

2017

Brown v. GNC Corp.: The Fourth Circuit's New Standard for Literal Falsity

Olamide Orebamjo

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/proxy>

Recommended Citation

Olamide Orebamjo, *Brown v. GNC Corp.: The Fourth Circuit's New Standard for Literal Falsity*, 12 J. Bus. & Tech. L. Proxy 1 (2017), Available at: <http://digitalcommons.law.umaryland.edu/proxy/11>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Proxy by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

OLAMIDE OREBAMJO*

Brown v. GNC Corp.: The Fourth Circuit's New Standard for Literal Falsity

INTRODUCTION

What does it mean for an advertisement to be literally false? Does the advertisement need to actually deceive the public or does the advertisement have to be literally false on its face? Federal courts have consistently held that, under the Lanham Act,¹ to show that an advertisement is literally false, a plaintiff is not required to prove that an advertisement actually deceived customers, or that it was likely to do so, if the advertisement is literally or actually false.² However, if it is not clear whether the advertising statement is false, then the plaintiff must prove that it misled or deceived consumers.³ The difference between literal falsity and misleading advertisements has been articulated in various false advertising claims jurisprudence.⁴ Nonetheless, in

© 2017 Olamide Orebamjo

* J.D. Candidate, University of Maryland Francis King Carey School of Law, 2017

1. The Lanham Act is a federal statute that grants protection for trademark and unfair competition.

2. See *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. Ill. 1996) (“The general rule is that if a statement is literally false, the court may grant relief without reference to the reaction of buyers or consumers of the product.”); *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d. Cir. N.Y. 1978) (“Deceptive advertising or merchandising statements may be judged in various ways. If a statement is actually false, relief can be granted on the court’s own findings without reference to the reaction of the buyer or consumer of the product...”); *Groupe SEB United States, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 198 (3d. Cir. Pa. 2014) (stating that proving literal falsity relieves the plaintiff of its burden to prove actual consumer deception.); *PBM Prods. LLC v. Mead Johnson & Co.* 639 F.3d 111, 120 (4th Cir. 2011) (explaining that when an advertisement is literally false, a violation of the Lanham Act may be established even with no evidence of consumer deception).

3. See *Schering Corp. v. Pfizer Inc.*, F.3d 218, 229 (2d Cir. N.Y. 1999), *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1140 (9th Cir. 1997); see also *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007), *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 113 (2d. Cir. 2010), *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.* 902 F.2d 222, 228 (3d. Cir. 1990), *Clorox Co. v. Proctor & Gamble Commer. Co.*, 288 F.3d 24, 33 (1st Cir. 2000), *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 276 (4th Cir. 2002).

4. See, e.g., *Design Res., Inc v. Leather Indus. Of Am.*, 789 F.3d 495, 501 (4th Cir. 2015), *Innovation Ventures, LLC v. N.V.E. Inc.*, 694, F.3d 723, 735 (6th Cir. 2012), *Johnson & Johnson v. GAC Int’l, Inc.*, 862 F.2d 975, 977 (2d. Cir. 1988), *Time Warner*, 497. F.3d at 153, *Scotts Co.*, 315 F.3d at 276,

BROWN V. GNC CORP.

regards to literal falsity claims, courts have chosen to apply various tests depending on the basis of the plaintiff's claim.⁵

On June 2015, the Fourth Circuit heard *Brown v. GNC Corp. (In re GNC CORPORATION: Triflex Products Marketing and Sales Practices Litigation (No. II))*,⁶ a class action lawsuit brought by purchasers of joint health supplements against the manufacturer, GNC Corporation (GNC). The plaintiffs alleged that GNC violated state consumer laws by misrepresenting the effectiveness of the supplements.⁷ In response to the suit, GNC filed a motion to dismiss, which the district court granted and the Fourth Circuit affirmed.⁸ The court incorrectly found that in order to survive a motion to dismiss, a plaintiff in a false advertising suit must allege that all reasonable experts in the field agree that the representations are false.⁹ This ruling unfairly heightened the literal falsity standard of a false advertising claim and diverged from the literal falsity standard followed by its sister circuits; the third, fifth, and ninth circuits have found that the literal falsity standard does not require everyone in a particular field to agree.¹⁰ The Fourth Circuit wrongly decided this case and should have let a jury decide which experts to believe based on the evidence presented.¹¹

This Note argues that literal falsity should not be determined by an allegation that all scientists or experts agree on a particular predisposition at the pleading stage, but rather should be determined at a later stage where both parties are able to present evidence supporting or rebutting the issue at hand. Part I and Part II summarize *Brown v. GNC Corp.* and give a brief historical background of the Lanham Act and the literal falsity standard.¹² Part III explains the Fourth Circuit's reasoning. Part IV analyzes how *GNC Corp.* changed the literal falsity standard in the Fourth Circuit and discusses how this new standard unfairly heightens a plaintiff's burden in pleading literal falsity.¹³ Finally, Part V concludes that the Fourth Circuit overreached in its ruling and arguably created a strong pro-defendant precedent.¹⁴

5. The various tests that courts have applied depends on whether the challenged advertisement is based on test results. See *Castrol Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d. Cir. 1992) ("A plaintiff's burden in proving literal falsity thus varies depending on the nature of the challenged advertisement. Where the defendant's advertisement claims that its product is superior, plaintiff must affirmatively prove defendant's product equal or inferior. Where ... defendant's ad explicitly or implicitly represents that tests or studies prove its product superior, plaintiff establishes its burden by showing that the tests did not establish the proposition for which they were cited.).

