

COMPLAINT NUMBER	17/372
COMPLAINANT	M Honeychurch
ADVERTISER	Brand Developers Ltd
ADVERTISEMENT	Brand Developers Ltd, BeActive, Digital Marketing
DATE OF MEETING	28 November 2017
OUTCOME	Upheld, in part, Settled, in part

SUMMARY

The advertisement for the BeActive <https://www.branddevelopers.co.nz/shop/beactive> contained therapeutic claims about the product, testimonials and a section titled 'Customer Reviews'.

The Complainant said the advertisement made therapeutic claims that were unable to be substantiated and included testimonials which were likely to mislead consumers.

The Advertiser provided substantiation to support that the claims made in the advertisement were consistent with both the WAND listed intended purpose for the device and removed a testimonial which included a therapeutic claim.

The Advertiser said the Customer Review section of the webpage contained independent reviews that were clearly labelled "Review Snapshot", did not contain testimonials but were independent reviews hosted by *PowerReviews*. The Advertiser said it had not posted these reviews and they are not part of their advertising.

The Complaints Board found the claim the BeActive knee brace was "alleviating pain to the nerve and up to the lower back" was inconsistent with this medical device's intended purpose which was notified in the WAND database as (in part) "helps alleviate pain to the nerve, lower back, buttocks and legs". Therefore, the Complaints Board ruled the claim was in breach of Rule 2(a) of the Therapeutic and Health Advertising Code and Upheld this aspect of the complaint.

The Complaints Board noted the Advertiser had amended the testimonial which said "Right away I feel the release of pain in my lower back" to remove any reference to a therapeutic benefit from the product and, noting the self-regulatory actions of the Advertiser to amend this part of the advertisement, the Complaints Board ruled the aspect of the complaint was Settled against Rule 2(f) of the Therapeutic and Health Advertising Code.

The Complaints Board said the Customer Reviews which appeared at the bottom of the webpage which promoted the BeActive product was advertising for the purposes of the ASA Codes of Practice and the Advertiser had control over the placement. The Complaints Board said the therapeutic benefit claims in the testimonials were in breach of Rule 2(f) of the Therapeutic and Health Advertising Code, were likely to mislead the consumer and had not been placed with a high standard of social responsibility to consumers in breach of Principle

2 and Rule 2(a) of the Therapeutic and Health Advertising Code. The Complaints Board ruled this aspect of the complaint was Upheld.

The Complaints Board ruled the complaint was Upheld, in part and Settled, in part.

[No further action required]

Please note this headnote does not form part of the Decision.

Preliminary matter: At the 28 November 2017 meeting of the Complaints Board the complaint was adjourned in order to seek clarification on the use of independent Customer Reviews, which include therapeutic benefit statements and appear adjacent to a product advertisement. Medsafe, the New Zealand Medicines and Medical Devices Safety Authority responsible for the regulation of medicines and medical devices in New Zealand were approached for comment on whether section 58 (1) (c) (iii) of the Medicines Act 1981 applies to independent Customer Reviews when they are included as part of a product advertisement for a Medical Device and when the Customer Review shows that they have benefited from it in some way. At the time of the Complaints Board deliberation, no response had been received.

COMPLAINTS BOARD DECISION

The Chair directed the Complaints Board to consider the complaint with reference to Principle 2 and Rules 2(a) and 2(f) of the Therapeutic and Health Advertising Code. The Complaints Board noted Principle 2 required advertisements were truthful, balanced and not misleading, that they shall not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear. This includes by implication, omission, ambiguity, exaggerated or unrealistic claim or hyperbole. Rule 2(a) required statements and claims to be valid and able to be substantiated. Substantiation should exist prior to a claim being made. For medical devices, therapeutic claims must be consistent with the WAND listed intended purpose for the medical device.

Rule 2(f) required the Complaints Board to consider whether the testimonials in the advertisement, where not prohibited by law, are authenticated, genuine, current, and typical and acknowledge any valuable consideration. Exceptional cases should be represented as such.

Principle 1 of the Therapeutic and Health Advertising Code required advertisements observe a high standard of social responsibility particularly as consumers often rely on such products, devices and services for their health and wellbeing.

The Complaints Board ruled the complaint was Upheld, in part and Settled, in part.

