

# Guidelines to Avoid False Advertising

## When making an advertisement, what is okay?

- Identifying a competitor’s product in the advertisement to make a true comparison
- Making a true statement about your product or a competitor’s product that is based on reliable scientific evidence that reasonably supports the claim
- Exaggerated Boasts or Puffery: general, vague or clearly subjective claims of superiority understood as opinions rather than factual representations
  - Example of puffery - “WE ARE THE BEST!”

## Elements of False Advertising - 43(a) of the Lanham Act

- 1** A false statement of fact in a commercial advertisement about its own or another’s product;
- 2** The statement actually deceived or has a tendency to deceive a substantial segment of the audience;
- 3** The deception is material;
- 4** Defendant caused its false statement to enter interstate commerce; and
- 5** Plaintiff has been or will likely be injured as a result

## Two ways to prove a statement is FALSE

- 1** Literally False; or
- 2** Literally true but tends to mislead, confuse or deceive the consuming public

## How can my advertisement tend to mislead, confuse or deceive the consuming public?

- Identify every direct and implied claim made by the advertisement
  - How would consumers perceive the advertising message?
- Does the statement appear to be based on testing (“30% almonds”)?
  - Do we have sufficient testing evidence to back up these claims?
  - Should you include qualifiers as to how the testing was done?
- If the statement does not appear to be based on testing, does it misdescribe some absolute characteristic of the product (i.e., “fresh orange juice”)?

## How can someone attack my testing?

- Your test is not sufficiently reliable
- Your test does not support the claim or implication made
- Your test contradicts another test, whether done by someone else or the attacker

## If I comply with the FDCA (Food, Drug and Cosmetic Act), will I avoid a False Labeling Claim?

No. See POM Wonderful LLC v. The Coca-Cola Company (U.S. June 12, 2014)

## Venues

- District Court
  - Federal false advertising claims and state law claims (trademark infringement, unfair competition and dilution)
    - Also may consider state trade libel claims, but in California, requires the false claim to be an intentional disparagement or done with reckless disregard
- Federal Trade Commission
- National Advertising Division of the Better Business Bureau
- Other Federal Regulatory Agencies (i.e., FDA, SEC, DOT)

## Who We Are

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