

# The Best Explanation and Update on Puffery You Will Ever Read

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“DON’T WORRY, IT’S JUST A PUFF,” or “that claim doesn’t mean anything, it’s just puffery,” have become common refrains in marketing departments and, to some extent, the legal departments reviewing advertising copy in companies across the United States. In many cases, puffing—the making of advertising claims that are not measurable and of the type upon which consumers would not normally rely—can be a powerful tool to build a brand’s image with consumers. Some memorable examples include Nike’s Air Jordan slogan, “It’s gotta be the shoes!”; Starbucks’s slogan, “the best coffee for the best you”; and GEICO’s “[switching to GEICO is] so easy a caveman can do it.” Puffery is valuable precisely because it allows marketers to grab the attention of consumers with bold advertising claims that do not require substantiation. A marketer’s dream, right? Despite the potential for creating a lasting impression, puffing is not without its dangers.

As recent court cases have demonstrated, the marketer’s dream of the perfect puff turns into the legal department’s nightmare when a court determines that the advertising claim is measurable and requires substantiation. The common response that it was only puffery will not suffice to escape liability. Whether or not an advertiser intended to communicate a particular advertising claim has no bearing on liability for false advertising, a strict liability offense. Thus, the calculus of whether or when an ad claim is mere puffery versus a claim that requires substantiation can be a matter of extreme importance to consumer protection lawyers and their clients.

To complicate matters, the applicable legal standards are evolving. In a number of recent cases, a trend appears to be developing with regard to advertising claims that would normally be considered a puff but have been found to require substantiation because the court determined that they are measurable as part of comparative advertising claims. As explained more fully below, there is no bright line rule for

determining whether a claim is puffery or not. But recent developments in case law suggest that the closer an advertiser gets to a comparative advertising claim, the less likely a court will accept the claim to be a mere puff.

## The World’s Briefest History of Puffery

The legal origins of the term “puffery” can be traced back to an 1893 English Court of Appeal case involving a manufacturer’s promise to compensate customers with £100 pounds (in that era, a considerable sum), if they were to contract the flu after properly using the Carbolic Smoke Ball—a rubber ball with a tube that allowed users to inhale carbolic acid vapors purportedly to prevent disease.<sup>1</sup> Eventually, a consumer sued the company after it refused to reimburse the customer who contracted the flu. During trial, the manufacturer defended its marketing claims by arguing such statements were “mere puff” and not meant to be construed literally.<sup>2</sup> Although the three judge panel ruled against the manufacturer, the decision endorsed the notion that traditional rules relating to promises might not apply to advertisements that were clearly not meant to be taken seriously. Thus, the legal defense of puffery was born.

The puffery defense became more prevalent in the early 1900s when U.S. courts commonly applied a caveat emptor approach to commercial transactions. For example, the Second Circuit in *Vulcan Metals Co. v. Simmons Manufacturing Co.*, allowed a company to use a puffing defense, noting that consumers already naturally distrust marketing slogans and finding that customers have equal means of knowing or inspecting a product before purchasing it.<sup>3</sup>

Despite its continued and frequent invocation by practitioners today, a considerable lack of clarity remains as to the legal boundaries of the puffery doctrine.

## Today’s Puffery Standard

In the modern era, the legal definition of puffery depends slightly on your geographic location. Not all courts employ the same definition of puffery. The U.S. Court of Appeals for the Third Circuit, for instance, defines puffery as marketing “that is not deceptive, for no one would rely on its exaggerated claims.”<sup>4</sup> The Ninth Circuit, on the other hand, describes puffery as “exaggerated advertising, blustering and

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boasting upon which no reasonable buyer would rely.”<sup>5</sup> The Fifth Circuit established a more exacting meaning, defining puffery to be “a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”<sup>6</sup> The Federal Trade Commission has established its own definition of puffery, limiting the defense to marketing claims “that ordinary consumers do not take seriously.”<sup>7</sup>

