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United they Rise Divided they Fail—Blending Antitrust, False Advertising and Trademark Law into a Hybrid Standard Resolves Problems of Prudential Standing under Section 43(a) of the Lanham Act

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United they Rise Divided they Fail—Blending Antitrust, False Advertising and Trademark Law into a Hybrid Standard Resolves Problems of Prudential Standing under Section 43(a) of the Lanham Act

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Courts struggle to deduce the proper jurisprudential policy underlying false advertising, which has resulted in varying applications of prudential standing analysis. This confusion needs be resolved to ensure that the proper party is bringing action for an injury that section 43(a) of The Lanham Act was meant to protect. By granting certain standing rights the Lanham Act runs the risk of setting the bar too high or low. If the standards are too low or relaxed the concern is that it will lead to over-enforcement. This promotes anti-competitive behavior and threatens to over-burden courts as innumerable plaintiffs line up to collect damages for the most remote injuries. However, if the standards are too high or stringent then anti-competitive behavior is similarly encouraged because false advertising law will not serve as a check on improper practices. The present circuit split needs to be addressed so that the courts can apply a uniform standard, rather than allowing different jurisdictions to come to disparate results. Furthermore, the application of a single established standard will create a system whereby competitors can collect damages incurred by the harm of others' false advertisements, allow competitors to self-regulate their respective marketplaces, and cause potential plaintiffs to bring less frivolous suits—resulting in better judicial economy.

I. INTRODUCTION

“In enacting the Lanham Act² in 1946, Congress sought to bring together various statutes regarding trademark protection that previously had been scattered throughout the United States Code.”³ Section 43(a) has been interpreted by the various circuit courts as granting parties a right to bring action where they have been adversely affected by competitors’ false advertising.⁴ In general, “[c]ongress is presumed to incorporate background prudential standing principles, unless the statute expressly negates them.”⁵ Because “Congress did not expressly negate prudential standing doctrine in passing the Lanham Act[,]”⁶ prudential standing principles apply under Section 43(a)⁷ where the “party has a reasonable interest to be protected against false

² Plaintiffs who prevail under the Lanham Act “may recover (1) the defendant’s profits; (2) any damages sustained by the plaintiff; and (3) the costs of the action. Elizabeth Williams, *Standing to bring False Advertising Claim or Unfair Competition Claim under § 43(a)(1) of Lanham Act (15 U.S.C.A. § 1125(a)(1))*, 124 A.L.R. Fed. 189 (1995).

³ *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 229 (3d Cir. 1998).

⁴ *Id.* at 227.

⁵ *Id.* at 227 (citation omitted).

⁶ *Id.* at 227.

⁷ Section 43(a) provides:

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

advertising.”⁸ Herein lies the problem confronting the courts. Differing circuits have adopted varying tests in an effort to define ‘reasonable interest’ with greater precision and therefore have applied different standards to make prudential standing determinations.⁹

In an effort to strike the proper balance of the equities involved, circuits have adopted three approaches: (1) the categorical approach, (2) reasonable interest test and (3) five-factor balancing test. The categorical test is the most stringent, allowing only parties in direct competition with false advertisers to bring action under the Lanham Act.¹⁰ In response, some courts adopted more flexible approaches such as the five-factor balancing test first articulated in *Conte Bros. v. Quaker State*, which is derived from antitrust law.¹¹ Conversely, a number of circuits find prudential standing where the plaintiff alleges a ‘discernibly competitive injury.’¹² However, decisions utilizing the reasonable interest test fail to provide the proper framework for evaluating a competitors’ reasonable interest.¹³ As a result of this split, the Lanham Act is not uniformly applied with regard to the prudential standing requirements for false advertisement claims.¹⁴

designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person ... 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.

15 U.S.C. § 1125(a)(1).

⁸ *Smith v. Montoro*, 648 F.2d 602, 608 (9th Cir. 1981).

⁹ *Conte Bros. Automotive Inc.*, 165 F.3d at 231.

¹⁰ *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 112 (2d Cir. 2010). “*Telecom* is the only case in which we appear to have squarely utilized the categorical approach[.]”

¹¹ *Conte Bros. Automotive, Inc.*, 165 F.3d at 233. Court in *Conte* adopted and applied the antitrust factors that the Supreme Court put forth in *Associated General* addressing standing requirements for plaintiffs bringing action for damages under § 4 of the Clayton Act. *See Associated General Contractors of Cal., Inc., v. Cal. State Council of Carpenters et al*, 459 U.S. 519, 529, 103 S.Ct. 897 (1983).

¹² *Id.* at 232.

¹³ *Id.* at 232.

¹⁴ Bruce A. Colbath, ‘*Famous Horse*’ and Standing under the Lanham Act, WEIL (last visited Oct. 1, 2011), <http://www.weil.com/news/pubdetail.aspx?pub=10256>.

The categorical approach, reasonable interest test and the five-factor balancing tests all have their strengths and weaknesses, but neither properly gives competitors' the necessary standing to protect their reasonable interests. Consequently, a new standard is necessary. The solution is a result of synthesizing the strengths of each test with Congress' aims in executing the Lanham Act, while incorporating false advertising law so that an operative standard is established.

The circuit split is best resolved by splitting the difference between the Trademark and False Advertising approaches to prudential standing standards, and establishing a new test that places greater accountability and as a result liability on the alleged false advertiser. By utilizing a single standard that better addresses the equities involved, the problems of under and over-enforcement will be squelched. In addition, the adoption of this new standard is paramount if parties are to be held accountable for false advertising that commercially damages competitors. So long as the new standard does not too easily lend itself to over-enforcement, competitors will not be subject to excessive litigation. Otherwise, the present system of under-enforcement will continue, resulting in harm to lawful competitors and the erosion of consumer confidence.

II. LEGAL BACKGROUND

Analysis of Section 43(a) begins with the plain text and its literal meaning. Moreover, “[c]onferring standing to the full extent implied by the text of 43(a) would give standing to parties, such as consumers, having no competitive or commercial interests affected by the conduct at issue.”¹⁵ Some courts have recognized that “[t]his would not only ignore the purpose of the Lanham Act... but would run contrary to... precedent[.]”¹⁶ Additionally, “[t]he reason

¹⁵ Conte Bros. Automotive, Inc., 165 F.3d at 229.

