

Recent Developments in Advertising Law: Trends and Key Decisions

Accompanying Materials

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March 26, 2025

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Apple's PFAS Consumer Fraud Lawsuit the Latest in Growing Trend

Article By:

John Gardella

Directly on the heels of [our article](#) this week regarding the latest PFAS consumer fraud lawsuit (this time, against Samsung for its smart watches), Apple finds itself in a similar lawsuit over its smartwatches. The number of product types targeted for these lawsuits are growing and diverse in terms of the industries targeted. While there has been at least one significant settlement in these lawsuits to date, recently a few of the lawsuits that we [previously reported](#) on related to PFAS consumer fraud allegations were dismissed by separate courts.

However, this has not deterred plaintiffs from filing these types of cases, and in fact there are other lawsuits that successfully defeated Motions to Dismiss. The latest PFAS consumer fraud lawsuit targets Apple and shows that the number of consumer fraud lawsuits is likely to continue, and consumer goods industries, insurers, and investment companies interested in the consumer goods vertical must pay careful attention to these lawsuits.

PFAS Consumer Fraud Lawsuit – Overview

The consumer fraud PFAS lawsuits filed to date follow a very similar pattern: various plaintiffs bringing suit on behalf of a proposed class allege that companies market consumer goods as safe, healthy, environmentally friendly, etc., or that the companies themselves market their corporate practices as such, yet it is allegedly discovered that certain products marketed with these buzzwords contain PFAS. The lawsuits allege that since certain PFAS may be harmful to human health and PFAS are biopersistent (and therefore environmentally unfriendly), the companies making the good engaged in fraud against consumers to entice them to purchase the products in question.

In the Complaints, plaintiffs typically allege the following counts:

- Violation of state consumer protection laws and the federal Magnuson-Moss Warranty Act
- Violations of various state consumer protection laws
- Breach of warranty
- Fraud
- Constructive fraud
- Unjust enrichment

The plaintiffs seek certification of nationwide class action lawsuits, with a subclass defined as consumers in the state in which the lawsuits are filed. In addition, the lawsuits seeks damages, fees, costs, and a jury trial. Representative industries and cases that have recently been filed include:

- Cosmetics industry:
 - *Brown v. Cover Girl*, New York (April 1, 2022)
 - *Anderson v. Almay*, New York (April 1, 2022)
 - *Rebecca Vega v. L’Oreal*, New Jersey (April 8, 2022)
 - *Spindel v. Burt’s Bees*, California (March 25, 2022)
 - *Hicks and Vargas v. L’Oreal*, New York (March 9, 2022)
 - *Davenport v. L’Oreal*, California (February 22, 2022)
- Food packaging industry:
 - *Richburg v. Conagra Brands*, Illinois (May 6, 2022)
 - *Ruiz v. Conagra Brands*, Illinois (May 6, 2022)
 - *Hamman v. Cava Group*, California (April 27, 2022)
 - *Azman Hussain v. Burger King*, California (April 11, 2022)
 - *Little v. NatureStar*, California (April 8, 2022)
 - *Larry Clark v. McDonald’s*, Illinois (March 28, 2022)
- Food and drink products:
 - *Bedson v. Biosteel*, New York (January 27, 2023)
 - *Lorenz v. Coca-Cola*, New York (December 28, 2022)
 - *Toribio v. Kraft Heinz*, Illinois (November 29, 2022)
- Apparel products:
 - *Krakauer v. REI*, Washington (October 28, 2022)
- Hygiene products:
 - *Esquibel v. Colgate-Palmolive Co.*, New York (January 27, 2023)
 - *Dalewitz v. Proctor & Gamble*, New York (August 26, 2022)
- Feminine hygiene products:
 - *Gemma Rivera v. Knix Wear Inc.*, California (April 4, 2022)
 - *Blenis v. Thinx, Inc.*, Massachusetts (June 18, 2021)
 - *Destini Canan v. Thinx Inc.*, California (November 12, 2020)

Latest PFAS Consumer Fraud Lawsuit

In [Dominique Cavalier and Kiley Krzyzek v. Apple Inc.](#), the plaintiffs alleges that they purchased various Apple smart watches designed to encourage and support personal fitness goals of consumers. The products, plaintiffs argue, were marketed as promoting human health, environmentally sustainable, and suitable for everyday use and wear. Upon testing, the watches were found to have various types of PFAS. Plaintiffs allege that they were therefore deceived by Apple, and never would have purchased the product if they knew that they contained PFAS. Plaintiffs seeks a class certification of all purchasers of the products in question for the time period in question, with a subclass of all purchasers of the products from California.

Recent Rulings In Consumer Fraud PFAS Lawsuits

In California, the *Yeraldinne Solis v. CoverGirl Cosmetics et al.* case made allegations that cosmetics were marketed as safe and sustainable, yet were found to contain PFAS. The defendants in the lawsuit filed a Motion to Dismiss, arguing in relevant part that the plaintiff had no standing to file the lawsuit because she did not sufficiently allege that she suffered any economic harm from purchasing the product. The plaintiff put forth two theories to counter this argument: (1) the “benefit of the

bargain” theory, under which the plaintiff alleged that she bargained for a product that was “safe”, but received the opposite. The court dismissed this argument because the product packaging did not market the product as safe, and the ingredient list explicitly named the type of PFAS found in testing; and (2) an overpayment theory, under which plaintiff alleged that if she knew the product contained PFAS, she would not have paid as much for it as she did. The Court dismissed this argument because the product packaging specifically listed the type of PFAS at issue in the case.

In Illinois, the *Richburg v. Conagra Brands, Inc.* alleged that popcorn packaging was marketed as containing “only real ingredients” and ingredients from “natural sources”, yet the popcorn contained PFAS (likely from the packaging itself), which was allegedly false and misleading to consumers. The defendant moved to dismiss the lawsuit on several grounds and the Court found in defendant’s favor on one important ground. The Court held that the statements on the popcorn packaging would not mislead an ordinary and reasonable consumer because a consumer would understand “ingredients” to mean those items that are required to be disclosed by the [FDA](#) and not materials that may have migrated to the food from the product packaging. In fact, the Court ruled that the FDA “exempts substances migrating to food from equipment or packaging;” and those “do not need to be included in the ingredients list.” The defendant argued that reasonable consumers would not consider PFAS to be an “ingredient” under this regime. In other words, whether or not PFAS migrated into the popcorn, the representations that the popcorn contained “only real ingredients” and “100% ingredients from natural sources” were “correct as a matter of law.” The court dismissed plaintiffs claims on this basis.

Conclusion

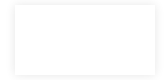
Several major companies now find themselves embroiled in litigation focused on PFAS false advertising, consumer protection violations, and deceptive statements made in marketing and ESG reports. The lawsuits may well serve as test cases for plaintiffs’ bar to determine whether similar lawsuits will be successful in any (or all) of the fifty states in this country. Companies must consider the possibility of needing to defend lawsuits involving plaintiffs in numerous states for products that contain PFAS. It should be noted that these lawsuits would only touch on the marketing, advertising, ESG reporting, and consumer protection type of issues. Separate products lawsuits could follow that take direct aim at obtaining damages for personal injury for plaintiffs from consumer products. In addition, environmental pollution lawsuits could seek damage for diminution of property value, cleanup costs, and PFAS filtration systems if drinking water cleanup is required.

While the above rulings are encouraging for companies facing consumer fraud PFAS lawsuits, it is far too early to tell if the trend will continue nationally. As the recent California case shows, plaintiffs continue to file PFAS consumer fraud cases despite the recent dismissals. Different courts apply legal standards differently and these cases are very fact specific, which could lead to differing results. This has been the case in several jurisdictions, where PFAS consumer fraud cases have been permitted to proceed to litigation after initial challenges were made.

It is of the utmost importance that businesses along the whole supply chain in the consumer products industry evaluate their PFAS risk. Public health and environmental groups urge legislators to regulate PFAS at an ever-increasing pace. Similarly, state level EPA enforcement action is increasing at a several-fold rate every year. Now, the first wave of lawsuits take direct aim at the consumer products industry. Companies that did not manufacture PFAS, but merely utilized PFAS in their manufacturing processes, are therefore becoming targets of costly enforcement actions at rates that continue to multiply year over year. Lawsuits are also filed monthly by citizens or municipalities against companies that are increasingly not PFAS chemical manufacturers.

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National & World Affairs



Credit: AP Photo/Gene J. Puskar

Where's the beef?

Lecturer Louis Tompros discusses a recent lawsuit against a fast-food giant and the role class actions play in the U.S. legal system

Sep 13, 2023 By Jeff Neal

Is Burger King selling you a Whopper of a tale? A juicy class action lawsuit filed in March 2023 alleges that the fast-food chain's signature hamburger contains 35% less meat than the company's ads suggest. On August 23, a federal judge in Florida allowed the lawsuit, *Coleman et al v. Burger King Corporation*, to move forward based on the company's in-store marketing and menus. Filled with mouthwatering legal issues, the Burger King case is one of several class action suits filed by the same law firm, including similar cases against Arby's, McDonald's, Taco Bell, and Wendy's, each alleging that the fast-food purveyors falsely represented the size of their meat-based products.

Intellectual property expert Louis Tompros, a lecturer on law at Harvard and a partner at WilmerHale, says that class action false advertising lawsuits often, but not always, play an important role in compensating consumers and preventing companies from committing further harm. In a recent conversation, Tompros discussed the Burger King lawsuit, how class action lawsuits work, and the legal concept of "puffery" in advertising.



Harvard Law Today: At first glance, what is your impression of the case?

Louis Tompros: It's a very interesting case and falls into a general category of false advertising class actions. Sometimes, consumer product class action cases serve an important purpose to keep advertising honest. Other times, the cases are a little bit more opportunistic, and have more to do with going after big pockets. This is an interesting one, because it involves advertising that is on the line between a pretty clear factual statement, and something that's not a factual statement. If what Burger King was doing was falsely stating how many pounds of meat went into each burger, it'd be a straightforward false advertising claim. And you would imagine that Burger King would settle very quickly if the claims were false, or they would fight to the end if, in fact, the claims were true. What makes this interesting is that the claim that Burger King is making in its advertisement is fuzzier as to whether it really is or is not a factual claim. And it's those kinds of cases, where the advertisement is somewhere between a clear factual claim and pure puffery, where you find some of the most interesting cases.

It reminds me of the Red Bull case from roughly 10 years ago. Red Bull had used the slogan "Red Bull gives you wings," and a class action was brought against them, saying that people had been drinking Red Bull for a long time and never got actual wings. Ultimately, Red Bull settled that case for a very significant amount of money. That was interesting, as well, because "Red Bull gives you wings" is one of these factual statements that most people would think is a metaphor, and it was therefore on the line between a clearly provable, relevant, factual statement and one that is not so.

HLT: Now that the judge has restricted this to in-store advertising, could Burger King argue that the plaintiffs had already decided to go to and enter the restaurant, so they were clearly planning to make a purchase before they had a chance to be influenced?

Tompros: The plaintiffs will have to convince a jury that they were standing there in the store, they looked at the picture on the menu, and if the picture on the menu had shown the burger with the size of meat that it actually had, they would not have bought that burger. They don't have to prove that the person would have walked out of the store, only that the person wouldn't have bought that specific burger. Deciding what the truth is will be up to the jury.

“The plaintiffs will have to convince a jury that they were standing there in the store, they looked at the picture on the menu, and

if the picture on the menu had shown the burger with the size of meat that it actually had, they would not have bought that burger.”

HLT: Would it matter if the plaintiffs had purchased the burgers before, and therefore had some foreknowledge of their actual size, regardless of the advertising?

Tompros: There's a variety of different claims in this lawsuit, the two most prominent being false advertising and breach of contract. For the false advertising claim, it may matter if the customers had previously seen the same picture and bought the burgers, because that would tend to show that they were not deceived in a way that affected their purchasing decision. So, if you're telling me that this burger that has a certain amount of meat, and I buy it, I get the burger, and it has a smaller amount of meat, then I go back and I buy it again and again, by the 10th or 12th time, I know that the picture does not look like what I'm going to get. And so, it's wrong for me to say that that picture influenced my purchasing decision.

In the contract case, what the plaintiffs will have to show is that the picture operated as an offer, that the offer was a very specific offer of a burger with a particular amount of meat, and that the customer accepted the offer by ordering and paying for it with that picture in front of them. If I were Burger King, and the same customer who saw the same picture bought the burger 10 different times in the past, I would argue that the contract, as informed by the party's prior performance, did not include this larger amount of meat. So, yes, the fact that somebody bought one of these burgers before having seen the picture and didn't complain about it may affect the outcome. It's not dispositive. It just goes to their credibility when now they come in and say they wouldn't have bought it if they had known that it was going to look like it did.

HLT: The supposed damage in this case for each plaintiff is less than the cost of one burger. Is there a minimum level of damage for which one can file a lawsuit?

Tompros: As a matter of principle, there's no minimum amount that you can sue somebody for. That's why we have things like small claims courts. You are allowed to bring a case for a small amount of money. But as a practical matter, it very often isn't worth it, because the filing fees and the attorney's fees often dwarf the value of the case. Usually, that means that when we're

talking about small amounts per customer, the case will need to involve a large number of people, which is why this case has been brought as a class action. Under the federal Class Action Fairness Act, most class actions must allege a total amount of harm of more than \$5 million across the class. And the plaintiffs in this case did make that allegation. Another requirement is that there must be at least 100 people in the class, which the plaintiffs also allege.

One of the reasons why class actions exist is to address small amounts of harm affecting a large number of people. We want it to be possible to have some legal remedy for those harms. So, we have the class action procedure to allow for that. Just because something is not worth bringing the lawsuit over in an individual case, you don't want to let somebody get away with doing it thousands and thousands, or even millions of times.

“One of the reasons why class actions exist is to address small amounts of harm affecting a large number of people.”

HLT: One of Burger King's arguments is that everyone knows that “[f]ood in advertising is and always has been styled to make it look as appetizing as possible.” Where is the line between making a product as attractive as possible and false advertising?

Tompros: There is a concept in false advertising law known as puffery. Puffery is intended to attract more consumers rather than to intentionally deceive them about a fact. And, generally speaking, puffery is fine. Whereas intentional deception about a fact is false advertising and is improper. Let me give you a couple of examples. For decades, cereal companies have made advertisements where they show milk being poured into their cereal. If you actually pour milk into a bowl of cereal and try to film it, it doesn't look very good because milk is kind of thin and it usually does gross things to the cereal. Those commercials for years have used glue instead of milk because it's thicker and you get a gorgeous picture. Even in the context of fast food, there are photoshoots of burgers in which each sesame seed is very carefully glued on to the bun in a particular configuration to look very appetizing. And there are chemicals that look like water that are placed on the tomatoes to make them look like they've just been washed and are fresh and beautiful. And the cheese is sometimes replaced by icing or putty or something else.

So that kind of puffery has happened all the time. It is well established that it is not generally speaking false advertising, because false advertising has to convey a specific statement of fact. That's why in the Burger King case, the plaintiffs are not alleging that the burger didn't look generally like the photo, and they're not alleging that the burger didn't look as appetizing as the one in the photo. Both of those claims would have been rejected if Burger King had argued that the photos are just puffery. What the plaintiffs instead allege is a much more specific allegation that the ratio of meat and the size of meat to the rest of the burger was misrepresented. What the plaintiffs claim is that the photo was representing a fact about the size of the patty, and that that fact was false. And that's the distinction here that matters.

“Puffery is intended to attract more consumers ... generally speaking, puffery is fine. Whereas intentional deception about a fact is false advertising and is improper.”

HLT: What role do class action lawsuits play in the U.S. legal system?

Tompros: The fundamental purpose of class actions is to allow for the resolution of harms that happen in small amounts to a large number of people. And there have been some class actions that have been hugely important over the years. For example, the auto industry class actions of the 1970s were instrumental in making automobiles safer. And I think there's general consensus that that was a good thing. They gave some financial redress to people who had been harmed. But more importantly, they resulted in the manufacture of safer automobiles and the auto industry taking more seriously things like recalls, because they know that they will be liable across the board for problems.

There have also been some class actions that have, in my view, been of somewhat questionable value. And here I think of, for example, the Red Bull class action from 2014, in which Red Bull did indeed change its advertising and no longer says “Red Bull gives you wings.” It's not clear to me that that provided any real value to society or provided any real value to the consumers that were supposedly deceived. So, class action false advertising lawsuits can have incredibly important impacts on industry, the economy, and consumers. But they can also be a drain. And where you draw the line is the challenge.

HLT: It seems the biggest impact can be changing corporate behavior. What kind of redress do the plaintiffs typically receive?

Tompros: Class actions are often primarily about changing company behavior and creating a disincentive because of the need to pay out money when companies to engage in misleading or unsafe behavior. The named plaintiffs in class actions usually get somewhat better compensation as a result of being the named plaintiffs, as compared to unnamed individual class members. And so there is some advantage to those plaintiffs to being involved. Although many named plaintiffs want to be involved in class actions just to do the right thing and hold the defendant accountable. And, of course, as part of class action settlements or resolutions, there are almost always significant attorney's fees involved. So, there's a real incentive for class action law firms to bring consumer class actions because they are very well compensated, as they clearly should be in the cases that are meritorious and societally beneficial. But that also leaves room for, to put it bluntly, shenanigans, including overly aggressive class action lawsuits that don't have a lot of merit and are driven by the lawyers and their desire for the fees rather than by a real, meritorious effort to hold a company accountable for harmful conduct. There are some class action cases where the lawyers probably were undercompensated for the amount of good that they were able to do based on the impact that the case had. But there are some where the case was really driven by the lawyers' fees and were settled because the defendants would rather get rid of the litigation than spend more on their own attorneys' fees defending against it.

HLT: On that note, do you think it is a coincidence that this lawsuit is being spearheaded by the same firm which is also involved in lawsuits against McDonald's, Taco Bell, Wendy's, and Arby's, all alleging that the amount of meat in their food items is less than pictured in those companies' ads?

Tompros: There are firms that specialize in class actions and they very much do drive the identification of potential class action plaintiffs and the filing of those suits. And they're usually pretty forthright about it and advertise themselves. You may have seen late night TV ads that say, "Were you injured after taking X medication? If so, please call this firm." The firms behind those ads are often looking for named plaintiffs for class action litigation. Usually, the law firms will identify what they perceive as a problem, and then hunt for people who have the receipts to be able to show that they were injured. So, it's not surprising to me that the same firm has brought multiple cases of this nature against multiple different defendants. I'd be surprised if they hadn't, quite honestly, because it takes a lot of expertise and a lot of experience to be able to bring these kinds of class actions.

“Where’s the beef?”

Wendy’s is one of several fast food chains, alongside Burger King, recently targeted by class action lawsuits alleging a difference between the amount of meat on the bun and in the company’s advertisements.

Wendy's - 'Where's the Beef ' Ad (Original - 1984)



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Schmidt did. Finally, Dr. Greenspan’s report says virtually nothing about the other evidence that Ybarra was malingering. As a result, Ybarra’s Prong 1 argument still fails because no valid IQ test has shown significantly subaverage intellectual functioning. Because we find that the Nevada Supreme Court’s Prong 1 determination was reasonable, we do not consider Prongs 2 or 3 and Ybarra’s petition must be denied. *See Apelt*, 878 F.3d at 837 (“To prevail on his *Atkins* claim, [the petitioner] must meet all three prongs of the test for intellectual disability.”).

CONCLUSION

Because the Nevada Supreme Court was not unreasonable in finding that Ybarra had failed to prove he is intellectually disabled by a preponderance of the evidence, the district court’s denial of his federal petition for a writ of habeas corpus was correct.

AFFIRMED.



Sean MCGINITY, Plaintiff-Appellant,

v.

The PROCTER & GAMBLE
COMPANY, Defendant-
Appellee.

No. 22-15080

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 29, 2023
San Francisco, California

Filed June 9, 2023

Background: Consumer brought action against manufacturer of personal care products, asserting claims under California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and Con-

sumers Legal Remedies Act (CLRA), alleging that phrase “Nature Fusion” on front label of shampoo and conditioner products misled consumers into believing the products were made with only natural ingredients. The United States District Court for the Northern District of California, Yvonne Gonzalez Rogers, J., 2021 WL 3886048, granted manufacturer’s motion to dismiss for failure to state a claim. Consumer appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

- (1) manufacturer was not precluded from relying on products’ back label ingredient list to derive meaning of ambiguous phrase on front label;
- (2) ambiguous phrase on front label of products was not misleading when read in conjunction with back label; and
- (3) consumer survey results did not make plausible consumer’s allegation that phrase on front label was misleading.

Affirmed.

Gould, Circuit Judge, joined by Berzon, Circuit Judge, filed concurring opinion.

1. Federal Courts ⇄3587(1), 3667

Court of Appeals reviews de novo a district court’s grant of a motion to dismiss for failure to state a claim, accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party. Fed. R. Civ. P. 12(b)(6).

2. Federal Civil Procedure ⇄1772

On a motion to dismiss for failure to state a claim, determining whether a complaint states a plausible claim for relief is a context-specific task requiring the reviewing court to draw on its judicial experience and common sense. Fed. R. Civ. P. 12(b)(6).

3. Federal Courts ⇨3549

If support exists in the record, a dismissal for failure to state a claim may be affirmed on any proper ground. Fed. R. Civ. P. 12(b)(6).

4. Antitrust and Trade Regulation
⇨136, 163

Claims under California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA) are governed by the reasonable consumer test, under which a plaintiff is required to show that members of the public are likely to be deceived. Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Civ. Code § 1770.

5. Antitrust and Trade Regulation
⇨164

The reasonable consumer standard for claims under California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA) requires more than a mere possibility that the label might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner, rather, the standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled. Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Civ. Code § 1770.

6. Antitrust and Trade Regulation
⇨164

Phrase "Nature Fusion," accompanied by an image of an avocado on a green leaf, on front label of shampoo and conditioner products was ambiguous as to whether products contained only natural ingredients, and thus manufacturer was not precluded from relying on the back label ingredient list to derive the meaning of the phrase, on motion to dismiss, in consumer's action against it for violation of California's Unfair Competition Law (UCL),

False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA); front label did not make any affirmative promise about what proportion of the ingredients were natural and could have meant any number of things about the products bearing some relationship to nature, as illustrated in consumer survey responses interpreting meaning of phrase. Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Civ. Code § 1770; Fed. R. Civ. P. 12(b)(6).

7. Antitrust and Trade Regulation
⇨164

Whether a product's back label ingredients list can ameliorate any tendency of the front label to mislead in violation of California's False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumers Legal Remedies Act (CLRA), depends on whether the back label ingredients list conflicts with or confirms a front label claim. Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Civ. Code § 1770.

8. Antitrust and Trade Regulation
⇨164

If a defendant commits an act of deception on the front label of a product, in violation of California's False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumers Legal Remedies Act (CLRA), then the presence of fine print revealing the truth is insufficient to dispel that deception. Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Civ. Code § 1770.

9. Antitrust and Trade Regulation
⇨164

The front label of a product must be unambiguously deceptive for a defendant to be precluded from insisting that the back label of the product be considered together with the front label to defeat claims for violations of California's False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumers Legal

Remedies Act (CLRA). Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Civ. Code § 1770.

10. Antitrust and Trade Regulation

⇨164

Ambiguous phrase “Nature Fusion,” accompanied by an image of an avocado on a green leaf, on front label of shampoo and conditioner products, was not misleading, when read in conjunction with back label ingredient lists, and thus did not violate California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA); upon seeing the back labels, it would have been clear to a reasonable consumer that avocado oil was the natural ingredient emphasized in manufacturer’s labeling and marketing, and the ingredient list clarified that the rest of the ingredients were artificial and contained both natural and synthetic ingredients. Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Civ. Code § 1770.

11. Antitrust and Trade Regulation

⇨164

Consumer survey results showing that consumers were split on question of whether shampoo and conditioner products, with phrase “Nature Fusion” on front label, contained a mixture of natural and non-natural ingredients, did not make plausible consumer’s allegation that the phrase “Nature Fusion” was misleading, as required to support claims against manufacturer for violation of California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA); survey participants were only shown the front label, and, had the participants had access to the back label, they would have had an immediate answer to their question, as it revealed what ingredients were natural and what ingredients were not. Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Civ. Code § 1770.

Appeal from the United States District Court for the Northern District of California Yvonne Gonzalez Rogers, District Judge, Presiding, D.C. No. 4:20-cv-08164-YGR

George V. Granade (argued), Reese LLP, Los Angeles, California; Michael Reese, Reese LLP, New York, New York; for Plaintiff-Appellant.

Anne M. Voigts (argued), King & Spalding LLP, Palo Alto, California; George R. Morris, King & Spalding LLP, San Francisco, California; John P. Hooper, King & Spalding LLP, New York, New York; for Defendant-Appellee.

Before: Ronald M. Gould, Marsha S. Berzon, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Gould;

Concurrence by Judge Gould

OPINION

GOULD, Circuit Judge:

Plaintiff-Appellant Sean McGinity sued Defendant-Appellee The Procter & Gamble Company (“P&G”), alleging that P&G violated California consumer protection laws by labeling some of its products with the words “Nature Fusion” in bold, capitalized text, with an image of an avocado on a green leaf. After the district court dismissed McGinity’s second amended complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), McGinity appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The products

In June 2019, Sean McGinity purchased “Pantene Pro-V Nature Fusion” shampoo

and conditioner at a Safeway grocery store in Santa Rosa, California. The shampoo and conditioner are products manufactured, marketed, sold, and labeled by P&G. The products' front labels display the words "Nature Fusion" in bold, capitalized letters, an image of an avocado on a green leaf, and an image of what appears to be a gold vitamin with the word "PRO-V" on it.

McGinity contends that P&G's packaging "represents that the Products are natural, when, in fact, they contain non-natural and synthetic ingredients, harsh and potentially harmful ingredients, and are substantially unnatural." McGinity has stated that he purchased the products, and paid a premium for them, because he wanted to buy "natural" personal care products. If McGinity had known when he purchased them that the products were not "from nature or otherwise natural," he would not have purchased the products or paid a price premium for the products.

McGinity's counsel commissioned an independent third party to conduct a survey of more than 400 consumers regarding their impressions of the products' front labels. Survey participants did not have access to the products' back labels. Survey results showed that, when given pictures of the front of the products, 74.9% of consumers thought the label conveyed that the shampoo contained more natural than synthetic/artificial ingredients, and 77.4% of consumers thought the same about the conditioner. When asked about the phrase "Nature Fusion," 52.6% of consumers thought that the phrase "Nature Fusion" meant that the product did *not* contain synthetic ingredients; 49.1% of consumers thought that the phrase "Nature Fusion" meant that the product contained *only* natural ingredients; and 69.2% of consumers thought that the phrase "Nature Fusion" meant that the product contained *both* natural and synthetic ingredients.

