17-2252

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

ELI LILLY AND COMPANY, *ET AL.*,

Plaintiffs-Appellees,

—v.—

ARLA FOODS USA, INC., *ET AL.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
CIVIL DIVISION
NO. 1:17-CV-00703-WCG
HONORABLE WILLIAM C. GRIESBACH

BRIEF FOR PLAINTIFFS-APPELLEES

DANIEL M. JANSSEN
JOHANNA M. WILBERT
QUARLES & BRADY LLP
411 East Wisconsin Avenue,
Suite 2400
Milwaukee, Wisconsin 53202
(414) 227-5000

STEVEN A. ZALESIN
TRAVIS J. TU
PATTERSON, BELKNAP, WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorneys for Plaintiffs-Appellees

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2252

Short Caption: Eli Lilly and Company, et al. v. Arla Foods, Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

| | PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Eli Lilly and Company

Elanco US Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Patterson Belknap Webb & Tyler LLP

Quarles & Brady LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Eli Lilly and Company is a corporate parent of Elanco US, Inc. Eli Lilly owns 100% of Elanco US, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: SA Zalesin Date: 7/18/2017

Attorney's Printed Name: Steven A. Zalesin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

Address: Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas, New York, New York 10036

Phone Number: 212-336-2110 Fax Number: 212-336-2111

E-Mail Address: sazalesin@pbwt.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2252

Short Caption: Eli Lilly and Company, et al. v. Arla Foods, Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Eli Lilly and Company

Elanco US Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Patterson Belknap Webb & Tyler LLP

Quarles & Brady LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Eli Lilly and Company is the corporate parent of Elanco US, Inc. Eli Lilly owns 100% of Elanco US, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Travis J. Tu Date: 7/18/2017

Attorney's Printed Name: Travis J. Tu

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

Address: Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas, New York, New York 10036

Phone Number: 212-336-2765 Fax Number: 212-336-7965

E-Mail Address: tjtu@pbwt.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2252

Short Caption: Eli Lilly and Company, et al. v. Arla Foods, Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Eli Lilly and Company

Elanco US Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Patterson Belknap Webb & Tyler LLP

Quarles & Brady LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Eli Lilly and Company is the corporate parent of Elanco US, Inc. Eli Lilly owns 100% of Elanco US, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Daniel M. Janssen Date: 7/18/2017

Attorney's Printed Name: Daniel M. Janssen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Quarles & Brady LLP
411 E. Wisconsin Ave., Ste 2400, Milwaukee, WI 53202

Phone Number: 414-277-5733 Fax Number: 414-978-8733

E-Mail Address: daniel.janssen@quarles.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2252

Short Caption: Eli Lilly and Company, et al. v. Arla Foods, Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Eli Lilly and Company

Elanco US Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Patterson Belknap Webb & Tyler LLP

Quarles & Brady LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Eli Lilly and Company is the corporate parent of Elanco US, Inc. Eli Lilly owns 100% of Elanco US, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Johanna M. Wilbert Date: 7/18/2017

Attorney's Printed Name: Johanna M. Wilbert

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Quarles & Brady LLP
411 E. Wisconsin Ave., Ste 2400, Milwaukee, WI 53202

Phone Number: 414-277-5495 Fax Number: 414-271-3552

E-Mail Address: johanna.wilbert@quarles.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes and Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

JURISDICTIONAL STATEMENT

The jurisdictional statement of Defendants-Appellants Arla Foods, Inc. and Arla Foods Productions LLC (collectively "Arla") is complete and correct.

STATEMENT OF ISSUES PRESENTED

1. Were Arla's advertisements, which portrayed recombinant bovine somatotropin ("rbST") as a deadly monster and described it as "weird stuff" added as an "ingredient" to some cheeses, literally false or false by necessary implication?

2. Did the district court clearly err in finding that Plaintiffs-Appellees Eli Lilly and Company and Elanco US, Inc. (collectively "Elanco") established a likelihood of success on the merits where evidence in the record demonstrated that (a) Arla's ads were likely to mislead consumers about the safety of rbST and the quality of dairy products made with milk of rbST-treated cows, and (b) Arla intended its advertisements to convey false messages?

3. Did the district court clearly err in finding that Elanco was likely to suffer reputational and financial harm as a result of Arla's advertisements when Elanco sells the only rbST supplement approved by the U.S. Food and Drug Administration ("FDA") and Arla's advertising campaign expressly targeted rbST, by name, with false claims?

4. Does the district court's preliminary injunction order satisfy the requirements of Federal Rule of Civil Procedure 65(d)?

STATEMENT OF THE CASE

On April 25, 2017, Arla—a $10 billion international food conglomerate—unveiled an egregious smear campaign against one of Elanco's mainstay products. In advertisements that blanketed television, websites, and social media outlets throughout the country, Arla claimed that its cheese is safer and of better quality than others because Arla does not use milk from cows that receive rbST, a supplement given to some cows to enhance milk production. It did so by depicting rbST as a six-eyed monster with "razor sharp horns" that electrocutes anyone who touches it, and by expressly claiming that rbST is "weird stuff" that is added as an "ingredient" to some cheeses, which people should not "feel good about" consuming.

Elanco is one of the world's leading animal health companies and produces the only rbST supplement approved by FDA for sale in the United States. On May 19, 2017, Elanco commenced this action in the U.S. District Court for the Eastern District of Wisconsin, asserting that Arla's ad campaign violated federal and Wisconsin truth-in-advertising laws. To restore the status quo, Elanco also filed a motion for a preliminary injunction to prevent Arla from further disseminating false information about rbST pending resolution of its claims on the merits.

On June 15, 2017, the district court (Griesbach, C.J.) granted Elanco's motion for a preliminary injunction in a 23-page Decision and Order supported by extensive findings of fact and conclusions of law. (App. 1.) The district court recognized that a preliminary injunction is an "extraordinary" remedy, but found that Elanco established a high likelihood of success on the merits. (*Id.* at 11.) Specifically, the district court found that Elanco presented "strong evidence" that dairy products

made with "milk from rbST-treated cows and from non-rbST-treated cows" are "equally safe and healthy for human consumption," and that "there is no quantifiable difference between" the two. (*Id.* at 15–16.) Contrary to these scientific facts, Arla's advertisements conveyed the "misleading message that cheese from cows treated with rbST is dangerous, unhealthy, and something that you should not feel good about feeding to your family," and "falsely stat[ed]" that rbST is "an ingredient that is placed in other companies' cheese" when it is actually a supplement given to some cows. (*Id.* at 18–19.)

The district court further found that Arla's campaign of "fear-mongering" was likely to inflict irreparable injury upon Elanco and harm the public. Because Elanco is the only seller of rbST in the United States, the district court recognized that "a reputational attack on rbST is necessarily a reputational attack on" Elanco, and that Elanco would "continue to suffer unquantifiable reputational and financial damage for the length of the campaign[.]" (*Id.* at 20.)[1] Moreover, the district court found that Arla's advertising "only serve[d] to disseminate misinformation to the public," and that the balance of hardships weighed decidedly in Elanco's favor. (*Id.* at 21.)

In this appeal, Arla does not contest the district court's findings regarding Elanco's irreparable injury, the harm to the public interest, or the balance of hardships. Rather, Arla asks this Court to vacate the preliminary injunction and

[1] In denying Arla's motion for a stay pending appeal, the district court added that "[t]he type of advertising campaign in this case—which implicitly calls into question the safety of a product given to dairy cows—is particularly harmful for a company involved in food production." (SA 297.)

allow it to resume its false attacks on rbST because, in Arla's view, the district court's finding that Elanco is likely to succeed on the merits was not supported by evidence. In fact, there was abundant proof in the record to buttress the district court's findings, and Arla has not come close to demonstrating that those findings were clearly erroneous or that the entry of the preliminary injunction was an abuse of discretion. The order of the district court should be affirmed.

A. Posilac®

Bovine somatotropin ("bST") is a hormone produced in the pituitary glands of all cattle that coordinates cows' metabolism so that nutrients are funneled toward the production of milk. (App. 1–2.) rbST is virtually identical to naturally occurring bST and helps boost the production of milk in supplemented cows. (*Id.*; *see also* SA 83.)

Elanco's Posilac supplement is the only rbST product approved for sale in the United States. (App. 9.) Originally developed in the 1980s, Posilac was acquired by Elanco in 2008 and today is "one of its top five selling products." (*Id.* at 1.)

B. rbST Safety

Before approving rbST, FDA "conducted an in-depth review of the scientific evidence regarding the composition and safety of dairy products made with milk from cows treated with rBST." (*Id.* at 2.) FDA "concluded that rbST 'is safe and effective for dairy cows, [and] that milk from rbST-treated cows is safe for human consumption." (*Id.*) In the decades since its approval, FDA and authoritative bodies around the world have repeatedly reaffirmed these conclusions. (*Id.*)

In 2014, a joint expert panel of the United Nations and the World Health Organization (known as "JECFA") conducted an exhaustive review and found "no evidence" that "the use of rBSTs would result in a higher risk to human health." (*Id.* at 15.) In 2016, FDA published a similar report in response to a Citizen Petition requesting that the agency review the safety of Posilac. (*Id.*) FDA reaffirmed that "rbST is safe" and that "there is no significant difference between milk from cows treated with [rbST] and untreated cows." (*Id.*)

The district court found that Elanco presented "strong evidence" that there is "no quantifiable difference between milk from cows treated with rBST and those that have not been treated with rBST." (*Id.*) Indeed, the district court found "a high likelihood" that Elanco ultimately "can demonstrate that milk from rbST-treated cows and from non-rbST-treated cows are not significantly compositionally different and are equally safe and healthy for human consumption." (*Id.* at 16.)

Arla does not contest the district court's scientific findings on appeal. However, in its opening brief, Arla gratuitously asserts that "nearly every other industrialized country" has rejected rbST "based on safety concerns to cattle, humans, or both" and includes a list of adverse health effects that purportedly "have been shown" to result from rbST supplementation. (Arla Br. 6.) Elanco thoroughly refuted these assertions in the proceedings below, and the district court expressly rejected them in its decision.[2]

[2] The evidence showed that countries that have not approved rbST have acted not out of "human safety concerns but rather economic considerations relevant to those countries." (App. 14.) (Footnote Continued on Next Page)

C. FDA and Wisconsin Proscriptions

FDA has published detailed guidance for the dairy industry regarding rbST-related advertising. FDA's guidance, first issued in 1994, declares that promotional claims that a dairy product is "rbST-free" are "false and misleading" if they state or "imply that milk from untreated cows is safer or of a higher quality than milk from [rBST] treated cows." (SA 91.) FDA reaffirmed that such claims are false and misleading in 2016. (*Id.* at 98.)