Generally speaking, claims that assert a product is “incredible” or “fine quality,” for instance, will usually be tolerated as “mere puff.” However, when outlandish or exaggerated marketing claims move closer to something that can be measured, the risk the claim will be considered actionable false advertising under the Lanham Act increases. More specifically, Section 43(a) of the Lanham Act establishes the standard under which false advertisement claims are reviewed. This standard consists of the following questions: (1) whether the advertiser made a false or misleading statement of fact about a product; (2) whether the misrepresentation of fact deceived or had the capacity to confuse the general public; (3) whether the deception is material, in that it is likely to influence the consumer’s purchasing decision; and (4) whether the plaintiff has been or is likely to be injured as a result of the statement at issue.<sup>8</sup> Additionally, the statements must be verifiable and “capable of being prove[n] false” by scientific methods.<sup>9</sup> Statements that do not meet the standard above, and cannot be scientifically proven, are likely to be classified as non-actionable puffery.

In practice, the line between actionable statements and “mere puffery” can be difficult to discern. For example, in *Pizza Hut, Inc. v. Papa John’s International, Inc.*, Pizza Hut sued Papa John’s based on its \$300 million national marketing campaign that included, among other things, the slogan, “Better Ingredients. Better Pizza.”<sup>10</sup> Pizza Hut not only claimed that the slogan itself constituted false advertising, but also challenged the entire marketing campaign for its disparaging representations of the competitors’ food quality. In fact, the Papa John’s marketing campaign made multiple assertions, including an ad that claimed that its pizza dough was made with “clear filtered water,” while its competitors, including Pizza Hut, used “whatever comes out of the tap.”<sup>11</sup> During trial, the jury concluded that although Papa John’s advertisements were true, they were actively misleading to consumers. The trial court held that these misleading statements “tainted” Papa John’s slogan, and enjoined the company from continued use.<sup>12</sup>

Papa John’s appealed the decision, arguing that its slogan “Better Ingredients. Better Pizza” constituted non-actionable puffery. The Fifth Circuit agreed, concluding that the slogan by itself was not a claim customers could justifiably rely on because it concerned individual taste not subject to scientific verification.<sup>13</sup> The court also found that the slogan “epitomizes the exaggerated advertising, blustering, and boasting by a manufacturer upon which no consumer could reasonably rely.”<sup>14</sup>

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Nevertheless, the court upheld the jury’s finding that the slogan was misleading when considered in conjunction with Papa John’s entire marketing campaign. The court stated that when viewed in combination with Papa John’s dough and sauce ads, such as the filtered water claim, the slogan changed from non-actionable puffery into a quantifiable statement of fact regarding the relative quality of its ingredients.<sup>15</sup>

Thus, the otherwise unverifiable slogan, “Better Ingredients. Better Pizza,” became effectively tainted “as a result of its use in a series of ads comparing specific ingredients used by Papa John’s with the ingredients used by its ‘competitors.’”<sup>16</sup> This case provides a cautionary tale of how the context of an advertisement can transform the most obvious puffery into a false and misleading statement under the Lanham Act, and in particular, the risks encountered when puffery is used in marketing campaigns featuring comparative advertisements.

### **Puffery and Comparative Advertising**

In some circumstances, a company’s advertising claims are so far-fetched that the claims will clearly fall outside the bounds of the Lanham Act. For example, in *Martin v. Living Essentials, LLC*,<sup>17</sup> the Seventh Circuit affirmed the district court’s decision dismissing false advertising claims brought by the individual world record holder for consecutive kicks of a Hacky Sack. The case involved a commercial advertisement by 5-hour ENERGY that depicted a person who had disproved the theory of relativity, “mastered origami while beating the record for Hacky Sack,” swam the English Channel, and found Bigfoot all within the span of five hours from consumption.<sup>18</sup>

The plaintiff alleged that the commercial falsely represented that a person could beat “the record” for Hacky Sack by consuming a 5-hour ENERGY drink.<sup>19</sup> The circuit court agreed with the lower court’s determination that the commercial was so “grossly exaggerated” that “no reasonable buyer would take it at face value.”<sup>20</sup> The court noted that it did not matter that the commercial conveyed the literally false message that drinking 5-hour ENERGY would empower a per-

son to break the Hacky Sack record, because there was “no danger of consumer deception and hence, no basis for a false advertising claim.”<sup>21</sup> The court found that the challenged statement was “an obvious joke that employ[ed] hyperbole and exaggeration for comedic effect,” and therefore constituted nonactionable puffery.<sup>22</sup>

Moving away from the obviously far-fetched and closer toward the measurable, it is undeniable that making direct competitor statements increases the risk that such advertising crosses the line into actionable statements. Indeed, direct comparisons between products are almost always measurable at some level. This point is vividly illustrated in a trio of recent cases where puffery was combined with comparative advertising elements.

