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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NATIONAL COUNCIL AGAINST HEALTH FRAUD, INC., Plaintiff and Appellant, v. KING BIO PHARMACEUTICALS, INC. et al., Defendants and Respondents.	B156585 (Los Angeles County Super. Ct. No. BC245271)

APPEAL from a judgment of the Superior Court of Los Angeles County. Haley J. Fromholz, Judge. Affirmed.

Law Offices of Morse Mehrban and Morse Mehrban for Plaintiff and Appellant.

Mark Boling for Consumer Justice Center, Inc. as Amicus Curiae on behalf of Plaintiff and Appellant.

Law Offices of Carlos F. Negrete and Carlos F. Negrete for Defendants and Respondents.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts IV. and V. of the Discussion.

A private plaintiff brought a representative action for unlawful competition (Bus. & Prof. Code, § 17200 et seq.) and false advertising (Bus. & Prof. Code, § 17500 et seq.) against a seller of homeopathic remedies. After the close of plaintiff's case-in-chief in a court trial, judgment was entered in favor of the seller. The trial court imposed the burden of proving the advertising claims were false or misleading on plaintiff. On appeal, plaintiff acknowledges the trial court correctly imposed the burden of proof under current California law, but contends the law should be changed to impose the burden of proof on a defendant in a false advertising action. In the published portion of this opinion, we conclude the burden of proof properly rests with the plaintiff in such actions. In the unpublished portion of this opinion, we discuss plaintiff's contentions concerning discovery and the contentions of amicus curiae. We affirm.

PROCEDURAL BACKGROUND

Plaintiff and appellant National Council Against Health Fraud, Inc. (NCAHF) brought a representative action against defendants and respondents King Bio Pharmaceuticals, Inc. and its president Frank J. King, Jr. (collectively "King Bio") for unfair competition (Bus. & Prof. Code, §§ 17200, 17203, 17204) and false advertising (Bus. & Prof. Code, §§ 17500, 17535). NCAHF alleged that King Bio's advertising claims for 50 of its homeopathic remedies were false and misleading, in that the products were not effective as claimed. The case proceeded to court trial. At the conclusion of NCAHF's case-in-chief, King Bio moved for judgment under Code of Civil Procedure section 631.8. The trial court granted the motion on the ground NCAHF had failed to prove the advertising claims were false or misleading. Judgment was entered in favor of King Bio. NCAHF appealed. We gave the Consumer Justice Center, Inc. (CJC) permission to file a brief as amicus curiae in support of NCAHF.

FACTS[1]

King Bio sells homeopathic remedies. According to its product labels and website, King Bio's products relieve a variety of symptoms and ills, including: stress, colds, flu, eating disorders, learning disorders, menstrual irregularities, snoring, and tobacco and alcohol cravings.

Homeopathy is a form of alternative medicine. Homeopathic remedies are manufactured using extremely small quantities of various ingredients. Recognized homeopathic remedies are listed in the Homeopathic Pharmacopoeia, which is updated by the Homeopathic Pharmacopoeia Convention, a group of homeopathic practitioners. The Convention will not accept a new remedy for inclusion in the Homeopathic Pharmacopoeia without evidence of its safety and efficacy.[2] The federal Food, Drug, and Cosmetic Act (the Act) recognizes as official the remedies and standards in the Homeopathic Pharmacopoeia. The federal Food and Drug Administration (FDA) has issued guidelines under which homeopathic remedies may be marketed. The FDA guidelines permit a homeopathic remedy, meeting the standards for strength, quality, and purity set forth in the Homeopathic Pharmacopoeia, to be marketed. With the exception of certain labeling and registration requirements not at issue, the FDA does not require homeopathic remedies to satisfy other requirements of the Act. All of the homeopathic remedies marketed by King Bio are listed in the Homeopathic Pharmacopoeia and comply with FDA guidelines.

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[1] We state the evidence in the light most favorable to the judgment. (Code Civ. Proc., § 631.8; *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1254-1255.)

[2] Conflicting evidence was introduced as to whether the standards used by the Convention for acceptable proof of safety and efficacy would be accepted by the scientific community.

