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MAKING IT STOP: A PRACTICAL GUIDE TO CHALLENGING YOUR COMPETITOR'S ADVERTISING CLAIMS

By

John E. Villafranco and Jennifer Ngai*

ASSESSING OPTIONS FOR CHALLENGE

You are an in-house attorney or outside counsel and your client brings a competitor's advertising claim to your attention, convinced that it cannot be substantiated. You are asked to take action to prevent further damage to your client's market position. But taking a stand does not and should not always mean taking your competitor to court. What are your options, and what factors will influence your recommended course of action?

Depending on the circumstances, you may be able to halt the offending claims simply by sending a demand letter or, if the issue involves broadcast advertising, by notifying the networks. A demand letter, otherwise known as a "cease and desist" letter, states the challenger's legal argument against the validity of the claim and sends a simple message to the competitor – modify or discontinue the claim, or suffer the consequences. While this has the benefit of being inexpensive, sending a demand letter also has downsides. You can almost always expect your competitor to reply that *your* client's advertising is false and deceptive, which will require some back-and-forth disputing such points. In addition, a competitor in this situation is unlikely to admit any wrongdoing. The best outcome is usually a statement that the campaign has "run its course and will be discontinued" or will be modified "for other reasons."

Similarly, if the issue involves broadcast advertising, notifying the networks of a competitor's false advertising claims may be effective. Much like a demand letter, network challenge often leads to a counter-complaint and requires internal assistance collecting facts and conducting testing. However, the principal networks have advertising standards and procedures that apply to challenges, and a well-constructed argument with relevant documentary or other extrinsic evidence can end an advertising campaign–even if only temporarily while the network decides the challenge. In this regard, notifying the networks can have the same effect as a temporary restraining order but at a fraction of the cost. Where your client's primary goal is just to "make it stop" and let a competitor know the company is monitoring claims, these options can provide a simple, effective solution.

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When a demand letter or network notification is not a viable option, however, there are three principal ways to challenge a competitor's advertising claims:

(1) initiate a proceeding before the National Advertising Division (NAD),

(2) alert state and/or federal regulators, or

(3) litigate.

These options are not exclusive, and in some cases it may be effective to pursue more than one simultaneously. Similarly, failure to obtain the desired result through one avenue may require your client to proceed with another.

This article provides the practical guidance necessary to evaluate which option or options are best suited to serve your client's needs and increase the likelihood of a successful challenge. By weighing the pros and cons of each method and staying up-to-date on relevant cases and trends, you will quickly transform any plan of attack from standard to strategic.

INITIATE A PROCEEDING BEFORE THE NAD

The National Advertising Division of the Council of Better Business Bureaus, Inc. is a self-regulatory body that commands the respect of national advertisers, advertising attorneys, federal and state regulators, and the judiciary. Advertising issues brought to the NAD's attention receive thorough review by highly competent attorneys who apply relevant precedent in reaching a determination of whether an advertising claim is truthful, non-misleading, and substantiated. Parties may appeal NAD decisions to the National Advertising Review Board (NARB).

The Process

One of the greatest benefits of using the NAD process is the ability to obtain a thorough review on the merits in only a fraction of the time required for litigation. The NAD process provides for briefing and, if desired, meetings. A well-reasoned decision is usually issued within about 90 days of a challenge, unless the challenger opts to use NAD's expedited process, thus waiving the right to respond after the initial filing of the complaint and potentially speeding up the entire process by several weeks to obtain a decision in closer to 60 days. Because both the regular and expedited timeframes are determined at least in part by the scheduling of meetings following briefing, if meetings occur promptly, the time to a decision may be decreased significantly. For example, in November 2006 NAD issued a decision in favor of Reckitt Benckiser Inc., which had challenged competitor S.C. Johnson & Son, Inc. for advertising claims related to Oust Air Sanitizer. Having already presented the relevant

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facts and legal arguments in its initial brief, Reckitt Benckiser opted to invoke the expedited process and waive its right to submit a final brief after receiving S.C. Johnson's response. As a result, Reckitt Benckiser was able to receive a favorable decision in only 61 days. Further, because meetings accounted for 15 of the days, the actual time to decision was only 46 days.[2]

Another significant benefit of the NAD process is that there is no discovery. This results in substantial cost savings and relieves the challenger of having to engage in costly and potentially disruptive discovery. While total costs for an NAD proceeding vary according to the nature of the complaint, a challenger should expect to spend quite a bit more than it would if it were pursuing a remedy through a demand letter but much less than if it were forced to litigate. There is an NAD filing fee of $2,500 for members of the Council of Better Business Bureaus, Inc. and $6,000 for non-members. With regard to preparation, internal assistance is usually required to marshal facts and gather testing documents. NAD has rules concerning the treatment of confidential materials so that proprietary information submitted during the process is protected.