6. 789 F. 3d 505 (4th Cir. 2015).

7. *Id.* at 506.

8. *Id.* at 515.

9. See *infra* Parts III, IV.

10. See *infra* Part IV.

11. See *infra* Part IV.

12. See *infra* Parts I, II.

13. See *infra* Parts III, IV.

14. See *infra* Part V.

OLAMIDE OREBAMJO

I. THE CASE

A. Background

General Nutrition Corporation and GNC Holdings (hereinafter, “GNC”) manufacture, market, distribute, and sell joint health dietary supplements under the names “TriFlex: GNC TriFlex; GNC TriFlex Fast-Acting; GNC TriFlex Sport; and GNC TriFlex Complete Vitapak.”¹⁵ These supplements all contain glucosamine hydrochloride and chondroitin sulfate (“glucosamine and chondroitin”).¹⁶ They also all contain the ingredients methylsulfonyl-methane (MSM) and hyaluronic acid (HA). TriFlex Fast-Acting and TriFlex Sport also contain herbs like white willow bark extract, hops cones extract, and Chinese skullcap root extract.¹⁷ Additionally, TriFlex Complete Vitapak contains tablets of TriFlex Fast-Acting as well as separate fish oil, willow bark, and MSM supplements.¹⁸

TriFlex product labels state that the supplements “promote[] joint mobility & flexibility,”¹⁹ “protect[] joints from wear and tear of exercise,”²⁰ “rebuild[] cartilage and lubricate[] joints,” and provide “[m]aximum strength joint comfort.”²¹ The labels also state that TriFlex Fast-Acting provides a 20% improvement in joint function and 25–30% improvement in joint flexibility.²²

Rite Aid Corporation (hereinafter, “Rite Aid”) also markets, distributes, and sells store brand supplements including: Rite Aid Glucosamine/Chondroitin; Rite Aid Natural Glucosamine /Chondroitin; Rite Aid Glucosamine Chondroitin Advanced Complex; Rite Aid Glucosamine Chondroitin, Triple Strength + MSM; Rite Aid Glucosamine Chondroitin + MSM; and Rite Aid Glucosamine Chondroitin Advanced Complex with HA.²³ These supplements are manufactured by GNC, which is contractually obligated to indemnify Rite Aid for any claims.²⁴ Similar to the GNC brand supplements, the Rite Aid supplements contain glucosamine, chondroitin, and the same or similar herbs.²⁵ Moreover, the Rite Aid labels also state that they “promote[] joint health” or that they “help[] rebuild cartilage and lubricate joints.”²⁶

15. *Brown*, 789 F.3d at 509.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Brown*, 789 F.3d at 509.

22. *Id.*

23. *Id.* at 510.

24. *Id.*

25. *Id.*

26. *Id.*

*BROWN V. GNC CORP.**B. The Litigation*

In *Brown v. GNC Corp.*, consumers purchased various GNC and Rite Aid joint health dietary supplements in different states.²⁷ The named plaintiff-consumers alleged that the supplements do not provide the health benefits stated on the labels and that they would not have purchased the supplements but for the advertisement on the labels.²⁸ The plaintiffs filed a putative class action suit against GNC and Rite Aid under the consumer protection laws of their states including various false and deceptive business practices claims.²⁹

The plaintiffs alleged that the advertisements on the labels of the supplements were false because many scientific studies indicate that glucosamine and chondroitin do not provide the promised health benefits.³⁰ The plaintiffs cited to peer-reviewed published studies that show that “glucosamine and chondroitin[] are ineffective at treating the symptoms of osteoarthritis, whether taken alone or in combination with each other,”³¹ and that “glucosamine, chondroitin, or both are no more effective than a placebo in relieving the symptoms of arthritis.”³² The plaintiffs also cited studies that showed that MSM was no more effective than a placebo in relieving the symptoms of knee arthritis.³³ Nonetheless, Rite Aid and GNC moved to dismiss the claim stating that the plaintiffs had not alleged that the advertisements were literally false.³⁴

The District Court for the District of Maryland granted the defendant’s motion to dismiss (initial order), holding that the plaintiffs did not plead that “any reasonable expert would conclude from the cited studies that glucosamine and chondroitin are ineffective in non-arthritic consumers.”³⁵ Additionally, the Court found that a manufacturer could not be liable for false advertising as long as at least one qualified

27. *Brown*, 789 F.3d at 510.