B. Procedural history

McGinity asserted claims under California's Unfair Competition Law ("UCL"), California's False Advertising Law ("FAL"), and California's Consumers Legal Remedies Act ("CLRA"). P&G moved to dismiss McGinity's original complaint under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion to dismiss with leave to amend. McGinity later filed his amended complaint, which P&G again moved to dismiss under Rule 12(b)(6). The district court stated that McGinity's original and amended complaints failed for the same reason: the complaints did not "allege sufficient facts to show that a reasonable consumer would be deceived by P&G's labeling." The district court dismissed McGinity's second amended complaint, and he appealed.

II. STANDARD OF REVIEW

[1–3] "We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016) (quoting *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012)). Determining whether a complaint states a plausible claim for relief is a "context-specific task," requiring "the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). If support exists in the record, a dismissal may be affirmed on any proper ground. See *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *Papa v. United States*, 281 F.3d 1004, 1009 (9th Cir. 2002).

III. DISCUSSION

A. Deceptive or misleading practice

[4, 5] Appellant’s claims under the UCL, FAL, and CLRA are governed by the “reasonable consumer” standard. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). That standard requires that Appellants “show that members of the public are likely to be deceived.” *Id.* (internal quotation marks and citation omitted). The California Supreme Court has recognized that these statutes prohibit explicitly false advertising and advertising that is “either actually misleading[,] or which has a capacity, likelihood[,] or tendency to deceive or confuse the public.” *Id.* (quoting *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 951, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002)). The reasonable consumer standard requires more than a mere possibility that the label “might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.” *Ebner*, 838 F.3d at 965 (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508, 129 Cal.Rptr.2d 486 (2003)). Rather, the reasonable consumer standard requires a probability “that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.” *Id.* (citation omitted). The touchstone under the “reasonable consumer” test is whether the product labeling and ads promoting the products have a meaningful capacity to deceive consumers.

In *Moore v. Trader Joe’s Co.*, we held that the label “100% New Zealand Manuka Honey” was not likely to deceive a reasonable consumer into believing that the product contained only honey from the Manuka flower. 4 F.4th 874, 876–77 (9th Cir. 2021). We reasoned that there was “some ambi-

guity as to what 100% mean[t] in the phrase, ‘100% New Zealand Manuka Honey’”: it could mean, as examples, that the Manuka flower was the only source of the honey, that the Manuka flower was the primary source of the honey, or that 100% of the honey was from New Zealand. *Id.* at 882. Because of this ambiguity, we explained that “reasonable consumers would necessarily require more information before they could reasonably conclude Trader Joe’s label promised a honey that was 100% derived from a single, floral source.” *Id.* This additional information could be something on the rest of the packaging (e.g., the ingredient list), the relative price of the product, or in the context of honey, general knowledge about how honey is made. *See id.* at 882–85. While the reasonable consumer is not expected to be an expert in honey production, the reasonable consumer should know that beekeepers cannot force bees to gather honey from only certain types of flowers. *Id.* at 883. We agreed with the district court’s conclusion that other available information about Trader Joe’s Manuka Honey would dissuade a reasonable consumer from thinking that the product was derived only from Manuka flower nectar. *Id.* at 882–883.

[6] Here, like in *Trader Joe’s*, there is some ambiguity as to what “Nature Fusion” means in the context of its packaging. Appellants argue that the phrase could be interpreted to mean that the product contains a mixture of natural ingredients, while Appellees argue that the phrase should be interpreted to mean that the product contains a mixture of both natural and synthetic ingredients. The ambiguity of the phrase is further shown by the nearly 50/50 split in survey responses interpreting whether the phrase means that the products are all-natural and lack synthetic ingredients.¹ At the same time,

1. According to the survey, 52.6% of consumers thought that the phrase “Nature Fusion” meant that the product did *not* contain syn-

thetic ingredients; 49.1% of consumers thought that the phrase “Nature Fusion”

nearly 70% of survey respondents said yes when asked whether the phrase meant that the products contain both natural *and* synthetic ingredients. This ambiguity means that, like in *Trader Joe's*, we must consider what additional information other than the front label was available to consumers of the P&G products. *See id.* McGinity contends that circuit precedent precludes P&G from relying on the back ingredient list to derive the meaning of “Nature Fusion.” We disagree.

[7–9] Whether a back label ingredients list “can ameliorate any tendency of [a] label to mislead” depends on whether the “back label ingredients list . . . conflict[s] with” or “confirm[s]” a front label claim. *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1017 (9th Cir. 2020) (citation omitted). In other words, if a defendant *does* commit an act of deception on the front of a product, then “the presence of fine print revealing the truth is insufficient to dispel that deception.” *See Ebner*, 838 F.3d at 966. However, the front label must be unambiguously deceptive for a defendant to be precluded from insisting that the back label be considered together with the front label. *See id.* (considering the rest of the product’s packaging when there was “no deceptive act to be dispelled” on the front).

In *Williams v. Gerber Products*, we held that the back ingredient label on Gerber’s “Fruit Juice Snacks” could not cure the misleading nature of the front and side of the package. 552 F.3d at 939. The front label of Gerber’s fruit juice snacks contained the phrase “fruit juice snacks,” pictures of fruits, and the side label stated that the product was made “with real fruit juice and other all natural ingredients.” *Id.* at 936. However, when consumers turned

the package over, they would discover that the product did not contain juice from any of the fruits pictured on the front and that the first two ingredients listed, showing their prominent role in the manufacturing of the product, were corn syrup and sugar. *Id.* We explained that the purpose of the ingredients list should be to confirm the representations on the front or other parts of a package. *Id.* at 939–40. We stated: “We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that *confirms* other representations on the packaging.” *Id.* (emphasis added).

[10] Here, the front label containing the words “Nature Fusion” is not misleading—rather, it is ambiguous.² Unlike a label declaring that a product is “100% natural” or “all natural,” the front “Nature Fusion” label does not promise that the product is wholly natural. Although the front label represents that something about the product bears a relationship to nature, the front label does not make any affirmative promise about what proportion of the ingredients are natural. Instead, as the parties point out, “Nature Fusion” could mean any of a number of things: that the products are made with a mixture of natural and synthetic ingredients, that the products are made with a mixture of different natural ingredients, or something else entirely.

meant that the product contained *only* natural ingredients.

2. The image of the avocado on a green leaf is truthful because the products do contain avo-

cado oil. The back label ingredient list thus “confirms” the avocado image on the front label. *See Williams*, 552 F.3d at 939–40.

We hold that when, as here, a front label is ambiguous, the ambiguity can be resolved by reference to the back label. In addition to the ingredient lists, the back labels of the Nature Fusion shampoo and conditioner contain the phrases “Smoothness Inspired by Nature” and “NatureFusion® Smoothing System With Avocado Oil.” Upon seeing the back labels, it would be clear to a reasonable consumer that the avocado oil is the natural ingredient emphasized in P&G’s labeling and marketing. The ingredients list, which McGinity alleges includes many ingredients that are synthetic and that a reasonable consumer would not think are natural, clarifies that the rest of the ingredients are artificial and that the products thus contain both natural and synthetic ingredients.

B. The consumer survey

[11] McGinity relies heavily on the results of the consumer survey that his counsel had commissioned from a third party. Although we accept the allegations concerning the survey as true at this stage of litigation, the survey is not particularly instructive or helpful to us in deciding this case.

The consumer survey in *Becerra v. Dr Pepper/Seven Up, Inc.* was similarly unhelpful. 945 F.3d 1225 (9th Cir. 2019). In *Becerra*, the survey concerned consumers’ understanding of the word “diet” in the context of Diet Dr. Pepper soda products. *Id.* at 1230. *Becerra* alleged that the survey in that case showed that “consumers expect a diet soft drink to either help them lose weight, or help maintain or not affect their weight.” *Id.* at 1230. However, we agreed with the district court that it was difficult to tell what questions were asked in the survey. *Id.* at 1230–31. Because the survey did not adequately address the crux of the issue (whether the reasonable consumer would understand the word “diet” in the context of Diet Dr. Pepper as a relative claim about the calorie or sugar

content), we held that the survey did not “make plausible the allegation that reasonable consumers are misled by the term ‘diet.’” *Id.* at 1231.

Here, the survey participants did not have access to the back label of the products. This omission to a degree undermines the extent to which we can fairly rely on the survey results as being instructive of how the “reasonable consumer” understands the phrase “Nature Fusion” in the context of the products. As in *Becerra*, the survey here does not adequately address the primary question in this case.

Rather than demonstrating that the phrase “Nature Fusion” is misleading, the survey results confirm that it is ambiguous. Looking only at the front label, survey respondents were split nearly 50/50 on the question of whether the products contain a mixture of natural and non-natural ingredients, or if they instead contain all or substantially all natural ingredients. Given that ambiguity, the survey is not informative as to whether the labeling of the products is misleading as a whole. Had the survey participants had access to the products’ back labels, they would have had an immediate answer to this question—they could see that the products contain avocado oil, a natural ingredient, as well as many synthetic ingredients. Although a back label cannot contradict deceptive statements made on the front label, the back label can be used to interpret what is conveyed by the labeling when the front label is ambiguous, as here. With the entire product in hand, we conclude, no reasonable consumer would think that the products are either completely or substantially natural. The survey results do not make plausible the allegation that the phrase “Nature Fusion” is misleading.

As shown by both *Becerra* and this case, it is important that potential or current litigants draft questions for consumer sur-

veys with utmost care. Although the particular survey proved noninformative in the context of this case and the results of the survey, consumer surveys may well be relevant and helpful in other cases. “Consumer surveys offer opportunities for the court . . . to see current consumer understandings of [] products as well as identify points of ambiguity, confusion, or blatant falsity amongst the labeling.” Jessica Guarino et. al., *What the Judge Ate for Breakfast: Reasonable Consumer Challenges in Misleading Food Labeling Claims*, 35 Loy. Consumer L. Rev. 82, 135 (2023).

IV. CONCLUSION

We affirm the decision of the district court dismissing McGinity’s claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

AFFIRMED.

GOULD, Circuit Judge, joined by BERZON, Circuit Judge, concurring:

Although we hold that McGinity has not successfully shown that P&G’s “Nature Fusion” labeling is deceptive as a matter of law, I write separately to express my view that P&G’s labeling nonetheless resembles a concerning practice known as “greenwashing.” Greenwashing refers to “a set of deceptive marketing practices in which an entity publicly misrepresents or exaggerates the positive environmental impact or attributes of a product[.]” Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 Colum. L. Rev. 2033, 2037 (2022); see also *id.* at

2056–57. The practice of greenwashing has resulted from the increasing number of American consumers who want to buy environmentally friendly, or “green,” products. See 16 C.F.R. § 260.1 (“the Green Guides”).

Greenwashing is not limited to environmental effects and is also used to describe the misleading or false labeling of a wide range of consumer products.¹ For example, the practice of greenwashing also affects “the way consumers buy cosmetic and personal products.” Alexa Riccolo, *The Lack of Regulation in Preventing Greenwashing of Cosmetics in the U.S.*, 47 J. Legis. 120, 122 (2021). In the context of cosmetics and personal care products (e.g., shampoos and conditioners), the term is used to describe products that have “natural” labeling “but actually contain chemicals[.]” *Id.*

The Federal Trade Commission issued the Green Guides to help companies avoid making misleading environmental claims. The Green Guides discourage marketers from making broad environmental benefit claims like “green” or “eco-friendly” because they are “difficult to interpret and likely convey a wide range of meanings.” See 16 C.F.R. § 260.4. The Green Guides also state that companies “should not imply that any specific benefit is significant if it is, in fact, negligible.” 16 C.F.R. § 260.4(c). While the Green Guides do not explicitly comment on use of the words “nature” or “natural,” they give general principles that all marketers can use to avoid deceiving consumers unintentionally or from mere negligence. See, e.g., 16

1. The far-reach of greenwashing is well-illustrated in “The Six Sins of Greenwashing,” an influential 2007 study published by TerraChoice Environmental Marketing. In this study, TerraChoice sent research teams to “big box” stores to record every product-based human health or environmental claim they observed. TerraChoice identified over 50 product categories in which false or mislead-

ing claims were found, including everything from televisions, to household cleaning products, to personal care products such as shampoo and conditioner. TerraChoice, *The “Six Sins of Greenwashing”: A Study of Environmental Claims in North American Consumer Markets* 9 (2007), <https://perma.cc/7BTD-Z2U7>.

C.F.R. §§ 260.9 (addressing claims that a product is “free of” specified substances or chemicals), 260.10 (addressing claims that a product is “non-toxic”).

Here, although there is only one natural ingredient in the products, the word “Nature” is in bold, capitalized text on the front labels and is one of the largest words on the bottles, second only to the brand name, “Pantene.” As a consumer hoping to purchase natural personal care products, McGinity was drawn to the emphasis on “Nature” and thought that the labeling meant that the products were “of, by, and from ‘Nature.’” McGinity alleges that “Nature Fusion” conveyed to him that the products were made of predominantly natural ingredients when they were, in fact, made of almost entirely synthetic ingredients. The phrase “Nature Fusion” may be more ambiguous and less deceptive than “green” or “eco-friendly,” but I still note how the use of such a phrase sounds alarm bells similar to those sounded in the Green Guides.



**In the MATTER OF: Roger A. EVANS;
Lori A. Steedman, Debtors,**

**Roger A. Evans; Lori A. Steedman,
Appellants,**

v.

**Kathleen A. McCallister, Chapter
13 Trustee, Appellee.**

No. 22-35216

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted February
7, 2023 Portland, Oregon

Filed June 12, 2023

Background: In Chapter 13 case that was voluntarily dismissed pre-confirmation,

debtors objected to trustee’s final report and sought an order requiring trustee to disgorge all of the undistributed plan payments that she had collected, including the percentage fee collected from plan payments as compensation for her work. The United States Bankruptcy Court for the District of Idaho, Joseph M. Meier, J., 615 B.R. 290, sustained objection. Trustee appealed. The District Court, David C. Nye, Chief Judge, 637 B.R. 144, reversed and remanded. Debtors appealed.

Holdings: Addressing a matter of first impression for the court, the Court of Appeals, M. Smith, Circuit Judge, held that a standing trustee in a Chapter 13 case is not to be paid her percentage fee when the case is dismissed prior to confirmation. District Court’s judgment reversed.

1. Bankruptcy ⇌3701

Chapter 13 bankruptcies provide debtors receiving a regular income an opportunity to pay off their debts while retaining their property.

2. Bankruptcy ⇌2257, 3704.1

To commence a Chapter 13 case, a debtor must file a petition with the court and, either at that time, or 14 days thereafter, a proposed plan that outlines how he will pay off debts using his future income. 11 U.S.C.A. §§ 1321, 1322; Fed. R. Bankr. P. 3015.

3. Bankruptcy ⇌3703

Under the Bankruptcy Code, within 30 days of filing a Chapter 13 plan or petition, whichever is earlier, the debtor must begin making plan payments to a Chapter 13 trustee. 11 U.S.C.A. § 1326(a)(1).

4. Bankruptcy ⇌2363.1

Filing of a voluntary Chapter 13 petition constitutes an order of relief, under which debtors may temporarily pause payments to creditors while the petition is pending. 11 U.S.C.A. § 301(b).

Lady of Guadalupe, 591 U.S. at 752, 140 S.Ct. 2049. Therefore, the district court properly granted summary judgment based on the ministerial exception.

AFFIRMED.



Summer WHITESIDE, individually and on behalf of all others similarly situated, Plaintiff-Appellant,

v.

**KIMBERLY CLARK CORP.,
Defendant-Appellee.**

No. 23-55581

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 13,
2024 Pasadena, California

Filed July 17, 2024

Background: Consumer brought putative class action against manufacturer alleging that label of its baby wipes, which contained terms “plant-based wipes” and “natural care®,” was misleading in violation of California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA). Manufacturer moved to dismiss. The United States District Court for the Central District of California, Jesus G. Bernal, J., 2023 WL 4328175, granted the motion. Consumer appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

(1) consumer plausibly alleged that front label was unambiguous, such that defendant was precluded from relying on back label ingredients list;

(2) representations on front label, without any qualifications, were plausibly misleading;

(3) use of asterisk and qualifying statement on front label of some products ameliorated any tendency of those labels to mislead; and

(4) consumer satisfied particularity requirement for pleading fraud.

Affirmed in part and reversed in part.

1. Federal Courts ⇌3587(1)

A dismissal for failure to state a claim is reviewed de novo. Fed. R. Civ. P. 12(b)(6).

2. Federal Courts ⇌3667

On review of ruling on motion to dismiss for failure to state a claim, all allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff. Fed. R. Civ. P. 12(b)(6).

3. Federal Civil Procedure ⇌1772

Dismissal of a complaint for failure to state a claim is appropriate when the complaint fails to state sufficient facts creating a plausible claim to relief. Fed. R. Civ. P. 12(b)(6).

4. Antitrust and Trade Regulation ⇌136, 163

California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) require basic fairness in advertising and permit a civil remedy against those who deceive consumers. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

5. Antitrust and Trade Regulation ⇌163

California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and

Consumer Legal Remedies Act (CLRA) prohibit not only false advertising, but also advertising that is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

6. Antitrust and Trade Regulation

⇨136, 163

Claims under California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) are governed by the reasonable consumer standard, which requires a plaintiff to show that members of the public are likely to be deceived by the defendant's marketing claims. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

7. Antitrust and Trade Regulation

⇨164

The reasonable consumer standard for claims brought under California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) requires more than a mere possibility that label might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

8. Antitrust and Trade Regulation

⇨164

Reasonable consumer standard for claims brought under California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled by a label. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

9. Antitrust and Trade Regulation

⇨164

A complaint asserting a violation of California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) must allege that the packaging will deceive many consumers, not just that a few might be deceived; although there is no bright-line test, the law does not concern itself with trifles. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

10. Antitrust and Trade Regulation

⇨163, 363

Whether a business practice is deceptive will usually be a question of fact not appropriate for decision at the pleadings stage; likewise dismissal at the pleadings stage of false or misleading advertising claims brought under California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) is appropriate when the advertisement itself makes it impossible for the plaintiff to prove that a reasonable consumer is likely to be deceived. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

11. Antitrust and Trade Regulation

⇨164

Under California law, a front label is not "ambiguous" simply because it is susceptible to two possible meanings; a front label is ambiguous when reasonable consumers would necessarily require more information before reasonably concluding that the label is making a particular representation, and only in these circumstances can the back label be considered to clear up the ambiguity at the dismissal stage of a false or misleading advertising claim. Fed. R. Civ. P. 12(b)(6).

See publication Words and Phrases for other judicial constructions and definitions.

12. Antitrust and Trade Regulation

⌚164

Front-label ambiguity in California false-advertising cases is determined not by whether a consumer could look beyond the front label, but whether they necessarily would do so.

13. Antitrust and Trade Regulation

⌚164

Consumer plausibly alleged that a reasonable consumer could interpret front label of baby wipes, which used phrases “plant-based wipes” and “natural care®,” as unambiguous representation that products did not contain synthetic ingredients, and thus, manufacturer was precluded from relying on back-label ingredients list that clarified there were synthetic ingredients included to be absolved of liability for deceptive statements at pleading stage challenge to consumer’s claims under California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA); consumer alleged that she was a single parent without specialized knowledge of how baby wipes were made, and in buying an everyday product, she was not expected to study labels with same diligence of as consumers of specialty products. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.; Fed. R. Civ. P. 12(b)(6).

14. Antitrust and Trade Regulation

⌚164

Terms “plant-based wipes” and “natural care®” on front label of baby wipes, together with nature-themed imagery on the packaging, could be interpreted by reasonable consumers as representing that products contained only natural, plant-based ingredients, and thus, those representations, without any qualification, were plausibly misleading in violation of California’s Unfair Competition Law (UCL),

False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) because the wipes also contained synthetic ingredients that did not come from plants and were not natural. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

15. Antitrust and Trade Regulation

⌚136, 163

Manufacturer’s use of asterisk after term “plant-based wipes” with corresponding qualifying statement “*70+ % by weight” on front label of baby wipes, paired with back label ingredients list, ameliorated any tendency of the label to mislead, and thus, consumer failed to state false advertising claims under California’s Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) that alleged baby products were deceptively marketed because they contained synthetic ingredients; reasonable consumer could not ignore the asterisk which put her on notice that there were qualifications or caveats, making it unreasonable to assume products were 100% plant-based. Cal. Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.; Cal. Civ. Code § 1750 et seq.

16. Federal Civil Procedure ⌚636

When a plaintiff brings fraud or misrepresentation claims, the federal fraud pleading rule demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong. Fed. R. Civ. P. 9(b).

17. Federal Civil Procedure ⌚636

Under particularity requirement for pleading fraud in federal court, the plaintiff must plead the who, what, when, where, and how of the misconduct charged. Fed. R. Civ. P. 9(b).

18. Federal Civil Procedure ⇔636

Consumer pleaded misconduct charged with particularity required for bringing fraud claims in federal court, with respect to her claims in putative class action that baby wipes containing terms “plant-based wipes” and “natural care®” on the front label falsely represented that product did not contain any synthetic ingredients, where consumer’s complaint set forth where she bought the product and referred to an exhibit that featured an image of the label she herself saw. Fed. R. Civ. P. 9(b).

Appeal from the United States District Court for the Central District of California, Jesus G. Bernal, District Judge, Presiding, D.C. No. 5:22-cv-01988-JGB-SP

Glenn A. Danas (argued), Ryan J. Clarkson, and Katelyn M. Leeviraphan, Clarkson Law Firm PC, Malibu, California; Zachary Crosner, Crosner Legal PC, Beverly Hills, California; for Plaintiff-Appellant.

Theodore J. Boutrous Jr. (argued), Timothy W. Loose, and Patrick J. Fuster, Gibson Dunn & Crutcher LLP, Los Angeles, California; Andrew M. Kasabian, Gibson Dunn & Crutcher LLP, Irvine, California; James A. Kelly, Gibson Dunn & Crutcher LLP, Denver, Colorado; for Defendant-Appellee.

Before: Ronald Lee Gilman,* Ronald M. Gould, and Salvador Mendoza, Jr., Circuit Judges.

OPINION

GOULD, Circuit Judge:

Plaintiff Summer Whiteside brought a putative class action against Defendant

Kimberly Clark Corp., alleging that the label of Defendant’s baby wipes was misleading, in violation of California’s false advertising laws. The district court granted Defendant’s motion to dismiss pursuant to Federal Rule of Civil Procedure (“FRCP”) 12(b)(6), holding that the label was not misleading as a matter of law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse in part.

BACKGROUND

I. Facts

Plaintiff’s class-action complaint alleges that several versions of Defendant’s “Huggies Natural Care® Baby Wipes” (the “Products”) were deceptively marketed in violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et seq.*; False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, *et seq.*; and Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.* Plaintiff also brings claims for breach of warranty and unjust enrichment. Plaintiff claims that the words “plant-based wipes” (or “plant-based ingredients”) and “natural care®” on the front label, together with the nature-themed imagery displayed on the packaging, suggest that Defendant’s baby wipes contain only “water, natural ingredients, and ingredients that come from plants and that are not subject to chemical modification or processing.” To the contrary, the Products contain synthetic ingredients that do not come from plants and are subject to chemical modification or processing.

Plaintiff alleges that she regularly purchased Defendant’s baby wipes from Target every two weeks over a five-month

*The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of

Appeals for the Sixth Circuit, sitting by designation.

period. Plaintiff also asserts class allegations on behalf of consumers who purchased the same or substantially similar Products during the same time period. Although all Products purchased by the putative class members allegedly contain the

phrases “natural care” and “plant-based,” Defendant uses a variety of label designs for its wipes, with some differences. For example, Plaintiff’s complaint contains an image of the label of the wipes she purchased:



And attachments to the complaint contain numerous examples of the other label

designs that Defendant used, like the following example:



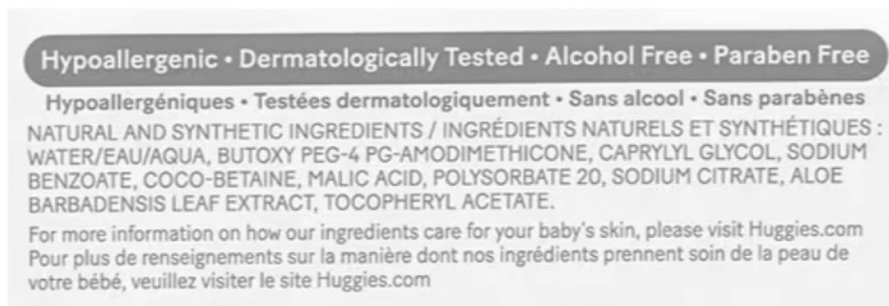
After reviewing the different types of Products described, the district court sepa-

rated the label designs into two categories: (1) labels where an asterisk was placed

after “plant-based wipes*” and a corresponding qualifying statement (“*70% + by weight”) was present elsewhere on the front label (the “Asterisked Products”); and (2) labels on which no asterisk or qualifying statement appeared on the front label (the “Unasterisked Products”). *Whiteside v. Kimberly-Clark Corp.*, Case No. 5:22-cv-01988-JGB-SP, 2023 WL 4328175, at *4 (C.D. Cal. June 1, 2023). Plaintiff alleges that the wipes she purchased were among the Unasterisked

Products, and that the Asterisked Products are substantially similar.

Both the Asterisked and Unasterisked Products contain a list of ingredients on their back label. Directly preceding the ingredients list is a statement reading: “NATURAL AND SYNTHETIC INGREDIENTS.” The following is an image of the back label on the wipes Plaintiff purchased and a magnified image of the ingredients section:



II. District Court Proceedings

Defendant moved to dismiss Plaintiff's complaint for lack of standing under FRCP 12(b)(1)¹ and for failure to state a claim under FRCP 12(b)(6). *Whiteside*, 2023 WL 4328175, at *1. The district court granted Defendant's motion under FRCP 12(b)(6), concluding that Plaintiff had

failed to plausibly allege that a reasonable consumer would be misled by the Products' packaging. *Id.* at *7. Although its analysis was based on Plaintiff's statutory (UCL, FAL, and CLRA) claims, the district court determined that the same reasoning applied to Plaintiff's warranty and unjust enrichment claims, and the court

1. The district court did not rule on standing, and Defendant does not challenge Plaintiff's

standing on appeal.

dismissed Plaintiff's complaint in its entirety. *Id.*

The district court concluded that the Asterisked Products were not misleading as a matter of law because the front label qualified that the wipes were not wholly plant-based, but instead were "70% + [plant-based] by weight." *Whiteside*, 2023 WL 4328175, at *4 (alteration added). The district court also reasoned that the "natural and synthetic ingredients" disclaimer on the back label "dispel[led] whatever misrepresentation allegedly exists." *Whiteside*, 2023 WL 4328175, at *4.

