UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SANDERSON FARMS, INC., *et al.*, *Plaintiffs-Appellees,* v. TYSON FOODS, INC., *Defendant-Appellant*.	Civil Action No. 08-1461

OPPOSITION TO TYSON'S MOTION FOR STAY OF PRELIMINARY INJUNCTION

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SUMMARY OF ARGUMENT

Plaintiffs-Appellees Sanderson Farms, Inc. and Perdue Farms, Inc. oppose the Motion of Tyson Foods, Inc. ("Tyson") for the following reasons:

1. It is undisputed that Tyson (1) injects its chickens with ***human*** (non-ionophore) antibiotics at the hatchery; and (2) feeds its chickens ionophore antibiotics at the growing farm. Tyson did not disclose its antibiotic injections to the USDA and never received label approval for this practice.

2. Recognizing that this defeats its Motion, Tyson did not disclose the human antibiotic injections to this Court and focused only on its ionophore use. The Court may deny Tyson's motion on this basis alone without even reaching the "immunity" issue regarding ionophores.

3. Tyson faces an extraordinary burden in seeking to stay the preliminary injunction; stays are rarely granted particularly in false advertising cases. Tyson cites one example (*Scotts*) where the Court stayed an injunction when sales of the seasonal products in question were "nonexistent" pending trial, a totally unique circumstance not present here.

4. Tyson's "Raised Without Antibiotics" ("RWA") campaign deceives consumers about an important health safety issue (bolstered with visual images of children). Examples of ads at Ex. 1. The risk of consumers ingesting antibiotic resistant "superbugs" (when consumers think they have paid more for antibiotic free chicken) creates a significant public interest in support of the preliminary injunction.

5. Plaintiffs' harm vastly outweighs Tyson's harm. While Tyson still competes with existing advertising materials that do not use RWA, Tyson itself admitted that its RWA campaign "wrecked" and "devalued" Plaintiffs' brand equity

while enhancing Tyson's brand at Plaintiffs' expense. Tyson also captured retail accounts from Plaintiffs which Tyson itself attributes solely to the RWA campaign. Tyson's admissions make its attempt to downplay Plaintiffs' irreparable harm to this Court frivolous.

6. The District Court found that Sanderson and Perdue had an "extremely high likelihood of success on the merits," an assessment based on an extensive record that included a four-day evidentiary hearing, an additional day of legal argument, hundreds of exhibits, a robust, well-controlled consumer survey (lynch-pin evidence in false advertising cases), and expert testimony.

7. The District Court found that Tyson acted "aggressively" by flooding the market with the unqualified RWA claim after USDA declared the claim false and revoked Tyson's product label.

8. Tyson's defense based on USDA label approval of the qualified RWA does not cover Tyson's human antibiotic injections at the hatchery. In addition, Tyson inexplicably ***ignores*** the *Voss* line of cases, where courts consistently have held that USDA label decisions do ***not*** immunize a company from advertising litigation. Tyson's chief marketer who ran the RWA program agreed, declaring that the USDA labeling process did ***not*** prevent Tyson from flooding the market with multi-media advertising containing a claim that had been revoked by the USDA. Thus, clear USDA case law -- as well as clear estoppel -- defeat Tyson's USDA immunity argument.

9. Tyson wrongfully manufactured the "emergency" nature of its motion. Tyson was enjoined on April 22 but waited until April 28 to file, and insisted on a

decision by May 1, leaving this Court one day to resolve the Motion. This strategy is designed to impede the judicial process and, as a matter of law, undercuts the urgency Tyson must prove to win its Motion.

SELECTED STATEMENT OF FACTS

The following are selected fact citations pertinent to Tyson's motion.

1. ***Tyson uses human antibiotic injections***. "[I]n addition to using ionophores . . . it was clearly established that Tyson injects a vaccine containing antibiotics into its chicken eggs two or three days before the egg hatches." (Mem. Op. 4).

2. ***The injected human antibiotics are not ionophores***. "Defendant's chicken is not "Raised Without Antibiotics" when ionophores are used in chicken feed and ***other*** antibiotics are injected into the chicken egg two to three days before hatch." (Mem. Op. 31).

3. ***These injections would render chicken ineligible for any RWA label.*** Ex. 11, 4/9/08 Tr. 6:6-9 ("Q. Now if you injected one of these chickens instead of two to three days before it hatched the day after it hatched, would that chicken be a candidate for the RWA slogan? A. No, it would not.").

4. ***Tyson did not disclose or receive USDA approval to label injected chickens with any RWA label.*** Tyson's human antibiotic injections were "not revealed in Tyson's USDA application for label approval. (Mem. Op. 4-5). 4/9/08 Tr. 9:17-20 ("Q. . . . [J]ust confirm that Tyson does not mention injecting the chicken embryo in the egg with antibiotics in that application? A. No, we don't.").

5. ***Tyson also feeds chickens ionophore antibiotics.*** (Mem. Op. 4).

6. ***Tyson admits ionophores create resistant bacteria***. 4/9/08 Tr. 19-20.

7. ***Tyson admits that ionophore-resistant bacteria may multiply, transfer, and spread from chickens to humans.*** 4/9/08 Tr. 21-22.

