

Nos. 23-2427, 23-2428

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IN THE  
**United States Court of Appeals  
for the Third Circuit**

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CAREDX, INC.,

*Appellant/Cross-Appellee,*

v.

NATERA, INC.,

*Appellee/Cross-Appellant.,*

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On Appeal from the United States  
District Court for the District of Delaware  
No. 1:19-cv-662 (CFC)

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**BRIEF OF REBECCA TUSHNET AND ALEXANDRA ROBERTS  
AS *AMICI CURIAE* IN SUPPORT OF  
REHEARING**

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## **STATEMENT OF INTEREST OF AMICI CURIAE**

Amici are scholars whose research and teaching has focused on false advertising law. Amici have no direct interest in the outcome of this litigation.<sup>1</sup> Alexandra Roberts is is Professor of Law and Media, Northeastern University School of Law and Rebecca Tushnet is the Frank Stanton Professor of the First Amendment, Harvard Law School.

## **SUMMARY OF ARGUMENT**

The panel opinion suggests that a jury cannot rely on circumstantial evidence, including the defendant's knowledge of falsity and deliberate employment of falsity as the center of an ad campaign, to find actionable harm under the Lanham Act's false advertising provisions. This result is inconsistent with courts' treatment of other Lanham Act claims and will encourage future false advertisers to try their luck. The panel should grant rehearing to correct this error.

### **I. The Lanham Act Allows Inferences of Harm from Knowing Falsity**

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<sup>1</sup> Institutional affiliations are listed for informational purposes only. The parties have consented to the filing of this brief. Amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than the amici contributed money that was intended to fund the preparation or submission of this brief.

The Lanham Act is a “common law statute”: it incorporates many principles of the common law, and it does not define many key terms.<sup>2</sup> Courts have therefore created tests for what constitutes trademark infringement and false advertising under the Lanham Act. Although harm to the plaintiff is an important limiting principle (and Article III requirement), the statute does not specify how harm is to be determined. *Cf.* Restatement (Third) of Unfair Competition § 3 (1995) (stating that a misrepresentation will be “to the likely commercial detriment of” the plaintiff if it is material (i.e., if “it is likely to affect the conduct of prospective purchasers”) and if a reasonable basis exists for believing that the misrepresentation would likely divert trade from the plaintiff or harm its reputation or good will).

As the petition for rehearing indicates, courts generally agree that the test can take into account the dangers that arise when an advertiser consciously disregards material truth in favor of falsity. Thus, if the defendant believes that a false factual claim is important to its sales, then a jury can reasonably infer that it was. The defendant is in the best position to understand what sells its products.

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<sup>2</sup> Graeme B. Dinwoodie, *The Common Law and Trade Marks in an Age of Statutes*, in *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* 331, 331-52 (Catherine W. Ng, Lionel Bently & Giuseppina D’Agostino eds., 2010); Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 *Colum. J.L. & Arts* 187, 197-98 (2004).

Importantly, the Lanham Act covers both trademark infringement and false advertising.<sup>3</sup> Courts have often treated false advertising and trademark infringement interchangeably for issues related to remedies and proof.<sup>4</sup> Congress has also

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<sup>3</sup> The relevant language for both causes of action does not specify how harm is to be proven. 15 U.S.C. § 1125(a)(1) creates a cause of action for trademark infringement in (A) and false advertising in (B), covering

any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

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

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.

(Likewise, 15 U.S.C. § 1114 covers uses of a registered mark “likely to cause confusion, or to cause mistake, or to deceive.”) False advertising under (a)(1)(B) has the additional element of “commercial advertising or promotion” compared to trademark infringement under (a)(1)(A), but no additional proof-of-harm requirement. See Rebecca Tushnet, Running the Gamut from A to B: Federal Trademark and False Advertising Law, 159 U. Penn. L. Rev. 1305, 1312 (2011) (the “nearly identical statutory language ... reinforced the relationship between trademark infringement and other types of false advertising under federal law”).

