Tuesday, October 21
9:00 am-10:30 am

405 We Said That? Building a Robust Review of Advertising Claims & Marketing Programs

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Matthew Frank
Global Marketing Counsel
Hill's Pet Nutrition, Inc.

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Faculty Biographies

Wayne Bond

Wayne Bond is a partner at Womble Carlyle Sandridge & Rice, PLLC in its Atlanta, Georgia office. Womble Carlyle is a Southeastern-based firm with over 530 lawyers in eleven offices in Georgia, North Carolina, South Carolina, Virginia, DC, Maryland, and Delaware.

Mr. Bond has substantial experience in business and product-related litigation in a variety of industries, including pharmaceutical, healthcare and life sciences companies, financial institutions, construction products, technology-based companies, and transportation-related companies. He has successfully represented clients in a variety of business and advertising disputes, including federal and state injunction proceedings for false advertising claims, and a variety of contract disputes related to print and TV media advertising. Mr. Bond has handled high-profile, "front-page" class action and other litigation across the country in cases involving contract and business disputes, clinical trials, product liability, real estate and construction issues, professional malpractice, corporate liability, criminal defense, fraud and business torts.

Mr. Bond was elected to Order of the Coif, and was on the managing board of the Georgia Law Review. Additionally, he has extensive experience in ADR as an advocate, mediator and arbitrator. He has taught undergraduate and graduate level courses on legal issues at UGA and Emory, and he has often been asked to lecture at continuing professional education seminars focusing on clinical trials, business litigation, and advertising issues.

Mr. Bond graduated magna cum laude from the University of Georgia Law School.

Matthew Frank

Matthew Frank is global marketing general counsel for Hill's Pet Nutrition, Inc. (a Colgate-Palmolive Company). In this position, Mr. Frank provides counsel and support globally with respect to the development of new Science Diet® and Prescription Diet® brand products, advertising campaigns, product relaunches, challenges to Hill's and competitors' pet food advertising, and related activities driving Hill's global pet food business.

Prior to joining Hill's/Colgate, Mr. Frank was of counsel at Zackler & Associates in Oakland, California where he worked in the areas of advertising, marketing, and litigation on behalf of a number of well known food companies (Dryer's Ice Cream, C&H Sugar, Ghirardelli Chocolate, and Maui Pineapple).

Mr. Frank received his JD from the University of San Diego School of Law and his BA from Kalamazoo College.

Cynthia Hughes-Coons

Cynthia Hughes-Coons is assistant general counsel, Bayer HealthCare LLC, animal health division. As managing counsel for the animal health division of Bayer HealthCare LLC, her domestic and international practice includes litigation management, regulatory law (FDA, USDA, EPA), advertising law, licensing and transactional work, commercial contracts, products liability, antitrust, corporate compliance, corporate governance, and employment matters.

Prior to Bayer, Ms. Hughes-Coons was vice president and general counsel at Novartis Animal Health US, Inc. with responsibility for the North American and Asia Pacific regions. Ms. Hughes-Coones began her law career as a litigation associate with the firm of Shook, Hardy & Bacon LLP with an emphasis in the area of complex products liability defense for manufacturers of consumer and pharmaceutical products.

Her professional and civic affiliations include Kansas City Metropolitan and Johnson County Bar Associations, ACC, and Regulatory Affairs Professional Society.

Mr. Hughes-Coons received her undergraduate degrees from Kansas State University and graduated from the University of Kansas, School of Law.

Darin Inglish

Darin Inglish is senior legal counsel with Cricket Communications, Inc. and is responsible for overseeing legal issues relating to sales, marketing, and operations.

Mr. Inglish has been practicing law for 14 years, of which the last ten years have been in-house with Fortune 500 companies.

We Said That?!

Developing a Robust Review of Marketing and Advertising Claims

What Will They Talk About?

- How to keep it legal
- How to know when you can sue
- How to know when you can be sued
- How to keep your job (must be more than “Sales Prevention Department”)

Working With The Marketing Dept

- Substantiation of claims
- Citing data and studies
- Using Footnotes
- Professional vs. Direct-To-Consumer ads

Working With The Marketing Dept

- Comparative Advertising
- Importance of “clean hands”
- Keeping the competition honest
- “Home Made Bread”
- Training programs

Working With The Marketing Dept

- Introduce yourself and meet regularly
- Know company's products & promotions
- Educate them on laws of advertising
- Give feedback and suggestions for ads
- Ask to bounce ideas off you in advance
- Tell them the best way to work with you and when you want to be included

Regulatory Compliance

- Bayer – FDA & EPA, look to the label
- Cricket – FCC, state laws and litigation (e.g., early termination fees, telecom taxes and rate plan disclosures)
- Hills – FDA, 140 different products, global markets

Working With Ad Agencies

- Understand relationship between Marketing Dept & Agency
- Establish controls in review process
- Train the Agency
- Get to know Agency's lawyer
- Tell Agency if there is an issue you'll handle it internally
- Let Agency know when you want to see things in process

Seven Steps to Good Claim Support*

STEP 1 – **Assemble appropriate cross functional team**

STEP 2 – **Obtain Team and Management buy-in on desired advertising claim(s) / demos**

STEP 3 – **Obtain Team buy-in on intended use of claim(s) / demos: geography, media (pack, advertising, POS, internet)**

STEP 4 – **Build and obtain Team buy-in on testing program**

STEP 5 - **Trouble shoot the testing program**

STEP 6 - **Revise testing program, with team consultation and buy-in, if and as appropriate based on results of Step 5**

STEP 7 - **Agree on and communicate timing to complete testing and report results**

* Used by Hill's Pet Nutrition, Inc.

"Ain't No Bugs" Issues

- "Ain't no bugs on me"
- "There may be bugs on some of you mugs"
- Nurse's cabin and cap (blue v. red cross)
- "Gentle effective protection from disease spreading pests"
- "Ask your veterinarian for K9 ADVANTIX or another Advantage Family product that is right for your pet"

"Chandler's Story" Issues

- For "testimonial" format, there must be underlying studies to support claims (Hill's had 3 robust clinical studies with over 500 dogs)
- Chandler's results must be typical or additional disclosures would be required
- Demos (stairs and jumping in the mini-van) were accurate - no camera tricks or simulations
- Consumer was paid to be in the video study - disclosure required

"The Lion Sleeps" Issues

- "Fleas don't bite him"
- Advantage kills fleas faster than the competition
- Vet's #1 choice for fast, gentle flea control
- "Advantage makes cats and dogs [flea] free"

"Jackson's Story" Issues

- Real Vet in ad signed affidavit that she used the food for overweight pets in her practice
- Disclosures on the basis of "most effective" claims (calories, fat, fiber and L-carnitine)
- Disclosures on competitive products of comparison (major premium brands)

"Salt Lake's #1 Network" Issues

- Displayed at Major Soccer League game.
- Photo received from a competitor's Associate GC asking for substantiation
- Banner not reviewed by Legal Department or Corporate Marketing
- Banner created based on internal analysis (conducted by third-party) showing Cricket #1 in certain areas

"Raised Without Antibiotics"

Based on: ***Sanderson Farms v. Tyson Foods***, 2008 WL 1733607 and WL 1838719 (D.Md. 2008)

- Court denied motion to dismiss and issued injunction prohibiting Tyson from using either statement regarding antibiotics (qualified or not)
  - USDA role in approving labels does not preempt false advertising suit for *non-label* advertising
  - Revised label language did little to correct deception caused by original language
  - Evidence showed actual consumer confusion

"Raised Without Antibiotics"

- Competitive Chicken Processor has challenged your company's claim that its chickens are "Raised Without Antibiotics"
  - Although your company used antibiotics in raising its chickens, USDA approved its **"Raised Without Antibiotics"** label by mistake
  - USDA notified your company that the label was mistakenly approved, and your Marketing Dept revised the label to **"Raised Without Antibiotics that impact antibiotic resistance in humans"?**
    - » If USDA approves the revised label, can you use it in non-label advertising?

Puppy Food Competitors

- Management wants to sue competitor making claims its puppy food "reduces the severity of Canine Hip Dysplasia" ("CHD")
  - Competitor does not have any individual tests with statistically significant results to support claim, but it says several tests, when pooled together, support the claim
  - Your people think competitor is using junk science

Puppy Food - Additional Facts

- Your company runs ads saying the *formula* in its puppy food is preferred by veterinarians "2 to 1" over competitor's
  - Veterinarians overwhelming prefer competitor's *brand* over your company's brand
  - Veterinarians who were surveyed weren't examining formulas of actual products
  - Your Marketing Dept can't support "2 to 1" statistic

Puppy Food Questions:

- Can you sue competitor for making false claims about CHD without scientific basis?
- What if competitor challenges your company's "2 to 1" formula claim?
- Will claims and counterclaims just cancel each other out?

Puppy Food Competitors (cont.)

Based on ***Alpo Petfoods v. Ralston Purina***, 720 F. Supp. 194 (D.D.C. 1989)

- Injunction granted against unsupported CHD Ads
  - Evidence showed no reliable support for claim that Ralston-Purina pet food affected CHD
  - Results of multiple studies were not properly pooled
  - Even if results were properly pooled, resulting data was ***not statistically significant***

Puppy Food Competitors (cont.)

Based on ***Alpo Petfoods v. Ralston Purina***, 720 F. Supp. 194 (D.D.C. 1989)

- Injunction granted against Alpo ads claiming "2 to 1" formula preference
  - Consumer research showed take away message of ad was *brand* preference, rather than *formula* preference
  - Formula survey of vets was not valid and didn't support "2 to 1" claim

Puppy Food Competitors (cont.)

Based on ***Alpo Petfoods v. Ralston Purina***, 720 F. Supp. 194 (D.D.C. 1989)

- Net result:
  - Both sides enjoined for false ads (party acting more egregiously also had to pay damages)
  - Unclean hands defense must relate to the "very matter in controversy"
  - Unclean hands defense won't be applied when net result is advertisers continuing to deceive innocent puppies

Chinese Diet Tea

Based on ***FTC v. Bronson Partners***, 2008 WL 2698673 (D. Conn. July 10, 2008)

- In FTC Act suit, Court found Chinese Tea ads false and misleading
  - Claims were implicit and explicit (doctrine of false by necessary implication applied)
  - Claims were not adequately supported by research, which only suggested tea *can* reduce weight, not that tea *will* reduce weight
  - "Guarantee" was implicit "weight loss guarantee, and not just a "satisfaction guarantee"

Chinese Diet Tea

- Marketing Dept wants to make the following claims about your company's Chinese Diet Tea:
  - Drinking Chinese Diet Tea leads to weight loss without increased exercise or dieting
  - Clinical trials show 163 participants losing at least 18 pounds in 12 weeks
  - Guaranteed refund of purchase price if similar weight loss not achieved
    - » Do you approve *any* of these claims?

Reward Card Rebates

- Marketing Dept wants to implement rebate program where "rebates" are in the form of VISA Reward Cards
  - The rebates will be offered with the purchase of cell phones and service plans
  - The reward cards will come in the mail as a rebate check would normally come
  - Marketing Dept says cards are "as good as cash"
    - » Do you approve?

Reward Card Rebates

Based on ***Faigman v. AT&T Mobility***, 2007 WL 2088561 (N.D. Cal. July 2007)

- Court found rebate program false advertising under California state law
  - Advertising reward cards as "rebates" not in line with consumer expectations (not check or cash), especially since Cingular never disclosed that "rebates" would be in the form of rewards cards
  - Rewards cards were less valuable than cash or checks because of restrictions
    - (only accepted at certain locations, will be declined when transaction exceeds amount of card, the cards expire, do not earn interest, etc.)

"Picture That Can't Be Beat"

- Marketing Dept for your Satellite TV company wants approval for new TV ads starring Jessica Simpson and William Shatner saying:
  - Buy satellite service "For an HD picture that can't be beat"
  - You can't get "the best picture out of some fancy big screen" TV without Satellite service
  - "Settling for cable would be illogical"

"Picture That Can't Be Beat"

Based on ***Time Warner v. DIRECTV***, 497 F.3d 144 (2nd Cir. 2007)

- Court found DIRECTV ad false and misleading
  - Statements falsely claim DIRECTV produces a higher quality HD television picture than cable
  - Statements are "**false by necessary implication**"
  - Cable and satellite HD service have virtually equal quality pictures

▶
Alpo Petfoods, Inc. v. Ralston Purina Co.
D.D.C.,1989.

United States District Court,District of Columbia.
ALPO PETFOODS, INC., Plaintiff,
v.
RALSTON PURINA COMPANY, Defendant.
Civ. A. No. 86-2728.

July 28, 1989.

Rival puppy food manufacturers brought actions accusing each other of false advertising. The District Court, Sporkin, J., held that: (1) first manufacturer's false claims regarding its product's effect on canine hip dysplasia would be enjoined with damages awarded to competitor, and (2) competitor's false claims of veterinarian preference would be enjoined.

Relief granted.

West Headnotes

[1] Antitrust and Trade Regulation 29T ⇐23

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk23 k. Particular Cases. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)
Puppy food manufacturer's advertising claim that "one out of every two puppies" has some degree of hip dysplasia, though technically incorrect, was not actionable under Lanham Act; though claim was somewhat exaggerated, hip dysplasia was in fact prevalent condition in dogs. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[2] Antitrust and Trade Regulation 29T ⇐23

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk23 k. Particular Cases. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)
Puppy food manufacturer's advertising claim that its product could lessen degree of "osteokinetic bone trauma in puppies up to two years of age" was deceptive, and thus actionable under Lanham Act; advertisement claimed to ameliorate nonexistent condition and manufacturer had not tested effects of its formula on puppies beyond one year of age. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[3] Antitrust and Trade Regulation 29T ⇐23

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk23 k. Particular Cases. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)
Puppy food manufacturer's advertising claim that it was the only food specially formulated to reduce hip joint laxity in growing puppies was false, within meaning of Lanham Act in that there was at least one existing competitive dog food which also contained allegedly beneficial formula. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[4] Libel and Slander 237 ⇐136

237 Libel and Slander
237V Slander of Property or Title
237k136 k. Defenses. Most Cited Cases
Where puppy food manufacturer's advertising claims were false and misleading, competitor's public statements to that effect did not give rise to cause of action based on defamation.

[5] Antitrust and Trade Regulation 29T ⇐22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases
(Formerly 382k540.1, 382k540 Trade Regulation)
Lanham Act section prohibiting false advertising creates cause of action for representations and statements that are facially false, affirmatively misleading, untrue due to failure to disclose information, or are partially correct and literally true but convey false impression. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[6] Antitrust and Trade Regulation 29T ⇐64

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(B) Actions and Proceedings
29Tk64 k. Persons Protected and Entitled to Sue. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)
Although Lanham Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving cause of action to competitors who are prepared to vindicate injury caused to consumers. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[7] Antitrust and Trade Regulation 29T ⇐22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)
Elements of false advertisement claim under the Lanham Act are that advertisements are false or misleading and actually deceived or had tendency to deceive substantial segment of audience, deceptive or misleading portions of advertisements were material, defendant caused advertised goods to enter interstate commerce, and that plaintiff was injured either by diversion of sales or by lessening of goodwill or acceptability of its products. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[8] Antitrust and Trade Regulation 29T ⇐23

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk23 k. Particular Cases. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)
Puppy food manufacturer's advertising claim, that its product could reduce canine hip dysplasia, was false on its face, and thus actionable under Lanham Act, in that manufacturer's claim was not supported by its clinical research. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[9] Antitrust and Trade Regulation 29T ⇐81

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(B) Actions and Proceedings
29Tk79 Evidence
29Tk81 k. Presumptions, Inferences, and Burden of Proof. Most Cited Cases
(Formerly 382k571.1, 382k571 Trade Regulation)
Where manufacturer's advertising claims are found to be actually false, their materiality may be presumed, for Lanham Act purposes. Lanham Trade-

Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[10] Equity 150 ⇐72(1)

150 Equity
150II Laches and Stale Demands
150k68 Grounds and Essentials of Bar
150k72 Prejudice from Delay in General
150k72(1) k. In General. Most Cited Cases

Defense of laches bars equitable relief only where excessive delay on part of plaintiff in enforcing his rights under law induces defendant to undertake substantial activities in reliance on that delay.

[11] Equity 150 ⇐65(1)

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(C) Principles and Maxims of Equity
150k65 He Who Comes Into Equity Must Come with Clean Hands
150k65(1) k. In General. Most Cited Cases

Doctrine of unclean hands was not available to defendant in Lanham Act false advertising action, in that actual victim of plaintiff's and defendant's conduct was public, and failure to grant injunctive relief would only increase damage inflicted on buying public. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[12] Antitrust and Trade Regulation 29T ⇐103(2)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk103 Grounds, Subjects, and Scope of Relief
29Tk103(2) k. Particular Cases. Most Cited Cases
(Formerly 382k644.1, 382k644 Trade Regulation)

Antitrust and Trade Regulation 29T ⇐110(2)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk108 Monetary Relief; Damages
29Tk110 Grounds and Subjects
29Tk110(2) k. Particular Cases. Most Cited Cases
(Formerly 382k644.1, 382k644 Trade Regulation)

Antitrust and Trade Regulation 29T ⇐117

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk116 Costs
29Tk117 k. In General. Most Cited Cases
(Formerly 382k644.1, 382k644 Trade Regulation)

Puppy food manufacturer, found to have engaged in false advertising of health claims for its product in violation of Lanham Act, would be enjoined from continuing its false claims, be required to issue corrective release, and would be assessed damages in amount of double its advertising expenditures pertaining to dissemination of deceptive message, along with plaintiff's attorney fees and costs. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A § 1125(a).

[13] Antitrust and Trade Regulation 29T ⇐28

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk28 k. Comparisons; Comparative Advertising. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)

Puppy food manufacturer's advertising claim that veterinarians preferred its product over that of competitor by "2-to-1" margin was false, and thus actionable under Lanham Act; evidence showed that veterinarians preferred competitor's food, and even manufacturer's own biased surveys failed to show claimed margin of preference. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[14] Antitrust and Trade Regulation 29T ⇐103(2)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk103 Grounds, Subjects, and Scope of Relief
29Tk103(2) k. Particular Cases. Most Cited Cases
(Formerly 382k644.1, 382k644 Trade Regulation)

Antitrust and Trade Regulation 29T ⇐110(2)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk108 Monetary Relief; Damages
29Tk110 Grounds and Subjects
29Tk110(2) k. Particular Cases. Most Cited Cases
(Formerly 382k644.1, 382k644 Trade Regulation)

Antitrust and Trade Regulation 29T ⇐117

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk116 Costs
29Tk117 k. In General. Most Cited Cases
(Formerly 382k644.1, 382k644 Trade Regulation)

Puppy food manufacturer's false claims that its product was preferred by veterinarians to that of competitor's would be enjoined, with manufacturer required to issue corrective release, and manufacturer would be assessed damages in amount of competitor's attorney fees and costs; additional damages would not be assessed in light of competitor's more serious Lanham Act violations. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

***196** Richard J. Leighton, Richard F. Mann, Douglas J. Behr, Lewis Bernstein, Susan Anthony, and Anita M. Nanni, Leighton and Regnery, Washington, D.C., for plaintiff.
Michael L. Denger, John W. Behringer, Willard K. Tom, Steuart H. Thomsen, Bruce M. Bettigole, and Lee H. Pelton, Sutherland, Asbill & Brennan, Washington, D.C., (Dennis D. Fales, Stanley M. Rea, and Tammy T. Walsh, Ralston Purina Co., St. Louis, Mo., of counsel), for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SPORKIN, District Judge.

PRELIMINARY ISSUES

This court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28 U.S.C. § 1331 under the Lanham Act regarding the parties' claims of false advertising. This court has pendent jurisdiction over the state statutory and common law claims.

Venue is proper in the District of Columbia pursuant to 28 U.S.C. § 1391.[FN1]

FN1. Defendant's motion to transfer venue to the Eastern District of Missouri was denied.

Background

The core of this suit pertains to the puppy food advertising campaigns of the parties. The campaigns were conducted during approximately the same period of time, from the beginning of October 1985 to the end of September 1986. Plaintiff ALPO Petfoods, Inc. ("ALPO") challenges defendant Ralston Purina Company's ("Ralston") claim that Ralston Puppy Chow products are formulated to reduce hip joint laxity and improve hip joint fit in puppies, thereby lessening the severity of Canine Hip Dysplasia ("CHD").[FN2] By counterclaim, ***197** Ral-

ston challenges ALPO's claim that veterinarians prefer the "formula" in ALPO Puppy Food "2 to 1" over the leading puppy food.

> FN2. Canine Hip Dysplasia describes the abnormal development of the bones, surrounding soft tissue, muscles, and fluids in a dog's hip joints. Dysplasia is derived from the greek words: "dys," meaning poor or abnormal, and "plasia," meaning growth. The disease has no cure and is degenerative in nature. In severe cases there is deterioration of the hip joint bones and cartilage, and formation of bony growths, a condition known as degenerative joint disease. This further inhibits joint flexibility and irritates surrounding tissue to the point where movement of the leg can be so painful that the dog is unable to walk. CHD can severely and permanently cripple a dog, and in its advanced stages the dog must be put to sleep.
>
> Hip joint laxity describes the laxity or space between the ball of the femoral (leg) bone and the socket of the hip. Such a condition does not necessarily affect a dog's locomotion. While not proven, researchers have hypothesized that hip joint laxity may lead to the development of Canine Hip Dysplasia.

Ralston is a Missouri Corporation with its principal place of business in St. Louis, Missouri. Ralston manufactures and markets Puppy Chow dry puppy food and Puppy Chow Chewey Morsels, a soft-dry puppy food. Puppy Chow dry food was introduced in 1964. Puppy Chow Chewey Morsels was introduced in April 1985. Puppy Chow is marketed nationally and since 1964 has been the leading puppy food in the United States by a wide margin.

ALPO, a subsidiary of Grand Metropolitan, is a Pennsylvania Corporation with its principal place of business in Pennsylvania. ALPO is the second largest seller of puppy food in the United States. It manufactures and markets ALPO Puppy foods in both canned and dry form, primarily in the eastern part of the United States, a market that includes approximately thirty-six percent of the population of the United States. Both forms of ALPO puppy food were introduced in January 1985.

Procedural History

On October 3, 1986, plaintiff ALPO filed suit alleging that Ralston violated the Lanham Act and engaged in unfair competition. ALPO claims that Ralston advertisements and promotions, which state that Puppy Chow puppy foods contain a formula that reduces hip joint laxity, promotes proper hip joint development and lessens the severity of canine hip dysplasia and degenerative joint disease ("CHD claims"), are false, misleading and deceptive in violation of § 43(a) of the Lanham Act and the common law. ALPO has also put in issue Ralston's claims that its Puppy food has superior digestibility compared to its competitors' brands.

Ralston filed a counterclaim alleging that ALPO's claims that ALPO Puppy Food was more digestible than other puppy food brands, and that ALPO's formula was preferred by veterinarians over competing brands and the "leading brand" were false, misleading and deceptive in violation of both § 43(a) of the Lanham Act and the common law. Ralston also alleges that ALPO's statements to veterinarians and the news media regarding Ralston's CHD claims constituted unfair competition, deceptive trade practices, and defamation.

ALPO has charged that Ralston's claims are frivolous and in violation of Fed.R.Civ.P. 11.[FN3]

> FN3. In light of the findings in this opinion, I find that this claim lacks merit.

Both parties seek permanent injunctions prohibiting further publication of these alleged false claims. ALPO seeks an additional order requiring Ralston to issue corrective advertising regarding its allegedly false CHD claims. Both parties seek treble

damages, the disgorgement of profits made from the false advertising, costs and attorneys' fees under § 35 of the Lanham Act and punitive damages pursuant to their common law claims.

The parties waived their right to a jury trial, and a trial by the court was conducted over a period of approximately 61 days.

After a considered review of the evidence and testimony offered at trial, the pleadings and the arguments of the parties, the court finds that both parties have made false, deceptive and misleading claims which are actionable. In this respect, both parties are entitled to relief, the extent to which is set out later in this opinion. Because liability has been found and relief has been granted under the Lanham Act, this court does not reach the question of whether the parties' actions constitute common law false advertising or unfair competition. The parties' respective claims, to the extent this court finds the conduct of the parties actionable, can be fully vindicated under the Lanham Act.

The court also finds that ALPO's statements to the media and the public regarding the challenged CHD claims are not defamatory and do not constitute unfair competition or deceptive trade practices.

FINDINGS OF FACT

For almost twenty-five years since its introduction in 1964, Ralston's Puppy Chow ***198** has dominated the puppy food market. While a number of competing foods have appeared since the early 1980's, few competitors with the exception of ALPO's puppy food have obtained a significant share of the market.

ALPO introduced ALPO Puppy Food in its East Coast markets in January 1985. During the time period relevant to this action, from the beginning of October 1985 to the end of September 1986, ALPO controlled approximately 22 percent of the non-Ralston puppy food sales.

Ralston's Puppy Chow Claims

In August 1985, Ralston began a 5.2 million dollar marketing campaign in which it claimed that Ralston Puppy Chow products helped reduce hip joint laxity in dogs and helped dogs develop a snugger hip joint fit, thereby reducing the incidence of CHD and degenerative joint disease. To veterinarians, dog breeders and owners, Ralston's claims were spectacular because Canine Hip Dysplasia is one of the most feared dog diseases. It is incurable and is difficult to treat. Dogs with CHD cannot be used for breeding or in competition. In its advanced stages CHD is so painful and debilitating that the afflicted dog must be put to sleep. Such claims had a particularly high degree of credibility because of Ralston Purina's preeminent position in the pet food business.

The alleged offending claims made by Ralston took several forms and at times were addressed to different audiences. The claims were direct. They included:

[New] Reformulated Puppy Chow brand puppy foods ... can reduce the severity of Canine Hip Dysplasia ...

[Test] Results demonstrate ... Hip joint laxity-REDUCED ... Dysplastic hip deterioration-REDUCED.

Puppy Chow helps prevent CHD.

New Puppy Chow is formulated with a superior CHD nutrient profile to reduce hip joint laxity ... [and is] specially developed to help promote close hip joint fit.

[Puppy Chow is] Specially formulated to improve hip joint fit in growing puppies [and] reduce hip joint laxity which lessens the severity of Canine Hip Dysplasia.

The first of Ralston's challenged advertisements appeared in a number of leading veterinarian publications which announced in large, bold type "A SCI-

ENTIFIC BREAKTHROUGH IN CANINE NUTRITION". They stated that the Ralston scientists had "concentrated [their] efforts on the critical developmental period-up to two years of age" and

[Their] studies demonstrate that a superior CHD balanced diet is beneficial for maintaining a closer hip fit in puppies which can reduce hip joint deterioration in dogs prone to canine hip dysplasia.

The advertisements stated that new Puppy Chow is "formulated to: improve hip joint fit ... [and] reduce hip joint laxity," and that Puppy Chow is "the only puppy food specifically formulated to improve hip joint development during the entire growth period, which reduces the severity of canine hip dysplasia." Such ads ran in veterinarian magazines through October 1986.

During this period, Ralston distributed printed promotional materials to veterinarians which claimed that Puppy Chow products had been reformulated to "reduce hip joint laxity" and "improve hip joint development" which would "reduce the severity of Canine Hip Dysplasia" ("CHD").

In December 1985, Ralston distributed a research monograph on Canine Hip Dysplasia through direct mass mailings to veterinarians across the country and at Veterinarian Medical Association conferences. The monograph was also sent out to inquiring dog breeders, consumers, television networks and various state and federal regulatory officials who sought substantiation for Ralston's CHD claims. Ralston's veterinary sales representatives were also briefed on how to respond to questions regarding Ralston's CHD claims.

As part of its sales promotion, Ralston provided veterinarians with pamphlet racks and accompanying pamphlets called Pet Care Reports. The racks were checked and refilled monthly with new Pet Care Reports. From January to October, 1986, ***199** these reports carried three pages of advertisements containing CHD claims.

During this period, Ralston made available to veterinarians at no charge a free-standing office display and packets of 100 CHD brochures, dedicated entirely to CHD and Ralston's CHD claims. The brochure, entitled "A Purina Breakthrough Can Improve the Quality of Your Puppy's Life," was ultimately intended for distribution to dog owners. Ralston also provided to veterinarians so-called Puppy Care Kits-a ten ounce carton of new Puppy Chow and a pamphlet containing information regarding the CHD benefits of the new food.

Ralston directed its CHD claims at dog breeders, hunters and other dog enthusiasts. It published a number of CHD related advertisements in a variety of publications directed to these audiences, including *American Field, Dog World, Canine Chronicle, Bloodlines: Dog and Pet Stock Journal,* and *Hounds & Hunting.* Those advertisements ran from November 1985 to September 1986. Breeders were also provided with Puppy Starter Kits for redistribution to their customers. CHD claims were contained in the May 1986 printing of the Starter Kit booklet.

The explicit claims made in those advertisements and pamphlets were virtually identical to the claims made to veterinarians. The ads claimed that Puppy Chow "reduces hip joint laxity during the growth period, which decreases degenerative joint disease in hereditary Canine Hip Dysplasia" and "... CAN SIGNIFICANTLY REDUCE THE SEVERITY OF CANINE HIP DYSPLASIA."

Finally, Ralston made extensive CHD claims concerning Puppy Chow to the buying public. The ads stated that Puppy Chow "promotes better hip joint development," helps "hip joints ... develop a snugger, better fit," and "help [s] reduce the severity of Canine Hip Dysplasia."

From January through June, 1986, Ralston ran such advertisements in 15 different consumer publications, including *Good Housekeeping, McCall's Magazine,* and *Family Circle.* Ralston also distributed two freestanding newspaper inserts containing

CHD claims, which were placed in Sunday newspapers nationwide. CHD claims were also found in coupons mailed directly to households in the ALPO East Coast marketing area. CHD claims were made during the campaign period to consumers who called Ralston's 800 number asking for information about new Puppy Chow. Pet owners were also exposed to CHD claims through Pet Care booklets given to veterinarians and breeders for redistribution to dog owners.

The court finds that the target audiences viewing the CHD claims in print advertisements and promotional material took away the literal claims made. What is more, some of those audiences took away an implicit message that Puppy Chow "prevents" or "cures" CHD. This finding is supported by audience focus group and survey research, and actual testimony of members of the audience exposed to these ads. The results of Ralston's prepublication consumer focus group testing show that people who were exposed to claims identical to those used in Ralston's campaign took away the intended message. The results of the consumer survey conducted by Burke Market Research on consumer perception of one of Ralston's major CHD advertisements show a significant number of consumers exposed to the advertisement (thirty-eight percent) interpreted it as linking such a diet to the prevention of CHD. Ralston's own survey of veterinarians taken during the advertising campaign showed that 74 percent of those surveyed who were advertising-conscious had a detailed, unaided recollection that Ralston was advertising that Puppy Chow could prevent CHD. Additionally, witnesses from each of the three target audiences testified that they interpreted the advertisements as claiming that Puppy Chow could help prevent or cure hip joint laxity and CHD.

CHD related claims were also made by Ralston on television in what have been identified as Puppy Chow's "Baby New" commercials. Between June 26, 1986, and October 16, 1986, Ralston broadcast on national television networks a thirty second ***200** version of the "Baby New" advertisement for Puppy Chow. While it made no explicit CHD or hip related claims, the commercial visually featured a package of the new product with its sell line of "Extra Nutrition for First Two Years," and stated that Puppy Chow "help[s] critical bone development".[FN4] When asked by the networks to provide substantiation for the claims made in these commercials, Ralston cited its CHD research and provided a copy of a monograph entitled *Ralston Purina Nutritional Research on Canine Hip Dysplasia.*

> FN4. Two shorter, fifteen second versions of this commercial made no mention of "critical bone development" and this court finds that plaintiff has failed to produce any substantive evidence that these versions conveyed any CHD or hip related message.

ALPO alleges that Ralston has made collateral representations in its CHD advertisements that are also false and misleading. The court has examined four of these claims.[FN5]

> FN5. Although the materiality of collateral false claims is difficult to determine, their existence and Ralston's intent to communicate such claims are probative in determining Ralston's intent in communicating the main CHD claims.

[1] The first, "One out of every two puppies" has some degree of hip dysplasia and "[CHD] is estimated to affect as much as fifty percent of the total dog population," appears as a preface in advertisements containing explicit CHD claims. The evidence presented to the court showed that only 50 percent of large dogs have some degree of hip dysplasia and that the rate of affliction for all dogs is lower. The court finds that while Ralston's claim is somewhat exaggerated, the fact is that CHD is a prevalent condition in dogs, particularly large dogs. Accordingly, the court finds that this statement, although technically incorrect, is not actionable.

[2] Second, Ralston makes the claim in one of its veterinary advertisements that "Puppy Chow can lessen the degree of osteokinetic bone trauma in puppies up to two years of age." The court finds this claim deceptive. The advertisement claims to ameliorate what expert testimony identified as a nonexistent condition, "osteokinetic bone trauma," in puppies up to "two years of age". The evidence shows that at that time Ralston had not tested the effects of its new formula on puppies beyond one year of age.

Third, ALPO also alleges that the statement on the front of bags of Puppy Chow dry dog food, "Extra Nutrition for First *Two* Years" was a CHD related claim. This Court finds there is some relationship between this claim and the similar claims made in connection with Ralston's CHD "Baby New" television commercial. Clearly, consumers seeing the commercial which juxtaposes the claim of "extra nutrition for the first two years" with the claim that Puppy Chow helps "critical bone development" would likely be conditioned into taking away the "critical bone development" message when they see the "Extra nutrition for the first two years" language on the front of the Puppy Chow dry dog food package. Thus, it is not unreasonable to conclude that consumers would be persuaded after they have seen the "Baby New" commercial to expect that they would obtain for their dogs better "bone development" when they actually purchased the package of dog food with the claim of "Extra nutrition for the first two years" emboldened on the package.

[3] Fourth, Ralston claims that "Puppy Chow is the *only* puppy food specially formulated to reduce hip joint laxity in growing puppies, which can lessen the severity of Canine Hip Dysplasia." The evidence presented to this court shows not only that the basic CHD claim was false, but that at the time this representation was made at least one existing competitive dog food also contained a low anion gap formula. This formula, which Ralston claims to be exclusive to Puppy Chow, is the very trait upon which Puppy Chow's CHD claims are based.

Ralston's Intent

The court finds that Ralston intended to communicate the claim that new Purina ***201** Puppy Chow reduces hip joint laxity and improves hip joint fit, thereby reducing the severity of CHD, and degenerative joint disease. An examination of the "copy platforms" created by Ralston's advertising agencies and approved by Ralston shows that the CHD message was targeted at three main groups: veterinarians, dog breeders and other dog enthusiasts, and the buying public. According to Ralston's internal marketing and advertising memoranda, these audiences offered an excellent opportunity to increase puppy food sales.

The explicit objective of the Ruther Advertising Agency's "professional" CHD advertising campaign was to use the CHD claims to convince the veterinarian and breeder target audiences that Puppy Chow was superior to all other puppy foods for canine bone growth and development. The campaign was designed to communicate "vital information" that was "supported by strong clinical data." By directing Ralston CHD claims at veterinarians, Ralston attempted to use that audience's ability to influence the purchasing decisions of their clients. If veterinarians could be convinced that Puppy Chow could reduce hip joint laxity and lessen the severity of CHD, veterinarians would pass that information to their clients.

Ralston intended that its CHD claims have a similar effect on breeders. The breeder advertisements encouraged the purchase of Puppy Chow, since breeders purchase substantial amounts of dog food for their own use and for resale. Other dog enthusiasts were targeted because they are heavy users of dog food and are often breeders as well.

The Gardner Agency, which produced the general consumer advertising campaign, employed the CHD claims to convince their target audience that Puppy Chow was superior to all other puppy foods.

This court finds that Ralston intended to use its

CHD related claims to influence the purchasing decisions of consumers and finds that the CHD claims were effective in that regard. Ralston's prepublication tests showed that consumers reacted enthusiastically to the CHD claims in Ralston's advertising. The results of Ralston's focus group research showed that consumers reacted very positively to claims that Puppy Chow could reduce hip joint laxity and the severity of CHD. The focus group evidence revealed that the test audiences considered the claims to be important, attention getting, and relevant to the health of dogs. The prepublication research also showed that consumers exposed to the claims would consider buying Puppy Chow products. Ralston advertising memoranda reported that those ads with headlines announcing "A Nutritional Breakthrough" and containing the CHD message "pushed purchasing intent very high."

This court finds that Ralston intended to use the CHD campaign to gain an edge on its competitors, preserve its market share, and blunt any national introduction of ALPO Puppy Food. This later finding is based on the court's examination of internal marketing plans during the CHD advertising campaign which describe ALPO as the chief competitive threat to Puppy Chow.

Internal statements of Ralston's marketing objectives, formulated and approved by Ralston executives during the CHD campaign, identify ALPO as "potentially the greatest threat faced by Puppy Chow." The testimony of Terence E. Block, Ralston's Director of Marketing for Dog Food, indicates that the CHD campaign was used to defend Puppy Chow from its competition, ALPO Puppy Food and Kibbles 'n Bits. ALPO Puppy Food was featured in a number of Ralston's published advertisements.

Support for Ralston's Claims

Ralston bases its claims on the results of research and testing conducted during the early 1980's. None of its individual tests produced statistically significant results on their own.[FN6] However, Ralston maintains ***202** that by pooling the results of several tests it obtained significant results that substantiate its claims.