The Complaint

The Complainant raised three issues regarding the advertisement for the BeActive knee brace relating to possible misleading claims and concerns about the testimonials and Customer Reviews.

Misleading Claims

The Complainant said the advertisement contained unsubstantiated therapeutic claims, stating, in part: “The website claims the product ‘compresses behind the knee, alleviating pain to the nerve and up to the lower back’, offers “Drug Free Pain Relief” and can “Reduce and relieve your pain and discomfort without the side effects of over-the-counter or prescription drugs.”

Testimonial

The Complainant said the testimonial which stated: “Right away I feel the release of pain in my lower back” was potentially in breach of Rule 2(f) of the Therapeutic and Health Advertising Code.

Customer Reviews

The Complainant was also concerned the claims which appeared as part of the Customer Review section of the website were also in breach of Rule 2(f), specifically where it stated, in part the product: “definitely works”, “he made a speedy recovery” and “I have found a HUGE reduction in pain & by wearing it while sleeping”.

The Advertiser’s Response

The Advertiser responded to the issues raised by the Complainant.

Misleading Claims

The Advertiser responded to the Complainant’s concerns the advertisement contained misleading claims, and stated that “All claims made are consistent with both the WAND and ARTG listed intended purpose for this device.” The Advertiser explained the Intended Purpose as notified in the WAND database stated:

“The BeActive Brace fits about the knee, is an acupressure system that presses on the nerve behind the knee to help alleviate pain to the nerve, lower back, buttocks and legs”.

To support the intended purpose as listed in the WAND database, the Advertiser said: “part of the requirements to list a medical device in New Zealand is that the NZ sponsor (Brand Developers) is expected to hold suitable substantiation to support the ‘Evidence of Conformity Assessment’ for the safety and efficacy of the device. For the *BeActive* device, Brand Developers hold the following substantiation to support the ‘Evidence of Conformity Assessment’... *BeActive* Clinical Report, independent clinical report was prepared by *CPT Labs (USA)*... The summary indicates that multiple comparison testing of subjects showed a decrease in pain with the use of the *BeActive* device”

The Advertiser also provided the ARTG Certificate provided in Australia and *BeActive* Technology Background paper which provided information on how point specific compression devices worked to alleviate pain.

The Advertiser said the claims challenged by the Complainant were consistent with the WAND Intended Purpose. They provided substitution to support the pain relief claim and as the device was not a medicine and as the *BeActive* brace is confirmed drug-free, the drug-free pain relief claim was substantiated the brace cannot exhibit drug-related side-effects.

Testimonials

The Advertiser responded to the Complainant’s concern the testimonial which stated: “Right away I feel the release of pain in my lower back” was in breach of Rule 2(f) of the Therapeutic and health Advertising Code. They said, in part: “The review section of this website inadvertently contained a short quote from testimonials featured in our international advertising. *BeActive* is a product we have marketed since 2014 – the website had not been

updated to reflect the recent changes to the Code regarding the use of testimonials in New Zealand; specifically, Rule 2(f)...This has **already been acknowledged** in the latest update of the site – the quote, “Right away I feel the release of pain in my lower back” has been removed and replaced with a non-therapeutic quote from the reviewer.”

Customer Reviews

The Advertiser said the independent review section, clearly labelled “Review Snapshot”, did not contain testimonials but were independent reviews hosted by *PowerReviews*. The Advertiser said it had not posted these reviews and they are not part of their advertising, and noted Brand Developers has no control over that content whether reviews are favourable or unfavourable. The Advertiser said, in part: “This company has used their standard, easily-recognized review forum that appears on the world’s most-viewed websites, including *Google* and *Amazon*.”

The Advertiser said, in part: the reviews posted to “Review Snapshot” on the BeActive *webpage* are not referred to in the advertisement... The advertisement does not say “Check out the reviews” or “read the stories users have posted to *Product Reviews*”. The people who made these comments are also not referred to in our advertisement. We do not refer to “people who have benefitted from BeActive”. Any claim that because they appear on the “same page”, *therefore are part of the advertisement*, is not accurate... The advertisement is from the advertiser, the comments are from unsolicited writers independent from the advertiser.”