Recognizing that false claims about product safety can be made both expressly and by implication, FDA's guidance further warns that even a literally truthful statement that "rBST has not been used in the production of the subject milk[] has the potential to be misunderstood by consumers." (*Id.* at 91.) Accordingly, if advertisers choose to make such claims, they must take precautions *not* to imply a safety or quality difference. At minimum, manufacturers must accompany promotional claims regarding the use of milk from untreated cows with an affirmative statement that "No significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows," and must provide reasons other than safety or quality why the manufacturer uses milk from non-treated cows. (*Id.*)

All of the purported adverse health effects listed by Arla have been debunked by the "most recent reviews of the underlying scientific literature on rbST." (*Id.* at 15–16.) Arla's reliance on the Sixth Circuit's decision in *International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010), is misplaced for the same reason. There, the Sixth Circuit cited safety concerns that had been raised about rbST in striking down an Ohio ban on "rbST-free" promotional claims on First Amendment grounds. Elanco demonstrated that each of the cited concerns has been refuted by more recent scientific evidence. (App. 94–96.) The district court agreed. (*Id.* at 13, 15–16.)

The State of Wisconsin has similarly declared that advertisements that portray "rbST-free" dairy products as superior are false and misleading. Specifically, the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP") has published regulations that prohibit any person from representing, "directly or by implication," that dairy products "produced with milk from cows treated with [rbST] are of lower quality, or are less safe or less wholesome than other dairy products." Wis. Admin. Code § ATCP 83.02(2)(e). DATCP regulations also prohibit any person from representing that dairy products made with milk from cows treated with rbST differ significantly in composition from other dairy products. *Id.* § ATCP 83.02(2)(d).

Like FDA, Wisconsin requires manufacturers who make rbST-related claims to affirmatively disclose that there is no discernable difference in milk from treated and untreated cows. Wisconsin's regulations, however, mandate that such qualifying statements must be "at least as clear and conspicuous" as the claims regarding the use of milk from untreated cows. *Id.* § ATCP 83.02(4)(a)(1).

D. Arla's False Advertising Campaign

Conspicuously absent from Arla's opening brief is any description of the advertising campaign the district court preliminarily enjoined. Arla asserts that its campaign "made the truthful assertion that its cheese always is sourced from cows that have not been treated with rBST." (Arla Br. 8.) This anodyne description bears no resemblance to Arla's actual advertisements.

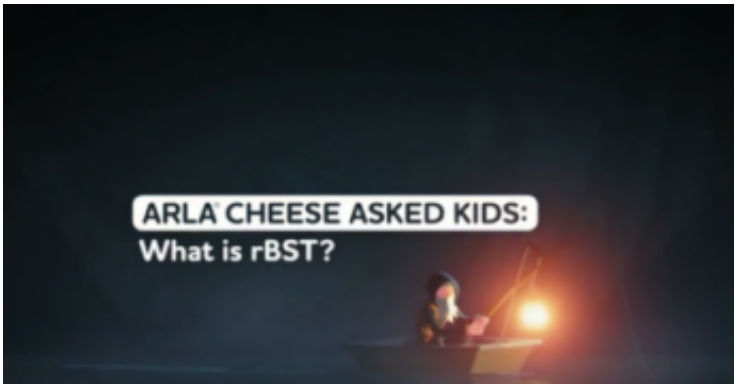
1. Arla's "Live Unprocessed" Campaign

Arla's advertising campaign was entitled "Live Unprocessed." (SA 34.) In a press release, Arla announced that the "$30 million campaign" was part of a planned "rapid and bold expansion into the U.S. grocery retail dairy" and came "at a tipping point of Americans' increasingly voracious desire to know more about the products they're eating and feeding their families." (*Id.*) The campaign featured "a television buy across 20+ national cable networks," "broadcast and video on demand," and "print, digital, social, public relations, consumer promotions and retail support." (*Id.*)

2. Arla's "rBST" Commercial

The centerpiece of Arla's campaign was a series of commercials in which children were asked "what—or who—they thought rbST, xanthan and sorbic acid were." (*Id.*) In a "Behind the Scenes" video, Arla explained that the children were not told that these unfamiliar items are actually "ingredients" often "found in sliced and cream cheeses." (*Id.* at 13.) The children instead were left to guess. Based on the sound of their names and nothing more, some of the children speculated that these "ingredients" were dangerous or unsafe. (*Id.*) Arla then hand-picked specific children and paired them with cartoon animators "who brought their fantastical stories" to life as commercials, supposedly to "show people how some cheese is made." (*Id.*)

For its "rBST" commercial,[3] Arla chose a seven-year-old girl named Leah who imagined "rBST" as a "very dangerous" monster.[4] (*Id.*) The commercial opened with a screen that said, "ARLA CHEESE ASKED KIDS: What is rBST?" (SA 10.)



As ominous music played in the background, Leah answered that rbST is a monster that "has razor sharp horns" and is "so tall it can eat clouds." (*Id.*) Meanwhile, an animated "rBST" monster, replete with horns, fangs, and six eyes, rose up from dark water. (*Id.*)

[3] Playable video files of Arla's commercials are available in the district court record. (D. Ct. Dkt. 5-3.)

[4] Scientists use the abbreviation "rbST," and the district court adopted that convention. Arla's advertisements used "rBST" instead. This brief uses "rbST" except when quoting Arla's advertisements.

As Leah explained that the monster's "fur is electric," the "rBST" monster electrocuted a man attempting to touch it, sending him plunging down a hill. (*Id.*)

The dark scene then switched to a sun-filled room, where Leah was cheerfully drawing a picture. An adult narrator proclaimed that "Actually rBST is an artificial growth hormone given to some cows, but not the cows that make Arla cheese. No added hormones. No weird stuff." (*Id.*) Meanwhile, a tiny disclaimer, not legible to ordinary viewers, briefly appeared at the bottom of the screen: "Made with milk from cows not treated with rBST. No significant difference has been shown between milk derived from rBST-treated cows and non-rBST-treated cows." (*Id.*)

In the final frames of the commercial, the phrases "No added hormones" and "No weird stuff" were prominently displayed, while Leah happily ate a sandwich made with Arla cheese. (*Id.*)

3. Arla's Website

Arla's "Live Unprocessed" webpage also falsely portrayed rbST as unsafe. (SA 16.) In addition to featuring the "rBST" commercial, Arla's webpage claimed that, unlike dairy companies that use milk from cows supplemented with hormones such as rbST, "Arla provides dairy products that ***you can feel good about eating and serving to your friends and family***." (*Id.* at 29 (emphasis added).) The clear (and false) implication was that consumers ***should not*** "feel good about eating" or "serving" cheese made with milk from rbST-treated cows.

Arla's webpage also repeated the false claims that rbST is "weird stuff," that Arla's products are of better quality than cheese made with milk from rbST-treated cows, and that rbST is an "ingredient" in some cheeses. For example, the webpage stated, "We've been making cheese the simple, honest way for over 100 years. Ingredients you can pronounce. Happy, healthy cows. ***No weird stuff***." (*Id.* at 18 (emphasis added).) Hovering a mouse over an icon next to the phrase "No weird stuff" triggered a pop-up screen that read:

> No artificial additives. No ***ingredients*** that you can't pronounce. No ***ingredients*** that sound confusing or in any way like a made-up word. No ***ingredients*** with names that sound like they may be aliens with

> nine arms, beasts with electric fur, gigantic robots or bears in disguise. ***No artificial growth hormones like rBST****. . . . Nor anything else artificial, because our cheese has always been made with simple ***ingredients*** and never anything weird.

(*Id.* at 19 (emphasis added).) Further down the webpage, Arla stated, "100% cheese; ***0% weird stuff. . . . No added hormones.* No weird stuff.***" (*Id.* at 23.)[5]

4. Twitter

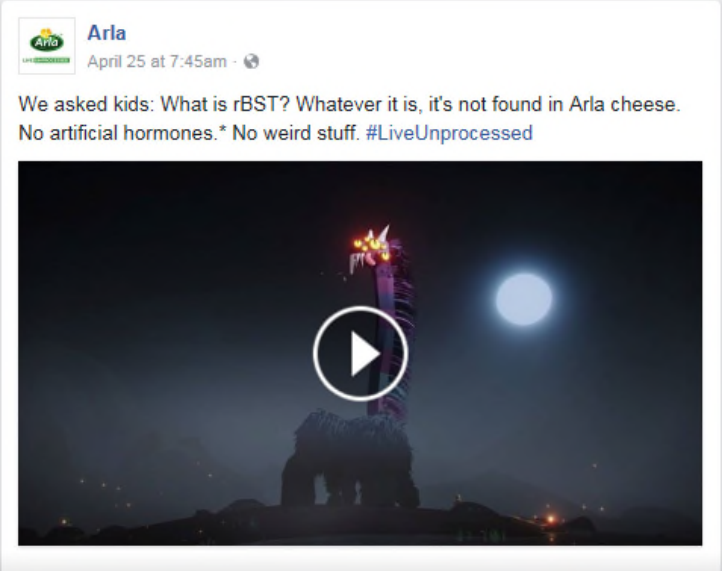
Arla maintains a Twitter account. (*Id.* at 38.) On April 19, 2017, Arla tweeted a "teaser" advertisement for the "rBST" commercial that falsely portrayed rbST as scary and unsafe. The text stated, "We asked kids: What's rBST?" (*Id.*) Below the text was an alarming graphic with the phrase, "IT HAS RAZOR SHARP HORNS." (*Id.*)

5. Facebook

Arla also maintains a Facebook page to which it posted the "rBST"

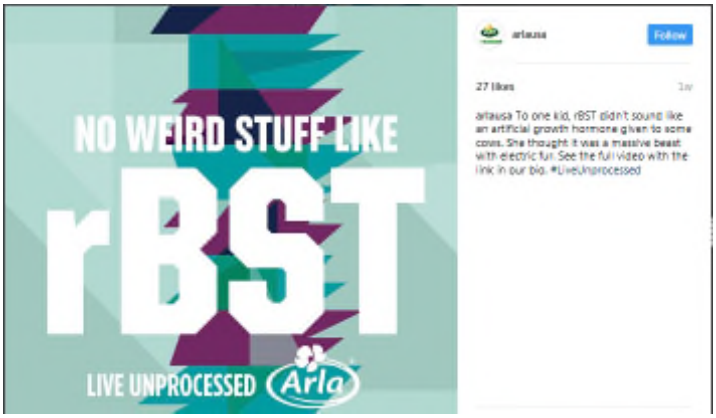
[5] The asterisks that accompanied Arla's claims regarding "No added hormones" referred to a disclaimer that appeared in tiny font at the very bottom of some, but not all, of Arla's webpages. The disclaimer read: "No significant difference has been shown between milk derived from rBST-treated and non-rBST treated cows." (*Id.* at 29.)

commercial, reiterating the commercial's false claims. (*Id.* at 42.)



