

**WAL-MART STORES, INC.**

**Wal-Mart**

Advertising Agency: *Undisclosed*

Challenger: *National Advertising Division*

- **An advertiser is responsible for all messages conveyed by its advertising, not only those it intended to communicate.**

**Basis of Inquiry:** As part of its routine monitoring program, NAD requested substantiation for certain advertising claims made by Wal-Mart Stores, Inc. (“Wal-Mart” or “advertiser”) in television, internet, and print advertising in the form of a flyer.

The following claims formed the basis of this inquiry:

Express Claim:

- “Wal-Mart Saves the Average Family \$2,500 per Year.”

Implied Claim:

- Families that shop at Wal-Mart will save \$2,500 per year more than families than shop at other stores.

**Advertiser’s Position:**

The advertiser asserted that the express claim, “Wal-Mart Saves the Average Family \$2,500 per Year,” was supported by the findings of an independent consulting firm. Regarding the implied claim, *i.e.*, that families that shop at Wal-Mart will save \$2,500 per year more than families that shop at other stores, the advertiser argued that it was neither the intended message of the advertising, nor a reasonable interpretation of the express claim.

The advertiser described Wal-Mart’s background, explaining that Sam Walton opened the first Wal-Mart store in Arkansas in 1962, based on his vision of providing quality merchandise at low prices.<sup>1</sup> Wal-Mart’s basic value was, and is, customer service, the advertiser stated.

Walton’s store became a chain of large, discount department stores, noted the advertiser, which grew quickly over the years. Further, the advertiser explained, Walton’s philosophy is not only felt at his stores; in order to compete, other retailers followed Walton’s lead and began selling merchandise at lower prices. According to the advertiser, Wal-Mart’s successful retailing of quality merchandise at low prices is so profound that it literally has affected the overall American economy to the consumer’s benefit.

*The Express Claim that “Wal-Mart Saves the Average Family \$2,500 per Year” is Adequately Substantiated*

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<sup>1</sup> In Walton’s autobiography, noted the advertiser, he wrote: “The secret of successful retailing is to give your customers what they want. . . . And really, if you think about it from the point of view of the customer, you want everything: a wide assortment of good quality merchandise; the lowest possible prices; guaranteed satisfaction with what you buy; friendly, knowledgeable service; convenient hours; free parking; a pleasant shopping experience.”

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The advertiser asserted that the claim that “Wal-Mart Saves the Average Family \$2,500 per Year” was truthful and substantiated. It is important to note, the advertiser contended, that this claim does not state that Wal-Mart saves the average family \$2,500 per year because of its low prices or that by shopping at Wal-Mart rather than other stores, families will save \$2,500 per year. The claim addresses the direct impact of Wal-Mart’s low prices plus the competitive and efficiency effect that Wal-Mart has had on other retailers and the nation’s supply chain, it explained. The expansion of Wal-Mart stores throughout the United States has lead to a cumulative 3.0% decline in overall consumer prices as measured by the Consumer Price Index for All Items (“CPI”), stated the advertiser. This decrease in consumer prices, the advertiser continued, directly translates into \$287 billion in savings in 2006, which corresponds with a savings of \$957 per person and \$2,500 per household.

The advertiser explained that in 2005, Wal-Mart commissioned the global consulting firm, Global Insight,<sup>2</sup> to research the national economic impact of the expansion of its stores. According to the advertiser, Global Insight is a global leader in economic and financial analysis and forecasting. Global Insight’s findings were documented in a November 4, 2005 report, “The Economic Impact of Wal-Mart” (“2005 Report”), stated the advertiser. Pursuant to Wal-Mart’s instruction, the 2005 Report was updated and reissued, dated September 4, 2007, and titled “The Price Impact of Wal-Mart: An Update Through 2006” (“2007 Report”).

According to the advertiser, Global Insight performed statistical analyses of consumer prices and how they were affected by Wal-Mart’s existence. To perform its analysis, the advertiser explained, Global Insight reviewed data from 1985 through 2006 from the Bureau of Labor Statistics for consumer prices, unemployment rates, and industry employment by major metropolitan areas; the U.S. Census Bureau for population data; the U.S. Department of Energy for electricity prices; and Wal-Mart for Wal-Mart store square footage data. Then, according to the advertiser, Global Insight used a complex regression equation to explain the variation in consumer price inflation during this period.