First, a case involving competing car services, *XYZ Two Way Radio Service, Inc. v. Uber Technologies, Inc.*, provides a recent example of a court’s analysis in the comparative advertising context.<sup>23</sup> Although the court in *XYZ Two Way Radio* accepted the puffery defense, it may be the closest an advertiser can come without facing consequences for unsubstantiated comparative advertising.

In *XYZ Two Way Radio*, two vehicle for-hire companies that provided black-car services sued Uber for allegedly false statements touting the “safety” of Uber’s services. The court found that Uber’s safety-related statements fell into the “boastful and self-congratulatory” definition of puffery because many of the statements were couched in terms such as “committed to,” “aim to,” or “we believe deeply.”<sup>24</sup> The court also found that other challenged statements could not reasonably be understood as representations of fact that could be proven—e.g., “Uber is committed to connecting you to the safest ride on the road. This means setting the strictest safety standards possible, then working hard to improve them every day.” The court reasoned that if Uber literally set the “strictest safety standards possible,” it could not “improve them every day.”<sup>25</sup>

Neither was the court persuaded by the plaintiffs’ challenge of Uber’s guarantee that its drivers “must go through a rigorous background check” that is “often more rigorous than what is required to become a taxi driver.” Although Uber’s background check did not require fingerprints, a medical clearance or a drug test—all of which New York City requires for licensed cab drivers—the court explained that Uber’s background check statements are also “boastful and self-congratulatory.”<sup>26</sup> Further, this statement, featured on Uber’s website, included the qualifier “often,” so that Uber was actually stating that its background checks are often more rigorous than what is required to become a taxi driver.<sup>27</sup> Uber’s website also included the disclaimer that “specifics [on the background checks] vary depending on what local governments allow.”<sup>28</sup> Ultimately, the Court concluded that Uber’s statements were meant simply to convey that it takes the safety of its passengers very seriously.<sup>29</sup> The plaintiffs’ motion for reconsideration of the court’s order dismissing the action is still pending, so stay tuned.

In other recently decided cases, courts have reached different conclusions, holding against companies that defended their comparative claims as mere puffing. For example, in *Tempur Sealy International, Inc. v. WonderGel, LLC*, a Kentucky district court granted a temporary restraining order and preliminary injunction against the mattress manufacturer, WonderGel, due to “likely false or misleading statements under the Lanham Act.”<sup>30</sup> WonderGel’s online mattress commercial featured a Goldilocks character making disparaging comments about a Tempur Sealy mattress. When the Tempur Sealy mattress appeared in the commercial (although not identified by name), Goldilocks suggested to the audience that the mattress causes shoulder pain, is “rock hard,” puts pressure on your hips, and may cause arthritis. For example, Goldilocks stated, “Looking for some shoulder pain? Try a hard mattress. It may feel like a rock and put pressure on your hips, but it’s the perfect way to tell your partner: ‘Hey baby, want some arthritis?’”<sup>31</sup> At another point in the commercial, Goldilocks referred to the Tempur Sealy mattress as a “prison bed.”<sup>32</sup>

In defense of its commercial, WonderGel argued that the commercial was permissible comedy, and that the statements made should be considered mere puffery. The court rejected this argument, finding that (1) it was “unaware of any ‘humor exception’ that would make literally false statements acceptable under the Lanham Act”; and (2) “statements regarding potential negative health effects” of a competitor’s product are clearly unacceptable forms of advertising.<sup>33</sup>

Also this past year, General Mills sought and obtained a temporary restraining order and the entry of a preliminary injunction against Chobani for targeting Yoplait in Chobani’s Simply 100 campaign.<sup>34</sup> In Chobani’s ad, a woman throws a Yoplait Greek 100 yogurt out of her car, which an announcer says, “Potassium sorbate? Really? That stuff is used to kill bugs.”<sup>35</sup> The commercial also includes images of a roadside stand packed with fresh racks of produce and the hashtag #NOBADSTUFF appears at the end of the commercial.

