MINE IS BETTER THAN YOURS!
THE RISKS AND REWARDS OF CONDUCTING
COMPARATIVE ADVERTISING

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I. INTRODUCTION

Comparative advertising—the act of conveying information about one’s own products or services by measuring them against those of another—is not only permissible but encouraged, according to the case law as well as regulatory pronouncements by the Federal Trade Commission (“FTC”) and other agencies such as the Food & Drug Administration (“FDA”). “Both the FTC and the FDA encourage product comparisons. The FTC believes that consumers gain from comparative advertising, and to make the comparison vivid the Commission ‘encourages the naming of, or reference to competitors.’”1 Provided that it is “truthful and nondeceptive,” comparative advertising is “a source of important information to consumers and assists them in making rational purchase decisions.”2 Like the FTC, the courts recognize that the antitrust laws’ promotion of free competition is not necessarily inconsistent with prohibitions against unfair competition.3 Rather, antitrust law and the law of unfair competition are both intended to promote competition on the merits.4

So when does comparative advertising cross the line between permissible “free” competition and prohibited “unfair” competition? After examining the common law, statutory, and regulatory sources of restrictions on comparative advertising, this paper will provide guidelines for substantiating—and challenging—comparative advertising, and review the remedies available if such a challenge is successful.

II. COMPARATIVE ADVERTISING IN FRANCHISING

Comparative advertising is an effective means of differentiating one’s business, products, and services from those of a competitor. In the franchise context, this is especially true because the battle lines are frequently clearly drawn among regional and national competitors. It does not take much imagination, for example, to determine who the direct competitors of Subway restaurants are. Moreover, it can be efficient and beneficial for all franchisees if the franchisor launches a comparative advertising campaign to strengthen the franchise in all markets.

Perhaps the most famous example of comparative advertising in the franchise context is the so-called “Burger Wars” that began in the 1970s. Eager to acquire larger portions of the consumer base, fast food restaurants launched a series of campaigns that included comparative

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1 See August Storck K.G. v. Nabisco, Inc., 59 F.3d 616, 618 (7th Cir. 1995) (citation omitted).
2 Triangle Publ’n, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1176 (5th Cir. 1980).
3 See, e.g., Schulenburg v. Signatrol, Inc., 50 Ill. App. 2d 402, 200 N.E.2d 615, 620 (Ill. App Ct. 1964), aff’d in part, rev’d in part on other grounds, 33 Ill. 2d 379, 212 N.E.2d 865 (1965), cert. denied, 383 U.S. 959 (1966) (“Competition is a desideratum in our economic system, but it ceases to serve an economic good when it becomes unfair. The concept of fair play should not be shunted aside on the theory that competition in any form serves the general good. Only fair competition does that. Unfair competition is not competition at all in the truest sense of the word.”) (emphasis in original); Atlantic Monthly Co. v. Frederick Ungar Pub’g Co., 197 F. Supp. 524, 534 (S.D.N.Y. 1961) (“The essence of the law of unfair competition is fair play—fair play to the consumer and to one’s competitor. Competition may be vigorous, but not deceptive.”).
4 See, e.g., Standard Oil Co. v. Humble Oil & Refining Co., 363 F.2d 945, 954 (5th Cir. 1966), cert. denied, 385 U.S. 1007 (1967) (“The essence of competition is the ability of competing products to obtain public recognition based on their own individual merit. A product has not won on its own merit if the real reason the public purchases it is that the public believes it is obtaining the product of another company.”); SK&F, Co. v. Premo Pharm. Labs, Inc., 625 F.2d 1055, 1067 (3d Cir. 1980) (“Neither [state nor federal unfair competition law] offends the federal antitrust laws, for those [antitrust] laws have never been held to require toleration of acts or practices presently or potentially deceptive.”)
claims relating to the quality, size, value, or other characteristics of their burgers. Their advertisements frequently called out a competitor by name or through a proxy such as a parody of Ronald McDonald. In a relatively recent salvo in these Burger Wars, Jack in the Box released a television advertisement in which the chain’s mascot, Jack—explaining the cut of beef from which its sirloin burgers are made—is asked to point to the Angus area on the diagram of a cow. “I’d rather not,” Jack replies. The implication, according to competitors Carl’s Jr. and Hardee’s in their lawsuit filed in federal court in California, was that Angus meat—the touted ingredient in their burgers—is really from the cow’s anus, when in fact Angus is a specific breed of cattle. Their plea for injunctive relief was denied because they failed to show extrinsic evidence that a significant portion of the audience for the commercial had been deceived or evidence of an intent to mislead consumers, and the balance of the hardships did not tilt in their favor.

In 2006, Quiznos sponsored a contest inviting customers to submit videos comparing a Quiznos sandwich to a Subway sandwich using the theme “meat, no meat.” Contestants submitted their videos to the website/domain name “www.meatnomet.com.” Entries were published online, where they remained following the end of the contest and selection of the winner. This form of comparative advertising was unique in that customers created the ads rather than the franchisor or franchisee. In response to Subway’s false advertising claim, Quiznos moved for summary judgment. The motion was denied on the grounds that the website/domain name was arguably literally false because it implied that the Subway sandwich has “no meat.” Further, Quiznos had produced four “sample videos” designed to shape the contest submissions to contain arguably false representations depicting the Subway sandwich as having no meat or less meat than a Quiznos sandwich. In light of this evidence, the court refused to find that Quiznos was not responsible for creating or developing the contestant videos as a matter of law. Instead, the court found the question to be an issue of material fact, best submitted to the jury after viewing all of the relevant evidence. The case subsequently settled.

Fast food, of course, is not the only arena in which comparative advertising can occur in the franchise context. In the early 1990s, a RE/MAX real estate agent in South County, California ran an ad stating: “RE/MAX HAS THE POWER TO SELL! # 1 Real Estate Company In the U.S.A. In 1992 • Most Total Transactions . . . • Highest Level Of Customer Satisfaction.” Subsequently, the same office sent a letter to clients claiming the following: “It’s now official. After several years of being close, we have now passed Century 21 to become the largest volume real estate organization in the United States and Canada.” Century 21 alleged that this advertisement and letter violated Section 43(a) of the Lanham Act and portions of the California Unfair Practices Act because the claims were false. Their claims were largely disposed of in summary judgment because much of the content was considered puffery or opinion.

5 The commercial can be viewed at https://www.youtube.com/watch?v=t7kgL86xSTc.
7 Doctor’s Assocs., Inc. v. QIP Holder LLC, No. 3:06—cv—1710 (VLB), 2010 WL 669870, at *24 (D. Conn. Feb. 19, 2010) (“A reasonable jury may well conclude that the Defendants did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos.”)
Cases such as the foregoing also highlight the fact that limits on comparative advertising come from a variety of sources—including the common law of unfair competition, federal statutes such as the Lanham Act and Section 5 of the Federal Trade Commission Act, state statutes, and regulations. A brief review of these sources of illegality is therefore in order.

III. COMPARATIVE ADVERTISING: THE GOVERNING LAW(S)

A. THE COMMON LAW OF UNFAIR COMPETITION

In its original form, the common law of unfair competition was typically limited to “passing off” or “palming off” one’s product as that of another by using similar labeling, packaging, or advertising. A 1918 Supreme Court decision, however, made clear that the scope of unfair competition law is not so limited. Although unfair competition was included in the original 1938Restatement of Torts, the 1977 Restatement (Second) of Torts did not include an unfair competition section. A separate Restatement of Unfair Competition published in 1995 addressed false advertising, passing off, and trademark infringement. Today, although certain aspects of state unfair competition law are preempted by federal patent and copyright law, state unfair competition law co-exists peacefully with the federal prohibitions against unfair competition codified in Section 43(a) of the Lanham Act, 15 U.S.C. § 1125.