8. ***Ionophores might mutate and create bacteria cross-resistant to human antibiotics.*** 4/9/08 Tr. 25:11-12; 4/7/08 Tr. 83:14-20 ("I have no idea if they developed or they have a contribution to the development of antibiotic resistance. We haven't studied it. I don't know how you'd study it.").

9. ***Other antibiotics such as fluoroquinolones, like ionophores, were once approved for use in animals but later withdrawn once science discovered that they did, in fact, create bacteria resistant to human drugs.*** "Dr. Pilkington acknowledged that fluoroquinolones, once thought by experts to have no impact on human antibiotic resistance, were pulled for use by the FDA when it was learned that they did, in fact, impact human antibiotic resistance." (Mem. Op. 4 n.3).

10. ***Tyson's advertising is false.*** "[C]onsumers are misled into believing that Tyson's mass-marketed chicken and Perdue's specialty chicken are both-antibiotic-free, when, in fact, Tyson feeds its chicken ionophores and injects its chicken eggs with antibiotics." (Mem. Op. 5, 31).

11. ***Compelling visuals bolster the false advertising message***. Tyson dresses its false safety message with strong visual images of children (see Examples of Tyson's advertising, Exhibits 1 and 2), seeking to create an "emotional connection" with consumers based on the false antibiotic-free claim. (Mem. Op. 8).

12. ***Plaintiffs well-controlled survey proves deception.*** Eminent surveyor Michael Mazis conducted a robust, well-controlled survey demonstrating that substantial portions of consumers believe that Tyson chicken contains absolutely "no" antibiotics and is "safer" compared to competitors' chicken products. 4/8 Tr. 219: 17-220:6 and 232:2-19.

13. ***Tyson's motive is to "price up" its chicken.*** "Tyson executives have acknowledged that this permits them to 'price up,' meaning that the company can raise the price of its [RWA] chicken . . . ." (Mem. Op. 5).

14. ***Tyson's campaign is causing "incalculable loss" to Perdue and Sanderson***. "[Tyson]'s advertising campaign 'wrecked Perdue' . . . and 'devalued the Perdue brand.'" (Mem. Op. 25). "Sanderson's revenues and sales have decreased thus far in 2008." (Mem. Op. 12). Perdue suffered "truckloads of lost volume." (Mem. Op. 12). But "sales of Tyson chicken increased by almost thirty-five million pounds." (Mem. Op. 9).

15. ***Tyson previously took the position that USDA lacked authority over advertising.*** "[A]s late as November 30, 2007, weeks after the USDA refused to reconsider its revocation, Mr. Hogberg was telling other Tyson employees that 'no one should be holding up anything because of the RWA labeling issue.' Indeed, he was encouraging others to 'GO! GO! GO!" onward with the campaign." (Mem. Op. 9).

16. ***USDA itself confirmed that it lacks authority over non-label advertising in this case***. *See* Ex. 4, email from USDA Undersecretary Dick Raymond stating that USDA "has no control over media advertising" and would not be able to do anything about Tyson's television advertising using the RWA claim.

ARGUMENT

I. TYSON'S HIGH BURDEN TO STAY THE PRELIMINARY INJUNCTION

A. District Court's Factual Findings Were Based on a Well-Developed Record and Cannot Be Disturbed Absent Clear Error

The District Court's factual findings are entitled to substantial deference. *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004) (decision to grant a preliminary injunction is reviewed for abuse of discretion, with factual determinations reviewed for "clear error"). In this case, such deference is particularly appropriate: the District Court's two separate published opinions were the result of careful deliberation made after legal argument and four days of testimony received after nine weeks of preparation. The parties in this case exchanged expert reports and other documents before the hearing, and each called two experts: two in veterinary science and two in surveys.

B. Stays Are Disfavored

A stay pending appeal is an extraordinary and disfavored remedy. *See, e.g.*, *Classic Components Supply, Inc. v. Mitsubishi Electronics*, 841 F.2d 163, 165 (7th Cir. 1988) ("Litigants should not lightly seek injunctions pending appeal"); *U.S. v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978) ("[W]e declined to grant the extraordinary remedies of summary reversal or a stay pending appeal."); *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685 (5th Cir. 1968) (denying motion where appellants failed to show "sufficient grounds for granting the extraordinary remedy of stay pending appeal").

The factors for obtaining a stay are similar to those that the District Court considered in granting the preliminary injunction in the first instance: (1) whether the movant is likely to succeed on the merits; (2) whether the movant will be irreparably harmed absent the stay; (3) whether the stay will substantially injure the other parties interested in the proceedings; and (4) whether the stay is in the public interest. *Hilton v. Braunskill*, 41 U.S. 770, 776 (1987).

