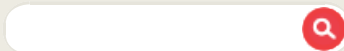




The UK's independent regulator for advertising across all media



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ASA Adjudication on Desert Point Ltd

Desert Point Ltd

St Denis Street
Port-Louis
Mauritius

Date: 24 October 2012
Media: Internet (on own site)
Sector: Health and beauty

Number of complaints: 1
Agency: Net Ventures
Complaint Ref: A12-199372



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Background

Summary of Council decision:

Four issues were investigated, all were Upheld.

Ad

The website www.clearsmoke.co.uk, which offered a trial of electronic cigarettes, was headed "ClearSmoke" and featured the logos of the BBC, Sky News and itv1 with the statement "e-Cigs advertised on". Under the heading "THE SMART SMOKERS [sic] CHOICE" the ad stated "SMOKE ANYWHERE. ClearSmoke electronic cigarettes are smoke-free and flame-free, meaning you can enjoy them safely, anywhere you want". Under the heading "Electronic Cigarettes in the Media" the ad included quotations from national newspapers and television broadcasters. The quotation from the Guardian stated "The government's 'nudge unit' wants to encourage the use of smokeless nicotine cigarettes - in an attempt to reduce the numbers killed in the UK by smoking diseases each year". The quotation from the Daily Telegraph stated "Electronic cigarettes mimic the act of smoking and include nicotine, but do not emit the same type of odour or ash". The quotation from the Daily Mail stated "The devices address both the nicotine addiction and the behavioural aspects of smoking - the holding of the cigarette, the puffing, exhaling something that looks like smoke and the hand motion - without the more than 4000 chemicals found in cigarettes". The quotation from itv1 stated "They look like cigarettes but they comprise of [sic] a battery, an atomiser and also a cartridge chamber that contains a small quantity of nicotine and water". The quotation from the BBC stated "If you're one of thousands of smokers made to shiver outside when you want a fag - help is on its way. (E-cigs) contain liquid nicotine and when you inhale on them the end lights up. That gives you a hit of nicotine and then you breathe out water vapour, which looks like smoke". The quotation from the FT (Financial Times) stated "Non-tobacco nicotine products genuinely recreate the smoking experience". The ad also stated "QUALITY ASSURANCE. All ClearSmoke products are subjected to strict quality control and industry assessments". It then listed "CE A mandatory conformance mark on products in the European Economic Area - RoHS Restriction of Hazardous Substances - SGS The global leader and innovator in inspection, verification, testing & certification". The ad also stated "ClearSmoke has the following certifications: CE ... RoHS - SGS".

Issue

A complainant challenged whether:

1. the claim that the product had been advertised by the BBC, SKY NEWS and itv1 was misleading and could be substantiated;
2. the claim "... you can enjoy them safely, anywhere you want" was misleading and could be substantiated, because he understood that was not the case;
3. the quotations under the heading "Electronic Cigarettes in the Media" were misleading, because he believed they had been taken out of context; and



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4. the heading "QUALITY ASSURANCE" and the text "All ClearSmoke products are subjected to strict quality control and industry assessment" followed by the CE, RoHS and SGS logos were misleading, because he believed they suggested the product had been medically approved.

CAP Code (Edition 12)

3.1 3.11 3.47 3.50 3.7 3.9

Response

Net Ventures responded for Desert Point.

1. They said that the claim, "e-Cigs advertised on", referred to the product type as a whole and not the ClearSmoke brand specifically.

2. Net Ventures said the only ingredients in ClearSmoke refills were nicotine, propylene glycol and safe flavouring ingredients. They said propylene glycol was an ingredient found in many health products and medicines and that, while nicotine was addictive, they believed it was widely acknowledged that the detrimental health effects caused by smoking were due to the process of burning tobacco. They cited reports and fact sheets published by Action on Smoking and Health (ASH). Additionally, they said "safely" also referred to the device being flame-free and that it therefore did not present a fire hazard in the way conventional cigarettes did. They pointed out that a disclaimer on their website stated "Information and statements regarding dietary supplements products have not been evaluated by the European Medicines Agency. The information and products are not intended to diagnose, treat, cure, or prevent any disease. The pages found on this site are intended for information purposes only and should not be considered a substitute for professional medical care from your physician. Information on this site is provided for informational purposes, is taken directly from the marketing and product information furnished by the manufacturer, and is not meant to substitute for the advice provided by your own physician or other medical or nutritional professional. You should not use the information contained herein for diagnosing or treating a health problem or disease, or prescribing any medication. You should read carefully through all product packaging. Keep in mind that we are all different - actual results will vary widely among users of any of these products".