6. Instagram

Arla maintains the Instagram account "arlausa." (*Id.* at 48.) Arla posted links to its "rBST" commercial on Instagram, which also referred to rbST as "weird stuff." (*Id.*)



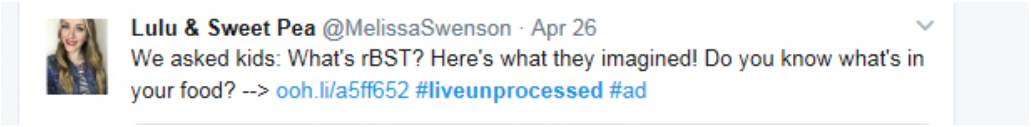
7. YouTube

Arla also posted its "rBST" commercial to YouTube. (*Id.* at 44.) In text that accompanied the commercial, Arla falsely claimed that rbST is a "weird ingredient" found in other cheese: "Arla Cheese only uses ingredients you'd recognize, unlike some companies that

use weird ingredients[.]" (*Id.*)

8. Other Social Media

Arla paid spokespeople and "bloggers" to further disseminate its messaging. (*Id.* at 52.) In addition to driving traffic to Arla's website, these bloggers repeated Arla's false claims that rbST is an ingredient found in other cheese. For example, one of Arla's sponsored bloggers falsely described rbST as an ingredient "in your food." (*Id.* at 54.)



Another Arla-sponsored blogger wrote, "***So, what's in your cheese?***" and stated that Arla's ad campaign was designed "to see if kids understood some ***ingredients*** commonly found in dairy products." (*Id.* at 55.) She then reported that when "asked to draw their interpretations of Xanthan, rBST*, and Sorbic Acid . . . [t]he kids (understandably) drew vivid representations of ***the ingredients***, often imagining them ***as monsters, bad guys, or icky chemicals***." (*Id.* (emphasis added).)

E. Elanco's Complaint and Motion for a Preliminary Injunction

Arla's "Live Unprocessed" campaign had an immediate detrimental impact on Elanco. In only its first weeks, the campaign generated thousands of internet posts, made millions of consumer impressions, and reached a television audience of millions nationwide. (*Id.* at 6–7, 73, 79, 252.) In response to Arla's advertising, a major U.S. cheese producer decided to drastically curtail its use of milk from rbST-

treated cows.[6] (*Id.* at 7.) Companies that supply milk to this cheese producer sent letters to dairy farmers telling them to stop using Posilac by the end of 2017. (*Id.* at 263.) Elanco subsequently learned directly from the producer that Arla's campaign was a significant motivating factor in its decision. (D. Ct. Dkt. 30-5; App. 131.)

Recognizing the catastrophic losses that would result if others followed suit, Elanco filed this action on May 19, 2017—just over three weeks after the launch of Arla's campaign—and accompanied its complaint with a motion for a preliminary injunction.[7] In support of the motion, Elanco submitted a declaration from Dr. Robert Collier, a retired professor at the University of Arizona who, years earlier, led the development of Posilac, attesting to the safety of rbST and the extensive scientific evidence demonstrating that dairy products made with milk from supplemented cows are of no lesser safety or quality.[8] (SA 81.) Elanco also submitted a declaration from Grady Bishop, an employee who oversees Elanco's relationships with the dairy industry. Mr. Bishop attested to the falsity of Arla's ads and the irreparable harm they were inflicting on Elanco. (*Id.* at 1–8.)

In addition to Arla's advertisements, Mr. Bishop's declaration attached copies of consumer complaints posted to Arla's Facebook page shortly after the campaign's launch, and public statements by Arla concerning the intent of the campaign. The

[6] Because of the competitively sensitive nature of this cheese producer's decisions, the district court granted Elanco's request not to publicly disclose the producer's identity and to maintain the evidence summarizing Elanco's discussions with the producer under seal.

[7] Elanco subsequently filed an Amended Complaint that corrected the corporate name of one of the Arla defendants.

[8] Elanco originally submitted a declaration from Dr. Richard Cady, a scientist employed by Elanco. Professor Collier was substituted because Dr. Cady was overseas on the date of the preliminary injunction hearing.

Facebook posts revealed that consumers were receiving loud and clear the message that rbST is unsafe. Below are examples from five separate consumers:

- "[F]ear mongering is easy. Stop this anti-science nonsense please. You're feeding into the problem." (*Id.* at 64.)
- "You've made RBST sound like a scary monster when in reality it has a naturally occurring counterpart in milk." (*Id.* at 66.)
- "'Weird' is totally subjective and this sort of ad doesn't help to inform people, it just spreads fear and, at least, implies that other cheese-makers are doing something fairly bad." (*Id.* at 65.)
- "[rbST] has been proven safe time, time and time again so [no] need to promote the fear mongering with your latest commercial. This type of fear mongering does nothing to promote the industry and is in fact harmful and detrimental . . . You should be ashamed and I would expect (and your patrons should demand) truthful, legit, quality advertising in the future[,] . . . not more mislabeling and false claims through invalid cartoon characters and the glorified patronizing of kids." (*Id.* at 71.)
- "The children were told . . . a jumble of letters, apropos of nothing? And then you gleaned the results that were ominous or dark, scary. Ok, well this is even worse than I thought. It's not even one iota genuine, it's a cartoon of fear that you're purposely using to prop a fallacious argument upon. Nice. Using . . . kids and fear to sell a product isn't exactly genuine OR factual." (*Id.* at 63.)

Arla's public statements, meanwhile, demonstrated that Arla knowingly exploited children's lack of understanding to generate claims about rbST that it knew would be inaccurate, then chose to dramatize the specific message that rbST is dangerous. For example, on its "Live Unprocessed" website, Arla conceded that "We asked kids: What's rBST?" but "***Of course, they had no idea***." (*Id.* at 20–21.) In a press release, Arla's advertising agency explained that it chose children for the campaign because they "won't mince words" and that "[t]he kids had no idea [that rbST and Xantham] were food additives/hormones, so they drew scary monsters[.]"

(*Id.* at 265.) Arla's "Behind the Scenes" video for the "rBST" commercial revealed that Arla hand-picked Leah, who imagined "rBST" as a "very dangerous" monster, and brought her story "to life" for the express purpose of "show[ing] how some cheese is made." (*Id.*)

F. Arla's Response to Elanco's Preliminary Injunction Motion

Rather than defend its advertisements on the merits, Arla devoted the bulk of its brief in opposition to Elanco's preliminary injunction motion to the argument that the Amended Complaint lacked sufficient allegations to establish standing. Indeed, the lead point in Arla's opposition was titled "Plaintiffs Do Not ***Allege*** a Cause of Action under the Lanham Act." (D. Ct. Dkt. 25 at 8.)

When it finally got around to defending its ads, Arla denied that the advertisements were false, but did not explain what message consumers were supposed to take away from the "rBST" monster or the description of rbST as "weird stuff." Rather, Arla asserted that its "rBST" commercial was "designed to be fantastical," that the monster served only to "entice viewers to continue watching," and that the campaign's disparaging references to "weird stuff" were non-actionable puffery. (*Id.* at 20–21.)

Arla submitted declarations from three individuals. Dr. Shiv Chopra opined that rbST is unsafe for cows and people, but did not address any of the recent scientific evidence or regulatory pronouncements refuting the now-debunked safety issues raised in his declaration. (D. Ct. Dkt. 25-2.) Dr. Henry An, an agricultural economist, discussed his research on the reasons some dairy farmers have chosen to "disadopt" rbST, which concluded that "fears over negative public opinion" was a

leading factor. (SA 284.) And Arla's CEO, Don Stohrer, asserted that Arla would lose millions of dollars if its advertising were enjoined but submitted no evidence to back up these purported losses. (*Id.* at 390.) Notably, Mr. Stohrer did not deny that Arla intended its advertisements to convey that rbST is dangerous and unsafe. (*Id.*)

G. The Preliminary Injunction Hearing

The district court held a preliminary injunction hearing on June 7, 2017. Prior to the hearing, Elanco made repeated requests of Arla to bring its witnesses to court to be cross-examined under oath. Arla refused and called no witnesses.

Both of Elanco's witnesses testified live at the preliminary injunction hearing. Professor Collier offered a point-by-point refutation of Dr. Chopra's opinions regarding the safety rbST, establishing that the "issues raised by Dr. Chopra have been addressed by regulatory authorities around the world and have been answered to the satisfaction of the scientific community that there is no risk to humans from drinking milk from cows treated with rBST." (App. 58.)

Mr. Bishop explained that he is responsible for Elanco's outreach to the dairy industry, which includes everyone from farmers to the consumers who ultimately purchase dairy products. As a result of that work, Mr. Bishop is very familiar with consumer sentiment regarding rbST. Mr. Bishop testified that Arla's campaign was different from any Elanco had seen in the past because it was "[c]learly stating and claiming that this is something that's dangerous, it's unsafe." (*Id.* at 116.) Mr. Bishop also testified regarding the reputational and financial harms to Elanco caused by Arla's ad campaign. (*Id.* at 120–23.)

H. The District Court's Decision and Order

The district court granted Elanco's motion for a preliminary injunction on June 15, 2017. The Decision and Order first dispensed with Arla's standing arguments. The district court rejected Arla's contention that the Amended Complaint lacks sufficient allegations to confer Article III and Lanham Act standing, but did not rest solely on Elanco's allegations. Rather, based upon the record evidence, it found that "Elanco will continue to suffer unquantifiable reputational and financial damage for the length of [Arla's] campaign[.]" (*Id.* at 20.)