DISCUSSION

At trial, NCAHF proceeded on the theory that there is no scientific basis for the advertised efficacy of King Bio's products. NCAHF performed no tests to determine the efficacy of King Bio's products and presented no anecdotal evidence. NCAHF instead argued that King Bio's products were drugs, and the scientific community required representations regarding the efficacy of drugs to be supported by acceptable scientific evidence. NCAHF asserted that the burden of proof should be shifted to King Bio to prove its products' efficacy. On appeal, NCAHF acknowledges that, under current California law, a false advertising plaintiff bears the burden of proving the defendant's advertising claim is false or misleading. NCAHF contends, however, that we should shift the burden of proof to the defendant to facilitate the campaign against health fraud. NCAHF argues that federal law shifts the burden to the defendant in false advertising actions.

We conclude there is no basis in California law to shift the burden of proof to a defendant in a representative false advertising and unlawful competition action. We conclude further that the Legislature has indicated an intent to place the burden of proof on the plaintiff in such cases. Finally, we conclude federal authority is not apposite.

I. False Advertising

A. Business and Professions Code section 17500

False advertising is unlawful. Business and Professions Code section 17500 makes it unlawful "with intent directly or indirectly to dispose of real or personal property . . . to make or disseminate . . . before the public in this state . . . [by any] means whatever, . . . any statement, concerning that real or personal property . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." A violation of Business and Professions Code

section 17500 is a misdemeanor. Civil actions to enjoin false advertising under Business and Professions Code section 17500 may be brought "by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." (Bus. & Prof. Code, § 17535.) False advertising actions under Business and Professions Code section 17535 may also seek restitution.

B. Business and Professions Code section 17200

A violation of Business and Professions Code section 17500 also constitutes unfair competition. (Bus. & Prof. Code, § 17200.) As with false advertising actions, actions to enjoin unfair competition may be brought by a prosecuting authority or private persons acting for themselves or the general public. (Bus. & Prof. Code, § 17204.) Actions under Business and Professions Code section 17204 may also seek restitution. (Bus. & Prof. Code, § 17203.) In such an action, the plaintiff bears the burden of proving the defendant's advertising claim is false or misleading. (*People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 431, fn. 9; *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 878.)

C. Business and Professions Code section 17508

Business and Professions Code section 17508 establishes an administrative procedure, whereby prosecuting authorities may require an advertiser to substantiate advertising claims. This procedure is limited to prosecuting authorities and may not be utilized by private persons. Business and Professions Code section 17508, subdivision (a) prohibits advertisers from making "any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence,

that (2) compare the product's effectiveness or safety to that of other brands or products, or that (3) purport to be based on any fact."[3]

Business and Professions Code section 17508, subdivision (b) provides in pertinent part: "Upon written request of the Director of Consumer Affairs, the Attorney General, any city attorney, or any district attorney[,] any person doing business in California and in whose behalf advertising claims are made to consumers in California, including claims that (1) purport to be based on factual, objective, or clinical evidence, that (2) compare the product's effectiveness or safety to that of other brands or products, or that (3) purport to be based on any fact, shall provide to the department or official making the request evidence of the facts on which such advertising claims are based." If the advertiser does not respond "by adequately substantiating the claim within a reasonable time, or if the [prosecuting authority] shall have reason to believe that any such advertising claim is false or misleading," the prosecuting authority may "do either or both of the following: (1) seek an immediate termination or modification of the claim by the person in accordance with [Business and Professions Code s]ection 17535, (2) disseminate information, taking due care to protect legitimate trade secrets, concerning the veracity of such claims, or why such claims are misleading, to the consumers of this state." (Bus. & Prof. Code, § 17508, subd. (c).)

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[3] When originally enacted, Business and Professions Code section 17508 prohibited only "false advertising claims that (1) purport to be based on factual, objective, or clinical evidence, or that (2) compare the product's effectiveness or safety to that of other brands or products." (Stats. 1972, ch. 1417, § 1, p. 3081.) In 1989, Assembly Bill No. 1543 was introduced to add a third category of false advertising: claims that "purport to be based on 'value,' 'savings' or other areas subject to false or misleading advertising." (Assem. Bill No. 1543 (1989-1990 Reg. Sess.) as introduced Mar. 8, 1989.) An amendment modified this new category to include all claims that "purport to be based on any fact," and modified the statutory language simply to prohibit "any false or misleading advertising claim," including the three enumerated categories. (Assem. Amend. to Assem. Bill No. 1542 (1989-1990 Reg. Sess.) Apr. 10, 1989.)

Business and Professions Code section 17508, subdivision (f) expressly provides, "The plaintiff shall have the burden of proof in establishing any violation of this section."

