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Lanham Act False Advertising

False advertising law is not, strictly speaking, intellectual property law, but it is a close relative. Three issues are pervasive in advertising law: falsity, materiality and commerciality. Each of them raises conceptual questions about the control of information that go well beyond advertising law.

The central concern of false advertising law is to prevent the dissemination of false commercial information. Note that this task necessarily requires courts to distinguish true statements from false ones. At least five different conceptions of truth butt heads in the caselaw:

- **Scientific truth** exists in the world and can be determined through objective investigation.
- **Linguistic truth** is conventional; the true meaning of a term is the meaning a reasonable listener (e.g., a reasonable consumer) would regard it as having.
- **Legal truth** is a matter of authority; courts must defer to what legislatures and agencies assert.
- **Trademark truth** is determined by priority of appropriation; the owner of a mark is entitled to say definitively what it means.
- In a pluralistic society committed to free speech, there is **no absolute truth**; everyone is entitled to express their own opinions.

As you read the cases, always ask which conception or conceptions the courts are appealing to.

As with trademark and unfair competition,[1] state and federal law provide overlapping—and often redundant—protections against false advertising. In this chapter, we will focus on our old federal friend, section

1. The leading advertising treatises are David H. Bernstein & Bruce P. Keller, The Law of Advertising, Marketing, and Promotions (2011); James B. Astrachan, Donna M.D. Thomas, & Peter E. Rosden, The Law of Advertising (2014). See also the casebook Rebecca Tushnet & Eric Goldman, Advertising and Marketing Law: Cases and Materials (5th ed. 2020).

43(a), except that now our attention turns to a different subparagraph. The next chapter looks more broadly at advertising law beyond the Lanham Act.

Section 43(a)(1)(B) of the Lanham Act is short and to the point:

> (a) *Civil action*. –
>
> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— …
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

A "Ownership": Competitor Standing

In a sense, false advertising law shares the tort structure of trademark law, but without the requirement that the plaintiff own a trademark.[2] One gains tort protection against competitors' false advertising competitors simply by having competitors—by engaging in a commercial activity that has customers capable of being diverted by lies. This requirement of competitor standing functions as a kind of ownership rule. But modern standing law under § 43(a) is considerably more liberal than its common-law precursor.

At common law circa 1900, consumers could sue a seller in fraud for lies about its own products, provided that they satisfied the fraud tort's stringent requirements. And competitors could sue in defamation or trade libel for lies about them or their products. But to the classical legal imagination, false statements about one's products own invaded no legally protected interests of one's competitors.

> It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the legislature, and not the courts, must provide a remedy.[3]

2. *See* Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. Pa. L. Rev. 1305 (2011).
3. Am. Washboard Co. v. Saginaw Mfg. Co., 103 F. 281, 285 (6th Cir. 1900).

In the case from which this language comes, *American Washboard Co. v. Saginaw Mfg. Co.*, the American Washboard Company sold aluminum washboards honestly marked "aluminum." The Saginaw Manufacturing Company sold zinc washboards, falsely marked "aluminum." In an opinion by future President and Chief Justice William Howard Taft, the Sixth Circuit held that American had no right to sue. It could not bring a *trademark* lawsuit, because it held no trademark in the word ALUMINUM, which is a generic term for aluminum washboards. Nor was there an unfair-competition theory that Saginaw was passing off its washboards as being from American. Saginaw was passing off its washboards as being made of aluminum; this is deception about product attributes, not deception about source.

The court also added a policy justification that is worth reading closely:

> Take the metal which is the subject-matter of the controversy in this case. Many articles are now being put upon the market under the name of aluminum, because of the attractive qualities of that metal, which are not made of pure aluminum, yet they answer the purpose for which they are made and are useful. Can it be that the courts have the power to suppress such trade at the instance of others starting in the same business who use only pure aluminum?[4]

There is a serious point here. Zinc washboards "answer the purpose for which they are made and are useful," so if a court is too aggressive in examining their composition, it could drive from the market a product that consumers genuinely want and benefit from. Many plaintiffs would love to exclude their competitors from the market, and false advertising provides an attractive tort for that purpose even when—as here—the plaintiff holds no exclusive rights over its product.

But this reasoning is ultimately unsustainable, because it relise on a false binary. The alternative to letting Sagniaw sell misabled zinc washboards is not prohibiting it from selling zinc washboards, but *requiring it to accurately label the zinc washboards it sells*. That lets consumers who prefer aluminum washboards find the washboards that truly are made of aluminum, while also leaving zinc washboards on the market for consumers who are okay with zinc. A concern that plaintiffs will sue over trivial inaccuracies—stamping "aluminum" on a washboard that is only 99% alumninum—is best addressed on the merits,[5] not with a blanket rule against competitor suits.

False advertising law today is far more expansive about competitor

4. *Id.* at 286.
5. This is what falsity and materiality guard against.

standing. Section 43(a) gives statutory standing to "any person who believes that he or she is likely to be damaged" by the false advertising. This language includes direct competitors who sell competing products, like American Washboard. In *Lexmark International, Inc. v. Static Control Components, Inc.* ("*Static Control II*"), the Supreme Court held that it extends even further.[6] Static Control made and sold the components needed to remanufacture Lexmark toner cartridges to other companies that actually carried out the refurbishment. Lexmark allegedly lied in two ways. First, it told its own customers that they were legally required to return cartridges to Lexmark after a single use. Second, it sent letters to numerous cartridge remanufacturers telling them "that it was illegal to sell refurbished Prebate cartridges and, in particular, that it was illegal to use Static Control's products to refurbish those cartridges."[7]

The Supreme Court's opinion held that to bring a section 43(a) false-advertising suit, a plaintiff must show ***proximate causation*** between the false statements and its injuries:

> We thus hold that a plaintiff suing under [section 43(a)] ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff. That showing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff. For example, while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's inability to meet its financial obligations.[8]

