

# ADVERTISING STANDARDS COMPLAINTS BOARD

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**05/147**  
**AWAP 05/5**

## **DECISION**

### **Special Meeting 20 June 2005**

### **Convened pursuant to Rule 3 of the**

### **Constitution of the Advertising Standards Complaints Board**

#### **Complaint 05/147 AWAP 05/5**

Complainant: New Zealand Sugar

Advertisement: Johnson & Johnson Pacific

**Complaint:** The voice-over in the television advertisement for Splenda (Key No: 30JJC 1002 R, 15JJC0137) said:

“These are my famous no sugar lemon pancakes - Martin can still eat three! My no sugar custard isn't exactly unpopular either and just watch my no sugar gingerbread men walk.

You see its not sugar in my sugar bowl, it's Splenda.

It's made from sugar and tastes like it, but doesn't have all the calories, so we can still have a little sweetness in our lives.

Splenda -made from sugar, tastes like sugar”

The advertisement ended with a depiction of a packet of the product showing in small lettering under the name of the product, “Low Calorie Sweetener”

#### **Procedure**

##### **The Panel:**

The Chairman, Mr R. Thompson, ruled to deal with the matter with the attendance of parties pursuant to Rule 3 of the Complaints Procedures of the Advertising Standards Complaints Board. As Mr Rob Thompson would not be available at the time of the hearing he appointed the following panel: Mr E. Abernethy (Chairman of the Appeal Board) – Chairman, and Ms J. Courtney and Mr B. Moffat - co-panelists.

The Complainant, Sugar New Zealand was represented by Ms V. Lenihan – Senior Brand Manager – Chelsea Sugar and Mr. G. Leach – Managing Director - Revo.

The Advertiser, Johnson & Johnson Pacific, was represented by Mr. C. Towers - Managing Director – NZ and Mr D. Lewis – Partner – Kensington Swan Lawyers. Mr S. Wallace – Managing Director, McNeil Nutritionals Asia – Pacific was in attendance.

**The Complainant, New Zealand Sugar, said:****“What:** Splenda**Where:** TVNZ/TV3/Prime**When:** week commencing April 3/10/17 and May 8 to date**Description:** Commercial has a 15 sec and 30 sec version

A woman has baked several foods, which she says have all the appeal of sugarbaked goodies but without the sugar and no calories.

**Transcript of 30 second TVC:***“These are my famous no sugar lemon pancakes - Martin can still eat three! My no sugar custard isn't exactly unpopular either and just watch my no sugar gingerbread men walk.**You see its not sugar in my sugar bowl, it's Splenda.**It's made from sugar and tastes like it, but doesn't have all the calories, so we can still have a little sweetness in our lives.**Splenda -made from sugar, tastes like sugar”***Complaint:**

This complaint is on the basis that Splenda is being compared directly to sugar and misleading and confusing consumers into thinking it's as natural as sugar because it's “made from sugar and tastes like sugar”.

This complaint relates to what we believe is a breach of the Code for Comparative Advertising - guidelines a &amp; b, plus Principle 2 and 4, guidelines a, b &amp; c of the Code for Advertising of Food.

This is misleading for consumers as they are lead to believe Splenda is actually sugar, when in fact its an artificial chemical sweetener called sucralose.

While Splenda is originally derived from sugar (sucrose) it goes (sic) through a chemical process that changes its composition to sucralose.

Sucralose is 600 times sweeter than sucrose; it has a disaccharide structure in which three chlorine molecules replace three hydroxyl groups (chemical name trichlorogalactosucrose).

Sucralose provides essentially no energy: it is poorly absorbed (range 11 % to 27%) and excreted unchanged in the faeces. Any absorbed sucralose is excreted in the urine unchanged.

In the USA Johnson &amp; Johnson currently face a federal court case which has been brought by the Sugar Association on the basis of false and misleading advertising and marketing to consumers. This case is yet to be heard.

Detail of relevant codes as the basis for this complaint:

**GUIDELINES FOR COMPARATIVE ADVERTISING**

- a. **Comparative advertising should be factual and informative and should offer a product or service on its positive merits. The intent and connotation of the advertisement should be to inform and not to discredit, disparage or attack competitors, competing products or services directly or by implication.**

This Splenda ad discredits sugar by implication that sugar is bad for you as it contains calories.