The Advertiser said in order to ensure there was no confusion for the consumer who may assume the third-party reviews are part of the advertisement, it could “alter the presentation of the third-party reviews, and by adding a disclaimer make it abundantly clear that anything else that appears anywhere on the internet (including this website) is not part of the advertisement.

The Advertiser said, in part: “If our clear intention was to “influence the customer” with “testimonials” at the bottom of the page...

- 1) They would all be *positive*, in line with *all* of our other advertising across all media. If these were testimonials that were part of our advertisement, we would have removed the *negative* comments and only published the ones with 5-star ratings.
- 2) The reviews at the bottom of the page are posted by third parties, with no cost to us – if we considered them “influential”, we would not have bothered with the three testimonials that *are* featured in the advertisement (these cost us time and production budget to source, and we had to supply Testimonial Release Forms).”

Complaints Board Discussion

The Complaints Board considered each issue raised by the Complainant.

Misleading Claims

The Complaints Board noted the Advertiser was required to demonstrate that there was suitable substantiation for the WAND listed intended purpose for BeActive and therefore for the therapeutic benefit claims made in the advertisement before it. The Complaints Board considered the substantiation provided by the Advertiser, including the Clinical Summary and ARTG Certificate. The Advertiser argued the claims are consistent with the intended purpose and provided evidence to support the claims made.

The Complaints Board said the notification of the intended purpose of the device required on the Medsafe WAND listing in New Zealand was consistent with evidence provided and noted the Advertiser was entitled to use the information of the device's intended purpose in its advertising in a responsible manner.

The Complaints Board said, however, the advertisement did not meet the requirements of Rule 2(a) of the Therapeutic and Health Advertising Code with regard to consistency of notification for medical devices, as the intended purpose stated (in part) "helps alleviate pain to the nerve, lower back, buttocks and legs" and the advertisement went further, stating "alleviating pain to the nerve and up to the lower back." The Complaints Board said this was an absolute claim and was not consistent with the listed intended purpose.

The Complaints Board ruled the claim "alleviating pain" was in breach of Rule 2(a) of the Therapeutic and Health Advertising Code and had not been prepared with a high standard of social responsibility to consumers and society required by Principle 2 of the Therapeutic and Health Advertising Code and this aspect of the complaint was Upheld.

Testimonials

The Complaints Board took into account the Advertiser had amended the testimonial which appeared at the bottom of the page which stated "Right away I feel the release of pain in my lower back" to remove any reference to a therapeutic benefit from the product. Noting the self-regulatory actions of the Advertiser to amend this part of the advertisement, the Complaints Board ruled the aspect of the complaint was Settled against Rule 2(f) of the Therapeutic and Health Advertising Code.

Customer Reviews

The Complaints Board were required to consider whether the Customer Review section of the website was part of the advertisement for BeActive and then determine whether the content was 'testimonial' for the purposes of the Advertising Code. The Complaints Board were then required to consider whether there was a breach of Rule 2(f) of the Therapeutic and Health Advertising Code and if the claims made in the reviews were likely to mislead the consumer. The Complaints Board noted its role was to consider the advertisement from the perspective of its likely audience, taking into account the context, medium, product and audience.

The Complaints Board took into account the definition of an advertisement which said:

"Advertising and advertisement(s)" are any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed."

The Complaints Board noted Rule 2(f) of the Therapeutic and Health Advertising Code states: "*Patient testimonials and healthcare professional endorsements in advertisements, where not prohibited by law, shall comply with the Code, be authenticated, genuine, current, and typical and acknowledge any valuable consideration. Exceptional cases shall be represented as such.*"

The Complaints Board noted the Therapeutic and Health Advertising Code Guidance Note on Rule 2(f) Testimonials, states "the Medicines Act Section 58 (1) (c) (iii) prevents the use of patient testimonials in advertisements to consumers for medicines or medical devices or methods of treatment where a therapeutic benefit is obtained" and required mandatory compliance.

The Complaints Board took into account the information provided by the Advertiser that:

- The reviews were independent
- It did not have control over their content
- It did not solicit reviews
- The reviews are not referred to in the advertisement
- The reviews were not intended to influence the consumer
- A disclaimer could be included to differentiate the customer reviews from the rest of the webpage.

