I. Introduction

False advertising claims are not often taken seriously by courts or academics. After presiding over a preliminary injunction hearing to determine whether Proctor & Gamble made false statements in its advertisements about its “ALEVE” pain reliever, Judge Nicholas H. Politan wrote in the Court’s order that it had “heard days of testimony and reviewed countless exhibits, including free-standing inserts, gravity-fed dispensers, clinical data and television commercials. It is thus not surprising that the Court presently finds itself in possession of a monumental headache, the alleviation of which is beyond the durational powers of any of the analgesics discussed herein. Accordingly, in an effort to achieve long lasting and efficacious relief, the Court will take them all.”¹

This clever quip raises substantive questions that are not easy to answer. Do courts take these private disputes about false statements seriously? Or are they headaches that prompt courts to reach for doctrinal remedies to get them quickly off their dockets? Thousands of these claims have been filed since the Lanham Act was amended to specifically provide a claim for false advertising. Yet, very little is known about how advertising doctrines play out in practice. Indeed, to our knowledge, no empirical work has been done on false advertising law at all. This Article begins to fill that void by providing an empirical study of false advertising claims brought under the Lanham Act and adjudicated in federal district court between 1990 and 2010.

The Lanham Act provides a mechanism for federal registration of trademarks and causes of action for trademark infringement, a variety of forms of unfair competition, and false advertising.\(^2\) Federal law is not exclusive with respect to any of those types of claims: state statutory and common law trademark laws exist, even if they are largely redundant of federal law, and states regulate and sometimes provide for private rights of action under their own consumer protection and false advertising laws.\(^3\) The Lanham Act is not even the only source of federal advertising law – the Federal Trade Commission also regulates deceptive advertising under authority of Section 5 of the FTC Act.\(^4\) And there are also several private dispute resolution mechanisms, most notably those administered through the Advertising Self-Regulatory Council (ASRC), including the National Advertising Division (NAD) and Children’s Advertising Review Unit (CARU).\(^5\) Nevertheless, courts have issued reported decisions in thousands of private enforcement actions under §43(a)(1)(B) of the Lanham Act over the last two decades.\(^6\) These disputes therefore undoubtedly play an important role in the regulation of advertising.

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\(^4\) Section 5 of the FTC Act broadly prohibits unfair or deceptive acts or practices in commerce. 15 U.S.C. § 45. That Section gives the FTC authority to regulate, but it does not provide a private right of action.

\(^5\) NAD administers a private alternative dispute resolution system through which parties can challenge whether claims in an advertisement were substantiated. See http://www.asrcreviews.org/2011/08/how-nad-works/ (“NAD uses a unique, hybrid form of alternative dispute resolution, working closely with in-house counsel, marketing executives, research and development departments and outside consultants to decide whether claims have been substantiated. Each party to the dispute has ample opportunity to explain its position and provide supporting data.”). CARU monitors and reviews advertising directed to children, initiates and receives complaints about advertising practices, and determines whether such practices violate the program’s standards. When it finds violations, it seeks changes through the voluntary cooperation of advertisers and Website operators.” See http://www.asrcreviews.org/wp-content/uploads/2012/04/CARU-GUIDELINES-Revised-ASRC-4-3-122.pdf. CARU’s guidelines go well beyond false advertising to deal with a variety of issues relating to advertising to children, including, for example, privacy issues.

\(^6\) By way of contrast, a search for FTC actions brought against false advertising during the same time period returned 41 results. (Using the following search string: “ti("federal trade commission") & "false advertising" & "federal trade commission act").
Despite the size and practical significance of this body of law, relatively little academic literature focuses on false advertising, particularly false advertising suits under the Lanham Act. The dearth of literature is all the more striking given advertising law’s close relationship to trademark law, which is the subject of substantially more scholarly attention. Things are beginning to change on this front, however, as a number of scholars recently have focused on advertising, some focusing specifically on the lessons false advertising law might teach trademark law (or vice versa). One of us has even argued that trademark law ought to draw more heavily on false advertising law, both doctrinally and conceptually. Some of this recent literature has suggested, explicitly or implicitly, that false advertising cases are more difficult to win than trademark cases. This difference is often

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12 See, e.g., McKenna, supra note 11 at 80-81 (“At the same time courts in trademark cases have continually found new reasons to protect consumers, they have taken great pains to restrict, rather than expand, the scope of false advertising law.”); Tushnet, Running the Gamut, supra note 10.
attributed primarily to the fact that, even though both trademark and false advertising claims derive from the same section of the Lanham Act, courts have created additional doctrinal hurdles for false advertising claimants that they have not applied in trademark cases. Specifically, courts developed prudential standing rules to limit the class of parties who can bring a false advertising claim, as well as a requirement that the false statement be material to consumers’ purchasing decisions. We therefore intended to determine, among other things, the extent to which standing and materiality doctrines determine outcomes in false advertising cases.

II. Background on False Advertising Law

In its original form, the Lanham Act did not explicitly provide for a false advertising cause of action. From early on, however, courts interpreted § 43(a) to provide parties with a cause of action against competitors that made false statements about their own products or services. At the same time, many courts refused to recognize claims under the statute against parties that made false statements about someone else’s goods or services. Congress amended the Lanham Act in 1988 to provide expressly for a federal false advertising cause of action and to eliminate this distinction between statements about one’s own products and statements about the products of another. The new statutory provision provides a claim against:

(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

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15 See, e.g., Bernard Food Indus. v. Dietene Co., 415 F.2d 1279, 1283 (7th Cir. 1969) (“False advertising or representations made by a defendant about a plaintiff’s product are not covered by section 43(a).”).
commercial activities. . . .

