

Literal Falsity and the Role of Social Media Influencers

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I. INTRODUCTION

On March 20, 2019, Khloe Kardashian promoted Flat Tummy Tea on her Instagram with the caption, “Loving the way my tummy looks right now you guys!”¹ Flat Tummy Tea is a meal replacement drink made by Flat Tummy Co., the company that presumably paid Khloe Kardashian to promote the product.² Celebrities, like Jameela Jamil, criticized Kardashian for touting the product as the cause of her healthy body weight rather than her use of a personal trainer, nutritionist, chef, and plastic surgeon.³ Celebrity trainers and dietitians also criticized meal replacement teas like Flat Tummy Tea as not supported by evidence and often a scam.⁴ To date, Khloe Kardashian has 310 million followers,⁵ at least some (if not most) are women and teenage girls making purchasing decisions based upon what they see and hear from her. Khloe has since deleted the post from her Instagram, but should she or Flat Tummy Co. be held accountable for misleading or lying to consumers?⁶

1. Daniel Boan, *Khloe Kardashian Has Responded to Jameela Jamil’s Criticism of Her Weight-Loss Shake Ads: ‘I Am Showing You What to Do, Silly Person,’* BUS. INSIDER (Apr. 3, 2019, 7:31 AM), <https://www.insider.com/jameela-jamil-khloe-kardashian-instagram-photo-criticism-2019-3> [<https://perma.cc/D8DV-TGP8>].

2. See Gabby Landsverk, *Khloe Kardashian Promoted Flat Tummy Shakes Again, and Influencers Are Warning They Promote Risky Dieting Habits*, BUS. INSIDER (Jan. 10, 2020, 11:45 AM), <https://www.insider.com/khloe-kardashian-vogue-williams-flat-belly-shakes-instagram-controversy-2020-1> [<https://perma.cc/JV6J-PQFF>].

3. Boan, *supra* note 1.

4. Landsverk, *supra* note 2; see also Amelia Tait, *What Happens When You Get Scammed by an Influencer*, VICE (Mar. 7, 2019, 8:12 AM), <https://www.vice.com/en/article/8xym9x/instagram-influencer-scams-flat-tummy-tea-fyre-fest> [<https://perma.cc/7YXA-YLA9>] (describing various scams promulgated by Instagram influencers including Flat Tummy Tea).

5. Khloé Kardashian (@khloekardashian), INSTAGRAM, <https://www.instagram.com/khloekardashian/?hl=en> <https://perma.cc/D2HR-H5V2> (last visited Apr. 19, 2023).

6. This problem is not limited to weight loss drinks. Social media influencers promoted a music festival that turned out to be a false promise. See Mary Hanbury, *These Photos Reveal Why the 27-Year-Old Organizer of the Disastrous Fyre Festival Has Been Sentenced to 6 Years in Prison*, BUS. INSIDER (Jan. 19, 2019, 10:29 AM), <https://www.businessinsider.com/fyre-festival-expectations-vs-reality-2017-4> [<https://perma.cc/>]

Social media formed as a platform to connect individuals, but now functions as a magazine of clothes to wear,⁷ food to eat,⁸ places to go,⁹ even dentists to visit.¹⁰ These products and services are not just being promoted by companies with advertisements on the companies' social media accounts, they are now being promoted by what has been deemed an "Influencer." Social media influencers are the celebrities of the internet, with a large following of potential customers.¹¹ These influencers completely disrupted the advertising market. Now individuals with minimal connections to a business can and do promote various products and services through their social media posts. Inevitably, some social media influencers make false and misleading statements in their posts, and these statements affect consumer behavior.¹² On social media, consumers are targeted by

667X-C4V2]. Finance influencers promoted a cryptocurrency company that was not properly buying and storing cryptocurrency. See Amanda Perelli, *Finance Influencers Are Apologizing to Fans After Making Money Promoting FTX—and Some Say They'll Make Changes*, BUS. INSIDER (Nov. 14, 2022, 6:30 AM), <https://www.businessinsider.com/influencers-sponsored-by-ftx-say-sorry-to-fans-2022-11> [<https://perma.cc/U8VA-AJAM>].

7. See, e.g., Arielle Charnas (@ariellecharnas), INSTAGRAM, <https://www.instagram.com/ariellecharnas/> (last visited Apr. 19, 2024) (showing videos, photos, and links to clothing, shoes, and jewelry).

8. See, e.g., Tieghan Gerard (@halfbakedharvest), INSTAGRAM, <https://www.instagram.com/halfbakedharvest/> (last visited Apr. 19, 2024) (showing videos, photos, and recipes for food and drinks).

9. See, e.g., Murad Osmann (@muradosmann), INSTAGRAM, <https://www.instagram.com/muradosmann/> (last visited Apr. 19, 2024) (showing videos and photos of travel destinations across the world).

10. See, e.g., Bill Dorfman (@drbilldorfman), INSTAGRAM, <https://www.instagram.com/drbilldorfman/> (last visited Apr. 19, 2024) (showing videos and photos of dental treatments).

11. Werner Geyser, *What Is an Influencer? – Social Media Influencers Defined [Updated 2024]*, INFLUENCER MKTG. HUB (Feb. 14, 2024), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/6W5M-3WSL>]; see also Roza Tsvetkova, *A Guide to Influencer Marketing in the Fashion Industry*, BRANDWATCH (July 14, 2022), <https://www.brandwatch.com/blog/guide-to-influencer-marketing-in-fashion-industry/> [<https://perma.cc/P9YJ-XKL2>] ("Instead of relying on supermodels to sell clothing, brands can create powerful campaigns using real people and the power of social media.").

12. It can also have adverse effects on the company that an influencer is supposed to be promoting. See Jason Cochran, *Travel Influencer Sued for Telling "Increasingly Bold Lies" to Build Her Brand*, FROMMER'S (Oct. 16, 2023, 12:00 PM), https://www.frommers.com/blogs/arthur-frommer-online/blog_posts/travel-influencer-sued-for-telling-increasingly-bold-lies-to-build-her-brand [<https://perma.cc/XQC9-QZEQ>] (describing how one influencer lied to companies about being the record-breaking, first woman to travel to every country to charge companies a higher premium for her advertisements in her social media posts).

algorithms¹³ that analyze their engagement data with a post or a link.¹⁴ Consumers are also targeted directly by companies based on who the consumers follow. Influencers themselves also document their engagement metrics to report to the company that paid them to promote a product or service.¹⁵ Social media runs on data that targets specific individuals with data driven advertisements.¹⁶

False and misleading statements on social media seem to have a more direct link with consumers than they otherwise had when there was more distance between the consumer and the marketing scheme. With the emergence of this new form of advertisement comes a need to evaluate the laws currently enacted to protect companies and consumers from abuse. The accountability of the influencer is called into question as is the role of the company who pays the influencer to promote their product.¹⁷ Traditional legal remedies exist to ensure fair competition and truth in advertising, but the law needs to catch up with the rapidly evolving social media culture.

The Lanham Act protects against false advertising, but federal circuits are split about whether the finding of a statement as literally false allows for a presumption of materiality in a false advertising claim. Some courts allow a finding of literal falsity to give way to the presumption of materiality.

13. See Talia Bulka, Comment, *Algorithms and Misinformation: The Constitutional Implications of Regulating Microtargeting*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1108–09 (2022) (“Using algorithms, platforms display content to individual users based on their interests, deriving this information from users’ data and previous media interactions.”).

14. *How Do Social Media Algorithms Work*, INST. ENTREPRENEURSHIP DEV. (June 10, 2022), <https://ied.eu/blog/technology-blog/how-do-social-media-algorithms-work/> [<https://perma.cc/WN6S-3AGV>].

15. Natalie Burclaff, *Influencer Marketing: A Research Guide*, LIBR. CONG. (May 1, 2023), <https://guides.loc.gov/influencer-marketing/metrics-and-costs> [<https://perma.cc/SLS8-2KJH>]. Common metrics include number of followers, number of people who saw a post, and number of likes, comments, or shares. *Id.* Social media management companies charge for custom analytics to allow tracking of influencers metrics. *Id.*

16. See, e.g., Michal Lavi, *Targeting Exceptions*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 65, 92 (2021) (describing how targeted advertising can go so far as promoting the advertiser’s agendas while making them a profit); see also JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 180 (2019) (“Targeted advertising can ensure that consumers see only certain options, and cutting-edge behavioral microtargeting techniques that identify points of vulnerability can be used to shape and refine targeting strategies.”).

17. See Adrienne Sconyers, Note, *Corporations, Social Media, & Advertising: Deceptive, Profitable, or Just Smart Marketing*, 43 IOWA J. CORP. L. 417, 419 (2018) (describing prices influencers charge for posts). Accountability will also be necessary if social media marketing spending continues to grow. See *Social Media Advertising—United States*, STATISTA (Nov. 2023), <https://www.statista.com/outlook/dmo/digital-advertising/social-media-advertising/united-states> [<https://perma.cc/8EU4-SRZZ>] (forecasting continued growth in social media marketing spending in the United States through 2028).

Other courts require that both literal falsity and materiality be proven. In the wake of rapidly changing advertising uses and norms, this problem should be solved definitively.

This Comment seeks to analyze and resolve the current circuit split and justify the solution based on changing forms of advertising through social media.

In addition, this Comment identifies certain categories of goods and services such as skincare, food and beverages, and medical products that warrant the presumption of materiality. Shifting the burden to the defendant for these particular categories would deter influencers and the companies who employ them from making potentially false and misleading statements about products and services that can affect a consumer's physical wellbeing.

This Comment proceeds as follows: Part II provides background on the Lanham Act, the history of the false advertising claim, and the past and present advertising landscape. Part III addresses the current circuit split regarding the presumption of materiality. Part IV asserts that there should be a presumption of materiality because of the influence of social media in today's society. Part V asserts that the Supreme Court should resolve the circuit split in favor of the presumption, proposes a legislative amendment to the Lanham Act to formally recognize the presumption, and discusses a potential role for social media companies. Part VI concludes in favor of the presumption.