D. Summary

In sum, both private persons and prosecuting authorities may sue to enjoin false advertising and obtain restitution. When they bring such actions, both private persons and prosecuting authorities bear the burden of proving the advertising claims to be false or misleading. Prosecuting authorities, but not private plaintiffs, have the administrative power to request advertisers to substantiate advertising claims before bringing actions for false advertisement, but the prosecuting authorities retain the burden of proof in the false advertising actions.

II. Shifting Burden of Proof or Production

Although NCAHF phrases its argument in terms of the burden of proof, we deem NCAHF to be making arguments both as to the burden of producing evidence and the ultimate burden of proof: (1) a false advertising defendant should have the burden of producing evidence substantiating the challenged advertising claim; and (2) a false advertising defendant should have the burden of proving the challenged advertising claim to be true. We address the two arguments in turn.

A. Burden of Producing Evidence

" "Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) "The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. [¶] . . . The burden of producing evidence as to a particular fact is initially on the party with the

burden of proof as to that fact." (Evid. Code, § 550.) As a general rule, a plaintiff has the burden of producing evidence to support the allegations of the complaint. (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 5, p. 158.) More specifically, a plaintiff in a false advertising or unlawful competition action has the burden of producing evidence that the challenged advertising claim is false or misleading. (*South Bay Chevrolet v. General Motors Acceptance Corp. supra*, 72 Cal.App.4th at p. 878.) Thus, in this case, under current California law, NCAHF has the burden of producing evidence that the challenged advertising claims of King Bio are false or misleading.

NCAHF argues that a private plaintiff is in the same position as the Attorney General and other prosecuting authorities and a failure to shift the burden of producing evidence of truth to the defendants in false advertising actions under Business and Professions Code sections 17200 et seq. and 17500 et seq. would cripple the Attorney General and other prosecuting authorities in their efforts to protect consumers from false or misleading advertising. This argument is not persuasive. The Legislature, by enacting Business and Professions Code section 17508, recognized the need for the Attorney General and other prosecuting authorities to be able to require advertisers to substantiate advertising claims. With Business and Professions Code section 17508, the Legislature established an administrative procedure by which prosecuting authorities may demand such substantiation. The statute is expressly applicable only to prosecuting authorities. Private plaintiffs are not authorized to demand substantiation for advertising claims.

Nevertheless, NCAHF claims private plaintiffs should be authorized to seek substantiation of advertising claims from advertising defendants by bringing false advertising actions pursuant to Business and Professions Code sections 17200 et seq. and 17500 et seq. and shifting the burden of production to the defendants. NCAHF asserts that a private plaintiff may simply allege that an advertising claim is false or misleading and thereby require the defendant to produce evidence that the claim is true. Thus, NCAHF seeks to obtain by its private plaintiff false advertising action a right

which has affirmatively been withheld from private plaintiffs by the Legislature. We decline to thwart the intent of the Legislature by this means.

The Legislature has expressly permitted prosecuting authorities, but not private plaintiffs, to require substantiation of advertising claims. Such a distinction is certainly rational. Business and Professions Code section 17508 permits only a limited number of prosecuting authorities to demand substantiation of advertising claims, not an unlimited number of private persons. This limitation prevents undue harassment of advertisers and is the least burdensome method of obtaining substantiation for advertising claims. Moreover, a prosecuting authority is authorized to disseminate information to consumers concerning unsubstantiated advertising claims. (Bus. & Prof. Code, § 17508, subd. (c).) However, the prosecuting authority is directed to "tak[e] due care to protect legitimate trade secrets." (*Ibid*.) No such restriction would be applicable to private plaintiffs prosecuting false advertising actions were we to shift the burden of production to the defendants.

We reject NCAHF's request to change current California law to shift the burden of production of evidence to defendants in false advertising actions. Under current California law, the plaintiff in a false advertising action has the burden of producing evidence to prove the allegations of the complaint that the challenged advertising is false or misleading. The Legislature has indicated an intent to alter the burden of substantiating advertising claims only with respect to prosecuting authorities. NCAHF has presented no persuasive argument that would justify a change in the existing burden of production as to private plaintiffs, in light of this clear legislative intent.

B. Burden of Proof

" 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for

relief . . . that he is asserting." (Evid. Code, § 500.) "The party claiming that a person is guilty of . . . wrongdoing has the burden of proof on that issue." (Evid. Code, § 520.) The plaintiff in a false advertising action has the burden of proving that the challenged advertising claim is false or misleading. (*South Bay Chevrolet v. General Motors Acceptance Corp., supra,* 72 Cal.App.4th at p. 878.)