B. LANHAM ACT SECTION 43(A)

Section 43(a) of the Lanham Act is the federal unfair competition statute. It is the most frequently used of all the laws in the comparative advertising context—not only to stop trademark infringement that may occur in such advertising but also to stop false or misleading statements or associations in such ads.

By way of background, Section 43(a) was enacted in 1947 to ease the burden of proof in common law false advertising cases because a predecessor federal statute required proof of willfulness and an intent to deceive. Before its amendment in 1989, Section 43(a) had been interpreted as not providing a cause of action for product disparagement and trade libel. As previously interpreted by the courts, Lanham Act Section 43(a) provided a cause of action only for false statements about the defendant’s own goods and services—not those of another. As a result of the 1989 amendment, one prong of Section 43(a)—Section 43(a)(1)(B), 15 U.S.C. § 1125(a)(1)(B)—provides a federal cause of action for false advertising that is defined broadly enough to include product disparagement, and trade libell if the following elements are

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satisfied: (1) the use of false or misleading description or representation of fact; (2) in interstate commerce; (3) in connection with goods or services; (4) that “misrepresents the nature, characteristics, qualities, or geographic origin of [the defendant’s] or another person’s goods, services, or commercial activities;” and (5) that causes or is likely to cause damage. Some courts have applied the requirement of Fed. R. Civ. P. 9(b) that fraud be pled with particularity to Lanham Act Section 43(a) false advertising claims. In addition, common law claims for product disparagement and trade libel may be subject to different standards in different states. For example, California requires proof of special damages, among other elements.

C. FTC ACT SECTION 5

Section 5 of the Federal Trade Commission Act (“FTCA § 5”) generally prohibits unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices. FTCA § 5 grants the FTC the power to define and prohibit false and misleading advertising. Specifically, it authorizes the FTC to issue interpretive rules, policy statements, and regulations that, following a statutory notice and comment period, have the force of law. The FTC is further empowered to initiate civil actions for violation of FTCA § 5, and to obtain the rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notice of the rule violation or the unfair or deceptive act or practice.

The FTC released a Statement of Policy Regarding Comparative Advertising (“FTC Statement”) in August 1979. The FTC Statement defines comparative advertising as “advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.” The FTC Statement also takes the position that truthful and non-deceptive comparative advertising is pro-competitive, in that it can be a source of important information to consumers that assists them in making rational purchasing decisions. Further, according to the FTC, comparative advertising can encourage product improvement and innovation, while also potentially leading to lower prices in the marketplace. The FTC Statement also takes the position that established industry codes and interpretations prohibiting disparagement of competitors or imposing a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate and may be subject to challenge by the FTC.

17 See, e.g., Max Daetwyler Corp. v. Input Graphics, Inc., 608 F. Supp. 1549, 1556 (E.D. Pa. 1985) (allegation that defendants represented “quality and nature” of a blade was held too vague to be construed as an allegation that defendants misrepresented the shape of their blade to make it seem as if it was the same shape as plaintiff’s blade); Gallup, Inc. v. Talentpoint, Inc., No. Civ. A. 00 – 5523, 2001 WL 1450592 (E.D. Pa. Nov. 13, 2001) (allegations of false attribution were sufficiently clear under policy of Rule 9(b) to adequately notify defendant of the nature of claim); Architectural Mailboxes, LLC v. Epoch Design, LLC, No. 10cv974 DMS (CAB), 2011 WL 1630809 (S.D. Cal. Apr. 28, 2011) (Rule 9(b) requires Epoch Design, LLC false advertising claims to allege “who, what, when, where, and how”); and A.H. Lundberg Assocs., Inc. v. TSI, Inc., No. C14-1160 JLR, 2014 WL 5365514 (W.D. Wash. Oct. 21, 2014) (citing decisions of other Ninth Circuit trial courts applying Rule 9(b) to false advertising claims).

18 Aetna Cas. & Sur. Co. v. Centennial Ins. Co., 838 F.2d 346, 351 (9th Cir. 1988) (“The cause of action for trade libel thus requires: (1) a publication, (2) which induces others not to deal with plaintiff, and (3) special damages.”).


22 Id.

23 Id.
Federal courts have consistently refused to recognize an implied private right of action for violation of FTCA § 5.24 The FTC guidelines regarding deceptive advertising may provide the basis for a Lanham Act Section 43(a) claim, however, as courts often give deference to the assessment of the FTC, as the administrative agency charged with preventing unfair trade practices.25 When the FTC itself brings an action for violation of FTCA § 5, the courts usually apply a three-step analysis. The first step is to attempt to parse out exactly what claims are conveyed in the advertisement. The next step is to consider whether those claims are false, misleading, or unsubstantiated. Finally, the court determines whether the claims are material to prospective consumers.26

D. FDA REGULATIONS

Pursuant to the Food, Drug, and Cosmetic Act ("FDCA"), the FDA has issued a lengthy publication entitled “Guidance for Industry: A Food Labeling Guide.”27 Although there is no private right of action for violation of the FDCA, a label or advertisement that did not meet FDA standards for substantiation could be attacked by a competitor as false or misleading in violation of Lanham Act Section 43(a). Section 43(a) of the Lanham Act does not preempt claims for false and misleading food and beverage labeling in violation of the FDCA. Rather, the prohibitions on false advertising in the FDCA and Section 43(a)(1)(B) of the Lanham Act are complementary and overlapping, so that a private party can bring a Lanham Act claim challenging a food label that is regulated by the FDCA—even if FDA regulations do not ban or even expressly permit certain wording in a food or beverage label.28

A direct conflict between an FDCA mandate and a Lanham Act claim would stand “as an obstacle to the accomplishment and execution of the important means-related federal objectives” of the FDCA and therefore would be preempted.29

E. STATE STATUTES PROHIBITING FALSE COMPARATIVE ADVERTISING

Regardless of whether comparative advertising violates FTCA § 5, it may be actionable under state statutes that prohibit false advertising. Some of these statutes—known as “little FTC” acts—are modelled after FTCA § 5. An example is the North Carolina Unfair and Deceptive Trade Practices Act. Other statutes are modelled after the Uniform Deceptive Trade Practices Act (“UDTPA”) or the Revised Uniform Deceptive Trade Practices Act (“RUDTPA”).30

25 B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 168 F.3d 967, 969 (7th Cir. 1999) (FTC guidelines defined when advertising such as “50 percent off” was false and misleading).
26 See POM Wonderful, LLC v. FTC., 777 F.3d 478, 490 (D.C. Cir. 2015).
27 Available at www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm2006828.htm#toc.
28 POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228 (2014) (competing seller of pomegranate and blueberry juice blend sued Coca-Cola for false advertising under Lanham Act § 43(a) alleging that the accused label misled consumers into believing defendant’s product consisted predominantly of pomegranate and blueberry juice when in fact it was composed almost entirely of less expensive apple and grape juices).
Finally, false comparative advertising may be subject to specific statutory prohibitions on false advertising or to more general statutory prohibitions on unfair competition, such as the prohibition enacted in California. General state law prohibitions against “unfair competition” may afford a cause of action for comparative advertising that violates FTC guidelines. A more detailed discussion of two state laws—the North Carolina Unfair and Deceptive Trade Practices Act and the California unfair competition statute—follows.

1. North Carolina Unfair and Deceptive Trade Practices Act

Like other state “little FTC” acts, the North Carolina Unfair and Deceptive Trade Practices Act prohibits “[u]nfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce.” The North Carolina statute, however, is one of the few that affords a treble damage remedy. Like the treble damages available for federal antitrust violations, trebling is automatic under the North Carolina statute.

What qualifies as an unfair or deceptive act “is a somewhat nebulous concept” but requires “[s]ome type of egregious or aggravating circumstances.” A practice is “unfair” if it “offends public policy and . . . is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” In other words, “a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.”