This Circuit has recognized that "the burden of persuasion on the moving party is ***substantially greater*** than it was before the trial judge." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (emphasis added); *see also Mylan Labs, Inc. v. Leavitt*, 495 F. Supp. 2d 43, 47 (D.D.C. 2007) ("As for burdens, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy"); Fed. Ct. App. Manual § 21.5 (5th ed.) (same). "[A]n applicant seeking a stay will have more difficulty establishing . . . likelihood of success on the merits." 36 C.J.S. Fed. Courts § 519. "A stay pending appeal . . . is truly necessary only if what may be done under the judgment is beyond the power of the circuit court to undo by its judgment." 20-308 Moore's Federal Practice Civil § 308.11 (2008). "Mere injuries, expended in the absence of a stay, are not enough." *Long*, 432 F.2d at 980 (quotations omitted); *see also id.* ("Substantial" and "irreparable" economic harm not entitled to "much weight" where harm of the defendant's "own making").

C. Stay Motions in Lanham Act False Advertising Cases Are Rare

Given the compelling public interest in avoiding consumer deception and competitive harm, stay motions in Lanham Act false advertising cases generally fail even where the potential harm is far greater than it is to Tyson. For example, in

Novartis Consumer Health, Inc. v. Johnson & Johnson Merck Consumer Pharmaceuticals Co., 290 F.3d 578, 585 n.4 (3d Cir. 2002), the Third Circuit refused to stay a preliminary injunction in a far more extreme situation. In *Novartis*, the court enjoined the defendant's product name "Mylanta Nighttime Strength" because the defendant could not substantiate that its product was uniquely formulated for nighttime heartburn. Given that the injunction in *Novartis* related to the defendant's product name itself, the court acknowledged that the injunction would have the effect of precluding the defendant from selling its product ***at all***. *Novartis*, 2001 WL 493266, at *2 (D.N.J. Jan. 17, 2001). Although the defendant claimed that the injunction would cause the defendant to abandon the product entirely, the Third Circuit held that the likelihood of continuing consumer deception outweighed private harm to the defendant. *Id*. at 585 n.4.

Other cases are in accord. *See, e.g., CAE, Inc. v. Clean Air Engineering, Inc.*, 267 F.3d 660, 672 n.8 (7th Cir. 2001); *Candle Factory, Inc. v. Trade Assocs. Group, Limited*, 2001 WL 1523349, at *2 (4th Cir. 2001); *SunAmerica Corp. v. Sun Life Assur. Co. of Canada*, 77 F.3d 1325, 1330-31 (11th Cir. 1996); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 941 n.2 (3d Cir. 1993). In these cases, like Tyson, the advertiser claimed dire consequences, but their stay requests were appropriately denied. For example, in *SunAmerica Corp.*, the defendant protested a preliminary injunction that required it to change its trade name. The defendant argued compliance with the preliminary injunction was "irreversible, and would effectively moot [its] right of appeal." *SunAmerica Corp.*, 77 F.3d at 1130-31. Nonetheless, its

stay request was denied (and in fact the defendant later claimed that its appeal was not moot because it could reinstitute the trade name). *Id.* at 1331.

In comparable cases where defendants are ordered to take down nationwide false advertising on consumer products, defendants do not even request a stay, recognizing that there is no basis to stay the order. See *Schick Mfg., Inc. v. Gillette Co.*, 372 F. Supp. 2d 273 (D. Conn., 2005) (razors) (no stay motion filed where preliminary injunction ordered the defendant to go into stores nationally and remove or cover all misleading product packaging and in-store displays); *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226 (S.D.N.Y 2005) (Listerine) (no stay motion filed where preliminary injunction required the defendant to cover (by sticker) the shoulder label of all Listerine bottles; and remove "neck hangers" from all Listerine bottles). *See* Ex. 9 (sample orders including from *Schick* and *McNeil*).

Tyson cites only *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264 (4th Cir. 2002), but that case is no help to Tyson. First, in *Scotts*, there was no irreparable harm because application for stay was made in the winter when sales of crabgrass products were "virtually nonexistent." Second, *Scotts* did not involve a claim of food safety, where there is a far greater public interest in truthful advertising (as opposed to the efficacy of a crabgrass product). Third, in *Scotts*, (1) the district court found that the advertising was literally <u>true</u> (a finding entitled to deference); and (2) based its finding the claim was misleading on a "focus group" (not normally accepted in false advertising cases) where the "moderators asked highly leading questions, often ignored responses that were inconsistent with the view that the Vigoro conveyed. . . , and typically explored in detail only the responses that were

consistent with this hypothesis."). Here, the District Court found the opposite -- that Tyson's advertising was false, and appropriately credited a robust, multi-cell, scientifically controlled survey developed by one of the country's foremost experts that constitutes lynch-pin evidence in false advertising cases. Mem. Op. at 14-18.

II. TYSON WILL LIKELY FAIL ON THE MERITS OF ITS APPEAL

A. No Defense For Tyson's Human Antibiotic Injections at the Hatchery

Tyson's USDA immunity argument focuses only on "ionophores" (an argument which fails for the reasons discussed below). Tyson's argument ignores entirely its human antibiotic egg injections, which are a separate and independent basis for the preliminary injunction -- and an issue at to which there is ***no USDA guidance*** whatsoever. USDA's December 19, 2007 label guidance relates solely to ionophore-fed chicken. Tyson's unqualified RWA approval also relates solely ionophore-fed chicken. The guidance does not even mention antibiotic injections at the hatchery. Those hatchery injections were omitted from Tyson's USDA label application, and likewise from its extensive correspondence with the USDA. There is no USDA guidance, decision, or approval concerning chicken injected with human antibiotics.