¹⁶ *Id.*

consumers do not have standing under the Lanham Act is that the injuries consumers suffer as a result of anti-competitive behavior—being forced to pay a higher price for a good, or being duped into purchasing a lower-quality service—are not the kinds of injuries that the Lanham Act was intended to redress.”¹⁷ Consequently, courts unanimously reject consumer standing to bring action under the Lanham Act.¹⁸

On the other hand, “[d]eterioration of competitive position is precisely the kind of injury the Lanham Act was intended to redress.”¹⁹ The 1946 Senate Report on the Lanham Act repeatedly references that the Act’s focus is anti-competitive conduct in the commercial arena.²⁰ The categorical approach, utilized by the Seventh, Ninth, and Tenth Circuits, is consistent with this focus—requiring that “the commercial plaintiff bringing an unfair competition claim be in competition with the alleged false advertiser.”²¹ Nevertheless, this rather stringent standard problematically focuses entirely on the parties relationships.²² By requiring this level of direct competition between parties, courts ignore instances where parties are damaged by the false advertising of more distant members of their respective market.²³ However, “[u]nder the reasoning [] adopt[ed] today, standing under the Lanham Act does not turn on the label placed on the relationship between the parties.”²⁴

By contrast, the reasonable interest and five-factor balancing tests consider additional criteria—giving great weight to a plaintiff’s ability to trace their injury to the defendant’s alleged

¹⁷ Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 798 (5th Cir. 2011).

¹⁸ Conte Bros. Automotive, Inc. 165 F.3d at 229.

¹⁹ Harold H. Huggins Realty, Inc. , 634 F.3d at 798.

²⁰ See S.Rep. No. 1333, 79th Cong., 2d Sess. (1946).

²¹ Famous Horse Inc., 624 F.3d at 111.

²² Conte Bros. Automotive, Inc., 165 F.3d at 235.

²³ Famous Horse Inc., 624 F.3d at 111.

²⁴ Conte Bros. Automotive, Inc., 165 F.3d at 235.

wrongful conduct, among other factors.²⁵ In expanding the jurisprudential analysis for false advertising claimants, more traceable injuries are remedied.²⁶ However, while the reasonable interest test lacks a reliable operative framework,²⁷ the five-factor balancing test invites over-enforcement.²⁸ As Professor Diane Taing has noted, “[i]f standing is construed too expansively, ‘firms can stifle their competitors’ ability to supply information to the market’ and thereby cause the net information available to consumers to fall below optimal levels.”²⁹ Such a result would not only do an injustice to consumers, but would deter competitive advertising for fear of suit by an incalculable number of competitors.³⁰ Conversely, under-enforcement might lead to anticompetitive behavior as an unrestricted market allows competitors to engage in injurious false advertising absent consequence.³¹ Interestingly too much enforcement also supports anticompetitive behavior by “instilling property rights in accurate information.”³²

A new approach is necessary in order to ameliorate the application and enforcement issues surrounding the circuit’s present tests.³³ The present scheme leads to parties gaming the system, frivolous suits, deficient judicial economy and uneven justice.³⁴ A proper standard results in businesses suing “only in circumstances where their assessments of marketplace reality

²⁵ ITC Ltd. v. 5th Ave. Punchgini, Inc., 482 F.3d 135, 169 (2d Cir. 2007). Conte Bros. Automotive, Inc., 165 F.3d at 233.

²⁶ ITC Ltd., 482 F.3d at 169. Conte Bros. Automotive, Inc., 165 F.3d at 233.

²⁷ Diane Taing, *Competition for Standing: Defining the Commercial Plaintiff under Section 43(A) of the Lanham Act*, 16 GEO. MASON L. REV. 493, 514 (2009).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK. L. REV. 283, 310-12 (2007).

³² *Id.*

³³ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1383-84 (2011).

³⁴ *Id.*

indicate that consumers are influenced by the challenging advertising.”³⁵ Such a standard leads to a better balance of the equities so that injurious false advertising is kept in check—resulting in a marketplace that discourages patently false advertising practices and maintains consumer confidence.³⁶ While walking the tight-rope between over and under-enforcement it must be intelligible so that competitors are put on notice, which deters competitors from engaging in the type of injurious false advertising that the Lanham Act was designed to protect against.³⁷

A. *The Three Approaches Currently Taken by the Courts*

1. *Categorical Approach*

The categorical approach requires that “the commercial plaintiff bringing an unfair competition claim to be in competition with the alleged false advertiser.”³⁸ While this approach is consistent with the statutory intent underlying the Lanham Act,³⁹ it also represents the courts’ unanimous decision to exclude consumers from bringing action.⁴⁰ The primary reason given for denying consumer standing is that such a broad reading would overwhelm the courts as every consumer who relied on a parties’ false advertising would have the means and cause to bring action in the already overcrowded federal courts.⁴¹ Rejecting the categorical approach, the court in *Famous Horse* noted that “although *Telecom* is the only case in which we appear to have squarely utilized the categorical approach, we have frequently stressed the importance of competition between litigants in evaluating Lanham Act claims even if we have not explicitly

³⁵ Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 55 (1985).

³⁶ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1383-84.

³⁷ *Id.*

³⁸ *Famous Horse Inc.*, 624 F.3d at 111.

³⁹ *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978).

⁴⁰ *Serbin v. Ziebert Intern. Corp., Inc.*, 11 F.3d 1163, 1174 (3rd Cir. 1993).

