United States Court of Appeals

for the

Fourth Circuit

SANDERSON FARMS, INC., et al.,

Appellees,

– v. –

TYSON FOODS, INC.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

APPELLANT'S MOTION IN SUPPORT OF STAY OF PRELIMINARY INJUCTION PENDING APPEAL

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PRELIMINARY STATEMENT

Defendant-Appellant Tyson Foods, Inc. ("Tyson") respectfully submits this motion to stay a sweeping preliminary injunction that takes effect on May 1, 2008 and requests that this motion be considered by a single judge. Unless a stay is granted, Tyson will be required to disrupt the operations of more than 8,000 retailers across the country by removing all point-of-purchase materials and labeling for fresh chicken products containing the statement "Raised Without Antibiotics that impact antibiotic resistance in humans" (the "Qualified Claim"). This exact statement, however, was pre-approved by the United States Department of Agriculture ("USDA"), pursuant to its congressionally-mandated authority, as truthful and not misleading. This injunction preventing Tyson and third-party retailers from disseminating the USDA-approved statement in advertising is especially harmful since it comes during the prime summer selling season.

In granting the preliminary injunction, the district court made numerous errors of law. First, by including point-of-purchase materials within the scope of its order, the district court usurped the USDA's authority to regulate poultry labels and labeling, which includes both the label affixed to the chicken package as well as point-of-purchase materials. Second, the court disregarded case law that uniformly holds that advertising that "substantively comports" with the labeling statements approved by the relevant government agency – even though the actual

advertising itself was not reviewed by that agency – is not subject to Lanham Act challenge. As a result, the district court's order holds that when the USDA-approved Qualified Claim appears on a chicken label, it is "truthful and not misleading," but when the identical words appear on a divider in a meat case right next to the chicken with the label, the statement is "false and misleading." The court compounded these errors by, among other things, impermissibly presuming irreparable harm to the plaintiffs because of its confidence that its decision on plaintiffs' "likelihood of success" was correct.

If this sweeping injunction is not stayed, the commercial consequences will be immediate and dramatic. The district court's order damages Tyson's ability to communicate truthful information to consumers because it creates a disconnect between what Tyson can say on product labels versus what can appear in point-of-purchase materials or advertising and causes irreversible consumer confusion and harm to the marketplace. If Tyson is forced to remove all point-of-purchase materials on an expedited basis, it also expects significant harm to its reputation, market share and goodwill since retailers will no longer be able to trust Tyson's statements about its products or marketing plans. Absent a stay, Tyson also will have no remedy for its lost sales and lost profits if this Court ultimately reverses the injunction because the district court set a wholly inadequate bond, wrongly dismissing the concept of lost profits as "purely speculative."

Accordingly, Tyson respectfully requests that this Court grant Tyson's motion to stay the preliminary injunction pending appeal insofar as it restrains use of the Qualified Claim. Attached hereto as exhibits to the Declaration of Caitlin J. Halligan ("Halligan Decl.") are the district court's Order Granting Preliminary Injunction ("PI Order") (Exhibit 1); the Memorandum Opinion Granting Preliminary Injunction ("PI Mem. Op.") (Exhibit 2); Tyson's Motion for Clarification of PI Order (Exhibit 3); and the district court's Letter Order clarifying the PI Order (Exhibit 4). Appellees oppose this motion and intend to file papers.

BACKGROUND

In April 2007, Tyson applied to the USDA for approval of the label claim "Raised Without Antibiotics" (the "Unqualified Claim") for chicken products, and the agency approved its use of that claim in May 2007. See Halligan Decl. Exh. 5 (4/8/08 Tr. at 350:20-351:2; 352:3-8 (Pilkington); 4/9/08 Tr. at 43:12-22 (Hogberg)). Tyson thereafter began an advertising campaign that included television, radio, billboard, and print media, and chicken "Raised Without Antibiotics" became available to consumers in June 2007. See Halligan Decl. Exh. 6 (Plaintiffs' PI Hearing Exhibit 7).

