

1 Jarod Bona (234327)
2 Aaron Gott (314264)
3 Bona Law PC
4 4275 Executive Square, Suite 200
5 La Jolla, CA 92037
6 858.964.4589
7 858.964.2301 (fax)
8 jarod.bona@bonalawpc.com
9 aaron.gott@bonalawpc.com

10 *Counsel for Plaintiff*

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 Ariix, LLC,

14 *Plaintiff,*

15 vs.

16 NutriSearch Corporation and
17 Lyle MacWilliam,

18 *Defendants.*

Case No.: 17CV320-LAB (BGS)

First Amended Complaint

JURY TRIAL DEMANDED

1 Plaintiff Ariix, LLC alleges as follows upon actual knowledge
2 with respect to itself and its own acts, and upon information and belief
3 as to all other matters.
4

5 NATURE OF THE ACTION

6 The *NutriSearch Comparative Guide to Nutritional Supplements*
7 purports to provide objective ratings and certifications of supplement
8 products. NutriSearch and the guide’s author, Lyle MacWilliam,
9 market the guide to consumers and professionals as “scientifically
10 objective,” touting unbiased ratings based on 18 criteria developed by
11 12 independent nutritional authorities, and certifications based on
12 independent laboratory review. They disclaim any affiliation with any
13 of the companies that are rated or certified in the publication.
14 Consumers and professionals rely on these representations to
15 determine which supplements they should purchase or sell.
16
17

18 But those representations are false: NutriSearch and
19 MacWilliam are closely associated with one of the world’s largest
20 direct sales supplement companies that they “rate”—Usana Health
21 Sciences, Inc. The game is rigged. Usana and defendants have a
22 symbiotic relationship in which they both profit at the expense of
23 consumers and Usana’s competitors.
24
25
26
27
28

1 Indeed, MacWilliam and NutriSearch’s current CEO are former
2 Usana sales representatives; MacWilliam originally created the guide
3 to sell more Usana products. Usana pays NutriSearch and
4 MacWilliam hundreds of thousands of thousands of dollars per year
5 and provides substantial indirect benefits—including tens of
6 thousands of book sales as a central component of Usana’s sales
7 associate marketing program. More than 90% of MacWilliam’s income
8 comes from Usana. In exchange, NutriSearch and MacWilliam
9 manipulate their ratings criteria to ensure Usana remains the top-
10 rated supplement company in the guide and actively sandbag Usana’s
11 competitors’ ratings and certifications. In other words, the guide is not
12 what it says it is: it is a marketing tool for Usana. NutriSearch and
13 MacWilliam affirmatively deceive consumers into believing they are
14 an objective, neutral evaluator of supplement products. They are, in
15 reality, a shill that is bought and paid for by Usana.

16
17
18 Plaintiff Ariix, LLC is one of Usana’s fiercest competitors. Both
19 are direct sales companies, so they compete on two levels: they
20 compete to recruit sales representatives, and they compete for sales to
21 end consumers. Ariix is a much newer company in the market and has
22 made it its mission to outcompete Usana on quality and value. With
23
24
25
26
27
28

1 Usana pulling the strings in the background, NutriSearch and
2 MacWilliam have deliberately deflated Ariix's ratings and denied it
3 certifications for which it had objectively—and admittedly—qualified,
4 while inflating Usana's ratings and certifications. A significant
5 number of sales representatives and end consumers have been
6 deceived into choosing Usana over Ariix, thus damaging Ariix.
7
8

9 This is an action for damages, declaratory, and injunctive relief
10 for false advertising under Section 43(a) of the Lanham Act, 15 U.S.C.
11 § 1125(a).
12

13 **JURISDICTION AND VENUE**

14
15 1. This Court has subject-matter jurisdiction over this
16 action under 28 U.S.C. § 1331 and 15 U.S.C. § 1121 because this action
17 arises under the laws of the United States.
18

19 2. Venue is proper in the Southern District of California
20 under 28 U.S.C. § 391(b)(3) because there is no judicial district in
21 which this action might otherwise be brought and defendants are
22 subject to personal jurisdiction in this district. Venue is also proper
23 under 28 U.S.C. § 1391(c)(3) because defendants are not residents in
24 the United States.
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

6. Defendant Lyle MacWilliam is a Canadian citizen residing in British Columbia, Canada. MacWilliam is the author the *NutriSearch Comparative Guide to Nutritional Supplements*.

7. NutriSearch and its employees and agents participated personally in the unlawful conduct challenged in this complaint and, to the extent they did not personally participate, they authorized, acquiesced, set in motion, or otherwise failed to take necessary steps to prevent the acts complained of in this complaint.

SUBSTANTIVE ALLEGATIONS

The NutriSearch Guide

8. The *NutriSearch Comparative Guide to Nutritional Supplements* is the comparative supplement ratings and review guide that many turn to, particularly sales representatives, in the supplement direct marketing industry. Due to the factors further explained below, the NutriSearch guide has become the trusted name among these independent sales representatives. Indeed, they make decisions about which companies to work with and which products to sell based on the ratings contained within the guide.

9. NutriSearch bills itself as an independent company that presents only objective data and analyses to the purchasing public. It

1 publicly prides itself on separating the good from the bad in an
2 industry that has been viewed as existing in a regulatory wild west.
3
4 NutriSearch seizes upon supplement scandals as a marketing tool.

