Toasted" sandwich lines that comprised the taste test and avoid the implication that the challenger's entire sandwich line was the subject of the taste test.

II. The Advertiser's Taste Test Offered in Support of its Taste Preference Claims:

It is well-established that in an NAD proceeding, the advertiser has the initial burden of presenting a reasonable basis for its claims.³⁰ If NAD finds that "an advertiser has provided a reasonable basis for its claim, the burden shifts to the challenger to show either that the advertiser's evidence is fatally flawed or that the challenger possesses stronger, more persuasive evidence reaching a different result."³¹ Thus, in evaluating the advertiser's claims for truth and accuracy, NAD first looked to the advertiser's evidence – its taste test – offered in support of its claims.

²⁹ See, Johnson & Johnson Vision Care, Inc. (Acuvue Advance for Astigmatism), supra; Johnson & Johnson Consumer Companies, Inc. (Aveeno Advanced Relief Cold Sore Treatment), Report #4719, *NAD/CARU Case Reports* (September 2007).

³⁰ See, Malt-O-Meal Company (Malt-O-Meal Cereals), Report #4556, *NAD/CARU Case Reports* (September 2006), aff'd NARB Panel 140 (March 2007); American Saw & Manufacturing Co. (Lenox Edge and Irwin Blue Blades), Report #4278, *NAD Case Reports* (January 2005).

³¹ Malt-O-Meal Company (Malt-O-Meal Cereals), supra; Colgate-Palmolive Co. (Palmolive Oxy Plus), Report #4252, *NAD/CARU Case Reports* (October 2004); S.C. Johnson & Son, Inc., (Shout Oxy Power Multi-Purpose Stain Remover), Report #4047, *NAD Case Reports* (May 2003); Mead Johnson & Company (Enfamil with Iron), Report #4019, *NAD/CARU Case Reports* (March 2003).

The NAD has made clear in previous decisions its evidentiary standards for comparative taste claims. The best evidence to support taste preference claims “consists of double-blind testing of comparative products and involves a geographically dispersed sample that reflects the target market.”³² The taste test “should employ adequate protocols and methodology. More specifically, a model taste test: (1) compares products with similar shelf life that were purchased in the test market; (2) prepares both products according to instructions; (3) presents and tests products in the same way; (4) requires test subjects to cleanse their palate prior to tasting each product; and (5) produces statistically significant results.”³³ Further, like any advertisement containing a comparative claim, an advertisement featuring a consumer taste preference claim must identify the products that are the objects of the comparison.³⁴

A taste preference test normally requires respondents to taste one product, cleanse their palette, taste the second product and then state which, if any, they prefer. The design of the survey, as well as each individual question, is also important. A taste preference survey should focus only on key components relevant to the claim (taste preference), preclude any potential biasing effect of one question on another, and ensure the proper placement of the key product rating question (often referred to as the “overall question”).³⁵

In general, NAD noted that comparative advertising claims, such as the one at issue here, naturally imply the use of a comparative test design that employs simultaneous presentation and consideration of the products. Although a comparative test design is not absolutely required, simultaneous presentation provides the most direct comparison of the products and avoids execution bias and sensitivity issues.³⁶

With respect to the instant taste test, NAD was satisfied that the survey properly consisted of a sufficient number of interviews, spread evenly over eight geographically dispersed markets within the United States and that identical procedures were set up and implemented in all locations. NAD was also satisfied that the sandwiches tested were prepared with the parties’ respective traditional ingredients and heated according to both parties’ in-store procedures. Likewise, NAD observed that each participant tasted two comparable sandwiches (brand-blinded) and that the order in which the sandwiches were tested was rotated. Participants also cleansed their palates between tastings and after tasting both, were asked which sandwich tasted better, and were provided with a “no preference” option.

i. Simulation of the Consumer Experience of a Subway Customer

³² Kraft Foods, Inc. (Tombstone Pizza), Report #4915, *NAD/CARU Case Reports* (October 2008); See also, Standard Guide for Sensory Claim Substantiation, ASTM E-1958, §5.4.1 – 5.4.2.

³³ Id.

³⁴ Id.