28. *Id.*

29. *Id.* Plaintiffs filed suit under California’s Unfair Competition Law (CAL. BUS. & PROF. CODE § 17200 (West 2006)) and Consumers Legal Remedies Act (CAL CIV. CODE § 1750) (West 2006)) and Illinois Consumer Fraud and Deceptive Business Practices Act, (815 ILCS 505/1). *Id.* at 511. Plaintiffs also filed suit under the Florida Deceptive and Unfair Trade Practices Act, (FLA. STAT. § 501.201), Ohio breach of express warranty under Ohio’s UCC, (OHIO REV. CODE ANN. § 1302.26 9 (West 2006)), New York’s deceptive business practices statute, (N.Y. GEN. BUS. LAW § 349 (West, 2006)), and false advertising statute, (N.Y. GEN. BUS. LAW § 350 (West 2006)), New Jersey Consumer Fraud Act, (N.J. STAT. ANN. § 56:8-1(West 2006)) and finally Pennsylvania’s Unfair Trade Practices and Consumer Protection Law, 73 PA. STAT. ANN. § 201-1(West 2006)).

30. *GNC Corp.*, 789 F.3d at 510.

31. *Id.* at 510.

32. *Id.* at 511.

33. *Id.*

34. *Id.*

35. *Id.*

OLAMIDE OREBAMJO

expert opines that the representations are truthful, even if the overwhelming weight of scientific evidence is to the contrary.”³⁶

The district court granted the plaintiffs’ leave to re-file if they could plead that “any reasonable expert would conclude from the cited studies that glucosamine and chondroitin do not improve joint health in non-arthritic consumers;” however, the plaintiffs did not amend their complaint.³⁷ After the plaintiffs filed an appeal, they moved for reconsideration.³⁸ In denying the plaintiff’s motion for reconsideration (later order), the court reasoned that it would be unfair for lay juries to ban the sale of glucosamine and chondroitin because the evidence of their effectiveness is inconclusive.³⁹ Subsequently, the plaintiffs appealed the district court’s orders and the United States Court of Appeals for the Fourth Circuit granted certiorari.⁴⁰ The Fourth Circuit ruled that it could not reconsider the later order due to lack of appellate jurisdiction, but it reconsidered the initial order to determine if the plaintiffs satisfied minimal pleading burden for various state consumer false advertising claims and affirmed the lower court’s order.⁴¹

II. LEGAL BACKGROUND

Section 43(a) of the Lanham Act is a critical provision in regards to unfair competition and trade laws. First, this section lays the framework and provisions of Section 43.⁴² Second, this section explains the elements of a false advertising claim as well as the difference between a literally false advertisement and a misleading advertisement.⁴³ Finally, this section examines how to prove each of these false advertising claims.⁴⁴

A. The Lanham Act

The Lanham Act, which Congress enacted in 1946, establishes federal trademark law and governs claims for false advertising.⁴⁵ Section 43(a)(1)(B) of the Lanham Act specifically protects consumers against false advertising.⁴⁶ Under this provision, a claim can be made against any person who, in connection with any goods used in commerce, makes any false or misleading representation of fact which in commercial

36. *Brown*, 789 F.3d at 511.

37. *Id.*

38. *Id.*

39. *Id.* at 512.

40. *Id.*

41. *Id.*

42. *See infra* Part II.A.

43. *See infra* Part II.B.

44. *See infra* Part II.B.

45. The Lanham Act 15 U.S.C. §§1051-1127 (2012).

46. Section 43(a)(1)(B) of the Lanham act is codified at 15 U.S.C. § 1125(a) (2012).

BROWN V. GNC CORP.

advertising or promotion misrepresents the nature, characteristics, qualities, or geographic origin” of “goods, services, or commercial activities.”⁴⁷ A plaintiff may bring a claim for false advertising if he or she shows the following: 1) the defendant made false statements of fact about defendant’s own product or another’s product; 2) the advertisements actually deceived, or have the tendency to deceive, a substantial segment of their audience; 3) the deception is material, in that it is likely to influence the purchasing decision of consumers 4) the defendant caused its falsely advertised goods or the advertisement itself to enter interstate commerce; and 5) the plaintiff has been or is likely to be injured as a result of the foregoing either by direct diversion of sales from itself to defendant, or by lessening of the goodwill which its products enjoy with the buying public.⁴⁸

B. Literally False v. Misleading Advertisements

The first element in proving a false advertising claim is showing that the defendant made a false statement about the defendant’s or another’s product.⁴⁹ Whether a statement is literally false or misleading is a question of fact.⁵⁰ To demonstrate a false statement, the plaintiff has to show that the advertising statement was either: 1) literally false, or 2) although literally true, the statement is likely to mislead, confuse, or deceive consumers.⁵¹ For a statement to be literally false, the statement must be a lie.⁵² Further, when a statement is literally false, the plaintiff does not need to provide extrinsic evidence of consumer deception because the court will presume deception.⁵³ When a statement is true but implies a falsehood, a plaintiff must provide extrinsic evidence to show that customers were either deceived or were likely to be deceived.⁵⁴

Courts have differentiated between literally false and misleading statements. The Seventh Circuit stated that where the statement in question is “actually false, then the plaintiff need not show that the statement either actually deceived consumers or was likely to do so. But where the statement is literally true or ambiguous, then the plaintiff is obliged to prove that the statement is ‘misleading in context, as demonstrated by actual consumer confusion.’”⁵⁵ Additionally, the Sixth Circuit described a literally false statement as focusing on the plain language while describing

47. *Id.*

48. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272 (4th Cir. 2002).