As courts have interpreted the provision, a plaintiff must generally prove the following five elements to state a claim for false advertising:

1. a false statement of fact by the defendant in a commercial advertisement about its own or another's product;
2. the statement actually deceived or has the tendency to deceive a substantial segment of its audience;
3. the deception is material, in that it is likely to influence the purchasing decision;
4. the defendant caused its false statement to enter interstate commerce; and
5. the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products.

False statements of fact come in two varieties: (1) literally false statements, and (2) statements that are literally true but misleading. Both types of statements are actionable, but they are treated differently. If a plaintiff can show that the defendant’s statement was literally false, courts generally do not require proof that the public was deceived, confused, or misled. Rather, courts presume that these statements affect consumers. Courts do not presume the same about statements that are literally true but potentially misleading. In those cases, a plaintiff must show (generally through

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18 United Industries, Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998) (quoting Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997); Johnson & Johnson–Merck Consumer Pharm. Co. v. Rhone–Poulenc Rorer Pharm., Inc., 19 F.3d 125, 129 (3d Cir. 1994)); See also TrafficSchool.com, Inc. v. Edriver Inc.653 F.3d 820 (9th Cir 2011) (“To succeed on an Internet false advertising claim, a plaintiff must show that a statement made in a commercial advertisement or promotion is false or misleading, that it actually deceives or has the tendency to deceive a substantial segment of its audience, that it's likely to influence purchasing decisions and that the plaintiff has been or is likely to be injured by the false advertisement.”).
19 S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232 (2d Cir. 2001)
21 See Johnson & Johnson–Merck Consumer Pharmaceuticals Co. v. Rhone–Poulenc Rorer Pharmaceuticals, 19 F.3d 125 (3rd Cir. 1994); Coca–Cola Co. v. Tropicana Products, Inc., 690 F.2d 312, 318 (2d Cir. 1982).
22 See Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144, 153 (2d Cir. 2007) (“When an advertisement is shown to be literally or facially false, consumer deception is presumed, and the court may grant relief without reference to the advertisement’s [actual] impact on the buying public.”) (internal quotation marks omitted).
survey evidence and expert testimony) that a significant number of consumers will perceive the message to be false.\textsuperscript{23}

Although false claims are often communicated in written or spoken words, images may, alone or together with relevant text, make a statement that is “literally false.” In a memorable series of ads featuring anxious goldfish, for example, Clorox depicted an S.C. Johnson Ziploc Slide–Loc plastic bag next to a Clorox Glad–Lock bag. Both bags contained goldfish in water, and both were turned upside-down. The ads showed the Slide–Loc bag leaking rapidly while the Glad–Lock bag did not leak at all.\textsuperscript{24} One ad from this series is pictured below:

\textsuperscript{23} Id. (“[W]hereas plaintiffs seeking to establish a literal falsehood must generally show the substance of what is conveyed, ... a district court must rely on extrinsic evidence [of consumer deception or confusion] to support a finding of an implicitly false message.”); Johnson & Johnson Merck Consumer Pharm. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 297–98 (2d Cir.1992).
\textsuperscript{24} S.C. Johnson & Son, Inc. v. Clorox Co, 241 F.3d 232 (2d Cir. 2001).
Both courts that reviewed Clorox’s ads found them “literally false” because they depicted a leakage rate that far exceeded what was found in actual quality control tests. Similarly, the advertisement at issue in Coca-Cola v. Tropicana Products, Inc., depicted Bruce Jenner squeezing an orange into a Tropicana container, which suggested that the company’s juice was freshly squeezed.25

25 690 F.2d 312 (2d Cir. 1982). While squeezing the orange, Jenner said, “It’s pure, pasteurized juice as it comes from the orange,” and the ad then showed Jenner pouring the fresh-squeezed juice into a Tropicana carton while the audio stated “[i]t’s the only leading brand not made with concentrate and water.” 690 F.2d at 314.
In fact, Tropicana’s juice was not fresh but heated, often frozen, processed and pasteurized. As a result, the court found the ad literally false.

Sometimes literally false statements are explicit – a claim, for example, that a product “was approved by the FDA” when it was not. But courts have also been willing to treat as literally false statements that are only implicitly made, if the implicit statement unambiguously sends a false message. Such statements are categorized as “literally false by necessary implication,” and because they are treated as a species of literally false statements, no proof of consumer reaction is necessary.

Statements that are literally true but misleading may also be grounds for false advertising claims. For example, UPS ran an advertisement claiming its services were “just ranked the most

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26 Id. at 318.
27 Id.
28 Statements that include claims that could be tested may be found literally false if the advertiser cannot substantiate the claims. These kinds of claims are often referred to as “establishment claims” because the truth of their assertions could be established by some other source. For example, in Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578 (3d Cir. 2002), the court held that the product name “Mylanta Night Time Strength” was literally false because the defendant could not establish that anything about the product made it especially suited for use at night.
29 Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144, 148 (2d Cir. 2007) (“[W]e hold that an advertisement can be literally false even though it does not explicitly make a false assertion, if the words and images, considered in context, necessarily and unambiguously imply a false message.”).
30 Clorox Co. Puerto Rico v. Proctor & Gamble Co., 228 F.3d 24, 35 (1st Cir. 2000) (“A claim is conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated.”).
reliable.” That statement was literally true: in November, 2008 a Morgan Stanley Research study ranked the UPS delivery service as the most reliable. In April 2009, however, the same study ranked Federal Express the most reliable. Nevertheless, UPS continued to run its ad even after the second study was published. Although the court found that UPS’s statement was literally true, it denied UPS’s motion to dismiss the false advertising claim on the ground that Federal Express might have been able to prove that the statement was still deceptive and misleading.