<sup>4</sup> See, e.g., *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992) (using survey precedent interchangeably); *Johnson & Johnson \* Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 300 (2d Cir. 1992) (same); *Rexall Sundown, Inc. v. Perrigo Co.*, 707 F. Supp. 2d 357, 363 (E.D.N.Y. 2010) (holding that damages should be evaluated the same way for both); *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384, 479 (D.N.J. 2009) (“Trademark case law applies to the remedies sought in this [false advertising] action: Congress amended the Lanham Act to expressly make all trademark

provided that the presumption of irreparable harm is the same for both. 15 U.S.C. § 1116.

Courts have long held that an intent to confuse consumers can justify an inference of deception in trademark. Just as with other issues, the same should be true in false advertising. Shortly after the adoption of the Lanham Act, one scholar explained that, once falsity is established, the best practice in false advertising cases is for courts to use the same tools to assess materiality and likely injury that they use to evaluate likely confusion in a trademark case:

[T]he courts might readily reason that an advertiser can hardly be expected to expend large sums of money to publicize a representation unless he believes that it will lead to sales of his product. ... In “passing off” cases a judicial willingness has been shown to accept the defendant’s own judgment as to the effectiveness of his simulation. ... [T]here would seem to be no reason, in a false advertising case, why the courts could not say that they “need no more” than the defendant’s “forecast that he is ‘likely’ to succeed” through the use of his chosen misrepresentation.

Gilbert H. Weil, *Protectability of Trademark Values Against False Competitive Advertising*, 44 Calif. L. Rev. 527, 537-38 (1956); *cf. Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 224 (2d Cir. 1999) (“Plaintiffs are ordinarily free to make their

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remedies available in false advertising cases, and numerous courts have since applied trademark precedent to false advertising damages claims.” (citation omitted)); 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:193 (4th ed. 2010) (discussing equal applicability of survey precedent and citing cases).

case through circumstantial evidence that will justify an ultimate inference of injury. ‘[C]ontextual factors’ have long been used to establish infringement. We see no reason why they should not be used to prove dilution.” (alteration in original)), *abrogated on other grounds by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

As this Court has repeatedly held, a trademark defendant’s intent to deceive is probative of the deception’s likely success. *See, e.g., Lontex Corporation v. Nike, Inc.*, 107 F.4th 139, 154 (3d Cir. 2024) (confusion is more likely where “the defendant chose the mark to intentionally confuse consumers”); *A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 226 (3d Cir. 2000) (“purposeful manipulation” favors finding infringement); *Versa Prods. Co., Inc. v. Bifold Co. (Mfg.) Ltd.*, 50 F.3d 189, 205 (3d Cir. 1995) (“a defendant’s intent to confuse or deceive consumers as to the product’s source may be highly probative of likelihood of confusion”). These rules serve both evidentiary and deterrent functions. *Id.* at 207; *Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 721 (3d Cir. 2004) (intent to deceive favors liability; a “defendant that “persisted in its plan” to adopt a mark “after being warned of too close resemblance between” its proposed mark and plaintiff’s mark is not “blameless”) (quoting *Telechron, Inc. v. Telicon Corp.*, 198 F.2d 903, 908 (3d Cir. 1952)).



The logic is exactly the same for the related tort of false advertising: At a minimum, intentional marketing of a material claim known to be false is probative evidence that the falsity succeeded, upon which a finder of fact can rely.

## **II. Alternative Means of Proof of Harm Are Both Insufficient and Subject To Similar Criticism**

The panel opinion does not affirmatively set out a view of what other evidence of harm it would have required to uphold the jury's findings. Without allowing different means of circumstantial proof, the courts will license deception that will inevitably go unchecked. *See, e.g., U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) ("It is not easy to establish actual consumer deception through direct evidence. The expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived. He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.").

Litigation is already expensive, and will get more expensive if circumstantial evidence of deceptiveness such as centrality to an ad campaign and intentional deception are treated as insufficient. The additional evidence of causation apparently sought by the panel is itself highly contestable and no more reliable than evidence of intent. The two types of evidence that courts typically consider "direct" evidence

of impact on consumers are from individual consumers or from surveys. But neither is foolproof, and neither should be required in a false advertising case.

Individual consumer testimony may be unavailable for various reasons, including customers' fears of disrupting otherwise working relationships by participating in litigation between two suppliers, each of whom might be important to the customer. With many products, affected consumers are unlikely to complain. *See, e.g., Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 693-94 (6th Cir. 2000) (citing, in a false advertising case, the trademark case *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993), which held that proof of actual confusion can be difficult to obtain and thus is not required).

