

False Influencing

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INTRODUCTION

Kendall Jenner launched Fyre Festival with a single post¹ to her more than 70 million Instagram followers²:



Fyre’s founders paid the reality star and model a cool \$275,000 for the post,³ which—as they boasted to investors—amassed 6 million unique impressions in the first five weeks, driving “an exponential leap in website views and ticket purchases.”⁴ The festival would turn out to be an epic failure, marooning ticketholders on an island without food or shelter, let alone entertainment from Jenner’s

1. See *Kendall Jenner, Emily Ratajkowski, & Other Celebs Are Being Sued for Promoting Fyre Festival*, SPIN SOUTHWEST (Sept. 2, 2019, 10:40 AM), <https://www.spinsouthwest.com/celeb/kendall-jenner-emily-ratajkowski-celebs-sued-promoting-fyre-festival-900150> [https://perma.cc/SG5B-MV3K].

2. See *Meet the 50 Top Instagram Influencers of 2016*, IZEA (Jan. 10, 2017), <https://izea.com/2017/01/10/top-instagram-influencers-2016/#:~:text=5.,fashion%20model%3A%2071.8M%20followers> [https://perma.cc/QKF4-AARP].

3. Complaint at 19, *Messer v. Jenner (In re Fyre Festival LLC)*, No. 17-11883 (MG) (Bankr. S.D.N.Y. Aug. 28, 2019).

4. Nick Bilton, *Exclusive: The Leaked Fyre Festival Pitch Deck Is Beyond Parody*, VANITY FAIR (May 1, 2017), <https://www.vanityfair.com/news/2017/05/fyre-festival-pitch-deck> [https://perma.cc/3M87-5E7L] (slide 7).

“G.O.O.D. Music Family.”⁵ Although the festival organizers were primarily at fault, and Fyre CEO Billy McFarland is currently serving concurrent prison terms for fraud and was ordered to pay \$26 million in forfeiture,⁶ the company’s use of “influencer marketing”—sponsored content that personalities with thousands or millions of followers post to their social media feeds—played an exquisitely effective role in perpetuating that fraud. This Article advocates for private companies to sue under Section 43(a)(1)(B) of the Lanham Act⁷ when competitors engage in “false influencing”—by disseminating deceptive claims via influencers—as Fyre did through its partnership with Jenner.⁸

Influencer advertising has enjoyed a meteoric rise. The industry is projected to reach \$10–20 billion in 2020,⁹ with close to 80% of brands participating.¹⁰ Consumers follow influencers on social media, engage with the content they post,¹¹ and buy what they endorse,¹² trusting the influencers they follow as

5. See Christina Prignano, *The Fyre Festival in the Caribbean Has Turned into a Disaster*, BOS. GLOBE (Apr. 28, 2017, 12:01 PM), <https://www.bostonglobe.com/arts/music/2017/04/28/this-high-end-music-festival-caribbean-has-turned-into-disaster/LIO2WDk5sgvjd90hiqM87O/story.html>.

6. One of the prison terms was for an unrelated ticket-fraud scheme. Doha Madani, *Fyre Festival Organizer Billy McFarland Sentenced to 6 Years on Fraud Charges*, NBC NEWS (Oct. 11, 2018, 5:13 PM), <https://www.nbcnews.com/news/us-news/fyre-festival-organizer-billy-mcfarland-sentenced-6-years-fraud-charges-n919086> [https://perma.cc/J46D-XVJR].

7. 15 U.S.C. § 1125(a)(1)(B) (2018).

8. A recent lawsuit alleged Jenner and other celebrities intentionally misled consumers about Fyre Festival and promoted the event without disclosing they were paid to do so in violation of FTC guidelines. Complaint, *supra* note 3, at 10, 19–20; Complaint at 9–10, 19, *Messer v. DNA Model Mgmt., LLC (In re Fyre Festival LLC)*, No. 17-11883 (MG) (Bankr. S.D.N.Y. Aug. 28, 2019). The story of Fyre Festival is unlikely to give rise to the type of litigation this Article urges competitors to pursue; it is included here only as an example of the ubiquity and power of influencer marketing.

9. Industry insiders report an impressive upward trajectory for the industry, with valuations jumping from \$1.7 billion in 2016 to a projected \$6.5 billion in 2019 and \$10–20 billion in 2020. INFLUENCER MARKETING HUB, *INFLUENCER MARKETING BENCHMARK REPORT 2020*, at 7 (2020), https://influencermarketinghub.com/Influencer_Marketing_Benchmark_Report_2020.pdf [https://perma.cc/W6P2-3LPV]; Nathaniel J. Evans, Joe Phua, Jay Lim & Hyoyeon Jun, *Disclosing Instagram Influencer Advertising: The Effects of Disclosure Language on Advertising Recognition, Attitudes, and Behavioral Intent*, 17 J. INTERACTIVE ADVERT. 138, 139 (2017); *Influencers: Frauds or the Future of Online Commerce?*, at 08:41–08:45, ATLANTIC: CRAZY/GENIUS (June 6, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/influencers-frauds-or-the-future-of-online-commerce/591133>. According to a study from the Association of National Advertisers and PQ Media, brand spending on influencer marketing is expected to hit \$101 billion by 2020. Cara Kelly, *Fyre Festival to Fashion Week, How Do Instagram Influencers Make So Much Money?*, USA TODAY (Feb. 13, 2019, 4:44 PM), <https://www.usatoday.com/story/news/investigations/2019/02/12/instagram-youtube-influencer-rates-fyre-festival-fashion-week-money-rich-branding-ads-girls/2787560002/> [https://perma.cc/WHG5-9LXX].

10. Nearly 80% of brands surveyed intended to earmark a portion of their 2020 marketing budget to spend on influencer partnerships. INFLUENCER MARKETING HUB, *supra* note 9, at 20–21.

11. See Christian Hughes, Vanitha Swaminathan & Gillian Brooks, *Driving Brand Engagement Through Online Social Influencers: An Empirical Investigation of Sponsored Blogging Campaigns*, 83 J. MARKETING 78, 80 (2019) (defining engagement as a “customer’s cognitive, emotional, and behavioral activities,” quantifiable in the form of “likes and comments on sponsored posts”).

12. A recent study reports that 93% of women who consider themselves “social media-savvy” have purchased something because an influencer recommended it. Stefania Pomponi Butler, *Social Media and the Female Holiday Shopper (Infographic)*, BUSINESS 2 COMMUNITY (Nov. 15, 2012), <https://www.business2community.com/social-media/social-media-and-the-female-holiday-shopper-infographic-0332987> [https://perma.cc/U6QW-JF89].

much—or more than—their actual friends.¹³ Authenticity lies at the core of the advertising model¹⁴: influencers strive to be authentic, consumers cite authenticity as driving their engagement with influencer content, and companies partner with influencers to link their products with trusted sources. And brands employ influencer marketing because it works. Influencer ads generate greater emotional intensity and higher memory encoding.¹⁵ One agency found companies earned an impressive 520% return on every dollar they spent on influencer marketing.¹⁶

Influencer marketing can be benign. But it creates an exceptionally fertile breeding ground for deception and consumer harm. Individuals, rather than brands, push out advertising messages, making it easy to mislead consumers without repercussions. Because of the trust consumers place in the influencers they follow, they may be materially deceived when influencers make false statements about products or about their experiences with them, endorsing things they don't actually use, wear, or like. Influencers' nondisclosure of the commercial relationship can also be deceptive¹⁷: according to some reports, over 90% of influencers fail to properly disclose when their posts are sponsored.¹⁸ Omitting

13. In a 2019 Sideqik poll, 70% of consumers surveyed said that they trust the opinions of influencers as much or more than those of their real-world friends. Gavin O'Malley, *Many Followers Trust Influencers' Opinions More Than Friends'*, DIGITAL NEWS DAILY (Aug. 21, 2019), <https://www.mediapost.com/publications/article/339579/many-followers-trust-influencers-opinions-more-th.html> [<https://perma.cc/F7NH-SNRC>].

14. Although a good deal of marketing scholarship has examined the importance of authenticity, most of it focuses on authenticity of product and brand rather than endorser. *See, e.g.*, Michael B. Beverland, Adam Lindgreen & Michiel W. Vink, *Projecting Authenticity Through Advertising: Consumer Judgments of Advertisers' Claims*, 37 J. ADVERT. 5 (2008); Stephen Brown, Robert V. Kozinets & John F. Sherry Jr., *Teaching Old Brands New Tricks: Retro Branding and the Revival of Brand Meaning*, 67 J. MARKETING 19, 19–21 (2003). *But see* Randall L. Rose & Stacy L. Wood, *Paradox and the Consumption of Authenticity Through Reality Television*, 32 J. CONSUMER RES. 284, 284–87 (2005) (exploring viewers' "apparent obsession with authenticity" in reality TV and the construction of authenticity through viewer practices, with parallels to influencer marketing).

15. Neuroscientists found that influencer ads generated 277% greater emotional intensity and 87% higher memory encoding than television ads. Blake Drosch, *What Does Your Brain on Influencer Marketing Look Like?*, EMARKETER (Aug. 26, 2019), <https://www.emarketer.com/content/your-brain-on-influencers-neuroscience-study-explains-the-effects-of-influencer-marketing> [<https://perma.cc/5GZU-FY8L>].

16. Harrison Loew, *Influencer Marketing Benchmark Report 2019*, NEOREACH (Feb. 12, 2019), <https://neoreach.com/influencer-marketing-benchmark-report-2019/> [<https://perma.cc/QT44-LEM3>]; *see also* Dominique Jackson, *Social Proof: How to Use Marketing Psychology to Boost Conversions*, SPROUT SOCIAL (May 29, 2018), <https://sproutsocial.com/insights/social-proof/> [<https://perma.cc/2P39-ZQY9>] ("Businesses are averaging \$6.50 for every \$1 spent on influencer marketing."). Of course, it bears noting that most of the data about influencer marketing come from influencer agencies or other industry players with a vested interest in touting its expansion and effectiveness; statistics should be read with their biases in mind.

17. "[O]ne of the reasons [influencer marketing] is so effective: people can't determine when they are viewing an ad." *Businesses Turning to Influencers to Avoid Ad Blocking*, ADSTOP (Dec. 9, 2019), <https://perma.cc/WW4B-N5X3>.

18. One influencer marketing agency reviewed posts from Instagram's fifty most-followed influencers over the course of a month and found that 93% of posts promoting a brand were not labeled in a way that complied with FTC guidelines. *93% of Top Celebrity Social Media Endorsements Violate FTC Guidelines*, MEDIAKIX (May 31, 2017), <https://mediakix.com/blog/celebrity-social-media-endorsements-violate-ftc-instagram/> [<https://perma.cc/4ZXZ-3TCE>].

sponsorship disclosure enables paid content to masquerade as organic buzz and peer-to-peer testimonial, rendering misrepresentations even more persuasive. Companies know disguising the commercial nature of the speech and presenting the endorsement as organic increases its effectiveness. In fact, the majority of influencers and brands go out of their way to obscure the nature of their relationship. At its most dangerous, false influencing can persuade consumers to purchase products that endanger their health or safety.¹⁹ The products consumers purchase based on influencers' endorsements may seem healthier and safer *because of* the lack of disclosure—consumers may be more willing to take risks on products that might endanger their health or safety recommended by people they know (even celebrities or Instagram stars) as opposed to companies. The lack of disclosure means they take uncalculated or miscalculated risks that they otherwise would not have.

False influencing also threatens fair competition.²⁰ When consumers buy something based on an influencer's misleading claims, or because they understand the influencer to be a bona fide user, they choose that product over a competing one—one that might actually be more effective, lower priced, or better suited to the purchaser. When the product they buy ultimately disappoints, it may turn consumers off from the category as a whole or exhaust the funds they would have used to purchase from a competitor. Consumers' increasing tendency to purchase products directly through social media platforms²¹ reduces the likelihood they will independently verify ad claims²² or punish false advertisers in the marketplace,²³ and increases brands' incentive to use influencer marketing to disseminate misleading statements.

19. For example, researchers at the University of Glasgow found that 90% of influencers discussing weight loss gave out false or inaccurate information. Adam Forrest, *Social Media Influencers Are Dishing Out False Nutrition and Weight Loss Advice 90% of the Time*, BUSINESS INSIDER (Apr. 30, 2019, 6:45 AM), <https://www.businessinsider.com/social-media-influencers-give-bad-health-advice-90-percent-of-time-study-shows-2019-4> [<https://perma.cc/E5Q5-NL49>]. Influencers also post sponsored endorsements of medical procedures and prescription drugs. Suzanne Zuppello, *The Latest Instagram Influencer Frontier? Medical Promotions.*, VOX (Feb. 15, 2019, 8:00 AM), <https://www.vox.com/the-goods/2019/2/15/18211007/medical-sponcon-instagram-influencer-pharmaceutical> [<https://perma.cc/7R63-3WPS>].

20. Professor Ellen Goodman has gone further to argue that stealth marketing, which includes influencer marketing without disclosure, “harms by damaging the quality of public discourse and the integrity of media institutions that support and shape this discourse.” Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 86 (2006).

21. See Adam Levy, *Social Shopping Is Taking Off, and Facebook Is the Biggest Beneficiary*, MOTLEY FOOL (Jan. 18, 2020, 3:00 PM), <https://www.fool.com/investing/2020/01/18/social-shopping-is-taking-off-and-facebook-is-the.aspx> [<https://perma.cc/WX6R-6SRQ>].

22. Conversely, “[a]s confidence in the truth of advertising diminishes, prospective purchasers may be forced to expend additional resources in examining and sampling competing products.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. a (AM. LAW INST. 1995).

23. Both approaches have been posited by critics of false advertising law to reduce brands' incentive to make false claims and their need for a private cause of action. 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).

Despite influencer marketing's potential for harm, the parties engaged in it are rarely (and barely) held accountable. The Federal Trade Commission (FTC) has jurisdiction to regulate advertising and endorsement under Section 5 of the FTC Act;²⁴ although it has promulgated guidelines, sent warning letters to repeat offenders, and occasionally sued companies whose practices run afoul of its guidance,²⁵ it lacks the resources and perhaps the authority to force industry-wide change. Private parties, meanwhile, don't have standing to challenge competitors' practices based on violations of the FTC Act.²⁶ A number of state laws²⁷ allow for individual or class action suits by consumers that challenge deceptive advertising practices,²⁸ but consumers rarely take advantage of them; such suits require resources and motivation that laypeople—particularly those most vulnerable to deceptive claims—tend to lack.²⁹ And consumer self-help depends on knowledge that an advertising claim is false or misleading, which consumers rarely possess,³⁰ as well as knowledge that opportunities for self-help exist. Social media platforms are neither obliged nor equipped to review and moderate misleading content, especially when the content appears as individual users' posts

24. 15 U.S.C. § 45 (2018).

25. *E.g.*, CSGOLotto, Inc., 164 F.T.C. 785, 792 (2017) (alleging YouTube influencers who promoted CSGO Lotto deliberately misrepresented their relationship with the company by failing to disclose they were its president and vice president); Warner Bros. Home Entm't, Inc., 162 F.T.C. 1040, 1042–45 (2016) (blaming Warner Brothers for its paid influencers' failure properly to disclose sponsorship even though the company had instructed them to do so); Lord & Taylor, LLC, No. C-4576, 2016 WL 2997854, at *1–2 (F.T.C. May 20, 2016) (alleging Lord & Taylor paying influencers to endorse a dress without disclosure and pre-approving those posts was deceptive); Machinima, Inc., 161 F.T.C. 318, 323–24 (2016) (alleging Machinima paying influencers to promote Xbox One without disclosing payments constituted a misleading marketing practice); Deutsch LA, Inc., 159 F.T.C. 1163, 1168–69 (2015) (alleging Sony's marketing firm directing its employees to tweet with the hashtag “#gamechanger” to promote a product ahead of launch without instructing them to disclose the material connection constituted a misleading marketing practice).

26. *See* Naylor v. Case & McGrath, Inc., 585 F.2d 557, 561 (2d Cir. 1978). *But see* Manning Int'l Inc. v. Home Shopping Network, Inc., 152 F. Supp. 2d 432, 437 (S.D.N.Y. 2001) (“[P]laintiff may and should rely on FTC guidelines as a basis for asserting false advertising under the Lanham Act.”).

27. *See State-by-State Resources*, TINA.ORG, <https://www.truthinadvertising.org/filing-complaints-at-the-state-level/> [<https://perma.cc/365E-Y8B5>] (last visited July 22, 2020) (summarizing state deceptive-advertising laws).

28. Some scholars have advocated for consumer standing under the Lanham Act. *E.g.*, Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 68 (1985); Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47, 95–96 (1994); A. Andrew Gallo, *False and Comparative Advertising Under Section 43(a) of the Lanham Trademark Act*, 8 COMM. & L. 3, 15–20 (1986); Gary S. Marx, *Section 43(a) of the Lanham Act: A Statutory Cause of Action for False Advertising*, 40 WASH. & LEE L. REV. 383, 397–99 (1983).

29. *See* 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.”); *see also* Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671, 753 (1984) (“[G]eneral reliance on state protection has led to inconsistency and unpredictability as well as to important gaps in protection.”).

30. *See* 1 MCCARTHY, *supra* note 29, § 2:22 (“[I]f the deception is truly effective, the consumer may not even be aware of it.”).

rather than brands' paid advertising content. So influencer marketing remains unchecked, leaving a loophole large enough for Kendall Jenner to fly a private jet through.

But there is another option. Private companies can sue one another for false advertising under Section 43(a)(1)(B) of the Lanham Act.³¹ Such suits have provided a powerful check on deceptive practices for decades, enjoining false claims, subjecting advertising language and images to scrutiny, and forging a body of precedent that guides advertising practices.³² Courts,³³ scholars,³⁴ and lawmakers³⁵ have ascribed to the Lanham Act the important goal of protecting consumers from deception.³⁶ In suing for false advertising, plaintiffs are often said to act in the public's interest³⁷ and serve as a proxy for consumers,

31. Exceedingly few plaintiffs have alleged Section 43(a)(1)(B) claims to address misleading practices via influencer marketing. *See, e.g.,* Lokai Holdings LLC v. Twin Tiger USA LLC, 306 F. Supp. 3d 629, 637 (S.D.N.Y. 2018); *Casper Sleep, Inc. v. Hales*, No. 16-cv-03223, 2016 WL 6561386, at *3 (S.D.N.Y. Oct. 20, 2016).

32. *See, e.g.,* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 131–32 (2014) (cited in 1,909 cases); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (cited in 806 cases); *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 133 (D. Mass. 1996) (cited in 39 cases); *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1535–36 (S.D.N.Y. 1994) (cited in 257 cases).

33. *See Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987) (“Protecting consumers from false or misleading advertising . . . is an important goal of the statute and a laudable public policy to be served.”); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 681 F.2d 1159, 1162 (9th Cir. 1982) (“[T]he Lanham Act is directed toward protecting the consumer as well as the competitor from false and deceptive advertising.”); *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918 (9th Cir. 1980) (concluding the Lanham Act and its legislative history reveal its goal of consumer protection); *Ames Publ'g Co. v. Walker-Davis Publ'ns, Inc.*, 372 F. Supp. 1, 13–14 (E.D. Pa. 1974) (“[A]n underlying purpose of Section 43(a) appears to be protection of the consuming public from false representations and descriptions.”); *see also* Ross D. Petty, *Supplanting Government Regulation with Competitor Lawsuits: The Case of Controlling False Advertising*, 25 IND. L. REV. 351, 352 (1991) (“Today, most courts recognize that there is a ‘strong public interest’ in using the Lanham Act to prevent misleading advertising.”).

34. BeVier, *supra* note 23, at 16 (explaining that it is the consumer “whose welfare the rule [against false advertising] is designed to protect, whose search and decisionmaking processes are most thwarted by its violation, and who accordingly stands most unambiguously to gain by its optimal enforcement.”); Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 810 (1999) (arguing that “as currently written and interpreted, . . . [Section 43(a)(1)(B)]’s basic goal can only be purchaser welfare, and its chief beneficiary can only be the duped buyer”).

35. *See* James B. Astrachan, *Who Will Protect the Consumers of Trademarked Goods?*, 46 U. BALT. L. REV. 375, 394–96 (2017) (citing legislative history and Congressman Lanham’s testimony); Tawnya Wojciechowski, *Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 SW. U. L. REV. 213, 216 (1994) (describing how the Act, its revisions, and their legislative histories “consistently maintain that the two-fold purpose of the Lanham Act is clear; that is, to protect competitors and consumers.”).

36. *But see* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840–41 (2007) (refuting widely held belief that trademark law has “traditional consumer protection moorings”).

37. *See* *Gen. Baking Co. v. Gorman*, 3 F.2d 891, 893 (1st Cir. 1925) (“In meritorious [trademark and unfair competition cases], the plaintiff is acting, not only in his own interest, but in the public interest.”); *May v. Goodyear Tire & Rubber Co.*, 10 F. Supp. 249, 257 (D. Mass. 1935) (“When the equity courts

“representing the absent party-in-interest who is harmed by the . . . deceptive acts.”³⁸ Some courts characterize the plaintiff in trademark and unfair competition cases as consumers’ “vicarious avenger,”³⁹ espousing the idea that although the consuming public is not a party, it is nonetheless “present and its interests are paramount.”⁴⁰ The Lanham Act⁴¹ enables producers to address harm to themselves, competition, and consumers simultaneously,⁴² which benefits their bottom line and helps them fulfill a duty they arguably owe to the marketplace.

Companies regularly call upon Section 43(a)(1)(B) to challenge the veracity of advertising claims made in traditional media. This Article advocates for private actors to use the Lanham Act to challenge competitors’ false influencing as a means to enjoin unfair competition.⁴³ Although several prongs of the false advertising cause of action may pose challenges when applied to influencer marketing, Section 43(a)(1)(B) case law does not preclude successful causes of action based

interfere [in an unfair competition claim], they act quite as much in the public interest as in the interest of the complainant.”).

38. Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 73 (2008).

39. *Innovation Ventures, LLC v. Bhelliom Enters. Corp.*, 529 F. App’x 560, 567 (6th Cir. 2013); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 827 (9th Cir. 2011); *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 15 (1st Cir. 1986); *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 753 n.7 (8th Cir. 1980) (“[U]nder § 43(a), Congressional policy appears to encourage commercial companies to act as the fabled ‘vicarious avenger’ of consumer rights.”); *Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 257, 260 (D. Del. 1979) (defining the vicarious avenger concept to mean “the competitor/plaintiff simultaneously pursues its own and the public’s right to be protected against false advertising”). *But see Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990) (“A competitor in a Lanham Act suit does not act as a “‘vicarious avenger’ of the public’s right to be protected against false advertising.” (quoting *Am. Home Prods. Corp. v. Johnson & Johnson*, 672 F. Supp. 135, 145 (S.D.N.Y. 1987))); *Midlothian Labs., LLC v. PamLab, LLC*, 509 F. Supp. 2d 1065, 1081 (M.D. Ala. 2007) (“[The Lanham Act] does not permit a plaintiff to act as a “‘vicarious avenger’ of the public’s right to be protected against false advertising.” (quoting *Sandoz Pharm. Corp.*, 902 F.2d at 230), *vacated in part on reconsideration*, 509 F. Supp. 2d 1095 (M.D. Ala. 2007)). Based on the cases cited, courts may be more likely to affirm the “vicarious avenger” concept when offered in support of injunctive relief and disavow it when offered in support of monetary relief.

40. *Laboratorios Roldan, C. por A. v. Tex Int’l, Inc.*, 902 F. Supp. 1555, 1571 (S.D. Fla. 1995).

41. Although many scholars and courts presume that the interests of consumers are of equal importance in trademark and false advertising litigation under the Lanham Act, some distinguish the two. *See, e.g., Burns, supra* note 34, at 874, (explaining that, although early case law assumed Section 43(a) was, like trademark law, designed to protect owners against competitors, “[w]ith the section’s focus now explicitly on false advertising, both logic and statutory rationality require that the federal courts accept purchaser welfare as its fundamental goal.”).

42. *See Roger E. Schechter, The Death of the Gullible Consumer: Towards a More Sensible Definition of Deception at the FTC*, 1989 U. ILL. L. REV. 571, 580–86 (asserting that the goals of false advertising laws as embodied in the FTC Act are to “(a) protect consumers; (b) protect competing firms; (c) promote economic efficiency; and (d) achieve certain ethical or moral goals”).