⁴¹ *Id.*

required competition⁴²...but instead have viewed competition as a strong indication of why the plaintiff has a reasonable basis for believing that its interest will be damaged by the alleged false advertising.”⁴³ In this regard, it is evident that the categorical approach acts more as an initial condition of prudential standing rather than as a standalone test.⁴⁴

Most courts reject the rather stringent categorical approach because indirect competitors may also be extensively harmed and such a narrow approach “prevents the Act from being efficiently utilized to protect both commercial parties and consumers.”⁴⁵ Because this deficiency leads to inequitable consequences, a more flexible approach is utilized in most circuits today.⁴⁶

2. *Reasonable Interest Approach*

A number of circuits follow the reasonable interest test whereby a plaintiff must show “(1) a reasonable interest to be protected against [the defendant’s] false or misleading claims, and (2) a reasonable basis for believing that the interest is likely to be damaged by the false or misleading advertising.”⁴⁷ The reasonable interest approach attempts to grant standing when it fosters precompetitive behavior, and deny standing when it fosters anticompetitive behavior.⁴⁸

a. *Strengths of the Reasonable Interest Approach*

In *Famous Horse*, the Second Circuit applied the flexible reasonable interest approach and granted the plaintiff standing where the defendant was not in direct competition, but was

⁴² *Famous Horse Inc.*, 624 F.3d at 112.

⁴³ *Id.* at 113.

⁴⁴ *Id.*

⁴⁵ Diane Taing, *Competition for Standing: Defining the Commercial Plaintiff under Section 43(A) of the Lanham Act*, 16 GEO. MASON L. REV. at 514.

⁴⁶ *Famous Horse Inc.*, 624 F.3d at 112.

⁴⁷ *ITC Ltd.*, 482 F.3d at 169.

⁴⁸ Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK. L. REV. at 306.

rather a member of the same market.⁴⁹ Specifically, the suit was brought by the operator of a chain of clothing stores against a supplier of clothing stores whose alleged false advertising had damaged their reputation in the market.⁵⁰ By granting prudential standing to an indirect competitor the court properly identified the plaintiff's claim as asserting a reasonable interest that had been commercially harmed by defendant's false advertisements.⁵¹ In *Famous Horse*, both elements of the reasonable interest test were met as the defendant's actions wrongfully suggested to the marketplace that the clothing retailer was engaged in the business of selling "knock-off" denim, which the defendant supplied.⁵² Here, the plaintiff had only a single purchase from the defendant.⁵³ When the falsity of the denim was discovered the products were immediately removed from the shelves.⁵⁴ Plaintiff brought action because of the association the defendant was trying to infer in the marketplace, which would promote the wide acceptance of their goods.⁵⁵ This association was not only untrue but also directly damaging to the plaintiff's reputation as a retailer of authentic goods.⁵⁶ *Famous Horse* is denotative of the reasonable interest test working effectively.

b. Weaknesses of the Reasonable Interest Approach

While the reasonable interest test is a more expansive reading of Section 43(a) than the categorical approach, it runs the risk of reaching injuries that are not directly associated with

⁴⁹ *Famous Horse Inc.*, 624 F.3d at 115.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Famous Horse Inc.*, 624 F.3d at 115.

⁵⁶ *Id.*

competition, leading to over-enforcement.⁵⁷ The lack of a clear standard for determining standing under the reasonable interest approach further contributes to the uncertainty courts face.⁵⁸ Courts are given little guidance as to what must be proven to satisfy each of these requirements, often courts only have past cases to look to in order to assess whether a plaintiff's interest is reasonable.⁵⁹ Furthermore, this uncertainty may also have the effect of chilling companies from making non-deceptive advertising where they are "uncertain as to how the courts might view a particular advertisement claim."⁶⁰ This type of inconsistent application and chilling effect is evidenced by the trend in lower federal courts of increasingly granting summary judgment to defendants asserting a lack of prudential standing.⁶¹ These courts are left without proper jurisprudential guidance and as a result they grant summary judgment in order to avoid having a trial that is reversed on appeal.⁶² The courts' and the potential false advertisers' nebulous understanding of a competitors' reasonable interest is illustrative of how unworkable the standard has been in practice.⁶³

3. *Five-Factor Balancing Approach*

In rejecting the categorical approach, the *Conte* court adapted the test for antitrust standing set forth in *Associated General Contractors of California, Inc. v. California State*

⁵⁷ Diane Taing, *Competition for Standing: Defining the Commercial Plaintiff under Section 43(A) of the Lanham Act*, 16 GEO. MASON L. REV. at 514.

⁵⁸ *Id.*

⁵⁹ Gregory Apgar, *Prudential Standing Limitations on Lanham Act False Advertising Claims*, 76 U. FORDHAM. L. REV. 2424 (2008).

⁶⁰ Diane Taing, *Competition for Standing: Defining the Commercial Plaintiff under Section 43(A) of the Lanham Act*, 16 GEO. MASON L. REV. at 514.

⁶¹ Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK. L. REV. at 315-16.

⁶² *Id.*

⁶³ *Id.*

Council of Carpenters.⁶⁴ The court found this test “provides an appropriate method for adding content to [their] ‘reasonable interest’ test.”⁶⁵ Presently, the Third, Fifth and Eleventh Circuits have adopted the *Conte* test, which consists of the following five factors that are weighed to determine whether a plaintiff has prudential standing under the Lanham Act:

- (1) The nature of the plaintiff’s alleged injury: Is the injury ‘of a type that Congress sought to redress in providing this private remedy for violations of the [Lanham Act]?’
- (2) The directness or indirectness of the alleged injury.
- (3) The proximity or remoteness of the party to the alleged injurious conduct.
- (4) The speculativeness of the damages claim.
- (5) The risk of duplicative damages or complexity in apportioning damages.⁶⁶

This test provides more flexibility and guidance than the categorical approach.⁶⁷ Standing under the five-factor test does not turn on the label placed on the relationship between the plaintiff and defendant, and cures any confusion courts have in making the ‘reasonable interest’ determination.⁶⁸

In adopting the five factor balancing test in a case of first impression, the Eleventh Circuit⁶⁹ concluded that the *Conte Bros.* test “provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under” Section 43(a) of the Lanham Act.⁷⁰

While a multifactor test such as this one encompasses some level of redundancy, it nonetheless

⁶⁴ *Conte Bros. Automotive, Inc.*, 165 F.3d at 232 (discussing *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)).

⁶⁵ *Id.* at 233.

⁶⁶ *Id.*

⁶⁷ *Id.* at 236.

⁶⁸ *Id.* at 235-36.

⁶⁹ *Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156, 1167 (11th Cir. 2007).