³⁵ Id. In particular, the survey should note whether it is necessary for the respondent to consider all attributes of the product prior to giving their overall measure of preference.

³⁶ Id.

It is undisputed that the taste test accurately simulated the carry-out experience that is typical for a Domino's customer. NAD did not agree with the challenger's contention that the Subway sandwiches were not ordered and delivered in a manner that the consumer would typically experience. Restaurants chosen for the test were equidistant from the testing facility and where there was a difference, it was the advertiser who placed itself at the disadvantage by ensuring that it was its own restaurant that was further away from the testing facility. Runners were provided precise timing requirements for all steps of the ordering and delivery process (to the testing facility) and both parties' sandwiches arrived at the same time. Notably, Domino's HeatWave bags were not employed for the advertiser's sandwiches so as to level the playing field. Further, customary wrappings for carry-out were employed as typically used by each party's restaurant. To the extent that the challenger asserted that sandwiches were prepared in large quantities, the record demonstrates that no one store prepared more than five sandwiches per tasting.

With respect to the challenger's contention that its customers typically consume its sandwiches in a shorter period of time than was provided for in the taste test, NAD observed that the challenger provided no support for this position, save for its statement that it has between 3-4 locations for every Domino's location and that, therefore, consumers have a relatively short distance to travel and will likely begin to consume their sandwiches within less time than a Domino's customer. In contrast, the advertiser's test was specifically designed to limit the distance and time between food preparation and consumption in a consumer-relevant manner. Similarly, to the extent that the challenger takes issue with the advertiser's super-heating of its own sandwiches, as the advertiser points out, this cannot be deemed a flaw of the study design as both parties' products were prepared consistent with consumer experience and in a manner replicating real-world circumstances.

Although NAD acknowledged that the taste test methodology recommends that sandwiches not be cut, to the extent that this was inconsistent with the real-world preparation of the sandwiches which are cut in half and that not cutting them preserves internal heat, NAD did not find this to be a fatal flaw in the test methodology. The record appears to indicate that the challenger's sandwiches were cut in half (which as the challenger acknowledged is standard in preparation of its sandwiches), but that the Domino's sandwiches were not cut. While the record does not make clear as to whether or not the latter instruction is standard or not in the preparation of the advertiser's sandwiches, there is no evidence that a single cut across the middle of a sandwich measurable impacts the internal heat retention of the sandwich.

Lastly, NAD determined that the fact that the challenger's customers can more easily customize their sandwiches³⁷ than the advertiser's customers' did not render the taste test fatally flawed. It was the challenger's position that, as respondents were not given the myriad of choices with respect to its "fixings", each was given a Subway sandwich that was prepared according to the testers', not the respondents', discretion and, as such, the test did not include a sufficiently representative sample of the various sandwich components, thereby rendering the results unreliable and inadequate to support the taste preference claims. The fact that a consumer may

³⁷ i.e. with its numerous "fixings" and different types of bread.

customize a food product does not necessarily preclude that food from being tested in a comparative setting. Here, each party's toasted sandwich comes with a standard set of ingredients and were ordered in accordance with these specific ingredients. Moreover, the advertiser (aware of the "fixings" issue), attempted to minimize any potential for bias by screening consumers to make sure that any of the listed ingredients were not considered unpalatable (i.e., that they did not dislike any of the standard ingredients of the sandwiches). Further, participants were given salt, pepper, mustard and mayonnaise packets to use at their discretion thereby permitting some customization of the sandwiches.

ii. The Appropriateness of the Sample Consumer Universe

The criteria used in selecting qualified respondents for the taste test was that they (1) must have purchased and eaten a sandwich in past month from a fast food or quick serve restaurant;" (2) must eat a sandwich from a fast food or quick service restaurants at least once a month;" and (3) must consider eating the ingredients in at least one of the tested sandwiches.

The advertiser stated that the sandwich consuming universe that was included in the taste test was screened to ensure every participant had purchased sandwiches from sandwich restaurants and that, in fact, 91% of the respondents had purchased Subway sandwiches within the three months preceding the taste test. As such, the advertiser contended that the testing universe was appropriate for the test conducted. The challenger countered that the criteria used, did not sufficiently limit the universe of qualified respondents and that one criterion should have been that participants should have consumed at least one of the types of sandwiches involved in the test, not just any sandwich from a fast food or quick serve restaurant.