Under this test, Static Control had competitor standing to sue. True, it was not a "classic Lanham Act false-advertising claim in which one competitor directly injures another by making false statements about his own goods or the competitor's goods and thus inducing customers to switch."[9] But Lexmark did bad-mouth Static Control (indeed, it did so by name). "When a defendant harms a plaintiff's reputation by casting aspersions on its business, the plaintiff's injury flows directly from the au-

6. Lexmark Int'l, Inc. v. Static Control Components, Inc. ("*Static Control II*"), 134 S. Ct. 1377 (2014). You may recall Lexmark's attempts to lock up the toner aftermarket for its printers from Lexmark Intern., Inc. v. Impression Prods., Inc., 816 F.3d 721 (Fed. Cir. 2016) and Lexmark Int'l v. Static Control Components, 387 F.3d 522 (6th Cir. 2004).
7. *Static Control II*, 134 S. Ct. 1377.
8. *Id.* at 1391.
9. *Id.* at 1393.

dience's belief in the disparaging statements."[10] In additon, Static Control tied a decrease in the purchase of remanufactured cartridges to a decrease in its own business:

> In addition, Static Control adequately alleged proximate causation by alleging that it designed, manufactured, and sold microchips that both (1) were necessary for, and (2) had no other use than, refurbishing Lexmark toner cartridges. It follows from that allegation that any false advertising that reduced the remanufacturers' business necessarily injured Static Control as well. Taking Static Control's assertions at face value, there is likely to be something very close to a 1:1 relationship between the number of refurbished Prebate cartridges sold (or not sold) by the remanufacturers and the number of Prebate microchips sold (or not sold) by Static Control. Where the injury alleged is so integral an aspect of the violation alleged, there can be no question that proximate cause is satisfied.[11]

This is a functional test, not a formalistic one; it is attentive to the specific nature of the false statements, and to the structure of the relevant industry.

There *is* one class of plaintiffs still conspicuously excluded from Lanham Act standing: consumers. They may have been injured by the false advertising—indeed, they are arguably more injured than anyone else—but they do not allege " an injury to a commercial interest in reputation or sales."[12] Note that this is the case even where the consumer of the product is itself a business. "Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act's aegis."[13] We will return to consumer suits in the Other Advertising chapter.

B "Similarity": Actionable Claims

With no specific information as such to protect, false advertising law lacks a similarity test. Instead, because it protects the truth, it asks whether the challenged statements are ***false*** and ***material*** to consumers.

1 Falsity

There is nothing particularly unusual about the evidence that shows whether a claim is true or false. Courts weigh evidence on factual questions all the time, and the factual questions teed up by an advertiser's

10. *Id.*
11. *Id.* at 1394.
12. *Id.* at 1390.
13. *Id.*

claim are more of the same. We will not dwell on the nature of the proof required to show that "4 out of 5 dentists surveyed recommended Flet Toothpaste" or that "Colon Blow has as much fiber as 30,000 bowls of oat bran cereal."

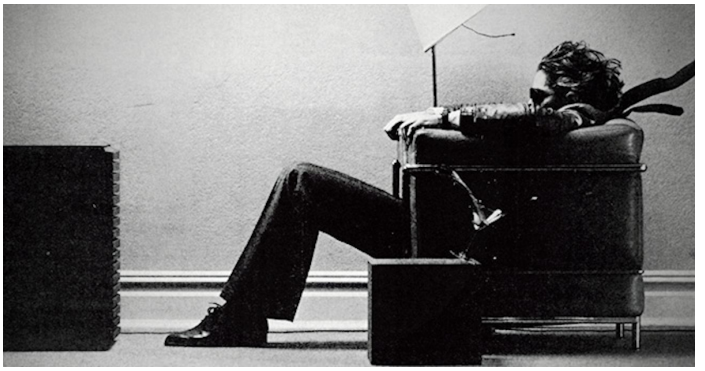
Instead, the heart of false advertising law is figuring out *what a claim means* in the first place, because that determines which questions must be shown to be true or false. The caselaw exhibits a subtle ambiguity about how falsity is to be proven. On the one hand, sometimes judges treat it as an empirical facts about consumer understanding, of the sort that can (or sometimes must) be proven with survey evidence. A claim means what a substantial number of consumers think it means. At other times, judges treat them as interpretive tasks in identifying the objective meaning of terms, at which judges have a particular expertise by virtue of their training and experience—just as they do in reading statutes and regulations.

a Literal Falsity, Misleadingness, and Puffery

To establish falsity, a plaintiff must show either that the claim is ***literally false*** or that it is ***misleading***. A literally false claim is one that is false on its face. A misleading claim is one that is literally true (or ambiguous), but which leaves consumers with a false impression about the product. For the most part, a plaintiff can show that a claim is literally false with intrinsic evidence alone, simply by pointing to its language and explaining why it is untrue. But to show that a claim is misleading, a plaintiff typically must introduce extrinsic evidence showing why a reasonable consumer would take away the false impression from the claim. Survey evidence is not absolutely required to show misleadingness, but it is the standard way of doing so.[14]

It is important to remember that some statements *do not have truth values*. "Is the cat in the kitchen?" is a question, not a statement; it makes no claims about where the cat is. And "Johnny is a poopy-head" is a statement of *opinion*, not an assertion of a factual proposition. It expresses the speaker's negative attitude towards Johnny, but does not say anything specific enough about Johnny to be proven true or false. Statements of opinion are pervasive in advertising:

14. "Although factfinders usually base literal falsity determinations upon the explicit claims made by an advertisement, they may also consider any claims the advertisement conveys by necessary implication. A claim is conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated. For instance, a factfinder found that an advertisement that claimed a motor oil provided 'longer engine life and better engine protection' without explicitly mentioning competitors nonetheless drew a comparison by necessary implication vis a vis those competitors." Clorox Co. P.R. v. Procter & Gamble Commercial Co., 228 F.3d 24 (1st Cir. 2000).