5 10. NutriSearch publishes two versions of its guide: a
6 consumer edition and a professional edition. The professional edition
7 is primarily used by sales representatives. The guide generally has
8 two parts: an “informational” part that purports to describe the
9 benefits and science of supplementation, and a “ratings” part that
10 purports to comparatively rate most supplement products on
11 the market.
12
13
14

15 11. The current professional edition is the 6th Professional
16 Edition. NutriSearch does not publish a new edition each year, but
17 instead publishes updates from time to time.
18

19 12. Each edition of the guide contains the following statement
20 on the inside cover:
21

22 This guide is intended to assist in sorting through the
23 maze of nutritional supplements available in the
24 marketplace today. It is not a product endorsement and
25 does not make any health claim. It simply documents
recent findings in the scientific literature.

26 This guide was not commissioned by any public sector or
27 private sector interest, or by any company whose
28 products may be represented herein. The research,
development, and findings are the sole creative effort of

1 the author and NutriSearch Corporation, neither of
2 whom is associated with any manufacturer or product
3 represented in this guide.¹

4 13. The guide purports to comparatively rate supplement
5 products on the market using a five-star rating system determined by
6 a “comprehensive analytical model” based on 18 different “health
7 support criteria” derived from 12 independent scientific sources and
8 additional scientific findings as they become known.
9

10 14. In February 2016, MacWilliam appeared as a guest on the
11 Dr. Oz Show, a “natural health”-centric daytime talk show, to promote
12 the guide. He advertised the guide as an “evidence-based scientifically
13 based [sic] system to separate the wheat from the chaff” that is
14 specifically designed to eliminate any bias or subjectivity:
15
16

17 Well what we’ve done in the book is we’ve taken a
18 scientific discipline to evaluate the product. First of all,
19 we developed an analysis model based upon the
20 published recommendations of 12 other nutritional
21 authorities. ***We didn’t want to put our particular***
22 ***bias into it*** so we relied on—we stood on the shoulders
23 of others so to speak—and developed this criteria and
24 then we applied it to 18 different health support—what
25 we call 18 different health support criteria such as heart

25 1. The 6th edition of the guide, which was published months after
26 this litigation commenced, appears to have removed the second
27 paragraph. NutriSearch’s removal of the claims of independence and
28 neutrality from the 6th edition, in response to this litigation, is a tacit
admission that the claims were false.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

health, metabolic health, level of inflammation, and on and on and on, so it's 18 different ways of kind of kicking the tires, looking under the hood. (emphasis added).

15. NutriSearch claims in the guide and on its website that this is an entirely mathematical potency determination:

To evaluate a product, its rating for each Health Support criterion is calculated mathematically. This rating is determined by the nutrients and their potencies present in the product in relation to the requirements for each criterion. The 16 individual ratings for each product are pooled to provide a raw score for that product. These scores represent a product's rating relative to all products evaluated within a particular market. Final product ratings are displayed as star ratings, shown in one-half-star increments from zero to five stars.

16. Companies whose products receive top ratings are invited to obtain an additional certification from NutriSearch called the NutriSearch Medals of Achievement (formerly called the Gold Medal of Achievement), which is the "central feature" of the guide. Certification is obtained by verifying compliance with the FDA's pharmaceutical good manufacturing practices (GMP) and by obtaining a certification that its label claims are true from one of two NutriSearch-approved laboratories (NSF International or U.S. Pharmacopeial Convention).

17. As MacWilliam explained on the Dr. Oz Show:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

We invited every company that we evaluated that scored five out of five stars, and we said “hey, put your money where your mouth is. Take your product, run it through an independent assessment body like the U.S. pharmacopoeia program or the NSF vitamin supplement program, demonstrate to us that you are manufacturing to basically pharmaceutical standards, and then what we want you to do is take your product off the shelf and have an independent lab assess that product so what it says on the label we know is actually in the bottle.”

18. These statements all suggest, individually and collectively, that NutriSearch is an independent observer that provides objective, scientific, evidence-based ratings and certifications of supplement products.

19. But the statements are inaccurate and, in some cases, literally false: in reality, NutriSearch and MacWilliam are closely affiliated with, and directly funded by, Usana Health Sciences, Inc., one of the world’s largest direct sales supplement companies. In exchange for that consideration, NutriSearch and MacWilliam consistently rate Usana as the best supplement company throughout the world, ensure symbiosis between the guide’s informational content and rating system and Usana’s current products and marketing claims, and deflate the ratings of Usana’s close competitors.

1 20. NutriSearch has long had a cozy relationship with
2 Usana Health Sciences, Inc. Lyle MacWilliam is a former Usana sales
3 representative, a former member of Usana’s scientific advisory board,
4 and has had regular speaking engagements at Usana’s global and
5 regional sales representative meetings. Indeed, MacWilliam originally
6 designed the guide as a tool to sell Usana products himself. The
7 current CEO of NutriSearch, Gregg Gies, is also a former Usana
8 representative.
9
10
11

12 21. In fact, MacWilliam remained a Usana sales
13 representative and advisory board member until 2005, when another
14 supplement company, Melaleuca, exposed MacWilliam’s affiliation
15 and bias. In response, MacWilliam told (now former) Usana
16 executives: “I should not be on the board or a representative anymore
17 because it looks like I’m biased. I am going to create more of a third-
18 party appearance, but I’d like you to use me for speaking and support
19 me.” Usana said “Yes, if you give us the number one rating.”
20
21
22