Although the Unasterisked Products presented a "closer question," the district court found that those products too were not misleading as a matter of law. The district court noted that Plaintiff's interpretation of the front label—as implying that the wipes contained only natural, plant-based ingredients—was "contrary to the disclaimer on the back of the label that expressly states the Product contains 'natural and synthetic ingredients.'" *Whiteside*, 2023 WL 4328175, at *5. Applying this court's decisions in *Ebner v. Fresh, Inc.* and *Moore v. Trader Joe's Co.*, the district court reasoned that when a product's front label is not "unmistakably clear about the facet for which she seeks more information," a reasonable consumer is expected to look to other features of the packaging, such as the fine print on the back label. *See id.* at *7 (citing *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016); *Moore v. Trader Joe's*, 4 F.4th 874 (9th Cir. 2021)). The district court also found that the term "plant-based" "plainly means mostly, not necessarily all, derived from plants," and that the Unasterisked Products were not misleading as a matter of law, even without reference to the back label. *Id.* Plaintiff timely appealed.

LEGAL STANDARDS

I. Standard of Review

[1–3] "A dismissal for failure to state a claim pursuant to [FRCP] 12(b)(6) is reviewed *de novo*. All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Stoner v. Santa Clara Cnty Office of Educ.*, 502 F.3d 1116, 1120 (9th Cir. 2007) (internal citations and quotation marks omitted). "Dismissal of a complaint under [FRCP] 12(b)(6) is appropriate when the complaint fails to state sufficient facts creating a plausible claim to relief." *Trader Joe's*, 4 F.4th at 880.

II. False Advertising

A. Reasonable Consumer Standard

[4–6] California's UCL, FAL, and CLRA require basic fairness in advertising and permit a civil remedy against those who deceive consumers. Those laws prohibit not only false advertising, but also advertising that is "either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951, 119 Cal. Rptr.2d 296, 45 P.3d 243 (2002)). Claims under each of these statutes are governed by the "reasonable consumer" standard, which requires a plaintiff to "show that members of the public are likely to be deceived" by the defendant's marketing claims. *Id.* (internal quotation marks and citation omitted).

[7–9] The reasonable consumer standard requires more than a mere possibility that the label "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Ebner*, 838 F.3d at 965 (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508, 129 Cal.Rptr.2d 486 (2003)). Rather, the

reasonable consumer standard requires a probability “that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.” *Id.* (citation omitted). Stated another way, a complaint asserting a violation of these laws must allege that the packaging will deceive many consumers, not just that a few might be deceived. Although there is no bright-line test, “the law does not concern itself with trifles.” *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 79, 163 Cal.Rptr.3d 804 (2013).

[10] “California courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision [at the pleadings stage].” *Williams*, 552 F.3d at 938-39 (citing *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-35, 61 Cal.Rptr.3d 221 (2007)) (other citations omitted). Likewise, in federal court, dismissals of UCL, FAL, and CLRA claims at the pleadings stage have “occasionally been upheld,” but such cases are “rare.” *Id.* at 939. Dismissal is appropriate when “the advertisement itself [makes] it impossible for the plaintiff to prove that a reasonable consumer [is] likely to be deceived.” *Id.*

B. Back-Label Disclaimers and Ingredients Lists

Placing a disclaimer or a fine-print ingredients list on a product’s back label does not necessarily absolve a defendant of liability for deceptive statements on the front label. In the seminal case *Williams*, the defendant sold a product called “Fruit Juice Snacks” that displayed images of various fruits on its front label. *Id.* at 936. The product’s side-label ingredients list disclosed that it contained none of the pictured fruits and that the only fruit-related ingredient was white grape concen-

trate. *Id.* We reversed dismissal of the plaintiff’s UCL and CLRA claims because we “disagree[d] with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.” *Id.* at 939.

California courts have endorsed *Williams*, describing it as “an especially perceptive decision” on the issue of the “front-back dichotomy.” *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1167, 237 Cal.Rptr.3d 683 (2018); see also *Skinner v. Ken’s Foods, Inc.*, 53 Cal. App. 5th 938, 949, 267 Cal.Rptr.3d 869 (2020). The *Brady* court, for example, adopted our conclusion in *Williams* that “a back label that [does] not confirm what was on the front label [cannot] defeat . . . a pleading stage challenge to the plaintiff’s UCL, CRLA, false advertising and warranty claims.” *Id.* at 1168, 237 Cal.Rptr.3d 683 (emphasis in original). The *Brady* court found that “One A Day” branded vitamins were misleading because consumers in fact had to take two vitamins daily to achieve the recommended dosage. *Id.* at 1178-80, 237 Cal.Rptr.3d 683. Following *Williams*, *Brady* dismissed the product’s back-label disclosure—which clearly directed consumers to take two vitamins daily—and it rejected “the assumption that reasonable consumers of vitamins are back-label scrutinizers.” *Id.* at 1174, 237 Cal.Rptr.3d 683. *Williams* and *Brady* stand for the proposition that if a product’s front label is plausibly misleading to reasonable customers, then the court does not consider the back label at the pleadings stage. Whether the back label ultimately defeats the plaintiff’s claims is a question left to the fact-finder.

More recent cases have clarified that a product’s back label may be considered at the pleadings stage if the front label is ambiguous. *McGinity v. Procter & Gamble*

Co., 69 F.4th 1093, 1099 (9th Cir. 2023) (“[When] a front label is ambiguous, the ambiguity can be resolved by reference to the back label.”) *McGinity* involved a shampoo and conditioner called “Pantene Pro-V Nature Fusion” that featured an image of an avocado on a green leaf and a gold vitamin on the front label. *Id.* at 1095-96. The plaintiff argued that the label suggested the product was “natural,” even though it was made with synthetic ingredients. *Id.* at 1096. After reviewing the product’s labeling, we reasoned that the front label was ambiguous because “Nature Fusion” could mean “that the products are made with a mixture of natural and synthetic ingredients, that the products are made with a mixture of different natural ingredients, or something else entirely.” *Id.* at 1098. Accordingly, we looked to the back label, which included, *inter alia*, an ingredients list featuring synthetic ingredients that “a reasonable consumer would not think are natural.” *Id.* at 1099. We concluded that the back label clarified the ambiguity on the front label and removed any reasonable possibility that consumers would be misled. *See id.* at 1098-99.

In some cases, other contextual factors aside from the back label can defeat claims that a product’s label is misleading. In *Trader Joe’s*, we rejected the charge that honey labeled “100% New Zealand Manuka Honey” was misleading, even though the product consisted of “only between 57.3% and 62.6% honey derived from Manuka flower nectar.” 4 F.4th at 876. We held that the plaintiff’s belief that the honey was derived entirely from one floral source was implausible. *See id.* at 882, 884. We did not look to the back label in that case; instead, we noted that three contextual factors were dispositive. “First and

foremost,” “given the foraging nature of bees, a reasonable honey consumer would know that it is impossible to produce honey that is derived exclusively from a single floral source,” and “[a] reasonable consumer would not understand Trader Joe’s label . . . as promising something that is impossible to find.” *Id.* at 883. Second, the relatively inexpensive cost of Trader Joe’s honey would have “signal[ed] to a reasonable consumer that the product has a relatively lower concentration of honey derived from Manuka flower nectar.” *Id.* at 884. Third, the front label displayed a “10+” denoting the honey’s “relatively low” quality based on a well-known grading system used specifically for Manuka honey.² *Id.* at 878, 884-85.

In analyzing each of these factors, we noted that Manuka honey is “a niche, specialty product,” and that buyers were “undoubtedly more likely to exhibit a higher standard of care than a parent walking down the dairy aisle in a grocery store, possibly with a child or two in tow, who is not likely to study with great diligence the contents of a complicated product package.” *Id.* at 884. (internal quotation marks and citation omitted). A reasonable consumer of specialty honey would be aware not only of how honey is made, but also of the industry grading system and the fact that the purest Manuka honey typically costs around 20-times more than Trader Joe’s. *See id.* at 878. These contextual factors defeated the plaintiff’s claim that the front label was misleading. *Id.* at 881.

DISCUSSION

I. Determining Front-Label Ambiguity

A threshold issue in this case is whether the Products’ back-label ingredients list—

2. Manuka honey producers use a grading system that rates honey on a scale of “5+ to 26+” based on the concentration of a sought-

after compound naturally occurring in that type of honey. *Trader Joe’s*, 4 F.4th at 877.

which states that the Products contain “natural and synthetic ingredients”—should be considered at the pleadings stage. The parties generally agree that if the front label is ambiguous, then we must look to the back label. But the parties disagree on how we may determine that the front label is ambiguous, and they present us with two theories.

For its part, Defendant invokes *McGinity*'s holding that “the front label must be unambiguously deceptive for a defendant to be precluded from insisting that the back label be considered together with the front label.” *McGinity*, 69 F.4th at 1098. Defendant reads *McGinity* to mean that a front label is ambiguous if it can have more than one possible meaning.

Plaintiff counters that a front label can be unambiguous for FRCP 12(b)(6) purposes even if it may have two possible meanings, so long as the plaintiff has plausibly alleged that a reasonable consumer would view the label as having one unambiguous (and deceptive) meaning.

We agree with Plaintiff's construction of the law. The overly restrictive standard proposed by Defendant is inconsistent with our precedent and that of California courts. But we acknowledge that *McGinity* lends some facial support to Defendant's position, and we take this opportunity to clarify our analysis in that case.

In *McGinity*, we stated that: “the front label must be unambiguously deceptive for a defendant to be precluded from insisting that the back label be considered together with the front label.” *McGinity*, 69 F.4th at 1098. In characterizing the law as such, we did not hold that a plaintiff must *prove* that the label is unambiguously deceptive to survive dismissal. After all, that position would be manifestly incompatible with the pleading standard found in FRCP 12(b)(6). Rather, we held that a plaintiff must *plausibly allege* that the front label would be

unambiguously deceptive to an ordinary consumer, such that the consumer would feel no need to look at the back label. We stated this better when quoting *Trader Joe's*, which held that a front label is ambiguous if “reasonable consumers would necessarily require more information before they could reasonably conclude” that the front label was making a specific representation. *McGinity*, 69 F.4th at 1097 (quoting *Trader Joe's*, 4 F.4th at 882).

Our reading of *McGinity* is consistent with the facts of that case and the sources on which we drew. We cited *Ebner*, which “consider[ed] the rest of the product's packaging when there was ‘no deceptive act to be dispelled’ on the front.” *Ebner*, 838 F.3d at 966. The important fact in *Ebner* was not that the plaintiff failed to prove that the label's representations were deceptive, but that the label made *no representation at all*. Likewise, the front label in *McGinity*—featuring “Nature Fusion”—was so devoid of any concrete meaning that there was nothing “from which *any* inference could be drawn or on which *any* reasonable belief could be based about” the shampoo's ingredients. *Id.* (emphasis in original). In each case, a reasonable consumer would necessarily have required more information before concluding that the products' front labels were making a specific promise.

This approach is consistent with California law, both as articulated by California courts and as interpreted in our prior decisions. As discussed above, California courts have adopted our holding in *Williams* that “[y]ou cannot take away in the back fine print what you gave on the front in large conspicuous print.” *Brady*, 26 Cal. App. 5th at 1172, 237 Cal.Rptr.3d 683 (citing *Williams*); *see also Skinner*, 53 Cal. App. 5th at 949, 267 Cal.Rptr.3d 869. Importantly, *Brady* applied this rule to a front label that was susceptible to two

possible meanings, but it did not conclude that this rendered the label ambiguous. Considering the “One A Day”-branded vitamins, *Brady* acknowledged that some sophisticated consumers might not interpret “One A Day” literally and would inquire into the back label. *Brady*, 26 Cal. App. 5th at 1174-75, 237 Cal.Rptr.3d 683. But other reasonable consumers might take the front label at face value and assume that they needed to take only one vitamin daily. *Id.* Despite these two possible interpretations, the court ruled that the defendant was precluded from relying on the back label because the plaintiff had plausibly alleged that reasonable customers would see the front label as making an unambiguous representation. *See id.* Put another way, reasonable consumers would not necessarily require more information before concluding that they needed to take only one vitamin daily.

[11] Defendant’s interpretation of *McGinity* would effectively overrule *Williams* and *Brady*, something we did not and could not do as a three-judge panel of the Ninth Circuit. We cited *Williams* with approval throughout our opinion and did not mention *Brady*. *See, e.g., McGinity*, 69 F.4th at 1098. *Williams* and *Brady* require only that a front label be plausibly misleading for a plaintiff to survive dismissal, and *McGinity* did not hold otherwise. Contrary to Defendant’s suggestion, our cases affirm that a front label is not ambiguous simply because it is susceptible to two possible meanings; a front label is ambiguous when reasonable consumers would necessarily require more information before reasonably concluding that the label is making a particular repre-

sentation.³ Only in these circumstances can the back label be considered at the dismissal stage. With this background of the applicable law, we turn to and address whether such circumstances are present here.

II. Whether the Products’ Labels Are Not Misleading as a Matter of Law

As explained above, the district court ruled that both the Asterisked and Unasterisked Products were not misleading as a matter of law. We first consider the Unasterisked Products.

A. Unasterisked Products

Analysis of the Unasterisked Products turns on whether the terms “plant-based” and “natural care,” along with images of leaves and trees, can be reasonably interpreted as representing that the Products contained only natural, plant-based ingredients. Relying on *McGinity*, Defendant argues that, “[b]ecause the term ‘plant-based wipes’ could reasonably be interpreted to mean that the wipes are *either* primarily or entirely made of plant-based ingredients,” the Products’ front label is at best ambiguous, and the district court correctly “considered the packaging as a whole, which . . . refuted [Plaintiff’s] all-natural interpretation.” We first address the threshold issue of whether the Products’ back label should be considered at this stage. We then turn to whether the front label, standing alone, is misleading as a matter of law.

i. Relevance of the Back Label

We reject Defendant’s contention that the Unasterisked Products’ front label is

3. Our position is consistent with that of our sister circuits. *E.g., Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 476-78 (7th Cir. 2020); *Dumont v. Reily Foods Co.*, 934 F.3d 35, 40 (1st Cir. 2019); *Mantikas v. Kellogg Co.*, 910 F.3d 633, 638-39 (2d Cir. 2018). In *Bell*,

the Seventh Circuit cited *Williams* as support for rejecting a district court’s proposed “ambiguity rule” that “as a matter of law, a front label cannot be deceptive if there is any way to read it that accurately aligned with the back label.” *Bell*, 982 F.3d at 476-77.

ambiguous, such that the district court correctly considered the back label. First, Defendant misstates the law. A front label is not ambiguous in a California false-advertising case merely because it is susceptible to more than one reasonable meaning. *Brady*, 26 Cal. App. 5th at 1174-75, 237 Cal.Rptr.3d 683. Second, Defendant's reliance on *McGinity* is misplaced. The representations at issue here are materially different than those at issue in that case. Although "plant-based" could be interpreted in different ways, it plausibly conveys a concrete and unambiguous meaning to a reasonable customer: that the product is entirely plant-based and exclusively contains "natural" materials. This stands in direct contrast to the all-but-meaningless marketing term "Nature Fusion" in *McGinity*. Likewise, and unlike the label in *Ebner*, "plant-based," together with the Products' allusions to "natural care" and nature imagery, plausibly suggests *some* representation about the contents of the package. It cannot be said that there are "no . . . words, pictures, or diagrams . . . from which *any* inference could be drawn." *Ebner*, 838 F.3d at 966 (emphasis in original).

[12] The district court cited *Trader Joe's* for the proposition that "a rational consumer who cares about what 'plant-based' means could look to the back of the Product, which clarifies that it contains both 'natural and synthetic ingredients.'" *Id.* As an initial matter, front-label ambiguity is determined not by whether a consumer "could" look beyond the front label, but whether they *necessarily* would do so. *Trader Joe's*, 4 F.4th at 882. The standard articulated by the district court would require a customer to consult the information on the back label any time such information is present. This is at odds with our holding in *Williams* that a consumer is not "expected to look beyond misleading rep-

resentations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." *Williams*, 552 F.3d at 939.

The district court's reliance on *Trader Joe's* was also misplaced because of the vastly different products at issue. In *Trader Joe's*, we noted that "[c]onsumers of Manuka honey, a niche, specialty product, are undoubtedly more likely to exhibit a higher standard of care than 'a parent walking down the dairy aisle in a grocery store, possibly with a child or two in tow,' who is 'not likely to study with great diligence the contents of a complicated product package.'" *Trader Joe's*, 4 F.4th at 884 (citation omitted). Here, Plaintiff alleges that she is a parent without any specialized knowledge, purchasing baby wipes for her young child. *Trader Joe's* makes clear that consumers of everyday items are not expected to study labels with the same diligence as consumers of specialty products. *See Trader Joe's*, 4 F.4th at 884; *see also Brady*, 26 Cal. App. 5th at 1172, 237 Cal. Rptr.3d 683 (contrasting "mass-market products" like vitamin gummies with products that would "appeal to skeptical consumers scrutinizing labels in a health food market"). Defendant does not assert that baby wipes are a niche product marketed to a small, sophisticated class of customers with deep knowledge of how baby wipes are made.

[13] In summary, Plaintiff has plausibly alleged that a reasonable consumer could interpret the front label as unambiguously representing that the Products do not contain synthetic ingredients, and that a reasonable consumer would not necessarily require more information from the back label before so concluding. These plausible allegations preclude Defendant's reliance on the back-label ingredients list at this stage. *See Brady*, 26 Cal. App. 5th at 1168, 237 Cal.Rptr.3d 683 ("[A] back label that

[does] not *confirm* what was on the front label [cannot] defeat . . . UCL, CRLA, false advertising and warranty claims” at the pleadings stage.” (emphasis in original) (citing *Williams*, 552 F.3d at 939-40)). The back label may persuade the fact-finder that the Products’ packaging is not misleading, but it is not a basis for dismissal under FRCP 12(b)(6).

ii. Front Label’s Tendency to Mislead

Having rejected Defendant’s assertion that the Products’ front label is sufficiently ambiguous to permit recourse to the back label, we turn to the district court’s conclusion that the front label, standing alone, was not misleading as a matter of law.

The district court reasoned that “Defendant’s use of the term ‘plant-based’ . . . is not misleading because it is truthful,” since the Products “contain at least 70% plant-based ingredients by weight.” *Whiteside*, 2023 WL 4328175, at *6. This reasoning is unpersuasive, because California law prohibits not only false statements, but also true statements that have a tendency to mislead. *Williams*, 552 F.3d at 938.

Further, the district court’s logic is premised on the assumption that “‘plant-based’ plainly means mostly, not necessarily all, derived from plants.” *Whiteside*, 2023 WL 4328175, at *6. The district court offered little support for its assumption that this is the only reasonable interpretation of “plant-based.” *See id.* For its part, Defendant argued that “[r]easonable consumers understand that baby wipes don’t grow on trees [and also understand that] baby wipes are manufactured through sophisticated mechanical processes, using a combination of natural and synthetic ingredients to ensure that the wipes are effective, shelf-stable, and af-

fordable.” *Id.* at *4. On appeal, Defendant also attempts an analogy to similar-sounding terms, such as a “tomato-based” sauce, which Defendant claims most people understand does not mean that the sauce contains only tomatoes.

We are not persuaded by Defendant’s contention that “[r]easonable consumers understand that baby wipes don’t grow on trees.” Reasonable consumers also understand that meat does not grow on trees, yet technology has advanced such that plant-based meat is now available.⁴ Consumers could reasonably suppose that manufacturers have similarly devised a way to make baby wipes using only plant-based compounds.

We are also not convinced that a reasonable consumer would necessarily “know baby wipes are manufactured through sophisticated mechanical processes, using a combination of natural and synthetic ingredients.” *See Whiteside*, 2023 WL 4328175, at *4 (quoting Defendant’s motion for summary judgment). Unlike bees (at issue in *Trader Joe’s*), which are familiar to anyone who has encountered vegetation, most people likely have not contemplated how baby wipes are made. Similarly, most consumers likely have not considered whether synthetic ingredients are necessary to make wipes “shelf-stable,” a term that is not part of common language.

Defendant’s analogy of “tomato-based” sauces does not hold up to scrutiny. It may be commonly known that tomato-based sauces contain non-tomato ingredients, but there is no reason to assume that consumers interpret all terms ending in “-based” in the same way. As *Trader Joe’s* explained, an advertising claim, such as describing a product as 100%-something, can

4. *See How Beyond Meat became a \$550 million brand, winning over meat-eaters with a vegan burger that ‘bleeds’*, CNBC, <https://www.cnb.com/2019/01/21/how-bill-gates-backed-vegan-beyond-meat-is-winning-over-meat-eaters.html> (last visited June 28, 2024).

[cnbc.com/2019/01/21/how-bill-gates-backed-vegan-beyond-meat-is-winning-over-meat-eaters.html](https://www.cnb.com/2019/01/21/how-bill-gates-backed-vegan-beyond-meat-is-winning-over-meat-eaters.html) (last visited June 28, 2024).

be interpreted very differently depending on what the “something” is. *See Trader Joe’s*, 4 F.4th at 882-83 (contrasting “100% grated parmesan cheese” with “100% New Zealand Manuka Honey”).

[14] The plausibility of Plaintiff’s interpretation of “plant-based” is bolstered by a consensus among California district courts that the term can reasonably imply that a product is entirely derived from natural, plant-based ingredients. *E.g.*, *Maisel v. S.C. Johnson & Son, Inc.*, 2021 WL 1788397, at *8 (N.D. Cal. May 5, 2021) (noting consensus and citing cases); *Moore v. EO Prods., LLC*, 2023 WL 6391480, at *7 (N.D. Cal. Sept. 29, 2023) (same); *Sultanis v. Champion Petfoods USA Inc.*, 2021 WL 3373934, at *11 (N.D. Cal. Aug. 3, 2021) (“Recent cases involving cleaning products illustrate the idea that statements broadly describing a certain type of ingredient can mislead consumers into thinking the products at issue contain *only* that type of ingredient.” (emphasis in original)).

Finally, we look to the FTC’s “Green Guides,” which warn that unqualified representations like “made with renewable materials” are likely to mislead a reasonable consumer to believe that a product “is made entirely with renewable materials.” Federal Trade Commission, *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. § 260.16 (hereinafter, “Green Guides”). The FTC recommends that marketers instead specify what portion of their product is made with renewable materials, such as by saying “[o]ur packaging is made from 50% plant-based renewable materials.” *Id.* The Green Guides are more than persuasive authority in California; they have been codified as law. Cal. Bus. & Prof. Code § 17580.5 (“For the purpose of [the section prohibiting “misleading environmental marketing claims”], ‘environmental marketing claim’ shall include any

claim contained in the ‘Guides for the Use of Environmental Marketing Claims’ published by the Federal Trade Commission.”).

Defendant correctly notes that the FTC has declined to provide guidance on the term “plant-based” specifically, and it has not labeled the term *per se* deceptive. Federal Trade Commission, *The Green Guides: Statement of Basis and Purpose* 246 (2012 ed.), <https://tinyurl.com/5r47sjth> (last visited June 27, 2024). Nevertheless, the Unasterisked Products’ unqualified “plant-based” representation is analogous to the “made with renewable materials” language used in the Green Guides, in that both terms might lead a reasonable consumer to believe that a product “is made entirely with” renewable or plant-based materials. This further convinces us that, at a minimum, this is not one of the “rare” cases in which dismissal is appropriate.

We reverse the district court’s dismissal of Plaintiff’s claims as to the Unasterisked Products.

B. Asterisked Products

Having found that “plant-based” is plausibly misleading if used without qualification, we next consider whether the use of an asterisk and the qualifying statement “*70+ % by weight” on the front label of the Asterisked Products “ameliorate[s] any tendency of [the] label to mislead.” *McGinity*, 69 F.4th at 1098 (citation omitted). The district court held that “a reasonable consumer would not simply assume the Asterisked Products contain 100% natural ingredients when she can plainly see that the wipes are 70% plant-based by weight.” *Whiteside*, 2023 WL 4328175, at *4 (internal quotation marks and citation omitted). Plaintiff asserts that “70%+ by weight” is ambiguous and “whether reasonable consumers understand . . . [it] to mean the Products are free from artificial ingredi-

ents presents questions of fact inappropriate for resolution on a motion to dismiss.” The district court rejected Plaintiff’s argument and found that the “Asterisked Products are unmistakably clear on the front [label] that they are 70% plant-based by weight.” *Whiteside*, 2023 WL 4328175, at *7.

We agree with the district court. The Asterisked Products track the Green Guides’ recommendation that marketers “qualify any ‘made with renewable materials’ claim unless the product or package (excluding minor, incidental components) is made entirely with renewable materials,” such as by describing the product as “made from 50% plant-based renewable materials.” Green Guides § 260.16. The California statute prohibiting misleading environmental marketing claims provides that “[i]t shall be a defense to any suit or complaint brought under this section that the person’s environmental marketing claims conform to the standards or are consistent with the examples contained in the [Green Guides.]” Cal. Bus. & Prof. Code § 17580.5(b)(1). The Asterisked Products are not an exact match for the example in the Green Guides, but they are consistent with the principle illustrated therein that environmental claims must be qualified.

We reach the same conclusion even giving Plaintiff the benefit of the doubt that “70%+ by weight” is ambiguous. If the statement were ambiguous, a reasonable consumer would require more information from the back label, and the back label clarifies that the Products contain both “natural and synthetic ingredients.” Even before reading the back label, the presence of an asterisk alone puts a consumer on notice that there are qualifications or caveats, making it unreasonable to assume that the Products were 100% plant-based. *See, e.g., Bobo v. Optimum Nutrition, Inc.*,

2015 WL 13102417, at *5 (S.D. Cal. Sep. 18, 2015) (“Plaintiff cannot simply look to the statement on the front panel, ignore the asterisk, and claim he has been misled.”).

[15] The asterisk and qualifying statement on the Asterisked Products, paired with the back label ingredients list, “[makes] it impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived.” *Williams*, 552 F.3d at 939. We affirm the district court’s dismissal of Plaintiff’s claims as to the Asterisked Products.

III. Whether Plaintiff Complied with the Particularity Requirements of Rule 9(b).

[16, 17] Defendant claims that FRCP 9(b) provides an alternative basis for dismissing Plaintiff’s complaint, an issue not reached by the district court. When a plaintiff brings fraud or misrepresentation claims, “Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (internal quotation marks and citations omitted). The plaintiff must plead “the who, what, when, where, and how of the misconduct charged.” *Id.* (internal quotation marks and citations omitted).