> FN6. Statistical significance in this context means that the probability that the results of Ralston's experiments could have occurred by chance is less than 5 percent. The 5 percent figure is commonly used as a measure of statistical significance. *See, e.g., Segar v. Smith,* 738 F.2d 1249, 1282 (D.C.Cir.1984). A greater probability of the results occurring by chance would generally render the results "not significant." Although the finding that Ralston's research lacks statistical significance is not dispositive of whether Ralston's research supports its CHD claims, it is a significant factor in that determination.

ALPO maintains that the results of the Ralston tests were not statistically significant and should not be pooled. ALPO states that the tests were not sufficiently reliable to permit Ralston to draw any reasonable conclusions from them. ALPO claims flatly that hip joint formation and CHD are inherited conditions not affected by the nutritional balance in a dog's diet, and asserts that Ralston's CHD claims are simply false, and without any reasonable basis in fact.

This court concurs with ALPO's view. The overwhelming weight of scientific authority indicates CHD is a hereditary disease and there is no reliable evidence that nutritional balance in a puppy's diet affects hip joint laxity, hip joint fit, CHD or degenerative joint disease. Ralston's research does not show that its puppy food reduces hip joint laxity. As a result, Ralston's CHD claims are false.

Canine Hip Dysplasia (CHD)

A range of symptoms often appears in dogs affected with CHD. Decreased activity and painful move-

ment are often observed in puppies between four and twelve months old, but such symptoms are not conclusive evidence that a puppy has CHD. Diagnosis of the disease is particularly difficult and cannot be accomplished with certainty until the dog reaches maturity, between one and two years of age. At that point the disease is difficult to treat. In severe cases veterinarians will implant a ball and socket prosthesis or perform hip replacement or arthroplasty (removal of the femoral head). In its most advanced stages, the symptoms of CHD are so severe that the dog must be put to sleep.

CHD is essentially an inherited, genetically determined condition. Dogs afflicted with the condition can pass it along to their offspring. As a result, virtually all dog breeders are especially concerned with CHD, particularly if they raise larger breeds of dogs which are more frequently afflicted with the disease.

There have been a number of attempts to determine whether any therapy or dietary changes could reduce the incidence or lessen the severity of CHD. Indeed Ralston itself conducted exploratory research in the 1960's on the effects of diet on CHD, but failed to find that diet and nutrition had a mitigating effect on CHD.

Vitamin and mineral supplements have been tested, but without success. In the late 1970's, Dr. Richard Kealy, Ralston's Manager of Pet Nutrition Research, conducted limited tests of the effect of Vitamin C on CHD. Dr. Kealy concluded that this research failed to demonstrate that Vitamin C had any beneficial effects.

Reducing a dog's caloric intake, thereby reducing the dog's growth rate, has also been suggested as a way to prevent or reduce the severity of CHD. However the research conducted on that theory is still inconclusive.

The Anion Gap Theory

The anion gap theory, the basis for Ralston's CHD and Hip related claims, was first proposed by Dr. Kealy in about 1980. The anion gap is the difference between a dog food's chloride content and the combined amount of the food's sodium and potassium content. The anion gap level of a puppy food ranges from a "superior" low level of approximately 7, to a "marginal" middle level of about 25, to a "poor" high level of up to 40. The studies conducted by Dr. Kealy, which were used to support Ralston's claims, tested puppy foods with anion gap levels in each of these three ranges. The theory postulates that the lower the anion gap level in a dog food, the better the formation of a hip joint in terms of reduced joint laxity and snugger fit. In turn, the reduction in hip joint laxity lessens the severity of both CHD and degenerative joint disease. In order to test his theory, Dr. Kealy conducted a series of ***203** experiments, identified as Trials I through VII.

Trials I Through IV

The first four trials relied upon by Ralston were conducted by Dr. Kealy. He was assisted by Dr. Dennis Lawler, the Resident Veterinarian at the Ralston Animal Research Facility. The first two trials, started in 1980, were considered "preliminary experiments" by Dr. Kealy. Trial I was conducted on puppies six weeks of age, and Trial II was conducted on puppies who were 31 weeks of age. Both trials ran 24 weeks and tested three diets with low, medium, and high anion gap levels. The puppy litters were split into three groups, and each group was put on a different diet. At the end of the tests, each puppy was put under general anesthesia, and its hips were radiographed. These radiographs were examined, and the Norberg angle [FN7] of each hip was measured and compared to the Norberg angles of the other puppies in the test.

> FN7. The Norberg angle is a static measurement of a radiograph of the fit of the hip ball and socket in a particular position (leg extended), while a certain degree of stress is applied to the leg of an anesthetized dog that is lying on its back.

Trial I began with pointers, Labrador retrievers, and one litter of St. Bernards. The Labrador retrievers were taken off the test when some fell ill from the high anion gap diet. At 30 weeks, the final Norberg angles of the hips of the 22 remaining puppies were rated on a scale of 1 to 5, with 5 being the best hip joint fit. Dr. Kealy reported that the difference in the average Norberg angle score between all of the dogs on the low anion gap diet and all of the dogs on the medium anion gap diet was two-tenths of a rating point. This difference was reported in the research monograph as "N.S.", meaning not statistically significant.[FN8]

> FN8. There was no significant difference between the hip scores of puppies on the medium and high anion gap diets.

Trial II used only St. Bernard puppies and measured the effect of the three diets on puppy hip joint development between 31 and 43 weeks of age. The results of this trial compared the average change in the hip scores (as opposed to the comparison of average hip score in Trial I) of each of the diet groups. The difference between the average change in the hip score of the low and medium anion gap diets was again two-tenths of a point. These results were reported as not statistically significant. Trial II was later dropped completely from Ralston's analysis because that test involved older dogs not comparable to the dogs used in the other trials.

The next two trials, according to Dr. Kealy, constituted the commercial phase of Ralston's research. Trial III began in June 1981. This was the first trial to test commercial puppy food diets: a specially reformulated version of Ralston Hero Puppy food with a low anion gap of 8, the standard version of Ralston Hero Puppy Food with a medium anion gap of 18, and Cycle I Puppy Food with a medium anion gap of 27. No dog food with a high anion gap was tested. Trial III employed St. Bernard puppies over a 24 week period, beginning at 6 weeks of age. The differences in average hip scores between the three groups were not statistically significant.

After Trial III was concluded, Dr. Kealy testified he conducted reproductive and growth tests under protocols issued by the Association of American Feed Control Officials ("AAFCO") [FN9]. The growth test became known as Trial IV. Dr. Kealy considered this test a continuation of the commercial phase of Ralston's research of its low anion gap diet.

> FN9. AAFCO is an association of state and federal regulatory officials who, with the cooperation of the pet food industry, set standards and approve labels for pet foods. If Ralston created a low anion gap Puppy food with a superior CHD profile and it passed the growth test, it could be labeled a "complete and balanced food for all puppies."

Trial IV used 30 pointers and 6 American coonhounds to test three diets: commercially available Beef Flavored Puppy Chow with a medium anion gap of 23 and two specially formulated versions of Beef Flavored Puppy Chow with low anion gaps of 7 and 8 respectively. The trial examined ***204** puppies over a 24 week period, from 6 to 30 weeks of age. Only the Norberg angle measurements of the dogs were reported. No hip scores were reported. The results of this trial were reported as not significant in the Ralston monograph. In some instances, the Norberg angle scores of the puppies on the low anion gap diet of 8 were worse than the scores of the puppies on the medium anion gap diet. Trial IV was concluded in March 1983. No further trials were conducted for almost two years.

Using the results of these four trials, Ralston drafted a research monograph which claimed that this research substantiated the anion gap theory and Ralston's CHD claims. Since the separate trials failed to produce significant results, Ralston claimed that

Pooled data from all four trials combined demonstrated a significantly ... reduced hip joint laxity

due to [superior] CHD nutrient profile.

The monograph served as the basis for Ralston's claims that its dog food could reduce hip joint laxity and lessen the severity of CHD. Omitted from Ralston's analysis was any reference to Trial V, discussed *infra.*, a test which completely discredited the basic premise of the anion gap theory.[FN10]

> FN10. This court finds that data from Trial V was improperly excluded from Ralston's "pooling" of data. Trial V was designed as a long term test with a planned duration of two to three years.

The evidence and expert testimony presented at trial and credited by this court indicate that the results of the four trials cannot properly be pooled, and that even if the results from all relevant trials were properly pooled, they did not produce significant results.

Ralston consulted a number of independent CHD experts prior to making its CHD claims. Both Drs. E.A. Corley and George Lust warned Ralston that more research was needed to confirm the anion gap theory. Dr. Corley, whose testimony this court credits, considered the data from the four trials in the monograph to be inadequate and not statistically significant. He found the monograph lacking in pathological data, which he felt was critical in determining the presence of CHD and proper joint formation. He advised Ralston that before Ralston made any public CHD claims, a long term, multi-year study was needed to confirm the anion gap theory. A third expert, Dr. William E. Blevins, head of radiology at the Purdue University School of Veterinary Medicine, was also consulted by Ralston. He told Ralston's researchers, Drs. Kealy and Lawler, that the Norberg angle was not an accurate measure of hip joint laxity.

In September 1984, after Trial IV had been concluded, Dr. Kealy conferred with the Ralston marketing officials about his anion gap theory and its possible benefits. He told them that many more months of tests were required to confirm the results of the initial tests. Kealy said that he wanted to see the effects of a low anion gap diet in adult dogs before Ralston made any CHD claims. The marketing people ignored Kealy's request that Ralston proceed with caution and started to prepare a marketing plan to push its CHD claim.

Trial V

While the earlier tests (Trials I-IV), when pooled, were offered to demonstrate the beneficial relationship between a low anion gap diet and hip joint laxity, they failed to confirm any beneficial relationship between the anion gap diet and the frequency and severity of CHD. Radiographic diagnoses of dogs under one year of age often fail to recognize diseased hips, since CHD cannot be diagnosed conclusively until a dog reaches maturity.

To remedy these problems and confirm the conclusions reached from the first four tests, Trial V was designed as a long term test of the effects of the low anion gap diet over a period of nearly three years. Its existence was not disclosed until discovery in this trial. Thirty-three Labrador retrievers were used in Trial V. Labrador retrievers are a large breed of dog that are known to have a high incidence of CHD. The design of Trial V was similar to earlier Ralston Trials. Three diets with low, medium,***205** and high anion gap levels were fed to puppies over the length of the test.

In October 1985 the radiographs taken in the 20th week of Trial V indicated that the hips of the puppies on the low anion gap diet were deteriorating. Those puppies developed the worst Norberg angle measurements, while those on the medium anion gap diet developed the best Norberg angle measurements. These results were completely inconsistent with and contrary to the anion gap theory and Ralston's claims. The results at 33 weeks only confirmed these negative results. In November 1985, while the CHD advertising campaign was underway, Dr. Kealy terminated Trial V.

The court notes with great concern Ralston's conduct during these proceedings. In a declaration filed with this court in opposition to ALPO's motion for a preliminary injunction, Dr. Kealy stated, "In all, four trials were performed under carefully controlled conditions." No reference at all was made to Trial V. The declaration was false. At the time the document was filed, Trial V had been terminated and Trial V-A [FN11] was being conducted. There was a similar failure to disclose the results of Trial V on the part of two other Ralston employees: Dr. Dennis Lawler, a Ralston researcher, and Robert Mohrman, Director of Pet Nutrition & Care Research. Both failed to mention the existence of Trial V and V-A in their declarations despite having full knowledge of these tests.

> FN11. Trial V-A, a continuation of Trial V, was started with the puppies from the aborted Trial V. It continued for about two years. The radiographs of Trial V-A were never examined and no summary of its results has been done.

Trials VI and VII

Two other tests were conducted by Ralston, Trials VI and VII. The court finds neither relevant in its determination of the veracity of CHD claims, since Trial VI was not designed to support Ralston's CHD claims and the results of Trial VII were not available at the time the claims were made.

Trial VI, begun in April 1985, used 36, six week-old Labrador retrievers and coonhounds. Based on the testimony of Dr. Kealy and Dr. Bebiak, manager of Ralston's Pet Nutrition Services, the test was not intended to be a CHD test and was not relied upon by Ralston in making its claims. Thus, even if its results were available at the time any of the CHD claims were made, they are not material to a determination of the false or misleading character of those claims.

Trial VII was started in December 1985, after the monograph had been prepared and distributed and well after the CHD advertising campaign had reached full force. It was originally designed to last one year, finishing well after Ralston had halted the CHD campaign.

The trial used pointer and German shepherd puppies. It tested three formulations of Puppy Chow, two with low anion gaps of 11 and 12 respectively, and one with a high anion gap of 37. The study is now a long term, five year study similar to the initial proposal for Trial V. The test was still ongoing at the end of this litigation. The preliminary results of this test were not statistically significant.

The court is mindful of Ralston's attempts to enlist the results of Trial VII to support its CHD claims. Given the court's reasoning as to what constitutes relevant evidence in this factual inquiry, such efforts are in vain. It is not the role of this court under the Lanham Act to determine whether clinical research will eventually support the challenged claims, but whether the claims were supported by clinical evidence available at the time they were made.[FN12]

> FN12. In an action for false advertising, claims which are unsubstantiated when made cannot be salvaged with after-the-fact clinical support. The Lanham Act prohibits claims that are false or misleading *at the time they are made.* Post facto evidence cannot make actionable true claims which later become false and does not bar suits for false or misleading representations which later become true. To do so would undermine the policy behind § 43(a) of the Lanham Act in prohibiting companies from making unsubstantiated claims in order to influence the purchasing decisions of the buying public. However, such evidence of the truth of a challenged representation could be relevant to other aspects of a claim.

***206** Even if the results of Trial VII were considered, the court finds they were not statistically

significant and in certain respects they directly contradict Ralston's claims. Indeed, examination of Trial VII results show that the hips of the German shepherd puppies who consumed Puppy Chow diets with low anion gaps deteriorated during the testing period. The testimony of Dr. Douglas Robson, which this court credits, shows that when the results of Trial VII are pooled with the other similar trials (I, III, IV and V), the results are not statistically significant and thus Ralston still lacks support for its claims.

Ralston's Research Methods

This court finds that inadequacies in the design and execution of Ralston's research were so substantial that the data gleaned from the tests are not valid. This finding is based on the court's evaluation of the design of the CHD research, the methods used in conducting the trials, the inability to explain how the anion gap formula affects hip joint formation, the objectivity and skill of the persons conducting the tests and their concerns that the research did not adequately support the claims made by Ralston.

Particularly significant is the fact that the tests were not conducted over an adequate time period to establish any impact of Puppy Chow on hip joint development. Although Ralston's claims extend to the first two years of a dog's life, most of the animals relied upon were observed only during their first seven months of development. Other research conducted in the field of CHD shows that false negative radiographic diagnoses in puppies at six months can be as high as fifty percent, and as high as twenty-five percent in dogs up to one year of age. Moreover, the Orthopedic Foundation for Animals will not rely on radiographic diagnoses of dogs under two years of age due to such inaccuracies. Ralston was notified of this fact before the publication of its CHD claims.

Ralston did not have proper test animal selection. The dogs selected were not those commonly used in CHD testing, for which extensive testing information is available. When Ralston did use dogs commonly used in CHD testing, Labrador retrievers and German shepherds, Ralston either discounted those tests or failed to test in large enough numbers to produce significant test results. Indeed the results from the tests on those breeds, particularly Trial V, show that the low anion gap diet had either no effect or a negative effect on hip joint laxity and development.

Ralston's research lacked control over variables. Experts for both parties testified that when testing the effect of anion gap levels on hip joints, nothing should have varied in the diets except the anion gap levels. However as noted by Both Dr. Corley and Dr. Bebiak, a Ralston researcher, the base diets in the trials were not held constant, so that considerably more than the anion gap levels varied between diets.

None of the trials tested any of the Puppy Chow brands for which the claims were made. Ralston failed to test the actual formulas used in Puppy Chow products, and only two of the studies, trials V and VII, actually tested a formula similar to those included in Puppy Chow products. Moreover, later reformulations of Puppy Chow to improve its palatability and digestibility were never tested to see what effect those changes in formula might have on hip joint development.

Ralston employed the Norberg angle as the sole measure of the effect of the low anion gap diet on puppies' hip formation.[FN13] That practice was criticized by a number of experts as inaccurate and not reproducible.

> FN13. The Norberg angle measures how tightly the head of the femoral bone fits into the socket of the thigh when the leg is extended. The measurement is taken from hip radiographs of anesthetized puppies, where the puppy is placed on its back and the hind legs are extended manually. The Norberg angle is the angle between a line drawn between the two femoral heads and a line drawn between the center point of the femoral head of the particular thigh joint (right or left) being measured and the rim of the hip socket the femoral head fits into.

Both Drs. Corley and Blevins thought it was inaccurate, and Dr. Blevins alone stated it was not sufficiently reproducible to be ***207** satisfactory. Ralston's own expert, Dr. George Lust, testified that the Norberg measurement is of questionable effectiveness in measuring borderline cases, the very cases Puppy Chow claimed to ameliorate. The court also points to the published statement of Dr. Lust that radiographic diagnoses made on dogs younger than one year often fail to identify dysplastic dogs, since dysplasia often does not develop until the dog reaches two years of age.

Ralston researchers failed to employ more established and more accurate methods of determining the presence and degree of joint laxity or CHD: pathological examinations of the hip joints during a necropsy, radiological examinations of the hip joints by board certified radiologists, or palpitation of the hip joint.

The most accurate and accepted method of detecting and evaluating the severity of CHD is by conducting a pathological examination of the actual hip joint, after the dog has died. Surprisingly, while the majority of the dogs used by Ralston in its research were sacrificed and necropsies were performed, no pathological studies of the hip joints were conducted.

The accepted method of diagnosing CHD in live dogs is by radiographic examination. The radiographic method most frequently employed is that used by the Orthopedic Foundation for Animals ("OFA"). First, radiographs of a dog's hips are sent to the OFA, which in turn sends them to three board certified radiologists for analysis and evaluation. Each radiologist makes a diagnosis as to whether the hips are normal or diseased, and rates each hip according to the degree of normality or disease. These separate evaluations are based upon the subjective comparison by the radiologist of the hip with the normal hip configuration of the breed being examined. When all three opinions are received at the OFA, a fourth board certified radiologist screens the information received and determines if there is a consensus as to whether the hips are normal or diseased.

The OFA, a leading organization in the field of radiographic diagnosis of CHD, does not regard as totally reliable any radiographic analysis showing normal hip joints on dogs less than two years of age, due to the fact that CHD may not appear in dogs until they reach two years of age. By contrast, the vast majority of puppies whose radiographs were relied upon by Ralston were less than eight months of age, and none of the radiographs were taken by board certified radiologists.

A third method of detecting hip joint laxity and CHD is by palpitation of the hip joint. Palpitation is part of the standard clinical examination to determine hip joint laxity or CHD that might not be detected in a radiographic examination.

Yet despite the wide use of all of these methods, apparently none were used by Ralston in its research. Instead, Dr. Kealy employed a method that is not used or endorsed by any established CHD research organization or expert in this country.

Researchers failed to explain consistently or sufficiently how the anion gap diet affects hip joint development. The biochemistry values reported for Trials I through IV-synovial fluid values, urine values and blood serum values-were inconsistent from trial to trial. Indeed, Ralston researchers often failed to measure these values in each of the trials. This is significant in that these values were used by Dr. Kealy to explain the mechanism by which the anion gap levels affected joint formation, an explanation which changed from trial to trial. In the monograph Dr. Kealy identified urinary hydroxyproline excretion as being most relevant to the effect of the low anion gap on hip joint laxity and

CIID. However, this value was not reported in Trial IV, and varied significantly among the remaining tests. Moreover, none of these biochemistry values was considered significant by those experts who reviewed the research.

The objectivity and skill of those conducting the tests is also a factor in the court's determination. Dr. Kealy, who conducted and supervised Ralston's CHD research, spent very little of his professional life in CHD research. None of the papers authored by Dr. Kealy, with the exception of Ralston's promotional research monograph, ***208** concern CHD. Only three relate to dogs: two concerning calcium metabolism and one on the evaluation of a dog's coat of hair. Additionally, Dr. Kealy, as an employee of Ralston, had a strong interest in seeing that the research conducted supported the anion gap theory, especially since a good portion of the research was performed while market planning for the formula was already underway.

This court also draws attention to Dr. Kealy's written concerns that the research did not support the advertising claims made. These written concerns were intentionally suppressed by his superior, Mr. Mohrman, who instructed Dr. Kealy to destroy all written expressions of concern about Ralston's CHD claims and never to put such concerns in writing. Dr. Lawler expressed similar concerns and was given similar instructions by Mr. Mohrman.

These actions raise serious questions regarding the intentional destruction of evidence, since Mr. Mohrman's expressed reason for directing the destruction of these documents was his concern that they might be used against Ralston in litigation. That Ralston researchers expressed concerns that the trial results did not support the advertised claims both reinforce this court's findings and undermine the testimony of Ralston employees to the contrary.

Statistical Analysis

This court finds that Ralston researchers excluded certain trials from consideration, the results of which directly contradict Ralston's CHD claims. Further, the court finds that the data from the Ralston trials lacked the requisite statistical significance to render them reliable.

What emerges from the record are the following facts: (1) the results of each of the first four trials taken by themselves are statistically insignificant, (2) Trials I-IV were improperly pooled, since the tests varied significantly in design and execution, (3) the results of Trial V were wrongly excluded from the statistical analysis, and (4) when the results of Trial V are pooled with the results of Trials I, III, and IV, the resulting data is statistically insignificant and does not substantiate Ralston's CHD claims.

The results of the four trials used by Ralston to support its CHD claims were not by themselves statistically significant, and therefore none of them lend any real support to the CHD claims. Ralston's own expert biostatistician, Dr. Ronald Helms, admitted that none of the trials conducted by Ralston produced statistically significant results.

Ralston's pooling of Trials I through IV to obtain statistically significant results is unacceptable. Expert witnesses for both parties agreed that Trial II should not have been included because the dogs tested were older (31 weeks) than the puppies in the other three tests (6 weeks), and the test only ran for 12 weeks, as opposed to 24 weeks for the other three tests. In addition, the test diets for Trial II, although identical to Trial I, were substantially different than the commercial diets used in Trials III and IV.

The results of Trial V should not have been excluded from Ralston's analysis. The testimony of Dr. Corley and Dr. Robson are credited on this point. The justification provided by Drs. Kealy and Helms as to why Trial V was excluded is unconvincing and contrary to the weight of the credible evidence. The data from Trial V is significant. Trial V

was the first test to make substantial use of the dog breed most often used in CHD research, Labrador retrievers. Dogs from the same sire were chosen to reduce the effects of genetic variability on the trial. Trial V procedures parallelled those of I, III, and IV. Although these results were initially found by Ralston to be statistically significant, they were not pooled and were not released to anyone outside Ralston despite Ralston's clear duty to submit such data to governmental and quasi-governmental regulatory agencies and its duty to disclose such data to this court at the early stages of these proceedings.

It is clear that when Trials I, III, IV and V are pooled the results are not statistically significant. Moreover, even if all the trials except Trial II (which both parties ***209** agree must be excluded) were pooled, the results would be inconclusive.

The overwhelming weight of credible scientific authority disputes Ralston's claim that its Puppy Food diet may retard the formation of CHD. The only support for the challenged advertised claims are tests which were poorly designed and conducted, whose data even in its most favorable light fails to be statistically significant. Thus, it is clear that Ralston's CHD claims are false under § 43(a) of the Lanham Act. Ralston's selective use of data from only four of Ralston's trials and the highly suspect manner in which the trials were organized and conducted further support the court's finding.

The Materiality of Ralston's CHD Claims

There is ample evidence that Ralston's CHD claims are material. The extensive planning of the campaign, the considerable prepublication review of the "effectiveness" of the claims, Ralston's own enthusiastic support of the campaign and its evaluation of the success of the campaign clearly evidence this finding.

Ralston conducted extensive prepublication review of its CHD claims and decided to publish those claims only after evaluating the effect of the advertisements on consumer focus groups. Its preliminary surveys show that Ralston clearly intended that its CHD ads exert a substantial effect on consumer purchasing decisions. The focus group evidence showed that the target audience considered the claims to be important, attention getting, and relevant to the health of dogs. The research also showed that consumers exposed to the claims would favorably consider buying Puppy Chow products.

The trial record includes testimony that certain Puppy Chow purchasers, who upon being exposed to Ralston's claims, switched or purchased Puppy Chow products expressly because of the Ralston claims. Ralston's own favorable assessments of its CHD campaign show its materiality. Ralston's Vice-President for Dog Food Marketing admitted that before and during the CHD campaign, Ralston considered the concept to be a "very viable product improvement," especially to professional audiences. Ralston's internal documents, prepared before this suit was filed, praised the success of the CHD campaign. Those documents acknowledge that the CHD claims were successful in favorably impressing veterinarians. Ralston memoranda hailed the CHD Campaign as a success, attributing Ralston's preservation of its market share in part to the marketing and advertising of Ralston's CHD Puppy Food.

Testimony of economic experts for both sides have shown that Ralston's CHD campaign was effective. Regression analyses conducted by Dr. Bruce Owen, whose testimony is credited by this court, indicate that there is sufficient evidence to show Ralston's CHD campaign was above average in effectiveness. This determination is supported by Ralston financial data during the period in which the campaign was conducted. Puppy Chow reached record levels in sales and profits during this time. The tonnage shipped to grocery and general merchandise outlets increased at a relatively constant pace.

This evidence is significant for a number of reasons. During the CHD campaign the puppy and dog food markets were flat or decreasing in terms of

new dog owners. Moreover, a number of new competitive products appeared on the market at this time which increased dramatically the level of competition in the puppy food market. Thus, the increase in Puppy Chow's sales during this time was achieved at the expense of its competitors, including ALPO.

As a result of the above, ALPO has sustained its case against Ralston. I shall now turn to Ralston's claims against ALPO.

ALPO's Veterinarian Preference Claims

For its part, ALPO has also made certain advertising claims it cannot support. ALPO's representations that veterinarians preferred its "formula" for Puppy Food "2 to 1" over that of other leading brands, and particularly over that of the leading puppy ***210** food are false, misleading, and deceptive.[FN14]

> FN14. In discussing ALPO's vet preference claim, little distinction is made between the general veterinarian preference and the "2 to 1" characterization of that claim with the exception of the court's analysis of ALPO's substantiation of its "2 to 1" ratio, *infra*.

Beginning in September of 1985, when it began marketing its newly formulated puppy food product, ALPO claimed that veterinarians preferred the "formula" for its puppy food over that of the leading puppy food. The claim was made in television advertisements, in consumer magazines, in trade advertising, in direct mail flyers, in point of sale materials, and on its Puppy Food product labels. The challenged claims that compare ALPO puppy food directly with the "leading brand," Puppy Chow, began at the same time that Ralston started its CHD campaign. ALPO ceased making the majority of these claims in October of 1986.FN15

> FN15. Some formula preference claims were continued into 1987, and packaging containing the veterinarian preference claim was on store shelves until spring of 1988.

Impact of ALPO's Claims on the Audience

Although the carefully parsed, literal claim states a formula preference, this court finds that the message carried away by consumers exposed to the ad is one of brand preference. In making this finding, the court credits the surveys conducted by Ralston. In those surveys the overwhelming majority of consumers exposed to the claims took away the message that ALPO dry puppy food was superior to the "leading" puppy food.

Surveys conducted by both Ralston and ALPO show that a substantial number of consumers interpreted ALPO's formula preference claim as a brand or product preference, claim. In the first of two marketing studies conducted by ALPO, twice as many consumers interpreted the claim as a brand preference, as opposed to a formula preference. In the second study, a brand preference was taken away by a margin of 14 to 1. The percentage of consumers who took away a product preference message was even greater. Similar results were reached in Ralston's surveys.

Support for ALPO's Claims

Considering ALPO's veterinarian preference claim against the undisputed fact that veterinarians' overwhelmingly preferred Purina Puppy Chow, this court finds that ALPO's veterinarian preference claim was deceptive and misleading. The design of the surveys upon which ALPO bases its veterinarian preference claims were flawed. ALPO's surveys presupposed that veterinarians were given sufficient information with which to formulate a meaningful choice. However, the information on which veterinarians made their preference was misleading and incomplete.

The various puppy food products on which veterinarians based their formula preference were not the actual proprietary formulas of the different products. Instead, the veterinarians in the survey were asked to make their choice based on a list of ingredients setting forth the amounts of protein fat, fiber, and moisture content as well as in certain instances, the caloric density and digestibility percentages. Such information is insufficient for a nutritional expert to make a meaningful choice among dog foods. The institutional experts who testified stated that information essential for a meaningful choice must also include whether a food is complete and balanced, the calcium and phosphorous levels of the food and the quality control measures employed by the manufacturer.

ALPO canned and dry puppy foods were advertised as having a single formula when they actually had different formulas. Veterinarians were unable to designate whether they preferred the wet or dry version of ALPO puppy food since both versions were lumped together as a single choice.

ALPO indiscriminately used the results of its survey that veterinarians preferred ALPO puppy food over that of Purina Puppy Chow dry food. ALPO's veterinarian surveys compared the combination of ALPO's *wet* and *dry* puppy formulas against the single dry formula for Puppy Chow. When, however, ALPO announced ***211** the results of its surveys, it suggested that the comparison was between ALPO and Ralston's *dry* puppy foods.

ALPO's preference survey results dated May 1986 show that ALPO lacked substantiation for its "2-to-1" preference claim. This was known to ALPO long before it took any action to stop publication of that claim. Internal ALPO documents, prepared in June of 1986 acknowledged that it could no longer sustain its "2-to-1" preference claim, even under its own analysis of its survey results. Even with this information, the challenged claim continued to be made in television advertisements until November 1986, and was included on ALPO's 25 lb. bag of puppy food until late February 1987.

ALPO's Intent

ALPO clearly intended that its formula preference claim be the focal point of its competitive "head to head" contest with Ralston Puppy Chow. ALPO's preference claim was designed to show a brand or product preference. ALPO officials were fully aware that veterinarians overwhelmingly preferred Purina's products, principally because of their established reputation in the field. With this in mind, ALPO designed its survey to facilitate the making of a brand or product preference claim.

Thus, ALPO officials intended that the formula preference claim be its central message in their advertising campaign. ALPO's own documents described the formula preference claims as, among other things, ALPO puppy food's "reason for being."

The Materiality of ALPO's Claims

ALPO's "formula preference" advertising and labeling, particularly concerning its "2-to-1" claim, were clearly material. A majority of the consumers exposed to the TV advertisements described the "2-to-1" representation as the main message of the commercial. In four studies conducted on behalf of ALPO, one involving the "2-to-1" label claim and three involving the "2-to-1" television claim, significant percentages of the consumers who participated found the claim important and believable.

Consumer survey studies conducted on an ALPO television commercial revealed that over eighty percent of those who viewed the commercial found the "2-to-1" veterinarian formula preference claim important in making their Puppy Food purchases. Sixty-seven percent of the consumers in the study found the claim to be believable. ALPO's study of the effectiveness of bag labeling containing the "2-to-1" formula preference indicated that 77 percent of those interviewed found the claims to be important. Its own continuous tracker surveys show that 69 percent of those people exposed to the

veterinarian preference claim believed ALPO Puppy Food was the brand veterinarians preferred.

Thus, it is clear that ALPO's formula preference claims were believable, important, and likely to influence consumer purchasing decisions. ALPO's own assessment of the commercials was that they were effective in influencing consumer purchasing decisions. ALPO's own long range marketing assessment refers to the veterinarian preference claims as possessing "proven consumer impact."

The Digestibility Claims of Both Parties

Both parties have alleged that its opponent's claims of "superior digestibility" amount to false and deceptive advertising. This court finds that neither party has sustained its burden on these allegations to justify an injunction or an award of damages.

8-to-1 Claim

ALPO has also alleged that Ralston's claim that Puppy Chow is "recommended 8 to 1 over any other puppy food by veterinarians" is false and deceptive. The court does not find that ALPO sustained its burden on this claim.

ALPO's Defamatory Statements

[4] Ralston alleges that ALPO conducted a publicity and lobbying campaign directed against Ralston's reformulated Puppy Chow that constituted defamation. Because of the court's finding that Ralston's puppy food claims were false and misleading. ALPO's public statements can in no ***212** manner give rise to a cause of action based on defamation.

Monetary Relief

The court finds that ALPO was damaged by Ralston's misconduct. Dog owners would certainly be remiss in caring for their dogs if they did not feed them a chow that would substantially lessen the possibility of their pet contracting CHD. Based on the materiality of Ralston's CHD claims and the economic analysis by both parties of the success of the CHD campaign, the court finds that ALPO Puppy Food lost sales to Puppy Chow on account of the CHD claims.

The court finds that ALPO spent a substantial amount of money in advertising expenditures in order to counter the CHD campaign, an amount over and above its planned advertising costs for ALPO Puppy Food. Moreover, the court finds that plaintiff had to postpone the introduction of its new puppy food on a nationwide basis, and finds the delay was due in part to ALPO's difficulty in overcoming the extravagant and false claims made by Ralston.

A particularly effective way to measure the damages sustained would be to look to the sums Ralston expended in its CHD advertising campaign. That amount was 5.2 million dollars.

During the 1986 fiscal year, the approximate period in which Ralston made its CHD claims, Ralston earned 171.6 million dollars in sales from Puppy Chow products. When this figure is reduced by the appropriate production and sales costs, Ralston's profits (pre-tax) come to 50.1 million dollars for the period.[FN16] The amount of Ralston's profits corresponding to ALPO's share (22 percent) of the non-Ralston puppy food market is 11 million dollars.

> FN16. Contrary to Ralston's arguments and in the absence of any mitigating circumstances, taxes are not a proper deduction in determining profits under § 35 of the Lanham Act. *See Wolfe v. National Lead Co.*, 272 F.2d 867 (9th Cir.1959), *cert. denied*,362 U.S. 950, 80 S.Ct. 860, 4 L.Ed.2d 868,*rehearing denied*,363 U.S. 809, 80 S.Ct. 1235, 4 L..Ed.2d 1151 (1960).

Ralston has maintained the validity of its CHD claims and unless enjoined would renew making them once this case has been concluded. It is also

clear the CHD claims have made a lasting impression on the audiences to which they were directed. Thus, there is evidence of continuing injury to competitors, veterinarians, breeders, and dog owners who were exposed to the CHD claims.

The court does not find that Ralston is entitled to an award of damages based on ALPO's misconduct. Ralston, as a competitor, and the consuming public are in need of protection from ALPO's false and misleading advertisements of its puppy food. The court believes that such protection can best be accomplished by enjoining ALPO from engaging in false and deceptive advertising of its puppy food.

CONCLUSIONS OF LAW

[5] Section 43(a) of Lanham Act provides in relevant part:

Any person who shall affix, apply, or annex ... any false description or representation, including words or other symbols tending falsely to describe or ... represent the same, and shall cause such goods to enter into commerce ... shall be liable to a civil action by any person ... who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a). The act creates a cause of action for representations and statements that are (1) facially false, (2) affirmatively misleading, (3) untrue due to a failure to disclose information, and (4) partially correct and literally true but convey a false impression. *See U-Haul Int'l, Inc. v. Jartran, Inc.*, 601 F.Supp. 1140, 1149 (D.Ariz.1984), *aff'd in part and rev'd in part*,793 F.2d 1034 (9th Cir.1986).

[6] While the Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving the cause of action to competitors who are prepared to vindicate the injury caused to consumers. *Gold Seal Co. v. Weeks*, 129 F.Supp. 928 (D.D.C.1955)*aff'd sub nom.S.C. Johnson & Johnson & Son, Inc. v. Gold Seal Co.*, 230 F.2d 832 (D.C.Cir.1956), ***213** *cert. denied*,352 U.S. 829, 77 S.Ct. 41, 1 L.Ed.2d 50 (1956); *Skil Corp. v. Rockwell Int'l Corp.*, 375 F.Supp. 777 (N.D.Ill.1974); *Johnson & Johnson v. Carter Wallace, Inc.*, 631 F.2d 186 (2d Cir.1980) (a broad range of parties entitled to relief).

The Lanham Act provides a private right of action against a merchant's misleading description of its product either by itself or when compared to its competitor's product. *See Gold Seal Co.*, 129 F.Supp. 928; *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 651 (3d Cir.1954); *see also McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34 (2d Cir.1988). In the instant case both parties are direct competitors in the puppy food market, and as such clearly have standing to sue under the statute. 15 U.S.C. § 1127.

[7] In order to prevail on a false advertisement claim under the Lanham Act, a plaintiff must prove:

(1) the advertisements at issue are false or misleading and the advertisements actually deceived or had the tendency to deceive a substantial segment of the audience,

(2) the deceptive or misleading portions of the advertisement were material, in other words they were likely to influence the purchasing decision,

(3) defendant caused the advertised goods to enter interstate commerce, and

(4) plaintiff has been or is likely to be injured either by direct diversion of sales from itself to defendant or by lessening the goodwill or acceptability its products enjoy with the buying public.

See Skil Corp. v. Rockwell Int'l Corp., 375 F.Supp. 777, 783 (N.D.Ill.1974); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 522 F.Supp. 1238, 1243 (D.Ariz.1981), *aff'd*,681 F.2d 1159 (9th Cir.1982).

In this action all the allegedly falsely advertised goods, Ralston's Puppy Chow products and ALPO Puppy Food, have entered interstate commerce.