49. *Id.*

50. *See C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 436 (4th Cir. 1997).

51. The Lanham Act, 15 U.S.C. § 1125(a) (2012).

52. *SmithKline*, 131 F.3d at 434.

53. *United Indus. Corp.*, 315 F.3d at 273.

54. *Id.*

55. *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971–72 (7th Cir. 1999). *See, e.g., Johnson & Johnson, Inc. v. GAC Int’l, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988).

OLAMIDE OREBAMJO

a misleading statement as focusing on how the advertisement is perceived by its intended audience.⁵⁶

1. Battle of the Experts in Proving Falsity or Deception in A False Advertising Claim

A trier of fact must determine whether an advertisement is literally false or misleading; thus, both the plaintiff and defendants must present evidence to prove that the advertisement is or is not false.⁵⁷ One way that parties seek to prove that an advertisement is not false is through expert testimony.⁵⁸ This often results in competing testimony either affirming that the advertisement is false or that it is not false.⁵⁹ For example, in *Eastman Chem. Co. v. PlastiPure, Inc.*,⁶⁰ the plaintiff's experts testified about studies and tests that showed the plaintiff's product had no estrogenic activity and that it was not harmful.⁶¹ In contrast, the defendant's experts presented testimony that supported the advertisement and cited to studies stating that there were harmful chemicals in the plaintiff's products.⁶² The jury weighed the evidence of both experts and found for the plaintiffs, holding that the advertisement was not only literally false, but also misleading.⁶³ Additionally, in *PBM*, the court allowed the plaintiff's expert testimony to be admitted into evidence even when the defendant argued about the methodology of the customer survey being used.⁶⁴ The court stated that doubts as to the expert testimony's methodology are properly addressed by the trier of fact and not by the court.⁶⁵ Thus, the use of expert testimony in false advertising claims serves as an important function because "[t]he ultimate success of an implied falsity claim almost always turns on the persuasiveness of a consumer survey or scientific study."⁶⁶

56. *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 735 (6th Cir. 2012); *see also*, *C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 435 (4th Cir. 1997).

57. *Mead Johnson & Co. v. Abbott Lab.*, 209 F.3d 1032, 1034 (7th Cir. 2000).

58. *See PBM*, 639 F.3d at 123. The Fourth Circuit has explained that the Federal Rule of Evidence 702 governs with expert testimonies in false advertising claims. *Id.*

59. *See, e.g., Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F.3d 230, 234 (5th Cir. 2014).

60. *Id.* In this case, the plaintiff, Eastman Chem. Co., manufactured a plastic resin called Tritan and sold it to manufacturers of waterbottles and other plasticware. *Id.* at 233. The defendant, PlastiPure published an article stating that Eastman products had dangerous levels of estrogenic activity and Eastman filed suit under the Lanham Act for false advertising. *Id.* at 233.

61. *Id.* at 238.

62. *Id.* at 238–39.

63. *Id.* at 239.

64. *PBM Prods. LLC v. Mead Johnson & Co.* 639 F.3d 111, 123 (4th Cir. 2011).

65. *Id.* *See also*, *Citizens Fin. Group, Inc. v. Citizens Nat'l Bank*, 383 F.3d 110, 121 (3d Cir. 2004) (finding that survey's technical unreliability goes to weight not admissibility).

66. Harold P. Weingerger et.al, *Lanham Act False Advertising: The Expert is Key*, N.Y.L.J. (July 19, 2010). Since Lanham Act surveys are specially designed for litigation, conducted and executed according to rigorous and idiosyncratic rules, it is important that plaintiffs hire an expert to create and administer such a survey and to testify at trial concerning the survey. *Id.*

*BROWN v. GNC CORP.**2. Proving Literal Falsity*

Literal falsity is often difficult for a plaintiff to prove because the statement must be *unambiguously* false.⁶⁷ Additionally, “[t]he 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.”⁶⁸ Thus, for a court to determine whether a claim is literally false, it must first look to see if the claims are unambiguous and determine whether the claims are false.⁶⁹ This sub-section will examine the various subsets of literal falsity claims: false by necessary implication, establishment, and non-establishment or independent claims.⁷⁰

a. False by Necessary Implication Claim

A literally false statement can either be facially false when it is directly stated or it can be facially false by necessary implication.⁷¹ An advertisement that is false by necessary implication is when, even though advertisement may not make a direct statement, the advertisement is considered in its entirety, the audience would recognize the statement as being explicitly stated; moreover, the indirect statement must relay an unambiguously false message.⁷²

There are various examples of false by necessary implication cases. For instance, a court found that an advertisement was literally false when it claimed a specific brand of motor oil provided “longer engine life and better engine protection,”⁷³ without directly mentioning competitors because it drew a comparison by necessary implication.⁷⁴ Also, the Second Circuit analyzed a false by necessary implication case with Time Warner Cable Company.⁷⁵ The court looked at Time Warner’s advertisement, which made a statement that “[s]ettling for cable would be illogical”⁷⁶ in the context of picture clarity between the plaintiff’s cable television services and Time Warner’s television services.⁷⁷ The court upheld the district court’s finding of literal falsity by necessary implication because the claim necessarily implied that the picture quality of the defendant’s DirecTV HD was superior to the plaintiff’s cable

67. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002).

