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No. 12-873

In The
Supreme Court of the United States

LEXMARK INTERNATIONAL, INC.,

Petitioner,

v.

STATIC CONTROL COMPONENTS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF NEITHER SIDE

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of the undersigned Law Professors identified in Appendix A.[1]

Amici are scholars at U.S. law schools whose research and teaching focus is trademark and advertising law. *Amici* seek consistent, manageable standards that effectuate Congress's intent to provide a remedy in Section 43(a)(1)(B) of the Lanham Act for businesses against false and misleading statements in commercial advertising or promotion.

SUMMARY OF THE ARGUMENT

Rules of prudential standing are flexible "rule[s] . . . of federal appellate practice," *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980), designed to protect the courts from "deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (citation omitted). These purposes do

[1] The Parties were timely notified of the intent to file this *amicus* brief pursuant to Rule 37.2. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk. This brief was not authored in whole or in part by counsel for any party. No one other than *Amici* made a monetary contribution to preparing or submitting this brief. *Amici's* institutional affiliations are provided only for purposes of identification.

not counsel in favor of a narrow or rigid standing doctrine in Lanham Act false advertising cases when a private party can identify a likely injury to its economic interests or ability to compete. While *Amici* express no opinion on the proper outcome on these facts, we believe that either a flexible "competitive injury" or a "reasonable interest" test is superior to the multifactor standing test adapted from antitrust law.

Unlike the antitrust laws, which are designed to protect "competition, not competitors," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), the Lanham Act is deliberately designed to protect individual businesses. The intent of Congress is evidenced by the language of the last sentence of 15 U.S.C. § 1125 (commonly known as § 43): "The intent of this chapter is . . . to *protect persons engaged in [commerce within the control of Congress] against unfair competition*; . . . ; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and *unfair competition* entered into between the United States and foreign nations" (emphasis added).[2] It is anticompetitive, in the Lanham Act sense, to advertise in a

[2] *See Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987) (deeming this passage "unusual, and extraordinarily helpful, in declaring in so many words the intent of Congress. . . . The statute is directed against unfair competition. To be actionable, conduct must not only be unfair but must in some discernible way be competitive.").

way that materially deceives consumers and harms the plaintiff's ability to compete. Thus, any standing inquiry should focus on the conduct targeted by Congress, not on factors developed to address a very different statutory scheme.

The history of the Lanham Act shows Congress's intent to allow a broad class of plaintiffs to attack false advertising, which poisons the market for legitimate competition. Empirical examination of Lanham Act false advertising cases shows little reason for concern about flexible standing tests. By contrast, cases applying the multifactor test adapted from antitrust law routinely end up engaging in factual speculation at the motion to dismiss stage, contrary to ordinary pleading rules. Thus, this Court should avoid transporting a legally inapposite and empirically distracting standard into the Lanham Act.

ARGUMENT

I. The Lanham Act was Designed to Broaden Standing.

Before the Lanham Act, influential cases such as *American Washboard Co. v. Saginaw Manufacturing Co.*, 103 F. 281 (6th Cir. 1900), held that a competitor did not have standing to assert a false advertising claim based on statements about the defendant's own product. *American Washboard* stated that if a

competing business was to have standing to prevent deceptive advertising, that "must come from the legislature, and not from the courts." *Id.* at 286.[3] The Lanham Act therefore went beyond the common law in conferring rights on businesses harmed by unfair competition.[4] This new flexibility enabled the law to address evolving markets and business practices. From our current perspective, the Lanham Act may look like what we imagine the common law to have

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[3] The court's discussion tracks what this Court now calls "prudential standing," and it has been so understood subsequently. Gary S. Marx, *Section 43(a) of The Lanham Act: A Statutory Cause of Action for False Advertising*, 40 Wash. & Lee L. Rev. 383, 388 (1983) ("The *American Washboard* result was consistent with views on standing prevailing at that time. . . . The common-law rule in 1927 . . . was that competitors had no standing to enjoin nondisparaging, deceptive advertising outside the palming off context unless the plaintiff had a monopoly position in the market. . . .").

[4] Pub. L. No. 79-489, § 43, 60 Stat. 427, 441 (July 5, 1946) ("Any person who shall . . . use in connection with any goods or services . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation."); *see Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 781-82 (N.D. Ill. 1974); Walter J. Derenberg, *Federal Unfair Competition Law at the End of the First Decade of the Lanham Act: Prologue or Epilogue?*, 32 N.Y.U. L. Rev. 1029, 1036-38 (1957); Marx, *supra* note 3, at 388-89.

been, but contemporaries understood matters quite differently.[5]

Thus, while the Third Circuit correctly identified Congress's focus on competitive injury caused in commercial markets, it was inaccurate in concluding that "[t]he congressionally-stated purpose of the Lanham Act . . . evidences an intent to limit standing to a *narrow* class of potential plaintiffs possessing interests the protection of which furthers the purposes of the Lanham Act." *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 229 (3d Cir. 1998) (emphasis added; citing student note arguing against providing standing to consumers). *Conte Bros.* continued that § 43(a) merely codified the common law "similar to today's prudential standing doctrine." *Id.* at 230. But prudential standing can only be understood with an appreciation of the background against which Congress legislated and the concerns animating Congress at the time. Modern sources may mistake the history by compressing decades of development into their final result under the Lanham Act. *Compare* Petitioner's Br. at 18 (referring to common-law requirement of direct competition as element of trademark infringement) *with*

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[5] *See, e.g.*, Daphne Robert, *The New Trade-Mark Manual* 165 (1947) (explaining gap in federal protection Lanham Act was designed to address); *id.* at 169-70, 180, 185-86 (explaining that Lanham Act both restored and expanded federal unfair competition law after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 Notre Dame L. Rev. 1839, 1899-1904 (2007) (discussing abandonment of competition requirement).