II. BACKGROUND

A. The Lanham Act

Congress enacted the Lanham Act in 1946.¹⁸ The Lanham Act created an action for “the deceptive and misleading use of marks” in order “to protect persons engaged in . . . commerce against unfair competition.”¹⁹ Supreme Court Justice John Paul Stevens highlighted the need to protect against the deleterious effects of false advertising:

[A] campaign of false advertising may completely discredit the product of an industry, destroy the confidence of consumers and impair a communal or trade good will. Less tangible but nevertheless real is the injury suffered by the honest dealer who finds it necessary to meet the price competition of inferior goods,

18. Lanham Act, Pub L. No. 79-489, 60 Stat. 427 (codified as amended at 15 U.S.C. §§ 1051–1127).

19. 15 U.S.C. § 1127.

glamorously misdescribed by the unscrupulous merchant. The competition of a liar is always dangerous even though the exact injury may not be susceptible of precise proof.²⁰

The Lanham Act was created to establish protections for trademark holders, but it also protected American companies against false advertising by their competitors.²¹ Section 43(a) of the Act, codified at 15 U.S.C. § 1125(a), provides a cause of action for false designations of origin, false descriptions, and dilution forbidden.²² The code defines a civil action as follows:

1. Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
 - a. is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
 - 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.²³

Therefore the elements for a false advertising claim are typically defined by the courts as: (1) the defendant made false or misleading statements as to his own products, or another's;²⁴ (2) actual deception, or at least a tendency to deceive a substantial portion of the intended audience; (3) the

20. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 778 n.4 (1992) (Stevens, J., concurring) (quoting Milton Handler, *Unfair Competition*, 21 Iowa L. Rev. 175, 193 (1936)).

21. Although the Lanham Act covers a variety of actions leading to unfair competition, this Comment focuses solely on the false advertising aspect of the Lanham Act.

22. 15 U.S.C. § 1125(a)(1).

23. *Id.*

24. In 1989 the Lanham Act was amended to include statements made by a defendant about someone else's products. See *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 243 n.1 (9th Cir. 1990) ("This section was amended, effective November 16, 1989, and now encompasses statements made by a defendant about 'his or her or another person's products.'" (quoting Trademark Law Revision Act, Pub. L. 100-667, 102 Stat. 3946 (codified at 15 U.S.C. § 1125(a))).

deception is material in that it is likely to influence purchasing decisions; (4) the advertised goods travel in interstate commerce; and (5) there is a likelihood of injury to the plaintiff.²⁵ All five elements must be met and the failure to prove any element of the prima facie case is fatal to a plaintiff's claim.²⁶ Therefore, a false advertising cause of action allows a company to sue their competitor if they are lying to or misleading consumers in their advertising practices.

The Lanham Act divides false advertising claims into two categories; (1) literally false and (2) misleading in a way that is likely to confuse, cause mistake, or deceive.²⁷ An actionable false statement can be "the product of affirmatively misleading statements [or] partially correct statements or failure to disclose material facts."²⁸ Notably, statements of fact are enforceable under the Act and statements of opinion are not²⁹ because people are more likely to believe a statement of fact is true.³⁰ However, consumers often struggle to differentiate between a statement of fact and a statement of opinion.³¹ Therefore, it is complicated to enforce the Lanham Act when statements fall in the gray area between fact and opinion.

25. See, e.g., *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974).

26. *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000) ("The failure to prove the existence of any element of the prima facie case [under 15 U.S.C. § 1125(a)(1)] is fatal to the plaintiff's claim.").

27. 15 U.S.C. § 1125(a)(1).

28. *Skil Corp.*, 375 F. Supp. at 783 n.11 (citing *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 364 F. Supp. 366, 372 (S.D.N.Y. 1973)).

29. A determination of whether the challenged statement is one of actionable or non-actionable general opinion is essential to any claim under § 43(a) of the Lanham Act. *Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F.3d 230, 234 (5th Cir. 2014) (quoting *Pizza Hut, Inc.*, 227 F.3d at 495–96).

30. *Peloton Interactive, Inc. v. Icon Health & Fitness, Inc.*, No. 20-662-RGA, 2021 WL 2188219, at *16 (D. Del. May 28, 2021) ("Only statements of fact capable of being proven false are actionable under the Lanham Act because, when personal opinions on nonverifiable matters are given, the recipient is likely to assume only that the communicator believes the statement, not that the statement is true." (quoting *Parker v. Learn Skills Corp.*, 530 F. Supp. 2d 661, 679 (D. Del. 2008))).

31. See Amy Mitchell et al., *Distinguishing Between Factual and Opinion Statements in the News*, PEW RSCH. CTR. (June 18, 2018), <https://www.pewresearch.org/journalism/2018/06/18/distinguishing-between-factual-and-opinion-statements-in-the-news/> [<https://perma.cc/ZKW9-FHJA>] (describing a survey that measured the public's ability to distinguish between factual statements and opinion statements).

1. Literal Falsity

The first prong of the false advertising claim is that a defendant made a false or misleading statement about their product or their opponent's product.³² If the plaintiff decides to pursue a claim as one of literal falsity, the onus is different in terms of proving consumer deception. When a statement is literally true or ambiguous, a plaintiff needs to prove the statement caused consumer confusion and was misleading, but when a statement is literally false, a plaintiff does not need to show that it caused or was likely to cause consumer deception.³³

A literally false statement means the statement is false on its face or conflicts with reality, both of which are questions of fact.³⁴ In some instances courts conclude that claims are literally false whereas in other cases the court parses out the words as literally false or not.³⁵ Usually, statements that are implicit, attenuated, or merely suggestive are not characterized as literally false.³⁶ Courts determine literal falsity by identifying the unambiguous claim in the advertisement and deciding if that claim is false.³⁷ Courts have broken down literal falsity claims into the categories of establishment claims, independent claims, and false by necessary implication claims.³⁸ Each of these alter the burden of proof on the plaintiff.

Establishment claims refer to advertisements that use scientific tests or studies as their proof.³⁹ To prove an establishment claim exists and is

32. See *Skil Corp.*, 375 F. Supp. at 783.

33. *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971–72 (7th Cir. 1999) (quoting *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1089 (7th Cir. 1994)).

34. See e.g., *Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 229 (2d Cir. 1999); see also *Clorox Co. P.R. v. Proctor & Gamble Com. Co.*, 228 F.3d 24, 34 (1st Cir. 2000) (“Whether an advertisement is literally false is typically an issue of fact.”).

35. Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U.L. REV. 807, 866 (1999).

36. *United Indus. v. Clorox Co.*, 140 F.3d 1175, 1181 (8th Cir. 1998) (“The greater the degree to which a message relies upon the viewer or consumer to integrate its components and draw the apparent conclusion, however, the less likely it is that a finding of literal falsity will be supported.”).

37. *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 120 (4th Cir. 2011) (quoting *Scotts Co. v. United Indus.*, 315 F.3d 264, 274 (4th Cir. 2002)).

38. See generally Richard J. Leighton, *Literal Falsity by Necessary Implication: Presuming Deception Without Evidence in Lanham Act False Advertising Cases*, 97 TRADEMARK REP. 1286, 1291–93 (2007) (explaining the expansion of literal falsity to include necessary implication claims); *Rhone-Poulenc Rorer Pharma, Inc. v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 514 (8th Cir. 1996) (discussing an independent claim).

39. See, e.g., *Nellcor Puritan Bennett LLC v. CAS Med. Sys., Inc.*, 11 F. Supp. 3d 861, 870–71 (E.D. Mich. 2014) (analyzing literal falsity as an establishment claim when

literally false requires the plaintiff to demonstrate the referenced data is not sufficiently reliable for the advertiser to be reasonably certain of their claim.⁴⁰

For example, two competitors sued each other alleging false advertising where they advertised their body lotions as superior to one another based on clinical testing.⁴¹ Each had a different clinical testing methodology with reference data to support their claims that was analyzed by the court for literal falsity.⁴² The Second Circuit upheld the district court's decision "that neither party had established a likelihood of successfully proving that the other party's advertising claims were false."⁴³ In reaching its conclusion, the court acknowledged that the technical and theoretical nature of the scientific product tests and intricate statistical analysis required for qualitative conclusions from the data makes valuation distasteful and challenging.⁴⁴ However, the court still concluded that it had a duty to consider and weigh the evidence the way it would for any other complicated antitrust or patent case.⁴⁵

Additionally, an independent claim is a claim that is not supported by a statement about testing, and thus requires evidence of the advertisement's

an advertisement said tests prove the defendant's product is more accurate than the plaintiff's product).

40. *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984) ("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 persons conducting the tests, the accuracy of their reports, and the results of other pertinent tests.").

41. *Id.* at 116; *see also* 15 U.S.C. § 1125(a)(1) (providing that any person who, in connection with the sale of goods or services, uses a "false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities," shall be liable to any person damaged thereby).

42. *Procter & Gamble Co.*, 747 F.2d at 116–17; *see also* *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978) (emphasizing that the Lanham Act includes protection for categories such as innuendo, indirect intimations, and ambiguous suggestions).

43. *Procter & Gamble Co.*, 747 F.2d at 120.

44. *Id.*

45. *Id.* For a discussion on the complexity of antitrust evidence, see generally Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011). For a discussion on the complicated standards for patent evidence, see generally Lawrence M. Sung, *Echoes of Scientific Truth in the Halls of Justice: The Standards of Review Applied by the United States Court of Appeals for the Federal Circuit in Patent-Related Matters*, 48 AM. U. L. REV. 1233 (1999).

falsity.⁴⁶ For example, where competing pharmaceutical manufacturing companies made claims about a hypertension drug, the court analyzed claims about the bioavailability of the drugs as independent claims rather than establishment claims.⁴⁷ The Eighth Circuit affirmed the district court's decision and emphasized:

[T]he record clearly supports the district court's finding that [defendant's] advertisements were literally false. The court focused on [defendant's] advertisements featuring images such as two similar gasoline pumps or airline tickets with dramatically different prices, accompanied by the slogan, "Which one would you choose." The court found that these ads falsely represented that the two drugs may be indiscriminately substituted, in effect, a representation that [plaintiff] "has certain qualities that it in fact does not actually have."⁴⁸

Lastly, false by necessary implication, sometimes called implicitly or impliedly false, means the falsity can be implied by the advertisement such that "the audience would recognize the claim as readily as if it had been explicitly stated."⁴⁹ For example, a competitor's claim that their motor oil lengthened engine life and provided better engine protection without explicitly mentioning their competitor's engine oil still drew a comparison by necessary implication about those competitors.⁵⁰

It is important to distinguish mere puffery from literal falsity.⁵¹ Puffery "is a complete defense in Lanham Act false advertising cases because it represents a conclusion that the claim at issue is not actionable."⁵² Puffery consists of "exaggerated statements of bluster or boast upon which no reasonable consumer would rely" and "vague or highly subjective claims of product superiority, including bald assertions of superiority."⁵³ Sometimes "puffery appears to be a[n] I-know-it-when-I-see-it phenomenon to which the closest broad definition of the concept is then applied after the fact."⁵⁴ Literal falsity therefore hinges on whether the defendant is making a

46. See, e.g., *Rhone-Poulenc Rorer Pharma., Inc. v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 514 (8th Cir. 1996).