Extrinsic evidence, such as consumer surveys, is not required but highly recommended when challenging implied claims. In recent years, there has been increasing acceptance of online surveys to support implied claims at the NAD. For example, in a case brought by Bissell Homecare, Inc. against Electrolux Homecare Products, Bissell submitted an online consumer perception survey to support its position that consumers were taking away a false message from Electrolux advertising for its Eureka Atlantis Extractor with OptiHEAT.[3] In its decision, NAD acknowledged that, despite certain drawbacks of online surveys, such as the lack of a face-to-face meeting with participants, online surveys are becoming increasingly prevalent and the trend will continue. Accordingly, NAD evaluated the online consumer perception survey the same way it would a "real world" consumer study and used some of the data in reaching its recommendation that the advertiser modify its claims.[4]

While NAD rules do not permit counterclaims, in practice, challengers are sometimes the target of retaliatory counter-challenges. Thus, like the demand letter, initiating a proceeding before NAD may come with the risk of receiving a challenge in return. To the extent NAD accepts the counter-challenge, it assigns a different case review specialist to ensure the proceedings do not bleed into each other.

Regardless of the outcome, each NAD decision is accompanied by a press release, and advertisers are asked to provide a statement indicating whether they intend to comply with the NAD decision. With the exception of this press release, NAD proceedings are generally not appropriate for publicity, and NAD participants must sign a statement at the outset of the case confirming that the proceedings are not to be used for publicity during or after the case.

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Further, crowing after a victory at NAD is considered bad form and can work against a successful party in future cases. Note, however, that NAD does permit a prevailing party to provide a list of media contacts who will then be sent the press release announcing the decision. Under no circumstances, however, can that list contain business contacts.

In Practice

NAD has an excellent reputation and has been increasingly recognized in a variety of contexts as being the most appropriate, authoritative entity on advertising issues. For example, in 2006 the Council for Responsible Nutrition (a prominent dietary supplement trade organization) chose to enlist NAD as its partner in launching a new initiative to expand the review of dietary supplement advertising, describing NAD as an excellent model of self-regulation by the Federal Trade Commission. In a series of grants totaling almost half a million dollars over three years, the initiative has provided NAD with an additional attorney focused solely on dietary supplement regulation.[5] Similarly, the Electronic Retailing Self-Regulation Program was formed under the National Advertising Review Council in 2004 as an extension of NAD's success as a self-regulatory program, focusing solely on evaluating, investigating, and resolving inquiries regarding the truthfulness of efficacy or performance claims in national direct response advertising.[6] NAD's expertise is further underscored by the rarity of reversals upon appeal to the NARB. In 2007, while NARB granted 10 appeals, not one was overturned.

One of the most significant recent acknowledgments of NAD's reputation and authority was in the 2007 Southern District of New York case *Russian Standard Vodka (USA), Inc. v. Allied Domecq Spirits & Wine USA, Inc.*[7] Russian Standard made claims in its advertising that it was the only true Russian vodka and that Allied Domecq's Stolichnaya vodka was not Russian. Allied Domecq challenged these claims at the NAD; however, after the challenge was fully briefed, Russian Standard closed down the NAD proceeding by seeking a declaratory judgment in the Southern District of New York that would allow them to continue making the claims at issue, receive damages, and obtain injunctive relief. Under NAD rules, cases that are the subject of litigation are outside NAD's jurisdiction. Thus, NAD suspended its proceeding once Russian Standard brought the litigation. In response, Allied Domecq sought a stay of the federal suit to allow the NAD to complete its "inquiry." The court found that such a stay was appropriate because "[a]llowing the NAD, a highly reputable institution, to provide its expert view on Stoli's authenticity as a Russian vodka would be extremely useful in resolving remaining claims in the complaint. The decision would promote judicial economy and be informative to the court in its own decision regarding the remaining claims. Furthermore, the NAD decision would promote settlement between the parties."[8] This holding sent the case back to NAD, which subsequently recommended that Russian Standard discontinue claims

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that Stolichnaya vodka is distilled in Latvia, rather than Russia, and that it modify or qualify any claims suggesting that Stolichnaya vodka is not "authentically Russian."[9] The district court's decision raises the profile of NAD in federal court proceedings and makes it harder for an advertiser to successfully end an NAD proceeding by filing an action for declaratory judgment.