43. Misleading commercial speech is not subject to First Amendment protection. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (“For commercial speech to come within [the First Amendment], it must . . . not be misleading.”); *see also Kasky v. Nike, Inc.*, 45 P.3d 243, 261 (Cal. 2002) (“[C]ommercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions.”). If an influencer claim meets the elements of Section 43(a)(1)(B), including that the claim constitutes a false or misleading representation of fact in commercial advertising or promotion, then it follows that the First Amendment does not reach it.

on influencer misrepresentations. Judges should construe the statute capaciously to better protect consumers, promote fair competition, and increase consistency in how ads are regulated across platforms and types of media.

The Article proceeds as follows: Section I explains why influencer marketing works and whom false influencing harms. Section II provides an overview of federal false advertising law under the Lanham Act and applies it to several types of misleading representations influencers might make, including false verbal and visual statements about products, false testimonials, and nondisclosure of material benefit. Section III argues that brands bear responsibility for the claims influencers make at their direction and the harm those claims inflict. It also explores some possible reasons why private companies rarely seek to curb competitors' misleading influencer practices using Section 43(a)(1)(B).

I. INFLUENCER MARKETING

A. WHAT INFLUENCER MARKETING IS

Influencers are social media personalities paid to leverage their popularity to market products and shape consumer preferences.⁴⁴ Although some are also off-line celebrities who gained a substantial following after becoming known entities, others are purely online personalities who have established a loyal audience in a particular niche.⁴⁵ Anyone who receives payment, commission,⁴⁶ free goods or services, or any other benefit⁴⁷ that might affect the weight consumers give their

44. *Inmar, Inc. v. Vargas*, No. 18-cv-2306, 2018 WL 6716701, at * 1 (N.D. Ill. Dec. 21, 2018); *see also* KEN MARK & MARY WEIL, AN INFLUENCER STRATEGY FOR BUDWEISER IN CANADA 1 (2019) (“Influencers were people who had gained prominence online. . . . The common thread linking all influencers was that they had an impact on trends.”); *What Is an Influencer?*, INFLUENCER MARKETING HUB, <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/NX7F-E7CY>] (last updated May 26, 2020) (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” or one who has “a following in a distinct niche” and actively engages with followers). Influencers “make regular posts about that topic on their preferred social media channels and generate large followings of enthusiastic, engaged people who pay close attention to their views.” *Id.*

45. Journalist Taylor Lorenz rattles off some of the myriad types of influencers in an interview for the *Atlantic*’s Crazy/Genius podcast. *Influencers: Frauds or the Future of Online Commerce?*, *supra* note 9, at 5:44–6:08.

46. In affiliate marketing, influencers receive a percentage of the profit when their post leads to a sale. “[A]n affiliate link is a unique URL leading to a retailer’s website that contains an identifier associated with the affiliate. . . . [A]ny resulting purchases [from the URL] are tracked and the affiliate receives a commission on each purchase.” *Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 635 n.1 (S.D.N.Y. 2016). Influencers may also include a discount code in their sponsored posts.

47. That includes influencers who have a business stake in the company they are promoting. For example, Arielle Charnas has ownership stakes in clothing brands Bandier, Jaja, and Kosas and posts about them frequently but rarely discloses those connections. *See* Tanya Chen, *A Major Influencer and a Popular Fashion Copycat Account Are Throwing Jabs at Each Other on Instagram over a Headband*, BUZZFEED NEWS (Apr. 11, 2019, 2:53 PM), <https://www.buzzfeednews.com/article/tanyachen/arielle-charnas-something-navy-feuding-with-diet-prada> [<https://perma.cc/ZV3H-BPCE>]; *Influencers Are Launching Big Businesses of Their Own, but Can They Compete with Established Fashion Brands?*, FASHION L. (Apr. 10, 2019), <https://www.thefashionlaw.com/influencers-are-harnessing-their-power-and-launching-brands-of-their-own/> [<https://perma.cc/5QMM-25ZD>].

endorsements⁴⁸ in exchange for posting on social media or elsewhere online is engaged in influencer marketing, as are the brand supplying the benefit and the agency acting as a go-between.⁴⁹

By most accounts, influencer marketing continues to grow steadily. A 2019 survey of 800 industry professionals found that 92% believe influencer marketing is effective, and 82% believe that “the quality of customers from influencer marketing campaigns is better than from other forms of marketing.”⁵⁰ Some businesses rely solely on influencer marketing to generate business, eschewing traditional ads altogether.⁵¹

In assessing whether and when influencer advertising claims mislead consumers and who is liable, as well as whether a claim is adequately disseminated to satisfy Section 43(a)(1)(B), the influencer’s reach matters. Most industry sources distinguish mega- and macro-influencers, who have anywhere from 100,000 followers to tens of millions, from micro- and nano-influencers, who have far fewer.⁵² Singer Ariana Grande has 203 million followers⁵³ on Instagram; followers may view her endorsements similarly to the way they view celebrity endorsements in traditional media. A post from someone with only a few thousand followers, on the other hand, is more likely to be viewed as a word-of-mouth-type endorsement.⁵⁴ Recently, some industry experts have asserted that micro- or nano-influencers⁵⁵ represent the best choice for

48. Press Release, Fed. Trade Comm’n, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [https://perma.cc/M28W-YGRX].

49. A definition based on material connection should include pet influencers, child influencers, and CGI influencers, whose owners, parents, or creators receive the material benefit. See Victoria Schwartz, Abstract, *Virtual Influencers* (unpublished manuscript), http://www.law.uh.edu/wipip2019/abstracts/Victoria_Schwartz.pdf [https://perma.cc/9CMG-J5E8]; Telephone Interview with Victoria Schwartz, Professor, Pepperdine Univ. Caruso Sch. of Law (July 29, 2019).

50. *The State of Influencer Marketing 2019: Benchmark Report*, INFLUENCER MARKETING HUB, <https://influencermarketinghub.com/influencer-marketing-2019-benchmark-report/> [https://perma.cc/NS4A-6VRH] (last updated Feb. 19, 2020).

51. Examples include e-commerce clothing company Revolve, retail store Brandy Melville, and vitamin brand SugarBearHair. See Thilini Gunaratne, *Blog: The Fast and the Furious Rise of SugarBearHair* (May 14, 2017), <https://thilinigunaratne.wordpress.com/2017/05/14/sugarbearhair/> [https://perma.cc/77Q9-XLNA]; Lisa Marsh, *Brandy Melville: Instagram’s First Retail Success*, BLOOMBERG (Dec. 11, 2014, 8:18 PM), <https://www.bloomberg.com/news/articles/2014-12-11/brandy-melville-instagram-s-first-retail-success>; Ronald D. White, *How Two Friends Built Revolve into a Fashion Empire with Instagram Influencers*, L.A. TIMES (Aug. 25, 2019, 4:00 AM), <https://www.latimes.com/business/story/2019-08-23/revolve-clothing-instagram-influencer-e-commerce>.

52. See Sapna Maheshwari, *Are You Ready for the Nanoinfluencers?*, N.Y. TIMES (Nov. 11, 2018), <https://www.nytimes.com/2018/11/11/business/media/nanoinfluencers-instagram-influencers.html>.

53. Ariana Grande (@arianagrande), INSTAGRAM, <https://www.instagram.com/arianagrande/?hl=en> [https://perma.cc/PQH6-ULJ7] (last visited Sept. 27, 2020).

54. See Maheshwari, *supra* note 52.

55. See Kim Einan, *How to Fix Influencer Marketing (Yes, It’s Broken)*, MEDIAPOST: AGENCY DAILY (June 17, 2019), <https://www.mediapost.com/publications/article/337081/how-to-fix-influencer-marketing-yes-its-broken.html> [https://perma.cc/5AF6-YJQ3]; *Influencer Marketing 2020*, ECONSULTANCY (Nov. 2018), <https://econsultancy.com/reports/influencer-marketing-2020/> [https://perma.cc/SYB7-NGYJ] (61% of consumers surveyed say micro-influencers produce the most relatable content).

advertisers.⁵⁶ Not only do micro-influencers cost less to engage, they also offer better returns on investment given how specialized they are.⁵⁷ Consumers reportedly find them “more transparent and authentic, [and] thereby more trustworthy.”⁵⁸ Micro-influencers are more likely to be perceived as identifiable and real,⁵⁹ which intensifies consumers’ trust⁶⁰ and increases engagement.⁶¹ The evolution from macro- toward micro-influencers and the availability of programs that let anyone sign up to be an influencer⁶² bolster the popular adage that everyone is a brand,⁶³ complicating questions about consumer trust and perception of advertising claims.

56. *Influencers: Frauds or the Future of Online Commerce?*, *supra* note 9, at 7:01–7:14 (“[Micro-influencers] are very influential to a very small amount of people, but those small amount of people that connect with them are extremely hyperloyal.”); Lucy Tesser, *A Third of Brands Admit to Not Disclosing Influencer Partnerships*, *MARKETING WEEK* (Nov. 14, 2018, 7:56 AM), <https://www.marketingweek.com/2018/11/14/influencer-marketing-partnerships/> (“More than half (56%) of respondents say they find micro- and mid-tier influencers (between 100,000 and one million followers) more cost effective.”); White, *supra* note 51. *But see* Lauren Meltzer, *Social Media ‘Influencers’ Add a New Twist to Advertising*, *CBS NEWS* (Feb. 8, 2018, 5:00 AM), <https://www.cbsnews.com/news/social-media-influencers-brand-advertising/> [<https://perma.cc/9H5X-TXBW>] (describing CEO of influencer marketing agency “urg[ing] advertisers to target the macro tier” for the highest engagement).

57. Yuyu Chen, *The Rise of ‘Micro-Influencers’ on Instagram*, *DIGIDAY* (Apr. 27, 2016), <https://digiday.com/marketing/micro-influencers/> (explaining how weight-loss tea company “was able to convert at an even higher level” when it switched from partnering with Kardashians to partnering with micro-influencers, “due to the inherent superior engagement”).

58. Tesser, *supra* note 56. One influencer notes that “bloggers pose as ‘real’ people with ‘honest’ perspectives. They let you look into their ‘reality.’” BROOKE ERIN DUFFY, (NOT) GETTING PAID TO DO WHAT YOU LOVE: GENDER, SOCIAL MEDIA, AND ASPIRATIONAL WORK 113 (2017).

59. *See* DUFFY, *supra* note 58, at 99, 106 (“[T]he individuals I interviewed often disavowed traditional markers of status and expertise to cast themselves as *regular people*.” For those influencers, “*realness* was tantamount to accessibility.”).

60. Tesser, *supra* note 56.

61. A study of about 5 million Instagram posts by 800,000 different influencers found that the more Instagram followers someone has, the less those followers engage with their posts, regardless of whether the posts were sponsored or organic. *See Instagram Marketing: Does Influencer Size Matter?*, *MARKERLY BLOG*, <http://markerly.com/blog/instagram-marketing-does-influencer-size-matter/> [<https://perma.cc/B9NH-7M7X>] (last visited July 23, 2020).

62. For example, Webfluential, Niche, FameBit, and Amazon Associates. *See About Us*, *NICHE*, <https://perma.cc/TQ7H-H2KJ> (last visited July 23, 2020); *Application Review Process*, *AMAZON ASSOCIATES*, <https://perma.cc/P3F4-WUXH> (last visited July 23, 2020); *Creators*, *FAMEBIT*, <https://famebit.com/creators> [<https://perma.cc/52PH-L9AH>] (last visited July 23, 2020); *Influencer Home*, *WEBFLUENTIAL*, <https://webfluential.com/influencers> [<https://perma.cc/V8CF-XLC9>] (last visited July 23, 2020).

63. Individuals in the age of modern marketing

are encouraged to reenact a particular vision of personhood that relies on competition, persuasion, and the erasure of any boundary between commercial and noncommercial behavior. Targeted consumers are meant to become brands themselves, constructing their own marketable self-presentations and accepting their role in a society organized by battles for individual attention.

The value at the core of influencer marketing is authenticity.⁶⁴ Influencers attract followers by purporting to portray their preferences and experiences in intimate detail.⁶⁵ Authenticity is a running theme in Professor Brooke Erin Duffy's book about aspirational labor in the influencer marketing industry, which is based on her extensive interviews with fifty-five fashion bloggers.⁶⁶ The idea of authenticity dominates the interviewees' comments as each details a struggle to find their voice, develop their "brand,"⁶⁷ and remain true to themselves and their followers while simultaneously earning enough from sponsored content to make a living or justify the time invested in a side hustle.⁶⁸ Several interviewees complain that companies choose to partner with them precisely because they admire their authentic voice and believe it will appeal to their consumers, but then the companies try to put words in their mouths⁶⁹ or censor their posts.⁷⁰ About half of influencers resent heavy-handed guidance from advertisers and believe brand guidelines negatively affect the authenticity of their content.⁷¹

64. DUFFY, *supra* note 58, at 97 (explaining how influencers "seek to harness and deploy the commercial value of 'authenticity'"); *Influencer Marketing 2020*, *supra* note 55 (explaining that based on a survey of 1,173 marketers and 500 consumers, "70% of marketers say that authenticity and transparency is key to influencer marketing success. . . . Consumer attitudes are similar, with 61% expressing a preference for influencers who create authentic, engaging content"); Scott Guthrie, *Is Effective Disclosure Killing Influencer Marketing?*, SCOTT GUTHRIE: BLOG (Sept. 6, 2018), <https://sabguthrie.info/disclosure-killing-influencer-marketing/> [<https://perma.cc/N3WM-AMUZ>] ("61% of women said they won't engage with an influencer's sponsored content if it doesn't feel genuine. . . . Trust and authenticity are the bedrock of influencer marketing."); Derek Thompson, *Are Influencers Frauds or the Future of Online Commerce?*, ATLANTIC (June 6, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/influencers-frauds-or-the-future-of-online-commerce/591133/> ("Building an audience on the internet requires mastering the elusive quality of authenticity—which is not necessarily the same as sincerity, but rather means the successful *performance* of sincerity.").

65. Desiree Fortin, for example, disclosed to her 123,000 followers (at the time) her clinical anxiety, hypothyroidism, prescription drug use, and financial challenges—all in a single sponsored post. Desiree Fortin (@theperfectmom), INSTAGRAM (June 27, 2019), <https://www.instagram.com/p/BzOgyOLAYjz/> [<https://perma.cc/Z8MM-FPMF>].

66. See generally DUFFY, *supra* note 58.

67. See *id.* at 153 ("Most of my interviewees had internalized the self-branding directive, describing their social media products through marketing discourses or using the language of personal branding rather unequivocally.").

68. See *id.* at 183.

69. See *id.* at 178 ("[The brand] chose me because I was authentic but then . . . they really wanted my authenticity to kind of coincide with their desires perfectly. . . . [T]hey get to stay anonymous and behind the scenes [and expect you to] turn out whatever bullshit [they] want written." (first alteration in original)); see also Kali Hays, *Influencers Still Can't Get Behind Disclosing Paid Posts*, WWD (Oct. 12, 2017), <http://wwd.com/business-news/media/influencers-the-12ish-style-scout-sixteen-hummingbird-high-still-cant-get-behind-disclosing-paid-posts-11026614/> ("It's really frustrating when someone sanitizes your content to the point where it's just like, [a brand] could have just sent me one of their commercials and had me post that because I'm not even in it." (alteration in original)).

70. E.g., DUFFY, *supra* note 58, at 178–79; Twitter Direct Message from Influencer Mktg. Specialist to author (June 28, 2019, 8:30 PM) (on file with author) (recounting a brand that rejected a draft post because "the content spoke ill about the overall industry the brand belonged to").

71. See Samone Wheeler, *We Asked, They Answered: Influencers Talk Authenticity*, INFLUENCE (Mar. 15, 2018), <https://influence.bloglovin.com/we-asked-they-answered-influencers-talk-authenticity-cad1cf8873da> [<https://perma.cc/RAL2-LM97>].

Some describe internal and external⁷² struggles when they're offered compensation to promote products or services they dislike, don't have experience with, or feel don't align with their personal brand. They note that followers are quick to accuse them of "selling out."⁷³

In that respect, the influencers Duffy interviews are representative. Influencers tout their authenticity to fans and brands—one proclaims, "I love being authentic and real when it comes to all things Motherhood and that is how I typically approach brand campaigns. I thin[k] there is great value in being authentic when it comes to sharing brands."⁷⁴ Another notes, "I think authenticity . . . is more important than anything, because at the end of the day the people who stick around and have genuine authentic engagement and conversations with you, that's the most valuable part of what you do online for other brands."⁷⁵ Indeed, some followers complain that posts that read like advertisements or seem over-produced turn them off; others simply engage less with posts that comply with FTC guidelines by using explicit, clear disclosures.⁷⁶ Like the influencers and their fans, companies and ad agencies recognize that authenticity is what makes followers pay attention, engage with posts, and trust influencers' recommendations.⁷⁷

B. HOW INFLUENCER MARKETING WORKS

In order to partner, influencers and companies need to find each other. One model is direct: aspiring influencers build a fan base and a backlog of content.

72. See DUFFY, *supra* note 58, at 176–78 (recounting a conversation with YouTuber Gaby, who acknowledged in an article that she accepts sponsorships to pay the bills). That disclosure offended at least one client, who then refused to pay: "[T]hey're saying that because I wrote that I take brand deals for money and not because I like the company necessarily, they feel it undermines the brand deal we did, which obviously we took for the money." *Id.* at 177.

73. See *id.* at 137, 170, 183. One design blogger described how influencers get "'called out' if they are deemed inauthentic product endorsers." *Id.* at 171. Her husband observed, "The moment a female blogger tries to find forms of compensation for her hard work she is chastised. . . . She's selling out." *Id.* Fans "cry foul if [influencers] produce an abundance of sponsored content," and another influencer noted, they "don't want to see that you're explicitly on the hustle," with the real effect of cabining how often influencers accept sponsorships. *Id.* at 218.

74. Desiree Fortin, *Partnership*, PERFECT MOM BLOG, <https://theperfectmomblog.com/partnership/> [https://perma.cc/HP3G-W8HK] (last visited July 23, 2020).

75. *Influencers: Frauds or the Future of Online Commerce?*, *supra* note 9, at 17:55–18:09.

76. See Hazel Sheffield, *How Instagram Became One Giant Ad*, VICE BLOG (Nov. 10, 2016, 7:00 PM), https://www.vice.com/en_nz/article/qbn33w/why-instagram-is-making-you-poor [https://perma.cc/M4KP-DP2E] (Influencers report that their followers engage less with posts when they disclose material benefit because the disclosure "destroy[s] that sense of being spoken to by someone the user trusts"); see also Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683, 705 (2007) (citing Maria Flores Letelier, Charles Spinosa & Bobby J. Calder, *Strategies for Viral Marketing*, in KELLOGG ON INTEGRATED MARKETING 90 (Dawn Iacobucci & Bobby Calder eds., 2003)) (describing how sponsors are instructed to keep a low profile in social media promotions to appear more credible).

77. See, e.g., Ashley Carman, *Who's Your Instagram Boyfriend?*, VERGE (Nov. 14, 2018, 3:09 PM), <https://www.theverge.com/2018/11/14/18092608/wyptb-podcast-instagram-boyfriend-influencer> [https://perma.cc/N5RC-WEM7] ("[T]he most effective version of influencer marketing' . . . usually . . . means being more authentic to the influencer. No one likes to see a really crappy influencer sponsored post, if it just looks like, 'Oh god, the brand just really over-engineered that one.'").

Companies then contact them, offering free products or compensation in exchange for those influencers using their platforms to review, rave about, mention, or simply show the products.⁷⁸ Alternatively, influencers might reach out to companies with whom they hope to partner.⁷⁹ Sephora, for example, put out a casting call for influencers, received more than 15,000 applications, and chose twenty-four of the applicants to compose its new “squad.”⁸⁰ Meanwhile, brands increasingly incorporate social media posts into broader celebrity endorsement deals.⁸¹

Although the direct-relationship model persists for many brands and influencers, companies increasingly rely on middlemen to match them with influencers. Nine hundred and thirty new platforms and influencer marketing agencies opened between 2016 and 2020 to serve this perceived matchmaking need.⁸² Some are full-service, assisting brands at every stage of the process from influencer training to content creation to analytics.⁸³ Others specialize solely in the matching process known as “influencer casting and placement.”⁸⁴ Most maintain a searchable roster of hireable influencers, including their personal brand, their followers’ interests, and metrics about their reach and effectiveness that enable the agency to determine which influencers best complement a given brand’s goals and aesthetics.⁸⁵

In a blog post, influencer Jera Foster-Fell details the process behind how a sponsored post comes to be.⁸⁶ First, a company contacts her, or she them.⁸⁷ The company might invite her (or she might propose)⁸⁸ to promote a product, service,

78. See Jera Foster-Fell, *Anatomy of a Sponsored Post*, JERA BEAN (Mar. 21, 2019), <https://www.jerabean.com/blog/2019/3/19/anatomy-of-a-sponsored-post> [<https://perma.cc/3UAE-RQK5>].

79. See Julie McCarthy, *Brands Push Back on Partnering with Social Media Influencers*, NPR: ALL THINGS CONSIDERED (June 17, 2019, 5:47 PM), <https://www.npr.org/2019/06/17/733497829/brands-push-back-on-partnering-with-social-media-influencers> [<https://perma.cc/MED3-92Q4>] (quoting a representative e-mail to a resort owner: “Hi, I’m coming with my girlfriend and a friend. . . . We will need three rooms, food, accommodation for three days, and I put you in two stories and two posts.”); see also Taylor Lorenz, *Welcome to the Era of Branded Engagements*, ATLANTIC (June 20, 2019, 2:48 PM), <https://www.theatlantic.com/technology/archive/2019/06/was-viral-proposal-staged/592141/> (describing a faux-surprise, pre-planned marriage proposal to an influencer and including excerpts from the pitch deck her boyfriend used to invite brands to sponsor, such as: “We’re pleased to offer your brand the opportunity to align with this momentous occasion.”).

80. Elizabeth Segrán, *Sephora Picks 24 Influencers for Its Coveted #SephoraSquad Program*, FAST COMPANY (Mar. 29, 2019), <https://www.fastcompany.com/90326765/sephora-brings-25-influencers-into-its-coveted-sephorasquad-program> [<https://perma.cc/TPK3-9FJP>].

81. See, e.g., Exhibit A to Complaint at 5, *Spencer v. Sensa Prods., LLC*, No. BC519632 (Cal. Super. Ct. Aug. 28, 2013) (endorsement agreement between Octavia Spencer and Sensa Products); Exhibit B to Complaint at 6, *Spencer*, No. BC519632 (first amendment to endorsement agreement).

82. *Influencer Marketing Benchmark Report 2020*, *supra* note 9, at 8.

83. See *id.* at 33.

84. *Leading Influencer Marketing Agencies You Have to Know in 2020*, INFLUENCER MARKETING HUB (Jan. 23, 2020), <https://influencermarketinghub.com/influencer-marketing-agencies-2020/> [<https://perma.cc/42HS-BDDV>].

85. See *30 Leading Influencer Marketing Agencies to Work with in 2020*, INFLUENCER MARKETING HUB (Apr. 13, 2020), <https://influencermarketinghub.com/top-influencer-marketing-agencies/> [<https://perma.cc/6CJL-AXUZ>].

86. Foster-Fell, *supra* note 78.

87. *Id.*

88. *Id.* Influencers reach out to brands more often than the classic model might suggest. See, e.g., Lorenz, *supra* note 79; Abigail Pent Appreciation Society (@babegladwallers), TWITTER (June 20, 2019,

or brand, participate in a specific campaign, or embark on a long-term partnership as a “brand ambassador.” In evaluating the proposal, Foster-Fell considers whether the product or service in question is one she already uses or is interested in using based on a trial run and whether it’s one that aligns with her values and personal brand.⁸⁹ Her narrative is echoed by others.⁹⁰ In a survey of 85,000 influencers, though, only 64% indicated they always try every product they endorse;⁹¹ some influencers reported brands pushing them to promote a product before allowing them to try it.⁹² Those results suggest many influencers are posting false testimonials, touting a positive experience with a product they have never actually used.

If Foster-Fell decides to endorse a product, she’ll move forward to negotiate an agreement, which typically includes deliverables, exclusivity,⁹³ usage rights, intellectual property rights, rates, and timelines.⁹⁴ Brands then provide “creative briefs” to arm Foster-Fell with the information she needs to create a post that’s consistent with the company’s goals.⁹⁵ A brief might include brand overviews, campaign hashtags, and creative direction. It might also include “thought starters for captions.”⁹⁶ Influencer agent Brittany Hennessy explains that the creative brief “will usually tell you the history of the brand, give you details on the product, and include talking points like sale dates, sizes, price points, ingredients, etc.”⁹⁷ A nano-influencer describes the guidance she receives as more explicitly

9:58 AM), <https://twitter.com/babegladwallers/status/1141706866793168896> [<https://perma.cc/36G6-7GEE>] (“I work for a company that sells engagement rings and we get CONSTANT pre-engagement pitches from influencers.”).