The Complaints Board then considered whether Customer Reviews were advertising when placed in or adjacent to an advertisement for a product. The Complaints Board said that as there was a level of Advertiser control in that the Customer Reviews were intentionally placed adjacent to product information for the BeActive product, they “influence the choice, opinion or behaviour” and therefore met the definition of an advertisement.

The Complaints Board noted the Advertiser does not solicit the reviews or control what is written, but were able to control where the Customer Review is seen, and they are intentionally placed within the same webpage as the product in a similar style and format. The Complaints Board noted the webpage also referenced the aggregated rating in the webpage and the mechanism for completing a review was a link included on the website. The Complaints Board were of the view the content of the Customer Reviews were also likely to influence the purchasing behaviour of the consumer.

The Complaints Board noted the concerns of the Complainant that the Customer Reviews contained therapeutic benefit claims which state the BeActive knee brace “definitely works”, “made a speedy recovery” and “I have found a HUGE reduction in pain & by wearing it while sleeping”.

The Complaints Board said the above claims in the testimonials were in breach of Rule 2(f) of the Therapeutic and Health Advertising Code as they were likely to mislead the consumer and had not been placed with a high standard of social responsibility to consumers in breach of Principle 2 and Rule 2(a) of the Therapeutic and Health Advertising Code. The Complaints Board were of the view the proposed changes to the website, including the disclaimer, did not save the advertisement from breaching the Therapeutic and Health Advertising Code and this aspect of the complaint was Upheld.

Summary

The Complaints Board found the claim the BeActive knee brace was “alleviating pain to the nerve and up to the lower back” was inconsistent with the medical devices intended purpose which was notified in the WAND database as (in part) “helps alleviate pain to the nerve, lower back, buttocks and legs”. Therefore, the Complaints Board ruled the claim was in breach of Rule 2(a) of the Therapeutic and Health Advertising Code and Upheld this aspect of the complaint.

The Complaints Board noted the Advertiser had amended the testimonial which said “Right away I feel the release of pain in my lower back” to remove any reference to a therapeutic benefit from the product and, noting the self-regulatory actions of the Advertiser to amend this part of the advertisement, the Complaints Board ruled the aspect of the complaint was Settled against Rule 2(f) of the Therapeutic and Health Advertising Code.

The Complaints Board said the Customer Reviews which appeared at the bottom of the webpage which promoted the BeActive product was advertising for the purposes of the Code and the Advertiser controlled the placement of the reviews. The Complaints Board said the therapeutic benefit claims in the testimonials were in breach of Rule 2(f) of the Therapeutic

and Health Advertising Code, were likely to mislead the consumer and had not been placed with a high standard of social responsibility to consumers in breach of Principle 2 and Rule 2(a) of the Therapeutic and Health Advertising Code. The Complaints Board ruled this aspect of the complaint was Upheld.

Accordingly, the Complaints Board ruled the was Upheld, in part and Settled, in part.

DESCRIPTION OF ADVERTISEMENT

The advertisement for the BeActive <https://www.branddevelopers.co.nz/shop/beactive> contained therapeutic claims about the product, testimonials and a section titled 'Customer Reviews'.

COMPLAINT FROM M HONEYCHURCH

The BeActive sold by Brand Developers is "a patented pressure pad within a discreet leg brace".

Therapeutic claims are made that the product "compresses behind the knee, alleviating pain to the nerve and up to the lower back", offers "Drug Free Pain Relief" and can "Reduce and relieve your pain and discomfort without the side effects of over-the-counter or prescription drugs."

These claims are therapeutic in nature and appear to be in breach of the ASA's Therapeutic and Health Advertising Code, specifically Rule 2(a). The claims have not been substantiated. Rule 2(f) is breached by the testimonials at the bottom of the page, claiming "Right away I feel the release of pain in my lower back", "definitely works", "he made a speedy recovery" and "I have found a HUGE reduction in pain & by wearing it while sleeping".

THERAPEUTIC AND HEALTH ADVERTISING CODE

Principle 1: Therapeutic and Health advertisements shall observe a high standard of social responsibility particularly as consumers often rely on such products, devices and services for their health and wellbeing.

Principle 2: Advertisements shall be truthful, balanced and not misleading. Advertisements shall not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear. This includes by implication, omission, ambiguity, exaggerated or unrealistic claim or hyperbole.