23 22. MacWilliam and NutriSearch are dependent upon that
24 “support.” Today, Usana directly pays NutriSearch and MacWilliam
25 hundreds of thousands of dollars per year, much of it in speaking and
26 promotion fees. It also provides other consideration: it heavily
27
28

1 promotes the guide to its sales representatives and encourages them
2 to purchase it. Usana’s marketing tools program for its sales
3 representatives focuses on the guide as its central component: they are
4 told to get the book, learn it, refer to it in making sales, and even pitch
5 the book to end consumers.
6
7

8 23. When MacWilliam and NutriSearch do not meet Usana’s
9 expectations, Usana cuts them off and they suffer financially: In 2008,
10 several additional companies were able to obtain Gold Medal
11 certification under NutriSearch’s criteria. Usana used its leverage and
12 withdrew its support, causing NutriSearch’s book sales and
13 MacWilliam’s speaking engagements to plummet. A Usana executive
14 explained the problem to MacWilliam when he complained about
15 sluggish book sales and a lack of speaking engagements: “when Usana
16 is not listed as number one, we don’t want to stand up and say ‘we’re
17 one of the five best.’ We like the fact that we’re number one.”
18 MacWilliam asked “would it help if Usana is number one in some
19 way?” The Usana executive said “of course it would help.”
20
21
22
23
24

25 24. NutriSearch subsequently came out with a new award
26 called “Editor’s Choice” and gave it to Usana, with the explicit
27 understanding that the new award—which allowed Usana to again be
28

1 “the best”—would entitle MacWilliam to return to the Usana event
2 circuit to speak and sell more books, and thus earn more speaking fees
3 and book royalties.
4

5 25. Once NutriSearch declared Usana as Editor’s Choice,
6 MacWilliam approached Usana for his reward, stating (as one former
7 Usana executive recalls):
8

9 My income is down. I would like to do a tour for Usana.
10 I got a motorhome, and my wife wants to travel the
11 country, and I would like you to pay for me to travel the
12 country so I can promote my books. I’ll speak on the
13 comparative guidebook and the benefits of Usana.
14 Usana is number one Editor’s Choice, and I’ll travel
15 from city to city so my wife and I can go on a summer-
16 long vacation and basically I want you to pay for it.

17 26. Usana paid MacWilliam \$90,000 for that summer tour.

18 27. The next year brought a new dilemma: another company
19 was actually going to beat Usana—with a perfect score, according to
20 the criteria. MacWilliam knew what that would mean: he would lose
21 income from Usana if it weren’t the top-rated product. So he went to
22 Usana, explained the situation, and told it “We need to change
23 something in your formula or I need to change something in
24 my matrix.”
25
26

27 28. MacWilliam and NutriSearch have since taken
28 extraordinary steps to ensure that Usana maintains its preeminent

1 status and top-rated position in the guide, arbitrarily revising their
2 so-called objective scientific criteria or by tweaking the advisable
3 amounts of particular ingredients of a supplement formula in order to
4 weight the criteria in Usana’s favor. In the 6th edition, MacWilliam
5 and NutriSearch also tweaked the Gold Medal of Achievement—now
6 called the Medals of Achievement with multiple echelons (bronze,
7 silver, gold, diamond, and platinum). Usana can now more clearly
8 state it is the best of the best because, of course, it earned the only
9 Platinum Medal of Achievement.
10
11
12

13 29. The collusion extends to Usana’s current marketing
14 claims. For example, Usana recently began making “cell-signaling”
15 claims on its labels. The 6th edition of the guide has a corresponding
16 focus: “the guide has been completely rewritten in light of recent
17 groundbreaking discoveries from the world of nutritional research”
18 regarding cell-signaling. In fact, “cell-signaling” is not a new concept—
19 it is a well-known phenomenon that has been known, studied, and
20 written about for many years. The only thing that’s new about it is
21 Usana’s label claims, and a NutriSearch guide that is custom-tailored
22 to showcase those claims.
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

30. Similarly, in 2013, Usana had increased the vitamin D and iodine content in its products and revised its marketing claims to emphasize the importance of those two ingredients. The 5th edition of the guide, which coincided with the products’ re-launch, was “rewritten from cover to cover” to discuss “the most recent and exciting scientific findings on two super-nutrients: Vitamin D and Iodine,” according to its back cover.

31. That is how it works: Usana makes minor tweaks to its formula, makes major changes to its marketing to emphasize those tweaks, and NutriSearch/MacWilliam simultaneously publish a new edition of the guide that feature language and concepts that mirror Usana’s new marketing. Consumers who read the guide, touted as an independent, scientifically objective, evidence-based guide on nutrition supplementation and analysis of supplement products are unaware they are reading a lengthy sponsored message designed to influence them to purchase a slightly reformulated product with a new and exciting marketing claim.

32. Thus, both the “informational” and “ratings” parts of the guide are designed to promote Usana.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

33. The guide is not only a tool for Usana’s promotion, but for sabotage of its competitors. As explained below, when Usana was threatened by Ariix—an emerging competitor with a similar direct sales model—MacWilliam and NutriSearch obliged Usana by knocking Ariix out of the running with falsified poor ratings and denied certifications.