89. Foster-Fell, *supra* note 78. In a survey by Activate of 111 U.S.-based marketing professionals, 44% reported that they had an influencer decline a partnership because “the influencer did not feel they were a fit for the brand” and the same number had an influencer decline because she was “not interested in the product or service.” Samone Wheeler, *Dealbreakers: Why Influencers Say No to Sponsored Partnerships*, INFLUENCE (May 14, 2019), <https://influence.bloglovin.com/dealbreakers-why-influencers-say-no-to-sponsored-partnerships-fb2e02c622bb> [<https://perma.cc/JBD7-G276>]. Influencers don’t always receive free samples and may need to pay for a product out of pocket to make an informed decision. See BRITTANY HENNESSY, INFLUENCER: BUILDING YOUR PERSONAL BRAND IN THE AGE OF SOCIAL MEDIA 176 (2018).

90. See, for example, a post by @yourtrendytherapist: “I would NEVER share a product with y’all I didn’t fully believe in. I’m really picky about the brands I partner with and what you may not realize is all the stuff I try out and hate (if I wouldn’t recommend it, not sharing it lol).” Mary Osborne (@Yourtrendytherapist), INSTAGRAM (Feb. 12, 2019), <https://www.instagram.com/p/BtzY23NgqUF/> [<https://perma.cc/ZBZ2-F9R4>].

91. Wheeler, *supra* note 71; see also DUFFY, *supra* note 58, at 176 (“Some brands I work with, like I don’t particularly like their clothing or their style; I think it’s cheap . . . the quality is not that good.”); Hays, *supra* note 69 (recounting the story of an influencer whom Netflix paid to promote a movie she’d never seen).

92. See Kelly, *supra* note 9 (One influencer “turned down a skin care company she was unfamiliar with that didn’t want to wait for her to test their products before completing the deal”).

93. Many brands don’t want an influencer promoting their competitors’ products or endorsing multiple brands in the same product category at the same time. See, e.g., Sample Influencer Contract from Attorney Mark Lindemann to author (on file with author) (“The Influencer agrees to avoid mentioning the following agreed competitors of The Advertiser . . .”); *id.* ¶ 8 (“The Influencer agrees that during the tenure of this contract, and for a three-month term afterward, the Influencer will not undertake influencer marketing for a competitor in the same [category] as the Advertiser.”).

94. See Foster-Fell, *supra* note 78.

95. *Id.*

96. *Id.*

scripted: brands “want you to say certain keywords, like something is ‘cruelty free’ or something ‘smells good,’ or whatever their marketing says. They want you to mimic that.”⁹⁸

C. WHY INFLUENCER MARKETING SUCCEEDS

Relying on social media influencers to support marketing and advertising messages offers a number of advantages over traditional methods of advertising. First, they’re often inexpensive⁹⁹ and offer greater return on investment.¹⁰⁰ One agency concludes based on its survey data that brands seem to be “positioning influencers as independent ‘micro studios’ with the capacity to generate premium content that is built for social at a fraction of the price of a production company.”¹⁰¹ Creating and executing a traditional print advertisement for a magazine run might require an ad agency, copywriters, models, stylists, casting professionals, photographers, sets, a director, an editor, and more.¹⁰² When a professional influencer creates a post, they often do the work of an entire team, with only the help of a professional photographer, “Instagram husband,”¹⁰³ passerby,¹⁰⁴ or selfie stick to capture the shot.

In addition, Instagram is replacing fashion magazines as the home for product discovery and inspiration for many consumers.¹⁰⁵ Social media increasingly provides ways to convert consumer interest directly into sales. If you see a handbag featured in a magazine, you might look for it next time you’re out or search the

97. HENNESSY, *supra* note 89, at 179.

98. Maheshwari, *supra* note 52.

99. See Kelly, *supra* note 9 (“The advantages for brands seem obvious: direct access to target audiences for a fraction of what they’d pay in the traditional space. Content creators routinely value their work at a much lower rate than marketing professionals expect to pay.”).

100. “ROIs can be as much as 11 times that of traditional digital marketing like banner ads.” *Id.*; see Carmen Juárez & Daniela García, “Marketing with Influencers Is Sixteen Times More Efficient than a Traditional Campaign”: CEO of Influencity, MDS (July 25, 2019, 8:54 AM), <https://www.themds.com/back-stage/marketing-with-influencers-is-sixteen-times-more-efficient-than-a-traditional-campaign-ceo-of-influencity.html> [https://perma.cc/27HM-B8QK].

101. ACTIVATE, DOUBLE OR NOTHING: BETTING BIG ON INFLUENCER MARKETING 10 (2019), <https://static1.squarespace.com/static/5a9ffc57fc7fd301e0e9928/t/5c7fd9c9f4e1fcc96b896b7e/1551882706715/ACTIVATE+2019+Influencer+Marketing+Study.pdf> [https://perma.cc/684G-PZCX] (survey of 111 marketers).

102. See Kelly, *supra* note 9.

103. “Instagram boyfriend is a loose term for whoever is the invisible person behind the camera of all of your Instagram photos.” Ashley Carman & Kaitlyn Tiffany, *Who Is Your Instagram Boyfriend?*, at 1:44–1:54, VERGE: WHY’D YOU PUSH THAT BUTTON? (Nov. 14, 2018), <https://www.theverge.com/2018/11/14/18092608/wyptb-podcast-instagram-boyfriend-influencer>; see also Taylor Lorenz, *The Instagram-Husband Revolution*, ATLANTIC (Jan. 11, 2019), <https://www.theatlantic.com/technology/archive/2019/01/instagram-husbands-are-no-longer-ashamed/580033/> (“An Instagram husband. . . [is] the person who will stop traffic to get the perfect shot, or stand endlessly in the rain while you pose for photos.”).

104. See, e.g., Opheli Garcia Lawler, *Who Takes These Terrifying Couple Pics for Travel Influencers?*, CUT (May 14, 2019), <https://www.thecut.com/2019/05/who-takes-these-death-defying-horny-pics-for-instagrammers.html> [https://perma.cc/G8HH-VPFN].

105. Lauren Sherman, *Instagram Killed the Fashion Magazine. What Happens Now?*, BUS. FASHION (Oct. 30, 2018, 5:20 AM), <https://www.businessoffashion.com/articles/professional/instagram-killed-the-fashion-magazine-what-happens-now>.

brand's website to decide whether to purchase it. But if you see it on Instagram, you may be able to click and buy it on the spot through programs like Instagram Shopping,¹⁰⁶ RewardStyle,¹⁰⁷ and LIKEtoKNOW.it.¹⁰⁸

Most importantly, influencer marketing works.¹⁰⁹ Studies have found that the use of influencers significantly increases both consumers' positive brand attitudes and their purchase intentions,¹¹⁰ with 74% of consumers relying on social media content when they make purchasing decisions.¹¹¹ Meanwhile, 81% of marketers who have used influencer advertising deemed it effective, with more than half believing it attracts better customers and 37% reporting better retention due to consumers trusting influencers over traditional advertisements.¹¹² The strategy enables brands to leverage an influencer's "built-in audience" and "social capital" by piggybacking on their aura of authenticity.¹¹³ Researchers who study online relationships have noted that the connection between an influencer and their followers is more than uni- or even bi-directional—influencers "build . . . communities in which they're in the center."¹¹⁴

Effective influencers cultivate loyalty and are able to hold their followers' attention even when posting sponsored content. They maintain a level of trust, intimacy, and engagement¹¹⁵ that's difficult for traditional advertising to match. Followers typically are interested in the lives of the influencers they follow,

106. Instagram Shopping has enabled shoppable posts for brands, influencers, and select publishers like Condé Nast, YouTube, TikTok, and Snapchat, which "are also investing heavily" in e-commerce. Deanna Ting, *Publishers See Opportunity in Instagram Shopping*, DIGIDAY (Dec. 9, 2019), <https://digiday.com/media/publishers-see-opportunity-instagram-shopping/>.

107. RewardStyle is a web-based, sub-affiliate network that connects influencers and retailers, enabling influencers to earn commissions by creating shoppable affiliate links. Its website boasts a network of 1 million brand partners, 60,000 influencers, more than 699 million consumers, and over \$1 billion in annual retail sales. *Company*, REWARDSTYLE, <https://about.rewardstyle.com/our-company/> [<https://perma.cc/3VFP-N9E6>]. The company is selective about which influencers it accepts into the program and ejects influencers who underperform. Lisa Koivu, *Why I Generally Don't Recommend RewardStyle*, OH, SHE BLOGS! (July 6, 2016), <https://ohsheblogs.com/generally-dont-recommend-rewardstyle/> [<https://perma.cc/Z7P9-YLYC>].

108. LIKEtoKNOW.it is a social-based (web and app) shopping service owned by RewardStyle that enables users to purchase items they see in influencer posts. AMBER VENZ BOX, VENZEDITS, *in LIKETOKNOW.IT: STORIES FROM THE INFLUENCER NEXT DOOR* 8 (2018).

109. See, e.g., Emilie Tabor, *14 Reasons Why Influencer Co-Creation Is the Way Forward in Influencer Marketing*, DRUM (Dec. 2, 2019, 3:45 PM), <https://www.thedrum.com/opinion/2019/12/02/14-reasons-why-influencer-co-creation-the-way-forward-influencer-marketing> [<https://perma.cc/SQZ2-HRDE>] (touting success stories, including several fashion launches that sold out within hours).

110. Evans et al., *supra* note 9, at 138.

111. Eric Burgess, *11 Essential Stats for Influencer Marketing in 2016*, ION, <https://www.ion.co/11-essential-stats-for-influencer-marketing-in-2016> [<https://perma.cc/TZ2V-5R6J>] (last visited July 26, 2020).

112. Evans et al., *supra* note 9, at 139.

113. DUFFY, *supra* note 58, at 138–39.

114. Maria A. Rodriguez, *New Kings: The Power of Online Influencers*, YOUTUBE (July 27, 2017), <https://www.youtube.com/watch?v=JiYdBLB90IM>.

115. *How Do You Define an Influencer? The Answer Has Shifted*, HYPR, <https://hyprbrands.com/blog/how-do-you-define-an-influencer/> [<https://perma.cc/C55B-5WYC>] (last visited Aug. 11, 2020) ("Another important facet of being an influencer is that these people have leverage within a certain community due to their personal engagement . . . that allowed them to build a rapport.").

believe their recommendations sincere,¹¹⁶ and perceive the separation between themselves and those influencers—especially micro- and nano-influencers—to be smaller than the distance between fans and celebrities. They view influencers as friends.¹¹⁷ And their interactions bear out those perceptions: if they ask a question or leave a comment, there's a good chance the influencer will respond.¹¹⁸

D. WHEN INFLUENCER MARKETING HARMS

The harms of false advertising have been well-documented and extensively debated. The Supreme Court quoted one commentator:

[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, 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.¹¹⁹

False claims harm consumers by deceiving them, hampering their autonomy, eroding their trust, improperly influencing their purchasing decisions, and providing unreliable information about goods and services that they nonetheless rely on.¹²⁰

116. It is possible that some influencers are immune to charges of disingenuous behavior, just as some famous brands appear immune to dilution by blurring. See Maureen Morrin & Jacob Jacoby, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL'Y & MARKETING 265, 274 (2000).

117. DUFFY, *supra* note 58, at 122 (recounting one blogger's observation about the challenge of balancing professionalism with "being personal so people can feel like they're actually . . . your friend almost when they read your blog"); Vanessa Friedman, *The Rise and (Maybe) Fall of Influencers*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/fashion/kendall-jenner-fyre-festival-pepsi-bella-hadid-influencers.html> ("[B]eing an Influencer means you are often thought of as a 'friend' by your followers."); Lorenz, *supra* note 79 ("The audience doesn't just see an influencer as an [entertainment] channel or celebrity; they see them as a friend." (quoting an advertising executive)); Maheshwari, *supra* note 52 ("When [nano-influencers] recommend a shampoo or a lotion or a furniture brand on Instagram, their word seems as genuine as advice from a friend."); Jane Solomon, *What Is an "Influencer" and How Has This Word Changed?*, DICTIONARY.COM, <https://www.dictionary.com/e/influencer/> [<https://perma.cc/5SLW-ZUCM>] (last visited July 26, 2020) ("We're constantly being advertised to, but [with influencer marketing] it's more like our cool friend is telling us their secrets.").

118. DUFFY, *supra* note 58, at 72 ("[A] fashion blogger . . . explained her obligation to 'keep on top of comments' and 'try to respond right away.' . . . [An influencer] . . . articulated . . . 'I want my readers to know that I'm accessible to you. [Responding to messages and comments] is part of my job.'"); Kelly, *supra* note 9 ("Influencers told USA TODAY they spend entire days responding to comments and direct messages and providing recommendations like their favorite products or travel tips.").

119. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 778 n.4 (1992) (alteration in original) (quoting Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 193 (1936)).

120. See David A. Anderson, *Hidden Agendas*, 85 TEX. L. REV. SEE ALSO 1, 2 (2006); Amar C. Bakshi, *Why and How to Regulate Native Advertising in Online News Publications*, 4 U. BALT. J. MEDIA L. & ETHICS 4, 10–11 (2015); Lili Levi, A "Faustian Pact"? *Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 665 (2015) ("If consumers are not aware that a native ad is a paid placement—rather than independently created content—they may fail to evaluate its claims critically.

False claims make advertising less useful.¹²¹ And in extreme cases, false claims jeopardize consumer health and safety.¹²²

Deceptive advertising also harms companies, which lose business and suffer reputational injury when competitors make false claims. A failure to police false advertising creates a race to the bottom, incentivizing deception and undermining the trustworthiness of every platform that hosts ads. To the extent that the rise of influencer-sponsored content has increased consumer skepticism about speech on social media, that skepticism may also harm public discourse.¹²³

Failure to effectively disclose when content is sponsored has similar effects. Sponsorship disclosure activates consumers' cognitive defenses, alerting them that content is intended to persuade and leading them to view the sponsored product more critically,¹²⁴ ultimately increasing resistance to advertising messages and diminishing persuasion.¹²⁵ Research has shown that activating consumers' awareness of persuasion attempts leads to less favorable attitudes toward the

Their skepticism might be tempered by the brand and credibility of the publisher.” (citing Chris Hoofnagle, *Notes from a Naif on Native Advertising Impressions from the FTC's Workshop on Advertorials and Other Disguised Advertising*, TAP BLOG (Dec. 6, 2013), <http://www.techpolicy.com/Blog/December-2013/Notes-from-a-Naif-on-Native-Advertising-Impression.aspx> [<https://perma.cc/4VD4-DZHG>]); Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 746–47 (2010).

121. See Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549, 551 (1991) (“The regulation of deceptive advertising is best viewed as a pragmatic exercise whose purpose is to make advertising as useful as possible for consumers.”).

122. See, e.g., Letter from Senator Richard Blumenthal to Joseph Simons, Chairman, Fed. Trade Comm’n (June 4, 2019), <https://twitter.com/senblumenthal/status/1136059843285061632?lang=en> [<https://perma.cc/XR29-ZWQ9>] (requesting the agency intervene to address extensive marketing of dangerous “detox teas” by celebrity influencers); Press Release, Fed. Trade Comm’n, FTC Sweep Stops Peddlers of Bogus Cancer Cures (Sept. 18, 2008), <https://www.ftc.gov/news-events/press-releases/2008/09/ftc-sweep-stops-peddlers-bogus-cancer-cures> [<https://perma.cc/895A-RHBB>]; Sheila Kaplan & Matt Richtel, *Juul Illegally Marketed E-Cigarettes*, F.D.A. SAYS, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/09/09/health/vaping-juul-e-cigarettes-fda.html>; Jacquie Lee, *FDA Warns Against False Advertising for Covid-19 Antibody Tests*, BLOOMBERG L. (Apr. 8, 2020, 1:54 PM), https://www.bloomberglaw.com/document/XEPN8PP0000000?bna_news_filter=pharma-and-life-sciences&jcsearch=BNA%2520000001715a01d977a5f5da9f25a20001#jcite.

123. Schechter, *supra* note 42, at 585 (“[I]f advertisers violate ethical norms frequently and with impunity, the public will begin to distrust advertising even more than they do today. As a result, advertisers will find it ever more difficult and expensive to communicate valuable and truthful product information to a skeptical public.”); see also Goodman, *supra* note 20, at 87 (observing that stealth marketing leads consumers to doubt what’s supposed to be an “authentic voice[, which] leads to an overgeneralization of distrust as audiences come to believe that mediated speech is inauthentic or untrue even when it is not”).

124. See Sophie C. Boerman, Eva A. van Reijmersdal & Peter C. Neijens, *Sponsorship Disclosure: Effects of Duration on Persuasion Knowledge and Brand Responses*, 62 J. COMM. 1047, 1049–50 (2012).

125. See Moniek Buijzen, Eva A. van Reijmersdal & Laura H. Owen, *Introducing the PCMC Model: An Investigative Framework for Young People's Processing of Commercialized Media Content*, 20 COMM. THEORY 427, 441–42 (2010); Richard E. Petty, Thomas M. Ostrom & Timothy C. Brock, *Historical Foundations of the Cognitive Response Approach to Attitudes and Persuasion*, in COGNITIVE RESPONSES IN PERSUASION 5, 11 (Richard E. Petty, Thomas M. Ostrom & Timothy C. Brock eds., 1981).

brand or product being advertised.¹²⁶ When people identify a social media post as an advertisement, that identification generates feelings of distrust.¹²⁷ Conversely, when commercial content masquerades as organic editorial or entertainment content, it may lead viewers to process the commercial content less critically, rendering it deceptive.¹²⁸ That's why Section 317 of the Communications Act requires broadcasters to disclose when programming has been aired in exchange for payment.¹²⁹

False influencing harms consumers, brands, and competition in the same ways that false claims and nondisclosure in traditional media do. Followers' trust in the influencers they follow¹³⁰ exacerbates that harm. Consumers aren't well positioned to know whether the influencer claims they see are misleading or unsubstantiated, so public assertions of falsity are not widespread, though plenty exist.¹³¹ Influencers have come under scrutiny for claims that a daily pill obviates the need for sunblock,¹³² a "carb crush" pill causes weight loss without dieting,¹³³ and Cannabidiol (CBD) effectively treats clinical depression,¹³⁴ to name a few. The harm is clear: in these three examples alone, consumers who believe the false

126. Boerman et al., *supra* note 124, at 1052 (citing Margaret C. Campbell, *When Attention-Getting Advertising Tactics Elicit Consumer Inferences of Manipulative Intent: The Importance of Balancing Benefits and Investments*, 4 J. CONSUMER PSYCHOL. 225 (1995)); Sang Yeal Lee, *Ad-Induced Affect: The Effects of Forewarning, Affect Intensity, and Prior Brand Attitude*, 16 J. MARKETING COMM. 225, 234 (2010); Mei-Ling Wei, Eileen Fischer & Kelley J. Main, *An Examination of the Effects of Activating Persuasion Knowledge on Consumer Response to Brands Engaging in Covert Marketing*, 27 J. PUB. POL'Y & MARKETING 34, 35 (2008).

127. Sophie C. Boerman, Lotte M. Willemsen & Eva P. Van Der Aa, *"This Post Is Sponsored": Effects of Sponsorship Disclosure on Persuasion Knowledge and Electronic Word of Mouth in the Context of Facebook*, 38 J. INTERACTIVE MARKETING 82, 90 (2017).

128. Boerman et al., *supra* note 124, at 1048 (testing disclosure of sponsored content in television programs and finding an indirect effect on brand attitudes).

129. 47 U.S.C. § 317(a) (2018).

130. See Merin Curotto, *Something Navy's Arielle Charnas Is More Successful Than Ever—But at What Price?*, OBSERVER (Dec. 12, 2018, 5:31 PM), <https://observer.com/2018/12/something-navy-star-arielle-arnas-launching-nordstrom-holiday-line/> [<https://perma.cc/YH97-4HJT>] ("According to [influencer Arielle's husband], his wife's off-the-charts conversion ratio comes down to one simple equation: Her followers think 'Arielle is their friend. . . . That's the key.'").

131. See, e.g., Tanya Chen, *A Yogi Influencer Is Trying to Backtrack and Clarify Her "Weekly Giveaways" After Upset Fans Noticed They Were Not, in Fact, Weekly*, BUZZFEED (Aug. 14, 2019, 3:23 PM), <https://www.buzzfeednews.com/article/tanyachen/yoga-influencer-jessica-ollie-said-weekly-giveaways-were> [<https://perma.cc/9LX6-7RWZ>] (describing accusations by followers of an influencer running a "scam" when the influencer committed to weekly giveaways of branded products and failed to follow through).

132. Victoria Watts (@Justvictoria_nosecret), INSTAGRAM (Sept. 4, 2018), https://www.instagram.com/p/BnUQI_wgEsG/ [<https://perma.cc/4DUZ-QAWC>] ("@sunaferx is a formula of vitamins A, E, zinc, etc. that you take to defend your skin from the sun from the INSIDE. Aka you eventually wont [sic] have to use sunscreen when you take it daily.").

133. Rachel Hosie, *Fitness Influencer Criticised for Promoting 'Extremely Dangerous' Weight Loss Pills*, INDEPENDENT (June 19, 2018, 11:03 AM), <https://www.independent.co.uk/life-style/health-and-families/michelle-lewin-weight-loss-diet-pills-instagram-promotion-fitness-influencer-florida-a8405936.html> [<https://perma.cc/LJW7-M6T4>].

134. Anna Merlan, *Companies Can't Claim CBD Treats Mental Health Issues—But Their Paid Influencers Can, and Do*, VICE (Dec. 9, 2019, 9:30 AM), https://www.vice.com/en_us/article/vb554j/companies-cant-claim-cbd-treats-mental-health-issuesbut-their-paid-influencers-can-and-do [<https://perma.cc/K7FB-SKZW>].

claims may be subject to the dangerous side effects of weight-loss drugs or the cancer risk associated with sun damage, or they may self-medicate rather than obtain professional treatment for serious mental health issues.

Consumer complaints about improper disclosure, meanwhile, are legion. Commenters on social media posts frequently call out what they deem to be undisclosed “sponcon,”¹³⁵ and entire subcommunities have grown up around critiquing influencers and their endorsements.¹³⁶ For example, in a thread on Reddit criticizing a YouTube influencer’s video entitled “Kiki Chanel trying and failing to pass off a blatantly sponsored video as if it’s not sponsored,”¹³⁷ users complained about the influencer’s hidden disclosure and that it was belied by twenty-three minutes of video content in which the influencer repeatedly stated, “no one asked me to do this.”¹³⁸ Elsewhere a reader proclaimed their disappointment over an influencer’s ad for a makeup palette: “We were bamboozled into sitting through promotional content under the guise of ‘exposing the beauty community.’”¹³⁹ Another noted their frustration with an influencer’s “hidden sponsorships,” calling the deception “annoying because [I] feel like I watched 10 min[ute]s of ads before realising it was an ad.”¹⁴⁰

As predicted by the marketing scholarship, consumers engage with content differently when they understand it to be sponsored rather than organic. They may choose to skip certain posts or engage with posts more skeptically. When the commercial nature of content goes undisclosed, consumers are subjected to advertising without their knowledge or consent, undermining their autonomy and impeding their ability to reach informed conclusions about promoted products.

II. FALSE INFLUENCING

A. LANHAM ACT FALSE ADVERTISING

The Lanham Act, known best as the federal statute that governs trademark protection and enforcement, provides a false advertising cause of action under Section 43(a)(1)(B). That Section reads:

135. “Sponcon” is a shortened version of “sponsored content.”

136. See, e.g., GOMIBLOG, <https://gomiblog.com/> [<https://perma.cc/8MH3-PLS7>] (last visited July 27, 2020); *r/BlogSnark*, REDDIT, <https://www.reddit.com/r/blogsnark/> [<https://perma.cc/6NM3-VJK7>] (last visited July 27, 2020).

137. *Kiki Chanel Trying and Failing to Pass Off a Blatantly Sponsored Video as if It’s Not Sponsored*, REDDIT: *r/BEAUTYGURUCHATTER* (Nov. 25, 2018, 7:53 PM), https://www.reddit.com/r/BeautyGuruChatter/comments/a0ed6s/kiki_chanel_trying_and_failing_to_pass_off_a/ [<https://perma.cc/TNM6-BW7L>].

138. *I Wore Only One Makeup Brand Every Day for a Month*, YOUTUBE (Nov. 25, 2018), https://www.youtube.com/watch?v=0rtzNB963KE&feature=emb_logo.

