

False Advertising Claims against Product Names and Labels

Mary LaFrance
William S. Boyd School of Law, UNLV

Introduction

False advertising claims under the Lanham Act may arise from a number of activities other than traditional advertising. Because Congress did not define any of the key terms in the false advertising provision, key questions have been left to the courts, including (1) whether a defendant's assertion of fact about a product is false, and (2) whether that assertion is in the context of "advertising." In attempting to give meaning to these terms, courts distinguish between claims that are explicitly and implicitly false, impose different requirements of proof for each type of false claim, and allow a certain amount of leeway for "puffery" or patently implausible representations. Yet there are no clear lines distinguishing these categories, and no safe harbors.

The Supreme Court reaffirmed the absence of safe harbors in *Pom Wonderful LLC v. Coca Cola Co.*,¹ where it held that a product name or label that complies with federal food and drug regulations may still be misleading under the Lanham Act. Even if the Court's decision is correct as a matter of policy as well as statutory interpretation, it expands the realm of uncertainty for manufacturers and trademark owners.

False advertising claims arising from food and beverage labeling have dramatically increased in recent years, and have gained additional momentum after *Pom Wonderful*. Because FDA regulations are no longer a safe harbor against federal false advertising claims, *Pom Wonderful* creates uncertainty with respect to what constitutes false advertising with respect to product names and labels applied to food, beverages, and other products regulated by the FDA. This may lead to increased false advertising litigation under the Lanham Act. In addition, because the scope of FDCA preemption of state laws is unsettled, *Pom Wonderful* will encourage more litigation under state false advertising and unfair competition laws; unlike the Lanham Act, these actions can be brought by consumers, and often take the form of a class action.

This article examines the application of false advertising laws to product names and labels, and the conflicts that arise between the FDCA, the Lanham Act, and state consumer protection laws. It concludes that the issues arising from *Pom Wonderful* can be situated within two broader questions: (1) how we decide whether a product name or label communicates an assertion of fact at all, and (2) how to identify what that assertion is, where different consumers might draw significantly different inferences from the same product name or label. Unless we can reliably determine what meaning consumers ascribe to the language and images on a product label, it will be difficult to assess whether the implicit message is misleading.

¹ 134 S.Ct. 2228 (2014).

I. False Advertising Overview

The Lanham Act's false advertising provision is drafted broadly enough to encompass the names of goods or services as well as the information conveyed on labels. A false advertising claim may arise from the use of "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" that is used in "commercial advertising or promotion" if it "misrepresents the nature, characteristics, qualities, or geographic origin" of goods or services.²

The plaintiff must show (1) that the defendant's statements have *actually* deceived, or are *likely* to deceive, a substantial portion of the intended audience, (2) that the deception is material in that it is likely to influence purchasing decisions, and (3) that there is a likelihood of injury to the plaintiff, such as declining sales or loss of good will.³

Advertising is considered false or misleading under either of two circumstances: The statements may be literally false, in which case the court may grant relief without considering whether the buying public was actually misled.⁴ Alternatively, if the statements are literally true or ambiguous, they will be false or misleading if, in light of the merchandising context, they are likely to deceive or confuse consumers.⁵ Evidence that consumers were actually misled or confused may include consumer testimony, marketing surveys, proof of lost sales, or other evidence of deception.⁶

Mere "puffery," however, is not actionable. Puffery has been described as "exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely,"⁷ and includes vague or highly subjective representations of product superiority.⁸ In contrast, actionable false advertising typically requires a false assertion regarding a product's specific or absolute

² The statute reads, in relevant part:

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.

15 U.S.C. § 1125(a)(1)(B).

³ See, e.g., *Warner-Lambert Co. v. BreathAsure, Inc.*, 204 F.3d 87, 91-92 (3d Cir. 2000); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998); *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm.*, 19 F.3d 125, 129 (3d Cir. 1994); *Black & Decker, Inc. v. Pro-Tech Power, Inc.*, 26 F. Supp. 2d 834, 861-62 (E.D.Va. 1998). As is true of any Lanham Act claim, there must also be a nexus with interstate commerce. *Warner-Lambert*, 204 F.3d at 92.

⁴ *Johnson & Johnson-Merck*, 19 F.3d at 129; see also *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1992).

⁵ *Lipton v. Nature Co.*, 71 F.3d 464, 474 (2d Cir. 1995); *Castrol*, 987 F.2d at 943; *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990).

⁶ See, e.g., *Warner-Lambert*, 204 F.3d at 96; *McNeilab, Inc. v. American Home Prods. Corp.*, 501 F. Supp. 517, 525 (S.D.N.Y. 1980); *Castrol*, 987 F.2d at 945. For a critique of the distinction between literally and implicitly false statements, see *Rebecca Tushnet, Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. Pa. L. Rev. 1305 (2011).

⁷ *United Indus. Corp.*, 140 F.3d at 1180.

⁸ *Perkins & Liehe, Inc. v. Northern California Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990).

characteristics, including specific, measurable claims of product superiority based on product testing.⁹

A literally false claim need not be explicit; it may be ``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.''¹⁰ However, the claim must still be unambiguous in order to be literally false: ``The greater the degree to which a message relies upon the viewer or consumer to integrate its components and draw the apparent conclusion,... the less likely it is that a finding of literal falsity will be supported.''¹¹

In determining whether a false claim is necessarily implied by a product's name or advertisement, so that the plaintiff will not be required to submit evidence of consumer confusion, courts inquire whether, ``based on a facial analysis of the product name or advertising, the consumer will unavoidably receive a false message from the product's name or advertising.''¹²

Many false advertisement claims involve declarative assertions made in advertising or promoting a product or service.¹³ For example, an advertisement may claim that ``tests prove'' that the advertised product is superior to the competition; such a claim is false if the tests do not in fact prove superiority.¹⁴ In other cases, however, the assertion is less direct, so that the false meaning is merely implied. This is typically the case with false advertising claims arising from product names and labels, where the consumer infers the false assertion from individual words, short phrases, visual images, or a combination thereof.

II. FDCA Preemption and Preclusion

The federal Food, Drug, and Cosmetic Act (FDCA) expressly preempts state laws that impose labeling requirements that inconsistent with FDA regulations.¹⁵ However, it does not expressly preclude application of other *federal* laws, such as the Lanham Act.

Even with respect to state law, the preemptive scope of the FDCA is not entirely clear. The 1990 NLEA prohibits misbranding of foods, and defines a food as misbranded if the label is ``false or misleading in any particular.''¹⁶ The NLEA expressly prohibits states from prescribing

⁹ *United Indus. Corp.*, 140 F.3d at 1180; *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997); *Castrol*, 987 F.2d at 945.

¹⁰ *Clorox Co. v. Proctor & Gamble Comm. Co.*, 228 F.3d 24, 35 ((1st Cir. 2000).

¹¹ *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 587 (3d Cir. 2002).

¹² *Id.*; see also *Warner-Lambert*, 204 F.3d at 96-97; *Cuisinart, Inc. v. Robot-Coupe Int'l Corp.*, 1982 U.S. Dist. LEXIS 13594 (S.D.N.Y. 1982); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.3d 272, 277 (2d Cir. 1981).