Statements that are sufficiently vague, subjective, or exaggerated may be deemed “mere puffery” and therefore non-actionable under the Lanham Act claim. Puffery is not susceptible to categorization as “true” or “false,” so a statement that is puffery cannot be a false statement of fact. For example, the Papa John’s slogan “Better Ingredients. Better Pizza.” was held to be “nonactionable puffery” because it did not meet the threshold level of specificity required for a viable false advertising claim.

Finally, false statements must be material to be actionable – that is, they must tend to influence consumers’ purchasing decisions. Materiality is technically an element of all false advertising claims, regardless of the type of false statement at issue. But proof of materiality

32 Id. at 1023.
33 Pizza Hut, Inc. v. Papa John’s Int’l, Inc., 227 F.3d 489, 497 (5th Cir. 2000) (“Non-actionable ‘puffery’ comes in at least two possible forms: (1) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying, or (2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”).
34 N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1226 (11th Cir. 2008) (holding that plaintiffs met their burden of showing that deception influenced their decision to purchase medical equipment, because the manufacturer’s claims, if they had been true, could have been used to attract patients); U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922 (3d Cir. 1990) (requiring that misrepresentations in ads be “likely to influence the purchasing decision[s]” of the public to satisfy the materiality requirement (quoting Toro Co. v. Textron, Inc., 499 F. Supp. 241, 251 (D. Del. 1980))).
35 Indeed, in some cases materiality affects the outcome in the case even when the false statement is expressly made and false beyond any doubt. See In re Century 21-RE/MAX Real Estate Adver. Claims Litig., 882 F. Supp. 915, 928 (C.D. Cal. 1994) (holding that an overstatement of 25,308 real estate transactions completed.
matters primarily in cases involving literally true but misleading statements because literally false statements generally are presumed to be material, as are statements regarding the “inherent qualities or characteristics” of the product.

III. Methodology

Our goal in this project was to identify patterns that have emerged in federal false advertising opinions since § 43(a) of the Lanham Act was amended in 1989 to provide expressly for a federal false advertising cause of action. Although thousands of cases have been decided since that amendment, courts have erected non-textual standing barriers and other doctrinal hurdles that make winning these cases an uphill battle for many, if not most, plaintiffs. We aim to identify the factors affecting the outcomes of false advertising litigation.

To identify decisions relevant to our analysis, we generated a sampling frame by searching Westlaw for all judicial opinions in state and federal courts that mentioned false advertising claims under the Lanham Act. From the roughly 4,000 opinions that search identified, we limited the pool to opinions issued after the revisions to the Lanham Act became effective on November 16, 1989. We included only opinions in federal cases because the vast majority of false advertising claims decided under the Lanham Act were heard in federal court. Westlaw reported fewer than 80 state court opinions responsive to our query. By contrast, in October 2011, Westlaw reported 3048

in 1992 (out of more than 600,000 transactions) was not likely to influence the purchasing decision of any consumer).

36 Johnson & Johnson v. GAC Int’l, Inc., 862 F.2d 975, 977 (2d Cir. 1988) (holding that materiality is presumed if statements are literally false but must otherwise be proven).

37 Cashmere & Camel Hair Mfrs. v. Saks Fifth Ave., 284 F.3d 302 (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.”).


39 Thus, only decisions reported in Westlaw were part of the initial universe from which we narrowed. We note, however, that this does not mean only officially reported opinions were included, as Westlaw reports some opinions not officially designated for publication.

40 We used the following search terms: “false advertising” & 1125(a) Lanham & da(aft 11/16/1989).”
federal opinions that met our initial criteria – 2669 district court opinions and 379 appellate opinions.

We initially focused our attention on district court, rather than appellate, opinions. We did so because our primary goal was to understand how false advertising litigation works in practice, and particularly to understand which factors influence false advertising decisions. Many of the factors relevant to outcomes in these decisions turn on questions of fact, and district courts have the greatest flexibility to consider the widest possible set of characteristics. Thus, from the list of 3048 opinions, we eliminated appellate decisions, leaving us 2669 district court opinions. Because we wanted to study only opinions that actually addressed a substantive false advertising issue, we asked our coders to determine which opinions discussed either (1) standing to bring a federal false advertising claim or (2) the merits of such a claim. After removing the opinions that satisfied neither of these conditions, 1380 opinions remained. As Figure 1 shows, by far the greatest number of those opinions were issued by district courts in the Second Circuit; courts in the Ninth and Third Circuits, respectively, were the next most well-represented.
Figure 2 shows the number of opinions over time. As it indicates, the number of opinions in cases filed by natural persons has remained stable and low (fewer than 10 cases per year). The number of opinions in cases brought by business entities increased steadily between 1989 and 2005 and has increased at a much higher rate since 2005.\textsuperscript{41}

\textsuperscript{41} We do not yet have an explanation for the notable increase since 2005.
For each of these false advertising opinions, the coders determined the number of allegedly false statements at issue. Many opinions deal with only one allegedly false statement, but a minority of the opinions involved multiple allegedly false statements. Sometimes multiple statements were at issue because both the plaintiff and the defendant alleged false advertising against each other (the defendant via counterclaim). More frequently multiple statement cases involved only unidirectional claims (by a plaintiff against a defendant), but the plaintiff alleged that the defendant made more than one false statement. These multiple statement cases raised significant coding problems because courts’ findings on different issues often varied according to the statement involved.