The scope of the North Carolina statute is broader than FTCA § 5, but it likely prohibits false or misleading comparative advertising that violates FTCA § 5. Unlike many other state “little FTC” acts or state trade regulation statutes, N.C. Gen. Stat. § 75-1.1 does not require or direct reference to FTCA § 5 for its interpretation. The North Carolina Supreme Court does, however, look to federal decisions interpreting FTCA § 5 for guidance in construing the meaning of this section. False advertising is clearly actionable under N.C. Gen. Stat. § 75-1.1.

2. California Unfair Competition Statute

California Business and Professions Code § 17200 prohibits “any unlawful, unfair or fraudulent business act or practice.” This statute is extremely broad in its coverage of prohibited


acts and practices, creating a private right of action for redress of any practice forbidden by any other law (civil, criminal, federal, state, municipal, statutory, regulatory, or court-made). Violations of Section 17200 are actionable if the plaintiff can show that it “has suffered injury in fact and has lost money or property as a result of such unfair competition.”\(^{40}\) The available remedies for unfair competition under Section 17200 include injunctive relief and/or restitution but not compensatory damages.\(^{41}\) In addition, California Business and Professions Code § 17500 specifically prohibits false advertising.

**F. COMMON LAW FRAUD**

The elements of common law fraud are a representation of material fact, falsity, *scienter*, reliance and injury.\(^{42}\) To allege a claim for common law fraud successfully, a plaintiff must plead each element with specificity and particularity.\(^{43}\) In a franchising context, inaccurate or misleading comparative advertising can give rise to a common law fraud claim. The more stringent pleading requirements applicable to fraud, however, may make such a claim less attractive than a Lanham Act claim. A successful fraud claim would likely involve an outright lie, such as when Volkswagen was caught cheating on emissions tests for its vehicles—a fraud that wound up costing the company nearly $15 billion in settlement money and an indeterminate amount in consumer goodwill.\(^{44}\) For most comparative advertising claims in the franchise context, the higher burden of proving fraud is not likely to yield relief that cannot be recovered more easily under other causes of action—unless the false statements are so egregious that an award of punitive damages would be warranted.

**G. RESTATEMENT OF UNFAIR COMPETITION (TORTIOUS INTERFERENCE)**

Although unfair competition was included in the original 1938 Restatement of Torts, the 1977 Restatement (Second) of Torts did not include an unfair competition section. A separate Restatement (Third) of Unfair Competition published in 1995 addressed false advertising, passing off, and trademarks.\(^{45}\) The Restatement sought to capture the evolved definition of unfair competition, including a broad array of legal actions addressing methods of competition that improperly interfere with the legitimate commercial interests of other sellers in the marketplace. The principles discussed in the Restatement are applicable to actions at common law and to the interpretation of analogous federal and state statutory codifications.\(^{46}\) Most challenges to comparative advertising are not based on the Restatement. Like actions for fraud, however, tortious interference claims do provide the potential for punitive damages.


\(^{41}\) Id. § 17203 (“Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, . . . or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.”).


\(^{46}\) Restatement (Third) of Unfair Competition Foreword (1995).
IV. SUBSTANTIATING—AND CHALLENGING—COMPARATIVE ADVERTISING CLAIMS

Sometimes, litigation brought by a competitor to challenge a comparative advertising program is unavoidable. And although federal and state agencies may provide guidance as to when comparative advertising is false or misleading, some regulatory challenges to comparative advertising campaigns are truly unforeseeable in view of the fact-specific and subjective nature of the analysis. Still, the reported case law and regulations are sufficient to permit franchisors to make more than an educated guess about whether particular advertising is likely to be actionable.

For franchisors and their counsel, the analysis is complicated, however, by the fact that there are so many different sources of guidance. These include case law decided under Section 43(a) of the Lanham Act, FTC regulations and guidelines issued under Section 5 of the FTC Act, other regulations addressing certain types of advertising claims (such as environmental marketing claims), and precedents decided under state “little FTC Acts” and the common law of unfair competition. For that reason, the principal issues raised by comparative advertising are addressed here both topically and by the applicable law because—although there are some common threads—the legality of a particular comparative advertising claim may vary depending on whether it is being challenged under Section 43(a) of the Lanham Act, Section 5 of the FTC Act, or some other law.

A. ELEMENTS OF A FALSE ADVERTISING CLAIM

1. “Materiality” Requirement

Materiality is not an explicit statutory requirement for a false advertising claim under Section 43(a) of the Lanham Act. However, courts typically do require a plaintiff bringing such a claim to plead and prove that the false or misleading statement was material, meaning that it was likely to have some effect on consumers’ purchasing decisions. For example, both the First and the Ninth Circuits have read a materiality requirement into the statutory requirement that there be a misrepresentation relating to an “inherent quality or characteristic” of a product or service.

2. False or Misleading Statements of Fact Versus Mere “Puffing” and Statements of Opinion

Consistent with the common law rule, mere “puffing” does not constitute false advertising and therefore does not violate Section 43(a) of the Lanham Act. Puffing can take one of two forms. The first type of puffing consists of grossly exaggerated claims that no reasonable buyer would believe to be true—including silly and incredible advertising claims (such as a crown

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47 See, e.g., Bretford Mfg., Inc. v. Smith Sys. Mfg. Co., 286 F. Supp. 2d 969, 972 (N.D. Ill. 2003), aff’d, 419 F.3d 576 (7th Cir. 2005) (defendant’s use of plaintiff’s product as a component of defendant’s sample table is not a material misrepresentation: “Component parts are not material. The complete product is what counts.”); Hearthware, Inc. v. E. Mishan & Sons, Inc., No. 11c5233, 2012 WL 3309634 (N.D. Ill. Aug. 10, 2012) (dismissed on summary judgment because consumer survey showed decision to purchase product was not materially affected by false statement that implied defendant’s halogen oven was designed and guaranteed by The Sharper Image).


49 Because it applies only to commercial speech, the Lanham Act “excludes use of § 43(a) to challenge the falsity of consumer or editorial content, parodies, satires, or other constitutionally protected material.” 5 McCarthy, § 27:71.

50 Castrol Inc. v. Pennzoil Co., 987 F.3d 939, 945-48 (3d Cir. 1993), (“Puffery is an exaggeration or overstatement expressed in broad, vague and commendatory language.”); Southland Sod Farms v. Stover Seed Co., 108 F.3d
appearing on the head of anyone who eats IMPERIAL margarine or a couple flying in the air before landing in a HERTZ convertible rental car). The second type of puffing consists of general claims of superiority over a comparative product that are so vague and so indeterminate that they would be understood as mere opinion. These types of claims include the common advertising statements that a particular product or service is generally “better than” or “superior to” its competitors. Here, though, definite and measurable claims cannot be considered puffery. This is especially true when the claim of superiority has been or could be based on product testing. Other examples of puffing include claims that a product or service is “new,” “improved,” “the favorite,” or “original.”

In federal courts, the availability of a puffing defense can be determined on a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). This defense reflects a policy choice under the law to give advertisers considerable leeway in crafting their advertising copy. Puffery is not actionable under the Lanham Act because it consists of, generally, “exaggerated statements of bluster or boast upon which no reasonable consumer would rely” and “vague or highly subjective claims of product superiority, including bald assertions of superiority.”

The fact that an advertising claim is exaggerated, however, does not make it actionable. An exaggerated advertising claim is not mere puffing if it influences consumer buying decisions or contains definite and measurable claims. Advertising that is otherwise puffing

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1134, 1145 (9th Cir. 1997) (advertising defendant’s grass seed as “Less is More” is non-actionable puffery because it is the kind of “generalized boasting upon which no reasonable buyer would rely,” whereas the claim that defendant’s grass required “50% Less Mowing” was not puffery because it was a specific and measurable claim of superiority based on product testing).