On rare occasions, the courts have altered the normal allocation of the burden of proof. (*McGee v. Cessna Aircraft Co.* (1983) 139 Cal.App.3d 179, 187.) The shift in the burden of proof from the plaintiff to the defendant rests on a policy judgment that there is a substantial probability the defendant has engaged in wrongdoing and the defendant's wrongdoing makes it practically impossible for the plaintiff to prove the wrongdoing. (See *Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1426.) Thus, the normal allocation of the burden of proof has been shifted in spoliation of evidence cases (*ibid*),[4] negligence per se actions (*McGee v. Cessna Aircraft Co., supra,* 139 Cal.App.3d at p. 190), and product liability cases based on design defect (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 431).[5] Even in these cases, however, the plaintiff has the burden of producing some evidence before the burden of proof is shifted to the defendant. In spoliation of evidence cases, for example, the plaintiff must produce evidence that the defendant failed to preserve the evidence and establish a substantial probability of causation before the burden of proof shifts to the defendant to prove the failure to preserve the evidence did not cause damage to the plaintiff. (*Galanek v. Wismar, supra,*

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[4] We recognize the California Supreme Court has concluded that there is no cause of action for intentional spoliation of evidence. (*Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 477-478; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 17-18.) Various courts of appeal have held there is no cause of action for negligent spoliation of evidence. (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1301; *Coprich v. Superior Court* (2000) 80 Cal.App.4th 1081, 1090; but see *Penn v. Prestige Stations, Inc.* (2000) 83 Cal.App.4th 336, 345.)

[5] Sometimes a shift in the burden of proof is effectuated by means of a presumption. (E.g., Evid. Code, § 669.)

68 Cal.App.4th at p. 1427.) As another example, in negligence per se actions, the plaintiff must produce evidence of a violation of a statute and a substantial probability that the plaintiff's injury was caused by the violation of the statute before the burden of proof shifts to the defendant to prove the violation of the statute did not cause the plaintiff's injury. (*Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 772.) Similarly, in design defect cases, the plaintiff must produce evidence that his or her injury was caused by the design of the product, before the burden of proof shifts to the defendant to prove the design of the product was not defective. (*Barker v. Lull Engineering Co., supra,* 20 Cal.3d at p. 431.) We are aware of no cases in which the burden of proof shifts to the defendant upon the filing of the complaint. (See *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 406 ["There is a limit to the number of presumptions in which the court will indulge solely for the purpose of assisting plaintiff in proving a case, especially when there is no evidentiary starting point from which those presumptions can flow."].)

In this case, NCAHF alleged that King Bio made false advertising claims as to the efficacy of 50 of its products. NCAHF presented evidence that King Bio made advertising claims as to the effectiveness of its homeopathic remedies in relieving various symptoms and ills. For example, one of King Bio's remedies was advertised as effective in alleviating stress and a second remedy was advertised as effective in reducing cravings for tobacco. NCAHF presented expert testimony of the inefficacy of homeopathic remedies in general, but presented no evidence concerning the efficacy of King Bio's products. Based on this production of evidence, NCAHF contends that public policy required the burden of proof to be shifted to King Bio to prove that its remedies were effective as claimed, i.e., the advertising claims were true. We reject this contention for a number of reasons.

Public policy in this regard has been clearly established by the Legislature. The Legislature has established as a general rule that the burden of proof is on the plaintiff to establish a defendant's wrongdoing. (Evid. Code, § 520.) More specifically, the Legislature has confirmed that the burden of proof rests with the plaintiff in false

advertising actions. (Bus. & Prof. Code, § 17508, subd. (f).) In Business and Professions Code section 17508, the Legislature has authorized prosecuting authorities to administratively seek substantiation of advertising claims from advertisers. If substantiation is not forthcoming, is inadequate, or fails to dispel the belief the advertising claim is false or misleading, the prosecuting authority may bring an action for false advertising under Business and Professions Code section 17535. In these actions for false advertising, the prosecuting authority is expressly assigned the burden of proof. It would be inappropriate to shift the burden of proof to a defendant in a private plaintiff false advertising action when the private plaintiff is not statutorily authorized to seek substantiation of the advertising claim from the defendant.