In light of its history, § 43(a) was indeed "narrow" in the sense that it did not cover all commercial acts that might be deemed unfair, such as bribery or trade secret theft. But it was not narrow in the sense of excluding plaintiffs who suffered commercial harm from another's false advertising. Nor did it codify the common law.[6] To the contrary, it was designed to expand the law, reverse *American Washboard*, and allow business plaintiffs to challenge others' false claims about their own products. Commentators, citing the legislative history, considered this expansion in line with the U.S.'s then-recently assumed international obligations to protect businesses against unfair competition more generally.[7]

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[6] *See supra* note 4-5 and accompanying text; *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 750 (8th Cir. 1980) (noting that § 43(a) "creates a federal statutory tort sui generis and does not merely codify the common law principles of unfair competition").

[7] *See* Derenberg, *supra* note 4, at 1037; Julius R. Lunsford, *Unfair Competition: Scope of the Lanham Act*, 13 U. Pitt. L. Rev. 533, 540-43 (1952) (citing Hearings on H.R. 9041, 75th Cong., 3d Sess. 11-13 (1938)); Edward S. Rogers, *New Concepts of Unfair Competition Under the Lanham Act*, 38 Trade-Mark Rep. 259, 264 (1948). This expansive language and purpose persisted throughout the development of the legislation that became the Lanham Act, with changes only in the direction of breadth (from covering any person who "is or is likely to be damaged" to

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The Trademark Law Revision Act of 1988 ratified judicial decisions holding that false and misleading statements about others' products and services were also covered, again expanding the law.[8] These changes federalized a cause of action for product disparagement by speakers engaging in commercial advertising and promotion.[9] Section 43(a)(1) was split into two parts, though the language related to standing remained identical: it provides for civil

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covering any person who "*believes* that he is or is likely to be damaged"). *See* Derenberg, *supra* note 4, at 1038. Though "believes" may lack any independent force inasmuch as the belief must be reasonable, it emphatically does not indicate a limiting force.

[8] A significant minority of courts had previously held that the only false advertising claims actionable under the Lanham Act were those the defendant made about its own products or services, not disparaging statements made about the plaintiff's products or services. *See, e.g.*, *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988).

[9] *See, e.g.*, S. Rep. No. 100-515, *reprinted in* 1988 U.S.C.C.A.N. 5603 (Congress wanted to make "clear that misrepresentations about another's products are as actionable as misrepresentations about one's own"); *Procter & Gamble v. Haugen*, 222 F.3d 1262, 1268, 1271-72 (10th Cir. 2000) ("However, the [1988 amendments] also overruled aspects of existing law, most significantly by covering trade libel or product disparagement (i.e., misrepresentations about the plaintiff's goods and services) and by permitting actions based on misrepresentations about commercial activities as well as goods and services.") (citation omitted); 5 Thomas J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:10 (4th ed. 2013) (the amendments covered trade libel and product disparagement).

actions "by any person who believes that he or she is likely to be damaged by such act."[10]

Through this period, courts continued to treat the Lanham Act's false advertising and trademark provisions similarly, as their parallel language suggested, requiring only falsity plus likely commercial injury to grant relief. Roger E. Schechter, *Additional Pieces of the Deception Puzzle: Some Reactions to Professor BeVier*, 78 Va. L. Rev. 57, 58-59 (1992). When Congress split § 43(a), it did nothing to suggest that the standing inquiries should differ as between trademark infringement and false advertising.[11] Nor

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[10] *See* Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. Pa. L. Rev. 1305, 1309 (2011).

[11] Indeed, because of the parallelism between these provisions, some courts in multifactor circuits have begun to use the rigid multifactor test in trademark infringement cases under § 43(a)(1)(A), unnecessarily complicating the analysis for a trademark owner, who would generally have prudential standing by virtue of plausibly alleging ownership and likely confusion. *See, e.g., Medimport, S.R.L. v. Cabreja*, ___ F. Supp. 2d ___, 2013 WL 443975, at *7-*8 (S.D. Fla. Mar. 12); *Trump Plaza of the Palm Beaches Condominium Ass'n, Inc. v. Rosenthal*, 2009 WL 1812743, at *4-*8 (S.D. Fla. Jun. 24) (using multifactor test in trademark case, but not focusing on true question of whether nonexclusive licensee of trademark has standing to sue for infringement); *AFL Philadelphia LLC v. Krause*, 639 F. Supp. 2d 512, 521-25 (E.D. Pa. 2009) (using multifactor test to determine whether plaintiff had standing to sue for defendant's use of plaintiff's name to falsely suggest endorsement); *cf. Static Control Components, Inc. v. Lexmark Intern., Inc.*, 697 F.3d 387, 410 (6th Cir. 2012) (noting contradiction between Third Circuit's holding that the two prongs of § 43(a) are

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did the legislative history, either initially or at the time of revision, reflect any intent to adopt a standing rule other than that indicated by the flexible "injury" language.[12]

The choice Congress explicitly faced in 1988 was, rather, whether to specifically *limit* standing to those "damaged in [their] business or profession" (language that was proposed but not adopted) or to continue to allow standing to evolve more flexibly, including potentially to allow consumer standing. Some in Congress opposed consumer standing; others suggested that consumer standing should remain possible. *See* Hearing: Trademark Law Revision Act: Hearing on H.R. 4156 Before the Subcomm. on Courts, Civil Liberties and Admin. of Justice of the H. Comm. on the Judiciary, 100th Cong. (Sept. 8, 1988), at 78-80, 90-91 et seq.; *see also* H.R. Rep. No. 100-1028 (Oct. 3, 1988) at 13-15.[13] Congress emphatically did not seek to *narrow* the class of businesses protected in the 1988 revisions.

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generally equivalent and its application of a separate standing test to § 43(a)(1)(B)).

[12] Marx, *supra* note 3, at 399 ("In the commercial context, the question of the requisite injury for standing under the Lanham Act merges into the issue of whether the plaintiff has shown a 'likelihood of injury' required on the merits.").