Defendant contends that Plaintiff failed to “particularly plead[] the *what* as part of the who, what, when, where, and how of the misconduct charged” because Plaintiff “never specifies which, if any, of the dozens of images in her complaint corresponds to the package *she* saw in store [sic] and purchased.”

[18] Defendant is incorrect. Plaintiff's complaint states that Plaintiff purchased "Huggies Natural Care® Baby Wipes (Sensitive) in 56 count size" at Target. The complaint refers to an exhibit that features an image of the label Plaintiff saw.⁵ There are indeed dozens of labels in the record because this is a putative class action, but Plaintiff's complaint sufficiently alleges the particular label she herself saw. We reject Defendant's alternative grounds for affirming dismissal under FRCP 9(b).

IV. Other Claims

The district court dismissed Plaintiff's claims for warranty and unjust enrichment, summarily concluding that, "[b]ecause the Complaint [was] subject to dismissal in its entirety on the [UCL, FAL, and CLRA] grounds, the Court need[ed] not reach" the other claims. *Whiteside*, 2023 WL 4328175, at *7. Because we reverse in part as to the Unasterisked Products, the district court must reconsider Plaintiff's warranty and unjust enrichment claims with respect to those products.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of Plaintiff's UCL, FAL, CLRA, breach of warranty, and unjust enrichment claims as to the Asterisked Products; REVERSE the dismissal as to the Unasterisked Products; and REMAND for further proceedings consistent with this disposition.



5. Defendant claims that "every image of wipes in the complaint that were available for purchase at Target [were Asterisked Products]," contrary to Plaintiff's allegation that

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Steven DUARTE, aka Shorty,
Defendant-Appellant.**

No. 22-50048

United States Court of Appeals,
Ninth Circuit.

Filed July 17, 2024

D.C. No. 2:20-cr-00387-AB-1, Central
District of California, Los Angeles

Kyle Kahan, Special Assistant U.S. Attorney, Juan M. Rodriguez, Attorney, Suria Marie Bahadue, David Ransom Friedman, Assistant U.S. Attorney, DOJ - Office of the U.S. Attorney, Los Angeles, CA, William A. Glaser, Trial Attorney, DOJ - U.S. Department of Justice, Criminal Division, Appellate Section, Washington, DC, for Plaintiff-Appellee.

Sonam A. H. Henderson, Assistant Federal Public Defender, FPDCA - Federal Public Defender's Office (Los Angeles), Los Angeles, CA, for Defendant-Appellant.

ORDER

MURGUIA, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion is vacated.

she purchased Unasterisked Products. This factual dispute is inappropriate for resolution at this stage and does not detract from the particularity of Plaintiff's allegations.

actions as private attorneys general on behalf of the state. In holding that the California law and the FAA did not conflict, the Court noted that “[n]on-class representative actions in which a single agent litigates on behalf of a single principal”—such as “shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons”—form “part of the basic architecture of much of substantive law.” 596 U.S. at 657, 142 S.Ct. 1906. The Court held that such actions are not “inconsistent [with] the norm of bilateral arbitration” in the same way that class actions are. *Id.* For that reason, California could prohibit contractual waivers of “representative standing” in this context without impermissibly interfering with contracting parties’ ability to choose the comparatively informal and efficient procedure of bilateral arbitration. *Id.*

But the fact that states have the authority to ban waivers of representative standing does not mean that a federal court—on its own initiative and in the absence of any statutory ban—may itself decide to prohibit such waivers by refusing to enforce arbitration agreements.

* * *

The district court should have compelled arbitration because the effective vindication exception—assuming it exists—is inapplicable. The court’s opinion cannot be reconciled with our obligation to enforce an arbitration agreement according to its terms and to avoid finding conflicts between the FAA and other federal statutes when possible. I dissent.



Charity BUSTAMANTE, individually and on behalf of all others similarly situated; Amanda Short; Sarah Thomas, on behalf of themselves and all others similarly situated; and Elizabeth Livingston, Plaintiffs-Appellants,

Amy Cavanagh, individually and on behalf of all others similarly situated; Robert O’Brien, individually, and on behalf of all others similarly situated; Mayra Galvez, individually and on behalf of all others similarly situated; Chris C. Galvez, individually and on behalf of all others similarly situated; Brandon Kaufer; Dena Karnezis, individually and on behalf of all others similarly situated; Danielle Cooper, individually and on behalf of all others similarly situated; Lee Jackson, individually and on behalf of all others similarly situated; Charlie McDonald; Benjamin Karter, individually and on behalf of all others similarly situated and the general public; Melanie House, individually and on behalf of all others similarly situated; Erich Zander; Bonnie Burkett; and Barry A. Cohen, Plaintiffs,

v.

KIND, LLC, a New York limited liability company, Defendant-Appellee,

**No. 22-2684-cv
August Term 2023**

United States Court of Appeals,
Second Circuit.

Argued: January 10, 2024

Decided: May 2, 2024

Background: Consumers brought putative class action against distributor of snack foods which were marketed as “All Natural,” alleging that label was deceptive and misleading in violation of state con-

sumer protection and false advertising laws, among other claims. The United States District Court for the Southern District of New York, William H. Pauley, III, Senior District Judge, 337 F.R.D. 581, granted consumers' motion for class certification and denied distributor's motion to strike testimony of one of consumers' experts. After the close of discovery, the District Court, Naomi Reice Buchwald, J., 627 F.Supp.3d 269, granted distributor's motion for summary judgment, to disqualify opinions of two other experts, and to decertify the class. Consumers appealed.

Holdings: The Court of Appeals, Merriam, Circuit Judge, held that:

- (1) trial court did not abuse its discretion in concluding that consumer perceptions survey was inadmissible as not relevant;
- (2) trial court did not abuse its discretion in finding that chemist's report was inadmissible as not relevant;
- (3) there was no admissible evidence of any cohesive definition of what a reasonable consumer would expect from products labeled "All Natural," relating to deception element of consumer protection claims; and
- (4) affirmance of trial court's grant of summary judgment in favor of distributor mooted appeal of grant of distributor's motion to decertify classes.

Affirmed.

1. Federal Courts ⇌3604(4)

When a party challenges the district court's evidentiary rulings underlying a grant of summary judgment, Court of Appeals first reviews the trial court's evidentiary rulings, which define the summary judgment record.

2. Federal Courts ⇌3598(4)

The District Court's determinations as to the admissibility of evidence are reviewed for abuse of discretion.

3. Federal Courts ⇌3604(4)

After the Court of Appeals has defined the record, the Court reviews the summary judgment decision de novo.

4. Antitrust and Trade Regulation ⇌164

For purposes of determining whether a label is deceptive in a consumer protection case, deception is governed by the reasonable consumer standard pursuant to which "deceptive acts" are defined objectively as those that are likely to mislead a reasonable consumer acting reasonably under the circumstances.

See publication Words and Phrases for other judicial constructions and definitions.

5. Antitrust and Trade Regulation ⇌164

For purposes of determining whether a label is deceptive, the reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.

6. Summary Judgment ⇌259

To establish deception under the reasonable consumer standard at the summary judgment stage of a consumer protection case alleging deceptive labeling, plaintiffs must present admissible evidence establishing how the challenged labeling statement tends to mislead reasonable consumers acting reasonably.

7. Federal Courts ⇌3600

Court of Appeals reviews a district court's decision to admit or exclude expert testimony under a highly deferential abuse of discretion standard. Fed. R. Evid. 702.

8. Federal Courts ⇨3600

A decision to exclude expert testimony is not an abuse of discretion unless it is manifestly erroneous. Fed. R. Evid. 702.

9. Evidence ⇨2484

Under *Daubert* and rule governing admission of expert testimony, the district court acts as a gatekeeper and is charged with the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

10. Evidence ⇨2276

Throughout, a judge assessing a proffer of expert scientific testimony under *Daubert* and rule governing admission of expert testimony should be mindful of other applicable rules; specifically, the trial court should look to the standards of rule governing test for relevant evidence in analyzing whether proffered expert testimony is relevant. Fed. R. Evid. 401, 702.

11. Evidence ⇨865

A court considering admissibility of evidence should consider whether the evidence has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

12. Evidence ⇨2484

If the expert evidence is relevant, a district court must next determine whether the proffered expert testimony has a sufficiently reliable foundation to permit it to be considered. Fed. R. Evid. 401, 702.

13. Evidence ⇨2288

The court reviewing a district court's decision to admit or exclude expert testimony must consider rule requiring the weighing of possible prejudice against probative force. Fed. R. Evid. 403.

14. Evidence ⇨2288

Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it, and because of this risk, the judge in weighing possible prejudice against probative force of the proposed evidence exercises more control over experts than over lay witnesses. Fed. R. Evid. 403.

15. Evidence ⇨2492, 2493

Daubert instructs a district court to focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions. Fed. R. Evid. 702.

16. Evidence ⇨2598

Although surveys are generally admissible in cases that depend on establishing that certain associations have been drawn in the public mind, the evidentiary value of a survey's results rests upon the underlying objectivity of the survey itself.

17. Evidence ⇨2598

The objectivity of a survey depends upon many factors, including whether the questions are leading or suggestive.

18. Evidence ⇨2288, 2598

Errors in survey methodology generally go only to the weight of the evidence, subject, of course, to the more general prohibition against evidence that is less probative than prejudicial or confusing. Fed. R. Evid. 403.

19. Evidence ⇨2598

Trial court did not abuse its discretion in concluding that consumer perceptions survey question regarding participants' expectations for distributor's snack product based on label's "All Natural" descriptor provided no useful information about how a reasonable consumer understood des-

criptor “All Natural,” and could not assist the trier of fact, and thus survey question and testimony based upon survey question were inadmissible as not relevant to consumers’ action alleging that misleading and deceptive label violated consumer protection and false advertising laws in California, New York, and Florida; expert had conceded both in his report and at deposition that he worded substantive response options on basis of understanding of consumers’ theory of liability, and expert’s design choice in survey question to display “All Natural” claim in isolation, unlike products’ actual packaging labels, undercut relevance of expert’s results. Fed. R. Evid. 401, 402, 702.

20. Evidence ⇌2598

District Court did not abuse its discretion in concluding that expert’s design of consumer survey question relating to participants’ expectations as to whether distributor’s snack products with label descriptor “All Natural” contained certain listed but undefined chemicals was inappropriately leading and a clear attempt to manipulate consumers into selecting the answer that consumers preferred, such that survey question had no probative value and could not assist a trier of fact, and thus survey question and expert’s testimony based upon survey question were inadmissible in consumers’ action, alleging that misleading and deceptive label violated consumer protection and false advertising laws in California, New York, and Florida. Fed. R. Evid. 403, 702.

21. Evidence ⇌2598

If surveys were so flawed that they lacked relevance, they would be inadmissible. Fed. R. Evid. 401, 402.

22. Evidence ⇌2298

District Court did not abuse its discretion in finding that chemist’s report did not assist the trier of fact because report did

not opine on whether ingredients in distributor’s snack products met definition of labeling term “All Natural” as understood by a reasonable consumer, and thus that report was inadmissible as not relevant to consumers’ action alleging that misleading and deceptive label violated consumer protection and false advertising laws in California, New York, and Florida; expert did not apply any of the definitions alleged in the operative complaint, did not perform any analysis, chemical or otherwise, of ingredients actually contained in products, and, for the most part, did not consider how distributor actually manufactured those ingredients, and instead, generally considered how challenged ingredients were typically sourced and concluded that many of challenged ingredients were not “natural” according to his personal understanding. Fed. R. Evid. 401, 402, 702.

23. Federal Courts ⇌3604(4), 3675

Court of Appeals reviews the district court’s rulings on summary judgment de novo, resolving all ambiguities and drawing all permissible inferences in favor of the nonmoving party. Fed. R. Civ. P. 56.

24. Summary Judgment ⇌45(2)

Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

25. Summary Judgment ⇌51, 77

The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists, but when the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to an absence of evidence on an essential element of the nonmovant’s claim. Fed. R. Civ. P. 56.

26. Summary Judgment ⇨78

Once a summary judgment movant points to an absence of evidence on an essential element of the nonmovant's claim, the nonmovant must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56.

27. Summary Judgment ⇨95

Conclusory allegations, conjecture, and speculation are insufficient to create a genuine issue of fact to survive a summary judgment motion. Fed. R. Civ. P. 56.

28. Antitrust and Trade Regulation
⇨164

There was no admissible evidence of any cohesive definition of what a reasonable consumer would expect from products labeled "All Natural," how a reasonable consumer understood terms "artificial" or "synthetic," or that a reasonable consumer would interpret "All Natural" as meaning "containing no artificial or synthetic ingredients," relating to deception element of consumers' claims that misleading and deceptive labeling violated consumer protection and false advertising laws in California, New York, and Florida.

29. Summary Judgment ⇨95

Although the definitions pled in the complaint may have sufficed at the motion to dismiss or class certification stage of litigation, plaintiffs cannot meet their burden on summary judgment through reliance on unsupported assertions. Fed. R. Civ. P. 56.

30. Federal Courts ⇨3515

Affirmance of trial court's grant of summary judgment in favor of distributor of snack products mooted appeal of grant of distributor's motion to decertify classes in consumers' action alleging that misleading and deceptive label containing descriptor "All Natural" violated consumer protection and false advertising laws in

California, New York, and Florida. Fed. R. Civ. P. 23, 56.

Appeal from the United States District Court for the Southern District of New York, No. 1:15MD02645, Naomi Reice Buchwald, *Judge*.

Todd S. Garber, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP, White Plains, NY (Bradley K. King, Ahdoot & Wolfson, PC, New York, NY; Daniel L. Warshaw, Pearson Warshaw, LLP, Sherman Oaks, CA, on the brief) for Plaintiffs-Appellants.

Keri Elizabeth Borders (Dale Joseph Giali, Rebecca B. Johns, on the brief), King & Spalding LLP, Los Angeles, CA, for Defendant-Appellee.

Before: Menashi, Lee, and Merriam,
Circuit Judges.

Sarah A. L. Merriam, Circuit Judge:

Plaintiffs-appellants ("plaintiffs") appeal from the September 12, 2022, judgment entered in the District Court for the Southern District of New York (Buchwald, *J.*), granting summary judgment in favor of defendant-appellee KIND, LLC ("KIND"), granting KIND's motion to disqualify two of plaintiffs' experts, and decertifying the classes.

KIND markets, advertises, and distributes various snack foods, including granola bars. Plaintiffs assert that the phrase "All Natural" that appeared on the labels of 39 KIND products is deceptive and misleading. Plaintiffs seek damages on behalf of themselves and three classes pursuant to common law and to New York, California, and Florida consumer protection and false advertising laws.

After the parties completed discovery, KIND moved for summary judgment, to

preclude plaintiffs' experts from offering testimony in opposition to its motion for summary judgment, and to decertify the classes. By memorandum and order dated September 9, 2022, the District Court granted KIND's motion for summary judgment, concluding, in relevant part, that plaintiffs had failed to establish a reasonable consumer's understanding of the term "All Natural," which was fatal to plaintiffs' claims. See generally In re KIND LLC "Healthy and All Natural" Litig., 627 F. Supp. 3d 269 (S.D.N.Y. 2022) ("KIND II"). The District Court also granted KIND's motion to preclude two of plaintiffs' expert opinions from the summary judgment record, and KIND's motion to decertify the classes. See generally id.

Plaintiffs timely appealed. For the reasons set forth below, we hold that the District Court did not abuse its discretion in precluding the opinions of plaintiffs' experts. We also hold that because plaintiffs failed to present admissible evidence of what a reasonable consumer would expect of KIND products labeled "All Natural," the District Court did not err in concluding that there was no triable issue of fact as to whether reasonable consumers would be misled by the "All Natural" claim. Because we affirm the District Court's grant of summary judgment, plaintiffs' arguments regarding class decertification are moot. The judgment of the District Court is therefore **AFFIRMED**.

BACKGROUND

This litigation began in 2015, shortly after the Food and Drug Administration ("FDA") issued a "warning letter" challenging a statement on KIND product labels that the products are "healthy and tasty."¹ Following the FDA letter, various plaintiffs filed private lawsuits asserting,

inter alia, that consumers had been deceived by the description of KIND products as "healthy." These lawsuits were eventually transferred to the Southern District of New York and consolidated to a multidistrict litigation docket.

Plaintiffs' claims have shifted over the course of this litigation. In May 2016, plaintiffs voluntarily dismissed the claims challenging KIND's use of the term "healthy." Thereafter, plaintiffs filed an amended consolidated class action complaint ("ACC") alleging that plaintiffs had instead been deceived by the "All Natural/Non-GMO" claim on the packaging of various KIND products. The ACC asserts claims for breach of express warranty, unjust enrichment, and negligent misrepresentation, as well as violations of the New York General Business Law ("GBL"), N.Y. Gen. Bus. Law §§ 349-50; California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.; California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, et seq.; California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; and Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, et seq.

To support these claims, the ACC alleges that the "All Natural" language on KIND products constitutes deceptive labeling under five separate definitions of "All Natural." It further alleges that the following eleven ingredients contained in some relevant KIND products are "non-natural": Soy Lecithin; Soy Protein Isolate; Citrus Pectin; Glucose Syrup/"Non-GMO" Glucose; Vegetable Glycerine; Palm Kernel Oil; Canola Oil; Ascorbic Acid; Vitamin A Acetate; D-Alpha Tocopheryl Acetate/Vitamin E; and Annatto. J. App'x at 87; see also id. at 87-95.

1. In 2016, the FDA withdrew the objections

outlined in its 2015 warning letter.

On January 17, 2020, plaintiffs filed a motion seeking to certify three damages classes under Rule 23(b)(3) of the Federal Rules of Civil Procedure: (1) The “New York Class,” which would include “[a]ll persons who purchased KIND’s Products in New York for their personal use and not for resale at any time since April 17, 2009”; (2) the “California Class,” which would include “[a]ll persons who purchased KIND’s Products in California for their personal use and not for resale at any time since April 17, 2011”; and (3) the “Florida Class,” which would include “[a]ll persons who purchased KIND’s Products in Florida for their personal use and not for resale at any time since April 17, 2011.” J. App’x at 163.² On March 24, 2021, the District Court granted plaintiffs’ motion to certify the three damages classes. See In re Kind LLC “Healthy and All Natural” Litig., 337 F.R.D. 581, 610 (S.D.N.Y. 2021) (“KIND I”). In relevant part, the District Court found that “common questions predominate[d]” because, *inter alia*,

the differences between “Non-GMO” and “No Genetically Engineered Ingredients” on one hand, and “All Natural” on the other, are minute If a product contains a GMO, it by definition cannot be natural [N]one of the labels displayed “All Natural” on its own. Rather, KIND coupled “All Natural” with “Non-GMO.”

Id. at 599-600.

Following class certification and further discovery, plaintiffs dropped any challenge to the “Non GMO” and “No Genetically Engineered Ingredients” statements on KIND products. Plaintiffs now pursue their challenge only to the “All Natural”

2. Plaintiffs also sought certification of injunctive classes pursuant to Rule 23(b)(2). The District Court denied that aspect of plaintiffs’ clarification motion and that ruling is not challenged on appeal.

claim that previously appeared on certain KIND products.³

After the close of discovery, KIND filed motions for summary judgment, to decertify the classes, and to exclude plaintiffs’ expert witnesses, Dr. J. Michael Dennis and Dr. Anton Toutov. In a memorandum and order issued on September 9, 2022, the District Court granted KIND’s motions. See generally KIND II, 627 F. Supp. 3d at 269. Judgment entered in favor of KIND on September 12, 2022, and this appeal followed.

DISCUSSION

[1–3] “When a party challenges the district court’s evidentiary rulings underlying a grant of summary judgment, we undertake a two-step inquiry. First, we review the trial court’s evidentiary rulings, which define the summary judgment record.” Picard Tr. for SIPA Liquidation of Bernard L. Madoff Inv. Sec. LLC v. JABA Assocs. LP, 49 F.4th 170, 180-81 (2d Cir. 2022) (citation and quotation marks omitted). The District Court’s determinations as to the admissibility of evidence are reviewed for abuse of discretion. See id. at 181. Second, after we have defined the record, we review the summary judgment decision *de novo*. See id. Accordingly, we begin by considering whether the District Court abused its discretion in precluding the expert opinions of Dr. J. Michael Dennis and Dr. Anton Toutov.

I. Relevant Consumer Protection and False Advertising Law

To frame this analysis, we begin with an overview of the law applicable to plaintiffs’

3. In 2014, KIND began discontinuing the use of the “All Natural/GMO” label on a rolling basis, and by 2017, KIND had discontinued all labels bearing any form of the “All Natural” claim.

claims. As noted, plaintiffs assert claims pursuant to various state law consumer protection and false advertising statutes. While the required elements of claims under each statute vary, the parties do not dispute the District Court's conclusion that "there is substantial overlap between the elements of the claims," and that to prevail on any of their claims, "plaintiffs must demonstrate: (1) a deceptive act; (2) materiality; and (3) injury." KIND II, 627 F. Supp. 3d at 280.⁴ Only the first element, deception, is at issue in this appeal.

[4, 5] Deception is governed by the reasonable consumer standard. See Maurizio v. Goldsmith, 230 F.3d 518, 521-22 (2d Cir. 2000) (per curiam) (GBL); McGinity v. Procter & Gamble Co., 69 F.4th 1093, 1097 (9th Cir. 2023) (UCL, FAL, CLRA); Zlotnick v. Premier Sales Grp., Inc., 480 F.3d 1281, 1284 (11th Cir. 2007) (FDUTPA). Under the reasonable consumer standard, deceptive acts are defined "objectively" as those "that are likely to mislead a reasonable consumer acting reasonably under the circumstances." Maurizio, 230 F.3d at 521 (citation and quotation marks omitted); see also Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) ("Under the reasonable consumer standard, Appellants must show that members of the public are likely to be deceived." (citation and quotation marks omitted)); Zlotnick, 480 F.3d at 1284 ("[D]eception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." (citation and quotation marks omitted)). The Ninth Circuit has helpfully explained that this standard requires "more than a mere possibility that the label might conceivably be misunder-

4. Plaintiffs also assert common-law claims for breach of express warranty, unjust enrichment, and negligent misrepresentation. Plaintiffs do not challenge the District Court's finding that because the common-law claims "are

stood by some few consumers viewing it in an unreasonable manner. Rather, the reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." McGinity, 69 F.4th at 1097 (citations and quotation marks omitted).

[6] To establish deception under the reasonable consumer standard at the summary judgment stage, plaintiffs must present admissible evidence establishing how the challenged statement – "All Natural" – tends to mislead reasonable consumers acting reasonably. See, e.g., Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 297-98 (2d Cir. 1992) (discussing deceptive advertising in the context of the Lanham Act); Bruton v. Gerber Prod. Co., 703 F. App'x 468, 471 (9th Cir. 2017) (mem.) (The evidence of record, including plaintiff's testimony and warning letters from the FDA, was insufficient "to create a genuine dispute of material fact for trial as to consumer deception" under the reasonable consumer test.).

II. The District Court did not abuse its discretion in excluding the expert opinions of Dr. Dennis and Dr. Touthov.

A. Applicable Law

[7, 8] "We review a district court's decision to admit or exclude expert testimony under a highly deferential abuse of discretion standard." In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II), 982 F.3d 113, 122 (2d Cir. 2020) (per

similarly premised on plaintiffs establishing a deceptive and misleading act," the common-law claims "fail if plaintiffs cannot meet the statutory standard." KIND II, 627 F. Supp. 3d at 281.

curiam) (citation and quotation marks omitted). “A decision to . . . exclude expert . . . testimony is not an abuse of discretion unless it is manifestly erroneous.” Amorgianos v. Nat’l R.R. Passenger Corp., 303 F.3d 256, 265 (2d Cir. 2002) (citation and quotation marks omitted).

[9] Rule 702 of the Federal Rules of Evidence governs the admissibility of expert witness testimony. Under this rule, the District Court acts as a gatekeeper and “is charged with ‘the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.’” Id. (emphasis added) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

[10, 11] “Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules.” Daubert, 509 U.S. at 595, 113 S.Ct. 2786. Specifically, “the trial court should look to the standards of Rule 401 in analyzing whether proffered expert testimony is relevant,” Amorgianos, 303 F.3d at 265. In other words, the court should consider whether the evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,” Daubert, 509 U.S. at 587, 113 S.Ct. 2786 (citation and quotation marks omitted); see also Fed. R. Evid. 401.

[12–14] If the evidence is relevant, a district court “must next determine whether the proffered testimony has a sufficiently reliable foundation to permit it to be considered.” Amorgianos, 303 F.3d at 265 (citation and quotation marks omitted).⁵ The reviewing court must also consider

Rule 403: “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.” Daubert, 509 U.S. at 595, 113 S.Ct. 2786 (citations and quotation marks omitted).

[15, 16] Daubert instructs a district court to “focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court’s belief as to the correctness of those conclusions.” Amorgianos, 303 F.3d at 266. Although surveys are generally admissible in cases that “depend on establishing that certain associations have been drawn in the public mind,” Schering Corp. v. Pfizer Inc., 189 F.3d 218, 225 (2d Cir.), as amended on reh’g (2d Cir. 1999), “[t]he evidentiary value of a survey’s results rests upon the underlying objectivity of the survey itself,” Johnson & Johnson, 960 F.2d at 300.

[17, 18] The objectivity of a survey “depends upon many factors,” including “whether the questions are leading or suggestive.” Id. (citation and quotation marks omitted). Errors in survey methodology generally “go only to the weight of the evidence – subject, of course, to Rule 403’s more general prohibition against evidence that is less probative than prejudicial or confusing.” Schering Corp., 189 F.3d at 228; see also Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, [or] misleading the jury . . .”).

5. Of course any “[i]rrelevant evidence,” including irrelevant expert testimony, “is not

admissible.” Fed. R. Evid. 402.

B. Dr. Dennis

At summary judgment, plaintiffs attempted to establish how a reasonable consumer would understand the phrase “All Natural” through the expert opinion of Dr. J. Michael Dennis. Dr. Dennis conducted a “consumer perceptions” survey on plaintiffs’ behalf for the purpose of this litigation. J. App’x at 1503. Based on his survey, Dr. Dennis concluded “that a reasonable consumer in [California, New York, and Florida] perceives the Products with the ‘All Natural’ descriptor will not contain artificial and synthetic ingredients or contain [certain] chemicals.” *Id.* at 1532.

The District Court excluded Dr. Dennis’s expert report, finding that the consumer perceptions survey on which it relied “does not assist the trier of fact because it is biased, leading, and to the extent it provides any insight, cannot provide the objective standard necessary to answer the key question in this case.” *KIND II*, 627 F. Supp. 3d at 292. Thus, because the survey “cannot assist the trier of fact,” the District Court held that “the survey and Dr. Dennis’s testimony regarding the survey are inadmissible.” *Id.* Plaintiffs contend that the District Court abused its discretion in excluding Dr. Dennis’s report because any criticisms of Dr. Dennis’s methodology should affect only the weight of the evidence and not its admissibility. We disagree.