Along with its reputation comes an excellent compliance record. Reputable advertisers honor NAD decisions even if they do not always agree with them. When an advertiser refuses to cooperate with NAD proceedings or indicates that it will not comply with an NAD decision–a rarity (reportedly less than 5 percent of decided cases)–NAD forwards the case to the Federal Trade Commission or to a state regulator for action. While NAD referral has rarely resulted in a formal order in past years, the potential for increased scrutiny is a substantial deterrent against advertisers failing to cooperate with NAD.

NAD handles cases involving a variety of recurring issues each year. Out of 176 cases handled by NAD in 2007, 77 cases involved performance claims but only 8 cases involved comparative performance claims. Twenty-one cases involved health and safety claims, 16 cases involved implied or perceived claims, and 9 cases involved claims of superiority. NAD handled cases involving several other issues, including but not limited to efficacy claims, pricing or discounts, and product packaging. Surprisingly, however, disparagement claims were only at issue in one case the entire year. This may reflect a general trend away from aggressive advertising tactics that directly disparage competitors and a corresponding shift toward the use of implied, contextual claims. The large proportion of cases involving general product performance claims may also reflect that more actions were initiated by NAD than by competitors. Excluding the 47 cases still pending in 2007, 67 of the cases handled that year were initiated by NAD through its routine monitoring program compared to 56 cases initiated by competitors. The few remaining cases were initiated by local BBB offices or consumer complaints.

Finally, an analysis of the NAD case dispositions from 2007 indicates that the largest percentage of cases–over forty percent–ended with NAD recommending that the claims at issue be modified or discontinued. In the remaining cases, NAD found that either all or some of the claims at issue were substantiated, administratively closed the case, or referred the case to the government.

ALERT STATE/FEDERAL REGULATORS

Issues with advertising can always be brought to the attention of regulators in the hope that the FTC or state officials will use their statutory authority to end an offending practice. There are advantages to this course of action. Complaints to federal and state regulators can be made at virtually no cost, and there are many government attorneys who have the skills that will enable them

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to understand the implications of your complaint and accurately assess the potential for consumer harm. The FTC is especially well-versed in assessing false advertising issues and holds public workshops on complying with federal and state truth-in-advertising standards several times each year throughout the country in cooperation with national advertising experts and local partners.[10] Further, the Division of Advertising Practices within the FTC coordinates consumer protection initiatives with state, federal, and international law enforcement agencies, as well as with industry self-regulation groups. The agency's strong ties with other regulators and enforcement agencies has the benefit of adding extra "bite" to a report that a competitor is engaging in false or misleading advertising.

There are, however, significant disadvantages to proceeding solely in this fashion. Once the complaint is made, you have no control over how (or if) the investigation will proceed. Indeed, an investigation can carry on for years without your knowledge that it is even underway. Statutes and regulations regarding maintenance of confidentiality during investigations prohibit regulators from sharing information about progress. And if publicity is important to your company's challenge, this is not the correct forum.

Further, while there is no risk of a counterclaim here, there is always the risk that arises when you grab the tiger by the tail. Educating the government about an industry concern poses a risk of increased scrutiny of the entire industry. Such industry-wide investigations, or "sweeps," are a common practice for regulators, and we have seen this type of enforcement applied to a whole range of industries. For example, in addition to actively pursuing dietary supplement advertising cases since at least 1983, the FTC has also launched numerous health-related enforcement campaigns that have led to consent orders against dietary supplement advertisers.[11] Given the risk of broad industry investigation and enforcement, your company's advertising and related documents should be clean before alerting a regulator to your competitor's advertising practices.