[13] *See also* Brian Morris, *Consumer Standing To Sue for False and Misleading Advertising Under Section 43(a) of the Lanham Trademark Act*, 17 Memphis St. U. L. Rev. 209 (1987).

By retaining the existing language, Congress declined to interfere with existing judicial treatment of plaintiffs. *Amici* are aware of no pre-1988 court that applied an antitrust-style, multifactor test limiting permissible commercial plaintiffs.

Standing involved identifying a plaintiff's reasonable commercial interest, as opposed to its interest as a consumer or advocate. The Third Circuit's approach in the early years of the Lanham Act reflected this expansiveness:

> we reject this entire [narrow] approach to the statute. We find nothing in the legislative history of the Lanham Act to justify the view that this section is merely declarative of existing law. Indeed, because we find no ambiguity in the relevant language in the statute we would doubt the propriety of resort to legislative history even if that history suggested that Congress intended less than it said. It seems to us that Congress has defined a statutory civil wrong of false representation of goods in commerce and has given a broad class of suitors injured or likely to be injured by such wrong the right to relief in the federal courts. This statutory tort is defined in language which differentiates it in some particulars from similar wrongs which have developed and have become defined in the judge made law of unfair competition. Perhaps this statutory tort bears closest resemblance to the already

> noted tort of false advertising to the detriment of a competitor, as formulated by law of unfair competition. But however similar to or different from pre-existing law, here is a provision of a federal statute which, with clarity and precision adequate for judicial administration, creates and defines rights and duties and provides for their vindication in the federal courts.

L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 651 (3d Cir. 1954) (citation omitted).

The Second Circuit likewise recognized that injury to the ability to compete can come in market-specific ways. In *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186 (2d Cir. 1980), Carter allegedly falsely advertised that the baby oil in its depilatory would work as well as using baby oil after depilation, discouraging consumers from buying J&J's baby oil. The Second Circuit allowed this claim, noting that § 43(a) deliberately did not require plaintiffs to prove actual damages and entitled a broad range of commercial parties to relief. *Id.* at 189. Since the standard for success on the merits – as in trademark – was *likely* consumer confusion rather than proof of actual consumer confusion, the corresponding burden was for the plaintiff to prove a reasonable basis for the belief that it was likely to be damaged as a result of the false advertising. *Id.* at 190. Competition is a standard way to meet this

burden, and the court concluded that the parties competed indirectly in the broader hair removal market.

As McCarthy has explained,

> While the standing requirements developed by the courts may appear quite liberal, the only alternative is a return to the strict and overly restrictive "single source" requirement of the common law. It must be kept in mind that one who is granted standing must still prove that defendant's advertising is in fact false or misleading. The only type of plaintiff that should be denied the opportunity to prove such falsity is the "mere intermeddler" who is minding other people's business. The theory of the commercial plaintiff as the "vicarious avenger" of consumer interests is clearly at work in these cases.

5 McCarthy, *supra*, § 27:31.

Congress very clearly meant to overturn *American Washboard*'s holding that, unless a claimant was the exclusive true source of a product, it could not *prove* that it had lost customers lured by a speaker's false statement. McCarthy's commentary recognizes that "competitive injury" is the only coherent alternative to *American Washboard*, and that requiring a plaintiff to show that it was the only and inevitable victim of commercial harm would ignore this history.

II. Competitive Injury Adequately Limits Standing.

The historically-based reasonable interest and competitive injury tests effectively limit standing. As part of the substantive cause of action, the plaintiff must always identify a specific, materially injurious falsehood to prevail. Private plaintiffs are uniquely suited to identify injuries to themselves worth expending the resources to sue.[14]

The cost of defending a false advertising case is much smaller than the cost of litigating an antitrust case.[15] In addition, the remedies are very different:

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[14] *See* Eric Goldman & Rebecca Tushnet, *The Law of Advertising and Marketing* 35-37 (2011) (noting that private actors have more detailed knowledge and firm-specific incentives to enforce the law against certain kinds of false advertising than the FTC does, and that the FTC devotes its resources to claims that private businesses are unlikely to bring).

[15] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (noting expense of antitrust litigation); *see also, e.g.*, *Iroquois Gas Transmission Sys., L.P. v. F.E.R.C.*, 145 F.3d 398, 399 (D.C. Cir. 1998) (more than $15,000,000 in legal fees); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 522-25 (E.D.N.Y. 2003) (plaintiff's legal fees were more than $60,000,000 in addition to almost $19,000,000 in costs and fees); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998) (plaintiff's attorneys' fees totaled $143,780,000). Although there are no comprehensive statistics available specific to Lanham Act false advertising cases, American Intellectual Property Law Association (AIPLA) members report total litigation costs in intellectual property cases, including similar Lanham Act trademark cases, of orders of magnitude less. *See* AIPLA, *2011 Report of the Economic Survey* 35 (2011) (finding median total cost of trademark infringement suit litigated to

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compared to treble damages or even the breakup of a monopolist, the standard remedy for a successful Lanham Act false advertising case is an injunction against continued false advertising, with occasional monetary remedies when the plaintiff can sufficiently prove actual damages. Many circuits impose stringent requirements for recovery of damages or profits in false advertising cases, often requiring willfulness for the latter. 5 McCarthy § 27:42 (damages); § 30:62 (profits). Attorneys' fees in a Lanham Act case are also usually unrecoupable by a prevailing plaintiff, and therefore noncompetitors are unlikely to bring nuisance suits.[16]

Given the limited remedies available, plaintiffs have strong incentives to only assert false advertising claims where there is a real tendency for the advertisements at issue to harm their commercial interests

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conclusion when more than $25 million was at risk to be $1.5 million; smaller cases cost less).