Plaintiffs retained Dr. Dennis to design and conduct “a consumer survey to measure the extent to which reasonable consumers’ perceptions of the Products are consistent with the Plaintiffs’ theory of liability, that is, the allegation that the Products’ labeling and marketing were deceptive with respect to the use of the ‘All Natural’ claim.” J. App’x at 1503. Dr. Dennis surveyed California, Florida, and New York consumers who had purchased KIND

products, or products from a KIND competitor, in the last twelve months. *See id.* at 1505-07. After some initial screening questions, Dr. Dennis presented the consumers with “a mock-up of the front of a brand-neutral product package and instructed the [consumers] to ‘examine it like you were shopping’” and “to assume that the nutrition snack bar is a ‘popular national brand.’” *Id.* at 1510. The mock-up label displayed the words “All Natural,” and in several respects resembled the packaging of a KIND bar. *See id.* at 1511.

[19] After instructing consumers to “consider only the product packaging in answering the survey questions,” the survey “administer[ed] six consumer perception questions,” only two of which are relevant to this appeal. J. App’x at 1512. The first question asked: “Because of this descriptor [All Natural], what is your expectation for this product?” *Id.* at 1512, 1515. The survey then directed the consumer to select one of the following responses: (a) “Will NOT contain artificial and synthetic ingredients;” (b) “Will contain artificial and synthetic ingredients;” or (c) “Not sure/No expectation.” *Id.* at 1515. In response to this question, “86.4% of consumers expected the Product with the ‘All Natural’ claim ‘will NOT contain artificial and synthetic ingredients.’” *Id.* at 1530. The survey did not define the terms “artificial” or “synthetic.”

The District Court found that this first question was “insufficient to determine in any meaningful sense how reasonable consumers understand the ‘All Natural’ claim, or to test plaintiffs’ theory.” *KIND II*, 627 F. Supp. 3d at 288. In so finding, the District Court properly focused on Dr. Dennis’s survey methodology, finding this first question “biased” and “lead[ing]” because it “improperly directs survey participants to the ‘correct’ answer” and “is

plainly designed to validate plaintiffs' theory" of liability. Id. at 287, 288.

There is nothing manifestly erroneous about that characterization, particularly given Dr. Dennis's concession both in his report and at his deposition that he "worded [his] substantive response options on the basis of [his] understanding of the Plaintiffs' theory of liability." J. App'x at 1515; see also KIND II, 627 F. Supp. 3d at 288. Indeed, we have previously held that a plaintiff could not rely on a survey based on a question that, like this one, "was an obvious leading question in that it suggested its own answer." Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112, 118 (2d Cir. 1984);⁶ see also Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc., 19 F.3d 125, 134 (3d Cir. 1994) ("A survey is not credible if it relies on leading questions which are inherently suggestive" (citation and quotation marks omitted)); Scotts Co. v. United Indus. Corp., 315 F.3d 264, 277 (4th Cir. 2002) (Focus group discussions lacked reliability where the "moderators of the groups channeled the discussions and led the participants into giving responses favorable to" the plaintiff.).

[20] The second question in Dr. Dennis's survey again asked: "Because of this descriptor [All Natural], what is your expectation for this product?" J. App'x at 1516. But in response to that question, the survey directed the consumer to select one of the following responses: (a) "Is NOT made using these chemicals: Phosphoric Acid, Hexane, Potassium Hydroxide, Ascorbic Acid"; (b) "Is made using these chemicals: Phosphoric Acid, Hexane, Potassium Hydroxide, Ascorbic Acid"; or (c)

"Not sure/No expectation." J. App'x at 1516. In response to this question, "76.2% of consumers expected the Product with the 'All Natural' claim is 'NOT made using these chemicals: Phosphoric Acid, Hexane, Potassium Hydroxide, Ascorbic Acid.'" Id. at 1530-31. The survey did not describe or otherwise define the listed "chemicals."

The District Court concluded that the second question, like the first, was inappropriately leading and manipulative. See KIND II, 627 F. Supp. 3d at 288-89. Our review of the record reveals nothing manifestly erroneous about that conclusion. Indeed, by asking participants whether they expected an "All Natural" snack bar to contain certain listed "chemicals," Dr. Dennis led survey participants down the path of selecting the answer preferred by plaintiffs. See id. at 289. Additionally, by listing the "chemicals" without defining them, Dr. Dennis failed to differentiate, for example, between "ascorbic acid," a form of Vitamin C safe for human consumption, and "phosphoric acid," which is "not safe for ingestion." Id. Dr. Dennis admitted that he did not define the listed chemicals because he "thought it would not serve the project well" to do so. Id. Based on these findings, the District Court did not abuse its discretion in concluding that the design of the second question was also a "clear attempt to manipulate consumers into selecting the answer that plaintiffs preferred," and thus had "no probative value and could not assist a trier of fact." Id.

[21] Plaintiffs assert that the District Court should have admitted Dr. Dennis's report because "[c]hallenges to the design and implementation of consumer perception surveys go to the weight of the evi-

6. That Dr. Dennis chose "to display the 'All Natural' claim in isolation, rather than as part of the 'All Natural/Non GMO' statement, as it always appeared on KIND labels" also supports the District Court's decision to ex-

clude his report because that design choice further "undercuts the relevance of Dr. Dennis's results." KIND II, 627 F. Supp. 3d at 288.

dence and do not affect admissibility.” Appellant’s Br. at 42 (citing Schering Corp., 189 F.3d at 228). But, as we have previously found, if “surveys were so flawed that they lacked relevance, they would [be] inadmissible under Rules 401 and 402 of the Federal Rules of Evidence.” McNeilab, Inc. v. Am. Home Prods. Corp., 848 F.2d 34, 38 (2d Cir. 1988). And, as noted, the admissibility of survey evidence is subject to “Rule 403’s more general prohibition against evidence that is less probative than prejudicial or confusing.” Schering Corp., 189 F.3d at 228; see also Starter Corp. v. Converse, Inc., 170 F.3d 286, 297 (2d Cir. 1999) (holding “that the district court did not abuse its discretion” in excluding a survey from evidence because “the probative value of the survey [was] so slight that it was easily outweighed, under a Rule 403 analysis, by the danger of confusion of the issues”).

The District Court did not expressly cite to Rule 401 or Rule 403. But its analysis clearly rests on those rules. The District Court concluded: “As it cannot assist the trier of fact, the survey and Dr. Dennis’s testimony regarding the survey are inadmissible.” KIND II, 627 F. Supp. 3d at 292. The District Court further found that Dr. Dennis’s choices “undercut[] the relevance of [his] results.” Id. at 288. These are findings based on Rule 401. And the District Court’s finding that Dr. Dennis’s report would leave the “factfinder to guess at the answers to key questions in this case,” id. at 290, suggests consideration of Rule 403, which allows a court to “exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . confusing the issues, [or] misleading the jury.” Fed. R. Evid. 403. Indeed, the District Court explicitly relied on Nimely v. City of New York, 414 F.3d 381 (2d Cir. 2005), which addressed the interplay between Rules 702 and 403 of the Federal Rules of Evidence. See KIND II, 627 F.

Supp. 3d at 291-92. In Nimely, we acknowledged that “[i]n addition to the requirements of Rule 702, expert testimony is subject to Rule 403, and ‘may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.’” 414 F.3d at 397 (emphasis added) (quoting Fed. R. Evid. 403). We also “noted the uniquely important role that Rule 403 has to play in a district court’s scrutiny of expert testimony.” Id. Plaintiffs fail to acknowledge the significance of Rule 401 and Rule 403 to the admissibility of the expert reports.

In sum, the District Court found that Dr. Dennis’s survey and testimony were inadmissible because, “even ignoring” the survey’s methodological failures, they “provide[d] no useful information about how a reasonable consumer understands ‘All Natural.’” KIND II, 627 F. Supp. 3d at 289. This rendered the survey and testimony based upon it not “relevant to the task at hand,” Amorgianos, 303 F.3d at 265 (citation and quotation marks omitted), and thus properly excluded from evidence under Federal Rule of Evidence 402. See Fed. R. Evid. 402 (“Irrelevant evidence is not admissible.”); see also Starter Corp., 170 F.3d at 297 (A survey may be precluded where “it is irrelevant to the issues.” (citation and quotation marks omitted)). We find no basis in the record to conclude that the District Court abused its discretion.

C. Dr. Toutov

[22] Plaintiffs designated Dr. Anton Toutov “as an expert chemist for the purpose of determining the veracity of KIND’s ‘All Natural’ labeling statements.” Appellants’ Br. at 51. The District Court excluded Dr. Toutov’s report, finding that it had “no relevance to this case” and “cannot assist the trier of fact.” KIND II,

627 F. Supp. 3d at 294-95. On appeal, plaintiffs contend that the District Court abused its discretion in excluding Dr. Toutov's opinion, arguing that the analysis underlying his report was "meaningful and relevant to a reasonable consumer's understanding of" the phrase "All Natural." Appellants' Br. at 51. We again disagree.

Dr. Toutov conducted a review of the ingredient lists on KIND's challenged products and then compared those ingredients to a framework he developed. This framework examined each ingredient's origin, the extent to which the ingredient had been processed from its natural form, and the final form of the ingredient. After conducting an analysis based on this framework, Dr. Toutov opined on whether a specific ingredient could be classified as "natural" under his framework. However, in doing so, Dr. Toutov did not apply or reference Dr. Dennis's definition of "All Natural." He also did not apply any of the definitions alleged in the operative complaint.

Furthermore, Dr. Toutov did not perform any analysis (chemical or otherwise) of the ingredients actually contained in the KIND products. Nor, for the most part, did he consider how KIND actually manufactured those ingredients. Instead, Dr. Toutov generally considered how the challenged ingredients were "typically" sourced and concluded that many of the challenged ingredients are not "natural" as he framed the term. But, without some evidence to the contrary, there is no reason to assume that Dr. Toutov's personal understanding of the term "natural" is relevant to how a reasonable consumer would understand that same term.

7. While Dr. Toutov's report explains from a purportedly scientific perspective what it means for a product to be "artificial" or "synthetic," the record does not reflect a reasonable consumer's understanding of these

Plaintiffs contend that the District Court erred in finding that "Dr. Toutov did not 'focus on' the actual ingredients used in KIND's products" because "[f]or every single one of the ingredients challenged in his report, which apply to all Products at issue in this litigation, Dr. Toutov . . . cited to specific evidence – most often from internal KIND documents – demonstrating that his analysis applied to the specific ingredients KIND used in the Products during the class period." Reply. Br. at 18. This is an overreaching and incorrect characterization of Dr. Toutov's report which, as correctly found by the District Court, heavily relies on generalities not tied to the challenged ingredients actually contained in the relevant KIND products.

The District Court did not abuse its discretion in finding that Dr. Toutov's report did not assist the trier of fact because his report does not opine on whether those ingredients meet the definition of the term "All Natural" as understood by a reasonable consumer. Dr. Toutov did not evaluate whether the KIND products at issue were "All Natural" as a reasonable consumer would understand that term, or even as the named plaintiffs claimed to understand it, or as it is defined in any dictionary.⁷

As Dr. Toutov testified, he "was not engaged to opine on consumer perception," and consumer perceptions had no "role . . . in the framework that [he] created" to arrive at his conclusions. J. App'x at 1937. Thus, Dr. Toutov's report is neither meaningful nor relevant to a reasonable consumer's understanding of the phrase "All Natural." Accordingly, the District Court did not abuse its discretion in precluding Dr. Toutov's expert report; his report does

terms. Thus, the report adds no useful information that would help the trier of fact determine the answer to the relevant legal question: whether consumers were actually deceived.

not “make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without” it. Amorgianos, 303 F.3d at 265 (citation and quotation marks omitted).

III. The District Court did not err in granting summary judgment for KIND.

Without Dr. Dennis’s report, the District Court concluded that plaintiffs had “not introduced evidence that could allow a factfinder to determine a reasonable consumer’s understanding of ‘All Natural,’ and therefore, their claims cannot survive defendant’s motion for summary judgment.” KIND II, 627 F. Supp. 3d at 283; see also id. at 292.

On appeal, plaintiffs contend that even without Dr. Dennis’s report, they have presented sufficient evidence for a trier of fact to conclude that KIND’s products are not “All Natural” because those products contain artificial and synthetic ingredients.

[23, 24] “We review the district court’s rulings on summary judgment de novo, resolving all ambiguities and drawing all permissible inferences in favor of the nonmoving party.” Tiffany & Co. v. Costco Wholesale Corp., 971 F.3d 74, 83 (2d Cir. 2020). “Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Bey v. City of New York, 999 F.3d 157, 164 (2d Cir. 2021) (citation and quotation marks omitted).

[25–27] “The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists,” but “when the burden of proof at

trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to” an absence of evidence “on an essential element of the nonmovant’s claim.” Souza v. Exotic Island Enters., Inc., 68 F.4th 99, 108 (2d Cir. 2023) (citation and quotation marks omitted). Once a movant has made that showing, “the nonmovant must set forth specific facts showing that there is a genuine issue for trial.” Id. (citation and quotation marks omitted). “Conclusory allegations, conjecture, and speculation are insufficient to create a genuine issue of fact.” Shannon v. N.Y.C. Transit Auth., 332 F.3d 95, 99 (2d Cir. 2003) (citation and quotation marks omitted).

[28] Plaintiffs present four primary theories as to why the evidence of a reasonable consumer’s perception is sufficient to defeat summary judgment, including the “pled definitions and deposition testimony, along with the scientific literature and existing consumer surveys in the record.” Appellants’ Br. at 19. But that purported evidence fails to present any cohesive definition of what a reasonable consumer would expect from products labeled “All Natural.”⁸

[29] First, the definitions of “All Natural” pled in the ACC fail to create a triable issue of fact because (1) those definitions fail to present a coherent definition of “All Natural” that could be applied by a trier of fact, and (2) the ACC is not verified and its allegations therefore are not evidence for summary judgment purposes. Cf. Brandon v. Kinter, 938 F.3d 21, 26 n.5 (2d Cir. 2019) (The “allegations in the complaint can be considered as evidence for summary judgment purposes” only where the complaint has been “sworn under penalty of perju-

8. This evidence also does not establish how a reasonable consumer understands the terms “artificial” or “synthetic.” Nor does it estab-

lish that a reasonable consumer would interpret “All Natural” as meaning “containing no artificial or synthetic ingredients.”

ry.”). Although the definitions pled in the ACC may have sufficed at the motion to dismiss or class certification stage of litigation, plaintiffs cannot meet their burden on summary judgment “through reliance on unsupported assertions.” Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995).

Second, plaintiffs’ deposition testimony also fails to create a triable issue of fact. Plaintiffs’ testimony, even taken collectively, does not establish an objective definition of how a reasonable consumer acting reasonably understands the term “All Natural.” To the contrary, it establishes how divergent consumers’ expectations can be. For example, one plaintiff testified that she expected “All Natural” to mean not synthetic. Another plaintiff testified that she expected “All Natural” to mean that the product was made from whole grains, nuts, and fruit. Yet another explained her belief that “All Natural” meant that the ingredients were literally plucked from the ground. Notably, several plaintiffs testified that consumers could have different understandings about the implications of the term “All Natural,” that these understandings could change over time, and that not everyone would agree with their particular understanding of that term. Plaintiffs fail to explain how a trier of fact could apply these shifting definitions to reach a conclusion as to whether the use of the term “All Natural” on KIND product labels was deceptive.

Third, plaintiffs submit that KIND’s internal documents “evidence its understanding of what ‘All Natural’ means to a reasonable consumer.” Appellant’s Br. at 31. But the documents on which plaintiffs

rely show only that KIND had its own conception of the term “All Natural.” The documents do not reveal a reasonable consumer’s understanding of that term. Nor do plaintiffs offer any theory on which these materials would be admissible in evidence.⁹

Fourth, plaintiffs contend that “an ordinary dictionary definition of the word ‘natural’ ” would suffice to meet their burden of establishing what a reasonable consumer acting reasonably expects from a product labeled “All Natural.” Appellants’ Br. at 2-3. Plaintiffs argue that we should rely on the dictionary definition of “natural” used at class certification: “existing in or caused by nature; not made or caused by humankind.” Id. (citation and quotation marks omitted); see also id. at 27-28. But this definition is not useful when applied to a mass-produced snack bar wrapped in plastic. Such a bar is clearly made by humans. It gets plaintiffs no closer to demonstrating what a reasonable consumer would expect of a KIND product bearing the “All Natural” label.

Finally, plaintiffs contend that “[a] precise definition of ‘All Natural’ is not required for the claim to be false and misleading.” Appellants’ Br. at 24. But plaintiffs’ arguments on this point confuse the standards applicable to summary judgment with those applicable at earlier stages of litigation. For example, plaintiffs rely heavily on Mantikas v. Kellogg Co., 910 F.3d 633 (2d Cir. 2018), which addressed whether the plaintiffs had alleged a plausible claim of consumer deception sufficient to defeat a motion to dismiss. Id. at 636-39. Mantikas did not address

9. The FDA materials relied upon by plaintiffs are similarly unhelpful. Plaintiffs cite to a 2015 FDA solicitation of comments regarding the term “natural” in food labeling. This cites a citizen petition, which in turn cites a Con-

sumer Reports National Research Center survey on perceptions of “natural.” The survey and citizen petition further confirm that consumers have varied understandings of what “natural” means.

the evidence required to defeat a motion for summary judgment.

Similarly, plaintiffs rely on the District Court's findings at the motion to dismiss and class certification stages, where the allegations of the pleadings are accepted as true and the primary question is whether plaintiffs have stated a cognizable claim. But at summary judgment, where KIND has pointed to a lack of evidence on an essential element of plaintiffs' claims, it is plaintiffs' burden to present admissible evidence that a reasonable consumer acting reasonably would be deceived by the "All Natural" claim on KIND products. See Souza, 68 F.4th at 108. Without evidence of a reasonable consumer's understanding of "All Natural," plaintiffs cannot succeed on their claims at summary judgment. Indeed, a jury could hardly render a unanimous verdict when multiple, shifting, definitions of the key term have been offered by the party with the burden of proof.

In sum, while the "evidence" to which plaintiffs point may have sufficed to overcome a motion to dismiss, or to support a motion for class certification, it fails to raise a triable issue of fact at summary judgment. Because plaintiffs failed to produce admissible evidence demonstrating what a reasonable consumer, acting reasonably, would expect of KIND products bearing the "All Natural" label, we hold that the District Court did not err in granting summary judgment in favor of KIND.

IV. The issue of class decertification is moot.

[30] Last, plaintiffs assert that the District Court abused its discretion in decertifying the classes. Because we affirm the District Court's grant of summary judgment, the issue of decertification is "no longer live" and plaintiffs "lack a legally cognizable interest in the outcome" of

KIND's motion to decertify the classes. Already, LLC v. Nike, Inc., 568 U.S. 85, 91, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013) (citation and quotation marks omitted). Accordingly, because the issue of class decertification is now moot, we need not reach it.

CONCLUSION

For the reasons stated above, we find that the District Court did not abuse its discretion in precluding the expert reports of Dr. Dennis and Dr. Toutov. We further hold that the District Court did not err in granting KIND's motion for summary judgment because plaintiffs failed to produce admissible evidence demonstrating what a reasonable consumer, acting reasonably, would expect of KIND products labeled "All Natural." Because we affirm the District Court's grant of summary judgment, plaintiffs' arguments regarding class decertification are moot.

Accordingly, we **AFFIRM** the judgment of the District Court.



**KEYSTONE-CONEMAUGH
PROJECTS LLC,
Petitioner**

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; Administra-
tor Environmental Protection Agency
No. 22-3026**

United States Court of Appeals,
Third Circuit.

Argued: November 6, 2023

(Filed: May 2, 2024)

Background: Operators of coal-fired electric generating units (EGU) equipped with

CROCS, INC., Plaintiff-Appellee

v.

EFFERVESCENT, INC., Holey Soles
Holdings, Ltd., Defendants

Double Diamond Distribution, Ltd.,
U.S.A. Dawgs, Inc., Mojave Desert
Holdings, LLC, Defendants-Appel-
lants

2022-2160

United States Court of Appeals,
Federal Circuit.

Decided: October 3, 2024

Background: Patentee filed suit against competitors, alleging patent infringement, and competitors counterclaimed, alleging that patentee was liable for damages for false advertising in violation of the Lanham Act. The United States District Court for the District of Colorado, Philip A. Brimmer, J., 2021 WL 4170997, granted patentee's motion for summary judgment as to competitors' counterclaim. Competitors appealed.

Holdings: The Court of Appeals, Reyna, Circuit Judge, held that cause of action for false advertisement under Lanham Act exists for false claims that party possesses patent on product feature.

Reversed and remanded.

1. Courts ⇌96(7)

The Court of Appeals for the Federal Circuit reviews appeals involving interpretation of the Lanham Act de novo, applying the law of the regional circuit in which the relevant district court sits. Lanham Trade-Mark Act § 1, 15 U.S.C.A. § 1051 et seq.

2. Courts ⇌96(7)

The Court of Appeals for the Federal Circuit reviews appeals of summary judgment under the law of the regional circuit.

3. Federal Courts ⇌3604(4)

The Tenth Circuit reviews a district court's grant of summary judgment de novo, applying the same legal standard as the district court.

4. Summary Judgment ⇌64

In determining whether to grant a motion for summary judgment, the district court considers whether the moving party is entitled to judgment as a matter of law.

5. Antitrust and Trade Regulation ⇌22

Under Tenth Circuit law, as predicted by the Court of Appeals for the Federal Circuit, a cause of action arises from the Lanham Act's prohibition against false advertising where a party falsely claims that it possesses a patent on a product feature and advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product. Lanham Trade-Mark Act § 43, 15 U.S.C.A. § 1125(a)(1)(B).

Appeal from the United States District Court for the District of Colorado in No. 1:06-cv-00605-PAB-MDB, Judge Philip A. Brimmer.

Michael Berta, Arnold & Porter Kaye Scholer LLP, San Francisco, CA, argued for plaintiff-appellee. Also represented by Sean Michael Callagy, Isaac Ramsey; Andrew Tutt, Washington, DC.

Matt Berkowitz, Reichman Jorgensen Lehman & Feldberg LLP, Redwood Shores, CA, argued for defendants-appellants. Also represented by Navid Cyrus Bayar.

Before Reyna, Cunningham, Circuit Judges, and Albright, District Judge ¹.

Reyna, Circuit Judge.

Appellants Double Diamond Distribution, Ltd.; U.S.A. Dawgs, Inc.; and Mojave Desert Holdings, LLC (collectively, “Dawgs”) appeal from a decision of the United States District Court for the District of Colorado granting summary judgment in favor of Appellee Crocs, Inc. (“Crocs”).

Crocs sued Dawgs for patent infringement. Dawgs counterclaimed, alleging that Crocs was liable for damages for false advertising in violation of Section 43(a) of the Lanham Act. Crocs moved for summary judgment on grounds that Dawgs’ counterclaim failed as a matter of law. Crocs argued that the circumstances in this case do not give rise to a Section 43(a) cause of action. The district court agreed and entered summary judgment in Crocs’ favor. We hold that a cause of action arises from Section 43(a)(1)(B) where a party falsely claims that it possesses a patent on a product feature and advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product. We reverse and remand.

1. Honorable Alan D Albright, District Judge, United States District Court for the Western District of Texas, sitting by designation.
2. This appeal rises from a group of cases spanning multiple forums that have a long and complex history of litigation involving Crocs and its competitors. The district court case against Double Diamond Distribution, Ltd. was stayed for almost five years pending a contemporaneously-filed Section 337 action before the International Trade Commission, which proceeded to an appeal before this court and a remand. *See Crocs, Inc. v. Int’l Trade Comm’n*, 598 F.3d 1294 (Fed. Cir. 2010). U.S.A. Dawgs was added as a defendant in the district court litigation after it

BACKGROUND

The pertinent history of this appeal begins in 2006 when Crocs sued Double Diamond Distribution, Ltd. and several other competitor shoe distributors for patent infringement.² *See Crocs’ Complaint for Patent Infringement, Crocs, Inc. v. Effervescent, Inc.*, No. 06-cv-00605-PAB-KMT (D. Colo. Apr. 3, 2006), ECF No. 1; *see also In the Matter of Certain Foam Footwear*, 71 Fed. Reg. 27514-01 (May 11, 2006).

In May 2016, Dawgs filed a counterclaim against Crocs alleging false advertising violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). In March 2017, Dawgs filed its operative pleading in the case, its Second Amended Answer and Counterclaims (“SACC”). *See* J.A. 469–580. The counterclaim alleges Dawgs was damaged by Crocs’ false advertisements and commercial misrepresentations. *See, e.g.*, J.A. 576, ¶ 345. Dawgs alleges that Crocs had engaged in a “campaign to mislead its customers” about the characteristics of the primary material Crocs uses to make its footwear products, a material it promoted as “Croslite.” J.A. 495, ¶ 51; J.A. 481, ¶ 7. According to Dawgs, Crocs’ website falsely described Croslite as “patented,” “proprietary,” and “exclusive” (collectively, “patented”). J.A. 575, ¶ 342; *see also* J.A. 603 (Ex. 21 to SACC); J.A. 608 (Ex. 23 to

resumed in 2012. The district court case was stayed again from 2012 to 2016 pending inter partes review proceedings. It was also stayed from 2018 to 2020 while U.S.A. Dawgs was engaged in bankruptcy proceedings, during which time Mojave Desert Holdings, LLC became involved in the litigation. Between these two stays, in 2016, Dawgs sued eighteen current and former Crocs officers and directors, alleging the same counterclaims against them as Crocs. The district court consolidated the cases and the individual defendants were later dismissed from the action. The facts and circumstances of the consolidated case are not at issue in this appeal.

SACC). Dawgs alleges that by promoting Croslite as “patented,” Crocs misled current and potential customers to believe that “Crocs’ molded footwear is made of a material that is different than any other footwear.” J.A. 575, ¶ 342. Dawgs alleges that Crocs’ statements deceived consumers into believing that its competitors’ molded footwear products are “made of inferior material compared to Crocs’ molded footwear.” J.A. 576, ¶ 345.

During discovery, Crocs moved for summary judgment on grounds that Dawgs’ counterclaim was “legally barred” by the Supreme Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S.Ct. 2041, 156 L.Ed.2d 18 (2003), and this court’s decision in *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009). J.A. 1398–99; *see generally* J.A. 1393–99.