Rule 2(a): Advertisements shall be accurate. Statements and claims shall be valid and shall be able to be substantiated. Substantiation should exist prior to a claim being made. For medicines and medical devices, therapeutic claims must be consistent with the approved indication(s) (for medicines) or the listed intended purpose (for medical devices).

Rule 2(f): Patient testimonials and healthcare professional endorsements in advertisements, where not prohibited by law, shall comply with the Code, be authenticated, genuine, current, and typical and acknowledge any valuable consideration. Exceptional cases shall be represented as such.

RESPONSE FROM ADVERTISER – BRAND DEVELOPERS LTD

Complaint 17/372 re: BeActive website

We are writing in response to the complaint about this advertisement, received from Mark Honeychurch of the *Society for Science Based Healthcare* on 5 OCT 2017. The website in question, www.branddevelopers.co.nz/shop/beactive#, advertises the *BeActive* support brace.

The main points of the complaint are as follows...

These claims are therapeutic in nature and appear to be in breach of the ASA's Therapeutic and Health Advertising Code, specifically Rule 2(a).

Therapeutic claims are made that the product "compresses behind the knee, alleviating pain to the nerve and up to the lower back", offers "Drug Free Pain Relief" and can "Reduce and relieve your pain and discomfort without the side effects of over-the-counter or prescription drugs."

We acknowledge the claims are therapeutic in nature – the *BeActive Brace* is a **Class 1a Medical Device** and as per the legislation in New Zealand, it is listed on the MedSafe WAND database. No claims are in breach of the code.

Therapeutic and Health Advertising Code Rule 2(a)

Advertisements shall be **accurate**. Statements and claims shall be **valid** and shall be able to be **substantiated**. Substantiation should exist prior to a claim being made. For medicines and **medical devices, therapeutic claims must be consistent with the approved indication(s) (for medicines) or the listed intended purpose (for medical devices)**.

All claims made are consistent with both the WAND and ARTG listed intended purpose for this device...

Intended Purpose	The Be Active Brace fits around the knee, is an acupressure system that presses on a nerve behind the knee to help alleviate pain to the nerve, lower back, buttocks and legs'
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The claims have not been substantiated.

Ref: WAND Notice, ARTG Certificate

All claims are accurate, valid and substantiated. As such, these claims are **not in breach** of the ASA's Therapeutic and Health Advertising Code Rule 2(a). Part of the requirements to list a medical device in New Zealand is that the NZ sponsor (Brand Developers) is expected to hold suitable substantiation to support the '*Evidence of Conformity Assessment*' for the safety and efficacy of the device. For the *BeActive* device, Brand Developers hold the following substantiation to support the 'Evidence of Conformity Assessment' and therefore the listed intended purpose for this device...

[Ref: BeActive Clinical Report.pdf](#)

This independent clinical report was prepared by *CPT Labs (USA)*. Established in 1975, *CPT* is a world leader in the testing of personal care, pharmaceutical and therapeutic products. Their New Jersey laboratory is the largest testing facility worldwide for clinical safety and claims substantiation.

We have attached this report. The summary indicates that multiple comparison testing of subjects showed a decrease in pain with the use of the *BeActive* device.

[Ref: ARTG Certificate](#)

Subsequently, substantiations in the form of this accepted *Clinical Report* (along with other clinical studies) resulted in the **Australian Government** accepting *Pain Erazor* as a **Class 1 Medical Device** as of **2016**. An **ARTG Certificate** was granted with the following intended purpose...

Intended Purpose	The Be Active Brace fits around the knee, is an acupressure system that presses on a nerve behind the knee to help alleviate pain to the nerve, lower back, buttocks and legs'
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NOTE: A WAND notice in New Zealand only requires substantiations for claims to be kept "on hand". However, the TGA in Australia, along with CAD, require all substantiations to be fully evaluated *before* an ARTG certificate can be issued and therapeutic claims can be made in advertising. The supporting materials supplied for *BeActive* satisfied all relevant Australian regulatory authorities.

[Ref: BeActive Technology Background.pdf](#)

This paper explains how a **point specific compression device** (such as *BeActive*) works to alleviate pain.