Public policy against a shifting of the burden of proof is also found in the federal regulation of homeopathic remedies. The Act recognizes as official the remedies and standards of the Homeopathic Pharmacopoeia. Homeopathic remedies are included in the Homeopathic Pharmacopoeia only after acceptance by the Homeopathic Pharmacopoeia Convention following submission of evidence of the remedy's efficacy and safety. The FDA permits homeopathic remedies included in the Homeopathic Pharmacopoeia to be marketed. King Bio's products are included in the Homeopathic Pharmacopoeia and otherwise comply with FDA regulations. Thus, prior to marketing of a product by King Bio, the general efficacy and safety of the remedy has been substantiated to the extent required by federal law. Public policy would not be furthered under these circumstances by requiring King Bio to substantiate its advertising claims as to general efficacy every time a private plaintiff brings a false advertising action. This federal regulation of homeopathic remedies also makes it less likely that there is a substantial probability of wrongdoing by King Bio.

Finally, there is nothing in the nature of a false advertising action that makes it difficult for a plaintiff to prove the allegations of the complaint. The homeopathic remedies are marketed and readily available for testing by a plaintiff. The falsity of the advertising claims may be established by testing, scientific literature, or anecdotal evidence. That NCAHF does not wish to bear the expense of proving its case does not

mean that the burden and expense should be shifted to King Bio. Nothing King Bio has done has made it practically impossible for a plaintiff to prove that the advertising claims are false or misleading.

III. Federal Law

NCAHF relies on cases arising under the Federal Trade Commission Act (FTC Act) and the Lanham Act to argue that federal law shifts the burden of proof to defendants in false advertising actions.

A. FTC Act

The FTC Act prohibits, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." (15 U.S.C. § 45(a)(1).) False advertising is specifically defined to be an unfair or deceptive act or practice. (15 U.S.C. § 52.) The FTC is empowered to prevent the use of unfair competition and unfair or deceptive practices. (15 U.S.C. § 45(a)(2).) The FTC can issue a complaint against the defendant and set an administrative hearing before the FTC. If the hearing results in an order against the defendant, the defendant may appeal to the federal circuit court of appeals, seeking to set aside the FTC's order. (15 U.S.C. § 45(b), (c).) If the FTC seeks to enjoin an unfair or deceptive practice pending the issuance of a complaint or before it is finally adjudicated, the FTC may bring an action in federal district court to temporarily enjoin the practice. (15 U.S.C. § 53.) In proper cases, the FTC may seek a permanent injunction. (*Ibid.*) In either type of proceeding, the FTC bears the burden of proof. (15 U.S.C. § 53(b)(2); *Porter & Dietsch, Inc. v. F.T.C.* (7th Cir. 1979) 605 F.2d 294, 305-306; *In re Pfizer, Inc.* (1972) 81 F.T.C. 23.)

Congress has delegated to the FTC the authority to define unfair trade practices. (*In re Pfizer, Inc., supra,* 81 F.T.C. 23.) In 1972, the FTC determined that it is unfair to make an affirmative advertising claim without a reasonable basis for making that claim.

(*Ibid.*) The type of basis considered sufficient depends on the type of advertising claim made. "Many ads contain express or implied statements regarding the amount of support the advertiser has for the product claim. When the substantiation claim is express (e.g., 'tests prove,' 'doctors recommend,' and 'studies show'), the [FTC] expects the firm to have at least the advertised level of substantiation. . . . [¶] Absent an express or implied reference to a certain level of support, and absent other evidence indicating what consumer expectations would be, the [FTC] assumes that consumers expect a 'reasonable basis' for claims." (FTC Policy Statement Regarding Advertising Substantiation, 49 Fed.Reg. 30999, Aug. 2, 1984.) The former type of claim is sometimes called an "establishment" claim, while the latter is a "non-establishment" claim. (*Removatron Intern. Corp. v. F.T.C.* (1st Cir. 1989) 884 F.2d 1489, 1492, fn. 3.) The level of substantiation necessary to support a non-establishment claim varies depending on the claim made. Sometimes, clinical testing is required to provide a reasonable basis for a non-establishment claim, but this is not always the case. (*Thompson Medical Co., Inc. v. F.T.C.* (1986) 791 F.2d 189, 194-195.) For a non-establishment claim, what constitutes a reasonable basis depends on a number of factors, including "the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation of the claim, and the amount of substantiation experts in the field believe is reasonable." (FTC Policy Statement Regarding Advertising Substantiation, 49 Fed.Reg. 30999, Aug. 2, 1984.)