[16] Some critics have argued that false advertising claims can be made anticompetitively by large competitors seeking to maintain their market power and harass new or upcoming entrants. Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 Va. L. Rev. 1, 42, 44 (1992). Whatever the merits of this criticism, it is worth noting that it applies primarily to the plaintiffs who will have standing no matter how narrow the test is – dominant market competitors. Thus, this problem should be addressed through fee-shifting, *see Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 626 F.3d 958, 963 (7th Cir. 2010), rather than through a standing test.

by misleading consumers. On the other side, defendants do not require additional protection from crushing liability beyond that provided by the universal requirement that plaintiffs plausibly plead their claims, including allegations of harm. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Twombly*. Conferring standing on plaintiffs whose commercial interests have likely been harmed by false advertising allows a modest remedy commensurate with plaintiffs' harm. A prudential standing inquiry need not add additional points at which a court must speculate about markets with which it may lack familiarity in order to protect defendants from unjustified costs.

Ongoing empirical research by Deborah Gerhardt, Mark McKenna, and Kevin McGuire confirms that noncompetitors do not make up a significant fraction of claimants *regardless* of the circuit and the standing test applied. The following information is based on their preliminary data which examined an array of variables from 835 district court false advertising decisions decided since the effective date of the 1988 Lanham Act amendments. Of these, 159 opinions (19.0%) considered standing. When standing was adjudicated, plaintiffs had standing 35.9% of the time. Looking only at cases decided after a circuit panel articulated a standing test beyond likelihood of injury, the results are as follows:

Circuit of district court case (test articulated by circuit panel)	Decisions Considering Standing	Percentage Finding Standing[17]
1 (reasonable interest)[18]	3	66.7
2 (reasonable interest)[19]	46	47.8
3 (multifactor)[20]	16	37.5
4 (commercial/competitive interest)[21]	8	25.0
5 (multifactor)[22]	6	16.7
6 (reasonable interest)[23]	5	60.0
7 (competitive injury)[24]	13	53.9
8 (antitrust/business injury but not multifactor)[25]	8	25.0

[17] A finding of standing does not mean that the plaintiff prevailed, only that the court found that it had standing.

[18] *Camel Hair and Cashmere Institute of America, Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6 (1st Cir. 1986).

[19] *Famous Horse, Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 113 (2d Cir. 2010).

[20] *Conte Bros.*

[21] *Made in the USA Foundation v. Phillips Foods, Inc.*, 365 F.3d 278, 279-81 (4th Cir. 2004).

[22] *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 562-63 (5th Cir. 2001).

[23] *Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 650 (6th Cir. 1982).

[24] *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993).

[25] *Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc.*, 989 F.2d 985, 990-91 (8th Cir. 1993).

9 (competitive injury/ reasonable interest (mixed))[26]	34	20.6
10 (competitive injury)[27]	1	0
11 (multifactor)[28]	3	33.3
DC	0	0
Total	143	37.1

The standing test adopted by a circuit does appear to be correlated with findings of standing, but that is as much as can be said. Although the Second and Ninth circuits are well-known as major loci of Lanham Act litigation, the "reasonable interest" circuits are not noticeably clogged with noncompetitor suits, nor are they unable to deny plaintiffs standing in appropriate circumstances. The general rule is that competition plus misleadingness confers a presumption of standing, while more detailed accounts of injury are required from noncompetitors. The data do not show difficulty applying these principles.[29]

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[26] *Smith v. Montoro*, 648 F.2d 602, 607 (9th Cir. 1981) (reasonable interest); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1108-09 (9th Cir. 1992) (requiring competition).

[27] *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995).

[28] *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1162-64 (11th Cir. 2007).

[29] In 66 standing decisions from the total set, including cases decided before a circuit panel adopted a specific test, a court reported that the parties were not competitors or not direct competitors. Only five found standing or factual issues on indirect competition precluding dismissal. *See EVCO Tech. & Devel. Co., L.L.C. v. Buck Knives, Inc.*, 2006 WL 2773421 (E.D. Pa. Sept. 22) (noncompetitor had standing); *Maguire v. Sandy Mac, Inc.*, 138

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Under current law, even being a direct competitor does not guarantee that a party will have standing in a false advertising case. Of the 12 standing cases in which a court specifically reported that the parties were direct competitors, it found standing in 7 of them (58.3%). Of the 93 decisions in which the court found that the plaintiffs did not have standing, 62 (66.7%) reported the plaintiff was not a competitor, and 19 (20.4%) found the plaintiff was not a direct competitor. (One possible explanation, as detailed in Part III below, is that courts sometimes conflate standing with failure to state a claim.)[30]

Under the reasonable interest test, competition is "a strong indication of why the plaintiff has a reasonable basis for believing that its interest will be damaged by the alleged false advertising." *Famous Horse*, 624 F.3d at 113. This test, which fits standing to the

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F.R.D. 444 (1991) (consumer had standing), *vacated*, 145 F.R.D. 50 (D.N.J. 1992); *see also Wellness Pub. v. Barefoot*, 2008 WL 108889 (D.N.J. Jan. 9) (direct competition unclear; no rejection of standing); *Omega Engineering, Inc. v. Eastman Kodak, Co.*, 30 F. Supp. 2d 226 (D. Conn. 1998) (indirect competitor had standing); *W. Indian Sea Island Cotton Ass'n Inc. v. Threadtex, Inc.*, 761 F. Supp. 1041 (S.D.N.Y. 1991) (question of fact on indirect competition). The total was 3.1% of all standing decisions.