139. Comment to *Biggest BG/Influencer Disappointment of 2019?*, REDDIT: *r/BEAUTYURUCHATTER* (Jan. 2, 2020, 6:14 PM), https://www.reddit.com/r/BeautyGuruChatter/comments/ej3kb9/biggest_bginfluencer_disappointment_of_2019/ [<https://perma.cc/34EX-ACPW>].

140. U/deadlement, Comment to *Biggest BG/Influencer Disappointment of 2019?*, REDDIT: *r/BEAUTYGURUCHATTER* (Jan. 3, 2020, 3:00 AM), https://www.reddit.com/r/BeautyGuruChatter/comments/ej3kb9/biggest_bginfluencer_disappointment_of_2019/ [<https://perma.cc/34EX-ACPW>].

(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 — . . .

(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.¹⁴¹

Case law interpreting Section 43(a)(1)(B) previously limited causes of action to direct competitors. But the Supreme Court overruled that limitation in 2014, holding in *Lexmark International v. Static Control Components, Inc.* that a plaintiff need only allege an injury to a commercial interest in order to establish standing.¹⁴² The injury to a plaintiff can be economic or reputational and must flow directly from the defendant's false or misleading advertising; it "occurs when deception of consumers causes them to withhold trade from the plaintiff."¹⁴³

Most courts interpret a *prima facie* case under Section 43(a)(1)(B) to require¹⁴⁴:

1. a false or misleading description or representation of fact,
2. in or affecting interstate commerce,¹⁴⁵
3. in connection with goods or services in commercial advertising or promotion,
4. that actually deceives or has the tendency to deceive an appreciable number of consumers in the intended audience,
5. is material,¹⁴⁶ and
6. is likely to injure the plaintiff.

141. Lanham Act § 43(a)(1)(B), 15 U.S.C. § 1125(a)(1)(B) (2018).

142. 572 U.S. 118, 131–32 (2014).

143. *Id.* at 133.

144. REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW* 67 (4th ed. 2018); see *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1052 (9th Cir. 2008). These factors derive from *Skil Corp. v. Rockwell International Corp.*, 375 F. Supp. 777, 782–83 (N.D. Ill. 1974), a case one major treatise calls "so important to an understanding of false advertising law that it can be said to be a *de facto* part of Section 43(a)." 2 ANNE GILSON LALONDE, *GILSON ON TRADEMARKS* § 7.02 (2020).

145. A plaintiff bringing a Section 43(a)(1)(B) claim must establish that the defendant caused its false or misleading statement to enter interstate commerce, but "[e]ntry into interstate commerce is virtually automatic" when representations are made online. Elizabeth Williams, *Cause of Action Under Lanham Act § 43(a) [15 U.S.C.A. § 1125(a)(1)(B)] for Misrepresentation in Commercial Advertising or Promotion*, in 57 CAUSES OF ACTION 2D 665 (2019) (citing *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820 (9th Cir. 2011)); see *Epson Am., Inc. v. USA111, Inc.*, 259 F. Supp. 3d 387, 393 (D.S.C. 2017). Statements (explicit or implied) included in posts on social media, like other advertising, have entered interstate commerce. See TUSHNET & GOLDMAN, *supra* note 144, at 67 ("[The] in interstate commerce [factor is] almost always satisfied and rarely contested.").

146. *But see* *Gen. Steel Domestic Sales, LLC v. Chumley*, 627 F. App'x 682, 685 (10th Cir. 2015) ("This court has yet to decide whether the Lanham Act imposes a materiality inquiry and, if so, the lines that inquiry should follow or the standard we would use to review a district court's materiality determination.").

The factors most relevant to a discussion about false influencing are the first, third, and fifth prongs, requiring that a claim be false or misleading, “in commercial advertising or promotion,” and material to the purchasing decision. The question of who is liable for a false or misleading claim under Section 43(a)(1)(B) is equally germane and is explored in Section III. Although deceptiveness and injury are also crucial to a successful claim, each is fact specific; it isn’t clear that either analysis would look particularly different for claims made via influencer marketing than it would for claims made in traditional advertising media.

B. COMMERCIAL ADVERTISING OR PROMOTION

The “in commercial advertising or promotion” prong is often characterized as “easy to meet”¹⁴⁷ when the offending claims are included in paid advertisements by a commercial defendant.¹⁴⁸ The requirement does not limit Section 43(a)(1)(B) claims to traditional forms of advertisements like television and magazine ads,¹⁴⁹ but encompasses a broad range of practices.¹⁵⁰ False advertising case law has repeatedly stressed that advertising and promotion must be “aimed at the consuming public and intended to influence buying decisions.”¹⁵¹ Sponsored influencer posts are deemed advertising by the FTC¹⁵² and social

147. See *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 133 (D. Mass. 1996).

148. See *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1532 (S.D.N.Y. 1994).

149. E.g., *Vitamins Online, Inc. v. HeartWise, Inc. (HeartWise I)*, 207 F. Supp. 3d 1233, 1242 (D. Utah 2016) (concluding a company manipulating online reviews of its products to make them more positive satisfied the requirement), *vacated in part on reconsideration*, No. 2:13-CV-982-DAK, 2017 WL 2733867 (D. Utah May 11, 2017); *Design Res., Inc. v. Leather Indus. of Am.*, 900 F. Supp. 2d 612, 620 (M.D.N.C. 2012) (concluding alleged misrepresentations that a trade association made about a seller’s products in an article published in a trade journal were in commercial advertising or promotion); *Ameritox, Ltd. v. Millennium Labs., Inc.*, 889 F. Supp. 2d 1304, 1313 (M.D. Fla. 2012) (concluding letters containing false or misleading claims a laboratory gave to healthcare providers, who provided them to patients, were in commercial advertising or promotion).

150. “Commercial advertising and promotion” may include “representations less formal than those made as part of a classic advertising campaign.” *Grasshopper House, LLC v. Clean & Sober Media, LLC*, No. 2:18-cv-00923-SVW-RAO, 2018 WL 6118440, at *6 (C.D. Cal. July 18, 2018) (quoting *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004)); see also *Grubbs v. Sheakley Grp., Inc.*, 807 F.3d 785, 799 (6th Cir. 2015); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 110, 114 (6th Cir. 1995); *Kraft Gen. Foods, Inc. v. Del Monte Corp.*, No. 93 CV. 4413, 1993 WL 557864, at *40, *43 (S.D.N.Y. Sept. 22, 1993); *Nat’l Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1234–36 (S.D.N.Y. 1991).

151. *Gillette*, 946 F. Supp. at 134 (citing *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1386 (5th Cir. 1996)); see *Mobius Mgmt. Sys., Inc. v. Fourth Dimension Software, Inc.*, 880 F. Supp. 1005, 1020 (S.D.N.Y. 1994); *EventMedia Int’l, Inc. v. Time Inc. Magazine Co.*, No. 92 Civ. 0502 (JFK), 1992 WL 321629, at *3 (S.D.N.Y. Oct. 26, 1992); see also *Gillette*, 946 F. Supp. at 135 (concluding that statements made inside the product’s packaging were not “commercial advertising or promotion”).

152. The FTC’s position is evidenced by its suggestion to use the hashtag “#ad” to disclose that content is sponsored, its letters to influencers and brands, and its determination that influencer marketing falls within the jurisdiction of its Advertising Division. See FTC, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS 5 (2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/M77W-BGCB>]; Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm’n Div. of Advert. Practices, to Lindsey Lohan (Sept. 6, 2017), https://www.ftc.gov/system/files/documents/foia_requests/all_of_the_signed_letters.pdf [<https://perma.cc/5EXS-8ZKQ>] (one of twenty-

media platforms.¹⁵³ Although courts have had scant opportunity to consider whether influencer marketing posts qualify as “in commercial advertising or promotion,”¹⁵⁴ it seems reasonable to characterize most influencer posts that way.¹⁵⁵

And yet courts in several cases have found that certain online statements did not rise to the level of commercial speech,¹⁵⁶ including blog posts reviewing products¹⁵⁷ and editorial content by a reviewer who generated revenue from affiliate relationships.¹⁵⁸ In one such case, the court found the reviews did not “propose any form of commercial transaction nor . . . embody the typical characteristics of an advertisement” but were instead designed to enable purchasers to make informed decisions, even if readers’ purchasing decisions financially benefited the reviewer.¹⁵⁹ Less than a year later, though, the same plaintiff persuaded a different district court that misrepresentations on another review site *did* qualify as statements in commercial advertising or promotion.¹⁶⁰

Courts have defined advertising as an “organized campaign to penetrate the relevant market,” and more recently, a few have held that a message needs to be widely disseminated in the relevant industry to qualify as a statement in commercial advertising or promotion.¹⁶¹ Although some courts emphasize sheer

one follow-up warning letters sent by the FTC to influencers and celebrities in September 2017); Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm’n Div. of Advert. Practices, to Mark King, President, Adidas Grp. N. Am. (Mar. 20, 2017), https://www.ftc.gov/system/files/documents/foia_requests/1b-2017-00799_instagram_influencers_327_pgs.pdf [<https://perma.cc/7WA5-QLGR>].

153. Instagram announced in 2019 that it would allow brands to promote influencer-created content in nonfollowers’ feeds. Instagram simply disseminates the post from the influencer’s handle to a broader audience as an ad without changing anything about it except to add the language “Paid Partnership with [brand],” a disclosure it deems “very important for ads transparency.” Instagram Business Team, *New: Branded Content Ads on Instagram*, INSTAGRAM: BUS. BLOG (June 4, 2019), <https://business.instagram.com/blog/branded-content-ads-on-instagram/> [<https://perma.cc/A9RB-YERLJ>]. Facebook allows the same. *See What Branded Content Posts Look Like*, FACEBOOK BUS. (June 2, 2019), <https://www.facebook.com/business/help/1859041471004169?id=1912903575666924> [<https://perma.cc/SL5Q-A6M9>].

154. *See New Balance Athletics, Inc. v. USA New Bunren Int’l Co.*, 424 F. Supp. 3d 334, 345 (D. Del. 2019) (noting in dicta that practices including “the sponsored wearing of items by celebrities and influencers[] . . . are regarded as advertisements and promotions”).

155. *See Goodman*, *supra* note 76, at 704–06 (arguing that when mixed peer promotions have sufficient sponsor involvement, they constitute advertising and do not meaningfully differ from commercial advertising).

156. A statement must constitute commercial speech to be a statement in commercial advertising or promotion, but not all forms of commercial speech satisfy that requirement—it is necessary but not sufficient that a representation qualify as commercial speech. *See* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 27:71 (5th ed. 2020).

157. *Tobinick v. Novella*, 848 F.3d 935, 950 (11th Cir. 2017); *RainSoft v. MacFarland*, 350 F. Supp. 3d 49, 62–63 (D.R.I. 2018).

158. *GOLO, LLC v. HighYa, LLC*, 310 F. Supp. 3d 499, 504 (E.D. Pa. 2018) (“On their face, the reviews do not promote any competing product, and do not explicitly propose a commercial transaction. They simply offer an analysis of Plaintiff GOLO’s product, and in doing so, do not go so far as to make any specific recommendations to consumers.”).

159. *Id.* at 505 (citing *Tobinick*, 848 F.3d at 950).

160. *GOLO, LLC v. Higher Health Network, LLC*, No. 3:18-cv-2434-GPC-MSB, 2019 WL 446251, at *9 (S.D. Cal. Feb. 5, 2019).

161. *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002); *ConsulNet Computing, Inc. v. Moore*, No. 04-3485, 2007 WL 2702446, at *11 (E.D. Pa. Sept. 12, 2007). *But see Grubbs v. Sheakley Grp., Inc.*, 807 F.3d 785, 801 (6th Cir. 2015) (“We believe that the

volume,¹⁶² others focus on the nature of the audience and the identity of the message's recipients—requiring only that the advertising message has the goal of influencing consumers to buy the defendant's goods or services¹⁶³ or that it “target a class or category of purchasers or potential purchasers.”¹⁶⁴ Especially in a small market, courts may find a statement was sufficiently disseminated even if distributed to only a handful of customers.¹⁶⁵ One court held that a company posting a link to a report on its website satisfied the test;¹⁶⁶ another held reviews were adequately disseminated by virtue of being posted to Amazon, rejecting an “actual viewing” standard that would ask how many customers actually read the reviews.¹⁶⁷

The dissemination requirement might be harder to satisfy in cases involving micro- and nano-influencers. The Second Circuit noted that “businesses harmed by isolated disparaging statements do not have redress under the Lanham Act.”¹⁶⁸ Consider, on the one hand, Jenner's Fyre post on Instagram. Jenner has more than 139 million followers, which means even if only 5% of her followers saw the post, it was more widely disseminated than a print advertisement in *Cosmopolitan Magazine* (2.6 million readers)¹⁶⁹ or a television ad during any

requirement of ‘widespread dissemination’ or ‘market penetration’ fails sufficiently to account for the types of sophisticated, tailored advertising in use today . . .”).

162. See, e.g., *Gen. Steel Domestic Sales, LLC v. Chumley*, 129 F. Supp. 3d 1158, 1175 (D. Colo. 2015) (“[T]o constitute an actionable advertising or promotional campaign, a dissemination of information must reach some numerically-significant quantity of actual or potential customers of the parties’ products.”).

163. See *Fashion Boutique*, 314 F.3d at 58.

164. *Podiatrist Ass’n, Inc. v. La Cruz Azul de P.R., Inc.*, 332 F.3d 6, 19 (1st Cir. 2003).

165. *Suntree Techs., Inc. v. Ecosense Int’l, Inc.*, 693 F.3d 1338, 1349 (11th Cir. 2012) (citing *Schütz Container Sys., Inc. v. Mauser Corp.*, 2012 WL 1073153, at *31 (N.D. Ga. Mar. 28, 2012)); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1386 (5th Cir. 1996) (concluding that a presentation to eleven soft drink bottlers was sufficiently disseminated); *Int’l Techs. Consultants, Inc. v. Stewart*, 554 F. Supp. 2d 750, 758 (E.D. Mich. 2008); *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 182 (S.D.N.Y. 1995) (holding that a single letter was sufficient because the issue is “the degree to which the representations in question explicitly target relevant consumers”); *Mobius Mgmt. Sys., Inc. v. Fourth Dimension Software, Inc.*, 880 F. Supp. 1005, 1021 (S.D.N.Y. 1994) (holding that a letter sent by defendant to a prospective customer of plaintiff comparing the products of the parties was commercial advertising or promotion). But see *EarthCam, Inc. v. OxBlue Corp.*, 49 F. Supp. 3d 1210, 1242–43 (N.D. Ga. 2014) (holding that a marketer of camera systems did not sufficiently disseminate allegedly false statement, even though sales representatives were documented making it to two putative customers, because there was no evidence of how frequently sales representatives made the representation to customers); *Reed Constr. Data Inc. v. McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 416 (S.D.N.Y. 2014) (observing that there is no minimum numerical threshold for dissemination, but mere “handfuls” from markets in the tens of thousands have repeatedly been held insufficient).

166. *Pegasystems, Inc. v. Appian Corp.*, 424 F. Supp. 3d 214, 222 (D. Mass. 2019).

167. *HeartWise I*, 207 F. Supp. 3d 1233, 1242 (D. Utah 2016). But see *Chumley*, 129 F. Supp. 3d at 1175 (granting summary judgment because the counterclaim plaintiff had not come forward with evidence establishing the false blog posts and pay-per-click ads posted by counterclaim defendant “reached sufficient numbers of customers . . . to permit the conclusion that it was ‘advertising’”).

168. *Fashion Boutique*, 314 F.3d at 57–58 (finding that evidence of twenty-seven statements in a marketplace of thousands of customers did not meet requirement that statements be disseminated “widely”); *accord Chamilia, LLC v. Pandora Jewelry, LLC*, No. 04-CV-6017 (KMK), 2007 WL 2781246, at *9 (S.D.N.Y. Sept. 24, 2007) (finding that claim made in six oral statements at trade shows in a market of thousands of customers was not disseminated widely).

169. Katherine Rosman, *At Cosmopolitan Magazine, Data Is the New Sex*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/style/cosmopolitan-magazine-jessica-pels.html>.

season of *Keeping Up with the Kardashians* (fewer than 5 million viewers).¹⁷⁰ Unlike the online product reviews in the cases cited above, Jenner's post was not presented as an objective review; rather, she urged followers to "[g]et tix now."¹⁷¹ A court would have been hard-pressed to find Jenner's post didn't "propose any form of commercial transaction"¹⁷² or wasn't part of the festival's "organized campaign to penetrate the relevant market,"¹⁷³ especially given the orange tile she deployed in coordination with hundreds of other "Fyre Starters."¹⁷⁴

On the other hand, consider a sponsored post by Alexis Baker (@alexisbakerrr), a nano-influencer with a handful of brand partnerships but only 3,601 Instagram followers.¹⁷⁵ Baker's post about Purlisse moisturizer¹⁷⁶ garnered only twenty-one likes.



170. Kate Knibbs, *The Dark Decline of 'Keeping Up with the Kardashians,'* RINGER (May 4, 2017, 10:43 AM), <https://www.theringer.com/2017/5/4/16044794/keeping-up-with-the-kardashians-ratings-season-13-3aa5b249eee7> [<https://perma.cc/6Z2J-9DX2>].

171. Kendall Jenner, Emily Ratajkowski, & Other Celebs Are Being Sued for Promoting Fyre Festival, *supra* note 1. "Tix" in this context is shorthand for "tickets."

172. *GOLO, LLC v. HighYa, LLC*, 310 F. Supp. 3d 499, 505 (E.D. Pa. 2018).

173. *Fashion Boutique*, 314 F.3d at 57.

174. See Allyna Mota Melville, *Fyre Festival — A Social Media Strategy that Ignited Chaos*, SPARKLOFT (Feb. 13, 2019), <https://sparkloftmedia.com/blog/2019/2/12/fyre-festival-a-social-media-strategy-that-ignited-chaos> [<https://perma.cc/C28S-QTNR>].

175. Alexis Baker (@Alexisbakerrr), INSTAGRAM, <https://www.instagram.com/alexisbakerrr/?hl=en> [<https://perma.cc/K33Y-JCAE>] (last visited Sept. 27, 2020).

176. Alexis Baker (@Alexisbakerrr), INSTAGRAM (July 6, 2019), <https://perma.cc/2L9B-5HFF>.

If Baker's claims about the moisturizer proved to be false and a Purlisse competitor sought to challenge the claim, a court could conceivably find a post to a social media account with so few followers—likely to be seen by a small proportion of the relevant consumers—inadequately disseminated to constitute a statement in commercial advertising or promotion.¹⁷⁷ This factor, then, will be easily satisfied in many cases, but may prove a closer question where influencer audiences are smaller, unless courts consider the reach of a micro-influencer campaign in the aggregate. If claims made to small audiences are harder to challenge, it might further drive advertisers to employ a large number of small influencers rather than a small number of large influencers.

C. FALSITY

1. Overview

An actionable statement in an advertisement may be literally false; false by necessary implication; or literally true, but likely to mislead consumers.¹⁷⁸ A majority of jurisdictions and the FTC further divide literally false claims into two types: establishment claims, which reference studies or data in support of facts,¹⁷⁹ and efficacy (or “non-establishment”) claims, which are more general descriptions or claims of effectiveness.¹⁸⁰ To prove that an establishment claim is literally false, a plaintiff must demonstrate that the data referenced in the advertisement are “not sufficiently reliable to permit one to conclude with reasonable certainty that they established” the claim made.¹⁸¹ To prove an efficacy claim literally false, a plaintiff must show that the advertiser lacked a reasonable

177. In cases where a brand reposts a nano-influencer's post to its corporate account, the “commercial advertising or promotion” prong will be handily met.

178. *Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 F. App'x 778, 784–85 (10th Cir. 2016); *see* *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 735 (6th Cir. 2012). Which category a claim falls into (if any) is a question of fact. 1 THOMAS M. WILLIAMS, FALSE ADVERTISING AND THE LANHAM ACT § 3.01[2][a] (2020). *But see* *Serv. Jewelry Repair, Inc. v. Cumulus Broad., LLC*, 145 F. Supp. 3d 737, 746 (M.D. Tenn. 2015) (citing *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 615 n.2 (6th Cir. 1999)) (“It is the province of the court to determine whether the statements are too ambiguous to be literally false.”); 2 GILSON, *supra* note 144, § 7.02 (“Courts routinely determine whether these representations are either literally ‘false’ or are merely ‘misleading.’”).

179. An establishment claim “suggests that a product's effectiveness or superiority has been scientifically established.” *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015). “[T]ests prove” [Quaker State's] 10W–30 motor oil provides better protection against engine wear at start-up” and “the Reflex Action [shaver] is ‘clinically proven’ to shave with less irritation than wet shavers” are examples of establishment claims. *See* *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 59, 62–63 (2d Cir. 1992); *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 121 (D. Mass. 1996).

180. *See* *POM Wonderful*, 777 F.3d at 490 (“An efficacy claim suggests that a product successfully performs the advertised function or yields the advertised benefit, but includes no suggestion of scientific proof of the product's effectiveness.”); *Gillette*, 946 F. Supp. at 122; *see also* *Avon Prods., Inc. v. S.C. Johnson & Son, Inc.*, 984 F. Supp. 768, 797 (S.D.N.Y. 1997) (finding Avon's representations that Skin-So-Soft bath oil was effective as an insect repellant not literally false); *W.L. Gore & Assocs., Inc. v. Totes Inc.*, 788 F. Supp. 800, 808 (D. Del. 1992) (concluding assertions that the “golf suits are waterproof in their entirety are literally false because the suits are waterproof only in limited areas”).

181. *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984).

basis for the claim.¹⁸² Meanwhile, commercial claims that may be literally true or ambiguous but implicitly convey a false impression can be challenged as “literally false by necessary implication.”¹⁸³ Lastly, claims that are not false, but are misleading in context or likely to deceive consumers, are deemed simply “misleading.”¹⁸⁴ All four types of claims support a Section 43(a)(1)(B) cause of action, but the burden of proof varies depending on how the claim is categorized. Challenged claims that don’t fall into any of those categories are often deemed puffery—claims no reasonable consumer would take literally because they are too subjective, vague, or exaggerated to be capable of being proved true or false.¹⁸⁵

To be characterized as literally false, a statement must be unambiguous.¹⁸⁶ An advertising claim that’s reasonably susceptible to multiple interpretations won’t meet that high standard.¹⁸⁷ Courts tend to use sweeping language in defining literal falsity, calling it a “bald-faced, egregious, undeniable, over the top” statement “that means what it says to any linguistically competent person.”¹⁸⁸ The greater the degree to which a message relies on the viewer or consumer to integrate its components and draw a conclusion, the less likely it is to be found literally false. Commercial claims that are implicit, attenuated, or merely suggestive usually won’t qualify. Yet some of the advertising claims courts have labeled literally false might surprise a lay reader, such as a claim that one painkiller “works better” than another;¹⁸⁹ a claim about laundry detergent that “whiter is not possible”;¹⁹⁰ or claims that viewers could not get “the best picture” without a cable competitor and “settling for cable would be illogical.”¹⁹¹ Meanwhile, other courts have deemed straightforward efficacy claims mere puffery.¹⁹²

182. See *POM Wonderful*, 777 F.3d at 490.

183. See *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 946 (3d Cir. 1993). Such a claim is also called “implicitly false” or “impliedly false.” For example, when Robot-Coupe advertised that “all 21 of the three-star restaurants in France’s Michelin Guide choose the same professional model food processor” and pronounced the score “Robot-Coupe: 21; Cuisinart: 0,” the court found the claim impliedly false because it failed to mention that Cuisinart didn’t make a professional-grade food processor, so none of those restaurants chose a Robot-Coupe over a comparable Cuisinart model. *Cuisinarts, Inc. v. Robot-Coupe Int’l Corp.*, No. 81 Civ 731-CSH, 1982 WL 121559, at *1–2 (S.D.N.Y. June 9, 1982).

184. WILLIAMS, *supra* note 178, § 3.01.

185. See *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 498–99 (5th Cir. 2000); Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexts*, 94 TRADEMARK REP. 585, 616–18 (2004).

186. *Novartis Consumer Health, Inc. v. Johnson & Johnson–Merck Consumer Pharm. Co.*, 290 F.3d 578, 587 (3d Cir. 2002).

187. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007).

188. *Schering–Plough Healthcare Prods. Inc., v. Schwarz Pharma, Inc.*, 586 F.3d 500, 513 (7th Cir. 2009).

189. *McNeil–P.C.C., Inc. v. Bristol–Myers Squibb Co.*, 938 F.2d 1544, 1549, 1551 (2d Cir. 1991).