Regardless of the level of substantiation required, however, the FTC still bears the burden of proving advertising claims are false or misleading. (*Sterling Drug, Inc. v. F.T.C.* (9th Cir. 1984) 741 F.2d 1146, 1150; *Porter & Dietsch, Inc. v. F.T.C., supra,* 605 F.2d at pp. 305-306.) In other words, the FTC can administratively impose on an advertiser the burden of producing evidence to substantiate its advertising claims, but the FTC, in an action for false advertising, bears the burden of proving the advertising claim is, in fact, false or misleading. In this respect, the FTC Act is very similar to Business and Professions Code section 17508 and provides no support for NCAHF's position.

B. Lanham Act

The Lanham Act provides: "Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device . . . which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." (15 U.S.C. § 1125(a)(1).) This section of the act does not provide for prosecution by government authorities; it provides for civil actions by competitors. In a competitor action for false advertising under the Lanham Act, the plaintiff has the burden of proving the defendant's advertisement is false or misleading. (*Castrol Inc. v. Pennzoil Co.* (3d. Cir. 1993) 987 F.2d 939, 943-944; *Proctor & Gamble Co. v. Chesebrough-Pond's Inc.* (2d Cir. 1984) 747 F.2d 114, 119.)

The burden of production in a Lanham Act case depends on whether the advertisement at issue is an establishment claim. "Where a plaintiff challenges a test-proven superiority advertisement, the defendant must identify the cited tests. Plaintiff must then prove that these tests did not establish the proposition for which they were cited." (*Castrol, Inc. v. Quaker State Corp.* (2d Cir. 1992) 977 F.2d 57, 63.) If, however, the challenged advertisement is a non-establishment claim, the plaintiff must simply prove it false. In such a case, the fact that the defendant might rely on unpersuasive evidence to support the advertising claim would not entitle the plaintiff to relief. (*Proctor & Gamble Co. v. Chesebrough-Pond's Inc., supra,* 747 F.2d at p. 119.) Instead, the plaintiff must affirmatively prove the advertising claim is false. (*Ibid.*; *Rhone-Poulenc Rorer Pharmaceuticals Inc. v. Marion Merrell Dow, Inc.* (8th Cir. 1996) 93 F.3d 511, 514.)

Under the Lanham Act, a competitor can require an advertiser to identify the tests expressly relied on in an advertising claim. While reasons of fairness may compel disclosure of the tests relied upon when an advertisement claims its results are supported

by tests, we need not reach the issue in this case. NCAHF conceded at trial that the only advertisements at issue in this case were non-establishment claims. Thus, even if we were to adopt the limited shifting of the burden of production used in Lanham Act cases, it would be of no assistance to NCAHF.

IV. Protective Order

Based on NCAHF's erroneous belief that it could prevail at trial by demonstrating King Bio had no scientific basis for its advertising claims, rather than by affirmatively proving the advertising claims false and misleading, NCAHF propounded numerous discovery requests to King Bio seeking disclosure of the evidence on which King Bio based its claims. The discovery propounded by NCAHF exceeded the 35-question limitation imposed on requests for admission and interrogatories (Code Civ. Proc., §§ 2030, subd. (c), 2033, subd. (c)) by almost 1000 questions. King Bio sought a protective order. Concluding NCAHF failed to justify the additional discovery, the trial court granted King Bio's motion for a protective order and awarded $900 in sanctions. King Bio contends this ruling was erroneous.

If a party seeks a protective order on the ground that the number of requests for admission or interrogatories is unwarranted, "the propounding party shall have the burden of justifying the number of" discovery requests.[6] (Code Civ. Proc., §§ 2030, subd. (c), 2033, subd. (c).) "[A] trial court's discovery ruling is not to be disturbed unless the court has abused its discretion." (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1286-1287.)

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[6] In its brief on appeal, NCAHF asserts King Bio had the burden of proving the requested discovery was oppressive. NCAHF overlooks the fact that, as proponent of discovery in excess of the statutory maximum, it had the burden of proving the discovery was justified.

On May 21, 2001, NCAHF served King Bio with its first set of requests for admission. For each of its 50 products, King Bio was requested to admit: (1) it advertised the product in California; (2) it sold the product throughout California; and (3) the product does not do each and every individual thing it is represented to do.[7] As there were many different claims associated with each of the 50 products, the total number of requests for admission was 600. Along with these requests for admission, NCAHF served its second set of form interrogatories, marking only form interrogatory 17.1. This interrogatory requests King Bio, with respect to every request for admission it does not unqualifiedly admit, to state all the facts upon which it bases its response and to identify all individuals with knowledge of the facts and all documents which support the

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[7] For example, King Bio's product, "Colds & Flu," bears a label reading, "FOR FAST RELIEF OF

-fever
-chills
-achiness
-nausea
-fatigue
-headaches
-congestion
-coughs
-sneezing

prevents cold & flu symptoms when taken at the beginning stages."