[30] Another complicating factor is uncertainty among lower courts over whether claims relating to false endorsement fit under § 43(a)(1)(A) or (B). A celebrity claiming that an advertiser falsely implied her endorsement might not conventionally "compete" with the advertiser, but some courts consider this competition. *E.g., Kournikova v. General Media Communications, Inc.*, 278 F. Supp. 2d 1111, 1117 (C.D. Cal. 2003).

particular competitive environment in which the parties operate, can be sensitive to circumstances without opening the floodgates to anyone. When the parties are not obviously in competition, a plaintiff has to make a more substantial showing of injury and causation to have standing. For example, *Klauber Bros., Inc. v. Russell-Newman, Inc.*, 2013 WL 1245456 (S.D.N.Y. Mar. 26), found no standing under the reasonable interest test. In that case, the plaintiff supplied a component used in the defendants' competitors' products, but didn't allege that greater sales for the defendant decreased the sales of its own product. *See also Runberg, Inc. v. Victoria's Secret Stores, Inc.*, 2012 WL 5252309, *6-*8 (S.D. Ohio Oct. 23) (finding that a supplier failed to allege a "reasonable interest" against a retailer with whom it did not directly compete; in the absence of direct competition, a more substantial showing of injury and causation is required and it was not plausible that the defendant's use of pictures of plaintiff's product impeded plaintiff's ability to sell the same designs to other retailers); *Gifford v. U.S. Green Building Council*, 101 U.S.P.Q.2d 2053 (S.D.N.Y. 2011) (finding lack of reasonable interest where plaintiffs engaged in environmental design and defendant offered certification of environmentally friendly design and construction).

A flexible test centered on harm to a plaintiff's ability to compete allows the Lanham Act to accommodate a wide variety of market situations. In some markets, some competitors are vertically integrated

and others are not, and the defendant may take sales from the plaintiff by false advertising at one part of the product chain. There may be other reasons to believe that the plaintiff is uniquely positioned to target false advertising even though it is not in direct, head-to-head competition with the defendant – for example, a victim of product disparagement, as contemplated by the 1988 amendments.

Recent case law has shown the continuing wisdom of flexibility. In *Merck Eprova AG v. Brookstone Pharmaceuticals, LLC*, 920 F. Supp. 2d 404 (S.D.N.Y. 2013), Merck's customers used Merck's ingredients to make supplements used to lessen the risk of certain cancers and cardiovascular disease, as well as to promote prenatal health. Defendant Acella sold its own lower-cost supplements, which undercut Merck's clients' products by falsely claiming equivalence when in fact its product had a different, and far less desirable, composition.[31]

Under the reasonable interest test, Merck had standing to contest Acella's false advertising. No one else was likely to do so, because each individual Merck customer suffered only a fraction of the loss. When the market in which false advertising takes place has numerous competitors, they may all suffer,

[31] The court took the unusual step of awarding treble damages given Acella's deliberate deception about health-related products. *Merck*, 920 F. Supp. 2d at 430. Under a strict competition test, and likely under the multifactor test, this false advertising could easily be continuing today.

but the individual loss may be insufficient to justify a suit that would benefit all truthfully advertising competitors precisely because the market is otherwise competitive. Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 Ga. L. Rev. 1, 29 (1985). Merck, by aggregating the interests of its clients, was in the best position to represent the competitive harm, not to mention to prove the facts related to the falsity of Acella's advertising.[32]

It should be noted that a broad definition of competition can also recognize the wide variation of market structures in American business. Finding a competitive interest sufficient to justify Lanham Act standing need not involve conventional head-to-head competition to deliver the same product. In *Animal Legal Defense Fund v. HVFG LLC*, ___ F. Supp. 2d ___, 2013 WL 1563215 (N.D. Cal. Apr. 12), one plaintiff made "faux" foie gras from vegan ingredients. The court found that the plaintiff adequately alleged

[32] The contributory liability aspect of the case further demonstrates the need for flexibility: the court found that Acella also engaged in contributory false advertising for intentionally inducing pharmaceutical databases to engage in false advertising. *Merck*, 920 F. Supp. 2d at 425. Contributory liability requires an underlying liability, but the databases didn't compete with Merck at all, despite their legally-mandated gatekeeper role in the pharmaceutical system. The reasonable interest test allowed the court to recognize the special characteristics of uniquely configured markets such as the market for pharmaceuticals, which are highly regulated and thus may not fit standard patterns.

competitive harm from the defendant's allegedly false advertising that its foie gras was "humanely raised," because it alleged sufficient facts to show that it competed with the defendant for the same pool of potential customers, even though the ingredients differed radically.[33]

Regardless of the test the Court adopts, any additional rule for assessing noncompetitors' prudential standing should not be applied to direct competitors or victims of product disparagement, because it is too likely to exclude them from standing when they are at the core of the class Congress intended to protect. In *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000), this Court distinguished product design trade dress from product packaging under the Lanham Act. The Court reasoned that a general rule about protectability for the entire class of product design was more likely to get correct answers than a resource-intensive and error-prone individualized inquiry into each specific design. *Id.* at 214. A general rule for run-of-the-mill cases could likewise avoid the traps into which courts have fallen in recent years as they have attempted to apply a multifactor standing test to the claims of direct competitors and victims of disparagement.

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[33] *See also American Optometric Soc., Inc. v. American Bd. of Optometry, Inc.*, 2012 WL 2135350 (C.D. Cal. Jun. 12) (finding associational standing to contest false advertising by professional organization where the parties' members competed against each other, even though the members did not compete against the organization).

III. The Multifactor Test Used by Some Circuits Has Distorted Results in Practice.

Instead of relying on a reasonable interest or competitive injury test, some circuits have imported into the Lanham Act a multifactor test for standing borrowed from antitrust law. The Second Circuit correctly observed that the multifactor test "complicates the inquiry without clarifying the result." *Famous Horse*, 624 F.3d at 115 n.3.[34] Whatever its merits in the antitrust context, the multifactor test imported into Lanham Act cases has led to unnecessary complications and a misguided turn away from competitive injury. It duplicates pleading requirements, leading to unwarranted speculation by courts that frustrates the intent of the Lanham Act.