On September 12, 2007, the USDA advised Tyson that it was reconsidering its approval of the Unqualified Claim. See Halligan Decl. Exh. 7 (4/9/08 Tr. at 44:25-45:13 (Hogberg)). Specifically, the USDA's Food Safety and Inspection

Service ("FSIS") noted that Tyson's feed ingredient list – which had been submitted in full to the USDA in Tyson's April 2007 label application package – contained ionophores,[1] and the USDA now questioned whether the Unqualified Claim was consistent with the use of those ingredients. See Halligan Decl. Exh. 2 at 5-6; see also Halligan Decl. Exh. 9 (4/8/08 Tr. at 351:3-14 (Pilkington)). Following discussions, the USDA notified Tyson in November 2007 that it had made an error and had decided to reverse itself by withdrawing its approval of Tyson's Unqualified Claim. See Halligan Dec. Exh. 2 at 6-7. The agency then granted Tyson a "temporary approval" to facilitate a transition that minimized retailer disruption. Id. at 7. In granting this temporary approval, the agency determined that continued use of the Unqualified Claim would not, *inter alia*, misrepresent the product or create competitive disadvantage in the market. See 9 C.F.R. §381.132(f); Halligan Decl. Exh. 10 (4/9/08 Tr. at 63:23-64:16 (Hogberg)).

On December 19, 2007, the USDA approved the Qualified Claim: "Raised Without Antibiotics that impact antibiotic resistance in humans." Tyson seeks a

[1] Ionophores are used to prevent a parasite that affects poultry and are not used in human medicine. See Halligan Decl. Exh. 8 (4/8/09 Tr. at 353:3-9, 354:12-15 (Pilkington)); see also Halligan Decl. Exh. 2 at 4. Although the USDA later determined that ionophores are technically classified as antibiotics, they are not implicated in concerns about resistance to human antibiotics. See id. at 6.

stay only with respect to the Qualified Claim, which "describes the situation in a truthful and non-misleading way." See Halligan Decl. Exh. 2 at 7.

On January 25, 2008, plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Maryland, alleging that Tyson's use of the Unqualified Claim constituted false advertising in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Following a hearing, the district court (Blake, J.) denied plaintiffs' motion.[2]

Following four days of testimony, on April 22, 2008, the district court (Bennett, J.) granted plaintiffs' motion for a preliminary injunction. See Halligan Decl. Exhs. 1-2. The court's order, effective May 1, 2008, requires Tyson to "remove any and all non-label advertisements containing" either the Qualified Claim or Unqualified Claim. Halligan Decl. Exh. 1 at ¶ 1(a). By its terms, the order applies to "any and all labeling, including point-of-purchase materials," that

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[2] On March 5, 2008, plaintiffs filed an Amended Complaint that added allegations concerning the Qualified Claim at issue here. On March 14, 2008, Tyson moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, *inter alia*, that there could be no cause of action under the Lanham Act against a claim that substantively comports with the label claims that the USDA approved as truthful and not misleading. The district court (Bennett, J.) orally denied Tyson's motion to dismiss at the conclusion of the preliminary injunction hearing on April 10, 2008 and subsequently issued a written Memorandum Opinion and Order on April 15, 2008. See Halligan Decl. Exh. 11 (Memorandum Opinion Denying Motion to Dismiss ("MTD Mem. Op.")). In its order, the district court held that it possessed the authority to regulate point-of-purchase materials and that it was irrelevant that the statements at issue in this lawsuit substantively comported with the statements approved by the USDA. Id.

contain the Qualified Claim, as well as television commercials radio spots and print ads, id. at ¶ 1(d), and even the case dividers in the meat cases. See Halligan Decl. Exh. 4. The only materials exempt from the order are product labels "placed immediately upon Defendant's chicken products or container." Halligan Decl. Exh. 1 at ¶ 1(e). The district court issued a supplemental order on April 25, 2008, setting a $1 million bond and clarifying that Tyson has 15 days to comply with the PI Order. See Halligan Decl. Exh. 12 (Supplementation to PI Order ("Supp. PI Order")). On April 25, 2008, the district court denied Tyson's motion for a stay of the preliminary injunction for the same reasons discussed in its PI Mem. Op. See Halligan Decl. Exh. 13 (Motion for Stay of Preliminary Injunction Pending Appeal); Halligan Decl. Exh. 14 (Memorandum Opinion and Order Denying Stay). A notice of appeal was filed on April 28, 2008. See Halligan Decl. Exh. 15 (Notice of Appeal).