After finding a "high likelihood" that Elanco will ultimately prove that dairy products made with milk from rbST-treated and untreated cows are "not significantly compositionally different" and "equally safe and healthy," the district court turned to the message of Arla's advertising campaign. (*Id.* at 15–16.) The district court rejected Arla's arguments that no reasonable consumer would take its advertising seriously, and that Arla's disparaging references to rbST as "weird stuff" were mere puffery. (*Id.* at 17–18.) Then, "based on the evidence before [it]," the district court determined that Elanco had established that Arla's commercial "conveys the misleading message that cheese from cows treated with rBST is dangerous, unhealthy, and something that you should not feel good about feeding to your family," and that Arla's campaign "falsely states that rbST is an ingredient that is placed in other companies' cheese." (*Id.* at 18.)

Despite its determinations that Arla had depicted rbST as "frightening" and "dangerous," and that the campaign amounted to "fear-mongering" (App. 18, 21), the district court declined to find that Arla's ads were literally false or false by

necessary implication. Arla's ads were not literally false, in the district court's view, because a reasonable consumer would not believe that "rbST is actually a monster." (App. 18.) And the district court found that Arla's ads were not false by necessary implication because the commercial included the FDA-mandated disclaimer that there is no significant difference between milk from rbST-treated and untreated cows. At the same time, the district court observed that the disclaimer was "very small" and that, despite its inclusion, the commercial "does nothing to dispel the false notion that cheese from cows treated with rbST is unsafe." (*Id.*)

SUMMARY OF ARGUMENT

A. If the district court made any error at all, it was in favor of Arla, not Elanco. The district court declined to find that Elanco had established a likelihood of success on the merits of its claims that Arla's advertisements are literally false and false by necessary implication. In its opening brief, Arla concedes that when an advertisement is literally false or false by necessary implication, a plaintiff "need not present any evidence of consumer confusion or deception." (Arla Br. 13.) That is precisely the situation here. Arla's ads, which portrayed rbST as a deadly monster and expressly referred to it as "weird stuff" added as an "ingredient" to some cheese, unambiguously conveyed the false messages that rbST is unsafe, that cheese made with milk from cows not treated with rbST is of better quality, and that rbST is an ingredient in some cheese products. The district court's contrary conclusion cannot be squared with the ads themselves, or with the court's own findings. To the extent that the district court's reluctance to hold that Arla's ads were false by necessary implication was due to an absence of precedent, this Court should join the First, Second, Third, Fourth, Sixth, and Ninth Circuits in recognizing the falsity-by-necessary-implication doctrine.

B. The district court's finding that Elanco established a likelihood of success in demonstrating that Arla's advertisements are impliedly false was not clearly erroneous. Contrary to Arla's contention on appeal, the district court's finding that Arla's ads were likely to mislead consumers was not based "solely on [the court's] own impression of the advertising language." (*Id.* at 13.) The preliminary injunction record included abundant proof that supports this finding,

including determinations by FDA and the State of Wisconsin that ads such as Arla's are likely to mislead consumers; anecdotal evidence that consumers interpreted Arla's ads to mean that rbST is dangerous; and evidence that Arla's campaign prompted a major cheese producer to abandon rbST. In addition, the record included evidence that Arla actually intended for its advertisements to convey false messages, which gives rise to a presumption that consumers were misled.

C. The district court also did not commit clear error in finding that Elanco is likely to suffer reputational and financial harm as a result of Arla's advertising. The Supreme Court held in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391–92 (2014), that the protections of the Lanham Act are not limited to direct competitors but extend to any commercial actor that is likely to suffer injury proximately caused by a false advertisement. Here, the district court correctly determined that Arla's advertisements are likely to cause injury to Elanco because Elanco sells the only FDA-approved rbST supplement in the United States, and the ads expressly target rbST, by name, with false claims. The district court did not base these findings on "unsubstantiated allegations," as Arla contends, but on the evidence of record.

D. Arla raises several technical objections to the language of the district court's preliminary injunction order. Several of Arla's objections have already been addressed. After reviewing Arla's opening brief on appeal, Elanco filed an expedited motion with the district court to amend the preliminary injunction order. The district court granted that motion and entered a new preliminary injunction order

that supersedes the one from which Arla appealed. The revised order (1) physically attaches the enjoined television commercial to the order itself, and (2) identifies the specific statements and claims that Arla is prohibited from making, without reference to the complaint or exhibits thereto. Arla's remaining objections are meritless. In fact, the language to which Arla objects is routinely used by courts when enjoining false advertisements under the Lanham Act.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for abuse of discretion. "Under the abuse of discretion standard, the proper inquiry is not how the reviewing court would have ruled if it had been considering the case in the first place, but rather whether any reasonable person could agree with the district court." *EEOC v. Century Broad. Corp.*, 957 F.2d 1446, 1460 (7th Cir. 1992).

The Supreme Court has cautioned that when deciding whether to enter or affirm a preliminary injunction courts should not "improperly equat[e] 'likelihood of success'" with actual success on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981). "The threshold for demonstrating a likelihood of success on the merits" is "low," *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016), and is satisfied where the movant shows a "better than negligible" chance of success, *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc.*, 549 F.3d 1079, 1096 (7th Cir. 2008).

Arla correctly observes that the district court's factual determinations are reviewed for clear error and legal conclusions are reviewed *de novo*. (Arla Br. 11.) Some courts have concluded that whether an ad is literally false "can be determined as a matter of law," *Allsup, Inc. v. Advantage 2000 Consultants*, 428 F.3d 1135, 1138 (8th Cir. 2005), but there is "some disagreement whether literal falsity is a question of fact or a question of law for the court," *Buetow v. A.L.S. Enters.*, 650 F.3d 1178, 1185 n.5 (8th Cir. 2011). Even where literal falsity is regarded as a question of fact, however, courts of appeal recognize that they are in just "as good a position" to review an ad and assess whether it conveys a literally false message.

See, e.g., *Coca-Cola Co. v. Tropicana Prods.*, 690 F.2d 312, 317–18 (2d Cir. 1982) ("In viewing defendant's 30-second commercial at oral argument, we concluded that the trial court's finding that this ad was not facially false is an error of fact. Since the trial judge's finding on this issue was based solely on the inference it drew from reviewing documentary evidence, consisting of the commercial, we are in as good a position as it was to draw an appropriate inference."); *cf. Henri's Food Prods. Co. v. Kraft, Inc.*, 717 F.2d 352, 354 (7th Cir. 1983) ("[T]his Court is in as good a position as the trial judge [to compare trademarks for likelihood of confusion].").

ARGUMENT

I. THE DISTRICT COURT'S ORDER SHOULD BE AFFIRMED BECAUSE ARLA'S ADVERTISEMENTS WERE LITERALLY FALSE AND FALSE BY NECESSARY IMPLICATION

The district court found that Elanco is likely to succeed on the merits because Arla's advertisements mislead a not insubstantial portion of their intended audience as to the safety and quality of rbST and dairy products made with milk from rbST-supplemented cows. This finding was not clearly erroneous for the reasons set forth in Point II below. This Court, however, need not decide whether the record below contained sufficient evidence to support the district court's finding of implied falsity. The preliminary injunction order should be affirmed because Arla's advertisements were literally false and false by necessary implication.

A. Legal Standards

The Lanham Act declares it unlawful for "any person," in "commercial advertising or promotion," to make a "***false or misleading*** description of fact" or a "***false or misleading*** representation of fact" that misrepresents the "nature, characteristics, qualities, or geographic origin of his or her or another person's goods[.]" 15 U.S.C. § 1125(a)(1)(B) (emphasis added). The statute thus prohibits both literal and implied falsehoods. *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999).

1. Literal Falsity

Literal and implied falsehoods are held to different standards of proof. A literally false advertisement is one that on its face conflicts with reality. *See BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1091 (7th Cir. 1994); *see also*

Schering Corp. v. Pfizer, Inc., 189 F.3d 218, 229 (2d Cir. 1999) ("[P]laintiffs alleging a literal falsehood are claiming that a statement, on its face, conflicts with reality, a claim that is best supported by comparing the statement itself with the reality it purports to describe."). As Arla acknowledges, a plaintiff challenging a literally false advertisement "need not present any evidence of consumer confusion or deception." (Arla Br. 13.) Consumer deception is presumed. *See B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971–72 (7th Cir. 1999); *see also Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 513 (7th Cir. 2009) (literal falsity "dispenses with" the need for "proof that anyone was misled or likely to be misled").

2. Implied Falsity

An advertisement is impliedly false if its meaning is ambiguous, but it is likely to mislead consumers. *B. Sanfield*, 168 F.3d at 971–72. When an advertisement implies a false message, rather than makes a false claim outright, a plaintiff has the burden to prove that the advertisement conveys a false message to a "not insubstantial" portion of the intended audience. *See McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.2d 34, 37 (2d Cir. 1988); *Republic Tobacco L.P. v. N. Atl. Trading Co.*, 2007 U.S. Dist. LEXIS 38079, at *12 (N.D. Ill. May 10, 2007).

At a trial on the merits, a plaintiff typically satisfies this burden with consumer survey evidence demonstrating that an ad deceives roughly 15% or more of its audience. *See Merisant Co. v. McNeil Nutritionals, LLC*, 515 F. Supp. 2d 509,

526 (E.D. Pa. 2007) ("15% is almost always deemed sufficient")[9]; *but see Coca-Cola*, 690 F.2d at 317 (reversing denial of preliminary injunction where rate of confusion was only 7.5%). This Court, however, has held that a consumer survey is "not required at the preliminary injunction stage." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 15 (7th Cir. 1992). Moreover, even at trial, a plaintiff need not adduce consumer survey evidence if the defendant is shown to have acted with intent to mislead. *See Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247, 256 (2d Cir. 2014); *Minuteman Int'l v. Critical-Vac Filtration Corp.*, 1997 U.S. Dist. LEXIS 9280, at *34 (N.D. Ill. June 24, 1997), *aff'd*, 152 F.3d 947 (Fed. Cir. 1998).