⁷⁰ *Conte Bros. Automotive, Inc.*, 165 F.3d at 236.

provides valuable analysis.⁷¹ The factors do not pose five distinct inquiries, and in fact overlap to some degree.⁷² This is evident as “each turn of the prism illuminates a slightly different facet of a single underlying question.”⁷³

The first “factor focuses not on the identity of the persons who received the misrepresentation but rather on the nature of the injury the misrepresentation caused.”⁷⁴ The *Conte Bros.* court identified the focus of § 43(a) as protecting commercial interests that are harmed by a competitor’s false advertising, and securing to the business the benefits of “reputation and good will by preventing their diversion from those who have created them to those who have not.”⁷⁵ “A typical direct-injury scenario thus proceeds in three steps: (1) the defendant runs a false advertisement; (2) the advertisement causes customers to switch from purchasing the plaintiff’s product to purchasing the defendant’s product; (3) the plaintiff suffers economic injury as a result.”⁷⁶ However, courts are mindful that application of the Lanham Act is not limited to such a paradigmatic case.⁷⁷ As a result, courts such as the *Phoenix Court* are mindful of atypical cases, which do not involve the same paradigmatic scenario yet involve an injury that Congress sought to protect.⁷⁸ “[T]he Lanham Act is not only designed to protect against unfair erosion of competitor’s reputation, it is *also* designed to protect ‘commercial interests [that] have been harmed by a competitor’s false advertising[.]’”⁷⁹

⁷¹ Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 797 (5th Cir. 2011).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 798.

⁷⁵ Phoenix of Broward, Inc., 489 F.3d at 1168.

⁷⁶ Harold H. Huggins Realty, Inc., 634 F.3d at 799.

⁷⁷ *Id.*

⁷⁸ Phoenix of Broward, Inc., 489 F.3d at 1169.

⁷⁹ *Id.* (citation omitted).

The second factor concerns “whether the defendants’ conduct has had a direct effect on either the plaintiffs or the market in which they participate.”⁸⁰ This factor can be satisfied by a plaintiff alleging lost sales and/or market shares as a result of defendant’s false advertising.⁸¹ But this factor should not be confused with ‘materiality’ element that a plaintiff must establish in order to succeed on the merits of its claim.⁸² By contrast to the ‘materiality’ requirement, the second factor only asks that courts weigh the directness of an alleged injury in favor of finding standing when the plaintiff’s harm is more easily traceable to the defendant’s actions.⁸³

The third factor requires courts to examine the proximity of the plaintiff to the harmful conduct so that only the most ‘identifiable class’ of persons is allowed to bring suit.⁸⁴ This factor will not be met “[i]f there is a competitor in the marketplace who likely suffered a greater or more serious injury than did the plaintiff as a result of the defendant’s alleged misconduct, that competitor is more proximate to the alleged misconduct.”⁸⁵ “The existence of such a class ‘diminishes the justification for allowing a more remote party...to perform the office of a private attorney general.’”⁸⁶ If less proximate competitors were given standing then defendants would be subject to a multitude of suits arising out of the same incident, and possibly be subject to unjustly inordinate damages.⁸⁷

The fourth factor looks to the speculative nature of plaintiff’s alleged damages.⁸⁸ In order to state a damages claim that is adequately determinate to support Lanham Act standing, plaintiffs must plead that they lost profits or else that the defendant gained profits as a result of

⁸⁰ *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164, 181 (3d Cir. 2001).

⁸¹ *Phoenix of Broward, Inc.*, 489 F.3d at 1169.

⁸² *Id.* at 1170.

⁸³ *Id.*

⁸⁴ *Id.* at 1170-71.

⁸⁵ *Harold H. Huggins Realty, Inc.*, 634 F.3d at 801.

⁸⁶ *Joint Stock Soc’y*, 266 F.3d at 181 (quoting *AGC*, 459 U.S. at 542, 103 S.Ct. 897).

⁸⁷ *Id.*

⁸⁸ *Phoenix of Broward, Inc.*, 489 F.3d at 1171.

anti-competitive conduct.⁸⁹ Furthermore, “this fourth factor is not satisfied where the plaintiff raises a claim for damages (or some other kind of relief) that any member of the public would be equally well-situated to raise.”⁹⁰ There must be a traceable causal connection between the defendant’s conduct and the plaintiff’s particular damages.⁹¹ “[P]laintiff[] may not bolster their case for prudential standing by relying on forms of monetary relief that they would receive ‘as a ‘vicarious avenger’ of the general public’s right to be protected against potentially false advertisements’.”⁹² Where the alleged damages are too speculative or general the courts will be less deferential to plaintiffs seeking standing to address such untenable injuries.⁹³

The fifth factor “undertakes a unitary inquiry into ‘practical concerns of judicial administration.’”⁹⁴ Although a cursory reading of the fifth factor suggests that courts will not grant standing where the interests of more than one competitor are harmed by the plaintiff’s false advertising,⁹⁵ the Fifth Circuit offered the following analysis in Harold H. Huggins Realty, Inc. v. FNC Inc.:

[W]e understand the fifth factor’s inquiry to be vertical, not horizontal. In other words, we are not concerned with whether there is a large number of potential claimants who occupy the same position in the market as the plaintiff. This factor does not weigh against standing merely because the defendant competes in a crowded market in which its false advertisements might cause injury to multiple—or even numerous—direct competitors. As long as each plaintiff has suffered a distinct economic injury, we need not inquire into how many other similarly situated persons might also have prudential standing.⁹⁶

The *Huggins Court* asserts that the fifth factor can be met even when the plaintiff is one competitor in a crowded market of similarly situated parties so long as distinct economic injury

⁸⁹ Harold H. Huggins Realty, Inc., 634 F.3d at 801.

⁹⁰ *Id.* at 802.

⁹¹ Phoenix of Broward, Inc, 489 F.3d at 1171-72.

⁹² Joint Stock Soc’y, 266 F.3d at 184 (citation omitted).

⁹³ *Id.*

⁹⁴ Harold H. Huggins Realty, Inc., 634 F.3d at 803 (citation omitted).