In *Stokely-Van Camp, Inc. v. Coca-Cola Co.*,\(^{42}\) for example, the makers of Gatorade sued Coca-Cola, alleging that three different statements in Coca-Cola’s Powerade advertisements were false. The first statement, which appeared in a series of ads directly comparing the two products, asserted

\(^{42}\) 646 F.Supp.2d 510 (S.D.N.Y. 2009).
that Gatorade was “incomplete” because it lacked two electrolytes found in Coca-Cola’s Powerade.\footnote{Id at 524.}
The district court found this claim to be moot because, in response to the lawsuit, Coca-Cola had agreed to stop running the ad making that claim.\footnote{Id.} The plaintiff also challenged Coca-Cola’s description of Powerade as “the complete sports drink.” The court did not enjoin that statement because it found that there was insufficient evidence that the claim was false.\footnote{Id at 526.} Finally, the Gatorade producers challenged the slogan “upgrade your game.” The court denied relief with respect to this third statement as well, but this time on the ground the statement was literally true and nonactionable puffery.\footnote{Id at. 529.} While the court rejected all of the plaintiff’s false advertising claims, it had different reasons for rejecting each one.\footnote{See HipSaver Co., Inc. v. J.T. Posey Co., 490 F.Supp.2d 55, 69 (D.Mass. 2007) (denying summary judgment on several allegedly false statements but granting it “for those ads that do not assert relative product superiority.”).} To capture a court’s analysis of the individual statements, each statement would have to be coded separately.

Because coding these multiple statement opinions several times raises the prospect of overweighting them in our analysis, and because we found that most opinions involved only one statement or multiple statements that the court treated identically, we initially analyzed those opinions in which only one statement was at issue or in which all statements at issue were treated identically.\footnote{Of course, we will eventually code the cases in which multiple statements were treated differently from one another. At this point, we have no reason to think that those cases are not comparable to the cases we analyze here (i.e., cases with single statement or multiple statements resolved in singular fashion).} For each of those opinions, coders gathered a wide array of information.\footnote{A .pdf copy of the coding form is attached as Appendix A.} Some questions sought basic information, such as the citation, year of decision, federal circuit, and identity of the judge. We also collected information relating to the threshold issue of standing, as well as numerous measures relevant to a decision on the merits. Among other things, we coded for the
statement at issue, the media in which it appeared, and a number of factors about the statement itself (e.g., whether it was comparative, whether it mentioned the plaintiff’s or defendant’s product or service, whether it made a claim of superiority or asserted a claim that was verifiable). We also included evidentiary facts, such as whether each party offered a survey and/or an expert opinion in support of it position. Likewise, we tried to capture judicial conclusions characterizing the statement – whether, for example, the court found the statement to be false, literally false, deceptive, material, likely to cause confusion, or merely puffery or opinion. We identified whether other intellectual property claims were asserted and whether the court awarded costs, damages and/or attorney’s fees. Finally, we coded the procedural disposition.

Although our process of data collection is still ongoing, for the purposes of this draft we have collected data on 605 district court false advertising opinions that address one statement or treat all of the statements identically. Of these 605 opinions, 77% were issued by district courts in the Second, Third, and Ninth circuits.

IV. Results

Our study was initially motivated by four questions. First, how frequently do plaintiffs win false advertising cases? Second, to what extent are prudential standing and materiality doctrines responsible for false advertising case outcomes? Third, what characteristics of the allegedly false

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50 Coder reliability was initially tested at two points. The authors and research assistants coded a decision together to make sure that all coders would have a consistent understanding of each question. Some clarifications were made to the instructions and questions at this point. Next, the authors and the research assistants all coded a sample group of opinions independently. The authors reviewed the results and concluded that all coders were entering generally consistent answers. Some additional changes were made to the form at this point to clarify questions where some inconsistency was present. Once an acceptable level of consistency was achieved, the research assistants proceeded to code independently. We have since checked coder reliability by having multiple coders independently code a subset of decisions.

51 Specifically, 30 of the opinions coded thus far were issued by district courts in the First Circuit, 221 in the Second Circuit, 97 in the Third Circuit, 36 in the Fourth Circuit, 45 in the Fifth, 30 in the Sixth and 144 by courts in the Ninth Circuit.
statements or the advertisements in which they appear affect outcomes? Here we were particularly interested in the extent to which outcomes varied depending on whether the ads mentioned the parties products and whether the allegedly false statements were made in, or accompanied by, visual material. Fourth, are plaintiffs more likely to win cases in which the statement at issue is literally false than those in which the statement is literally true but misleading, deceptive or confusing?

We hypothesized that, overall, plaintiffs win a relatively low percentage of false advertising cases. This hypothesis requires a success rate against which to compare our results, and we found it difficult to identify an appropriate comparator. Given the impressions of much of the literature regarding the comparative difficulty of winning a false advertising case, we would have liked to compare the false advertising success rate to that in federal trademark infringement cases. To our knowledge, however, there is no empirical evidence regarding the overall win rate for plaintiffs in trademark cases. In his empirical study of the likelihood of confusion factors, Barton Beebe found that courts determined that confusion was likely in approximately 42% of cases.52 But because Beebe’s study focused only on one aspect of trademark infringement cases, it does not provide an ideal baseline against which to evaluate the overall win rate in false advertising cases. Thus, for purposes of this paper we evaluate the success rate only in light of the Priest-Klein hypothesis.53 We acknowledge that this is not an ideal comparison either, not least because our data include many opinions that are not final judgments.