If you decide to go forward, you likely would want to present a white paper outlining your position. This may require internal assistance with facts and testing. Meetings with regulators also may be to your advantage. Whether a regulator will actually proceed, however, depends on a variety of factors, with consumer harm the most critical. One example of the type of case likely to capture a regulator's attention was the 2004 FTC action against Kentucky Fried Chicken Corporation.[12] In that case, the FTC charged KFC with making false claims in a national television advertising campaign about the relative nutritional value and healthiness of its fried chicken. The Commission also charged the company with making false claims that its fried chicken was compatible with certain popular weight-loss programs. Because the public health was implicated, the FTC was quick to jump in. Similarly, the level or amount of consumer harm is directly correlated to the likelihood of attention

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from state attorneys general, potentially combining efforts in a large-scale, multi-state action. Conversely, if the dispute is perceived as a matter between competitors only, regulators are less likely to commit limited resources to investigation and resolution. Instead, they will expect the parties to resolve the issue through negotiation, self-regulation, litigation, or other means.

LITIGATE UNDER THE LANHAM ACT

The Lanham Act permits an advertiser to recover for injury sustained as a result of false and/or misleading claims made by competitors.[13] Under the Lanham Act, liability arises if the commercial message or statement is either (1) literally false, or (2) literally true or ambiguous, but has the tendency to deceive consumers because of an implied message.[14] For literal falsity, courts have expanded the "false on its face" classification to include advertisements where the "necessarily implication" of the claim is false. This variant of literal falsity requires that the challenged advertisement be susceptible to no more than one interpretation.[15] If a claim is literally false, courts may enjoin the claim without reference to its impact on the buying public. Otherwise, the plaintiff bears the burden of proving, usually through the use of a consumer survey, that consumers are actually receiving the challenged implied claim and that the claim is false. Money damages are rare.

While Lanham Act litigation will eventually lead to resolution, you should plan for the process to take 10 to 12 months if not longer. In addition, counterclaims are a near certainty, meaning you will need to identify potential vulnerabilities and weigh the associated costs of opening up certain areas of inquiry. There will be substantial disruption to the company's business, including depositions, interviews, development of expert testimony, and document discovery that could lead to the disclosure of potentially damaging documents. Finally, like all litigation, it is expensive. Thus, with several other options for challenging a competitor's advertising claims, you should generally only proceed with Lanham Act litigation if your client has the strongest of claims and a full expectation that counterclaims will follow.

Standing Limitations

In addition to determining whether the benefits of litigation will outweigh the costs, you should also consider whether your client is likely to be able to bring the action in the first place. Over the past several years, an increasing number of courts have both expressly recognized that prudential standing limitations apply to false advertising actions under the Lanham Act and applied those limitations to bar certain plaintiffs from pursuing claims. Prudential standing has been described as governed by "prudential considerations that are part of judicial self government,"[16] which enable courts "to avoid deciding questions

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of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."[17]

The most significant development in false advertising standing issues last year was unquestionably the 11th Circuit's decision in *Phoenix of Broward, Inc. v. McDonald's Corp.*[18] Phoenix of Broward, a Burger King franchisee, brought a purported class action against McDonald's, seeking damages based on McDonald's advertising for its promotional games between 1995 and 2001. These games were advertised as being "fair and equal." Due to fraud committed by the company McDonald's engaged to operate the games, there was no "fair and equal chance" to win high-value prizes, which were redirected to people affiliated with McDonald's' contractor. The district court granted McDonald's' motion to dismiss for lack of prudential standing, and the Eleventh Circuit affirmed.

First, the Eleventh Circuit, as a matter of first impression, and joining the Third and Fifth Circuits, held that prudential standing limitations applied to false advertising claims under the Lanham Act. The court then went on to join the Third and Fifth Circuits in adopting the Third Circuit's *Conte Brothers* test for prudential standing. Finally, the court applied the *Conte Brothers* factors, and concluded that, while Phoenix of Broward had alleged an injury stemming from the McDonald's advertisements and, as a competing franchisee, was likely to be injured by the advertisements, because "the causal chain linking McDonald's alleged misrepresentations about one aspect of its promotional games to a decrease in Burger King's sales is tenuous, to say the least," the damages were both remote and highly speculative, the court further concluded that apportioning damages between McDonald's' many and various competitors would be excessively complex. Accordingly, Phoenix of Broward was found to lack prudential standing.