They said the 2007 UK Smoking Ban and anti-smoking laws referred specifically to tobacco and lit tobacco. They said it was ultimately a venue owner's decision whether or not to allow the public to use e-cigarettes but that it was not illegal to smoke an e-cigarette in any of the locations specified on the ClearSmoke website. They said they were willing to amend the claim so that it referred to using e-cigarettes "safely and legally, anywhere you want".

3. Net Ventures said the quotations were statements of fact about the devices and how they functioned, regardless of the author's opinion or the tone of the piece as a whole. They pointed out that the website also contained a disclaimer which stated "The use of references to statements made by news organizations and quotes from experts in the field does not mean that these organisations and/or experts in any way endorse the ClearSmoke (TM) product".

4. Net Ventures said they did not believe the Quality Assurance section implied in any way that the logos were medical or health-related certifications. They believed the text above the logos explained sufficiently clearly that the assessments related to quality control to meet industry manufacturing standards. They said each symbol was followed by a clear explanation of that organisation's work.

Assessment

1. Upheld

Whether the claim referred to the ClearSmoke brand or e-cigarettes generally, Desert Point had not explained the context in which the product was claimed to have been advertised or featured on the BBC, Sky News and itv1 and had not supplied evidence to substantiate the claim. Because of that, the ASA concluded that the claim was misleading.

On this point the ad breached CAP Code (Edition 12) rules 3.1 (Misleading advertising) and 3.7 (Substantiation).

2. Upheld

Advice published on www.nhs.uk acknowledged that e-cigarettes had increased in popularity but was cautious with regard to the health risks associated with using them. It stated that the vapour was "potentially less harmful" than tobacco smoke; that e-cigarettes may be safer than conventional cigarettes but that we didn't yet know the long-term effects of the vapour on the body. The advice stated that clinical trials were in progress to test the quality, safety and effectiveness of e-cigarettes but, until they were complete, the UK Government could not give any advice on them or recommend their use. The NHS advice also contained a link to www.ash.org.uk, which also contained cautiously-worded advice regarding the health risks

associated with using e-cigarettes.

The claim was worded "... you can enjoy them safely, anywhere you want". We considered that suggested the use of e-cigarettes was permitted where smoking conventional cigarettes was not, such as inside public buildings, workplaces, etc. We understood, however, that, regardless of the legal position on the use of e-cigarettes compared with smoking conventional cigarettes, policy on whether the use of e-cigarettes was actually allowed varied between organisations, employers, etc. meaning that, while it might not be illegal to use e-cigarettes, it was not always allowed in all situations. We welcomed Desert Point's willingness to amend the claim but, because they had not supplied evidence that supported an unqualified safety claim and which demonstrated it was possible to use e-cigarettes in all situations, and because we did not consider the disclaimer was sufficient to correct the understanding of the claim, we concluded that the investigated claim was misleading.

On this point the ad breached CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation) and 3.11 (Exaggeration).

3. Upheld

We considered that the way in which the wording of the quotations had been selected went beyond simple factual statements about how e-cigarettes functioned and, instead, suggested that the authors or organisations were strongly in favour of the use of e-cigarettes as an alternative to smoking conventional cigarettes. Desert Point had not supplied the articles in full, but we understood that the full text of the Daily Mail article was titled "Boston becomes latest U.S. city to ban electronic cigarettes in the workplace and for under-18s" and began "[electronic cigarette users] insist the devices ..." before it continued in the way quoted in the ad. We considered that the full text suggested a more cautious or questioning position on the use of e-cigarettes than the extracts used by Desert Point suggested. We did not consider that the disclaimer, which appeared some distance away from the quotations and was considerably smaller, was sufficient to correct the suggestion. Because of that, we concluded that the way in which the quotations had been used was misleading.

On this point the ad breached CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation) and 3.9 (Qualification).

4. Upheld

We acknowledged that explanatory text appeared alongside the CE, RoHS and SGS logos. However, we considered the explanatory text and the heading "QUALITY ASSURANCE - All ClearSmoke products are subjected to strict quality control and industry assessments" was ambiguous in that it could suggest ClearSmoke products had been assessed and approved. E-cigarettes were not, however, regulated by the MHRA and were not approved by them. Because the status of e-cigarettes was that they were unregulated, and because we considered that the heading "QUALITY ASSURANCE" and the text that followed, "All ClearSmoke products are subjected to strict quality control and industry assessments", in conjunction with the logos, was ambiguous and could suggest that they were approved and regulated, which was not the case, we concluded that the ad was misleading.

On this point the ad breached CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation) and 3.47 and 3.50 (Endorsements and testimonials).

Action

The ad must not appear again in its current form.

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