3. Falsity by Necessary Implication

On the continuum between literal and implied falsity, there is a third category of advertisements that has attributes of both: ads that are "false by necessary implication." Like an impliedly false advertisement, all of the express statements in an ad that is false by necessary implication are true, but the "words or images, considered in context," clearly "imply a false message." *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 148 (2d Cir. 2007). Like a literally false advertisement, an ad that is false by necessary implication may be enjoined without extrinsic evidence of consumer deception. *Id.* "This common-sense doctrine allows a court to conclude that, while no individual statement in an advertisement is false,

[9] *See also* David H. Bernstein & Bruce P. Keller, *The Law of Advertising, Marketing & Promotions* §1.02[1][B] (2011) ("As a general rule of thumb, consumer survey evidence showing 15% or more deception among consumers is persuasive evidence of substantial deception.").

taken as a whole, the advertisement necessarily implies a falsehood." *Tiffany (NJ), Inc. v. eBay, Inc.*, 2010 U.S. Dist. LEXIS 96596, at *7–8 (S.D.N.Y. Sep. 10, 2010).[10]

Courts to date have treated the doctrine of falsity by necessary implication as a species of literal falsity, though that is something of a misnomer. *See, e.g.*, *Clorox Co. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000) (some "messages implied by an advertisement will support a finding of literal falsity"). In fact, an ad that is false by necessary implication contains no literal falsehoods; the false message is implied. *Id.* But courts dispense with the need for consumer perception evidence because the ad is "misleading, *per se*," *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 906 F. Supp. 178, 182 (S.D.N.Y. 1995), because "the audience would recognize the [false] claim as readily as if it had been explicitly stated," *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Pharms. Co.*, 290 F.3d 578, 586–87 (3d Cir. 2002), or because the ad "necessarily and unambiguously" implies a false message, *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, 843 F.3d 48, 65 (2d Cir. 2016).

B. Arla's Ads Were Literally False or False By Necessary Implication

Arla's advertisements were literally false or false by necessary implication. For example, Arla's television commercial depicted "rBST" as a deadly monster

[10] *See also* Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 U. Pa. L. Rev. 1305, 1320–27 (2011) ("Falsity by necessary implication is a way for courts to relieve plaintiffs of the burden of an expensive (and likely extensively litigated) consumer survey when a false message in an ad is obvious, even if not stated in full syllogistic form. The doctrine alleviates some of the pressure caused by a rigid distinction" between literal and implied falsity.).

complete with fearsome fangs, "razor sharp" horns, and fur that electrocutes a man and sends him plunging down a hill. (App. 3–4.) The obvious, if not literal, message of this depiction is that rbST is dangerous, unsafe, and something that consumers should fear—a message that directly conflicts with reality. In fact, as the district court found, dairy products made with milk from rbST-supplemented cows is entirely safe and no less healthy than products made with milk from untreated cows. (*Id.* at 15–16.) Arla's "rBST" monster metaphor, therefore, is "misleading, *per se*." *SmithKline Beecham Consumer Healthcare*, 906 F. Supp. at 182.

In addition, Arla's campaign expressly denigrated rbST as "weird stuff" added to some cheese. (App. 4.) The reality is that, while rbST may be unfamiliar to some consumers, it is not "weird stuff." It is a near exact biological copy of the bST hormone that is naturally present in all cattle and is necessary for production of milk. (*Id.* at 5.) Deriding rbST as "weird stuff" necessarily and unambiguously conveys that cheese made with milk from rbST-supplemented cows is discernibly different from and of lesser quality than Arla cheese. Consumers "would recognize [these claims] as readily as if [they] had been explicitly stated." *Novartis Consumer Health*, 290 F.3d at 586–87.

Express references to rbST as "weird stuff" permeated Arla's entire ad campaign. However, in its launch press release, on its website, and across social media platforms, Arla also claimed that rbST is an "ingredient" added to some cheese. (App. 3, 18–19.) In fact, rbST is not an ingredient in any dairy product; it is

a supplement given to some cows. (*Id.* at 1–2.) Arla's false "ingredient" claims were not implicit. They were expressly stated, and they were false.

On its website, Arla accompanied all of the aforementioned falsehoods with the claim that, because it does not use added hormones such as rbST, "Arla provides dairy products that you can feel good about eating and serving to your friends and family." (SA 29.) In context, this claim "necessarily and unambiguously" implied the converse message that consumers should *not* feel good about eating or serving cheese made with milk from rbST-treated cows. *See Church & Dwight Co.*, 843 F.3d at 65.

In all of these respects, Arla's ad campaign was literally false and false by necessary implication, but the district court declined to make that finding, concluding instead that the campaign was impliedly false. ***First***, in its Decision and Order, the district court remarked that "Elanco *asserts* there is also a third category" of advertisements that are false by "necessary implication," which suggests that the district court may have had some doubts as to whether the doctrine is recognized in this Circuit. (*See* App. 16.) Such uncertainty is understandable because this Court has not had occasion to embrace the doctrine, let alone offer guidance to district courts on when or how it applies. This Court should do so now. The doctrine of falsity by necessary implication is firmly rooted in Lanham Act jurisprudence. While Arla disputed that its ads were false by necessary implication in the proceedings below, it has never contested the doctrine's existence and, indeed, acknowledges the doctrine multiple times in its opening brief

on appeal. (Arla Br. 13, 15.) This Court should join the First, Second, Third, Fourth, Sixth, and Ninth Circuits in recognizing the falsity-by-necessary-implication doctrine.[11]

Second, the district court found that Arla's "rBST" commercial was not literally false or false by necessary implication because "[n]o reasonable consumer could watch Arla's commercial and conclude that rbST is *actually* a monster." (App. 18.) That is true, but it misses the point. Arla's commercial depicts rbST as harmful and dangerous, and that is the literal message of the ad, even if consumers realize that rbST is not a monster. *See, e.g.*, *Charter Commc'ns. Inc. v. Sw. Bell Tel. Co.*, 202 F. Supp. 2d 918, 929–30 (E.D. Mo. 2001), *aff'd*, 23 F. App'x 635 (8th Cir. 2002) (ad literally false because, even though "no reasonable consumer would believe that people really have to wake their children in the middle of the night to use the internet," the premise of superior internet speeds was false); *Tempur Seal Int'l v. Wondergel*, LLC, Civil Action No. 5:16-cv-83-JMH, 2016 U.S. Dist. LEXIS 44354, at *10 (E.D. Ky. Apr. 1, 2016) (ad literally false because, even if the "commercial is obviously in jest," the premise of superior health benefits from the mattress was false); *Polar Corp. v. Coca-Cola Co.*, 871 F. Supp. 1520, 1521 (D. Mass. 1994) (ad enjoined because, even though the commercial featured an animated polar bear, the premise that Coke is not "pure" was false).

[11] *Clorox Co.*, 228 F.3d at 35; *Church & Dwight Co.*, 843 F.3d at 65; *Novartis Consumer Health, Inc.*, 290 F.3d at 586–87; *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 120 (4th Cir. 2011); *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723 (6th Cir. 2012); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

Third, the district court also found that the "rBST" commercial is not literally false or false by necessary implication because it includes the mandatory "FDA disclaimer" that there is no significant difference in milk from rbST-treated and untreated cows. (App. 18.) In the same paragraph, however, the district court went on to find that the "FDA disclaimer at the bottom of the commercial" was "very small," and that the commercial "does nothing to dispel the false notion that cheese from cows treated with rbST is somehow dangerous." (*Id.*) Numerous courts have held that that a disclaimer—especially one that is inconspicuously placed or contradicts the main message of an ad—cannot cure an advertisement that is otherwise literally false or false by necessary implication. *See, e.g.*, *Church & Dwight Co.*, 843 F.3d at 65–66 (disclaimer explaining how product calculated length of pregnancy could not cure the necessary implication that it used the same calculation doctors would use); *Novartis Consumer Health, Inc.*, 290 F.3d at 584 (disclaimer that the product "does not contain sleep aid" could not cure the necessary implication that product was specially formulated for nighttime use).[12]

Finally, the district court determined that Arla's claims that rbST is "weird stuff" and an "ingredient" added to some cheese are false, and preliminarily enjoined Arla from making them in future advertisements. These claims, however, were not merely implied by Arla's advertisements. Arla's ads made the "weird stuff" and "ingredient" claims expressly. (*See* App. 19 ("The advertising campaign

[12] *See also Caterpillar, Inc. v. Telescan Techs.,* LLC, 2002 U.S. Dist. LEXIS 3477, at *10 (C.D. Ill. Feb. 13, 2002) (disclaimers "normally" are "ineffective" to cure deception); *JR Tobacco of Am. v. Davidoff of Geneva (CT),* 957 F. Supp. 426, 437 (S.D.N.Y. 1997) (same).

also ***falsely states*** that rbST is an ingredient that is placed in other companies' cheese.") (emphasis added).) Accordingly, while the district court did not hold that these claims were literally false, its findings compel that conclusion. The same is true of Arla's claim that people should not "feel good about" feeding dairy products made with milk from rbST-supplemented cows to their family. This claim was not communicated by ambiguous innuendo. It was necessarily implied by Arla's express claim that people should feel good about serving Arla cheese because Arla does not use added hormones such as rbST.

This Court is in as good a position as was the district court to review Arla's advertisements. *Ante* at 24. Arla's ads were literally false or false by necessary implication. The decision of the district court should be affirmed on this basis alone.

II. THE DISTRICT COURT'S FINDING THAT ARLA'S ADS WERE IMPLIEDLY FALSE WAS NOT CLEARLY ERRONEOUS

Even if Arla's ads were not literally false or false by necessary implication, the district court found that Elanco established a likelihood of success in showing that they were impliedly false. Arla concedes that the district court's finding of implied falsity is reviewed for clear error (Arla Br. 13), but argues that the district court committed "clear legal error" by relying "solely" on "its own impression of the advertising language" rather than any "actual evidence." (*Id.*) Arla is incorrect.

A. Legal Standards

As discussed above, a plaintiff can prove implied falsity either through evidence that a not insubstantial portion of the intended audience is likely to be

misled, *Hot Wax, Inc.*, 191 F.3d at 820, or a showing that the defendant intended to convey false messages, *B. Sanfield, Inc.*, 168 F.3d at 975.

This Court has held—and Arla concedes—that "fully-blown consumer surveys" are "not required at the preliminary injunction stage." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d at 15; *see* Arla Br. 13. This rule makes eminent sense. "In a false advertising case[,] the campaigns have a short lifespan but the resulting damage can be grave." *Abbott Labs. v. Watson Pharms., Inc.*, 2001 U.S. Dist. LEXIS 10289, at *14 (N.D. Ill. July 19, 2001). Consumer surveys take weeks, or even months, to complete. Were surveys a prerequisite to preliminary relief, even the most egregious ads would essentially be immune from attack until after their harm has been done. Thus, in *Abbott Laboratories v. Mead Johnson*, this Court upheld a preliminary injunction and finding of likelihood of success as to implied falsity based upon the "context of [the defendant's] entire promotional campaign," "anecdotal accounts" of consumers' reactions to the campaign, and the "verbal and pictorial" content of the ads themselves. 971 F.2d at 15.