¹³ See, e.g., *Castrol*, 987 F.2d at 947; *Cuisinarts, Inc. v. Robot-Coupe Int'l Corp.*, 1982 U.S. Dist. LEXIS 13594 June 9, 1982).

¹⁴ *Id.* at 947-48.

¹⁵ 21 U.S.C. §§ 343(k), 343-1; see, e.g., *Engurasoff v. Coca-Cola Co.*, 2014 U.S. Dist. LEXIS 116936 (N.D. Cal. Aug. 21, 2014); *Catheter Connections, Inc. v. Ivera Med. Corp.*, 2014 U.S. LEXIS 98206 (July 17, 2014); *Vigiano v. Hansen Natural Corp.*, 944 F.Supp.2d 877 (C.D. Cal. 2013) (collecting cases).

¹⁶ 21 U.S.C. § 343(a).

requirements “not identical to” to federal ones.¹⁷ Specifically, states may not impose any food definitions or food labeling requirements that differ from certain specific requirements of the FDCA.¹⁸ However, this bar on state regulation does not expressly apply to the general prohibition against “false or misleading” labels under § 343(a). Thus, it appears that there is a residual category of food mislabeling which the states are permitted to regulate.

In addition, it is unsettled whether NLEA preemption applies to state laws of general application, like unfair competition or deceptive trade practices laws, because these do not, on their face, impose particular requirements as to food identity or labels.¹⁹ However, adjudicating the application of these laws to any specific consumer complaint will, if the consumer prevails, result in the imposition of such requirements on the losing party. Arguably, then, such laws should be preempted because their application can result in requirements that are not identical to FDA requirements. By analogy, suits for defamation or invasion of privacy are private actions rather than state actions, but because the state will impose a judgment if the plaintiff prevails, defamation and privacy laws are subject to the First Amendment.

As a result of these uncertainties, courts have reached conflicting conclusions on whether consumer complaints arising under state laws prohibiting deceptive labeling or advertising are preempted by the NLEA.²⁰ Because the NLEA does not recognize a private right of action,²¹ and consumers do not have standing to bring false advertising claims under the Lanham Act, consumers and class action attorneys have gravitated to state laws that give consumers a private cause of action for unfair trade practices. In recent years, there has been a dramatic increase in such litigation.²² Much of this litigation takes place in California, which has created a private

¹⁷ 21 U.S.C. §§ 343-1(a)(1). There is an express exemption for maple syrup. *Id.*

¹⁸ *Id.* (referencing the requirements of §§ 341 and 343(g)); *id.* § 343-1(a)(2) (referencing the requirements of §§ 343(c), (e), (i)(2), (w), and (x); *id.* § 343-1(a)(3) (referencing the requirements of §§ 343(b), (d), (f), (h), (i)(1), and (k)); *id.* § 343-1(a)(4) (referencing the requirements of § 343(q); *id.* § 343-1(a)(5) (referencing the requirements of § 343(r)).

¹⁹ *In re Simply Orange Orange Juice Marketing & Sales Practices Litigation*, 2013 U.S. Dist. LEXIS 28080 (D. Mo. Mar. 1, 2013) (no evidence of congressional intent to broadly preempt state consumer protection laws); *Stewart v. Smart Balance Inc.*, 2012 U.S. Dist. LEXIS 138454 (D.N.J. Jun. 26, 2012) (no preemption of claim that product was falsely labeled “fat free” under state law prohibiting “fraudulent” and “deceptive” practices).

²⁰ Diane P. Flannery & Joan S. Dinsmore, *2013’s Key Rulings in Food Mislabeling Litigation*, Law360, available at <http://www.law360.com/articles/499170>. See, e.g., *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1361-62 (S.D. Fla. 2012) (no preemption of Florida honey standards because there is no federal standard of identity for honey); *Perea v. Walgreen Co.*, 939 F.Supp.2d 1026 (C.D. Cal. Apr. 11, 2013) (NLEA expressly preempts California honey standards even though there is no federal standard of identity for honey); *Chacana v. Quaker Oats Co.*, 752 F. Supp. 2d 1111 (N.D. Cal. 2010) (no preemption of claims addressing the word “wholesome” because they did not involve “nutrient content”); *Shepard v. DineEquity Inc.*, 2009 U.S. Dist. LEXIS 97245 (D. Kan. Sept. 25, 2009) (NLEA preempts claims based on restaurant chain’s statements about fat and calorie content because these were “nutrition content” and not “nutrition information”); *Holk v. Snapple Beverage Corp.*, 574 F. Supp. 2d 447, 454 (D.N.J. 2008) (finding “implied preemption” of complaint against use of “all natural” even though FDA regulations don’t define “all natural”); *Evans v. Rich*, 2014 U.S. Dist. LEXIS 76721 (E.D.N.C. June 4, 2014) (preemption of complaint about promoting off-label use); *Fraker v. KFC Corp.*, 2007 U.S. Dist. LEXIS 32041 (S.D. Cal. Apr. 30, 2007) (preemption); *Farm Raised Salmon Cases*, 42 Cal. 4th 1077 (2008) (no preemption).

²¹ 21 U.S.C. § 337.

²² Diane P. Flannery & Joan S. Dinsmore, *2013’s Key Rulings in Food Mislabeling Litigation*, Law360, available at <http://www.law360.com/articles/499170>.

right of action under a statute that avoids NLEA preemption by imposing standards identical to those of the NLEA.²³

III. False Advertising Precedents Involving Names, Labels, or Both

Although Lanham Act false advertising jurisprudence addresses both advertising and other communications *about* goods and services, there are few precedents addressing names and labels. Most false advertising cases involve information communicated to consumers through commercial advertising or marketing activities. While there have been a small number of cases involving product labels, false advertising claims based purely on product names are relatively uncommon. Some cases are hard to classify, because the deceptive term may be perceived either as a product name or as part of the label.²⁴

A. Names

In 2002, the Third Circuit upheld a district court's finding that the product names BreathAsure and BreathAsure-D for ingestible capsules sold as breath fresheners were "deceptive and a misrepresentation of the products' qualities."²⁵ There were essentially two reasons for this finding. First, there was no scientific evidence that the capsules were effective as breath fresheners; indeed, at trial, the defendant stipulated that they were not.²⁶ Second, BreathAsure's advertising had heavily promoted the products as being effective against bad breath.²⁷ This claim was literally false.²⁸

Although BreathAsure consented to an injunction prohibiting it from advertising that its capsules freshened breath, it argued that it should be allowed to continue using the product names once it discontinued the deceptive advertising, because the word BreathAsure, "alone or in connection with otherwise benign descriptions, could itself lead to a multiple number of conclusions as to what the product is."²⁹ Both the district court and the Third Circuit rejected this argument. The district court found that the term BreathAsure was "deceptive and a misrepresentation of the products' qualities."³⁰ The court of appeals agreed: "The name falsely tells the consumer that he or she has assurance of fresher breath when ingesting one of the defendant's capsules."³¹ However, the conclusion that the product names were deceptive was based largely on the effectiveness of the defendant's deceptive advertising campaign:

²³ Cal. Health & Safety Code § 109875 et seq. (the Sherman Food, Drug & Cosmetic Act); *see* Brazil v. Dole Food Co., 935 F.Supp.2d 947 (N.D. Cal. Mar. 25, 2013) (Sherman Act is not preempted because it "has adopted requirements identical to FDA regulations").