ARGUMENT

The Federal Rules permit this Court to issue an order suspending an injunction while an appeal therefrom is pending. Fed. R. App. P. 8. A party is entitled to a stay upon a showing that: (1) it will likely prevail on the merits of the appeal; (2) it will suffer irreparable injury if the stay is denied; (3) other parties will not be substantially harmed by the stay; and (4) the public interest will be served by granting the stay. See Long v. Robinson, 432 F.2d 977, 979 (4th Cir.

1970); see also City of Alexandria v. Helms, 719 F.2d 699, 700-01 (4th Cir. 1983) (granting stay of preliminary injunction). These factors weigh heavily in favor of granting a stay here because the threat of irreparable injury to Tyson "is immediate and substantial," "the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear," and neither appellees nor the public would be harmed substantially. Goldstein v. Miller, 488 F. Supp. 156, 173 (D. Md. 1980) (internal quotation marks omitted), aff'd, 649 F.2d 863 (4th Cir. 1981).

I. TYSON IS LIKELY TO PREVAIL ON THE MERITS OF ITS APPEAL

A. The District Court Usurped the USDA's Authority In Enjoining Tyson's Labeling

In granting the preliminary injunction, the district court substituted its judgment for that of the government agency authorized by Congress to determine whether Tyson's statements were truthful and not misleading as a matter of law. The Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451, et seq., gives the USDA jurisdiction to regulate poultry product labels and labeling. The PPIA defines a "label" as "a display of written, printed, or graphic matter upon any article or the immediate container (not including packaged liners) of any article," and "labeling" as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. § 453(s). By regulation, FSIS must pre-approve poultry labels, see

9 C.F.R. § 381.132(a), and its determination as to whether or not a label is false or misleading is conclusive. See 9 C.F.R. § 381.130. FSIS also has jurisdiction over labeling, which likewise must be truthful and not misleading. See, e.g., 21 U.S.C. § 453(h)(1) (defining a product as "misbranded" "if its labeling is false or misleading in any particular"); 21 U.S.C. § 457(c) (allowing sales of products with labeling that is "not false or misleading").[3]

The district court's order directly usurps the USDA's authority insofar as it enjoins the use of the Qualified Claim on materials such as case dividers and other point-of-purchase materials that constitute labeling. See 21 U.S.C. § 453(s). Extensive case law holds under analogous statutes that a broad range of materials, including point-of-purchase materials, constitute labeling. See, e.g., Kordel v. United States, 335 U.S. 345, 349-50 (1948) (literature shipped separately from products with which they were associated constitutes labeling under Food, Drug and Cosmetic Act ("FDCA")); SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc., 211 F.3d 21, 26 (2d Cir. 2000) (labeling under FDCA includes "[b]rochures, booklets, . . . motion picture films, film strips, . . . sound

[3] See also FSIS, A Guide to Federal Food Labeling Requirements for Meat and Poultry Products 14, http://www.fsis.usda.gov/pdf/labeling_requirements_guide.pdf ("FSIS labeling authority is very broad, extending from the labels appearing on the food package, before they are applied to the product, to point-of-purchase materials, including promotional brochures and shelf-talkers.").

recordings, . . . and similar pieces of printed, audio, or visual matter") (internal quotation marks omitted); United States v. Jorgensen, 144 F.3d 550, 557-58 (8th Cir. 1998) (labeling under Federal Meat Inspection Act ("FMIA") embraces "brochures that accompanied . . . meat products"); Indian Brand Farms, Inc. v. Novartis Crop Prot., Inc., Civil Action No. 99-2118, 2007 WL 4571087, at *5-7 (D.N.J. Dec. 20, 2007) (brochure sent separately from product was labeling under Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")).[4]

In short, the USDA has approved Tyson's use of the Qualified Claim, and neither the district court nor plaintiffs have identified a single statute or case that allows the district court to second-guess this determination. To the contrary, the PPIA expressly precludes private causes of action. See 21 U.S.C. § 467c.