68. *Groupe SEB United States, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 198 (3d Cir. 2014).

69. *Id.* at 199.

70. *See infra* Part II.

71. *PBM Prods. LLC v. Mead Johnson & Co.* 639 F.3d 111, 120 (4th Cir. 2011).

72. *Id.*

73. *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 941 (3d Cir. 1993).

74. *Id.* at 946.

75. *See generally* *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144 (2d Cir. 2007)

76. *Id.* at 158.

77. *Id.* The court explained that that the preceding content included praise for the “amazing picture clarity of DIRECTV HD.” *Id.*

OLAMIDE OREBAMJO

television, when in fact it was not.⁷⁸ The Fourth Circuit has also reviewed the false by necessary implication doctrine in *Design Resources, Inc. v. Leather Indus. of Am.*⁷⁹ The plaintiff argued that the defendant's claim that "some upholstery suppliers are using leather scraps that are misrepresented as leather"⁸⁰ was literally false by necessary implication because the phrase "some upholstery suppliers" referred to the plaintiff's products.⁸¹ However, the court found that a claim of literal falsity by necessary implication was viable only where the plaintiff's asserted conclusion "necessarily flowed from the ad's statements,"⁸² which was not present in this case.⁸³

b. Establishment Claims

An establishment claim involves advertisements that explicitly or implicitly represent that tests or studies prove the claim.⁸⁴ To prove an establishment claim is literally false, the plaintiff must show either: 1) the defendant's test or study was not sufficiently reliable to permit one to conclude with reasonable certainty that it establishes the proposition for which it was cited, or 2) that the test, while sufficiently reliable, does not establish the proposition claimed in defendant's advertising.⁸⁵ For instance, in *Osmose Inc v. Viance LLC*,⁸⁶ the Eleventh Circuit classified a claim as an establishment claim when the defendant, a wood preservative company, had an advertisement that raised concerns about the safety and efficacy of a competitor's wood preservative product. The defendant's claims were based on test results that

78. *Id.*

79. 789 F.3d 495 (4th Cir. 2015).

80. *Id.* at 498. The plaintiff argued that advertisement's audience "would have recognized these references 'as readily as if [they] had been explicitly stated' and that the advertisement's reference to their product was "unmistakable" when viewed in the "broader context in which consumers would have understood it." *Id.* at 502.

81. *Id.* at 499.

82. *Id.* at 503.

83. The court explained that the plaintiff's argument was confounding and that for the argument to be plausible, one would have to follow their "winding inquiry far outside the face of the advertisement, which the concept of literal falsity by necessary implication does not allow the court to do *Id.* at 502. The court noted that the greater the degree to which a message relies upon the viewer to "integrate" its components to draw the asserted conclusion, the less likely it is that a court will find literal falsity. *Id.* (quoting *United States v. Clorox Co.*, 140 F.3d 1175, 1181 (8th Cir. 1998)).

84. *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1090 (7th Cir. 1994).

85. *Castrol Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d Cir. 1992). In assessing whether a study or test is reliable, "the fact-finder's judgment should consider all relevant circumstances, including the state of the testing art, the existence and feasibility of superior procedures, the objectivity and skill of the person conducting the tests, the accuracy of their reports, and the results of other pertinent tests." *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984).

86. 612 F.3d 1298 (11th Cir. 2011). The court noted that the "advertising statements were "tests prove" or "establishment" claims. *Id.* at 1310.

BROWN V. GNC CORP.

they obtained from a third party.⁸⁷ The court upheld the district court's ruling⁸⁸ and noted that the plaintiff only needed to show that the tests the defendant mentioned in its advertisements did not support the conclusions the defendant drew in regards to the safety and efficacy of the product.⁸⁹ Also, the Ninth Circuit has analyzed establishment claims, finding that a plaintiff "must demonstrate that such tests are not sufficiently reliable to permit one to conclude with reasonable certainty that they established' the claim made."⁹⁰ The court held that a plaintiff could meet this burden "either by attacking the validity of the defendant's tests directly *or* by showing that the defendant's tests are contradicted or unsupported by other scientific tests."⁹¹ Thus, a plaintiff can show that an establishment claim is literally false by focusing on the defendant's inaccurate use of testing, not the overall inaccuracy of the advertisement.⁹² The plaintiff has two choices: 1) prove that the cited tests does not establish the claimed proposition or 2) show that the defendant did not actually conduct the cited tests.⁹³

c. Non-establishment Claims

When an advertisement does not explicitly or implicitly state that a specific claim is based on testing or reports, the plaintiff must prove that the advertisement is false.⁹⁴ For example, in *C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*⁹⁵, the Fourth Circuit found that the plaintiff's claim, which challenged the defendant's testing and advertising of its product as a better cleanser than plaintiff's, was not an establishment claim because the plaintiff did not expressly contest defendant's use of testing and there was no language in the text implying a test.⁹⁶ Thus, the plaintiff had to affirmatively prove that the defendant's advertised claim of "comparative superiority" was literally false.⁹⁷ Additionally, the Eight Circuit further clarified how

87. *Id.* at 1305–06. The advertisements stated that the test results uncovered that the plaintiff's wood product failed to prevent wood decay and that it actually accelerated the decay, which was a consumer safety issue. *Id.* at 1306.