²⁴ Examples are POM Wonderful LLC v. Coca-Cola, Inc., 134 S.Ct. 2228 (2014) and Werbel v. Pepsico, Inc., 2010 U.S. Dist. LEXIS 76289 (July 2, 2010).

²⁵ Warner-Lambert Co. v. BreathAsure, Inc. 204 F.3d 87 (3rd Cir. 2000).

²⁶ *Id.* at 89.

²⁷ *Id.*

²⁸ *Id.* at 96.

²⁹ *Id.* at 90.

³⁰ *Id.*

³¹ *Id.* at 97.

The Court determines that the name Breath Asure, particularly given its contemplated future use for defendant's products, is indeed deceptive and a misrepresentation of the products' qualities. It implies assurance where there is no basis for it. It relates to breath; and, together with a residuum of past ads, although discontinued, will inform the market and prospective consumers that it is designed to enhance breath quality and limit offensive odors. While discontinuance of the ads that are the subject of the consent injunction here is and will be significant, particularly in terms of any likelihood of future injury to the plaintiff, that residual impact will be enough to generate product recognition, particularly when the name Breath Asure continues to be used. . . .

Breath Asure's campaign over the last six years has been successful in producing sufficient recognition for the term Breath Asure that its continued use in the market will present to the public once again a product with assurance of breath quality. Accordingly, Breath Asure is deceptive, advising the consumer that there is a sound basis for assurance that this product will freshen or destroy odors in one[']s breath when there is inadequate support for such a claim.³²

Thus, rather than evaluating the meaning of the product's name by itself, the court treated the advertising campaign as part of the overall context that would influence consumer perceptions about the product's name, much as a court evaluating a trademark infringement claim must consider the context in which the consumer encounters the mark. Courts adopting this approach are unlikely to evaluate an allegedly misleading product name without considering the entire context in which the name appears – including the packaging of the product, and the content of any advertising for the product.

The Third Circuit addressed product names again in 2002, upholding a district court's finding that the name "Mylanta Night Time Strength" (MNTS) for a heartburn remedy was "literally false by necessary implication because it conveys the unambiguous message that the product is specially formulated to relieve nighttime heartburn."³³ In addition, the court believed that the plaintiff would be able to prove, at trial, that consumers were likely to be misled. It based this conclusion on a survey in which 30% of respondents who were shown the MNTS product believed that it would provide all-night relief.³⁴

A number of consumer class action suits alleging that product names are deceptive have been brought under state statutes rather than the Lanham Act, because the latter does not give consumers standing.³⁵

For example, a group of plaintiffs brought a class action under California law alleging that the name "Gerber's Fruit Juice Snacks" was deceptive because it appeared alongside pictures of oranges, peaches, strawberries, and cherries on the product packaging, although the

³² *Id.* at 90.

³³ Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 589 (3d Cir. 2002). The court rejected the plaintiff's second theory of false advertising, that the name necessarily implied that the product was superior to other products at providing nighttime relief. "The MNTS name and advertising alone do not require that this inference will be made." *Id.* at 588.

³⁴ *Id.* at 590-91.

³⁵ Lexmark Int'l, Inc. v. Static Controls, Inc., 134 S.Ct. 1377, 1390 (2014).

only fruit juice the product actually contained was white grape juice from concentrate.³⁶ The plaintiffs also claimed that other components of the packaging were deceptive: A side panel stated that the product was made “with real fruit juice and other all natural ingredients” even though the “most prominent” ingredients were corn syrup and water.³⁷ Another side panel said that the Snacks were “one of a variety of nutritious Gerber Graduates foods and juices.”³⁸ The plaintiffs also argued that the term “Snacks” was itself misleading, because the product was more accurately a “candy,” “sweet,” or “treat.”³⁹

The district court dismissed the claims, finding that the packaging was “not likely to deceive a reasonable consumer as a matter of law,”⁴⁰ and that “the challenged statements and images, viewed in context, are truthful or constitute non-actionable puffery.”⁴¹ The district court expected consumers to base their conclusions on the packaging as a whole: “[N]o reasonable consumer upon review of the package as a whole would conclude that Snacks contains juice from the actual and fruit-like substances displayed on the packaging particularly when the ingredients are specifically identified.”⁴²

However, the Ninth Circuit reversed, finding that several of these packaging components “would likely deceive a reasonable consumer.”⁴³

The product is called “fruit juice snacks” and the packaging pictures a number of different fruits, potentially suggesting (falsely) that those fruits or their juices are contained in the product. Further, the statement that Fruit Juice Snacks was made with “fruit juice and other all natural ingredients” could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, which appears to be false. And finally, the claim that Snacks is “just one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy” adds to the potential deception.⁴⁴

The court indicated that the word “nutritious” by itself might be non-actionable puffery,⁴⁵ “since nutritiousness can be hard to measure concretely,” but in context it was deceptive: “This statement certainly contributes . . . to the deceptive context of the packaging of the packaging as a whole.”⁴⁶ The appellate court also disagreed that reasonable consumers “should be expected to look beyond misleading representations on the front of the box to discover the truth from the

³⁶ Williams v. Gerber Prods. Co., 552 F.3d 934, 936 (9th Cir. 2008). Although Gerber argued that the state law claims were preempted by the FDCA, the Ninth Circuit did not consider this argument because it was raised for the first time on appeal. *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Williams v. Gerber Prods. Co., 439 F.Supp.2d 1112, 1117 (S.D. Cal. 2006).

⁴¹ *Id.* at 1118.

⁴² *Id.* at 1116.

⁴³ 552 F.2d at 939.

⁴⁴ *Id.*

⁴⁵ Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990) (statements are non-actionable puffery where they are “general assertions of superiority” rather than “factual misrepresentations”).

⁴⁶ *Id.* at 939 n.3.

ingredient list in small print on the side of the box.” Noting that ingredients lists are required by the FDA, the court added:

We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.⁴⁷

Consumers have also alleged, without success, that the cereal names “Froot Loops”⁴⁸ and “Cap’n Crunch’s Crunch Berries”⁴⁹ deceptively conveyed the message that the cereals in question contained fruit. In the Crunch Berries case, one district court dismissed the claim as “nonsense”:

It is obvious from the product packaging that no reasonable consumer would believe that Cap’n Crunch derives any nutritional value from berries. As an initial matter, the term “Berries” is not used alone, but always is preceded by the word “Crunch,” to form the term, “Crunch Berries.” The image of the Crunch Berries, which is “ENLARGED TO SHOW TEXTURE,” shows four cereal balls with a rough, textured surface in hues of deep purple, teal, chartreuse green and bright red. These cereal balls do not even remotely resemble any naturally occurring fruit of any kind. There are no representations that the Crunch Berries are derived from real fruit nor are there any depictions of any fruit on the cereal box. To the contrary, the packaging clearly states that product is a “SWEETENED CORN & OAT CEREAL.” In short, no reasonable consumer would be deceived into believing that Cap’n Crunch “has some nutritional value derived from fruit.”⁵⁰

B. Labels

False advertising claims arise more frequently from product labels than from product names alone.

