EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SANDERSON FARMS, INC. and PERDUE FARMS, INC.,	*	
Plaintiffs,	*	
v.	*	Civil Case No. RDB-08-210
TYSON FOODS, INC.,	*	
Defendant.	*	

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MEMORANDUM OPINION

Plaintiffs Sanderson Farms, Inc. ("Sanderson") and Perdue Farms, Inc. ("Perdue") (collectively "Plaintiffs") bring this suit against Tyson Foods, Inc. ("Tyson" or "Defendant"), alleging violations of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which prohibits false or misleading advertising and unfair trade practices in interstate commerce. This action arises out of alleged advertisements disseminated by Tyson containing the claim that its chicken is "Raised Without Antibiotics" or "Raised Without Antibiotics that impact antibiotic resistance in humans." According to their Amended Complaint (Paper No. 45),[1] Plaintiffs seek preliminary and permanent injunctive relief, disgorgement of profits, attorney's fees, and other damages. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Pending before this Court is Defendant's Motion to Dismiss (Paper No. 50) for failure to state a claim upon which relief can be granted. Plaintiffs' Supplemental Motion for a Preliminary Injunction (Paper No. 44) also remains pending, but will be addressed in a separate

[1] Plaintiffs' original Complaint also included Foster Farms, Inc. and the Truthful Labeling Coalition as named Plaintiffs, but these entities are no longer parties to the action.

Memorandum Opinion and Order. This Court held a lengthy hearing over four days on both motions, commencing on Monday, April 7, 2008, and concluding on Thursday, April 10, 2008. Oral argument was heard on Defendant's Motion to Dismiss primarily on April 7, 2008. At the conclusion of the hearing on April 10, 2008, this Court DENIED Defendant's Motion to Dismiss for reasons stated on the record. Specifically, this Court held that a label approved by the United States Department of Agriculture does not insulate a company from an allegation of non-label false advertising under the Lanham Act. This Memorandum Opinion and accompanying Order serve to supplement the reasons previously stated on the record.

BACKGROUND

Bound to accept all well-pleaded allegations as true, this Court has taken the following factual allegations largely from Plaintiffs' Amended Complaint. Plaintiffs allege that Tyson has been and continues to nationally advertise that its chicken is "Raised Without Antibiotics" by means of television commercials, radio spots, print ads, billboards, posters and other media. (Amend. Compl. ¶¶ 1, 2.) This language has been referred to by the parties in this litigation as Tyson's "unqualified RWA claim." Plaintiffs also allege that Tyson is advertising a similar claim, namely, that its chicken is "Raised Without Antibiotics that impact antibiotic resistance in humans." (*Id.* ¶ 17.) The latter qualified claim has been disseminated in several forms, including "Raised Without Antibiotics that Impact Human Antibiotic Resistance," "Raised Without Antibiotics ** No compounds used that create antibiotic resistance in humans," and "Chicken Raised Without Antibiotics that impact antibiotic resistance in humans." (*Id.* ¶ 18.) Combined, these latter claims have been referred to by the parties as Tyson's "qualified RWA claim."

The gravamen of the Amended Complaint is that the unqualified language "Raised Without Antibiotics" is literally false and that the qualifying language, "that impact antibiotic resistance in humans" and any of its variations, is ineffective at curing the literal falsity of the root language "Raised Without Antibiotics." (*Id.* ¶ 19.) Plaintiffs contend that both the unqualified and qualified RWA claims "deceive consumers and injure competitors and will continue to do so absent an injunction." (*Id.* ¶ 20.)

Plaintiffs allege that Tyson uses in its chicken feed hydrophobic molecules called ionophores, which are used to "disrupt transmembrane ion concentration gradients, required for the proper functioning and survival of microorganisms." (*Id.* ¶ 19.) Ionophores kill microorganisms in chicken, thereby yielding a larger, healthier, and more profitable production of chicken. (*Id.* ¶ 24.) Plaintiffs allege that ionophores are in fact antibiotics, despite Tyson's claim that its chicken is "Raised Without Antibiotics."

The Food Safety and Inspection Service ("FSIS") of the United States Department of Agriculture ("USDA") originally approved Tyson's use of a "Raised Without Antibiotics" label. FSIS subsequently revoked that approval and specifically stated that ionophores *are* antibiotics. Accordingly, FSIS informed Tyson that they could no longer use a product label claiming that the chicken contained therein was "Raised Without Antibiotics." (*Id.* ¶ 27.) Subsequently, the label was qualified to read "Raised Without Antibiotics that impact antibiotic resistance in humans." (*Id.*) On December 19, 2007, FSIS issued a document titled "USDA Labeling Guidance for Raised Without Antibiotic Claims and the Use of Ionophores," in which the agency stated as follows:

> It is longstanding FSIS policy that ionophores are antibiotics because they meet the [American Veterinary Medical Association

> ("AVMA")] definition.[2] The Food and Drug Administration [("FDA")] agrees that by strict definition, ionophores are antibiotics thus; poultry meat from birds to which ionophores have been administered is not eligible to bear a "RWA" claim.

(*Id.* ¶ 29.)

Because FSIS considers ionophores to be antibiotics, Plaintiffs allege in their Amended Complaint that Tyson's advertisements containing the claim "Raised Without Antibiotics" are false and misleading. (*Id.* ¶ 33.) They also allege that the advertisements are sufficiently distributed to constitute commercial advertising under the Lanham Act.[3] (*Id.*) Plaintiffs further contend that the advertisements constitute material misstatements likely to influence the decisions of consumers, (*id.* ¶¶ 34-36), and that the advertisements constitute an implied health and safety superiority claim over the chicken products of Sanderson and Perdue. (*Id.* ¶ 37.) These alleged Lanham Act violations are causing and will continue to cause irreparable injury to Plaintiffs for which there is no adequate remedy at law. (*Id.* ¶¶ 38-39.)

As part of their Amended Complaint, Plaintiffs have submitted a consumer survey conducted by Professor Michael B. Mazis. Plaintiffs describe the consumer survey in their Amended Complaint as follows:

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[2] The AVMA has defined an ionophore as "a chemical substance produced by a microorganism, which has the capacity, in dilute solutions, to inhibit the growth of or to kill other microorganisms." (Amend. Compl. ¶ 25.)

[3] Specifically, Plaintiffs allege, *inter alia*, that "Tyson continues to run various versions of its 'unqualified' raised without antibiotics television commercial, including on the following dates and channels: February 2, 2008 on channels WPLG, WFAA, KNXV, KTVT, WPLG, WFOR, KXAS, KPNX; February 3, 2008 on channel KPNX; February 4, 2008 on channel KPNX, February 9, 2008 on channel WPLG; February 10, 2008 on channels KPHO, KTVT, WFOR, KXAS, WTVJ, WFAA and KNXV; February 11, 2008 on channels KPHO, KTVT, WFOR, KXAS and WTVJ; February 12, 2008 on channels WFAA, KPIX, WPLG and KGO; and February 16, 2008 on channel KXAS." (*Id.* ¶ 32.)

> In February 2008, Professor Mazis conducted a survey of approximately 600 consumers in 28 shopping malls across the United States. There were four cells of approximately 150 respondents each shown different stimuli: two cells were shown an "unqualified" "Raised Without Antibiotics" Tyson claim; a third cell was shown a print stimulus with the "qualified" "Raised Without Antibiotics" claim; and a fourth cell was shown a "control" stimulus. Professor Mazis' survey demonstrates that approximately 59-63% of survey respondents perceived a false implied safety superiority message from these claims (regardless of whether the claim is "qualified" or "unqualified"). In addition, consumers appear deceived with regard to the "qualified" claim, and Professor Mazis concludes that many consumers appear to separate the "qualified" claim into two concepts: (1) Tyson's chicken has no antibiotics; and (2) because Tyson's chicken has no antibiotics, Tyson's chicken does not impact antibiotic resistance in humans.