88. The district court ruled that the plaintiff's false advertising claim was an establishment claim and that the defendant's advertisement was literally false. *Id.* at 1306–07.

89. *Id.* at 1310.

90. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997)

91. *Id.*

92. *Osmose Inc v. Viance LLC*, 612 F.3d 1298, 1310 (11th Cir. 2011).

93. *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1091 (7th Cir. 1994).

94. *Id.* Non-establishment claims must be proven false by affirmative evidence of falsity. *Id.* The Fourth Circuit stated that a non-establishment claim may be more difficult than merely proving that a test asserted to validate the claim is not sufficiently reliable to do so. *C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 436 (4th Cir. 1997).

95. 131 F.3d 430 (4th Cir. 1997).

96. *Id.* at 436.

97. *Id.* at 435.

OLAMIDE OREBAMJO

to prove that a non-establishment claim is literally false. In *Rhone-Poulenc Rorer Pharma., Inc. v. Marion Merrell Dow, Inc.*,⁹⁸ the court noted that when a false advertising claim states that “my product is better than yours, the Lanham Act plaintiff must show that the defendant’s claim of superiority is false.”⁹⁹ However, when the advertising states “tests prove that my product is better than yours,” the plaintiff only has to prove the tests used are unreliable.¹⁰⁰

3. Proving Misleading Statements

Even if an advertisement is not literally false, a plaintiff can still show that an advertisement misled or deceived consumers. In order to prove that an advertisement is misleading,

*the courts favor testing by consumer reaction surveys, but have also found falsity based on their own independent reaction and the reaction of witnesses testifying before the court, including testimony based on test results, consumer surveys, complaints received, allegations of more than a few instances or misrepresentation, and otherwise.*¹⁰¹

Thus, a false advertisement does not have to be literally false for a plaintiff to get relief, as the courts want to prevent “clever use of innuendo, indirect intimations, and ambiguous suggestions”¹⁰² from being shielded by advertising law.¹⁰³

III. THE COURT’S REASONING

In *Brown v. GNC Corp.*,¹⁰⁴ the Fourth Circuit affirmed the judgment of the lower court. The Court found that although the lower court’s test was incorrect in its specific formulation, it was correct in analyzing the law of false advertising.¹⁰⁵ The Court ruled that, “in order to state a false advertising claim on a theory that representations have been proven to be false, a plaintiff must allege that *all* reasonable experts in the field agree that the representations are false.”¹⁰⁶ If a plaintiff cannot do

98. 93 F.3d 511 (8th Cir. 1996).

99. *Id.* at 514–15.

100. *Id.*

101. *Cottrell, Ltd. v. Biotrol Int’l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999).

102. *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978)

103. *Id.*

104. *Brown*, 789 F.3d at 509.

105. *Id.* at 513-14. The district court held that “[i]f there are experts who support what [the Companies] say in their advertisements, the advertisements are not false and misleading, but the Fourth Circuit found that the district court incorrectly referenced *Twombly* and *Iqbal*. *Id.* at 514 n.7.

106. *Id.* at 516.

BROWN V. GNC CORP.

this because the scientific evidence is equivocal, then he or she has “failed to plead that the representations based on this scientific evidence are false.”¹⁰⁷

The Court first differentiated between false and misleading representation.¹⁰⁸ While the Court acknowledged that every state applies its own tests for determining whether advertising statements are misleading, it reasoned that statements that are literally false are also necessarily misleading.¹⁰⁹ The Court stated that since the plaintiffs argued that the advertisements were literally false rather than true but misleading, the Court should only focus on whether the representations are false.¹¹⁰ The plaintiff’s complaint specifically stated that “the vast weight of competent clinical evidence, and the overwhelming weight of high quality, credible and reliable studies” supported that the advertisements were false.¹¹¹ Thus, the Court reasoned that by not pleading that all scientists agreed that glucosamine and chondroitin were ineffective, the plaintiffs conceded that some scientific experts could agree that glucosamine and chondroitin are effective.¹¹² Moreover, the Court stated that the plaintiffs could not concede that some reasonable and duly qualified scientific experts agree with a scientific proposition while simultaneously arguing that the statement is also literally false.¹¹³ The Court explained that the experts supporting the companies are either unqualified or that they reflect a reasonable difference of scientific opinion.¹¹⁴ Thus, according to the Court, if there is a reasonable difference of opinion, then the challenged representation cannot be literally false.¹¹⁵

Although the plaintiffs argued that the Court should not resolve a battle of the experts based solely on the pleadings, the Court found it did not need to resolve any battle of the experts in order to determine whether the complaint stated a claim for false advertising.¹¹⁶ Moreover, the court noted that by characterizing the issue as a battle of the experts the plaintiffs further highlighted that some scientists do believe that the glucosamine and chondroitin were effective.¹¹⁷ The Court further rejected the plaintiff’s contention that the holding would create a loophole for manufacturers to find any expert in order to immunize the company from consumer fraud action.¹¹⁸

107. *Id.*

108. *Id.* at 514.