Chobani’s Print ad also used the phrase “bad stuff” to refer to artificial ingredients in non-Chobani yogurts, while prominently displaying a Yoplait Greek 100 yogurt.<sup>36</sup> Chobani defended its bug-killer claims by arguing that they were literally true (i.e., that potassium sorbate is used to kill bugs) and that the other challenged messages—that its products are “good” or that General Mills’ artificial ingredients are “bad stuff”—constitute mere puffery.

In rejecting Chobani’s puffery defense, the court distinguished between general statements of puffery versus what it saw as direct attacks against a competing yogurt company.<sup>37</sup> Chobani’s statements about potassium sorbate may have been literally true, but nonetheless could still be “literally false” if the clear meaning of the message conveyed by the advertisement is false. In that case, it was the juxtaposition of the negative phrasing with other statements and images that unfairly painted General Mills’ products as a safety risk because they contain the ingredient potassium sorbate. According to the

court, the television commercial goes so far as to convey that because Yoplait Greek 100 is laced with a pesticide, it is dangerous and unfit to eat, and that consumers should discard it as garbage, even though federal agencies have found potassium sorbate to be a safe food ingredient.<sup>38</sup> As a result of this finding, the court enjoined Chobani from disseminating the false message that potassium sorbate makes Yoplait Greek 100 unsafe to consume.

### False Advertising Is a Strict Liability Offense

So an advertiser puffs and misses—no harm no foul, right? Wrong. Recent case law confirms that false advertising is a strict liability offense. If the advertising claim is false, then the advertiser is liable regardless of intent. This is true even if the advertisement was once true, but has been rendered stale in the marketplace through new product innovation. In the case of *SharkNinja v. Dyson*, for example, SharkNinja challenged certain advertising claims made by Dyson regarding the comparative efficacy of Dyson’s vacuum cleaner products.<sup>39</sup> Specifically, Dyson claimed that one of its vacuums had “twice the suction of any other vacuum.” Dyson defended on the grounds that at the time it initially made its advertising claim, it was a truthful claim. Nevertheless, SharkNinja launched a new vacuum, which had more than half the suction power of Dyson’s DC65 vacuum, sometime after Dyson launched its Twice the Suction advertising campaign. This development rendered Dyson’s advertising claim false and both parties moved for summary judgment.

On summary judgment, Dyson argued that while Dyson’s claim may have become stale in the market, Dyson “made commercially reasonable efforts” to remove the claim from the market upon learning of SharkNinja’s new product. In other words, Dyson argued that it never intended to falsely advertise its vacuum and, when it learned that its advertising claim was false, Dyson purportedly moved quickly to remove the false claim and, thus, should not be found liable for false advertising. The court denied Dyson’s argument, stating:

The language of the statute is compulsory, and it includes no exceptions for cases in which a manufacturer undertakes good faith, commercially reasonable efforts to remove a false claim from the marketplace upon learning of its falsity. Good faith is simply not a defense to a false advertising claim under the Lanham Act.

Thus, the case law and the statute seem to appropriately establish that an advertiser that puts a claim into the marketplace bears all of the risk of the claim being false or becoming stale. An approach that allowed such an advertiser to continue to benefit from false or stale claims, so long as reasonably commercial efforts were undertaken to remove the advertising, would not adequately disincentive the behavior prohibited by the Lanham Act or foster vigilance about the accuracy of advertising claims. Further, it would unfairly shift the cost of stale or inaccurate claims from the sponsor of such claims to its competitors, as long as the sponsor made reasonable efforts to remove those claims.<sup>40</sup>

It is a short leap between the court’s analysis in the *Shark-*

*Ninja* case and the analysis to be applied in cases asserting a puffing defense. Whether an advertiser intended to puff is not the relevant question for analysis, advertisers and their lawyers should keep this strict liability standard in mind when developing claims they plan on categorizing as puffery. If it turns out substantiation is needed, the advertiser will be liable for the duration of the false claim, regardless of intent or efforts to remove the claim from the market.