B. Statements in Advertisements That Substantively Comport With Government-Approved Labels Cannot Be False or Misleading

The district court also erred when it enjoined Tyson's use of the Qualified Claim in advertisements. Well-established case law makes clear the common-

[4] See also Original Honey Baked Ham Co. of Georgia, Inc. v. Glickman, 172 F.3d 885, 887 (D.C. Cir. 1999) (holding that provisions of PPIA would be construed to have same meaning as provisions in analogous acts, in particular FMIA, in view of acts' parallel or identical provisions and common purposes); 21 U.S.C. § 321(m) (defining labeling in FDCA); 21 U.S.C. § 601(p) (defining labeling in FMIA); 7 U.S.C. § 136(p)(2) (defining labeling in FIFRA); FSIS, Food Standards and Labeling Policy Book 140, http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf (stating that such materials as pamphlets, brochures, and posters constitute labeling under PPIA).

sense principle that claims in advertisements that merely repeat claims that the appropriate government agency has approved for use in connection with labels and labeling cannot be false or misleading as a matter of law. See, e.g., Cytyc Corp. v. Neuromedical Systems, Inc., 12 F. Supp. 2d 296 (S.D.N.Y. 1998). The Cytyc court held that advertising statements "that comport substantively with statements approved as accurate" by the government are, "as a matter of law, . . . neither false nor misleading" and thus "cannot supply the basis for [Lanham Act] claims." Id. at 301. See also Prohias v. Pfizer, Inc., 490 F. Supp. 2d 1228, 1235 (S.D. Fla. 2007) (government approval of product labeling "prevents the plaintiffs' [sic] from proceeding with claims that [defendant's] advertisements were misleading"); SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co., Inc., Nos. 95 CIV. 7011, 7688 (HB), 1996 WL 280810, at *13 (S.D.N.Y. May 24, 1996) (advertisements were "neither facially false nor misleading" under Lanham Act because they were "based on the package labelling [sic] approved by the FDA"); American Home Prods. Corp. v. Johnson & Johnson, 672 F. Supp. 135, 144-45 (S.D.N.Y. 1987) (FDA approval of product labeling is a "complete defense" to false advertising claims).

The district court disregarded these cases because they involved the FDA, which, unlike the USDA, has authority to review advertisements. See Halligan Decl. Exh. 2 at 30. The district court's distinction seems to misapprehend the

premise of the Cytyc cases: in those cases, the agency in fact had not reviewed or pre-approved the challenged advertisements, regardless of whether it had jurisdiction. Rather, the holdings were that the agency need not specifically review the challenged advertising – so long as the challenged statements "substantively comported" with what the agency had pre-approved, they were not false or misleading as a matter of law. See, e.g., Cytyc, 12 F. Supp. 2d at 301.

The USDA's approval of Tyson's Qualified Claim here thus should have ended the inquiry. The USDA had already determined that the claim was "not false or misleading," under 21 U.S.C. § 457(c), which is the same determination the district court was asked to make under the Lanham Act. See 15 U.S.C. § 1125(a)(1); Scotts Co. v. United Indus. Corp., 315 F.3d 264, 272 (4th Cir. 2002) (Lanham Act plaintiff must establish that "defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product") (internal quotation marks omitted). It was therefore improper for the district court to overrule the USDA's determination.

C. The District Court Erred in Finding that Plaintiffs Had Established a Likelihood of Irreparable Harm

The district court further erred in finding that plaintiffs had established a likelihood of irreparable harm. The district court erroneously applied a presumption of irreparable harm based upon its determination that Tyson's advertisements had the tendency to deceive consumers. See Halligan Decl. Exh. 2

at 20-25. The district court's holding impermissibly collapses the independent consideration of irreparable harm into the analysis of likelihood of success on the merits and thus runs contrary to this Court's recognition that irreparable harm is the most important factor in the assessment of preliminary injunction motions. See, e.g., Manning v. Hunt, 119 F.3d 254, 263 (4th Cir. 1997); Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991).