In the Second Circuit, *ITC Ltd. v. Punchgini, Inc.*[19] also reflects a continuing trend to limit standing to bar actions. Plaintiff ITC operates a "Bukhara" restaurant in India, previously operated "Bukhara" restaurants in the United States, and sells "Dal Bukhara" packaged foods in the United States. Defendants operate their own "Bukhara Grill" restaurant in the United States. Plaintiffs claimed that Defendants implied that their restaurant was affiliated with Plaintiff's products and this constituted false advertising. The lower court dismissed Plaintiff's advertising claims for lack of standing, and the Circuit affirmed.

First, the court stated that Plaintiff's mere plans to open "Bukhara" restaurants in the United States did not establish a protectable interest sufficient to give rise to standing. Second, the court held that since defendants were not comparing

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their restaurant to Plaintiff's packaged food products, Plaintiff's use of the "Dal Bukhara" name on such products did not provide them with standing to challenge Defendants' advertising. Finally, the court rejected the claim that Plaintiff's interests based on the operation of "Bukhara" restaurants overseas supported standing for a false advertising claim in the United States, as such activities were too remote to justify a U.S. court's intervention. Additional cases at the district court level also reflect courts' skepticism about expansive standing under the Lanham Act, especially where corporate customers or suppliers attempt to bring a false advertising action under section 43(a).[20]

Lanham Act Claims Based on Intellectual Property Rights

Another significant trend in Lanham Act litigation has been the continuing effort by courts to determine the scope to which *Dastar Corp. v. Twentieth Century Fox Film Corp.*[21] bars false advertising claims based on representations about intellectual property rights in a product. In *Baden Sports, Inc. v. Molten*,[22] the court rejected an effort to set aside a jury's finding that Molten's advertisement of a "Dual Cushion" basketball as "innovative" was false, despite Molten's claim that such a finding was barred by *Dastar*. The "dual cushion" basketballs in question include a sponge cushion layer between the skin of the basketball and the basketball's bladder. Although some witnesses took the position that the "innovative" claim in the advertisement was false because Molten was claiming inventorship of the "dual cushion" technology, the court concluded that the essence of the advertisement was a claim that the basketball was "new," and thus could not be barred by *Dastar*.

Notably, however, in a prior decision,[23] the court had rejected Baden's effort to assess a claim based on Molten's references to its product as "exclusive or "proprietary." The court concluded that such representations did "not relate to the 'nature' or 'qualities' of Molten's products, but to the fact that Molten invented and owns the basketball technology." Accordingly, the court granted partial summary judgment under *Dastar*. This pair of decisions illustrates that choice of words matters a great deal in determining actionability under *Dastar*. While advertising a product as "new" likely remains actionable, making representations that relate to exclusive rights in such a product may not be actionable.

Moving Forward with a Lanham Act Claim

Assuming you can still proceed with a Lanham Act claim, when your competitor's false advertising threatens to cause irreparable injury, you can move for a preliminary injunction, which, if granted, would end the campaign immediately. Irreparable injury can be shown by establishing the likelihood of consumer confusion. In Section 43(a) cases involving comparative

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advertising that specifically mentions the competitor, plaintiffs benefit from a presumption of irreparable injury.[24] For claims arising solely from the defendant's claims about its own product, on the other hand, some indication of actual injury and causation is required to ensure that the plaintiff's injury is not speculative.[25]

To prevail on a motion for preliminary injunction, a plaintiff must show, among other things, likelihood of success on the merits. This showing will require the plaintiff to argue the entire case, supported by relevant evidence, in a very tight time frame–usually about 30 days.

The filing of a motion for preliminary injunction sends a very clear signal to the marketplace and to the court:

(1) the challenged advertising is false and/or misleading;

(2) we are prepared to prove this allegation through testimony, documents, and extrinsic evidence;

(3) irreparable injury will result if the claims continue; and

(4) we are prepared to incur the associated costs of bringing this case.

Thus, while Lanham Act litigation is costly, burdensome, and involves substantial risk, it remains the strongest way to challenge a competitor's claim and, in some cases, may be the only effective option.

CONCLUSION

Challenging a competitor's advertising claims can mean anything from writing a letter to spending a year battling claims and counterclaims in court, with several additional options in between. While choosing the best plan of action is rarely an easy task, knowing what options are available and how they tend to play out in practice will enable you to choose strategically and adjust your plan wisely as you go.