NCAHF's requests for admission included the following 11 requests: "The product, 'Colds & Flu' does not provide users with fast relief from fever. [¶] The product, 'Colds & Flu' does not provide users with fast relief from chills. [¶] The product, 'Colds & Flu' does not provide users with fast relief from achiness. [¶] The product, 'Colds & Flu' does not provide users with fast relief from nausea. [¶] The product, 'Colds & Flu' does not provide users with fast relief from fatigue. [¶] The product, 'Colds & Flu' does not provide users with fast relief from headaches. [¶] The product, 'Colds & Flu' does not provide users with fast relief from congestion. [¶] The product, 'Colds & Flu' does not provide users with fast relief from coughs. [¶] The product, 'Colds & Flu' does not provide users with fast relief from sneezing. [¶] When taken at the beginning stages, 'Colds & Flu," does not prevent users from having cold symptoms. [¶] When taken at the beginning stages, 'Colds & Flu," does not prevent users from having flu symptoms."

facts. In other words, the requests for admission combined with the form interrogatory required King Bio to disclose its basis for stating that each of its 50 products was effective for every symptom for which they were labeled.

Counsel for NCAHF submitted a declaration in support of the additional requests. Counsel declared the additional discovery was warranted "because of the number of said defendant's products that plaintiff alleges have been falsely advertised in violation of Business and Professions Code, [s]ections 17500 and 17200, the necessity of proving the numerous elements of the . . . causes of action alleged by plaintiff, the complicated scientific and medical nature of the issues presented, the necessity of providing said defendant with a reasonable opportunity to examine their files and records to provide answers, the remedial significance of this lawsuit to the health and economic safety of California residents, the fact that plaintiff cannot afford the costs associated with obtaining answers to the requests at deposition, and the necessity of providing said defendant with a reasonable opportunity to obtain answers to the requests from entities and individuals within and without its corporate structure."

On May 30, 2001, NCAHF served its first set of special interrogatories on King Bio. For each of its 50 products, King Bio was asked (with respect to the period after February 16, 1997): (1) the sale price in California; (2) the total number sold in California; (3) the total gross revenue from California sales; (4) the names and address of its manufacturers, distributors, and California retailers; (5) the names and addresses of every California resident who purchased the product; (6) the substance of all advertisements in California for the product; and (7) all health benefits attributed to the product in California. There were 453 interrogatories in total. NCAHF's counsel submitted a declaration in support of the additional interrogatories that was substantially the same as the declaration in support of the additional requests for admission.

King Bio moved for a protective order with respect to the excessive requests for admission and interrogatories. In opposition to King Bio's motion for protective order, NCAHF asserted it had propounded only a small number of questions pertaining to each product and representation; and the total number of discovery requests was large only

because of the number of products and representations. NCAHF argued the discovery related to King Bio's bases for its representations was necessary in order for it to prove the falsity of NCAHF's advertising.[8] NCAHF argued the discovery related to prices and customers was necessary so that the trial court could properly order restitution. As to manufacturers, distributors, and retailers, NCAHF claimed it could use these individuals to verify King Bio's sales figures and lists of active ingredients. NCAHF argued it could ask King Bio's customers whether the products were effective.

The trial court concluded NCAHF had failed to justify the need for more than 1000 discovery requests. The trial court acknowledged that NCAHF was probably entitled to discovery in excess of 35 requests for admission and 35 interrogatories, but determined the amount of discovery actually propounded was clearly excessive. The trial court did not preclude NCAHF from conducting discovery, but ruled only that the declarations submitted did not justify the amount of discovery propounded.[9] This ruling was not an abuse of discretion.

Despite NCAHF's argument to the contrary, it was not necessary for NCAHF to propound several hundred discovery questions on the topic of King Bio's bases for its claims. NCAHF proceeded on the erroneous theory that the only way it could prove King Bio's advertising false was to prove King Bio lacked a scientific basis for its advertising claims. But this was just one of many ways NCAHF could have obtained relevant evidence on the issue of falsity, and the other ways would not impose such a burden on King Bio. For example, NCAHF could have purchased King Bio's products, or obtained samples through discovery. NCAHF could have determined the products'

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[8] NCAHF did not attempt to justify the discovery as relevant to King Bio's alleged knowledge of the falsity of its representations.