Id. ¶ 40.) Because the Plaintiffs contend that the survey shows no demonstrable consumer impact by the qualified language, the claim "Raised Without Antibiotics that impact antibiotic resistance in humans" is also false and misleading to the consumer in violation of section 43(a) of the Lanham Act.

On March 14, 2008, Defendant filed the pending Motion to Dismiss. (Paper No. 50.) On March 18, 2008, Plaintiffs filed their Response (Paper No. 52) and, on March 27, 2008, Defendant filed its Reply (Paper No 58).[4]

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[4] Defendant's Motion to Dismiss was not filed until after the parties began discovery on Plaintiffs' pending Supplemental Motion for Preliminary Injunction. By the time this Court denied Defendant's Motion to Dismiss on the record at the April 10, 2008 hearing, this Court had already been privy to the extensive evidence and testimony offered by the parties on the Plaintiffs' Supplemental Motion for Preliminary Injunction.

By its very nature, however, Defendant's Motion to Dismiss relates only to the sufficiency of the Amended Complaint and whether it fails as a matter of law. Therefore, although this Court has become intimately familiar with the factual contentions of the parties and the underlying evidentiary support, this Motion to Dismiss will be dealt with the same as any other motion to dismiss—by testing the legal sufficiency of the Amended Complaint based on the allegations contained therein. A more extensive factual discussion of this case, including

STANDARD OF REVIEW

Defendant seeks to dismiss Plaintiffs' action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In reviewing a complaint, this Court accepts all well-pleaded allegations of the complaint as true and construes the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005); *Ibarra v. United States,* 120 F.3d 472, 473 (4th Cir. 1997); *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Migdal v. Rowe Price-Fleming Int'l Inc.,* 248 F.3d 321, 325-26 (4th Cir. 2001); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (stating that a complaint need only satisfy the "simplified pleading standard" of Rule 8(a)).

The Supreme Court of the United States recently explained that a "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted). Nonetheless, detailed factual allegations are not needed to survive a motion to dismiss. *Id.* at 1964. Instead, a complaint must only contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. Moreover, the Supreme Court determined that a properly plead complaint "may be supported by showing any set of facts consistent with the allegations." *Id.* at 1969.

DISCUSSION

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findings of fact, will be contained in the Memorandum Opinion addressing Plaintiffs' Supplemental Motion for Preliminary Injunction.

The Lanham Act prohibits the "false or misleading description of fact, or false or misleading representation of fact, 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." 15 U.S.C. § 1125(a)(1)(B). The elements of a false advertising claim under the Lanham Act are as follows:

> (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product;
>
> (2) the misrepresentation is material, in that it is likely to influence the purchasing decision;
>
> (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience;
>
> (4) the defendant placed the false or misleading statement in interstate commerce; and
>
> (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.

Scotts Co. v. United Indus. Corp., 315 F.3d 264, 272 (4th Cir. 2002) (citing *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-11 (1st Cir.), *cert. denied*, 123 S. Ct. 485 (2002)). False advertising is actionable under the Lanham Act if the statement is false on its face or if, despite its truth, the statement is likely to mislead or confuse consumers because of the nature of the advertisement. *See C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 434 (4th Cir. 1997). This Court finds that Plaintiffs' Amended Complaint states sufficient factual allegations under section 43(a) of the Lanham Act to survive dismissal on a 12(b)(6) motion.

Nonetheless, Defendant argues that Plaintiffs' Amended Complaint fails as a matter of

law because the language that Plaintiffs allege to be false and misleading under section 43(a) of the Lanham Act—*i.e.*, the unqualified and qualified RWA claims—was approved for use on Defendant's chicken labels by FSIS, the USDA agency to which Congress has delegated the authority to regulate poultry labels. According to Defendant,

> courts uniformly have held that no Lanham Act cause of action lies regarding advertising claims that "comport substantively" with the label and labeling statements approved as accurate by the government agency vested with that approval authority. To hold otherwise would enable competitors like the plaintiffs here to use the Lanham Act to create a private cause of action, which the [Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.* ("PPIA")] expressly prohibits.

(Def.'s Mem. Supp. Mot. to Dismiss 2.) In support, Defendant relies on what has been termed the *Cytyc* line of cases, which includes *American Home Products Corp. v. Johnson & Johnson*, 672 F. Supp. 135 (S.D.N.Y. 1987), *Cytyc Corp. v. Neuromedical Systems, Inc.*, 12 F. Supp. 2d 296 (S.D.N.Y. 1998), and, most recently, *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228 (S.D. Fla. 2007).

In *Cytyc*, the defendant filed a counterclaim alleging that plaintiff promoted its product in a false and misleading manner in violation of the Lanham Act. 12 F. Supp. 2d at 301. Plaintiff moved to dismiss the case because many of the statements contained in the advertisements had been approved by the Food and Drug Administration ("FDA"). *Id.* Citing *American Home Products*, 672 F. Supp. at 145, the court determined that "representations by plaintiff that comport substantively with statements approved as accurate by the FDA cannot supply the basis for [defendant's] claims." *Cytyc Corp.*, 12 F. Supp. 2d at 301. The court continued: "Although [plaintiff's] statements do not correspond precisely to statements that the FDA has approved, the challenged statements discussed above are similar enough to the approved statements for the

Court to conclude, as a matter of law, that they are neither false nor misleading." *Id.*

In *Prohias,* a proposed nationwide class action alleged that the defendant pharmaceutical company, Pfizer, had engaged in false and misleading advertising under the consumer fraud acts of several states (not the federal Lanham Act) with respect to Pfizer's cholesterol-lowering drug Lipitor. Lipitor was originally approved by the FDA only to reduce cholesterol in certain patients, but in 2004 it was also approved to reduce the risk of heart attacks for women and the elderly with multiple risk factors for coronary heart disease. 490 F. Supp. 2d at 1230. The advertising in question in *Prohias* began running prior to and continued after the 2004 approval and depicted women and elderly people with their cholesterol numbers visible, accompanied by text warning that "high cholesterol is a risk factor for heart disease." *Id.* The plaintiffs alleged that these advertisements were false and misleading because there was no scientific support for the claim that Lipitor reduced the risk of heart disease in women or elderly people who did not already have heart disease or diabetes. *Id.* As to the post-2004 advertisements,[5] the court granted the defendant's motion to dismiss, finding that "even if the advertisements did not comport precisely with Lipitor's approved label . . ., the alleged advertisements generally comport with the approved label, and are therefore not misleading as a matter of law." *Id.* at 1235 (citing *Cytyc*, 12 F. Supp. 2d at 301).

Taken together, the *Cytyc* line of cases exemplify a broader proposition—namely, that federal courts should not unduly entangle themselves in regulatory agency decisions where the agency has special expertise in the subject matter and where, more importantly, doing so would

[5] The pre-2004 advertisements, which aired before the FDA approved *any* use of Lipitor for heart disease, survived Pfizer's motion to dismiss.

usurp the authority specifically delegated by Congress to that agency.

With Defendant's legal position in mind, this Court must address whether Defendant's unqualified claim, "Raised Without Antibiotics," and qualified claim, "Raised Without Antibiotics that impact antibiotic resistance in humans," are actionable under section 43(a) of the Lanham Act.

I. The Unqualified Claim — "Raised Without Antibiotics"

The *Cytyc* line of cases provide no defense to Plaintiffs' claim that advertisements containing the unqualified "Raised Without Antibiotic" claim are false and misleading. In fact, there is absolutely no tension between Plaintiffs' Lanham Act allegations and the USDA.

Defendant's reliance on the *Cytyc* line of cases is based exclusively on the position that "a Lanham Act claim cannot proceed against advertisements that simply repeat information that the government has approved to appear in labeling because the appropriate federal agency has determined that it is not false or misleading." (Def.'s Reply Mem. 1.) As alleged in Plaintiffs' Amended Complaint, FSIS has revoked Defendant's unqualified label, "Raised Without Antibiotics." (Amend. Compl. ¶27.) It is further alleged that FSIS issued a letter on December 19, 2007 that unambiguously stated that "[i]t is longstanding FSIS policy that ionophores are antibiotics" and that "poultry meat from birds to which ionophores have been administered is not eligible to bear a 'RWA' claim." (*Id.* ¶ 29.) Without current USDA approval for its label, Defendant cannot rely on the USDA's former (and briefly held) position to defend itself against allegations that it continues to run false and misleading advertisements carrying the "Raised Without Antibiotics" language.