51 5 McCarthy, § 27:38, citing Stokely-Van Camp, Inc. v. Coca-Cola Co., 646 F. Supp. 2d 510, 523 (S.D.N.Y. 2009) (claim for sports drink—“Upgrade your formula. Upgrade your game.”—was exaggeration and boasting because no reasonable person would believe consuming the drink would actually result in improved athletic abilities, such as playing a better game of basketball).

52 Lipton v. Nature Co., 71 F.3d 464, 474 (2d Cir. 1995) (general assertion that the research conducted by defendant was “thorough” was mere puffing.); United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998) (“Nonactionable puffery includes representations of product superiority that are vague or highly subjective.”); Am. Italian Pasta, 371 F.3d 387, 391 (“If the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery.”); Guidance Endodontics, LLC v. Dentsply Int’l, Inc., 708 F. Supp. 2d 1209, 1241 (D.N.M. 2010) (“Whether one thing or another is the ‘best’ is a normative assessment that involves weighing potentially infinite and sometimes immeasurable factors.”); Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999) (statement that a competitor was “too small” to handle a client’s business was puffing: “It was not a specific and measurable claim capable of being proved false or of being reasonably interpreted as a statement of objective fact.”); Newcal Indus., Inc. v Ikon Office Sol., 513 F.3d 1038, 1053 (9th Cir. 2008), cert. denied, 129 S. Ct. 2788 (2009) (advertisement by competitor leasing copier equipment claiming it would deliver “flexibility” with “low costs” was puffing).

53 Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 390-91 (8th Cir. 2004) (“The phrase ‘America’s Favorite Pasta,’ standing alone, is a statement of fact as a matter of law.”)

54 Toro Co. v. Textron, Inc., 499 F. Supp. 241, 253 (D. Del. 1980) (advertising claims made “are manifestly meant to be believed and relied upon, and I cannot say that a reasonable prospective purchaser would fail to take them seriously”); U-Haul Int’l, Inc. v. Jartran, Inc., 522 F. Supp. 1238 (D. Ariz. 1981), aff’d, 681 F.2d 1159 (9th Cir. 1982) (ads placed with intent to affect consumer’s judgment are not mere puffery); Am. Home Prods. Corp. v. Abbott Labs., 522 F. Supp. 1035, 1037 (S.D.N.Y. 1981) (claims that hemorrhoid treatment is “new” and “stops pain immediately” were false and therefore violated Section 43(a)).

55 Castrol Inc. v. Pennzoil Co., 987 F.2d at 945-48 (“There was ample evidence adduced at trial to prove that that [defendant’s] claims of superior protection against engine wear were literally false.”); W.L. Gore & Assoc., Inc. v. Totes, Inc., 788 F. Supp. 800, 809 (D. Del. 1992) (advertising claim that TECH-TEX suits are “extremely breathable,
can be considered an actionable statement of fact if the context gives it a definite, factual meaning. For example, in *Pizza Hut, Inc. v. Papa John's International* 66 one pizza restaurant franchisor brought a Lanham Act false advertising claim against another challenging the defendant’s use of the slogan “Better Ingredients – Better Pizza.” The Fifth Circuit held that, generally, the slogan was opinion-type puffery that was not actionable as a false advertising claim. 57 However, when the slogan appeared in certain advertising comparing specific ingredients with those of competitors, the specific ingredient claims gave objective, quantifiable, and fact-specific meaning to the phrase, transforming it from opinion puffery into a fact-based advertising claim. The court nevertheless dismissed the plaintiff’s false advertising claims on the ground that the plaintiff had failed to prove that materiality, *i.e.*, that consumers relied on the statements in making their purchasing decisions. 58

Examples of non-actionable puffing include the following from cases decided under Section 43(a) of the Lanham Act:

- advertising a computer accessory as “redesigned and improved;” 59
- the advertising slogan “AMERICA’S FAVORITE PASTA;” 60
- the claim that Blue Cross/Blue Shield health coverage was “better than” a health maintenance organization’s coverage, which the court found to be “the most innocuous kind of puffing;” 61
- advertising a computerized chess game as “new” and “new technology” and “like having Karpov” as your opponent; 62
- advertising a letter cutting machine as the “finest” and “most flexible” and the “most versatile die cutting system available today;” 63

allowing seven times more air and sweat vapor to pass through the rainsuit than suits produced from GORE-TEX fabric” was a definite assertion with a numerical comparison, not a claim of general superiority or mere puffing); *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 38-39 (1st Cir. 2000) (advertising claim that conveys the message that the advertiser’s detergent gets clothes whiter than chlorine bleach is “specific and measureable, not the kind of vague or subjective statement that characterizes puffery.”); *Nat’l Prods., Inc. v. Gamber-Johnson LLC*, 699 F. Supp. 2d 1232 (W.D. Wash. 2010) (claims that a certain model of emergency vehicle laptop computer mounting could “submarine” and “fly around in your vehicle” were “sufficiently concrete” that a jury could find them not to be puffing); *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1368 (Fed. Cir. 2013) (advertising claim that a “tote towel” had “performance that lasts the useful lifetime of the towel” was not just puffing even though literally, it meant only that the towel “performs” as long as it does, even if only for one washing).

57 Id.
58 Id. at 502.
60 Am. Italian Pasta, 371 F.3d at 391 (“favorite” means popular, well-liked, or admired—terms that are subjective and vague, and use of the word “America’s” did not necessarily imply that the pasta was a nationally marketed brand).
63 Cytyc Corp. v. Neuromedical Sys., Inc., 12 F. Supp. 2d 296, 300-01 (S.D.N.Y. 1998) (“Although claims of product superiority may be actionable, the sort of subjective claims of product quality at issue here are non-actionable.”).
• advertising by the owner of HILTON hotels in the U.S. that its CONRAD hotels located abroad were “the first international hotels with standards proud enough to bear his [Conrad Hilton’s] name” because the word “proud” made the statement subjective and ambiguous;64

• advertising for a website for real estate agents claiming “We take care of everything . . . Once it’s online, you don’t need to worry about the site;”65

• Abercrombie & Fitch’s claim that a pants design was “Our Most Original Pant Since 1892 . . . Pure Abercrombie & Fitch design and fit,” because there was no way to prove that this design was more or less “original” than another or that the design and fit were “pure” or “impure” Abercrombie;66

• Advertising that coaches should advise their athletes to wear Speedo brand equipment if they want to compete at the highest level (“The statement here is unquestionably hyperbole, but it is a general one. No reasonable person would think that they [sic] would be incapable of competing without the Speedo suit.”);67

• advertising the POWERADE sports drink as “The Complete Sports Drink” (“An advertising claim that a product “is ‘The’ something-or-other is commonly viewed as puffery, because consumers understand the advertiser is not contending that the particular attribute or feature can only be found in its product.”);68 and

• a diaper manufacturer’s claims that its HUGGIES diapers had a “natural fit” and “fit more naturally,” because these claims were not objective statements of fact.69

3. Actionable Advertising Claims That Are Not “Literally False”

To be actionable as “false” advertising, a claim need not be literally false. Rather, “a claimant may succeed by showing that the innuendo or ambiguity in the disputed advertisement would have a tendency to deceive the buying public.”70 Before its most recent amendment in 1989, Section 43(a) of the Lanham Act prohibited only any “false description or representation,” including words or symbols “tending falsely to describe or represent” the defendant’s goods or services. The foregoing prohibitions were interpreted by the courts, however, to include

68 Stokely-Van Camp, 646 F. Supp. 2d at 526 (Because the word “complete” in the context of sports drinks is an ambiguous term, it is puffery which cannot be proven false. “Moreover, the addition of ‘The’ to ‘Complete’ adds puffery upon puffery.”).
69 Procter & Gamble Co. v. Kimberly-Clark Corp., 569 F. Supp. 2d 796, 802 (E.D. Wis. 2008) (“In sum, P&G asks the Court to find KC’s natural fit claim false even when: (1) people cannot agree on what factors make a diaper fit more naturally; (2) the measurement of any of the possible factors is based on subjective consumer perception; and (3) the perception about fit does not even come from the wearer of the diaper itself.”).
descriptions or representations that were “misleading.” Section 43(a) has since been amended to codify this interpretation so that it now expressly prohibits any “false or misleading” description or representation of fact that “misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person’s goods, services, or commercial activities.” “The bottom line is that a statement, although literally true, can for all practical purposes, convey a false message.”