⁹⁵ *Id.*

⁹⁶ *Id.* at 804.

is shown.⁹⁷ However, in practice, courts have been loath to hold defendant's accountable under such circumstances.⁹⁸ Such courts hold that "the risk of duplicative damages is low when the plaintiff is the market participant most directly injured by the defendant's false advertising, such that allowing the plaintiff's suit to go forward would not necessarily require that any other plaintiffs also be allowed to bring suit."⁹⁹ Consequently, the fifth factor overlaps with the third, which considers the proximity or remoteness of the plaintiff's injury to the defendant's alleged misconduct.¹⁰⁰ Where a defendant's false advertising harms multiple competitors in the marketplace, it will be equally more challenging for plaintiffs to establish the directness of their injury.¹⁰¹ In this manner, it is clear that the third and fifth factors have the potential for considerable overlap.¹⁰²

a. Strengths of the Five-Factor Balancing Approach

The five-factor balancing approach squares better with the purposes of section 43(a) than the Ninth Circuit's approach.¹⁰³ The purpose of Section 43(a) was to protect both commercial entities and consumers.¹⁰⁴ Meanwhile, "[t]he reasonable interest approach...recognizes that noncompetitors can have sufficient commercial interests to warrant standing, and in certain cases, this recognition can lead to consumer protection that would not exist under the Ninth Circuit's approach."¹⁰⁵ Although Section 43(a) is primarily concerned with protecting competitors from damages in the commercial arena, protecting consumers is essential to an

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 804-05.

¹⁰⁰ Harold H. Huggins Realty, Inc., 634 F.3d at 805.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Gregory Apgar, *Prudential Standing Limitations on Lanham Act False Advertising Claims*, 76 U. FORDHAM. L. REV. 2423 (2008).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

efficient marketplace.¹⁰⁶ Furthermore, the reasonable interest test is more ambiguous and difficult to follow than the five-factor balancing test, which more articulately illustrates the reasoning courts are to perform.¹⁰⁷ For these reasons, the five-factor balancing test provides the most consistent and intelligible approach to applying prudential standing jurisprudence to both prongs of Section 43(a).¹⁰⁸

b. Weaknesses of the Five-Factor Balancing Approach

The practical effect of the five-factor test is to allow only those plaintiffs who are directly disparaged by the false advertising of their competitor to bring suit.¹⁰⁹ The statutory intent behind Section 43(a) is to give standing to parties who have endured any commercial harm as a result of another's false advertising—protecting competition in the market.¹¹⁰ However, under the five-factor approach, no party will be able to bring suit where there are a number of competitors who are harmed by the false advertising of a competitor that does not diminish a single competitor, but rather diminishes multiple competitors or makes false assertions about itself.¹¹¹ Under such circumstances, the second, third and fifth factors will almost certainly weigh against the plaintiff.¹¹² Additionally, because such damages are necessarily speculative to some degree, whereby plaintiffs assert lost sales or lesser market shares as a result of false advertising, the fourth factor will also weigh against standing under such circumstances.¹¹³ As a result, competitors are unchecked to make false advertisements about the quality of their goods

¹⁰⁶ *Id.*

¹⁰⁷ Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK. L. REV. at 315-16.

¹⁰⁸ *Conte Bros. Automotive, Inc.*, 165 F.3d at 236.

¹⁰⁹ *Famous Horse Inc.*, 624 F.3d at 115.

¹¹⁰ *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978).

¹¹¹ *Famous Horse Inc.*, 624 F.3d at 115.

¹¹² *Id.*

¹¹³ *Id.*

or services, which only encourages further licentious conduct and leads to the erosion of consumer confidence.¹¹⁴ Although Section 43(a)'s principal purpose is to remedy commercial interests that have been harmed by a competitors' false advertisements,¹¹⁵ no standard can be acceptable where it has such an inequitable effect. The effect of the five-factor test is not the protection of competitors' 'reasonable interests,' but rather the protection of competitors who make false advertisements about their own goods at the expense of their competitors.¹¹⁶ A competitors' prudential standing cannot be so limited so that actual injuries suffered go unaddressed because they choose not to engage in the same false advertising that deceives consumers as to the quality of their own goods.¹¹⁷

III. FORMING A NEW HYBRID STANDARD

Borrowing from Trademark and False Advertising Laws will satisfy all concerns, and encourage competition, creating an efficient marketplace. The Lanham Act was assembled from Trademark and Unfair Competition Laws,¹¹⁸ and then influenced by Antitrust Law in the five-factor balancing test.¹¹⁹ In similar fashion, the solution to the deficiencies of the present approaches is revealed by untangling the past. The proper focus under the Lanham Act is greater enforcement against false advertising competitors in order to better ensure pro-competitive markets. So long as competitors go unchecked for their false advertising they will continue to erode the marketplace until consumers lose all faith, and competitors are forced to make similar

¹¹⁴ *Id.*

¹¹⁵ *Am. Home Prods. Corp.*, 577 F.2d at 165.

¹¹⁶ *Famous Horse Inc.*, 624 F.3d at 115.

¹¹⁷ *Id.*

¹¹⁸ *Conte Bros. Automotive, Inc.*, 165 F.3d at 229.

¹¹⁹ *Id.* at 233.

false advertisements or else perish by comparison.¹²⁰ By increasing the influence of False Advertising Law and decreasing the role Trademark and Antitrust Laws play under Section 43(a), it will become abundantly evident how much it lends to the genesis of a new functional standard.

A. *Reigning in the Expansiveness of Trademark Law*

The influence of Trademark Law has led to the expansion of prudential standing under the Lanham Act, and this expansion has been met with some hesitation on the part of courts that are reticent to give standing where it results in defendants being subjected to conflicting claims across the distribution chain.¹²¹ A number of courts have looked to Antitrust Law to reign in Trademark's expansiveness.¹²² In spite of courts' reliance on Antitrust Law, the consequences have been unduly harsh to plaintiffs and have produced a culture that simultaneously rewards and encourages anticompetitive behavior.¹²³

The *Conte Bros.* court expressing similar fears remarked that “[i]f remote plaintiffs like the union were to be permitted to sue for damages, ‘potential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund... thereby creating the danger of multiple liability’ on the one hand or a ‘massive and complex’ damages litigation on the other.”¹²⁴ Moreover, “courts are continuing to express skepticism about expansive standing under the Lanham Act, especially where customers or suppliers, rather than

¹²⁰ Phoenix of Broward, Inc., 489 F.3d 1156 (In denying standing to plaintiff, the court protected defendant from any liability for false advertising allegations despite a national campaign that induced countless consumers to pay patronage to their stores at the expense of their competitor).