Ralston's CHD Claims

[8] A product claim is false under the Lanham Act if the representation cites tests or other authority that does not substantiate the claim made; that is if the false substantiation is part of the representation. *See American Home Prod. Corp. v. Johnson & Johnson,* 577 F.2d 160 (2nd Cir.1978). A representation purportedly supported by clinical research may be deemed false if it is shown that the tests referred to were not sufficiently reliable to permit a reasonable conclusion that the research established the claim made. *Procter & Gamble Co. v. Chesebrough-Pond's Inc.,* 747 F.2d 114, 119 (2d Cir.1984). Representations found to be unsupported by accepted authority or research or which are contradicted by prevailing authority or research, may be deemed false on their face and actionable under Section 43(a) of the Lanham Act.

The literal message consistently communicated to the public by the Ralston advertisements and promotional materials was that Ralston Puppy Chow products help reduce hip joint laxity or help puppies develop a snugger hip joint fit, which can reduce the severity of CHD. Simply put, Ralston's claims lacked any reasonable basis in fact. Not only have such claims perpetrated a cruel hoax on dog owners, but also have severely disadvantaged Ralston's competitors who were attempting to sell their existing products and to introduce new products in the puppy food market.

The record establishes that with the exception of Ralston's own faulty research, there is no valid scientific support for the proposition that the nutritional balance in a dog's diet can affect hip joint formation, hip joint laxity, or the severity or occurrence of CHD. The overwhelming weight of scientific research indicates that hip joint laxity and CHD are hereditary in nature and are unaffected by the nutritional balance of a dog's diet. Against this background, and in view of the factual finding that Ralston's research lends no support to its claims, it is clear that they are false on their face.

***214** Once a challenged claim has been found "actually false, relief can be granted on the court's own findings without reference to the reaction of the buyer or consumer of the product." *PBX Enterprises v. Audiofidelity Enterprises,* 818 F.2d 266, 272 (2nd Cir.1987) (quoting *American Brands, Inc. v. R.J. Reynolds Tobacco Co.,* 413 F.Supp. 1352, 1356 (S.D.N.Y.1976)); *see also American Home Prod. Corp. v. Johnson & Johnson,* 577 F.2d 160 (2nd Cir.1978).

[9] Since this court has found that Ralston's CHD claims are actually false, their materiality thus may be presumed. This bolsters the court's earlier finding that Ralston's claims were material in fact.

Injunctive Relief Against Ralston

A party is entitled to injunctive relief under the Lanham Act if it demonstrates a "likelihood of deception or confusion on the part of the buying public" caused by a product's false or misleading description or representation. *E.g., Burndy Corp. v. Teledyne Indus.,* 748 F.2d 767, 772 (2d Cir.1984). A permanent injunction may be granted where it is shown that the plaintiff and defendant are competitors in the relevant market, and the false claims were likely to injure the plaintiff. *See Johnson & Johnson v. Carter-Wallace, Inc.,* 631 F.2d 186 (2d Cir.1980).

ALPO and Ralston are direct competitors in the puppy food market. Further, the claims made by Ralston were false and deceptive, and the credible evidence shows that consumers were deceived by those claims.

The parties have raised the equitable defenses of laches and unclean hands against any prayer for relief by the opposing party.

[10] The defense of laches bars equitable relief only where excessive delay on the part of the plaintiff in enforcing his rights under law induces a defendant to undertake substantial activities in reliance on that delay. *See McNeil Laboratories, Inc. v. Am. Home Products Corp.,* 416 F.Supp. 804, 809 (D.N.J.1976) (applied in an action for trademark infringement). The court finds no evidence of any protracted neglect in the assertion of any of the claims in this suit, nor does it find that the parties relied to their detriment on the existing delay. Thus the defense of laches is unavailable in this case.

[11] The defense of unclean hands is available in an action brought under the Lanham Act seeking equitable and monetary relief. *American Home Products Corp. v. Johnson & Johnson,* 654 F.Supp. 568, 590 (S.D.N.Y.1987); *see also Urecal Corp. v. Masters,* 413 F.Supp. 873, 876 (N.D.Ill.1976) (applied to a "passing off" claim). The doctrine requires that the conduct which is said to be unclean hands must relate to the "very matter in controversy." In an action for false advertising, the unclean hands conduct of the plaintiff must relate to the same product a defendant has falsely advertised. *See Ames Publishing Co. v. Walker-Davis Publications, Inc.,* 372 F.Supp. 1, 14 (E.D.Pa.1974) (quoting *McLaughlin v. McLaughlin,* 410 Pa. 1, 187 A.2d 905 (1963)). Both parties contend that the requirements for its exercise have been met, since the false claims made by plaintiff ALPO relate to the same product as the false claims made by Ralston puppy food.

In deciding whether to apply the doctrine, the court must take into account the public and the competitors' interests in preventing the proliferation of false and deceptive advertising. *Id.,* 372 F.Supp. at 14-15. The defenses may be rejected where, as is the case here, failure to grant an injunction would only increase the damage inflicted on the buying public. *Id.* Given that the worst effects of ALPO's and Ralston's conduct have been visited on the buying public, this court believes that the equitable defenses raised cannot bar relief which is necessary and in the public interest.

[12] Based on the above, injunctive relief against Ralston is clearly warranted. But there is more. Ralston still maintains its position with respect to the viability of its CHD claims and has only halted its continued advertisement of the claims pending this court's decision. Thus, there is the real likelihood that Ralston will renew***215** its CHD advertising campaign once this litigation is over. Ralston's persistence in its claims clearly evidences the likelihood of repeated future false claims and unless restrained Ralston will continue to violate the Lanham Act with its attendant adverse impact on the buying public and ALPO's business.

The court has also found that Ralston's CHD claims have left a lingering impression on veterinarians, breeders, and dog owners. As part of this court's injunctive relief Ralston shall be ordered to prepare and disseminate to those who received information concerning its CHD claims a corrective release in terms and in form to be approved by this court.

Damages to be Assessed Against Ralston

The Lanham Act permits the assessment of damages and the award of profits where the facts warrant. The measure of damages and profits may be assessed on a number of different bases where necessary to effectuate the purposes of the Act, which also permits the assessment of costs and allowance of attorneys' fees in appropriate circumstances. The Act allows the award of damages in an amount up to three times the actual damages proven. After considering the various measures of damages, the court finds the most appropriate measure would be one that is based on Ralston's advertising expenditures as they pertain to the dissemination of its deceptive message. This form of relief has support in the case law and would appear to be particularly appropriate here. *See U-Haul Intern. v. Jartran, Inc.,* 793 F.2d 1034, 1037 (9th Cir.1986). Ralston's offending advertisements directly injured the public and adversely affected ALPO's business both in cutting into its existing business and depriving it of the opportunity to fully introduce and develop its new puppy food on a nationwide basis.

According to the evidence presented to this court, Ralston spent approximately 5.2 million dollars on

its deceptive CHD advertising program. Since this figure does not measure the full impact caused by Ralston's impermissible conduct, the court finds this would be an appropriate case to double the damage award. Accordingly, the award of damages to ALPO is in the sum of 5.2 million dollars doubled to 10.4 million dollars. This amount is close to the 11 million dollar adjusted net profits Ralston earned from the sales of its Puppy Chow products during the period of its CHD advertising program. This sum is obtained by applying to Ralston's nationwide net profits of 50.1 million dollars ALPO's 22 percent share of the non-Ralston puppy food sales.

The court is also awarding ALPO its attorney's fees limited to its prosecution of its case in chief against Ralston, along with its related costs for this phase of the proceeding.

ALPO's Veterinarian Preference Claims

[13] In determining whether Ralston is entitled to relief for ALPO's violations of § 43(a) of the Lanham Act, this court has applied the legal guidelines set forth in its analysis of Ralston's CHD claims.

As demonstrated with Ralston's CHD claims, an advertisement can be literally false, or it can be shown to be deceptive. *Toro Co. v. Textron, Inc.*, 499 F.Supp. 241, 251 (D.Del.1980) (quoting *American Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F.Supp. 1352, 1357 (S.D.N.Y.1976)).

Since it is undisputed that more veterinarians prefer Ralston's Puppy Chow over ALPO's Puppy Food, ALPO's veterinarian preference claims are false and misleading. ALPO's advertisements were designed to mislead consumers into believing veterinarians preferred the ALPO brand over all other brands. Moreover, after May 1986, ALPO was clearly aware that its "2-to-1" preference claim was false, since ALPO's own biased surveys failed to show such a margin of preference among veterinarians. The court finds that ALPO's veterinarian preference claims are material in that they were likely to and did influence consumer purchasing decisions.

Injunctive Relief Against ALPO

[14] Because ALPO conducted a deceptive campaign with respect to its new Puppy Dog Food, in order to protect competitors***216** and the buying public ALPO shall be enjoined from future violations of the Lanham Act and shall be required to issue a corrective release in terms and in a form to be approved by the court.

The issuance of an injunction is needed to protect the public and ALPO's competitors. Accordingly, ALPO will be enjoined from making preference claims unless there is an adequate basis for making such claims.

Damages to be Assessed Against ALPO

This court has decided not to award Ralston damages because the court does not find that ALPO's actions approach the magnitude of Ralston's misconduct. The magnitude of the wrongdoing by Ralston in comparison to that of ALPO is so much greater that a damage award would not be justified. This is especially so where, as here, an award to Ralston would in effect absolve it from its own misconduct. This is not to condone ALPO's misconduct, but only to place it in proper perspective. This court has taken into account the fact that ALPO has acknowledged its misconduct and has ceased its offending advertising program, whereas Ralston persists in its position that its thoroughly inadequate and distorted research permits it to continue to claim its dog food can ameliorate CHD. Ralston withheld vital information about its research from the public, from government agencies, and from this court, and at least one of its officials ordered that certain adverse information be destroyed. These actions cannot go unredressed. Such would clearly be the case if Ralston is permitted to annul its damages by this court issuing a damage award against ALPO.

This court has also taken into account that the charges brought by Ralston against ALPO were instituted only as an afterthought, solely to counteract the more serious charges leveled against it by ALPO. Ralston, however, shall be awarded its attorneys fees limited to its prosecution of its claim against ALPO and the costs it incurred in pressing that phase of the litigation.

The court is particularly disturbed by its finding that the two leading manufacturers and distributors of dog food in the United States have engaged in serious, deceptive advertising practices. Because of the seriousness of these practices, the court has decided to enjoin both parties from engaging in such practices in the future.

These are my findings of fact and conclusions of law. Any finding of fact which constitutes a conclusion of law is hereby adopted as such, and any conclusion of law which constitutes a finding of fact is hereby adopted as such.

An appropriate Order will follow.

ORDER

Upon consideration of the entire record in this case and in accordance with the court's opinion of this date, it is

ORDERED that judgment be and hereby is entered for ALPO in the amount of 10.4 million dollars; it is

FURTHER ORDERED that Ralston pay to ALPO those costs and attorneys' fees limited to ALPO's prosecution of its case in chief against Ralston; it is

FURTHER ORDERED that Ralston, its officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be and hereby are enjoined from making any advertising or other related claims that are false, misleading, deceptive or made without substantiation in fact concerning the effects of Ralston Dog food products on hip joint formation, hip joint laxity, Canine Hip Dysplasia, Degenerative Joint Disease and similar conditions; it is

FURTHER ORDERED that Ralston prepare and disseminate to those who received information concerning its CHD claims a corrective release in terms and in a form to be approved by this court; it is

FURTHER ORDERED that ALPO pay to Ralston those costs and attorneys' fees limited to Ralston's prosecution of its false advertising claims against ALPO; it is

FURTHER ORDERED that ALPO, its officers, agents, servants, employees, attorneys***217** and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be and hereby are enjoined from making advertising or other related claims that are false, misleading, deceptive, or without proper substantiation in fact concerning veterinarian preferences and similar claims; it is

FURTHER ORDERED that ALPO prepare and disseminate to those who received information concerning its veterinarian preference claims a corrective release in terms and in a form to be approved by this court; it is

FURTHER ORDERED that within 30 days the parties are required to adopt, implement, and submit to this court procedures for assuring compliance with the injunctive portions of this Order; and it is

FURTHER ORDERED that all other requests for relief are hereby denied.

This court shall retain jurisdiction in this matter in order to assure compliance with this order and to grant such other and further relief as may be appropriate.

D.D.C.,1989.
Alpo Petfoods, Inc. v. Ralston Purina Co.

720 F.Supp. 194, 12 U.S.P.Q.2d 1178

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Faigman v. AT & T Mobility LLC
N.D.Cal.,2007.
Only the Westlaw citation is currently available.
United States District Court,N.D. California.
David and Lisa FAIGMAN, individually and on behalf of others similarly situated, Plaintiffs,
v.
AT & T MOBILITY LLC, formerly known as Cingular Wireless, LCC; and Does 1 through 100, inclusive, Defendants.
No. C 06-04622 MHP.

July 18, 2007.

Bruce Lee Simon, Esther L. Klisura, Pearson Simon Soter Warshaw & Penny, LLP, San Francisco, CA, Harvey Jay Rosenfield, Pamela Pressley, Santa Monica, CA, for Plaintiffs.
Eric Stefan Clay Lindstrom, Felicia Yi-Wen Feng, McKenna Long & Aldridge LLP, San Francisco, CA, David L. Balser, Nathan Lewis Garroway, McKenna Long & Aldridge, LLP, Atlanta, GA, for Defendants.

***MEMORANDUM & ORDER* Re: Defendant's Motion to Dismiss**

MARILYN HALL PATEL, United States District Court Judge.
***1** Plaintiffs David and Lisa Faigman ("plaintiffs"), individually and on behalf of a class of others similarly situated, filed this action in California Superior Court for the County of San Francisco against AT & T Mobility LLC, formerly known as Cingular Wireless, LLC ("Cingular" or "defendant") and Does 1 through 100, inclusive.[FN1] Defendant removed the action to this court. Plaintiffs filed their first amended complaint ("FAC") in April 2007 seeking damages for violations of the Consumer Legal Remedies Act ("CLRA"), violations of the False Advertising Act, violations of the Unfair Competition Law, and unjust enrichment. Now before the court is defendant's motion to dismiss plaintiffs' FAC for failure to state a claim on which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

FN1. Plaintiffs' original complaint was filed against Cingular Wireless, LLC. Following plaintiffs' original complaint, and prior to the filing of plaintiffs' first amended complaint, defendant Cingular Wireless, LLC changed its name to AT & T Mobility LLC. According to plaintiffs' first amended complaint, AT & T Mobility LLC continues to use the Cingular name, logo and website. Herein, defendant AT & T Mobility LLC is referred to as "Cingular."

BACKGROUND[FN2]

FN2. Unless otherwise specified, background facts are taken from plaintiffs' first amended complaint, and are assumed to be true for purposes of this motion only.

Plaintiffs are California residents who claim that they were misled into purchasing mobile phones and service contracts from Cingular as a result of a misleading rebate program. Defendant Cingular is the nation's largest mobile phone company in terms of subscribers and revenue, operating nationwide with a substantial amount of business in California. Cingular has fifteen retail stores in the city of San Francisco.

As part of its marketing efforts, Cingular advertises the availability of rebates in exchange for the purchase of its products or services. According to plaintiffs, "[f]ollowing the custom of other rebate offers it has offered in the past, Cingular's advertising seeks to convey the impression that once a customer mails in a completed rebate form, he or

she will receive the value of the rebate in cash or by check."FAC ¶ 17. In 2005, Cingular discontinued its use of rebate checks and has since issued "Cingular VISA Rewards Cards," which function similarly to a debit card and carry a maximum balance of $50 each.

Plaintiffs claim that Cingular's practice of marketing its rebates as directly reducing the cost of Cingular cell phones by the dollar amount of the rebate is misleading because the VISA Rewards Cards do not reduce the cost of Cingular phones by the value of the rebate. *Id*. ¶¶ 13-15.The cards are less valuable than cash or check, according to plaintiffs, due to the limitations and restrictions placed upon the use of the cards. *Id*. Plaintiffs identify the following restrictions which are not disclosed in Cingular's advertisements: the cards must be activated, the cards are only accepted at certain locations, the cards can incur service charges, the cards will be declined in transactions that exceed the balance of the card, the cards expire, the cards are not redeemable for cash, the cards do not earn interest, the cards are not divisible, the cards are not transferrable, the cards collect private information, and the cards are issued in maximum increments of $50. *Id*. ¶ 16.Plaintiffs further claim that these programs have led to numerous customer complaints. *Id*. ¶ 30.

***2** Plaintiffs purchased three mobile phones and signed up for two-year service contracts with Cingular in October 2005 via a Cingular retail store in San Rafael, California. *Id*. ¶¶ 33-34.While at the store, plaintiff Lisa Faigman noticed that rebates were offered on various phone models, including models advertised as "buy one, get one free" after rebate, and "free" after rebate. *Id*. ¶ 33.Based on these advertisements, Lisa Faigman and her husband David, whom she called while in the store, decided to purchase the phones and enter into a service contract with Cingular. *Id*. ¶ 34.Lisa Faigman received her rebate forms after completing the purchase transaction, which David Faigman thereafter completed and submitted.[FN3] *Id*. ¶¶ 35-36.Plaintiffs claim that after the purchase transaction and completion of the rebate forms, they did not realize that Cingular would tender the rebates with VISA Rewards Cards, and that Lisa Faigman expected that Cingular would tender the rebates via check. *Id*. ¶¶ 35-36.Plaintiffs were surprised when they received three VISA Rewards Cards for $30 each (one for each phone purchased from Cingular) instead of cash or checks. *Id*. ¶ 37.Plaintiffs assert that they have encountered difficulties and inconvenience when attempting to use the cards, including activation and rejection. *Id*. ¶ 38.Specifically, plaintiffs claim that their card was rejected at a Chevron gas station. *Id*.

> FN3. Plaintiffs do not make clear in their complaint when David Faigman filled out and mailed the rebate forms. The complaint merely states that he filled them out "after Lisa Faigman returned home." FAC ¶ 36. Although the question of whether David Faigman filled out the forms before the three-day cooling off period expired may be legally significant to issues not considered in this motion, the court need not address this ambiguity here where plaintiffs have pled reliance.

Plaintiffs filed this action in California Superior Court on June 23, 2006. Plaintiffs asserted causes of action for violations of the Consumer Legal Remedies Act, violations of the False Advertising Act, concealment, violations of the Unfair Competition Law, and unjust enrichment. On July 28, 2006 defendant removed the action to this court pursuant to 28 U.S.C. section 1441, alleging jurisdiction based upon the Class Action Fairness Act of 2005, 28 U.S.C. section 1332(d). On March 2, 2007 defendant's motion to dismiss plaintiffs' original complaint pursuant to Rule 12(b)(6) was granted with leave to amend. Docket Entry 64 (hereinafter "March Order"). Plaintiffs timely filed their FAC on April 16, 2007 seeking damages for violations of the Consumer Legal Remedies Act, violations of the False Advertising Act, violations of the Unfair Competition Law, and unjust enrichment. Defendant now moves again to dismiss plaintiffs' FAC for failure to state a claim upon which relief can be granted.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss "tests the legal sufficiency of a claim."*Navarro v. Block,* 250 F.3d 729, 732 (9th Cir.2001). In examining the claim's sufficiency, as opposed to its substantive merits, "a court may [typically] look only at the face of the complaint to decide a motion to dismiss."*Van Buskirk v. Cable News Network, Inc.,* 284 F.3d 977, 980 (9th Cir.2002).

A motion to dismiss should be granted if plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face."*Bell Atl. Corp. v. Twombly,* --- U.S. ----, 127 S.Ct. 1955, 1960, --- L.Ed.2d ----, (2007).[FN4] Dismissal can be based on lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.*Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir.1996). The court need not, however, accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact or unreasonable inferences. *See Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir.2001); *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-55 (9th Cir.1994).

> FN4. In light of the Supreme Court's recent decision in *Twombly,* defendant argues that plaintiff has failed to allege facts that show plaintiff is "plausibly" entitled to relief. Although defendant has correctly articulated the new standard for a motion to dismiss after *Twombly,* this change does not affect the analysis in this case.

DISCUSSION

***3** Defendant alleges that plaintiffs' FAC is defective for the same two reasons articulated in defendant's first motion to dismiss. First, defendant claims that plaintiffs have again failed to allege, with requisite specificity, misrepresentations on the part of Cingular with respect to the reward card rebate program. This deficiency would be fatal to all four of plaintiffs' claims. Second, defendant claims that plaintiffs have again failed to allege that they were injured "as a result of" alleged misrepresentations by Cingular, as they must to sustain a cause of action under the CLRA.

I. *Misrepresentations*

Defendant claims that each of plaintiffs' causes of action arises out of the same alleged unified course of fraudulent conduct, and that where fraudulent conduct serves as the basis for a cause of action the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) apply.[FN5] Because plaintiffs have dropped their concealment cause of action in their amended complaint, fraud is no longer a necessary element of any of the California statutory claims that plaintiffs have set forth. *See Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1103 (9th Cir.2003). However, the requirements of Rule 9(b) may nonetheless apply to discrete allegations within each cause of action. *Id*. As the Ninth Circuit has explained:

> FN5.Rule 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and

rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).

[...]

In other cases, however, a plaintiff may choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege some fraudulent and some non-fraudulent conduct. In such cases, only the allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements.

Id. at 1103-04.Where a complaint or claim is grounded in fraud and the averments of fraud are insufficiently pled, "there is effectively nothing left of the complaint" and dismissal under Rule 12(b)(6) is warranted. *Id.* at 1107.

This court has held that each of plaintiffs' causes of action rests upon an allegation of fraudulent conduct in the form of misrepresentations made by Cingular regarding its rebate programs. March Order at 5. Again, plaintiffs admit in their complaint that "[a]ll of the claims asserted herein arise out of Cingular's misleading and unfair advertisements and marketing campaign regarding its rebate programs ...." FAC ¶ 3. Each of plaintiffs' causes of action still contains an explicit or implicit reference to fraud. FAC ¶¶ 55 ("defendants knowingly misrepresented the legal rights, obligations, or remedies involved in the purchase and sale of Cingular service and products"), 60 (defendants' conduct "constitutes unfair competition, unfair, deceptive, untrue or misleading advertising ..."), 65 (defendants' conduct constitutes "a continuing course of conduct of unfair competition because defendants are marketing and selling their phones and services in a manner that is likely to deceive the public ..."), 67 (defendants' practices "were likely to deceive consumers into purchasing services or products under ... false pretense ..."), & 72 ("As a direct and proximate result of defendants' misleading and unfair business practices, defendants have been unjustly enriched."). Because each of plaintiffs' claims is thus "grounded in fraud," each claim "as a whole" is subject to heightened pleading requirements.*Vess,* 317 F.3d at 1103-04.

***4** Plaintiffs correctly observe, however, that this court addressed the applicability of Rule 9(b)'s heightened standard to claims brought under the CLRA in *Nordberg v. Trilegiant Corp.,* 445 F.Supp.2d 1082, 1097-98 (N.D.Cal.2006) (Patel, J.). In *Nordberg,* the court held that while the requirements of Rule 9(b) were not strictly applicable to a CLRA claim, plaintiffs were "still required to provide some specificity in their pleadings to put defendants on notice of the charges leveled against them."*Id.* The question is whether plaintiffs have met the requirements of this intermediate standard in their complaint.

Defendant claims that plaintiffs have failed to plead facts specific enough to satisfy this requirement in their complaint. First, defendant argues that plaintiffs fail to identify "any misleading advertisement or marketing by Cingular with respect to the VISA Reward Card program."Plaintiffs have, however, identified language that they claim to be misleading. Specifically, plaintiffs describe the promotional materials that Lisa Faigman saw inside the Cingular store which advertised phones as "buy one, get one free" after rebate and "free" after rebate. FAC ¶ 33. The legally relevant question is whether a reasonable consumer would believe Cingular's marketing to be misleading.[FN6] *See Williams v. Gerber Products Co.,* 439 F.Supp.2d 1112, 1115 (S.D.Cal.2006). The court finds that a reasonable consumer, upon seeing an advertisement that promises a "rebate" of a certain amount, would generally understand that advertisement to mean that the amount will be returned to the consumer in cash, check or its equivalent. Other forms of tender, such as the VISA Reward Cards at issue in the instant case, may satisfy this expectation. However, the more terms, conditions and restrictions that are placed upon a form of tender, the less equivalent it becomes to cash or check. In their complaint, plaintiffs list various restrictions on the VISA cards that allegedly reduce their value. For example, the VISA cards must be activated, the cards are only accepted at certain locations, the cards can incur service charges, the cards will be declined in transactions that exceed the balance of the card, the cards expire, the cards are not redeemable for cash, the cards do not earn interest, the cards are not divisible, the cards are not transferrable, the cards collect private information, and the cards are issued in maximum increments of $50. FAC ¶ 16. Still more terms and conditions are included in the documents that come with the phone upon purchase. Pls.' Exh. D. An additional two pages worth of terms and conditions arrive when customers receive their VISA Rewards Cards. Pls.' Exh. A. These numerous terms and conditions raise an issue of fact about whether the VISA cards could reasonably be interpreted as equivalent to cash or check. For purposes of this motion the court must assume that the cards are not equivalent. Assuming arguendo that the VISA cards are materially different from cash or check, advertising the cards as a "rebate" would not be in line with the expectations of reasonable consumers. Plaintiffs have identified language in Cingular's advertising that promises "rebates" where consumers in fact receive VISA Reward Cards, and therefore, defendant's argument that plaintiffs' complaint should be dismissed for failure to identify "any misleading advertisement" is unavailing.[FN7]

FN6. Plaintiffs state throughout their complaint that they assumed that they would receive their rebate in cash or by check. As the relevant standard is what a reasonable consumer would expect, the court will take the plaintiffs' discussion of their own assumptions to be a claim about what a reasonable consumer would expect in their situation. *See Williams v. Gerber Products Co.,* 439 F.Supp.2d 1112, 1115 (S.D.Cal.2006).

FN7. Cingular's advertisements often show the price of a phone as the remainder calculated after the subtraction of a savings from a "mail-in rebate card." At the July 9, 2007 hearing defendant argued that the term "mail-in rebate card" actually refers to the VISA Reward Card the consumer receives, and therefore, Cingular's advertisements explicitly disclose the fact that customers receive a VISA card instead of cash or check. This argument is entirely without merit. No reasonable consumer expects that the term "mail-in" refers to an item which the seller mails to the consumer; rather, a reasonable consumer would expect the term to refer to the rebate form the consumer must *mail-in* to the seller to obtain the rebate. Cingular's own language makes this clear as well. Nowhere in Cingular's rebate forms or elsewhere does Cingular say they will be sending customers their "mail-in VISA Reward Card." Cingular is bound by the language they have created. The court therefore rejects the argument that "mail-in rebate card" refers to the VISA Reward Cards.

***5** Next, defendant argues that plaintiffs have not described Cingular's advertisements with sufficient particularity. Plaintiffs have described the specific advertisements that Lisa Faigman saw at the Cingular store containing language such as "buy one, get one free" after rebate and "free" after rebate, and have attached additional representative samples of advertisements containing similar language to their complaint. FAC ¶ 33, Pls.' Exhs. B & C. The United States District Court for the Southern District of California has held that where alleged misrepresentations occur in printed form, the particularity requirements of Rule 9(b) may be satisfied by "identifying or attaching representative samples of [misleading] materials."*Von Grabe v. Sprint PCS,* 312 F.Supp.2d 1285, 1306 n. 19 (S.D.Cal.2003). Notably, plaintiffs' complaint averring a cause of action under the CLRA is not strictly required to rise to the level of specificity mandated by Rule

9(b).*Nordberg,* 445 F.Supp.2d at 1097-98. Because attaching representative samples satisfies the heightened particularity standard of Rule 9(b), plaintiffs' complaint meets the intermediate particularity standard at issue here.

Last, defendant argues that the samples plaintiffs attached to their complaint are not the actual promotional materials that Lisa Faigman saw at the Cingular store at the time of purchase, and therefore, plaintiffs have failed to plead a cause of action under the CLRA with sufficient particularity to put defendants on notice of the charges leveled against them. This argument is unpersuasive for three reasons.

First, plaintiffs state in their complaint that they "believe that the 'mail-in rebate card' language appeared uniformly in Cingular's newspaper ads, direct mail ads, and *in-store displays*."FAC ¶ 18 (emphasis added). This would include the in-store displays Lisa Faigman saw in October 2005, described at paragraph 33 of plaintiffs' complaint. Even if the representative samples are not the actual advertisements Lisa Faigman saw, they are likely very similar considering plaintiffs' allegations regarding Cingular's uniformity in marketing.

Second, plaintiffs allege in their complaint that Cingular modified the language of its advertisements after the Faigmans filed suit in June 2006. Requiring plaintiffs to attach a copy of the actual in-store promotional material that Lisa Faigman saw in 2005 would be unduly difficult without discovery since Cingular is likely the only entity with access to the actual, discontinued, in-store advertisements Lisa Faigman saw in October 2005.

Lastly, *Nordberg* does not require, as defendants suggest, that a cause of action under the CLRA be dismissed if plaintiffs cannot identify the unique advertisement which actually induced plaintiffs to act. *Nordberg,* 445 F.Supp.2d at 1097-98. In *Nordberg,* plaintiffs' claims under Cal. Civ.Code sections 1770(a)(1), (3), (5) and (9) were dismissed not because plaintiffs failed to identify advertisements which actually induced plaintiffs to act, but because the harm plaintiffs suffered was not caused by defendants' advertising at all. Plaintiff Nordberg had specifically declined defendants' services on the phone and was nonetheless charged, and plaintiff Smith was charged without ever having seen any of defendants' advertising. *Id.* at 1098.Nordberg's claim under section 1770(a)(14)-the same section at issue in the instant case-was found to have been pled with requisite specificity given that it described Nordberg's personal experience with defendants' representatives: when the alleged misrepresentations were made to her, approximate dates, the manner in which Nordberg discovered that defendants' representations were inaccurate, and the content of defendants' alleged omissions. *Id.* Here plaintiffs have included the approximate dates of their interactions with Cingular, the content of Cingular's allegedly misleading representations, the content of Cingular's alleged omissions, and the manner in which plaintiffs discovered the omissions.

***6** Because plaintiffs' have identified allegedly misleading language in Cingular's advertisements, described the advertisements with particularity and attached representative samples of Cingular's advertisements to the complaint, plaintiffs' complaint is sufficiently particular to put Cingular on notice of the charges leveled against them.

II. *Causation*

As an alternative ground for dismissal, defendant claims that plaintiffs have failed to plead that they were injured "as a result of" Cingular's alleged misrepresentations, a purported defect fatal to plaintiffs' cause of action under the CLRA.[FN8]

FN8. In their amended complaint, plaintiffs plead causes of action under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code sections 17200 *et seq.,* and California's False Advertising Law ("FAL"), Cal. Bus & Prof.Code sections 17500 *et seq.*. The UCL and FAL were amended via a ballot initiative passed in November 2004 such that standing to bring a private claim under either statute is limited to "any person who has suffered injury in fact and has lost money or property "as a result of" such unfair competition or false advertising. Cal. Bus. & Prof.Code §§ 17204 & 17535. Defendants maintain that this language, while clearly limiting standing to individuals who have suffered an injury in fact, further imposes a requirement that a private plaintiff has suffered such injury as a result of relying upon the defendant's statutory violation. The question of whether this language implies a requirement of "actual reliance" was taken up by the California Supreme Court on November 1, 2006, after plaintiffs filed their original complaint, but prior to the filing of plaintiffs' FAC in the following two cases: *Pfizer, Inc. v. Superior Court,* 45 Cal.Rptr.3d 840 (2006), and *In re Tobacco II Cases,* 47 Cal.Rptr.3d 917 (2006). It is therefore unsettled, as a matter of California law, whether actual reliance is required to plead a cause of action under UCL or FAL. As the state's highest court is in the process of deciding this question, it would be imprudent for the court to reach the issue at this time. Accordingly, the court reserves judgment on plaintiffs' UCL and FAL claims until after the California Supreme Court issues its decisions on these cases.

The right to bring a private cause of action under the CLRA is limited to "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by [California Civil Code] Section 1770."Cal. Civ.Code § 1780. Relief under the CLRA is therefore "specifically limited to those who suffer damage, making causation a necessary element of proof."*Wilens v. TD Waterhouse Group, Inc.,* 120 Cal.App.4th 746, 754, 15 Cal.Rptr.3d 271 (2003); *see also Caro v. Procter & Gamble Co.,* 18 Cal.App.4th 644, 668, 22 Cal.Rptr.2d 419 (holding that the requirements of the CLRA were not met where the purported class representative did not believe the alleged misrepresentation to be true).

Defendant claims that courts have construed the "as a result of" language in the CLRA to require a plaintiff to allege causation and actual reliance as "a necessary element of proof." While both of the cases defendants cite in support of this claim do identify causation as a necessary element of CLRA claims, neither require, or even mention, actual reliance. *See Wilens* 120 Cal.App.4th at 754, 15 Cal.Rptr.3d 271;*see also Caro,* 18 Cal.App.4th at 668, 22 Cal.Rptr.2d 419. To prove causation via reliance, courts require defendant's representations to have been a "substantial factor" influencing plaintiffs' decision. *Whitely v. Philip Morris Inc.,* 117 Cal.App.4th 635, 678, 11 Cal.Rptr.3d 807 (2004). As the California Court of Appeal explained, "[i]t is not necessary that a plaintiff's reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant ... factor in influencing his conduct. It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision."*Id.* In their complaint, plaintiffs allege that "[i]n making the decision to purchase the phones and enter into a new service contract, the Faigmans were predominantly influenced by the advertised value of the rebates and their understanding that the rebates would be the functional equivalent of cash."FAC ¶ 39. This allegation of reliance clearly meets the standard set forth in *Whitely,* and therefore, plaintiffs have successfully plead the causation requirement of their claim under the CLRA.FN9

FN9. As alternative grounds for proving causation, plaintiffs argue that their allegations regarding the inferiority of VISA Reward Cards to cash or check show that Cingular's misrepresentation were materi-

al, therefore giving rise to a presumption of reliance. A presumption of reliance arises where there is a showing that a misrepresentation was material. *Engalla v. Permanente Med. Group, Inc.*, 15 Cal.4th 951, 977, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997). Defendant responds by arguing that plaintiffs have failed to identify any misrepresentations at all, and that the marketing language Lisa Faigman saw at the Cingular store does not support a finding of materiality. Since plaintiffs have successfully plead reliance under *Whitely*, a finding that Cingular's alleged misrepresentations were material, therefore giving rise to a presumption of reliance, is unnecessary to support plaintiffs' case.

CONCLUSION

For the reasons stated above, the court DENIES defendant's motion to dismiss.

***7** IT IS SO ORDERED.

N.D.Cal.,2007.
Faigman v. AT & T Mobility LLC
Slip Copy, 2007 WL 2088561 (N.D.Cal.)

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F.T.C. v. Bronson Partners, LLC
D.Conn.,2008.
Only the Westlaw citation is currently available.
United States District Court,D. Connecticut.
FEDERAL TRADE COMMISSION, Plaintiff,
v.
BRONSON PARTNERS, LLC, Martin Howard, H & H Marketing, LLC, and Sandra Howard, Defendants.
Civil Action No. 3:04cv1866 (SRU).

July 10, 2008.

Robin E. Eichen, Ronald Waldman, Federal Trade Commission, New York, NY, John B. Hughes, U.S. Attorney's Office, New Haven, CT, for Plaintiff.
Andrew B. Lustigman, Scott Shaffer, Sheldon S. Lustigman, The Lustigman Firm, PC, New York, NY, Barbara S. Miller, Brody, Wilkinson & Ober, SouthporT, CT, for Defendants.

RULING ON MOTION FOR SUMMARY JUDGMENT

STEFAN R. UNDERHILL, District Judge.
***1** The Federal Trade Commission ("FTC") brought this enforcement action challenging as false advertising the claims that the defendants, Bronson Partners, LLC ("Bronson"), Martin Howard, H & H Marketing, LLC, and Sandra Howard (collectively "defendants"), made in their advertisements for two products: Chinese Diet Tea and the Bio Slim Patch. The exemplar advertisement for Chinese Diet Tea touts the tea almost exclusively as a weight-loss product, and, when read objectively and in context, virtually guarantees the user that, by drinking the tea, the user will lose large quantities of weight in a relatively short period of time without dieting or exercising. The defendants also advertised the Bio Slim Patch as an effective weight loss product. FN1

FN1. Defendants concede liability with respect to the Bio Slim Patch, but contest the FTC's damage calculation related to that claim. Because I address only liability in this ruling, I do not further discuss the Bio Slim Patch.

The FTC seeks a permanent injunction and damages, and has moved for summary judgment on all claims. For reasons that follow, the FTC's motion is granted with respect to liability.

I. Background

Chinese Diet Tea is not materially different from any other green tea product on the market. The defendants' exemplar one-page advertisement for Chinese Diet Tea is entitled, "Powerful Green Diet Tea, **SHEDS POUND AFTER POUND OF FAT-FAST!**"FN2 It includes a picture of a slim Asian woman on a scale wearing what appears to be a bathing suit or tight-fitting tank top. The advertisement states:

FN2. Unless otherwise noted, all quotes are taken from the exemplar advertisement, which is attached as an appendix to this ruling. The exemplar advertisement ran in the December 26-28, 2003 issue of *USA Weekend*.Defendants have used varying but similar advertisements. The extent to which any particular advertisement caused purchases is an issue that will be addressed at the upcoming hearing on damages.

You eat your favorite foods-but STILL lose weight!

Eliminates an amazing 91% of absorbed sugars.

Prevents 83% of fat absorption.

Doubles your metabolic rate to burn calories fast.

Powerful herbal formula helps you stop snacking.