For example, a district court found a label misleading in *Merck Eprova AG v. Brookstone Pharmaceuticals, LLC*.⁵¹ Plaintiff Merck produced a chemically pure version of the nutritional supplement folate (a B vitamin) called Metafolin, while Acella produced mixed folate products (called Xolafin and Xolafin-B) because it was unable to license the chemically pure folate from Merck, and because the mixed versions were less expensive. Merck alleged that Acella

⁴⁷ 552 F.3d at 940.

⁴⁸ *Videtto v. Kellogg USA*, 2009 U.S. Dist. LEXIS 43114, 2009 WL 1439086 at *2 (E.D. Cal., May 21, 2009) (dismissing UCL, FAL and CLRA claims based on allegations that consumers were misled into believing that “Froot Loops” cereal contained “real, nutritious fruit”); *McKinnis v. Kellogg USA*, 2007 U.S. Dist. LEXIS 96106, 2007 WL 4766060 at *3-4 (C.D. Cal., May 21, 2007) (same).

⁴⁹ *Werbel v. Pepsico, Inc.*, 2010 U.S. Dist. LEXIS 76289 (N.D. Cal. July 2, 2010) (dismissing claim under California unfair competition and false advertising statutes); *Sugawara v. Pepsico, Inc.*, U.S. District Ct., 2009 U.S. Dist. LEXIS 43127 (E.D. Cal. May 21, 2009) (same).

⁵⁰ *Werbel*, 2010 U.S. Dist. LEXIS 76289 at *10.

⁵¹ 920 F. Supp.2d 404 (S.D.N.Y. 2013), *appeal withdrawn* (2d Cir. June 14, 2013).

mislabeled its products in violation of the Lanham Act⁵² as well state law. Merck's Metafolin was 99% pure L-methylfolate, which is the active and naturally-occurring L-isomer.⁵³ Although Xolafin was a 50-50 mix of the L-isomer and the inactive, synthetic D-isomer, the label on Acella's Xolafin products identified its folate ingredient as L-methylfolate, without any indication that the D-isomer was also present.⁵⁴ By omitting any mention of the D-isomer from the label, and making sure that its labels always listed ingredients identical to those on the Metafolin labels, Acella ensured that its products would be linked to Metafolin on pharmaceutical databases, thus increasing the likelihood that pharmacists would perceive Acella's products as appropriate substitutes for the more expensive Metafolin.

The Southern District of New York held that Acella's labels were not literally false. Even though they failed to mention the presence of the D-isomer, they accurately stated the net amount (in micrograms) of L-isomer that was present. Because the labels were "susceptible to more than one reasonable interpretation," they were not literally false.⁵⁵

The court nonetheless held that Merck should prevail on an implied falsity theory, based on extrinsic evidence of consumer confusion. Merck's survey evidence indicated that a substantial percentage of pharmacists and physicians believed, based on Acella's labels and package inserts, that Xolafin was the pure L-isomer.⁵⁶ The court also concluded that this representation was false or likely to mislead or confuse. It based that conclusion on several findings: (1) Because a third competitor, GNC, labeled its own 50-50 product as containing both the L- and D-isomers, the court found that mixed folate products customarily disclose the presence of the D-isomer. (2) The fact that Acella purposely sought out the mixed product "underscore[d] the deceptive nature of" its labels. (3) Merck's survey evidence indicated that even sophisticated parties were likely to believe that Acella's products contained the pure isomer, which the court called "an unsurprising result given labeling customs and database linkage."⁵⁷

⁵² In the Second Circuit, one element of a Lanham Act false advertising claim is that the misleading misrepresentations must be part of an organized campaign to penetrate the relevant market. 920 F. Supp.2d at 424. The court held that this element was satisfied, because Acella distributed its labels and package inserts to pharmaceutical databases in order to link its products to Metafolin-containing products, so that pharmacists would perceive them as generic substitutes. *Id.*

⁵³ Metafolin's 99% purity both established and satisfied the purity standard adopted by the FDA and several international organizations. *Id.* at 413.

⁵⁴ Acella later introduced Xolafin-B, contained 90- 95% L-isomer and 5-10% D-isomer, again using a label that failed to disclose the presence of the D-isomer. *Id.*

⁵⁵ *Merck Eprova*, 920 F.Supp. at 419 (quoting *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007)).

⁵⁶ According to one survey, 21% of pharmacists and 11% of physicians surveyed understood that Acella's Xolafin was a substantially pure isomer because of the "L" designation on the label. Another survey invited retail pharmacists to compare the products based on their labels; 45.3% of pharmacists surveyed believed, based on the labels, that Acella's products would be appropriate substitutes for products containing Metafolin (most of them stating that the products had the same ingredients), even though only 10% of them believed that a mixed-isomer product was an appropriate substitute for the pure product. A third study focused on the package inserts produced similar results; 75.3% of retail pharmacists concluded, based on the package inserts, that Acella's products would be appropriate substitutes for products containing Metafolin, while only 33% believed that a mixed-isomer product was an appropriate substitute for the pure product. *Id.* at 418-20.

⁵⁷ *Id.* at 420.

Even without the survey evidence, the court stated, Merck was entitled to a presumption of consumer deception because Acella deliberately set out to give consumers the impression that its products were identical to Merck's, knowing that this was not the case. Finding that Acella failed to rebut this presumption, the court concluded that the labels and package inserts were implicitly false. These false representations were material, because the evidence at trial showed that the purity of the folate source was likely to influence consumers' purchasing decisions. The evidence included expert testimony from several pharmacists and physicians that, for at least some patients, they would not recommend a product that contained the D-isomer.⁵⁸ In addition, because the mislabeling caused Acella's generic products to be linked to Metafolin-containing products on pharmaceutical databases, in many cases pharmacists were legally required to substitute Acella's products when Metafolin products were prescribed.

In a case of first impression, *Sanderson Farms, Inc. v. Tyson Foods, Inc.*,⁵⁹ a federal district court held that the defendant's use of a USDA-approved label was not immune from a Lanham Act false advertising claim. The label, used for chicken, described the defendant's products as "raised without antibiotics that impact antibiotic resistance in humans." In a consumer survey, however, roughly 60 percent of the survey respondents misunderstood this label as indicating that the chickens were raised without any antibiotics at all.⁶⁰ The court observed that "[l]abeling may be prepared in such a manner that it is effectively 'commercial advertising and promotion' under the Lanham Act."⁶¹ Although no previous cases had addressed the possibility of a false advertising claim arising from a USDA-approved label, the court concluded that the Lanham Act claim was not precluded.⁶²

C. *POM Wonderful v. Coca-Cola*⁶³

In *POM Wonderful*, the Supreme Court opened the door to false advertising claims alleging the use of deceptive names and labels for food, beverages, and dietary supplements by holding that compliance with FDA regulations does not immunize defendants from suit.