¹²¹ Conte Bros. Automotive, Inc., 165 F.3d at 234 (citation omitted).

¹²² Conte Bros. Automotive, Inc., 165 F.3d at 233.

¹²³ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1328.

¹²⁴ Conte Bros. Automotive, Inc., 165 F.3d at 234 (3d Cir. 1998) (citation omitted).

competitors, attempt to bring false advertising actions under Section 43(a).”¹²⁵ These concerns are not properly addressed by Antitrust Law, which is evidenced by the under-enforcement that followed the adoption of the five-factor balancing test.¹²⁶

B. Blending Antitrust and False Advertising Law

It is somewhat ironic that the courts adopted antitrust principles to establish standing for false advertising claims because they are so different. While both antitrust and false advertising protect the free market, they function differently.¹²⁷ The former “regulates” anti-competitive conduct, and the latter “punishes” misconduct that has the potential to persuade the public.¹²⁸ “[A]ntitrust does not have the same aim as false advertising law: while it is cliché to say that antitrust law protects competition, not competitors, the Lanham Act aims to protect both.”¹²⁹ Specifically, the Lanham Act is primarily intended to protect commercial interests that are legitimate, and not give a competitor the right to “act as a vicarious avenger of the public’s right to be protected against false advertising.”¹³⁰ If plaintiffs are given too long a leash and are able to bring claims where they have not personally suffered an injury, then courts will have given such plaintiffs license to bring suit as if they were a private attorney general for the people.¹³¹ This is at the heart of courts’ concerns when they are trying to avoid under-enforcement.¹³²

¹²⁵ John E. Villafranco & Matthew D. Marcotte, *Unfair Competition In Advertising: Developments and Trends in Lanham Act Litigation*, ANTITRUST (last visited Oct. 1, 2011), http://www.kelleydrye.com/publications/articles/1189/_res/id=Files/index=0.

¹²⁶ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1328.

¹²⁷ *Id.* at 1376-77.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Am. Home Prods. Corp.*, 577 F.2d at 165.

¹³¹ *Id.*

¹³² *Id.*

Unnecessarily subjecting advertisers to innumerable suits in federal court would be overly onerous and a cost born by consumers.¹³³

It is also important to remember what false advertising claims concern and how high the stakes are in a given case.¹³⁴ A vast majority of false advertising cases recognize “that literally true statements can mislead . . .if only false statements were actionable,”¹³⁵ “clever use of innuendo, indirect intimations, and ambiguous suggestions could shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed.”¹³⁶ It is because parties are, by the very nature of competition, driven to push boundaries in search of an edge in the market that courts need to grant standing—preventing parties who have harmed others by their false or misleading statements from continuing such practices unabated.¹³⁷ Although the puffery doctrine¹³⁸ alleviates this concern to some extent, where the deception is more serious and the claim is made outright the courts need to grant plaintiff’s the necessary standing to right such wrongs.

On the other hand, one of the justifications for courts erring on the side of under-enforcement rather than over-enforcement is that the plaintiffs’ burden in establishing the statement’s falsity is somewhat low.¹³⁹ “False statements violate the Lanham Act without further proof of consumer deception: courts presume that consumers receive the false messages.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1320.

¹³⁶ *Am. Home Prods. Corp.*, 577 F.2d at 165.

¹³⁷ *Id.*

¹³⁸ *American Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390-91 (8th Cir. 2004) (“Puffery exists in two forms: (1) exaggerated statements of bluster or boast upon which no reasonable consumer would rely; and (2) vague or highly subjective claims of product superiority, including bald assertions of superiority.”).

¹³⁹ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1320.

Literally true statements must be shown to mislead consumers with extrinsic evidence.”¹⁴⁰ This phenomenon is not acknowledged by Trademark Law, which fails to account for the difference between statements that are arguably untrue and those that also materially affect consumers so as to damage competitors.¹⁴¹ “Regardless of what message consumers receive from the words and images in an advertisement, a far more important issue is what messages affect their decisions in identifiable ways. While false advertising recognizes this distinction, trademark law largely does not, to the great detriment of the latter.”¹⁴² In order to counteract the rather low burden plaintiffs face in collecting damages for false statements, that may or may not affect consumers’ decisions, some commentators have suggested the introduction of a materiality requirement.¹⁴³ “The materiality requirement is based on the premise that not all deceptions affect consumer decisions.”¹⁴⁴ If a claim is relevant to a purchasing decision, the materiality requirement is met.¹⁴⁵ Conversely, if the claim is unlikely to affect the purchasing decision then the courts will reject it.¹⁴⁶ Where the false statement does not impact the consumer no damage can be said to have transpired, and plaintiffs are arguably no worse off.¹⁴⁷ To grant standing where materiality cannot be established would be to give plaintiffs a blank check to act as attorney general for the public.¹⁴⁸ However successful or unsuccessful a materiality requirement may be, what is noteworthy is its aim is the restoration of the proper assessment of false advertising, which would in theory allow courts to restore balance to the relevant prudential standing

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1344

¹⁴² *Id.*

¹⁴³ *Johnson & Johnson Vision care, Inc. v. 1-800 Contracts, Inc.*, 299 F.3d 1242, 1250 (11th Cir. 2002).

¹⁴⁴ *Id.*

¹⁴⁵ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1348.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

requirements.¹⁴⁹ The materiality requirement on its own however, does not cure prudential standing as the existing standards remain problematic.