Plaintiffs' Amended Complaint clearly states a claim upon which relief can be granted

with respect to the unqualified claim "Raised Without Antibiotics." Therefore, this portion of Plaintiffs' Amended Complaint survives Defendant's Motion to Dismiss.

II. The Qualified Claim — "Raised Without Antibiotics that impact antibiotic resistance in humans"

Defendant relies on the same cases to support its defense of Plaintiffs' claim that the use of "Raised Without Antibiotics that impact antibiotic resistance in humans" in advertisements is false and misleading to the consumer. As was previously discussed, Defendant has current approval from the United States Department of Agriculture to carry this language on its labels. Thus, this portion of Plaintiffs' Amended Complaint is distinguishable from the claim with respect to the "Raised Without Antibiotics" language.

Lanham Act claims often collide against the regulatory authority of the FDA. Extensive case law has developed on the issue, including the *Cytyc* line of cases. This case, however, involves the USDA and therefore the cases cited by Defendant are not directly on point. In fact, the parties have not submitted and this Court has been unable to locate a single federal case—published or unpublished—where a court has resolved the precise issue at bar, *i.e.*, whether a USDA-approved label insulates a company from allegedly false non-label advertising under the Lanham Act.[6] To a large extent, therefore, this case is one of first impression. For the reasons discussed in detail below, the *Cytyc* line of cases is distinguishable based on the limited

[6] One court highlighted this tension, but did not decide the issue. In *ConAgra, Inc. v. George A. Hormel & Co.*, 784 F. Supp. 700 (D. Neb. 1992), the court wrote that it "need not reach the question of whether or not the USDA guidelines are applicable in this case. Among other things, [plaintiff] argues that USDA guidelines cannot regulate advertising, as opposed to the regulation of labels, since the guidelines do not explicitly pertain to advertisements, as opposed to labels, and the authorizing statutes, 21 U.S.C. §§ 601(o) and 607, apply only to labels and not advertisements generally." *Id.* at 737 n.26. While this accurately reflects the issue presented in this case, the *ConAgra* decision does not work in favor of either party.

jurisdiction of the USDA. Moreover, to the extent that the *Cytyc* line of cases offer persuasive authority, this Court is not convinced that Plaintiffs' Amended Complaint must be dismissed as a matter of law. Plaintiffs' Lanham Act claim is therefore not barred simply because the USDA approved the Defendant's use of the qualified language "Raised Without Antibiotics that impact antibiotic resistance in humans" on labels.

A. The Limited Authority and Jurisdiction of the USDA under the Poultry Products Inspection Act

1. The USDA Does Not Have Jurisdiction over Advertising

Pursuant to the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, the FDA has significant authority and jurisdiction to regulate advertisements. FDA regulations plainly govern "prescription drug advertisements" and include the authority to regulate "[a]dvertisements broadcast through media such as radio, television, or telephone communications systems." 21 C.F.R. § 202.1. The Division of Drug Marketing, Advertising, and Communications ("DDMAC") within the FDA has "responsibility for reviewing prescription drug advertising and promotional labeling to ensure that the information contained in these promotional materials is not false or misleading." DDMAC Mission Statement, *available at* http://www.fda.gov/cder/ddmac/. FDA also prohibits restricted medical devices from "using false or misleading advertising." *See* 21 U.S.C. §§ 352(q)-(r). The FDA frequently brings enforcement actions against companies it believes are disseminating false and misleading advertisements.

Moreover, with respect to FDA's regulation of over-the-counter ("OTC") products, the FDA voluntarily abstains from exercising its jurisdiction over advertising in favor of the Federal Trade Commission ("FTC"). *See* Working Agreement Between FTC and FDA, 4 Trade Reg.

Rep. (CCH) ¶ 9,850.01 (1971). Nonetheless, the FDA reevaluates approvals under the FDCA through a monograph process involving an independent advisory review panel that submits recommendations to the FDA. *See, e.g., Kelso v. Bayer Corp.*, 398 F.3d 640, 643 (7th Cir. 2005) ("All OTC drug labeling required by a monograph or other regulation (*e.g.*, statement of identity, warnings, and directions) must appear in the specific wording established under the OTC drug monograph or other regulation." (internal citation omitted)); *Bristol-Myers Squibb Co. v. Teva Pharmaceuticals USA, Inc.*, 288 F. Supp. 2d 562, 574 (S.D.N.Y. 2003).

Pursuant to the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451 *et seq.*, the USDA has jurisdiction to approve all aspects of poultry product labels and labeling. In reviewing proposed labels and labeling for approval, FSIS seeks to ensure that they are not "false or misleading." *See* 21 U.S.C. § 457(b)-(c). FSIS does not, however, have any congressional authority to review advertisements. *See* Regulation of Advertising and Labeling, AH-715, Economic Research Service - U.S. Department of Agriculture, *available at* http://www.ers.usda.gov/publications/ah715/ah715c.pdf (stating that the FTC regulates advertising, while "FSIS regulates meat and poultry product labeling"). In fact, FSIS acknowledges that the FTC controls advertising issues in the poultry industry. *See* FSIS, A Guide to Federal Food Labeling Requirements for Meat and Poultry Products 18, *available at* http://www.fsis.usda.gov/PDF/ Labeling_Requirements_Guide.pdf ("An advertising claim may be deemed false or misleading if it is not adequately substantiated pursuant to FTC guidelines.").

In marked contrast to the FDA, the USDA does not have congressional authority to regulate advertising. While the "comport substantively" standard addressed in the *Cytyc* line of

cases may be appropriate in light of the expansive jurisdiction of the FDA, this Court finds the "comport substantively" standard inapplicable in this case based on the limited jurisdiction of the USDA.

2. Scope of Labeling Provisions

The scope of "labeling" is also at issue in this case and requires clarification. Label and labeling are defined in the PPIA as follows:

> The term "label" means a display of written, printed, or graphic matter upon any article or the immediate container (not including packaged liners) of any article; and the term "labeling" means 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). Plaintiffs' Amended Complaint alleges that Defendant's "*non-label* advertising" is false and misleading under the Lanham Act. According to FSIS's definition, labeling should be interpreted broadly as all "product labels *and materials that accompany a product but are not attached to it, such as point-of-purchase (POP) materials*." *See* FSIS, Guide to Federal Food Labeling Requirements, at 5 (emphasis added).

Labeling may be prepared in such a manner that it is also effectively "commercial advertising and promotion" under the Lanham Act. *See Applied Med. Res. Corp. v. Steuer*, 527 F. Supp. 2d 489, 493 (E.D. Va. 2007) (stating that the four-part test used in *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48 (2d Cir. 2002), has been "uniformly embraced by district courts in this Circuit"). As such, some labeling is actionable advertising. Point-of-purchase materials that merely restate the language approved for the label cannot fairly be characterized as advertising. As has become clear in this case, however, point-of-purchase materials that may well be considered labeling to FSIS often contain images and promotional

slogans in conjunction with the language approved for the label. This sort of labeling is merely advertising by another name. False and misleading images and slogans contained in a magazine advertisement are no less false and misleading, and consequently no less actionable under the Lanham Act, when they are transposed onto a piece of cardboard and placed in the poultry section of a grocery store. The fact that FSIS characterizes point-of-purchase materials as labeling will not insulate what is plainly an advertisement intended to induce consumers to purchase Defendant's product.

Therefore, Plaintiff's Amended Complaint fairly encompasses any labeling that, despite including language approved by the USDA, contains additional images and promotional slogans that effectively turn the labeling into an advertisement.