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

191. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 154, 158 (2d Cir. 2007) (affirming determination that TWC established a likelihood of success of proving the claim literally false by necessary implication).

192. For example, one held the claim that a brand’s vacuums “always work effectively” was not specific enough to constitute a statement of fact, and the claim, “Dyson is different because it doesn’t rely on bags and filters” was neither false nor misleading even though the Dyson vacuums in question had filters. *Dyson, Inc. v. Garry Vacuum, LLC*, No. CV 10-01626 MMM (VBKx), 2011 WL 13268002,

Once a plaintiff proves that a challenged claim is literally false, courts in most circuits¹⁹³ presume consumer deception;¹⁹⁴ the plaintiff need not offer extrinsic evidence that members of the public were actually misled.¹⁹⁵

A plaintiff challenging a claim characterized as misleading, on the other hand, bears the additional burden of proving that consumers were actually misled (or likely to be misled) by the claim.¹⁹⁶ Proof might encompass survey evidence, market research,¹⁹⁷ direct consumer testimony, or unsolicited consumer comments.¹⁹⁸ Courts require evidence that a misleading claim actually deceived consumers if the plaintiff seeks damages but accept evidence of a tendency to deceive consumers if a plaintiff seeks only injunctive relief.¹⁹⁹

There are many ways for advertising claims to be false or misleading and many ways in which influencers in particular might make misrepresentations. The categories analyzed below are explicit false or misleading statements, false or misleading visual representations, false or misleading testimonials, and nondisclosure of material benefit.

at *15–17 (C.D. Cal. Jan. 4, 2011) (citing *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999)) (holding that defendant’s statement that plaintiff was “too small” to effectively handle a client’s business was puffery because “it was not a specific and measurable claim, capable of being proved false”); *see also* *Buetow v. A.L.S. Enters.*, 650 F.3d 1178, 1186–87 (8th Cir. 2011) (holding that claims that garments work on “100% of your scent 100% of the time” and render the wearer “completely scent-free” were nonactionable puffery); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1139–40 (C.D. Cal. 2005) (holding that representations regarding the “outstanding quality, reliability, and performance” of a product were nonactionable puffery).

193. *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 314 (1st Cir. 2002) (“[I]t has become the practice of most circuits to apply the presumption.”).

194. *See Johnson & Johnson Vision Care, Inc. v. 1–800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002); *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988) (presuming irreparable harm where the challenged advertisement directly, but falsely, proclaims the superiority of defendant’s product over plaintiff’s).

195. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002); *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000); *see* 5 MCCARTHY, *supra* note 156, § 27:53.

196. Some courts have held that proof that a defendant actively intended to mislead consumers justifies the same presumption of deceptiveness. *See Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1337 (8th Cir. 1997); *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 258–59 (9th Cir. 1995); *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298–99 (2d Cir. 1992).

197. *See Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 732 (6th Cir. 2012); 5 MCCARTHY, *supra* note 156, § 27:53.

198. *See, e.g., Innovation Ventures*, 694 F.3d at 738–39 (overruling lower court’s exclusion of phone calls from customers as evidence of consumer deception); *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1111 (9th Cir. 2012).

199. 5 MCCARTHY, *supra* note 156, § 27:36 (“When plaintiff seeks only an injunction, there is no requirement that it prove that purchasers were actually deceived. All that is required to prove a statutory violation is that the challenged advertisement has a tendency to deceive If plaintiff wants to recover damages, it must prove actual deception of customers.”).

2. Explicit False or Misleading Statements

Efficacy claims—statements about what a product does or its effectiveness—abound in sponsored influencer posts. When actress Ali Landry proclaimed the drink POM Wonderful “a good source of potassium, which helps maintain healthy muscle function,”²⁰⁰ for example, her claims about both the beverage and the mineral were factual claims capable of being proved true or false.



If the company made those claims directly via traditional media, it would need a reasonable basis to support them. In fact, when POM Wonderful made misleading claims in print ads, litigation followed.²⁰¹

Establishment claims are less ubiquitous in influencer marketing, but are still common. In a sponsored post for the brand Native, Jera Foster-Fell made a number of ostensibly research-based claims about ingredients found in most antiperspirants and shampoos, including the claims “[s]ome research has found links between aluminum and diseases, like Alzheimer’s and breast cancer” and “parabens can enter through our skin and remain inside us . . . and disrupt normal hormone systems.”²⁰²

200. Ali Landry (@alilandry), INSTAGRAM (Jan. 12, 2019), <https://www.instagram.com/p/BsiwOHlncat/> [https://perma.cc/4NSF-YL9B].

201. POM Wonderful, LLC v. FTC, 777 F.3d 478, 483–84 (D.C. Cir. 2015) (finding marketer “touted medical studies ostensibly showing that daily consumption of its products could treat, prevent, or reduce the risk of various ailments, including heart disease, prostate cancer, and erectile dysfunction,” many of which “mischaracterized the scientific evidence concerning the health benefits of POM’s products with regard to those diseases,” and enjoining such future claims).

202. Jera Foster-Fell (@jerabeen), INSTAGRAM (June 20, 2019), <https://www.instagram.com/p/By8c51zl7ef/> [https://perma.cc/C3F6-LU2J].



A court would likely assess the veracity of those claims the same way it would assess claims made in traditional media directly by the advertiser. So the assertion that “research has found links between aluminum and diseases, like Alzheimer’s and breast cancer” would require Foster-Fell and partner-brand Native to provide studies demonstrating that they had a reasonable basis to make that claim.²⁰³ Courts may take a neutral approach in assessing allegedly false claims by influencers, presuming the medium does not complicate a Section 43(a)(1)(B) analysis of the message.

But presumptions in either direction are also possible. Factfinders might expect that the source of the claim could make audiences more credulous because they believe in the authenticity of the influencers they follow. Alternatively, they might expect consumers to be more likely to discount an efficacy claim by an influencer because the influencer stands in the shoes of a consumer sharing their own experience, rather than those of a producer well versed in the data that substantiate a claim calculated to increase sales. Even if data supporting either theory are generated in the course of litigation or outside of it, factfinders might conclude that a neutral, objective approach to assessing falsity that focuses on the claims’ accuracy presents the best path forward, and that information about consumer perception based on the speaker’s status as an influencer is more relevant in assessing whether a claim is misleading than whether it’s false.

203. Of course, an individual influencer is unlikely to have access to studies that substantiate scientific claims. That’s one reason this Article advocates for companies to hold competitor brands, rather than influencers, responsible for misleading messages. Corporate accountability, in turn, increases incentives for brands to train and monitor influencers to ensure they don’t make unsubstantiated or misleading claims.

3. False or Misleading Visual Representations

Courts have found a variety of visual representations in traditional media capable of being construed as false or misleading in context. When Clorox's print and television ads exaggerated how quickly water would leak out of Ziploc bags, the Second Circuit found the visual depictions made literally false claims.²⁰⁴ And when Caitlyn Jenner²⁰⁵ was shown squeezing an orange directly into a carton in a 1982 juice ad campaign, the court reversed a finding of no literal falsity where "[t]he visual component of the ad makes an explicit representation that [the type of juice] is produced by squeezing oranges and pouring the freshly-squeezed juice [sic] directly into the carton," which was "not a true representation of how the product is prepared."²⁰⁶ Other visual representations held capable of being construed as false or misleading include "before and after" pictures,²⁰⁷ a current photo of a musician on an album comprising old recordings,²⁰⁸ an image of a sandwich that was no longer for sale at the time of the ad,²⁰⁹ a video showing drop tests of two competing cameras,²¹⁰ and product packaging that misrepresented what was inside.²¹¹

In addition to those misleading visual representations, courts have assessed claims that the use of photo editing renders images in advertisements false or misleading. At least one court declined to dismiss false advertising claims based on the use of Photoshop in advertising images for skincare products.²¹² Others have found (or have concluded that a jury could reasonably find) literal falsity based on the use of technology to alter images, like one pool-toy seller's practice of shrinking images of children to make its toys appear larger in relation to them.²¹³

204. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 239 (2d Cir. 2001).

205. Jenner is referred to in the decision as "Bruce," the name she used publicly at the time of the endorsement and during litigation.

206. *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 318 (2d Cir. 1982).

207. *E.g.*, *GlaxoSmithKline Consumer Healthcare, L.P. v. Merix Pharm. Corp.*, No. Civ. 05-898 (DRD), 2005 WL 2230318, at *7 (D.N.J. Sept. 13, 2005) ("The 'Before' and 'After' photographs . . . convey the unmistakable impression that RELEEV effects a cure of the physical manifestations of colds sores. . . . [T]his is false.").

208. *CBS Inc. v. Springboard Int'l Records*, 429 F. Supp. 563, 565, 567 (S.D.N.Y. 1976).

209. *Doctor's Assocs., Inc. v. QIP Holder LLC*, No. 3:06-cv-1710(VLB), 2010 WL 669870, at *21 (D. Conn. Feb. 19, 2010).

210. *FLIR Sys., Inc. v. Sierra Media, Inc.*, 903 F. Supp. 2d 1120, 1134-35 (D. Or. 2012) (granting summary judgment for defendant on other grounds).

211. *See In re McCormick & Co.*, 215 F. Supp. 3d 51, 60 (D.D.C. 2016) (denying defendant's motion to dismiss false advertising claim based on slack-filled packaging); *see also* *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 406 (E.D.N.Y. 2010); *Cyclone U.S.A. v. LL&C Dealer Servs. LLC*, No. CV-03-992 WMB (JWJx), 2004 WL 7325117, at *34 (C.D. Cal. Apr. 14, 2004) ("[T]he use of a photograph on the outside of a box, or on a website, to sell a completely different product inside the box is false advertising.").

212. *In re L'Oreal Wrinkle Cream Mktg. & Sales Practices Litig.*, No. 2:12-03571 (WJM), 2013 WL 6450701, at *1, *4 (D.N.J. Dec. 9, 2013) (concerning class action claims alleging fraud under various state statutes based in part on L'Oreal's practice of "photoshop[ing] images to give prospective customers a false impression of their products' efficacy").

213. *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 829 F. Supp. 2d 802, 812-13 (D. Minn. 2011). *But see* *La.-Pac. Corp. v. James Hardie Bldg. Prods., Inc.*, 928 F.3d 514, 517-18 (6th Cir. 2019)

At the intersection of physical and digital alteration of images, the National Advertising Division (NAD), which applies federal false advertising case law in its nonbinding dispute resolution process,²¹⁴ determined in multiple cases involving mascara ads that advertisers make false product demonstrations when their ads contain quantified performance claims accompanied by photographs where the model's eyelashes are digitally or physically enhanced (for example, by false lashes).²¹⁵

Influencers on Instagram and various other platforms are known for using filters, Photoshop, Facetune,²¹⁶ and other means of post-production tweaking on their skin, hair, and curves. Many, if not most, use photo-editing tools to perfect their pictures before posting them; one high-profile influencer recently proclaimed, "Almost every single celebrity or influencer you see posting a photo has probably 'Facetuned' it."²¹⁷ Influencers are also widely known to physically alter their appearance in ways both permanent (plastic surgery) and temporary (eyelash extensions). Reality television star Lilly Ghalichi from *Shahs of Sunset* posted in a paid endorsement on Instagram, "@HAIRtamin Hair Nourishing Vitamins have helped me so much."²¹⁸ But two months earlier, Ghalichi acknowledged in an interview "that her natural hair isn't actually very thick! Her secret weapon is her [hair] extensions!"²¹⁹ That doesn't necessarily mean Ghalichi didn't take the HAIRtamin vitamins she endorsed, or that her testimonial was dishonest. But the images she posted might be false or misleading²²⁰ if

("Reasonable consumers know that marketing involves some level of exaggeration, and some amount of digital retouching to tell a story.").

214. Terri Seligman & Hannah Taylor, ABA, *Navigating the National Advertising Division*, LANDSLIDE MAG., Mar.–Apr. 2019, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/navigating-national-advertising-division/#7 [<https://perma.cc/46ZT-PDJ2>]. The NAD also at times applies principles derived from FTC cases and guides. John E. Villafranco & Katherine E. Riley, ABA, *So You Want to Self-Regulate? The National Advertising Division as Standard Bearer*, 27 ANTITRUST 79, 79–80 (2013).

215. Procter & Gamble Co., NAD Case Report No. 5635, 18 (Sept. 25, 2013).

216. Facetune is "[a] cheap, easy-to-use Photoshop alternative in the pocket of anyone with a smartphone, allowing them to smooth, slim, or skew any part of their face or body in an instant." Rebecca Jennings, *Facetune and the Internet's Endless Pursuit of Physical Perfection*, VOX (July 25, 2019, 7:14 AM), <https://www.vox.com/the-highlight/2019/7/16/20689832/instagram-photo-editing-app-facetune> [<https://perma.cc/C43V-V94H>].

217. *Retouching Photos: Is It Right or Wrong?*, BBC: CBBC NEWSROUND (Dec. 12, 2018, 4:01 AM), <https://www.bbc.co.uk/newsround/46467338> [<https://perma.cc/R4QK-PGZZ>] (quoting influencer James Charles).

218. Katie Notopoulos, *Not Even the FTC Knows What Exactly #Spon Looks Like*, BUZZFEED NEWS (July 12, 2017, 11:46 AM), <https://www.buzzfeednews.com/article/katienotopoulos/not-even-the-ftc-knows-what-exactly-spon-looks-like> [<https://perma.cc/KC4C-2G3W>]; see also Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n Div. of Advert. Practices, to Leyla Milani-Khoshbin (Mar. 20, 2017), https://www.ftc.gov/system/files/documents/foia_requests/1b-2017-00799_instagram_influencers_327_pgs.pdf [<https://perma.cc/4E2F-P42F>] (FTC letter identifying post). Although many of Ghalichi's sponsored posts for HAIRtamin feature her image, the photograph in this post is of someone else. Notopoulos, *supra*.

219. Debra Krein, *Lilly Ghalichi's Beauty Secrets — How to Attain Flawless Locks & More*, HOLLYWOOD LIFE (May 23, 2016, 6:37 PM), <https://hollywoodlife.com/2016/05/23/lilly-ghalichi-hair-extensions-makeup-beauty-tips-bellami-lashes/> [<https://perma.cc/Y6WG-UMHS>].

220. For examples of false or misleading visual representations, see, for example, *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 159 (2d Cir. 2007); *S.C. Johnson & Son, Inc. v. Clorox*

she credited the vitamins with making her hair longer, healthier, and shinier,²²¹ when in fact she was wearing extensions in the photos that accompanied her sponsored posts.²²²

Likewise, it seems logical to question whether an influencer who edits an image of her face in a promotional post for makeup or uses Photoshop to whittle her waist while shilling a weight-loss product renders her Instagram post a false advertisement. Israel and France have passed laws requiring disclosure when advertisers use Photoshop to alter images.²²³ Representative Ileana Ros-Lehtinen introduced a bill in Congress in 2014 proposing that the FTC regulate the extent to which advertisers could digitally alter images,²²⁴ but it did not pass.²²⁵ False advertising claims based on the use of editing software to improve people's appearance seem unlikely to survive, but those that equate to a false or misleading statement about the product's efficacy—like photoshopping whiter teeth in an influencer ad for a tooth whitening product or longer lashes in an ad for a lash-lengthening mascara—seem more likely to be fair game. Advertisers in traditional media are also known to edit photographs, though, so courts may decline to apply more stringent standards to influencer posts than they apply to print ads.²²⁶

4. False or Misleading Testimonials

Fans and competitors often won't have cause to suspect that a testimonial—an influencer's personal story about their product use, results, and experiences—might be false. But in Kendall Jenner's case (again!), her followers were paying

Co., 241 F.3d 232, 239 (2d Cir. 2001); *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 318 (2d Cir. 1982); *In re L'Oreal Wrinkle Cream Mktg. & Sales Practices Litig.*, No. 2:12-03571 (WJM), 2013 WL 6450701, at *2, *5 (D.N.J. Dec. 9, 2013); *Procter & Gamble Co.*, NAD Case Report No. 5635, 18 (Sept. 25, 2013).

221. Lilly Ghalichi (@lillyghalichi), INSTAGRAM (June 7, 2018), <https://www.instagram.com/p/BjutZUMlyLH/?hl=en> (“[N]atural hair growing like crazy thanks to all my new growth from using @HAIRtamin Hair Vitamins and Prenatals.”).

222. Some followers have questioned whether sponsored posts endorsing Sugar Bear Hair gummies feature images of celebrities' real hair. See Sandra Borowski, *The Truth Behind Instagram's Hair Growth Candy*, MEDIUM (Jan. 21, 2018), <https://perma.cc/D8RV-7RMP>.

223. See Tayla Minsberg, *What the U.S. Can—and Can't—Learn from Israel's Ban on Ultra-Thin Models*, ATLANTIC (May 9, 2012), <https://www.theatlantic.com/international/archive/2012/05/what-the-us-can-and-cant-learn-from-israels-ban-on-ultra-thin-models/256891/>; *The French “Photoshop Law” Is in Effect...Now What?*, FASHION L. (Oct. 2, 2017), <https://www.thefashionlaw.com/the-french-photoshop-law-is-not-in-effect/> [https://perma.cc/KJ3N-KPWZ]; see also *ASA Ruling on Coty UK Ltd. ADVERT. STANDARDS AUTHORITY*, <https://www.asa.org.uk/rulings/coty-uk-ltd-a16-367087.html> [https://perma.cc/N4SK-VAER] (concluding mascara ads where lashes were photoshopped to appear fuller breached regulations against misleading advertising); *Photoshopped Ads Join Sponsored Content as a Growing Concern for International Watchdogs*, FASHION L. (June 20, 2018), <https://www.thefashionlaw.com/home/photoshopped-sponsored-content-of-growing-concern-for-international-watchdogs> [https://perma.cc/ZY27-MGMF] (describing the Advertising Standards Authority of Ireland's new requirements that influencers and advertisers “declare if an image has been ‘manipulated’”).

224. Truth in Advertising Act of 2014, H.R. 4341, 113th Cong. (2014).

225. See *H.R. 4341 - Truth in Advertising Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bills/113/congress/house-bill/4341> [https://perma.cc/X83Q-BU6L].

226. See *Procter & Gamble Co.*, NAD Case Report No. 5635 (Sept. 25, 2013) (recommending P&G “discontinue the use of artificial lash enhancements in mascara advertisements that make quantified performance claims” such as “200% [m]ore [v]olume”).

close attention. In early 2019, Jenner announced a partnership with Proactiv in dramatic fashion, teasing a big reveal and then crediting the brand with curing her acne.²²⁷

The brand reported great success with the campaign; after the first full week of its partnership with Jenner, new subscribers were up 30% year-over-year.²²⁸ But some of Jenner's 102 million followers²²⁹ were skeptical. Fans who had followed Jenner and her skincare regimen over time pointed to inconsistencies in her story—not only had she been open about her struggles with acne in the past, she had already disclosed publicly what methods had worked to improve her acne, and none of those methods was Proactiv.²³⁰ Fans and journalists speculated that Jenner was

227. See Kendall Jenner (@kendalljenner), INSTAGRAM (May 21, 2019), <https://perma.cc/XQL8-T5RK> (“I’ve been able to maintain clear skin thanks to Proactiv. I’m on the ProactivMD system.”).



228. Allison Collins, *Proactiv Speaks Out About Kendall Jenner Backlash*, WOMEN'S WEAR DAILY (Jan. 18, 2019), <https://wwd.com/beauty-industry-news/skin-care/proactiv-speaks-out-about-kendall-jenner-backlash-1202954926/> [<https://perma.cc/EUB5-AVF6>].

229. *Id.*

230. Jenner shared in 2015 that she had been “acne-free for about three years now” and credited her dermatologist and laser treatments; followers noted Proactiv had never been part of the skincare regimen she disclosed. See Andrea Park, *Does Kendall Jenner Actually Use Proactiv? The Internet Thinks Not*, W MAG. (Jan. 8, 2019, 7:56 PM), <https://www.wmagazine.com/story/does-kendall-jenner-use-proactiv-internet-theories> [<https://perma.cc/AS3K-T5GJ>]; Martha Ross, *More Kendall Jenner Backlash: She's Challenged for Claiming Proactiv Cured Her Acne*, MERCURY NEWS (Jan. 9, 2019, 8:47 AM), <https://>

not the bona fide user she made herself out to be.²³¹

False, misleading, or dishonest testimonials can be subject to challenge based on several different theories. First, statements endorsers make about their personal experiences with a product may convey general efficacy claims about the product, such as when an ad offers first-person accounts from users stating how much weight they lost with a weight-loss aid or how much their pain improved with a particular pain treatment. A study by FTC staff examined the claims communicated by a promotional booklet that consisted entirely of consumer testimonials touting a dietary supplement's efficacy for treating breathing problems, fatigue, and chronic pain, with and without disclaimers.²³² More than three-quarters of the respondents who read the three-page booklet of testimonials understood it to communicate efficacy claims.²³³ About 70% of the respondents believed, based on the testimonials, that the dietary supplement would reduce breathing problems, increase energy levels, or relieve pain for at least half of the people who take it,²³⁴ and their belief was unaffected by disclaimers.²³⁵ Ultimately, the study concluded: "These results suggest that multiple testimonials about a product effectively communicate efficacy claims, i.e., that the product works for the uses discussed in the testimonials."²³⁶

Similarly, a 2004 FTC study of 1,624 subjects found that advertisements featuring fictional testimonials about a weight-loss program, a supplement for reducing cholesterol, and a business opportunity all communicated effectiveness and typicality.²³⁷ Typicality is the expectation that an endorser's results or experience are typical and representative of what other consumers will achieve or experience.²³⁸ Influencer testimonials, then, can convey the same efficacy claims about products that straightforward assertions about their effectiveness do, but they may be more persuasive due to consumers' trust that influencers share only their authentic experiences. And because campaigns often employ a slate of influencers to make similar claims, their testimonials taken together may convey both efficacy and typicality.

www.mercurynews.com/2019/01/09/more-kendall-jenner-backlash-shes-challenged-for-claiming-proactively-cured-her-acne/.

231. See *New Proactiv Ambassador Kendall Jenner Might Not Use the Company's Products. Legally, That Matters*, FASHION L. (Jan. 10, 2019), <https://perma.cc/2894-25QX>.

232. MANOJ HASTAK & MICHAEL B. MAZIS, FTC, THE EFFECT OF CONSUMER TESTIMONIALS AND DISCLOSURES ON AD COMMUNICATION FOR A DIETARY SUPPLEMENT 1 (2003), <https://www.ftc.gov/system/files/documents/reports/effect-consumer-testimonials-disclosures-ad-communication-dietary-supplement-endorsement-booklet/030920consumerreport.pdf> [<https://perma.cc/67JT-9T3S>].

233. *Id.* at 4–5.

234. Respondents selected "all," "almost all," "most," or "about half." *Id.* at 9.

235. *Id.* at 5–6.

236. *Id.* at 9.

237. MANOJ HASTAK & MICHAEL B. MAZIS, FTC, EFFECTS OF CONSUMER TESTIMONIALS IN WEIGHT LOSS, DIETARY SUPPLEMENT AND BUSINESS OPPORTUNITY ADVERTISEMENTS 1, 6 (2004), <https://www.ftc.gov/system/files/documents/reports/effects-consumer-testimonials-weight-loss-dietary-supplement-business-opportunity-advertisements/report.pdf> [<https://perma.cc/38Q8-FAPT>].

238. See *id.* at 1.

The FTC assesses alleged false claims in testimonials the same way it assesses false statements in non-testimonial ad copy.²³⁹ Courts take a similar approach.²⁴⁰ If the overall impression created by outlier testimonials is alleged to be misleading, courts consider the message reasonable consumers will take away from the advertisement, the effect of any disclaimer language like “results not typical,” and any other mitigating context. Ultimately, as with most arguably misleading claims, the outcome rests on whether the plaintiff can establish that consumers were misled or confused and that the deception was material.