Disturbingly, Tyson admitted that injecting these chickens a single day after hatch instead of one day before it hatched would render the chicken ineligible for its RWA. Tyson's speculation about the effect of ionophores on antibiotic resistance in humans -- which formed the basis of its arguments before the USDA in obtaining label approval-- have no applicability to Tyson's antibiotic injections.

Tyson's Motion does not contain a single word about these human antibiotic hatchery injections, which is surprising because this Court may reject Tyson's USDA immunity argument on this ground alone, without even reaching the question of whether USDA label approval immunizes Tyson's non-label advertising.

B. Tyson Does Not Dispute the Falsity of its Advertising

Tyson's "likelihood of success" section does not argue that its advertising is truthful. But that is the sole test: The Lanham Act prohibits Tyson from using any representation of fact in interstate commerce that "misrepresents the nature, characteristics, [or] qualities" of its own or another's product. 15 U.S.C. § 1125(a). The statute is "designed to protect consumers and competitors from any duplicitous advertising or packaging which results in unfair competition." *Cashmere & Camel Hair Mfrs. Inst.* v. *Saks Fifth Ave*., 284 F.3d 302, 310 (1st Cir. 2002).

The District Court properly concluded that Tyson could not credibly argue that chicken twice administered antibiotics is "raised without antibiotics." (Mem. Op. 31). It is fundamental that an advertiser cannot misrepresent an inherent quality of a product. Even Tyson's recent press release, Ex. 5 -- issued ***after*** the entry of the preliminary injunction -- fails to mention the antibiotic injections and calls ionophores "antimicrobials."[1]

Any affirmative mention of antibiotics as a claim to the public logically triggers a duty to disclose how antibiotics are actually used. Here, Tyson's decision

[1] The District Court found as a matter of fact that ionophores are ***antibiotics***. The scientific literature and the scientific, regulatory, and other authoritative agencies agree. Yet Tyson deceptively "wordsmiths" the issue to this day and refuses to tell consumers the truth.

to trumpet "raised without antibiotics" at a minimum would require Tyson to disclose the antibiotic injections and feed. Tyson's invocation of "antibiotics" without disclosing these practices constitutes a violation of the Lanham Act including by way of material omission. *See* 5 McCarthy on Trademarks and Unfair Competition § 27:65 (4th ed.) (§ 27:65. False representations as to the nature or qualities of goods and services--Failure to disclose facts) (telling a half-truth may be "misleading" and trigger an obligation to tell the whole truth in order to make the advertising claim "un-false.") (collecting authority).

When as here, a plaintiff can show a likelihood that a competitor has engaged in false advertising, courts do not hesitate to grant preliminary injunctive relief. *See, e.g.*, *Time Warner Cable, Inc. v. DirecTV, Inc.*, 475 F. Supp. 2d 299, 303 (S.D.N.Y. 2007) (preliminarily enjoining defendant from disseminating false advertising claims that DirecTV had "picture quality that beats cable"), *aff'd in relevant part*, 497 F.3d 144 (2d Cir. 2007); *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp. 2d 226, 256 (S.D.N.Y. 2005) (preliminarily enjoining defendant from disseminating false advertising claims that "Listerine is just as effective as floss"); *Novartis Consumer Health, Inc. v. Johnson & Johnson Merck Pharmaceuticals Co.*, 290 F.3d 578 (3d Cir. 2002) (affirming preliminary injunction against drug manufacturer for falsely advertising product as "Night Time Strength" when product was not specially formulated to work at night).[2]

[2] *See also DirecTV Inc. v. Comcast of Illinois, Inc.*, No. 07 C 2568, 2007 WL 2808235, at *1 (N.D. Ill. Aug. 15 2007) (granting preliminary injunction preventing cable company from disseminating false advertising based on a biased customer survey); *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232 (2d Cir. 2001) (affirming preliminary injunction against plastic bag manufacturer preventing it from using "Goldfish commercials" falsely advertising that a competitor's product

[Footnote continued on next page]

It bears mention that because Tyson is making an express safety claim about a food product (not like the crabgrass in *Scotts*), Tyson must withstand the highest level of scrutiny. This is bedrock advertising law. As the FTC explained more than 30 years ago: "Parties making claims about the attributes of products -- and particularly about the safety of products -- owe to the public a high degree of precision and care. Where there is doubt, not merely as to the truth, but as to the substantiability of a claim, the public is seriously disserved by a presentation which implies that no doubt exists." *Nat'l Commission on Egg Nutrition*, 88 FTC 89, 192 (1976). Today, the FTC's Enforcement Policy on Food Claims (Exhibit 8) makes clear that the substantiation standard for health and safety claims is "rigorous." Tyson comes nowhere close to complying with this heightened standard. *Cf.* FTC Food Enforcement Guide (advertiser commits a deceptive "material omission" by making an affirmative health claim but failing to disclose "risk-increasing nutrients that are closely related to the health claim.").