B. Distinction Between Labels and Advertising — *National Broiler Council v. Voss*

Despite not being directly on point, this Court finds *National Broiler Council v. Voss*, 44 F.3d 740 (9th Cir. 1994), persuasive. In *Voss*, the United States Court of Appeals for the Ninth Circuit addressed whether a state statute that made it illegal to "advertise, label, describe, otherwise hold out, or sell as 'fresh' poultry that is stored below 26 degrees" was preempted by the PPIA, which did not contain the same limitation. *Id.* at 743. The USDA had issued a regulation under the PPIA that permitted such chicken to be labeled "fresh." The plaintiffs, three poultry and meat trade associations, as well as the USDA, argued that the regulation made under the PPIA preempted the conflicting state statute. In his opinion specially concurring in the judgment, Judge O'Scannlain summarized the holding of the case, which he described as one involving "legal gymnastics": "[w]e . . . hold[], quite properly, that the California legislature is federally preempted from requiring that frozen chickens be *labeled* 'frozen.'" *Id.* at 749

(emphasis added).

The plaintiffs and the USDA also argued that the advertising portion of the state statute was preempted by the PPIA, but the court found that the advertising portion of the statute was functionally severable from the labeling portion and therefore was not preempted. The court wrote that the legislative purpose of the advertising portion of the state statute was to "protect consumers from misleading claims that previously frozen poultry is 'fresh'" and that the purpose of the statute would be enforced "even though the labeling restriction [could] no longer [be] enforced." *Id.* at 748. Judge O'Scannlain stated that

> the States are not without devices of their own to protect their citizens when Congress permits the federal bureaucracy to impose the absurd. California stores can still be required by state law to tell the truth in *advertising* and to *display* frozen chickens for what they are—"frozen"—even though the labels on the chickens themselves are required by federal law to say "fresh."

Id. at 749 (emphasis added).

Although the legal issues in the *Voss* case involve the severability and preemption of state statutory provisions, the case highlights the distinction between labels and advertising and constitutes judicial recognition that a label approved by the USDA may nonetheless be false or misleading in other contexts. Despite the fact that the specific language at issue was approved by the USDA for poultry labels, the Ninth Circuit determined that the language was nonetheless actionable as misleading under a state statutory analogue to the Lanham Act when used in advertising and in-store displays.[7]

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[7] Lending further support for Plaintiffs is the position taken by the National Advertising Division ("NAD") of the Better Business Bureau, an organization that adjudicates false advertising disputes, issues written decisions, and refers matters to the FTC when its decisions are not heeded. NAD's decisions are not binding on the parties before it, effectively making

C. Plaintiffs' Non-Label False Advertising Claim Does Not Infringe on the USDA's Jurisdiction to Regulate Labels Under the PPIA

It is well established that a party may not use the Lanham Act as a backdoor to private enforcement of the Food, Drug, and Cosmetic Act. *See, e.g., Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir. 1993) ("Mylan, in short, is not empowered to enforce independently the FDCA."), *cert. denied*, 510 U.S. 1197 (1994); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 231 (3d Cir. 1990) (finding that the FDCA does not create private causes of action).

Federal courts have struggled to find a consistent line of demarcation between, on the one hand, cases that assert legitimate Lanham Act violations and, on the other, cases that assert Lanham Act violations as a means to achieve private enforcement of the FDCA.[8] The conflict between Lanham Act claims and the FDCA was addressed by this Court in *Pediamed Pharmaceuticals, Inc. v. Breckenridge Pharmaceutical, Inc.*, 419 F. Supp. 2d 715 (D. Md. 2006),

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them advisory. Despite this limited authority, however, voluntary compliance appears almost universal. *See, e.g., AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 458 (E.D.N.Y. 1985).

In *Kraft Foods Global, Inc. v. Perdue Farms*, NAD Case No. 4576 (Oct. 20, 2006), *aff'd*, Report of Panel 141 (March 14, 2007), the NAD reviewed a label that had been approved by FSIS that said "no preservatives." The challenger, as the party bringing the action is called, argued that in fact the chicken product contained ingredients that qualified as preservatives. Although FSIS approved the label containing "no preservatives" as "accurate and not misleading," NAD independently determined that the words "no preservatives" were misleading to consumers when used in the advertising context.

[8] "The FDCA and the Lanham Act overlap to the extent that both regulate drug products in the marketplace. Courts have recognized the potential conflict between the two Acts and have struggled to define the proper scope of each law. Courts have come to the general conclusion that the FDA's enforcement of the FDCA is primarily concerned with the safety and efficacy of new drugs, while the Lanham Act is focused on the truth or falsity of advertising claims." *Axcan Scandipharm Inc. v. Ethex Corp.*, No. 07-2556, 2007 WL 3095367 (D. Minn. Oct. 19, 2007).

a case involving whether products manufactured by the parties were pharmaceutically equivalent. Notably, this Court explained that although a Lanham Act "claim cannot stand if it comes 'too close to the exclusive enforcement domain of the FDA,'" *id.* at 723 (citing *Summit Tech., Inc. v. High-Line Med. Instruments Co.*, 922 F. Supp. 299, 306 (C.D. Cal. 1996)), "[t]he FDA's administrative scheme should not be allowed to 'eviscerate a Lanham Act or related common law claim over which the agency has no jurisdiction.'" *Id.* (citing *Healthpoint Ltd. v. Stratus Pharms., Inc.*, 273 F. Supp. 2d 769, 792-93 (W.D. Tex. 2001)). Surveying the applicable case law, this Court determined that courts "have drawn a line between claims that involve application and interpretation of the FDCA and its implementing regulations, and claims that do not." *Id.* at 724. The former fail as a matter of law, whereas the latter do not.

Like the FDCA, there is no private cause of action under the Poultry Products Inspection Act. *See* 21 U.S.C. § 467c ("All proceedings for the enforcement or to restrain violations of this chapter shall be by and in the name of the United States."). Thus, Plaintiffs may not use the Lanham Act as a disguised attempt to enforce the PPIA. In this case, the USDA indisputably had authority and jurisdiction under the PPIA when it approved Defendant's application to use the term "Raised Without Antibiotics that impact antibiotic resistance in humans" on labels. If Plaintiffs' Amended Complaint had alleged that the Defendant's *labels* were false and misleading under the Lanham Act, the claim would be precluded as an attempt by Plaintiffs to use the Lanham Act as a vehicle to challenge the USDA's primary jurisdiction under the PPIA to determine whether or not a label is false or misleading.

Plaintiffs' Lanham Act claim, however, relates solely to allegedly false and misleading *non-label advertising* and is, therefore, simply not within the authority or jurisdiction of the

USDA. Plaintiffs assert that Defendant's advertisements containing the qualified RWA claim are false or misleading to the consumer public notwithstanding the fact that the USDA has determined that the language in the qualified RWA claim is not "false or misleading" under the PPIA. *See* 21 U.S.C. § 457(b)-(c). As such, Plaintiffs are not trying to enforce the provisions of the PPIA. *Cf. Pediamed Pharms.*, 419 F. Supp. 2d at 726 ("Defendants have not pointed specifically to any portion of the FDCA or to any implementing regulations to support their assertion that Plaintiff's claims are based on the FDCA or its regulations, and therefore are precluded."); *Healthpoint, Ltd.*, 273 F. Supp. 2d at 815-16 (stating that the "the proper judicial approach is for the Court to defer to the FDA for the resolution of issues within its primary jurisdiction and to exercise jurisdiction over Lanham Act and other claims which do not require application or construction of FDA law, regulations or policy").