The district court agreed with Crocs and granted summary judgment in its favor. *Crocs, Inc. v. Effervescent, Inc.*, No. 06-cv-00605-PAB-KMT, 2021 WL 4170997, at *9 (D. Colo. Sept. 14, 2021) (“*Decision*”). The district court decided that in view of *Dastar* and *Baden*, Dawgs failed as a matter of law to state a cause of action under Section 43(a) of the Lanham Act. *Id.* at *7. The district court concluded that the terms “patented,” “proprietary,” and “exclusive” were claims of “inventorship.” *Id.* at *6; *see also* J.A. 1977. Applying *Dastar* and *Baden* to the SACC, the district court determined that Dawgs’ claims of inventorship were directed to a claim of false designation of authorship of the shoe products and not the nature, characteristics, or qualities of Crocs’ products. *Decision*, 2021 WL 4170997, at *7; *see also* J.A. 1969 (quoting 15 U.S.C. § 1125 (a)(1)(B)).

Dawgs moved for reconsideration, which the district court denied. J.A. 1966; J.A. 1981. Dawgs appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

STANDARD OF REVIEW

[1] We review appeals involving interpretation of the Lanham Act *de novo*, applying the law of the regional circuit in which the relevant district court sits, in this case the Tenth Circuit. *Baden*, 556 F.3d at 1304; *Strauss v. Angie’s List, Inc.*, 951 F.3d 1263, 1267 (10th Cir. 2020). Since the Tenth Circuit has not spoken on the legal issue, we must “predict how that regional circuit would have decided the issue in light of the decisions of that circuit’s various district courts, public policy, etc.” *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1575 (Fed. Cir. 1984).

[2–4] Similarly, we review appeals of summary judgment under the law of the regional circuit. *Baden*, 556 F.3d at 1304. The Tenth Circuit reviews a district court’s grant of summary judgment *de novo*, applying the same legal standard as the district court. *Faustin v. City & Cnty. of Denver, Colo.*, 423 F.3d 1192, 1195 (10th Cir. 2005); *Hull v. IRS*, 656 F.3d 1174, 1177 (10th Cir. 2011). In determining whether to grant a motion for summary judgment, the district court considers whether the moving party is entitled to judgment as a matter of law. *Faustin*, 423 F.3d at 1198.

DISCUSSION

Dawgs raises a single issue on appeal: whether the district court erred in granting summary judgment against Dawgs’ counterclaim for failure to state a cause of action under Section 43(a)(1)(B) of the Lanham Act. Appellant Br. 6. We first address the Lanham Act.

The Lanham Act was enacted to “protect persons engaged in . . . commerce against unfair competition.” 15 U.S.C. § 1127. Section 43(a)(1) of the Lanham Act

establishes a federal cause of action for unfair competition. *Dastar*, 539 U.S. at 29, 123 S.Ct. 2041.

Section 43(a)(1) of the Lanham Act states,

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

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(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) (emphasis added).

The district court found no genuine issue of material fact in dispute supporting a cause of action under Section 43(a)(1)(A). *Decision*, 2021 WL 4170997, at *4. Dawgs does not appeal this ruling. Instead, Dawgs only challenges the district court's decision on whether its counterclaim allegations sufficiently raise a cause of action

under Section 43(a)(1)(B) of the Lanham Act.³ We therefore do not separately address Section 43(a)(1)(A).

In addition, as a threshold matter, the key question of whether Crocs' representation that Croslite is patented is in fact false is not in dispute. Section 43(a)(1)(B) creates a cause of action for a person damaged by *false or misleading* commercial advertising or promotions that mislead consumers about the nature, characteristics, or qualities of goods or services. *See* 15 U.S.C. § 1125(a)(1)(B). Crocs conceded in its briefing, and at oral argument before this court, that its statements that Croslite was covered by a patent are false. *See* Appellee Br. 70–71; Oral Arg. Tr. 16:22–16:33. Stated differently, Crocs admits that it was never granted a patent for Croslite. Oral Arg. Tr. 16:22–16:33.

Dawgs' appeal focuses on Section 43(a)(1)(B). Dawgs argues that when commercial misrepresentations that a product is “patented,” “proprietary,” and “exclusive” are linked to the nature, characteristics, or qualities of the product, those misrepresentations are actionable under Section 43(a)(1)(B) of the Lanham Act. *See, e.g.*, Appellant Br. 23.

Dawgs asserts that the district court's conclusion that *Dastar* and *Baden* are dispositive in this case is erroneous. Appellant Br. 36; *see Decision*, 2021 WL 4170997, at *6–7. First, Dawgs argues that those cases were based on circumstances different from the circumstances in this appeal. Appellant Br. 28–33, 36. Second, Dawgs argues that its counterclaims ade-

3. Various courts have taken the approach that “nature, characteristics, [or] qualities” in Section 43(a)(1)(B) relate to “the characteristics of the good itself,” not intangibles involving the source of ideas embodied in a product, like product authorship. *Baden*, 556 F.3d at 1307 (quoting *Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008)); *see also Kehoe Component Sales Inc. v.*

Best Lighting Prod., Inc., 796 F.3d 576, 590 (6th Cir. 2015). At least one circuit court has suggested in passing that there is an “open . . . possibility that some false authorship claims could be vindicated under the auspices of § 43(a)(1)(B)'s prohibition on false advertising.” *Zyla v. Wadsworth, Div. of Thomson Corp.*, 360 F.3d 243, 252 n.8 (1st Cir. 2004); *see also Baden*, 556 F.3d at 1308 n.1.

quately allege that Crocs used the terms “patented,” “proprietary,” and “exclusive” in its advertisements in a manner that misled consumers about the nature, characteristics, or qualities of its own products and the products of its competitors. *Id.* at 46–51. As such, Dawgs argues that it has sufficiently alleged a cause of action under Section 43(a)(1)(B) and therefore the district court should not have granted summary judgment. *Id.* at 6.

Dastar and Baden

The district court concluded that based on binding precedent established in *Dastar* and *Baden*, Crocs’ false claims to have “patented” Croslite are not actionable under Section 43(a)(1)(B). *Decision*, 2021 WL 4170997, at *6. The district court likened falsely claiming to have “patented” something as similar “to plagiarizing or reverse passing off, which *Dastar* held not . . . covered by the Lanham Act’s false advertising prohibition.” *Id.* (footnote omitted). The district court similarly concluded that this court in *Baden* found non-actionable “terms that the court likened to claims of inventorship” and that in this case, “[f]alsely claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it.” *Id.* The district court determined that Dawgs’ counterclaim could not stand because any claim that a product was patented was directed to inventorship, and thus the counterclaim was precluded by *Dastar* and *Baden*. *Id.* We disagree.

In *Dastar*, the Supreme Court considered the scope of unfair competition that is actionable under Section 43(a)(1)(A) of the Lanham Act, which relates to misrepresentations about the “origin, sponsorship, or approval” of goods or services. *Dastar*, 539 U.S. at 31, 123 S.Ct. 2041. *Dastar* involved a World War II television series first broadcast in 1949. *Id.* at 26, 123 S.Ct. 2041. Although the copyright on the television

series expired in the 1970s, the respondents acquired exclusive rights to distribute the series on video in the late 1980s. *Id.* In 1995, petitioner Dastar purchased tapes of the original 1949 series, copied them, and edited them with minor changes. *Id.* at 26–27, 123 S.Ct. 2041. It then sold the video set as its own product, with no reference to the original series. *Id.* at 27, 123 S.Ct. 2041. Respondents brought an action against Dastar under Section 43(a)(1)(A) of the Lanham Act for false designation of origin. *Id.* at 27, 31, 123 S.Ct. 2041.

The Court found that “origin” in Section 43(a)(1)(A) of the Lanham Act means “the producer of the tangible goods that are offered for sale, and not . . . the author of any idea, concept, or communication embodied in those goods.” *Id.* at 37, 123 S.Ct. 2041. The Court concluded that this section of the Lanham Act was not intended to protect originality or creativity, and that “[t]o hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.” *Id.* Because Dastar was the originator of the products it sold, the Court found the Lanham Act claim failed. *Id.* at 38, 123 S.Ct. 2041. The Court concluded that parties in respondents’ shoes might still have other forms of relief for conduct like Dastar’s. *Id.* If, for example, a party substantially copied a series but suggested in advertising that the work was “quite different” from the earlier series, they might be entitled to relief under Section 43(a)(1)(B). *Id.* The Court observed that a Lanham Act cause of action does not arise for merely claiming that a party is the producer of the video. *Id.*

In *Baden*, this court considered the effect of *Dastar* in a Section 43(a)(1)(B) action brought in the Ninth Circuit. *Baden*, 556 F.3d at 1304–08. In a suit between two competing basketball manufacturers, Ba-

den argued that its competitor Molten's advertising violated the Lanham Act. *Id.* at 1302. Molten promoted its basketballs as having a "dual-cushion technology" that its advertisements described as "innovative." *Id.* at 1302–03. Baden argued that by advertising its basketballs as "innovative," Molten deceived consumers into believing that it was the originator of the dual-cushion technology. *Id.* at 1303. At trial, the jury issued a verdict in favor of Baden. *Id.* at 1304. We reversed.

We explained that in the Ninth Circuit, a claim based on false designation of authorship is not actionable under Section 43(a)(1)(A) or Section 43(a)(1)(B). *Id.* at 1307. Baden had argued that Molten's advertisements were false "precisely because Molten was not the source of the innovation," *i.e.*, not the author. *Id.* We held that "authorship, like licensing status, is not a nature, characteristic, or quality, as those terms are used in Section 43(a)(1)(B) of the Lanham Act." *Id.*; see *Sybersound*, 517 F.3d at 1144. Because Baden based its false advertising claims on allegations that Molten was improperly asserting itself as the innovator, *i.e.*, the author, of the technology, Baden had no claim under Section 43(a)(1)(B). *Id.*

Although *Dastar* and *Baden* are based on different circumstances, the analysis used by the Supreme Court and this court in those cases is informative in this appeal. *Dastar* cautions that a false claim of origin, and nothing more, is a claim of authorship and does not give rise to a cause of action under Section 43(a)(1)(A) or (B). But, here, the false claim that a product is patented does not stand alone. Dawgs presents allegations and evidence that the falsity of Crocs' promotional statements is rooted in the nature, characteristics, or qualities of Crocs' products.

Both the district court and Crocs quote *Baden* to suggest that permitting a Section

43(a)(1)(B) claim based on linking "patented" with a product characteristic would contravene *Dastar* by allowing reframing of a claim that is based on false attribution of authorship. *Baden*, 556 F.3d at 1307; see *Decision*, 2021 WL 4170997, at *7; Appellee Br. 59. We disagree. A claim that a product is constructed of "patented" material is not solely an expression of innovation and, hence, authorship. Again, *Baden* did not involve false advertisements linking such claims to a product's tangible nature, characteristics, or qualities. In this case, for example, Dawgs submitted webpage printouts that purported to show promotional statements by Crocs that a patent covers Croslite. See, *e.g.*, J.A. 603 (Ex. 21 to SACC), J.A. 608 (Ex. 23 to SACC). Those promotional materials further included statements that Croslite has numerous tangible benefits found in all of Crocs' shoe products. J.A. 603 (Ex. 21 to SACC), J.A. 608 (Ex. 23 to SACC).

Dawgs argues it has stated a cause of action because the falsehood that Croslite is patented was used by Crocs to ascribe characteristics that go to the nature and qualities of Croslite. Dawgs alleges that "Crocs' statements referring to the closed-cell resin that [it] call[s] 'Croslite' as 'exclusive,' 'proprietary,' and/or 'patented'" causes customers to believe that "Crocs' molded footwear is made of a material that is different than any other footwear." J.A. 575, ¶ 342. Dawgs further alleges that Crocs' promotional materials "deceive consumers and potential consumers into believing that all other molded footwear . . . is made of inferior material compared to Crocs' molded footwear." J.A. 576, ¶ 345.

[5] We agree with Dawgs that these allegations about Crocs' advertisement statements are directed to the nature, characteristics, or qualities of Crocs' shoes. We hold that a cause of action arises from Section 43(a)(1)(B) where a party falsely

claims that it possesses a patent on a product feature and advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product.

CONCLUSION

We have considered Crocs' remaining arguments and find them unpersuasive. Because Dawgs timely presented a theory under Section 43(a)(1)(B) of the Lanham Act linking Crocs' alleged misrepresentations in commercial advertisements to the nature, characteristics, or qualities of Crocs' shoes, the district court erred in granting summary judgment on Dawgs' Lanham Act counterclaim. We accordingly reverse and remand for further proceedings.

REVERSED AND REMANDED

COSTS

Costs against Crocs.



VENSURE HR, INC., Plaintiff-Appellant

v.

UNITED STATES, Defendant-Appellee
2023-1640

United States Court of Appeals,
Federal Circuit.

Decided: October 4, 2024

Background: Taxpayer, a company that provided payroll and tax reporting services for employers, filed tax-penalty refund suit, seeking a refund of penalties assessed by IRS with respect to employment-relat-

ed taxes paid to IRS on behalf of employers. The Court of Federal Claims, Patricia Elaine Campbell-Smith, J., 164 Fed.Cl. 276, converted government's motion to dismiss for lack of subject matter jurisdiction into a motion to dismiss for failure to state a claim, and granted motion. Taxpayer appealed.

Holdings: The Court of Appeals, Prost, Circuit Judge, held that:

- (1) requirements relating to when, where, and how a power of attorney may accompany a refund claim were waivable by IRS;
- (2) remand from Court of Appeals was warranted for Court of Federal Claims, in the first instance, to determine whether powers of attorney as filed were sufficient;
- (3) assuming that taxpayer filed valid powers of attorney, Court of Federal Claims was required to determine whether IRS waived regulatory requirement that powers of attorney accompany refund claims; and
- (4) remand from Court of Appeals was warranted for Court of Federal Claims, in the first instance, to determine whether IRS waived regulatory requirement that a power of attorney accompany claim.

Vacated and remanded with instructions.

1. Federal Courts ⇌3587(1)

Court of Appeals reviews de novo whether the Court of Federal Claims properly dismissed a complaint for failure to state a claim. RCFC, Rule 12(b)(6).

2. Internal Revenue ⇌4963, 4967

Insofar as Congress has made explicit statutory requirements for tax refund claims, they must be observed and are beyond the dispensing power of Treasury officials.

2-2024

Press Play to Presume: The Policy Benefits Behind the Trademark Modernization Act's Resurrection of the Irreparable Harm Presumption in False Advertising Cases

Daniel Stephen

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NOTES

PRESS PLAY TO PRESUME: THE POLICY BENEFITS BEHIND THE TRADEMARK MODERNIZATION ACT'S RESURRECTION OF THE IRREPARABLE HARM PRESUMPTION IN FALSE ADVERTISING CASES

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INTRODUCTION

Advertisements are prevalent everywhere today, and consumers often do not even realize it. Advertising industry experts estimate that most Americans see a staggering 4,000 to 10,000 advertisements every day through various forms of media.¹ In the iconic film *E.T. the Extra-Terrestrial*, the main character lures the loveable alien over with Reese's Pieces candy.² The decision to use Reese's Pieces was a form of deliberate advertising—and a very successful one—as Reese's Pieces sales increased by 65 percent within two weeks of the film's release.³

The sheer amount of product information projected on consumers every day naturally raises concerns about which advertisements are false or deceptive. Serious harm exists in false advertising because it induces consumers to purchase products or services predicated on inaccurate information.⁴ Aside from the obvious economic injury to customers who purchase goods and do not receive the product as advertised, there are far greater risks as well. For example, someone who decides to buy a specific medication based on false information might not get their desired relief or may experience serious side effects that the advertisements deliberately hid from them. Fortunately, federal false advertising law steps in to save the day. False advertising law seeks not only to protect businesses, but also to assemble a shield to defend consumers.⁵ Under the Lanham Act, a plaintiff can bring a cause of action against companies that promote either deceptive or confusing advertisements, or advertisements

1. Jon Simpson, *Finding Brand Success in the Digital World*, FORBES (Aug. 25, 2017, 8:00 AM), <https://www.forbes.com/sites/forbesagencycouncil/2017/08/25/finding-brand-success-in-the-digital-world/?sh=1370a19f626e> [<https://perma.cc/GF3J-URNY>].

2. *10 Iconic Product Placement Examples in Films*, ORCHARD (Mar. 29, 2022), <https://www.orchard.co.uk/blog/10-iconic-product-placement-examples-in-films-23902.aspx> [<https://perma.cc/6K6A-VAU7>].

3. *Id.*

4. See Max Dillan, Note, *Keeping the Status Quo: Why Continuing to Recognize the Presumption of Irreparable Harm in False Comparative Advertising Protects the Market*, 20 FORDHAM J. CORP. & FIN. L. 933, 940-42 (2015).

5. See *id.* at 939-40 (“[T]he [Lanham Act] seeks to protect the commercial interests of a company targeted by a false advertisement ... [and] to protect against consumer deception.”).

that misrepresent the qualities of the plaintiff's or the defendant's products or services.⁶

Injunctions remain highly effective tools at a plaintiff's disposal in a Lanham Act lawsuit. Injunctions are court orders that prevent a party from continuing an action.⁷ For example, a court granted Ty, Inc., the producer of the (formerly) popular Beanie Babies stuffed animals, an injunction against a company that was producing knock-off Beanie Babies to stop all sales of the infringing products.⁸ Courts grant permanent injunctions after a final judgment on the merits, and typically issue preliminary injunctions before a trial, making them temporary.⁹ In the context of false advertising litigation, a plaintiff seeks an injunction to stop the defendant from continuing to engage in the alleged false advertising.¹⁰ In deciding whether to grant or deny an injunction, an essential factor in a court's analysis is whether the plaintiff will suffer irreparable harm in the absence of the injunction.¹¹ Plainly put, the court will grant an injunction if, without one, the injured party will continue to suffer harm and no other remedy can cure the injury.¹²

Recently, controversy erupted over the appropriate standard courts should use to determine irreparable harm in an injunction analysis. This debate ignited in 2006 as a result of the Supreme Court's ruling in *eBay v. MercExchange*.¹³ In that case, the Court struck down the presumption of irreparable harm when evaluating

6. 15 U.S.C. § 1125(a)(1).

7. *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. See *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169 (7th Cir. 1997).

9. *Permanent Injunction, Preliminary Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

10. Dillan, *supra* note 4, at 933 (explaining that in situations where a plaintiff seeks an injunction, "before the underlying false advertisement claim is ever argued, a plaintiff will first seek to preliminarily enjoin the defendant from broadcasting the advertisement"); see Robert S. Thompson, *False Advertising and Unfair Competition: Claims for Injunctive Relief Under the Lanham Act*, 53 NO.2 FOR DEF., 52, 76 (Feb. 2011) ("Often, these types of [false advertising] cases are determined on the merits at the preliminary injunctions stage.").

11. See Beatrice C. Franklin, *Irreparability, I Presume? On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. L. REV. 623, 629 (2014).

12. See *id.*; Shane K. Blank, *Preliminary Versus Permanent Injunctions: A Focused Look at the Distinctions Between Them*, 72 J. MO. B. 254, 255 (2016) ("The elements ... for permanent injunction include: (1) irreparable harm, and (2) lack of an adequate remedy at law." (quotations omitted)).

13. 547 U.S. 388, 390-94 (2006).

whether a permanent injunction was an appropriate remedy during a patent infringement trial, holding that the presumption does not exist just because a party achieves success on the merits.¹⁴ The *eBay* Court declared that lower courts should grant injunctions only if traditional equitable principles are satisfied, and the plaintiff shows that they would suffer irreparable harm without the injunction.¹⁵ Essentially, a plaintiff may no longer rely on a presumption of irreparable harm and must affirmatively prove that such harm exists.¹⁶

Two years later, more fuel was dumped on the fire. In *Winter v. Natural Resources Defense Council, Inc.*, a case involving the Navy's use of a sonar device off the coast of California, the Supreme Court held that there is no presumption of irreparable harm without a showing of *likely* harm, not just a possibility of harm.¹⁷ The Court emphasized that preliminary injunctions are an "extraordinary remedy," and therefore the standard for showing irreparable harm must reflect this principle through a clear showing of likely harm.¹⁸ In the years after *eBay* and *Winter*, uncertainty ensued in the federal court system as to whether these two rulings applied across the board to all cases considering injunctions.¹⁹

This confusion seemed to be at least somewhat resolved in late 2020, when Congress amended the Lanham Act through the passage of the Trademark Modernization Act (TMA).²⁰ The TMA resurrected the rebuttable presumption of irreparable harm for Lanham Act claims seeking both permanent and preliminary injunctions.²¹

14. *Id.*

15. *Id.*

16. *See id.*

17. 555 U.S. 7, 22 (2008).

18. *Id.*

19. *Compare* Ferring Pharms., Inc. v. Watson Pharms., Inc., 765 F.3d 205, 206 (3d Cir. 2014) (holding a party bringing a claim under the Lanham Act is not entitled to the presumption of irreparable harm), *and* AFL Telecomm., LLC v. SurplusEZ.com, Inc., No. CV 11-1086-PHX-DGC, 2011 WL 5547855, at *1, *3 (D. Ariz. Nov. 15, 2011) (failing to find error in a trial court decision that required a showing of likely harm to grant an injunction), *with* Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC, 747 F. Supp. 2d 568, 581-82, 584 (W.D.N.C. 2010) (presuming irreparable harm in a false advertising case).

20. *See* 15 U.S.C. § 1116(a).

21. *Id.* The Lanham Act's subject matter covers only trademark and false advertising, meaning that the TMA's passage does not affect other cases involving injunctions, such as patent or copyright. *See id.*

Although the amendment appears to have quelled the confusion in the realm of trademark and false advertising cases, some federal courts have continued to apply *eBay* and *Winter* to their rulings on injunctions in Lanham Act cases.²²

Beyond these inconsistent rulings, a critical question is whether the resurrection of the irreparable harm presumption is a beneficial policy choice. Congress certainly believed that the presumption was favorable when they amended the Lanham Act to strike back against the Supreme Court's rulings against the presumption.²³ However, this Note demonstrates that this issue is not so clear-cut by analyzing the policy effects that the irreparable harm presumption has from legal, practical, and consumer perspectives. Part I of this Note provides background information on the history and principles surrounding injunctions generally, the Supreme Court's rulings in *eBay* and *Winter*, federal courts' rulings after these decisions, and the Trademark Modernization Act of 2020. Part II presents anti-presumption advocates' arguments against the presumption due to longstanding equitable concerns and because, in their view, requiring a showing of irreparable harm is not too difficult. Lastly, Part III discusses why the irreparable harm presumption in the TMA serves as beneficial policy by presenting counterarguments to anti-presumption reasoning and additional benefits of the presumption.

I. INJUNCTION, INJUNCTION: WHAT'S YOUR FUNCTION?

A. A Brief History of Injunctions

Like many of the foundational principles of the American legal system, injunctions originated in medieval England, specifically in

22. See *Dynatemp Int'l, Inc. v. R421A, LLC*, No. 5:20-CV-142-FL, 2021 WL 3284799, at *1, *10-11 (E.D.N.C. July 30, 2021) (applying *Winter* and saying that “[a] party seeking a preliminary injunction must make a ‘clear showing’ of irreparable harm”); *Sec. USA Servs., LLC v. Invariant Corp.*, No. 1:20-cv-01100 KWR-KRS, 2021 WL 2936612, at *1, *5 (D.N.M. July 13, 2021) (rejecting the idea that the plaintiff can simply presume irreparable harm in a Lanham Act claim).

23. H.R. REP. NO. 116-645, at 19 (2020) [hereinafter House Report] (“To rectify this circuit split and resulting confusion, H.R. 6196 confirms that the historical practice of applying a rebuttable presumption of irreparable harm is the appropriate course for claims under the Lanham Act.”).

the Court of Chancery.²⁴ A chancery court is a court of equity, which means that it is a judiciary that does not award damages (unlike a court of law), but rather grants injunction orders commanding a party to cease or perform some specific conduct.²⁵ Notably, injunctions are not an option for parties that can achieve full relief through awarded damages; instead, they are issued only when a party does not have “an adequate remedy in a court of law.”²⁶ Because of this restriction, preliminary injunctions are an “extraordinary remedy” that courts do not issue lightly.²⁷ Unlike monetary damages, where a court orders a party to pay another party, injunctions govern a party’s conduct with the “backing of [the court’s] full coercive powers,” therefore making them a more extreme measure than ordering monetary damages.²⁸ This significant principle continues to exist in American jurisprudence today.²⁹

During the nineteenth century, courts adopted a uniform standard to solve the problem of when exactly to issue a preliminary injunction.³⁰ Over time, the general four-prong test that we know today emerged as the universal standard. Namely, for a preliminary injunction to be issued, the plaintiff must satisfy four factors: (1) the

24. Franklin, *supra* note 11, at 626.

25. See *id.* See generally Hon. Marcia S. Krieger, “The Bankruptcy Court is a Court of Equity”: What Does That Mean?, 50 S.C. L. REV. 275, 280 (1999) (describing how American federal courts do not operate in the same way English courts of equity do: “[i]n the federal system ... [the] adoption of the Federal Rules of Civil Procedure [in 1938 state that] equitable and legal claims [are] merged into a single civil action, subject to a single set of procedural rules”).

26. Franklin, *supra* note 11, at 626 (quoting Anthony DiSarro, *Freeze Frame: The Supreme Court’s Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 56 (2011)); Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split Over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1019 (2012).

27. Franklin, *supra* note 11, at 624; see Bethany Bates, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1526 (2011); Weisshaar, *supra* note 26, at 1021-22 (“[A]n injunction is an ‘extraordinary’ remedy ... [t]his notion is derived from equity’s origins.”); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008).

28. *Nken v. Holder*, 556 U.S. 418, 428 (2009).

29. See Franklin, *supra* note 11, at 628; Kirti Gupta & Jay P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases* 12 (U. of Ill. Coll. of L., Rsch. Paper No. 17-03), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816701 [<https://perma.cc/S7J3-82SG>] (detailing a study conducted between 2006 to 2012, which shows that out of 908 preliminary and permanent injunctions sought in patent cases, only 290 were granted, highlighting that courts grant injunctions roughly 31.9 percent of the time).

30. Franklin, *supra* note 11, at 627; Bates, *supra* note 27, at 1526.

plaintiff will likely suffer irreparable harm in the absence of the injunction; (2) there is a likelihood of success on the merits; (3) the balance of equities tips in the plaintiff's favor; and (4) the injunction is in the public interest.³¹ One important goal of granting a preliminary injunction is to preserve the status quo of the parties as it was immediately prior to the defendant's alleged bad conduct.³² The test is similar for permanent injunctions, except the plaintiff does not need to show a likelihood of success on the merits, because permanent injunctions are awarded after a judgment in the plaintiff's favor.³³

This Note focuses on the irreparable harm factor of the injunction analysis, in part because it remains the most controversial, but also because it often represents the critical threshold that plaintiffs must cross to obtain an injunction.³⁴ Allowing or disallowing a presumption of irreparable harm has a multitude of impacts on not only the litigating parties, but also on the public at large.