Among other problems, intent to harm the plaintiff is part of the test in antitrust law. *Associated Gen.*

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[34] *See also Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 337 (5th Cir. 2002) (Benavides, J., specially concurring) ("Although technically distinct, these five factors can be distilled into an essential inquiry, i.e., whether, in light of the competitive relationship between the parties, there is a sufficiently direct link between the asserted injury and the alleged false advertising."). For further evidence that the multifactor test generates heat without light, compare *Pernod Ricard USA LLC v. Bacardi U.S.A., Inc.*, 505 F. Supp. 2d 245, 253-54 (D. Del. 2007) (finding that direct competitor had standing to sue Bacardi for false advertising of Havana Club brand rum under multifactor test), with *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116 (2d Cir. 2000) (reaching same result under reasonable interest test).

Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 537 (1983) (*AGC*). By contrast, it is black-letter law that a violation of the Lanham Act requires no intent. 5 McCarthy § 27:51 ("[I]t is clear that § 43(a) does *not* require that the false description or representation be made willfully or with an intent to deceive."). The test therefore could not be imported wholesale. Unfortunately, *Conte Bros.* kept the number of factors at five by splitting the *AGC* fifth factor – whether the claim involves speculative harm, duplicative recovery, or a complex apportionment of damages – into two different factors. *Conte Bros.*, 165 F.3d at 233. This automatically eased the way for courts to determine that multiple factors weighed against Lanham Act standing. But there is no basis in the structure of the Lanham Act for this change. Indeed, because damage awards in Lanham Act cases are rare, creating a separate factor assessing hypothetical damage awards is even less justified.

Even adopters of the multifactor test note its "internal redundancy,"[35] which invites double-counting[36]

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[35] *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 797 (5th Cir. 2011); *see also Night Vision Systems, LLC v. Night Vision Depot, Inc.*, 2011 WL 3875515, *4-*8 (E.D. Pa. Sept. 2) (engaging in extended analysis in order to determine that a plaintiff that competed directly with defendant for some sales had prudential standing to challenge disparaging statements about the plaintiff).

[36] *Huggins*, 634 F.3d at 805 ("The fifth factor thus overlaps substantially with the third factor, which inquires into the

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and distracts from the core question of competitive injury. Essentially, the multifactor test reduces to a merits inquiry, but it is regularly determined on the pleadings, requiring unwarranted speculation and distorting the pleading requirements set forth in *Iqbal* and *Twombly*.[37]

Phoenix, a class action brought by Burger King franchisees and decided in 2007 by the Eleventh Circuit, highlights the problem. The case involved fraud and theft by a McDonald's subcontractor, resulting in the diversion of at least $20 million in large-ticket prizes for McDonald's contests. Customers did not in fact have a chance to win the prizes, although McDonald's continued to advertise the

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proximity or remoteness of the plaintiff's injury to the defendant's misconduct"; because third factor favored standing, so did fifth factor).

[37] *See Holy Cross Hospital, Inc. v. Baskot*, 2010 WL 5418999, at *3 (S.D. Fla. Dec. 23) ("[T]he merits nature of Defendants' argument regarding lack of standing is due to the overlap between the [multifactor] test for prudential standing under Section 43(a) and the injury element of such Section 43(a) claims."); *compare Diascience Corp. v. Blue Nile, Inc.*, 2009 WL 1938970, at *3 (S.D.N.Y. Jul. 7) (noting overlap between showing necessary to establish reasonable interest and proof required to succeed on the merits, and holding that this meant that dismissal on the pleadings, without factfinding, was inappropriate); *with Vexcon Chemicals, Inc. v. CureCrete Chemical Co., Inc.*, 2008 WL 834392, at *3-*7 (E.D. Pa. Mar. 28) (holding that plaintiff couldn't show prudential standing because it couldn't show that the challenged statements were false or that it suffered injury in fact, both separate components of a claim regardless of prudential standing).

sweepstakes after discovering the fraud. While the Fifth and Third Circuits had previously used the multifactor test to determine whether noncompetitors should get standing, *Phoenix* began the practice of using the multifactor test to cut off standing for direct competitors. The court reasoned that the test could determine whether the harm was of the type the Lanham Act was designed to redress – competitive harm "directly and proximately caused by the defendant's false advertising." *Phoenix*, 489 F.3d at 1167. However, as applied, the test focuses not on the type of injury but rather on factual questions of materiality and effect on consumers that should properly be addressed at a stage at which evidence can be considered, if Rule 8 has been satisfied.

Indeed, the *Phoenix* court acknowledged that the injury alleged was exactly the type that Congress sought to redress (factor 1) and that McDonald's direct competitors were closer to the competitive injury than any other parties (factor 3), but still found no standing. *Id.* at 1168-70. Though the causal chain was "similar to that of the typical false advertising claim in which a plaintiff alleges that it lost sales and/or market share as a result of the defendant's false or misleading representations," *id.* at 1169, the court then double-counted events, determining that the alleged diversion of customers from Burger King to McDonald's was a different step in the causal chain than the allegation that customers would otherwise have eaten at Burger King in the absence of the chance to win big prizes. *Id.* at 1169.

The court emphasized that only certain high-value prizes were stolen, and other prizes remained, meaning that consumers might still have wanted a chance to win low-value prizes. However, advertising law generally presumes that explicitly false, intentional advertising claims are material to consumers, *see, e.g.*, *Johnson & Johnson v. GAC Int'l, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988), and McDonald's extensively promoted the big-ticket prizes.

The point is not that *Phoenix* made a factual mistake. Rather, the structure of the multifactor test invited the court to make factual assumptions and thereby encouraged speculation in advance of evidence, without assessing whether the facts were well-pleaded. These assumptions were repeated in the court's assessment of the speculativeness of damages (factor 4), and the risk of duplicative damages or complexity in damages (factor 5). *See id.* at 1171-73. Again, this triple-counting demonstrates that the test creates unnecessary complexity and distracts from the true question of competitive injury. Moreover, in a multi-competitor market, there will always be some uncertainty about the amount of damages and the extent to which business was diverted from any one competitor.[38] If this is enough to defeat standing, as it

[38] This conflicts with the clear congressional intent to cover false statements made about an advertiser's own product. *See, e.g.*, *U-Haul Int'l, Inc. v. Jartran, Inc.*, 681 F.2d 1159, 1160-61 (9th Cir. 1982). The connection between an advertiser's self-promotion and the plaintiff's loss will almost always be less direct than the connection between an attack on the plaintiff

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was in *Phoenix*, then only dominant competitors with already-large market share will have a chance to prove false advertising – an anticompetitive result contrary to the purpose of competition law.