C. Uniting Antitrust, False Advertising and Trademark Law as a Cure for Prudential Standing: The Formation of a Hybrid Standard

The courts must depart from a system that too readily adopts the approaches of Antitrust and Trademark Laws. The present approaches are deficient and inequitable. When making prudential standing determinations, courts must take better account of the equities involved in order to arrive at a more just solution. Judicial trends indicate that the categorical, reasonable interest five-factor balancing tests have led to unpredictable and inequitable results.¹⁵⁰ These shortcomings must be the focus for a proposed solution to be effective. Furthermore, in adopting a new standard, the tenuous line between over and under-enforcement needs to be respected in order to maintain the proper competition that underlies a fair and effective marketplace. The gap between the present approaches and this ideal standard, whereby the tight rope between over and under-enforcement is properly walked, must be bridged if justice is to be served and a pro-competitive market is to be encouraged.

1. Hybrid Standard

The circuit split is best resolved by splitting the difference between the Trademark and False Advertising approaches to prudential standing standards, and establishing a new test that places greater accountability and in turn liability on the alleged false advertiser. The reasonable interest test properly identifies injuries that § 43(a) was designed to remedy; however, it provides

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1327.

too little guidance with regard to establishing a clear standard.¹⁵¹ Similarly, the five-factor balancing test is too stringent. As a result, the five-factor test does not allow for claimants whose injuries are sufficient, but are nonetheless barred because the court is overly concerned about speculative plaintiffs and over-enforcement.¹⁵² Specifically, the third and fifth prongs of the balancing test too narrowly interpret the necessary relationship between the parties.¹⁵³ Weighed as two factors and not one, the effect of being one competitor in a busy market where the defendant made false or misleading statements as to the quality of their goods or services is that under five-factor analysis it will be an uphill battle for the plaintiff to avoid summary judgment.¹⁵⁴

Another commenter similarly took note, remarking that “[t]he major problem is the increasing rigidity of a judicially created standing doctrine borrowed from antitrust law, which deprives any plaintiff other than a market leader of the ability to challenge false advertising.”¹⁵⁵ This is not what Congress intended in Section 43 of the Lanham Act—for prudential standing to be a right limited to the province of only the largest competitors in a market. Moreover, “[t]his has obvious consequences both for the amount of falsity in a market and for the risk of false advertising (and false advertising law) being used anticompetitively to squelch new entrants. Standing in trademark is, characteristically, much more relaxed.”¹⁵⁶

One of the biggest problems that arise when a clear operative standard is lacking is the wasteful expenditure of resources and money on the part of plaintiffs, defendants and the

¹⁵¹ Diane Taing, *Competition for Standing: Defining the Commercial Plaintiff under Section 43(A) of the Lanham Act*, 16 GEO. MASON L. REV. at 514.

¹⁵² Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK. L. REV. at 305.

¹⁵³ *Harold H. Huggins Realty, Inc.*, 634 F.3d at 805.

¹⁵⁴ *Id.*

¹⁵⁵ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1374.

¹⁵⁶ *Id.*

courts.¹⁵⁷ Little has been done to curb the legal expense and burden that accompany false advertising actions.¹⁵⁸ One instance is where a false message in an ad is obvious, but parties are nonetheless required to indulge in “expensive (and likely extensively litigated) consumer survey when a false message in an ad is obvious[.]”¹⁵⁹ The installation of a clear standard puts all on notice so that such expenses can be averted where the claim falls short. The notice that a clear standard offers applies to both potential plaintiffs at the trial stage, but also perhaps more importantly it puts competitors on notice so that such damaging false advertising can be curbed before it is ever produced.

The following test represents an innovative attempt to bring together aspects of trademark, antitrust and false advertising law to define the ‘reasonable person’ standard with a more workable and fair formula than past courts have proffered:

- (1) The nature of the plaintiff’s alleged injury must be of a type that Congress sought to redress in providing this private remedy for violations of the Lanham Act; and¹⁶⁰
- (2) The alleged injury is the result of a materially false or misleading statement, which can be causally traced to certain incurred damages; and¹⁶¹
- (3) Plaintiff may not assert a claim where they are so remote to the alleged injurious conduct that there is a risk of duplicative actions by other parties¹⁶² such

¹⁵⁷ *Id.* at 1327.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Conte Bros. Automotive, Inc.*, 165 F.3d at 233.

¹⁶¹ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1344.

¹⁶² *Conte Bros. Automotive, Inc.*, 165 F.3d at 233.

that a defendant is vulnerable to claims of a common fund¹⁶³—whereby the claim is that of a party seeking to act as the people’s avenger.¹⁶⁴

By formatting the test not as a list of factors to be weighed, but rather a series of required subsections or elements that must be met the courts will have a clear observable standard that is easily implemented.

The test begins with the same factor that the *Conte* court first articulated; however, here it is not a factor but rather a necessary element for asserting prudential standing. This element ensures that only those injuries the Act was designed to protect will be served, and the more litigious potential plaintiffs will not be able to take advantage of a more benevolent standard.

The second element requires that the alleged conduct had a material effect on the plaintiff and that the damages be sufficiently related to plaintiff’s conduct. This element is important because it serves as a check against the causally traceable requirement, which is a relaxed standard whereby plaintiffs can make somewhat speculative claims to damages so long as a logical connection can be reasonable proffered. Without the proper materiality, no damages can be said to have transpired.

Finally, the third element serves as a check against over-enforcement, which enables courts to better gauge potential plaintiff’s claims—ensuring a pro-competitive market that effectively curbs unlawful false advertising. This element is not designed to protect defendants whose false advertising damages multiple plaintiffs, but rather as a safeguard against over-enforcement. Where the plaintiff’s seeks to benefit from a claim of action that all competitors might bring the risk of abuse is too great. Defendants ought to be punished for wrongful actions, but only in proportion to the wrong. By comparison to the five-factor balancing approach, this

¹⁶³ *Id.* at 234 (citation omitted).

¹⁶⁴ *Joint Stock Soc’y*, 266 F.3d at 184 (citation omitted).

new hybrid standard avoids the consequence of over-enforcement by allowing more affected competitors to bring action. Although over-enforcement is the primary concern that the third element is meant to satisfy, the effect or purpose of it is not to shield competitors from committing widespread fraud but rather to prevent parties from bringing action absent the necessary injury.