These are the specific claims disputed by the complainant...

CLAIM 1

"Compresses behind the knee, alleviating pain to the nerve and up to the lower back"

This claim is consistent with the listed intended purpose...

This claim is consistent with the listed intended purpose...

Intended Purpose	The Be Active Brace fits around the knee, is an acupressure system that presses on a nerve behind the knee to help alleviate pain to the nerve, lower back, buttocks and legs'
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[Ref: WAND Notice](#)

This Intended Purpose is supported by the above mentioned clinical report which demonstrates the pain relief efficacy of this product. Therefore, this claim is not in breach of the Therapeutic and Health Advertising Code Rule 2 (a).

CLAIM 2

"Drug free pain relief"

The *BeActive* brace is a medical device, not a medicine. It is therefore confirmed drug-free. This is consistent with the WAND notice...

- › The device is not medicated.
- › The device is not formulated.
- › The product does not contain a medicine that has consent for marketing in New Zealand.
- › The product does not contain a medical device which incorporates a medicine as an integral part and that has an action ancillary to the device.

Ref: WAND Notice

Pain relief is substantiated, as per the Clinical Report noted above. Below is the summary from the attached independent clinical report...

Summary:

Using the Tukey method, multiple comparison testing was conducted between each and every evaluation time point. The Day 4 time point exhibited statistically significantly lower pain evaluation scores than all other time points, indicating a decrease in pain with the use of the BeActive™ Brace.

Ref: BeActive Clinical Report.pdf**CLAIM 3**

"Reduce and relieve your pain and discomfort without the side effects of over-the-counter or prescription drugs"

As above, pain relief is substantiated, and the BeActive brace is confirmed drug-free, therefore cannot exhibit drug-related side-effects.

The final point of the complaint...

Rule 2(f) is breached by the testimonials at the bottom of the page, claiming "Right away I feel the release of pain in my lower back", "definitely works", "he made a speedy recovery" and "I have found a HUGE reduction in pain & by wearing it while sleeping".

The review section of this website inadvertently contained a short quote from testimonials featured in our international advertising. BeActive is a product we have marketed since 2014 – the website had not been updated to reflect the recent changes to the Code regarding the use of testimonials in New Zealand; specifically, Rule 2(f)...

Therapeutic and Health Advertising Code Rule 2(f)

... The Medicines Act Section 58 (1) (c) (iii) prevents the use of patient testimonials in advertisements to consumers for medicines or medical devices or methods of treatment where a therapeutic benefit is obtained (Note: Section 60 of the Medicines Act exempts advertisements that are circulated solely or principally to healthcare professionals). This means that an advertisement to consumers cannot include (or imply) a patient (or group of patients / class of people) with a medical condition or disease, taking a medicine or using a medical device or have accessed a method of treatment and showing in some way that they have benefited from it.

This has **already been acknowledged** in the latest update of the site – the quote, "Right away I feel the release of pain in my lower back" has been removed and replaced with a non-therapeutic quote from the reviewer. Please note – none of these reviewers are

presented as patients, nor as someone with a medical condition or disease, nor as having gained pain relief, therefore there is no breach of rule 2(f)...

...

The remaining “claims” the complainant has quoted are **not from “testimonials at the bottom of the page”**. They are from the independent review section, clearly labelled “Review Snapshot”. It is obvious to any reasonable member of the public that these are not testimonials, they are independent reviews hosted by *PowerReviews*. This company has used their standard, easily-recognized review forum that appears on the world’s most-viewed websites, including *Google* and *Amazon*.

Brand Developers has not posted these reviews, their content is not part of our advertising, and Brand Developers has no control over that content whether reviews are favourable or unfavourable.

The regulation in full...

58 Further restrictions on advertisements

(1) Subject to section 60, no person shall publish, or cause or permit to be published, any medical advertisement that—

(c) directly or by implication claims, indicates, or suggests that a medicine of the description, or a medical device of the kind, or the method of treatment, advertised—

(iii) has beneficially affected the health of a particular person or class of persons, whether named or unnamed, and whether real or fictitious, referred to in the advertisement;

The regulation “condensed”...

No person shall publish, or cause or permit to be published, any **medical advertisement** that claims a medical device has beneficially affected the health of a person **referred to in the advertisement**

The restriction on health claims is clearly directed at patient stories “**referred to in the advertisement**”.