Ariix

34. Ariix is a health and wellness company that utilizes a direct sales model to distribute its products which include, among other things, nutritional supplements. It was launched by former Usana executives who were discontent with Usana’s various scandals and dishonest practices.

35. Ariix holds trademarks for its brand name: Ariix, Registration No. 4242877 (registered Nov. 13, 2012, valid until Nov. 13, 2022); ARIIX, Registration No. 4250956 (registered Nov. 27, 2012, valid until Nov. 27, 2022).

36. Ariix is Usana’s fiercest competitor. Both are direct sales companies. They compete with one another in sales to end consumers and in recruiting independent sales representatives.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

37. In service of its agreement with Usana, NutriSearch has deflated Ariix’s ratings and denied it certification for NutriSearch’s Medals of Achievement.

38. In 2011, before Ariix had launched its first product or made information about it publicly available, Ariix learned that Usana had misappropriated Ariix’s confidential information about its first product, Ariix Optimal, and its draft marketing materials.

39. On information and belief, Usana provided NutriSearch with the Ariix Optimal product information and instructed it to run a new printing for the express purpose of thwarting Ariix’s entry to the market by giving Ariix Optimal a sub-par rating.

40. NutriSearch rated Ariix Optimal at 3.5 stars. After public criticism and incontrovertible evidence that Ariix was a top-quality product, NutriSearch agreed to revise Ariix’s rating to five stars.

41. With a five-star rating, Ariix was eligible for the NutriSearch Gold Medal of Achievement—the same as Usana. The Gold Medal of Achievement is an important marketing tool. Ariix’s sales representatives understand that Gold Medal status is fundamentally important to their sales strategy, particularly because Ariix’s fiercest competitor, Usana, markets its products as Gold Medal

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

certified. Sales representatives lose sales to competing products if they aren't listed as Gold Medal certified.

42. As the guide explains, Gold Medal of Achievement winners

have invested significant time, resources, and money to ensure their products are manufactured to the highest standards possible

Deservedly so, NutriSearch recognizes these companies and their products as the *Best of the Best*. Graphs of each company's highest-scoring product are included [in the guide].

Lyle MacWilliam, *The NutriSearch Comparative Guide to Nutritional Supplements*, 78 (5th Prof. ed. 2014).

43. Ariix spent two years and several hundred thousand dollars to obtain the Gold Medal of Achievement. If NutriSearch and MacWilliam gave Ariix—Usana's chief rival—a Gold Medal of Achievement, they would lose financial support from Usana that they were so dependent upon. So they continuously made changes to its certification requirements—requirements that it applied only to Ariix—in an attempt to provide false excuses not to certify Ariix.

44. Ariix first applied for Gold Medal status in February and March 2014. NutriSearch denied the application in August 2014

1 because Ariix (admittedly) misunderstood the requirements of
2 its submission.
3

4 45. Ariix made its corrected (second) submission one week
5 later August 13, 2014. NutriSearch again denied Ariix’s application on
6 September 16, 2014. NutriSearch claimed that, as a result of an NBC
7 Dateline expose on the issue of “dry-labbing” at ISO-certified
8 laboratories, NutriSearch would no longer accept ISO-17025-certified
9 laboratory reports and certifications.
10
11

12 46. NutriSearch also specifically acknowledged that “this
13 disclosure was not in any way a reflection on ARIIX” or its submission.
14 But NutriSearch did not apply this policy to previous submissions—
15 nor did it ever disclose it publicly in subsequent editions of the book or
16 advertisements, or otherwise issue any kind of statement. Instead,
17 NutriSearch purported to apply this secret new policy *only* on a going-
18 forward basis—thus exempting Usana and other previous recipients
19 who had relied on ISO-17025-certified labs. So—unknown to the
20 books’ readers—NutriSearch held Usana to a lower standard
21 than Ariix.
22
23
24
25

26 47. Immediately thereafter, on NutriSearch’s prompting,
27 Ariix undertook an expensive new full analysis of its formulation
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

through one of two NutriSearch-approved laboratories, NSF. Because of NutriSearch’s new requirements, NSF did not even have the analytical procedures necessary to verify certain nutrients.

48. As NutriSearch would later acknowledge, Ariix “diligently worked with NSF scientists to develop” these protocols and procedures and that Ariix’s “pioneering” work would “‘up the game’ for all future contenders of the NutriSearch GOLD Medal.”

49. NutriSearch thanked Ariix for “pioneering new ground” by developing new testing protocols with NSF and achieving certification (pending final laboratory reports). NutriSearch stated that “[t]here is unlikely to be a new edition of the Professional guide for some time, as the 5th edition is not long out of the box; however, as previously mentioned, we can insert your NutriSearch GOLD Medal of Achievement into future printings of the existing guide once current stock has been depleted.”

50. One month later, on May 13, 2015, Ariix submitted its final full NSF laboratory reports. Less than two weeks after that, on May 23, NutriSearch denied Ariix the Gold Medal that NutriSearch had just admitted it had earned and which Ariix had even set a new

1 standard for attaining. NutriSearch did not report any problems or
2 concerns with Ariix’s final NSF laboratory reports.

3
4 51. NutriSearch instead claimed that because of the dry-
5 labbing allegations that it had known of for nearly a year, “it came to
6 the difficult decision to suspend any further revisions of the 5th edition
7 of the guide” to create a 6th edition because it “could no longer
8 confidently assure the consumer that *what is on the label is what*
9 *is in the bottle*” (emphasis added). NutriSearch did not, however,
10 publicly question or disclose its own reservations about the validity of
11 the information in its current publications. Indeed, it continued to
12 market them, and affirmatively made statements that contradicted
13 that concern (e.g., MacWilliam’s Dr. Oz Show appearance).