While FSIS's determination involves a highly technical and scientific review of the proposed label language, it does not involve a review of whether the language is misleading to the consumer when combined with images and promotional slogans.[9] Undoubtedly, language that is technically and scientifically accurate on a label can be manipulated in an advertisement to create a message that is false and misleading to the consumer. The Lanham Act protects against precisely this situation by permitting claims based on language that, although literally

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[9] This is true even though, as Defendant stresses, the "false and misleading" text in the PPIA mirrors the requirement under the Lanham Act that the Plaintiffs establish, *inter alia*, "a *false or misleading* description of fact or representation of fact in a commercial advertisement about his own or another's product." *Scotts*, 315 F.3d at 272. As discussed above, although FSIS necessarily determines that language approved for a label is not "false or misleading," it does not and cannot determine whether or not the same language used in an advertisement is false or misleading to the consumer public. That determination is strictly within the province of the Lanham Act.

true, nonetheless misleads or deceives consumers in an advertisement. *See C.B. Fleet*, 131 F.3d at 434. Plaintiffs must therefore show that "Raised Without Antibiotics that impact antibiotic resistance in humans" means something different to the consumer public when viewed as part of Defendant's advertisements than the language did to the experts and scientists at the USDA during the label-approving process. Plaintiffs' Amended Complaint contains this allegation in substance and they have submitted a 600-participant consumer survey that they suggest strongly buttresses their allegation.

In sum, this Court has the obligation to enforce federal statutes that supply private causes of action, such as the Lanham Act. Contrary to Defendant's argument, this Court does not usurp in any way the USDA's authority under the PPIA with respect to labels, nor does it challenge the agency's expert judgment, by allowing Plaintiffs' Lanham Act claim to move forward. The USDA has not and cannot approve Defendant's non-label advertising. Simply put, a non-label false advertising claim brought under the Lanham Act is not precluded because the language on which the claim is based was approved for use on labels by the USDA. The opposite conclusion would extend USDA expertise into an area, *i.e.*, advertising, which the agency has no congressional authority to enter, while at the same time significantly curtailing the congressional protections explicitly accorded to "persons engaged in such commerce" under the Lanham Act. *See* 15 U.S.C. § 1127.

Plaintiffs have stated a cognizable claim that the qualified language approved by the USDA for use on labels, "Raised Without Antibiotics that impact antibiotic resistance in humans," is false and misleading to the consumer when used in advertisements. Therefore, this portion of Plaintiffs' Amended Complaint also survives Defendant's Motion to Dismiss.

CONCLUSION

For the reasons stated in this Memorandum Opinion and on the record at the hearing that concluded on April 10, 2008, Defendant's Motion to Dismiss (Paper No. 50) is DENIED. A separate Order follows.

Dated: April 15, 2008

/s/
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SANDERSON FARMS, INC. and PERDUE FARMS, INC.,	*	
Plaintiffs,	*	
v.	*	Civil Case No. RDB-08-210
TYSON FOODS, INC.,	*	
Defendant.	*	

* * * * * * * * * * * * *

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this 15th day of April, 2008, HEREBY ORDERED that:

1. The Motion to Dismiss filed by Defendant Tyson Foods, Inc. (Paper No. 50) is DENIED;
2. Defendant shall answer the Complaint within 20 days of the date hereof; and
3. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel for the parties.

/s/
Richard D. Bennett
United States District Judge

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SANDERSON FARMS, INC. and PERDUE FARMS, INC.,	*	
Plaintiffs,	*	
v.	*	Civil Case No. RDB-08-210
TYSON FOODS, INC.,	*	
Defendant.	*	

SUPPLEMENTATION TO PRELIMINARY INJUNCTION ORDER

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, on April 22, 2008, this Court entered a Preliminary Injunction Order, which provided the parties three days to file submissions on their respective positions as to the appropriate amount of the bond to be posted by the Plaintiffs as security for the issuance of that Preliminary Injunction. By Letter Order of April 24, 2008, this Court further granted the Defendant's Motion for Clarification and noted that the Defendant will be given a 15 day period commencing on May 1, 2008, to comply with the Preliminary Injunction, which is now specifically noted in this Supplementation to the Preliminary Injunction Order. The submissions of the parties have been filed and reviewed. For the reasons stated in the accompanying Memorandum Opinion;

IT IS HEREBY ORDERED, this 25th day of April, 2008, that the Plaintiffs shall file with the Clerk a bond in the amount of $1 million ($1,000,000) with good and sufficient surety, and conditioned, as required by Rule 65 of the Federal Rules of Civil Procedure. As previously noted in the Preliminary Injunction Order, said bond shall be posted by 12:01 a.m. May 1, 2008.

/s/
Richard D. Bennett
United States District Judge

EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
-- Northern Division --

SANDERSON FARMS, INC., et al., Plaintiffs, v. TYSON FOODS, INC., Defendant.	Civ. No. RDB-08-210

MOTION OF TYSON FOODS, INC. TO STAY PRELIMINARY INJUNCTION ORDER PENDING APPEAL

Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, defendant Tyson Foods, Inc., by its undersigned attorneys, respectfully moves for a stay of the Preliminary Injunction Order entered on April 22, 2008 [Dkt. No. 79], and in support thereof states:

1. The Preliminary Injunction Order requires Tyson Foods to "remove any and all non-label advertisements" containing language claiming that its chicken products are "Raised Without Antibiotics" or "Raised Without Antibiotics that impact antibiotic resistance in humans." Order, at ¶ 1.a. The Order also enjoins Tyson from "using non-label advertisements" during the pendency of this case. The Court defined "non-label advertising" to include "any and all labeling, including point-of-purchase materials" that contain the qualified or unqualified RWA language. (The Court has provided clarification of certain aspects of its Order, *see* Dkt. No. 82, and, during a teleconference on April 24, 2008, the Court further explained that both Exhibits B and C to Tyson's Motion for Clarification [Dkt. No. 81] were not within the meaning of paragraph 1(c) of the Order.)

2. The standard for a stay pending appeal of a final decree is similar to the standard for granting a preliminary injunction. "Briefly stated, a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *Long* v. *Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (Winter, J., as single Circuit Judge); *see also Johns Hopkins Univ.* v. *Datascope Corp.*, 2007 W.L. 2709986, at *1 (D. Md. Aug. 31, 2007). When the appeal is from an interlocutory injunction as opposed to a final decree on the merits, the burden for a stay pending appeal is probably lighter. In that context, it may be enough for the movant to show questions on the merits "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *See Blackwelder Furniture Co.* v. *Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (quoting *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)); *see also Hilton* v. *Braunskill*, 481 U.S. 770, 778 (1987); *Goldstein* v. *Miller*, 488 F. Supp. 156, 172-73 (D. Md. 1980), *aff'd*, 649 F.2d 863 (4th Cir. 1981). In *Goldstein*, Judge Kaufman explained that "likelihood-of-success standard does not mean that the trial court needs to change its mind or develop serious doubts concerning the correctness of its decision in order to grant a stay pending appeal." 488 F. Supp. at 172.

3. Tyson addressed each of the *Long* factors in the course of its presentation at the preliminary injunction hearing from April 7 through April 10, 2008. Tyson acknowledges, of course, that the Court rejected Tyson's positions when it issued the Preliminary Injunction Order. Nevertheless, Tyson incorporates the evidence and argument it presented at the preliminary injunction hearing in support of its motion to stay. Tyson further incorporates its argument in support of its motion to dismiss. Tyson respectfully suggests that, at minimum, the question

whether point-of-purchase materials are governed by the USDA's approval of Tyson's labels is so serious and substantial as to make it fair ground for more deliberate investigation. Even if the Court concludes that Tyson is not likely to succeed on appeal with respect to all provisions of the Preliminary Injunction Order, it may choose to stay certain aspects of the Order, such as the applicability of the Order to point-of-purchase materials in proximity to Tyson's chicken products.

4. In addition, Tyson yesterday filed a memorandum in support of its request for bond. [Dkt. No. 84.] That memorandum explains the enormous costs Tyson is likely to incur in complying with the Preliminary Injunction Order pending appeal. Tyson incorporates that memorandum, and the materials submitted with the memorandum, in further support of this motion to stay pending appeal.

5. As the Court recognized, the Preliminary Injunction Order is immediately appealable to the United States Court of Appeals for the Fourth Circuit. Tyson intends to file an immediate notice of appeal and an emergency motion for a stay pending appeal in the Court of Appeals (assuming this Court denies a stay pending appeal). Under Rule 8(a)(1) of the Federal Rules of Appellate Procedure, an appellant who seeks a stay pending appeal from the Court of Appeals ordinarily must first request that relief in the District Court.