When Coca-Cola named its new multi-juice beverage "Pomegranate Blueberry" even though it contained only 0.3% Pomegranate juice and 0.2% blueberry juice, competing beverage maker POM Wonderful sued for false advertising under the Lanham Act as well as California's false advertising and unfair competition laws.⁶⁴ POM based its claims on the product's name and label as well as its advertising and marketing campaigns. The Ninth Circuit held that the claims based on the name and label were preempted by the federal Food, Drug, and Cosmetic Act (FDCA),⁶⁵

⁵⁸ *Id.* at 424.

⁵⁹ 549 F.Supp.2d 708 (D.Md. 2008).

⁶⁰ *Id.* at 711-12.

⁶¹ *Id.* at 717 (citing *Applied Med. Res. Corp. v. Steuer*, 527 F.Supp.2d 489, 493 (E.D.Va.2007)).

⁶² *Id.* at 715-716.

⁶³ 134 S.Ct. 2228 (2014).

⁶⁴ *Pom Wonderful LLC v. Coca Cola Co.*, 727 F. Supp. 2d 849 (C.D. Cal. 2010), *aff'd*, 679 F.3d 1170 (9th Cir. 2012).

⁶⁵ 21 U.S.C. § 301 et seq. *See PhotoMedex, Inc. v. Irwin*, 601 F.3d 919 (9th Cir. 2010); *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990).

because the name “Pomegranate Blueberry” complied with FDA regulations that allow a blended juice beverage to be named after a juice that is present in the blend but does not predominate.⁶⁶ In the Ninth Circuit’s view, both the name and the labeling of Coca-Cola’s product complied with FDA regulations; accordingly, the federal false advertising claim was barred, even if the name and label were in fact deceptive, because only the FDA had the authority to take action against this deception.⁶⁷

As a threshold matter, the Supreme Court was uncertain whether “Pomegranate Blueberry” was the product’s name, or simply descriptive information appearing on the label. The Court’s confusion is understandable, because these words are not especially prominent on the label. While they appear in all capital letters, their typeface is smaller than that of several other elements on the label, including the Minute Maid brand name and another slogan that appears in all capitals: HELP NOURISH YOUR BRAIN. Both of these elements, as well as an image depicting a cluster of fruit, appear higher and more prominently on the label. The label is crowded with many other words and images as well. Toward the bottom of the label, immediately below the capitalized words POMEGRANATE BLUEBERRY, in only slightly smaller letters and also in all capitals, was the phrase A FLAVORED BLEND OF 5 JUICES.

Despite this uncertainty, the Court unanimously reversed,⁶⁸ holding that nothing in the Lanham Act or the FDCA suggests that Congress intended to prevent competitors from bringing false advertising claims against food or beverage labels that are subject to FDA regulation. The two statutory schemes have coexisted since 1946, and during this time Congress has amended both regimes without ever suggesting that the FDCA should foreclose a Lanham Act claim. In addition, the Court noted, the Nutrition Labeling and Education Act (NLEA),⁶⁹ which amended the FDCA in 1990, expressly preempts *state* laws that impose food labeling requirements that are “not identical” to the FDCA’s food labeling requirements,⁷⁰ but it says nothing about preempting any *federal* laws.⁷¹

The Court characterized the Lanham Act and the FDCA as complementary rather than conflicting regimes,⁷² noting that the remedies available under Lanham Act give competitors a strong incentive to pursue claims against merchants that engage in misleading advertising.⁷³ The

⁶⁶ 679 F.3d at 1176-77 (citing 21 C.F.R. § 102.33(c)-(d)). In reaching this conclusion, the Ninth Circuit expressly rejected the contrary holdings of three district courts that had allowed Pom Wonderful to proceed with false advertising claims against other juice products on the grounds of deceptive labeling. *Id.* at 1178 (citing Pom Wonderful, LLC v. Tropicana Prods., Inc., 2010 U.S. Dist. LEXIS 99266 (C.D. Cal. Sept. 7, 2010); Pom Wonderful LLC v. Ocean Spray Cranberries, Inc., 642 F. Supp. 2d 1112, 1119-20 (C.D. Cal. 2009); Pom Wonderful LLC v. Welch Foods, Inc., CV 09-567 AHM, D.E. 29, at 6-7 (C.D. Cal. June 23, 2009)).

⁶⁷ *Pom Wonderful*, 679 F.3d at 1177-78.

⁶⁸ Justice Breyer was recused.

⁶⁹ Pub. L. 101-535, 104 Stat. 2353 (1990).

⁷⁰ 21 U.S.C. § 343-1.

⁷¹ 134 S.Ct. at 2238.

⁷² “The Lanham Act and the FDCA complement each other in major respects, for each has its own scope and purpose. Although both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety.” *Id.*

⁷³ *Id.*

Court also implied that competitors in some respects serve as *better* consumer watchdogs than federal regulators.⁷⁴

The Court found an additional reason to permit Lanham Act claims against misleading food and beverage labels. In contrast to drug labels, food and beverage labels are not pre-approved by the FDA. Because the FDA also does not necessarily bring enforcement actions against every non-compliant food or beverage label, if Lanham Act remedies were foreclosed then food and beverage merchants could use misleading labels more freely than merchants in non-regulated industries: “It is unlikely,” the Court observed, “that Congress intended the FDCA’s protection of health and safety to result in *less* policing of misleading food and beverage labels than in competitive markets for other products.”⁷⁵ The Court expressly rejected the government’s position (in an amicus brief) that Lanham Act claims are precluded “to the extent that the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label,” because this argument assumes that the federal food and drug regulations constitute a “ceiling” on regulations pertaining to labels.⁷⁶ Although the FDA rulemaking proceedings regarding food and beverage labels attempted to strike an appropriate balance between consumers’ need for information and manufacturers’ need for flexibility, they also expressly encouraged manufacturers to exceed the legally required minimum disclosures.⁷⁷

Pom Wonderful makes clear that FDA approval does not provide a safe harbor against Lanham Act false advertising claims. The same logic could also extend to USDA regulations.

However, the loss of the safe harbor significantly increases the uncertainty over whether a particular product name or label is misleading – at least where the name or label is not literally false. For example, *Pom Wonderful*’s own competing product is labeled “POMEGRANATE BLUEBERRY.” This phrase appears in all-caps on the front of the label, right below the brand name POM WONDERFUL (also in all caps), although in significantly smaller type. As was true of the same words on Coca-Cola’s label, it is unclear whether POMEGRANATE BLUEBERRY is the product’s name or merely a description. The ingredients list on the back of the label reveals that the contents are 85% pomegranate juice and 15% blueberry juice. Is POMEGRANATE BLUEBERRY misleading? Arguably not, because the predominant

⁷⁴ “Competitors who manufacture or distribute products have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies. Their awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators.” *Id.*

⁷⁵ *Id.* at 2239 (emphasis added). While acknowledging that the FDA’s labeling regulations were far more detailed than the Lanham Act, the Court did not consider this a sufficient reason to give those regulations preclusive effect: “[T]his greater specificity would matter only if the Lanham Act and the FDCA cannot be implemented in full at the same time.” *Id.* at 2240. It would appear, then, that a federal false advertising claim can be preempted only by an FDA regulation that requires labels to be false or misleading – a highly unlikely scenario.