47. *Id.* at 515.

48. *Id.* at 516.

49. *Clorox Co. P.R. v. Proctor & Gamble Com. Co.*, 228 F.3d 24, 35 (1st Cir. 2000).

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

51. See David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1400–01 (2006) (defining puffery); Courtland L. Reichman & M. Melissa Cannady, *False Advertising Under the Lanham Act*, 21 FRANCHISE L.J. 187, 189 (2002) (discussing the difficulty in distinguishing puffery from actionable advertising); see also IVAN L. PRESTON, *THE GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING*, 27–46 (1996) (discussing the law's tendency to favor puffery at the expense of consumers).

52. Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexts*, 94 TRADEMARK REP. 585, 588 (2004).

53. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390–91 (8th Cir. 2004).

54. Leighton, *supra* note 52, at 587.

statement of fact whereas puffery is commonly categorized as a statement of opinion or exaggeration without proof. When making a statement of fact, it can be logically proven to be true or false; puffery cannot. Puffery also includes jokes, hyperbole, and statements for comedic effect.⁵⁵

2. Consumer Deception

The second prong of the cause of action for false advertising is consumer deception. Generally, a plaintiff must show that the false or misleading statement actually deceived or had a tendency to deceive a consumer of the product or service. It is currently accepted among the circuit courts that a finding of literal falsity creates a presumption of consumer deception.⁵⁶ This means that once something is proven to be a literally false statement, courts are not required to evaluate the effects of that statement on actual or potential consumers.⁵⁷ However, this presumption has not always existed and the approach of circuit courts on this issue has evolved.⁵⁸

Additionally, the Ninth Circuit extended the consumer deception presumption to intentional or deliberately misleading advertisements, emphasizing that “[h]e who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.”⁵⁹ Moreover, the Ninth Circuit stated that “[t]he expenditure by a competitor of substantial funds in an effort to deceive consumers *and influence their purchasing*

55. See, e.g., *Martin v. Living Essentials, LLC*, 160 F. Supp. 3d 1042, 1049 (N.D. Ill. 2016) (explaining that comedic, farcical exaggerations carry no risk of deceiving customers).

56. *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 120 (4th Cir. 2011) (“Where the advertisement is literally false, a violation may be established without evidence of consumer deception.” (quoting *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 311 (1st Cir. 2002)); see also *MMM Healthcare, Inc. v. MCS Health Mgmt. Options*, 818 F. Supp. 2d 439, 450 (D.P.R. 2011) (“Plaintiff’s [sic] that present literally false claims are liberated from the burden of presenting evidence because they benefit [from] a presumption of consumer deception.” (citing *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993)).

57. See, e.g., *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 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.”).

58. See Leighton, *supra* note 52, at 585–86 (explaining that courts have been retrenching with regard to § 43(a) advertising tort litigation by increasingly applying “materiality” and “puffery” constraints in such cases).

59. *U-Haul Int’l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986).

decisions justifies the existence of a presumption that consumers are, in fact, being deceived.”⁶⁰

3. Materiality

The third requirement in a false advertising case is proving materiality. For both cases of literal falsity and misleading statements, a plaintiff is required to prove that the deception is material, meaning it is likely to influence a consumer’s purchasing decision.⁶¹ In order to prove materiality, the statement must be related to the good’s or service’s “inherent quality or characteristic.”⁶² The requirement of materiality comes from the idea that a consumer’s decision to buy a product is not necessarily in response to advertisements.⁶³ A plaintiff is not necessarily required to prove a statement actually influenced a specific purchasing decision, but instead “that the advertisements are likely to influence that choice.”⁶⁴

Usually, materiality in a false advertising claim is proven through consumer surveys.⁶⁵ These surveys are used as evidence of the intended audience’s perception of the importance of the claim at issue.⁶⁶ For example, “[s]ources for such evidence are recorded focus groups, depositions or original trial testimony.”⁶⁷ Materiality may also be proven by a consumer’s declaration, where the customer attests to how they were confused by the false or misleading representations.⁶⁸

4. Goods Travel in Interstate Commerce

The fourth requirement that must be proven by the plaintiff is that the advertised goods or services that correspond to the false or misleading

60. *Id.* (emphasis added).

61. *Skil Corp. v. Rockwell Int’l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974).

62. *S.C. Johnson & Son v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (quoting *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997)).

63. *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1226 (11th Cir. 2008) (“The materiality requirement is based on the premise that not all deceptions affect consumer decisions.” (quoting *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1250 (11th Cir. 2002))).

64. *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V.*, 69 F. Supp. 3d 175, 217 (D.D.C. 2014).

65. *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1111 (9th Cir. 2012) (explaining that false advertising claims are typically proven through consumer surveys but are not required under the Lanham Act).

66. See Richard J. Leighton, *Using (and Not Using) the Hearsay Rules to Admit and Exclude Surveys in Lanham Act False Advertising and Trademark Cases*, 92 TRADEMARK REP. 1305, 1306–07 (2002).

67. See Leighton, *supra* note 52, at 603.

68. *Id.* (explaining that evidence from potential or actual purchasers that were exposed to the false claim can provide persuasive support).

statement travel in interstate commerce.⁶⁹ Social media advertisements and posts easily meet the interstate commerce requirement because people across state lines view the information when accessing the social media applications using the internet.⁷⁰

5. Likelihood of Injury to the Plaintiff

The last requirement that must be proven by the plaintiff is that the “plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.”⁷¹ However, “a competitor need not prove injury when suing to enjoin conduct that violates section 43(a).”⁷²

B. Advertising

At the time the Lanham Act was enacted in 1946, advertising occurred through local television ads, radio, and print media.⁷³ These forms of advertisement are distinct because the company both controlled and designed the advertisement. In the 1990s, with the dawn of the internet, advertisements moved online, but were largely still controlled by the companies creating them. However, in the past decade, social media platforms like Instagram, TikTok, Twitter, and Facebook created a new category of advertising called user-generated advertising.⁷⁴ Now, an individual, unrelated to the company in many cases, can market a product from their account in partnership with a brand.⁷⁵ Instead of advertising from the

69. Skil Corp., v. Rockwell Int’l Corp, 375 F. Supp. 777, 783 (N.D. Ill. 1974).

70. Cf. Epson Am., Inc. v. USA111, Inc., 259 F. Supp. 3d 387, 393 (D.S.C. 2017) (“Consumers from every state in the United States are able to purchase [defendant’s] projectors on any of those websites. Therefore, because the internet is an ‘instrumentality of interstate commerce,’ false advertisements on such sites are in interstate commerce.” (quoting Verisign, Inc. v. XYZ.com, No. 1:14-cv-01749, 2015 WL 7430016, at *4 (E.D. Va. Nov. 20, 2015))).

71. Design Res., Inc. v. Leather Indus. of Am., 789 F.3d 495, 501 (4th Cir. 2015) (quoting PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 120 (4th Cir. 2011)).

72. Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 210 (9th Cir. 1989).

73. See generally William M. O’Barr, *A Brief History of Advertising in America*, 11 ADVERT. & SOC’Y REV., no. 3, 2001, at 1.

74. See Geyser, *supra* note 11.

75. *Id.* (defining an influencer as “someone who has the power to affect the purchasing decisions of others because of his or her authority, knowledge, position, or relationship with his or her audience” and has “a following in a distinct niche, with whom he or she actively engages”).

company to the consumer, this form of user-generated advertising is exchanged between the consumers. Although facially similar to the celebrity endorsements in a traditional television or magazine advertisement, user-generated advertising comes from online personalities that market themselves as specialists in whatever product or brand they are promoting.⁷⁶

The influencer marketing industry grew exponentially in 2022, with the number of influencers and influencer firms amassing quickly.⁷⁷ Unsurprisingly, many of these influencers are tied directly to online e-commerce stores. Some hopeful influencers are even pretending to have brand partnerships in order to amass a large enough following to become a legitimate influencer.⁷⁸

There is also now a growing category of virtual influencers who play the same role as a traditional influencer, except they are avatars rather than real people.⁷⁹ Companies use influencers to increase sales and exposure of their brands.⁸⁰ Advertisements on social media seem just like a traditional television or online advertisement, but these social media influencers have a more direct relationship with their viewers. This relationship is made more consequential by the fact that in the past decade social media users are spending more time on social media platforms than ever before.⁸¹

Social media platforms create a marketing environment more consumer centric than ever before.⁸² An individual on a social media website has

76. See Grey Geppert, *How Influencer Marketing Differs from Celebrity Endorsement*, CONVINCE & CONVERT, <https://www.convinceandconvert.com/digital-marketing/influencer-marketing-differs-from-celebrity-endorsement/> [<https://perma.cc/E7CB-5DVH>].

77. The influencer marketing industry grew to approximately \$16.4 billion in 2022 and experts estimated social commerce sales would be \$958 billion. Werner Geyser, *The State of Influencer Marketing 2022: Benchmark Report*, INFLUENCER MKTG. HUB (Mar. 2, 2022), <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2022/> [<https://perma.cc/3CTE-S9ZS>].