> Let this powerful Chinese Green Diet Tea help you to lose those unwanted pounds. Can you imagine losing weight by simply drinking a cup of refreshing tea? Well, that is all you now have to do to lose weight with one of the "easiest" and most effective diets ever discovered. Chinese Green Diet Tea is a 2000 year old secret remedy now available in the U.S. Obesity is a big problem in Western societies but is almost unheard of in China. That is because millions of Chinese men and women regularly drink herbal tea after every meal. Clinical trials have shown that by drinking a cup of Chinese Green Diet Tea your body will absorb less sugar and animal fats. Participants on Chinese Green Diet Tea clinical trials carried on eating a normal healthy measure of sugar and fats-but they still lost weight. Just make sure you drink one cup of Chinese Green Diet Tea after each meal to neutralize the absorption of fattening foods. You'll get the satisfaction and flavor of eating a balanced diet but without any fattening effects.

The advertisement continues to assure the reader that Chinese Diet Tea is:

> **GUARANTEED!**Chinese Green Diet Tea has been clinically trialed on 163 patients. All participants lost between 18 lbs and 75 lbs over the 12 week trial period. If you do not lose similar amounts of weight we guarantee to refund your purchase price in full (less s/h).**REMEMBER,** the more Chinese Green Diet Tea you drink, the more weight you may lose!

***2** It also asserts that "[r]esearchers found that those who drank Chinese Diet Green Tea burned an additional 500 calories per week, with no change in diet or physical activity," and that:

> Chinese Green Diet Tea's secret herbal ingredients act in four ways to help you lose weight:
>
> 1) Reduces sugar absorption by an amazing 91%. This means you can eat sweet buns and chocolate without putting on so much weight. But be careful-drinking Chinese Green Diet Tea is not a license to gorge yourself.
>
> 2) Reduces the absorption of animal fats and dairy products by as much as 83%. This controls the fattening effects of butter, cheese, pate, sausages and fatty meats.
>
> 3) Doubles the digestion of food in the intestine. This prevents food laying in your stomach for 24 hours or more and contributing to that "pot belly" look. The faster digestion of food means fewer calories are absorbed into the body.
>
> 4) Acts as an effective appetite suppressant to reduce snacking.

The advertisement also includes the following warning: **"WARNING:** Doctors recommend that weight loss must be achieved gradually over an extended 8-12 week period. We therefore recommend that you do not lose weight too suddenly. If very rapid weight loss occurs, stop taking Chinese Green Diet Tea for 10-14 days and consult your doctor."

The advertisement continues to offer various "courses:"

> • Week Course-You'll lose up to 25 lbs-$24.95
>
> • Week Course-You'll lose up to 50 lbs-$39.95-Save $16.00
>
> • 12 Week Course-You'll lose up to 75 lbs-49.95-Save $32.90

The advertisement contains several "testimonials:"

> **• I Lost 64 lbs in 10 weeks!**
>
> • After 10 weeks my weight was down to 104 lbs. I lost weight so fast my doctor ordered me to slow down.
>
> • We (my husband and I) have lost 45 lbs. so far. Send extra order forms for friends.
>
> • I have been on the program 6 weeks and have not religiously followed the schedule of a cup of tea after each meal. However, I have gone from 240 lbs. down to 210 lbs. I feel better.

The order form for Chinese Diet Tea states "Please RUSH me by First Class Mail the following order of ***guaranteed to help you lose weight*** **Chinese Green Diet Tea bags.**"Finally, the advertisement provides that Chinese Diet Tea ***"Makes Great Iced Tea!"***

The FTC filed a four-count complaint pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), to secure a permanent injunction against and disgorgement of allegedly ill-gotten gains from the defendants. The FTC alleges that the defendants violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, by making false and unsubstantiated claims with respect to Chinese Diet Tea (counts one and two), and by making false and unsubstantiated claims with respect to the Bio-Slim Patch (counts three and four). They now move for summary judgment on all counts.

II. Standard of Review

***3** Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). When ruling on a summary judgment motion, the court must construe the facts in the light most favorable to the nonmoving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson,* 477 U.S. at 255;*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970); *see also Aldrich v. Randolph Cent. Sch. Dist.,* 963 F.2d. 520, 523 (2d Cir.1992). To present a "genuine" issue of material fact, there must be contradictory evidence "such that a reasonable jury could return a verdict for the non-moving party."*Anderson,* 477 U.S. at 248. Thus, the non-moving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment."*Id.* at 257.

III. Liability Under the FTC Act

The FTC Act, 15 U.S.C. § 52(a), provides that "[i]t shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement ... for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics."*Id.* Section 52(b) of the FTC Act continues that the "dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 5."*Id.*Section 5 of the FTC Act provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful," and that the FTC "is hereby empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."15 U.S.C. § 45(a).

The Act defines "false advertisement" as follows:

> The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertise-

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ment, or under such conditions as are customary or usual.

***4** 15 U.S.C. § 55. Two types of false advertising are actionable: "(1) advertising which makes claims which are literally false on their face, and (2) advertising which, although literally true on its face, is perceived by a significant proportion of the relevant market as making 'subliminal' or 'implicit' claims which are provably false. With regard to the second type of false advertising, the courts sometimes say that the advertising has a tendency to mislead, confuse or deceive."*Schering Corp. v. Pfizer Inc.,* 189 F.3d 218, 229 (2d Cir.1999) (quoting *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.,* 614 F.Supp. 1278, 1319 (S.D.N.Y.1985)).

To prove a violation of Section 5, the FTC must show three elements; (1) the existence of "a representation, omission, or practice," that is (2) "likely to mislead consumers acting reasonably under the circumstances," and (3) "the representation, omission, or practice is material."*FTC v. Verity Int'l, Ltd.,* 443 F.3d 48, 63 (2d Cir.2006) (internal quotations omitted)."To be actionable under section 5, these misrepresentations or practices need not be made with an intent to deceive. Indeed, an advertiser's good faith does not immunize it from responsibility for its misrepresentations. Moreover, the omission of material information, even if an advertisement does not contain falsehoods, may cause the advertisement to violate section 5."*FTC v. World Travel Vacation Brokers, Inc.,* 861 F.2d 1020 (7th Cir.1988) (internal quotations and citations omitted); *see also Verity,* 443 F.3d at 63.

A. *Does the Advertisement for Chinese Diet Tea Make the Alleged Claims?*

In the complaint, the FTC alleges that the Chinese Diet Tea advertisement makes the following claims:

(a) Chinese Diet Tea causes rapid and substantial weight loss without the need to reduce caloric intake or increase physical activity;

(b) Chinese Diet Tea enables users to lose as much as six pounds per week over multiple weeks and months without the need to reduce caloric intake or increase physical activity;

(c) Chinese Diet Tea enables users to lose substantial weight while enjoying their favorite foods, including foods high in sugar and animal fat;

(d) Chinese Diet Tea blocks the absorption of fat and calories thereby enabling users to lose substantial weight;

(e) Chinese Diet Tea causes substantial weight loss for all users; and

(f) Chinese Diet Tea is clinically proven to cause rapid and substantial weight loss without the need to reduce caloric intake or increase physical activity.

Pl. Am. Compl. at ¶ 18(a)-18(f).

Defendants offer several reasons why the Chinese Diet Tea advertisement does not make those claims. First, the defendants argue that several of the claims in the advertisement were "merely testimonial in nature," and presumably, that they should be given less (or no) weight. Defendants assert that there are fundamental differences in the way testimonials, implied and express claims are to be treated.

***5** But simply because an advertiser labels a statement a "testimonial" does not render the statement irrelevant to determining the claims made in an advertisement. To the contrary, "[w]hen an advertisement contains a testimonial reflecting the experience of an individual with a product, there is an implicit representation that such experience reflects the typical or ordinary results anyone may anticipate from use of the product."*In the Matter of Porter & Dietsch, Inc.,* 90 F.T.C. 770, 1977 FTC LEXIS 11, * 147 (1977). The defendants' purported treatment of the testimonials is also inconsistent with the proper approach to interpreting an advertisement. The Second Circuit, in *FTC v. Sterling Drug, Inc.,* 317 F.2d 669 (2d Cir.1963), held that the "purpose of the [FTC Act] is not to punish the wrongdoer but to protect the public," so "the cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader."*Id.* at 675."It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately."*Id.* The consumer "does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."*Id.* In this case, the testimonials in the Chinese Diet Tea advertisement are clearly tiles contributing to the mosaic. Although not dispositive of whether the advertisement makes the alleged claims, the testimonials are certainly relevant to the analysis.

Second, the defendants assert that the court cannot determine whether an advertisement makes a particular claim without extrinsic evidence about how a reasonable consumer would perceive the advertisements. At oral argument, defendants suggested that "in a false advertising case ... the parties seeking to prove a false advertisement [have] the burden of coming forward with extrinsic evidence" or "consumer data showing what impression people take away from the ad."Transcript of 9/19/07 Hearing on Motion at 6 ("Hearing Tr."). For support, defendants cite *Kraft, Inc. v. FTC,* 970 F.2d 311 (7th Cir.1992); *FTC v. Amy Travel Svcs., Inc.,* 875 F.2d 564 (7th Cir.1989);[FN3] *In re Thompson Medical Co.,* 104 F.T.C. 648, 1984 FTC LEXIS 6 (1984); and *Time Warner Cable, Inc. v. DIRECTV, Inc.,* 497 F.3d 144 (2d Cir.2007), for the proposition that the court *must* look to extrinsic evidence to determine whether an advertisement makes a certain claim. None of those cases, however, stands for such a proposition.

FN3.*FTC v. Amy Travel,* does not even broach the subject of whether a court must, in all cases, rely on extrinsic evidence when determining whether an advertisement makes a particular claim.

To the contrary, the need for extrinsic evidence to determine whether an advertisement makes a particular claim hinges on the type of claim the advertisement makes. Any given advertisement can assert two different types of claims: express claims or implied claims. If an advertisement makes a claim expressly, then extrinsic evidence is not necessary. *See Kraft, Inc. v. FTC,* 970 F.2d at 318 n. 4 ("Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way. To illustrate, consider the following. Suppose a certain automobile gets poor gas mileage, say, 10 miles per gallon. One advertisement boasts that it gets 30 miles per gallon while another identifies the car as the 'Miser,' depicts it rolling through the countryside past one gas station after another, and proclaims that the car is inexpensive to operate. Both ads make deceptive claims; the first does so expressly, the second does so impliedly.")[FN4] (citation omitted).

FN4. It is useful to expound upon this hypothetical. Consider the example of the "express" claim-that a particular automobile actually gets 10 miles to the gallon, but is advertised to get 30 miles to the gallon. The advertisement is expressly making a false claim, that the automobile gets 30 miles to the gallon when it really only gets 10 miles to the gallon. But the same advertisement is also making the functional equivalent of at least one other express claim, namely, that the automobile gets more than 10 miles per gallon, even though the advertisement does not specifically state "gets more than 10 miles per gallon."An express claim thus encompasses the explicit statements in the advertisement itself, but also, necessary implications derived from the statements themselves. For

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example, in the hypothetical, the advertiser could not claim that, by stating the automobile gets 30 miles to the gallon, he has not expressly made the claim that the automobile "gets more than 10 miles per gallon."The claim "gets more than 10 miles to the gallon" is self-evident from the face of the advertisement because it is a necessary implication from the text.

***6** Even if an advertisement makes a claim by implication, extrinsic evidence is not always necessary. In *Kraft, Inc. v. FTC*, the Seventh Circuit upheld the FTC's decision finding that an advertisement made, by implication, certain false and misleading claims, despite the fact that the FTC had not presented any extrinsic evidence to support its claims. Kraft had advanced the same argument that the defendants argue here, namely, that the FTC must present some extrinsic consumer evidence in all cases where the FTC alleges an implied, as opposed to an express claim. But the *Kraft* Court disagreed. It held that "[i]n determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence."970 F.2d at 318. The *Kraft* Court ultimately opted not to adopt a "*per se* " rule requiring extrinsic evidence because such a rule would rest "on the faulty premise that implied claims are inescapably subjective and unpredictable."*Id*. at 319.The Court held instead that "implied claims fall on a continuum, ranging from the obvious to the barely discernible."*Id*. The Court continued that the FTC, "when confronted with claims that are implied, yet conspicuous, extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to makes its findings."*Id*. at 320.The Court concluded that the FTC does not need extrinsic evidence to determine whether an advertisement makes an implied claim as long as those claims are reasonably clear from the face of the advertisement. *Id*. at 319.

In re Thompson Medical Co. also does not stand for the proposition that extrinsic evidence is always necessary. In that case, the FTC found that "the Commission employs two different techniques in evaluating whether an advertisement contains implied claims."104 F.T.C. 648, 1984 FTC LEXIS 6, *313. The first is "to look at evidence from the advertisement itself."*Id*. The FTC "often conclude[s] that an advertisement contains an implied claim by evaluating the contents of the advertisement and the circumstances surrounding it. This technique is primarily useful in evaluating advertisements whose language or depictions are clear enough, though not express, for [the FTC] to conclude with confidence after examining the interaction of all the different elements in them that they contain a particular implied claim."*Id*. The FTC requires extrinsic evidence only "[i]f [its] initial review of evidence from the advertisement itself does not allow [the FTC] to conclude with confidence that it is reasonable to read an advertisement as containing a particular implied message."*Id*.

Finally, *Warner Cable, Inc. v. DIRECTV, Inc*. also does not stand for the cited proposition. In that case, the Second Circuit Court of Appeals considered whether a particular advertisement was false or misleading under the Lanham Act.[FN5] The Court held "that an advertisement can be literally false even though it does not explicitly make a false assertion, if the words or images, considered in context, necessarily and unambiguously imply a false message."497 F.3d 144 at *2. In so holding, the Court formally adopted the "false by necessary implication" doctrine:

> FN5. The Lanham Act grants a private right of action for false advertisement, whereas the FTC must bring actions under the FTC Act. *Compare*15 U.S.C. § 45(a)(2) (The FTC "is hereby empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce") *with*15 U.S.C. § 1125(a) ("Any person who [violates the enumerated provisions of the Lanham Act] shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."). Some courts have nevertheless held that, at least in certain respects, Lanham Act claims are "analogous" to FTC Act claims. *Kraft*, 970 F.2d at 319.

***7** Under this doctrine, a district court evaluating whether an advertisement is literally false must analyze the message conveyed in full context, it must consider the advertisement in its entirety and not ... engage in disputatious dissection. *If the words or images, considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required*.However, only an unambiguous message can be literally false. Therefore, if the language or graphic is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false. There may still be a basis for a claim that the advertisement is misleading, but to resolve such a claim, the district court must look to consumer data to determine what the person to whom the advertisement is addressed finds to be the message. In short, where the advertisement does not unambiguously make a claim, the court's reaction is at best not determinative and at worst irrelevant.
Id. at *29-*32 (internal citations and quotations omitted) (emphasis added).[FN6]

> FN6. I note that "[s]tatements susceptible of both a misleading and a truthful interpretation will be construed against the advertiser."*Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir.1964).

As set forth in greater detail below, I can conclude from the face of the advertisement that the advertisement makes the alleged claims. The advertisement is not subtle. It does not employ innuendo, subliminal messages or hints to convey its message. It does not contain conflicting messages that are reasonably susceptible to different interpretations. It makes no meaningful qualifications. Instead, it is clear, stark and dramatic.[FN7] Only four words in the entire advertisement do not relate to weight loss in some way: "makes great iced tea." Defendants attempt to torture the language in the advertisement to create an ambiguity where none exists. For example, they point out that the advertisement does not use the specific terms alleged in the complaint. For one, that is not true of all claims. And to the extent it is true of other claims, the advertisement's statements are so clear, repetitive, and unambiguous that they constitute the functional equivalent of express claims.[FN8]

> FN7. The defendants have submitted additional briefing regarding the recent case *FTC v. QT, Inc.*, 512 F.3d 858 (7th Cir.2008). They rely on that case for the proposition that certain scientific evidence may not be necessary to support claims made in an advertisement, and that "a statement that is plausible but has not been tested in the most reliable way cannot be condemned out of hand ."*QT*, 512 F.3d at 861. Here, the claims made in the Chinese Diet Tea advertisements are so stark as to be implausible. There is no material fact with regard to the falsity of those advertisements not because the defendants have failed to produce a placebo-controlled double-blind study to support their claims, but instead for the reasons discussed throughout this opinion.
>
> FN8. I hold that those claims are the functional equivalent of express claims. But even if they were not the functional equivalent, the claims are certainly so strongly implied and conspicuous that extrinsic evidence would not be necessary under *Kraft* and *Time Warner*.

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1. *Claim One-Chinese Diet Tea Causes Rapid and Substantial Weight Loss Without the Need to Reduce Caloric Intake or Increase Physical Activity*

With respect to the claim that Chinese Diet Tea will cause "substantial weight loss," the advertisement provides that Chinese Diet Tea is **"GUARANTEED!**Chinese Green Diet Tea has been clinically trialed on 163 patients. All participants lost between 18 lbs and 75 lbs over the 12 week trial period. If you do not lose similar amounts of weight we guarantee to refund your purchase price in full (less s/h)."[FN9] At oral argument, defendants suggested that the guarantee is a "satisfaction guarantee" and not a "weight-loss guarantee." Hearing Tr. at 6 (The guarantee "is a guarantee of satisfaction. If you're not satisfied, we guarantee that you'll receive your money back"). But the word "satisfaction" appears nowhere in the guarantee, or in the advertisement. What does appear in the guarantee is that *"[a]ll* participants lost between 18 lbs and 75 lbs over the 12 week period. *If you do not lose similar amounts of weight* we guarantee to refund your purchase price in full."(emphasis added). Indeed, the very order form for the tea states "[p]lease RUSH me by First Class Mail the following order of ***guaranteed to help you lose weight*** **Chinese Green Diet Tea bags."**

> FN9. Although not directly relevant to the claimed falsity, it is worth noting that defendants failed to present any admissible evidence that any such clinical trial was conducted. Thus, the advertisement is literally false, though not in a manner addressed by the complaint.

***8** In addition, the advertisement assures the reader that she will **"SHED [ ] POUND AFTER POUND OF FAT-FAST!**"At oral argument, the defendants argued that "pound after pound of fat" means "a minimum of two" pounds. Hearing Tr. At 26. "[T]he first pound is a pound, 'after pound' is a second pound.... Shed pound after pound of fat fast, to me that means it's a promise ... if you want to parse this out ... that you'll shed at least two pounds fast."*Id*. Again, defendants' purported interpretation of the advertisement is unreasonable.

Many other statements in the Chinese Diet Tea advertisement unambiguously state that users will lose substantial amounts of weight. The advertisement offers various "courses," which explicitly state that the user will lose up to 25 pounds in four weeks, up to 50 pounds in eight weeks, or up to 75 pounds in twelve weeks. It allegedly "doubles" the user's metabolic rate. The testimonials are stark: "I Lost 64 lbs in 10 weeks!;""After 10 weeks my weight was down to 104 lbs;""We (my husband and I) have lost 45 lbs. so far. Send extra order forms for friends;""I have been on the program 6 weeks and have not religiously followed the schedule of a cup of tea after each meal. However, I have gone from 240 lbs. down to 210 lbs. I feel better."In short, almost every statement in the advertisement says essentially the same thing-drink Chinese Diet Tea and you will lose substantial amounts of weight in a matter of weeks.

The Chinese Diet Tea advertisement also assures the reader that the substantial weight loss will occur rapidly. Again, the advertisement indicates that the user will **"SHED[ ] POUND AFTER POUND OF FAT-FAST!"**At the hearing, the defendants implied that the term "fast" may not be synonomous with "rapid" (although counsel later appeared to concede that the terms were "roughly similar.") Hearing Tr. at 25. The defendants press the argument that the claim hinges upon the Court's subjective definition of the words "rapid" and "fast." Defendants' proffered interpretation is again unreasonable.

But even if the term "fast" does not mean "rapid," the advertisement makes claim after claim that necessarily and unambiguously imply that the user will rapidly lose weight. The advertisement warns that "weight loss must be achieved gradually over an extended 8-12 week period. We therefore recommend that you do not lose weight too suddenly. If very rapid weight loss occurs, stop taking Chinese Green Diet Tea for 10-14 days and consult your

doctor."One purported user allegedly reported that she "lost weight so fast [that her] doctor ordered [her] to slow down."The advertisement also purports to "double" the user's metabolic rate to "burn calories fast," and sets forth a schedule that clearly implies the user will lose substantial amounts of weight within four to twelve weeks.

The advertisement also assures readers that they need not reduce caloric intake or increase physical activity to lose the stated amount of weight. Chinese Diet Tea drinkers allegedly may still **"eat your favorite foods-but STILL lose weight!"**The advertisement claims that "all [the user] now [has] to do to lose weight" is "simply drink[ ] a cup of refreshing tea."Chinese Diet Tea causes users to burn additional calories "with no change in diet or physical activity.""Participants on Chinese Green Diet Tea clinical trials carried on eating a normal healthy measure of sugar and fats-but they still lose weight."As long as the user drinks a cup of tea after every meal, she "can eat sweet buns and chocolate without putting on so much weight."The defendants virtually conceded as much at the hearing on the motion: "I would agree with you that ... there's no question the ad focuses primarily on the weight loss qualities of green tea, but ... we feel the scientific evidence shows that green tea ... will be a ... healthful means of losing weight ... without any additional exercise."Hearing Tr. at 8.

***9** The advertisement also assures that using the tea "means you can eat sweet buns and chocolate without putting on so much weight," and that it "controls the fattening effects of butter, cheese, pate, sausages and fatty meats."Defendants stress that the advertisement asserts that "drinking Chinese Green Diet Tea is not a license to gorge yourself."Not gorging oneself, however, is a far cry from stating, or implying, that a user must diet or exercise to lose the advertised amount of weight, especially when read in context of the other statements in the advertisement. Even if the warning against "gorging" implied that tea drinkers would need to reduce caloric intake to lose weight, one true statement, in the presence of a mass of false and misleading statements, does not render an otherwise misleading advertisement non-misleading.

In short, the advertisement is literally chock full of statements that, in all but the most express terms, make the claim that drinking Chinese Diet Tea will cause the user to experience rapid and substantial weight loss without reducing caloric intake or increasing physical activity. Although the advertisement does not use the exact words "rapid," "substantial," or "without increasing physical activity or reducing caloric intake," I conclude, with the utmost confidence, that the advertisement, especially when read in context, makes those claims so unambiguously that the claims are the functional equivalent of express claims.

2. *Claim Two-Chinese Diet Tea Enables Users to Lose as Much as Six Pounds Per Week Over Multiple Weeks and Months Without the Need to Reduce Caloric Intake or Increase Physical Activity*

The Chinese Diet Tea advertisement offers the following "courses:"

- 4 Week Course-You'll lose up to 25 lbs-$24.95
- 8 Week Course-You'll lose up to 50 lbs-$39.95-Save $16.00
- 12 Week Course-You'll lose up to 75 lbs-49.95-Save $32.90

When the numbers are averaged out, the advertisement expressly claims that users will lose up to 6.25 pounds per week for up to 12 weeks. The advertisement also provides that "Chinese Green Diet Tea has been clinically trialed on 163 patients. All participants lost between 18 lbs and 75 lbs over the 12 week trial period. If you do not lose similar amounts of weight we guarantee to refund your purchase price in full (less s/h)." Again, when averaged out, the advertisement expressly claims the user will lose up to 6.25 pounds per week for up to 12 weeks.

In addition, for reasons set forth in the preceding section, the Chinese Diet Tea advertisement also claims that users need not increase physical activity or decrease caloric intake to lose weight. As such, the Chinese Diet Tea advertisement expressly claims that drinkers will lose as much as six pounds per week over multiple weeks and months without the need to reduce caloric intake or increase physical activity.

3. *Claim Three-Chinese Diet Tea Enables Users to Lose Substantial Weight While Enjoying Their Favorite Foods, Including Foods High in Sugar and Animal Fat*

***10** The advertisement also provides that users will **"eat [their] favorite foods-but STILL lose weight!"**"Participants on Chinese Green Diet Tea clinical trials carried on eating a normal healthy measure of sugar and fats-but they still lost weight."It also claims that Chinese Diet Tea has "secret herbal ingredients" that "[r]educe[ ] sugar absorption by an amazing 91%. This means you can eat sweet buns and chocolate without putting on so much weight."It provides that drinking Chinese Diet Tea also "[r]educes the absorption of animal fats and dairy products by as much as 83%. This controls the fattening effects of butter, cheese, pate, sausages and fatty meats."Those statements, especially when read in context of the entire advertisement, constitute the functional equivalent of an express claim that Chinese Diet Tea enables users to lose substantial weight while enjoying their favorite foods, including foods high in sugar and animal fat.

4. *Claim Four-Chinese Diet Tea Blocks the Absorption of Fat and Calories Thereby Enabling Users to Lose Substantial Weight*

For reasons already stated, the advertisement expressly or unambiguously claims that Chinese Diet Tea blocks the absorption of fat, thus enabling users to lose substantial weight. The advertisement also provides that Chinese Diet Tea "[d]oubles the digestion of food in the intestine. This prevents food laying in your stomach for 24 hours or more and contributing to that 'pot belly' look. *The faster digestion of food means fewer calories are absorbed into the body."*(emphasis added). The advertisement thus again advances the functional equivalent of an express claim that Chinese Diet Tea blocks the absorption of fat and calories thereby enabling users to lose substantial weight.

5. *Claim Five-Chinese Diet Tea Causes Substantial Weight Loss For All Users*

The advertisement provides the following:

> **GUARANTEED!**Chinese Green Diet Tea has been clinically trialed on 163 patients. All participants lost between 18 lbs and 75 lbs over the 12 week trial period. If you do not lose similar amounts of weight we guarantee to refund your purchase price in full (less s/h).**REMEMBER,** the more Chinese Green Diet Tea you drink, the more weight you may lose!

In the alleged clinical trial, "*all* participants" lost between 18 and 75 pounds. That statement necessarily implies that all users will lose comparable weight. In addition, the advertisement's four testimonials all touted substantial weight loss that users purportedly experienced. One testimonial proclaimed that **"I Lost 64 lbs in 10 Weeks!"**Again, "[w]hen an advertisement contains a testimonial reflecting the experience of an individual with a product, there is an implicit representation that such experience reflects the typical or ordinary results anyone may anticipate from use of the product."*In the Matter of Porter & Dietsch, Inc.*, 90 F.T.C. 770, 1977 FTC LEXIS 11 at * 147. The Chinese Diet Tea advertisement admittedly does not state that "all users" will lose substantial amounts of weight. But that message is unambiguously implied from the advertisement's language.

***11** Finally, the advertisement contains no disclaimers. It does not state that Chinese Diet Tea would have less of an effect on certain individuals. It does not state that heavier individuals will lose more weight than lighter individuals. It does not state that only individuals who diet will lose more weight. It does not state that only individuals who exercise will lose more weight. Reading the advertisement as a whole, it plainly claims that all users will experience substantial weight loss.

6. *Claim Six-Chinese Diet Tea is Clinically Proven to Cause Rapid and Substantial Weight Loss Without the Need to Reduce Caloric Intake or Increase Physical Activity*

For reasons already stated, the Chinese Diet Tea advertisement claims that tea drinkers will experience substantial weight loss without the need to reduce caloric intake or increase physical activity. In addition, other portions of the advertisement indicate that Chinese Diet Tea is clinically proven to yield those results. Again, the advertisement contains the following passage-**"GUARANTEED!**Chinese Green Diet Tea has been clinically trialed on 163 patients. All participants lost between 18 lbs and 75 lbs over the 12 week trial period. If you do not lose similar amounts of weight we guarantee to refund your purchase price in full (less s/h). The advertisement also provides that "[c]linical trials have shown that by drinking a cup of Chinese Green Diet Tea your body will absorb less sugar and animal fats. Participants on Chinese Green Diet Tea clinical trials carried on eating a normal healthy measure of sugar and fats-but they still lost weight."As such, the advertisement expressly claims that Chinese Diet Tea is clinically proven to cause rapid and substantial weight loss.

In conclusion, I hold that the advertisement expressly makes the alleged claims, or at least so strongly and unambiguously implies those claims that the claims are the functional equivalent of express claims.

B. *Are the Alleged Claims Made in the Chinese Diet Tea Advertisement False and Misleading?*

Defendants assert that the claims made in the Chinese Diet Tea advertisements are not false and misleading. Specifically, the defendants assert that green tea does, in fact, help individuals to lose weight. Defendants retained Dr. Hasan Mukhtar, Ph D. to support the claims in the advertisement. Mukhtar is a professor at the University of Wisconsin in Madison, focusing primarily on dermatology and cancer research. *See* Mukhtar Curriculum Vitae, Ex. A to Mukhtar Report, Def. Ex. 1. Mukhtar has a Ph.D. in biochemistry and is purportedly a leading expert on green tea. *See id.*Mukhtar has no significant education or experience related to nutrition. *See id*.

Mukhtar's report assessed the credibility of the following claims:

> a. The consumption of green tea can be a useful part of a weight reduction program;
>
> b. The consumption of green tea helps reduce sugar absorption;
>
> ***12** c. The consumption of green tea helps reduce fat absorption;
>
> d. The consumption of green tea increase metabolic rates to help burn calories.

Mukhtar Report, Def. Ex. 1 at 4. In his report, Mukhtar comments that "there is sufficient evidence that consumption of green tea, especially the catechins present herein, by humans could lead to weight reduction."*Id*. at 6.

Mukhtar drew his conclusions from several studies. From one study performed by A.G. Dulloo, et al., Mukhtar concluded that the "oral administration of ... green tea extract stimulated thermogenesis and fat oxidation and thus has the potential to influence body weight and body fat composition via changes in both EE and substrate utilization."*Id*. at 8. Mukhtar interpreted a study on rats performed by J.J. Choo from Kunsan National University in

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Korea that "green tea consumption exerts potent body fat-suppressive effects in rats fed on a high-fat diet" and that "this effect resulted in part from reduction in digestibility and to much great extent from increase in brown adipose tissue thermogenesis through beta-adrenoceptor activation. This study strongly suggests that consumption of green tea by humans could reduce body fat."*Id*. at 9.

Mukhtar next cites a study from Kao, Hiipakka and Liao. Mukhtar concludes from the study that the daily consumption of between two to four cups of green tea "may mimic some of the acute effects of EGCG," and that "long-term consumption of green tea may decrease the incidence of obesity and perhaps, green tea components such as EGCG may be useful for treating obesity."*Id*. at 9-10. Mukhtar cited a study from K. Diepvens, et al. that performed a double-blind placebo study on 46 female subjects. *Id*. at 10. The subjects were given green tea extract and placed on a low-energy diet on health-related blood parameters. *Id*. The study found "modest weight loss" from green tea consumption. *Id* . at 10-11.

Mukhtar cited a study by T. Murase, A. Nagasawa, J. Suzuki, T. Hase, and I. Tokimitsu. *Id*. at 11. The study investigated the long-term effects of feeding tea catechins to mice. *Id*. The study found that the "supplementation with tea catechins resulted in a significant reduction of high-fat diet-induced body weight gain," and that the "stimulation of hepatic lipid metabolism might be a factor responsible for the anti-obesity effects of tea catechins" on mice. *Id*."The authors suggested that long-term consumption of tea catechins is beneficial for the suppression of diet-induced obesity."*Id*. Finally, Mukhtar cites an advertisement by a Japanese Pharmaceutical Company that claims concentrated green tea catechins have been clinically trialed to cause individuals to lose 10 percent of their body fat in three months. *Id*. at 12.

Mukhtar thus concluded that:

a. The consumption of green tea can be a useful part of a weight reduction program;

b. The consumption of green tea can help reduce sugar absorption;

***13** c. The consumption of green tea can help reduce fat absorption;

d. The consumption of green tea can increase metabolic rate to help burn calories....

Chinese Diet Tea will also have these beneficial effects against obesity.*Id*. at 12-13.

Even assuming the truth of Mukhtar's conclusions,FN10 the report does not support the claims the advertisement makes because the conclusions do not address the claims as alleged in the complaint; the conclusions addresses only whether it is possible that green tea can help reduce weight. Mukhtar's opinions about green tea are not as strong as the advertisement's claims about green tea. Mukhtar concludes that Chinese Diet Tea "*could lead to weight reduction*," *id*. at 6, and that "[t]he consumption of green tea *can be a useful part* of a weight reduction *program*." *Id*. at 12. The consumption of green tea *can* help reduce sugar absorption, *can* help reduce fat absorption, and *can* increase metabolic rate to help burn calories. *Id*. Moreover, at his deposition, Mukhtar was asked if the statement "Chinese Diet Tea causes rapid and substantial weight loss without the need to reduce caloric intake or increase physical activity" was accurate. He responded that "the underlying message is correct, but the statement is too strong."Mukhtar dep. at p. 38.Mukhtar continued that, to make the statement accurate, the advertisement would need to say *"may* cause rapid and substantial weight loss,"*Id*. at 40 (emphasis added), but agreed that the statement, as it exists, is "too strong." *Id*. But the advertisement claims, for example, that Chinese Diet Tea *will* lead to *rapid and substantial* weight loss *without decreasing caloric intake or increasing physical activity*.Indeed, if the advertisement made relatively modest claims, Mukhtar's report may be supportive and this case may have a different posture. But nothing in Mukhtar's report, nor any of the articles he cites support the specifically alleged claims, as opposed to some generalized notion that drinking green tea can be a useful part of a weight reduction program.

> FN10. It is substantially unclear whether the studies Mukhtar cites actually support his conclusions.

In addition to the fact that Mukhtar's report is not supportive of the advertisement's claims, many of the advertisement's claims are comprised of representations of objective facts that are either wholly without support or patently false. The advertisement claims that Chinese Diet Tea was clinically trialed on 163 patients, all of whom lost between 18 and 75 pounds in 12 weeks. There is no admissible or probative evidence to support the fact that a trial was ever performed on Chinese Diet Tea, much less that the trial yielded the claimed results. The advertisement claims that Chinese Diet Tea eliminates 91 percent of absorbed sugars and 83 percent fat absorption. There is no evidence supporting those numbers. The advertisement provides for various "courses" that a user can take to lose up to 25 pounds over 4 weeks, up to 50 pounds over 8 weeks, and up to 75 pounds over 12 weeks. Again, there is no evidence supporting those numbers. Some of the testimonials paint a dramatic and startling picture-**"I Lost 64 lbs in 10 Weeks,"**"I lost weight so fast my doctor ordered me to slow down."There is no evidence supporting the fact that those testimonials were actually made in the first instance, much less proof that the testimonials are true. The advertisement provides that Chinese Diet Tea "[d]oubles the digestion of food in the intestine. This prevents food laying in your stomach for 24 hours or more and contributing to that 'pot belly' look."There is no evidence that Chinese Diet Tea doubles the digestion of food in the intestine, no evidence that Chinese Diet Tea acts as a type of laxative to prevent food from laying in an individuals stomach, and no evidence to support the claim that the tea acts to reduce the "pot belly" look. In short, the advertisement's claims either unsupported or patently false.

***14** By contrast, the FTC has presented reliable evidence to contradict the alleged claims. The FTC submitted an expert report from Edward R. Blonz, Ph.D., M.S., F.A.C.N. Blonz holds a Ph.D. in Nutrition. In contrast to Mukhtar, Blonz considered the specific claims that the Chinese Diet Tea advertisement made, as alleged in the complaint. Blonz found that all claims were false and unsupported. Blonz Rep. at 6-7. Blonz reported that "[w]eight loss is a complex and difficult process. There are well-established general principles of weight control. The difference between energy intake and energy output, *i.e.,* energy balance, is the ultimate determinant of weight loss and weight change."*Id*. at 10. Blonz continued that "excess body weight relates to the excess energy stored in the adipose tissue," and that "[a] small weight change can occur with water gain or loss, but significant weight loss cannot occur in the absence of a negative energy balance. A negative energy balance can be brought about either by calorie restriction or by increasing caloric expenditure through physical activity while keeping caloric intake constant."*Id*. at 11.

Blonz concluded that the weight loss benefits claimed in the advertisement "are not within the realm of plausible science."*Id*. at 17. The caloric deficit required to induce the claimed weight loss "cannot be achieved under normal circumstances, and it certainly cannot be achieved without extreme reductions in caloric intake coupled with dramatic increases in physical activity."*Id* ."Weight loss would be even less likely if users continued to eat substantial amounts of foods with a high caloric density, such as foods with high sugar and fat content. No physiological mechanism has been reported in the peer-reviewed scientific literature demonstrating how drinking green tea can block the absorption of fat and calories sufficient to cause substantial weight loss in humans. There is no scientific support that Chinese Diet Tea could work in the

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manner claimed for *any* user. Therefore it is wholly without scientific merit to state that the product could work as claimed for all users."*Id.* (emphasis added).

Simply stated, the claims the advertisement makes are either false or unsupported.[FN11] Given the complete lack of support for the specific claims made in the advertisement, and given Blonz's credible report that the claims in the advertisement are both unsupported and beyond the realm of scientific plausibility, I hold that the advertisement's claims are false and misleading.

> FN11. In considering false advertising claims, the FTC has held that "[t]here are two different analytic routes by which complaint counsel can prove advertisements are likely to mislead. One is to carry the burden of proving that the express or implied message conveyed by the ad is false. The other is to show that the advertiser lacked a reasonable basis for asserting that the message was true."*In re Thompson Medical Co.,* 104 F.T.C. 648, 1984 FTC LEXIS 6, *380. The FTC continued, "[f]or example, if an advertisement claims that a new brand of orange juice is more nutritious than others on the market, the Commission could put on its own evidence showing the claim to be false or it could show that the substantiation the advertiser had to support the ad did not provide a reasonable basis for the claim of greater nutritional value."*Id.* at *380-*381 In this case, the FTC has met its burden through both analytic routes.