Overall, stated the advertiser, Global Insight found that the U.S. economy without Wal-Mart would have meant higher prices for consumers. The advertiser noted that in the 2005 Report, Global Insight estimated that the existence of Wal-Mart between 1985 and 2004 resulted in a cumulative reduction of consumer prices of 3.1% as measured by the CPI, which translates into \$263 billion in consumer savings in 2004. The advertiser explained that this equals a savings of \$895 per person and \$2,330 per household. In the 2007 Report, the advertiser noted, Global Insight’s estimated that the expansion of Wal-Mart between 1985 and 2006 lead to a cumulative reduction of consumer prices of 3.0% as measured by the CPI. This, stated the advertiser, directly translates into \$287 billion in savings in 2006, which corresponds with a savings of \$957 per person and \$2,500 per household. The advertiser stated that these results are statistically significant at the 95% confidence level.

The advertiser contended that both the 2005 and the 2007 Reports showed that the consumer savings associated with Wal-Mart were generated through Wal-Mart’s higher levels of capital

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<sup>2</sup> The advertiser noted that Global Insight was formed in May 2001 by the merger of Data Resources, Inc. (“DRI”) and Wharton Econometrics Forecasting Associates (“WEFA”).

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investment in distribution and inventory control, lower import prices, and greater efficiency in its supply chain through the application of improved technology and processes.<sup>3</sup>

### *The Alleged Implied Claim is Neither the Intended Message Nor a Reasonable Interpretation of the Claim*

The advertiser disagreed with NAD's concern that the challenged advertising may also reasonably convey the implied message that families that shop at Wal-Mart will save \$2,500 per year more than families that shop at other stores. To the contrary, the advertiser stated, this alleged message was not the intended message, nor was it a reasonable interpretation of the claim.<sup>4</sup>

According to the advertiser, Wal-Mart's message in this advertising campaign was very clear and simple: Based on its efforts, Wal-Mart saves the average family \$2,500 per year. The advertiser stated that the average savings are realized across the nation, whether or not consumers shop at Wal-Mart. The advertiser noted that it did not state in its advertising or intend to imply that people have to shop at Wal-Mart in order to obtain these savings. That was not the message in the campaign, the advertiser contended. Rather, all of the advertising features people who are able to spend on something special because, due to the existence of Wal-Mart, they saved money in general.

The advertiser argued that the alleged implied message that families that shop at Wal-Mart will save \$2,500 per year more than families that shop at other stores was not a reasonable interpretation of the express claim for a number of reasons.

First, explained the advertiser, the claim at issue was not limited to the impact of Wal-Mart's low prices, as discussed above. Rather, argued the advertiser, it included the competitive and efficiency effect that Wal-Mart has had on other retailers and the nation's supply chain.

Second, noted the advertiser, in all of the television commercials, the following claim appeared in a super on the screen: "Wal-Mart saves the average family \$2,500 per year." Directly below this claim, in the same font and style, was the disclaimer: "Global Insight, The Price Impact of Wal-Mart: An Update through 2006, 9/4/07," the advertiser stated, and this clear and conspicuous disclaimer remains on the screen as long as the claim does. Further, the advertiser contended that the title of the 2007 Report clearly informs consumers that the basis of the claim is Wal-Mart's price impact on the economy. The advertiser noted that NAD has determined that a claim is truthful and substantiated when "the super in the commercial appropriately qualifies the main claim because it is clear and conspicuous," in large font against a contrasting

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<sup>3</sup> In addition, stated the advertiser, the television commercials were broadcast on the television networks, and all of the networks found the claim "Wal-Mart Saves the Average Family \$2,500 per Year" to be substantiated based on the results of the 2005 and 2007 Reports.

<sup>4</sup> To the best of its knowledge, stated the advertiser, it has not been approached by any consumer, competitor, consumer protection organization, or governmental agency alleging such an implied claim. Such an implied claim was also not raised by the television networks when reviewing the television commercials and substantiation for Wal-Mart's express savings claim.

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background, and appears for a sufficient period of time without distracting elements, and argued that the super in the Wal-Mart commercials met those criteria.<sup>5</sup>

In the Consumer Action Network flyer (identified by NAD, and which served as a basis for NAD's inquiry), the claim "What would you do with an extra \$2,500\* a year?" is accompanied by the disclaimer "\*According to an independently-certified study, Wal-Mart saves the average American household more than \$2,500 per year," explained the advertiser. Here, the disclaimer explains Global Insight's findings rather than citing the 2007 Report. This disclaimer does not limit the savings to Wal-Mart shoppers but rather attributes them to average households across the country, the advertiser argued.

Second, argued the advertiser, the savings claim at issue appeared in monadic advertising that did not make any reference to competitors, did not make any price comparisons to competitors' prices, and did not mention Wal-Mart's low prices. In fact, noted the advertiser, none of the individuals in the commercial are even shown shopping in a Wal-Mart store. It is well established NAD precedent that a claim must be interpreted in the context of the entire advertisement in which it appears, the advertiser stated;<sup>6</sup> here, this general savings claim was not tied in any way to shopping at Wal-Mart instead of other stores.