109. *Id.*

110. *Brown*, 789 F.3d at 514.

111. *Id.* at 515.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Brown*, 789 F.3d at 515.

117. *Id.*

118. *Id.*

OLAMIDE OREBAMJO

IV. ANALYSIS

In *Brown v. GNC Corp.*,¹¹⁹ the Court held that in order to survive a motion to dismiss, a plaintiff in a false advertising claim suit must allege that *all* reasonable experts in the field agree that the representations are false.¹²⁰ In reaching this holding, the Court unfairly heightened the literal falsity standard of a false advertising claim and diverged from its sister circuit's findings.¹²¹ This decision has ultimately created an anti-consumer precedent for false advertising claims.

By requiring plaintiffs to allege all reasonable experts must agree on a certain claim,¹²² the Court has set a dangerous precedent, potentially allowing manufacturers to automatically win in false advertising claims. Before this decision, the Fourth Circuit allowed for discrepancies between experts in the field.¹²³

In *PBM*, the Court affirmed the district court's order permitting the expert testimony of two experts who conducted a consumer survey and found that the defendant's advertisement was misleading.¹²⁴ Although the defendant objected to the use of the experts, the Court determined that the technicalities of the surveys went to the weight of the evidence and not the admissibility.¹²⁵ Moreover, the Court stated that the methods used by the experts were of the type considered by *experts* in their field."¹²⁶ Nowhere in the *PBM* court's decision did it specifically mention that *all* experts in the field had to believe or rely on the methods used at trial. Rather, the court used the word *experts*, which suggests that *some* experts in the field had to agree with the methods of the survey.

Additionally, the Court has also cited to Third, Fifth, and Ninth Circuit decisions that support the conclusion that ambiguity in experts is permissible and is for the trier of fact.¹²⁷ Moreover, the Fourth Circuit has also stated that expert testimony must adhere to the Federal Rules of Evidence 702 by being both relevant and reliable.¹²⁸ Thus, when the Fourth Circuit ruled that at the pleading stage *all* experts had to believe that a statement was false, the Court moved from the role of an effective gatekeeper to an overbearing decision-maker. With this new standard, the Court is effectively stating that although an expert testimony may be reliable and may be

119. 789 F.3d 505 (4th Cir. 2015).

120. *Id.* at 515.

121. *See infra* Part IV.

122. *Id.*

123. *PBM*, 639 F.3d 111.

124. *Id.* at 118.

125. *Id.* at 124.

126. *Id.* (emphasis added).

127. *See, e.g.,* *Citizens Fin. Group, Inc. v. Citizens Nat'l Bank*, 383 F.3d 110, 121 (3d Cir. 2004), *Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F.3d 230, 234 (5th Cir. 2014). *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1262-63 (9th Cir. 2001).

128. *See Richmond Med. Ctr. for Women v. Herring*, 527 F.3d 128, 134 n.1 (4th Cir. 2008).

BROWN V. GNC CORP.

relevant to proving a literally false advertisement, it still needs to pass an additional consensus by all experts before it even gets to trial.

Section 43 of the Lanham Act was intended to address consumer deception;¹²⁹ thus, the Court should not have focused mainly on whether “reasonable experts” disagree or agree on the literal falsity of an advertising claim. While experts are critical in determining whether consumers are deceived, the emphasis should be on the consumers that are being deceived and the business competitors that are being harmed. While experts can *help* the factfinder decide whether or not a claim is false, a consensus amongst all experts should not be required at the initial motion to dismiss stage. By ruling that all reasonable experts have to agree on whether or not a statement is false,¹³⁰ the Fourth Circuit is removing the fact-finding power from the jury and putting it into the hands of the judge.

The Fourth Circuit uses a Third Circuit case to further emphasize its ruling that all reasonable experts must agree in a literal falsity claim.¹³¹ In *Castrol Inc. v. Pennzoil*,¹³² the Third Circuit emphasized that the test for literal falsity is whether or not the claim is false; if a defendant’s claim is untrue, then it must be deemed literally false.¹³³ The majority further states that

*[t]he dissent asserts, however, that a defendant need only establish a reasonable basis to support its claims to render the advertisement literally true. We disagree. Rather, the test for literal falsity is simpler; if a defendant’s claim is untrue, it must be deemed literally false.*¹³⁴

The majority’s statement thus emphasizes that the literal falsity test is meant to be a *simple* test; thus, while the Fourth Circuit uses this case to explain literal falsity, it neglected to mention that the decision also noted that the literal falsity is not meant to be a complicated standard at the pleading stage.