The district court specifically recognized both that a presumption of irreparable harm has been limited to cases involving comparative advertising and that Tyson's advertising is not comparative in nature. See Halligan Decl. Exh. 2 at 21 n.10. Nonetheless, relying on an Eighth Circuit case that involved comparative advertising, the district court followed the suggestion "that a presumption of irreparable harm should be applied in all Lanham Act false advertising cases where the plaintiff has established a tendency to deceive." Id. at 21 (citing United Indus. Corp. v. Clorox Co., 140 F.3d 1175 (8th Cir. 1998)).[5] But this presumption has been limited to cases where the challenged advertisement

[5] The district court also cites two pre-Scotts district court cases in this Circuit in which a presumption of irreparable harm was applied based upon a determination that the plaintiff had established a tendency to deceive. See Halligan Decl. Exh. 2 at 21-22 (citing JTH Tax, Inc. v. H&R Block Eastern Tax Servs., Inc., 128 F. Supp. 2d 926, 948 (E.D. Va. 2001) and Black & Decker (U.S.) Inc. v. Pro-Tech Power Inc., 26 F. Supp. 2d 834, 862 (E.D. Va. 1998)). Both of those cases relied upon Coca-Cola Co. v. Tropicana Products, Inc., 690 F.2d 312 (2d Cir. 1982), which involved a comparative claim Id.

makes a misleading comparison to a competitor's product, and "[o]utside the context of comparative advertisements (that is, those that make no direct reference to a competitor's product), a presumption of irreparable injury to a party is unwarranted." Mutual Pharm. Co. v. Ivax Pharms., Inc., 459 F. Supp. 2d 925, 944-45 (C.D. Cal. 2006)); see also North Am. Med. Corp. v. Axiom Worldwide, Inc., No. 07-11574, 2008 WL 918411, at *11 (11th Cir. Apr. 7, 2008) (presumption of irreparable harm applicable, if at all, only where allegedly false advertising was comparative in nature). Indeed, this Court has expressly declined to determine whether a presumption should ever apply in false advertising cases. Scotts, 315 F.3d at 273-74.[6]

The district court also clearly erred in finding, alternatively, that plaintiffs had demonstrated that they would suffer irreparable harm absent a preliminary injunction. See Halligan Decl. Exh. 2 at 25-26. First, plaintiffs failed to establish the requisite causal connection between any alleged losses of retailer accounts and Tyson's use of the Qualified Claim. Contrary to the district court's determination that such losses were "as a result of Tyson's advertising campaign," id. at 12, the

[6] As the Eleventh Circuit explained, moreover, the Supreme Court's recent decision in eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006), "calls into question whether courts may presume irreparable harm merely because a plaintiff in an intellectual property case has demonstrated a likelihood of success on the merits," and "a strong case can be made that eBay's holding necessarily extends to the grant of preliminary injunctions under the Lanham Act." See North Am. Med. Corp., 2008 WL 918411, at *12.

witnesses for plaintiffs testified that, at most, they could only "assume" that was the case. See, e.g., Halligan Decl. Exh. 16 (4/7/08 Tr. at 126:2-9 (Burroughs); 4/8/08 Tr. at 155:18-21 (Burroughs)). Such assumptions are insufficient to meet plaintiffs' burden of proving irreparable harm. See, e.g., In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 533 (4th Cir. 2003).

Second, the district court noted that plaintiffs' harm, if any, is readily quantified – $4.1 million to Sanderson and $10 million to Perdue. See Halligan Decl. Exh. 2 at 25. Such quantifiable losses are not irreparable; "[m]ere injuries, however substantial, in terms of money . . . are not enough." Hughes Network Sys., Inc. v. Interdigital Commc'ns. Corp., 17 F.3d 691, 694 (4th Cir. 1994) (internal quotation marks and citation omitted).[7] Ignoring this basic concept, the district court relied upon that fact that "there is no evidence . . . showing that the damage already incurred by Plaintiffs will not be made worse during the pendency of this case." Halligan Decl. Exh. 2 at 25. This lack of evidence does not satisfy plaintiffs' burden, nor does it answer the key question of whether the plaintiffs' harm could be compensated by money damages. See Hughes, 17 F.3d at 694.

[7] See also Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc., 1:04CV00977, 2005 U.S. Dist. LEXIS 38501, at *10 (M.D.N.C. Sept. 30, 2005), adopted by, injunction denied by, 2005 U.S. Dist. LEXIS 38499 (M.D.N.C. Dec. 28, 2005) (finding that lost sales are addressable by quantifiable monetary damages and are "not irreparable in nature").