- b. **Comparative claims should be unambiguous and clearly understandable so that there is no likelihood of the consumer being misled as a result of the comparison.**

We believe this ad misleads consumers into thinking that Splenda is a natural sugar product.

## **GUIDELINES FOR ADVERTISING OF FOOD**

### **Principle 2**

**All food advertisements should be prepared with a due sense of social responsibility to consumers and to society. However advertisements containing nutrient, nutrition, health or therapeutic claims, should observe a high standard of social responsibility.**

### **Principle 4**

**Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive consumers, abuse the trust of or exploit the lack of knowledge of consumers, exploit the superstitious or without justifiable reason play on fear.**

### **Guidelines**

**(a) All nutrient, nutritional, health and therapeutic claims should be factual, not misleading, and able to be proved. A high standard of substantiation is required, such as authentication by ANZFA and/or appropriate government agencies or significant scientific agreement among experts that the claim or message is supported by publicly available scientific evidence.**

**(b) The nature of the audience should be taken into account particularly when advertisements contain nutrient, nutritional, health and therapeutic claims.**

**(c) Food advertisements can contain exaggerated or humorous depictions. This is acceptable provided it is obviously not misleading**

By not stating what Splenda is, consumers are misled, as is evidenced by the US court case and statements from consumers in NZ. The ad confuses us, as on one hand it states that this is “**not** sugar in my sugar bowl” and then that it is “made from sugar and tastes like sugar”. This does not seem logical and therefore confuses and misleads consumers.

### **Further support**

We have the video records of a consumer focus group we were conducting at the time, into which we introduced the Splenda 30 second ad. It was played twice and respondents were asked to tell us the message that the ad conveyed about the brand and product.

The unanimous initial impression was one of confusion about whether it was sugar or not and following discussion they wondered if it wasn't sugar what exactly was this product?

This corroborates the misleading nature of this advertising.

Verbatim comments from respondents:

“I was completely confused about whether it was a sugar product or not and found the message contradictory”

“I was confused - they said it was made from sugar, but is that right or wrong?”

“Gives the message that just straight sugar is bad. Tastes like sugar, but isn't, so is much healthier - I was confused, so I thought maybe I should check that out and find out exactly what it is””

**The Chairman ruled that the following provisions were relevant:**

**\* Code for Comparative Advertising: Guidelines (a) and (b)**

**\* Code for Advertising of Food: Principle 2 and Principle 4 – Guidelines (a), (b) and (c).**

**The Advertiser, Johnson & Johnson Pacific, said:**

“We acknowledge receipt of your letter of 3 June 2005 and refer to your telephone conversation with David Lewis of Kensington Swan, our legal representative in New Zealand. In that conversation, you confirmed that the deadline for responding to your letter was extended to 3.30pm Wednesday 15 June 2005. Thank you for granting this extension.

Our response is as follows.

## **1. Complaint**

**1.1** The grounds of the complaint are extracted below:

- (a) the TVC misleads consumers “into thinking it's as natural as sugar because it's “made from sugar and tastes like sugar””;
- (b) the TVC misleads consumers “as they are lead to believe Splenda is actually sugar”;
- (c) the TVC “discredits sugar by implication that sugar is bad for you as it contains calories”, in breach of Guideline a. of the *Guidelines for Comparative Advertising*;
- (d) the TVC “misleads consumers into thinking that Splenda is a natural sugar product”, in breach of Guideline b. of the *Guidelines for Comparative Advertising*; and
- (e) the TVC confuses consumers “as on one hand it states that this is **not sugar** in my sugar bowl” and then that it is “made from sugar and tastes like sugar””. in breach of Principles 2 and 4 and Guidelines a., b. and c. of the *Guidelines for Advertising of Food*.

These grounds can be summarised as follows:

- (i) the TVC misleads consumers into believing that SPLENDA2 in fact is sugar;
- (ii) the TVC misleads consumers into believing that SPLENDA\* is as natural as sugar and is a natural sugar product; and
- (iii) the TVC discredits sugar by implying that sugar is bad for consumers as it contains calories.

We will respond to each of these grounds of complaint in turn.