Although advertising need not be literally false to violate Section 43(a) of the Lanham Act, truthful advertising that is clear on its face cannot be attacked as “misleading” based on consumer surveys that merely establish that certain factual claims might be misunderstood. A statement is misleading when, although literally true, it implies something that is false… ‘Misleading’ is not a synonym for ‘misunderstood,’… . As a result, otherwise protected “puffing” does not become actionable as “misleading” simply because a consumer survey establishes that it was misunderstood. “[T]he Lanham Act protects against misleading and false statements of fact, not misunderstood statements.” Survey evidence therefore is not relevant if the challenged statements are facially unambiguous and factually accurate. In deciding whether an advertising claim is misleading if not false, courts rely on the usual meaning of terms—not re-definitions advocated by plaintiffs.

B. REQUIRED SUBSTANTIATION FOR COMPARATIVE ADVERTISING CLAIMS

1. Lack of Pre-Existing Data to Substantiate Advertising Claims

One obvious split between the FTC’s interpretation of “false” advertising and the standard under Section 43(a) of the Lanham Act is whether the lack of pre-existing data for an advertising claim alone makes it actionable. In cases decided under the Lanham Act, most courts have held that the plaintiff must prove falsity—not just lack of pre-existing substantiation. However, at least one federal court (the U.S. District Court for the District of New Jersey) has held that an advertising claim may be deemed false simply because it lacked pre-existing substantiation.

Complicating things further, the Third Circuit appears to have decided this issue both ways—although its decisions may be reconcilable: “The line the court appears to be drawing is between a case where the substantiation for the ad is inadequate and a case where the advertiser has absolutely no basis or substantiation for believing that the accused advertising

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73 Mead Johnson & Co. v. Abbott Laboratories, 201 F.3d 883 (7th Cir.), opinion amended on denial of reh’g, 209 F.3d 1032 (7th Cir.), cert. denied, 531 U.S. 917 (2000).

74 Id. at 887.

75 American Italian Pasta, 371 F.3d at 394.


77 First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800 (7th Cir. 2001).


claim is true. It is only in the latter case that the claim may be found false without any further evidence.\textsuperscript{80}

In contrast, the FTC’s interpretation of FTCA § 5 is at least unambiguous: an inadequately substantiated advertising claim is inherently misleading and therefore violates the FTC Act without proof of actual falsity.\textsuperscript{81}

2. Required Substantiation for Claims of Superiority or Equivalence

The burden of proving falsity varies depending whether the advertising is a “better than” advertising claim (in FTC parlance, an “efficacy” claim) or a “tests prove” advertising claim (in FTC parlance, an “establishment” claim). To show the falsity of “better than” advertising claims under Section 43(a) of the Lanham Act, the “plaintiff must affirmatively prove defendant’s product equal or inferior.”\textsuperscript{82} The FTC Act analogue to a “better than” advertising claim is an “efficacy” claim, \textit{i.e.}, advertising that claims that the product performs a given function or delivers a certain benefit but makes no suggestion that scientific evidence supports the claim. Under FTCA § 5, the advertiser must have a “reasonable basis” for making the efficacy claim.\textsuperscript{83}

3. Required Substantiation for Claims of Scientific Establishment

To establish the falsity of “tests prove” advertising claims under Section 43(a) of the Lanham Act, “plaintiff satisfies the burden merely by showing that the tests did not establish the proposition for which they were cited.”\textsuperscript{84} A Lanham Act plaintiff can meet its burden of proving

\begin{itemize}
\item \textsuperscript{80} 5 McCarthy, § 27:61. The Third Circuit cases upon which Professor McCarthy based the foregoing observation include \textit{Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.}, 902 F.2d 222 (3d Cir. 1990) (affirming district court’s denial of preliminary injunction against allegedly false advertising because plaintiff failed to prove either that the ingredient in defendant’s cough medicine which was designed to shield cough receptors immediately was ineffective or that the advertising claim was literally false); \textit{Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm.,} 19 F.3d 125, 129 (3d Cir. 1994) (“A plaintiff must prove that the claim is false or misleading, not merely that it is unsubstantiated.”); and \textit{Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.}, 290 F.3d 578, 590 (3d Cir. 2002) (because defendant did not argue or present any evidence to support the truth of the challenged claim that its product was specially formulated for nighttime relief from heartburn, the advertising was “a completely unsubstantiated advertising claim” that could be found false on that ground alone).
\item \textsuperscript{81} See Federal Trade Commission, Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30999 (Aug. 2, 1984) (“[W]e reaffirm our commitment to the underlying legal requirement of advertising substantiation—that advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated. ... The Commission emphasizes that as a matter of law, firms lacking a reasonable basis before an ad is disseminated violate section 5 of the FTC Act and are subject to prosecution.”).
\item \textsuperscript{82} \textit{Castrol, Inc. v. Quaker State Corp.}, 977 F.2d 57, 62-63 (2d Cir. 1992).
\item \textsuperscript{83} See n.73, supra.
\item \textsuperscript{84} Id. \textit{See also Schering-Plough Healthcare Prods., Inc. v. Neutrogena Corp.}, 702 F. Supp. 2d 266, 272 (D. Del. 2010) (“The Best line ad makes an ‘implicit establishment claim,’ i.e., one that ‘relies on scientific studies by making an implicit superiority claim or parity claim by showing a graph or diagram.’ To prove literal falsity, plaintiff must prove that defendant’s tests did not support the advertising claim.”); \textit{Church & Dwight Co., Inc. v. Clorox Co.}, 840 F. Supp. 2d 717, 720 (S.D.N.Y. 2012) (an “establishment claim” is one in which scientific or technical evidence is said to establish the claim; to prove literal falsity, plaintiff must prove that the test did not back up the claim because it was either not reliable or irrelevant); \textit{BASF}, 41 F.3d at 1090 (“If the challenged advertisement makes implicit or explicit references to tests, the plaintiff may satisfy its burden by showing that those tests do not prove the proposition; otherwise, the plaintiff must offer affirmative proof that the advertisement is false.”); \textit{Rhone-Poulenc Rorer Pharm., Inc. v. Marion Merrell Dow, Inc.}, 93 F.3d 511 (8th Cir. 1996) (agreeing with the \textit{Castrol} distinction between “better than” and “tests prove” advertisements); \textit{Southland Sod.}, 108 F.3d 1134 (approving of the distinction drawn in the \textit{Castrol} case); \textit{C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, Ltd. P’ship}, 131 F.3d 430 (4th Cir. 1997) (adopting the distinction made in the \textit{Castrol} case); \textit{Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.}, 299 F.3d 1242 (11th Cir. 2002) (adopting the \textit{Castrol} rule in the Eleventh Circuit).
\end{itemize}
the falsity of a “tests prove” advertising claim based on evidence either that the tests are not sufficiently reliable to support the claim or that the tests, although reliable, do not support the claim. According to the Eighth Circuit, among other appellate courts, in a “tests prove” case in which the plaintiff is challenging the reliability of the tests, “[t]o ensure vigorous competition and to protect legitimate commercial speech, courts applying this standard should give advertisers a fair amount of leeway, at least in the absence of a clear intent to deceive or substantial consumer confusion.”