Maxell advertisement

> The law recognizes that a vendor is allowed some latitude in claiming merits of his wares by way of an opinion rather than an absolute guarantee, so long as he hews to the line of rectitude in matters of fact. Opinions are not only the lifestyle of democracy, they are the brag in advertising that has made for the wide dissemination of products that otherwise would never have reached the households of our citizens. If we were to accept the thesis set forth by the appellees, [that all statements by advertisers were statements of fact actionable under the Lanham Act,] the advertising industry would have to be liquidated in short order.[15]

General claims of superiority are called ***puffery***, and they are not actionable. "The Best Beer in America" is puffery of this sort.[16] McCarthy's trademark treatise describes puffery as "exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely. But Prosser and Keeton's torts hornbook is more cynical, describing puffery as "a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk."

The category of puffery also includes some statements that superficially look like they are falsifiable. Consider the 1980s-era Maxell advertisement for blank audio cassette tapes with a picture of a person in an armchair, hair and tie flowing out behind them, nearly being blown out of the chair by the sound coming out of a speaker. A reasonable consumer looking at the ad would have understood that this is a metaphor, and would not have expected Maxell tapes to literally create a windstorm in their home. To be precise, one might say that just as a misleading claim is

15. Presidio Enters., Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674, 685 (5th Cir. 1986).
16. *In re* Bos. Beer Co., 198 F.3d 1370 (Fed. Cir. 1999) (this type of general claim "should be freely available to all competitors in any given field to refer to their products or services").

one that is literally true but not taken literally by consumers, hyperbolic puffery is literally false but not taken literally.

b Establishment Claims

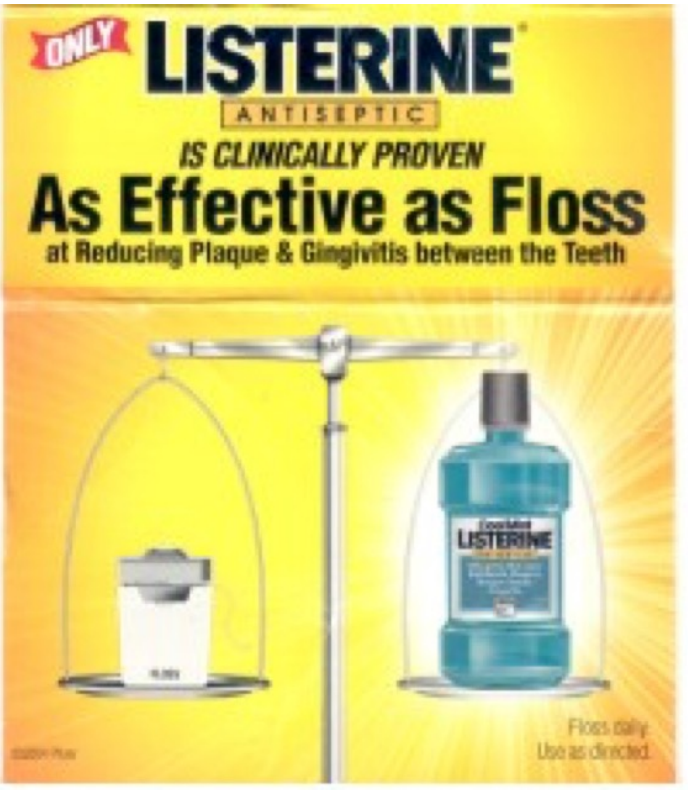
A typical claim refers to the product itself. For example, if an advertiser says that its mouthwash is "as effective as floss," then the claim is that *the mouthwash is as effective as floss*, and to show falsity, the plaintiff must prove that the mouthwash is less effective. But if the advertiser says "clinical studies prove that our mouthwash is as effective as floss," then the claim is that *the clinical studies prove its effectiveness*, and to show falsity the plaintiff must prove that the studies do not do so. This is an easier burden for the plaintiff to meet, because to win on the issue, all it needs to do is show that the studies do not exist or "were not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited."[17] The plaintiff doesn't need to set up its own studies; it just needs to knock down the advertiser's studies. In effect, the burden of proof on the underlying issue—is the mouthwash as effective as floss?—is shifted from the plaintiff to the defendant's studies.

The doctrinal rule is that ***establishment claims*** require ***substantion***. To continue the mouthwash example, consider *McNeil-PPC, Inc. v. Pfizer Inc.*, where Pfizer ran a campaign for Listerine with print ads featuring "an image of a Listerine bottle balanced on a scale against a white container of dental floss" and a television commercial that announced "Listerine's as effective as floss at fighting plaque and gingivitis. Clinical studies prove it." McNeil-PPC, which sells dental floss, sued under section 43(a).

The court first observed that the two studies Pfizer sponsored only included participants with mild to moderate gingivitis, but not with severe gingivitis. Thus, the studies did not even purport to stand for the broader claim in the ad. If the ad had said "as effective as floss at fighting plaque and *mild to moderate* gingivitis," that would have been a different story. But it did not, and the unqualified claim was thus literally false. Next, the court observed that the experimenters in both studies observed that the effectiveness of flossing declined over time in the flossing gropus, suggesting that the participants were no longer flossing effectively. Thus:

> Hence, the studies did not "prove" that Listerine is "as effective as floss." Rather, they proved only that Listerine is "as effective as improperly-used floss." The studies showed only that Listerine is as effective as floss when the flossing is not performed properly. As one of the ADA consultants observed in objecting to the advertising when it was proposed, "for a substitute product to be

17. McNeil-PPC, Inc. v. Pfizer Inc., 351 F. Supp. 2d 226 (S.D.N.Y. 2005).



Listerine ad

'as good as' or 'better' than flossing it must be compared against the data of subjects who demonstrate they can and are flossing effectively."