It is also well established NAD precedent that an advertiser is only responsible to substantiate reasonable interpretations of an advertising claim, not unreasonable ones, stated the advertiser.<sup>7</sup> This follows the reasonable consumer standard set forth by the Federal Trade Commission in the FTC Policy Statement on Deception, the advertiser contended, which is available online at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>: "The Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment." According to the advertiser, because NAD's alleged implied claim is not a reasonable interpretation of Wal-Mart's general savings claim, substantiation is not required for this alleged implied claim.

### Decision:

NAD accepted that the intended message of the advertising was, as the advertiser stated, "clear and simple: Based on its efforts, Wal-Mart saves the average family \$2,500 per year." Reviewing the advertiser's support for this express claim (the two Global Insight reports), NAD determined that the advertiser had provided adequate support for its intended message.

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<sup>5</sup> The advertiser cited General Mills, Inc. (Cheerios Cereal), Report #4683, *NAD/CARU Case Reports* (June 2007). As in the Cheerios case, it argued, an implied claim in the Wal-Mart commercials "is not communicated based on the disclosures in the advertisements."

<sup>6</sup> See e.g., GFA Brands, Inc. (Smart Balance Buttery Spread), Report #4646, *NAD/CARU Case Reports* (March 2007); Conagra Foods, Inc. (Hunt's Ketchup), Report #4194, *NAD/CARU Case Reports* (June 2004).

<sup>7</sup> See, e.g., Johnson & Johnson Consumer Companies, Inc. (Aveeno Advanced Relief Cold Sore Treatment), Report #4719, *NAD/CARU Case Reports* (September 2007); Pan Am Corp. (The Pam Am Shuttle), Report #2564, *NAD/CARU Case Reports* (February 1988).

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However, it is well established that a claim that is expressly truthful can still be misleading.<sup>8</sup> Here, NAD determined that in the context of the challenged advertising, consumers could quite reasonably take away the message that families that shop at Wal-Mart will save \$2,500 per year more than families that shop at other stores – a message for which the advertiser provided no support and, in fact, conceded that there was none.

It is a fundamental principle of advertising law that advertisers are responsible for all reasonable interpretations of their advertising claims, including messages they may not have intended to convey.<sup>9</sup> Further, it is well established that in the absence of reliable consumer perception data, NAD will use its experienced judgment to determine the reasonable messages conveyed by an advertisement.<sup>10</sup> In evaluating the potential messages communicated by an advertising claim, NAD typically steps into the shoes of the reasonable consumer and examines the claim at issue in the context of the entire advertising in which it appears.<sup>11</sup>

There was no consumer perception evidence in the record. Accordingly, NAD analyzed the advertising to identify the potential messages reasonably conveyed to consumers. Viewing the television commercials at issue in their entirety, NAD determined that one reasonable consumer takeaway was that families that shop at Wal-Mart save \$2,500 per year more than families that shop at other stores. Certain particulars, as well as the net impression of the commercials, led NAD to its conclusion. For example, the first commercial opens with a family driving out of the Wal-Mart parking lot, a Wal-Mart shopping bag between the kids on the back seat, headed for the open road of the vacation that they can take because of the savings at issue here; shopping at Wal-Mart is clearly implicated. The commercial (as well as all of the others) ends with the well-known Wal-mart tagline: “Wal-Mart. Save Money. Live Better.”

Another commercial, depicting a father and son impulsively buying a used car with the touted savings, shows Wal-Mart shopping bags on the back seat of their car; father and son have evidently been shopping at Wal-Mart. NAD considered it quite reasonable for a consumer to assume that the featured savings had accrued due to shopping there. A third commercial shows a little girl donating to a Salvation Army solicitor in front of a Wal-Mart store. NAD finds it highly likely that many consumers would connect the touted \$2,500 savings to actually shopping at Wal-Mart – after all, these are all commercials for Wal-Mart, an enormous American presence whose overarching advertising message has always been about the savings consumers will obtain by shopping there.

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<sup>8</sup> See The Clorox Company (Clorox® Toilet Wand™ System), Report #4306, *NAD/CARU Case Reports* (April 2005) (an expressly truthful advertisement may be deemed misleading depending on the manner in which the information is communicated); see also Nestle USA, Inc. (Carnation Instant Breakfast for the Carb Conscious), Report #4203, *NAD/CARU Case Reports*, (July 2004) (qualifying information was neither clear nor conspicuous; more importantly, it contradicted rather than limited the main message); McNeil Consumer Healthcare (St. Joseph Adult Low-Strength Aspirin), Report #3871, *NAD/CARU Case Reports* (February 2002).