- 1.2** We strongly deny that the TVC is in breach of the Guidelines for Comparative Advertising or the Guidelines for Advertising of Food. We confirm that all claims made in the TVC are factual, not misleading and able to be proved.

## **2 Response**

### **2.1 Background**

SPLENDA\* is a low calorie sweetener, the sweetener being sucralose. We agree with the Complainant and confirm that SPLENDA\*:

- is not sugar (sucrose);
- is “originally derived from sugar (sucrose)”;
- “goes through a chemical process that changes its composition to sucralose.”

In that regard, SPLENDA\* is chemically derived from sugar, and thus its chemical structure clearly resembles that of sugar. In this regard, we set out the comparative chemical structures of sucrose, sucralose and competing artificial sweeteners. You will see that sucralose is structurally similar to sucrose, unlike other sweeteners. (a comparative diagram was enclosed)

SPLENDA\* has been sold in New Zealand for around 9 years, throughout which time the attributes discussed in this letter have been heavily promoted. We are not aware of any complaints that the SPLENDA\* claims are misleading (to verify this, we have reviewed our records back to 2002).

You also will see that on the front of the packaging SPLENDA\* clearly is described as a "Low Calorie Sweetener". The front of the packaging is featured in the last frame of the TVC.

There are two relevant TVCs, a 30 second version and a 15 second version. We point out that while the Complainant refers to the 15 second TVC in the "Description" section, it does not refer to the grounds on which the 15 second TVC is misleading or otherwise in breach of the Guidelines. **Attached** is a transcript of the 30 second TVC. If required, an electronic copy of this TVC can be made available to the Board.

The TVC was first broadcast in New Zealand on 3 April 2005. Apart from this complaint, we have not received any consumer or competitor complaints in New Zealand in relation to the TVC, or any claim in the TVC.

## 2.2 Complainant ground 1: SPLENDA\* is in fact sugar

The Complainant claims that the TVC is in breach of Principles 2 and 4 and Guidelines a, and c of the Guidelines for Advertising of Food on the basis that the TVC confuses and misleads consumers into believing that SPLENDA in fact is sugar. We strongly deny that this is the case. SPLENDA" has unique and special sugar-like attributes and we have every right to promote the relationship between our product and sugar, just as consumers are entitled to be informed in this regard.

The connections with sugar to which we refer are the following.

- SPLENDA\* is derived from sugar- sugar is a principal component in the manufacture of sucralose.
- The chemical structure of SPLENDA\* is similar to sugar - see 2.1.

- SPLENDA\* tastes like sugar - extensive testing has been conducted on this proposition, and the proposition is widely acknowledged as correct.
- The reason SPLENDA\* tastes like sugar is because it is derived from sugar - see the attached technical paper (Wiet, S and Miller, G, (1996) Does chemical modification of tastants merely enhance their intrinsic taste qualities? *Food Chemistry* 58(4).305-311) which provides clear support for this and associated propositions.
- Like sugar, SPLENDA\* can be used in cooking and baking - this attribute is a significant differentiating factor compared with other artificial sweeteners (which either degrade under heat or do not have a sugar-like taste).

In short, Splenda is not sugar but a sugar substitute that resembles sugar more closely than other artificial sweeteners. This is important information for consumers to know, and it is what differentiates our product from competing low calorie sweeteners.

Contrary to the allegations of the complaint, the statement “made from sugar, tastes like sugar” (the Complainant incorrectly quotes “made from sugar and tastes like sugar”) in no way implies to consumers that SPLENDA\* actually is sugar. In fact these claims clearly differentiate the SPLENDA\* product from sugar in that:

- “made from sugar” expressly conveys to consumers that SPLENDA\* is manufactured or derived from sugar (and therefore no longer is sugar); as distinct from "made with sugar" which conveys that sugar is an ingredient;
- "tastes like sugar" compares the taste of the SPLENDA\* product with the taste of sugar, thereby expressly conveying that SPLENDA\* is not sugar, but something different. We have difficulty understanding how SPLENDA\* could be understood to be sugar if it merely tastes **like** sugar.

Further, in the TVC the claims “made from sugar” and “tastes like sugar” are made in the context of claims such as:

- my famous **no-sugar** lemon pancakes;
- my **no-sugar** custard;
- my **no-sugar** gingerbread men; and
- you see it's **not sugar** in my sugar bowl.