Pfizer and its experts argue that the two studies are reliable, notwithstanding the indications that the participants in the flossing group did not floss properly, because these conditions reflect "real-world settings." But the ads do not say that "in the real world," where most people floss rarely or not at all and even those who do floss have difficulty flossing properly, Listerine is "as effective as floss." Rather, the ads make the blanket assertion that Listerine works just as well as floss, an assertion the two studies simply do not prove. Although it is important to determine how a product works in the real world, it is probably more important to first determine how a product will work when it is used properly.[18]

An advertiser who relies on scientific studies must be prepared to defend the *bona fides* of those studies. There is an enormous quantity of low-

18. *Id.* at 252.

"Better Ingredients. Better Pizza" ad

quality, small-sample advertiser-funded studies that "prove" all kinds of dubious propositions about the health benefits of foods, hygiene products, and dietary supplements. False advertising law's substantiation requirement is one way of policing these shady studies.

2 Materiality

Even if a claim is false, it is actionable only if it is also ***material***, i.e., likely to influence consumers' purchasing decisions. The usual rule is that a literally false claim is presumed to be material, but that the plaintiff must show that a merely misleading claim actually deceived consumers. This commonly requires direct extrinsic evidence: testimony from consumers who fell for the deception, or surveys showing that consumers are likely to fall for it. These presumptions are questionable as a factual matter; they don't correspond to anything linguistics tells us about how people use and interpret language. But perhaps they can be justified on the theory that we can and should expect advertisers to keep literal falsehoods out of their ads, so it is fair to take a presumption of materiality against advertisers who do not.

The following case brings together almost all of the doctrines discussed in this section.

Pizza Hut, Inc. v. Papa John's Intern., Inc.
227 F.3d 489 (5th Cir. 2000)

This appeal presents a false advertising claim under section 43(a) of the Lanham Act, resulting in a jury verdict for the plaintiff, Pizza Hut. At the center of this appeal is Papa John's four word slogan "Better Ingredients. Better Pizza."

The appellant, Papa John's International Inc. ("Papa John's"), argues that the slogan "cannot and does not violate the Lanham Act" because it is "not a misrepresentation of fact." The appellee, Pizza Hut, Inc., argues that the slogan, when viewed in the context of Papa John's overall advertising

campaign, conveys a false statement of fact actionable under section 43(a) of the Lanham Act. The district court, after evaluating the jury's responses to a series of special interrogatories and denying Papa John's motion for judgment as a matter of law, entered judgment for Pizza Hut stating:

> When the "Better Ingredients. Better Pizza." slogan is considered in light of the entirety of Papa John's post-May 1997 advertising which violated provisions of the Lanham Act and in the context in which it was juxtaposed with the false and misleading statements contained in Papa John's print and broadcast media advertising, the slogan itself became tainted to the extent that its continued use should be enjoined.

We conclude that (1) the slogan, standing alone, is not an objectifiable statement of fact upon which consumers would be justified in relying, and thus not actionable under section 43(a); and (2) while the slogan, when utilized in connection with some of the post-May 1997 comparative advertising—specifically, the sauce and dough campaigns—conveyed objectifiable and misleading facts, Pizza Hut has failed to adduce any evidence demonstrating that the facts conveyed by the slogan were material to the purchasing decisions of the consumers to which the slogan was directed.

I

Pizza Hut is a wholly owned subsidiary of Tricon Global Restaurants. With over 7000 restaurants (both company and franchisee-owned), Pizza Hut is the largest pizza chain in the United States. In 1984, John Schnatter founded Papa John's Pizza in the back of his father's tavern. Papa John's has grown to over 2050 locations, making it the third largest pizza chain in the United States.

In May 1995, Papa John's adopted a new slogan: "Better Ingredients. Better Pizza." In 1996, Papa John's filed for a federal trademark registration for this slogan with the United States Patent & Trademark Office ("PTO"). Its application for registration was ultimately granted by the PTO. Since 1995, Papa John's has invested over $300 million building customer goodwill in its trademark "Better Ingredients. Better Pizza." The slogan has appeared on millions of signs, shirts, menus, pizza boxes, napkins and other items, and has regularly appeared as the "tag line" at the end of Papa John's radio and television ads, or with the company logo in printed advertising.

On May 1, 1997, Pizza Hut launched its "Totally New Pizza" campaign. This campaign was the culmination of "Operation Lightning Bolt," a nine-month, $50 million project in which Pizza Hut declared "war" on poor quality pizza. From the deck of a World War II aircraft carrier, Pizza Hut's president, David Novak, declared "war" on "skimpy, low quality pizza." National ads aired during this campaign touted the "better taste" of Pizza Hut's pizza, and "dared" anyone to find a "better pizza."

In early May 1997, Papa John's launched its first national ad campaign. The campaign was directed towards Pizza Hut, and its "Totally New Pizza" campaign. In a pair of TV ads featuring Pizza Hut's co-founder Frank Carney, Carney touted the superiority of Papa John's pizza over Pizza Hut's pizza. Although Carney had left the pizza business in the 1980's, he returned as a franchisee of Papa John's because he liked the taste of Papa John's pizza better than any other pizza on the market. The ad campaign was remarkably successful. During May 1997, Papa John's sales increased 11.7 percent over May 1996 sales, while Pizza Hut's sales were down 8 percent.

On the heels of the success of the Carney ads, in February 1998, Papa John's launched a second series of ads touting the results of a taste test in which consumers were asked to compare Papa John's and Pizza Hut's pizzas. In the ads, Papa John's boasted that it "won big time" in taste tests. The ads were a response to Pizza Hut's "dare" to find a "better pizza." The taste test showed that consumers preferred Papa John's traditional crust pizzas over Pizza Hut's comparable pizzas by a 16-point margin (58% to 42%). Additionally, consumers preferred Papa John's thin crust pizzas by a fourteen-point margin (57% to 43%).