Second, we hypothesized that false advertising law’s special standing and materiality requirements would have a significant impact on the plaintiff’s success rate, and that the effect of standing would be particularly apparent at the motion to dismiss stage. Third, we hypothesized that

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53 Under the Priest-Klein hypothesis, plaintiff win rates in cases that actually are litigated to judgment will trend toward 50% regardless of the substantive standard of law. George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984).
courts would find statements to be false at different rates depending on whether those statements were made in or accompanied by visual material rather than made purely textually. We were not sure whether courts would find those statements with visual material to be false at a higher or lower rate, but we suspected the rate would be significantly different in one direction or the other. Finally, we hypothesized that plaintiffs would have greater success in cases in which the court classified the statement at issue as literally false compared to those in which the statement was literally true but misleading or confusing.

A. Overall Win Rates

We aggregated the outcomes at various stages into findings that would show definitive wins for either the plaintiff (the party that asserted the false advertising claim) or the defendant (the party against which the false advertising claim was asserted). In both the “plaintiff win” and “defendant win” aggregate disposition variables, we included only rulings that resulted in a definite victory on the merits. For example, we counted it as a win for the defendant when the court granted a motion to dismiss. We did not count denials of motions to dismiss as wins for the plaintiff, however, because such rulings are not final dispositions. Similarly, when a party was granted summary judgment in whole, we counted that as a win for the party in whose favor summary judgment was granted. By contrast, we did not count partial summary judgment or denial of summary judgment as a win for either side because neither type of ruling would end the case.

For our purposes, any of the following dispositions counted as a “win” for the plaintiff in our aggregate variable: grant of preliminary or permanent injunction, grant of plaintiff’s motion for summary judgment motion, grant of plaintiff’s motion for judgment as a matter of law or renewed motion for judgment as a matter of law, or award of damages to the plaintiff.\textsuperscript{54} We counted these

\textsuperscript{54} We acknowledge some possible over estimation of the plaintiff’s ultimate win rate in that we count a grant of preliminary injunction as a “win” for the plaintiff, even though a preliminary injunction is not necessarily
dispositions as “wins” for the defendant: grant of the defendant’s motion to dismiss, grant of the defendant’s motion for summary judgment, grant of judgment as a matter of law or renewed motion for judgment as a matter of law in the defendant’s favor, and denial of the plaintiff’s motion for preliminary or permanent injunction.\textsuperscript{55}

Figure 3 illustrates overall win rates in false advertising cases first for all parties, and then for cases in which the plaintiffs are not natural persons.

For similar reasons, this approach may underrepresent wins for the plaintiff and over-represent wins for the defendant, since denial of a plaintiff’s motion for preliminary injunction may not end the suit and the plaintiff may still ultimately win. But again, our research suggests that very few cases proceed to a later final disposition after a motion for preliminary injunction is denied.
Our preliminary data indicate that when a court issues an opinion in a false advertising case, plaintiffs win only 14.2% of the time, whereas defendants win 44.1% of the time.\footnote{Thus, 41.7% of the opinions we have coded so far have no clear winner.} One reason the plaintiff’s overall win rates might be so low is that some number of cases are brought by consumers despite a clear judicially-created rule that consumers do not have standing.\footnote{Made in the USA Found. v. Phillips Foods, 365 F.3d 278, 281 (4th Cir. 2004) (noting that “the several circuits that have dealt with the question are uniform in their categorical denial of Lanham Act standing to consumers”).} To determine the extent to which consumer cases, which we would expect to be dismissed by courts, artificially depressed the plaintiff win rates (and inflated defendant win rates), we controlled for cases in which natural persons were the sole plaintiffs, which we used as a proxy for cases brought by consumers.\footnote{We controlled only for decisions in which natural persons were the sole plaintiffs rather than all cases involving a natural person plaintiff, leaving in some which natural persons and business entities were joined as plaintiffs. We did so because the individuals joined in these opinions with business entities frequently were owners or executives of the entities with which they were joined.} As Figure 3 shows, overall win rates differ only negligibly when we control for cases filed by natural persons. Plaintiffs won 15.3% of cases not involving solely natural persons as plaintiffs, and defendants won 41.2% of such cases.\footnote{Therefore, 44% of these cases had no clear winner by our definition.}

The low plaintiff win rate is consistent with suggestions many scholars have made that false advertising claims are quite difficult to win. One explanation for this low success rate may be that clearer cases of false advertising may be remedied through the private dispute resolution mechanisms we described above. The limited data we have so far regarding NAD proceedings suggests that the NAD resolves approximately twice as many disputes each year as federal courts issue opinions in false advertising cases. And at least in 2011 and 2012, the challenger’s success rate in NAD proceedings was substantially higher – the NAD recommended modifications to the ads at issue in nearly 80% of the cases. If that data is representative, then it may suggest that stronger false advertising cases never make it to federal litigation, so some of the low success rate can be explained
by selection effects. This of course would not explain why plaintiffs continue to bring the weaker cases under the Lanham Act. To the extent litigants are aware of the low plaintiff success rate, something other than the likelihood of prevailing on the merits must be motivating these claims.\textsuperscript{60}

B. Grant Rates by Disposition

Next, we looked at how success rates changed for different procedural dispositions. Figure 4 disaggregates the overall win rate, focusing on whether various motions are granted or denied, to provide a finer-grained look at the difficulty of prevailing at each stage.