In support of its position, the challenger relied on the case of Int'l Home Foods, Inc., wherein the advertiser presented a taste test as support for its 2 to 1 preference claim regarding its solid white tuna in water product.³⁸ In that case, NAD observed that a consumer was qualified to be a respondent if he or she was "the primary grocery shopper in the household who has served canned tuna in the past 30 days."³⁹ In that case, NAD was concerned that the sample universe included consumers who merely purchased and served the product but did not necessarily consume the product but were nevertheless asked their opinions after tasting the product. NAD was also troubled by the fact that the sample universe included consumers who may have been purchasers/users of another variety of tuna (i.e., chunky tuna in vegetable oil) that was markedly different from the advertised product (albacore tuna in water).⁴⁰ Ultimately, in that case, NAD determined that the taste was unreliable, in part because the sample universe "may well have included respondents unfamiliar with the advertised product."⁴¹ NAD determined that the facts of the instant matter are distinguishable from those in the Int'l Home Foods, Inc. case.

In the first instance, NAD observed, the instant taste test (unlike the one in Int'l Home Foods, Inc.), only included subjects who *had* consumed sandwiches or subs in the preceding month, not

³⁸ Int'l Home Foods, Inc. (Bumble Bee Tuna), Report #3486, *NAD/CARU Case Reports* (Sept. 2008).

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

simply *purchasers* or those who have merely *served* these food products. As such, any concern that participants might be those consumers who had not necessarily consumed such products was alleviated. As for NAD's concerns in the Int'l Home Foods, Inc. case that the sample universe included consumers who may have been purchasers or users of another variety of tuna – indeed, one that was “significantly different from the product being advertised”⁴² that was markedly different from the advertised product, NAD determined that such concerns were not present in the instant matter. NAD concluded that the taste test was sufficiently specific in that the vast majority of respondents were, in fact, Subway consumers.⁴³

Accordingly, NAD found that the sample consumer universe was not overbroad.

iii. The Sufficiency of the Different Types of Subway Sandwiches Tested

The challenger asserted that the taste test did not account for a wide enough segment of its products, arguing that the comparative taste claims refer to the entire Domino's and Subway product lines.

Although NAD observed that the commercial claims: “Domino's oven baked sandwiches beat the taste of Subway's [or simply “Subway”] 2 to 1”, any potential for consumer confusion as to the nature of the products being compared is alleviated by NAD's recommendation (previously discussed) that the commercials be modified so as to qualify expressly, up front, that it is the parties' respective *toasted* sandwiches that comprised the taste test. This, NAD determined, coupled with the disclosure appearing in these commercials specifying the particular sandwiches compared,⁴⁴ adequately apprises the viewer as to the object of comparison.

To the extent that the challenger asserts that it offers a minimum of 16 sandwich varieties (and that most of its restaurants offer more than 20) and that any of these can be toasted upon request, NAD noted that at the time of this proceeding, the challenger promoted on its web site (and in television commercials) its distinct segment of “Fresh Toasted” sandwiches which, unlike its other products, were advertised as being served hot. Additionally, as the advertiser pointed out, only six sandwiches are listed under the Fresh Toasted logo on the advertiser's web site. Moreover, NAD noted that the challenger's printable online menu lists its “Fresh Toasted Subs” (with an accompanying logo) as a separate and distinct line of sandwiches from its “Subway FreshFit” sandwiches (which carries their own logo). As such, NAD determined that the advertiser properly designed a taste test comparing the parties' respective “toasted” sandwiches.

Further, insofar as the challenger asserted that the advertiser failed to test the entire Fresh Toasted product line (i.e., that Subway also offers Meatball Marinara, Spicy Italian, as well as its

⁴² Id.

⁴³ Although NAD believed that a more specific criterion *could* have been implemented (i.e., screening to ensure that respondents were within the category of “toasted” sandwiches, NAD did not find the absence of this filter to be a fatal flaw in the taste-test methodology.