Following the taste test ads, Papa John's ran a series of ads comparing specific ingredients used in its pizzas with those used by its "competitors." During the course of these ads, Papa John's touted the superiority of its sauce and its dough. During the sauce campaign, Papa John's asserted that its sauce was made from "fresh, vine-ripened tomatoes," which were canned through a process called "fresh pack," while its competitors—including Pizza Hut—make their sauce from remanufactured tomato paste. During the dough campaign, Papa John's stated that it used "clear filtered water" to make its pizza dough, while the "biggest chain" uses "whatever comes out of the tap." Additionally, Papa John's asserted that it gives its yeast "several days to work its magic," while "some folks" use "frozen dough or dough made the same day." At or near the close of each of these ads, Papa John's punctuated its ingredient comparisons with the slogan "Better Ingredients. Better Pizza."

Pizza Hut does not appear to contest the truthfulness of the underlying factual assertions made by Papa John's in the course of these ads. Pizza Hut argues, however, that its own independent taste tests and other "scientific evidence" establishes that filtered water makes no difference in pizza dough, that there is no "taste" difference between Papa John's "fresh-pack" sauce and Pizza Hut's "remanufactured" sauce, and that fresh dough is not superior to frozen dough. In response to Pizza Hut's "scientific evidence," Papa John's asserts that "each of these 'claims' involves a matter of common sense choice (fresh versus frozen, canned vegetables and fruit versus remanufactured paste, and filtered versus unfiltered water) about which individual consumers can and do form preferences every day without 'scientific' or 'expert' assistance."

In November 1997, Pizza Hut filed a complaint regarding Papa John's "Better Ingredients. Better Pizza." advertising campaign with the National Advertising Division of the Better Business Bureau, an industry self-regulatory body. This complaint, however, did not produce satisfactory results for Pizza Hut.

On August 12, 1998, Pizza Hut filed a civil action in the United States District Court for the Northern District of Texas charging Papa John's with false advertising in violation of Section 43(a)(1)(B) of the Lanham Act. . . .

IV

. . . Reduced to its essence, the question is whether the evidence, viewed in the most favorable light to Pizza Hut, established that Papa John's slogan "Better Ingredients. Better Pizza." is misleading and violative of section 43(a) of the Lanham Act. In making this determination, we will first consider the slogan "Better Ingredients. Better Pizza." standing alone to determine if it is a statement of fact capable of deceiving a substantial segment of the consuming public to which it was directed. Second, we will determine whether the evidence supports the district court's conclusion that after May 1997, the slogan was tainted, and therefore actionable, as a result of its use in a series of ads comparing specific ingredients used by Papa John's with the ingredients used by its "competitors."

A

The jury concluded that the slogan itself was a "false or misleading" statement of fact, and the district court enjoined its further use. Papa John's argues, however, that this statement "quite simply is not a statement of fact, [but] rather, a statement of belief or opinion, and an argumentative one at that." Papa John's asserts that because "a statement of fact is either true or false, it is susceptible to being proved or disproved. A statement of opinion or belief, on the other hand, conveys the speaker's state of mind, and even though it may be used to attempt to persuade the listener, it is a subjective communication that may be accepted or rejected, but not proven true or false." Papa John's contends that its slogan "Better Ingredients. Better Pizza." falls into the latter category, and because the phrases "better ingredients" and "better pizza" are not subject to quantifiable measures, the slogan is non-actionable puffery.

We will therefore consider whether the slogan standing alone constitutes a statement of fact under the Lanham Act. Bisecting the slogan "Better Ingredients. Better Pizza.," it is clear that the assertion by Papa John's that it makes a "Better Pizza." is a general statement of opinion regarding the superiority of its product over all others. This simple statement, "Better Pizza.," epitomizes the exaggerated advertising, blustering, and boasting by a manufacturer upon which no consumer would reasonably rely. Consequently, it appears indisputable that Papa John's assertion "Better Pizza." is

non-actionable puffery.[8]

Moving next to consider separately the phrase "Better Ingredients.," the same conclusion holds true. Like "Better Pizza.," it is typical puffery. The word "better," when used in this context is unquantifiable. What makes one food ingredient "better" than another comparable ingredient, without further description, is wholly a matter of individual taste or preference not subject to scientific quantification. Indeed, it is difficult to think of any product, or any component of any product, to which the term "better," without more, is quantifiable. . . . Thus, it is equally clear that Papa John's assertion that it uses "Better Ingredients." is one of opinion not actionable under the Lanham Act.

Finally, turning to the combination of the two non-actionable phrases as the slogan "Better Ingredients. Better Pizza.," we fail to see how the mere joining of these two statements of opinion could create an actionable statement of fact. Each half of the slogan amounts to little more than an exaggerated opinion of superiority that no consumer would be justified in relying upon. It has not been explained convincingly to us how the combination of the two phrases, without more, changes the essential nature of each phrase so as to make it actionable. We assume that "Better Ingredients." modifies "Better Pizza." and consequently gives some expanded meaning to the phrase "Better Pizza," i.e., our pizza is better because our ingredients are better. Nevertheless, the phrase fails to give "Better Pizza." any more quantifiable meaning. Stated differently, the adjective that continues to describe "pizza" is "better," a term that remains unquantifiable, especially when applied to the sense of taste. Consequently, the slogan as a whole is a statement of non-actionable opinion. Thus, there is no legally sufficient basis to support the jury's finding that the slogan standing alone is a "false or misleading" statement of fact.