B. The eBay and Winter Decisions and Subsequent Court Rulings

Before the Supreme Court's 2006 ruling in *eBay*, courts considering intellectual property and false advertising permanent injunction motions generally presumed the plaintiff satisfied the irreparable harm prong upon success on the merits at trial, even without the plaintiff showing specific proof of harm.³⁵ In addition,

31. See *Winter*, 555 U.S. at 20; *Bates*, *supra* note 27, at 1522-23; *Franklin*, *supra* note 11, at 628.

32. See *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."); *Asa v. Pictometry Int'l Corp.*, 757 F. Supp. 2d 238, 243 (W.D.N.Y. 2010) ("[T]he court's task when granting a preliminary injunction is generally to restore, and preserve, the status quo ante, *i.e.*, the situation that existed between the parties immediately prior to the events that precipitated the dispute."); *Gates v. Detroit & Mackinac Ry. Co.*, 115 N.W. 420, 421 (1908) ("The object of preliminary injunctions is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either.").

33. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390-91 (2006).

34. See Brief for Int'l Trademark Ass'n as Amici Curiae Supporting Appellant at 3-4, *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205 (3d Cir. 2014) (No. 13-2290) [hereinafter *Amici Curiae Supporting Ferring*] (explaining that the irreparable harm prong requires a greater burden of proof).

35. Ronald T. Coleman, Jr., Trishanda L. Treadwell & Elizabeth A. Loyd, *Applicability of the Presumption of Irreparable Harm After eBay*, 32 *FRANCHISE L.J.* 3, 3 (2012); *e.g.*,

courts typically also presumed irreparable harm for preliminary injunctions upon a showing of a likelihood of success on the merits.³⁶ This came to a screeching halt after the landmark ruling in *eBay v. MercExchange*. In that case, technology development and online auction company MercExchange held many patents, and alleged that eBay had infringed one by operating their popular online marketplace business.³⁷ At trial, the jury agreed, finding that eBay had infringed one of MercExchange's patents and awarded damages.³⁸ However, the district court denied MercExchange's motion for a permanent injunction to stop eBay from continuing to use their patented technology.³⁹ The court of appeals reversed this decision and granted the permanent injunction, presuming irreparable harm based on the jury's finding of infringement.⁴⁰

On appeal, the United States Supreme Court subsequently reversed the court of appeals ruling, holding that there is no presumption of irreparable harm even when the plaintiff's case succeeds on the merits; the plaintiff must still show that this harm exists.⁴¹ Although MercExchange had proved patent infringement, the Court concluded that because MercExchange did not actively practice their patent in the marketplace, irreparable harm could not be presumed based on the infringement alone, and the infringement could not be used to justify an injunction.⁴² Instead, the Court reiterated that the irreparable harm factor in the injunction test must still be shown and that "a major departure from the long tradition of equity practice should not be lightly implied."⁴³

While *eBay* struck down the irreparable harm presumption for permanent injunctions, two years later, *Winter* affirmed that for courts to grant a preliminary injunction, there also must be a

McNeilab, Inc. v. Am. Home Prods. Corp., 848 F.2d 34, 38 (2d Cir. 1988) ("[T]he district court did not err in presuming harm from a finding of false or misleading advertising.").

36. *E.g.*, Calvin Klein Cosms. Corp. v. Lenox Lab'ys, Inc., 815 F.2d 500, 505 (8th Cir. 1987) ("The court correctly noted that it could presume irreparable injury from a finding of probable success in proving likelihood of confusion.").

37. *eBay*, 547 U.S. at 390.

38. *Id.* at 391.

39. *Id.*

40. *Id.*

41. *Id.* at 393-94.

42. *Id.* at 393.

43. *Id.* at 391 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

showing of likely irreparable harm, and courts cannot presume such harm.⁴⁴ In *Winter*, the Natural Resources Defense Council sued the United States Navy over the Navy's training of a sonar device off the coast of California.⁴⁵ The plaintiffs alleged that the device posed serious danger to marine wildlife and habitats, and they sought a preliminary injunction to stop the use of the device.⁴⁶ Although the plaintiffs presented no evidence that wildlife had been harmed, the court of appeals upheld the preliminary injunction.⁴⁷ The appellate court reasoned that when the plaintiff can make a showing of a strong likelihood of success on the merits, a preliminary injunction may be granted based off of the mere possibility of irreparable harm alone.⁴⁸

After granting certiorari, the Supreme Court reiterated that the traditional test for preliminary injunctions must be met in order to grant such equitable relief.⁴⁹ But the Court further held that the plaintiff fails to meet the irreparable harm factor by only showing a possibility of harm.⁵⁰ Instead, the plaintiff must demonstrate that there is *likely* irreparable harm.⁵¹ In doing so, the Court emphasized that a possibility standard is "too lenient."⁵² Thus, *eBay* and *Winter* built directly off of each other and created a new standard for granting preliminary injunctions: the movant can no longer merely rely on a presumption of irreparable harm.⁵³ In addition, there must be a showing of *likely* harm, not just a possibility of harm.⁵⁴

Following these two milestone cases, a dispute emerged regarding whether the rulings on the irreparable harm presumption applied across the board to all types of lawsuits in which a plaintiff sought an injunction, including in false advertising cases, or solely in

44. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

45. *Id.* at 15-17.

46. *Id.* at 12.

47. *Id.*

48. *Id.* at 21.

49. *Id.* at 20.

50. *Id.* at 22.

51. *Id.*

52. *Id.*

53. See *id.* While this Note shows that this rule does not apply to Lanham Act lawsuits anymore, the rule still applies to patent and possibly other intellectual property lawsuits. See Coleman et al., *supra* note 35, at 4-5.

54. *Winter*, 555 U.S. at 22.

patent infringement cases.⁵⁵ Some federal courts applied these rulings to false advertising cases, while others did not.⁵⁶

For example, in *AFL Telecomm. v. SurplusEZ.com, Inc.*, a district court denied a preliminary injunction in a false advertising lawsuit because the plaintiff did not allege sufficient facts to demonstrate irreparable harm.⁵⁷ The court explained that *eBay* and *Winter* “suggest[] a lack of favor with *any* presumption of irreparable harm when issuing preliminary or permanent injunctions.”⁵⁸ Additionally, the court noted that *eBay*’s repudiation of the presumption of irreparable harm extends beyond just patent cases.⁵⁹

The Third Circuit followed suit in *Ferring Pharms., Inc. v. Watson Pharms., Inc.* and held that a plaintiff is not entitled to a presumption of irreparable harm when seeking a preliminary injunction pursuant to a Lanham Act false advertising claim.⁶⁰ The *Ferring* court reasoned that *eBay*’s ruling applies in contexts other than patent infringement cases, including false advertising litigation.⁶¹ The court based this decision on the Lanham Act’s injunctive relief section, which states that an injunction should be determined by traditional principles of equity, and the presumption of irreparable harm “deviates” from these equitable principles.⁶²

However, not all federal courts followed *eBay* and *Winter*’s holdings. In *Irwin Industrial Tool Co. v. Worthington Cylinders Wisconsin, LLC*, the District Court for the Western District of North Carolina granted a permanent injunction in a false advertising case after the plaintiff showed that the defendant’s “advertisement was

55. Compare *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 206 (3d Cir. 2014), and *AFL Telecomm., LLC v. SurplusEZ.com, Inc.*, No. CV 11-1086-PHX-DGC, 2011 WL 5547855, at *1 (D. Ariz. Nov. 15, 2011), with *Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC*, 747 F. Supp. 2d 568, 582 (W.D.N.C. 2010).

56. See *Ferring Pharms.*, 765 F.3d at 206; *AFL Telecomm.*, 2011 WL 5547855, at *1 (requiring a showing of likely harm to grant injunction). But see *Irwin Indus. Tool Co.*, 747 F. Supp. 2d at 582 (presuming irreparable harm in a false advertising case).

57. 2011 WL 5547855, at *1.

58. *Id.* at *2.

59. See *id.*

60. 765 F.3d at 216.

61. *Id.* at 214.

62. *Id.* at 214-16 (“The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable.”) (quoting the Lanham Act, 15 U.S.C. § 1116(a)).

literally false.”⁶³ Although the defendant had ceased using the false advertisements at the time of trial, the court still granted the permanent injunction because of the possibility that the defendant could resume using the false advertisement at any time.⁶⁴ The court stated that, because of the judgment showing the advertisement was literally false, “a presumption arises that [the plaintiff] has suffered irreparable harm.”⁶⁵

These three cases paint a vivid picture of federal courts’ vastly different interpretations as to the applicability of the irreparable harm presumption in false advertising cases. This uncertainty was not meant to last, however, because Congress acted quickly to fix the problem.⁶⁶

C. *The Trademark Modernization Act of 2020*

In December 2020, Congress passed the Trademark Modernization Act (TMA), which amended the Lanham Act.⁶⁷ Perhaps the most impactful part of the TMA is the section regarding false advertising and trademark injunctions, which states that

[a] plaintiff seeking any such injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation identified in this subsection in the case of a motion for a permanent injunction or upon a finding of *likelihood of success on the merits* for a violation identified in this subsection in the case of a motion for a preliminary injunction or temporary restraining order.⁶⁸

63. 747 F. Supp. 2d 568, 582 (W.D.N.C. 2010).

64. *Id.*

65. *Id.*

66. See Patrick M. Bergin, *New Trademark Act Restores Presumption of Irreparable Harm, Helps Clear Dead Wood*, NAT'L L. REV. (May 2, 2022), <https://www.natlawreview.com/article/new-trademark-act-restores-presumption-irreparable-harm-helps-clear-dead-wood> [<https://perma.cc/7UMG-TLPJ>] (“The TMA has resolved the split among the courts.”).

67. Kyle R. Kroll, *Trademark Litigators: Congress Reinstated the Presumption of Irreparable Harm in Lanham Act Cases*, A.B.A. (Sept. 15, 2021), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2021/congress-presumption-irreparable-harm-lanham-act-cases/> [<https://perma.cc/3AA2-EBUS>].

68. 15 U.S.C. § 1116(a) (emphasis added). This section applies to false advertising claims, but also more broadly to any trademark violation too. See *id.*

After a tumultuous on-again, off-again relationship with federal courts following *eBay* and *Winter*, the TMA reinstated the irreparable harm presumption for plaintiffs seeking injunctive relief in false advertising and trademark cases.⁶⁹ To move for a permanent injunction, a plaintiff can now point to a judgment showing that the defendant engaged in false advertising in order to achieve the presumption.⁷⁰ Similarly, to request a preliminary injunction, a plaintiff achieves the presumption by satisfying the likelihood of success on the merits prong.⁷¹ Importantly, a defendant still retains the ability to rebut the presumption by providing evidence attacking the existence of irreparable injury.⁷²

II. THE CASE FOR ELIMINATING THE PRESUMPTION OF IRREPARABLE HARM

The TMA appears to be a stark rebuke to the Supreme Court's rulings in *eBay* and *Winter*. But now that the irreparable harm presumption rule has dramatically changed in the false advertising context, questions have arisen about who this change benefits and whether it is logical from both a legal and policy perspective. This Part details arguments supporting the elimination of the irreparable harm presumption in false advertising claims and why the TMA may be unfavorable policy. While there is certainly merit to this reasoning, the case for eliminating the presumption of irreparable harm ultimately remains too vulnerable to pro-presumption arguments that are presented in Part III of this Note.⁷³

69. See Kroll, *supra* note 67. Because the Lanham Act only governs trademark and false advertising, *eBay* and *Winter* still remain precedent for patent cases and other possible subject matter. See *id.*

70. See 15 U.S.C. § 1116(a).

71. *Id.*

72. See *id.*

73. See *infra* Part III.

A. *The Presumption Violates Traditional Principles of Equity*

1. *Injunctions Are an Extraordinary Remedy*

From the medieval English Court of Chancery to modern Supreme Court jurisprudence, injunctions have been characterized as an “extraordinary remedy.”⁷⁴ In this way, injunctions are an option of last resort: courts will only grant them if monetary damages cannot adequately provide full relief for the injury.⁷⁵ Some scholars argue that there are several considerations justifying this characterization, specifically for preliminary injunctions.

First, preliminary injunctions are, by definition, granted before a full trial or final judgment can take place.⁷⁶ The court acts without witness testimony at trial, and essentially relies on motions and affidavits alone to inform its decision.⁷⁷ Courts, therefore, grant preliminary injunctions without the full record of facts and arguments that are presented at trial.⁷⁸ This can have serious implications for a defendant who is ordered by a preliminary injunction to cease running an allegedly false advertisement.⁷⁹ For example, if a defendant is ordered to stop a nationwide advertisement for a heart disease medication and then months later a jury trial concludes that their advertisement was not—and was not ever—false, the defendant would suffer months of potential lost revenue.

Second, anti-presumption scholars point to arguments that injunctions should be treated as an extraordinary remedy because of the public consequences that can follow their issuance.⁸⁰ Typically, monetary damages directly affect only the defendants themselves,

74. See Weisshaar, *supra* note 26, at 1021.

75. See Franklin, *supra* note 11, at 626.

76. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 728 (1990).

77. See *id.* (“The reasons a court may be cautious in awarding preliminary relief are clear. The court must act without a full trial, sometimes with only sketchy motion papers and affidavits to guide its decision.”).

78. *Id.*

79. *Id.*

80. See Kathleen K. Olson, *Injunctions and the Public Interest in Fair Use Cases After eBay*, 17 COMM. L. & POL’Y 235, 250-51 (2012); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in [issuing an] injunction.”) (citing R.R. Comm’n v. Pullman Co., 312 U.S. 496, 500 (1941)).

because only the party being sued in court must pay the plaintiff.⁸¹ Conversely, preliminary injunctions in false advertising cases discontinue advertising campaigns that presumptively reach a plethora of consumers.⁸² In the above heart disease medication example, for instance, a preliminary injunction would affect heart disease patients who could not see the advertisement and then could possibly be deprived of buying a legitimate product to help their condition.

Granted, the public interest is just one prong of the four-part injunction test; however, the Supreme Court has maintained that “the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.”⁸³ For anti-presumption advocates, this ruling demonstrates that the judiciary is reluctant to grant injunctions even if it may be to the detriment of plaintiffs.⁸⁴ In fact, this reluctance was partly why the Court in *Winter* deemed it necessary to assert that the standard for showing irreparable harm is based on likely injury in the absence of an injunction, rather than on a possibility of injury.⁸⁵ In *Winter*, the Court reiterated that preliminary injunctions are an extraordinary measure and, as a result, the lower court failed to adequately consider the public’s interest in preserving the Navy’s activities.⁸⁶

Additionally, anti-presumption activists emphasize that *eBay* and *Winter*’s impact on litigation is apparent. In 2017 and 2018, requests for preliminary injunctions in patent infringement cases endured less success than in the past.⁸⁷ Attorneys believe this is

81. Will Kenton, *What Are Civil Damages? Definition, Types, and Example Scenarios*, INVESTOPEdia (Aug. 27, 2021), <https://www.investopedia.com/terms/c/civil-damages.asp> [<https://perma.cc/9S7B-7XYU>] (“Civil damages are owed to a winning plaintiff by the losing defendant in a civil case tried in a court of law.”).

82. Malla Pollack, *Suing for False Advertising Under Federal Lanham Act*, 111 AM. JUR. TRIALS 303, § 23 (2009) (“In false advertising cases, the standard remedy is an injunction limiting the future advertising of the offending party.”).

83. See *Weinberger*, 456 U.S. at 312-13; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008); *Bates*, *supra* note 27, at 1522-23; *Franklin*, *supra* note 11, at 628.

84. See *Weinberger*, 456 U.S. at 312-13.

85. See *Winter*, 555 U.S. at 22.

86. *Id.* at 24.

87. Ryan Davis, *Patent Injunctions Drop Sharply in 2018*, LAW360 (Jan. 31, 2019, 10:03 PM), <https://www.law360.com/articles/1121976/patent-injunctions-drop-sharply-in-2018> [<https://perma.cc/8HPC-VAEJ>] (showing data that only nine preliminary injunctions were granted in 2017 while forty-one were denied. Meanwhile, in 2016, twenty-one were granted

because “patent owners face an uphill climb with such motions, since they are required to show *both* that they are suffering harm and that they are likely to prove infringement.”⁸⁸ Therefore, anti-presumption proponents point to this trend as demonstrating that the required showing of irreparable harm has had its intended effect of keeping injunctions an extraordinary remedy.⁸⁹

2. *No Shortcuts in the Four-Part Test*

Anti-presumption advocates maintain that courts should never deviate from the four-prong test. In *eBay* and *Winter*, the Supreme Court reiterated the four-prong test for both preliminary and permanent injunctions.⁹⁰ These are not balancing tests, and courts held long before *eBay* and *Winter* that “satisfying one requirement does not necessarily affect the analysis of the other requirements.”⁹¹

These scholars argue that presuming irreparable harm simply by satisfying one of the other distinct prongs of the analysis directly clashes with requiring a four-factor equitable test.⁹² In other words, these theorists believe that an irreparable harm presumption essentially allows plaintiffs to take a shortcut in the injunction analysis.⁹³ Showing irreparable harm is one thing, and showing a likelihood of success on the merits, or proving that no adequate remedy at law exists, is another—they are separate factors that each require their own analysis.⁹⁴ Lumping them together undermines traditional

and twenty-two were denied. This puts the success rate for a preliminary injunction at 18 percent in 2017 and roughly 50 percent in 2016).

88. *Id.* (emphasis added).

89. William Atkins & Richard Kirkpatrick, *New TM Act's Irreparable Harm Presumption Is Not a Panacea*, LAW360 (Mar. 4, 2021, 2:55 PM), <https://www.law360.com/articles/1360651/new-tm-act-s-irreparable-harm-presumption-is-not-a-panacea> [<https://perma.cc/P5MH-ZFH4>].

90. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Winter*, 555 U.S. at 32.

91. *Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, 457 (5th Cir. 2016).

92. *Id.* (“Such a presumption of the balance of harm factor would not comport with the discretionary and equitable nature of the preliminary injunction in general and of the balance of harm factor in particular.”) (citing *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185 (5th Cir. 1982)).

93. See *id.*

94. See Pamela Samuelson & Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 67, 74 (2010) (noting that there is “no intrinsic link between a plaintiff’s likelihood of success on the merits and the need for the plaintiff to show irreparable harm”).

notions of equity and the principle that injunctions are an extraordinary remedy.⁹⁵

Further, anti-presumption advocates emphasize that equity is unique in the legal world and can be viewed as “moderat[ing] the rigid and uniform application of law by incorporating standards of fairness and morality into the judicial process.”⁹⁶ Its purpose encompasses practicality and offers “relief from hardship.”⁹⁷ Viewed against this backdrop, presuming irreparable harm without a showing of such harm appears incompatible with the notion of curing a hardship. How can you treat an injury that never existed? The *eBay* case displayed this principle when the defendant infringed the plaintiff’s patents, but because the plaintiff did not license or practice the patents at issue, the plaintiff did not actually suffer any irreparable harm.⁹⁸

Given the foregoing, anti-presumption activists believe that requiring a showing of irreparable harm is consistent with “courts hav[ing] long recognized the distinction between right and remedy, and that invasion of a right does not give rise to a right to injunctive relief.”⁹⁹ In their view, the irreparable harm presumption bypasses the four-factor test by providing a shortcut for plaintiffs to prove only a likelihood of success on the merits (or just rely on the defendant’s liability) for permanent injunctions.¹⁰⁰ It is therefore inconsistent with longstanding traditional principles of equity.¹⁰¹ However, a closer look reveals that the presumption does not ignore traditional equity principles and specifically allows for a rebuttal by the defendant, which greatly weakens the shortcut theory.¹⁰²

95. *See id.*

96. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 430 (2003).

97. *Id.*

98. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006). It is important to note that the Court did not say that a plaintiff who does not license or practice their patents can never make a showing of irreparable harm—only that in this case, the district court found that the plaintiff did not make such a showing. *See id.*

99. Rachel M. Janutis, *The Supreme Court’s Unremarkable Decision in eBay Inc. v. MercExchange, L.L.C.*, 14 LEWIS & CLARK L. REV. 597, 619 (2010).

100. *See Samuelson & Bebenek, supra* note 94, at 72.

101. *See id.* at 74 (“Plaintiffs cannot meet their evidentiary burdens on both factors by proving only [likelihood of success on the merits].”).

102. *See infra* notes 128-46 and accompanying text. The rebuttal means that plaintiffs do not automatically satisfy the irreparable harm prong even with the presumption. *See id.*

B. The Claim that Showing Irreparable Harm is Not Too Hard

1. Types of Harms that Can Arise in False Advertising Cases

In addition to arguments from a legal perspective, anti-presumption proponents offer a practical case that showing irreparable harm is not too difficult. Under the Lanham Act, a plaintiff can sue an advertiser for any “false or misleading description of fact, or false or misleading representation of fact, which ... misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.”¹⁰³ Typically, plaintiffs are the defendants’ direct competitors, and will argue that because of the defendants’ false advertisements, consumers are likely to or have chosen the defendants’ products or services over the plaintiffs’.¹⁰⁴ Under the Lanham Act, a plaintiff can also assert that the alleged false advertisements do not necessarily target them directly, but still give the defendant an unfair advantage in the market.¹⁰⁵ Particularly, plaintiffs may claim injuries such as the loss of sales or good will.¹⁰⁶ Good will refers to a company’s reputation, and, when claimed as an injury in false advertising contexts, it means that the false advertisement has damaged the plaintiff’s reputation in an unlawful way.¹⁰⁷

While a textbook case might involve a defendant’s advertisement falsely claiming that their product is five times more effective than a competitor’s, other cases show that false advertising injuries exist in less obvious situations as well. For example, in *Incarcerated Entertainment, LLC v. Warner Bros. Pictures*, a company that owned the rights to an individual’s life story sued Warner Brothers based on false marketing and comments made by actors starring in the

103. 15 U.S.C. § 1125(a)(1).

104. See Pollack, *supra* note 82, § 8.

105. See *id.*

106. See *id.* § 10.

107. *Goodwill*, BLACK’S LAW DICTIONARY (11th ed. 2019); see RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS 24-26 (2d ed. 1950) (“Good will ... connotes more than just good credit, honesty, fair name and reliability.... Good will can no more be separated from a business than reputation from a person.... [It] is the business as it is viewed by others.”); Pollack, *supra* note 82, § 10; *Retractable Tech., Inc. v. Dickinson & Co.*, 919 F.3d 869, 882 (5th Cir. 2019).

movie *War Dogs*.¹⁰⁸ The film, based on Efraim Diveroli's memoir, detailed his life as an arms dealer and his eventual criminal conviction.¹⁰⁹ While the memoir recounted actual facts of Diveroli's life, the film took several artistic liberties and added events that did not occur.¹¹⁰ However, the film's marketing described it as a true story, and cast interviews used in the film's advertisements extolled that the movie was "one of the craziest movies I've ever been in ... [a]nd it's all true."¹¹¹ The plaintiff sued Warner Brothers over the misleading advertisements, alleging that the film diverted book sales from the plaintiff's customers because they were more likely to buy a ticket to the film instead of purchasing the plaintiff's memoir, based on the assumption that the film was a true story.¹¹² The district court agreed that these amounted to valid injuries because of the plaintiff's potential lost sales and a loss of good will.¹¹³ Anti-presumption advocates, therefore, may point to *Incarcerated Entertainment* as an example of the fact that there is plenty of harm to go around in false advertising litigation.

2. *How to Make a Showing of Irreparable Harm*

As previously shown, false advertising harms can arise in many situations, and according to anti-presumption thinkers, it is not too rigid of a requirement for courts to demand that plaintiffs make a showing of irreparable harm. This theory is best illustrated by the fact that, in false advertising cases, even without the presumption of irreparable harm, the nature of a plaintiff's injury often results in a showing of irreparable harm.¹¹⁴ For instance, in *CJ Products LLC v. Snuggly Plushez LLC*, the plaintiff sold plush pillows in the shape of animals known as "Pillow Pets."¹¹⁵ The defendants distributed similar products, but used marks resembling the registered "Pillow Pets" mark and even purchased software allowing them to redirect potential customers to their own website when customers

108. 261 F. Supp. 3d 1220, 1225-26 (M.D. Fla. 2017).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1233.

113. *Id.*

114. Coleman et al., *supra* note 35, at 8.

115. 809 F. Supp. 2d 127, 139 (E.D.N.Y. 2011).

searched for “Pillow Pets.”¹¹⁶ The court granted a preliminary injunction on behalf of the plaintiff based on the showing that the defendants’ product sales “would certainly impact the sale of another party’s product.”¹¹⁷ In addition, the court found that “[p]rospective loss of this good will alone is sufficient to support a finding of irreparable harm.”¹¹⁸ Thus, while the court did not presume irreparable harm, the plaintiffs satisfied this prong of the analysis simply by pointing to the defendants’ sales.¹¹⁹

A similar outcome of a case involving a request for a permanent injunction occurred in *Fresh Del Monte Produce Inc. v. Del Monte Foods Co.*¹²⁰ The court applied *eBay* to the case and explained that even without the irreparable harm presumption, “[i]n most cases, after a full trial finding false advertisements, a final injunction is appropriate.”¹²¹ Although the jury concluded that the plaintiff had zero dollars in lost sales due to the false advertising, the plaintiff still demonstrated irreparable harm because the parties were competitors and the defendants’ profits represented “a rough measure of the plaintiff’s damages.”¹²² Both of these cases support the argument that the irreparable harm requirement is often easy to satisfy, with or without the presumption.

This conclusion is further bolstered by the fact that consumer surveys are an effective way to demonstrate irreparable harm.¹²³ These surveys show the likelihood of deception resulting from false advertisements and serve as evidence proving the irreparable harm that follows from such deception.¹²⁴ Surveys demonstrate harm by capturing consumers’ reactions to the false advertisement at issue by asking them how they feel about the plaintiff’s product after

116. *Id.* at 139-40.

117. *Id.* at 149.

118. *Id.* (quoting *New York City Triathlon, LLC v. NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 343 (S.D.N.Y. 2010)).

119. *See id.*; Coleman et al., *supra* note 35, at 8.

120. *See* 933 F. Supp. 2d 655, 658 (S.D.N.Y. 2013).

121. *Id.* at 660 (quoting 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS § 27:37 (4th ed. 2012) (alteration in original)).

122. *Id.* at 664 (quoting MCCARTHY, *supra* note 121, § 30:59).