The TVC clearly conveys to consumers that SPLENDA\* is not sugar. In fact, the entire thrust of the TVC is that SPLENDA\* is not sugar, but rather a low calorie sweetener (that is made from sugar and tastes like sugar) that is an alternative to sugar.

The claims “no-sugar”, “not sugar in my sugar bowl”, “made from sugar” and “tastes like sugar” therefore are not inconsistent or illogical: they in fact expressly confirm that SPLENDA\* is not sugar (it is difficult to think of anything less ambiguous than “no sugar” and “not sugar”).

The Complainant seeks to rely on video records of a consumer focus group. However, you will appreciate that typical consumer focus group research inherently is unreliable as a basis for assessing the consumer take-out from an advertisement. The Complainant has not provided any details on the design, implementation, conduct, analysis and integrity of this “consumer survey”. For example:

- the method of selection and number of participants;
- the mode of questioning and actual questions (eg. initial response, considered response).

The Complainant has provided no evidence of the reliability or integrity of the results from the group or its ability to provide sound, unbiased technical support for the Complainant's assertion. As you would appreciate, without this evidence there is nothing to suggest that the focus group research is reliable. The Complainant's consumer focus group results in this regard are of no merit and should be set aside.

The Complainant also seeks to rely on current litigation in the US courts relating to our US affiliate and the US Sugar Association. That litigation:

- does not relate to the TVC in question;
- relates to different claims to those referred to in this matter; and
- as the Complainant readily concedes, has not been decided by a US court.

On that basis, it is clear that the US proceedings are irrelevant to the issues at hand.

### **2.3 SPLENDA- is as natural as sugar and is a natural sugar product**

The Complainant argues that the TVC misleads consumers into believing that SPLENDA\* is “as natural as sugar” because:

- SPLENDA\* is being compared directly to sugar; and
- the TVC claims that SPLENDA\* is “made from sugar and tastes like sugar”.

We strongly deny that consumers are misled in this way.

At no point in the commercial is it claimed that SPLENDA\* is a natural product. Further, the claims in the TVC that SPLENDA\* is made from sugar or that it tastes like sugar do not in themselves convey to consumers that SPLENDA\* is as natural as sugar. In fact, these claims expressly convey that this product is different to sugar, is a substitute for sugar, has been manufactured or derived from sugar and processed to reduce its calories (clearly not through a naturally occurring process) and is lower in calories. Clearly, consumers would understand from the TVC that SPLENDA\*, as a low calorie sweetener, is not a natural sweetener like sugar.

Furthermore, as set out in point 2.2, the TVC clearly conveys that SPLENDA\* is not sugar. Thus we strongly deny that consumers would understand SPLENDA\* to be as natural as sugar or a natural sugar product.

In addition, even if some consumers potentially had further questions about SPLENDA\* after viewing the TVC, that does not necessarily mean that they will be **mislead** into thinking that SPLENDA\* is sugar or a natural sugar product, or that the TVC violates any applicable advertising Principle or Guideline of the *Guidelines for Food Advertising*. It simply would mean that these particular consumers (whom we certainly would not regard as typical consumers) would seek out further information on how a product can have similar properties to sugar (eg, taste, appearance, cooking performance) without being sugar.

#### **2.4 The TVC discredits sugar**

The Complainant argues that the TVC is in breach of Guideline a. of the Guidelines for Comparative Advertising. Guideline a. states that:

*Comparative advertising should be factual and informative and should offer a product or service on its positive merits. The intent and connotation of the advertisement should be to inform and not to discredit, disparage or attack competitors, competing products or services directly or by implication.*

The TVC's intent and connotation clearly is to inform consumers of the fact that:

- SPLENDA\* is made from sugar; it is good to be made from sugar;
- SPLENDA\* tastes like sugar; it is good to taste like sugar;
- SPLENDA\* can be used in cooking, like sugar;
- SPLENDA\* is not sugar; and
- SPLENDA\* has lower calories than sugar.