B

We next will consider whether the use of the slogan "Better Ingredients. Better Pizza." in connection with a series of comparative ads found by the jury to be misleading – specifically, ads comparing Papa John's sauce and dough with the sauce and dough of its competitors – "tainted" the statement of opinion and made it misleading under section 43(a) of the Lanham Act. Before reaching the ultimate question of whether the slogan is actionable under the Lanham Act, we will first examine the sufficiency of the evidence supporting the jury's conclusion that the comparison ads were misleading.

8. It should be noted that Pizza Hut uses the slogan "The Best Pizza Under One Roof." Similarly, other nationwide pizza chains employ slogans touting their pizza as the "best": (1) Domino's Pizza uses the slogan "Nobody Delivers Better."; (2) Danato's uses the slogan "Best Pizza on the Block."; (3) Mr. Gatti's uses the slogan "Best Pizza in Town: Honest!"; and (4) Pizza Inn uses the slogans "Best Pizza Ever." and "The Best Tasting Pizza."

(1)

After the jury returned its verdict, Papa John's filed a post-verdict motion under Federal Rule of Civil Procedure 50 for a judgment as a matter of law. In denying Papa John's motion, the district court, while apparently recognizing that the slogan "Better Ingredients. Better Pizza." standing alone is nonactionable puffery under the Lanham Act, concluded that after May 1997, the slogan was transformed as a result of its use in connection with a series of ads that the jury found misleading. These ads had compared specific ingredients used by Papa John's with the ingredients used by its competitors. In essence, the district court held that the comparison ads in which the slogan appeared as the tag line gave objective, quantifiable, and fact-specific meaning to the slogan. Consequently, the court concluded that the slogan was misleading and actionable under section 43(a) of the Lanham Act and enjoined its further use.

(2)

We are obligated to accept the findings of the jury unless the facts point so overwhelmingly in favor of one party that no reasonable person could arrive at a different conclusion. In examining the record evidence, we must view it the way that is most favorable to upholding the verdict. Viewed in this light, it is clear that there is sufficient evidence to support the jury's conclusion that the sauce and dough ads were misleading statements of fact actionable under the Lanham Act.

Turning first to the sauce ads, the evidence establishes that despite the differences in the methods used to produce their competing sauces: (1) the primary ingredient in both Pizza Hut and Papa John's sauce is vine-ripened tomatoes; (2) at the point that the competing sauces are placed on the pizza, just prior to putting the pies into the oven for cooking, the consistency and water content of the sauces are essentially identical; and (3) as noted by the district court, at no time "prior to the close of the liability phase of trial was any credible evidence presented [by Papa John's] to demonstrate the existence of demonstrable differences" in the competing sauces. Consequently, the district court was correct in concluding that: "Without any scientific support or properly conducted taste preference test, by the written and/or oral negative connotations conveyed that pizza made from tomato paste concentrate is inferior to the 'fresh pack' method used by Papa John's, its sauce advertisements conveyed an impression which is misleading. . . ." Turning our focus to the dough ads, while the evidence clearly established that Papa John's and Pizza Hut employ different methods in making their pizza dough, again, the evidence established that there is no quantifiable difference between pizza dough produced through the "cold or slow-fermentation method" (used by Papa John's), or the "frozen dough method" (used by

Pizza Hut).[10] Further, although there is some evidence indicating that the texture of the dough used by Papa John's and Pizza Hut is slightly different, this difference is not related to the manufacturing process used to produce the dough. Instead, it is due to a difference in the wheat used to make the dough. Finally, with respect to the differences in the pizza dough resulting from the use of filtered water as opposed to tap water, the evidence was sufficient for the jury to conclude that there is no quantifiable difference between dough produced with tap water, as opposed to dough produced with filtered water.

We should note again that Pizza Hut does not contest the truthfulness of the underlying factual assertions made by Papa John's in the course of the sauce and dough ads. Pizza Hut concedes that it uses "remanufactured" tomato sauce to make its pizza sauce, while Papa John's uses "fresh-pack." Further, in regard to the dough, Pizza Hut concedes the truth of the assertion that it uses tap water in making its pizza dough, which is often frozen, while Papa John's uses filtered water to make its dough, which is fresh – never frozen. Consequently, because Pizza Hut does not contest the factual basis of Papa John's factual assertions, such assertions cannot be found to be factually false, but only impliedly false or misleading.

Thus, we conclude by saying that although the ads were true about the ingredients Papa John's used, it is clear that there was sufficient evidence in the record to support the jury's conclusion that Papa John's sauce and dough ads were misleading – but not false – in their suggestion that Papa John's ingredients were superior.

(3)

Thus, having concluded that the record supports a finding that the sauce and dough ads are misleading statements of fact, we must now determine whether the district court was correct in concluding that the use of the slogan "Better Ingredients. Better Pizza." in conjunction with these misleading ads gave quantifiable meaning to the slogan making a general statement of opinion misleading within the meaning of the Lanham Act.

In support of the district court's conclusion that the slogan was transformed, Pizza Hut argues that "in construing any advertising statement, the statement must be considered in the overall context in which it appears." Building on the foundation of this basic legal principle, Pizza Hut argues that "[t]he context in which Papa John's slogan must be viewed is the 2½ year campaign during which its advertising served as 'chapters' to demonstrate the truth of the 'Better Ingredients. Better Pizza.' book." Pizza Hut argues, that because Papa John's gave consumers specific facts supporting

10. The testimony of Pizza Hut's expert, Dr. Faubion, established that although consumers stated a preference for fresh dough rather than frozen dough, when taste tests were conducted, respondents were unable to distinguish between pizza made on fresh as opposed to frozen dough.

its assertion that its sauce and dough are "better" – specific facts that the evidence, when viewed in the light most favorable to the verdict, are irrelevant in making a better pizza – Papa John's statement of opinion that it made a "Better Pizza" became misleading. In essence, Pizza Hut argues, that by using the slogan "Better Ingredients. Better Pizza." in combination with the ads comparing Papa John's sauce and dough with the sauce and dough of its competitions, Papa John's gave quantifiable meaning to the word "Better" rendering it actionable under section 43(a) of the Lanham Act.