The drawbacks of this test are that it is a new standard and the results are to some extent unpredictable. Because the standard is new, courts will initially struggle to apply it to fact patterns; however, this is no different than the growing pains that all standards face when they are first implemented. Likewise, the results of applying this standard are to an extent hard to predict. But, given that a great deal of the test is drawn from pre-existing law on the subject in one manner or another, greater stability and guidance may be similarly attached. The risk of inequitable results from application is another growing pain that all standards face after first being adopted; however, any inequity that derives from this new test should be an improvement over the current approaches. Although this test is markedly different from the categorical, reasonable interest and five-factor-balancing approaches previously adopted, it is sufficiently grounded in similar jurisprudence so that it can be relied upon to reach the types of harms Congress sought to correct in Section 43(a) of the Lanham Act.

2. Other Solutions and their Shortcomings

The Supreme Court could grant certiorari and if it chooses not to proffer a new test that addresses the shortcomings of the categorical, reasonable interest and five-factor balancing approaches, it could choose one of the three tests and endorse it as the proper jurisprudential policy for finding prudential standing under the Lanham Act with respect to Section 43(a). If it

were to choose one of these approaches, the weaknesses as described herein would continue to plague courts and potential plaintiffs. The advantage of adopting a pre-existing approach is that there is published dicta and judicial commentary that will help guide judges in adhering to the standard. Likewise, potential plaintiffs will be on notice of what is required for establishing prudential standing to bring false advertising claims. The transition would be minimal or non-existent as many courts already have practice implementing a given approach.

If this is the case, then the repercussions to competitors, consumers and the advertising landscape will be borne by all.¹⁶⁵ One possible outcome is that “[c]onsumers will correct the misinformation by no longer buying the firm’s goods or services and by conveying their bad experience to other consumers... Firms committed to long-term positions in the market gain little from supplying misinformation.”¹⁶⁶ This will only be the case where consumers are alerted to the misinformation; however, in most cases such revelations will only take place where the false information materially affects the consumer. The costs of such a system will be increasingly absorbed by consumers and those competitors whose advertisements were truthful.

Another solution that has been suggested is that by “[a]sking courts to routinely consider materiality... would be a major step to rein in trademark claims that do not promote consumer welfare.”¹⁶⁷ However, this solution places too much emphasis on consumer welfare, which is an important but somewhat tertiary concern of the Lanham Act.¹⁶⁸ By incorporating materiality to a greater extent, courts will diverge from Congress’ intent or focus on commercial injuries and

¹⁶⁵ Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK. L. REV. at 312.

¹⁶⁶ *Id.*

¹⁶⁷ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1367.

¹⁶⁸ *Phoenix of Broward, Inc.*, 489 F.3d at 1170. *See also* *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d at 165. Congress’ intent in granting prudential standing for false advertising claims under the Lanham Act is not principally consumer welfare, but rather with alleviating commercial interests that have been harmed by the false and/or misleading statements of a competitor.

place greater emphasis on the amount of influence a false or misleading statement has had in a given market.¹⁶⁹ While a materiality requirement might help to better balance the equities, it alone does not provide an adequate solution.¹⁷⁰ Furthermore, such inquiries as materiality of a claim are better reserved for the fact finder in the evaluation of a given plaintiff's claims and not as an additional hurdle for plaintiffs who are already struggling to overcome the trend of granting defendant's summary judgment motions.¹⁷¹

On the other hand, instead of litigating to combat misinformation there are alternatives such as engaging in a campaign of corrective advertising.¹⁷² Those plaintiffs who seek to avail themselves of corrective advertising may engage in a 'decisional calculus,' whereby "competitors will have to consider the likelihood the market will correct itself, the costs/benefits of its own advertising campaign, and the risks/rewards associated with litigation."¹⁷³ This outcome results in little costs being borne on the consumers other than where competitors deem the false advertising as being too detrimental to their commercial interests.¹⁷⁴ While this seems to be less inequitable than other possible solutions, it places too great a burden on competitors to actively police their competitors and marketplaces. The effect of this is twofold—competitors will pass the additional costs of doing business onto consumers and the prudential standing the Lanham Act was expressly given will be essentially without teeth. Alternatives such as corrective advertising as a sole means of righting another's wrong engender the great injustice that the Act was principally created to fight.

¹⁶⁹ Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. at 1366.

¹⁷⁰ *Id.*

¹⁷¹ Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK. L. REV. at 315-16.

¹⁷² *Id.* at 312.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

IV. CONCLUSION

Although interpretations of Section 43(a) have resulted in various unique approaches, the courts' problem to define 'reasonable interest' with greater precision is an ongoing problem.¹⁷⁵ In response to the stringent categorical approach, courts adopted more reasonable interest and flexible five-factor balancing approaches, which were derived from antitrust law and trademark law.¹⁷⁶ Both the reasonable interest test and the five-factor balancing tests fail to provide a consistent operative framework for evaluating a competitors' reasonable interest.¹⁷⁷ As a result of these deficiencies, the Lanham Act is not uniformly applied.¹⁷⁸

Consequently, a new standard is necessary. Synthesizing the strengths of both tests with Congress aims in executing the Lanham Act, while incorporating false advertising law is crucial to holding false advertisers to a greater accountability—absent expanding liability to the point of over-enforcement. The proposed solution represents not only the best balance of the equities involved, but also better comports with Congress' intent. Otherwise, the present system, which utilizes faulty jurisprudential policy will continue to the detriment of lawful competitors and the erosion of consumer confidence, which is an outcome that cannot be tolerated and must be repressed.

¹⁷⁵ *Conte Bros. Automotive, Inc.*, 165 F.3d at 231.

¹⁷⁶ *Id.* at 233. Court in *Conte* adopted and applied the antitrust factors that the Supreme Court put forth in *Associated General* addressing standing requirements for plaintiffs bringing action for damages under § 4 of the Clayton Act. *See Associated General*, 459 U.S. 519, 529, 103 S.Ct. 897.

¹⁷⁷ *Conte Bros. Automotive, Inc.*, 165 F.3d at 232.

¹⁷⁸ Bruce A. Colbath, 'Famous Horse' and Standing under the Lanham Act, WEIL (last visited Feb. 24, 2012), <http://www.weil.com/news/pubdetail.aspx?pub=10256>.