The word “discredit” is not defined in the *Guidelines for Comparative Advertising*. The ordinary meaning of this word is “to damage a reputation; disgrace”. Clearly the TVC does not damage or disgrace sugar. Sugar is presented in a positive way. While sugar has more calories than SPLENDA\*, the message is that it is favourable to be made from sugar and favourable to taste like sugar.

The fact that sugar contains calories is widely known. It is not disparaging of sugar to state this fact. It also is a fact that some consumers seek sweetness without calories. Informing the market of their choices in this regard is not disparaging of sugar. Nothing in the TVC discredits sugar or gives rise to such a connotation.

For the reasons expressed above, we submit that the Complainant's complaint should be dismissed.”

**The Agency, Lowe Hunt, said:**

“We write to acknowledge receipt of your correspondence of 9 June 2005 concerning the complaint made by Revo on behalf of Chelsea Sugar in relation to the Splenda Television Commercials Complaint 05/147 AWAP 05/05. We note that in light of the Queen's Birthday public holiday in New South Wales last Monday, the Advertising Standards Complaints Board has granted an extension until 3.30pm on Wednesday 15<sup>th</sup> June to respond to the complaint.

We confirm that Lowe Hunt is an advertising agency for Johnson & Johnson New Zealand Limited trading as Johnson & Johnson Pacific. We have specific responsibility for the Splenda product in New Zealand. We note that Johnson & Johnson has prepared a submission in response to the Advertising Standards Complaints Board, which is being sent to you today. Lowe Hunt has reviewed our client's response and agrees with it. Lowe Hunt does not have anything further to add to the submissions made by our client....”

**Television Commercial Approvals Bureau (TVCAB) said on behalf of the media:**

“The complainant is claiming this advertisement infringes the Code for Comparative Advertising, and the Code for Advertising Food.

TVCAB appraised the commercial and felt it presented the product features of Splenda without denigrating sugar either openly or by implication.

In the mind, eye and general understanding of Joe Public, sugar has two main properties: sweetness and calories. Sweetness is a matter of taste, and the degree of taste can be managed by the quantity. The calorific content is also managed by volume and with some people it is of equal importance to taste, for the quick energy it can supply.

However, with sugar one cannot have sweetness without calories. If one wants to reduce their calorie intake with sugar they have to diminish the sweetness of the food.

The complainant acknowledges that Splenda is originally derived from sugar but then contends that it is an artificial chemical sweetener, whereas it is more accurately described as processed. In much the same way that decaf coffee is processed to eliminate caffeine for those who want coffee without the caffeine, Splenda is processed to give sweetness without calories. There is no suggestion that calories are bad for you, it is simply offering the consumer a personal choice, without saying or suggesting that one option is better than the other.

The entire advertisement is completely lacking in hyperbole, ambiguity and exaggeration. In our opinion it meets the required standard of high social responsibility and the complaint overall lacks merit.”

**Oral Submissions****The Complainant, New Zealand Sugar, said:**

The desired outcome from the hearing would be an amendment to the advertisement which clearly stated that Splenda was a “low calorie sweetener”.

Omission of this phrase made the advertisement misleading to the consumer.

The Food Standards Authority classified Splenda as an “intense sweetener”.

Splenda was a different product from sugar.

Splenda was metabolised in a manner which differed from the way in which sugar was metabolised.

The fact that there was a pending USA Federal Court case brought by the Sugar Association suggested that there was a query to be answered.

As the advertisement stood, it was misleading to the consumer.

The retail market for sugar showed a stable long term decline in sales.

**Johnson & Johnson Ltd, the Advertiser, said:**

The claims, “Made from sugar. Tastes like sugar” had been on the Splenda packaging since 1997.

The advertisement had received pre-screening approval from the Television Commercial Approvals Bureau.

The advertisement (98% similarity) had been shown in the UK, Australia and New Zealand.

This was the first complaint received.

Johnson & Johnson’s customer complaint centre for Australasia indicated that no complaints had been received, and was surprised to have received the complaint.

Prime competitors for the product was other low calorie sweeteners.

The chemical structure of Splenda was very close to sugar and this was the point of difference between Splenda and other low calorie sweeteners.

The US Federal case was not relevant to the matter before the Panel, it had not been heard and concerned different claims.

The advertisement was not misleading to the consumer as it clearly stated the product was not sugar.