⁴⁴ “Taste preference based on a national taste test by an independent research company of Domino's oven-baked sandwich varieties; Philly Cheese Steak, Chicken Bacon Ranch and Italian vs comparable Subway fresh toasted sandwich varieties – Steak & Cheese, Chicken & Bacon, Italian BMT.”

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Subway Melt sandwiches), NAD noted that the advertiser's taste test only incorporated the parties' comparable sandwiches (both parties served their own version of the Philly Cheese Steak, Chicken Bacon Ranch and Italian sandwiches), as noted in the disclosure appearing in the challenged commercials. The advertiser does not offer a Meatball Marinara, Spicy Italian or "Melt" sandwich. Thus, contrary to the challenger's contention that the advertiser's taste test did not take into account a sufficient sample of its "sandwiches" (that it only tested three of the minimum 16 sandwiches offered by Subway and which come in a wide range of flavors and types), NAD concluded that the advertiser's taste test, in fact, comprised a sampling of 50% of the challenger's Fresh Toasted sandwiches.⁴⁵

To the extent that the challenger asserted that the advertiser tested the challenger's Italian B.M.T. sandwich without cheese against its own Italian sandwich which contains melted provolone cheese, NAD observed that the challenger's online menu, upon which the taste test was designed (both at the time of the initiation of the instant challenge and at the time of NAD's decision) does not list cheese as a standard ingredient. Rather, the copy states that the Italian B.M.T. is "[a]n old-world favorite. Sliced Genoa salami, pepperoni and ham and your choice of fresh vegetables and condiments served on freshly baked bread. Some say BMT stands for biggest, meatiest, tastiest. We wouldn't disagree." Indeed, NAD noted that, at the time of NAD's decision, the challenger's "Subway Freshbuzz" website⁴⁶ describes its Italian B.M.T. (product nutritional information) as "[t]he sandwich to conquer all hunger. Served on freshly baked bread, The Italian B.M.T. is bursting with sliced Genoa salami, pepperoni, ham and your choice of vegetables and condiments. It's a sandwich you can really sink your teeth into." Although the photograph on both the online menu and the "Freshbuzz" web page depict melted cheese on the sandwich, there is no mention of cheese in the product description as a standard ingredient.

The challenger points out that a separate "Sandwich Components" section of its web site states that the Italian B.M.T. comes with "Genoa salami, pepperoni, ham, cheese and standard vegetables"⁴⁷ and argues that this, along with the images of its sandwich, demonstrate that, contrary to the sandwich tested, its Italian B.M.T. is made with cheese as a standard ingredient. However, it cannot be ignored that the advertiser's principal display of this sandwich under the "Menu" drop-down link of its Menu/Nutrition tab does not mention cheese as a standard ingredient. At best, the challenger's website sends mixed messages regarding this sandwich's ingredients and NAD concluded that the addition of cheese is an option, but not necessarily a standard ingredient in the challenger's sandwich. As such, NAD determined, it was not unreasonable for the advertiser to test the challenger's sandwich according to the ingredients listed in the challenger's sandwich description on its menu.

⁴⁵ As such, the challenger's reliance on the case of General Mills, Inc. (Pillsbury Toaster Strudel Frozen Toaster Pastries), Report #4867, *NAD/CARY Case Reports* (June 2008) is misplaced. In that case, the advertiser test only involved 9 of the 39 different varieties of the challenger's product and was, therefore, insufficient to support a brand-wide taste preference. Likewise misplaced is the challenger's reliance on the case of Papa John's International (Papa John's Pizza), Report #3450, *NAD/CARU Case Reports* (March 1998), wherein NAD determined that the advertiser's taste test, comparing only the parties' thick crust pizzas did not support a broad claim that the advertiser's pizza was superior to all of the challenger's pizzas when the challenger's best-selling pan pizza was not subjected to the taste test.

⁴⁶ www.subwayfreshbuzz.com/menu/hot_fresh_toasted/italian_bmt/

⁴⁷ www.subway.com/subwayroot/MenuNutrition/Nutrition/sandwichComps.aspx

Additionally, NAD noted, orders for this sandwich were placed by phone by researchers and each ingredient listed as standard under the website menu was requested when placing the order. At no time were researchers asked whether they wanted cheese on the Italian BMT nor was it necessary to specify “no cheese” when placing the order, contrary to the challenger’s suggestion.

