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Combatting the Rise in False Advertising by White-Label Manufacturers on The Internet

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Due to the rise and dominance of eCommerce and Internet marketplaces as a sales channel, many U.S. manufacturers face increasing competition from Chinese and other international companies flooding cheaper, white-label alternatives into the market. However, a growing concern for many of these U.S.-based manufacturers is the use of false advertising to entice consumers to purchase these white-label alternatives with the (empty) promise of equal or better performance. Such a misleading sales tactic has unfairly cost many manufacturers lost sales and lost revenue.

To be sure, manufacturers are not powerless to these deceptive practices by international market entrants. U.S. trademark law prohibits the exact false advertising that many manufacturers face from competitors on the Internet. A federal false advertising claim is a quick and, ultimately, rather cost-effective means to combat lost sales to this dishonest competition.

WHITE-LABEL PRODUCTS AND INFLATED PERFORMANCE SPECIFICATIONS

White-label products are mass-manufactured generic products later customized for multiple brands. This customization often comes in the form of simply adding a logo or brand name to the product. In other words, the white-label products are later “re-branded” and can be resold by many companies to consumers. Because they are generic products, white-label products are often less expensive, but they cannot compete with the performance of a well-known branded product. Because white-label products are new in the marketplace and their brand names are unknown, they typically compete for a sale only on price—often offering prices lower than their better-known branded competition.

However, a recent trend is developing where white-label products are advertised at a lower price *and* with exaggerated product performance specifications. In seeking to gain a foothold in the marketplace and build their brand names, white-label product manufacturers are purposefully inflating their products’ performance standards. The examples are endless: a white-label flashlight with inflated brightness, a white-label battery with an exaggerated life cycle, a white-label webcam with overstated picture resolution, a white-label massage gun with embellished percussions per second, and white-label makeup claiming to be organic. When a white-label product costs less *and* is advertised with false product specifications, well-known manufacturers cannot compete on such an

uneven playing field. To combat this sales disruption, well-known brands can, and should, turn to the formidable defense offered by U.S. trademark law.

FALSE ADVERTISING UNDER TRADEMARK LAW

U.S. trademark law, otherwise known as the Lanham Act, prohibits false advertising and, specifically, "any false designation of origin, false or misleading description of fact, or false or misleading representation[s] of fact, which… in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities…of his or her or another person's goods, services, or commercial activities…."[1]

In recent years, the U.S. Supreme Court has added that the Lanham Act utilizes, and even relies upon, competitors as its enforcement mechanisms to sniff out and curtail false advertising. Recognizing that competitors are most knowledgeable about the representations and advertisements of each other's products, the Supreme Court explained:

Competitors who manufacturer or distribute products have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies. Their awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators…. *Lanham Act suits draw upon this market expertise by empowering private parties to sue competitors to protect their interests on a case-by-case basis*.[2]

For example, the best agent to discover whether a flashlight manufacturer has misrepresented the brightness of its products is, ultimately, a competing flashlight manufacturer.

Importantly, as the Supreme Court recognized and emphasized, manufacturers need not wait for government enforcement but have standing to bring a private lawsuit for the false advertising of their competitors under the Lanham Act. A manufacturer must show the following elements to be successful in a false advertising claim: (1) the defendant made false or misleading statements as to its own products (or another's products); (2) the existence of actual deception, or at least a likelihood of confusion, by consumers of those products; (3) the deception is material or, in other words, likely to influence a consumer's purchasing decisions; (4) the advertised goods travel in interstate commerce; and (5) a likelihood of injury to plaintiff, such as lost sales.[3]

Moreover, a false advertising claim under the Lanham Act provides the additional benefit of allowing a plaintiff manufacturer to bring the case in federal court and before federal judges, which is a more experienced forum for this type of claim. The court would then likely have supplemental jurisdiction over related state-law unfair competition claims, which often afford double or treble damages.

WHAT THIS MEANS FOR U.S. MANUFACTURERS

Many manufacturers are under the false impression that there is little to be done to curb competitors' false representations about their own products to gain a competitive edge. However, recognizing that U.S. trademark law seeks to protect against this precise issue, manufacturers are far from defenseless to these deceptive practices. Ultimately, a false advertising claim is a cost-effective, straightforward, and efficient mechanism to protect against the misrepresentations of white-label products resulting in an uneven playing field.

[1] 15 U.S.C. § 1125(a)(1)(B) (emphasis added).

[2] POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2234 (2014) (emphasis added).

[3] "To prove a false advertising claim under the Lanham Act, a plaintiff must demonstrate that (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) 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." Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 310–11 (1st Cir. 2002).

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