14
15
16
17
18 52. Interestingly, Ariix was the *only* qualified recipient of the
19 Gold Medal of Achievement that had at any point submitted 100% of
20 its laboratory certifications from a non-ISO-17025 laboratory; it was
21 also the *only* qualified recipient to submit full labs exclusively from a
22 NutriSearch-approved laboratory.

23
24
25 53. NutriSearch gave no timeline for these revisions and
26 stated that it intended to grandfather its current recipients, including
27 Usana, at least until it could publish the next edition.
28

1 54. Thereafter, NutriSearch’s responsiveness to Ariix’s
2 inquiries became sporadic and eventually stopped. NutriSearch did
3 not notify Ariix when it finalized its new criteria or when it began
4 accepting applications for the 6th edition. The 6th edition has since
5 been published, and does not include Ariix as a Medal of Achievement
6 recipient. In effect, NutriSearch froze Ariix out of its certification
7 process, which misleads consumers to believe that Ariix—unlike
8 Usana—either isn’t willing to “go the extra mile to demonstrate the
9 quality of [its] product” or isn’t able because it failed GMP certification
10 or voluntary product testing.

15 **Defendants’ Exclusive Promotion of Usana**

16 55. MacWilliam has long been a keynote speaker at Usana
17 sales representative events. Given the importance of the guide in the
18 direct sales supplement industry and the fierce competition between
19 Ariix and Usana, Ariix intimated a desire and eventually made an
20 offer to MacWilliam to speak at one of its conventions.
21

22 56. On September 17, 2014, MacWilliam declined a speaking
23 engagement with Ariix, stating he would not be taking any more
24 speaking engagements and citing his changing priorities and desire to
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

be at home with his family. Nevertheless, MacWilliam continued to take paid speaking engagements with Usana on a regular basis.

57. Ariix questioned MacWilliam’s apparent exclusive relationship with Usana on multiple occasions. In 2015, after MacWilliam had already told Ariix that he was “retiring” from speaking, NutriSearch CEO Gies deflected by explaining that the speaking engagement had occurred some time ago, assuring Ariix that MacWilliam was not playing favorites in choosing speaking engagements.

58. But MacWilliam continued to consistently take paid speaking engagements with Usana. When confronted, MacWilliam admitted “They [Usana] will cut me off the second I do this [speak for Ariix].” This direct financial incentive is exactly why Ariix was ultimately not certified as a Gold Medal recipient: NutriSearch and MacWilliam knew that if Usana’s fiercest competitor achieved the same rating as Usana, it would cut off their payments.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

59. He also appeared as a guest on the Dr. Oz Show February 2, 2016 to promote the guide and Usana.² In the first half of 2016, the Dr. Oz Show averaged a 1.4 Nielsen household rating, or approximately 1.6 million viewers nationwide each day it was aired. The clip is also available on YouTube, where it has 18,000 views, and is featured on the homepage of NutriSearch’s website.

60. Not coincidentally, Usana is a sponsor of the Dr. Oz Show. On information and belief, Usana secured the guest appearance through its relationship with the Dr. Oz Show as another benefit for NutriSearch and MacWilliam—it would help boost book sales and provide another opportunity for MacWilliam to plug Usana as the best supplement company in the market.

61. MacWilliam first advertised the guide and the unbiased, evidence-based, scientific approach as explained above. But he ended his segment with a plug for Usana, prompted by Dr. Oz asking, “Who did the best?”:

Well there are some good companies out there. Oh, and one of the companies, I think it’s a trusted partner with your show, Usana Health Sciences. Outstanding

2. The Dr. Oz Show, *Your Guide to the Best Vitamins and Supplements* (Feb. 2, 2016), available at <https://www.youtube.com/watch?v=BSSJxAanXHQ&feature=youtu.be>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

products and this company manufactures to pharmaceutical standards as a matter of fact. Usana Health Sciences is even registered with the FDA, the Food and Drug Administration, as a pharmaceutical manufacturer. They've always, ever since we've done the guide, scored in our top five-star products. But, they've also demonstrated by going that extra mile and showing that their manufacturing practices are at pharmaceutical standards and also by taking their products and running it through independent analysis. These products are excellent products, and the company has done an outstanding job with it. What I like about the company as well is the commitment, it's a company that doesn't run with the market hype. It runs with the science. And if the company is putting the science first, I've got a lot of confidence that the product is exceptional.

62. MacWilliam made these statements promoting the 5th edition of the guide (and Usana) after the dry-labbing allegations, after it had grandfathered Usana's Gold Medal certification, and after he privately told Ariix he "could no longer confidently assure the consumer that what is on the label is in the bottle" from the testing that had been used for Usana's certification. He did not disclose that:

- a. Usana pays him and NutriSearch hundreds of thousands of dollars per year, promotes the guide, and provides other benefits;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- b. Dry-labbing had been exposed, that he had concerns about it, or that Usana’s certification came from a lab accused of “dry-labbing”;
- c. Ariix was the first and only company to set a “new, higher bar” for certification, but had not been awarded the Gold Medal of Achievement; and
- d. His appearance on the show was orchestrated by Usana (in fact, he leads the audience to believe that Usana’s sponsorship of the show is coincidental).