C. *Are the Advertisement's Claims "Materially" False or Misleading?*

"A 'material' misrepresentation is one that involves information that is important to consumers, and that is therefore likely to affect a consumer's choice of or conduct regarding a product. Proof of actual consumer injury is not required."*In the Matter of Kraft, Inc.,* 114 F.T.C. 40, 1991 FTC LEXIS 38, *38 (1991). In considering false advertising claims, the FTC presumes several types of claims to be material, including any express claim, or "implied claims where there is evidence that the seller intended to make the claim."*Id.; see also In re Thompson Medical Co.,* 104 F.T.C. 648, 1984 FTC LEXIS 6 at *373 ("The Commission considers certain categories of information presumptively material. First, the Commission presumes that express claims are material. Similarly, when evidence exists showing that a seller deliberately made an implied claim, the Commission presumes materiality."). The underlying rationale for finding a claim to be presumptively material in both instances is "the assumption that the willingness of a business to promote its products reflects a belief that the consumers are interested in the advertising."*Id.*

***15** In this case, I have held that the subject advertisement made all six of the alleged claims either expressly, or by such strong implication that they are the functional equivalent of an express claim. As such, those claims are presumed to be material.

Even if I had found the advertisement made the claims only implicitly, the statements in the advertisement were so unambiguous and repetitive that they were clearly intended by the advertiser to make the alleged claims, and as such, can be presumed material.

Finally, even if the claims were not intended by the advertiser, no reasonable juror could find, after reading the advertisement, that the claims were not "important to consumers" and thus "likely to affect a consumer's choice of conduct regarding a product."The advertisement is almost entirely a weight loss advertisement. Therefore, consumers who purchases Chinese Diet Tea because of the advertisement are thus purchasing Chinese Diet Tea because it would have the advertised effect on weight loss. As such, I hold that the alleged claims are material.

IV. Liability of Individual Defendants

A. *Defendants*

In its amended complaint, the FTC has named Bronson Partners, LLC and Martin Howard as defendants. As discussed above, the advertising at issue is materially misleading. Because Bronson disseminated that advertising, Bronson is liable. Likewise, Martin Howard, who wrote the copy for those advertisements without obtaining outside review, and who is a 50% owner and managing member of Bronson, is personally liable. Local R. 56(a)(1) Stmt. ¶¶ 8-9, 14, 64-67. The defendants' argument to the contrary-that Howard must have been "aware that fraud was highly probable and intentionally avoided the truth"-is unavailing. Summ. J. Resp. at 39 (quoting *FTC v. Garvey,* 383 F.3d 891, 902 n. 12 (9th Cir.2004)). Here, the claims made in the advertisements for Chinese Diet Tea are so sweeping and far-fetched as to render their fraudulent nature highly probable. Even if Martin Howard researched the properties of green tea on the internet, *id.,* he avoided conducting any reliable research concerning whether Chinese Diet Tea could possibly provide the sort of weight loss results promised, including whether any study had ever been done that produced the sort of dramatic and rapid weight loss indicated in the advertisements. Because Howard was responsible for the text and dissemination of the advertisements, and because he failed to engage in any meaningful investigation of such bold claims, he is personally liable for Bronson's false advertising. The amounts and percentages of each party's liability will be determined at a future hearing on damages.[FN12]

> FN12. It is important to note that this ruling addresses only the question of liability on the plaintiff's false advertising claims. Nothing discussed here should be construed in a manner that would preclude any future claims for indemnification or contribution, if appropriate.

B. *Relief Defendants*

On June 8, 2005, I granted the FTC's motion to amend its complaint to add relief defendants Sandra Howard and H & H Marketing, LLC. Courts of appeal have approved claims against "relief" or "nominal" defendants, and the Second Circuit has described a relief defendant as "a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds."*SEC v. Cavanagh,* 155 F.3d 129, 136 (2d Cir.1998). Although the *Cavanagh* Court addressed the question of relief defendants in a securities enforcement action, district courts have applied that same analysis in FTC actions, and I do so here. *See, e.g., FTC v. Think Achievement Corp.,* 144 F.Supp.2d 1013, 1020 (N.D.Ind.2000).

***16** The parties have not fully briefed, and I did not hear argument concerning, whether either relief defendant should be held jointly and severally liable in order to satisfy any judgment in favor of the FTC. Under section 13(b) of the FTC Act, I have equitable powers over "innocent persons" in order to accomplish such relief as repayment, restitution, rescission or disgorgement of any unjust enrichment. *F. T.C. v. AmeriDebt, Inc.,* 343 F.Supp.2d 451 (D.Md.2004); *see also CFTC v. Kimberlynn Creek Ranch, Inc.,* 276 F.3d 187, 192 (4th Cir.2002).

It is not clear from the record evidence presently before me if, how, and to what extent the relief defendants received funds obtained through sales resulting form Bronson's fraudulent advertising. At the upcoming hearing on damages, the parties should be prepared to present evidence bearing on those questions: (a) if H & H and/or Sandra Howard received money that came from Chinese Diet Tea or Bio Slim Patch sales, (b) how much they received, and (c) if they did receive such money, does either relief defendant have a legitimate claim to it.

V. Conclusion

Advertisements often employ subtle tactics to im-

ply that their product will achieve a desired result or create a desired effect. The advertisement for Chinese Diet Tea is not such an advertisement. I hold that: (1) the subject Chinese Diet Tea advertisement makes the alleged claims expressly, or by such strong implication as to constitute the functional equivalent of express claims; (2) the claims are misleading; and (3) the claims are material. The FTC's motion for summary judgment **(doc. # 98)** is GRANTED with respect to liability on all claims. All issues related to damages will be decided following a further hearing.

It is so ordered.

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HSandersonFarms, Inc. v. Tyson Foods, Inc.
D.Md.,2008.
Only the Westlaw citation is currently available.
United States District Court,D. Maryland.
SANDERSONFARMS, INC. and Perdue Farms, Inc., Plaintiffs,
v.
TYSON FOODS, INC., Defendant.
Civil No. RDB-08-210.

April 15, 2008.

Background: Chicken processor's competitors brought action against processor, alleging violation of Lanham Act section prohibiting false or misleading advertising arising from processor's dissemination of advertisements making unqualified claims that its chickens were "raised without antibiotics" and qualified claims that its chickens were "raised without antibiotics that impact antibiotic resistance in humans." Processor moved to dismiss.

Holdings: The District Court, Richard D. Bennett, J., held that:
(1) former approval of processor's "raised without antibiotics" label by United States Department of Agriculture (USDA) was not a defense to Lanham Act claim of false or misleading non-label advertising based on the same unqualified language, and
(2) in a matter of first impression, USDA-approved label with qualified language about antibiotics did not insulate processor from Lanham Act claim of false or misleading non-label advertising based on the same qualified language.

Motion denied.

[1] Antitrust and Trade Regulation 29T ⇐22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

The elements of a false advertising claim under the Lanham Act are: (1) the defendant makes a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant places the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products. Lanham Act, § 43(a)(1)(B), 15 U.S.C.A. § 1125(a)(1)(B).

[2] Antitrust and Trade Regulation 29T ⇐22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

False advertising is actionable under the Lanham Act if the statement is false on its face or if, despite its truth, the statement is likely to mislead or confuse consumers because of the nature of the advertisement. Lanham Trade-Mark Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[3] Constitutional Law 92 ⇐2563

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)3 Encroachment on Executive
92k2561 Powers, Duties, and Acts Under Legislative Authority
92k2563 k. Judicial Encroachment on Executive Acts Taken Under Statutory Authority. Most Cited Cases

Federal courts should not unduly entangle themselves in regulatory agency decisions where the agency has special expertise in the subject matter and where, more importantly, doing so would usurp the authority

specifically delegated by Congress to that agency.

[4] Antitrust and Trade Regulation 29T ⚿67

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(B) Actions and Proceedings
29Tk66 Defenses
29Tk67 k. In General. Most Cited Cases

Former approval of a "raised without antibiotics" label for processor's chicken products by United States Department of Agriculture (USDA) was not a defense to competitors' Lanham Act claim alleging false or misleading non-label advertising based on processor's use of the same unqualified "raised without antibiotics" language in advertisements; processor needed current USDA label to mount any possible defense based on USDA label approval. Lanham Act, § 43(a)(1)(B). 15 U.S.C.A. § 1125(a)(1)(B); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[5] Antitrust and Trade Regulation 29T ⚿67

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(B) Actions and Proceedings
29Tk66 Defenses
29Tk67 k. In General. Most Cited Cases

Label approved by United States Department of Agriculture (USDA) for processor's chicken products, containing qualified language that chickens were "raised without antibiotics that affect antibiotic resistance in humans," did not insulate processor from competitors' Lanham Act claim of false or misleading non-label advertising based on processor's use of same qualified language in advertisements; USDA did not have congressional authority to regulate advertising, additional images and promotional slogans on label effectively turned label into advertisement, Lanham Act related solely to allegedly false or misleading non-label advertising, USDA's determination did not involve review of whether language was misleading to consumers when combined with images and promotional slogans, and allowing USDA to approve non-label advertising would have curtailed congressional protections accorded to persons under Lanham Act. Lanham Act, § 43(a)(1)(B), 15 U.S.C.A. § 1125(a)(1)(B).

[6] Antitrust and Trade Regulation 29T ⚿24

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk24 k. Labeling and Packaging. Most Cited Cases

Labeling, as defined in Poultry Products Inspection Act (PPIA), may be prepared in such a manner that it is also effectively commercial advertising and promotion under the Lanham Act, and thus some labeling under PPIA is actionable under Lanham Act as advertising. Lanham Act, § 43(a)(1)(B), 15 U.S.C.A. § 1125(a)(1)(B).; Poultry Products Inspection Act. § 4(s), 21 U.S.C.A. § 453(s).

[7] Antitrust and Trade Regulation 29T ⚿24

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk24 k. Labeling and Packaging. Most Cited Cases

Point-of-purchase materials for chicken products that merely restate the language approved for the label by the United States Department of Agriculture (USDA) under the Poultry Products Inspection Act (PPIA) cannot fairly be characterized as advertising under the Lanham Act; however, point-of-purchase materials often contain images and promotional slogans in conjunction with the language approved for the label, and this sort of labeling is merely advertising by another name. Lanham Act, § 43(a)(1)(B), 15 U.S.C.A. § 1125(a)(1)(B).; Poultry Products Inspection Act. § 4(s), 21 U.S.C.A. § 453(s).

[8] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

The Lanham Act protects against language that is technically and scientifically accurate but that is manipulated in an advertisement to create a message

that is false and misleading to the consumer by permitting claims based on language that, although literally true, nonetheless misleads or deceives consumers in an advertisement. Lanham Act, § 43(a)(1)(B), 15 U.S.C.A. § 1125(a)(1)(B).

Randall Karl Miller, Arnold and Porter LLP, McLean, VA, Nicholas M. Depalma, Ross S. Goldstein, Arnold and Porter LLP, Washington, DC, for Plaintiffs.
Helene D. Jaffe, Weil Gotshal and Manges LLP, New York, NY, John J. Connolly, Murphy and Shaffer LLC, Baltimore, MD, Joshua D. Janow, Weil Gotshal and Manges LLP, Washington, DC, Laura J. Protzmann, Randi W. Singer, Weil Gotshal and Manges LLP, New York, NY, William J. Murphy, Murphy and Shaffer LLC, Baltimore, MD, for Defendant.

MEMORANDUM OPINION

RICHARD D. BENNETT, District Judge.
***1** Plaintiffs **SandersonFarms**, Inc. ("Sanderson") and Perdue Farms, Inc. ("Perdue") (collectively "Plaintiffs") bring this suit against **Tyson** Foods, Inc. ("**Tyson**" or "Defendant"), alleging violations of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which prohibits false or misleading advertising and unfair trade practices in interstate commerce. This action arises out of alleged advertisements disseminated by **Tyson** containing the claim that its chicken is "Raised Without Antibiotics" or "Raised Without Antibiotics that impact antibiotic resistance in humans."According to their Amended Complaint (Paper No. 45),[FN1] Plaintiffs seek preliminary and permanent injunctive relief, disgorgement of profits, attorney's fees, and other damages. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Pending before this Court is Defendant's Motion to Dismiss (Paper No. 50) for failure to state a claim upon which relief can be granted. Plaintiffs' Supplemental Motion for a Preliminary Injunction (Paper No. 44) also remains pending, but will be addressed in a separate Memorandum Opinion and Order. This Court held a lengthy hearing over four days on both motions, commencing on Monday, April 7, 2008, and concluding on Thursday, April 10, 2008. Oral argument was heard on Defendant's Motion to Dismiss primarily on April 7, 2008. At the conclusion of the hearing on April 10, 2008, this Court DENIED Defendant's Motion to Dismiss for reasons stated on the record. Specifically, this Court held that a label approved by the United States Department of Agriculture does not insulate a company from an allegation of non-label false advertising under the Lanham Act. This Memorandum Opinion and accompanying Order serve to supplement the reasons previously stated on the record.

BACKGROUND

Bound to accept all well-pleaded allegations as true, this Court has taken the following factual allegations largely from Plaintiffs' Amended Complaint. Plaintiffs allege that **Tyson** has been and continues to nationally advertise that its chicken is "Raised Without Antibiotics" by means of television commercials, radio spots, print ads, billboards, posters and other media. (Amend.Compl .¶¶ 1, 2.) This language has been referred to by the parties in this litigation as **Tyson's** "unqualified RWA claim." Plaintiffs also allege that **Tyson** is advertising a similar claim, namely, that its chicken is "Raised Without Antibiotics that impact antibiotic resistance in humans."(*Id.* ¶ 17.)The latter qualified claim has been disseminated in several forms, including "Raised Without Antibiotics that Impact Human Antibiotic Resistance.""Raised Without Antibiotics * * No compounds used that create antibiotic resistance in humans," and "Chicken Raised Without Antibiotics that impact antibiotic resistance in humans."(*Id.* ¶ 18.)Combined, these latter claims have been referred to by the parties as **Tyson's** "qualified RWA claim."

***2** The gravamen of the Amended Complaint is that the unqualified language "Raised Without Antibiotics" is literally false and that the qualifying language, "that impact antibiotic resistance in humans" and any of its variations, is ineffective at curing the literal falsity of the root language "Raised Without Antibiotics." (*Id.* ¶ 19.)Plaintiffs contend that both the unqualified and qualified RWA claims "deceive consumers and injure competitors and will continue to do so absent an injunction."(*Id.* ¶ 20.)

Plaintiffs allege that **Tyson** uses in its chicken feed hydrophobic molecules called ionophores, which are used to "disrupt transmembrane ion concentration

gradients, required for the proper functioning and survival of microorganisms."(*Id.* ¶ 19.)Ionophores kill microorganisms in chicken, thereby yielding a larger, healthier, and more profitable production of chicken. (*Id* . ¶ 24.)Plaintiffs allege that ionophores are in fact antibiotics, despite **Tyson's** claim that its chicken is "Raised Without Antibiotics."

The Food Safety and Inspection Service ("FSIS") of the United States Department of Agriculture ("USDA") originally approved **Tyson's** use of a "Raised Without Antibiotics" label. FSIS subsequently revoked that approval and specifically stated that ionophores *are* antibiotics. Accordingly, FSIS informed **Tyson** that they could no longer use a product label claiming that the chicken contained therein was "Raised Without Antibiotics." (*Id* . ¶ 27.)Subsequently, the label was qualified to read "Raised Without Antibiotics that impact antibiotic resistance in humans."(*Id.*) On December 19, 2007, FSIS issued a document titled "USDA Labeling Guidance for Raised Without Antibiotic Claims and the Use of Ionophores," in which the agency stated as follows:

> It is longstanding FSIS policy that ionophores are antibiotics because they meet the [American Veterinary Medical Association ("AVMA")] definition.[FN2] The Food and Drug Administration [("FDA")] agrees that by strict definition, ionophores are antibiotics thus; poultry meat from birds to which ionophores have been administered is not eligible to bear a "RWA" claim.

(*Id.* ¶ 29.)

Because FSIS considers ionophores to be antibiotics, Plaintiffs allege in their Amended Complaint that **Tyson's** advertisements containing the claim "Raised Without Antibiotics" are false and misleading. (*Id.* ¶ 33.)They also allege that the advertisements are sufficiently distributed to constitute commercial advertising under the Lanham Act.[FN3](*Id.*) Plaintiffs further contend that the advertisements constitute material misstatements likely to influence the decisions of consumers. (*id.* ¶¶ 34-36), and that the advertisements constitute an implied health and safety superiority claim over the chicken products of Sanderson and Perdue. (*Id.* ¶ 37.)These alleged Lanham Act violations are causing and will continue to cause irreparable injury to Plaintiffs for which there is no adequate remedy at law. (*Id.* ¶¶ 38-39 .)

***3** As part of their Amended Complaint, Plaintiffs have submitted a consumer survey conducted by Professor Michael B. Mazis. Plaintiffs describe the consumer survey in their Amended Complaint as follows:

> In February 2008, Professor Mazis conducted a survey of approximately 600 consumers in 28 shopping malls across the United States. There were four cells of approximately 150 respondents each shown different stimuli: two cells were shown an "unqualified" "Raised Without Antibiotics" **Tyson** claim; a third cell was shown a print stimulus with the "qualified" "Raised Without Antibiotics" claim; and a fourth cell was shown a "control" stimulus. Professor Mazis' survey demonstrates that approximately 59-63% of survey respondents perceived a false implied safety superiority message from these claims (regardless of whether the claim is "qualified" or "unqualified"). In addition, consumers appear deceived with regard to the "qualified" claim, and Professor Mazis concludes that many consumers appear to separate the "qualified" claim into two concepts: (1) **Tyson's** chicken has no antibiotics; and (2) because **Tyson's** chicken has no antibiotics. **Tyson's** chicken does not impact antibiotic resistance in humans.

Id. ¶ 40.)Because the Plaintiffs contend that the survey shows no demonstrable consumer impact by the qualified language, the claim "Raised Without Antibiotics that impact antibiotic resistance in humans" is also false and misleading to the consumer in violation of section 43(a) of the Lanham Act.

On March 14, 2008, Defendant filed the pending Motion to Dismiss. (Paper No. 50.) On March 18, 2008, Plaintiffs filed their Response (Paper No. 52) and, on March 27, 2008, Defendant filed its Reply (Paper No 58).[FN4]

STANDARD OF REVIEW

Defendant seeks to dismiss Plaintiffs' action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In reviewing a complaint, this Court accepts all well-pleaded allegations of the complaint as true and construes the facts and reasonable

inferences derived therefrom in the light most favorable to the plaintiff. *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir.2005); *Ibarra v. United States*, 120 F.3d 472, 473 (4th Cir.1997); *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993).Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief."*Migdal v. Rowe Price-Fleming Int'l Inc.*, 248 F.3d 321, 325-26 (4th Cir.2001); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (stating that a complaint need only satisfy the "simplified pleading standard" of Rule 8(a)).

The Supreme Court of the United States recently explained that a "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."*Bell Atl. Corp. v. Twombly*, --U.S. ----, ---- - ----, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007) (internal citations omitted). Nonetheless, detailed factual allegations are not needed to survive a motion to dismiss. *Id.* at 1964.Instead. a complaint must only contain "enough facts to state a claim to relief that is plausible on its face."*Id.* at 1974.Moreover, the Supreme Court determined that a properly plead complaint "may be supported by showing any set of facts consistent with the allegations."*Id.* at 1969.

DISCUSSION

***4**[1][2] The Lanham Act prohibits the "false or misleading description of fact, or false or misleading representation of fact, which ... 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."15 U.S.C. § 1125(a)(1)(B). The elements of a false advertising claim under the Lanham Act are as follows:

> (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product;
>
> (2) the misrepresentation is material, in that it is likely to influence the purchasing decision;
>
> (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience;
>
> (4) the defendant placed the false or misleading statement in interstate commerce; and
>
> (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.

Scotts Co. v. United Indus. Corp., 315 F.3d 264, 272 (4th Cir.2002) (citing *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-11 (1st Cir.), *cert. denied*,537 U.S. 1001, 123 S.Ct. 485, 154 L.Ed.2d 396 (2002)). False advertising is actionable under the Lanham Act if the statement is false on its face or if, despite its truth, the statement is likely to mislead or confuse consumers because of the nature of the advertisement. *See C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 434 (4th Cir.1997). This Court finds that Plaintiffs' Amended Complaint states sufficient factual allegations under section 43(a) of the Lanham Act to survive dismissal on a 12(b)(6) motion.

Nonetheless, Defendant argues that Plaintiffs' Amended Complaint fails as a matter of law because the language that Plaintiffs allege to be false and misleading under section 43(a) of the Lanham Act-*i.e.*, the unqualified and qualified RWA claims-was approved for use on Defendant's chicken labels by FSIS, the USDA agency to which Congress has delegated the authority to regulate poultry labels. According to Defendant,

> courts uniformly have held that no Lanham Act cause of action lies regarding advertising claims that "comport substantively" with the label and labeling statements approved as accurate by the government agency vested with that approval authority. To hold otherwise would enable competitors like the plaintiffs here to use the Lanham Act to create a private cause of action, which the [Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.* ("PPIA")] expressly prohibits.

(Def.'s Mem. Supp. Mot. to Dismiss 2.) In support, Defendant relies on what has been termed the *Cytyc* line of cases, which includes *American Home*

Products Corp. v. Johnson & Johnson, 672 F.Supp. 135 (S.D.N.Y.1987), *Cytyc Corp. v. Neuromedical Systems, Inc.*, 12 F.Supp.2d 296 (S.D.N.Y.1998), and, most recently, *Prohias v. Pfizer, Inc.*, 490 F.Supp.2d 1228 (S.D.Fla.2007).

***5** In *Cytyc*, the defendant filed a counterclaim alleging that plaintiff promoted its product in a false and misleading manner in violation of the Lanham Act. 12 F.Supp.2d at 301. Plaintiff moved to dismiss the case because many of the statements contained in the advertisements had been approved by the Food and Drug Administration ("FDA").*Id.* Citing *American Home Products*, 672 F.Supp. at 145, the court determined that "representations by plaintiff that comport substantively with statements approved as accurate by the FDA cannot supply the basis for [defendant's] claims."*Cytyc Corp.*, 12 F.Supp.2d at 301. The court continued: "Although [plaintiff's] statements do not correspond precisely to statements that the FDA has approved, the challenged statements discussed above are similar enough to the approved statements for the Court to conclude, as a matter of law, that they are neither false nor misleading."*Id.*

In *Prohias*, a proposed nationwide class action alleged that the defendant pharmaceutical company, Pfizer, had engaged in false and misleading advertising under the consumer fraud acts of several states (not the federal Lanham Act) with respect to Pfizer's cholesterol-lowering drug Lipitor. Lipitor was originally approved by the FDA only to reduce cholesterol in certain patients, but in 2004 it was also approved to reduce the risk of heart attacks for women and the elderly with multiple risk factors for coronary heart disease. 490 F.Supp.2d at 1230. The advertising in question in *Prohias* began running prior to and continued after the 2004 approval and depicted women and elderly people with their cholesterol numbers visible, accompanied by text warning that "high cholesterol is a risk factor for heart disease."*Id.* The plaintiffs alleged that these advertisements were false and misleading because there was no scientific support for the claim that Lipitor reduced the risk of heart disease in women or elderly people who did not already have heart disease or diabetes. *Id.* As to the post-2004 advertisements,[FN5] the court granted the defendant's motion to dismiss, finding that "even if the advertisements did not comport precisely with Lipitor's approved label ..., the alleged advertisements generally comport with the approved label, and are therefore not misleading as a matter of law."*Id.* at 1235 (citing *Cytyc*, 12 F.Supp.2d at 301).

[3] Taken together, the *Cytyc* line of cases exemplify a broader proposition-namely, that federal courts should not unduly entangle themselves in regulatory agency decisions where the agency has special expertise in the subject matter and where, more importantly, doing so would usurp the authority specifically delegated by Congress to that agency.

With Defendant's legal position in mind, this Court must address whether Defendant's unqualified claim, "Raised Without Antibiotics," and qualified claim, "Raised Without Antibiotics that impact antibiotic resistance in humans," are actionable under section 43(a) of the Lanham Act.

I. The Unqualified Claim-"Raised Without Antibiotics"

***6**[4] The *Cytyc* line of cases provide no defense to Plaintiffs' claim that advertisements containing the unqualified "Raised Without Antibiotic" claim are false and misleading. In fact, there is absolutely no tension between Plaintiffs' Lanham Act allegations and the USDA.

Defendant's reliance on the *Cytyc* line of cases is based exclusively on the position that "a Lanham Act claim cannot proceed against advertisements that simply repeat information that the government has approved to appear in labeling because the appropriate federal agency has determined that it is not false or misleading."(Def.'s Reply Mem. 1.) As alleged in Plaintiffs' Amended Complaint, FSIS has revoked Defendant's unqualified label, "Raised Without Antibiotics." (Amend.Compl.¶ 27.) It is further alleged that FSIS issued a letter on December 19, 2007 that unambiguously stated that "[i]t is longstanding FSIS policy that ionophores are antibiotics" and that "poultry meat from birds to which ionophores have been administered is not eligible to bear a 'RWA' claim."(*Id.* ¶ 29.)Without current USDA approval for its label, Defendant cannot rely on the USDA's former (and briefly held) position to defend itself against allegations that it continues to run false and misleading advertisements carrying the "Raised Without Antibiotics" language.

Plaintiffs' Amended Complaint clearly states a claim upon which relief can be granted with respect to the unqualified claim "Raised Without Antibiotics." Therefore, this portion of Plaintiffs' Amended Complaint survives Defendant's Motion to Dismiss.

II. The Qualified Claim-"Raised Without Antibiotics that impact antibiotic resistance in humans"

[5] Defendant relies on the same cases to support its defense of Plaintiffs' claim that the use of "Raised Without Antibiotics that impact antibiotic resistance in humans" in advertisements is false and misleading to the consumer. As was previously discussed, Defendant has current approval from the United States Department of Agriculture to carry this language on its labels. Thus, this portion of Plaintiffs' Amended Complaint is distinguishable from the claim with respect to the "Raised Without Antibiotics" language.

Lanham Act claims often collide against the regulatory authority of the FDA. Extensive case law has developed on the issue, including the *Cytyc* line of cases. This case, however, involves the USDA and therefore the cases cited by Defendant are not directly on point. In fact, the parties have not submitted and this Court has been unable to locate a single federal case-published or unpublished-where a court has resolved the precise issue at bar, *i.e.*, whether a USDA-approved label insulates a company from allegedly false non-label advertising under the Lanham Act.[FN6]To a large extent, therefore, this case is one of first impression. For the reasons discussed in detail below, the *Cytyc* line of cases is distinguishable based on the limited jurisdiction of the USDA. Moreover, to the extent that the *Cytyc* line of cases offer persuasive authority, this Court is not convinced that Plaintiffs' Amended Complaint must be dismissed as a matter of law. Plaintiffs' Lanham Act claim is therefore not barred simply because the USDA approved the Defendant's use of the qualified language "Raised Without Antibiotics that impact antibiotic resistance in humans" on labels.

A. The Limited Authority and Jurisdiction of the USDA under the Poultry Products Inspection Act

1. The USDA Does Not Have Jurisdiction over Advertising

***7** Pursuant to the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, the FDA has significant authority and jurisdiction to regulate advertisements. FDA regulations plainly govern "prescription drug advertisements" and include the authority to regulate "[a]dvertisements broadcast through media such as radio, television, or telephone communications systems."21 C.F.R. § 202.1. The Division of Drug Marketing, Advertising, and Communications ("DDMAC") within the FDA has "responsibility for reviewing prescription drug advertising and promotional labeling to ensure that the information contained in these promotional materials is not false or misleading."DDMAC Mission Statement, *available at* http://www.fda.gov/cder/ddmac/. FDA also prohibits restricted medical devices from "using false or misleading advertising." *See*21 U.S.C. §§ 352(q)-(r). The FDA frequently brings enforcement actions against companies it believes are disseminating false and misleading advertisements.

Moreover, with respect to FDA's regulation of over-the-counter ("OTC") products, the FDA voluntarily abstains from exercising its jurisdiction over advertising in favor of the Federal Trade Commission ("FTC").*See* Working Agreement Between FTC and FDA, 4 Trade Reg. Rep. (CCH) ¶ 9,850.01 (1971). Nonetheless, the FDA reevaluates approvals under the FDCA through a monograph process involving an independent advisory review panel that submits recommendations to the FDA. *See, e.g., Kelso v. Bayer Corp.*, 398 F.3d 640, 643 (7th Cir.2005) ("All OTC drug labeling required by a monograph or other regulation (*e.g.*, statement of identity, warnings, and directions) must appear in the specific wording established under the OTC drug monograph or other regulation."(internal citation omitted)); *Bristol-Myers Squibb Co. v. Teva Pharmaceuticals USA, Inc.*, 288 F.Supp.2d 562, 574 (S.D.N.Y.2003).

Pursuant to the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451 *et seq.*, the USDA has jurisdiction to approve all aspects of poultry product labels and labeling. In reviewing proposed labels and labeling for approval, FSIS seeks to ensure that they are not "false or misleading." *See*21 U.S.C. § 457(b)-(c). FSIS does not, however, have any congressional authority to review advertisements. *See* Regulation of Advertising and Labeling, AH-715, Economic

Research Service-U.S. Department of Agriculture, *available at* http://www.ers.usda.gov/publications/ah715/ah715c.pdf (stating that the FTC regulates advertising, while "FSIS regulates meat and poultry product labeling"). In fact, FSIS acknowledges that the FTC controls advertising issues in the poultry industry. *See* FSIS, A Guide to Federal Food Labeling Requirements for Meat and Poultry Products 18, *available at* http://www.fsis.usda.gov/PDF/ Labeling-Requirements-Guide.pdf ("An advertising claim may be deemed false or misleading if it is not adequately substantiated pursuant to FTC guidelines.").

***8** In marked contrast to the FDA, the USDA does not have congressional authority to regulate advertising. While the "comport substantively" standard addressed in the *Cytyc* line of cases may be appropriate in light of the expansive jurisdiction of the FDA, this Court finds the "comport substantively" standard inapplicable in this case based on the limited jurisdiction of the USDA.

2. Scope of Labeling Provisions

The scope of "labeling" is also at issue in this case and requires clarification. Label and labeling are defined in the PPIA as follows:

> The term "label" means a display of written, printed, or graphic matter upon any article or the immediate container (not including packaged liners) of any article; and the term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

21 U.S.C. § 453(s). Plaintiffs' Amended Complaint alleges that Defendant's "*non-label* advertising" is false and misleading under the Lanham Act. According to FSIS's definition, labeling should be interpreted broadly as all "product labels *and materials that accompany a product but are not attached to it, such as point-of-purchase (POP) materials.*" *See* FSIS, Guide to Federal Food Labeling Requirements, at 5 (emphasis added).

[6][7] Labeling may be prepared in such a manner that it is also effectively "commercial advertising and promotion" under the Lanham Act. *See Applied Med. Res. Corp. v. Steuer*, 527 F.Supp.2d 489, 493 (E.D.Va.2007) (stating that the four-part test used in *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48 (2d Cir.2002), has been "uniformly embraced by district courts in this Circuit"). As such, some labeling is actionable advertising. Point-of-purchase materials that merely restate the language approved for the label cannot fairly be characterized as advertising. As has become clear in this case, however, point-of-purchase materials that may well be considered labeling to FSIS often contain images and promotional slogans in conjunction with the language approved for the label. This sort of labeling is merely advertising by another name. False and misleading images and slogans contained in a magazine advertisement are no less false and misleading, and consequently no less actionable under the Lanham Act, when they are transposed onto a piece of cardboard and placed in the poultry section of a grocery store. The fact that FSIS characterizes point-of-purchase materials as labeling will not insulate what is plainly an advertisement intended to induce consumers to purchase Defendant's product.

Therefore, Plaintiff's Amended Complaint fairly encompasses any labeling that, despite including language approved by the USDA, contains additional images and promotional slogans that effectively turn the labeling into an advertisement.

B. Distinction Between Labels and Advertising-*National Broiler Council v. Voss*

***9** Despite not being directly on point, this Court finds *National Broiler Council v. Voss*, 44 F.3d 740 (9th Cir.1994), persuasive. In *Voss*, the United States Court of Appeals for the Ninth Circuit addressed whether a state statute that made it illegal to "advertise, label, describe, otherwise hold out, or sell as 'fresh' poultry that is stored below 26 degrees" was preempted by the PPIA, which did not contain the same limitation. *Id.* at 743.The USDA had issued a regulation under the PPIA that permitted such chicken to be labeled "fresh." The plaintiffs, three poultry and meat trade associations, as well as the USDA, argued that the regulation made under the PPIA preempted the conflicting state statute. In his opinion specially concurring in the judgment, Judge O'Scannlain summarized the holding of the case, which he described as one involving "legal gymnastics": "[w]e ... hold [ ], quite properly, that the California legislature is federally preempted from requiring that frozen chickens be *labeled* 'frozen.' " *Id.* at 749 (emphasis added).

The plaintiffs and the USDA also argued that the advertising portion of the state statute was preempted by the PPIA, but the court found that the advertising portion of the statute was functionally severable from the labeling portion and therefore was not preempted. The court wrote that the legislative purpose of the advertising portion of the state statute was to "protect consumers from misleading claims that previously frozen poultry is 'fresh' " and that the purpose of the statute would be enforced "even though the labeling restriction [could] no longer [be] enforced."*Id.* at 748.Judge O' Scannlain stated that

> the States are not without devices of their own to protect their citizens when Congress permits the federal bureaucracy to impose the absurd. California stores can still be required by state law to tell the truth in *advertising* and to *display* frozen chickens for what they are-"frozen"-even though the labels on the chickens themselves are required by federal law to say "fresh."

Id. at 749 (emphasis added).

Although the legal issues in the *Voss* case involve the severability and preemption of state statutory provisions, the case highlights the distinction between labels and advertising and constitutes judicial recognition that a label approved by the USDA may nonetheless be false or misleading in other contexts. Despite the fact that the specific language at issue was approved by the USDA for poultry labels, the Ninth Circuit determined that the language was nonetheless actionable as misleading under a state statutory analogue to the Lanham Act when used in advertising and in-store displays.[FN2]

C. Plaintiffs' Non-Label False Advertising Claim Does Not Infringe on the USDA's Jurisdiction to Regulate Labels Under the PPIA

It is well established that a party may not use the Lanham Act as a backdoor to private enforcement of the Food, Drug, and Cosmetic Act. *See, e.g., Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir.1993) ("Mylan, in short, is not empowered to enforce independently the FDCA."), *cert. denied*,510 U.S. 1197, 114 S.Ct. 1307, 127 L.Ed.2d 658 (1994); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 231 (3d Cir.1990) (finding that the FDCA does not create private causes of action).

***10** Federal courts have struggled to find a consistent line of demarcation between, on the one hand, cases that assert legitimate Lanham Act violations and, on the other, cases that assert Lanham Act violations as a means to achieve private enforcement of the FDCA.[FN3]The conflict between Lanham Act claims and the FDCA was addressed by this Court in *Pediamed Pharmaceuticals, Inc. v. Breckenridge Pharmaceutical, Inc.*, 419 F.Supp.2d 715 (D.Md.2006), a case involving whether products manufactured by the parties were pharmaceutically equivalent. Notably, this Court explained that although a Lanham Act "claim cannot stand if it comes 'too close to the exclusive enforcement domain of the FDA,' " *id.* at 723 (citing *Summit Tech., Inc. v. High-Line Med. Instruments Co.*, 922 F.Supp. 299, 306 (C.D.Cal.1996)). "[t]he FDA's administrative scheme should not be allowed to 'eviscerate a Lanham Act or related common law claim over which the agency has no jurisdiction.' " *Id.* (citing *Healthpoint Ltd. v. Stratus Pharms., Inc.*, 273 F.Supp.2d 769, 792-93 (W.D.Tex.2001)). Surveying the applicable case law, this Court determined that courts "have drawn a line between claims that involve application and interpretation of the FDCA and its implementing regulations, and claims that do not." *Id.* at 724.The former fail as a matter of law, whereas the latter do not.

Like the FDCA, there is no private cause of action under the Poultry Products Inspection Act. *See*21 U.S.C. § 467c ("All proceedings for the enforcement or to restrain violations of this chapter shall be by and in the name of the United States."). Thus, Plaintiffs may not use the Lanham Act as a disguised attempt to enforce the PPIA. In this case, the USDA indisputably had authority and jurisdiction under the PPIA when it approved Defendant's application to use the term "Raised Without Antibiotics that impact antibiotic resistance in humans" on labels. If Plaintiffs' Amended Complaint had alleged that the Defendant's *labels* were false and misleading under the Lanham Act, the claim would be precluded as an attempt by Plaintiffs to use the Lanham Act as a vehicle to challenge the USDA's primary jurisdiction

under the PPIA to determine whether or not a label is false or misleading.