Arla does not so much as mention *Abbott* in its opening brief. Instead it cites authority from other Circuits for the proposition that a district court cannot find an ad impliedly false based solely on its own subjective view of how consumers are likely to interpret it.[13] Assuming *arguendo* that this is a correct statement of the

[13] The cases cited by Arla are not contrary to *Abbott*. Each recognized that a consumer survey is not required at the preliminary injunction stage. Each is also distinguishable because the district court had "found the advertisements to be literally false," *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002); the plaintiff offered "utterly unreliable" evidence that "address[ed] issue[s] that [were] not relevant to [its] false advertising claim," *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264,

law, the district court here did not divine the meaning of Arla's advertisements based upon its subjective judgment alone. In fact, the record contained extensive evidence that Arla's ads are likely to mislead consumers, and the district court expressly predicated its findings of implied falsity on the entirety of the "record as it now stands." (App. 19–20.)

To be sure, the district court considered the content and context of Arla's advertisements—including the "advertising campaign" as whole, the "entire [rBST] commercial in context," and the "message the advertisement contains"—in conjunction with the record evidence. (*Id.* at 18.) This was not improper, let alone clear error. This Court did the same in *Abbott* and found that the "context of [the defendant's] entire promotional campaign" and the advertisement's "verbal and pictorial" references supported the district court's finding of implied falsity. 971 F.2d at 15–16. Indeed, to some extent, a court "must" rely "on its own experience and understanding of human nature in drawing reasonable inferences about the reactions of consumers to the challenged advertising." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 39–41 (D.C. Cir. 1985) (quoting *McNeilab, Inc. v. American Home Prods. Corp.*, 501 F. Supp. 517, 525 (S.D.N.Y. 1980) (discussing false advertising under the Lanham Act)).

278, 281 (4th Cir. 2002); or the "the parties [were] not before [the] court on a petition for a preliminary injunction," *First Health Grp. Corp. v. United Payors & United Providers, Inc.*, 95 F. Supp. 2d 845, 847 (N.D. Ill. 2000).

B. The Record Supports the District Court's Finding of Implied Falsity

Arla asserts that the district court had before it "no evidence of consumer confusion" and "no credible evidence" of deceptive intent. (Arla Br. 19–20.) In fact, the preliminary injunction record included compelling evidence of both.

In reviewing a decision to grant a preliminary injunction, this Court is not limited to the specific evidence cited by the district court in support of its ruling, and may affirm on "any ground that finds support in the record." *Wayne Chem., Inc. v. Columbus Agency Ser. Corp.*, 567 F.2d 692, 697 (7th Cir. 1977). For example, in *Stuller, Inc. v. Steak N Shake Enterprises*, the district court entered a preliminary injunction without "address[ing] whether the implementation of [the defendant's] policy would harm [the plaintiff's] business[.]" 695 F.3d 676, 680 (7th Cir. 2012). This Court, however, "consider[ed] the record ourselves," because "[w]e may affirm on any basis that appears in the record." *Id.*; *see also Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1087 (reviewing facts in the preliminary injunction record for the first time on appeal); *Donoghue v. IBC USA (Publs.), Inc.*, 70 F.3d 206, 217 (1st Cir. 1995) (affirming preliminary injunction on evidence found "elsewhere in the record").

1. FDA and State of Wisconsin Determinations

The district court's finding of implied falsity is supported by the fact that both FDA and the State of Wisconsin have determined that advertisements such as Arla's are misleading to consumers. In guidance to the dairy industry, FDA has warned that promotional claims regarding the use of milk "from cows not treated by

rbST" are likely to "imply that milk from untreated cows is safer or of higher quality than milk from treated cows" unless advertisers take precautions to put these claims in "proper context." Such "an implication," the FDA determined, would be "false and misleading." *Interim Guidance on the Voluntary Labeling of Milk*, 59 Fed. Reg. 6279, 6280 (Feb. 10, 1994). The State of Wisconsin has reached the same conclusion. To ensure that consumers are not misled, Wisconsin law mandates that advertisers accompany promotional claims regarding the use of milk from non-rbST-treated cows with qualifying statements that are "at least as clear and conspicuous" as the underlying claims. Wis. Admin. Code § ATCP 83.02(4)(a)(1).

Arla's advertisements do not provide the "proper context" that FDA and the State of Wisconsin have deemed necessary to avoid consumer deception. For example, Arla's "rBST" commercial includes (in fine print) the FDA-mandated disclaimer that there is no significant difference between milk from rbST-treated and untreated cows, but Arla did not heed FDA's guidance to provide reasons other than safety or quality why Arla uses milk from cows not treated with rbST. Nor did Arla abide by Wisconsin's requirement that the disclaimer be as clear and conspicuous as other rbST-related claims. To the contrary, the district court found that the disclaimer in the commercial was "very small" and that the commercial as a whole "does nothing to dispel the false notion that cheese from cows treated with rbST is somehow dangerous." (App. 19.)

Arla's advertisements also claim that rbST is "weird stuff" added as an "ingredient" to some cheese. FDA, however, has determined that advertisements

that even suggest that rbST is a foreign ingredient added to cheese are "false and misleading." 59 Fed. Reg. at 6280. Both the FDA and the Wisconsin determinations were part of the preliminary injunction record and are highly probative evidence that Arla violated the Lanham Act. *See, e.g.*, *Bohac v. Gen. Mills, Inc.*, 2013 U.S. Dist. LEXIS 147530, at *10–11 (N.D. Cal. Oct. 10, 2013) ("Of course, the FDA's views are relevant to the issue of whether these labels could be deceptive or misleading to a reasonable consumer"); *Johnson & Johnson-Merck Consumer Pharms. Co. v. P&G*, 285 F. Supp. 2d 389, 393 n.2 (S.D.N.Y. 2003) (finding it "significant" that the FDA "rejected as misleading" the defendant's claim); *cf. B. Sanfield, Inc.*, 168 F.3d at 973 (FTC assessment of what "constitutes deceptive advertising commands deference from the judiciary").

2. Anecdotal Evidence of Consumer Reactions

The preliminary injunction record also includes anecdotal evidence—in the form of complaints posted to Arla's Facebook page—demonstrating that consumers who saw Arla's advertisements actually took away the message that rbST is dangerous and unsafe. Multiple consumers contacted Arla in response to the campaign to complain that Arla's ads were "fear mongering," made rbST "sound like a scary monster," "implie[d] that other cheese-makers are doing something bad," and suggested that rbST was "ominous," "dark," and "scary." (SA 63–71.) Such "anecdotal accounts" of consumers' reactions to a defendant's advertisements are persuasive evidence of their capacity to mislead. *Abbott*, 971 F.2d at 15 (finding an

advertisement misleading, in part, because of "anecdotal accounts of" confusion from "physicians and consumers").[14]

3. Mr. Bishop's Testimony

At the preliminary injunction hearing, the district court heard testimony from an Elanco employee, Grady Bishop, regarding the falsity of Arla's advertisements. Mr. Bishop testified that he oversees Elanco's relationships with the entire dairy supply chain, from farmers to the consumers who purchase dairy products. As a result of this work, Mr. Bishop explained, he is familiar with consumer sentiment regarding rbST, including the results of consumer research Elanco has conducted. Mr. Bishop was therefore "qualified to testify with respect to [consumers'] understanding [of] the words they hear." L. Altman, *Callmann on Unfair Competition, Trademark, and Monopolies* § 5.22 (4th ed. 2016). He testified that Arla's advertisements were unlike any Elanco had seen before because they were "[c]learly stating and claiming that [rbST] is something that's dangerous, it's unsafe." (App. 116.)

[14] The consumers who lodged complaints with Arla were not themselves misled because, as their comments make clear, they were aware that dairy products made with milk from rbST-treated and untreated cows are equally safe and of comparable quality. Their complaints nevertheless are probative of the messages conveyed by Arla's advertisements. Indeed, if Arla's ads did not convey that rbST is dangerous and unsafe, these informed consumers would have had no reason to complain.

4. Actual Marketplace Impact

The misleading nature of Arla's advertising was corroborated by the fact that a major U.S. cheese producer decided to discontinue the use of milk from rbST-treated cows in response to the campaign. The district court not only credited this evidence in its preliminary injunction order, but cited it in support of its conclusion that Arla's advertisements are impliedly false. That a major cheese producer was provoked to abandon rbST out of concern about Arla's fear-mongering is further evidence of the misleading impression created by Arla's ads. *See Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 739 (6th Cir. 2012) (evidence that "distributors called to stop buying" the product demonstrates deception).

5. Arla's Misleading Intent

Finally, the record demonstrates that Arla *intended* to deceive consumers. Proof of intent to mislead is not required under the Lanham Act, but such evidence gives rise to a presumption that consumers were misled. *B. Sanfield*, 168 F.3d at 975. The rationale underlying this "perspicuous" presumption is that, if an advertiser spends "substantial funds in an effort to deceive customers," it is reasonable to assume that those efforts were successful. *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 317 (1st Cir. 2002).[15]

[15] Arla cites a single case from Second Circuit for the proposition that an advertiser's intent to mislead must be of an "egregious nature." (Arla Br. 18.) Other courts do not require a showing of egregiousness. *See, e.g.*, *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1333 (8th Cir. 1997) (approving jury instruction allowing presumption of deception "upon a finding that the defendant deliberately deceived the public"); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 209 (9th Cir. 1989) (same for a finding of "intentional deception"). Nor has the Second Circuit required such a showing in more recent cases. *See, e.g.*, *Church & Dwight Co.*, 843 F.3d at 68.

At the preliminary injunction stage, it is rare for a plaintiff to have adduced evidence of the defendant's intent to mislead. Here, however, no discovery was necessary because Arla publicly disclosed its intent as part of its ad campaign. On its website, Arla revealed that it came up with the concept of asking children to describe rbST with full knowledge that children "of course" would have "no idea" what rbST is. (SA 20–21.) Arla's advertising agency explained that that, precisely because the children had "no idea," they "drew scary monsters." (*Id.* at 265.) It further announced that it asked children about "these ingredients" because kids "won't mince words." (*Id.*) Moreover, in its "Behind the Scenes" video, Arla revealed that its cartoon animations were meant to show that rbST is "very dangerous"; that Arla deliberately chose to dramatize the answer of a child who imagined rbST as a menacing monster; and that Arla exploited the girl's naiveté for the express purpose of supposedly showing "people how some cheese is made." (*Id.* at 13.)