78. Taylor Lorenz, *Rising Instagram Stars Are Posting Fake Sponsored Content*, THE ATLANTIC (Dec. 18, 2018), <https://www.theatlantic.com/technology/archive/2018/12/influencers-are-faking-brand-deals/578401/> [<https://perma.cc/98EA-A69D>].

79. Tiffany Hsu, *These Influencers Aren't Flesh and Blood, Yet Millions Follow Them*, N.Y. TIMES (June 17, 2019), <https://www.nytimes.com/2019/06/17/business/media/miquela-virtual-influencer.html> [<https://perma.cc/QS9V-T6TG>].

80. Jennifer Ortakales, *The Entrepreneur's Ultimate Guide to Influencer Marketing on Instagram, from Micro-Influencers to Brand Ambassadors, and Everything in Between*, BUS. INSIDER (Feb. 26, 2020), <https://www.businessinsider.in/strategy/news/the-entrepreneurs-ultimate-guide-to-influencer-marketing-on-instagram-from-micro-influencers-to-brand-ambassadors-and-everything-in-between/articleshow/74322599.cms> [<https://perma.cc/Y7CG-3B64>]; Megan K. Bannigan & Beth Shane, *Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry*, 64 N.Y.L. SCH. L. REV. 247, 248 (2019–2020).

81. See *Daily Time Spent on Social Networking by Internet Users Worldwide from 2012 to 2024*, STATISTA (Apr. 10, 2024), <https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/> [<https://perma.cc/83TC-LESL>].

82. “The power of social media marketing comes from the unparalleled capacity of social media in three core marketing areas: connection, interaction, and customer data.”

either chosen to follow a specific influencer or is receiving the influencer's advertisement through the social media platform's advertising algorithm. In addition, influencers are categorized based on the size of their following so companies may strategically decide which social media influencers would more efficiently target specific groups of consumers.⁸³ An individual on social media seeks out the influencer and is able to see and hear their opinion as it relates to daily activities, products, or services. And often, unbeknownst to the social media user, they are being targeted by companies based on these same interests.

Typically, an influencer is hired by a company through an endorsement deal, where the influencer is paid to promote a product or service to consumers online.⁸⁴ Companies either deal directly with the influencer or more frequently work with a third party to recruit the influencer.⁸⁵ These relationships may be one time promotions or long term brand ambassador engagements.⁸⁶ The influencer usually contracts directly with the company for which they are advertising.⁸⁷ Influencers are therefore typically considered independent contractors rather than employees.⁸⁸

Adam Hayes, *Social Media Marketing (SMM): What It Is, How It Works, Pros and Cons*, INVESTOPEDIA (Feb. 2, 2024), <https://www.investopedia.com/terms/s/social-media-marketing-smm.asp> [https://perma.cc/6CC5-7HQF].

83. Jasmine Garsd, *Instagram Advertising: Do You Know It, When You See It?*, NPR (June 24, 2019, 2:43 PM), <https://www.npr.org/2019/06/24/734747462/instagram-advertising-do-you-know-it-when-you-see-it> [https://perma.cc/AUU9-W89Q].

84. "As social-media influencers have become more ubiquitous and brands have grown to recognize their value, endorsement deals with social-media spokespeople have become a new norm." Annamarie W. Carty, Comment, *Cancelled Morality Clauses in an Influencer Era*, 26 LEWIS & CLARK L. REV. 565, 589 (2022).

85. See Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 90 (2020).

86. Jennifer Dublino, *Why Brand Ambassadors Could Be Your Best Marketing Strategy*, BUSINESS.COM (Apr. 1, 2024), <https://www.business.com/articles/why-brand-ambassadors-matter-in-marketing/> [https://perma.cc/88JZ-YJNY].

87. An influencer's contract usually includes terms like post frequency, which social media platform, payment, and the influencer's exclusivity. See *Social Media Influencer Contract*, EFORMS.COM (Dec. 16, 2023), <https://eforms.com/employment/influencer/> [https://perma.cc/JE4C-VFBP].

88. However, in California the strict requirements for independent contractors mean that exertion of control over the influencer may push them more into being treated like an employee. Ari Hersher & Elizabeth J. MacGregor, *Hiring Influencers: Are You Playing With Fyre?*, SEYFARTH (Apr. 3, 2019), <https://www.calpeculiarities.com/2019/04/03/hiring-influencers-are-you-playing-with-fyre/> [https://perma.cc/8XE3-X5V8] (discussing California's "ABC" test for independent contractors).

In return for their endorsements, influencers receive payment or free products and services.⁸⁹ And people are buying the goods and services that are being promoted.⁹⁰ People admit to trusting the influencers more than the brands they are promoting.⁹¹ A 2022 study of the top Instagram influencer areas determined that lifestyle and beauty are the most common areas in which these influencers post.⁹² Therefore these areas should require more attention when analyzing the truthfulness of the influencer's claims.

However, complexity arises when these influencers deceive or lie to their loyal followers or even social media users who come across their advertisements through the algorithm. This new prevalent role that influencers have threatens the fair competition that the Lanham Act was designed to promote. One solution is to hold companies accountable for the statements influencers make about their product through false advertising law.⁹³ Recently, non-profits are jumping in to try to protect consumers from deceptive advertising in all categories, including the recent trend of celebrity promotion of non-fungible tokens (NFTs) and undisclosed advertisements by celebrity influencers.⁹⁴

A recent study shows that most people do not know that the content they interact with online is advertising and they cannot identify the sponsor of these advertisements.⁹⁵ Moreover, this problem is worsened when there is a liaison between the company and the consumer. Social media platforms

89. See Geyser, *supra* note 11; Stasia Skalbana, Comment, *Advising 101 for the Growing Field of Social Media Influencers*, 97 WASH. L. REV. 667, 670 (2022).

90. However, not all of an influencer's following includes real people. Research has dubbed this influencer marketing fraud and considers those advertising dollars lost. Megan Cerullo, *Influencer Marketing Fraud Will Cost Brands \$1.3 Billion in 2019*, CBS NEWS (July 25, 2019, 1:49 PM), <https://www.cbsnews.com/news/influencer-marketing-fraud-costs-companies-1-3-billion/> [https://perma.cc/S2G3-EBZE].

91. *Matter Survey Reveals Consumers Find Influencers More Helpful and Trustworthy than Brands During the Pandemic*, BUS. WIRE (May 26, 2020, 8:45 AM) [hereinafter *Matter Survey*], <https://www.businesswire.com/news/home/20200526005058/en/> [https://perma.cc/SAG8-WNJT].

92. Geyser, *supra* note 77.

93. See Roberts, *supra* note 85, at 85.

94. See, e.g., *TINA.org Sends Notification Letters to Celebrities Promoting NFTs*, TRUTH IN ADVERT. ORG (Aug. 17, 2022), <https://truthinadvertising.org/articles/tina-org-sends-letters-to-celebrities-promoting-nfts/> [https://perma.cc/W99N-L75E]; *Another One: TINA.org Calls Out DJ Khaled's Undisclosed Alcohol Ads, Again*, TRUTH IN ADVERT. ORG (July 15, 2022), <https://truthinadvertising.org/articles/another-one-tina-org-calls-out-dj-khaleds-undisclosed-alcohol-ads-again/> [https://perma.cc/NP7C-9C6T].

95. Joe Lazauskas, *Fixing Native Ads: What Consumers Want from Publishers, Brands, Facebook, and the FTC*, THE CONTENT STRATEGIST 8, 12 (2016), <https://the-content-strategist-13.docs.contently.com/v/fixing-sponsored-content-what-consumers-want-from-brands-publishers-and-the-ftc> (last visited Apr. 20, 2024).

are working to regulate the content shown on their platform,⁹⁶ but users will still see deceptive and misleading content and they may not be aware of its source.

Moreover, a social media influencer has a financial incentive to pump out content and accept as many brand deals as possible. Although companies often try to dictate what an influencer says,⁹⁷ an influencer is still at risk of making false statements about a product when trying to maximize their income. There are influencers with seemingly endless brand deals and a constant flow of advertised content as posts or stories.⁹⁸ Influencers compare products to one another without oversight from the brands about whether they are violating false advertising laws.

The Federal Trade Commission (FTC) noticed the prevalent role that social media influencers play in advertising and is trying to issue new regulations to monitor the influencers, the sponsors, and the social media platforms on which the marketing occurs.⁹⁹ For example, the FTC sent businesses warnings regarding the fake reviews influencers are posting and their potentially misleading endorsements about products they do not use but are promoting to their thousands or millions of followers.¹⁰⁰

The problem is global in nature. An international study found that influencers' advertisement disclosure compliance was markedly low in the United

96. See, e.g., *How Instagram Uses Artificial Intelligence to Moderate Content*, INSTAGRAM, <https://help.instagram.com/423837189385631> [<https://perma.cc/93ES-PNSV>].

97. See John Hall, *What Businesses Need to Know About Collaborating with Influencers*, FORBES (Nov. 6, 2022, 8:00 AM), <https://www.forbes.com/sites/johnhall/2022/11/06/what-businesses-need-to-know-about-collaborating-with-influencers/> [<https://perma.cc/J2Y5-Q8WS>].

98. See Christina Moravec, *9 Brands Crushing It with Instagram Stories*, CONVINC & CONVERT, <https://www.convinceandconvert.com/social-media/crushing-it-with-instagram-stories/> [<https://perma.cc/BZW7-ANNE>].

99. In May 2022, the FTC released proposed revisions of the guides including for fake reviews. See Press Release, Fed. Trade Comm'n, *FTC Proposes to Strengthen Advertising Guidelines Against Fake and Manipulated Reviews* (May 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-proposes-strengthen-advertising-guidelines-against-fake-manipulated-reviews> [<https://perma.cc/5HNT-M4R7>].

100. The list of companies warned by the FTC for deceptive or unfair conduct around endorsements and testimonials in October 2021 includes food and beverage companies, makeup companies, skincare companies, clothing companies, among many others. See generally *List of October 2021 Recipients of the FTC's Notice of Penalty Offenses Containing Deceptive or Unfair Conduct Around Endorsements and Testimonials*, FED. TRADE COMM'N (Oct. 2, 2021), <https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/list-recipients-endorsement-notice.pdf> [<https://perma.cc/Q5N9-4M8D>].