NAD next addressed the challenger’s contention that the advertiser improperly compared its Oven Baked Philly Cheese Steak to the challenger’s Fresh Toasted Steak & Cheese rather than its Subway Philly Cheesesteak sandwich. Again, looked to the challenger’s menu. Putting aside the arguments as to whether or not the challenger’s Big Philly Cheesesteak was nationally available at the time of the taste test’s design, NAD noted that the challenger’s Big Philly Cheesesteak was not offered in its “Fresh Toasted” menu line of sandwiches but, rather, was only available in 8 markets. The only steak sandwich offered in its Fresh Toasted product line at the time of the taste test was the challenger’s “Fresh Toasted Steak & Cheese” sandwich. Further, to the extent that the challenger did offer its Big Philly Cheese Steak, it was offered elsewhere on the challenger’s menu. Given that the advertiser’s taste designed was designed to incorporate sandwiches from the parties’ respective “toasted/oven-baked” product lines, the advertiser properly selected the comparable Steak & Cheese sandwich from the challenger’s Fresh Toasted menu for inclusion in its taste test.

In sum, NAD concluded that advertiser’s taste-test provided a reasonable basis for a properly qualified taste preference claim. Further, NAD concluded that the challenger failed to establish that it possessed more reliable evidence or that the advertiser’s evidence was fatally flawed.

Notwithstanding this finding, however, NAD noted that challenged advertising campaign and the evidence offered in support of taste preference claim made therein, do not operate in a vacuum but, rather, are subject to the test of time. During the course of the instant proceedings, NAD observed that the challenger’s menu for its Fresh Toasted sandwiches had changed significantly. In the first instance, the challenger no longer offers its Steak & Cheese as part of its Fresh Toasted product line but, rather, its Big Philly Cheesesteak has taken its place on the menu – a sandwich that was undisputedly not tested and, at present, is the most comparable toasted sandwich in the challenger’s Fresh Toasted product line to the advertised Oven-Baked Philly Cheese Steak. The current Fresh Toasted product line, according to the challenger’s current menu, now consists of its Meatball Marinara, Italian B.M.T. Spicy Italian, Big Philly Cheesesteak, Subway Melt, Chicken & Bacon Ranch, and its Prime Rib sandwiches.

Thus, at the time of NAD’s decision, the advertiser’s taste test only comprised two of the six sandwiches offered by the challenger (or one-third) which NAD determined was insufficient to support the broad “toasted” product line comparison (with or without disclosure).

NAD concluded that while the advertiser possessed a reasonable basis for its taste preference claims *at the time of the initiation of the instant challenge*, the circumstances of this case make clear that the advertiser’s taste test is insufficient to support and “Oven-Baked” versus “Fresh-Toasted” *current* product line taste preference claim given the changes in the challenger’s “Fresh Toasted” sandwich menu. Therefore, NAD recommended that the challenged commercials be

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discontinued or modified to make a more limited taste preference claim expressly limited to the specific sandwiches tested. In such case, NAD cautioned that the advertiser must take care to avoid the implication that the parties' respective oven-baked/toasted *sandwich lines* are the subject of the taste preference claim.

iv. The Adequacy of the Commercials' Disclosure

Although largely moot at this juncture (given NAD's recommendation that the challenged commercials be discontinued or modified to make expressly limited taste preference claims as to the specific sandwiches tested, NAD briefly addressed the challenger's contentions regarding the sufficiency of the disclaimer in the challenged commercials. The commercials contains a disclaimer stating, "Taste preference based on a national taste test by an independent research company of Domino's oven-baked sandwich varieties; Philly Cheese Steak, Chicken Bacon Ranch and Italian vs comparable Subway fresh toasted sandwich varieties - Steak & Cheese, Chicken & Bacon, Italian BMT."

It is well-established that a disclaimer intended to qualify a claim is inadequate to prevent inaccurate consumer perceptions if it contradicts the main message of the advertising.⁴⁸

Ultimately, the focus is not on the wording of the specific disclosure in isolation but rather the overall net impression that the entire advertisement – including the disclosure – conveys to reasonable consumers.