Tellingly, *Phoenix* cautioned that its analysis might differ "if, for example, the facts were such that McDonald's had falsely advertised the odds of winning all of its prizes (low-, mid-, and high-value), or if McDonald's were only giving away a single prize and falsely represented the odds of winning, as these hypotheticals present factual scenarios materially different from the facts of this case." *Id.* at 1173. Yet these hypotheticals have very little to do with the factors that supposedly counseled against standing, especially the two damages factors. The court relied instead on its speculation about the actual effect of the advertising on consumers, in the absence of any evidence on materiality.[39]

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and plaintiff's loss. Denying competitors standing to challenge such claims leaves markets vulnerable to significant distortions. *See* George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488, 495 (1970) ("The cost of dishonesty . . . lies not only in the amount by which the purchaser is cheated; the cost also must include the loss incurred from driving legitimate business out of existence.").

[39] *See also Furniture "R" Us, Inc. v. Leath Furniture, LLC*, 2008 WL 4444007, at *8 (S.D. Fla. Sept. 26) (noting that factor 2, directness of injury, is similar to materiality, but weighing this factor against the plaintiff even though the challenged claims related to price and bait-and-switch advertising, which are generally considered material).

Something that will always be true is not properly deemed a factor. A Lanham Act claim, whether for trademark infringement or false advertising, has multiple steps by definition: consumers will believe a defendant's misrepresentation, thus harming the plaintiff.[40] Unlike a car accident, in which the harm is inflicted directly on the plaintiff, false advertising only harms the plaintiff because of the actions of third parties – consumers – who believe the false claims and act thereon. Whether this harm will actually happen – how consumers interpret the claim at issue, and whether it is material to them – is a quintessentially factual inquiry, but its "indirectness" is inherent in false advertising.

Phoenix is, unfortunately, not an outlier. While the factors are plainly not "wholly distinct," *Huggins*, 634 F.3d at 797, their use has nonetheless led courts inappropriately to engage in counting exercises and to lose sight of Congress's core focus on allowing competitors to compete in a market where sales are not made or lost because of false claims.

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[40] *Compare Huggins*, 634 F.3d at 797 (calling a "three-step[ ]" process of material consumer deception "direct injury"), *with Precision IBC, Inc. v. PCM Capital, LLC*, 2011 WL 5444114, *9 (S.D. Ala. Oct. 17) (using the multifactor test and finding that damages were speculative "[b]ecause the actual economic loss depends on consumers' reaction in a particular way to Defendants' advertisements," which is always true for any advertisement); *Aviva Sports, Inc. v. Fingerhut Direct Marketing, Inc.*, 2011 WL 2533812, *6 (D. Minn. Jun. 27) (same reasoning).

Having two out of five factors related to the difficulty of determining damages is particularly inappropriate. Evidence on damages is usually unavailable at the pleading stage, where the standing assessment is usually carried out. Separately, a successful Lanham Act plaintiff may typically receive injunctive relief without proving specific damages. This rule developed precisely because of the difficulty inherent in quantifying damages caused by false advertising or trademark infringement.[41] For similar reasons, successful plaintiffs may recover defendant's profits in appropriate circumstances.[42] A plaintiff

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[41] *See, e.g., TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 (9th Cir. 2011) (probability of harm is the appropriate standard "because proving a counterfactual is never easy, and is especially difficult when the injury consists of lost sales that are predicated on the independent decisions of third parties; i.e., customers. A plaintiff who can't produce lost sales data may therefore establish an injury by creating a chain of inferences showing how defendant's false advertising could harm plaintiff's business.") (citation omitted); *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982) (explaining that "[i]t is virtually impossible to prove that . . . sales will be lost or goodwill will be damaged as a direct result of a competitor's advertisement"); 5 McCarthy § 27:31 (same); Marx, *supra* note 3, at 401 ("[S]ound policy reasons exist for not requiring proof of actual loss as a prerequisite to obtaining standing for injunctive relief under section 43(a). An inability to prove monetary damages in an injunction suit, as distinguished from an action for damages, poses no likelihood of an unwarranted recovery for the plaintiff. The plaintiff achieves no more than that to which all competitors are entitled – a market free of false advertising.").

[42] *See* 15 U.S.C. § 1117(a) (violation of § 43(a) entitles the plaintiff, "subject to the principles of equity, to recover (1)

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should not have to plead that damages will be readily ascertainable in order to have Lanham Act standing, when the black-letter doctrine is that damages from false advertising and trademark infringement are often not easily measurable.

The other factors have proved similarly problematic, which is unsurprising given that they are variations on one another. The multifactor test essentially asks, several times, whether the plaintiff has truly been harmed in its ability to compete. But by breaking the inquiry into overlapping parts, it invites error and confusion. In the Lanham Act context, courts have not been able to come up with a coherent rubric for analyzing speculativeness of damages.[43] Likewise,

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defendant's profits, (2) any damages sustained by the plaintiff, *and* (3) the costs of the action" (emphasis added)); *Logan v. Burgers Ozark Country Cured Hams*, 263 F.3d 447, 461 (5th Cir. 2001) (jury finding that plaintiff hadn't proven actual losses didn't deprive plaintiff of standing, where plaintiff proved defendant's profits resulting from sale of falsely advertised products and adequately pled injury specific to himself); *Balance Dynamics Corp. v. Schmitt Indus.*, 204 F.3d 683, 689 (6th Cir. 2000) (noting the importance of "clearly distinguishing the elements necessary to prove a breach of the Lanham Act from the elements necessary to justify a certain remedy for that breach").