Kingdom as well.¹⁰¹ The FTC also created a guide for influencers called Disclosures 101 that outlines how transparent influencers need to be when partnering with a brand or promoting a company's product.¹⁰²

The reach of the Lanham Act is broader than just a traditional advertising campaign. To establish a false advertising claim in the social media context, the commercial advertising or promotion is analyzed under a specific test: whether the statement is (1) commercial speech; (2) by a defendant in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and (4) disseminated sufficiently to the relevant purchasing public to constitute advertising or promotion within an industry.¹⁰³ The purpose of the test is to broaden the scope of a false advertising claim to include statements about competitors and the like that are not run in traditional ad campaigns. This is because commercial speech is entitled to less protection than other forms of constitutionally guaranteed expression.¹⁰⁴ Accordingly, although much of what an influencer might say on social media is protected by freedom of speech, if it is commercial in nature, it is not entitled to the same permissibility.¹⁰⁵

III. WHETHER A PRESUMPTION OF MATERIALITY OUGHT TO EXIST: A SPLIT BETWEEN VARIOUS CIRCUITS

Courts are currently split about whether a showing of literal falsity warrants a presumption of materiality. The following sections outline the different approaches various circuit courts have taken and their justifications. Presently, the Fifth Circuit allows for the presumption. The First, Eighth, and Eleventh Circuits do not permit the presumption. The Ninth Circuit leaves the question unanswered. At the time of this writing, the Supreme Court has denied

101. *Influencer Ad Disclosure on Social Media*, ADVERT. STANDARDS AUTH. 3 (Mar. 2021), <https://www.asa.org.uk/static/dd740667-6fe0-4fa7-80de3e4598417912/Influencer-Monitoring-Report-March2021.pdf> [<https://perma.cc/37EY-SLKJ>].

102. *See generally Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/QRB5-EKJB>].

103. *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1535–36 (S.D.N.Y. 1994). The representations need not be made in a classic advertising campaign but may consist of more informal types of promotion. *Id.* at 1536.

104. *See, e.g., United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

105. Similarly, low value lies are not protected by the First Amendment. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1440 (2015) (“[F]alse factual statements are not protected by the First Amendment: (1) *they have no value* (false factual statements do not promote democracy, do not, by definition, advance the search for truth, and do not contribute anything, or anything substantial, to the speaker's autonomy); and (2) *they can cause tangible social harm . . .*”).

granting certiorari on this issue and has not resolved the split among the circuit courts.

A. Case in Favor of the Presumption: Fifth Circuit

In *Pizza Hut, Inc. v. Papa John's International, Inc.*, plaintiff sued the defendant on a false advertising claim under the Lanham Act for using the slogan “Better Ingredients. Better Pizza.”¹⁰⁶ The advertisement appeared on signs, shirts, menus, pizza boxes, and was used as the tag line in their radio and television ads.¹⁰⁷ Plaintiff specifically alleged that defendant falsely asserted its sauce and dough was superior to plaintiff’s.¹⁰⁸

The Fifth Circuit permitted the influence of materiality from the finding of literal falsity.¹⁰⁹ The Fifth Circuit concluded that a court may assume that literally false statements mislead consumers, so the plaintiff is not required to show the impact the statements had on consumers.¹¹⁰ Although later criticized by other circuits, the *Pizza Hut* decision does not define materiality in the same way as the consumer deception prong of the false advertising test. Rather, the Fifth Circuit acknowledged that both the consumer purchasing decision that defines materiality and the consumer deception evidence are interrelated. When something is literally false, a presumption of consumer deception is permissible.¹¹¹ The materiality prong is one step further than deceiving the consumer and acknowledges the role a statement has in the final decision to buy a good or service. The Fifth Circuit instead categorizes this as the impact statements had on consumers,

106. *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 491 (5th Cir. 2000).

107. *Id.*

108. *Id.*; see also *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 (5th Cir. 1996) (“Section [1125(a)(1)(B))] provides protection against a ‘myriad of deceptive commercial practices,’ including false advertising or promotion.” (quoting *Resource Devs., Inc. v. Statue of Liberty-Ellis Island Found., Inc.*, 926 F.2d 134, 139 (2d Cir. 1991))).

109. *Pizza Hut, Inc.*, 227 F.3d at 497 (“With respect to materiality, when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact the statements had on consumers.”). The Seventh Circuit adopts a similar approach. See, e.g., *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 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.”).

110. *Pizza Hut, Inc.*, 227 F.3d at 497. For examples of other circuits applying a similar rule, see *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999), *Johnson & Johnson, Inc. v. GAC International, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988), and *U-Haul International, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986).

111. See, e.g., *Pizza Hut, Inc.*, 227 F.3d at 497.

where impact includes their state of being deceived and their actions as a result.

*B. Cases Against the Presumption: The Approaches of the
First, Eighth, and Eleventh Circuits*

1. First Circuit

In *Cashmere & Camel Hair Manufacturers Institute v. Saks Fifth Ave.*, the First Circuit reached the conclusion that a presumption of materiality is not permissible from the finding of literal falsity.¹¹² In this case, the defendants marketed their garments as being “70 percent wool, 20 percent nylon, and 10 percent cashmere” and labeled them as “A Luxurious Blend of Cashmere and Wool,” “Cashmere and Wool,” or “Wool and Cashmere.”¹¹³ Plaintiffs did independent testing of the garments and determined they were not cashmere, so they brought suit under the Lanham Act.¹¹⁴ Ultimately, the defendants conceded to making a false or misleading statement of fact.¹¹⁵ However, the court went on to require proof, and analyzed plaintiff’s and defendant’s arguments, of whether the false or misleading statements had some type of influence on a purchasing decision.¹¹⁶

The First Circuit acknowledged the presumption of consumer deception upon a finding of literal falsity but failed to provide a presumption for materiality.¹¹⁷ The First Circuit discussed the reasoning for accepting the presumption of consumer deception by explaining that “applying a presumption of consumer deception to all literal falsity claims, irrespective of the type of relief sought, makes sense.”¹¹⁸ The First Circuit found that there was

112. *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 312 n.10 (1st Cir. 2002) (“[E]ven when a statement is literally false or has been made with the intent to deceive, materiality must be demonstrated in order to show that the misrepresentation had some influence on consumers.”).

113. *Cashmere & Camel Hair Mfrs. Inst.*, 284 F.3d at 306.

114. *Id.* at 307.

115. *Id.* at 311.

116. *Id.* at 312.

117. *Id.* at 314; *see also* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:35 (4th ed. 2014) (noting the court required plaintiff to show the advertisement related to an “inherent quality or characteristic” of the product to create a presumption that the misrepresentation was material (quoting *Cashmere & Camel Hair Mfrs. Inst.*, 284 F.3d at 311–12)); *cf.* *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993) (“[A] plaintiff must prove *either* literal falsity *or* consumer confusion, but not both.”); *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982) (“When a . . . representation is literally or explicitly false, the court may grant relief without reference to the advertisement’s impact on the buying public.”), *abrogated on other grounds by* FED. R. CIV. P. 52(a), *as recognized in* *Johnson & Johnson v. GAC Int’l, Inc.*, 862 F.2d 975, 979 (2d Cir. 1988).

118. *Cashmere & Camel Hair Mfrs. Inst.*, 284 F.3d at 314.

no need to onerously burden a plaintiff with demonstrating how consumers perceived the advertisement when the plaintiff demonstrated that a defendant's material misrepresentation was literally false.¹¹⁹ Importantly, the court acknowledged that "there was once support for the assertion that consumer deception cannot be presumed simply because a plaintiff alleges a literal falsity claim for money damages."¹²⁰

2. Eighth Circuit

In *Select Comfort Corp. v. Baxter*, the plaintiff sued another adjustable bed company for false advertising online.¹²¹ The jury instructions included a presumption of materiality if literal falsity was proven.¹²² The Eighth Circuit declined to allow for a jury instruction that presumed materiality when literal falsity was proven.¹²³ The Eighth Circuit held that the trial court impermissibly shifted the burden of proof by applying an erroneous presumption on the materiality element of the Lanham Act false advertising claim based on a finding of literal falsity.¹²⁴ The Eighth Circuit determined that literal falsity does not suggest the statement is material and does not necessarily make a statement more or less likely to influence a purchasing

119. *Id.*

120. *Id.*

121. *Select Comfort Corp. v. Baxter*, 996 F.3d 925, 930 (8th Cir. 2021). Specifically, plaintiff alleged:

Defendants employed words or phrases identical or confusingly similar to Plaintiffs [sic] trademarks in various online advertising formats including: website urls; search inquiry paid terms; embedded links in third-party sites; and general use of identical or similar phrases in text advertisements or combined graphic-and-text advertisements that could be viewed by users or detected organically by search engines.

Id.

122. *Id.* at 938 ("The instructions also provided, over Defendants' objection, that the jury could presume materiality (element 3) if the Defendants made: (1) a literally false statement; (2) a false statement relating to the inherent quality or characteristic of a product; or (3) a deliberately false or misleading statement that was comparative or implicated a competitor or its product.").

123. *Id.* at 939; *cf.* *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997) ("[I]n addition to proving falsity, the plaintiff must also show that the defendants 'misrepresented an inherent quality or characteristic' of the product . . . [that] is essentially one of materiality, a term explicitly used in other circuits." (quoting *Nat'l Ass'n of Pharma. Mfrs v. Ayerst Lab.*, 850 F.2d 904, 917 (2d Cir. 1988))).