Clearly, it could; plaintiffs have quantified their alleged lost sales and could do so again.

II. TYSON AND ITS RETAIL CUSTOMERS WILL SUFFER IRREPARABLE HARM IF ENJOINED FROM USING THE QUALIFIED CLAIM

If this Court does not stay the injunction, the commercial consequences will be immediate and irreparable. Although the district court readily acknowledged that Tyson "may suffer some degree of irreparable injury upon the issuance of a preliminary injunction," Halligan Decl. Exh. 2 at 28, the court discounted this harm rather than consider it because it purportedly "could have been mitigated . . . through the adoption of a less aggressive marketing position." Id. at 27. But as this Court has found: "[I]t is error for a district court to conclude that any harm that would be suffered by a defendant was self-inflicted and thus entitled to lesser weight in the balancing-of-the-harms portion of the preliminary injunction calculus." Scotts, 315 F.3d at 285.

Tyson, in fact, will suffer irreparable injury unless a stay is granted. The district court's order, which takes effect on May 1, 2008, requires Tyson to remove point-of-purchase materials from more than 8,000 retail stores, see Halligan Decl. Exh. 1 at ¶ 1(a), a massive logistical effort that will incur extraordinary costs. Among other point-of-purchase materials, the injunction covers thousands of chicken case dividers – part of the physical structure of chicken display cases –

that cannot be removed without substantial disruption and inconvenience to Tyson's retail customers, particularly if carried out in the exceedingly short time period required by the district court. See id. at ¶ 1(d); Halligan Decl. Exh. 4.

Implementation of the injunction is also likely to cause significant and permanent loss of market share. Tyson just finished removing point-of-purchase materials bearing the Unqualified Claim from 8,000 stores as a result of the USDA's conceded error. See Halligan Decl. Exh. 17 (Tr. 4/9/09 at 67:4-20; 74:11-77:2 (Hogberg)). Many of Tyson's retail customers made clear that they would not tolerate additional disruptions. See id. Tyson anticipates that if it is forced to comply with the district court's injunction, a substantial number of its retail customers would simply drop Tyson's products from their shelves. See id. These permanent losses are cognizable irreparable harm and cannot be redressed by money damages. See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994); Hughes, 17 F.3d at 694.

The district court's order also prohibits Tyson and third-party retailers from advertising that its chicken is "Raised Without Antibiotics that impact antibiotic resistance in humans." See Halligan Decl. Exh. 1 at ¶ 2(c). Some of these retailers sell Tyson chicken under their own store brands, and if the injunction is not stayed, these retailers' operations with respect to their store brand chicken would be adversely impacted. Without a stay, neither Tyson nor its retailer

customers will be able to advertise chicken using Tyson's USDA-approved label claim during the prime summer selling season – Memorial Day to Labor Day.

Tyson further expects that significant harm to its reputation would result since retailers and consumers would no longer trust Tyson's statements. See Halligan Decl. Exh. 18 (4/10/08 Tr. at 476:15-477:10 (Hogberg)). Indeed, the patent inconsistencies in the district court's order damage Tyson's ability to communicate truthful information to consumers, as well as retailers' ability to control the contents of their meat cases. For example, although the case dividers bear only the USDA-approved Qualified Claim and the Tyson logo, they are expressly enjoined. See Halligan Decl. Exh. 3 (compare exhibits A and B); Halligan Decl. Exh. 4. Without a stay, the injunction will cause a disconnect between what Tyson and others can say on its product labels and on point of purchase materials or advertising, likely resulting in irreversible consumer confusion and harm to the marketplace if this Court ultimately reverses the injunction. The district court's injunction will undoubtedly damage Tyson's goodwill and reputation among consumers. See id.