We agree that the message communicated by the slogan "Better Ingredients. Better Pizza." is expanded and given additional meaning when it is used as the tag line in the misleading sauce and dough ads. The slogan, when used in combination with the comparison ads, gives consumers two fact-specific reasons why Papa John's ingredients are "better." Consequently, a reasonable consumer would understand the slogan, when considered in the context of the comparison ads, as conveying the following message: Papa John's uses "better ingredients," which produces a "better pizza" because Papa John's uses "fresh-pack" tomatoes, fresh dough, and filtered water. In short, Papa John's has given definition to the word "better." Thus, when the slogan is used in this context, it is no longer mere opinion, but rather takes on the characteristics of a statement of fact. When used in the context of the sauce and dough ads, the slogan is misleading for the same reasons we have earlier discussed in connection with the sauce and dough ads.

(4)

Concluding that when the slogan was used as the tag line in the sauce and dough ads it became misleading, we must now determine whether reasonable consumers would have a tendency to rely on this misleading statement of fact in making their purchasing decisions. We conclude that Pizza Hut has failed to adduce evidence establishing that the misleading statement of fact conveyed by the ads and the slogan was material to the consumers to which the slogan was directed. Consequently, because such evidence of materiality is necessary to establish liability under the Lanham Act, the district court erred in denying Papa John's motion for judgment as a matter of law.

As previously discussed, none of the underlying facts supporting Papa John's claims of ingredient superiority made in connection with the slogan were literally false. Consequently, in order to satisfy its prima facie case, Pizza Hut was required to submit evidence establishing that the impliedly false or misleading statements were material to, that is, they had a tendency to influence the purchasing decisions of, the consumers to which they were directed. We conclude that the evidence proffered by Pizza Hut fails to make an adequate showing.

In its appellate brief and during the course of oral argument, Pizza Hut directs our attention to three items of evidence in the record that it asserts establishes materiality to consumers. First, Pizza Hut points to the results of

a survey conducted by an "independent expert" (Dr. Dupont) regarding the use of the slogan "Better Ingredients. Better Pizza." as written on Papa John's pizza box (the box survey). The results of the box survey, however, were excluded by the district court. Consequently, these survey results provide no basis for the jury's finding.

Second, Pizza Hut points to two additional surveys conducted by Dr. Dupont that attempted to measure consumer perception of Papa John's "taste test" ads. This survey evidence, however, fails to address Pizza Hut's claim of materiality with respect to the slogan. Moreover, the jury rejected Pizza Hut's claims of deception with regard to Papa John's "taste test" ads – the very ads at issue in these surveys.

Finally, Pizza Hut attempts to rely on Papa John's own tracking studies and on the alleged subjective intent of Papa John's executives "to create a perception that Papa John's in fact uses better ingredients" to demonstrate materiality. Although Papa John's 1998 Awareness, Usage & Attitude Tracking Study showed that 48% of the respondents believe that "Papa John's has better ingredients than other national pizza chains," the study failed to indicate whether the conclusions resulted from the advertisements at issue, or from personal eating experiences, or from a combination of both. Consequently, the results of this study are not reliable or probative to test whether the slogan was material. Further, Pizza Hut provides no precedent, and we are aware of none, that stands for the proposition that the subjective intent of the defendant's corporate executives to convey a particular message is evidence of the fact that consumers in fact relied on the message to make their purchases. Thus, this evidence does not address the ultimate issue of materiality.

In short, Pizza Hut has failed to offer probative evidence on whether the misleading facts conveyed by Papa John's through its slogan were material to consumers: that is to say, there is no evidence demonstrating that the slogan had the tendency to deceive consumers so as to affect their purchasing decisions. Thus, the district court erred in denying Papa John's motion for judgment as a matter of law.

V

In sum, we hold that the slogan "Better Ingredients. Better Pizza." standing alone is not an objectifiable statement of fact upon which consumers would be justified in relying. Thus, it does not constitute a false or misleading statement of fact actionable under section 43(a) of the Lanham Act.

Additionally, while the slogan, when appearing in the context of some of the post-May 1997 comparative advertising – specifically, the sauce and dough campaigns – was given objectifiable meaning and thus became misleading and actionable, Pizza Hut has failed to adduce sufficient evidence establishing that the misleading facts conveyed by the slogan were material to the consumers to which it was directed. Thus, Pizza Hut failed to produce

evidence of a Lanham Act violation.

For a coda to the case, see this Domino's ad.

C Prohibited Conduct

Notice the two threshold conditions in § 43(a)(1)(B). First, the challenged statement must be "in commercial advertising or promotion," a requirement that is heavily influenced by First Amendment concerns. Second, the statement must concern "the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities," a phrase that is expansive but not infinitely so. In short, the statement must be commercial on both the speaker's and the subject's side.

1 "in commercial advertising or promotion"

In *Greater Houston Transportation Co. v. Uber Technologies, Inc.*, taxicab permit owners sued Uber for allegedly misrepresenting its safety to consumers. They pointed to statements given by Uber's Communications department to news organizations reporting on allegations that Uber failed to screen its drivers properly.[19] The statements, which included phrases like "We work every day to connect riders with the safest rides on the road and go above and beyond local requirements in every city we operate," were posted as parts of the news organizations' stories on their websites.

Uber argued that these statements were not "in commercial advertising or promotion" because news articles are not commercial advertising. Certainly this is a winning argument *as to the news organizations*. Their reporting is not advertising. And it is sometimes a winning argument for defendants who are quoted in news articles. In In *Boulé v. Hutton*, for example, the plaintiffs and defendants competed in selling paintings by Lazar Khidekel.[20] Two defendants, who were Khidekel's son and daughter-in-law, were quoted in ART*news* claiming that paintings being sold by the plaintiff were not authentic Khidekels. This was not commercial on their part, either. But the argument was a loser for Uber:

> Each of Uber's statements was issued by its corporate spokesperson or on Uber's own official website as part of a concerted campaign by the company in response to incidents that had been publicized in the media. . . .