WHEREFORE, Tyson Foods, Inc. respectfully requests that its motion to stay the effect of the Preliminary Injunction Order pending appeal be granted.

Respectfully submitted,

MURPHY & SHAFFER LLC

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EXHIBIT 14

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SANDERSON FARMS, INC. and PERDUE FARMS, INC.	*	
Plaintiffs,	*	
v.	*	Civil Case No. RDB-08-210
TYSON FOODS, INC.	*	
Defendant.	*	

* * * * * * * * * * * * *

MEMORANDUM ORDER

On April 22, 2008, this Court granted a request by Plaintiffs Sanderson Farms, Inc. ("Sanderson") and Perdue Farms, Inc. ("Perdue") (collectively, "Plaintiffs") for a preliminary injunction against Defendant Tyson Foods, Inc. The Preliminary Injunction Order (Paper No. 79) requires that Defendant remove from the marketplace "any and all non-label advertisements," which include "any television commercials, radio spots, print ads, billboards, circulars, and posters," as well as "any and all labeling, including point-of-purchase materials" that contain the language "Raised Without Antibiotics" and "Raised Without Antibiotics that impact antibiotic resistance in humans." The Preliminary Injunction Order also enjoins Defendant from engaging in any further non-label advertising during the pendency of this case.[1]

The Preliminary Injunction Order is set to take effect at 12:01 a.m. on Thursday, May 1, 2008, in order to provide Defendant the opportunity to appeal to the United States Court of Appeals for the Fourth Circuit. Earlier today, April 25, 2008, Defendant filed a Motion to Stay

[1] The Preliminary Injunction Order, issued April 22, 2008, was clarified by Letter Order on April 24, 2008. (Paper No. 82.)

the Preliminary Injunction Order pending appeal. (Paper No. 86.)

A party seeking a motion to stay an order granting injunction relief must establish four elements: "(1) that [the party] will likely prevail on the merits of the appeal, (2) that [the party] will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir.1970). Each factor must be met before a motion to stay is granted.

As Defendant accurately notes, many of the same arguments it provides in support of the pending motion to stay were denied by this Court in its Memorandum Opinion addressing Plaintiffs' Supplemental Motion for Preliminary Injunction.[2] (Paper No. 78.) For example, this Court found that Plaintiffs were likely to succeed on the merits of their Lanham Act claim, in large part due to the consumer survey submitted in support. (Mem. Op. 28-30.) Moreover, this Court found that Plaintiffs would suffer irreparable injury if the preliminary injunction were denied (*id.* at 20-26), and that the public interest worked heavily in favor of granting the preliminary injunction (*id.* at 30-31).

Although this Court found that Defendant was likely to suffer irreparable injury insofar as the qualified "Raised Without Antibiotics that impact antibiotic resistance in humans" claim *(id.* at 26-28), it is insufficient that only the second *Long* element has been met. Defendant has not submitted any new post-order evidence or arguments that cause this Court to question the factual and legal conclusions it made earlier this week. Therefore, for many of the same reasons

[2] There is significant overlap between the factors applied in a motion to stay and the factors applied in a motion for preliminary injunction. *See Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co.*, 550 F.2d 189, 195 (4th Cir. 1977)

discussed at length in this Court's previously issued Memorandum Opinion, Defendant cannot meet the first, third, and fourth factors under *Long*.

Accordingly, it is this 25th day of April 2008, ORDERED that:

a. Defendant Tyson Foods, Inc.'s Motion to Stay (Paper No. 86) is DENIED; and

b. The Clerk of the Court transmit copies of this Memorandum Order to counsel of record.

/s/
Richard D. Bennett
United States District Judge

EXHIBIT 15

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

SANDERSON FARMS, INC., et al., Plaintiffs, -against- TYSON FOODS, INC., Defendant.	Civil Action No. RDB 08CV210

NOTICE OF APPEAL

Notice is hereby given that Tyson Foods, Inc., defendant in the above named case, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Preliminary Injunction Order entered in this action on April 22, 2008, as well as the Order denying Tyson Foods' Motion to Dismiss entered on April 15, 2008, and all other appealable orders and rulings that formed a part of the Preliminary Injunction Order or modified that Order, including the Letter Order dated April 24, 2008, clarifying the Preliminary Injunction Order and the Supplementation to the Preliminary Injunction Order dated April 25, 2008.

Dated: April 28, 2008

MURPHY & SHAFFER LLC

By: */s/ William J. Murphy*
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Attorneys for Defendant
Tyson Foods, Inc.

EXHIBIT 16

A We were told Tyson.

Q All right. And now can you tell this Court for sure that Customer X switched from Sanderson to Tyson because of Tyson's raised without antibiotics campaign?

A We have to assume that that's a significant factor out there. Yes.

Q Okay. Because there could be all kinds of reasons. Right?

A Oh, sure.

Q All right. And has Sanderson Farms lost any other accounts like this retail accounts to Tyson recently?

A Not that we're aware of. But we're concerned that that's a big possibility as long as the raised without antibiotic campaign is out there.

Q All right. And what about -- this is a retail account. What about consumers themselves? You said you were concerned about maybe losing other retail accounts. What about consumers? Do you have any concerns about consumers?

A Sure. We know that consumers have an interest in product that's raised without antibiotics and it is a growing interest. I don't know that it's understood as well as it needs to be. But yeah, it's a huge concern.

MR. MILLER: Okay. Your Honor, I don't have any further questions.

THE COURT: Thank you, Mr. Miller. Ms. Jaffe?

A. Right in that area.

Q. And that doesn't affect Sanderson, does it?

A. If it's that product in the meat case next to us. But it didn't replace our volume.

Q. Right. And that's what I want to get to next and then we can end our cross-examination, Ms. Burroughs. Yesterday, your counsel showed you Plaintiffs' Exhibit 47 and you discussed using this document how Sanderson lost its account with Customer X. Is that correct?

A. Of what?

Q. Oh, sure. This is in your binder under 47. Ms. Burroughs, your counsel is going to show you what exhibit we're talking about.

A. Yes. I've got it now.

Q. Okay. Okay. Now yesterday, you testified, Ms. Burroughs, that Sanderson lost Customer X and that account amounted to a loss for Sanderson of about $4 million?

A. Yes.

Q. And I believe you also said that you couldn't be sure that the loss of that account was due to Tyson's RWA campaign. Right?

A. No. We can't be sure. But we'd have to assume it's a significant factor that exists.

Q. Okay. Now that was the only customer account you testified to losing during the time of Tyson's raised without antibiotics claim. Right?

A. Yes.

EXHIBIT 17

stores across the U.S. is that we are 90% converted to either having removed in some cases or converting that point of sale to the new qualified claim.

Q And how many stores, just so we can understand better what that 90% is up against, how many stores contained the unqualified RWA claim on point-of-sale materials?

A We had over 8,000. I'll have an exact count on that because actually, the tracker that we have in place, an individual has to sign that they have transitioned every single store of those 8,000-plus. So I'll have an exact count when we're entirely finished within five days. But we're through again 90% of those right now.

Q When you say you're finished in five days, what do you mean by that?

A We gave a deadline -- again we wanted to really without getting into the transition date commitment, we wanted on a point of sale to beat even the commitment we had made by several weeks, let's just put it that way. And so we set an internal target of April 14 to be 100% converted on every point of sale piece and every store that existed in America.

Q Okay. And so that left you, I think you said you were 90% --

A Yes.

Q -- completed as of today? That leaves you the last 10%. In talking about that 90%, you earlier told us the approach you used in terms of product labels. What was the approach you used here in terms of removing the point of sale or changing the point of sale to the qualified claim point of sale?

A It was really the same strategy. It was to have the largest impact as quickly as we could. So out of the gate, we went to the largest, you know, retailer such as Croager, which wouldn't be confidential, over a thousand stores and then we worked our way down to we're now for the most part other than some remote location stores, we're really dealing with, you know, accounts who are in smaller geographies, smaller areas. So it was again the same philosophy. Largest impact as quickly as we could on the conversion.