![Figure 4. Success Rate by Type of Disposition](image)

Figures 4, 5, 7 and 8 reflect grant rates on various motions; they are not win rates in the sense we described above. For example, motions to dismiss were granted in 59.6% of the opinions.

\textsuperscript{60} It is possible, of course, that litigants are not primarily motivated in this area by the likelihood of receiving a final favorable disposition from a court. Alternatively, these cases might have value to the plaintiff simply because they raise the costs of competitors’ advertising and/or induce the defendant to modify or withdraw the offending ad. If that is the case, then the fact that 44% of cases never reach a definitive outcome might be counted as a reason in favor of bringing the case – more than half of cases either result in a judgment for the plaintiff or at least cannot be easily disposed of by the defendant.
in which the court addressed such a motion. Grant of a motion to dismiss is obviously a “win” for the defendant because the case is dismissed, at least temporarily. But denial of a motion to dismiss is not a “win” for the plaintiff in the same sense – those cases go forward, but with no guarantee the plaintiff will ultimately prevail.

Nevertheless, as Figure 4 shows, the only stage at which the plaintiff is successful more than half of the time (either in having its own motions granted or defeating the defendant’s motion) is at the permanent injunction stage, where plaintiffs prevailed 72.3% of the time (34 of 47 opinions). Defendants prevailed on 55.4% (129 of 233) of their motions to dismiss and 63.3% (81 of 128) of their motions for summary judgment; they also defeated plaintiffs’ summary judgment motions 50% (20 of 40) of the time and plaintiffs’ preliminary injunction motions 40.7% (33 of 81) of the time. Although plaintiffs have a low overall success rate, their likelihood of winning improves as the case progresses. Plaintiffs win 72% (34 of 47) of cases in which a court considers a plaintiff’s motion for a permanent injunction.

If we control for cases brought by only individual plaintiffs, illustrated in Figure 5, we see some changes in these rates, but the only notable difference is at the motion to dismiss stage.
Defendants’ motions to dismiss are granted in 49.7% of the cases (94 of 189) that do not involve only natural person plaintiffs and denied in 50.3% of those cases (95 of 189). Thus, defendants’ motions to dismiss were granted somewhat less often and denied somewhat more often when we control for cases with natural person plaintiffs. This difference makes sense because, if “natural persons as plaintiffs” is a good proxy for consumer suits, we would expect those suits to be dismissed on standing grounds, and standing is generally resolved through a motion to dismiss.

Otherwise, the same patterns seen in Figure 4 hold. Defendants’ summary judgment motions were granted 63.6% of the time (70 of 110), whereas plaintiffs’ summary judgment motions were granted 47.4% of the time (18 of 38). Plaintiffs’ motions for preliminary injunction were granted only 41.3% of the time (31 of 75). Plaintiffs prevailed more than 50% of the time only at the permanent injunction stage when their motions were granted 76.7% of the time (33 of 43).

C. Standing
As discussed above, standing is considered a significant barrier to false advertising claims. Figure 6 reflects initial findings on how frequently standing impacts the outcome of a case.

![Figure 6. Impact of Standing Consideration on Case Disposition](image)

When courts considered standing, defendants won 68.6% of the time (81 of 118), whereas plaintiffs ultimately won only 9.3% of the time (11 of 118). By comparison, in decisions that did not consider standing, defendants won 38.2% of the time (186 of 487) and plaintiffs won 15.4% of the time (75 of 487). Thus, even though defendants’ win rate is considerably higher than plaintiffs’ whether standing is considered or not, defendants win more often (and plaintiffs win less frequently) when standing is considered.

One explanation for this difference could be that defendants only raise, and courts therefore only consider, standing when it is likely that the plaintiff lacks standing, or that the case is otherwise weak. The effects of standing also could be more pronounced at certain stages, such that overall win

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61 A “win” here is defined the same way it is in the overall win rate section, above.
rates are not fully representative. We therefore disaggregated the effect of standing to see how standing affects dispositions at different stages of the litigation.

To address this issue, Figure 7 displays how courts ruled on standing issues at different procedural points in the cases.

![Figure 7. Disposition of Cases Adjudicating Standing](image)

Defendants’ motions to dismiss were granted in 77.6% (59 of 76) of the decisions in which the court addressed standing at that stage. Standing is considered much less frequently at later stages, and the effects are less pronounced.

As Figure 8 shows, when we control for cases in which natural persons were the sole plaintiffs, defendants’ motions to dismiss were granted 70.4% of the time (38 of 54). Motions to dismiss are therefore granted somewhat less frequently in cases not involving natural person
plaintiffs, but even for business entities, motions to dismiss are granted at a fairly high rate when the court considers standing.\textsuperscript{62}

![Figure 8. Disposition in Cases Ajudicating Standing, Excluding Natural Persons as Sole Plaintiffs](image)

Figure 9 considers the effect of standing consideration on win rates in (1) all cases, and (2) motion to dismiss cases only. As we previously noted, defendants prevailed in 77.6\% of decisions in which standing was addressed and there was a motion to dismiss, compared to 66.7\% of cases in which standing was addressed at any stage.\textsuperscript{63} Therefore, defendants’ success rate is high whenever a court addresses standing, but it is particularly high when the court addresses standing at the motion

\textsuperscript{62} Defendants’ summary judgment motions are granted somewhat less frequently in cases considering standing when we control for natural person plaintiffs (77.8\% vs. 78.3\% of the time in all cases considering standing). But at this point our data include only 18 cases in which the defendant filed a motion for summary judgment and the court considered standing once we have controlled for natural person plaintiffs.