The irreparable harm that Tyson will face absent a stay is compounded by the grossly inadequate bond set by the district court. Tyson proffered uncontradicted evidence that a bond of $38.5 million was necessary to protect Tyson in the event the injunction was later found to have been erroneously

granted.[8] Despite this evidence, the district court fixed the amount of the bond at $1 million because it concluded that plaintiffs had shown a "high likelihood of success on the merits." Halligan Decl. Exh. 19 at 4 (Memorandum Order Setting Bond). The district court's rationale runs contrary to Federal Rule of Civil Procedure 65(c), which is designed to protect the defendant in the event that plaintiffs do *not* ultimately succeed on the merits. See Fed. R. Civ. Pro. 65(c) (amount of bond must be "proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained"); Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 n.3 (4th Cir. 1999) (holding that bond should "provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an *improvidently* issued injunction") (emphasis added). The fact that the district court may be confident in its decision on the injunction is not part of the analysis in setting the bond amount.

III. ANY HARM TO PLAINTIFFS FROM STAYING THE INJUNCTION WOULD PALE IN COMPARISON TO TYSON'S INJURY IF THE INJUNCTION WERE GIVEN EFFECT

There would be no irreparable harm to plaintiffs if this Court enters a stay because any harm to plaintiffs would be purely monetary and thus compensable by

[8] Plaintiffs' own claims of harm allegedly constituted an aggregate of $14.1 million; if that is true, it is quite likely that Tyson would suffer even greater lost profits if it were required to cease using the Qualified Claim over a significantly longer period of time.

an award of damages. See Hughes, 17 F.3d at 694. Moreover, plaintiffs delayed more than eight months in bringing their Lanham Act claims in the first place. Plaintiffs had numerous opportunities to challenge Tyson's RWA claims beginning in June 2007. This Court has found that such inordinate delay indicates an absence of irreparable harm required to support a preliminary injunction. See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, 872 F.2d 75, 79-80 (4th Cir. 1989) (holding that plaintiff's six-month delay shows "absence of the kind of irreparable harm required to support a preliminary injunction") (internal quotation marks and citation omitted).

Furthermore, Perdue is in no position to assert that it will be harmed if Tyson uses the Qualified Claim during the pendency of this appeal. Perdue itself claimed that its ionophore-fed Harvestland chicken had "No Antibiotics Ever" for months after receiving notification that the USDA had decided to classify ionophores as antibiotics.[9] See Halligan Decl. Exh. 20 (4/7/08 Tr. at 85:18-88:14 (Stewart-Brown)).

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[9] Perdue eventually removed ionophores from the feed of its Harvestland chickens, but the doctrine of unclean hands precludes equitable relief in cases like this one where a plaintiff engages in the very inequitable conduct that gives rise to the action. See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945) (unclean hands doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief").

IV. GRANTING THE MOTION TO STAY THE INJUNCTION IS IN THE PUBLIC INTEREST

Congress has recognized that it is in the public interest to protect the health and welfare of consumers by assuring that poultry products distributed to them are properly marked, labeled and packaged. See 21 U.S.C. § 451. Congress further determined that the USDA is best suited for the responsibility of regulating the labeling and packaging of poultry products. See id. Consequently, the public interest here is best served by enforcing the clear congressional intent that the USDA shall have jurisdiction to determine whether certain claims concerning poultry are truthful and not misleading in order to protect the public.

Food companies, retailers and consumers that follow the rules and procedures set forth by the federal government should be able to confidently rely upon the determinations of the agencies vested by Congress with jurisdiction over particular matters. Similarly, competitors that may be impacted by truthful and not misleading government-approved statements should not be able to end-run expert agency determinations. The public has an interest in consistent government regulation and the district court's order impermissibly produces the opposite result.

CONCLUSION

For the foregoing reasons, this Court should grant Tyson's Motion for Stay of Preliminary Injunction Pending Appeal, insofar as the injunction restrains use of the Qualified Claim.

Dated: New York, New York
April 28, 2008

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SANDERSON FARMS, INC., et al., Plaintiffs-Appellees, -against- TYSON FOODS, INC., Defendant-Appellant.	Dist Court: Civ. Action No. RDB 08CV210 Court of Appeals Docket No. _____

DECLARATION OF CAITLIN J. HALLIGAN

I, Caitlin J. Halligan, declare under penalty of perjury as follows:

1. I am a partner at Weil, Gotshal & Manges LLP in its New York, New York office.

2. The purpose of this declaration is to place before the Court the following documents referred to in the accompanying Motion for Stay of Preliminary Injunction Pending Appeal:

(1) Exhibit 1 hereto is a true and correct copy of the Order of the United States District Court for the District of Maryland Granting Plaintiffs' Motion for Preliminary Injunction, dated April 22, 2008.