Even if consumers are willing and able to testify, consumer researchers agree that they may not be accurate reporters of their own reasons for decisions—especially after the fact, when there is a natural human impulse to justify the decisions we have already made, known as choice-supportive bias or post-purchase rationalization.<sup>5</sup> *See* Shari Seidman Diamond, Control Foundations: Rationales and

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<sup>5</sup> *See, e.g.,* Adam N. Hornsby & Bradley C. Love, How Decisions and the Desire for Coherency Shape Subjective Preferences Over Time, *Cognition* (July 2020), <https://www.sciencedirect.com/science/article/pii/S0010027720300639?via%3Dihub>; Veronica Juarez Ramos, Analyzing the Role of Cognitive Biases in the Decision-Making Process 52 (2018).

Approaches, in *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*, 201, 211 (Shari Seidman Diamond & Jerre Bailly Swann, eds. 2022) ((explaining that “why” answers are unreliable; “[a]lthough people are often able to justify their positions when asked to explain their actions, such post-hoc explanations can only imperfectly capture the reasoning that actually produced their answers”) (footnote omitted)).

Surveys, which can substitute for direct consumer testimony, offer additional problems. They are expensive, putting relief from truly misleading claims out of the reach of smaller businesses.<sup>6</sup> And even when they are present, courts often disparage them as imperfect and biased. *See, e.g., Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P’ship*, 34 F.3d 410, 416 (7th Cir. 1994) (disparaging the “survey researcher’s black arts”). As one court in this Circuit reasoned,

[P]utting together and executing a survey is an expensive and dubious proposition. . . . Further, just as . . . anecdotal evidence of confusion is “frequently discounted as unclear or insubstantial,” the same is true for surveys. The expense that a survey entails will go all for nothing if the court will not accept its methodology. . . . Because it would have been difficult,

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<sup>6</sup> Robert C. Bird, *The Impact of the Moseley Decision on Trademark Dilution Law*, 26 J. Pub. Pol’y & Marketing 102, 104 (2007) (noting that surveys could cost as much as \$100,000 to administer in 2007); cf. *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 951 (3d Cir. 1993) (noting, in the course of holding that literal falsity obviates the need for a survey, that obtaining surveys is a “time consuming and expensive task”).

cost-preclusive, and risky for Facenda to have obtained evidence of actual confusion, I cannot weigh the lack of this evidence too heavily against him. *Facenda v. N.F.L. Films, Inc.*, 488 F. Supp. 2d 491, 513 (E.D. Pa. 2007) (citation omitted), *aff'd in part*, 542 F.3d 1007 (3d Cir. 2008). To the extent that the panel's opinion relied on the idea that there is in fact regularly direct evidence of harm from false advertising available in other cases, it was mistaken.<sup>7</sup>

None of this is to say that such evidence is inadmissible. Rather, it is to highlight that all harm evidence is imperfect. As such, it does not make sense to exclude other forms of evidence of harm, including reasonable inferences made from knowledge of falsity and the centrality of a claim to an ad campaign.

### **Conclusion**

For the foregoing reasons, this Court should grant rehearing and allow juries to use circumstantial evidence and common sense to find that materially false claims caused harm.

Respectfully submitted,

*/s/ Rebecca Tushnet*

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<sup>7</sup> See Jennifer L. Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 Vill. L. Rev. 763, 767 (2007) (explaining that imagined ideal evidence from experts leads courts to ignore the real potential of evidence, which is inevitably imperfect).

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## Combined Certifications

The undersigned attorney certifies as follows:

1. Bar Membership: I the attorney whose name appears on this brief and I am a member of the bar of this court.
2. Type Volume, Typeface, and Type Style: This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 2282 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point Times New Roman, a proportionally spaced typeface with serifs, using Microsoft Word 365.
3. Service: Counsel for all parties required to be served are registered to use the court's electronic-filing system and are being electronically served by the filing of this brief with that system.
4. Identical Text: The text of the electronic brief is identical to the text in the paper copies of this brief.
5. Virus Check: The electronic file for this brief was checked for viruses using version 1.437.214.0 of the virus detection program Windows Defender and no virus was detected.

Respectfully submitted,

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