124. *Select Comfort Corp.*, 996 F.3d at 940.

decision.¹²⁵ Further, the Eighth Circuit criticized the Fifth Circuit for permitting the presumption because it conflates the element of consumer deception with the element of materiality and for being unclear about the presumption.¹²⁶

3. Eleventh Circuit

In *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, the Eleventh Circuit reached the same conclusion that a finding of literal falsity does not warrant a presumption of materiality.¹²⁷ Plaintiff asserted in this case that the defendant produced physical advertisements that were mailed out to consumers asserting that its contact lenses were preferred by consumers based on a specific consumer study.¹²⁸ Plaintiff alleged that these pamphlets and letters made literally false statements about plaintiff and plaintiff's products.¹²⁹

In its analysis, the Eleventh Circuit stated another permissible presumption that "once a court deems an advertisement to be literally false, the movant need not present evidence of consumer deception."¹³⁰ The court emphasized that the materiality requirement exists because not all literal falsities affect a consumer's decision-making.¹³¹ The Eleventh Circuit supported the position with precedent through a case that showed consumer decisions were not influenced by a literally false statement in an advertisement.¹³²

Moreover, the Eleventh Circuit criticized the Fifth Circuit's approach to the presumption by arguing that it conflated materiality with consumer deception.¹³³ The court stated that "[s]uch conflation is not without precedent;

125. *Id.* at 939; *see also* *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 829 F. Supp. 2d 802, 813 (D. Minn. 2011) ("Even where literal falsity is established, materiality is not presumed.").

126. *Select Comfort Corp.*, 996 F.3d at 940 ("The Fifth Circuit's discussion of materiality, however, is not clear and does not provide an explanation as to why a finding of literal falsity implies materiality.").

127. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1250 (11th Cir. 2002).

128. *Id.* at 1246.

129. *Id.*

130. *Id.* at 1247 (citing *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999)).

131. *Id.* at 1250.

132. *Id.* ("In *Motorola*, for example, the Second Circuit concluded that Motorola's advertisement that its SportsTrax device provided sports information 'direct from each arena' was literally false, but irrelevant to consumer decisions. . . . [Plaintiff's] argument [here] fails because [it] did not prove that [defendant's] use of the term 'eye doctor' was material to consumer decisions." (quoting *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997))).

133. *Id.*

it appears that the Fifth Circuit blurred the boundary between the two elements in its recent Pizza Hut decision.”¹³⁴

C. The Unique Case of the Ninth Circuit

The district courts in the Ninth Circuit have varying approaches to this presumption. District courts have highlighted the split within their own circuit regarding many of the Lanham Act presumptions, including that of materiality.¹³⁵

There are many district courts that find in favor of the presumption.¹³⁶ For example, in *AECOM Energy & Construction, Inc. v. Ripley*, an owner of trademarks used in conjunction with construction and engineering services sued competitors alleging false designation of origin, false advertising and cyberpiracy under Lanham Act.¹³⁷ The district court permitted the presumption of materiality because the statements were literally false and held in favor of the plaintiff because defendants did not put forth evidence to the contrary.¹³⁸ Many other Ninth Circuit cases have done the same.

On the other hand, there have also been district courts in the Ninth Circuit that do not permit the presumption.¹³⁹ For example, in *Obesity Research*

134. *Id.* (citing *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000)); *cf. Pizza Hut, Inc.*, 224 F.3d at 497 (“With respect to materiality, when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact the statements had on consumers.”).

135. *See, e.g., Williams & Cochrane, LLP v. Rosette*, 631 F. Supp. 3d 884, 915 (S.D. Cal. 2022) (collecting cases).

136. *See, e.g., AECOM Energy & Constr., Inc. v. Ripley*, 348 F. Supp. 3d 1038, 1056 (C.D. Cal. 2018) (“[W]here a statement is literally false or the defendant intentionally set out to deceive, both actual deception and materiality are presumed.”), *rev'd sub nom.* *AECOM Energy & Constr., Inc. v. Morrison Knudsen Corp.*, 851 F. App'x 20 (9th Cir. 2021); *Jerome's Furniture Warehouse v. Ashley Furniture Indus., Inc.*, No. 20-CV1765-GPC(BGS), 2021 WL 1541649, at *6 (S.D. Cal. Apr. 20, 2021) (“Because Plaintiff alleged that Defendant's advertisements are literally false, the court may presume that actual deception and materiality are sufficiently alleged.”); *Russell v. Walmart Inc.*, No. CV 19-5495-MWF (JCx), 2020 WL 9073046, at *12 (C.D. Cal. Oct. 16, 2020) (“If Plaintiff proves at trial that Walmart is responsible for posting the copyrighted pictorial works, actual deception and materiality will be presumed.”); *ITEX Corp. v. Glob. Links Corp.*, 90 F. Supp. 3d 1158, 1173 (D. Nev. 2015) (“[I]f the statements at issue are found to be literally false, the court may presume materiality.”).

137. *AECOM Energy & Constr., Inc.*, 348 F. Supp. 3d at 1046.

138. *Id.* at 1056; *see also ITEX Corp.*, 90 F. Supp. 3d at 1172 (permitting the presumption of materiality after the plaintiff proved literal falsity).

139. *Obesity Rsch. Inst., LLC v. Fiber Rsch. Int'l, LLC*, 310 F. Supp. 3d 1089, 1125 (S.D. Cal. 2018) (“The Court is not convinced that the Ninth Circuit has likewise

Institute, LLC v. Fiber Research International, LLC, the District Court for the Southern District of California declined to permit a presumption of materiality when literal falsity was proven for defendants' claims about their obesity research.¹⁴⁰ The district court stated that no Ninth Circuit case had formally permitted the presumption.¹⁴¹ Notably, the Court of Appeals for the Ninth Circuit has not reviewed this matter to determine the proper approach.

D. Importance of the Circuit Split

Thus, the split creates different standards for making a false advertising claim under the Lanham Act. Therefore, depending on the circuit, it may be easier for a case to be brought because it benefits from the presumption. A federal statute designed to protect consumers should protect all consumers regardless of which circuit they bring suit in. Moreover, this split will lead to inequitable administration of the Lanham Act across the country, to the detriment of consumers. Similarly, problematic forum shopping may occur when companies try to take advantage of presumptions in some circuits and not others.

IV. ADVOCATING FOR THE PRESUMPTION REGARDING MATERIALITY

The Fifth Circuit and many of the district courts in the Ninth Circuit are correct that the presumption should be permissible.¹⁴² Based on the logic of the accepted presumption of consumer deception when literal falsity is proven, there should likewise be a presumption of materiality when literal falsity is proven. The bar for literal falsity is high and requires evidentiary proof that a statement was untrue.¹⁴³ Once a plaintiff proves this, the burden should be on the defendant to demonstrate that it was not material, meaning it did not or was unlikely to alter consumer spending decisions.¹⁴⁴

Additionally, the presumption should be permissible due to the advertisement's targeted nature at consumers who trust influencers. These consumers are more likely to buy the promoted products and be influenced

determined that materiality is presumed for actually false statements"); *Pestube Sys., Inc. v. HomeTeam Pest Def., LLC*, No. CV 05-2832-PHX-MHM, 2008 WL 11448028, at *8 (D. Ariz. Mar. 31, 2008) ("The Court has found no instance where a court in the Ninth Circuit held that the rebuttable presumption applies to the element of materiality in either comparative false advertising or non-comparative false advertising cases.").

140. *Obesity Rsch. Inst., LLC*, 310 F. Supp. 3d at 1125.

141. *Id.*

142. See discussion *supra* Sections III.A, C.

143. See Leighton, *supra* note 38, at 1290.

144. See *supra* Section II.A.3.

by the influencer.¹⁴⁵ Therefore, the presumption should exist to encourage truth in advertising and trust from the consumer.

Lastly, the existence of the presumption would promote a more fair and competitive marketplace, which the Lanham Act was designed to protect. Without the presumption, there is a substantial risk to competitive and fair marketplaces. Therefore, allowing for this presumption will promote better oversight from companies in the social media space, thereby promoting a better marketplace for companies and consumers.

A. Similarity to the Presumption of Consumer Deception

First, both materiality and consumer deception regard the effects of false advertising on the consumer.¹⁴⁶ The logic of the current consumer deception presumption revolves around the idea that lying to or misleading a consumer already shows that they are or were likely to be deceived by the lie.¹⁴⁷ If courts presume a consumer was likely to be deceived by the false statement, the same should go for their purchasing decisions. It is true that not all literal falsities affect a consumer's ultimate purchase. But that is not the test. The test is whether it is likely that the false statement influences a consumer's purchasing decision.¹⁴⁸

A literally false statement to a consumer about a product or a competitor's product is likely to affect that consumer's decision to purchase the product. It may not be immediate, but a consumer is processing the information provided and using it to decide to purchase a good or service.¹⁴⁹ Once a

145. Christopher Terry, Eliezer Joseph Silberberg & Stephen Schmitz, *Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers*, 29 J.L. & POL'Y 406, 418 (2021).

146. See *supra* Sections II.A.2–3.

147. In *Cashmere & Camel Hair Manufacturers Institute v. Saks Fifth Avenue*, 284 F.3d 302 (1st Cir. 2002), the First Circuit persuasively noted:

[A]pplying a presumption of consumer deception to all literal falsity claims, irrespective of the type of relief sought, makes sense. When a plaintiff demonstrates that a defendant has made a material misrepresentation that is literally false, there is no need to burden the plaintiff with the onerous task of demonstrating how consumers perceive the advertising.

Id. at 314.

148. *Id.* at 312 n.10.

149. Studies show that the use of influencers greatly increases consumer attitudes toward brands and their purchase intentions, with 74% of consumers relying on social media content when they make online purchase decisions. See, e.g., Roberts, *supra* note 85, at 97 (citing Eric Burgess, *11 Essential Stats for Influencer Marketing in 2016*, INFLUENCER

statement is proven to be literally false in a false advertising case, the defendant should have the burden of proving that it did not affect the consumer's purchasing decision.¹⁵⁰

Admittedly, this makes a claim for false advertising easier for a plaintiff to prevail and more difficult for a defendant to defend. However, this applies only to the small subset of cases where the plaintiff can prove that a statement was literally false. This would encourage fewer literal falsities in advertising. Defendants would then have the choice to limit comparative advertisements that unsupported by the facts.

If a company is using advertising on social media platforms with influencers, it is because they think those influencers will alter consumer decision-making better than the traditional advertising route.¹⁵¹ The company intends to affect consumer spending decisions, and the influencer has a closer relationship to the consumer than the company. Literal falsities in the social media advertising context are more likely to affect a consumer's choice to buy a product because that is often the reason the consumer is following the influencer in the first place.¹⁵² And those consumers are unable to fend for themselves.¹⁵³

Certainly, there are situations where the influencer or company truly believes what they are saying, and those are cases which are handled differently under the Lanham Act false advertising claim.¹⁵⁴ This Comment proceeds on the theory that the plaintiff has successfully proven that a claim is literally false, which merits no evaluation of what an influencer or company did or did not believe. What matters in making this distinction is if the influencer is making puffery statements such as "this product is the best"

ORCHESTRATION NETWORK, <https://www.ion.co/11-essential-stats-for-influencer-marketing-in-2016> [<https://perma.cc/EG36-242A>].