(2) Exhibit 2 hereto is a true and correct copy of the Memorandum Opinion of the United States District Court for the District of Maryland Granting Plaintiffs' Motion for Preliminary Injunction, dated April 22, 2008.

(3) Exhibit 3 hereto is a true and correct copy of Tyson's Motion for Clarification of the Preliminary Injunction Order, dated April 23, 2008.

(4) Exhibit 4 hereto is a true and correct copy of the Letter Order of the United States District Court for the District of Maryland regarding Tyson's Motion for Clarification of the Preliminary Injunction Order, dated April 24, 2008.

(5) Exhibit 5 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 8, 2008, at pages 350:20-351:2 and 352:3-8 and the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 9, 2008 at page 43:12-22.

(6) Exhibit 6 hereto is a true and correct copy of Tyson's June 19, 2007 press release, entered into evidence at the preliminary injunction hearing as part of Plaintiffs' Exhibit 7.

(7) Exhibit 7 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett

of the United States District Court for the District of Maryland, dated April 9, 2008, at pages 44:25-45:13.

(8) Exhibit 8 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 8, 2008, at pages 353:3-9 and 354:12-15.

(9) Exhibit 9 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 8, 2008, at pages 351:3-14.

(10) Exhibit 10 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 9, 2008, at pages 63:23-64:16.

(11) Exhibit 11 hereto is a true and correct copy of the Memorandum Opinion and Order of the United States District Court for the District of Maryland denying Defendant's Motion to Dismiss, dated April 15, 2008.

(12) Exhibit 12 hereto is a true and correct copy of the Supplementation to Preliminary Injunction Order, dated April 25, 2008.

(13) Exhibit 13 hereto is a true and correct copy of Defendant's Motion to Stay the Preliminary Injunction Pending Appeal, dated April 25, 2008.

(14) Exhibit 14 hereto is a true and correct copy of the Memorandum Order of the United States District Court for the District of Maryland denying Defendant's Motion for Stay the Preliminary Injunction Pending Appeal, dated April 25, 2008.

(15) Exhibit 15 hereto is a true and correct copy of Defendant's Notice of Appeal, dated April 25, 2008.

(16) Exhibit 16 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 7, 2008, at page 126:2-9 and the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 8, 2008 at page 155:18-21.

(17) Exhibit 17 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 9, 2008, at pages 67:4-20 and 74:11-77:2.

(18) Exhibit 18 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett

of the United States District Court for the District of Maryland, dated April 10, 2008, at pages 476:15-477:10.

(19) Exhibit 19 hereto is a true and correct copy of the Memorandum Opinion Supplementing Preliminary Injunction Order, dated April 25, 2008.

(20) Exhibit 20 hereto is a true and correct copy of the transcript of the Preliminary Injunction hearing held before the Honorable Richard D. Bennett of the United States District Court for the District of Maryland, dated April 7, 2008, at pages 85:18-88:14.

This declaration was executed this 28th day of April, 2008, in Richmond, Virginia.

By: Caitlin Halligan
Caitlin J. Halligan

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SANDERSON FARMS, INC., et al., Plaintiffs-Appellees, -against- TYSON FOODS, INC., Defendant-Appellant.	District Court: Civ. Action No. RDB 08CV210 Court of Appeals: No. _____

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2008, I caused copies of Tyson's Motion in Support of Stay of Preliminary Injunction Pending Appeal and the attachments thereto to be sent by served upon:

Randall K. Miller (Randall.Miller@aporter.com)
Nicholas M. DePalma (Nicholas.Depalma@aporter.com)
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1600 Tyson Boulevard
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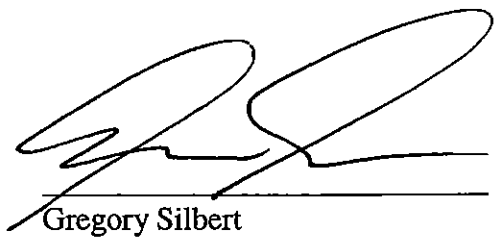

Gregory Silbert