Q You said that you had 800 -- you thought about a little over --

A 8,000.

Q -- 8,000 stores that had the unqualified claim on its point of sale and labeling materials. Was there any major customers who were handling the RWA products for Tyson that had no point-of-sale materials?

A Yes. In fact our largest customer, Wal-Mart, was over

1500 stores. Did not have any at all.

Q Now let me go through and let's go through a little bit more detail the process you followed with regard to eliminating the unqualified claim point of sale and transitioning to the qualified claim point-of-sale materials. You got your label approved on April, on, I'm sorry, December 19th. What was the first action you took once you had your label approval with regard to this transitioning of point-of-sale materials?

A On the 20th of December, we got all of our sales managers together, debriefed them on the outcome obviously and approval of the qualified claim and then we talked to them and instructed them to start contacting retailers with regard to the

MR. MILLER: I thought so, too, but I can't find it either after looking through it.

THE COURT: All right.

MR. MILLER: Can I get an extra copy?

MS. JAFFE: Yes. We will give you -- I am sorry. We will give you another copy.

MR. MILLER: All right. I'm sorry to interrupt.

MS. JAFFE: In fact, I'll give you my copy.

MR. MILLER: Thank you.

Q Now let me ask you a few questions. You said that you instructed your field force to either just remove what was there or replace. Why those two options?

A Well, what we laid out here and we actually had a meeting with our what we call our field merchandisers the next day is that even though the 4-14 date was prior to and again I don't want to for confidentiality say the date of final transition, but we really drew a line in the sand and said this has got to be done by the 14th of April and if that means if for some reason because we use brokers to do this and the brokers have people they employ who can only service so many stores per week. So we said given that the new material is not going to be printed and available you see here in the memo until March 10th, if an order to get rid of the old, you can't get new and can't complete this by the 14th, then just pull down the old material

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and we'll on the next cycle get the new in. But we cannot miss the April 14th date.

Q Did you have any personal experience with customers who refused to let Tyson just remove the materials without replacing them with new P.O.S. materials containing the qualified claim?

A Yes. The one thing about point of sale is that the retailer really views it as part of their store once it's up and they're not really, you know, under an obligation to remove it and so when we went in actually early on with retailers to try to just remove some of it, they, in fact retailers representing at that point in time about 400 stores refused to allow us to do that until the new material was available.

Q Why would it take six weeks to have everything, once everything was printed?

A Well, the, as I mentioned in a situation like this, unlike if you were dealing with as we talked earlier a safety issue or a product adulteration where the retailer actually removes that product from the shelf, in this case the retailer does not do that. You need to provide the labor to do that and so you use brokers to did that. And the brokers, they don't have enough people to go in every store in America every day. So they cycle through stores every day and it's about a six-week cycle before they can make it through all the stores in a given market area to accomplish it. So that's why it was set to the tightest window possible which was mandating them to do this between the

28th and between April 14th.

Q Right. And April 14th, I think you mentioned earlier that you have some sort of signature program or a check to insure that --

A Yes.

Q Can you describe that?

A Well, one of the things we were concerned about because point of sale is somewhat uncontrollable. You know, someone can

find a piece later in a store that who knows where it was at and we took this very seriously and it's a very sensitive issue obviously. And so we said the best thing that we can do is with all the representatives through our brokers and our sales organization who are going into these 8,000 stores that we want a tracker in place so that for Store Number 42 of Bruno's or whatever account it may be, that we know the exact date, who went in there and that they had to physically sign that they pulled down the old point-of-sale material and put up the new point-of-sale material and that way, we would have at least that documentation on the day and the individual and when that change was made.

Q And when will the company have, when will Tyson have that material, the checker I think is the --

A They have to submit all that material to us by close of business on April 14th because that's the -- now we expect we'll get some on the 15th, but they have to complete that as they're

completing every store. So certainly by the end of the day on the 14th.

Q We've been talking about the transition from the unqualified claim on point-of-sale material and labeling right now. Let me go back just to get the timing of the initial dissemination of the point-of-sale material and labeling with the unqualified claim. When did Tyson start disseminating that point-of-sale material?

A We had materials produced and began the process of getting those up at retail starting about the first week of July.

Q July?

A Yes.

EXHIBIT 18

assurance that we were done because while they had hung in there with us, given their support also of the broader positive impact we were trying to have, you know, they said okay, so what's going to happen,

is everything going to change. So we went through, yes, the label is going to change, point of sale is going to change. You're going to have to change your ads. We are going to change our advertising in both print and in television to the new claim and they wanted our reassurance that that was going to happen because it's important to them also that there's consistency from a consumer communications standpoint you're not saying one thing on the label and one thing in ads and one thing in T.V. and so forth. So I had more than one retailer, major retailer in the country, we walked out of those meetings and they said okay, you know, we're with you. We understand, but we are done. Okay. You know, don't come back in here with all of a sudden, things have changed again and that was a very clear signal to me that there would be significant business consequences if we were to do so.

Q. Let me ask you to amplify on something you just said about the advertising claims being consistent with the point of sale and labeling claims. Why is that important as a marketer?

A. Well, it's important from two dimensions. When you're trying to build a strong brand, one of the basic rules is that is consistency of communication across every touch point we call it that you have with the consumer and those can be the package and what they read on it, the point-of-sale material, you know, labeling, what they read in the print ad, what they hear and see on television. And so

from one aspect, that is just fundamental to maintaining a high trust with the consumer because if they see a difference in those in one

vehicle versus another, it makes them question or if they don't see it on Trimmed and Ready and they just see it on the rest of the business, well, then well, does Trimmed and Ready not have it? So that's one aspect and the other is as I mentioned from a retailer standpoint, all you are putting into their store and what you are doing to drive traffic to their store, they are very interested in. We have always shown them our television commercials, story boards, all those things and that was one of the areas that I was directly questioned on on what are we going to do with the television? Is it moving to the qualified claim? I told them yes, it would.

Q. Two final questions, Mr. Hogberg. Did Tyson change any of its poultry practices in order to apply for the RWA claim?

A. Yes. And you're referring even I'm going all the way back to May, the original claim, which is continued. We had to make significant changes in our operation affecting weekly as I said well over ten million chickens. What we had to do and we had to demonstrate to the USDA is that we first incurred additional expense to try to further even though we believe we're very low in the industry to further reduce the occurrence of disease. Secondly, we had to put in processes and mechanisms around isolating chicken house, you know, which is where chickens are raised if you have an occurrence where you do need to treat with antibiotics. And then third, we had to put in a whole distribution mechanism because those chickens may have been scheduled to go into a plant and a package that was Tyson raised without antibiotics, no longer can. So we set up a whole

EXHIBIT 19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SANDERSON FARMS, INC. and PERDUE FARMS, INC.	*	
Plaintiffs,	*	
v.	*	Civil Case No. RDB-08-210
TYSON FOODS, INC.	*	
Defendant.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION SUPPLEMENTING PRELIMINARY INJUNCTION ORDER

The facts of this case have been set forth completely in this Court's Memorandum Opinion (Paper No. 78) issued on April 22, 2008. In support of the Preliminary Injunction Order entered on that date (Paper No. 79), the parties were given three days to file submissions on the amount of bond to be posted by Plaintiffs as security for the issuance of the Preliminary Injunction Order. Defendant Tyson Foods, Inc. has filed its submission under seal and has requested that Plaintiffs Sanderson Farms, Inc. and Perdue Farms, Inc. be required to post a bond in the amount of $38.5 million. Plaintiffs have suggested a bond in the amount of $100,000 or, alternatively, $400,000, and have specifically contended that a bond exceeding $1 million should not be entered. For the reasons stated below, this Court will require Plaintiffs Sanderson Farms, Inc. and Perdue Farms, Inc. to post a bond in the amount of $1 million ($1,000,000).