In its opening brief, Arla asserts that Elanco proffered no evidence that Arla "knew" the "messaging" of its ads was false. (Arla Br. 19.) The disclaimer that Arla included in its "rBST" commercial reveals that, in fact, Arla did know that dairy products made with milk from rbST-treated and untreated cows are equal in terms of safety and quality. But Arla's knowledge of the true scientific facts is beside the point. The relevant inquiry is whether Arla intended to convey the message that its cheese is safer and of better quality. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) (expending "substantial funds" to "deceive consumers and

influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived"). The evidence cited above showed this was precisely Arla's intent. Moreover, the only "intent" evidence proffered by Arla was the declaration of its CEO, which conspicuously did not deny that Arla intended to convey that rbST is dangerous and unsafe, and stated only that Arla sought to "provide cheese consumers with information about the dairy products that they eat to enable them to make informed choices." (D. Ct. Dkt. 25-1.) As noted above, Arla refused to bring its declarants to the preliminary injunction hearing or otherwise make them available for cross-examination.

* * *

Contrary to Arla's contention, the district court was not left to rely solely on its own subjective interpretation of Arla's advertisements to determine whether Elanco was likely to succeed in showing that the ads were impliedly false. This Court may affirm based upon any evidence that was before the district court. Because there was ample proof in the record to support the district court's finding of implied falsity, that finding was not clear error. The order of the district court should be affirmed for this reason as well.

III. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT ARLA'S ADVERTISEMENTS WERE LIKELY TO INJURE ELANCO

The district court found that Elanco was likely to suffer reputational and financial harm for the length of Arla's advertising campaign. According to Arla, the district court based this finding on "unsubstantiated allegations" in the Amended Complaint. This is not correct. The district court addressed Elanco's allegations in

the Amended Complaint because Arla expressly challenged the sufficiency of those allegations in its opposition to the preliminary injunction motion. But the grant of the preliminary injunction was based upon record evidence, not mere averments.

A. Legal Standards

Arla is correct that the Lanham Act requires a showing of injury and proximate causation, and that the U.S. Supreme Court's decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), is the leading case on point. (Arla Br. 21.) Arla's description of *Lexmark*, however, is incomplete.

Lexmark was a false advertising case between companies that were not direct competitors. 134 S. Ct. at 1384. The defendant, Lexmark, sold its brand of printer toner cartridges in competition with "remanufacturers" that sold refurbished, pre-owned cartridges. *Id.* at 1383. The plaintiff, Static Control, sold parts that remanufacturers needed to refurbish the cartridges. *Id.* at 1384. The question presented was whether Static Control had standing to challenge false advertisements by Lexmark that claimed that Static Control's products were illegal, and that consumers were required to return their cartridges to Lexmark after use. *Id.*

The Supreme Court held that Static Control had standing. *Id.* at 1393. The Court observed that "Static Control's alleged injuries—lost sales and damage to its business reputation—are injuries to precisely the sorts of commercial interests the [Lanham] Act protects." *Id.* Even though Static Control and Lexmark did not compete, Static Control's injuries were proximately caused by Lexmark's

advertisements for two reasons: (1) Lexmark's ads expressly targeted Static Control by name, and "[w]hen a defendant harms a plaintiff's reputation by casting aspersions on its business, the plaintiff's injury flows directly from the audience's belief in the disparaging statements"; and (2) even if the advertisements were intended to divert sales from remanufacturers and not parts suppliers like Static Control, lost sales to remanufacturers "necessarily injured Static Control as well" by reducing demand for its parts. *Id.* at 1393–94.

B. Arla Challenged the Sufficiency of Elanco's Allegations Below

The district court held that Elanco has standing to assert a Lanham Act claim under a straightforward application of *Lexmark*. (App. 9.) In doing so, the district court analyzed the sufficiency of Elanco's allegations in the Amended Complaint, but this was not error.

Before it filed its opposition to Elanco's motion for a preliminary injunction, Arla alerted the district court that it intended to challenge the sufficiency of Elanco's pleading. (D. Ct. Dkt. 12 at 2–3.) Specifically, Arla asserted that whether the Amended Complaint stated a claim for relief under *Lexmark* was a "threshold issue[]" that "must be briefed and resolved" by the district court "before considering" Elanco's preliminary injunction motion. (*Id.* at 2.) Arla reiterated this argument in its opposition to the motion. In fact, the lead point in Arla's opposition brief was "Plaintiffs Do Not ***Allege*** A Cause of Action Under the Lanham Act." (D. Ct. Dkt. 25 at 8.) Arla asserted that the district court lacked jurisdiction to rule on the preliminary injunction because Elanco had made "nothing more than conclusory

and speculative ***allegations*** that Arla's advertising caused injury." (*Id.* at 9 (emphasis added).)

To address Arla's "threshold" argument that Elanco had not alleged enough facts, the district court made specific findings regarding the sufficiency of Elanco's allegations. The fact that the district court addressed those "allegations" in its decision does not suggest that the court erred or applied the wrong standard. Rather, it shows that the district court thoroughly considered Arla's arguments below, and rejected them.

C. The District Court's Preliminary Injunction Order Was Based Upon Evidence of Injury and Causation

Although it found that Elanco had alleged facts sufficient to confer standing, the district court did not rest its ruling on allegations alone. It proceeded to find that Elanco "provided evidence" sufficient to establish Lanham Act standing (App. 9), and was likely to succeed on the merits of this issue at trial (*id.* at 20). These findings were based upon the evidence of record, not Elanco's averments.

First, the district court found that Elanco sells the only FDA-approved rbST supplement in the United States, and that Arla's advertisements expressly targeted rbST, by name, with false claims. (App. 20.) Such "reputational attack[s] on rbST," the court recognized, are "necessarily a reputational attack on" Elanco and its business. (*Id.*) Evidence in the record supported these findings. Elanco's witness, Mr. Bishop, testified at length regarding the reputational harm that Elanco would suffer if Arla's campaign were allowed to continue. (*See, e.g.*, App. 124–25 (testifying that Arla's ad campaign "certainly affects our customers' willingness to

continue to utilize Posilac" and "causes our producers to question whether or not [rbST] is something that is viable going forward").)

Arla cannot possibly show that these findings were clearly erroneous. The Supreme Court in *Lexmark* recognized that when a false advertisement tars a plaintiff's product by name, that plaintiff suffers a "direct" injury. *See Lexmark*, 134 S. Ct. at 1393 (false advertisement invariably "harms a plaintiff's reputation" if it "denigrates a plaintiff's product by name" or "damages the product's reputation").[16] Indeed, cases in this Circuit and elsewhere establish that such injuries are presumptively irreparable. *See Abbott Labs.*, 971 F.2d at 16 ("presumption that injuries arising from Lanham Act violations are irreparable" is "well-established"); *see also Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144, 161–62 (2d Cir. 2007) (presumption applies especially when ads "mention plaintiff's product by name").

Second, the district court found that Arla's advertisements were likely to cause financial harm to Elanco. (App. 9, 20.) On appeal, as below, Arla asserts that Elanco's injuries are too attenuated to be actionable because they involve a multi-step chain of causation, from consumers who purchase cheese to dairy farmers who purchase Posilac.[17] The district court properly rejected this argument, finding that

[16] Arla cites no case in which a court has found a lack of standing, injury, or proximate causation where the disputed advertising expressly targeted the plaintiff's product by name. This is unsurprising. It defies logic that a party would lack standing to challenge a false advertisement that expressly disparages the party's product.

[17] That Elanco's injury results from a chain of events does not preclude a finding of proximate causation. In fact, the same was true in *Lexmark*. As the Supreme Court explained, the "causal chain" between Lexmark's false advertising and Static Control's losses was "not direct, but include[d] the intervening link" of injury to Static Control's

"Elanco has provided evidence that Arla's advertisements" do, indeed, "result in economic injuries" to Elanco based upon (1) evidence that at least one major cheese producer had already decided to transition to rbST-free milk as a result of Arla's campaign, and (2) the declaration of Arla's own expert that "fear[] about negative public opinion" is one of the "most important factors" in dairymen's "disadoption of rbST." (*Id.* at 9.)

Arla nonetheless urges this Court to vacate the preliminary injunction because Elanco presented no evidence that "consumers have seen [Arla's ads] and determined they no longer wish to purchase cheese" made with milk from rbST-treated cows, or that "any dairy farmer" has actually "informed Elanco it will no longer purchase Posilac as a result" of Arla's campaign. (Arla Br. 26–27.) At the preliminary injunction stage, Elanco was not required to prove actual lost sales or a specific quantum of damages.[18] Its burden was to establish a "better than negligible" chance of ultimately proving that Arla's advertisements proximately result in financial harm. *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986). The district court's finding that Elanco met that burden was amply supported by the evidence and not clearly erroneous.

---

customers stemming from deception of consumers. *Lexmark*, 134 S. Ct. at 1394. Nevertheless, Static Control had standing because Lexmark's ads caused consumers to purchase fewer refurbished cartridges, reducing demand for Static Control's parts. *Id.*

[18] Difficulty in quantifying damages weighs in favor of a preliminary injunction, not against one. *See Medtronic, Inc. v. Intermedics, Inc.*, 725 F.2d 440, 444 (7th Cir. 1984).

IV. THE PRELIMINARY INJUNCTION ORDER COMPLIES WITH FEDERAL RULE OF CIVIL PROCEDURE 65(d)

Arla concludes its brief with a litany of technical objections to the form and language of the preliminary injunction order. Specifically, Arla argues that the order (1) improperly incorporates by reference copies of Arla's advertisements attached to the Amended Complaint (Arla Br. 29); (2) does not specify which advertisements attached to the Amended Complaint, or what specific promotional claims in those advertisements, are enjoined (*id.* at 31); (3) is overbroad insofar as it enjoins Arla from disseminating advertisements "substantially similar" to the ones that the district court determined to be false and misleading (*id.* at 30), or that convey the same false messages "either directly or by implication" (*id.* at 33); and (4) is not supported by factual findings or conclusions of law (*id.* at 34–35).