\textsuperscript{63} One plaintiff prevailed in the 62 cases in which standing was raised at the motion to dismiss stage. Given the posture, it is generally not possible for the plaintiff to “win” any of these cases, since the best case scenario is denial of the motion to dismiss, which is not a disposition of the case. In this one unusual case, the court both denied the motion to dismiss and granted the plaintiff’s motion for preliminary injunction. So it considered standing at the motion to dismiss stage, but the decision is not purely on a motion to dismiss. Eleven plaintiffs prevailed in the 118 cases in which standing was addressed at any stage.
to dismiss stage. Again, one possible explanation is that courts address standing in relatively weak cases, so one would expect to see high win rates for defendants. Still, it is clear that defendants prevailed on standing grounds in a significant number of cases.

Finally, we were interested in determining the extent to which dispositions in cases addressing standing differed depending on whether the ad containing the allegedly false statement mentioned the plaintiff’s products or services, the defendant’s products or services, or both. Figure 10 shows the percentage of plaintiffs found to have standing, sorted by mention of each party’s products.
Plaintiffs were found to have standing in 52.3% of (23 of 44) cases in which the statement at issue mentioned the plaintiff’s product. Only 28.4% of the plaintiffs (21 of 74) had standing when the ad did not mention the plaintiff’s product. Not surprisingly, given that courts generally discuss standing in terms of the competitive relationship between the plaintiff and the defendant, courts find that plaintiffs have standing most frequently in cases in which the ad at issue mentions both parties’ products (64.3% of cases compared to 28.9% of cases in which both products are not mentioned).

D. Form of Ad

We were particularly interested in the extent to which the form of the advertisement in which the allegedly false statement appears affects the outcome of a case. Because one of the purposes of the 1989 Amendment to the Lanham Act was to make clear that false advertising cases could be brought against both false statements about one’s own goods or services and false statements about another’s goods or services, we were interested in determining the extent to which
the plaintiff’s success rate depended on whether the allegedly false claim referred to the plaintiff’s products or services, the defendant’s products or services, or both. Figure 11 shows these results.

![Figure 11. Impact of Product Mentions on Plaintiff Success](image)

We found some differences along this dimension: plaintiffs prevailed 17.5% of the time in cases involving ads mentioning only plaintiff’s product, 14.7% of the time in cases involving ads that mentioned only the defendant’s product, and 17.3% of the time when both products were mentioned. Notably, plaintiffs win only 4.4% of cases in which the ad mentions neither the plaintiff’s nor the defendant’s product.

Next, we considered whether the use of text and/or images in an ad might correlate with plaintiffs’ success rates. Courts have sometimes suggested that the combination of audio-visual material with textual media makes some difference. In *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, for example, the defendant argued that its ad, which claimed that its detergent did a

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*228 F.3d 24 (1st Cir. 2000).*
better job of whitening clothes, drew a comparison only to other detergents and not to chlorine bleach. As a result, the defendant suggested, even if consumers actually believed that its detergent outperformed chlorine bleach, it could not be liable under *Mead Johnson* because “a consumer survey could not be used to show that an advertisement that is clear and unequivocal on its face otherwise conveyed a misleading message.” 

The First Circuit disagreed, distinguishing the short, printed slogan at issue in *Mead Johnson* from the television commercial launched by defendants in *Clorox*, the latter of which the court believed “communicate[d] its message to consumers through a combination of audio-visual and textual media.”

Building on Rebecca Tushnet’s work regarding courts’ difficulty assessing the truth of visual content, we thought that we might see meaningful variance in the rate at which courts find statements false depending on the context in which those statements were made. Specifically, we hypothesized that courts would find statements made through images to be false at a significantly higher (or lower rate) than ads that involved only text. As Figure 12 shows, the data do not reflect a significant difference between the success rate in cases involving ads that communicate in only text or images (plaintiffs win 19.4% of the cases involving only visual images and 17.1% of the cases involving only textual statements).

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65 Id. at 37, quoting *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, modified by, 209 F.3d 1032 (7th Cir.2000).
66 *Clorox*, 228 F.3d at 38.
67 Tushnet, *Looking at the Lanham Act*
68 Tushnet suggests that courts oscillate between treating images as transparent and having special access to truth, on the one hand, and dangerously opaque and not susceptible of evaluation, on the other hand). Id.; see also Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. _ (2012).
Interestingly, we do see a significant difference between decisions involving statements that have both text and images and those involving only text or visual images. When claims are based on an alleged falsity conveyed through both text and visual imagery, plaintiffs win at a higher rate (29.6%) than when the statement is conveyed in only one of those ways.\(^6\)

E. Materiality

Given the prominence of materiality in some recent scholarship that advocates borrowing the concept from advertising law and importing it into trademark law, we were interested to determine the extent to which materiality affects outcomes in false advertising cases. As Figure 13 shows, of the opinions we have coded so far, only 68 (approximately 11.2%) have addressed materiality. In fifteen of these opinions, materiality was deemed a question of fact. Courts made a

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\(^6\) The difference in success rate between the “Either text or visual” category (where plaintiffs win 18.8% of the time) and the “Visual, not text” and “Text, not visual” categories is explained by the higher rate of success in cases involving both text and visual, all of which would be included in “Either Text or visual.”
definitive finding on materiality in the remaining 53 opinions. In 38 decisions (71.7%), the court found the statement material, compared to 15 (28.3%) in which the court found the statement immaterial. Plaintiffs ultimately prevailed in 28 of the 38 cases (73.7%) in which the statement was material; the defendants prevailed in 4 of 38 cases (10.5%) despite the court having found its statement material. Predictably, no plaintiff prevailed when the court found the statement immaterial.