Other Promotional Statements

63. MacWilliam and NutriSearch also make the same and similar promotional statements about the guide and about Usana products in other media.

64. Many of the relevant statements in the guide are reproduced on Amazon.com as product descriptions, additional information, and the “Look Inside” feature. For example, one Amazon product page for the guide states “over 1,500 U.S. and Canadian supplements are scientifically rated and compared, [and] the 18 critical Health Support Criteria required to evaluate the supplements

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

are fully explained” in the product description; reiterates that it uses “a scientifically-based approach . . . representing thousands of hours of research” and that Medals of Achievement are based on “proof of manufacturing and product quality, including independent laboratory analysis [that assures] what is on the label is really in the bottle” in the “From the Inside Flap” excerpt; and the neutrality disclaimer described in paragraph 12 is one of the first pages viewable through the “Look Inside” feature designed to entice purchases of the book.

65. MacWilliam and NutriSearch authorize Usana and its representatives to use their trademarks, copyrighted material, and likenesses for promotional purposes on websites and social media. In some instances, MacWilliam’s quotes were intended as promotional product endorsements. For example, on one Usana Facebook page, the featured photo is a professionally designed composite photo of MacWilliam, the guide, and his quote:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

USANA's® New CellSentials™ with InCelligence™ technology is a real game changer that raises the bar for the industry. That's why I have full confidence that USANA will once again stand out as an industry leader and will continue to receive an elite standing in the new Comparative Guide.

USANA's® new CellSentials™ with InCelligence™ technology is a real game changer that raises the bar for the industry. That's why I have full confidence that USANA will once again stand out as an industry leader and will continue to receive an elite standing in the new Comparative Guide.

LYLE MACWILLIAM
BSc, MSc, FP - founder of NutriSearch.ca
former Canadian Member of Parliament, and member of the Legislative Assembly for British Columbia

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

66. Each time Usana is awarded with a Medal of Achievement, the Editor’s Choice award, or other accolades from NutriSearch, it issues a press release for worldwide distribution that quotes the guide. In 2013, for example, Usana quoted the guide’s purported objective, unbiased, scientific criteria for its rating and Gold Medal certification in its press release announcing its third consecutive Gold Medal award. NutriSearch and MacWilliam intend for their statements to be used promotionally in this way: they offer “licensing opportunities” to do so. This symbiotic relationship between defendants and Usana has been profitable for them all.

COUNT I
THE LANHAM ACT, 15 U.S.C. § 1125(a)
False Advertising or Promotion

67. Plaintiff repeats each and every allegation contained in the paragraphs above and incorporates by reference each preceding paragraph as though fully set forth at length herein.

68. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—. . .

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

69. Defendants NutriSearch and MacWilliam made false and/or misleading descriptions and/or representations of fact in each of its consumer and professional edition guides, in Amazon book descriptions, advertisements on the NutriSearch website, advertisements on Usana-affiliated Facebook pages, during Usana sales calls, and a promotion on the Dr. Oz Show.

70. NutriSearch and MacWilliam’s statements that neither NutriSearch nor the author of the guide “is associated with any manufacturer or product represented in this guide” is literally false:

a. MacWilliam has a long-running association with Usana as a keynote speaker at its conferences, and his continued income stream and other benefits are conditioned on ensuring that Usana remains the top-rated supplement company in the guide. This directly contradicts the statements on the inside cover pages of NutriSearch’s guides: NutriSearch’s and MacWilliam’s claims that they are

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

independent and that the ratings and certifications are based on unbiased, objective, scientific criteria.

b. MacWilliam has turned down offers for speaking engagements at Ariix events, citing personal reasons, while continuing to speak on behalf of Usana. This directly contradicts the statements on the inside cover pages of NutriSearch’s guides.

c. Both MacWilliam and Gies are former Usana commissioned sales representatives.

d. NutriSearch and MacWilliam have accepted money and other benefits from Usana in exchange for ensuring that Usana is always the best-rated supplement company in the guide.

e. NutriSearch and MacWilliam collude with Usana prior to publication of a new edition of the guide to coordinate tweaks in Usana’s nutrient formulation with corresponding changes to the ratings criteria that ensure Usana remains the best-rated product in the guide.

f. NutriSearch and MacWilliam collude with Usana prior to publication of a new edition of the guide to coordinate

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the guide’s informational content with Usana’s updated marketing messages and label claims.

g. MacWilliam regularly promotes Usana on paid speaking tours, in authorized endorsements featured on the internet and social media, and even on a nationally broadcast TV show.

h. Usana, NutriSearch, and MacWilliam have a symbiotic relationship that is profitable for all three.

71. NutriSearch and MacWilliam also made numerous misleading claims including, for example:

- **It is not a product endorsement.**

This is misleading because a substantial proportion of NutriSearch’s revenue and MacWilliam’s income comes from Usana sales representatives who purchase the guide as a sales tool. MacWilliam originally created the guide as a sales tool for Usana, for example. NutriSearch sells supplement companies on the marketing benefits of participating in its guide, offering “licensing opportunities” to Medal of Achievement recipients. And MacWilliam has, in fact, endorsed Usana through those “licensing opportunities,” on tour, and on TV.