123. *See* Christopher A. Cole & Jason M. Crawford, *Not as Easy as Advertised: New Challenges in Bringing a Successful § 43(a) False Advertising Case*, ANTITRUST SOURCE, 8 (Aug. 2013), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/aug13_full_source.pdf [<https://perma.cc/96KX-MMF4>].

124. *See id.* at 7.

seeing the defendant's advertisement.¹²⁵ For example, if a defendant's advertisement falsely claimed that their migraine medication worked faster than the plaintiff's Excedrin product, and consumers answered in a survey that after viewing the advertisement they are more likely to buy the defendant's product instead of Excedrin, then this would provide reliable evidence to show a potential loss of sales for the plaintiff.

In sum, anti-presumption advocates present a case centered around tradition and the purported feasibility of showing irreparable harm.¹²⁶ But their arguments are far from bulletproof and fail to see the bigger picture benefits of the presumption, as discussed in the following Part of this Note.

III. WHY THE REINSTITUTION OF THE IRREPARABLE HARM PRESUMPTION IS ULTIMATELY BENEFICIAL POLICY

As detailed in the previous Part, the arguments against the irreparable harm presumption stem from a desire not to violate traditional principles of equity and from a practical standpoint positing that false advertising harms can readily be shown, and thus that a presumption of harm is unnecessary.¹²⁷ However, while this reasoning certainly has legitimacy, this Part advances arguments in favor of the presumption of irreparable harm and concludes that allowing the presumption is better policy than prohibiting it, at least in the context of false advertising cases. First, this Part presents counterarguments to anti-presumption advocates' main talking points that the presumption violates traditional principles of equity and that making a showing of irreparable harm is not difficult. It then addresses additional considerations such as protecting the consumer and the TMA's uniformity benefits.

125. See E. Deborah Jay, *Ten Truths of False Advertising Surveys*, 103 TRADEMARK REP. 1116, 1117-18 (2013).

126. See *supra* Part II.

127. See *supra* Part II.

A. The Irreparable Harm Presumption Conforms with Equitable Principles

While some scholars argue that the irreparable harm presumption does not align with equitable principles, a careful analysis shows that it does in fact conform with these principles.¹²⁸ These anti-presumption scholars are eager to point out that injunctions remain an extraordinary remedy and judges are already cautious when granting them.¹²⁹ Although this notion is not in dispute here, the argument that the presumption specifically violates this principle is ripe for attack. First, anti-presumption advocates contend that because preliminary injunctions occur at the preliminary stage of litigation and before all the evidence at trial is presented, a defendant eventually found non-liable faces tremendous consequences when preliminary injunctions are granted.¹³⁰ And they contend that presuming irreparable harm makes this harm all the more likely.¹³¹ Reality, however, does not reflect this thinking. Looking at over 1,300 false advertising cases, one study showed that the number of cases where a court grants a plaintiff's preliminary injunction but the plaintiff ultimately does not prevail on the merits is low.¹³² When analyzed in the actual courtroom, the data suggests that this concern is overblown because the plaintiff typically will eventually receive a judgment in their favor.¹³³ Put simply, if a court grants the plaintiff a preliminary injunction, the defendant is likely to be found liable for running a false advertisement.¹³⁴

128. See *supra* notes 74-103 and accompanying text (detailing anti-presumption arguments).

129. See *supra* notes 74-87 and accompanying text (outlining the history and arguments supporting injunctions being an extraordinary remedy).

130. See *supra* notes 74-80 and accompanying text (providing the example of an injunction granted for the defendant's heart disease medication advertisement).

131. See *supra* notes 74-80 and accompanying text.

132. Deborah R. Gerhardt, Kevin T. McGuire & Mark P. McKenna, *An Empirical Study of False Advertising Claims Under the Lanham Act* 17-18 n.54 (2013), https://law.duke.edu/sites/default/files/fac/workshop/Gerhardt_paper.pdf [<https://perma.cc/HH4X-3Q8R>]. While this footnote does not provide the exact number of these low cases, it states that "it is possible that a plaintiff whose preliminary injunction motion is granted will ultimately not prevail on the merits. But our follow up research suggests that the number of such cases is small." *Id.*

133. *Id.*

134. See *id.*

Anti-presumption scholars also argue that the public consequences that follow injunctions are another reason why the presumption violates the extraordinary principle.¹³⁵ However, this reasoning is misconceived. Again, the public concern prong of the injunction test remains undisputed, but it is irrelevant to the presumption of irreparable harm debate in the first place. A court presumes irreparable harm based either on a likelihood of success on the merits (in preliminary injunctions) or an actual success on the merits (in permanent injunctions).¹³⁶ The public interest factor has little to no bearing on the irreparable harm factor and involves an entirely different analysis.¹³⁷ Further, while public consequences are certainly an important factor leading to caution when granting injunctions, this argument only looks at one half of the problem. Public consequences also arise when courts are less lenient to grant injunctions, most notably the manipulation of innocent consumers.¹³⁸ Thus, although injunctions remain an extraordinary remedy in the court system, anti-presumption advocates misguidedly bolster this principle when criticizing the presumption of irreparable harm, while ignoring the public consequences on everyday consumers when injunctions are not granted.

Anti-presumption proponents also suggest that the presumption creates a shortcut around the four-factor test.¹³⁹ Thankfully, the TMA is well equipped to handle this criticism. One crucial aspect of the TMA's restoration of the presumption is that a defendant can rebut the presumption, meaning that the irreparable harm factor is not automatically proven by a false advertisement violation or likelihood of success on the merits.¹⁴⁰ The presumption, therefore,

135. See *supra* notes 80-86 and accompanying text.

136. See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

137. See Samuelson & Bebenek, *supra* note 94, at 72-73 (“The Court in *eBay* specifically said that plaintiffs ‘must demonstrate’ that they have satisfied *each of the four factors* to qualify for issuance of an injunction.”) (emphasis added); *Weisshaus v. Cuomo*, 512 F. Supp. 3d 379, 390 (E.D.N.Y. 2021) (“[T]he favorable presumption of irreparable harm arises only *after* a plaintiff has shown a likelihood of success on the merits.”) (quoting *Page v. Cuomo*, 478 F. Supp. 3d 355, 364 (N.D.N.Y. 2020)).

138. See *infra* notes 170-83 and accompanying text (detailing in depth how consumers are vulnerable to false advertising and how the presumption of irreparable harm hands them a defensive shield).

139. See *supra* notes 92-95 and accompanying text.

140. See 15 U.S.C. § 1116(a).

can be understood not as a way of dodging satisfaction of the four-factor equitable test, but rather as a burden-shifting device that puts the ball in the defendant's court to demonstrate that irreparable harm does not exist.¹⁴¹ Even with the presumption, plenty of opportunity remains for a defendant to demonstrate that the plaintiff suffered no such irreparable harm, and the plaintiff must still satisfy the other three factors.¹⁴² The presumption, therefore, still ensures that the four-factor test and equitable principles remain intact and not offended.

Another reason why the presumption remains consistent with equitable principles is that equity invites uniformity. In fact, a main reason for the creation of the traditional equitable principles was to have a consistent test for judges to apply.¹⁴³ While equitable rulings generally involve a judge's discretion, establishing a uniform standard reigned in some of this discretionary power to allow more transparency in the judicial system.¹⁴⁴ But uniformly reimposing the irreparable harm presumption still affords judges powerful discretion in considering the injunction test factors.¹⁴⁵ Along with the reasons articulated later in Part III.D, the restoration of the irreparable harm presumption in the TMA also provides the sort of uniformity that helps guide judges' discretionary decision-making and allows for consistent application of the traditional principles of equity.¹⁴⁶

141. See Dillan, *supra* note 4, at 963 (“[T]he presumption is consistent with *Winter* because it is not a speculative burden requirement itself, but rather a burden shifting mechanism based on established norms.”).

142. See Andrew F. Spillane, *The Continuing Vitality of the Presumption of Irreparable Harm in Copyright Cases*, 15 MARQ. INTELL. PROP. L. REV. 257, 287 n.215 (2011) (“A rebuttable presumption does not remove the plaintiff’s burden to prove that injunctive relief generally is appropriate because the plaintiff still must sufficiently demonstrate that the three other *eBay* factors support permanent relief. The presumption only relieves plaintiffs of the burden of proving the first factor.”).

143. See Bates, *supra* note 27, at 1526 (“This focus on general principles governing the standard for granting a preliminary injunction was born in part out of the need for uniform decisions among the more numerous judges.”).

144. See *id.*

145. See *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179, 1183-84 (8th Cir. 1998) (recognizing that irreparable harm is presumed on a showing that the advertisement tended to deceive, as well as maintaining that “[a] district court has broad discretion when ruling on requests for preliminary injunctions”).

146. Part III.D goes into more depth about the TMA’s uniformity benefits. The uniformity benefits are briefly mentioned here because of the overlap of uniformity and equity principles.

B. In Reality, Demonstrating Irreparable Harm Remains Difficult

Absent the irreparable harm presumption, a plaintiff frequently struggles to make a showing of such harm in false advertising cases.¹⁴⁷ Anti-presumption advocates contend the opposite of this: that the showing is easy even without the presumption.¹⁴⁸ However, this Section demonstrates the true burden of proving such harm in the courtroom.

Anti-presumption proponents point to the wide array of case law and situations where false advertising violations occur.¹⁴⁹ However, simply focusing on the variety of contexts that constitute false advertising only leads to the conclusion that more cases can be brought to the courtroom.¹⁵⁰ Court dockets filled with increasing false advertising litigation have no bearing on the difficulty, and therefore practicality, of showing irreparable harm.¹⁵¹ In other words, just because more cases may be brought does not mean that it becomes easier to prove harm and ultimately succeed.¹⁵²

The harms caused by false advertisements, such as a loss of good will or sales, are often hard to quantify and present, specifically at the preliminary injunction stage.¹⁵³ It remains difficult to demonstrate how a business's loss of sales is proximately caused by a defendant's false advertisement, as many factors can affect lost sales.¹⁵⁴ For example, imagine a scenario in which a defendant's advertisement falsely claims that its product is more effective than the plaintiff's product, but at the same time a third party launches a similar product to both of them. The plaintiff would struggle with showing how much, if any, of their lost sales are attributable to the defendant's false advertisement (as opposed to the third party's

147. See Dillan, *supra* note 4, at 944.

148. See *supra* notes 103-13 and accompanying text.

149. See *supra* notes 103-13 and accompanying text.

150. In fact, the example case of *Incarcerated Ent. v. Warner Bros. Pictures* in Part III.B.1 was just a motion to dismiss opinion. See 261 F. Supp. 3d 1220, 1224 (M.D. Fla. 2017).

151. See Gerhardt et al., *supra* note 132, at 19 (explaining that empirical results indicating low wins for plaintiffs' injunctions are "consistent with suggestions many scholars have made that false advertising claims are quite difficult to win").

152. See *id.*

153. See Anne G. LaLonde & Jerome Gilson, *Adios! To the Irreparable Harm Presumption in Trademark Law*, 107 TRADEMARK REP. 913, 921 (2017); Amici Curiae Supporting Ferring, *supra* note 34, at 21.

154. See Dillan, *supra* note 4, at 944.

product in the marketplace) and would fail at making a showing of irreparable harm because they could not show certainty of the harm.¹⁵⁵

This problem is exacerbated when a plaintiff tries to demonstrate a loss of good will. While lost sales caused by a false advertisement can be hard to prove, they at least can be boiled down to a number representing a lost dollar amount. Loss of good will, on the other hand, remains a much more abstract harm to try to quantify.¹⁵⁶ However, the presumption of irreparable harm provides a solution to this issue. A prime example of this occurred in *McNeilab, Inc. v. American Home Products Corp.*, in which the producers of Tylenol sued the producers of Advil because the defendants ran an advertisement saying, “nothing is better than Advil. Not even Tylenol.”¹⁵⁷ The court discussed how a defendant’s misleading comparative advertisement, when aimed at a plaintiff’s specific competing product, diminishes the plaintiff’s good will because it decreases the reputation and value of the product in consumers’ minds.¹⁵⁸ It subsequently held that because of this obvious loss of good will, irreparable harm could be presumed without demonstrating a quantifiable injury resulting from loss of good will.¹⁵⁹

Critics of the presumption are quick to assert that even if showing irreparable harm remains an obstacle, courts often still conclude there is irreparable harm in false advertising cases.¹⁶⁰ However, as discussed in the next Section, a primary purpose of false advertising law is protecting consumers.¹⁶¹ If anti-presumption advocates

155. See *id.*; Amici Curiae Supporting Ferring, *supra* note 34, at 7.

156. See LaLonde & Gilson, *supra* note 153, at 957 (“[I]t is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of good will.”); Amici Curiae Supporting Ferring, *supra* note 34, at 7 (“[D]amage to good will and/or reputation ... are intangible because they are not capable of measurement with any certainty, and therefore that such harms are inherently irreparable.”).

157. 848 F.2d 34, 36 (2d. Cir. 1988) (showing that the court additionally found that the plaintiff’s advertisements misled consumers by alleging that Advil was less risky than Tylenol).

158. *Id.* at 38.

159. See *id.*

160. See *supra* notes 117-22 and accompanying text (showing in *CJ Products LLC* that the court found irreparable harm by “[p]rospective loss of this good will alone” and in *Fresh Del Monte Produce Inc.* that the court found the defendant’s profits were a “rough measure of the plaintiff’s damages”).

161. See Amici Curiae Supporting Ferring, *supra* note 34, at 8; *infra* notes 165-83 and accompanying text.

believe that there is almost always irreparable harm in false advertising violations, then a presumption of such harm furthers the goal of protecting consumers.¹⁶² Put plainly, the general irreparable harm found in false advertising violations, combined with the difficulty of quantifying and showing such harm, makes the presumption necessary to maximize the ultimate goal of protecting consumers.¹⁶³ And if anti-presumption advocates still cry out that not all false advertising violations create irreparable harm, a refresher that the presumption is rebuttable should quell any remaining fears.¹⁶⁴

C. The Ultimate Goal: Protecting the Consumer

At its core, the Lanham Act's purpose is to protect consumers from false and misleading advertisements.¹⁶⁵ The irreparable harm presumption directly contributes to this goal.¹⁶⁶ This is best understood by looking at false advertising law through the lens of one of the fundamental freedom of speech principles—the marketplace of ideas. Under the marketplace of ideas principle, advertisements are made through “private economic decisions” and “[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”¹⁶⁷ Truthful advertisements, with the exception of puffery, lead consumers to make informed decisions about what they purchase, generating a healthy economic market.¹⁶⁸

162. See Carolyn Ward, *The Role of the First Amendment in False Advertising: How the Supreme Court's Decision in Pom Wonderful, LLC v. Coca-Cola, Inc. Supports a Future of Expanded Protection*, 13 FIRST AMEND. L. REV. 554, 580 (2015) (explaining that “consumer safety is a great area of concern” in false advertising cases).

163. See *Amici Curiae Supporting Ferring*, *supra* note 34, at 7-8.

164. *Id.* at 9 (“[The] presumption is rebuttable to allow a defendant to avoid the evidentiary presumption in the rare cases where the facts show the harm is not irreparable.”).

165. See *id.* at 8.

166. Dillan, *supra* note 4, at 963-64 (“The Lanham Act's goal of protecting the market by promoting a truthful one pushes in favor of a presumption that would give assistance to a party with interests aligned with that goal.”).

167. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

168. See *id.*; see also *Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 F. App'x 778, 786-89 (10th Cir. 2016) (explaining that puffery is “used to characterize those vague generalities that no reasonable person would rely on as assertions of particular facts.” Puffery does not pose a threat to consumers because it is “not relied on by rational adults” and therefore will not make consumers ill-informed like false advertisements do. Nor is it actionable under the Lanham Act) (emphasis omitted).

When consumers are ill-informed and make poor purchasing decisions, the results are wasted money or something much worse, such as not knowing the negative side effects of a product.¹⁶⁹ Thus, the harm caused by false and misleading advertisements remains “likely to be one that is both ‘grave and imminent’” to consumers.¹⁷⁰ Adequately addressing this harm thus directly promotes the goal of consumer protection.¹⁷¹

The irreparable harm presumption constructs a shield to protect consumers in the marketplace of ideas by allowing injunctions to issue even when such harm cannot necessarily be shown.¹⁷² In the case of permanent injunctions, if a defendant is found liable for false advertising, but the plaintiff cannot prove that the harm is not too speculative or remote, then without the irreparable harm presumption, a court will not grant an injunction.¹⁷³ This creates a possible situation where a defendant is not enjoined from running the proven false advertisement, and “[i]n the absence of injunctive relief, the marketplace would be subject to infiltration by false and deceptive messages thereby undermining the Lanham Act’s policy goals.”¹⁷⁴ The advertising market then becomes the Wild West, with the false advertising bandits preying on the townspeople consumers. But just like a spaghetti Western, the irreparable harm presumption cowboy steps in to save the day. By presuming irreparable harm through a finding of liability, the court orders the defendant to stop running the false advertisement, protecting consumers from the dangers of exposure to false or misleading information.¹⁷⁵

The argument remains the same for preliminary injunctions: when a plaintiff shows a likelihood of success on the merits, the court presumes irreparable harm and orders the defendant to cease displaying the advertisement, allowing consumers to make well-informed decisions without a false advertisement circulating.¹⁷⁶

169. Nicole LaMarco, *Negative Effects of False Advertising*, CHRON. (Dec. 3, 2018), <https://smallbusiness.chron.com/negative-effects-false-advertising-25679.html> [<https://perma.cc/D6EU-HHH5>].

170. Ward, *supra* note 162, at 580.

171. *Id.*

172. See Dillan, *supra* note 4, at 963-64.

173. See LaLonde & Gilson, *supra* note 153, at 918.

174. Dillan, *supra* note 4, at 941.

175. See *id.* at 939-40, 963-64.

176. See Amici Curiae Supporting Ferring, *supra* note 34, at 8-9.

Difficulty ensues when attempting to show likely irreparable harm at this pre-trial stage because the court does not have access to all the facts and arguments that would normally be presented at trial.¹⁷⁷ The presumption substantially provides relief to plaintiffs and protects consumers when there may be insufficient evidence at that stage in litigation to adequately demonstrate irreparable harm.¹⁷⁸

Legal standing requirements for bringing a false advertising lawsuit present another challenge that the presumption assists with. While consumers are clearly harmed by false advertisements, they cannot bring a Lanham Act action unless they allege “an injury to a commercial interest in reputation or sales.”¹⁷⁹ In other words, a plaintiff must be a business or someone akin to the plaintiff in the *War Dogs* case discussed previously.¹⁸⁰ Because consumers cannot sue as a class, the irreparable harm presumption guards them from the dangers of false advertising by allowing for a more practical granting of injunctions.¹⁸¹ Without the presumption, consumers risk continued exploitation and have an increasingly arduous time protecting their interests.¹⁸² In this way, the irreparable harm presumption serves the Lanham Act’s purpose of protecting consumers—the recipients of advertisements.¹⁸³

177. See LaLonde & Gilson, *supra* note 153, at 920-21.

178. See *id.* at 920 (“Legal presumptions are useful when there is insufficient evidence or it is difficult or impracticable for a court to draw a definite conclusion.”).

179. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131-32 (2014) (noting further that “[a] consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact ... but he cannot invoke the protection of the Lanham Act”).

180. See *Incarcerated Ent., LLC v. Warner Bros. Pictures*, 261 F. Supp. 3d 1220, 1233 (M.D. Fla. 2017) (showing that the plaintiff, an individual, had standing to sue because he suffered direct financial loss resulting from the false advertisement).

181. See Dillan, *supra* note 4, at 964 (“[I]f the market interests are to be duly supported, the recognition of the presumption will provide the first line of defense in guarding those interests.”). See generally *Lexmark*, 572 U.S. at 131-32 (discussing that consumers without commercial or reputational harm cannot recover under the Lanham Act).

182. See generally Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 68-70 (1985) (suggesting a more direct method to protect consumers—simply giving them standing to sue).

183. See *Amici Curiae Supporting Ferring*, *supra* note 34, at 8.

D. The TMA Solves Practical Uniformity Concerns

As discussed in Part I.B, confusion initially reigned over the divided federal courts concerning whether to apply the *eBay* and *Winter* holdings to cases involving false advertisements.¹⁸⁴ Fortunately, the TMA's reinstatement of the presumption of irreparable harm solves the pandemonium that arose from the court splits.¹⁸⁵

1. The TMA Discourages Forum Shopping

Forum shopping is a litigation strategy in which one party chooses and initiates a lawsuit in a specific jurisdiction or venue solely for the purpose of achieving a favorable outcome.¹⁸⁶ While the strategy is not new, it remains widely condemned, with courts and prominent scholars having written extensively about “the evil[s] of forum shopping.”¹⁸⁷ That may seem melodramatic, but its horrors are real: forum shopping attacks the integrity of the courts by allowing parties to manipulate what should be a true, consistent, and impartial legal system.¹⁸⁸ Consequently, the strategy negatively impacts the judiciary as a whole by creating a risk that courts are not applying the law equally in all relevant jurisdictions.¹⁸⁹

Because of the disparity in federal court decisions regarding the presumption before the TMA's passage, plaintiffs engaged in forum shopping by filing lawsuits in courts that still adhered to the presumption.¹⁹⁰ For example, prior to the TMA's passage, the Ninth

184. See *supra* notes 56-66 and accompanying text.

185. See House Report, *supra* note 23, at 19.

186. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) [hereinafter *Forum Shopping Reconsidered*].

187. *Id.* at 1681 (quoting Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974)).

188. See *id.* at 1685 (“Consistency of outcomes is a fundamental tenet of virtually any legal system.”); Markus Petsche, *What’s Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT’L LAW. 1005, 1017 (2011) (“[F]orum shopping ‘goes against the principle of consistency of outcomes, apparently a fundamental tenet of virtually any legal system.’”) (citation omitted).

189. See *Forum Shopping Reconsidered*, *supra* note 186, at 1685-86; Petsche, *supra* note 188, at 1017-18.

190. See Adam Powell & Stephen Larson, *Trademark Modernization Act Could Reshape Litigation*, LAW360 (Feb. 1, 2021, 4:05 PM), <https://www.law360.com/articles/1350075> [<https://perma.cc/78YM-9KM2>].

Circuit would not recognize the irreparable harm presumption, and some legal commentators believe that this directly contributed to forum shopping because plaintiffs would seek out other appropriate forums that allowed the presumption.¹⁹¹ The TMA discourages any forum shopping attempts because it gives a uniform rule regarding the irreparable harm presumption: the presumption is here to stay in false advertising cases.¹⁹² The TMA's uniform framework eliminates incentives to sue only in courts that recognize the presumption because now all federal courts must apply it.¹⁹³ Restricting forum shopping safeguards a healthy legal system that has a uniform applicability of the law.¹⁹⁴

2. *The TMA Encourages Predictability*

The principle of applying the law equally also lends itself to the strong desire to ensure predictability in the law.¹⁹⁵ Predictability in the legal system “helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way the courts will resolve disputes ..., ... lend[ing] strength and legitimacy to a rule-of-law system.”¹⁹⁶ A lack of predictability creates more than just a headache for practicing attorneys. Rather, it greatly interferes with their ability to adequately advise clients and prepare for litigation because they cannot confidently predict how a court will decide or even apply the law.¹⁹⁷ Because of the overwhelming positive effects of predictability, American jurisprudence generally regards it as an “essential factor in judicial decision-making.”¹⁹⁸

By creating a uniform irreparable harm presumption in all false advertising cases, the TMA helps ensure predictability in litigation. It solves the issue of federal courts' inconsistency in applying (or not

191. *See id.*

192. *See* 15 U.S.C. § 1116(a).

193. *See* Powell & Larson, *supra* note 190.

194. *See Forum Shopping Reconsidered*, *supra* note 186, at 1685.

195. Petsche, *supra* note 188, at 1018-19 (“[F]orum selection only makes predictability more difficult.”).

196. Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 51 (2015).

197. *See* George G. Bailey, *Predictability of the Law; Its Relation to Respect for Law*, 66 W. VA. L. REV. 1, 2 (1963).

198. Frost, *supra* note 196, at 51.

applying) the irreparable harm presumption by asserting that all courts deciding false advertising cases must administer the rebuttable presumption.¹⁹⁹ While Congress passed the TMA only recently, it is a safe bet that with the presumption back in action, attorneys and advertisers can breathe a sigh of relief. Because of the TMA, they will not have to guess whether a court will apply the presumption of irreparable harm and can adequately prepare for litigation without wasting valuable time and resources.

CONCLUSION

Advertisements do more than just convey information to the public: they represent something deeper. As the well-known fictional advertising icon Don Draper explained, “[y]ou are the product. You feel something. That’s what sells.”²⁰⁰ While the best advertisements are often highly creative and take risks, it remains immensely important to ensure that those advertisements do not cross the line into false advertising. False advertisements betray our trust and prey on consumers instead of courting us in the marketplace of ideas like honest advertisements should.²⁰¹

Luckily, the TMA’s resurrection of the irreparable harm presumption is a front-line defense helping to mitigate the dangers of false advertising. It ushers in a new era for false advertisement rights and litigation. Most notably, it reestablishes the presumption of irreparable harm that was put in functional purgatory after the Supreme Court’s rulings in *eBay* and *Winter*.²⁰² Although some scholars have suggested that irreparable harm should not be presumed when granting an injunction, the arguments supporting the presumption far outweigh its prohibition.²⁰³ Most importantly, the presumption protects consumers, who are often the unheard victims

199. See *supra* notes 56-66 and accompanying text; 15 U.S.C. § 1116(a); House Report, *supra* note 23, at 19.

200. Erika Giles, *The 20 Best Don Draper Quotes on Advertising and Life to Help Hit Your Goals*, BLULEADZ (Aug. 31, 2020), <https://www.bluleadz.com/blog/10-marketing-quotes-from-don-draper-what-we-learned-from-them> [<https://perma.cc/FVK2-34TE>].

201. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (discussing how the marketplace of ideas principle guides commercial speech).

202. See *supra* Part I.B.

203. See *supra* Part III.

of false advertisements.²⁰⁴ Additionally, anti-presumption arguments remain vulnerable to attack and fail to meet the same persuasiveness that backs the irreparable harm presumption.

Although the TMA is in its infancy, consumers, lawyers, and businesses will likely see the positive effects of it in action soon. Specifically, the reinstatement of the irreparable harm presumption should foster a more fair and informed market for consumers to make intelligent decisions about the products they want to purchase.²⁰⁵ Whether you are deciding between two brands of gum at the store register or choosing between a Toyota and a Honda, accurate advertisements make sure that you get the best bang for your buck.

*Daniel Stephen**

204. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131-32 (2014).

205. See *Amici Curiae Supporting Ferring*, *supra* note 34, at 8-9.

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