The FTC Act analogue to a “tests prove” claim is an “establishment” claim, i.e., advertising suggesting that a product’s effectiveness or superiority has been scientifically established. The advertiser must be able to back up the claim with the specific scientific substantiation claimed in the ad. If the advertisement makes only a non-specific reference to a scientific basis (e.g., “medically proven”), then the advertiser must have evidence sufficient to satisfy the relevant scientific community that the claim is true.

4. Substantiation of Claims About Competitors’ Products

Although franchising has accounted for a number of reported decisions involving comparative advertising, cases decided outside the context of franchising provide further guidance as to what types of claims may be subject to challenge. The telecommunications industry, for example, is particularly contentious and thus has been the source of a number of reported decisions. The major cellular carriers regularly use comparative advertising in their television commercials—including those seemingly ubiquitous colored service area maps. A recent advertisement by Sprint drew the ire of T-Mobile, which challenged the Sprint advertisement in the Better Business Bureau’s National Advertising Division (“NAD”). The statements that formed the basis of T-Mobile’s complaint included the following:

[W]e’re inviting you to join Sprint for the biggest offer in U.S. wireless history, switch to Sprint and save 50% on most Verizon, AT&T or T-Mobile rates, you heard that right, no gimmicks, no tricks, you have Verizon’s 6 gigs for $60, 40 with Sprint and if you have 15 gigs for $100 from AT&T, 50 with Sprint, even if you have T-Mobile’s 10 gigs for $80,

85 See, e.g., United Industries Corp. v. Clorox Co., 140 F.3d 1175 (8th Cir. 1998) (scientific evidence supported advertising claim that lab tests prove bait kills roaches in 24 hours); Church & Dwight, 840 F. Supp. 2d at 721 (television advertising claiming that tests proved defendant’s cat litter with carbon better eliminated bad odors than plaintiff’s product with baking soda was based on test with flawed methodology because defendant’s test “cannot reasonably support the necessary implication that Clorox’s litter outperforms [plaintiff’s] products in eliminating odor in cat litters.”).

86 Rhone-Poulenc v. Marion Merrell Dow, 93 F.3d 511 (finding that advertiser did not falsely represent to sophisticated doctors, pharmacists, and hospitals that tests proved the comparative bioavailability of competing prescription hypertension drugs). See also Johnson & Johnson Vision Care, 299 F.3d at 1249 (“The fact that a study’s design is imperfect, however, does not render [defendant’s] advertisements false.”).

87 POM Wonderful, 777 F.3d at 491 (upholding finding that maker of pomegranate-based products violated FTCA § 5 by claiming that medical studies showed that daily consumption could treat, prevent, or reduce the risk of various ailments such as heart disease and prostate cancer).

88 The NAD is a forum used by competitors in many industries to obtain rulings on their advertising conduct but avoid going to court. The Better Business Bureau has also established a board for appellate review of NAD decisions, the National Advertising Review Board (“NARB”).
we’ll give it to you for $40 and we won’t force you to watch video in low def....

Based on the following statements, T-Mobile claimed that Sprint had promised customers savings they would never receive and that Sprint’s comparisons of its plans and prices with those of T-Mobile were false and misleading because the companies offered different services. In response, Sprint argued that any differences in the plans would be obvious to consumers. The NAD determined that the challenged Sprint statements in the television commercials reasonably conveyed the message that consumers can expect to retain the same services but reduce their bill by 50 percent when they switch from their current provider to Sprint. Accordingly, the NAD recommended that the Sprint commercials be discontinued.90

Similarly, Verizon recently took issue with the claim in a direct mail advertisement by Comcast-Xfinity that Verizon is “eliminating its traditional home phone service in certain markets” and that “Verizon is discontinuing its copper-wire based home phone service.”91 The advertisement also stated: “So now’s the time to switch to Xfinity Voice. You can count on us....” According to Verizon, many customers of home phone service are unlikely to understand that reliable, wired home telephone service can be supplied over different types of cable, not just copper wire. As a result, to the ordinary consumer, saying that Verizon is “eliminating” or “discontinuing” traditional and copper-based home phone service reasonably conveys that Verizon is eliminating home telephone service entirely—not merely changing the type of cable over which such service is provided. Comcast responded that its claim about Verizon was literally true because Verizon is eliminating its traditional, copper-wire based home phone service, which is a matter of public record. The NAD, considering the advertisement as a whole, decided that consumers could take away an inaccurate message that Verizon is eliminating home phone service entirely, and recommended that Comcast discontinue the claims about the Verizon home phone service.92

These cases underscore the need to be extremely precise when specifically calling out a competitor and/or its products and services. Such comparative advertising practices will likely catch the competitor’s attention. Even the suggestion that the advertising claim may be misleading to the ordinary consumer could lead to trouble. A recent example outside the telecom sector provides an example of such trouble. In a recent case in the Southern District of Texas, on-demand ride service provider Uber was sued by the local taxi operator for advertisements in which Uber stated it was the “SAFEST RIDE ON THE ROAD – Going the Distance to Put People First” and had “BACKGROUND CHECKS YOU CAN TRUST.”93 The court dismissed the claims against those advertisements as mere puffery that was not subject to empirical verification, stating that they each represented a “bald assertion of superiority—a general, subjective claim that lacks measurability.”94 The court allowed the taxi operator to

89 Sprint Corporation, N.A.D. Case # 5958 (May 20, 2016).
90 Id. at 9.
91 Comcast Communications, Inc., N.A.D. Case # 5974 (July 19, 2016).
94 Id. at 683.
proceed, however, against a statement on Uber’s website that specifically called out the taxi industry. The statement, attributed to Uber’s Head of Communications for North America, read: “Unlike the taxi industry, our background checking process and standards are consistent across the United States and often more rigorous than what is required to become a taxi driver.” This statement, the court wrote, was clearly intended and/or could lead to a reasonable consumer believing that an Uber ride is objectively and measurably safer than a local taxi operator ride. The court noted that because Uber’s comparative statement applied objective indicia to suggest that Uber had a superior background check process, a cognizable claim exists and it could be proven to be false or misleading.\textsuperscript{95} The Uber case is a good reminder for franchisors to be mindful about making such comparative claims not only in their commercial advertising, but also when such claims are made by franchisor and franchisee officers or representatives during interviews or press conferences, emails, or other less formal communications to the public.

5. **Substantiation Under FTCA § 5**

The FTC’s Statement of Policy Regarding Comparative Advertising (Aug. 13, 1979)\textsuperscript{96} defines comparative advertising as “advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.” To substantiate a comparative advertising claim under FTCA § 5, the “ultimate question”—whether “the advertising has a tendency or capacity to be false or deceptive”—“is a factual issue to be determined on a case-by-case basis,” according to the FTC’s Statement of Policy.

6. **Substantiation of FDD Claims**

FTCA § 5 is, of course, also the authority by which the FTC Franchise Rule was promulgated. Just like comparative advertising claims, statements in the Franchise Disclosure Document (“FDD”) must be substantiated. This is especially true of Item 19 earnings claims. In this regard, the FTC Franchise Rule Compliance Guide expressly states: “A franchisor electing to make a financial performance representation must, among other things, have a reasonable basis and written substantiation for the representation at the time it is made, and disclose the bases and assumptions underlying the representation in Item 19.”\textsuperscript{97} Indeed, the FTC Franchise Rule Compliance Guide devotes an entire section to what is prohibited in an Item 19 disclosure, \textit{i.e.}, “representations that are not true or are not substantiated.”\textsuperscript{98} These prohibitions apply not only to financial representations made by franchisors in an Item 19 disclosure but also to any media representations (including those made in social media, on the Internet, and in press releases) made by anyone who participates in selling franchises (\textit{e.g.}, brokers, subfranchisors, or developers).\textsuperscript{99} Indeed, as amended in 2007, the FTC Franchise Rule expressly makes it a violation for a franchise seller to make any financial performance representations that are inconsistent with what appears in the Item 19 disclosure.\textsuperscript{100} Moreover, the FTC Franchise Rule

\textsuperscript{95} Id. at 686.