- **It simply documents recent findings in the scientific literature.**

This is misleading because NutriSearch colludes with Usana as described in paragraphs 28–33.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- **Over 1,500 U.S. and Canadian supplements were scientifically rated and compared.**

This is misleading because NutriSearch rigs its ratings to ensure Usana is always the best-rated company.

- **The guide is an “independent publication.”**

This is misleading because NutriSearch has a long-running, direct financial relationship with Usana, as described throughout this complaint.

- **Suggestions of neutral evaluation for Gold Medal of Achievement awards based on “independent laboratory testing” using a “higher standard of evidence” provide “assurance to the consumer.”**

This is misleading because NutriSearch bases its certifications on ever-changing criteria designed to ensure that Usana remains the best-rated supplement company rather than any scientific process. It is also misleading because NutriSearch grandfathered Usana and exempted it from obtaining new laboratory certifications, while applying a different standard to deny Ariix the certification. Finally, it is misleading because it suggests that Ariix products are inferior to Usana’s products, have not undergone such rigorous testing, or have failed rigorous testing, when in private, NutriSearch acknowledges that Ariix has met a higher standard.

- **“[O]nly four manufacturers have completed the necessary steps to earn a Gold Medal of Achievement.”**

This is misleading because Ariix has not only completed the necessary steps, it jumped through additional hoops and “set a new, higher bar” for the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Gold Medal of Achievement, yet it has not been awarded the certification.

- **Statements that the NutriSearch five-star rating system is based on 18 objective scientific criteria and that it is used for the specific purpose of eliminating bias**

This is misleading because NutriSearch regularly changes its criteria to ensure that Usana remains the top-rated supplement company.

- **Other context suggesting the guide is neutral and objective in its ratings of various supplement products is false and misleading.**

72. The misstatements contain objective claims as to the neutrality of NutriSearch/MacWilliam rather than subjective opinion or puffery:

- Touting the objectivity of the rating system to more than a million potential consumers, MacWilliam explained that the five-star rating system is based on 18 objective scientific criteria and that it is used for that specific purpose of attaining objectivity: “we didn’t want to put our particular bias into it.”
See ¶ 14.
- NutriSearch/MacWilliam have also explained that the Gold Medal is not a subjective certification: any

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

company that obtains a five-star rating (touted as scientifically objective, as explained above) can obtain Gold Medal certification by (1) obtaining a pharmaceutical good manufacturing practices certification from NSF or USP and (2) obtaining lab certification that “what’s on the label is actually in the bottle.” See ¶ 17.

- c. NutriSearch and MacWilliam’s disclaimer of any ties to a company reviewed by the guide are demonstrably false. NutriSearch and MacWilliam have a direct and indirect financial relationship with Usana.
- d. NutriSearch made the statements with the intent of causing consumers to rely upon them.

73. The misstatements were made in connection with goods and services offered by NutriSearch as well as goods offered by Usana and Ariix, all of which are in interstate commerce.

- a. The guide is marketed and sold throughout the United States and around the world.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- b. The guide is designed to be used as a sales and marketing tool for nutrition sales representatives generally, and Usana sales representatives specifically.
- c. Usana and Ariix both sell their supplement products throughout the United States through independent sales representatives.
- d. MacWilliam promoted the guide and Usana on a nationally aired episode of the Dr. Oz Show; as part of the promotion, NutriSearch and the Dr. Oz Show offered viewers a chance to win one of 1,000 copies of the guide.
- e. The guide is available on Amazon.com, and many of the statements are included in product descriptions.

74. NutriSearch is not a direct competitor of Ariix, but has caused harm by deceiving consumers in a way that causes them to withhold trade from Ariix and to instead trade with Ariix's competitors. The misstatements directly reduced Ariix's revenues by causing both consumers and professionals to select Usana over Ariix.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Indeed, defendants profited by fixing the award to favor Usana, as described throughout this amended complaint.

75. The challenged statements are not consumer reviews; they are promotional material that is bought and paid for by Usana, coordinated in advance of publication. See ¶¶28–31. Moreover, NutriSearch purports to rate products based on scientific, objective ratings criteria rather than subjective opinion- or experience-based criteria.

76. Indeed, that is what makes NutriSearch and MacWilliam’s false and misleading statements so damaging to Ariix: because consumers believe that NutriSearch rates products based on objective, scientific criteria and has no connection with any company whose products are rated, they make purchasing decisions of nutrition supplements based on NutriSearch’s ratings and certifications.

77. The same is true for the Medal of Achievement certification: consumers believe NutriSearch and MacWilliam’s statements that the Medal of Achievement is available to any five-star recipient who “goes the extra mile” to obtain independent GMP certification and a lab verification that the label accurately reflects what is in the bottle. It is described as a binary determination: either

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

a company obtains GMP certification and laboratory verification of the label claims, or it does not. A five-star rated company that does not obtain a Medal of Achievement is thus, from the consumer’s viewpoint, either unwilling to “go the extra mile” and provide consumer assurance—or it is unable to do so because it does not manufacture to pharmaceutical standards or its labels do not accurately reflect what is in the bottle.