The above discussion focused on claims about products that consumers derive from testimonials. But the more subjective question of whether a personal testimonial is itself truthful about the speaker’s experience may also matter to influencers’ followers. The FTC Endorsement Guides (Guides) require that endorsements “reflect the honest opinions, findings, beliefs, or experience of the endorser.”²⁴¹ Under the Guides, then, even an influencer posting that beauty products they endorse “smell AMAZING!”²⁴² would theoretically run afoul of the Guides if a competitor could prove the influencer thought the products smelled heinous or had never smelled them at all. But Section 43(a)(1)(B) would likely characterize those claims as puffery, subjective bluster incapable of being proved true or false.²⁴³ A good deal of ink has been spilled on the Lanham Act’s distinction between false statements of fact, which are actionable, and statements of opinion, which are not.²⁴⁴ Under that rubric, the testimonial claim “these products smell amazing,” even if insincere, is unlikely to be actionable. As one court noted, “there is no exception to the ‘statements of opinion are not actionable’ rule

239. See FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1(a) (2019) (stating that endorers may not make representations that would be deceptive if made by the advertiser). “Copy” as used here and further in this Article refers to the text contained in an advertisement. *Copy*, OXFORD ENGLISH DICTIONARY (3d ed. 2020) (definition 9(c)); see *infra* notes 339, 341, and text accompanying note 347. The term can also mean journalistic content or material. *Copy*, *supra* (definition 9(d)); see *infra* note 341.

240. See, e.g., *ThermoLife Int’l, L.L.C. v. NeoGenis Labs, Inc.*, 411 F. Supp. 3d 486, 501 (D. Ariz. 2019); *Sci. Weight Loss, LLC v. U.S. Med. Care Holdings, LLC*, No. CV 08-2852 PSG (FFMx), 2008 WL 4533918, at *4 (C.D. Cal. Oct. 6, 2008); *Appel v. Masciocchi*, Civil No. 08-1303, 2008 WL 11383664, at *5 (D.N.J. June 4, 2008); *Patient Transfer Sys., Inc. v. Patient Handling Sols., Inc.*, No. Civ A. 97-CV-1568, 1999 WL 54568, at *8-9 (E.D. Pa. Jan. 29, 1999). But see *Weight Watchers Int’l, Inc. v. Noom, Inc.*, 403 F. Supp. 3d 361, 372-73 (S.D.N.Y. 2019) (concluding that the Lanham Act does not apply to FTC guidance that testimonials will be perceived as representative and advertisers must disclose when the endorser’s results are not typical).

241. 16 C.F.R. § 255.1(a).

242. Christine Le (@christineleeee), INSTAGRAM (July 22, 2019), <https://www.instagram.com/p/B0O9Kf-BNLD/?hl=en> [<https://perma.cc/458U-EPAW>].

243. On the other hand, a court could still deem the necessary implication that the reviewer actually tried the goods or services to be factual and falsifiable, even if the opinion expressed constitutes puffery about the product.

244. See, e.g., *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 495-96 (5th Cir. 2000); *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995) (“[S]tatements of opinion are generally not the basis for Lanham Act liability.”).

for statements of opinion that are influenced by factors such as a financial relationship.”²⁴⁵

But influencers also often make specific and apparently factual claims about their own product use, such as when Kim Kardashian posted of SugarBearHair: “I have two of these a day as part of my hair care routine.”²⁴⁶ The FTC Guides interpret the FTCA to require that an endorser be a bona fide user of a product at the time the user endorses it.²⁴⁷ If Kim was lying—if she’s not a habitual user of the brand’s gummy supplements—is that the kind of false statement the Lanham Act might also reach?

The answer depends in part on whether and how courts cabin the false statement requirement. Many courts and treatises²⁴⁸ have recited a rule that the statement must be “a false statement of fact by the defendant in a commercial advertisement about its own or another’s *product*,”²⁴⁹ that is, the alleged misrepresentation must pertain to the goods or services themselves to be actionable.²⁵⁰ The statute also references “commercial practices,” so misrepresentations about the advertiser’s or challenger’s company likely fit the bill.²⁵¹ A false testimonial that Kardashian takes two gummies a day was arguably a lie about the endorser, rather than the product.

But courts won’t necessarily limit the requirement that way. Courts in a number of cases have held fake reviews factual and falsifiable for falsely implying that a reviewer is a real person who actually tried the goods or services.²⁵² And at least some courts treat any false or misleading statement in an advertisement as satisfying the falsity prong of Section 43(a)(1)(B).²⁵³ In *BMMG, Inc. v.*

245. *Casper Sleep, Inc. v. Hales*, No. 16-cv-03223 (CM), 2016 WL 6561386, at *5 (S.D.N.Y. Oct. 20, 2016).

246. Haley Henschel, *I Tried the Gummy Bear Hair Vitamins All the Kardashians Swear By and Here’s What Happened*, LITTLE THINGS, <https://www.littlethings.com/sugarbear-hair-vitamins-kim-kardashian> [<https://perma.cc/RT6N-ZBTv>] (last visited Aug. 3, 2020).

247. 16 C.F.R. § 255.1(c) (2019).

248. *E.g.*, 2 GILSON, *supra* note 144, § 7.02[6][b][i][A] (“The statement must be a false or misleading statement of fact about either the defendant’s or the plaintiff’s *goods*.” (emphasis added) (multiple capitalizations altered)).

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

250. *See, e.g.*, *Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987) (holding that “[t]he plain meaning” of the statutory phrase “‘any false description or representation’ . . . clearly encompasses a false description or misrepresentation about the characteristics or qualities or overall quality of a product”). *Coca-Cola* predates changes to the Lanham Act, but the language in question remains the same today.

251. *See, e.g.*, *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1276 (10th Cir. 2000) (concluding that e-mail message suggesting competitor’s profits supported devil worship constituted commercial advertising or promotion); *Youngevity Int’l v. Smith*, No. 16-CV-704-BTM-JLB, 2019 WL 2918161, at *7–8 (S.D. Cal. July 5, 2019) (denying defendant’s motion for summary judgment as to allegedly false claim that a certain person was the founder, owner, and CEO of company on basis that claim could be false or misleading).

252. *E.g.*, *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, No. 08cv442(DLC), 2016 WL 815205, at *7 (S.D.N.Y. Feb. 29, 2016).

253. *E.g.*, *Invent Worldwide Consulting, LLC v. AbsolutelyNew, Inc.*, No. 11 C 1619, 2012 WL 4174994, at *2 (N.D. Ill. Sept. 19, 2012) (concluding false claim that testimonials on a party’s website

American-Telecast Corp., for example, a court held false testimonials about celebrity endorsers' experiences with a product fell within the Lanham Act's prohibition.²⁵⁴ In that case, two professional golfers "lied when they told the television audience that the golf instruction tapes being sold had enormously helped their games when in fact the tapes had not even been made" at the time they recorded their endorsements.²⁵⁵ The court noted that the golfers couldn't have watched the tapes, much less benefited from them as claimed.²⁵⁶ The endorsers' claims about the videotapes' helpfulness were treated as satisfying Section 43(a)(1)(B), even though the "lies" were arguably not representations about the tapes' characteristics or about the company that made them, but only about the endorsers' own experiences with them.²⁵⁷

In that respect, the endorsers' lies about the benefits they received from the tapes are indistinguishable from false testimonials by influencers who claim to be bona fide product users but are not. False advertising claims, then, could arise from influencer testimonials that contain false statements of fact (distinct from dishonest opinions) about the influencer's personal experience with a product or service. A statement like "I have two [gummies] a day as part of my hair care routine"²⁵⁸ is capable of being verified or disproved in discovery, and thus potentially could form the basis for a Section 43(a)(1)(B) cause of action consistent with case law.²⁵⁹

5. Nondisclosure

Influencers are required under FTC guidelines and typically under their individual endorsement agreements to properly disclose to followers when they are paid to post, receive free goods or services in exchange for posting, or gain some other material benefit.²⁶⁰ Scholars and consumer watchdog organizations have

were fake satisfied Section 43(a) requirements); *Ramsey Grp., Inc. v. EGS Int'l, Inc.*, 329 F. Supp. 2d 630, 655, 657 (W.D.N.C. 2004) (finding use of the symbol for a company's unregistered trademark was false advertising under Section 43(a)); *Popeil Bros. v. Morris*, No. 1250-69, 1972 WL 17704, at *12 (D.N.J. Dec. 20, 1972) (finding false claim that a company's product was advertised elsewhere for more violated Section 43(a)).

254. No. CV92-3308-HLH, 1993 WL 850564, at *1 (C.D. Cal. May 6, 1993), *aff'd*, 42 F.3d 1398 (9th Cir. 1994) (unpublished table decision).

255. *Id.*; see also *Brown v. Armstrong*, 957 F. Supp. 1293, 1304 (D. Mass. 1997) (assessing false advertising allegations based on the same statements and finding falsity but inadequate evidence of deception or materiality).

256. *BMMG*, 1993 WL 850564, at *1.

257. See *id.*

258. Henschel, *supra* note 246.

259. *But see* *Tria Beauty, Inc. v. Radiancy, Inc.*, No. C 10-5030 RS, 2012 WL 12919483, at *3-4, *4 n.5 (N.D. Cal. June 12, 2012). The counterclaimant alleged celebrity-endorser Kim Kardashian violated California Business and Professions Code Sections 17200 and 17500 in part by endorsing a product without having tried it or achieved results; the court noted, "Given that it is undisputed the [product] does produce some results at some point in time, it is unclear whether liability and/or damages would flow from such a finding." *Id.* The Author represented Tria Beauty and Kardashian in a portion of this litigation.

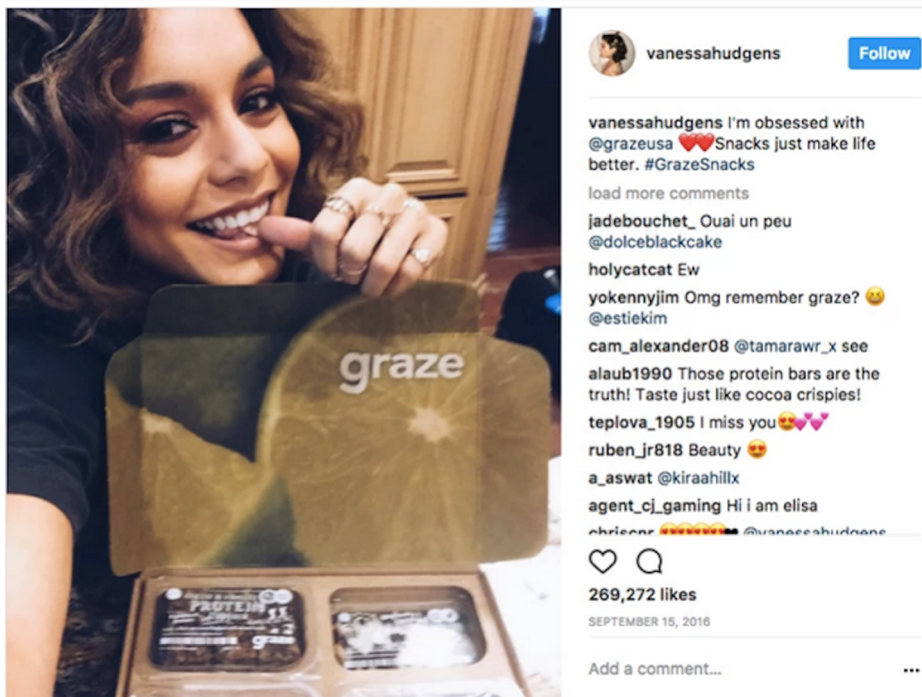
260. See FTC, *supra* note 152, at 2-3.

painted ineffective disclosure as unethical and deceptive.²⁶¹ When actress Vanessa Hudgens claimed to be “obsessed with @grazeusa” without disclosing her partnership with the snack box brand,²⁶² for example, an appreciable number of consumers may have been misled. Nondisclosure is, in a sense, inherently deceptive. As Professor Lili Levi writes of native advertising, “[I]ts entire *raison d’être* is precisely to disable consumers from being able to distinguish between editorial content and commercial propaganda—to trick consumers and end-run ad avoidance.”²⁶³ But it’s not yet clear whether omitting disclosure can form the basis for a Lanham Act cause of action.²⁶⁴

Courts have differed in construing whether the Section 43(a)(1)(B) false or misleading statement prong requires an affirmative misrepresentation rather than

261. See Emma Loude, #Sponsored?: Recognition of Influencer Marketing on Instagram and Effects of Unethical Disclosure Practices 5 (Dec. 9, 2016) (unpublished B.A. thesis, University of Minnesota-Twin Cities), <https://conservancy.umn.edu/bitstream/handle/11299/189102/Emma%20Loude%20summa%20CLA%20sp2017.pdf?sequence=1&isAllowed=y> [<https://perma.cc/T5WX-6YJM>]; *TINA.org Files FTC Complaint Against Instagram Influencers*, GLOBENEWSWIRE (Mar. 5, 2019, 7:00 AM), <https://www.globenewswire.com/news-release/2019/03/05/1747874/0/en/TINA-org-Files-FTC-Complaint-Against-Instagram-Influencers.html> [<https://perma.cc/4Z3J-PXGS>].

262. Notopoulos, *supra* note 218.



263. Levi, *supra* note 120, at 666.

264. 2 GILSON, *supra* note 144.

a mere omission.²⁶⁵ A number of the courts that have taken up the question have held that an omission can constitute a false statement only in combination with an affirmative statement that the omission renders false.²⁶⁶ For example, in a case regarding a campaign that compared two restaurant chains' sandwiches, a district court held "a reasonable jury could conclude that the omission of pricing information was misleading and deceptive to consumers because consumers were misled to believe that the two sandwiches were similarly priced but the [advertiser's] sandwich had more than twice the meat and thus was a better value."²⁶⁷ Another court held a plaintiff "plausibly pleaded that the omission of the relationship" between the defendant and the third-party author of an ostensibly neutral report that the defendant linked on its website rendered the report and the website false and misleading.²⁶⁸

Lokai Holdings LLC v. Twin Tiger USA LLC appears to be the only U.S. case litigated to published decision in which a litigant alleged false advertising based on influencer nondisclosure.²⁶⁹ The court found that allegation insufficient to support a claim under Section 43(a)(1)(B), citing precedent that "the Lanham Act requires an affirmative misrepresentation or an omission that renders an affirmative statement false or misleading—not a failure to disclose something material . . . 'even something that [consumers] should know.'"²⁷⁰

The same court considered the issue of false statement by omission twice more in cases brought by mattress e-retailer Casper against online reviewers Derek Hales²⁷¹ and Jack Mitcham.²⁷² In *Hales*, Casper argued that Hales's affiliate agreements led him to write biased reviews endorsing his partner brands; it

265. Some courts require an affirmative false or misleading statement on the theory that treating an omission as a false statement would impose too great a burden on companies to disclose every possible detail. *See Brown v. Armstrong*, 957 F. Supp. 1293, 1303 & n.9 (D. Mass. 1997); *Truck Components, Inc. v. K-H Corp.*, 776 F. Supp. 405, 410 (N.D. Ill. 1991); *Int'l Paint Co. v. Grow Grp., Inc.*, 648 F. Supp. 729, 730 (S.D.N.Y. 1986). A few courts have found an omission misleading or deceptive and required disclosure of information under Section 43(a) to correct the false impression it caused. *See, e.g., CBS Inc. v. Springboard Int'l Records*, 429 F. Supp. 563, 569 (S.D.N.Y. 1976).

266. *E.g., Casper Sleep, Inc. v. Hales*, No. 16-cv-03223 (CM), 2016 WL 6561386, at *6 (S.D.N.Y. 2016); *Register.com, Inc. v. Domain Registry of Am., Inc.*, No. 02 Civ. 6915(NRB), 2002 WL 31894625, at *14 (S.D.N.Y. Dec. 27, 2002) ("[A] failure to disclose facts is not actionable under [Section] 43(a),' unless the failure is relevant to an affirmative statement that is made false or misleading by its omission." (quoting 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:13 (4th ed. 2002))); *Tube Alloy Corp. v. Homco Int'l, Inc.*, No. 85-5829, 1989 WL 120694, at *2 (E.D. La. Oct. 5, 1989); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 22, § 2 cmt. e; *TUSHNET & GOLDMAN, supra* note 144, at 198 ("[A]n omission becomes actionable [only] if it leads consumers to draw erroneous conclusions about the meaning of the explicit claims.").

267. *Doctor's Assocs., Inc. v. QIP Holder LLC*, No. 3:06-cv-1710(VLB), 2010 WL 669870, at *20 (D. Conn. Feb. 19, 2010).

268. *Pegasystems, Inc. v. Appian Corp.*, 424 F. Supp. 3d 214, 223 (D. Mass. 2019).

269. 306 F. Supp. 3d 629, 636-39 (S.D.N.Y. 2018). Plaintiff Lokai sold beaded bracelets "with the dark bead filled with mud from the Dead Sea . . . and the light colored [sic] bead filled with water from Mount Everest"; Twin Tiger allegedly sold copycat bracelets. *Id.* at 636.

270. *Id.* at 639-40 (quoting *McNeilab, Inc. v. Am. Home Prods. Corp.*, 501 F. Supp. 517, 532 (S.D.N.Y. 1980)).

271. *Hales*, 2016 WL 6561386, at *2.

272. *Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 638 (S.D.N.Y. 2016).

deemed his disclosure of those relationships insufficient.²⁷³ According to Casper, that inadequate disclosure constituted the false statement by omission and the content in the reviews was the affirmative representation that the omission rendered false.²⁷⁴ The court held the reviews nonactionable statements of opinion, even if Hales's supposed opinion was simply "that people who pay him make superior mattresses."²⁷⁵ If the omissions required a separate affirmative representation of fact—not opinion—to be actionable, it followed that the omissions were not actionable either.²⁷⁶ But the court found other statements Casper challenged gave rise to a plausible Section 43(a)(1)(B) claim, including the statement that "[n]o review or content is written, directed, or otherwise influenced by any manufacturer."²⁷⁷ In *Mitcham*, the only statements that survived the motion to dismiss were explicit false claims stating the defendant had an affiliate relationship with Casper when it no longer did.²⁷⁸ In both Casper cases, then, nondisclosure of material relationship did not qualify as a false statement under Section 43(a)(1)(B), but false disclosure or false disclaimer of material relationship did.

The most radical case on this issue due to its broad reading of Section 43(a)(1)(B) is *HeartWise I*.²⁷⁹ The parties in *HeartWise I* sold competing dietary supplements online, including on Amazon.²⁸⁰ Defendant NatureWise had its employees upvote the helpfulness of product reviews on Amazon to increase the likelihood consumers would see positive comments.²⁸¹ It also offered consumers free products or gift cards to post positive reviews, in some cases making minor edits to the reviews before asking consumers to post them.²⁸² NatureWise argued, naturally, that its Amazon review practices did not involve any false or misleading statements.²⁸³ But the court found the alleged review manipulation sufficient to survive summary judgment because it "may give a false or misleading representation of the nature, characteristics, or qualities of NatureWise's goods or its commercial activities."²⁸⁴

273. *Hales*, 2016 WL 6561386, at *2.

274. *Id.* ("Casper alleges that Hales's pecuniary interests have made his reviews substantively untrue or, at the very least, misleading to the consumer, and nothing about his disclosures or disclaimers, which are also alleged to be false or misleading, mitigate these harms.").

275. *Id.* at *5–6. Even though the reviews contained some verifiable facts, the factual statements were not the parts Casper challenged. *Id.* at *6.

276. *See id.* at *5–6. Casper objected that Hales's disclosures did not explicitly inform consumers that the affiliate relationship biased the review, but the court noted consumers can and may still reach that conclusion. *Id.*

277. *Id.* at *7. The court denied Hales's motion to dismiss as to those statements. *Id.* at *8.

278. *Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 640 (S.D.N.Y. 2016).

279. 207 F. Supp. 3d 1233 (D. Utah 2016), *vacated in part on reconsideration*, No. 2:13-CV-982-DAK, 2017 WL 2733867 (D. Utah 2017).

280. *Id.* at 1235.

281. *Id.* at 1236.

282. *Id.*

283. *Id.* at 1237.

284. *Id.* at 1243–44. The court initially granted summary judgment for defendant as to NatureWise's practice of offering consumers free products in exchange for positive reviews, but subsequently reversed that holding because expert discovery had yet to conclude, so plaintiff Vitamins Online might yet

In construing the requirements of Section 43(a)(1)(B), the *HeartWise I* court took a different tack than other courts before it. After tracing the evolution of false advertising law, it declared that the structure of Section 43(a) “opens the door to a wider range of false advertising causes of action that do not necessarily require a false or misleading description or representation of fact,” but merely require a false or misleading “device.”²⁸⁵ That’s because the first part of subsection (a) applies to both trademark and false advertising causes of action.²⁸⁶ The *HeartWise I* court maintained that the Lanham Act’s “broad language . . . is sufficient to cover novel methods of false advertising such as this”²⁸⁷ and echoed the landmark case *Skil Corp. v. Rockwell International Corp.* in observing that “the judiciary has yet to reach the limits of the coverage of [Section 43(a)].”²⁸⁸ In the four years since *HeartWise I* came down, no case has either followed or disavowed its broad interpretation of Section 43(a).

When an influencer shills for a brand without disclosing they were paid to do so, then, some courts may find the omission fails to satisfy the requirements of Section 43(a)(1)(B). Cases like *HeartWise I* and *Pegasystems*, however, make that outcome less than guaranteed.²⁸⁹ Under the majority standard (and the Restatement), the omission qualifies only if it renders a separate affirmative

provide support for its allegation that the practice was misleading. *Vitamins Online, Inc. v. HeartWise, Inc.* (*Heartwise II*), No. 2:13–CV–982–DAK, 2017 WL 2733867, at *2 (D. Utah 2017).

285. *HeartWise I*, 207 F. Supp. 3d at 1239–40.

286. As explained by the court:

[A]lthough most false advertising claims are based on the “false or misleading description . . . or . . . representation of fact” language, the statute unambiguously allows for a false advertising claim to be based on the “any word, term, name, symbol, or device” language as long as the use of that conduct “in commercial advertising or promotion” results in the unlawful effect of “misrepresent[ing] the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.”

...

Using the ordinary meaning of the word “device,” the court concludes that either form of conduct performed by NatureWise could qualify as the use of a device in commerce as described by Section 43(a)(1) of the Lanham Act.

Id. at 1240–41 (second alteration in original).

287. *Id.* at 1245.

288. *Id.* (quoting *Skil Corp. v. Rockwell Int’l Corp.*, 375 F. Supp. 777, 786 (N.D. Ill. 1974)); see also Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671, 752 (1984) (observing “a judicial inclination to give [43(a)] a restrictive meaning,” and noting that “[t]he early [43(a)] precedents, based in substantial measure on pre-Lanham Act decisions, gave the provision an unduly narrow reading, and under our common law tradition these cases still rule from the grave”).

289. See *FTC v. Willms*, No. C11–828 MJP, 2011 WL 4103542, at *8 (W.D. Wash. Sept. 13, 2011) (granting an injunction to prevent the use of falsified celebrity endorsements); *ADT LLC*, 157 F.T.C. 1646, 1661 (2014) (ordering ADT to disclose when product endorsers are paid spokespeople); Press Release, Fed. Trade Comm’n, *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers* (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [<https://perma.cc/X8R6-PGMU>] (announcing settlement between two social media influencers and FTC for failing to disclose ownership of online gambling service).

statement false or misleading.²⁹⁰ In the influencer context, that might look like this Instagram post²⁹¹:

The poster, @thedeveloperswife, heaped praise on several products and included both a discount code and an affiliate link. The LIKEtoKNOW.it link guaranteed that she would receive a cut of every sale of the products made from that link,²⁹² which the FTC treats as the kind of material benefit that requires disclosure.²⁹³ But the post also included the hashtag “#notanad”—a statement



290. See *supra* note 266 and accompanying text.

291. @Thedeveloperswife, INSTAGRAM (July 27, 2019), <https://www.instagram.com/p/B0bKYj5AkRR/> [<https://perma.cc/7MPL-3QWD>].

292. Susan Caminiti, *A Blogger's Social Media Idea Sparks a Retail Revolution, and \$1 Billion in Sales*, CNBC (Oct. 2, 2017, 10:21 AM), <https://www.cnbc.com/2017/09/27/rewardstyle-liketoknow-it-sparks-1-billion-in-retail-sales.html> [<https://perma.cc/7J6B-3PDC>]. But note that in this case, the brands don't necessarily have a relationship with the influencer and thus would not be liable for the post— influencers approved by LTK.it do not require brands' permission to promote products and receive commission on sales, although some do use the app in conjunction with paid collaborations. *What Is RewardStyle?*, ONE ROOF SOC. (June 11, 2018), <https://www.oneroofsocial.com/articles/rewardstyle> [<https://perma.cc/ANE4-W4QU>]. The same is true for Amazon's affiliate program. Meg Prater, *Everything You Need to Know About the Amazon Affiliate Program*, HUBSPOT (May 29, 2020), <https://blog.hubspot.com/sales/amazon-affiliate> [<https://perma.cc/H9LP-WAMS>].