NAD determined that the disclosure here, in the overall context presented of the challenged commercials was insufficient to adequately qualify the challenged commercials' overarching message of taste comparison between Domino's and "Subway's."

In Kraft Foods, Inc. (Tombstone Pizza), NAD determined that consumers could reasonably interpret the taste preference claim "TOMBSTONE is Preferred over RED BARON," as a broad claim comparing the parties' respective brands as a whole (rather than limited only to the parties' pepperoni pizzas tested), and further concluded that a disclaimer (in the form of a super), although adequate in terms of size and placement and identifying the specific products involved in the advertiser's taste test, was inadequate to qualify this broad taste preference claim.⁴⁹ Indeed, NAD concluded that this disclaimer contradicted the broader taste preference claim message conveyed by the advertising and did not cure the inaccurate message conveyed by the claim.⁵⁰

⁴⁸ Kraft Foods, Inc. (Tombstone Pizza), supra; General Mills, Inc. (Fiber One), Report #4176, *NAD/CARU Case Reports* (May 2004).

⁴⁹ Kraft Foods, Inc. (Tombstone Pizza), supra (The super read: In a recent consumer test comparing TOMBSTONE Pepperoni Pizza and RED BARRON Pepperoni Pizza.)

⁵⁰ Id., See also, General Mills, Inc. (Fiber One), supra (Where packaging claim on the Fiber One cereal box that the cereal stating "#1 in Taste" and accompanied by a qualifying disclosure that narrowed the claim to a comparison against just one cereal [Kellogg's All-Bran], NAD found that the disclosure contradicted the main message of the advertisement and recommended that the advertiser discontinue its "#1 in Taste" claim and limit future claims to actual cereal(s) tested.)

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In the instant matter, as previously noted, the challenged commercials make the overarching, unqualified claim, quite prominently in both large onscreen lettering and in audio, that "Domino's oven baked sandwiches beat the taste of Subway's [or simply Subway] 2 to 1" which NAD determined could reasonably be interpreted by consumers as a comparison of Domino' oven baked sandwiches versus all Subway sandwiches, not simply its Fresh Toasted product line. As such, NAD concluded that the disclosure substantially contradicted or otherwise changed the broader main message conveyed and did little to cure this erroneous taste preference message so as to prevent inaccurate consumer take away.

To the extent that the challenger took issue with the legibility, placement, etc. of the subject disclosure, in light of NAD's recommendations that the challenged commercials be discontinued or modified to make a narrower taste preference claim expressly limited to the specific sandwiches tested, it was unnecessary to address the sufficiency of the disclosure.

Conclusion:

NAD concluded that advertiser's taste-test provided a reasonable basis for its taste preference claim as presented in the challenged commercials at the time that the challenge was commenced. Further, NAD concluded that the challenger failed to establish that it possessed more reliable evidence or that the advertiser's evidence was fatally flawed. Notwithstanding this finding, however, NAD concluded that because the underlying facts have changed, the advertiser's taste test is insufficient to support an "Oven-Baked" versus "Fresh-Toasted" *current* product line taste preference claim given the changes in the challenger's "Fresh Toasted" sandwich menu. Therefore, NAD recommended that the challenged commercials be discontinued or modified to expressly limit the taste preference claims to the specific sandwiches tested. In such case, however, NAD cautioned that the advertiser must take care to avoid the implication that the parties' respective oven-baked/toasted *sandwich lines* are the subject of the taste preference claim.

Advertiser's Statement:

Domino's Pizza, Inc. is pleased that NAD found that a limited claim that Domino's Oven Baked Sandwiches are preferred 2 to 1 over Subway's Fresh Toasted Sandwiches was properly and adequately substantiated by its consumer taste test. Domino's agrees to take NAD's recommendations into account for its future advertising, including modifications in light of Subway's changes to its product line. Domino's appreciates the opportunity to participate in the self-regulatory process and NAD's careful consideration of the issues in this matter. **(#5023 MSZ, closed 05/26/2009)**