### Conclusion

Puffery can be a powerful marketing tool that, if used correctly, can capture the attention of consumers and garner sales. But puffery is not without its dangers. Care should be taken to ensure that an advertising claim is one that does not need substantiation before putting the claim into the marketplace. As recent case law has emphasized, the more the claim resembles a measurable fact or comparative advertisement, the more likely the claim will require substantiation and, if not supported, the advertiser will be held strictly liable. ■

<sup>1</sup> *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (U.K. Ct. of Appeal 1893).

<sup>2</sup> *Id.*

<sup>3</sup> *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 857 (2d Cir. 1918).

<sup>4</sup> *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 922 (3d Cir. 1990) (“Mere puffing, advertising ‘‘that is not deceptive for no one would rely on its exaggerated claims,’’ is not actionable under § 43(a).” *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253 n.23 (D. Del. 1980) (quoting 1 R. CALLMANN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 19.2(b)(2) (3d ed. 1967 & 1979 Supp.)).

<sup>5</sup> *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997) (quoting 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27.04[4][d] at 27–52 (3d ed. 1994)).

<sup>6</sup> *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000) (quoting 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION § 27.38 (4th ed. 1996)).

<sup>7</sup> *Cliffdale Assocs.*, 103 F.T.C. 110, 174 (1984); see also FTC Policy Statement on Deception (Oct. 14, 1983), <https://www.ftc.gov/system/files/documents/publicstatements/410531/831014deceptionstmt.pdf>.

<sup>8</sup> 15 U.S.C. § 1125 (a) (1); see also *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1500 (5th Cir. 1990).

<sup>9</sup> *Coastal Abstract Serv. Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999).

<sup>10</sup> 227 F.3d 489 (5th Cir. 2000).

<sup>11</sup> *Id.* at 492.

<sup>12</sup> *Id.* at 493–94.

<sup>13</sup> *Id.* at 498–99.

<sup>14</sup> *Id.* at 498.

<sup>15</sup> *Id.* at 501–02.

<sup>16</sup> *Id.* at 498.

<sup>17</sup> *Martin v. Living Essentials, LLC*, 653 F. App’x 482 (7th Cir. 2016).

<sup>18</sup> *Id.* at 483.

<sup>19</sup> *Id.*

<sup>20</sup> *Martin v. Living Essentials, LLC*, 160 F. Supp. 3d 1042, 1049 (N.D. Ill.), *aff’d*, 653 F. App’x 482 (7th Cir. 2016), *reh’g denied* (7th Cir. July 21, 2016).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1051.

<sup>23</sup> XYZ Two Way Radio Serv., Inc. v. Uber Techs., Inc., 214 F. Supp. 3d 179 (E.D.N.Y. 2016).

<sup>24</sup> *Id.* at 183–84.

<sup>25</sup> *Id.* at 183.

<sup>26</sup> *Id.* at 184.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Tempur Sealy Int'l, Inc. v. WonderGel, LLC, Civil Action No. 5:16-cv-83-JMH, 2016 WL 1305155, \*4 (E.D. Ky. Apr. 1, 2016).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Even though the Temper Sealy mattress was unnamed throughout the commercial, the court determined that Tempur Sealy's trade dress was sufficiently recognizable such that viewers would recognize it as the plaintiff's product.

<sup>34</sup> Gen. Mills, Inc. v. Chobani, LLC, 158 F. Supp. 3d 106 (N.D.N.Y. 2016).

<sup>35</sup> *Id.* at 112.

<sup>36</sup> *Id.* at 113.

<sup>37</sup> *Id.* at 118.

<sup>38</sup> *Id.* at 113–14.

<sup>39</sup> SharkNinja Operating LLC v. Dyson Inc., 200 F. Supp. 3d 281 (D. Mass. 2016).

<sup>40</sup> *Id.* at 287–88.