STANDARD FOR SETTING BOND

Rule 65(c) of the Federal Rules of Civil Procedure provides that '[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an

amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The United States Court of Appeals for the Fourth Circuit has explained that "[i]n fixing the amount of an injunction bond, the district court should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order." *Hoechst Diafoil Co. v. Nan Ya Plastics, Inc.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999).

ANALYSIS

There is ample authority supporting the issuance of a nominal bond where the district court determines that a plaintiff is highly likely to succeed on the merits at trial. *See Hoechst Diafoil*, 174 F.3d at 421 n. 3 (4th Cir.1999) ("Where the district court determines that the risk of harm is remote, *or that the circumstances otherwise warrant it*, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may suffice."); *Arkansas Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 518 (W.D.N.C. 1999) (stating that "[c]ircumstances in the instant case warrant the posting of only a nominal bond in that Plaintiffs have shown a strong likelihood of success on the merits").

Plaintiffs have cited a series of cases in which modest bonds were required in similar cases involving alleged violations of the Lanham Act, including a recent opinion of this Court. *NaturaLawn of America, Inc. v. West Group*, LLC, 484 F. Supp. 2d 392 (D. Md. 2007) ($50K bond). This Court is satisfied that more than a nominal bond must be posted in this case. In the alternative, Plaintiffs have suggested that a $400,000 bond is appropriate under the circumstances, citing in support *Schick Mfg., Inc. v. Gillette Co.*, 372 F. Supp. 2d 273 (D. Conn.,

2005). In *Schick*, the district court ordered that the plaintiff post a $400,000 bond after the defendant was required to (a) "remove or cover by sticker" all false and misleading packaging on its products and (b) "remove all displays, including in-store displays" that carried the false and misleading claims. (Pls.' Mem., Ex A.)

Plaintiffs argue further that even if a bond over $400,000 is warranted, such a bond should not exceed $1 million. This Court notes, however, that Plaintiffs have cited to *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226 (S.D.N.Y 2005), a case in which the district court ordered that the plaintiff post a $2 million bond. The *Pfizer* case is instructive insofar as it provides certain factors to be considered by this Court in this case. Although the defendant in *Pfizer* was required to take steps beyond taking down non-label advertisements (the scope of the preliminary injunction in this case), there was nonetheless a requirement that defendant remove all advertising nationwide.

Defendant has noted a series of cases involving patent infringement, trademark infringement and copyright infringement. *See Pfizer, Inc. v. Teva Pharms.USA, Inc.*, 429 F.3d 1364 (Fed. Cir. 2005) (patent infringement); *Bebe Stores, Inc. v. May Dep't Stores Int'l, Inc.*, 230 F. Supp. 2d 980 (E.D. Mo. 2002) (trademark infringement); *Cybermedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070 (N.D. Cal. 1998) (copyright infringement). In infringement cases such as the ones cited by Defendant, multi-million dollar bonds were required with entry of a preliminary injunction order. None of these cases, however, involved alleged false advertising under the Lanham Act.

Defendant has provided this Court with certain predictable direct costs associated with the preliminary injunction order. Defendant asserts that compliance with this Court's

Preliminary Injunction Order, including taking down point-of-purchase materials, could easily exceed $450,000. In addition, Defendant has also argued that it expects to lose sales and profits, but a precise amount is purely speculative. Moreover, Defendant has not submitted any precise figures involved with the cancellation of advertising, but has instead addressed the potentiality of lost profits. Finally, Defendant has suggested that damage to its customer relations with respect to it having to "return to retailers for the second time" to address advertising issues and the "repeated disruptions" resulting from the "Raised Without Antibiotics" advertising claim.

CONCLUSION

In light of the high likelihood of success on the merits, this Court finds that Defendant's interests (including, *inter alia*, direct costs, potential lost profits, and customer and consumer relations) will be secured through the duration of this Court's Preliminary Injunction Order by Plaintiff posting a bond of One Million Dollars ($1,000,000).

Dated: April 25, 2008

/s/
Richard D. Bennett
United States District Judge

EXHIBIT 20

position on one hand that it does use ionophores and it also takes the position that it doesn't feed its birds antibiotics. Is that right?

A That's correct. There are some real problems with this wording in June of '07 as we migrated through this process. As we've described, USDA was quite confusing at the time.

Q Well, I understand, Doctor. I'm just trying to understand the position that Perdue was taking because it seems safe to say then that in June of 2007, Perdue was still telling the public that ionophores are not antibiotics. Is that right?

A Well, first of all, telling the public, that's a -- we may have sent out maybe 12, I don't know how many letters. But let's say one a month is a lot. It's also a discussion with a particular somebody associated with some question. So not defending that the wording is not confusing, we've changed wording I bet ten times and we stopped sending letters all together because it's just not something people can understand.

Q Well, let me show you Defendant's Exhibit 234. Now on July 26, 2007, Perdue submitted several applications to USDA for the use of the labeling claim, raised without antibiotics, but on the Perdue brands of products. Is that correct?

A That's correct.

Q And you fed those Perdue chickens ionophores at that time. Correct?

A That's correct.

Q And with that application, as we saw in the past, you submitted a testimonial which has been individually marked as Defendant's Exhibit 234 and you submitted documents like this with each of those applications. Correct.

A Yes.

Q And once again in this testimonial dated July 24, 2007, you attested to USDA that Perdue doesn't consider ionophores to be antibiotics based on the three documents that you list there. Correct?

A Correct.

Q But USDA denied these applications because of Perdue's use of ionophores. Isn't that right?

A This is when apparently they were moving back to their original position.

Q Well, let me turn your attention now to document, Defendant's Exhibit 248 and the last page of that, which is Plaintiffs', it's Bates stamped Plaintiffs' 008087. Now here we see, Doctor, that at least on one of those applications, the FSIS examiner indicated USDA's position that ionophores are antibiotics. Right?

A They rejected this label claim, yes, with now this discussion that they're back to considering ionophores antibiotics within label claim.

Q Okay. And it looks from the fax line on the top of this page that you got this information on July 31st of 2007.

Correct?

A That's correct.

Q Okay.

A Well, I guess that's what it is.

Q So at least as of that time, Perdue had noticed that based on its own application for the use of the RWA claim on chickens that have been eating feed that had been treated with ionophores that USDA's policy on ionophores had changed. Correct?

A Well, in conjunction with this, we went in to discuss with USDA this position and were confused because that they were and now they aren't and what is their position on this and that other label claims that are in their books including Harvest Land have this discrepancy, what would they advise, what's their position on where they're going. Their advice was to hold on. They have to have some conversations, apparently private conversations with Tyson in order to decide what to do with this situation and we were trying to get some guidance from them on what to do with this as well as in the other label claim.

Q So, Doctor, you in the face of this on July 30th, you continued to feed the Harvest Land chickens feed that were treated with ionophores. Correct?

A I described to you the process. We went in and talked with USDA about the discrepancy in label claims and asked for some guidance and they explained that they were having this

conversation with Tyson about how to go forward on that.

Q Okay. Let me rephrase the question, Doctor. As of July 30, 2007, you knew that USDA had changed its position and now was telling you in words right on your own testimonial that they are now considering ionophores to be antibiotics. Correct?

A Here's what they told me. They gave me this, said no. But then they said several things following that that said we're still trying to figure out where we're going on this thing. That's what they said.

Q Okay. Doctor, so that what you continued, what the company continued to do was market Harvest Land chickens with the claim no antibiotics ever although those chickens were fed with feed that were treated with ionophores. Correct?

A Looking for guidance on what to do. Yes.

Q But you marketed the Harvest Land chickens with the claim no antibiotics ever even though those chickens were fed with feed that was treated with ionophores and you knew at this point --

A While we were looking for guidance, yes.

Q Defendant's Exhibit 235, please. Okay. I apologize, Doctor, for the quality of this copy, but this is the best that we got from your counsel. Now even as late as October 3, 2007, Perdue continued to put in writing to the USDA its position, again addressed and signed by you, that ionophores were not properly considered to be antibiotics based on those three