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leaked more); *Garden Way, Inc. v. Home Depot, Inc.*, 94 F. Supp. 2d 276 (N.D.N.Y. 2000) (preliminarily enjoining tractor manufacturer from falsely advertising that a competitors' tractors had "approximately three times as many failures" cost more to repair, and were otherwise inferior, and requiring manufacturer to immediately recall such advertising); *Surdyk's Liquor, Inc. v. MGM Liquor Stores, Inc.*, 83 F. Supp. 2d 1016 (D. Minn. 2000) (preliminarily enjoining wine merchant from disseminating false advertisements for "available" products that it did not have in stock); *Smart Inventions v. Allied Comms. Corp.*, 94 F. Supp. 2d 1060, 1075-76 (C.D. Cal. 2000) (preliminary enjoining battery distributor from falsely advertising a promotional "limited time offer statement" when there was no such limited time).

C. Tyson's USDA Immunity Defense Lacks Merit

For the reasons stated above, Tyson's USDA defense has no applicability to Tyson's hatchery injections. Even with respect to ionophores, Tyson's USDA immunity argument also fails for the following reasons:

1. Tyson Ignores the *Voss* Line of Cases, Which Is Devastating to Tyson's Legal Argument

Tyson argues that USDA approved the qualified RWA claim for ionophore-fed chicken, so Tyson should have immunity with respect to this practice.[3] On this narrow issue, Tyson's brief rhetorically asks how can a label claim could be permitted by USDA, but "when the identical words" appear in non-label advertising, there is a Lanham Act violation.

Tyson ignores the answer -- a line of USDA cases cited by the District Court that hold that whether USDA approves a label claim, such approval is not a defense in a false advertising case. *See Nat'l Broiler Council v. Voss*, 44 F.3d 740, 749 (9th Cir. 1994). In *Voss*, the Ninth Circuit held that USDA's label determination preempted a contrary regulation as to the label – but not as to advertising. In *Voss*, the USDA permitted frozen chicken kept at 0-26 degrees to be labeled "fresh." But California law differed, and held that chicken kept at 25 degrees or lower could not be labeled or advertised as "fresh."

The Court held that USDA preempted state law ***only*** as to label -- not non-label advertising:

[3] Tyson's claim of immunity is ironic. On September 12, 2007, USDA revoked Tyson's label claim "raised without antibiotics" because that statement is literally false as to ionophore use. Tyson claimed that USDA "abused its discretion" and argued to USDA from September to November 2007 that the "ionophores" in Tyson's chicken feed were not antibiotics. USDA rejected Tyson's junk science.

> The legislature's stated purpose in enacting § 26661 was to "protect consumers from misleading claims that previously frozen poultry is 'fresh'." Cal.S.Bill 1553, § 1. That legislative purpose will continue to be served, for example, by the restriction on ***advertising*** poultry as "fresh" ***even though the labeling restriction is no longer enforced***. Consumers will continue to receive whatever protection the advertising restriction offers them.

Id. at 748-49 (emphasis added). As a result of *Voss*, poultry companies could label their frozen chicken "fresh" -- but could not advertise this claim.[4] Tyson similarly may label chicken raised with ionophores with the qualified RWA claim, but cannot use the claim in non-label advertising. *See* demonstrative, Exhibit 3.

This result is not surprising given that USDA controls the label but not advertising.[5] USDA does not review or approve advertising – and notably, USDA cannot bring enforcement actions regarding advertising. Thus, for example, Plaintiffs could not have brought their complaint to USDA. The USDA actually warns companies like Tyson that label approval is not a defense to FTC advertising actions, and that "An advertising claim may be deemed false or misleading if it is not adequately substantiated pursuant to FTC guidelines." FSIS, A Guide to Federal Food Labeling Requirements 18, *available at* http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf.

[4] Subsequently, the USDA changed its position and came in line with the state statute. The same result could occur here. Label decisions are on an entirely separate track and the USDA currently is considering the matter and has not yet reached a final decision.

[5] Under the Poultry Products Inspection Act ("PPIA") USDA's power and authority are limited to the product label. Labels and containers are expressly defined in PPIA Sections 453(s)-(u), and do not include non-label advertising.

Indeed, USDA confirmed its lack of authority in this case. *See* Ex. 4 (email from USDA Undersecretary Dick Raymond commenting that USDA has "no control" over Tyson's national media advertising using the RWA claim).

Other USDA decisions are in accord. For example, in *Kraft Foods Global, Inc. v. Perdue Farms*, NAD Case No. 4576 (Oct. 20, 2006) *aff'd* Report of Panel 141 (March 14, 2007) (attached as Exhibit 7)[6] the label in question had been approved by FSIS and said "no preservatives" when in fact the chicken product "contained ingredients that" qualified as preservatives. NAD held that while the FSIS staff approved the label in question, USDA approval was not dispositive of the separate question regarding whether that ad "was false and misleading." Like the District Court, NAD conducted its own analysis and recommended that the claim be discontinued.[7]

Like the antibiotic injections at the hatchery, Tyson inexplicably fails to disclose this obviously relevant legal authority in its Motion. The District Court found these cases persuasive in denying Tyson's Motion to Dismiss, yet Tyson

[6]Attached as Ex. 7. The National Advertising Division of the Better Business Bureau ("NAD") (www.nadreview.org) adjudicates false advertising disputes, issues written decisions, and refers matters to the FTC when its decisions are not heeded. NAD is the non-judicial analog to Lanham Act suits, and provides persuasive authority here. *See Illinois Bell Tel. Co. v. MCI Telecomm. Corp.*, No. 96 C 2378, 1996 WL 717466, at *5-6 (N.D. Ill. Dec. 9, 1996).