Plaintiffs' Lanham Act claim, however, relates solely to allegedly false and misleading *non-label advertising* and is, therefore, simply not within the authority or jurisdiction of the USDA. Plaintiffs assert that Defendant's advertisements containing the qualified RWA claim are false or misleading to the consumer public notwithstanding the fact that the USDA has determined that the language in the qualified RWA claim is not "false or misleading" under the PPIA. *See* 21 U.S.C. § 457(b)-(c). As such, Plaintiffs are not trying to enforce the provisions of the PPIA. *Cf. Pediamed Pharms.*, 419 F.Supp.2d at 726 ("Defendants have not pointed specifically to any portion of the FDCA or to any implementing regulations to support their assertion that Plaintiff's claims are based on the FDCA or its regulations, and therefore are precluded."); *Healthpoint, Ltd.*, 273 F.Supp.2d at 815-16 (stating that the "the proper judicial approach is for the Court to defer to the FDA for the resolution of issues within its primary jurisdiction and to exercise jurisdiction over Lanham Act and other claims which do not require application or construction of FDA law, regulations or policy").

***11**[8] While FSIS's determination involves a highly technical and scientific review of the proposed label language, it does not involve a review of whether the language is misleading to the consumer when combined with images and promotional slogans.[FN9] Undoubtedly, language that is technically and scientifically accurate on a label can be manipulated in an advertisement to create a message that is false and misleading to the consumer. The Lanham Act protects against precisely this situation by permitting claims based on language that, although literally true, nonetheless misleads or deceives consumers in an advertisement. *See C.B. Fleet*, 131 F.3d at 434. Plaintiffs must therefore show that "Raised Without Antibiotics that impact antibiotic resistance in humans" means something different to the consumer public when viewed as part of Defendant's advertisements than the language did to the experts and scientists at the USDA during the label-approving process. Plaintiffs' Amended Complaint contains this allegation in substance and they have submitted a 600-participant consumer survey that they suggest strongly buttresses their allegation.

In sum, this Court has the obligation to enforce federal statutes that supply private causes of action, such as the Lanham Act. Contrary to Defendant's argument, this Court does not usurp in any way the USDA's authority under the PPIA with respect to labels, nor does it challenge the agency's expert judgment, by allowing Plaintiffs' Lanham Act claim to move forward. The USDA has not and cannot approve Defendant's non-label advertising. Simply put, a non-label false advertising claim brought under the Lanham Act is not precluded because the language on which the claim is based was approved for use on labels by the USDA. The opposite conclusion would extend USDA expertise into an area, *i.e.*, advertising, which the agency has no congressional authority to enter, while at the same time significantly curtailing the congressional protections explicitly accorded to "persons engaged in such commerce" under the Lanham Act. *See* 15 U.S.C. § 1127.

Plaintiffs have stated a cognizable claim that the qualified language approved by the USDA for use on labels, "Raised Without Antibiotics that impact antibiotic resistance in humans," is false and misleading to the consumer when used in advertisements. Therefore, this portion of Plaintiffs' Amended Complaint also survives Defendant's Motion to Dismiss.

CONCLUSION

For the reasons stated in this Memorandum Opinion and on the record at the hearing that concluded on April 10, 2008, Defendant's Motion to Dismiss (Paper No. 50) is DENIED. A separate Order follows.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this 15th day of April, 2008, HEREBY ORDERED that:

1. The Motion to Dismiss filed by Defendant **Tyson** Foods, Inc. (Paper No. 50) is DENIED;

2. Defendant shall answer the Complaint within 20 days of the date hereof; and

***12** 3. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel for the parties.

FN1. Plaintiffs' original Complaint also included Foster Farms, Inc. and the Truthful Labeling Coalition as named Plaintiffs, but these entities are no longer parties to the action.

FN2. The AVMA has defined an ionophore as "a chemical substance produced by a microorganism, which has the capacity, in dilute solutions, to inhibit the growth of or to kill other microorganisms."(Amend.Compl.¶ 25.)

FN3. Specifically, Plaintiffs allege, *inter alia*, that "**Tyson** continues to run various versions of its 'unqualified' raised without antibiotics television commercial, including on the following dates and channels: February 2, 2008 on channels WPLG, WFAA, KNXV, KTVT, WPLG, WFOR, KXAS, KPNX; February 3, 2008 on channel KPNX; February 4, 2008 on channel KPNX, February 9, 2008 on channel WPLG; February 10, 2008 on channels KPHO, KTVT, WFOR, KXAS, WTVJ, WFAA and KNXV; February 11, 2008 on channels KPHO, KTVT, WFOR, KXAS and WTVJ; February 12, 2008 on channels WFAA, KPIX, WPLG and KGO; and February 16, 2008 on channel KXAS."(*Id.* ¶ 32.)

FN4. Defendant's Motion to Dismiss was not filed until after the parties began discovery on Plaintiffs' pending Supplemental Motion for Preliminary Injunction. By the time this Court denied Defendant's Motion to Dismiss on the record at the April 10, 2008 hearing, this Court had already been privy to the extensive evidence and testimony offered by the parties on the Plaintiffs' Supplemental Motion for Preliminary Injunction.

By its very nature, however, Defendant's Motion to Dismiss relates only to the sufficiency of the Amended Complaint and whether it fails as a matter of law. Therefore, although this Court has become intimately familiar with the factual contentions of the parties and the underlying evidentiary support, this Motion to Dismiss will be dealt with the same as any other motion to dismiss-by testing the legal sufficiency of the Amended Complaint based on the allegations contained therein. A more extensive factual discussion of this case, including findings of fact, will be contained in the Memorandum Opinion addressing Plaintiffs' Supplemental Motion for Preliminary Injunction.

FN5. The pre-2004 advertisements, which aired before the FDA approved *any* use of Lipitor for heart disease, survived Pfizer's motion to dismiss.

FN6. One court highlighted this tension, but did not decide the issue. In *ConAgra, Inc. v. George A. Hormel & Co.*, 784 F.Supp. 700 (D.Neb.1992), the court wrote that it "need not reach the question of whether or not the USDA guidelines are applicable in this case. Among other things, [plaintiff] argues that USDA guidelines cannot regulate advertising, as opposed to the regulation of labels, since the guidelines do not explicitly pertain to advertisements, as opposed to labels, and the authorizing statutes, 21 U.S.C. §§ 601(o) and 607, apply only to labels and not advertisements generally."*Id.* at 737 n. 26. While this accurately reflects the issue presented in this case, the *ConAgra* decision does not work in favor of either party.

FN7. Lending further support for Plaintiffs is the position taken by the National Advertising Division ("NAD") of the Better Business Bureau, an organization that adjudicates false advertising disputes, issues written decisions, and refers matters to the FTC when its decisions are not heeded. NAD's decisions are not binding on the parties before it, effectively making them advisory. Despite this limited authority, however, voluntary compliance appears

almost universal. *See, e.g., AMF, Inc. v. Brunswick Corp.*, 621 F.Supp. 456, 458 (E.D.N.Y.1985).

In *Kraft Foods Global, Inc. v. Perdue Farms*, NAD Case No. 4576 (Oct. 20, 2006), *aff'd*, Report of Panel 141 (March 14, 2007), the NAD reviewed a label that had been approved by FSIS that said "no preservatives." The challenger, as the party bringing the action is called, argued that in fact the chicken product contained ingredients that qualified as preservatives. Although FSIS approved the label containing "no preservatives" as "accurate and not misleading," NAD independently determined that the words "no preservatives" were misleading to consumers when used in the advertising context.

FN8. "The FDCA and the Lanham Act overlap to the extent that both regulate drug products in the marketplace. Courts have recognized the potential conflict between the two Acts and have struggled to define the proper scope of each law. Courts have come to the general conclusion that the FDA's enforcement of the FDCA is primarily concerned with the safety and efficacy of new drugs, while the Lanham Act is focused on the truth or falsity of advertising claims." *Axcan Scandipharm Inc. v. Ethex Corp.*, No. 07-2556, 2007 WL 3095367 (D.Minn. Oct.19, 2007).

FN9. This is true even though, as Defendant stresses, the "false and misleading" text in the PPIA mirrors the requirement under the Lanham Act that the Plaintiffs establish, *inter alia*, "a *false or misleading* description of fact or representation of fact in a commercial advertisement about his own or another's product." *Scotts*, 315 F.3d at 272. As discussed above, although FSIS necessarily determines that language approved for a label is not "false or misleading," it does not and cannot determine whether or not the same language used in an advertisement is false or misleading to the consumer public. That determination is strictly within the province of the Lanham Act.

D.Md.,2008.
Sanderson Farms, Inc. v. Tyson Foods, Inc.
--- F.Supp.2d ----, 2008 WL 1733607 (D.Md.)

END OF DOCUMENT

SandersonFarms, Inc. v. **Tyson** Foods, Inc.
D.Md.,2008.
Only the Westlaw citation is currently available.
United States District Court,D. Maryland.
SANDERSONFARMS, INC. and Perdue Farms, Inc., Plaintiffs,
v.
TYSON FOODS, INC., Defendant.
Civil No. RDB-08-210.

April 22, 2008.

Background: Sellers of chicken meat products sued competitor, alleging violations of the Lanham Act, specifically claiming that advertisements containing the claims "Raised Without Antibiotics" and "Raised Without Antibiotics that impact antibiotic resistance in humans" were false and misleading. Sellers moved for a preliminary injunction.

Holding: The District Court, Richard D. Bennett, J., held that sellers were entitled to preliminary injunctive relief.

Ordered accordingly.

[1] Injunction 212 ⇐135

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)1 In General
212k135 k. Discretion of Court. Most Cited Cases
Decision whether to issue a preliminary injunction is committed to the sound discretion of the trial court. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

[2] Injunction 212 ⇐138.1

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.1 k. In General. Most Cited Cases
To determine whether a preliminary injunction is appropriate, the court must apply the four-factor hardship balancing test, considering the following: 1) the likelihood of irreparable harm to the plaintiff if injunctive relief is denied, 2) the likelihood of harm to the defendant if injunctive relief is granted, 3) the likelihood that the plaintiff will succeed on the merits, and 4) the public interest. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

[3] Antitrust and Trade Regulation 29T ⇐104(2)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk104 Preliminary or Temporary Relief; Grounds, Subjects, and Scope
29Tk104(2) k. Particular Cases. Most Cited Cases
Sellers of chicken meat products were entitled to preliminary injunctive relief against a competitor alleged to have made false and misleading claims in advertisements, in violation of the Lanham Act; an unqualified "Raised Without Antibiotics" claim was literally false, given the use of ionophores in chicken feed and the injection of other antibiotics into chicken eggs two to three days before hatch, the claim was likely to be misleading to consumers, the qualified language "Raised Without Antibiotics that impact antibiotic resistance in humans" was not likely to have been understood by a significant portion of the consumer public, and the advertising campaign had affected sales dramatically. Lanham Act, § 43(a), 15 U.S.C.A. § 1125(a).

[4] Antitrust and Trade Regulation 29T ⇐22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases
Elements of a false advertising claim under the Lanham Act are as follows: (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to

deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products. Lanham Act, § 43(a), 15 U.S.C.A. § 1125(a).

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MEMORANDUM OPINION

RICHARD D. BENNETT, District Judge.

***1** Plaintiffs **SandersonFarms**, Inc. ("Sanderson") and Perdue Farms, Inc. ("Perdue") (collectively, "Plaintiffs") bring this suit against their competitor, **Tyson** Foods, Inc. ("**Tyson**" or "Defendant"), alleging violations of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Plaintiffs' Amended Complaint alleges that **Tyson's** advertisements containing the claims "Raised Without Antibiotics" and "Raised Without Antibiotics that impact antibiotic resistance in humans" are false and misleading to the consumer. Plaintiffs specifically allege that **Tyson** uses ionophores in its chicken feed and that ionophores are antibiotics.

Pending before this Court is Plaintiffs' Supplemental Motion for a Preliminary Injunction. Plaintiffs' Motion seeks to require that **Tyson** immediately cease all non-label advertising using the unqualified "Raised Without Antibiotics" claim and the qualified "Raised Without Antibiotics that impact antibiotic resistance in humans" claim. Plaintiffs' Amended Complaint requests injunctive relief against "any claim, direct or indirect, qualified or unqualified, in words or in substance, that **Tyson's** chicken is raised without antibiotics."

This Court held a hearing over four days, commencing on Monday, April 7, 2008 and concluding on Thursday, April 10, 2008, to allow the parties to present oral argument, testimony, and evidence.[FN1] Having heard the testimony of numerous witnesses, including experts proffered by the parties, and having reviewed hundreds of exhibits, this Court finds that consumers are being misled by **Tyson's** advertisements proclaiming that its chicken is "Raised Without Antibiotics." Based largely on Plaintiffs' consumer survey, this Court also finds that the qualified language "Raised Without Antibiotics that impact antibiotic resistance in humans" is not likely to be understood by a significant portion of the consumer public. This Court further finds that there is a strong likelihood of success by Plaintiffs on the merits of this case when it proceeds to trial. Moreover, this Court finds that the public interest compels the issuance of a preliminary injunction during the pendency of this case. Accordingly, for the reasons set forth in the following findings of fact and conclusions of law, Plaintiffs' Supplemental Motion for a Preliminary Injunction is GRANTED.

FINDINGS OF FACT

At the hearing, Plaintiffs offered the testimony of the following witnesses: 1) Dr. Bruce Stewart Brown, Perdue's Vice President of Food Safety and Quality; 2) Hilary Burroughs, Sanderson's Manager of Marketing; 3) John Bartelme, Perdue's Chief Marketing Officer; 4) Michael B. Mazis, Ph.D., Professor of Marketing at American University's Kogod School of Business; and 5) David Hogberg, **Tyson's** Senior Vice President of Product Marketing.[FN2] Defendant offered the testimony of the following witnesses: 1) Steve Roth, a market research consultant; 2) Dr. Patrick Pilkington, **Tyson's** Vice President of State and Government Affairs; and 3) David Hogberg. In addition, both parties submitted a substantial amount of evidence, with hundreds of exhibits being introduced.

I. Ionophores, the USDA, and Tyson's Labels

A. Ionophores Are Antibiotics

***2** It is undisputed in this case that ionophores are antibiotics. The United States Department of Agriculture ("USDA"), the Food and Drug Administration ("FDA"), and the American Veterinary Medical Association ("AVMA") are all in agreement on this point. The Food Safety and Inspection Service ("FSIS"), the USDA agency to which Congress has delegated the authority to regulate poultry labels, confirmed this fact on several occasions. After FSIS notified **Tyson** in September 2007 of its classification of ionophores as antibiotics, it reiterated its position on December 19, 2007, explaining as follows:

S. Bryson, the agency had "contacted **Tyson** [on September 12, 2007] to advise that FSIS had subsequently determined that approval of the ["Raised Without Antibiotics"] labels was a mistake and should be rescinded."(Def.'s Ex. 62.) Therefore, as early as September 12, 2007, **Tyson** was on clear notice that FSIS believed it had made a mistake and intended to revoke its approval.

On September 19, 2007, **Tyson** executives, along with Ms. Bryson, met with FSIS officials. After the meeting, FSIS permitted **Tyson** to formally respond to its concerns, which **Tyson** did by way of Ms. Bryson's September 26, 2007 letter. On November 6, 2007, Philip S. Derfler, Assistant Administrator of FSIS, replied to Ms. Bryson. In the letter, Mr. Derfler, on behalf of FSIS, stated that

> [i]t is longstanding FSIS policy that ionophores are antibiotics and, therefore, FSIS has not approved labels bearing a "Raised Without Antibiotics" claim if the source animals were fed ionophores. The **Tyson** labels at issue were thus approved in error by FSIS staff. Accordingly, we advised **Tyson** that FSIS intended to revoke their approval. Your letter dated September 26, 2007, asks us to reconsider this decision and to permit the continued use of these labels.

***4** (Def.'s Ex. 35.) Mr. Derfler formally denied **Tyson's** request for reconsideration: "Because ionophores are antibiotics under the AVMA definition, FSIS will not change its longstanding policy regarding ionophores."(*Id.*) FSIS did, however, provide four different options to **Tyson**: 1) remove all "Raised Without Antibiotics" labels within forty-five days; 2) stop using ionophores in its feed formulation, in which case the "Raised Without Antibiotics" label would be technically accurate; 3) petition FSIS to initiate a public notice and comment process on the use of ionophores in poultry and meat; or 4) submit a revised label application. (*Id.*)

D. FSIS Approves a Qualified "Raised Without Antibiotics" Label

On December 18, 2007, **Tyson** submitted an application to FSIS seeking approval of a revised label containing qualifying language. On December 19, 2007, FSIS approved **Tyson's** application seeking permission to use "Raised Without Antibiotics that impact antibiotic resistance in humans" on its labels.

On January 7, 2008, the Under Secretary of the USDA, Richard A. Raymond, sent a letter to the Senior Vice President of **Tyson**, Archie Shaffer III, confirming that **Tyson** and the USDA "reached an agreement" on the qualified label. (Def.'s Ex. 36.) Mr. Raymond stated that FSIS believed the qualified "Raised Without Antibiotics" claim described "the situation in a truthful and non-misleading way."(*Id.*) The letter also indicated that FSIS would be willing to grant a period of time for **Tyson** to transition from the unqualified label to the qualified label. On February 25, 2008, FSIS formally approved **Tyson's** temporary use of the unqualified "Raised Without Antibiotics" through a date that has been redacted for this litigation.

II. Tyson's Aggressive Advertising Campaign

During the same time period that **Tyson** was actively involved with the USDA in having both the unqualified and qualified language approved for use on its labels, it was also incorporating both the unqualified and qualified language into a multimillion-dollar nationwide advertisement campaign that utilized television, radio, billboards, print media, posters, and point-of-purchase materials.

A. Tyson's Advertising Campaign Uses the Unqualified "Raised Without Antibiotics" Claim

After **Tyson's** unqualified "Raised Without Antibiotics" claim was initially approved by FSIS, the company initiated a multimedia advertising campaign that was internally termed "Project Sting." A subsection of Project Sting, the "Thank You" campaign, placed significant importance on the "Raised Without Antibiotics" language. The advertisements uniformly featured smiling children, often accompanied by a parent. Many of the advertisements included a heading in large print declaring "Chicken your family deserves, raised without antibiotics."(*See, e.g.*, Pls.' Exs. 14-18.) Project Sting was clearly intended to "[s]trengthen [the] emotional connection to [the] **Tyson** brand" by appealing to the public's safety and health concerns. (Pls.' Ex. 122.)

***5Tyson** received overwhelmingly positive consumer feedback and believed this multimedia campaign was a large-scale success. From the advertisements, consumers understood that **Tyson** did not use antibiotics, and many consumers indicated that **Tyson's** chicken was "better" or "safer" than competitors' chicken. (Pls.' Ex. 119.) After conducting market research in the form of consumer reaction groups, Mr. Hogberg relayed to coworkers

specific consumer quotes that he believed "summarize[d] how this campaign makes people feel [.]"(*Id.*)Among the sample quotes was the following: "It [**Tyson's**'Raised Without Antibiotics' chicken] is safer chicken than others."(*Id.*) In a separate internal document, **Tyson** quoted another consumer as saying the following: "[**Tyson's**'Raised Without Antibiotics' chicken] has made me very happy as I am a cancer survivor and I believe that all the antibiotics and artificial ingredients contribute to this major disease."(Pls.' Ex. 31.)

Tyson's data also indicated that nine out of ten consumers considered it important to have antibiotic-free chicken; in fact, it was the second most important claim that consumers looked for when shopping for chicken. (Pls.' Exs. 122, 126.) As a result of the advertising campaign, sales of **Tyson** chicken increased by almost thirty-five million pounds. (Pls.' Ex. 95.) The "Raised Without Antibiotics" advertising campaign was internally described as having a "dramatic" effect on sales. (Pls.' Ex. 108.)

Project Sting's success is also strongly corroborated by the fact that advertisements containing the unqualified "Raised Without Antibiotics" claim remained in the marketplace months after September 12, 2007, the date in which the USDA clearly communicated that it had made a mistake in approving the label. Indeed, as late as November 30, 2007, weeks after the USDA refused to reconsider its revocation, Mr. Hogberg was telling other **Tyson** employees that "no one should be holding up anything because of the RWA labeling issue."(Pls.' Ex. 108.) Indeed, he was encouraging others to "GO! GO! GO!" onward with the campaign. (*Id.*) This Court finds that **Tyson's** continuation of Project Sting was done with full knowledge that the USDA intended to revoke the unqualified "Raised Without Antibiotics" label. Indeed, Mr. Hogberg's "GO! GO! GO!" directive is demonstrated by the fact that **Tyson** purchased additional television advertisements featuring the "Raised Without Antibiotics" language on September 27, 2007, to run through January 20, 2008. This decision was made despite the fact that the USDA unambiguously indicated its intent to revoke the unqualified 'Raised Without Antibiotics" label.

Moreover, **Tyson** distributed point-of-purchase materials to supermarkets across the country. Hilary Burroughs of **SandersonFarms** attached sixty-one photographs to her affidavit that purport to show point-of-purchase materials with the unqualified "Raised Without Antibiotics" language. The photographs were all taken between January 29, 2008 and February 18, 2008, in stores located in seven states (Alabama, Arizona, California, Colorado, Mississippi, Georgia, and South Carolina).[FN5] Despite **Tyson** having constant communication with the USDA from September 2007 until December 2007, **Tyson** took no action to remove unqualified point-of-purchase materials from the market until February 28, 2008. On that date, **Tyson** sent out an internal "action notice" intended to begin the phase out all point-of-purchase materials that contained the unqualified "Raised Without Antibiotics" language. Mr. Hogberg, Senior Vice President of Product Marketing, testified about this delay, and this Court finds his explanation unacceptable. It is quite clear to this Court that it was in **Tyson's** financial interest to delay the phase-out period as long as possible.[FN6]

***6** Additional advertisements containing the unqualified "Raised Without Antibiotics" language appeared in other media outlets long after **Tyson's** original label was revoked by FSIS. A billboard in Mississippi containing the unqualified "Raised Without Antibiotics" language was not taken down until mid-January 2008. (Pls.' Ex. 110.) Ironically, Joe Sanderson, the Chairman and CEO of **SandersonFarms**, received at his home a retail store circular advertisement containing **Tyson** chicken coupons that included unqualified "Raised Without Antibiotics" language during the week of March 9, 2008 (Pls.' Ex. 117), approximately *six months* after **Tyson** received unambiguous notice from the USDA that the unqualified label would be revoked and *five months* after it was made clear to **Tyson** that the USDA, FDA, and the AVMA all agreed that ionophores were antibiotics. Although **Tyson** did not pay for the circular advertisement, it is certainly well within the company's power to insist, with little more than a phone call or email, that retail stores cease all use of the unqualified claim in circular advertisement.

B. Tyson Begins Using Variations of the Qualified "Raised Without Antibiotics" Claim

Further evidencing the aggressiveness of its marketing campaign, **Tyson** began purchasing advertisements using qualified "Raised With Antibiotics" language before FSIS approved **Tyson's** application on December 19, 2008. For this reason, many of the most recent **Tyson** advertisements contain qualifying language that differs from the approved qualified language "Raised Without Antibiotics that impact antibiotic resistance in humans."

For example, the March/April 2008 edition of Weight Watchers magazine contains an advertisement using the language "raised without antibiotics that *create* antibiotic resistance in humans."(Pls.' Exs. 70-71. (emphasis added)) Other magazine advertisements and free-standing newspaper inserts purchased by **Tyson** do not include the qualifying language immediately following the unqualified "Raised Without Antibiotics" claim. For instance, in some advertisements, the unqualified claim was followed by an asterisk, leading the reader elsewhere on the page to a similar, but not USDA-approved, qualification typed in small print. (Def.'s Exs. 47-48.) This Court finds that the addition of qualifying language does little to correct the initial deception resulting from the early stages of the Project Sting campaign.

C. Tyson's Raised Without Antibiotics Advertising Campaign Has a Negative Impact on Sanderson and Perdue

Tyson's advertising campaign correspondingly had a negative financial impact on both Sanderson and Perdue. Ms. Burroughs testified that Sanderson lost approximately $4.1 million as a result of **Tyson's** advertising campaign utilizing the unqualified and qualified "Raised Without Antibiotics" claims. (Pls.' Ex. 47.) She testified that a large supermarket retail account that had been using Sanderson for a decade switched to **Tyson** during the time period **Tyson** was airing the "Raised Without Antibiotics" advertisements. Despite increased revenues in the final months of 2007, Sanderson's revenues and sales have decreased thus far in 2008. As far as the consumer effect, Ms. Burroughs testified that it typically takes eight to twelve months for an advertising campaign to actually penetrate the market, so the largest consumer effect of **Tyson's** "Raised Without Antibiotics" campaign will not be felt by Sanderson for some time.

***7** Mr. Bartelme testified that **Tyson's** advertising campaign has been a "big problem" for Perdue, resulting in "truckloads of lost volume." Perdue has lost three major retail accounts to **Tyson** as a result of **Tyson's** "Raised Without Antibiotics" advertising campaign, causing a net loss to the company of approximately $10 million. (Pls.' Exs. 46, 116.) Unlike Sanderson, Perdue did not receive any new accounts during the same time period.

At the four-day hearing, evidence was introduced clearly reflecting **Tyson's** marketing strategy and the financial harm inflicted on Perdue. Internal **Tyson** documentation indicates that the "Raised Without Antibiotics" advertising campaign had "wrecked Perdue's overall enterprise strategy" and that "elevating the **Tyson** brand with RWA has also devalued the Perdue brand."(Pls.' Ex. 106.)

III. Plaintiffs' Consumer Survey

Professor Michael B. Mazis's consumer survey, submitted on Plaintiffs' behalf, presents compelling evidence of consumer confusion with respect to both the unqualified and qualified "Raised Without Antibiotics" claims and stands uncontradicted in all important respects. Professor Mazis's testimony at the four-day hearing also clearly established that the qualified language is not understood by a substantial percentage of consumers.

The consumer survey included 608 consumers in twenty-eight shopping malls across the United States.[FN7]The 608 participants were broken down into four equally distributed cells, each with approximately 150 people. The participants were assigned randomly to the four cells. Each cell was shown a different stimulus. The first two cells were shown an unqualified "Raised Without Antibiotics" **Tyson** advertisement-the first cell was shown a television commercial and the second cell was shown a print stimulus, such as would appear in a magazine. The third cell was shown a print stimulus with the qualified "Raised Without Antibiotics" claim, using the language approved by the USDA, *i.e.*,"Raised Without Antibiotics that impact antibiotic resistance in humans."The fourth cell was shown a control print stimulus containing the following promotional statement: "chicken with great taste, high quality and unmatched variety."The fourth cell was not shown anything relating to **Tyson's** "Raised Without Antibiotics" claim, whether unqualified or qualified.

Professor Mazis reached two conclusions based on the consumer survey. First, the individuals that participated in the survey largely responded the same way to the qualified "Raised Without Antibiotics that impact antibiotic resistance in humans" claim as they did to the unqualified "Raised Without Antibiotics" claim. Second, participants viewed both the unqualified and qualified claims as implying that **Tyson's** chicken is safer and healthier than competitors' chicken.[FN8]

A. Open-Ended Questions-Participants Interpreted the Unqualified Language and the Qualified Language the Same

***8** Participants were asked "[w]hat is the main idea that the advertisement is trying to communicate?"Respondents who indicated that the advertisement communicated something about **Tyson's** chicken and antibiotics were then asked "[w]hat does the advertisement imply or state about **Tyson** and antibiotics?"Professor Mazis concluded from the responses to these open-ended questions that consumers process the "unqualified" and "qualified" messages in the same fashion. In short, consumers believe that there are no antibiotics given to **Tyson's** chickens.

In the first cell (unqualified "Raised Without Antibiotics" television commercial), 71.4% of respondents felt that the commercial communicated a "no antibiotics" claim. In the second cell (unqualified "Raised Without Antibiotics" print advertisement), 85.1% of respondents felt that the advertisement communicated a "no antibiotics" claim. In the third cell (qualified "Raised Without Antibiotics" print advertisement), 63.4% of respondents reported that a "no antibiotics" claim was communicated and about half (54.9%) referred to "no antibiotics" without mentioning antibiotic resistance. In addition, 9.2% of respondents mentioned "no antibiotics" and "antibiotic resistance" as separate but related ideas. Quite significant to this Court is the fact that only 4.6% of respondents understood the claim to mean what the experts at the USDA understood it to mean-*i.e.*, that **Tyson** uses antibiotics, but that the antibiotics it uses do not cause antibiotic resistance in humans.

Professor Mazis testified that the participants appeared to break down the qualified "Raised Without Antibiotics" into two distinct parts. The first part, "Raised Without Antibiotics," was taken literally by participants to mean that **Tyson's** chicken was not given antibiotics, which is not accurate. The second part of the qualified claim, "that impact antibiotic resistance in humans," was taken by participants to mean that **Tyson's** chicken does not impact antibiotic resistance in humans *because* **Tyson's** chicken has no antibiotics, which is also inaccurate. Taken together, participants largely misunderstood the entire qualified claim to mean that **Tyson's** chicken had no antibiotics and therefore could not impact antibiotic resistance in humans.[FN9] Indeed, based on Professor Mazis's testimony, this Court finds that the qualifying language may actually serve to reinforce the false impression that **Tyson's** chicken is antibiotic-free.

B. Close-Ended Questions-Participants Believed That Tyson's Chicken Was Safer and Healthier

Participants were first asked "[w]hat is the name of the company that put out or sponsored the advertisement that you just looked at?"If the participant answered this question correctly, the following series of additional close-ended questions was asked:

> Q2-"What is the main idea that the advertisement is trying to communicate? Anything else?"
>
> Q3-"Does or doesn't the advertisement (TV commercial) imply or state anything about **Tyson** chicken and antibiotics?"If the respondent answered affirmatively, he or she was also asked question Q3A: "What does the advertisement imply or state about **Tyson** and antibiotics? Anything else?"
>
> ***9** Q4-"Does or doesn't the advertisement imply or state anything about **Tyson** chicken and taste?"If the respondent answered affirmatively, he or she was also asked Q4A: "What does the advertisement imply or state about **Tyson** and taste? Anything else?"

Question four specifically asked about something entirely unrelated to this lawsuit, *i.e.*, taste, to avoid highlighting the focus of the study.

In analyzing these closed-ended questions, Professor Mazis concluded that the respondents in the "qualified" cell (cell three) provided similar responses to the advertisements as respondents in the two "unqualified" cells (cells one and two). In response to Q3, 85.1% and 79.1% of respondents in the two "unqualified" cells thought the advertisement they had seen implied or stated something about **Tyson** and antibiotics, while 81.0% of respondents in the "unqualified" cell answered the same way.

Respondents were then told that a series of statements would be read to them, some, all or none of which may have been implied by or stated in the **Tyson** advertisement. The respondent was then told to answer: (1) yes, the statement was implied; (2) no, the statement was not implied; (3) I don't know whether the statement was implied; or (4) no opinion. The respondent was then read the following statements, the order of which was rotated differently for each respondent:

> **Tyson** chicken is fresher than other chicken
>
> **Tyson** chicken is safer than other chicken
>
> **Tyson** chicken contains more protein than other chicken
>
> **Tyson** chicken is better for you than other chicken
>
> **Tyson** chicken tastes better than other chicken
>
> **Tyson** chicken is more healthful than other chicken

The questions asking about whether **Tyson's** chicken was safer, better for you, and more healthful were the most relevant to this lawsuit. The other questions were asked so that the purpose of the questions remained unknown.

First, Professor Mazis calculated the percentage of people who believed that **Tyson's** chicken was safer, more healthful, or better for you. Next, he adjusted the results for "noise" (*e.g.*, guessing, pre-existing beliefs, suggestive question wording, bias, etc.) by subtracting the percentage of positive responses obtained from the control cell. The following chart summarizes the consumer survey data, with the boldfaced number indicating the final results of the survey:

	Tyson chicken is safer than other chicken	**Tyson** chicken is more healthful than other chicken	**Tyson** chicken is better for you than other chicken
Cell One-"Unqualified" TV	65.6%-29.9% = **35.7%**	72.1%-46.3% = **25.8%**	60.4%- 46.3% = **14.1%**
Cell Two-"Unqualified" Print	59.1%-29.9% = **29.2%**	68.2%-46.3% = **21.9%**	57.1%- 46.3% = **10.8%**
Cell Three-"Qualified" Print	63.4%-29.9% = **33.5%**	70.6%-46.3% = **24.3%**	60.1%- 46.3% = **13.8%**

***10** Based on the responses controlled for noise, about one-third of all respondents in cells one, two and three-including both unqualified and qualified language-agreed that the advertisement communicated that **Tyson's** chicken is safer than other chicken, and about one-quarter of respondents in cells one, two, and three-again, including both unqualified and qualified language-agreed that the advertisement communicated that **Tyson's** chicken is more healthful. Because all three chicken producers in this action use ionophores, these figures represent nothing less than consumer deception about the relative safety and health of **Tyson's** chicken. Moreover, the percentages remained consistent for all three implied claims of superiority (safer, more healthful, and better for you), regardless of whether the language was unqualified (cells one and two) or qualified (cell three). In fact, for print advertisements (cells two and three), a greater percentage of respondents who viewed the qualified language believed that it contained an implied claim of superiority than did respondents who viewed the unqualified language.

CONCLUSIONS OF LAW

[1][2] Under Rule 65 of the Federal Rules of Civil Procedure, the decision whether to issue a preliminary injunction is committed to the sound discretion of the trial court. *Hughes Network Sys. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir.1994). To determine whether a preliminary injunction is appropriate, the court must apply the four-factor hardship balancing test established by the United States Court of Appeals for the Fourth Circuit in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir.1977). The four *Blackwelder* factors are 1) the likelihood of irreparable harm to the plaintiff if injunctive relief is denied, 2) the likelihood of harm to the defendant if injunctive relief is granted, 3) the likelihood that the plaintiff will succeed on the merits, and 4) the public interest. *Id.* at 195;*see also Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir.1991).

In *Scotts Co. v. United Industries Corp.*, 315 F.3d 264 (4th Cir.2002), the Fourth Circuit summarized the proper analysis to determine whether a preliminary injunction should be granted:

> When deciding whether to grant a preliminary injunction, the court must first determine whether the plaintiff has made a strong showing of irreparable harm if the injunction is denied; if such a showing is made,

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the court must then balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant. If the balance of the hardships "tips decidedly in favor of the plaintiff,"... then typically it will "be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation,".... But if the balance of hardships is substantially equal as between the plaintiff and defendant, then "the probability of success begins to assume real significance, and interim relief is more likely to require a clear showing of a likelihood of success."

***11** *Id.* at 271 (internal citations omitted); *see also* Sun Microsystems, Inc. v. Microsoft Corp., 333 F.3d 517, 526 (4th Cir.2003) (stating that the *Blackwelder* test represents a "sliding scale that demands less of a showing of likelihood of success on the merits when the balance of hardships weighs strongly in favor of the plaintiff, and vice versa").

[3] Applying the *Blackwelder* factors, this Court concludes that Plaintiffs' Supplemental Motion for Preliminary Injunction should be granted. The preliminary injunction proceeding in this case was extensive. Although naturally incomplete at this stage in the litigation, the record is hardly insufficient and this Court does not reach its legal conclusions in haste. *See* Sole v. Wyner, --- U.S. ----, ----, 127 S.Ct. 2188, 2195, 167 L.Ed.2d 1069 (2007) ("In some cases, the proceedings prior to a grant of temporary relief are searching; in others, little time and resources are spent on the threshold contest.").

I. Likelihood of Irreparable Harm to Plaintiffs If Injunctive Relief Is Denied

Based on the consumer survey, this Court finds that Plaintiffs have demonstrated that consumers are in fact misled by Defendant's advertisements. This Court also finds that, even in the absence of a presumption, the continuation of Defendant's advertisements during the pendency of this case will cause further harm that is neither "remote nor speculative, but actual and imminent."Scotts Co., 315 F.3d at 271.

A. Evidence of Consumer Confusion

In *Scotts Co.*, the Fourth Circuit "did not reach the issue [of an irreparable harm presumption] in a false advertising context because the plaintiff had failed to make a prima facie showing of consumer confusion."Pediamed Pharms., Inc. v. Breckenridge Pharm., Inc., 419 F.Supp.2d 715 (D.Md.2006) (citing Scotts Co., 315 F.3d at 272). The presumption that was not addressed by the Fourth Circuit was discussed in United Industries Corp. v. Clorox Co., 140 F.3d 1175 (8th Cir.1998), where the United States Court of Appeals for the Eighth Circuit suggested that a presumption of irreparable harm should be applied in all Lanham Act false advertising cases where the plaintiff has established a tendency to deceive.[FN10] *Id.* at 1183.

The Fourth Circuit noted that other district courts in this circuit have applied the *United Industries* presumption. See Scotts Co., 315 F.3d at 273 (citing JTH Tax, Inc. v. H & R Block Eastern Tax Servs., Inc., 128 F.Supp.2d 926, 948 (E.D.Va.2001) ("[A] demonstration that the competitor's advertising tends to mislead consumers satisfies the [Lanham] Act's irreparable harm requirement."). *aff'd in part, vacated in part, and remanded,*28 Fed.Appx. 207 (4th Cir. Jan.10, 2002) and Black & Decker (U.S.) Inc. v. Pro-Tech Power Inc., 26 F.Supp.2d 834, 862 (E.D.Va.1998) ("Courts have explained that a demonstration that the competitor's advertising tends to mislead consumers satisfies the Lanham Act's irreparable harm requirement.")). In *JTH Tax*, the district court explained that, "[b]ecause it is 'virtually impossible to prove that so much of one's sales will be lost as a direct result of a competitor's advertisement,' a demonstration that the competitor's advertising tends to mislead consumers satisfies the [Lanham] Act's irreparable harm requirement."128 F.Supp.2d at 948 (internal citations omitted).