⁷⁶ *Id.* at 2240-41.

⁷⁷ *Id.* at 2241. The Court distinguished *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), where federal regulations specifically authorized auto manufacturers to choose whether or not to install air bags. The Court held in *Geier* that this authorization precluded a state law tort claim that sought to impose liability on a manufacturer for failing to install air bags. Because the purpose of the federal law was to encourage flexibility and innovation in safety restraints, that purpose would be frustrated if state tort laws restricted those choices. *Id.* at 875. *Pom Wonderful* Court distinguished *Geier* by noting that “the FDA has not made a policy judgment that is inconsistent with Pom’s Lanham Act suit,” and “[t]his is not a case where a lawsuit is undermining an agency judgment.” 134 S.Ct. at 2241.

ingredient appears first. On the other hand, the fact that both words are in the same size type could imply to some consumers that the two juices are present in 50/50 blend. What if the words were reversed? Would BLUEBERRY POMEGRANATE be misleading? What if a consumer survey indicated that a substantial number of consumers believed that blueberry juice predominated? What if Pom Wonderful revised the blend to include 5% grape juice, but still labeled the product POMEGRANATE BLUEBERRY?

How should Coca-Cola label its product now? Would “Pomegranate Blueberry Juice Product,” “Pomegranate Blueberry Juice Blend” or “Pomegranate Blueberry Drink” be misleading? It is possible that *any* use of the term “juice” or any mention of a specific fruit could mislead some consumers into believing that the product has a higher fruit juice component than is actually the case. Yet the same concerns about terminology seem less compelling when the product is unabashedly unhealthy. No one believes that lime Jello is made from limes. Is it somewhat more likely that some consumers believe that Fruit Loops contain fruit? Who decides when a misdescription (whether literal or implied) is so implausible as to be non-misleading? Should courts use their own judgment? When are consumer surveys essential?

D. Misleading Labels for Dietary Supplements

The Dietary Supplement Health and Education Act of 1994 (DSHEA)⁷⁸ classifies dietary supplements as foods rather than drugs. As such, they are subject to a lower degree of regulation than drugs, although consumers may not realize this. The DSHEA states that they may not contain ingredients that create “a significant or unreasonable risk of illness or injury” when the product is used as directed on the label, or under normal use if there are no directions. However, in contrast to the stricter regulations it applies to drugs, the FDA does not require any testing before a dietary supplement is marketed; in this respect, the FDA treats dietary supplements like foods rather than like prescription or non-prescription drugs. Therefore, the presence of harmful ingredients (such as pesticides or other contaminants) may not be detected until actual harm occurs. Recent studies have indicated that dietary supplements bear misleading labels with disturbing frequency; such labels may misstate the nature, purity, or quantity of the ingredients.⁷⁹

E. Should Names and Labels be Analyzed Differently?

Should the false advertising analysis be different for names than for labels? Perhaps, for several reasons:

⁷⁸ 21 U.S.C. § 321.

⁷⁹ From 2004-2012, more than half of the Class 1 drugs recalled by the FDA were dietary supplements. The majority of these were sexual enhancement, bodybuilding, and weight loss products that contained unapproved ingredients, such as steroids. Ziv Harel, Shai Harel, Ron Wald, Muhammad Mamdani, Chaim M. Bell, *The Frequency and Characteristics of Dietary Supplement Recalls in the United States*, *JAMA Internal Medicine* 2013, 173(10): 929-30. Another study using DNA barcoding of 44 herbal products found that the majority contained contaminants, fillers, and plant species not listed on the labels; this rendered the products less effective and, in some cases, posed serious health risks. Steven G. Newmaster, Meghan Grguric, Dhivya Shanmughanandhan, Sathishkumar Ramalingam, and Subramanyam Ragupathy, *DNA Barcoding Detects Contamination and Substitution in North American Herbal Products*, *BMC Medicine* 2013, 11:222 (Oct. 11, 2013).

(1) Consumers typically encounter the contents of a label only when viewing the product's packaging, either while in physical proximity to the product or while viewing detailed images of the packaging. In contrast, names appear not only on the labels but in all advertising and communications about the product, so that consumers may encounter the name without seeing the information on the label (such as the ingredients list) that might mitigate any confusion arising from the name.

(2) Because product names are also the subject of trademarks, misleading names are often weeded out by trademark law. Restrictions on federal trademark registration will dissuade many trademark owners from adopting misleading names for their products or services, but they do not limit the other information that a label might convey or imply. A mark cannot be registered if it is deceptive,⁸⁰ and if it is deceptively misdescriptive it can only be registered with proof of secondary meaning.⁸¹ Because many trademark owners aspire to obtain, and maintain, registration on the Principal Register, this goal will dissuade them from choosing misleading marks. On the other hand, if a trademark owner that is content to rely on common law protection, the Lanham Act does not prevent the owner from adopting a misleading mark.

(3) Based on their own experience, consumers may be predisposed to perceive product names as somewhat fanciful or hyperbolic, while they are likely to perceive the other content of a product's label as conveying objective information and, in the case of items such as food, drugs, cosmetics,⁸² and dietary supplements,⁸³ as conforming to legal requirements external to the Lanham Act. Consumers may believe that the information on the label is subject to a greater degree of government regulation than is in fact that case, as in the example of dietary supplements.

F. Living in a Post-POM World

On the heels of *Pom Wonderful*, the Center for Science in the Public Interest (CSPI) threatened to sue the Campbell Soup Company over its products labeled V8 Splash and V8 V-Fusion Refreshers. V8 Splash contains only 5-10% juice, while the Refreshers drinks contain 20-25% juice; both products consist mostly of high-fructose corn syrup, artificial dyes, and in some cases artificial sweeteners. However, the labels show pictures of fruits and vegetables, and the packaging looks almost identical to the original V8 and V-Fusion juice, both of which are 100% juice. Even the label of original V8 juice is potentially vulnerable to challenge: The label says "100% juice," but because the juice is from concentrate, it contains added water.⁸⁴ It also contains large quantities of added salt, as well as unidentified "flavorings."

The term "natural" is not defined by the FDCA and has no settled meaning among food producers or consumers. Surveys show that consumers do not know the difference between "organic" and "natural" foods.⁸⁵ Several state-law class actions have been filed against makers of

⁸⁰ 15 U.S.C. § 1052(a).

⁸¹ *Id.* § 1052(e).

⁸²

⁸³ Dietary Supplement Health and Education Act of 1994 (DSHEA), 21 U.S.C. § 21.

⁸⁴ Hemi Weingarten, *V8 Vegetable Juice – Twice the Salt of McD's French Fries* (April 27, 2010), available at <http://blog.fooducate.com/2010/04/27/v8-juice-a-health-scam/>.