[43] *See, e.g., Huggins*, 634 F.3d at 800 (reversing district court on standing and disagreeing with its enumeration of causal steps).

courts have divided on how to assess damages (again, usually on the pleadings).[44]

Thus, though courts have labeled the multifactor test "a valuable heuristic," *Huggins*, 634 F.3d at 797, in practice it is a time-consuming, error-inviting diversion – especially in classic cases in which one competitor seeks to enjoin the false advertising of another competitor seeking the same consumer dollars. Most strikingly, while the multifactor test

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[44] *Compare Phoenix*, 489 F.3d at 1172 (arguing that one purpose of the fifth factor is to "assess[ ] the risk of duplicative damages by examining the number of potential claimants in the same position in the distribution chain as the plaintiff and/or in the same market as the plaintiff"); *Nature's Earth Products, Inc. v. Planetwise Products, Inc.*, 2010 WL 4384218, *6 (S.D. Fla. Oct. 28) (weighing fifth factor against standing because market was competitive); *and Furniture "R" Us*, 2008 WL 4444007, *3 (weighing second factor against standing for same reason); *with Huggins*, 634 F.3d at 807 (given its basis in antitrust law, the duplicative damages factor is aimed at excluding remote participants in a distribution chain; the inquiry is "vertical, not horizontal. In other words, we are not concerned with whether there is a large number of potential claimants who occupy the same position in the market as the plaintiff. . . . This factor does not weigh against standing merely because the defendant competes in a crowded market in which its false advertisements might cause injury to multiple – or even numerous – direct competitors. As long as each plaintiff has suffered a distinct economic injury, we need not inquire into how many other similarly situated persons might also have prudential standing."). Some courts have gone so far as to deny standing in part because not every dollar of the defendant's earnings may have come from false advertising. *Furniture "R" Us*, *supra*, at *4 (finding damages speculative because some of defendant's profits might have come from non-false advertising).

purports to make competition not *necessary* for standing, in application it has meant that competition is necessary, but not *sufficient*.[45] Thus, as in *Phoenix*, the multifactor test has been used to prevent *any* competitor from bringing suit against false advertising, simply because the market is not highly concentrated.[46]

The multifactor test also has led to conflicts with another element of a Lanham Act false advertising claim: the defendant's statements must come in

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[45] *See, e.g.*, *CareerFairs.com v. United Business Media LLC*, 838 F. Supp. 2d 1316, 1323 (S.D. Fla. 2011) (in the course of finding that plaintiff lacked standing because the defendant had successfully excluded it from the market, stating that "[e]ach of the *Phoenix* Factors hinges on the directness of the competition between the parties" and that "direct competition is *essential* to a finding of standing to bring a false advertising claim under the Lanham Act in the Eleventh Circuit.") (emphasis added); *cf. Intertape Polymer Corp. v. Inspired Technologies, Inc.*, 725 F. Supp. 2d 1319, 1332 n.25 (M.D. Fla. 2010) (suggesting that plaintiff lacked standing to challenge competitor's comparative advertising directly disparaging its product under the multifactor test, because it failed to state a claim).

[46] By contrast, the "reasonable interest" test recognizes that each competitor has an interest in a truthful market in which to compete. *See Ramchandani v. Sani*, 844 F. Supp. 2d 365, 365 (S.D.N.Y. 2012) (rejecting defendant's argument that the market was competitive and that therefore the plaintiff couldn't reasonably believe that defendant's fraud would harm him; this was a factual argument, and "Plaintiff's reasons for apprehension seem entirely reasonable to the Court, and that would be so even if there are others threatened with the same or similar harm"). Fact-specific questions of injury and damage are better answered through factual inquiries.

"commercial advertising or promotion" in order to fall within the statute's scope. § 43(a)(1)(B). But because courts have read a requirement of competition into this element, any noncompetitor plaintiff supposedly aided by the multifactor test then fails the "commercial advertising or promotion" requirement. *See Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1533 (S.D.N.Y. 1994) ("Suit may be brought only by a commercial plaintiff who can prove that its interests have been harmed by a competitor's false advertising.").[47] This means that the multifactor test can only cut off standing, not expand it, depriving the test of its intended flexibility.[48] Though the meaning of "commercial advertising or promotion" is not before the Court, its interaction

[47] Though *Gordon & Breach* is a district court case, its formulation has been followed in almost every case to explicitly consider the meaning of "commercial advertising or promotion." *See* 5 McCarthy § 27:71.

[48] *See, e.g., Kaufman, Englett & Lynd, PLLC v. Better Business Bureau of Cent. Florida, Inc.*, 2013 WL 524931, at *2 (M.D. Fla. Feb. 13); *CHW Group, Inc. v. Better Business Bureau of New Jersey, Inc.*, 2012 WL 426292, at *3-*4 (D.N.J. Feb. 8) (adopting both an absolute requirement of commercial competition and applying the multifactor test); *ZL Techs., Inc. v. Gartner, Inc.*, 2009 WL 3706821, at *4 & n.2 (N.D. Cal. Nov. 4) (noting the standing/commercial advertising and promotion inconsistency).

with any prudential standing test should be kept in mind.[49]

To the extent that the multifactor test has any use as a heuristic, it could only be in cases not involving direct competitors. This Court should endorse the longstanding rule that properly pled allegations of direct competition and a materially misleading statement in commercial advertising and promotion justifies an inference of the necessary commercial harm sufficient to confer standing. Competitor-plaintiffs may ultimately fail to prove their cases, but those issues of proof should be considered on the merits.

[49] At some point, the doctrine should be rationalized. One possibility would be that a plaintiff with prudential standing would also satisfy what is currently the "competition" prong of the advertising and promotion test.

CONCLUSION

For the foregoing reasons, this Court should reject overly restrictive standing tests and adopt a test that focuses on the likelihood of injury to the plaintiff's ability to compete.

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