[7] *See also Kraft General Foods, Inc. v. Del Monte Corp.*, No. 93 CV. 4413, 1993 WL 557864, *39-41 (S.D.N.Y. Sept. 22, 1993) (evaluating advertising claiming products were "gelatin" under the Lanham Act and enjoining such advertisements without giving dispositive weight to "a USDA regulation . . . which defines the term gelatin to be used on the labels of products"); *ConAgra, Inc. v. George A. Hormel & Co.*, 784 F. Supp. 700, 737 n.26 (D. Neb. 1992) (declining to reach the question of whether USDA label guidelines applied in a Lanham Act case and noting the counsel's argument that "USDA guidelines cannot regulate advertising, as opposed to the regulation of labels").

ignores it and instead cites FDA cases. However, unlike USDA, FDA (1) has authority over advertising and can bring enforcement actions; (2) has an entire division (DDMAC) devoted to regulating advertising; and (3) FDA's determinations about how a drug works or its side effects are based on substantial scientific data, including thousands of patient observations in rigorous, well-controlled clinical trials. But even in the FDA context, Lanham Act courts reject FDA immunity arguments in Lanham Act false advertising cases.[8]

[8] Recent cases include the following: *Cytosport, Inc. v. Nature's Best, Inc.*, 2007 WL 1345379, at *2 (E.D.Cal. May 8, 2007) ("[F]alse statements are actionable under the Lanham Act, even if their truth may be generally within the purview of the FDA."); *Putney, Inc. v. Pfizer, Inc.*, 2007 WL 3047159, at *4 (D. Me. Oct. 17, 2007) ("So long as courts are not required to perform 'authoritative interpretation and direct application of FDA regulations,' then the simple fact that a matter touches upon an area dealt with by the FDA is not a bar to proceeding with a claim under the Lanham Act"); *Axcan Scandipharm Inc. v. Ethex Corp.*, 2007 WL 3095367, at *4 (D. Minn. Oct. 19, 2007) ("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"); *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 303, 307 n.1 (E.D. Pa. 2007) ("it is beyond dispute that a consumer product that is approved for consumer use by the FDA can still be marketed or advertised in a manner that violates the Lanham Act"); *Pedinol Pharm., Inc. v. Rising Pharm., Inc.*, 512 F.Supp.2d 137, 140 (E.D.N.Y. 2007) ("There is no question but that the product at issue here is a "drug" subject to regulation by the FDA. What is less clear is the legality of the current marketing of that drug and the extent to which the realities of the regulatory, prescribing and commercial marketplaces impact on what is "legal." … the court is mindful that this is a false advertising and unfair competition case based upon alleged misrepresentations made concerning the products at issue. Such statements may or may not apply to the regulatory status of the products. The court is simply in no position to tell at this time."); *Merix Pharm. Corp. v. GlaxoSmithKline Consumer Healthcare, L.P.*, No. 5 C 1403, 2006 WL 1843370, at *1 (N.D. Ill. June 28, 2006); *Pediamed Pharmaceuticals, Inc. v. Brekenridge Pharmaceutical, Inc.*, 419 F. Supp. 2d 715, 725 (D. Md. 2006) ("There is a distinction between respecting the FDA's primary jurisdiction to determine in the first instance whether a drug is lawful, 'generic,' 'bioequivalent,' 'therapeutically equivalent,' or 'pharmaceutically equivalent' and, on the other hand, a Lanham Act claim that a false statement has been made about a product.").

2. Labeling Is Actionable As Advertising

The fact that USDA only offered Tyson time to transition product ***labels*** further undercuts Tyson's motion. 4/10 Tr. 548:1-2 (Defense Counsel) ("[Y]ou can get a temporary ***label*** approval and that's exactly what the November 6th Defendant's Exhibit 78 does."); PX 21; DX-9 (USDA letter limiting transition time to the product "***label***"); Feb 21 transcript (Defense Counsel) ("Why do we need time, Your Honor? Because you have to print new ***labels***") (emphasis added). Nowhere does USDA attempt to regulate (or immunize) Tyson's non-label advertising.

Tyson cites *Kordel v. United States*, 335 U.S. 345, 348 (1948) for the proposition that "labeling" constitutes "a broad range of materials, including point-of-purchase materials" whether or not attached to the article for sale. (Def.'s Motion at 8). Tyson is wrong. First, *Kordel* is an FDA case (distinguishable for the reasons noted above). Second, cases following *Kordel* routinely explain that "labeling" does not cover signs or point of purchase materials referencing a particular product. To the contrary: numerous cases have specifically held that that signs aimed at the general public, including point-of-sale signs, are not 'labeling' within the definition of the FDCA and similar statutes. *See, e.g., The New York State Pesticide Coalition v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989); *Chemical Specialties Mfrs Ass'n, Inc. v. Allenby*, 958 F.2d 941, 946-47 (9th Cir. 1992). Tyson's argument that the posters attached as Exhibit 1 (which are still running to this day with the USDA revoked RWA claim) can be considered "labeling" if Tyson hangs the posters directly above the meat case in the grocery store underscores the meritless nature of the argument.