150. See Lillian 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).

151. "Unlike traditional advertisements, which were static and disseminated en masse, digitally-mediated platforms, such as websites and social media applications, constitute dynamic, interactive, intrusive, and personalized choice architectures. Websites can alter the presentation of information depending on the specific things they know about each individual visitor." Daniel Susser, Beate Roessler, & Helen Nissenbaum, *Online Manipulation: Hidden Influences in A Digital World*, 4 GEO. L. TECH. REV. 1, 31–32 (2019).

152. See Geyser, *supra* note 11 ("Influencers in social media are people who have built a reputation for their knowledge and expertise on a specific topic. They make regular posts about that topic on their preferred social media channels and generate large followings of enthusiastic, engaged people who play close attention to their views.").

153. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:22 (5th ed. 2020) ("The amount of provable financial damage to one consumer, if any, is too small to justify expensive litigation. The consumer's interest would never be adequately protected by individual consumer lawsuits.").

154. See *supra* notes 51–55 and accompanying text.

versus literally false statements like “this product contains cashmere” when it factually does not.¹⁵⁵

Additionally, a Lanham Act presumption is rebuttable.¹⁵⁶ This means that if the defendant can show any evidence against a presumed fact, the presumption disappears. Therefore, permitting the presumption of materiality will not necessarily shift the burden to the defendant permanently. Instead, a defendant would just need to show that there is evidence that it was not material for the burden to shift back to the plaintiff to show that the false statement was material. Importantly, presumptions do not shift the burden of persuasion away from the plaintiff.¹⁵⁷

In the era of social media, where influencers can track the engagement with all of their posts and videos, this information is more readily available to the defendant paying the influencer. Therefore, it would not be too onerous to require a defendant to carry the burden of showing that their already literally false statement also did not materially alter their sales revenue or some other easily tracked metric. Therefore, it makes more sense for the company who has easier access to the data to hold the burden after literal falsity is proven. Companies and social media platforms have access to a plethora of consumer data which they use to influence and alter consumer decision-making.¹⁵⁸

155. *E.g.*, *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 312 (1st Cir. 2002).

156. A Lanham Act presumption is rebuttable. *See Appliance Recycling Centers of Am., Inc. v. JACO Env’t, Inc.*, 378 F. App’x 652, 655 (9th Cir. 2010) (noting that, under the Lanham Act, “[d]eliberately false comparative claims give rise to a rebuttable presumption of actual deception” (citing *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997))); *see also* *Nunley v. City of L.A.*, 52 F.3d 792, 796 (9th Cir. 1995) (“Under the so-called ‘bursting bubble’ approach to presumptions, a presumption disappears where rebuttal evidence is presented.”).

157. *See, e.g.*, FED. R. EVID. 301 (“In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.”).

158. Carole Cadwalladr, *Google, Democracy and the Truth About Internet Search*, THE GUARDIAN (Dec. 4, 2016), <https://www.theguardian.com/technology/2016/dec/04/google-democracy-truth-internet-search-facebook> [https://perma.cc/DX7Z-CUM9].

B. Promoting Trust in Advertising

A consumer in the United States is protected from deceptive business practices and the goal of the Lanham Act is to protect the consumer¹⁵⁹ and to foster an economy where promises can be relied upon between buyer and seller. This trust is vital to companies' profit margins, the wellbeing of consumers, and the economic wellbeing of the United States and global economies.¹⁶⁰ A good salesman can alter consumer behavior, and good salesmen are necessary to stimulate consumption in a healthy economy. However, the line should be drawn at the violation of that salesman's good faith and honesty.¹⁶¹

False and misleading statements on social media are more likely to affect consumers than traditional advertising where there is more distance between the consumer and the marketing. Sometimes social media advertising is described as native advertising because of the way the advertising camouflages itself within the social media platform.¹⁶² Influencers rely on the consumer's emotional investment in social media in order to promote the good or service.¹⁶³ One study found that using social media advertising to access customers led to higher consumer-brand relationships and more word-of-mouth communications about confidence in the brand.¹⁶⁴ Therefore, consumers are using social media to make purchasing decisions and are trusting the efficacy of the brands more.¹⁶⁵

Moreover, studies show that consumers treat influencers more like friends than they do salespeople.¹⁶⁶ One study shows that 61% of consumers are

159. But see Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840–41 (2007) (arguing that trademark law does not have purely consumer-oriented pedigree).

160. See, e.g., Arch G. Woodside & J. William Davenport, Jr., *The Effect of Salesman Similarity and Expertise on Consumer Purchasing Behavior*, 11 J. MKTG. RSCH., May, 1974, at 198, 198.

161. Melvin J. Dubnick, *Accountability and Ethics: Reconsidering the Relationships*, 6 INT'L J. ORG. THEORY & BEHAV. J. 405, 407–09 (2003).

162. Bannigan & Shane, *supra* note 80, at 248; see also Bianca Harms, Tammo H.A. Bijmolt & Janny C. Hoekstra, *Digital Native Advertising: Practitioner Perspectives and a Research Agenda*, 17 J. INTERACTIVE ADVERT., July–Dec. 2017, at 80, 85 (discussing how consumers are especially receptive to emotional content conveyed through digital native advertising for a product).

163. See Bannigan & Shane, *supra* note 80, at 248.

164. Simon Hudson et al., *The Influence of Social Media Interactions on Consumer-Brand Relationships: A Three Country Study of Brand Perceptions and Marketing Behaviors*, 33 INT'L J. RSCH. MKTG. 27, 37–38 (2016).

165. See *id.* at 29, 38.

166. See Bannigan, *supra* note 80, at 249.

likely to trust an influencer's recommendation whereas only 38% would trust a brand's similar recommendations.¹⁶⁷

The argument that a literally false statement by a social media influencer is not affecting consumer decision-making is controverted by the readily available, tracked data of how the influencer is affecting a company's sales.¹⁶⁸ By virtue of partnering with an influencer, a company keeps track of this data so if the influencer states something literally false about the product, the defendant is in the best position to demonstrate how it affected consumer decision-making.¹⁶⁹

Similarly, surveys show that only 64% of influencers indicate that they always tried the products they endorsed.¹⁷⁰ This shows that at least some influencers are touting a positive experience with a product they have not used.¹⁷¹

The internet created an era of misinformation that spreads to news, medicine, politics, and everywhere in between.¹⁷² Our society has a moral commitment to combat untruths on all media platforms, including in advertising.

A literally false statement as proven in a false advertising claim is what is commonly referred to as a lie. Although a literally false statement does not require scienter, permitting the presumption of materiality for literally false statements will likely reduce the amount of lying in advertisements on the internet and on social media. The influencers on social media are tied to the defendants at risk of being sued for false advertising when a false statement is made.

167. *Matter Survey*, *supra* note 91.

168. Companies can readily track how many followers they gained as a result of the influencer content, and they can track how many consumers purchased, signed-up, or subscribed based on trackable links posted by the influencer. *The Total Guide to Influencer Marketing Measurement*, GRIN (June 2023), <https://grin.co/blog/influencer-marketing-measurement/> [<https://perma.cc/26QA-KBBJ>].

169. *Id.* (identifying tools used by companies to track consumer purchase data related to particular influencer); *see also* Shmuel I. Becher, Yuval Feldman & Meirav Furth-Matzkin, *Toxic Promises*, 63 B.C. L. REV. 753, 760 (2022) (noting that brand interaction impacts consumer decision-making).

170. *See* Roberts, *supra* note 85, at 95.

171. *Id.*

172. *See, e.g.*, Michael L. Rustad & Thomas H. Koenig, *Creating a Public Health Disinformation Exception to CDA Section 230*, 71 SYRACUSE L. REV. 1251, 1274 (2021); *see also* Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. 297, 308 (2022) (arguing the detrimental effects of misinformation from the news, politicians, and social media supports stronger prohibitions on lying).

If this presumption exists, the companies using influencers will be more careful about the statements an influencer can make about their product or service and the comparisons they make to other products or services. This matters. Toxic oral promises to consumers are especially harmful. The influencers have oral interactions with consumers that are intuitive and spontaneous, such as video stories or broadcasting live on a platform.¹⁷³ This intuitive reasoning leads to more dishonesty by the influencer and cheating of the consumer because lying is more rewarding than telling the truth and there is a short window to self-correct. The influencer is gratifying their own self-interest instead of maximizing the consumer's interest. Similarly, verbal interactions, such as live broadcasting on a social media platform, increase ambiguity. Ambiguous language makes it easier for influencers to disregard the potentially misleading nature of their words.

In particular, the beauty industry is fraught with advertisements and misleading statements about the efficacy of certain products over another.¹⁷⁴ In the past twenty years, the skincare industry boomed¹⁷⁵ and influencers played a large role in driving consumers to beauty sites to purchase various products.¹⁷⁶ For instance, social media users can direct message social media influencers and ask them questions about products they promote. Additionally, false statements like Khloe Kardashian's use of Flat Tummy directly harm consumers and their safety.¹⁷⁷ When an influencer states something false about a beauty product—for example, that they use it every day or it is better than XYZ company for reducing wrinkles—

173. Cf. Becher, Feldman & Furth-Matzkin, *supra* note 169, at 781–82 (“When salespeople engage freely with consumers and respond to their questions, they typically use their intuitive, rather than deliberate, reasoning. Such intuitive reasoning may enhance dishonesty in situations where cheating is tempting . . .”).

174. See Alecsandra Dragus, Note, *Detoxing from Clean Claims: Bridging the Gap Between “Clean” and “Dirty” Beauty*, 13 WM. & MARY BUS. L. REV. 895, 903–04 (2022).