Arla's first two objections have already been cured. In response to Elanco's expedited motion to modify the preliminary injunction order, the district court entered a revised order that (1) physically attaches the storyboard of the enjoined television commercial to the order itself, and (2) delineates the specific advertising statements and claims that Arla is enjoined from making, without reference to the complaint or exhibits thereto. (SA 306–07.)[19]

Arla's remaining objections to the preliminary injunction order are baseless.

[19] The order further notes that, should it be determined that the district court lacked authority to modify the preliminary injunction due to the pendency of this appeal, "this court would grant the motion to modify the preliminary injunction order if the Seventh Circuit Court of Appeals remands this case for that purpose." (SA 307.) *See, e.g.*, *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799–800 (5th Cir. 1990) (remanding with instructions to address Rule 65(d) concerns); *In re Energy Coop., Inc.*, 886 F.2d 921, 930 (7th Cir. 1989) (same).

A. The Preliminary Injunction Order Is Not Vague or Overbroad

Arla protests that the terms of the preliminary injunction order prohibiting Arla from disseminating "substantially similar" false advertisements, or advertisements that convey the same false messages "either directly or by implication," are vague and overbroad. The district court's use of these terms was not an abuse of discretion. *See Russian Media Grp., LLC v. Cable Am.*, Inc., 598 F.3d 302, 307 (7th Cir. 2010) (an "injunction must be broad enough to be effective, and the appropriate scope of the injunction is left to the district court's sound discretion").

Arla concedes (Arla Br. 28) that a district court "has broad power" to restrain advertisements of "the same type or class" as those "which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated." *NLRB v. Express Pub. Co.*, 312 U.S. 426, 435 (1941). While Rule 65(d) requires injunctions to be "specific in terms," the rule does "not require the impossible." *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1431 (7th Cir. 1985). There are "millions of possible" advertisements that Arla could run, and "[a]ny effort to identify and prohibit one million of them would have left another million or more subject to dispute." *Id.* This Court, therefore, has approved injunctions that described the future conduct to be enjoined in terms such as "any colorable imitation," *Scandia*, 772 F.2d at 1432; "in any like manner," *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 505 (7th Cir. 2008); or "otherwise promoting," *United States v. Kaun*, 827 F.2d 1144, 1150 (7th Cir. 1987).

Such terms are especially common in injunctions against false advertising. In fact, in the Lanham Act context, such terms are necessary because the statute prohibits both literal *and* implied falsehoods, and courts cannot possibly predict how creative advertisers might seek to evade an injunction. *Sandia*, 772 F.2d at 1432. For example:

- In *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578 (3d Cir. 2002), the district court enjoined the defendant from "otherwise claiming, either '***explicitly or implicitly***,'" that its product was "formulated for night time heart burn." *Id.* at 598 (emphasis added). The Third Circuit rejected the advertiser's argument that the injunction was "overbroad," reasoning that the injunction "only reaches claims that are false" whether literal or implied. *Id.*
- In *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir. 2001), the Second Circuit rejected a similar challenge to a preliminary injunction that prohibited the defendant from disseminating ads that conveyed "***essentially the same message***" as those the court enjoined. *S.C. Johnson & Son v. Clorox Co.*, 2000 U.S. Dist. LEXIS 4977, at *7 (S.D.N.Y. Apr. 6, 2000). The Second Circuit found that this language put the defendant "on notice that other advertisements that similarly fail to accurately depict" the parties' products would violate the injunction, but

was "hardly so broad as to" violate Rule 65(d). *S.C. Johnson*, 241 F.3d at 241.

- *In Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939 (3d Cir. 1993), the district court prohibited the defendant from publishing "any advertisement that claims, ***directly or by clear implication***," that its motor oil provided better protection. *Id.* at 948 (emphasis added). The Third Circuit found that the injunction was not "overbroad," but "reache[d] the specific claims that the district court found to be" false. *Id.* at 949.

The cases cited by Arla in which this Court has expressed concerns over vague injunctions did not involve false advertising. *American Can Co. v. Mansukhani*, 742 F.2d 314, 333 (7th Cir. 1984), was a trade-secret case in which the court enjoined the defendant from selling "compositionally similar" products, without any further guidance. Meanwhile, *McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir. 2015), was a defamation case between two private individuals, which raises First Amendment concerns not present in false advertising cases involving purely commercial speech.

To illustrate the purported overbreadth of the district court's injunction, Arla poses a series of hypothetical questions (Arla Br. 31) and imagines various advertising claims that might conceivably be covered by the injunction (*id.* at 33).[20]

[20] Arla also argues that, because the preliminary injunction order does not identify the specific promotional claims that are enjoined, the prohibition against "substantially similar" advertisements theoretically could sweep in claims that appeared in Arla's ads but that Elanco did not challenge. Elanco's pending motion to modify the injunction would address this concern by identifying the specific promotional claims in the ads that are enjoined.

But the Supreme Court has recognized that it "would not be good judicial administration" to vacate an injunction based upon "hypothetical situations which [defendants] say may rise up to plague them." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957). Rather, as "actual situations arise," the proper procedure is to present them to the district court "in evidentiary form rather than as fantasies," *id.*, or to seek "clarification or modification" of the injunction to ensure that any "proposed conduct is not proscribed," *Scandia*, 772 F.2d at 1432. Arla has not availed itself of these procedures in the district court, but there is no reason why Arla could not do so if it were genuinely concerned that any future ad may run afoul of the injunction.

B. The District Court's Order Is Supported by Specific Factual Findings

Finally, Arla argues that the district court's order does not "state the findings and conclusions that support its action" as required by Federal Rule of Civil Procedure 52(a)(2), and identifies two aspects of the injunction that supposedly lack support. (Arla Br. 34.) Arla's interpretation of Rule 52(a)(2) is not correct. That rule does not require "over-elaboration of detail" or "particularization of facts." Fed. R. Civ. P. 52 Adv. Comm. Note. In fact, a court "need only make brief, definite, pertinent findings." *Id.*; *see also Dexia Credit Local v. Rogan*, 602 F.3d 879, 884 (7th Cir. 2010) (preliminary injunction findings must be "precise and self-contained, and we require nothing more"). The district court's order here readily clears that hurdle.

In any event, the two aspects of the injunction that Arla finds objectionable were not "unsupported by any evidence of record" (Arla Br. 35) or unexplained in

the district court's order. Subsection 2(a) of the modified injunction,[21] which prohibits Arla from claiming, either expressly or by implication, that rbST is "dangerous or unsafe," was supported by overwhelming record evidence and extensive findings by the district court. (App. 15–16, 18.) Arla notes that subsection (a) is broad enough to prohibit promotional claims that rbST is dangerous or unsafe for humans and cows, but that is as it should be. Promotional claims that rbST is harmful to cows—especially in ads for cheese intended for human consumption—would mean that rbST is harmful to people as well. Moreover, there was considerable evidence in the record establishing that rbST is safe for cows. Elanco proffered scientific evidence and expert testimony on that subject,[22] and the district court rejected all of Arla's contrary evidence.[23]

The district court's order and the record evidence also fully support subsection 2(e) of the modified injunction, which prohibits Arla from claiming, either expressly or by implication, that consumers should not feel "good about eating" or "serving to [their] friends and family" dairy products made with milk from rbST-treated cows. Arla asserts that, except for a "passing reference in the

---

[21] Arla protested subsections 2(a) and 2(e) of the original injunction order, which are identical to the same sections of the modified injunction.

[22] Elanco's scientist, Dr. Cady, explained in his declaration that FDA has time and again confirmed "the safety of rbST for cows, humans, and the environment." (SA 81); *see also supra* at 7–8 (describing FDA approval process). Dr. Collier likewise testified that the "science is settled" that rbST is safe for cows. (App. 14, 58; *see also id.* at 77 ("Is there any doubt whatsoever in your mind that Posilac or rbST is safe for cows? A. None").)

[23] The district court explained that a committee of the World Health Organization had recently found "no significant change in the concentrations of total bST" detected in "tissues of rbST-treated cows when compared with untreated controls." (App. 14.) Moreover, the district court credited Dr. Collier's testimony that rbST is "safe for both cows and humans," (*id.* at 14), and ultimately concluded that "rbST use is safe." (*Id.* at 15.)

Background section" of its decision, the district court made "no findings about the false or misleading nature of such claims." (Arla Br. 35.) Not so.

In fact, the district court expressly found that Arla's advertising "conveys the misleading message that cheese from cows treated with rbST is . . . something that you should not feel good about feeding your family" (App. 18), and that "[b]ased on the record as it now stands, . . . Arla's advertising campaign—especially the commercial on rbST—may result in a not insubstantial percentage of the intended audience concluding that milk from cows treated with rbST is . . . altogether something that you should not feel good about feeding your family" (*id.* at 19–20). In reality, consumers should have no qualms whatsoever about consuming or serving dairy products made with milk from rbST-treated cows because, as the district court found, rbST-treated milk is "equally safe and healthy" and, indeed, "[t]here is no quantifiable difference between milk from cows treated with rbST and those that have not been treated." (App. 15–16.)

CONCLUSION

Arla's "Live Unprocessed" ad campaign falsely claimed—literally, by necessary implication, and implicitly—that rbST is a dangerous, "weird" "ingredient" that consumers "should not feel good about" eating or serving to their families, and that cheese made from milk of cows supplemented with rbST is inferior to and less wholesome than other cheeses, including Arla's. The district court correctly found that every one of these claims was false, and Arla does not challenge those findings here. The Decision and Order should be affirmed.

Dated: July 18, 2017

Respectfully submitted,

/s/ Steven A. Zalesin

Steven A. Zalesin (counsel of record)
Travis J. Tu
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036

Daniel M. Janssen
Johanna M. Wilbert
QUARLES & BRADY LLP
411 East Wisconsin Avenue, Suite 2350
Milwaukee, Wisconsin 53202-4497

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This document complies with the word limit of Seventh Circuit Rule 32(c) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 13,848 words.

The document complies with the typeface requirements of Seventh Circuit Rule 32(b) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Century Schoolbook.

Dated: July 18, 2017

/s/ Steven A. Zalesin

Steven A. Zalesin (counsel of record)
Travis J. Tu
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 18, 2017

/s/ Steven A. Zalesin

Steven A. Zalesin (counsel of record)
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036

Counsel for Plaintiffs-Appellees