78. The statements constitute a commercial advertising or promotion because:

a. They were designed to promote the goods and services of NutriSearch and Usana.

b. They propose commercial transactions, including but not limited to, the purchase of the guide itself, purchases of periodic updates to the guide, and the purchase of “top-rated” products featured in the guide.

c. They are intended to be used as promotional material for Usana representatives who propose commercial transactions. MacWilliam specifically created NutriSearch for that purpose, and now he is paid directly to promote Usana as

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the best-rated supplement company—in the guide, in promotional material, and in live and televised appearances.

d. They were motivated by NutriSearch and MacWilliam’s economic interests, as well as Usana’s economic interests.

e. They are sufficiently disseminated to the relevant purchasing public and, in fact, target said purchasing public (as further explained in paragraphs 79–80).

f. They are in a “traditional advertising format” to the extent that publishers expect purchasers of books to read the statements prior to purchase, which are contained in the inside covers of the book. For example, prospective purchasers will peruse the book, especially the inside cover and first couple of pages, before deciding to purchase. These books are available to purchase at certain conferences, for example, where consumers can review them before buying.

g. Each book is an advertisement for readers to purchase future versions of the book. Each edition discusses the importance of new scientific breakthroughs and emphasizes the importance of purportedly cutting-edge new

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

research, suggesting the reader should make sure to pick up each new edition.

h. NutriSearch intends its Medal of Achievement awards to be used for promotional purposes by offering “licensing opportunities” for recipients of the certification.

79. NutriSearch’s scientific objectivity and neutrality statements have been sufficiently disseminated to the relevant purchasing public:

- a. They are contained as promotional material on the inside cover of the books themselves.
- b. They are repeated by NutriSearch and MacWilliam at Usana sales conferences, speeches, and summits as a selling point: you can sell more Usana products by showing your prospective customers this guide.
- c. They are made on bookseller websites, such as Amazon.com, and NutriSearch’s public website. See ¶¶ 15, 64.
- d. MacWilliam made similar scientific objectivity and neutrality statements as a guest on the Dr. Oz Show February 2, 2016. In the 2016/2017 season,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the Dr. Oz Show had an average daily viewer rating of approximately 1.6 million viewers. 18,000 people have also viewed the YouTube clip on Dr. Oz’s official YouTube channel, and the clip is also featured on the homepage of NutriSearch’s website.

e. They are quoted, summarized, and repeated by Usana in press releases with worldwide distribution and marketing materials.

80. NutriSearch’s misleading promotions of Usana and corollary misleading statements and omissions regarding Ariix’s ratings and quality have also been sufficiently disseminated to the relevant purchasing public:

- a. They are contained in the falsified ratings and certifications for Usana and Ariix within the books themselves.
- b. They are repeated by NutriSearch and MacWilliam at Usana sales conferences, summits, and events to drum up enthusiasm for Usana and the guide’s potential to help sell products.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- c. They were made during MacWilliam’s appearance on the Dr. Oz Show, a clip of which is available on YouTube and featured on the homepage of NutriSearch’s website.
- d. They are repeated by the tens of thousands of Usana sales representatives who are trained to use the guide as a marketing tool to sell supplements to consumers.
- e. Usana boasts its top rating and other achievements from NutriSearch in its marketing materials.

81. Consumers are likely to be, and actually have been, deceived by the statements made by NutriSearch in two ways: first, consumers decided to purchase NutriSearch guides because of the statements; and second, consumers (which includes end-consumers and supplement sales representatives) made supplement purchasing decisions because of the statements. The professional edition is specifically designed for and marketed to tens of thousands of Usana sales representatives, who are told that referring prospective customers to the guide is one of the most effective ways to sell Usana products.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

82. The statements relate to descriptions or representations of fact that misrepresent the nature, characteristics, and quality of NutriSearch and its products. The statements also relate to descriptions or representations of fact that misrepresent the nature, characteristics, and quality of Ariix and its services, as well as the nature, characteristics, and quality of its primary competitor, Usana.

REQUEST FOR RELIEF

WHEREFORE, Ariix requests that this Court:

- A. Declare that defendants’ conduct violates Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);
- B. Enter judgment against defendants;
- C. Award Ariix compensatory damages;
- D. Award Ariix pre- and post-judgment interest at the applicable rates on all amounts awarded;
- E. Award Ariix its costs and expenses of this action, including its reasonable attorneys’ fees necessarily incurred in bringing and pressing this case, as provided in 15 U.S.C. § 1117(a);

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

F. Grant permanent injunctive relief to prevent the recurrence of the violations for which redress is sought in this complaint; and

G. Order any other such relief as the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all claims.

DATED: April 19, 2018

Bona Law PC

s/ Aaron Gott

AARON GOTT

Jarod Bona
Aaron Gott
4275 Executive Square, Suite 200
La Jolla, CA 92037
858.964.4589
858.964.2301 (fax)
jarod.bona@bonalawpc.com
aaron.gott@bonalawpc.com

Counsel for Plaintiff

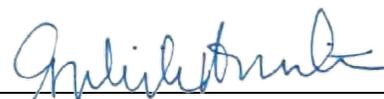
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF SERVICE

I am employed in San Diego County. I am over the age of 18 and not a party to the within action. My business address is 4275 Executive Square, Suite 200, La Jolla, California 92037. On April 19, 2018, I caused to be served via CM/ECF a true and correct copy of the Amended Complaint.

The CM/ECF system will generate a “Notice of Electronic Filing” (NEF) to the filing party, the assigned judge and any registered user in the case. The NEF will constitute service of the documents for purposes of the Federal Rules of Civil, Criminal and Appellate Procedure.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of April 2018 at San Diego, California.



Gabriela Hamilton