\textsuperscript{96} Available at https://www.ftc.gov/public-statements/1979/08/statement-policy-regarding-comparative-advertising.

\textsuperscript{97} FTC Franchise Rule Compliance Guide at 85.

\textsuperscript{98} Id. at 130.

\textsuperscript{99} Id. at 130-35.

\textsuperscript{100} Id. at 137.
Compliance Guide notes that a franchise seller that runs afoul of this requirement could face liability under FTCA § 5 if the representations are false or deceptive.101

7. Deceptive Testimonials and Endorsements

Whether an advertising claim that refers to alleged testimonials and endorsements is false or misleading is—under Section 43(a) of the Lanham Act—a fact-specific question. However, the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255, provide guidance as to whether testimonials and endorsements are deceptive under a variety of scenarios. These include product placements; celebrity endorsements; endorsements by individuals on social networking sites; compensation for endorsements; social media contests; online review programs; soliciting endorsements; use of intermediaries (“influencers”); network and affiliate marketing; employee endorsements; and testimonials that do not reflect the typical consumer experience.

8. Environmental Marketing Claims

Pursuant to FTCA § 5, the FTC has issued the so-called “Green Guides” governing Environmental Marketing Claims.102 Under the Green Guides, environmental claims must be substantiated: “any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim.”103

The Green Guides establish regulatory requirements for substantiation of certain environmental claims—sometimes with specific evidence. For example, “biodegradable” or “degradable” is “an unqualified claim that a product or package is degradable, biodegradable or photodegradable,” and this claim “should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal.”104 As for “recyclable” claims “[a] product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product, through an established recycling program.”105

9. FDA Food Labeling Guide

The Food Labeling Guide covers Nutrient Content Claims, Health Claims—including Qualified Health Claims, and Structure/Function Claims. Because the regulatory requirements for substantiating such claims are so detailed, this paper provides a brief overview with reference to the Appendices to the Food Labeling Guide.

101 Id. at 137-38.
103 Id. § 260.5.
104 Id. § 260.7(b) (emphasis added).
105 Id. § 260.7(d).
a. **Nutrient Content Claims**

Nutrient Content Claims are claims on a food product that directly or by implication characterize the level of a nutrient in the food (e.g., “low fat,” “high in oat bran,” or “contains 100 calories”). Appendix A to the FDA Food Labeling Guide contains definitions of and synonyms for certain content claims, specifically—with respect to fat, calories, and the like—“free,” “low,” and “reduced/less.” Appendix B to the FDA Food Labeling Guide sets forth additional requirements for Relative Claims, certain other Nutrient Content Claims, and Implied Claims. For Relative Claims—i.e., “light,” “reduced” and “added” (or “extra,” “plus,” “fortified,” and “enriched”) “more” and “less” (or “fewer”)—the amount of that nutrient in the food must be compared to an amount of nutrient in an appropriate reference food. Other Nutrient Content Claims for which the Food Labeling Guides contain requirements include: “high,” “rich in,” or “excellent source of,” “good source,” “contains,” or “provides,” “more,” “fortified,” “enriched,” “added,” “extra,” or “plus,” “lean” and “extra lean,” “high potency,” “modified,” “fiber”; and claims using the term “antioxidant.”

The types of “Implied Claims” as defined by 21 C.F.R. 101.65 for which Appendix B to the FDA Food Labeling Guide provides guidance include the following:

- Claims about a food or ingredient suggesting that the nutrient or ingredient is absent or present in a certain amount or claims suggesting that a food may be useful in maintaining healthy dietary practices and which are made with an explicit claim (e.g., “healthy, contains 3 grams of fat”);

- Claims that a food contains or is made with an ingredient known to contain a particular nutrient may be made if product is “low” in, or a “good source” of, the nutrient associated with the claim (e.g., “good source of oat bran”); and

- Equivalence claims (“contains as much [nutrient] as a [food”]).

The following label statements are generally not considered implied claims unless they are made in a nutrition context: avoidance claims for religious, food intolerance, or other non-nutrition related reasons (e.g., “100% milk free”); statements about non-nutritive substances (e.g., “no artificial colors”); added value statements (e.g., “made with real butter”); statements of identity (e.g., “corn oil” or “corn oil margarine”); and special dietary statements made in compliance with a specific Part 105 provision.

The term “healthy” and related terms (“health,” “healthful,” “healthfully,” “healthfulness,” “healthier,” “healthiest,” “healthily” and “healthiness”) may be used if the food meets the requirements of 21 C.F.R. 101.65(d)(2).

Nutrient Content Claims on foods for infants and children less than two years old are prohibited except for claims describing the percentage of vitamins and minerals in a food in relation to a daily value; claims on infant formulas provided for in Part 107; the terms

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108 Such claims are permissible if both the reference food and the labeled food are a “good source” of a nutrient on a per-serving basis (e.g., “contains the same amount of Vitamin C as an 8 oz. glass of orange juice”). Id. § 101.65(c)(2).
109 Id. § 101.13(q)(3)(i).
“unsweetened” and “unsalted” as taste claims;\textsuperscript{111} and “sugar free” and “no added sugar” claims on dietary supplements only.\textsuperscript{112}

b. Health Claims vis-à-vis Qualified Health Claims

Health Claims are any claim made in labeling of a food, including a dietary supplement, that expressly or by implication characterize the relationship of any substance to a disease or health-related condition. This characterization can occur, for example, through “third party” references, written statements (\textit{e.g.}, a brand name including a term such as “heart”), symbols (\textit{e.g.}, a heart symbol), or vignettes.

Implied health claims include those statements, symbols, vignettes, or other forms of communication that suggest, within the context in which they are presented, that a relationship exists between the presence or level of a substance in the food and a disease or health-related condition.\textsuperscript{113}

Health claims must be substantiated by Significant Scientific Agreement (“SSA”) based on the totality of publicly available scientific evidence.\textsuperscript{114} Appendix C to the FDA Food Labeling Guide sets forth detailed requirements for health claims made on food labels.

Qualified Health Claims must be based on the totality of publicly available evidence, but the scientific support for them does not have to be as strong as for SSA. Appendix D to the FDA Food Labeling Guide sets forth detailed requirements for Qualified Health Claims made on food labels and sets forth various factors the FDA will consider in exercising its enforcement discretion with respect to Qualified Health Claims.

c. Structure/Function Claims – Dietary Supplements

Pursuant to the Dietary Supplement Health and Education Act of 1994, Section 403(r)(6) of the FDCA permits the label for a dietary supplement to make certain statements if they meet certain requirements. Permitted Structure/Function Claims describe the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or that characterize the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function, provided that such statements are not “disease claims.”\textsuperscript{115} A disease claim is a claim that a product will diagnose, cure, mitigate, treat, or prevent disease. If the label for a dietary supplement bears a disease claim, the product will be subject to regulation as a drug unless the claim is an authorized health claim for which the product qualifies.

Although Section 403(r)(6) of the FDCA does not apply to conventional foods, the label for a conventional food can make structure/function claims if the effects are derived from the nutritive value of the food.