[9] The hearing on the motion for protective order was held on July 31, 2001. The discovery cut-off date was September 21, 2001. NCAHF therefore could have propounded a reasonable amount of discovery after the trial court's ruling. The record does not indicate whether NCAHF took advantage of this opportunity.

ingredients from the product labels. NCAHF could have tested the products to prove they were ineffective. NCAHF could have researched scientific and homeopathic literature relating to the active ingredients in King Bio's products. NCAHF could have performed chemical analyses on the products to determine if they contained trace amounts of anything other than water. There were many ways NCAHF could have obtained evidence in support of its allegation that King Bio's advertisements were false, without having to burden King Bio with hundreds of discovery requests. Although the questions concerning the basis for King Bio's representations were of some relevance to the issue of falsity, they were not absolutely necessary to it. As such, NCAHF was not justified in burdening King Bio with an oppressive amount of discovery on the subject of the basis for its claims.

Additionally, several categories of questions asked were duplicative. NCAHF's interrogatories sought the sales prices, total units sold, and gross revenue with respect to each product. NCAHF never established why discovery of gross revenue was necessary in light of the other two categories. NCAHF's interrogatories sought the substance of all advertisements as well as all health claims. Again, NCAHF failed to establish why such apparently duplicative interrogatories were warranted. NCAHF also submitted more than 100 interrogatories relating to the identity of manufacturers, retailers, and distributors of each product, with the purported relevance of these questions being that the individuals could confirm information otherwise supplied by King Bio. Given the quantity of discovery sought, NCAHF did not provide adequate justification for burdening King Bio with so many duplicative requests.

Given the trial court's express indication that it was ruling only on the total 1053 discovery requests before it, and not whether NCAHF was entitled to conduct some discovery in excess of the statutory amount, the trial court did not abuse its discretion in concluding NCAHF did not justify the discovery it sought.[10]

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[10] The trial court also imposed $900 in sanctions. In passing, NCAHF notes that sanctions should not be imposed on the party opposing a motion for a protective order

V. CJC's Contentions

While NCAHF proceeded almost solely on its false advertising cause of action, with any other theories of unfair competition pursued as an afterthought at trial and abandoned on appeal, CJC argues the heart of NCAHF's action was unfair competition, and treats the false advertising cause of action as superfluous. CJC candidly acknowledges that it raises arguments "without regard to whether any of these arguments were raised by [NCAHF]."

" ' " '[A]n appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered [citations].' " ' " (*Lavie v. Proctor & Gamble Co.* (2003) 105 Cal.App.4th 496, 502.) Although the rule is not absolute and an appellate court has discretion to consider new issues raised by an amicus (*id.* at p. 503), we see no reason to do so here. CJC's issues are not questions of law raised on undisputed facts, nor do they implicate important issues of public policy. Instead, CJC argues substantial evidence would have supported a judgment in favor of NCAHF. It is enough to say this is the wrong test. The question is not whether substantial evidence would have supported a

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when the party "acted with substantial justification." (Code Civ. Proc., § 2023, subd. (b).) NCAHF does not expressly argue that it acted with substantial justification. In any event, the trial court did not abuse its discretion in concluding NCAHF had not acted with substantial justification. When King Bio attempted to meet and confer regarding the excessive discovery, the only concession of NCAHF was that King Bio need not respond to discovery requests pertaining to products it had not actually sold in California. Otherwise, NCAHF simply restated the boilerplate language from its declaration in support of additional discovery. NCAHF was not substantially justified in its position that 1000 discovery questions were warranted.

different judgment, but rather whether substantial evidence supports the judgment rendered. It does.[11]

DISPOSITION

The judgment is affirmed. National Council Against Health Fraud, Inc. is to bear King Bio Pharmaceuticals, Inc.'s and Frank J. King, Jr.'s costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

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[11] The trial court concluded NCAHF failed to prove a false or misleading statement. King Bio's expert testified the products were safe and effective. The products were included in the Homeopathic Pharmacopoeia and complied with FDA guidelines. NCAHF presented no evidence that King Bio's products were not safe and effective, relying instead on a general attack on homeopathy, made by witnesses who had no knowledge of, or experience with, King Bio's products, and who were found to be biased and unworthy of credibility.