***12** In this case, unlike in *Scotts Co.*, Plaintiffs have sufficiently demonstrated consumer confusion. There are two distinct aspects to this inquiry, each requiring different quanta of proof: "If the advertising is literally false, no evidence of consumer confusion is required. But if the advertising is impliedly false, the plaintiff must present extrinsic evidence of consumer confusion."Scotts Co., 315 F.3d at 274.

Plaintiffs have established the literal falsity of Defendant's unqualified "Raised Without Antibiotics" claim. Indeed, the evidence before this Court conclusively demonstrates that the United States Department of Agriculture, the Food and Drug Administration, and the American Veterinary Medical Association, as well as the scientific community at large, are all in agreement that ionophores

are antibiotics. Having demonstrated the literal falsity of the unqualified "Raised Without Antibiotics" claim and having demonstrated consumer confusion, Plaintiffs have established irreparable harm as to Defendant's unqualified "Raised Without Antibiotics" claim.

Plaintiffs have also established that the qualified "Raised Without Antibiotics" claim leads to consumer confusion. Because the qualified language, "Raised Without Antibiotics that impact antibiotic resistance in humans," was approved for labels by FSIS as being not "false and misleading," *see* Poultry Products Inspection Act, 21 U.S.C. § 457(b)-(c), this Court will not consider the claim to be literally false, at least not at the preliminary injunction stage of this litigation. Nonetheless, Plaintiffs' consumer survey sufficiently demonstrates that "a not insubstantial number of consumers" are likely to be confused or misled. Johnson & Johnson* Merck Consumer Pharms. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 298 (2d Cir.1992).

Plaintiffs' consumer survey found that 63.4% of respondents reported that the qualified "Raised Without Antibiotics" language meant that Defendant used no antibiotics in its chicken. The consumer survey also found that 54.9% of respondents referred to "no antibiotics" without mentioning anything about the qualifying language "that impact antibiotic resistance in humans."Defendant's own expert witness, Steve Roth, acknowledged during his testimony that these figures far exceed the level of consumer survey evidence usually required by courts. *See, e.g.*, Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 594 (3d Cir.2002) ("We believe that survey evidence demonstrating that 15% of the respondents were misled ... is sufficient to establish the 'actual deception or at least a tendency to deceive a substantial portion of the intended audience,' necessary to establish a Lanham Act claim for false or misleading advertising."(internal citation omitted)).[FN11]

Having heard testimony for four days and having reviewed hundreds of exhibits, this Court is convinced by a preponderance of the evidence that a substantial percentage of consumers are misled by Defendant's advertisements carrying the message "Raised Without Antibiotics that impact antibiotic resistance in humans."The qualifying language does not appear to serve its intended purpose-the consumer is still led to believe that Defendant does not use antibiotics, when in fact Defendant uses ionophores in its chicken feed and injects its chicken eggs with antibiotics. Indeed, the qualification may only serve to reinforce that Defendant's chicken is "Raised Without Antibiotics," a claim that is literally false.

***13** Moreover, Plaintiffs' consumer survey does not suffer from the flaws highlighted by the Fourth Circuit in *Scotts Co.* In *Scotts Co.*, the Fourth Circuit found that the critical issue in the case was not adequately answered by the questions posed in the consumer survey and that the answers given to those questions were ambiguous. *See* Scotts Co., 315 F.3d at 279. Plaintiffs' consumer survey answers the precise issue in his case, *i.e.*, whether Defendant's qualified "Raised Without Antibiotics" claim misleads the consumer into believing that Defendant does not use antibiotics. Furthermore, the consumer survey answers are not ambiguous-the sample responses underscore the fact that a substantial portion of consumers do not appear to understand that Defendant's chicken is not antibiotic-free. *See supra* note 9 (listing sample responses of survey participants that understood the qualified "Raised Without Antibiotics" advertisements to mean that Defendant did not use antibiotics).

Therefore, this Court credits Plaintiffs' consumer survey and finds that the results establish consumer confusion. Therefore, Plaintiffs have met their burden of establishing the irreparable harm prong of the *Blackwelder* analysis.

B. Financial Impact on Plaintiffs

Alternatively, even in the absence of any presumption, Plaintiffs have demonstrated that they will suffer irreparable harm that is "neither remote nor speculative, but actual and imminent."Scotts Co., 315 F.3d at 271 (citations omitted). Defendant's advertising campaign has already had a "dramatic" effect on its sales, directly resulting in a thirty-five million pound increase. During the same time period, Defendant's advertisements have had a negative impact on Plaintiffs' respective businesses. Sanderson submitted evidence establishing that it lost a $4.1 million account, and Perdue submitted evidence that it lost three accounts totaling approximately $10 million.

Indeed, Defendant believed that the advertising campaign caused incalculable loss to Perdue. Internal memoranda indicate that Defendant's advertising campaign "wrecked Perdue's overall enterprise strategy" and that "elevating the **Tyson** brand with RWA has also devalued the Perdue brand."(Pls.' Ex. 106.) This is precisely the sort of loss that the issuance of a preliminary injunction is designed to

prevent. As a result, a preliminary injunction would serve to limit the continued gravitation of consumer purchasing decisions towards Defendant's product as a result of the qualified "Raised Without Antibiotics" advertising campaign.

Moreover, there is no evidence before this Court showing that the damage already incurred by Plaintiffs will not be made worse during the pendency of this case. *See Scotts Co.*, 315 F.3d at 283-84 (finding that the plaintiff had not met its burden of "actual and imminent" irreparable harm largely because of a slow industry-specific business cycle during the pendency of the trial). Tellingly, even while the status of the "Raised Without Antibiotics" label was in flux, internal memoranda indicated that "no one should be holding up anything because of the RWA labeling issue" and that employees should "GO! GO! GO!" forward with the advertising campaign. A similarly aggressive position could be taken while Defendant awaits a trial on the merits.

***14** Accordingly, this Court finds that Plaintiff has made a strong showing of irreparable harm if the injunction is denied. Such a showing has been made through evidence of consumer confusion and continued economic harm.

II. Likelihood of Irreparable Harm to Defendant If Injunctive Relief Is Granted

This Court finds that there is virtually no harm whatsoever to Defendant with respect to non-label advertisements carrying the unqualified "Raised Without Antibiotics" claim. Defendant has informed this Court that they are currently in the process of removing all "Raised Without Antibiotics" advertisements from the marketplace. Thus, a preliminary injunction ensuring that this occurs only reinforces the status quo by way of a court order. On the unqualified "Raised Without Antibiotics" claim, the scale tips decidedly in favor of Plaintiffs.

As to non-label advertisements carrying the qualified "Raised Without Antibiotics" claim, Defendant will undoubtedly incur substantial costs associated with removing advertising from the marketplace upon the issuance of a preliminary injunction,[FN12] which offsets at least part of the financial harm Plaintiffs argue they will suffer if this Court does not issue a preliminary injunction. Defendant also argues that the issuance of a preliminary injunction would result in "consumer mistrust and the loss of goodwill."(Def.'s Mem. Opp'n Prelim. Inj. 6.)

The Fourth Circuit has admonished district courts not to give short shrift to irreparable harm that may appropriately be characterized as self-inflicted by the defendant. In *Scotts Co.*, the Fourth Circuit explained that "[i]f self-made harm is given substantially less weight, as it was by the district court in this case, then the balance of the harms will almost always favor the plaintiff, thus transforming a preliminary injunction from an extraordinary remedy into a routine occurrence."315 F.3d at 284. This Court does not substantially minimize the harm that might befall Defendant upon the issuance of a preliminary injunction, but it does note that such harm could have been mitigated, if not prevented, through the adoption of a less aggressive marketing position. The evidence plainly indicates that Defendant's executives identified an opportunity to increase the company's market share and sought to capitalize on that perceived opportunity despite full knowledge of the risk. Mr. Hogberg candidly acknowledged that he continually assessed the risks associated with Defendant's marketing campaign and that Defendant's executives "made the call" to move forward notwithstanding the risks. *See NaturaLawn of Am., Inc. v. West Group, LLC*, 484 F.Supp.2d 392, 402 (D.Md.2007) (noting that harm created by the defendant's "own willful acts" is "a factor that the court is entitled to consider").

Moreover, not only have Plaintiffs demonstrated that they will suffer irreparable harm if injunctive relief is denied, but, as will be discussed below, Plaintiffs have convinced this Court that there is an extremely high likelihood of success on the merits. As such, the fact that Defendant may suffer some degree of irreparable injury upon the issuance of a preliminary injunction is alone insufficient for this Court to forgo granting it. Therefore, balanced against the harm that will be suffered by Plaintiffs if the preliminary injunction is not issued, this Court finds that the scale tips slightly in Plaintiffs' favor on the qualified "Raised Without Antibiotics" claim.

III. Likelihood That Plaintiff Will Succeed on the Merits

***15** The Fourth Circuit has explained that "the balance-of-the-hardship question is intertwined with questions about the merits."[FN13] *Scotts Co.*, 315 F.3d at 272. As noted above, extensive evidence was presented by Sanderson, Perdue, and **Tyson** during the four-day hearing. Indeed, with the submission of hundreds of

exhibits and the testimony of key witnesses, this Court has, in effect, conducted a mini-trial. This Court has based its factual findings on an extensive record, including a comprehensive consumer survey submitted by Plaintiff. For many of the same reasons discussed in the first *Blackwelder* factor, this Court finds that there is a very strong likelihood that Plaintiffs will succeed on the merits in a trial before a jury.

[4] The elements of a false advertising claim under the Lanham Act are as follows:

> (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product;
>
> (2) the misrepresentation is material, in that it is likely to influence the purchasing decision;
>
> (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience;
>
> (4) the defendant placed the false or misleading statement in interstate commerce; and
>
> (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.

Scotts Co., 315 F.3d 264 at 272 (citing *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-11 (1st Cir.), *cert. denied*,537 U.S. 1001, 123 S.Ct. 485, 154 L.Ed.2d 396 (2002)).

With respect to the first element, the unqualified "Raised Without Antibiotics" claim is literally false, and the qualifying language has proven to be of little effect to the consumer, as demonstrated by Plaintiffs' consumer survey. Furthermore, Defendant's advertising does not communicate to the consumer the fact that Defendant injects antibiotics into its chicken eggs two to three days before hatch.

The evidence also demonstrates that Defendant's misrepresentation is material. Nine out of ten consumers considered it important to have antibiotic-free chicken and a claim of antibiotic-free chicken is the second most important claim that consumers looked for when shopping for chicken. Therefore, Plaintiffs are likely to succeed on the second and third elements. The fourth element will be met because Defendant's advertisements were clearly disseminated nationwide. The fifth element will likely be met for the same reasons this Court found that Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction.

Defendant again makes the same argument in defense of this motion as it did in support of its Motion to Dismiss, which was denied by this Court by Order dated April 14, 2008 (Paper No. 73.) In short, Defendant argues that "courts repeatedly have rejected Lanham Act claims based upon advertisements that simply repeat information in labeling that a government agency has determined not to be 'false or misleading.' " (Def.'s Mem. Opp'n Prelim. Inj. 6-7.) Defendant relied on cases involving the FDA, an agency with substantially broader jurisdiction than the USDA, the government agency at issue in this case. Unlike the FDA, the USDA does not have congressional authority to review advertisements. Therefore, this Court held that

> ***16** a non-label false advertising claim brought under the Lanham Act is not precluded because the language on which the claim is based was approved for use on labels by the USDA. The opposite conclusion would extend USDA expertise into an area, *i.e.*, advertising, which the agency has no congressional authority to enter, while at the same time significantly curtailing the congressional protections explicitly accorded to "persons engaged in such commerce" under the Lanham Act.

(Mem.Op.20.) For the reasons stated in the Memorandum Opinion (Paper No. 72), this argument is without merit.

IV. The Public Interest

The public interest is served by the issuance of a preliminary injunction in this case. There is a significant and immediate public interest concern when specific advertising misrepresents that a product is something that it is not, even if the product does not pose an immediate health or safety concern. *See Scotts Co.*, 315 F.3d 264 at 286 ("[T]here is a strong public interest in the prevention of misleading advertisements.") (citing *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 587 (3d Cir.2002)).

This Court is satisfied that the consumer public is being misled by Defendant's "Raised Without Antibiotics" advertising. Defendant's chicken is not "Raised Without Antibiotics" when ionophores are used in chicken feed and other antibiotics are injected into the chicken egg two to three days before hatch. This Court, having heard testimony and reviewed voluminous exhibits and a comprehensive consumer survey, is satisfied that the qualifying language. *i.e.*,"that impact antibiotic resistance in humans," is not understood by a substantial portion of the consumer public. Indeed, it may even reinforce consumer misconception. Defendant has persisted in this advertising effort since September 2007, when the USDA clearly placed Defendant on notice that it intended to revoke its prior label approval because ionophores are antibiotics. The public interest compels that this advertising stop and that a preliminary injunction be issued in this case.

CONCLUSION

For the reasons stated in this Memorandum Opinion, Plaintiffs' Supplemental Motion for Preliminary Injunction (Paper No. 44) is GRANTED. Pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, a separate Order detailing the scope of the preliminary injunction follows.

PRELIMINARY INJUNCTION ORDER

For the reasons stated in the accompanying Memorandum Opinion issued this date, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, this Court, having conducted a hearing over four days between April 7, 2008 and April 10, 2008 and having considered memoranda and oral arguments, as well as testimony and evidence submitted by the parties, finds that Plaintiffs **SandersonFarms**, Inc. and Perdue Farms, Inc. will suffer imminent and irreparable harm from non-label advertising being disseminated by Defendant **Tyson** Foods, Inc., unless Defendant is preliminarily enjoined as set forth in this Order. Accordingly, it is this 22nd day of April 2008, HEREBY ORDERED:

***17** 1. That Plaintiffs' Supplemental Motion for a Preliminary Injunction (Paper No. 44) is GRANTED, as follows:

a. That Defendant must remove any and all non-label advertisements, as defined in paragraphs 1.c and 1.d, containing language claiming that its chicken products are "Raised Without Antibiotics," regardless of whether the statement has qualifying language such as "Raised Without Antibiotics that impact antibiotic resistance in humans";

b. That Defendant is further enjoined from using non-label advertisements, as defined in paragraphs 1.c and 1.d, containing language claiming that its chicken products are "Raised Without Antibiotics," regardless of whether the statement has qualifying language such as "Raised Without Antibiotics that impact antibiotic resistance in humans," during the pendency of this case;

c. That non-label advertising consists of television commercials, radio spots, print ads, billboards, circulars, and posters;

d. That non-label advertising also consists of any and all labeling, including point-of-purchase materials, that contain either the "Raised Without Antibiotics" or "Raised Without Antibiotics that impact antibiotic resistance in humans" language in association with other promotional language and images, regardless of whether such articles are located in proximity to Defendant's chicken products; and

e. That Defendant's labels are exempt from this Order and consist of language placed immediately upon Defendant's chicken products or container.

2. It is HEREBY FURTHER ORDERED that:

a. This Order shall take effect at 12:01 a.m., Thursday May 1, 2008, so as to accord Defendant an opportunity to appeal the issuance of this Preliminary Injunction Order to the United States Court of Appeals for the Fourth Circuit;

b. By 12:01 a.m., Thursday May 1, 2008, Plaintiffs shall post a bond, not to be released unless by further Order of this Court. The amount of the bond will be set by this Court by 5:00 p.m., Friday, April 25, 2008 after the parties have had an opportunity to file submissions on their respective positions on the appropriate amount of the bond;

c. Upon the effective date of this Order, pursuant to Rule 65(d)(2)(C), Defendant shall notify all retailers and other third parties disseminating its advertising of the scope and effect of this Order;

d. This Order shall remain in effect pending a trial in this matter; and

e. The Clerk of this Court transmit copies of this Order and accompanying Memorandum Opinion to counsel for both parties.

FN1. The parties also addressed the Defendant's Motion to Dismiss (Paper No. 50), which was denied on the record on April 10, 2008. That denial was supplemented by a Memorandum Opinion (Paper No. 72) and accompanying Order (Paper No. 73) issued by this Court on April 15, 2008.

FN2. Plaintiffs' counsel read into the record portions of Walter Leggett's deposition in lieu of his live testimony. Mr. Leggett took the photographs introduced as evidence by Plaintiffs.

FN3. Dr. Pilkington acknowledged that fluoroquinolones, once thought by experts to have no impact on human antibiotic resistance, were pulled for use by the FDA when it was learned that they did, in fact, impact human antibiotic resistance.

FN4. Perdue's application remains pending. This is highly unusual, as most applications are resolved within a week. Dr. Brown and John Bartelme both testified that it is industry practice to engage the USDA in dialogue through the application process. By reviewing which applications are approved and which are denied, a company can glean USDA's internal policy.

FN5. Defendant argued in support of its Motion to Dismiss (Paper No. 50) that point-of-purchase materials are beyond the scope of Plaintiffs' Amended Complaint because they are exclusively within the purview of the USDA under the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451, *et seq.* Addressing the qualified claim, this Court determined in its Memorandum Opinion dated April 14, 2008 (Paper No. 72) that "Plaintiffs' Amended Complaint fairly encompasses any labeling that, despite including language approved by the USDA, contains additional images and promotional slogans that effectively turn the labeling into an advertisement."(Mem.Op.15.)

FN6. Mr. Hogberg testified that **Tyson** set an internal deadline to remove all point-of-purchase materials using the unqualified "Raised Without Antibiotics" language from the marketplace no later than April 14, 2008, before the temporary window authorized by FSIS had expired.

FN7. Professor Mazis's consumer survey was completed with sufficient procedures to ensure accuracy. Participants qualified for the survey if they had purchased fresh raw chicken in the past three months and expected to purchase fresh raw chicken in the next three months. Potential respondents were excluded if (a) they or members of their households worked for an advertising agency or public relations firm, a marketing research firm, a law firm, or a manufacturer, distributor, or retailer of food products, or (b) if they wore eyeglasses or contact lenses but did not have their corrective eye wear with them at the time of the interview. The study was "double blind," in that neither the interviewers nor the respondents were aware of the identity of the client or the purpose of the study. The responses to all questions were then entered into a data file using 100% keypunch verification-*i.e.*, all data were keypunched twice to avoid any errors.

FN8. Steve Roth testified for Defendant regarding Professor Mazis's consumer survey. This Court finds his testimony to be of limited value. More importantly, his testimony did not cast any doubt on Professor Mazis's findings. To a large extent, the thrust of Mr. Roth's testimony was simply that he would have asked more open-ended questions because he prefers them over close-ended questions. On cross examination, he admitted that more participants viewed **Tyson's** chicken as "better" or "safer" than competitors' chicken than he had previously acknowledged on direct examination, and he also admitted that it is statistically significant that over half (54.9%) of respondents in cell three referred to "no antibiotics" without mentioning anything about antibiotic resistance. In fact, he testified that he was aware that 54.9% is greater than what has been deemed sufficient in other Lanham Act

cases.

FN9. The following sample responses were included in Professor Mazis's expert report (Pls.' Supp. Mot. Prelim. Inj. Ex. 3):

- "These chickens were raised without antibiotics. It does not impact resistance in humans."(# 01202);
- "No antibiotics in chicken. Resistance for us humans."(# 01909);
- "The chicken was raised without antibiotics. Makes humans more resistant."(# 04306);
- "The chicken from **Tyson** is raised without antibiotics. It cuts down on antibiotics' resistance in humans."(# 07804);
- "That this chicken is raised and fed right, without antibiotics so that people will not become resistant to antibiotics."(# 08617);
- "Chicken without antibiotics. It won't affect your immunity to antibiotics."(# 11612);
- "That their chickens are antibiotic free. It makes us less resistant to them if they don't have them."(# 01215); and
- "That the chickens don't have antibiotics fed to them. That it doesn't affect antibiotic resistance in humans."(# 11610).

FN10. As the Fourth Circuit explained in *Scotts Co.*, some courts limit the presumption to cases involving direct comparative advertising. 315 F.3d at 273-74;*see Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 696 (2d Cir.1994) (explaining that the presumption of irreparable harm is generally limited to cases involving false comparative advertising); *Mutual Pharm. Co. v. Ivax Pharms., Inc.*, 459 F.Supp.2d 925, 944-45 (C.D.Cal.2006) ("Outside the context of comparative advertisements (that is, those that make no direct reference to a competitor's product), a presumption of irreparable injury to a party is unwarranted."); 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:37 at 27-75 to 27-76 (4th ed. 2006) ("Where the challenged advertising makes a misleading comparison to a competitor's product irreparable harm is presumed. But if the false advertising is non-comparative and makes no direct reference to a competitor's product, irreparable harm is not presumed.").

> Although Plaintiffs' consumer survey indicates that one third of consumers believe that Defendant's advertisements make an implied claim of safety superiority, and that one fourth of consumers believe Defendant's advertisements make an implied claim of health superiority, the claims are clearly not direct claims of superiority. Therefore, the comparative advertising presumption is inapplicable in this case.

FN11.*See also Stiffel Co. v. Westwood Lighting Group*, 658 F.Supp. 1103, 1114 (D.N.J.1987) (finding that between 22% and 57% of potential consumers being misled was sufficient to warrant preliminary injunctive relief under the Lanham Act); *R.J. Reynolds Tobacco Co. v. Loew's Theatres, Inc.*, 511 F.Supp. 867, 876 (S.D.N.Y.1980) (finding between 20% and 33% of consumers being deceived sufficient to warrant preliminary injunctive relief); *McNeilab, Inc. v. Am. Home Prod. Corp.*, 501 F.Supp. 517, 527 (S.D.N.Y.1980) (finding 23% of consumers being confused sufficient to support a claim that the Lanham Act had been violated).

FN12. The costs will be mitigated by the bond to be posted by Plaintiffs under Rule 65(c) of the Federal Rules of Civil Procedure. In *Scotts Co.*, the Fourth Circuit found that the defendants would "suffer only minimal harm" despite the fact that they "would incur the monetary costs of complying with the injunction by creating new packaging or placing stickers to cover the offending graphic on the existing packaging."315 F.3d at 285 (citing *Hoechst Diafoil Co. v. Nan Ya Plastics, Inc.*, 174 F.3d 411, 421 n. 3 (4th Cir.1999) ("In fixing the amount of an injunction bond, the district court should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order.").

FN13. Indeed, the *Scotts Co.* court found that the plaintiff did not meet its burden under either the irreparable harm prong or the likelihood of success prong for the exact same reason. *See*315 F.3d at 283 (finding, in the irreparable harm inquiry, that "because we have rejected [the plaintiff's] evidence of consumer confusion (and its various arguments as to why no extrinsic evidence was required), it follows that the district court erred by applying the presumption of irreparable harm, a presumption that was dependent on [the plaintiff] establishing consumer confusion"); *id.* at 285 (finding that "because the evidence presented by [the plaintiff] is insufficient to show a likelihood of consumer confusion, [the plaintiff] has therefore failed to show a likelihood of success on the merits").

D.Md.,2008.
Sanderson Farms, Inc. v. Tyson Foods, Inc.
--- F.Supp.2d ----, 2008 WL 1838719 (D.Md.)

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Time Warner Cable, Inc. v. DIRECTV, Inc.
C.A.2 (N.Y.),2007.

United States Court of Appeals,Second Circuit.
TIME WARNER CABLE, INC., Plaintiff-Appellee,
v.
DIRECTV, INC., Defendant-Appellant.
No. 07-0468-cv.

Argued: May 29, 2007.
Decided: Aug. 9, 2007.

Background: Cable television service provider brought action against satellite television service provider, alleging claims under the Lanham Act and state law for false advertising, deceptive business practices, and breach of contract. The United States District Court for the Southern District of New York, 475 F.Supp.2d 299,Laura Taylor Swain, J., issued preliminary injunction enjoining satellite provider from broadcasting certain television and internet advertisements and from making negative statements regarding the picture or audio quality of cable provider's service or of cable service in general. Satellite television provider filed interlocutory appeal.

Holdings: The Court of Appeals, Straub, Circuit Judge, held that:
(1) claim that viewers could not get "the best picture out of some fancy big screen" without satellite television service was literally untrue, for purpose of Lanham Act claim;
(2) statement that "settling for cable would be illogical," considered in light of the advertisement as a whole, unambiguously made the literally false claim, for purpose of Lanham Act claim;
(3) internet advertisements amounted to "puffery," which could not support false advertising claim under Lanham Act; and
(4) cable provider demonstrated irreparable injury.

Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] Injunction 212 ⚿138.1

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.1 k. In General. Most Cited Cases
A party seeking preliminary injunctive relief must establish: (1) either a likelihood of success on the merits of its case, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor, and (2) a likelihood of irreparable harm if the requested relief is denied.

[2] Federal Courts 170B ⚿815

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk814 Injunction
170Bk815 k. Preliminary Injunction; Temporary Restraining Order. Most Cited Cases
The Court of Appeals reviews the entry of a preliminary injunction for excess of discretion, which may be found where the district court, in issuing the injunction, relied upon clearly erroneous findings of fact or errors of law.

[3] Antitrust and Trade Regulation 29T ⚿89

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(B) Actions and Proceedings
29Tk89 k. Verdict, Findings, and Judgment. Most Cited Cases

Federal Courts 170B ⚿860

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk855 Particular Actions and Proceedings, Verdicts and Findings
170Bk860 k. Copyrights, Patents and Trade Regulation. Most Cited Cases
The district court's determination, in a false advertising claim, of the meaning of the advertisement is a finding of fact that shall not be set aside unless clearly erroneous.

[4] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases
To show false advertising action under the Lanham Act, a plaintiff can demonstrate that the challenged advertisement is literally false, that is, false on its face. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[5] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases
When an advertisement is shown to be literally or facially false, consumer deception is presumed, and the court may grant relief, under the Lanham Act, without reference to the advertisement's actual impact on the buying public. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[6] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases
To prove a Lanham Act violation, a plaintiff can show that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[7] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases
Plaintiffs alleging an implied falsehood in advertising, under the Lanham Act, are claiming that a statement, whatever its literal truth, has left an impression on the listener or viewer that conflicts with reality, a claim that invites a comparison of the impression, rather than the statement, with the truth. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[8] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases
Under the Lanham Act, whereas plaintiffs seeking to establish a literal falsehood in the advertisement must generally show the substance of what is conveyed, a district court must rely on extrinsic evidence of consumer deception or confusion to support

a finding of an implicitly false message. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[9] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

To support a false advertising claim under the Lanham Act, a plaintiff must demonstrate that the false or misleading representation involved an inherent or material quality of the product. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[10] Antitrust and Trade Regulation 29T ⚿23

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk23 k. Particular Cases. Most Cited Cases

Television advertisement, telling viewers that they could not get "the best picture out of some fancy big screen" without high definition satellite television service was literally untrue, for purpose of cable television service provider's Lanham Act false advertising claim, where undisputed evidence established that viewers could get the same "best picture" with high definition programming from cable service provider. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[11] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

Under the false by necessity doctrine, a court evaluating whether an advertisement is literally false, under the Lanham Act, must analyze the message conveyed in full context, that is, it must consider the advertisement in its entirety and not engage in disputatious dissection. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[12] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

Under the false by necessity doctrine, in evaluating whether an advertisement is literally false, under the Lanham Act, if the words or images, considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[13] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

Under the false by necessity doctrine, in evaluating whether an advertisement is literally false, under the Lanham Act, if the language or graphic of the advertisement is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[14] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

If the advertisement is not literally false, there may still be a basis for a claim that the advertisement is misleading, under the Lanham Act, but to resolve such a claim, the court must look to consumer data to determine what the person to whom the advertisement is addressed finds to be the message. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[15] Antitrust and Trade Regulation 29T ⚿23

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk23 k. Particular Cases. Most Cited Cases

Assertion by television advertisement that "settling for cable would be illogical," considered in light of the advertisement as a whole, unambiguously made the literally false claim that cable television service provider's high definition picture quality was inferior to that of satellite television provider's high definition picture quality, for purpose of cable provider's Lanham Act claim. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[16] Antitrust and Trade Regulation 29T ⚿23

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk23 k. Particular Cases. Most Cited Cases

Internet advertisements depicting unwatchably blurry, distorted, and pixelated images were of such poor quality that no consumer would reasonably believe that cable television service provider transmitted such images to viewers, and thus, such advertisements amounted to "puffery," which could not support false advertising claim against satellite television provider under Lanham Act; the internet depictions of cable picture quality were not merely inaccurate, but were not even remotely realistic. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[17] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited Cases

If a visual representation is so grossly exaggerated that no reasonable buyer would take it at face value, there is no danger of consumer deception and hence, no basis for a false advertising claim under the Lanham Act. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[18] Antitrust and Trade Regulation 29T ⚿28

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk28 k. Comparisons; Comparative Advertising. Most Cited Cases

One form of "puffery," which cannot support a false advertising claim under the Lanham Act, is a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[19] Antitrust and Trade Regulation 29T ⚿22

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk21 Advertising, Marketing, and Promotion
29Tk22 k. In General. Most Cited

Cases
One form of "puffery," which cannot support a false advertising claim under the Lanham Act, is an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[20] Antitrust and Trade Regulation 29T 104(1)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk104 Preliminary or Temporary Relief, Grounds, Subjects, and Scope
29Tk104(1) k. In General. Most Cited Cases
A plaintiff seeking a preliminary injunction under the Lanham Act must persuade a court not only that it is likely to succeed on the merits, but also that it is likely to suffer irreparable harm in the absence of immediate relief. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[21] Antitrust and Trade Regulation 29T 104(1)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk104 Preliminary or Temporary Relief, Grounds, Subjects, and Scope
29Tk104(1) k. In General. Most Cited Cases
Something more than a plaintiff's mere subjective belief that it is injured or likely to be damaged is required before it will be entitled to a preliminary injunction in a Lanham Act false advertising claim. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[22] Antitrust and Trade Regulation 29T 104(1)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk104 Preliminary or Temporary Relief, Grounds, Subjects, and Scope
29Tk104(1) k. In General. Most Cited Cases
To show irreparable harm, a plaintiff seeking a preliminary injunction under the Lanham Act must submit proof which provides a reasonable basis for believing that the false advertising will likely cause it injury. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[23] Antitrust and Trade Regulation 29T 105

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk105 k. Proceedings to Impose; Evidence. Most Cited Cases
In general, for purpose of a motion for preliminary injunction in a Lanham Act false advertising claim, the likelihood of injury and causation will not be presumed, but must be demonstrated in some manner. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[24] Antitrust and Trade Regulation 29T 105

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk105 k. Proceedings to Impose; Evidence. Most Cited Cases
The likelihood of injury and causation may be presumed, for purpose of a motion for preliminary injunction in a Lanham Act false advertising claim, where the plaintiff demonstrates a likelihood of success in showing literally falsity of the defendant's comparative advertisement which mentions

the plaintiff's product by name. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[25] Antitrust and Trade Regulation 29T 64

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(B) Actions and Proceedings
29Tk64 k. Persons Protected and Entitled to Sue. Most Cited Cases
Some indication of actual injury and causation related to the false advertising is necessary to satisfy Lanham Act standing requirements and to ensure the plaintiff's injury is not speculative. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[26] Antitrust and Trade Regulation 29T 104(2)

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(C) Relief
29Tk101 Injunction
29Tk104 Preliminary or Temporary Relief, Grounds, Subjects, and Scope
29Tk104(2) k. Particular Cases. Most Cited Cases
Cable television service provider demonstrated irreparable harm, for purpose of preliminary injunction to enjoin satellite provider from broadcasting certain television advertisements, which negatively portrayed picture quality of cable television, in Lanham Act false advertising claim; although the advertisements did not mention cable provider by name, the cable provider was satellite provider's primary competitor in the markets in which the advertisements were aired, such that references to the poor picture quality would be reasonably understood by consumer as references to cable provider's product. Lanham Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

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Daniel H. Bromberg, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Redwood Shores, CA (Marc L. Greenwald, Sanford I. Weisburst, Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York, NY; Michael E. Williams, Justin C. Griffin, A.J. Bedel, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Los Angeles, CA; and Margret Caruso, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Redwood Shores, CA, on the brief), for Defendant-Appellant.

Before: KEARSE, STRAUB, and POOLER, Circuit Judges.

STRAUB, Circuit Judge:
Defendant-Appellant DIRECTV, Inc. ("DIRECTV") appeals from the February 5, 2007 opinion and order of the United States District Court for the Southern District of New York (Laura Taylor Swain, *Judge*) preliminarily enjoining it from disseminating, in any market in which Plaintiff-Appellee Time Warner Cable, Inc. ("TWC") provides cable service, certain television commercials and Internet advertisements found likely to violate the Lanham Act on literal falsity grounds. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 475 F.Supp.2d 299 (S.D.N.Y.2007).

This appeal requires us to clarify certain aspects of our false advertising doctrine. We make three clarifications in particular. First, we hold that an advertisement can be literally false even though it does not explicitly make a false assertion, if the words or images, considered in context, necessarily and unambiguously imply a false message. Second, we decide that the category of non-actionable "puffery" encompasses visual depictions that, while factually inaccurate, are so grossly exaggerated that no reasonable consumer would rely on them in navigating the marketplace. Third, we conclude that the likelihood of irreparable harm may be presumed where the plaintiff demonstrates a likelihood of success in showing that the defendant's comparative advertisement is literally false and that given the nature of the market, it would be obvious to the viewing audience that the advertisement is targeted at the

plaintiff, even though the plaintiff is not identified by name. Reviewing the District Court's decision under these principles, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

FACTUAL BACKGROUND[FN1]

FN1. This factual background is derived from the District Court's findings of fact, which are not in dispute. *See Time Warner Cable, Inc.*, 475 F.Supp.2d at 302-04.

A. The Parties

TWC and DIRECTV are major players in the multichannel video service industry. TWC is the second-largest cable company in the United States, serving more than 13.4 million subscribers. Like all cable providers, TWC must operate through franchises let by local government entities; it is currently the franchisee in the greater part of New York City. DIRECTV is one ***149** of the country's largest satellite service providers, with more than 15.6 million customers nationwide. Because DIRECTV broadcasts directly via satellite, it is not subject to the same franchise limitations as cable companies. As a result, in the markets where TWC is the franchisee, DIRECTV and other satellite providers pose the greatest threat to its market share. The competition in these markets for new customers is extremely fierce, a fact to which the advertisements challenged in this case attest.

TWC offers both analog and digital television services to its customers. DIRECTV, on the other hand, delivers 100% of its programming digitally. Both companies, however, offer high-definition ("HD") service on a limited number of their respective channels. Transmitted at 1 a higher resolution than analog or traditional digital programming, HD provides the home viewer with theater-like picture quality on a wider screen. The picture quality of HD is governed by standards recommended by the Advanced Television Systems Committee ("ATSC"), an international non-profit organization that develops voluntary standards for digital television. To qualify as HD under ATSC standards, the screen resolution of a television picture must be at least 720p or 1080i.[FN2] TWC and DIRECTV do not set or alter the screen resolution for HD programming provided by the networks; instead, they make available sufficient bandwidth to permit the HD level of resolution to pass on to their customers. To view programming in HD format, customers of either provider must have an HD television set.

FN2. The "p" and "i" designations stand for "progressive" and "interlaced." In the progressive format, the full picture updates every sixtieth of a second, while in the interlaced format, half of the picture updates every sixtieth of a second. The higher the "p" or "i" number, the greater the resolution and the better the picture will appear to the viewer.

There is no dispute, at least on the present record, that the HD programming provided by TWC and DIRECTV is equivalent in picture quality. In terms of non-HD programming, digital service generally yields better picture quality than analog service, because a digital signal is more resistant to interference. *See Consumer Elecs. Ass'n v. F.C.C.*, 347 F.3d 291, 293-94 (D.C.Cir.2003). That said, TWC's analog cable service satisfies the technical specifications, *e.g.* signal level requirements and signal leakage limits, set by the Federal Communications Commission ("FCC"). *See*47 C.F.R. § 76.1, *et seq.* According to a FCC fact sheet, analog service that meets these specifications produces a picture that is "high enough in quality to provide enjoyable viewing with barely perceptible impairments."

B. DIRECTV's "SOURCE MATTERS" Campaign

In the fall of 2006, DIRECTV launched a multimedia advertising campaign based on the theme of "SOURCE MATTERS." The concept of the campaign was to educate consumers that to obtain HD-

standard picture quality, it is not enough to buy an HD television set; consumers must also receive HD programming from the "source," *i.e.*, the television service provider.

1. Jessica Simpson Commercial

As part of its new campaign, DIRECTV began running a television commercial in October 2006 featuring celebrity Jessica Simpson. In the commercial, Simpson, portraying her character of Daisy Duke from the movie *The Dukes of Hazzard,* says to some of her customers at the local diner:

Simpson: Y'all ready to order?

***150** Hey, 253 straight days at the gym to get this body and you're not gonna watch me on DIRECTV HD?

You're just not gonna get the best picture out of some fancy big screen TV without DIRECTV.

It's broadcast in 1080i. I totally don't know what that means, but I want it.

The original version of the commercial concluded with a narrator saying, "For picture quality that beats cable, you've got to get DIRECTV."

In response to objections by TWC, and pursuant to agreements entered into by the parties, DIRECTV pulled the original version of the commercial and replaced it with a revised one ("Revised Simpson Commercial"), which began airing in early December 2006. The Revised Simpson Commercial is identical to the original, except that it ends with a different tag line: "For an HD picture that can't be beat, get DIRECTV."

2. William Shatner Commercial

DIRECTV debuted another commercial in October 2006, featuring actor William Shatner as Captain James T. Kirk, his character from the popular *Star Trek* television show and film series. The following conversation takes place on the Starship Enterprise:

Mr. Chekov: Should we raise our shields, Captain?