3. Tyson Should Be Estopped From Arguing USDA Immunity

Estoppel precludes one party from asserting rights "he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (quotation omitted). In this case, Tyson acted contrary to equity by ignoring the USDA "labeling issue" and running national advertising in the face of label revocation. When faced with Tyson's identical argument (that label approval affects advertising) Tyson's head marketing officer stated unequivocally that "no one should be holding anything up because of the RWA labeling issue . . . . GO! GO! GO!" See demonstrative, Ex. 3; Statement of Facts ¶ 15. Tyson should not be permitted to claim immunity from that same process.

D. Plaintiffs' Survey and Its Conclusions Stand Unrefuted

At the preliminary injunction hearing, an eminent survey expert (who previously worked for both Tyson and Tyson's law firm as a survey expert) testified about a substantial consumer survey proving falsity. Professor Michael Mazis testified that regardless of whether consumers were shown the qualified or unqualified claim, a substantial percentage were deceived into thinking that Tyson chicken (1) has "no" antibiotics; and (2) is "safer" than other chicken.

Under bedrock Lanham Act jurisprudence, consumer deception can be proven with "surveys," scientifically-designed studies intended to capture how consumers perceive advertising messages. *See Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 229-30 (2d Cir. 1999); *see also Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 37 (1st Cir. 2000). Surveys are vital in assessing

whether an advertising campaign is implicitly deceptive even if the message is literally truthful. *See McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp. 2d 226, 249, 252-53 (S.D.N.Y. 2005).

The District Court appropriately relied on such survey evidence in enjoining the further dissemination of the RWA campaign. *See, e.g., Hickson Corp. v. Northern Crossarm Co., Inc.*, 357 F.3d 1256 (11th Cir. 2004); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm.*, 290 F.3d 578, 590-91 (3d Cir. 2002); *Cashmere & Camel Hair Mfrs. Institute v. Saks Fifth Ave.*, 284 F.3d 302, 310 n.6 (1st Cir. 2002) (surveys demonstrate "exactly what message ordinary customers received from the ad.").[9] Tyson's Motion does not address this compelling evidence.

III. TYSON'S ALLEGED IRREPARABLE HARM IS GROSSLY OVERSTATED

Tyson's alleged irreparable harm is insufficient to stay the injunction. Tyson states that bond is inadequate, but cites no legal authority, and does not confront that the bond covers more than double the cost of Tyson's claimed compliance in the 8,000 retailer stores across the country. *See* Ex. 10 (Bond Opp.). The $1M bond is comparable to other Lanham Act cases. For example, in *Schick Mfg., Inc. v. Gillette Co.*, 372 F. Supp. 2d 273 (D. Conn. 2005), the court set a $400K bond where the injunction ordered the defendant to go into stores nationally and (a) remove or cover all false and misleading product packaging on its products and (b) remove all

[9] *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm.*, 129 F.Supp.2d 351, 358, 360, 364 (D.N.J. 2000) (enjoining implicitly deceptive advertising based on the consumer survey results, which is "typically" used to show how consumers actually react).

displays, including in-store displays, that carried the false and misleading claims. *See W.L. Gore & Assocs., Inc. v. Totes Inc.*, 788 F. Supp. 800, 814 (D. Del. 1992) ($100K bond that required the defendant to pull point-of-sale information, including ***tags and labels*** (not at issue here) from the consumer products (garments), as well as point-of-purchase displays); *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226 (S.D.N.Y 2005) ($2M bond as security for a preliminary injunction that required the defendant to (1) cover (by sticker) the shoulder ***label*** of all Listerine bottles; and (2) remove "neck hangers" from all Listerine bottles).

Tyson can also easily remove this non-label advertising without causing consumer confusion or harming its reputation. Tyson ***already uses other non-offending advertising materials***, including point-of-sale, that do not contain antibiotic claims. Tyson's head of marketing actually testified that RWA was only a small fraction of "Project Sting" and that Tyson had a far larger "Thank You" and "Trimmed and Ready" campaign. *See* 4/8/08 Tr. 259.

Additionally, Tyson's agents already visit grocery stores on a regular basis and Tyson claims to be actively and voluntarily replacing point-of-sale marketing materials. Tyson's recent press release further notes that the injunction does not affect Tyson because "the company is **not** currently running any ads and has none scheduled." Ex. 5 (emphasis added).

Tyson already must visit the stores to remove the "unqualified" RWA posters, examples at Exhibit 1, that are still hanging in grocery stores across the country to this day (even though the "unqualified" RWA claim has been revoked by the USDA). Tyson's Motion does not even challenge this portion of the preliminary

injunction; hence, Tyson will be visiting stores to remove the point-of-purchase materials in any event.