293. See *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/4EJ7-K8J8>]; see also *Brands and Influencers Are Split When It Comes to Sponsorship Disclosures*, FASHION L. (Aug. 5, 2017), <https://perma.cc/BE3W-3PHF> (explaining FTC's guidelines). But see Veronica N. Ramirez, Note, *Fashion Statements Turned Endorsements: How FTC Enforcement Could Cripple the Internet's Trendsetters*, 68 SYRACUSE L. REV. 483, 485, 490 (2018) (arguing that the FTC should not regulate affiliate posts because affiliate links are not advertisements created in partnership with a brand and compensation is not guaranteed).

rendered false by her nondisclosure²⁹⁴ that the post constitutes affiliate marketing.²⁹⁵

All four types of influencer misrepresentations—verbal statements, visual representations, testimonials, and nondisclosure—may qualify as actionable false or misleading representations of fact depending on the jurisdiction and the particular court’s approach. Although nondisclosure is the least likely to qualify on its own, it contributes to the false impression created by the other types of misrepresentations. If an influencer makes false or misleading statements *and* fails to disclose the post is sponsored, consumers may be more likely to believe those false statements because they view them as a sincere reflection of the endorser’s impressions. Without disclosure of material benefit, consumers have no way of discerning if content was ghostwritten or heavily influenced by corporations or if an influencer lacks personal experience with a product they promote.

D. MATERIALITY

To succeed on a Section 43(a)(1)(B) claim, a plaintiff must also establish that the challenged misrepresentation was “material,” that is, that it was likely to affect the purchasing decisions of a substantial portion of the relevant audience.²⁹⁶ Meeting that burden may involve extrinsic evidence such as surveys.²⁹⁷ Other relevant evidence may include increases in defendant’s sales and decreases in plaintiff’s sales;²⁹⁸ evidence of the effectiveness of the ad campaign in question;²⁹⁹

294. Another way to assess the post does not require treating the omission as the misrepresentation—rather, it’s the hashtag “#notanad” that by itself constitutes the false statement.

295. There are two plausible approaches here. One maintains the proper handling of a case like this turns on the sophistication of this influencer’s Instagram followers. See Grynberg, *supra* note 38, at 118; Alfred C. Yen, *The Constructive Role of Confusion in Trademark*, 93 N.C. L. Rev. 77, 86 (2014). The second treats the statement as per se false even if the average follower might find the affiliate link indicates the post is an ad. See Gregory Klass, *False Advertising Law*, in OXFORD HANDBOOK OF NEW PRIVATE LAW (Andrew S. Gold et al. eds., Oxford Univ. Press) (forthcoming Nov. 2020) (manuscript at 12) (available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3274&context=facpub> [<https://perma.cc/AQJ3-QPQZ>]); Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 491 (2012).

296. See, e.g., *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 257–58 (9th Cir. 1995); *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1428 n.9 (3d Cir. 1994); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1500 (5th Cir. 1990).

297. *Southland Sod Farms*, 108 F.3d 1134, 1140 (9th Cir. 1997) (explaining that materiality is “typically tested through the use of consumer surveys”); see, e.g., *SourceOne Dental, Inc. v. Patterson Cos.*, 328 F. Supp. 3d 53, 65 (E.D.N.Y. 2018) (holding that false claims about customer savings need “some form of evidence—usually, although not necessarily, survey evidence or expert testimony” showing the claims influenced purchasing decisions and are therefore material). One way to empirically measure materiality that is gaining traction in false advertising class actions is called “choice based conjoint.” See Suneal Bedi & David Reibstein, *Damaged Damages: Errors in Estimating Patent and False Advertising Litigation* 4–6 (Ind. Univ. Kelley Sch. of Bus. Research Paper No. 19-40, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440817 [<https://perma.cc/VT57-U7FS>].

298. *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 547 F. Supp. 2d 491, 496, 498 (D. Md. 2008).

299. See, e.g., *Hillman Grp., Inc. v. Minute Key Inc.*, 317 F. Supp. 3d 961, 977 (S.D. Ohio 2018) (holding that evidence that purchasing decision changed upon dissemination of false claim showed materiality).

consumers' reactions to the claim;³⁰⁰ or the claim's importance to consumers.³⁰¹ Several circuits hold that materiality, like deception, should be presumed when a claim is literally false,³⁰² while others require that materiality be separately established regardless of whether the claim in question is literally false or misleading.³⁰³

Courts that decline to apply a presumption based on literal falsity have noted that not all false or misleading claims will affect consumer decisionmaking.³⁰⁴ There are plenty of different types of information communicated by advertisements—from inactive ingredients³⁰⁵ to prior litigation³⁰⁶ to statements about the company's history—that consumers simply aren't attuned to. On the other hand, representations about quality, safety, effectiveness, environmental hazard, and cost are more likely to be material.³⁰⁷ Some courts, then, apply a presumption of materiality or find materiality adequately established when the misrepresentation concerns an “inherent quality or characteristic” of the goods or services in question, deeming it likely to affect the purchasing decision.³⁰⁸ A claim is more likely material if it's about something that's hard for consumers to evaluate for themselves³⁰⁹—in advertising parlance, that includes experience and credence claims.³¹⁰ Health claims typically benefit from a categorical presumption of materiality.³¹¹ As one scholar concludes, the courts that focus on whether a claim relates to an inherent

300. See *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1111 (9th Cir. 2012); *Reed Constr. Data Inc. v. McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 418–19 (S.D.N.Y. 2014).

301. See *LG Elecs. v. Whirlpool Corp.*, No. 08 C 242, 2010 WL 2921633, at *6 (N.D. Ill. July 22, 2010); *POM Wonderful LLC v. Purely Juice, Inc.*, No. CV-07-02633 CAS (JWJx), 2008 WL 4222045, at *12 (C.D. Cal. July 17, 2008) (considering evidence as to whether consumers cared if a product called “100% pomegranate juice” contained pomegranate juice).

302. *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000) (citing cases from the Second, Seventh, and Ninth Circuits); 2 LOUIS ALTMAN & MALLA POLLACK, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 5:35 (4th ed. 2019); see Leighton, *supra* note 185, at 596–97, 597 n.61.

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

304. See generally 2 ALTMAN & POLLACK, *supra* note 302, for examples of claims deemed material and not material in false advertising litigation.

305. See *Gold Seal Co. v. Weeks*, 129 F. Supp. 928, 935, 940 (D.D.C. 1955).

306. See *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 257 (9th Cir. 1995).

307. See *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1190–91 (N.D. Ga. 2008), *aff'd*, 356 F. App'x 358 (11th Cir. 2009); *Performance Indus., Inc. v. Koos, Inc.*, No. 90–6435, 1990 WL 161253, at *5 (E.D. Pa. Oct. 17, 1990); 2 ALTMAN & POLLACK, *supra* note 302 (citing *N. Am. Med. Corp. v. Axiom Worldwide, Inc.* 522 F.3d 1211 (11th Cir. 2008)).

308. *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 311–12 (1st Cir. 2002) (“One method of establishing materiality involves showing that the false or misleading statement relates to an ‘inherent quality or characteristic’ of the product.”); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997).

309. 2 ALTMAN & POLLACK, *supra* note 302.

310. See generally Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67 (1973) (defining experience and credence qualities of goods and assessing the effect of consumer knowledge on fraud and deception in the market).

311. Claims “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

characteristic of the goods or services “appear to be saying that they will presume materiality where the offending claim targets the essence of what the court thinks potential purchasers are looking for (or trying to avoid) with respect to the relevant type of product or service.”³¹²

There appears to be little data available on the impact to consumers’ purchasing decisions from influencer marketing or from misleading claims or omissions by influencers.³¹³ FTC staff have researched the effects of various types of disclosure on consumer perception, testing language, placement, font, size, borders, shading, and color, using eye tracking, spontaneous comments, and interview questions.³¹⁴ They found a number of those elements to have a substantial effect on whether consumers understand something to be a paid advertisement.³¹⁵ But that data addresses only whether consumers understand the disclosure, not whether its presence or absence is material to their purchasing decision.

The question of the materiality of false influencing lies at the intersection of two issues. First, the traditional inquiry applies: when an influencer makes a verbal or visual false or misleading statement about a product they are paid to endorse, courts will ask whether it’s the type of representation that tends to be material to the purchasing decision or will look for extrinsic evidence that the ad claim was in fact material. The analysis need not look too different from an analysis of the materiality of a claim made directly by an advertiser on traditional media.

Second, in assessing the ad’s persuasiveness, courts might also factor in the influencer’s authenticity and consumers’ level of trust, which studies have found to be substantially greater than their trust in other types of advertisements.³¹⁶ Say, for example, Kendall Jenner asserts that Proactiv cured her acne, when in fact she doesn’t use Proactiv at all. Arguably, Jenner’s lack of bona fide use of the product is neither a false statement about the product nor a statement about an inherent attribute of the product. Nonetheless, millions of people follow Jenner on social

decisions.” *N. Am. Med. Corp v. Axiom Worldwide, Inc.*, No. 1:06-CV-1678-JTC, 2007 WL 9752026, at *9 (N.D. Ga. Mar. 30, 2007) (quoting Leighton, *supra* note 185, at 595).

312. Leighton, *supra* note 185, at 594.

313. *But see* Alice Audrezet & Karine Charry, *Do Influencers Need to Tell Audiences They’re Getting Paid?*, HARV. BUS. REV. (Aug. 29, 2019), <https://hbr.org/2019/08/do-influencers-need-to-tell-audiences-theyre-getting-paid> (finding influencer disclosure did not affect consumers’ purchasing decisions in a statistically significant way).

314. LAURA M. SULLIVAN & MICHAEL F. OSTHEIMER, FTC, *BLURRED LINES: AN EXPLORATION OF CONSUMERS’ ADVERTISING RECOGNITION IN THE CONTEXTS OF SEARCH ENGINES AND NATIVE ADVERTISING* 1–2, 26 (2017), https://www.ftc.gov/system/files/documents/reports/blurred-lines-exploration-consumers-advertising-recognition-contexts-search-engines-native/p164504_ftc_staff_report_re_digital_advertising_and_appendices.pdf [<https://perma.cc/24J7-KN3Q>] (“Minor modifications, including changes to disclosure language, position, text size and color, and to other visual cues such as the borders around or background shadings of ads or ad groupings, can in combination substantially increase the likelihood that a consumer recognizes an ad as an ad and reduce the potential for consumers to be misled as to the commercial nature of paid search and native ads.”).

315. *Id.* at 26; *see also* Evans et al., *supra* note 9, at 141 (predicting that clearer disclosure language will have better advertising recognition); *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 293 (describing the format disclosures should take to be easily noticed by consumers).

316. *See supra* notes 109–12 and accompanying text.

media in part to buy what she buys, wear what she wears, and use what she uses. If they're induced to buy the Proactiv product based on the belief that Jenner uses it to treat her acne, when in fact her testimonial was false, the advertisement was material whether or not it checks every box in the analysis.

III. COMPLICATIONS AND APPLICATIONS

A. LIABILITY

Who should be held responsible when sponsored influencer posts are deceptive? For its part, the FTC has cast a broad net in alleging liability for deceptive advertising practices.³¹⁷ Though it has sent warning letters to both influencers³¹⁸ and brands based on marketing claims or omissions featured on influencers' social media accounts,³¹⁹ the Commission has named endorsers,³²⁰ but no influencers, as respondents in false advertising enforcement proceedings.³²¹ Given how influencer agreements are structured, the FTC's approach—targeting the companies behind influencer advertising posts with lawsuits—is also the fairest and most effective way to rein in false influencing under Section 43(a)(1)(B).

317. Advertising agencies have “frequently been found liable under the [FTC] Act for committing deceptive acts while advertising another’s products” where the agency was “an active participant in preparing the violative advertisements” and “[knew] or had reason to know that the advertisements were false or deceptive.” *Ramson v. Layne*, 668 F. Supp. 1162, 1167 (N.D. Ill. 1987) (quoting *Bristol-Myers Co.*, 102 F.T.C. 12, 364 (1983)); see also Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603, 624 (1991) (explaining how agencies are now subject to FTC enforcement for creating and pushing misleading claims).

318. Those practices have included nondisclosure of material benefit, nondisclosure of material health or safety risks, and failure to comply with alcohol industry marketing guidelines. See Press Release, Fed. Trade Comm’n, *supra* note 48; Lesley Fair, *FTC-FDA Warning Letters: Influential to Influencers and Marketers*, FED. TRADE COMM’N: BUS. BLOG (June 7, 2019, 11:59 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/06/ftc-fda-warning-letters-influential-influencers-marketers> [<https://perma.cc/GY4W-3MVX>]; see also Letters from Mary K. Engle, Assoc. Dir., Fed. Trade Comm’n Div. of Advert. Practices, *supra* notes 152, 218 (FTC warning letters regarding influencer posts); Sam Sabin, *DeGeneres, Minaj Among Celebrities Whose Social Posts Drew FTC Interest in Past Year*, MORNING CONSULT (Oct. 5, 2018, 5:35 PM), <https://morningconsult.com/2018/10/05/degeneres-minaj-among-celebrities-whose-social-posts-drew-ftc-interest-in-past-year/> [<https://perma.cc/Q6TT-JNVS>] (reporting on the FTC’s warning letters).

319. Fair, *supra* note 318.

320. *E.g.*, *Glass*, 95 F.T.C. 246, 247 (1980); *Cooper*, 94 F.T.C. 674, 675 (1979); *Cooga Mooga, Inc.*, 92 F.T.C. 310, 311 (1978), *modified*, 98 F.T.C. 814 (1981). In each of those three cases, the endorser entered into a consent agreement requiring them to cease making certain misrepresentations unless they had made a “reasonable inquiry” into the truthfulness of the endorsement.” *Ramson*, 668 F. Supp. at 1168.

321. See OFFICE OF COMM’R ROHIT CHOPRA, FTC, FILE NO: P204500, STATEMENT OF COMMISSIONER ROHIT CHOPRA REGARDING THE ENDORSEMENT GUIDES REVIEW 2 (Feb. 12, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf [<https://perma.cc/A9JV-88GE>] (“Focus on Advertisers, not Small Influencers: When individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern. But when companies launder advertising by paying someone for a seemingly authentic endorsement or review, this is illegal payola.”).

Any party who makes a false or misleading advertising statement can theoretically be liable under the Lanham Act.³²² Most false advertising claims are brought against the seller of goods, which is often the party that directly disseminated the false or misleading claim. But other parties, including the agency who authored a campaign³²³ and the individual endorsers who played a role in disseminating its claims,³²⁴ may also be liable.³²⁵

If influencers can be liable for deceptive statements they make on behalf of brands, it seems equally plausible that brands can be liable for deceptive statements influencers make at their direction. Circuit courts have imported common law concepts of vicarious liability in Lanham Act cases under theories of both actual and apparent authority.³²⁶ Although an influencer is most appropriately characterized as an independent contractor,³²⁷ a principal may be held liable for an independent contractor agent's statement when the principal authorizes the agent to speak on its behalf and benefits financially from the arrangement.³²⁸ Brands that hire influencers fit the bill.

Typically, the social media platform on which advertising claims are published is exempt from liability under Section 230 of the Communications Act of 1934.³²⁹ But holding brands responsible for content posted by influencers doesn't violate Section 230, which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."³³⁰ Professor Eric Goldman

322. Bruce P. Keller, *"It Keeps Going and Going and Going": The Expansion of False Advertising Litigation Under the Lanham Act*, 59 L. & CONTEMP. PROBS. 131, 139–40 (1996).

323. "Liability may extend to those who assist in preparing false advertising." 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:19 (5th ed. 2020) (citing *Grant Airmass Corp. v. Gaymar Indus., Inc.*, 645 F. Supp. 1507, 1512 (S.D.N.Y. 1986)).

324. Courts have in some cases declined to dismiss false advertising claims against endorsers. *See, e.g., Tria Beauty, Inc. v. Radiance, Inc.*, No. C 10-5030 RS, 2012 WL 12919483, at *3 (N.D. Cal. June 12, 2012) (declining to dismiss claim under California law). Endorsers may also be held liable under state statutes or tort theories. Kertz & Ohanian, *supra* note 317, at 635.

325. Research firms and officers of the defendant have also been named as co-defendants for helping create and distribute deceptive claims. *See, e.g., Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 603, 605–06 (3d Cir. 1978); *Gaymar*, 645 F. Supp. at 1509.

326. *See Duty Free Ams., Inc. v. Estée Lauder Cos., Inc.*, 797 F.3d 1248, 1276–77 (11th Cir. 2015); *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 807 (9th Cir. 2007); *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1430–31, 1439 (3d Cir. 1994) (holding defendant could be held responsible for the alleged misrepresentations of independent sales representatives if its sales representatives acted as agents or with apparent authority); *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1148–49 (7th Cir. 1992).

327. "[S]alesmen as a group are divided into servants and non-servants, the latter falling into the class of independent contractors for the purpose of distinguishing them from others for whose physical conduct in the scope of employment the employer is responsible." RESTATEMENT (SECOND) OF AGENCY § 14N cmt. a (AM. LAW INST. 1958).

328. *See AT&T*, 42 F.3d at 1438–39 (including the requirements that the misrepresentations be foreseeable and that reliance be reasonable and remanding case to determine whether sales representatives were agents).

329. 47 U.S.C. § 230 (2018).

330. *Id.* § 230(c)(1). Section 230 also includes a provision that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property"—in other words, Section 230

has argued that the FTC Endorsement Guides violate Section 230 by subjecting an advertiser to liability for misleading or unsubstantiated representations made by a blogger or other online endorser simply because it paid that person or gave them a free item to review.³³¹ But Section 230 grants immunity from liability for publishing false or defamatory material only so long as that material was provided by another party,³³² that is, only so long as the endorser and not the brand supplied the content. “Information content providers” are not immune under Section 230.³³³ Courts assessing Section 230 immunity in false advertising cases have emphasized the role the party asserting immunity played in the development of the advertising claims in question:³³⁴ mere publishers and editors are exempt from liability, but content co-creators are not.³³⁵

immunity will not apply in cases alleging intellectual property infringement. *Id.* § 230(e)(2). Some courts have held that as part of a broader statute regulating trademarks, Section 43(a)(1)(B) is included within that carve-out, such that Section 230 immunity does not extend to providers that engage in false advertising. *See* Enigma Software Grp. USA, LLC v. Bleeping Comput. LLC, 194 F. Supp. 3d 263, 273–74 (S.D.N.Y. 2016); 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 22:4.50 (5th ed. 2020). Others have held the opposite. *See, e.g.,* Marshall’s Locksmith Serv. Inc. v. Google LLC, 925 F.3d 1263, 1267 (D.C. Cir. 2019); *Corker v. Costco Wholesale Corp.*, No. C19-0290RSL, 2019 WL 5895430, at *6 (W.D. Wash. Nov. 12, 2019) (holding that Lanham Act false association claim did not fall within Section 230’s intellectual property exception to immunity).

331. According to Goldman, under Section 230 “the advertiser can’t [be] liable for the blogger’s online content or actions. Period.” Eric Goldman, *A Fuller Explanation of Why the FTC Endorsement/ Testimonial Guidelines Violate 47 USC 230*, TECH & MARKETING L. BLOG (Oct. 12, 2009), https://blog.ericgoldman.org/archives/2009/10/a_fuller_defens.htm [<https://perma.cc/D8AW-BYMU>]; *see* Eric Goldman, *Do the FTC’s New Endorsement/Testimonial Rules Violate 47 USC 230?*, TECH. & MARKETING L. BLOG (Oct. 6, 2009), https://blog.ericgoldman.org/archives/2009/10/do_the_ftcs_new.htm [<https://perma.cc/BU65-H6PL>].

332. *See, e.g.,* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003); *Am. Income Life Ins. Co. v. Google, Inc.*, No. 2:11–CV–4126–SLB, 2014 WL 4452679, at *14 (N.D. Ala. Sept. 8, 2014) (holding that Google qualified for Section 230 immunity because plaintiffs failed to allege Google authored the allegedly disparaging content); *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1147, 1149 (D. Ariz. 2005) (denying motion to dismiss based on Section 230 immunity where website operators provided editorial comments to content authored by users).

333. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009). Section 230 defines that phrase to mean “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* (quoting 47 U.S.C. § 230(f)(3) (2018)).

334. *See, e.g.,* Congoo, LLC v. Revcontent LLC, No. 16-401 (MAS) (TJB), 2016 WL 1547171, at *3 (D.N.J. Apr. 15, 2016) (declining to dismiss case about misleading native advertisements based on Section 230 immunity); *Doctor’s Assocs., Inc. v. QIP Holder LLC*, No. 3:06–cv–1710(VLB), 2010 WL 669870, at *24 (D. Conn. Feb. 19, 2010) (denying summary judgment as to advertiser’s Section 230 immunity in false advertising allegations based on consumer-video submissions solicited by Subway and hosted on its website and finding “[a] reasonable jury may well conclude that the Defendants did not merely post the arguably disparaging content contained in the contestant videos, but instead actively solicited disparaging representations about Subway and thus were responsible for the creation or development of the offending contestant videos”); *MCW, Inc. v. badbusinessbureau.com, LLC*, No. Civ.A.3:02–CV–2727–G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004) (holding that operator of a consumer complaint website went beyond traditional publisher’s role when it “actively” solicited “disparaging material”).

335. *See, e.g.,* *FTC v. LeanSpa, LLC*, No. 3:11–CV–1715, 2015 WL 1004240, at *11–12 (D. Conn. Mar. 5, 2015) (denying owner of affiliate marketing network Section 230 immunity for deceptive statements made by affiliate marketers because the network both knew of the acts and “participated in the acts or had authority to control the corporate defendant” (quoting *FTC v. Med. Billers Network, Inc.*,

Case-specific analyses of brand liability for claims disseminated by influencers under the Lanham Act and Section 230 will likely depend upon who wrote the claims and who, if anyone, reviewed and approved them.³³⁶ It's rare that an influencer is the sole creative voice behind a post. Although some influencers assert that delegating creative choices would undermine their authenticity,³³⁷ most accounts suggest brands and agencies play a significant role in collaborating with influencers on sponsored content.³³⁸ When influencers are responsible for content creation, partner brands usually reserve the right to review and sign off on posts before they go live,³³⁹ suggesting that when an influencer posts content with deceptive claims or omits disclosure language, they do so with the brand or agency's tacit or express approval.³⁴⁰ What's more, a number of brands and agencies appear to assume sole control of content. For example, Octavia Spencer's endorsement contract with weight-loss company Sensa offered ghostwriting services.³⁴¹ And influencers often accidentally reveal that content on their account was written or posted by someone else.³⁴²

545 F. Supp. 2d 283, 320 (S.D.N.Y. 2008))), *rev'd in part on other grounds*, FTC v. LeadClick Media, LLC, 838 F.3d 158 (2d Cir. 2016).

336. Brands that neither write nor review content are more likely exempt under Section 230. Although this Article advocates for brands to increase oversight of influencers they hire and to hold competitors responsible for influencer advertising claims, it's also possible that Section 230 could drive brands to eschew written agreements and take a hands-off approach to influencer marketing.

337. See DUFFY, *supra* note 58, at 197.

338. One influencer agency's template agreement details a process in which the influencer first provides a description of a proposed post for a brand's approval, then drafts content for the brand to review, which may lead to multiple rounds of edits before the brand grants final approval. See Sample Influencer Contract from Attorney Mark Lindemann, *supra* note 93 (on file with author); Twitter Direct Message, *supra* note 70. An entertainment lawyer advises that "usually the posts are co-written with the brand" or else subject to a vetting and approval process after the influencer drafts them. Twitter Direct Message from Heraty Law (@heratylaw) to author (July 1, 2019, 3:39 PM) (on file with author); see also E-mail from Quinn Heraty, Attorney, Heraty Law, to author (July 15, 2019, 6:46 PM) (on file with author) (describing language and terms in various influencer contracts).

339. See, e.g., Complaint at 2, PR Consulting, Inc., v. Sabbat, No. 655382/2018 (N.Y. Sup. Ct. Oct. 30, 2018) (complainting that Sabbat "did not submit the post to PRC prior to posting" as his contract specified); Sample Influencer Contract from Attorney Christian Barker to author (on file with author) ("[Influencer] will provide the full post copy to be used . . . including any and all hashtags to be used, subject to [corporate partner's] final approval."); Sample Influencer Contract from Attorney Mark Lindemann, *supra* note 93, ¶ 3 ("The Services . . . are subject to the Advertiser's acceptance and approval.").

340. Some companies intentionally place the onus on the influencer. For example, Emily Ratajkowski's Fyre Festival contract stated: "Fyre acknowledges that [Ratajkowski] shall include all necessary disclosures in her social media posts made hereunder to comply with the FTC Guides, which may include the hashtag: #spon or #ad." Complaint, Messer v. DNA Model Mgmt., LLC, *supra* note 8, at 19 (alteration in original) (emphasis added).