19. Greater Hous. Transp. Co. v. Uber Techs., Inc., 155 F. Supp. 3d 670 (S.D Tex. 2015).
20. Boulé v. Hutton, 328 F.3d 84 (2d Cir. 2003).

> Because Uber's statements as a whole are issued with the intent to influence consumer opinion, they thereby become commercial speech even though they were contained in news media. . . . The comments issued by Uber's communication executives demonstrate a careful, uniform, and orchestrated message designed to encourage and facilitate the commercial use of its product and service. Thus, the Court finds that the disputed statements contained in media articles are commercial speech, and are potentially actionable under the Lanham Act.

Another recurring fact problem of commerciality is the line between scientific research and press release. Typically, research articles as such are noncommercial. But if a company distributes an allegedly false study that praises its products, is *that* commercial? Compare *Eastman Chemical Co. v. PlastiPure, Inc.*[21] (yes) with *Ony, Inc. v. Cornerstone Therapeutics, Inc.*[22] (no).

2 "[concerning] commercial activities"

Now for the requirement that the false statement concern someone's business. In *Procter & Gamble Co. v. Haugen*, Randy Haugen, an Amway distributor, sent a voice message to other Amway distributors alleging that the president of Procter & Gamble had announced his allegiance to Satan, and that P&G gave a large portion of its profits to the Church of Satan.[23] According to Haugen, this could be confirmed by observing a ram's horn and the demonic number 666 in the P&G logo. Needless to say, all of this was entirely false.

This baseless rant did not concern the "qualities or characteristics" of P&G's products; it "impugned no feature of the products themselves, such as price, regulatory approval, scope of copyright, or substitutability for another product."[24] But it *did* concern the nature of P&G's "commercial activities":

> In particular, the subject message asserted that "a large portion of the profits from [P&G] products go to support [the church of Satan]." Given the common association of Satan and immorality, a direct affiliation with the church of Satan could certainly undermine a corporation's reputation and goodwill by suggesting the corporation conducts its commercial activities in an unethical or immoral manner. There can be little doubt that products are often marketed and purchased not only on the basis of their inherent utility, but also for the images they project and the

21. Eastman Chem. Co. v. PlastiPure, Inc., 775 F.3d 230 (5th Cir. 2014).
22. Ony, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490 (2d Cir. 2013).
23. Procter & Gamble Co. v. Haugen, 222 F.3d 1262 (10th Cir. 2000).
24. *Id.*

The allegedly Satanic P&G logo

> values they promote. In that regard, the subject message itself implies that recipients should question the values promoted by the businesses from whom they purchase goods. In light of the foregoing reality of the marketplace, corporations cultivate their images and values through a wide array of activities, including celebrity endorsements, sponsorships, and charitable giving. Allegations that P&G tithes the church of Satan concern just such commercial activities.[25]

D Secondary Liability

There is not a lot of caselaw on secondary liability for false advertising—but there is some. As always, there must be an underlying act of false advertisement to hold someone else contributorily liable for it. The actual test for contributory liability, which should sound familiar, is that a defendant will be liable if it "contributed to that conduct either by knowingly inducing or causing the conduct, or by materially participating in

25. *Id.* at 1272.

it."[26] The necessary mental state is knowledge or intent. For example, consider the case from which this quotation is taken, *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc.*[27] DFA operates duty free stores in airports. Due to a pricing dispute, it stopped selling Estée Lauder cosmetics, but some of its competitors still did. In the process of bidding against DFA for airport concession contracts, they made allegedly false statements about DFA, which sued Estée Lauder on a number of theories, including contributory false advertising. But DFA failed to show that Estée Lauder contributed to the false statements.

> We cannot see how the mere sale of Estée Lauder products can serve as a basis for holding the manufacturer liable for any disparaging statements its customers make in the course of their own separate business relations. In our view, selling Estée Lauder products is too unrelated to the making of the allegedly false or misleading statements to form a basis for liability—under either an inducement or participation theory.
>
> Moreover, contrary to DFA's argument, there are simply no facts in the complaint that suggest the existence of coordinated action or encouragement, much less inducement, between Estée Lauder and the operators on the decision to make the disputed claims to airport authorities. There has been no allegation that by selling its products to the duty free operators, Estée Lauder monitored, controlled, or participated in operators' statements to airport authorities during a competitive bidding process for which Estée Lauder was not even present. More generally, there are no facts to suggest that Estée Lauder commonly exercises any level of control over or involvement in the duty free operators' conduct during airport RFP bidding.[28]

This passage shows how contributory liability for false advertising is different from contributory liability for other IP rights. Holding Estée Lauder liable for selling its products to the operators could make sense if it were their *sales* that infringed DFA's rights—if, for example, it held a patent on one of the ingredients in Estée Lauder's cosmsetics. But false advertising is a tort about deceptive speech, not about unauthorized products. To impose liability here would be to give DFA a kind of exclusive right to sell Estée Lauder products in duty-free shops, and that is emphatically not a job for false advertising law.

26. Duty Free Ams., Inc. v. Estee Lauder Cos., Inc., 797 F.3d 1248 (10th Cir. 2015).
27. *Id.*
28. *Id.* at 1279.

Problems

Satellite TV Problem

This advertisement for DirecTV ran on the Internet; it was shown to customers in markets served by Time Warner Cable. Some of Time Warner's channels are analog; others are digital HD. DirecTV offers only digital HD channels. The parties agree that the HD channels are equivalent in quality. They also agree that the pixelated portions of the ads are not accurate depictions of cable TV signals, either digital or analog. Is the advertisement actionable?