The consumer was aware that the advertised product was a sugar substitute.

The “pack shot” at the end of the advertisement stated that the product was a “low calorie sweetener”.

The advertisement made it clear that the product was not sugar, but was made from sugar.

There were no other low calorie sweeteners made from sugar.

In a thirty second advertisement, there was a limit as to how many messages could be conveyed to the consumer.

The “low calorie sweetener” message was clearly available to the consumer on the packaging.

The advertisement was directed at female grocery shoppers aged 25 to 44, who had children.

The point of difference for the product advertised was that it was unaffected by heat, remaining chemically stable when subjected to heat, maintaining its flavour and thereby being suitable for use in baking and for sweetening hot foods, such as custard.

The market for low calories sweeteners was very competitive, with three main players.

The market for Splenda was still developing.

The product was targeted at the market sector making lifestyle choices about health based consumption of food products.

Splenda was different from other artificial sweeteners.

### **Deliberation**

The Panel perused the relevant correspondence and viewed the television advertisement. It took into account all visual and oral messages conveyed in the advertisement.

It noted New Zealand Sugar’s contention that the advertisement was misleading and confusing to consumers as the product Splenda was compared directly with sugar, thereby implying that it was as natural as sugar, when in fact a chemical process had converted sugar into sucralose, which was “an artificial chemical sweetener”.

The relevant provisions were the Code for Comparative Advertising, Guidelines (a) and (b). Also the Code for the Advertising of Food, Principles 2 and 4, and Guidelines 4(a) (b) and (c).

As a preliminary matter the Panel was of the view that the Splenda advertisement which said “You see its not sugar in my sugar bowl, it’s Spenda, it’s made from sugar and tastes like it but doesn’t have all the calories” could not be said to denigrate sugar by implying that it was bad for one, as it contained calories, as asserted by the Complainant. Accordingly, the advertisement could not be said to discredit, disparage or attack competitors, either directly or by implication and as such did not effect a breach of Guideline (a) of the Code for Comparative Advertising.

Addressing the issues raised by the advertiser, the Panel said that the fact that there had been no complaints received to date, did not necessarily mean that consumers

were not being confused by the message in the advertisement and despite not having received a consumer complaint an advertiser still had a duty to comply with the self-regulatory Advertising Codes in New Zealand. In line with this, the Panel said the fact that the advertisement had not received complaints in the UK, Australian or New Zealand markets, was not relevant to the matter before it.

Turning to the advertisement before it the Panel noted in particular the repeated reference to sugar. The Panel considered that this identified sugar as the market competitor for the Splenda product, not the “low calorie sweetener” market, in which market Splenda was classified by the Food Standards Authority. The Panel clarified that there were two distinct classes in the market for sweetening products, one being sugar and the other being the “not sugar” category.

The Panel was of the view that the reference to “low calorie sweetener” shown in the pack shot in the advertisement was of insufficient size and dominance to clarify the product category to the average consumer. It particularly noted that this qualification had not been included in the voice-over. On this issue, the Panel’s view concurred with that of the Complainant.

Furthermore, there was a long established requirement for advertisements to stand alone as a complete message, and there was no provision for having a consumer consult packaging in a retail environment to clarify a message in an advertisement. The length of a television advertisement did not excuse an advertiser from the requirement to present a clear and unambiguous message to the consumer, and in the Panel’s view, clarification of the product category for Splenda could easily have been included in a simple and concise way.

Turning to Guideline (b), which stated the requirement for comparative claims to be “unambiguous and clearly understandable so that there was **no likelihood of the consumer being misled as a result of the comparison**” (emphasis added), the Panel was of the view that the advertisement as it stood, contained an overall ambiguity, through the repeated reference to “sugar”, combined in particular with the reference to “not sugar in my sugar bowl”, which gave rise to a likelihood of a consumer being confused and misled as a result of the comparison in the advertisement. Accordingly, the Panel ruled that the advertisement was in breach of Guideline (b) of the Code for Comparative Advertising.

In the Panel’s view that advertisement did not meet the threshold to be in breach of Principles 2 and 4 of the Code for the Advertising of Food, or Guidelines (a), (b) and (c).

The Panel ruled to uphold the complaint.

**Decision:** Complaint **Upheld**