⁸⁵ *Bogus "Natural" Products Under Attack*, available at <http://eatdrinkbetter.com/2013/07/16/natural-labels/>.

products that label their goods as “natural,” including an action against Chobani Greek Yogurt for using labels that state “Only Natural Ingredients” and “No Artificial Flavors,” even though the products contain artificial flavorings, coloring, and chemical preservatives, and for listing “Evaporated Cane Juice” as an ingredient while failing to mention sugar.⁸⁶

Another dispute has erupted over mayonnaise – specifically, Hampton Creek’s vegan alternative to mayonnaise called “Just Mayo,” which contains no eggs but displays an egg-shaped image on its label.⁸⁷ Unilever, which makes Hellman’s and Best Foods mayonnaise, sought a preliminary injunction, arguing that the brand name and advertising falsely imply that the product contains eggs.⁸⁸ A few weeks after Unilever dropped its suit, apparently due to bad publicity,⁸⁹ a consumer class action was filed, making similar claims under Florida’s Deceptive and Unfair Trade Practices Act.⁹⁰

Several courts have held that the *Pom Wonderful* analysis is not limited to food and beverage labels, but applies also to other FDCA-regulated products, including drugs, medical devices, and cosmetics.⁹¹

G. Falsity and Trademark Distinctiveness

The Lanham Act’s provisions on federal trademark registration both penalize and reward falsity. Trademarks that imply *false but plausible* assertions about goods or services are either (1) completely unregistrable if they are “deceptive,”⁹² or (2) registrable only upon acquiring secondary meaning⁹³ if they are “deceptively misdescriptive.”⁹⁴ The latter penalty, however, is

⁸⁶ *Kane v. Chobani, Inc.*, Case no. CV 12-02425 (N.D. Cal. filed May 14, 2012).

⁸⁷ Stephanie Strom, Hellman’s Maker Sues Company over Its Just Mayo Substitute Mayonnaise (Nov. 10, 2014), available at http://www.nytimes.com/2014/11/11/business/unilever-sues-a-start-up-over-mayonnaise-like-product.html?_r=0.

⁸⁸ *Conopco, Inc. v. Hampton Creek, Inc.*, case no. 2:14-cv-06856 (D.N.J. 2014) (citing FDA regulations, 21 C.F.R. 169.140).

⁸⁹ Elaine Watson, *Unilever Drops “Just Mayo” Lawsuit* (Dec. 19, 2014), available at <http://www.foodnavigator-usa.com/Regulation/Unilever-drops-lawsuit-vs-Hampton-Creek-Foods-over-Just-Mayo>.

⁹⁰ Elaine Watson, *Hampton Creek Foods Sued Again over “Deceptive” Just Mayo Name* (Feb. 24, 2015), available at <http://www.foodnavigator-usa.com/Regulation/Hampton-Creek-Foods-sued-again-over-deceptive-Just-Mayo-name>.

⁹¹ *Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GmbH*, 2015 WL 2359467 (Mar. 24, 2015); *JHP Pharmaceuticals, LLC v. Hospira, Inc.*, 52 F. Supp.3d 992, 999-1000 (C.D. Cal. 2014).

⁹² 15 U.S.C. 1052(a). A trademark is “deceptive” as applied to particular goods if (1) it misdescribes the character, quality, function, composition or use of the goods, (2) prospective purchasers are likely to believe that the misdescription actually describes the goods, and (3) the misdescription is likely to affect the decision to purchase the goods. *In re Budge Mfg. Co.*, 857 F.2d 773, 775 (Fed. Cir. 1988).

⁹³ *J.T. Colby & Co., Inc. v. Apple Inc.*, 2013 WL 1903883, *9 (S.D.N.Y. May 8, 2013); *Marilyn Miglin Model Make-Up, Inc. v. Jovan, Inc.*, 224 U.S.P.Q. 178, 1984 WL 63130, *3 (N.D. Ill., July 24, 1984). The PTO can dispense with proof of secondary meaning if the applicant’s use of the mark has been substantially exclusive and continuous for five years. 15 U.S.C. 1052(f).

⁹⁴ 15 U.S.C. 1052(e)(1). A deceptively misdescriptive mark satisfies the first two tests for deceptiveness under *Budge*, but not the third (reliance). *See, e.g., J.T. Colby*, 2013 WL 1903883 at *9; *Marilyn Miglin Model Make-Up*, 224 U.S.P.Q. at ___, 1984 WL 63130 at *3 (“[A] deceptively misdescriptive mark is one in which consumer confusion as to ingredients, rather than mistaken reliance, is at issue.”); *Gold Seal Co. v. Weeks*, 129 F. Supp. 928, 934-35 (D.D.C. 1955) (GLASS WAX for a cleaning product containing no wax was not deceptive, but was deceptively misdescriptive because “customers might justifiably believe that it does contain the element wax,

triggered not by the mark’s falsity but by its descriptiveness; the same penalty – requiring secondary meaning as a condition of registration – applies also to descriptive marks that are truthful.⁹⁵ A third category of false trademarks is rewarded rather than penalized: Marks that imply *false but implausible* assertions are treated as inherently distinctive, and therefore can be registered without any proof of secondary meaning. These three categories of marks are distinguished from each other only by the way in which consumers interpret the false inferences arising from them. Thus, the subjective perceptions of consumers are crucial to determining whether the PTO will give a “false” mark preferential treatment or opprobrium.

When a mark that implies something false about the nature of a product is granted registration, either because the false inference is implausible or because the mark has acquired secondary meaning and is not deceptive, registration does not guarantee that consumers who encounter the mark will never be misled. The PTO’s registration decision is based on the mark itself and its relationship to the goods or services for which it is being registered; it does not (and cannot, for obvious practical reasons) consider the overall context (e.g., packaging, labeling, and advertising materials) in which the mark will eventually appear. Depending on the surrounding context, a mark that was non-deceptive “on paper” could become deceptive when consumers actually encounter it in the marketplace.⁹⁶ Thus, a mark can be registrable and still constitute false advertising once it is actually put to use.⁹⁷

H. Assigning Meaning to Names and Labels

An essential step in analyzing whether words or images are misleading is assigning meaning. Because consumers bring different experiences and predispositions to the interpretation of product names and labels – as well as other advertising messages – there will rarely be one indisputable meaning for the words and images found on product labels.

whether or not it was significant to them in purchasing the product.”), *aff’d per curiam sub nom. S.C. Johnson & Son v. Gold Seal Co.*, 230 F.2d 832 (D.C. Cir. 1956); *In re Phillips-Van Heusen Corp.*, 63 U.S.P.Q.2d 1047 (TTAB Mar. 28, 2002) (noting multiple dictionary meanings for the terms “super” and “silk”); *In re Quady Winery, Inc.*, 221 U.S.P.Q. 1213, 1214 (TTAB 1984). Some courts mistakenly use the three-part test for deceptive marks when they attempt to define deceptively misdescriptive marks. *See, e.g., Hako-Med USA, Inc. v. Axiom Worldwide, Inc.*, 2006 WL 3760416, *2 (M.D. Fla. Dec. 19, 2006) (citing *Budge*, 857 F.2d at 775) (also suggesting that, in the absence of consumer reliance on the misdescription, the mark is descriptive). With respect to geographic marks, the distinction between deceptive and deceptively misdescriptive marks was effectively eliminated by the Federal Circuit in *In Re California Innovations*, 329 F.3d 1334 (Fed. Cir. 2003). *See Mary LaFrance, Innovations Palpitations: The Confusing Status of Geographically Misdescriptive Trademarks*, 12 J. Intell. Prop. L. 125 (2004).