175. Ahiza Garcia, *The Skincare Industry Is Booming, Fueled by Informed Consumers and Social Media*, CNN BUS. (May 10, 2019, 11:30 AM), <https://www.cnn.com/2019/05/10/business/skincare-industry-trends-beauty-social-media/index.html> [<https://perma.cc/NMJ6-82WS>]; Savannah Sachs, *The Skin Care Effect: A Case Study*, GLOB. COSM. INDUS., Feb. 2021, at 11, 12, https://gcimagazine.texterity.com/gcimagazine/february_2021/ (last visited Apr. 21, 2024) (noting the rapid growth of “direct-to-consumer” skin care advertising during the pandemic).

176. Dina Gerdeman, *How Influencers Are Making Over Beauty Marketing*, FORBES (Dec. 13, 2019, 8:30 AM), <https://www.forbes.com/sites/hbsworkingknowledge/2019/12/13/how-influencers-are-making-over-beauty-marketing/> [<https://perma.cc/HLC2-9VY6>].

177. A Connecticut Senator has gotten involved by asking the FTC to address extensive false marketing issues by celebrity influencers. See, e.g., Julie Mazziotta, *Connecticut Senator Calls for Investigation into Detox Teas Sold by ‘Celebrity Influencers’*, PEOPLE (June 5, 2019, 1:35 PM), <https://people.com/health/senator-wants-detox-tea-investigation-celebrity-influencers/> [<https://perma.cc/ZUV8-E6Q7>] (citing Richard Blumenthal, (@SenBlumenthal), TWITTER (June 4, 2019, 4:59 PM), <https://twitter.com/SenBlumenthal/status/1136059843285061632> (last visited Apr. 19, 2024)).

consumers who follow them are relying on these false statements when making their choice to buy the product.¹⁷⁸ One court has outlined why a presumption of materiality should exist for health claims.¹⁷⁹

A company has a moral obligation to ensure that truthful information is advertised, either by the company through the traditional advertising routes or on social media. Holding the company accountable for false statements made by the influencer promotes the legitimacy of the marketplace, especially when the marketplace includes primarily younger generations.

C. Creating a Fairer Marketplace

A marketplace without the presumption of materiality poses a substantial risk to the maintenance of these competitive and fair marketplaces. False advertising discredits industry, hurts consumer confidence, and impairs trade.¹⁸⁰

Less tangible but nevertheless real is the injury suffered by the honest dealer who finds it necessary to meet the price competition of inferior goods, glamorously misdescribed by the unscrupulous merchant. The competition of a liar is always dangerous even though the exact injury may not be susceptible of precise proof.¹⁸¹

Companies in the marketplace are harmed when they suffer or lose out to their competitors making false claims.¹⁸² This can undermine sectors of industry, advertisement, and truth in general.

The Lanham Act permits companies to recover for “harm to themselves, competition, and consumers simultaneously, which benefits their bottom line and helps them fulfill a duty they arguably owe to the marketplace.”¹⁸³ Proving materiality and falsity is often burdensome and expensive for

178. See Becher, Feldman & Furth-Matzkin, *supra* note 169, at 759.

179. Statements “presumed to be material under this essential characteristics or qualities rubric” include claims relating to “health, safety and other areas of obvious consumer concern. Some of these types of claims are treated as virtually per se material because of their obvious potential effect on purchasing decisions.” *N. Am. Med. Corp. v. Axion Worldwide, Inc.*, No. 1:06-CV-1678-JTC, 2007 WL 9752026, at *9 (N.D. Ga. Mar. 30, 2007) (quoting Leighton, *supra* note 52, at 595).

180. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 778 n.4 (1992) (Stevens, J., concurring) (quoting Handler, *supra* note 20, at 193).

181. *Id.* (quoting Handler, *supra* note 20, at 193).

182. See Roberts, *supra* note 85, at 87–88.

183. *Id.* at 88.

companies bringing false advertising claims.¹⁸⁴ Allowing for the materiality presumption will lead to an accountable marketplace for companies to prosper with an easier solution for competitors who are losing out due to unfair claims by their competitors, whether through influencers or traditional advertising.

V. SOLUTION

A. *Judicial Remedy*

The solution to the issue of false advertising in the context of influencers is to permit the presumption of materiality upon a finding of literal falsity in all federal courts. The Supreme Court should therefore grant certiorari on this issue so that the circuits are aligned in their enforcement of this presumption. The Supreme Court should also limit the use of the presumption to contexts where the false statement is more likely to alter consumer spending behavior.

The Supreme Court need not use the exact logic of the Fifth Circuit, because it does not clearly articulate the necessity of the presumption and how it differs from consumer deception. Instead, the Supreme Court should set forth a logical test that explains how materiality is relevant to literal falsity.

The Supreme Court would primarily rely on the legislative intent of the Lanham Act to make this ruling. The Lanham Act was designed to protect companies and consumers.¹⁸⁵ In addition to textual interpretation of the Lanham Act, the Supreme Court could also rely on the reason the Lanham Act was enacted.

This would deter falsities in advertising by companies and influencers, and it would lead to more accountability for the new class of social media influencers when they are sponsoring goods and services. Rather than granting influencers complete freedom to say whatever they feel, companies would better educate these influencers at the risk of dealing with a complicated false advertising lawsuit from one of their competitors. In cases where influencers statements are heavily dictated by the companies that pay

184. In *U-Haul International, Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986), the Ninth Circuit acknowledged:

It is not easy to establish actual consumer deception through direct evidence. The expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived. He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.

Id. at 1041.

185. See *supra* Section II.A.

them, it would encourage the companies to be more truthful in the words they craft on behalf of the influencers.

B. Legislative Remedy: Codifying a Presumption

Additionally, Congress should amend the Lanham Act to include this presumption as well as the presumption of consumer deception. The presumption of consumer deception is already widely accepted by many circuit courts.¹⁸⁶ However, to ensure uniformity across the federal circuit courts moving forward, it is necessary to codify this presumption.

When amending the Lanham Act, Congress could limit the presumption to certain categories of goods and services that it thinks are more important to protect, such as those regulated by the Food and Drug Administration that are ingested by consumers.¹⁸⁷ Additionally, products and services in the beauty, diet, and wellness industries should receive extra protections under the Lanham Act. These products are more prevalent in advertisements and in social media advertisements in particular. Also, there is a higher likelihood that false or misleading statements about such products will lead to purchases to the consumer's detriment. Beauty and wellness products, like skincare, directly affect consumers body and mental state such that false advertising about such products should be limited.

If Congress amended the Lanham Act, sample language to codify the presumption could read, "Upon a finding of literal falsity, consumer deception and materiality may be presumed. In the case of health, food, and beauty product advertisements, consumer deception and materiality may similarly be presumed."¹⁸⁸ Such language would resolve the circuit split and provide clarity to companies seeking to advertise their products using social media or otherwise. Moreover, it specifically addresses the categories of consumer goods that are more directly harmful to consumers and emphasizes that the presumption likewise applies. The categories could also be amended by Congress as needed to account for changing advertising norms and problems.

186. See, e.g., *U-Haul Int'l, Inc.*, 793 F.2d at 1040; see also cases cited *supra* note 56.

187. See Leighton, *supra* note 52, at 595.

188. This is an example amendment to 15 U.S.C. § 1125.

C. Collaboration with Social Media Platforms

Another solution could be collaboration between social media platforms, influencers, and the government. The FTC has already begun to regulate the disclosures made by the influencers about their relationship to the companies they promote on their platforms.¹⁸⁹ The FTC could issue more guidelines to the social media platforms that influencers and companies use about what can and cannot be claimed. The FTC could also encourage social media companies to promote truth on their platforms by requiring statements of fact to be supported by evidence to avoid legal repercussions.

Social media companies are already starting to self-regulate some content on their platforms.¹⁹⁰ Cultural problems such as misinformation in political campaigns and COVID-19 realities sparked much of this self-regulation. Social media platforms could flag statements of fact for social media users as a warning that they may not necessarily be true.

Stronger FTC regulation would likely lead to stricter guidelines between the company and the influencer in terms of what they can say about the product on their platform.¹⁹¹ However, it would ultimately lead to more transparency on the internet.¹⁹²

Some companies are already strict about what they permit a social media influencer to say.¹⁹³ FTC guidance would encourage more companies to exercise caution in letting the influencer dictate the advertisements message. It would also encourage companies to treat their social media advertising the same as traditional modes of advertising, with legal repercussions.

189. See, e.g., 16 C.F.R. § 2551(d) (“Advertisers are subject to liability for misleading or unsubstantiated statements made through endorsements or for failing to disclose unexpected material connections between themselves and their endorsers.”). However, failure to disclose the relationship between an influencer and a company does not rise to the level of false advertising claim under the Lanham Act. See, e.g., *Lokai Holdings, LLC v. Twin Tiger USA, LLC*, 306 F. Supp. 3d 629, 639 (S.D.N.Y. 2018) (refusing to impose liability in suit brought by private plaintiff under the Lanham Act where defendant did not disclose relationship, but made no affirmative misrepresentation).

190. Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan. 14, 2021), <https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation> [<https://perma.cc/8YAJ-HNJ5>].

191. Brands should be wary of influencer brand promotion and should carefully monitor their potential liability under the Lanham Act. See Bannigan & Shane, *supra* note 80, at 258 (noting brands that violate consumer trust risk “bad publicity and damage to consumer goodwill”).

192. See Ashely Luong, Note, *All That Glitters Is Gold: The Regulation of Hidden Advertisements and Undisclosed Sponsorships in the World of Social Media Influencers*, 11 WM. & MARY BUS. L. REV. 565, 598 (2020).

193. See *id.* at 586.

VI. CONCLUSION

Social media has made its mark on the advertising landscape and with that comes the need for regulation. The parties involved include the companies, the influencers, the influencer's agencies, the social media platforms, the competitors, the consumers, and the government. The Lanham Act exists and functions effectively to promote truth in advertising and consumer protection. The dawn of the social media age requires that the Lanham Act be revisited to make sure it is protecting those it was designed to protect. Defendants in a false advertising case have the data to support whether a false statement materially affected consumer's purchasing decision, so the onus should be on them to rebut that presumption. With endless content online, at the very least the advertisements should be grounded in truth.