Moreover, the Fourth Circuit has also relied on the *Pennzoil* decision in another literal falsity case, *Design Resources, Inc. v. Leather Indus. of Am.*¹³⁵ The *Design Resources* court also chose to apply the literal falsity standard simply and stated that “[a] claim of literal falsity by necessary implication could stand where the contested conclusion necessarily flowed from the ad’s statements.”¹³⁶ Thus, based on the Fourth

129. The Lanham Act, 15 U.S.C. § 1125 (a) (2012).

130. *GNC Corp.*, 789 F.3d at 516.

131. *Id.* at 514.

132. 987 F.2d 939 (3d Cir. 1993).

133. *Id.* at 516.

134. *Id.* 944.

135. 789 F.3d 495, 501 (4th Cir. 2015),

136. *Id.* at 503.

OLAMIDE OREBAMJO

Circuit jurisprudence mentioned previously in this section, it is apparent that the Fourth Circuit has heightened its standard for literal falsity claims.¹³⁷

By stating that all reasonable experts have to agree that a statement is false, the Court also fails to acknowledge that some expert testimony is not always correct.¹³⁸ Thus, the Court undermines the fact-finding process and disregards the notion that a statement can be false even though a speaker believes that the statement is true. Moreover, “a factual dispute is best settled by a battle of the experts before the fact finder, not by judicial fiat”¹³⁹ and that “where two credible experts disagree, it is the job of the fact finder, not the trial court, to determine which source is more credible and reliable.”¹⁴⁰ Thus, since literal falsity is a question of fact, the fact finder should determine whether the advertising claim is literally false, and not the judge. This means that the question regarding the unanimity of scientific studies should not be required in order to survive a motion to dismiss, because it effectively makes the judge a fact-finder and not a gatekeeper in literally false advertising claims. This effectively makes it easier for defendant-companies to deceive and mislead consumers, because plaintiffs will have to make sure that *all* reasonable experts in a particular field agree before they even have a chance to prove their case at trial or they must forego their literal falsity claim.

In *Waldrep Bros. Beauty Supply, Inc v. Wynn Beauty Supply Co.*¹⁴¹, the Fourth Circuit Court of Appeals held that “[...] business conduct that seeks to . . . gain an advantage in the market is not [justified].”¹⁴² The Court stressed the importance of consumer welfare as a guide for how businesses conduct themselves.¹⁴³ The *Waldrep* Court is an example of how legitimate business activity must be balanced with the protection of consumers. In the present case, the Court failed to balance the welfare of consumers and focused solely on the business activity of Rite Aid and GNC. The well-being of consumers has not previously been put secondary to business activity, but the Fourth Circuit’s ruling threatens the very existence and balance of consumer protection laws.

Furthermore, the Fourth Circuit’s decision poses a substantial threat to consumer welfare. Scholars consider advertisements as helpful to consumers because advertisements are informational, lower consumer search costs, which then results in

137. See *supra* Part IV.

138. Albert S. Osborn MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY: *Reasons and Reasoning in Expert Testimony*, 490 (West 2006). See also, Brief for of Law Professors as Amici Curiae for Plaintiff-Appellants’ Petition 6, *Brown v. GNC Corp.*, 789 F.3d 505 (4th Cir. 2015).

139. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014); See also *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006).

140. *Id.*

141. 992 F.2d 59 (4th Cir. 1993).

142. *Id.* at 63.

143. *Id.*

BROWN V. GNC CORP.

competition in the markets.¹⁴⁴ However, with false advertising, the benefits of advertising goals are diminished. Instead of seeking to inform consumers, false advertising promotes a culture of beguilement and dishonesty. Consumers often rely on advertisements for entertainment, services, and to seek out information before purchasing a product.¹⁴⁵ In the context of advertisements concerning medicine, consumers heavily rely on the statements of manufacturers. Due to the sensitive nature of medicinal advertisements, and particularly in this instance, false advertising claims deserve a higher standard than what the Fourth Circuit decided. Because of the level of scientific inquiry that often involves medicines and supplements, like the ones at issue, the Court reduces consumer welfare to a mere procedural issue and engages in the technicalities of *all experts vs. some experts*. This damage to consumer welfare stands in stark contrast to this Court's stance on protecting consumer.

IV. CONCLUSION

The Fourth Circuit should not have set a new standard for literal falsity by claiming that all reasonable experts in the field had to agree that a representation was false.¹⁴⁶ The Court's ruling has vast implications because it presents an unfairly higher standard for plaintiffs to actually rely on the unanimity of experts in a particular field.¹⁴⁷ Thus, instead of leaving the issue of whether an advertisement is literally false in the hands of the trier of fact, the decision is now left to the judge.¹⁴⁸ This standard undermines and leaves the very people that false advertising claims were meant to protect—consumers—behind.¹⁴⁹

144. Lilian R. BeVier, *Competitor Suits for False Advertising under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 8 (1992).

145. *Id.*

146. *See supra* Part IV.

147. *See supra* Part IV.

148. *See supra* Part IV.

149. *See supra* Part IV.