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Footnotes

1. S.C. Johnson & Son, Inc. (Oust Air Sanitizer), Report # 4600 (*NAD/CARU Case Reports* November 2006).

2. *See also* Hills Pet Nutrition Inc. (Hill's Science Diet puppy and kitten products), Report # 4355 (*NAD/CARU Case Reports* July 2005) (67 days to decision with expedited process); Jelmar, LLC (CLR Enhanced Formula), Report # 4379 (*NAD/CARU Case Reports* August 2005) (88 days to decision with expedited process, where parties agreed to hold the case to be decided with a companion case; actual timeframe was only 55 days); Tropicana Products Inc. (Tropicana Pure Premium Orange Juice), Report # 4034 (*NAD/CARU Case Reports* February 2003) (approximately 60 days to decision with expedited process, including meetings).

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3. Electrolux Home Care Products, Ltd. (Eureka Atlantis Extractor), Report # 4561 (*NAD/CARU Case Reports* September 2006).

4. *Id.*

5. Press Release, Council for Responsible Nutrition, CRN, NAD Initiative to Expand Review of Dietary Supplement Advertising: New Initiative to Target False and Misleading Advertising (Sept. 18, 2006); John E. Villafranco and Andrew B. Lustigman, *Regulation of Dietary Supplement Advertising: Current Claims of Interest to the Federal Trade Commission, Food and Drug Administration and National Advertising Division* 62 Food & Drug L.J. 709, 710 (2007).

6. National Advertising Review Council, About the Electronic Retailing Self-Regulation Program (ERSP), http://www.narcpartners.org/ersp.

7. 523 F. Supp. 2d 376 (S.D.N.Y. 2007).

8. *Id.*

9. Company Russian Standard (Imperia Vodka), Report # 4591R (*NAD/CARU Case Reports* January 2008).

10. Green Lights & Red Flags: FTC Rules of the Road for Advertisers, http://www.ftc.gov/greenlights.

11. John E. Villafranco and Andrew B. Lustigman, *Regulation of Dietary Supplement Advertising: Current Claims of Interest to the Federal Trade Commission, Food and Drug Administration and National Advertising Division* 62 Food & Drug L.J. 709, 710 (2007); *see, e.g.*, Press Release, FTC, FTC Launches "Big Fat Lie" Initiative Targeting Bogus Weight-Loss Claims (Nov. 9, 2004) ("Today, the [FTC] is launching `Operation Big Fat Lie,' a nation-wide law enforcement sweep against six companies making false weight-loss claims in national advertisements . . . . The cases announced today challenge ads containing false . . . claims for a variety of products, including pills, powders, green tea, topical gels, and diet patches"); Press Release, FTC, FTC and FDA Act Against Internet Vendors of Fraudulent Diabetes Cures and Treatment (Oct. 19, 2006) (announcing that FTC and FDA sent a total of 108 warning letters to dietary supplement marketers and other companies making false, deceptive or otherwise illegal diabetes claims).

12. See Press Release, FTC, KFC's Claims that Fried Chicken Is a Way to "Eat Better" Don't Fly (June 3, 2004).

13. 15 U.S.C. § 1125(a).

14. *See Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 129–30 (3d Cir. 1994).

15. *John Wiley & Sons,* 2005 WL 2739267, at *6 (citation and internal quotation marks omitted).

16. *Lujan v. Defenders of Wildlife*, 555 U.S. 555, 560 (1992).

17. *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998), *quoting Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 560 (5th Cir. 2001) (explaining prudential standing).

18. 489 F.3d 1156 (11th Cir. 2007).

19. 482 F.3d 138 (2d Cir. 2007).

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20. *See Alexander Mill Services, LLC v. Bearing Distributors, Inc.*, 2007 WL 2907174 (W.D. Pa. Sept. 28, 2007) (competitor lacked standing to challenge representations about centrifuge where its injury resulted from its status as a consumer); *Mugworld, Inc. v. G.G. Marck & Associates, Inc.*, 2007 WL 2446539 (E.D. Tex. Aug. 23, 2007) (coffee mug supplier lacked standing to challenge labeling and packaging by customer company where it failed to show the parties had ever been competitors).

21. 539 U.S. 23 (2003).

22. 2008 WL 238593 (W.D. Wash. Jan. 28, 2008).

23. 2007 WL 2058673 (W.D. Wash. Jul. 16, 2007).

24. *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988) ("A misleading comparison to a specific competing product necessarily diminishes that product's value in the minds of the consumer.").

25. *Id.*

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