<sup>9</sup> See, e.g., Reckitt Benckiser, Inc. (Lysol® Neutra-Air®), Report # 4799, *NAD/CARU Case Reports* (February 2008); Novartis Consumer Health, Inc. (Lamisil AT Gel Advanced), Report #4796, *NAD/CARU Case Reports* (February 2008); DFS Services LLC (Discover Card Cash Rewards Program), Report #4779, *NAD/CARU Case Reports* (January 2008).

<sup>10</sup> See id.

<sup>11</sup> See Reckitt Benckiser, Inc. (Lysol® Neutra-Air®), Report #4799, *NAD/CARU Case Reports* (January 2008); DFS Services LLC (Discover Card Cash Rewards Program), Report #4779, *NAD/CARU Case Reports* (January 2008).

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The advertiser argued that the supers and disclaimers in the commercials were sufficient to ensure that the implied claim was not communicated, citing to the recent Cheerios case.<sup>12</sup> However, it is well established that a disclaimer should not contradict the main message of the claim it seeks to qualify.<sup>13</sup> Here, NAD was particularly concerned about the complexity of the information that the advertiser sought to communicate through the disclaimer. NAD noted that it was easy to communicate the necessary information in Cheerios (*i.e.*, the cholesterol lowering benefits promised were based on consumption of three cups of Cheerios, not one single-cup serving), whereas here, the material information was not nearly as simple to convey. NAD disagreed with the advertiser's argument that the title of the 2007 report ("Global Insight, The Price Impact of Wal-Mart: An Update through 2006, 9/4/07") itself communicates to consumers that the \$2,500 savings per family is based on an econometric model produced by extensive study of statistical data by a global consulting firm. Noting that a disclaimer cannot be used to alter the meaning of an express claim or to make an otherwise misleading claim truthful, NAD determined that the disclaimers here did not ensure that an inaccurate message was not communicated.

Further, in Cheerios, NAD explicitly premised its finding on the fact that "the super in the commercial appropriately qualifies the main claim because it is clear and conspicuous, *in large black font against a contrasting background and appears for one-third of the commercial without distracting elements.*" (Emphasis added.) By contrast, in the commercials at issue here the disclaimer is in relatively small type compared to the claim, is located at the bottom of the screen while the claim is at the center, appears on the screen for approximately four seconds of a thirty-second spot, and is not particularly high contrast (a lighter shade of the blue background in three of the commercials, for example, with the claim in white).<sup>14</sup>

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<sup>12</sup> General Mills, Inc. (Cheerios Cereal), Report #4683, *NAD/CARU Case Reports* (June 2007).

<sup>13</sup> See Nestle USA, Inc. (Carnation Instant Breakfast for the Carb Conscious), Report #4203, *NAD/CARU Case Reports* (July 2004); see also BMW of North America, LLC (Advertising for BMW X5 with xDrive), Report #4156, *NAD/CARU Case Reports* (March 2004) (a disclaimer cannot be used to alter the meaning of an express claim or to make an otherwise misleading claim truthful).

<sup>14</sup> NAD's comprehensive description of the relationship between the claim and the disclosure in Cheerios further highlights the differences between that case and this one:

The advertiser maintained that the claim "Cheerios can lower your cholesterol 4% in 6 weeks" is expressly qualified by a disclosure ("Studies show two 1½ cup servings daily for 6 weeks reduced bad cholesterol about 4% as part of a low fat diet"), shown on product packaging and in all advertising, which provides the amount of Cheerios a consumer must eat (1½ cups daily) to achieve the advertised benefit. The advertiser maintained that the disclosure is prominent, clear, conspicuous (e.g., black lettering against a yellow background on product packaging with only the product in the background) and in close proximity to the triggering claim without distracting elements in accordance with NAD precedent. The advertiser also noted that on the product packaging, *the entire back panel of the packaging, where consumers are directed by the large disclosure "SEE BACK FOR DETAILS" directly below the express claim ("Lower Your Cholesterol 4% in 6 Weeks"), is devoted to explaining the cholesterol-reducing claim which is facilitated by the disclosure that appears in close proximity to the express claim.*

(Emphasis added.) Here, by contrast, there is no explanation at all of the report's title or what it actually means to consumers.

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NAD was also concerned about the accuracy of the messages communicated by the print flyer and a portion of the advertiser's website.