⁹⁵ 15 U.S.C. 1052(e)(1). *See, e.g., J.T. Colby*, 2013 WL 1903883 at *9; *Otto Roth & Co., Inc. v. Universal Foods Corp.*, 640 F.2d 1317, 1322 (Ct. Cust. & Pat. App. 1981); *Bass Buster, Inc. v. Gapen Mfg. Co., Inc.*, 420 F. Supp. 144, 153 (W.D. Mo. 1976).

⁹⁶ The opposite is true as well. Marks that appear deceptive or deceptively misdescriptive on their face (and may therefore be denied registration) might not actually deceive consumers in the marketplace if the surrounding materials sufficiently negate the misleading inference. Because there is no way to guarantee that the mark will always appear in the same context, such contextual evidence will not allow a mark to be registered (or prevent a registered mark from being cancelled) if the mark is deceptive on its face. *See, e.g., In re Budge Mfg. Co.*, 857 F.2d 773, 776 (Fed. Cir. 1988); *R. Neumann & Co. v. Overseas Shipments, Inc.*, 326 F.2d 786, 790 (Ct. Cust. & Pat. App. 1964); *In re Bonide Chem. Co.*, 46 F.2d 705, 708 (Ct. Cust. Pat. App. 1931).

⁹⁷ *See Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 250-56 (3d Cir. 2011) (in contrast to trademark deceptiveness analysis, false advertising can consider context).

Yet the PTO and the courts often draw conclusions about how consumers interpret language and images without the benefit of consumer surveys, relying instead on their own interpretations of meaning. They have done this not only in the context of false advertising claims, but also in assessing the likelihood of confusion between similar trademarks and the likelihood of blurring or tarnishment in the case of allegedly dilutive marks.⁹⁸ In the trademark infringement context, this is often necessary when the parties to a trademark dispute do not provide evidence of actual confusion; in the registration context, the PTO does not have the resources to conduct its own surveys.⁹⁹ In the dilution context, it results from Congress's decision not to require evidence of actual dilution. Commentators have criticized the courts for over-confidence in their own perceptions in the context of copyright law.¹⁰⁰ Similar criticisms might be leveled at courts that place too much trust in their own interpretations of the meanings conveyed to consumers by product names and labels.

IV. Conclusion

After *Pom Wonderful*, food and beverage makers seeking to avoid Lanham Act liability for misleading labels should treat FDA regulations as a floor rather than a ceiling, and focus their efforts on considering how their labels will be perceived by typical consumers.¹⁰¹ In the case of food and beverages, it may be difficult to predict how consumers will perceive certain labels. For example, if a beverage is labeled as "Pomegranate Juice," consumers are likely to believe that a large percentage of the beverage consists of juice from a Pomegranate. But how does this translate to a percentage? Fifty percent? Ten percent? Eighty percent? Alternatively, if the label reads "Pomegranate Juice Beverage" or "Pomegranate Juice Product," will the typical consumer understand that the percentage of Pomegranate juice may be quite small? If so, how small? This high degree of uncertainty may lead manufacturers to conduct consumer surveys in order to determine how their labels are likely to be perceived. They can no longer rely on FDA regulations as a safe harbor against false advertising liability.

Problematic labeling has become pervasive in the markets for food, beverages, and dietary supplements. Consumers' understanding of terms such as "all natural," "sustainably farmed," "humanely raised," "free range," "no sugar added," "light," "low carb," "low fat," and "fat free" may not match the actual contents of the products. Images of fruits, grains, or vegetables may appear on the label of a product that consists mainly of sugar. "Zero trans fat" products can have up to .5 mg of trans fat per serving. "Cholesterol free" products can have up to 2 mg of cholesterol; "low cholesterol" products can have up to 20 mg. If a product is "made with

⁹⁸ *E.g.*, Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 250-56 (3d Cir. 2011) (while meaning of words is question of fact, sometimes court is correct to reject survey evidence when meaning of words to reasonable people is clear); Steinberg Bro., Inc. v. New England Overall Co., 377 F.2d 1004, 1005-1006 (common knowledge that dungarees are made of denim, so NUHIDE mark is not likely to deceive public believing they are made of leather).

⁹⁹ *In re Budge*, 857 F.2d 773, 775 (Fed Cir 1988).

¹⁰⁰ See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 Harv. L. Rev. 683, 708 (2012); Zahr Said, *Only Part of the Picture: A Response to Professor Tushnet's Worth a Thousand Words*, 16 Stan. Tech. L. Rev. 349 (2013).

¹⁰¹ The Supreme Court's decision addresses only food and beverage products. The opinion expressly notes that these product labels are "[u]nlike other types of labels regulated by the FDA, such as drug labels," because they are not *preapproved* by the FDA. 134 S.Ct. at 2239.

organic ingredients,” the USDA allows up to 30% of the ingredients to be grown with fertilizers and pesticides. Does this match the consumer’s understanding?

Given the tradition of puffery in the marketing of food and beverages, *Pom Wonderful* opens the door to a flood of potential litigation. Unless Congress intervenes by amending the FDCA or the Lanham Act to limit or preclude federal false advertising claims against labels that comply with FDA regulations, manufacturers are likely to adopt a more conservative approach to food and beverage labels. This incentive to label more conservatively is a socially beneficial result for consumers. However, the costs arising from false advertising claims between competitors could lead to an increase in consumer prices for food and beverage products. Alternatively, competitors may be reluctant to bring false advertising claims based on labeling, for fear of retaliation. As long as puffery remains the norm, many food and beverage manufacturers will find that they live in the proverbial glass house.

Legislative efforts may someday improve the accuracy of food labeling,¹⁰² but in the meantime Lanham Act false advertising claims and state laws allowing private rights of action for consumers are likely to proliferate as a result of *Pom Wonderful*. Congressional action to clarify the application of the Lanham Act to product names and labels, or to create a safe harbor for FDA or USDA-permitted content, could reduce uncertainty but might be premature. With so few false advertising precedents involving product names, and only a few more involving product labels, courts have not had many occasions to address such claims. As courts hear more of these disputes, they may be able to provide clearer guidance. In this context, moreover, the absence of safe harbors or clearcut standards may be good for consumers. The uncertain scope of false advertising claims as applied to names and labels may encourage manufacturers to be more cautious in choosing product names and selecting content for their labels, which should have the beneficial effect of reducing the likelihood of consumer confusion.

¹⁰² The Food Labeling Modernization Act was proposed in 2013 but not enacted.