The reviews posted to *ProductReviews* are **not referred to** in our advertisement. The advertisement does not say “Check out the reviews” or “read the stories users have posted to *Product Reviews*”. The people who made these comments are also **not referred to** in our advertisement. We do not refer to “people who have benefitted from BeActive”.

Any claim that because they appear on the “same page”, *therefore are part of the advertisement*, is not accurate.

Since the *ProductReviews* comments regarding BeActive include derogatory and unflattering remarks, they are obviously **not from the same source**. The advertisement is from the advertiser, the comments are from unsolicited writers independent from the advertiser.

We have been told that this regulation prohibits an advertisement from being placed on the same web page as (or “near”) any testimonial or recommendation regarding health benefits.

However – we contend that, although this may be a “general rule” that has been applied to advertisers... it doesn’t seem to fit the *actual regulation*. I have **bolded** the important phrase – “*claims... of a person... referred to in the advertisement*”.

In other words, if particular people make health benefit claims for our device (in the same publication, on TV, on the Internet) we can’t *refer to those particular people in our advertisement*. The regulation clearly states “referred to **in** the advertisement”, not “referred to **near** the advertisement”.

If there is contention that a confused reader might assume the third-party reviews are part of our advertisement, we can cover that.

First, we already have clearly distinct approved testimonials featured in our advertisement – they are highlighted, have nothing to do with the unsolicited third-party comments, and do not refer to them...

...

Second, we can alter the presentation of the third-party reviews, and by adding a disclaimer make it abundantly clear that anything else that appears anywhere on the internet (including this website) is not part of the advertisement...

IMPORTANT NOTICE

Any claims made for BeActive by individuals posting to internet websites (including this website) should be regarded as unauthorised and unverified. Such comments are not to be considered medical advice. Any third-party claims of health benefits resulting from product use are not endorsed by BeActive, and as such their contributors are not included or referred to in advertising for BeActive.

Current Layout

The “Review Snapshot” follows straight on from the final “FAQs” section of the advertisement. Although the light blue background of the advertisement ends, this is the only visual cue...

...

When we advertise on television, the very next advertisement that plays after ours is literally on “the same page” for the viewer – it may even be for a similar product to ours – but we are not liable for any of their claims. A viewer could look away for a few seconds, and when they look back not realise they are watching a different TVC. Yet, our TVC is still considered separate.

So where exactly does “our advertisement” *end* on a web page? Once a user has clicked to a following page? Or further - the page of another product we are selling? Or further still – someone else’s website?

Television ads aren’t considered finished *only when* viewers click to another channel. So should an advertisement on a webpage be treated any differently?

The point of the proposed disclaimer on our webpage is *not* to remove an issue **in** our advertisement – it would be there to make it abundantly clear to a reader that our advertisement *has ended*. Therefore, “perception by the consumer” should not be an issue – a reasonable viewer would *not* say, “The disclaimer clearly stated the advertisement had ended, but I took that to mean the advertisement was continuing”.

If our clear intention was to “influence the customer” with “testimonials” at the bottom of the page...

- 3) They would all be *positive*, in line with *all* of our other advertising across all media. If these were testimonials that were part of our advertisement, we would have removed the *negative* comments and only published the ones with 5-star ratings.
- 4) The reviews at the bottom of the page are posted by third parties, with no cost to us – if we considered them “influential”, we would not have bothered with the three testimonials that *are* featured in the advertisement (these cost us time and production budget to source, and we had to supply Testimonial Release Forms).

In summary...

- The complainant alleges we cannot make therapeutic claims – he is wrong. Medical devices are permitted to make therapeutic claims.
- The complainant has stated our claims are not substantiated – he is wrong. All claims have been substantiated.
- The complainant has claimed that independent unsolicited comments posted on a review forum are “patient testimonials”. They are not.

The complaint is therefore without merit. We are a responsible advertiser, and have insured that this advertisement for a medical device makes no unwarranted, unproven or irresponsible claims, and that it complies with all current relevant advertising codes.

With regard to the *ProductReviews* postings, we believe we have proposed a solution to any possible viewer confusion, but naturally will work within guidelines provided.