Regarding the flyer, the largest type on the page (upper left, in red) reads "What would you do with an extra \$2,500\* a year?" The smallest, just above a colorful symbol of the "Customer Action Network" ("CAN") and the Wal-Mart logo, is the disclaimer, reading "\*According to an independently-certified study, Wal-Mart saves the average American household more than \$2,500 per year." At the upper right corner of the flyer, the consumer is invited to "Save Money, Live Better, Join CAN!" The flyer has a background of text of items that apparently could be purchased at Wal-Mart stores, such as "clothes," "medication" and "groceries." The flyer also informs the consumer that one can sign up for CAN online or by visiting a booth located in a Wal-Mart store, and that CAN "is a program designed to keep customers informed and involved regarding issues that affect Wal-Mart and its ability to save people money so they can live better."

A "ticker" running on the opening page of Wal-Mart's website (<http://www.walmart.com>) also caused NAD concern. The ticker contains a constantly increasing dollar amount<sup>15</sup> and the statement: "This number represents the amount of money Wal-Mart has saved American families since January 1, 2008. (Learn More.)" Clicking through sends the viewer to another Wal-Mart website, at <http://www.savemoneylivebetter.com>, featuring holiday television commercials and customer testimonials. One section of this page invites the viewer to "head to our Living Better section and tell us what you do with the money you save *by shopping at Wal-Mart.*" (Emphasis added.) The constantly increasing number appears on this page as well, at the bottom left corner next to the text, "what's this?" Placing the cursor over those words makes a box pop up that reads, "This number represents the amount of money Wal-Mart has saved American families since January 1, 2008 (Source.) Clicking through, yet again, brings up the attribution, "Global Insight, The Price Impact of Wal-Mart: An Update Through 2006, 9/4/07."

Viewing the flyer and website from the perspective of a reasonable consumer, NAD determined that it would be not only reasonable, but likely, for consumers to interpret these messages of savings to be connected to *shopping at Wal-Mart*, not simply to the impact that the existence of Wal-mart has on the U.S. economy.

In fact, regarding all of the challenged advertising, NAD considered it unreasonable to expect the average consumer to understand the disclaimer, even if easy to notice and read, to mean (as the advertiser argued) that the \$2,500 savings was a result not only of Wal-Mart's low prices, but also "the competitive and efficiency effect that Wal-Mart has had on other retailers and the nation's supply chain." Nor did it seem likely to NAD that a consumer would, due to the disclaimer, comprehend that this claim resulted from a "complex statistical analyses performed by a global leader in economic and financial analysis and forecasting shows that an economy without Wal-Mart would have meant higher prices for consumers" to the tune of \$2,500 per household.

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<sup>15</sup> This number exceeded \$50,000,000,000.00 at the time of this decision.

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For all of these reasons, NAD recommended that the advertiser either discontinue the television commercials and the print flyer, or modify them to expressly convey to consumers that the \$2,500 savings are a result of the impact that Wal-mart has on the CPI and the U.S. economy as a whole, and will be realized no matter where they shop. Further, NAD recommended that the advertiser either discontinue the related "ticker" advertising on its website, or modify it to expressly, clearly and conspicuously disclose, on the same webpage as the savings claim each time it appears, that the savings depicted are based on Wal-mart's impact on the economy and that the savings will be realized no matter where the consumer shops.

### **Conclusions:**

NAD found the advertiser's claim "Wal-Mart Saves the Average Family \$2,500 per Year," which is based on an econometric study measuring the impact that the existence of Wal-mart stores has on consumer prices in the United States, to be expressly truthful but misleading. More specifically, NAD determined that consumers could reasonably take away from the advertising at issue the message that families that shop at Wal-Mart will save \$2,500 per year more than families that shop at other stores – a message that was not supported by any evidence in the record. Therefore, NAD recommended that the advertiser either discontinue the television commercials, flyer and related advertising on its website, or modify them to expressly convey the message that the \$2,500 savings are based on Wal-mart's impact on the economy and that the savings will be realized no matter where the consumer shops.

### **Advertiser's Statement:**

Wal-Mart is pleased that NAD has confirmed that the express claim, "Wal-Mart Saves the Average Family \$2,500 per year," which was the intended message, was substantiated.

Having low prices on the products and services people want to buy is at the heart of Wal-Mart's approach to retailing and, as the Global Insight study acknowledged, that philosophy lowers prices for all Americans, wherever they choose to shop.

We were surprised by NAD's interpretation of an implied claim but confirm, if we use it in future advertising, we would be proud to take their recommendation into account, ensuring that the positive impact we have for all American families is even more explicit. (**#4817 SMZ, closed 03/19/2008**)