Captain Kirk: At ease, Mr. Chekov.

Again with the shields. I wish he'd just relax and enjoy the amazing picture clarity of the DIRECTV HD we just hooked up.

With what Starfleet just ponied up for this big screen TV, settling for cable would be illogical.

Mr. Spock: [Clearing throat.]

Captain Kirk: What, I can't use that line?

The original version ended with the announcer saying, "For picture quality that beats cable, you've got to get DIRECTV."

DIRECTV agreed to stop running the Shatner commercial in November 2006. In January 2007, DIRECTV released a revised version of the commercial ("Revised Shatner Commercial") with the revamped tag line, "For an HD picture that can't be beat, get DIRECTV."

3. Internet Advertisements

DIRECTV also waged its campaign in cyberspace, placing banner advertisements on various websites to promote the message that when it comes to picture quality, "source matters." The banner ads have the same basic structure. They open by showing an image that is so highly pixelated that it is impossible to discern what is being depicted. On top of this indistinct image is superimposed the slogan, "SOURCE MATTERS." After about a second, a vertical line splits the screen into two parts, one labeled "OTHER TV" and the other "DIRECTV." On the OTHER TV side of the line, the picture is extremely pixelated and distorted, like the opening image. By contrast, the picture on the DIRECTV side is exceptionally sharp and clear. The DIRECTV screen reveals that what we have been looking at all along is an image of New York Giants

quarterback Eli Manning; in another ad, it is a picture of two women snorkeling in tropical waters. The advertisements then invite browsers to "FIND OUT WHY DIRECTV'S picture beats cable" and to "LEARN MORE" about a special offer. In the original design, users who clicked on the "LEARN MORE" icon were automatically directed to the HDTV section of DIRECTV's website.

In addition to the banner advertisements, DIRECTV created a demonstrative ***151** advertisement that it featured on its own website. Like the banner ads, the website demonstrative uses the split-screen technique to compare the picture quality of "DIRECTV" to that of "OTHER TV," which the ad later identifies as representing "basic cable," *i.e.,* analog cable. The DIRECTV side of the screen depicts, in high resolution, an image of football player Kevin Dyson making a touchdown at the Super Bowl. The portion of the image on the OTHER TV side is noticeably pixelated and blurry. This visual display is accompanied by the following text: "If you're hooking up your high-definition TV to basic cable, you're not getting the best picture on every channel. For unparalleled clarity, you need DIRECTV HD. You'll enjoy 100% digital picture and sound on every channel and also get the most sports in HD-including all your favorite football games in high definition with NFL SUNDAY TICKET."

PROCEDURAL HISTORY

A. Filing of Action and Stipulation

On December 7, 2006, TWC filed this action charging DIRECTV with, *inter alia,* false advertising in violation of § 43(a) of the Lanham Act. 15 U.S.C. § 1114, *et seq.* Initial negotiations led to the execution of a stipulation, in which DIRECTV agreed that pending final resolution of the action, it would stop running the original versions of the Simpson and Shatner commercials and also disable the link on the banner advertisements that routed customers to the HDTV page of its website. DIRECTV further stipulated that it would not claim in any advertisement, either directly or by implication, that "the picture quality presently offered by DIRECTV's HDTV service is superior to the picture offered presently by Time Warner Cable's HDTV service, or the present HDTV services of cable television providers in general." Finally, DIRECTV agreed that any breach of the stipulation would result in irreparable harm to TWC. The stipulation contained the caveat, however, that nothing in it "shall be construed to be a finding on the merits of this action." The District Court entered an order on the stipulation on December 12, 2006.

B. Preliminary Injunction Motion

The following week, on December 18, TWC filed a motion for a preliminary injunction against the Revised Simpson Commercial, as well as the banner advertisements and website demonstrative (collectively, "Internet Advertisements"), none of which were specifically covered by the stipulation. TWC claimed that each of these advertisements was literally false, obviating the need for extrinsic evidence of consumer confusion. TWC further argued that as DIRECTV's direct competitor, it was entitled to a presumption of irreparable injury. On January 4, 2007, after discovering that DIRECTV had started running the Revised Shatner Commercial, TWC filed supplemental papers requesting that this commercial also be preliminarily enjoined on literal falsity grounds.

DIRECTV vigorously opposed the motion. It asserted that the Revised Simpson and Shatner Commercials were not literally false because no single statement in the commercials explicitly claimed that DIRECTV HD is superior to cable HD in terms of picture quality. DIRECTV did not deny that the Internet Advertisements' depictions of cable were facially false. Rather, it argued that the Internet Advertisements did not violate the Lanham Act because the images constituted non-actionable puffery. Finally, DIRECTV argued that irreparable harm could not be presumed because none of the

***152** contested advertisements identified TWC by name.

C. The District Court's February 5, 2007 Opinion and Order

On February 5, 2007, the District Court issued a decision granting TWC's motion. The District Court determined that TWC had met its burden of showing that each of the challenged advertisements was likely to be proven literally false. Addressing the television commercials, the District Court held that the meaning of particular statements had to be determined in light of the overall context, and not in a vacuum as urged by DIRECTV. Given the commercials' obvious focus on HD picture quality, the District Court found that the Simpson's assertion that a viewer cannot "get the best picture out of some big fancy big screen TV without DIRECTV" and Shatner's quip that "settling for cable would be illogical" could only be understood as making the literally false claim that DIRECTV HD is superior to cable HD in picture quality. *See Time Warner Cable, Inc.,* 475 F.Supp.2d at 305-06. As for the Internet Advertisements, the District Court found that the facially false depictions of cable's picture quality could not be discounted as mere puffery because it was possible that consumers unfamiliar with HD technology would actually rely on the images in deciding whether to hook up their HD television sets to DIRECTV or analog cable. *See id.* at 306-08.

In assessing irreparable harm *vel non,* the District Court observed that under Second Circuit case law, irreparable harm could be presumed where the movant "demonstrates a likelihood of success in showing literally false defendant's comparative advertisement which mentions plaintiff's product by name." *Id.* at 308 (quoting *Castrol, Inc. v. Quaker State Corp.,* 977 F.2d 57, 62 (2d Cir.1992) (internal quotation marks omitted)). The District Court acknowledged that the Revised Shatner Commercial and the Internet Advertisements did not specifically name TWC, but concluded that a presumption of irreparable harm was nevertheless appropriate because the advertisements made explicit references to "cable," and in the markets where TWC is the franchisee, "cable" is functionally synonymous with "Time Warner Cable." *See id.* As for the Revised Simpson Commercial, the District Court reasoned that although the advertisement did not explicitly reference "cable," irreparable harm should be presumed because "TWC is DIRECTV's main competitor in markets served by TWC."*Id.*The District Court further noted that DIRECTV had breached the stipulation by continuing to run the contested commercials and that this breach also supported a finding of irreparable harm. *See id.* at n. 5.

In accordance with its opinion, the District Court entered a preliminary injunction barring DIRECTV from disseminating, "in any market in which [TWC] provides cable service,"

(1) the Revised Simpson Commercial and Revised Shatner Commercial, "and any other advertisement disparaging the visual or audio quality of TWC or cable high-definition ("HDTV") programming as compared to that of DIRECTV or satellite HDTV programming"; and

(2) the Internet Advertisements "and any other advertisement making representations that the service provided by Time Warner Cable, or cable service in general, is unwatchable due to blurriness, distortion, pixellation or the like, or inaudible due to static or other interference."

DISCUSSION

[1][2][3] A party seeking preliminary injunctive relief must establish: (1) either (a) ***153** a likelihood of success on the merits of its case or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor, *and* (2) a likelihood of irreparable harm if the requested relief is denied. *See Coca-Cola Co. v. Tropicana Prods., Inc.,* 690 F.2d 312, 314-15 (2d Cir.1982), *abrog-*

*ated on other grounds by*Fed.R.Civ.P. 52(a). We review the entry of a preliminary injunction for excess of discretion, which may be found where the district court, in issuing the injunction, relied upon clearly erroneous findings of fact or errors of law. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir.2001). "[T]he district judge's determination of the meaning of the advertisement [is] a finding of fact that shall not be set aside unless clearly erroneous." *Id.* (alterations in original; internal quotation marks omitted); *see also Johnson & Johnson v. GAC Int'l, Inc.*, 862 F.2d 975, 979 (2d Cir.1988) ("*GAC Int'l, Inc.*").

A. Likelihood of Success on the Merits

1. Television Commercials

Section 43(a) of the Lanham Act provides, in pertinent part that:

Any person who, on or in connection with any goods or services ... uses in commerce ... any ... false or misleading description of fact, or false or misleading representation of fact, which-

....

(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 or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

[4][5] Two different theories of recovery are available to a plaintiff who brings a false advertising action under § 43(a) of the Lanham Act. First, the plaintiff can demonstrate that the challenged advertisement is literally false, *i.e.*, false on its face. *See GAC Int'l, Inc.*, 862 F.2d at 977. When an advertisement is shown to be literally or facially false, consumer deception is presumed, and "the court may grant relief without reference to the advertisement's [actual] impact on the buying public." *Coca-Cola Co.*, 690 F.2d at 317. "This is because plaintiffs alleging a literal falsehood are claiming that a statement, on its face, conflicts with reality, a claim that is best supported by comparing the statement itself with the reality it purports to describe." *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 229 (2d Cir.1999).

[6][7][8][9] Alternatively, a plaintiff can show that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers. *See Coca-Cola Co.*, 690 F.2d at 317. "[P]laintiffs alleging an implied falsehood are claiming that a statement, whatever its literal truth, has left an impression on the listener [or viewer] that conflicts with reality"-a claim that "invites a comparison of the impression, rather than the statement, with the truth." *Schering Corp.*, 189 F.3d at 229. Therefore, whereas "plaintiffs seeking to establish a literal falsehood must generally show the substance of what is conveyed, ... a district court *must* rely on extrinsic evidence [of consumer deception or confusion] to support a finding of an implicitly false message." *Id.* (internal quotation marks omitted).FN3

> FN3. Under either theory, the plaintiff must also demonstrate that the false or misleading representation involved an inherent or material quality of the product. *See S.C. Johnson & Son, Inc.*, 241 F.3d at 238; *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir.1997). TWC has met this requirement, as it is undisputed that picture quality is an inherent and material characteristic of multichannel video service.

***154** Here, TWC chose to pursue only the first path of literal falsity, and the District Court granted the preliminary injunction against the television commercials on that basis. In this appeal, DIRECTV does not dispute that it would be a misrepresentation to claim that the picture quality of DIRECTV HD is superior to that of cable HD. Rather, it argues that neither commercial explicitly makes such a claim and therefore cannot be literally false.

a. Revised Simpson Commercial

[10] DIRECTV's argument is easily dismissed with respect to the Revised Simpson Commercial. In the critical lines, Simpson tells audiences, "You're just not gonna get the best picture out of some fancy big screen TV without DIRECTV. It's broadcast in 1080i." These statements make the explicit assertion that it is impossible to obtain "the best picture"-*i.e.*, a "1080i"-resolution picture-from any source other than DIRECTV. This claim is flatly untrue; the uncontroverted factual record establishes that viewers can, in fact, get the same "best picture" by ordering HD programming from their cable service provider. We therefore affirm the District Court's determination that the Revised Simpson Commercial's contention "that a viewer cannot 'get the best picture' without DIRECTV is ... likely to be proven literally false." *Time Warner Cable, Inc.*, 475 F.Supp.2d at 306.

b. Revised Shatner Commercial

The issue of whether the Revised Shatner Commercial is likely to be proven literally false requires more analysis. When interpreting the controversial statement, "With what Starfleet just ponied up for this big screen TV, settling for cable would be illogical," the District Court looked not only at that particular text, but also at the surrounding context. In light of Shatner's opening comment extolling the "amazing picture quality of [ ] DIRECTV HD" and the announcer's closing remark highlighting the unbeatable "HD picture" provided by DIRECTV, the District Court found that the line in the middle-"settling for cable would be illogical"-clearly referred to cable's HD picture quality. Since it would only be "illogical" to "settle" for cable's HD picture if it was materially inferior to DIRECTV's HD picture, the District Court concluded that TWC was likely to establish that the statement was literally false.

DIRECTV argues that the District Court's ruling was clearly erroneous because the actual statement at issue, "settling for cable would be illogical," does not explicitly compare the picture quality of DIRECTV *HD* with that of cable *HD*, and indeed, does not mention *HD* at all. In DIRECTV's view, the District Court based its determination of literal falsity not on the words actually used, but on what it subjectively perceived to be the general message conveyed by the commercial as a whole. DIRECTV contends that this was plainly improper under this Court's decision in *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir.1978).

TWC, on the other hand, maintains that the District Court properly took context into account in interpreting the commercial, as directed by this Court in *Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381 (2d Cir.1986). TWC argues that under *Avis Rent A Car*, an advertisement can be literally false even though no "combination of words between two punctuation ***155** signals" is untrue, if the clear meaning of the statement, considered in context, is false. Given the commercial's repeated references to "HD picture," TWC contends that the District Court correctly found that "settling for cable would be illogical" literally made the false claim that cable's HD picture quality is inferior to DIRECTV's.

To appreciate the parties' dispute, it is necessary to understand the two key cases, *American Home Products* and *Avis Rent A Car*.The *American Home Products* case involved a false advertising claim asserted by McNeil Laboratories, Inc., the manufacturer of Tylenol, against American Home Products Corporation, the manufacturer of the competing drug Anacin. One of the challenged advertisements was a television commercial, in which a spokesman told consumers:

Your body knows the difference between these pain relievers [showing other products] and Adult

Strength Anacin. For pain other than headache Anacin reduces the inflammation that often comes with pain. These do not. Specifically, inflammation of tooth extraction[,] muscle strain[,] backache [,] or if your doctor diagnoses tendonitis [,] neuritis. Anacin reduces that inflammation as Anacin relieves pain fast. These do not. Take Adult Strength Anacin.

Am. Home Prods., 577 F.2d at 163 n. 3 (notations of special effects omitted). Another advertisement, which appeared in national magazines, advised readers:
Anacin can reduce inflammation that comes with most pain. Tylenol cannot.

With any of these pains, your body knows the difference between the pain reliever in Adult-Strength Anacin and other pain relievers like Tylenol. Anacin can reduce the inflammation that often comes with these pains.

Tylenol cannot. Even Extra-Strength Tylenol cannot. And Anacin relieves pain fast as it reduces inflammation.

Id. at 163 n. 4. The print advertisement visually depicted the aforementioned "pains" as spots located on a human body, correlating to tooth extraction, muscle strain, muscular backache, tendonitis, neuritis, sinusitis, and sprains. *Id.*

To ascertain the meaning of these advertisements, the district court turned to consumer reaction surveys. *See id.* at 163. Based on these surveys, it found that: (1) the television commercial represented that Anacin is a superior pain reliever generally, and not only with reference to the particular conditions enumerated in the commercial or to Anacin's alleged ability to reduce inflammation; (2) the print advertisement claimed that Anacin is a superior analgesic for certain kinds of pain because Anacin can reduce inflammation; and (3) both advertisements represented that Anacin reduces inflammation associated with the conditions specified in the ads. *Id.* at 163-64. The district court determined that the first two claims were factually false. *Id.* at 164. Although the district court did not definitively decide the veracity of the third claim, it reasoned that "because the three claims [were] 'integral and inseparable,' the advertisements as a whole" violated the Lanham Act. *Id.* (internal quotations and citation omitted).

American Home Products appealed, arguing that since the advertisements did not contain an *express* claim for greater analgesia, they could not violate § 43(a), even if consumers mistakenly perceived a different and incorrect meaning. *See id.* This Court disagreed. It first observed that "[§] 43(a) of the Lanham Act encompasses more than literal falsehoods"; implied falsehoods are also prohibited. *Id.* at 165. The Court emphasized, however, that when an advertisement relies on "clever ***156** use of innuendo, indirect intimations, and ambiguous suggestions," instead of literally false statements, the truth or falsity of the ad "usually should be tested by the reactions of the public." *Id.* It provided district courts with the following guidance for analyzing a claim of implied falsity:

A court may, of course, construe and parse the language of the advertisement. It may have personal reactions as to the defensibility or indefensibility of the deliberately manipulated words. It may conclude that the language is far from candid and would never pass muster under tests otherwise applied-for example, the Securities Acts' injunction that "thou shalt disclose"; but the court's reaction is at best not determinative and at worst irrelevant. *The question in such cases is-what does the person to whom the advertisement is addressed find to be the message*?

Id. at 165-66 (quoting *Am. Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F.Supp. 1352, 1357 (S.D.N.Y.1976)).

Applying these principles to the facts of the case, the *American Home Products* Court determined that "the district court's use of consumer response data was proper" because "the claims of both the television commercial and the print advertisement [were] ambiguous." *Id.* at 166. "This obscurity," the Court explained, "[wa]s produced by several references to 'pain' and body sensation accompanying the assertions that Anacin reduces inflammation." *Id.* Therefore, "[a] reader of or listener to these advertisements could reasonably infer that Anacin is superior to Tylenol in reducing pain generally (Claim One) and in reducing certain kinds of pain (Claim Two)." *Id.*"Given this rather obvious ambiguity," the Court concluded that the district judge "was warranted in examining, and may have been compelled to examine, consumer data to determine first the messages conveyed in order to determine ultimately the truth or falsity of the messages." *Id.* (footnote omitted).

American Home Products dealt with a claim of implied falsity. *See id.* at 165 ("We are dealing not with statements which are literally or grammatically untrue.... Rather, we are asked to determine whether a statement acknowledged to be *literally true and grammatically correct nevertheless has a tendency to mislead, confuse or deceive*."(quoting *Am. Brands, Inc.*, 413 F.Supp. at 1357)). In *Avis Rent A Car*, the false advertising action was premised on a theory of literal, not implied, falsity. In the facts of that case, Avis Rent A Car System, Inc., the self-proclaimed "Number 2" in the car rental business, sued "Number 1" Hertz Corporation over an advertisement that proclaimed, in large bold print, that "**Hertz has more new cars than Avis has cars.**" *Avis Rent A Car*, 782 F.2d at 381-82. Below a picture of mechanics unloading new cars into an airport parking lot, the advertisement went on to explain: "If you'd like to drive some of the newest cars on the road, rent from Hertz. Because we have more new 1984 cars than Avis or anyone else has cars-new or old.... Whether you're renting for business or pleasure, chances are you'll find a domestic or imported car you'll want to drive." *Id.* at 382. At the bottom of the ad was Hertz's slogan, "***The # 1 way to rent a car.*"** *Id.*

At the time the advertisement was published, Hertz only had about 97,000 1984 model cars, whereas Avis had a total of approximately 102,000 cars. *See id.* at 383. However, 6776 cars in Avis's fleet were in the process of being sold and were no longer available for rental. *Id.* at 384. Thus, the literal truth or falsity of the claim that "Hertz has more new cars than Avis has cars" turned on whether the ***157** statement "referred to the rental fleets or the total fleets of the two companies." *Id.* at 383. The district court found that because the advertisement said "cars," and not "cars for rent," it had to be read as referring to the companies' total fleets and, as such, was literally false. *See id.* at 384.

This Court held that the district court's finding was clearly erroneous. It pointed out that the parties had "made their reputations as companies that *rent* cars, not companies that sell or merely own cars," and that the advertisement had appeared "in publications that would come to the attention of prospective renters, not car buyers or financial analysts." *Id.* at 385. Moreover, the advertisement featured a large picture of an airport rental lot and made three specific references to rentals. *See id.* Taking this context into consideration, the Court concluded that the claim that "Hertz has more new cars than Avis has new cars" could only be understood as referring to the companies' rental fleets. The Court elaborated:

Fundamental to any task of interpretation is the principle that text must yield to context. Recognizing this, the Supreme Court long ago inveighed against "the tyranny of literalness." In his determination to "go by the written word" and to ignore the context in which the words were used, the district judge in the present case failed to heed the familiar warning of Judge Learned Hand that "[t]here is no surer way to misread any document than to read it literally," as well as his oft-cited admonition that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."

These and similar invocations against literalness,

though delivered most often in connection with statutory and contract interpretation, are relevant to the interpretation of any writing, including advertisements. Thus, we have emphasized that in reviewing FTC actions prohibiting unfair advertising practices under the Federal Trade Commission Act a court must "consider the advertisement in its entirety and not ... engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately." ...Similar approaches have been taken in Lanham Act cases involving the claim that an advertisement was false on its face.

Id. at 385 (citations omitted).

At first glance, *American Home Products* and *Avis Rent A Car* may appear to conflict. *American Home Products* counsels that when an advertisement is not false on its face, but instead relies on indirect intimations, district courts should look to consumer reaction to determine meaning, and not rest on their subjective impressions of the advertisement as a whole. *Avis Rent A Car,* on the other hand, instructs district courts to consider the overall context of an advertisement to discern its true meaning, and holds that the message conveyed by an advertisement may be viewed as not false in the context of the business at issue, even though the written words are not literally accurate.

On closer reading, however, the two cases can be reconciled. In *American Home Products,* we did not say that context is irrelevant or that courts are myopically bound to the explicit words of an advertisement. Rather, we held that where it is "clear that ... the language of the advertisement[ ] is not unambiguous," the district court should look to consumer response data to resolve the ambiguity. *Am. Home Prods.,* 577 F.2d at 164. In *Avis Rent A Car,* we concluded that there was no ambiguity to resolve because even ***158** though the statement, "Hertz has more new cars than Avis has cars," did not expressly qualify the comparison, given the surrounding context, it "unmistakably" referred to the companies' rental fleets. *Avis Rent A Car,* 782 F.2d at 384.

[11][12][13][14] These two cases, read together, compel us to now formally adopt what is known in other circuits as the "false by necessary implication" doctrine. *See, e.g., Scotts Co. v. United Indus. Corp.,* 315 F.3d 264, 274 (4th Cir.2002); *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.,* 228 F.3d 24, 34-35 (1st Cir.2000); *Southland Sod Farms v. Stover Seed Co.,* 108 F.3d 1134, 1139 (9th Cir.1997); *Castrol Inc. v. Pennzoil Co.,* 987 F.2d 939, 946-47 (3d Cir.1993) ("*Pennzoil Co.*").FN4 Under this doctrine, a district court evaluating whether an advertisement is literally false "must analyze the message conveyed in full context,"*Pennzoil Co.,* 987 F.2d at 946,*i.e.,* it "must consider the advertisement in its entirety and not ... engage in disputatious dissection,"*Avis Rent A Car,* 782 F.2d at 385 (internal quotation marks omitted). If the words or images, considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required. *See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Pharm. Co.,* 290 F.3d 578, 586-87 (3d Cir.2002) ("A 'literally false' message may be either explicit or 'conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated.' " (quoting *Clorox Co. Puerto Rico,* 228 F.3d at 35)). However, "only an *unambiguous* message can be literally false." *Id.* at 587. Therefore, if the language or graphic is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false. *See Scotts Co.,* 315 F.3d at 275 (stating that a literal falsity argument fails if the statement or image "can reasonably be understood as conveying different messages"); *Clorox Co. Puerto Rico,* 228 F.3d at 35 ("[A] factfinder might conclude that the message conveyed by a particular advertisement remains so balanced between several plausible meanings that the claim made by the advertisement is too uncertain to serve as the basis of a literal falsity claim...."). There may still be a "basis for a claim that the advertisement is misleading,"*Clorox Co. Puerto Rico,* 228 F.3d at 35, but to resolve such a

claim, the district court must look to consumer data to determine what "the person to whom the advertisement is addressed find[s] to be the message,"*Am. Home Prods.,* 577 F.2d at 166 (citation omitted). In short, where the advertisement does not unambiguously make a claim, "the court's reaction is at best not determinative and at worst irrelevant." *Id.*

FN4. Several district courts in this Circuit have already embraced the doctrine. *See, e.g., Johnson & Johnson-Merck Consumer Pharm. Co. v. Procter & Gamble Co.,* 285 F.Supp.2d 389, 391 (S.D.N.Y.2003), *aff'd,*90 Fed.Appx. 8 (2d Cir.2003); *Tambrands, Inc. v. Warner-Lambert Co.,* 673 F.Supp. 1190, 1193-94 (S.D.N.Y.1987).

[15] Here, the District Court found that Shatner's assertion that "settling for cable would be illogical," considered in light of the advertisement as a whole, unambiguously made the false claim that cable's HD picture quality is inferior to that of DIRECTV's. We cannot say that this finding was clearly erroneous, especially given that in the immediately preceding line, Shatner praises the "amazing picture clarity of DIRECTV HD." We accordingly affirm the District Court's conclusion that TWC established a likelihood of success on its claim that the Revised Shatner Commercial is literally false.

159** ***2. Internet Advertisements

[16] We have made clear that a district court must examine not only the words, but also the "visual images ... to assess whether [the advertisement] is literally false." *S.C. Johnson & Son, Inc.,* 241 F.3d at 238. It is uncontroverted that the images used in the Internet Advertisements to represent cable are inaccurate depictions of the picture quality provided by cable's digital or analog service. The Internet Advertisements are therefore explicitly and literally false. *See Coca-Cola Co.,* 690 F.2d at 318 (reversing the district court's finding of no literal falsity in an orange juice commercial where "[t]he visual component of the ad makes an explicit representation that Premium Pack is produced by squeezing oranges and pouring the freshly-squeezed juice directly into the carton. This is not a true representation of how the product is prepared. Premium Pack juice is heated and sometimes frozen prior to packaging.").

DIRECTV does not contest this point. Rather, it asserts that the images are so grossly distorted and exaggerated that no reasonable buyer would take them to be accurate depictions "of how a consumer's television picture would look when connected to cable." Consequently, DIRECTV argues, the images are obviously just puffery, which cannot form the basis of a Lanham Act violation. Notably, TWC agrees that no Lanham Act action would lie against an advertisement that was so exaggerated that no reasonable consumer would rely on it in making his or her purchasing decisions. TWC contends, however, that DIRECTV's own evidence-which indicates that consumers are highly confused about HD technology-shows that the Internet Advertisements pose a real danger of consumer reliance.

This Court has had little occasion to explore the concept of puffery in the false advertising context. In *Lipton v. Nature Co.,* 71 F.3d 464 (2d Cir.1995), the one case where we discussed the subject in some depth, we characterized puffery as "[s]ubjective claims about products, which cannot be proven either true or false." *Id.* at 474 (internal quotation marks omitted). We also cited to the Third Circuit's description of puffery in *Pennzoil Co.:* "Puffery is an exaggeration or overstatement expressed in broad, vague, and commendatory language. 'Such sales talk, or puffing, as it is commonly called, is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer.... The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific.' " *Pennzoil Co.,* 987 F.2d at 945 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of*

Torts § 109, at 756-57 (5th ed.1984)). Applying this definition, we concluded that the defendant's contention that he had conducted "thorough" research was just puffery, which was not actionable under the Lanham Act. *See Lipton,* 71 F.3d at 474.

[17] *Lipton*'s and *Pennzoil Co.*'s definition of puffery does not translate well into the world of images. Unlike words, images cannot be vague or broad. *Cf. Pennzoil Co.,* 987 F.2d at 945. To the contrary, visual depictions of a product are generally "specific and measurable," *id.* at 946, and can therefore "be proven either true or false,"*Lipton,* 71 F.3d at 474 (internal quotation marks omitted), as this case demonstrates. Yet, if a visual representation is so grossly exaggerated that no reasonable buyer would take it at face value, there is no danger of consumer deception and hence, no basis for a false advertising claim. *Cf. Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.,* 960 F.2d 294, 298 (2d Cir.1992) ("[T]he injuries redressed in false advertising***160** cases are the result of public deception. Thus, where the plaintiff cannot demonstrate that a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement, the plaintiff cannot establish that it suffered any injury as a result of the advertisement's message. Without injury there can be no claim, regardless of commercial context, prior advertising history, or audience sophistication."); *see also U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia,* 898 F.2d 914, 922 (3d Cir.1990) ("Mere puffery, advertising that is not deceptive for no one would rely on its exaggerated claims, is not actionable under § 43(a)." (internal quotation marks omitted)).

[18][19] Other circuits have recognized that puffery can come in at least two different forms. *See, e.g., Pizza Hut, Inc. v. Papa John's Int'l, Inc.,* 227 F.3d 489, 497 (5th Cir.2000). The first form we identified in *Lipton*-"a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion." *Id.; see Lipton,* 71 F.3d at 474. The second form of puffery, which we did not address in *Lipton,* is "an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying." *Pizza Hut, Inc.,* 227 F.3d at 497; *accord United Indus. Corp. v. Clorox Co.,* 140 F.3d 1175, 1180 (8th Cir.1998) ("Puffery is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under § 43(a)." (internal quotation marks omitted)). We believe that this second conception of puffery is a better fit where, as here, the "statement" at issue is expressed not in words, but through images.

The District Court determined that the Internet Advertisements did not satisfy this alternative definition of puffery because DIRECTV's own evidence showed that "many HDTV equipment purchasers are confused as to what image quality to expect when viewing non-HD broadcasts, as their prior experience with the equipment is often limited to viewing HD broadcasts or other digital images on floor model televisions at large retail chains." *Time Warner Cable, Inc.,* 475 F.Supp.2d at 307. Given this confusion, the District Court reasoned that "consumers unfamiliar with HD equipment could be led to believe that using an HD television set with an analog cable feed might result in the sort of distorted images showcased in DIRECTV's Internet Advertisements, especially since those advertisements make reference to 'basic cable.' " *Id.*

Our review of the record persuades us that the District Court clearly erred in rejecting DIRECTV's puffery defense. The "OTHER TV" images in the Internet Advertisements are-to borrow the words of Ronald Boyer, TWC's Senior Network Engineer-"unwatchably blurry, distorted, and pixelated, and ... nothing like the images a customer would ordinarily see using Time Warner Cable's cable service." Boyer further explained that

the types of gross distortions shown in DIRECTV's Website Demonstrative and Banner Ads are not the type of disruptions that could naturally happen to

an analog or non-HD digital cable picture. These advertisements depict the picture quality of cable television as a series of large colored square blocks, laid out in a grid like graph paper, which nearly entirely obscure the image. This is not the type of wavy or "snowy" picture that might occur from degradation of an unconverted analog cable picture, or the type of macro-blocking or "pixelization" that might occur from degradation of a digital cable picture. Rather, the patchwork***161** of colored blocks that DIRECTV depicts in its advertisement appears to be the type of distortion that would result if someone took a low-resolution photograph and enlarged it too much or zoomed in too close. If DIRECTV intended the advertisement to depict a pixelization problem, this is a gross exaggeration of one.

As Boyer's declaration establishes, the Internet Advertisements' depictions of cable are not just inaccurate; they are not even remotely realistic. It is difficult to imagine that any consumer, whatever the level of sophistication, would actually be fooled by the Internet Advertisements into thinking that cable's picture quality is so poor that the image is "nearly entirely obscure [d]." As DIRECTV states in its brief, "even a person not acquainted with cable would realize TWC could not realistically supply an unwatchably blurry image and survive in the marketplace."

In reaching the contrary conclusion, the District Court relied heavily on the declaration of Jon Gieselman, DIRECTV's Senior Vice-President of Advertising and Public Relations. However, Gieselman merely stated that the common misconception amongst first-time purchasers of HD televisions is that "they will automatically get exceptional clarity on every channel" just by plugging their new television sets into the wall. Nothing in Gieselman's declaration indicates that consumers mistakenly believe that hooking up their HD televisions to an analog cable feed will produce an unwatchably distorted picture. More importantly, the Internet Advertisements do not claim that the "OTHER TV" is an HD television set, or that the corresponding images represent what happens when an HD television is connected to basic cable. The Internet Advertisements simply purport to compare the picture quality of DIRECTV's programming to that of basic cable programming, and as discussed above, the comparison is so obviously hyperbolic that "no reasonable buyer would be justified in relying" on it in navigating the marketplace. *Pizza Hut, Inc.,* 227 F.3d at 497.

For these reasons, we conclude that the District Court exceeded its permissible discretion in preliminarily enjoining DIRECTV from disseminating the Internet Advertisements.

B. Irreparable Harm

[20][21][22] A plaintiff seeking a preliminary injunction under the Lanham Act must persuade a court not only that it is likely to succeed on the merits, but also that it is likely to suffer irreparable harm in the absence of immediate relief. *See Coca-Cola Co.,* 690 F.2d at 316.Because "[i]t is virtually impossible to prove that so much of one's sales will be lost or that one's goodwill will be damaged as a direct result of a competitor's advertisement," we have resolved that a plaintiff "need not ... point to an actual loss or diversion of sales" to satisfy this requirement. *Id.* At the same time, "something more than a plaintiff's mere subjective belief that [it] is injured or likely to be damaged is required before [it] will be entitled even to injunctive relief." *Johnson & Johnson v. Carter-Wallace, Inc.,* 631 F.2d 186, 189 (2d Cir.1980). The rule in this Circuit, therefore, is that a plaintiff "must submit proof which provides a reasonable basis" for believing that the false advertising will likely cause it injury. *Coca-Cola Co.,* 690 F.2d at 316.

[23][24][25] In general, "[t]he likelihood of injury and causation will not be presumed, but must be demonstrated in some manner." *Id.* We have held, however, that these elements may be presumed "where [the] plaintiff demonstrates a likelihood of success in showing literally false [the]

***162** comparative advertisement which mentions [the] plaintiff's product by name." *Castrol, Inc.*, 977 F.2d at 62. We explained the reason for the presumption in *McNeilab, Inc. v. American Home Products Corp.*, 848 F.2d 34 (2d Cir.1988). There, we observed that in the case of a "misleading, non-comparative commercial[ ] which tout[s] the benefits of the product advertised but ma[kes] no direct reference to any competitor's product," the injury "accrues equally to all competitors; none is more likely to suffer from the offending broadcasts than any other." *Id.* at 38. Thus, "some indication of actual injury and causation" is necessary "to satisfy Lanham Act standing requirements and to ensure [the] plaintiff's injury [is] not speculative." *Id.* By contrast, where the case presents a false comparative advertising claim, "the concerns ... regarding speculative injury do not arise." *Id.* This is because a false "comparison to a specific competing product necessarily diminishes that product's value in the minds of the consumer." *Id.* Accordingly, no proof of likely injury is necessary.

[26] Although neither of the television commercials identifies TWC by name, the rationale for a presumption of irreparable harm applies with equal force to this case. The Revised Shatner Commercial explicitly disparages the picture quality of "cable." As the District Court found, TWC *is* "cable" in the areas where it is the franchisee. *Time Warner Cable, Inc.*, 475 F.Supp.2d at 308. Thus, even though Shatner does not identify TWC by name, consumers in the markets covered by the preliminary injunction would undoubtedly understand his derogatory statement, "settling for cable would be illogical," as referring to TWC. Because the Revised Shatner Commercial "necessarily diminishes" TWC's value "in the minds of the consumer," the District Court properly accorded TWC a presumption of irreparable harm. *McNeilab, Inc.*, 848 F.2d at 38.

The Revised Simpson Commercial, unlike the original version pulled in December 2006, does not explicitly refer to "cable." However, the fact that the commercial does not name plaintiff's product is not necessarily dispositive. As we said in *Ortho Pharmaceutical Corp. v. Cosprophar, Inc.*, 32 F.3d 690 (2d Cir.1994), the application of the presumption is disfavored "where the products are not obviously in competition *or* where the defendant's advertisements make no direct reference to any competitor's products." *Id.* at 696 (emphasis added); *see also Hutchinson v. Pfeil*, 211 F.3d 515, 522 (10th Cir.2000) ("[T]he presumption [of irreparable injury] is properly limited to circumstances in which injury would indeed likely flow from the defendant's objectionable statements, i.e., when the defendant has explicitly compared its product to the plaintiff's or the plaintiff is an obvious competitor with respect to the misrepresented product."(citing *Ortho Pharm. Corp.*, 32 F.3d at 694)). According to a survey in the record, approximately 90% of households have either cable or satellite service. Given the nearly binary structure of the television services market, it would be obvious to consumers that DIRECTV's claims of superiority are aimed at diminishing the value of cable-which, as discussed above, is synonymous with TWC in the areas covered by the preliminary injunction. Therefore, although the Revised Simpson Commercial does not explicitly mention TWC or cable, it "necessarily diminishes" the value of TWC's product. *McNeilab, Inc.*, 848 F.2d at 38. The District Court thus did not err in presuming that TWC has "a reasonable basis" for believing that the advertisement will likely cause ***163** it injury. *Coca-Cola Co.*, 690 F.2d at 316.[FN5]

FN5. Because we conclude that irreparable injury was properly presumed, we need not address the District Court's alternative rationale that DIRECTV's breach of the stipulation supports a finding of irreparable injury.

In sum, we conclude that the District Court did not exceed its allowable discretion in preliminarily enjoining the further dissemination of the Revised Simpson and Revised Shatner Commercials in any

market where TWC is the franchisee. The District Court's order also forbids the dissemination of "any other advertisement disparaging the video or audio quality of TWC or cable high-definition ('HDTV') programming as compared to that of DIRECTV or satellite HDTV programming." As worded, this statement could be construed to prohibit the unfavorable comparison of even TWC's analog programming. To eliminate any ambiguity, we instruct the District Court to change the phrase "TWC or cable" to "TWC's or cable's," and the phrase "DIRECTV or satellite" to "DIRECTV's or satellite's."

CONCLUSION

For the foregoing reasons, we AFFIRM the preliminary injunction in part, VACATE it in part, and REMAND for further proceedings consistent with this opinion.

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