\textsuperscript{110} Id. §101.13(b).
\textsuperscript{111} Id. §101.60(c)(3).
\textsuperscript{112} Id. §101.60(c)(4).
\textsuperscript{113} Id. § 101.14(a)(1).
\textsuperscript{114} Id. § 101.14.
\textsuperscript{115} Id. § 101.93.
C. FAIR USE & NOMINATIVE FAIR USE DEFENSES

“Trademarks of a rival company can be used in comparative advertising, so long as the advertising does not contain misrepresentations or create a reasonable likelihood that purchasers will be confused as to the source, identity, or sponsorship of the advertiser’s product.”116 Under the Lanham Act, a defense to claims of false and misleading comparative advertising is that the advertiser used the other party’s brand fairly and truthfully. The elements of this defense—known as fair use or nominative fair use—are as follows:

1. The product or service in question must be one not readily identifiable without use of the trademark;
2. The advertiser may use only so much of the mark or marks as is reasonably necessary to identify the product or service; and
3. The advertiser must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.117

In 1983, fast food chain Big Bite ran an advertisement that featured a girl dressed in a costume to look like the Wendy’s trademark saying “Ain’t no reason to eat anything but a Big Bite,” a play on the Wendy’s slogan “Ain’t no reason to go anywhere else.”118 Wendy’s claimed trademark infringement, and the Southern District of Ohio granted Wendy’s motion for a preliminary injunction. The court noted that, although nominative use is fair, Big Bite’s use of the Wendy’s trademark had been shown likely to cause consumer confusion. As a result, it was found sufficiently likely to run afoul of the Lanham Act that an injunction was warranted.119 In such situations, a survey might be a useful tool to determine whether there is a likelihood of confusion.120

Some common missteps to avoid in comparative advertising include: (1) displaying the competitor’s trademark in a larger font than other descriptive text or even one’s own trademark; (2) placing the competitor’s mark in more prominent positions than one’s own trademark; or (3) replicating any designs, logos, stylizations, special fonts, or color or color combinations of the competitor’s mark.

D. REMEDIES FOR FALSE AND MISLEADING COMPARATIVE ADVERTISING

1. Remedies Under the Lanham Act

Both injunctive relief121 and money damages122 are recoverable for false and misleading advertising under the Lanham Act. Unlike a claim for actual damages, which requires proof of

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117 Playboy Enter. v. Welles, 279 F.3d 796, 801 (9th Cir. 2002). See also Lindy Pen Co. v. Bic Pen Corp., 725 F.2d 1240, 1248 (9th Cir. 1984) (“liability . . . may not be imposed for truthful . . . comparative advertising”).
118 The commercial can be viewed at https://www.youtube.com/watch?v=Dq225Qx1_U.
120 6 McCarthy, § 32:194.
122 Id. § 1117(a).
actual deception, injunctive relief—both preliminary and permanent—requires showing only that the advertisement has a tendency to deceive. Preliminary injunctive relief is subject to the general four-factor test of *eBay v. MercExchange*. Specifically, the plaintiff must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." As they did before *eBay*, many courts since the decision still simply presume the irreparable injury element. For example, if the parties are direct competitors and there is proof that the advertising in question is likely to mislead consumers into believing that the defendant’s product is superior to the plaintiff’s, a court may presume irreparable injury rather than require an explicit showing. But some courts—including the Third Circuit—interpret *eBay* as requiring proof of irreparable harm. Whether permanent injunctive relief is available may depend on the likelihood that the false advertising will be repeated and on the need for corrective advertising.

Monetary remedies are available in the event of a violation under section 1125(a) or (d) of the Lanham Act, or a willful violation under section 1125(c). The plaintiff shall be entitled, “subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.”

### 2. Remedies Under State Law

The remedies for false and misleading advertising available under state law vary widely. Of the various state "little FTC" Acts, the North Carolina statute is one of the few that affords a

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123 See, e.g., *Burndy Corp. v. Teledyne Indus., Inc.*, 584 F. Supp. 656 (D. Conn.), aff’d, 748 F.2d 767, 773 (2d Cir. 1984).

124 *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1335 (8th Cir. 1997); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 210 (9th Cir. 1989).


126 Pre-*eBay* decisions holding that irreparable injury was presumed include *Coca-Cola Co. v. Tropicana Prods. Inc.*, 690 F.2d 312 (2d Cir. 1982); *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160 (3d Cir. 2001); *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988) ("A misleading comparison to a specific competing product necessarily diminishes that product’s value in the minds of the consumer."); *Castrol v. Quaker State*, 977 F.2d at 62 ("We will presume irreparable harm where plaintiff demonstrates a likelihood of success in showing literally false defendant’s comparative advertisement which mentions plaintiff’s product by name."); *Johnson & Johnson-Merck Consumer Pharm. Co. v. Proctor & Gamble Co.*, 285 F. Supp. 2d 386 (S.D.N.Y. 2003), aff’d, 90 F. App’x 8 (2d Cir. 2003) (challenged advertisements making side-by-side comparisons gave rise to a presumption of irreparable injury).

127 Post-*eBay* decisions in which irreparable injury was presumed include *Osmose*, 612 F.3d 1298 (affirming preliminary injunction affirmed against defendant’s advertising claim that test proved plaintiff’s wood preservative resulted in structural wood decay creating alarming safety hazards: "The inference that the serious nature of the claims in the advertisements would irreparably harm [plaintiff] Osmose’s goodwill and market position is certainly reasonable."); *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 148 (2d Cir. 2007) ("We conclude that the likelihood of irreparable harm may be presumed where the plaintiff demonstrates a likelihood of success in showing that the defendant’s comparative advertisement is literally false and that given the nature of the market, it would be obvious to the viewing audience that the advertisement is targeted at the plaintiff, even though the plaintiff is not identified by name.").


129 See, e.g., *Seven-Up Co. v. Coca-Cola Co.*, 86 F. 3d 1379 (5th Cir. 1996) (denying permanent injunctive relief because defendant had not used the challenged representations for five years and the challenged pre-1991 statistical data was of little significance for use in future sales presentations.

treble damage remedy. In contrast, some statutes do not allow the recovery of compensatory damages. For example, violations of California Business and Professions Code Section 17200 are actionable if the plaintiff can show that it “has suffered injury in fact and has lost money or property as a result of such unfair competition.” The remedies available for unfair competition under Section 17200 include injunctive relief and restitution but not compensatory damages.

V. CONCLUSION

Comparative advertising is an important and necessary element of competition in the marketplace. Fair, truthful comparative advertising benefits consumers and arguably increases the quality of goods and services. To minimize the risk of liability, however, comparative advertising must avoid any likelihood of confusion, must be accurate, and must be backed by substantial evidence.

131 N.C. GEN. STAT. § 75-1 (2016).
133 Id. § 17203 (“Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, . . . or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.”).
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As a partner with Kilpatrick Townsend, Marc’s practice focuses on intellectual property licensing and franchising in the consumer products/services, fashion and apparel, food and beverage, and retail. Marc also counsels clients on creating effective strategies for procuring, protecting and enforcing their global intellectual property assets, including patent, copyright and trademark prosecution, as well as trademark opposition and cancellation proceedings in the USPTO and US Copyright Office proceedings. Marc also provides intellectual property litigation counseling. He frequently lectures and writes on intellectual property issues for a variety of intellectual property organizations and publications, including INTA, NYSBA IP Section, Wharton Business Law Association, NYU, ABCNY Fashion Law Committee, National Law Journal, IP Strategist and The New York Law Journal, Practical Law, and The Licensing Journal. Marc is listed in the 2016 and the five years immediately preceding editions of World Trademark Review 1000 – The World’s Leading Trademark Professionals. He was recognized as a New York “Super Lawyer” in Intellectual Property by Super Lawyers magazine in 2015 and the five years immediately preceding, and, for the last five years, he was named a Top 100 New York Metro "Super Lawyer" in Intellectual Property. He has been recognized as an "IP Star" in 2016 and the three years immediately preceding by Managing Intellectual Property magazine. Marc was also recommended by Legal 500 US in 2015 and 2016 for Copyright. In 2013, he received the Lexology Client Choice Guide - International 2013 Award and is the sole winner in the Intellectual Property: Copyright category for New York. He was also listed in the 2012 and the four years immediately preceding editions of Chambers USA: America’s Leading Lawyers for Business for Intellectual Property: Trademark & Copyright. Chambers noted that Marc has “tremendous business savvy and is tenacious in his work ethic,” according to his clients (2012).

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