![Figure 13: Disposition of Cases Involving Materiality](image)

F. Falsity

Figure 14 summarizes an important dependent variable: judicial conclusions about falsity. Interestingly, most false advertising decisions appear to be decided on issues other than whether the ad was true or false. Courts consider the issue of falsity in only 32.9% (199 of the 605) opinions in our sample, of their false advertising opinions. This raises the question of how the other 406 cases
were decided. Our preliminary results indicate that many were resolved on standing, through pleading defects weeded out in motions to dismiss or on summary judgment.

As illustrated in the second set of bars in Figure 14, courts concluded that an ad was false in only 16.9% of all false advertising cases. Finally, the third set of bars show that when courts did make a decision about the truth of an advertisement, more than half (51.3%) found that the ad was false.

Because so many false advertising cases are dismissed on standing grounds, we took another look at the consideration of falsity, omitting all cases in which standing was decided. Figure 15 shows those results.
Excluding opinions in which standing was considered, falsity was considered in 35.7% of opinions, was found in 18.5%, and when considered, ads were found to be false in 51.7% of decisions. Still, more than half of the false advertising opinions in our sample were decided on grounds other than standing or falsity. Of these 313 cases, 164 opinions decided a motion to dismiss and 70 opinions were summary judgment decisions.

We expected that plaintiffs would have a higher success rate when the challenged statements were found to be literally false compared to when the statements were found to be true but misleading, confusing or deceptive. As we mentioned previously, statements that are deemed literally false are actionable under the Lanham Act without need for further proof of consumer impact. By contrast, statements that are literally true may still be actionable if they are misleading or confusing to consumers, but a plaintiff must provide proof (generally through a survey and expert testimony) that consumers have received the false message.
Figure 16 illustrates how the plaintiff success rate correlates with the classification of the statement in terms of its falsity.\textsuperscript{70}

![Figure 16. Impact of Type of Statement on Plaintiff Success](image)

One difficulty recording these data is that courts are often imprecise with their language and do not identify the type of falsity at issue. For example, courts sometimes state that the ad at issue contained a false statement. The category represented in Figure 16 as “false” includes statements that should have been placed in one of the other categories but the court never made a finding that was specific enough for us to do so. And there is also overlap between the categories because courts sometimes characterize a statement in more than one way. Some overlap exists between the “false”

\textsuperscript{70} These success rates are high, particularly in comparison to the overall plaintiff success rate, because only cases in which the court found some kind of falsity are included here. Out of the 605 cases we have coded so far, only 178 (29.4\%) of all decisions considered whether the statement was false. Of those opinions, only 81 (45.5\% of decisions in which falsity was considered) found the statement at issue false in any way. Very few cases involved statements found not to be false because they were puffery. Only 20 cases addressed puffery at all. The statement was found to be puffery in only 13 of those cases (4 others found the statement not to be puffery, and 3 found the question of puffery to be one of fact).
category and each of the other categories. Doctrinally, the cases included in the third bar are a subset of the those in the second because statements that are false by necessary implication are considered literally false. Occasionally, courts also characterize a statement as literally false and misleading deceptive or confusing, using the lay meaning of these terms in place of doctrinally exact categorizations.

Keeping these caveats in mind, our data show that the plaintiffs have a high success rate if they can prove that the defendant’s ad was false in any category. If we aggregate “literally false” and “false by necessary implication” categories (the latter of which includes only 3 cases so far), plaintiffs win 72.6% of the time. Our preliminary data do not reveal a meaningful difference in plaintiff win rates between these literally false ads and those found to be literally true but deceptive, misleading or confusing. Plaintiffs won 72.3% of cases in the collective category of deceptive, misleading, or confusing. These results are surprising because cases involving literally true, but deceptive, confusing or misleading statements are generally regarded as the most difficult to win as they require substantial additional evidence.\textsuperscript{71} We do not mean to suggest that there are not important differences between the categories; even if plaintiffs are successful with regard to confusing claims, those plaintiffs have to offer additional expensive proof, and that may have significant settlement impact. When the statement at issue is classified as false, without the court specifying whether it is literally false, plaintiffs still win 46.2% of their cases.

V. Conclusion

Our preliminary conclusions are as follows. The initial hypothesis that plaintiffs will have low win rates is generally supported by the data. Plaintiffs won only 14.2% of the false advertising decisions in our sample. The success rate does increase for the minority of opinions in which the

\textsuperscript{71} Cf. Tushnet, Running the Gamut at \_ ("An explicit claim, in other words, is much easier to challenge than an implicit claim, even when both are the same claim from the consumer’s standpoint.").
court ultimately decides a question of falsity. Heightened standing requirements for false advertising cases under the Lanham Act do substantially reduce the number of these claims. Materiality also presents a doctrinal barrier to success but courts remove many more false advertising cases from their dockets based on standing. We did not find that the presence of images in an ad made a significant difference, but plaintiffs did win more frequently when a challenged ad contained both images and text. Plaintiffs’ win rates increased modestly when the ad mentioned the plaintiff’s products (17.5%) or both parties’ products (17.3%), and was lower when defendants’ ads spoke only of their own products. Our preliminary findings show no correlation between the degree of falsity and plaintiff win rates.