341. Exhibit A to Complaint, Spencer v. Sensa Prods., LLC, *supra* note 81 ("Upon Lender's reasonable request, Company will draft the blog posts or otherwise create the content with sufficient substantive input by Artist to ensure the accuracy of such content"); see also *id.* at 13 (referencing Sensa "provid[ing] copy for Spencer's tweets").

342. See Michael Katz, *This Deleted DeSean Jackson Tweet Is Hilarious*, USA TODAY (July 11, 2012, 6:16 PM), <https://perma.cc/9MXJ-44QH>; Carly Ledbetter, *Scott Disick Made the Most Hilarious Mistake in His Instagram Caption*, HUFFPOST (May 19, 2016, 5:55 PM), <https://www.huffpost.com/entry/scott-disick-made-the-most-hilarious-mistake-in-his-instagram->

Meanwhile, brands frequently discourage influencers from disclosing that a post is sponsored. A recent study of marketers and consumers found “a third of brands admit to deliberately not disclosing influencer marketing as sponsored content as they believe doing so will impact consumers’ trust.”³⁴³ Consistent with that statistic, another study found that almost 30% of influencers report having been asked by a client or marketer not to disclose that a post was sponsored.³⁴⁴ Worse, industry insiders have revealed that some brands pay influencers extra to lie and explicitly state that they bought a product with their own money.³⁴⁵ Even companies that state an intent to follow the rules may change their tune if they feel advertising is more persuasive without disclosure. In its endorsement contract with Spencer, for example, Sensa initially placed responsibility on both parties to ensure appropriate disclosure.³⁴⁶ But Sensa later allegedly blamed Spencer’s disclosures for the campaign’s failure, instructed her to stop disclosing, and omitted disclosure in subsequent proposed copy.³⁴⁷

Brands’ relationships with influencers can be structured in a number of different ways, but it seems clear that when brands aren’t singlehandedly creating sponsored content, they play some role in collaborating on it. Construing Section 43(a)(1)(B) broadly to extend liability to all of the players involved might provide the greatest incentive to reduce misleading practices. But ultimately, brands placing responsibility on micro- and nano-influencers to review, understand, and comply with the patchwork of laws that govern advertising is unrealistic and overly burdensome. Many influencers piece together sponsored deals as a means to get by in a gig economy or supplement full-time work.³⁴⁸ Just as Uber bears

caption_n_573e0682e4b0ef86171d9d49 [https://perma.cc/KHS9-4YPH]; Kyle Neubeck (@KyleNeubeck), TWITTER (June 20, 2018, 6:43 PM), <https://perma.cc/H7DN-U3CC>; Alexandra J. Roberts (@lexlanham), TWITTER (June 5, 2019, 9:28 PM), <https://twitter.com/lexlanham/status/1136444606193774593> [https://perma.cc/7SRL-27EG].

343. Tesseras, *supra* note 56.

344. Alison McCarthy, *Marketers ‘Unaware’ of FTC Social Media Guidelines Regulating Influencers*, EMARKETER (Mar. 1, 2017), <https://www.emarketer.com/Article/Marketers-Unaware-of-FTC-Social-Media-Guidelines-Regulating-Influencers/1015341> [https://perma.cc/9TF2-YDSY].

345. See, e.g., Kevin James Bennett (@kjbenettbeauty), INSTAGRAM (Aug. 28, 2018), <https://www.instagram.com/p/BnBcIHngBhy/?hl=en&taken-by=kjbenettbeauty> [https://perma.cc/P8UL-VDZT]; Pretty Pastel Please, *Getting Paid \$85,000 for a Negative Review: The Secret World of Influencers Part 1*, YOUTUBE (Aug. 29, 2018), <https://www.youtube.com/watch?v=rJXB9VhK1eM>.

346. From Spencer’s endorsement agreement:

Lender shall ensure that all social media content created and/or published by Lender or Artist comply with all relevant laws. . . . Company shall ensure that any and all social media content created and/or published by Company complies with all relevant laws, regulations and rules, including without limitation the FTC Guidelines concerning the use of endorsements and testimonial in advertising.

Exhibit A to Complaint, *Spencer v. Sensa Prods., LLC*, *supra* note 81, 5–6.

347. *Id.* at 13.

348. See Ellie Cachette, *The Gig Economy Comes to Advertising*, HUFFPOST (Feb. 22, 2017), https://www.huffpost.com/entry/the-gig-economy-comes-to-advertising_b_58ac5490e4b029c1d1f88ee8 [https://perma.cc/JK85-ZRNF]; Sarah Kessler, *Becoming a Social Media “Influencer” Is the New Unpaid Internship, and Just as Exploitative*, QUARTZ (Aug. 10, 2017), <https://qz.com/1049408/becoming-a-social-media-influencer-is-the-new-unpaid-internship-and-just-as-exploitative/> [https://perma.cc/P8F6-

some responsibility for its drivers and Amazon its deliverers, corporations must work to minimize the harm they do through their independent contractors. When it comes to false influencing, brands and agencies are the least cost avoiders. They are best equipped to internalize the relevant legal requirements,³⁴⁹ draft compliant agreements, and monitor influencers' output. They are also best positioned to know their products' features and ingredients and have a handle on any relevant studies or data supporting advertising claims. Regardless of who ultimately drafts the text that influencers post, holding brands and agencies accountable under false advertising law is the fairest and most efficient way to reduce misleading messages, incentivize corporate partners to train and monitor influencers, and protect consumers.

B. CHALLENGES

There are several possible explanations for the paucity of private Section 43(a)(1)(B) litigation over influencer marketing to date. The first is the prevailing attitude that influencer marketing is the domain of the FTC, which already regulates that space effectively.³⁵⁰ Although many journalists with an eye on the industry seem to expect the FTC singlehandedly to keep advertisers, ad agencies, and influencers in line, that expectation does not comport with reality, and perhaps it should not. The FTC is constrained by limits on resources, penalties, and access to information. It cannot fine advertisers or influencers based solely on violation of the FTCA.³⁵¹ Although the FTC's Advertising Division strives to protect consumers, it prioritizes deceptive practices that

9AK3] ("A lot of people who were successful had worked for years moonlighting as a blogger while maintaining their full-time jobs. They were essentially doing two jobs in order to make enough to subsist on." (quoting Brooke Erin Duffy)).

349. See, e.g., Merlan, *supra* note 1 (explaining that influencers "claim that CBD products can help with a host of issues: anxiety, PTSD, depression, and insomnia," whereas CBD companies are "extremely careful about the claims they make" and avoid "claim[ing] that their products treat or alleviate an actual disease").

350. Reports that the FTC has "cracked down" on influencer marketing are rampant, but overblown. See, e.g., Stacy Jones, *How Much Kim Kardashian Charges for an Instagram Post*, HOLLYWOOD BRANDED (Nov. 27, 2017, 10:54 AM), <https://blog.hollywoodbranded.com/how-much-kim-kardashian-charges-for-an-instagram-post> [<https://perma.cc/3GEC-BVUF>] (inaccurately reporting that "[t]he government is really cracking down on influencers . . . who don't follow the rules with some hefty fines"); Shaina Mishkin, *Influencers Must Make Business Partnerships Obvious to Followers, FTC Says – Even if They're Not Getting Paid*, MONEY (Nov. 6, 2019), <https://money.com/social-media-influencer-ads-disclosure-partnerships/> [<https://perma.cc/B36T-QY7C>]. "[T]he FTC can require advertisers to pay redress or relinquish profits in the event of real harm—suffered due to a fraudulent product, for instance—to consumers, but the agency generally does not have the power to seek other monetary damages as part of a consent order." Yuyu Chen, *Cheatsheet: How the FTC Is Cracking Down on Deceptive Influencer Marketing*, DIGIDAY (Sept. 19, 2017), <https://digiday.com/marketing/cheatsheet-ftc-cracking-deceptive-influencer-marketing/>.

351. Federal Trade Commission Act § 5(l), 15 U.S.C. § 45(l) (2018); *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (Oct. 2019), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/QAD6-F44Y>] ("Even where the Commission determines through adjudication that a practice violates consumer protection or competition law, the Commission must still seek the aid of a court to obtain civil penalties or consumer redress for violations of its orders . . .").

threaten public health and safety³⁵² over those practices that merely reallocate market share among competitors or overpromise and underdeliver in ways that are deceptive but not physically dangerous.

Relatedly, some companies and lawyers may believe that deceptive influencer marketing doesn't fall within the purview of the Lanham Act. False statements in the form of influencer testimonials may be difficult to identify, and those who believe the primary deception performed by influencers is nondisclosure may conclude that the Lanham Act doesn't reach omissions. I have endeavored to rebut these assumptions above.

Another explanation relates to the types of goods and services whose producers are most attracted to influencer marketing. It is well known that, for example, makers of diet pills, shakes, and supplements are unlikely to sue one another for false advertising because their own practices are also problematic.³⁵³ If one weight-loss company were to accuse another of making deceptive statements, its own advertising practices would come under scrutiny when the defendant asserts an unclean hands defense and false advertising counterclaims. The practices of many industry players would not withstand such scrutiny.³⁵⁴ As investment in influencer marketing continues to grow and a broader range of producers experiment with it, however, this model may begin to lose explanatory power for all but a few industries. Brands from Acura³⁵⁵ to Steinway³⁵⁶ now employ influencer marketing. The Supreme Court's holding in *Lexmark*, clarifying that any party that suffers commercial injury has standing under Section 43(a)(1)(B),³⁵⁷ may further mitigate the issue.³⁵⁸

Finally, influencer campaigns can be ephemeral, short-lived, and difficult to track. The bulk of engagement with a social media post happens within the first

352. See *Enforcement Priorities, Division of Advertising Practices*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices> [<https://perma.cc/U7BP-HNYC>] (last visited Aug. 9, 2020).

353. See TUSHNET & GOLDMAN, *supra* note 144, at 97.

354. *Id.* ("Competitors may not sue when it's in every competitor's interest to make a certain set of false claims, such as cigarette companies' toleration for claims about the health effects of a particular brand of cigarettes. Similar patterns exist in the supplement and weight-loss industries, where extravagant claims are common and competition is so intense that most advertisers benefit more from being able to make shaky claims of their own than from suppressing any one competitor's shaky claims.").

355. Tanya Gazdik, *Acura Scores with Medium-, Micro-Influencers*, MARKETING DAILY (Jan. 30, 2020), <https://www.mediapost.com/publications/article/346469/acura-scores-with-medium-micro-influencers.html> [<https://perma.cc/B24C-XXXH>].

356. Katie Deighton, *In Search of Its 2040 Customer, Steinway Turns to Influencers and WeChat*, DRUM (Jan. 23, 2020, 2:03 PM), <https://www.thedrum.com/news/2020/01/23/search-its-2040-customer-steinway-turns-influencers-and-wechat> [<https://perma.cc/H4U6-35WT>].

357. See *supra* note 142 and accompanying text.

358. For example, a reputable company like Weight Watchers could challenge ad claims made by producers of shady quick-fix products like FitTea; the makers of tested headache pain relievers like Excedrin could show they were injured when a seller of essential oils touted their products' ability to cure headaches.

few hours,³⁵⁹ making injunctive relief ineffective unless a plaintiff identifies a pattern of deception likely to continue in the future. The tendency of companies to hire more small influencers for single posts, rather than one megastar for repeated posts, renders a misleading ad campaign more diffuse than one in traditional media. And given some companies' lack of influencer oversight, a company challenging a competitor's campaign might find that even in discovery, the defendant cannot easily produce a complete set of all influencer posts nor can the plaintiff track them down. Influencers' growing use of Instagram and Facebook "stories"³⁶⁰ and video-sharing platforms like YouTube and TikTok reduce searchability further compared to the use of static posts with text. So a potential challenger may fail to monitor its competitor's influencer marketing claims closely enough to identify a pattern or may assume that including claims by influencers in a broader suit over a deceptive campaign isn't worth the hassle. False advertising litigation can be expensive and long; businesses may conclude that the costs of suing to address false influencing outweigh the benefits.

But false advertising lawyers know a client's decision to litigate is not always rational. And the mere threat of action, in the form of well-supported cease-and-desist letters alleging Lanham Act violations, can also effectively reduce false influencing. So can complaints that settle quickly, although neither casts as large a shadow as cases litigated to decision. Companies can also bring complaints about competitors' false advertising to the NAD's forum. Although NAD's resolutions are nonbinding, parties involved almost always comply with its recommendations;³⁶¹ declining to do so subjects them to additional FTC scrutiny,³⁶² and NAD's decisions may be predictive of judicial outcomes. Pursuing false advertising before NAD is far less expensive and time-intensive than doing so in court,³⁶³ and its nominally voluntary nature means participation reflects positively on all players. Several companies have already brought false influencing

359. A study from Optimal Social found that 75% of the engagement from a typical Facebook post takes place within the first three hours. Ryan Pinkham, *75% of Facebook Post Engagement Takes Place in the First 3 Hours . . . And Other Hot Topics*, CONSTANT CONTACT, <https://blogs.constantcontact.com/facebook-engagement-study/> [<https://perma.cc/932D-X29C>] (last visited Aug. 9, 2020).

360. "Stories" on both platforms are posts that disappear after twenty-four hours.

361. TUSHNET & GOLDMAN, *supra* note 144, at 70 ("The NAD claims a compliance rate of over 95% . . .").

362. See *id.* at 68 ("The NAD . . . notifies the FTC when a business refuses to participate in its proceedings, and the FTC plays close attention to its referrals."); Alexander Goldman, *Advertisers Should Heed FTC Stats on NAD Referrals*, LAW360 (Mar. 18, 2019, 4:17 PM), <https://www.law360.com/articles/1139234/advertisers-should-heed-ftc-stats-on-nad-referrals> ("When an advertiser refuses to participate or follow the NAD recommendation, the NAD will refer the case record for further inquiry and investigation to the relevant government agency (or agencies)—usually the Federal Trade Commission but sometimes another appropriate regulatory agency such as the U.S. Food and Drug Administration or the Federal Communications Commission or, in appropriate cases, the state attorney general."); Press Release, Fed. Trade Comm'n, *Dietary Supplement Advertiser Settles FTC Charges of Deceptive Health Claims* (May 12, 1998), <https://www.ftc.gov/news-events/press-releases/1998/05/dietary-supplement-advertiser-settle-ftc-charges-deceptive-health> [<https://perma.cc/C88E-RK27>] ("[W]hen self-regulation fails, we are prepared to take action.").

363. See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 715–17 (1999).

claims before NAD³⁶⁴ or the Better Business Bureau's Electronic Retailing Self-Regulation Program.³⁶⁵ In fact, because NAD applies both Lanham Act standards and FTC guidelines to allegedly deceptive advertising practices, it is in some ways the ideal forum for companies to raise concerns about false influencing.³⁶⁶

False advertising suits help curb deceptive practices, which protects consumers and competition as well as the corporate actors that lose sales and suffer reputational harm. Companies with deep pockets and an appetite for litigation can and should stand in as consumers' vicarious avengers against the intentional spread of misinformation.³⁶⁷

C. ALTERNATIVES

This Article focuses on the potential of private Section 43(a)(1)(B) litigation to fight deceptive influencer marketing practices. But there are, of course, plenty of other ways to address the harm false influencing causes consumers and competition. The FTC could increase staffing, redirect resources, and commit to redouble its efforts to investigate section 5 violations and enforce the FTCA.³⁶⁸ Commissioner Rohit Chopra recently proposed several other ideas regarding review of the Endorsement Guides: one is codifying elements of the guides into formal rules, so that the FTC could hold violators liable for penalties and

364. *E.g.*, Press Release, BBB Nat'l Programs, Miller Lite Can Claim "More Taste" than Bud Light and Michelob Ultra, Says NAD; Recommends Changes to Its "Know Your Beer" Campaign (Dec. 20, 2018), <https://perma.cc/C2UM-M2D5> (describing NAD's recommendation that advertiser discontinue influencer videos featuring on-camera taste tests); Press Release, BBB Nat'l Programs, NAD Finds "No High Fructose Corn Syrup" Claim Alongside "Hellmann's Real Ketchup" on Label Not Misleading; Recommends Other Changes (Jan. 16, 2019), <https://perma.cc/43KW-RQG2> (describing NAD recommendation that advertiser discontinue "social media influencer posts characterizing Hellmann's Real Ketchup as 'better-for-you' and 'healthier' in comparison to other ketchups and stating that ketchup containing [corn syrup] was 'evil' and 'fake'").

365. *E.g.*, Press Release, BBB Nat'l Programs, ERSP Refers Advertising for Alo Yoga to FTC for Further Review (Oct. 18, 2018), <https://perma.cc/3QG6-FFVC> ("ERSP recommended that the Instagram posts be modified to disclose the material connection between the marketer and the Alo Yoga ambassadors within the first three lines of an Instagram post.").

366. *See, e.g.*, Pyle Audio, Inc., NAD Case Report No. 6265, at 6 (Aug. 2, 2019) (recommending advertiser cease offering consumers free products in exchange for positive Amazon reviews and modify existing reviews to reflect material relationship).

367. *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 212 (D.D.C. 1989), *aff'd in part, rev'd in part*, 913 F.2d 958 (D.C. Cir. 1990) ("While the Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving the cause of action to competitors who are prepared to vindicate the injury caused to consumers.").

368. Certainly, Commissioner Chopra's recent statement criticizing the settlements in several high-profile FTC cases suggests at least some at the Commission see a need to ramp up enforcement. *See* OFFICE OF COMM'R ROHIT CHOPRA, *supra* note 321, at 3 ("Going forward, we need to seek tougher remedies for companies that are illegally astroturfing or disguising their advertising as an authentic endorsement or review.").

damages; another is specifying required contractual terms for influencer agreements, including by promulgating sample language.³⁶⁹

Other agencies, including the Food and Drug Administration (FDA), Federal Communications Commission (FCC), and Securities and Exchange Commission (SEC), could do more to punish companies and influencers that disseminate false claims that fall within each agency's jurisdiction.³⁷⁰ Given the proportion of false influencing tied to products like weight-loss aids and hair-growth gummies, a change to federal law requiring dietary supplements be proven safe to the FDA's satisfaction before they are marketed or mandating that the FDA review labeling and advertising claims³⁷¹ could address a significant portion of false influencing in the supplement industry. Additional FDA oversight of the cosmetic industry could also help alleviate a broad range of deceptive influencer claims.³⁷²

Social media platforms have also erected some barriers to deceptive advertisements and can continue to shape this space.³⁷³ They can require disclosures of brand partnerships in a specific and consistent way with a built-in disclosure mechanism; prohibit certain categories of sponsored content or limit their visibility to users under eighteen; or implement reporting mechanisms so that users can easily notify moderators or brands when they encounter misleading sponsored posts. In fact, Commissioner Chopra indicated that the FTC is considering enacting new requirements for social media platforms to help deter deception.³⁷⁴ Social media companies might consider taking advantage of this opportunity to partner with administrative agencies in an attempt to head off more aggressive regulation and signal to users that platforms take their protection seriously.

Lowering barriers to consumer action in other ways might also help aggrieved parties pursue remedies. Two ways to do this are granting consumer standing

369. *Id.* at 3.

370. The FDA recently announced plans to study the effect of influencer endorsements of prescription drugs on consumer behavior. *FDA to Study Drug Endorsements by Instagram Influencers*, FDA NEWS (Feb. 3, 2020), <https://www.fda.gov/articles/195724-fda-to-study-drug-endorsements-by-instagram-influencers> [https://perma.cc/6CT2-RC9X].

371. "There are limitations to FDA oversight of claims in dietary supplement labeling. For example, FDA reviews substantiation for claims as resources permit." *FDA 101: Dietary Supplements*, FOOD & DRUG ADMIN. (July 15, 2015), <https://www.fda.gov/consumers/consumer-updates/fda-101-dietary-supplements> [https://perma.cc/US4J-M23B].

372. See Michael Kwa, Leah J. Welty & Shuai Xu, *Adverse Events Reported to the US Food and Drug Administration for Cosmetics and Personal Care Products*, 177 JAMA INTERNAL MED. 1202, 1203 (2017).

373. Instagram and Facebook recently announced a policy to block content promoting weight-loss or cosmetic procedures to younger teens and another banning influencers from promoting branded content related to vaping, tobacco, and weapons. See Gabrielle Sorto, *Instagram Will Block Content that Promotes Weight-Loss Products or Cosmetic Procedures to Anyone Under 18*, CNN BUS. (Sept. 20, 2019, 8:29 AM), <https://www.cnn.com/2019/09/19/business/instagram-posts-cosmetic-surgery-diet-products-trnd/index.html> [https://perma.cc/5RLL-LP6M]; Kaya Yurieff, *Instagram Influencers Can No Longer Promote Vaping and Guns*, CNN (Dec. 18, 2019, 2:52 PM), <https://www.cnn.com/2019/12/18/tech/instagram-influencers-vaping-guns/index.html> [https://perma.cc/463B-JD5T]. Instagram also pledged to roll out a feature that will allow users to report posts they believe violate that policy to Instagram's content reviewers. Sorto, *supra*.

374. OFFICE OF COMM'R ROHIT CHOPRA, *supra* note 321, at 1, 3.

under the Lanham Act to challenge misleading advertising or making it less arduous for consumers to avail themselves of state unfair competition laws. Additionally, the NAD could expand its reach and better communicate to consumers their ability to complain about false influencing directly.³⁷⁵ State Better Business Bureau chapters could also step up enforcement efforts. Lastly, boycotts and corporate shaming offer extralegal avenues for self-help that have proved effective in the trademark³⁷⁶ and copyright contexts.³⁷⁷

It's also possible to increase incentives for companies to bring Section 43(a)(1)(B) suits against competitors, such as by including attorneys' fees as a remedy.³⁷⁸ Holding individual influencers liable in addition to brands and agencies under Section 43(a)(1)(B) might also help keep all players honest. And enforcing FTC guidelines and false advertising laws against influencers is the only way to curb misleading marketing when it comes to "fake influencers" who feign partnerships that don't exist,³⁷⁹ as well as those who use programs like LIKEtoKNOW.it that provide affiliate codes and don't require brands to actively partner with influencers.

Finally, federal legislation directly addressing false influencing and providing additional paths to combat it may be warranted, particularly given how frequently and effectively brands use influencers to target children on YouTube and other social media sites in spite of—or precisely because of—children's lack of advertising literacy.³⁸⁰

But all of those changes require top-down action on the part of federal or state lawmakers, agencies, courts, or private entities. This Article advocates for private companies to seek relief and redress harms under an existing statutory regime through a widely used cause of action. Doing so has the potential to change the norms and rules of a form of advertising that increasingly dominates social media and shapes consumer decisionmaking. And judges need not be activists to make change in this space—they need only construe the Lanham Act as capacious as some courts already do.

375. For example, social media sites that host sponsored content could feature or link to messages from entities like the FTC or NAD that educate consumers about how they might report suspected undisclosed sponcon or misleading messages.

376. Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 677–79.

377. Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1479–80 (2019).

378. In copyright, likelihood of non-detection has been cited as a rationale for statutory or other super-compensatory damages. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 500 (2009).

379. See Taylor Lorenz, *Rising Instagram Stars Are Posting Fake Sponsored Content*, ATLANTIC (Dec. 18, 2018), <https://www.theatlantic.com/technology/archive/2018/12/influencers-are-faking-brand-deals/578401/>.

380. See generally Marijke De Veirman, Liselot Hudders & Michelle R. Nelson, *What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research*, FRONTIERS IN PSYCHOL., Dec. 2019, at 1 (examining children's psychological vulnerability to influencer marketing and its implications).

CONCLUSION

Deceptive advertising practices harm producers, consumers, and competition. When a brand launders advertising claims through influencers, it capitalizes on consumer trust and exploits influencer authenticity to render those claims more persuasive. And when the brand and influencer deliberately avoid disclosing that content is sponsored, it exacerbates the insidiousness of any misleading messages. The use of influencer marketing makes it easy to disseminate misleading claims without repercussions, and consumers' and administrative agencies' attempts to rein in false influencing have proved insufficient.

The Lanham Act offers a solution, if an imperfect one: public enforcement must be combined with private enforcement. Companies should regard FTC warning letters as cueing up and helping effectuate private action by putting parties on notice that their advertising claims or practices likely violate the law. Instead of relying on the FTC to regulate all deceptive advertising practices, business owners should play the role of vicarious avengers. It is producers and advertisers, not the government, that are most knowledgeable about the industry, best resourced, and best positioned to address false influencing via private litigation under Section 43(a)(1)(B).