Finally, Tyson is not required to recall products or to modify or cover labels (unlike other Lanham Act cases), which was Tyson's core concern throughout this case. *Cf.* Feb. 21, 2008 Tr. 27:17-18 (counsel for Tyson stating that label transition time is necessary only so that Tyson would not "have to throw out . . . packages of chicken"). To the extent Tyson claims additional costs, they are of Tyson's "own making." *See Five Platters, Inc. v. Purdie*, 419 F. Supp. 372, 388 (D. Md. 1976). Tyson unleashed massive advertising into the marketplace well after the USDA declared that "raised without antibiotics" was false and misleading. Additionally, Tyson never sought or received approval concerning its antibiotic injections. Nonetheless, Tyson proceeded in conscious disregard of a known risk (Ex. 3) and should not now be heard to complain that it will suffer "irreparable injury" based on the costs of removing its false and misleading advertising.

Accordingly, Tyson will not suffer irreparable harm absent a stay.

IV. SANDERSON AND PERDUE WILL SUFFER SERIOUS IRREPARABLE HARM THAT OUTWEIGHS TYSON'S ALLEGED INCONVENIENCE

Sanderson and Perdue will suffer competitive injury if Tyson is permitted to continue disseminating its literally false claim that its antibiotic-laced chicken is "raised without antibiotics." Contrary to Tyson's arguments, Plaintiffs' showing of irreparable harm in this case was overwhelming. Plaintiffs demonstrated that they are direct head-to-head competitors with Tyson, and Plaintiffs introduced a

substantial and well-controlled survey proving that consumers are in fact misled. Under these circumstances, Plaintiff's irreparable harm requirement was satisfied.

But beyond this, Tyson's own words refute its argument: Tyson's internal documents admit it "wrecked" and "devalued" the Perdue brand while at the same time enhancing its own. This kind of diversion of goodwill and brand equity is precisely the type of irreparable harm the requires injunctive relief. It is devastating to companies like Perdue and Sanderson, but impossible to particularize. Tyson's own documents further admitted that it was able to capture millions of dollars in account acquisitions at the expense of Perdue and Sanderson -- acquisitions that ***Tyson itself*** -- in its own words -- ***attributed exclusively*** to its false RWA campaign. Tyson's own Motion underscores this by arguing that it will lose profits and sales without its RWA claim.

Under these circumstances, it is difficult to imagine a stronger case where irreparable harm has been established. Tyson's argument is reduced to emphasizing that the Fourth Circuit has not decided whether or not to adopt a "presumption" of irreparable harm when there is a likelihood of deceptive advertising. Any such presumption is certainly not necessary where defendant is admitting -- in its own words -- that it is "wrecking" and "devaluing" a plaintiff's goodwill and equity. As the District Court found (which findings are subject to clearly erroneous review), Tyson "believed that the advertising campaign caused incalculable loss"; was devaluing Plaintiffs' brands; was diverting Plaintiffs' sales; and was influencing consumers in a way that would have lasting adverse effects on Plaintiffs' business (Mem. Opp. 12, 25). Tyson's irreparable harm argument is frivolous, and it is clear

from the record below that Sanderson and Perdue will suffer substantial irreparable harm that can never be remedied by money damages and which compel the preliminary injunction to go immediately into effect.

V. COMPELLING PUBLIC INTEREST SUPPORTS THE INJUNCTION

This point cannot be underestimated: Tyson is making a false advertising claim that relates to human safety and the safety of food products for human consumption. Thus, there is a compelling public interest that false safety claims be halted immediately.

VI. TYSON UNREASONABLY DELAYED IN SEEKING A STAY

The preliminary injunction in this case was entered on April 22, 2008. On that day, the District Court released the decision and convened a teleconference of all counsel to discuss the injunction. During the teleconference, the District Court explained it would delay the effective date of the preliminary injunction until May 1 precisely "so as to accord defendant an opportunity to appeal." Ex. 6 (4/22/08 Tr. 2).

Tyson elected not to request a stay at this time, despite announcing in press releases that it was going to do so. Exhibit 5. Notably, at another conference call on April 24, the District Court explained again that he specifically built in time for Tyson to appeal. Yet Tyson waited to file its District Court motion until the next day -- a cursory 3 page document that Tyson could have filed when the injunction first entered. Then, Tyson afforded itself 4 more days before filing this appeal.

This delay severely "undercuts the sense of urgency" and should be carefully considered by this Court. *See Five Borough Bicycle Club v. City of New York*, 483 F. Supp. 2d 351, 361 (S.D.N.Y. 2007).[10]

CONCLUSION

For the foregoing reasons, Sanderson and Perdue respectfully request that the Court deny Tyson's application for stay.

Respectfully submitted,
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Dated: April 29, 2008

[10] *Praefke Auto Elec. & Battery Co., Inc. v. Tecumseh Products Co.*, 123 F. Supp. 2d 470 (E.D. Wis. 2000) ("delay . . .undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."); *Pharmacia Corp. v. Alcon Laboratories, Inc*., 201 F. Supp. 2d 335 (D.N.J. 2002); *Seiko Kabushiki Kaisha v. Swiss Watch Intern.*, Inc., 188 F. Supp. 2d 1350 (S.D. Fla. 2002).

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2008, I have caused the foregoing Opposition to Tyson's Motion for Stay of Preliminary Injunction to be served via electronic transmission upon the following:

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