

1 California's Business & Professions Code §§ 17200 and
2 17500. Compl. ¶ 1. Plaintiff alleges that Defendant
3 has falsely represented that Defendant's StratoGrey
4 product line "meet[s]" a certain military
5 specification. Id. Plaintiff seeks actual damages in
6 the amount of \$3,030,911.33. Pl.'s Closing Trial Br.
7 ¶¶ 7-8. Plaintiff also seeks treble damages, id. at
8 32:17-25, and attorneys' fees, id. at 34:24-35:2.
9 Defendant seeks judgment in its favor and attorneys'
10 fees. Def.'s Closing Trial Br. 27:1-19.

11 Having received, reviewed, and considered the
12 evidence presented, as well as the Parties' arguments
13 at trial, the Court makes the following ruling:

14 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that
15 Judgment be entered in favor of Defendant Elkay
16 Plastics Company, Inc., and the parties shall bear
17 their own costs and fees.

18 **FINDINGS OF FACT**

19 1. Plaintiff Caltex is a California corporation
20 that manufactures, markets, and distributes
21 polyethylene bags and laminated products for military
22 and electronics. Compl. ¶¶ 2-3; Trial Tr. 150:14-15.

23 2. Plaintiff's packaging products include "flexible
24 military packaging material" that is qualified by the
25 Department of the Navy as meeting the Department of
26 Defense's ("DOD") MIL 81705 Type III specification for
27 "flexible barrier materials, often supplied as bags."
28 Pretrial Conference Order 3:4-22 (undisputed fact).

1 3. The term "MIL-PRF-81705" (formerly "MIL-B-
2 81705") is a military specification defined by the DOD
3 that establishes qualification requirements for certain
4 types of military packaging for electronic components.
5 Pretrial Conference Order 3:4-22 (undisputed fact);
6 Magnifico Dep. 12:6-21, ECF No. 56.

7 4. The DOD maintains a Qualified Products List
8 (QPL) for products that have been submitted to the DOD
9 for qualification and have met the military
10 specification's qualification requirements after
11 government testing. Magnifico Dep. 12:6-14:11; 20:12-
12 16.

13 5. If an entity wants to submit a product for
14 qualification, the entity must contact the DOD to begin
15 the process of qualification. Magnifico Dep. 20:12-
16 22:21.

17 6. The only way an entity can be placed on the QPL
18 is if the entity's product has been tested by the
19 government and approved by the government for
20 qualification. Magnifico Dep. 28:7-19. No entity can
21 self-qualify; for qualification and placement on the
22 QPL, the product must be qualified by the government.
23 Id. at 47:4-20.

24 7. Prior to submitting a product to the DOD for
25 qualification, an entity can find the specific testing
26 requirements in the military specification, and the
27 entity must test its product to ensure that the product
28 passes the tests before the DOD will begin testing the

1 product for qualification. Magnifico Dep. 22:4-23:1,
2 27:15-28:6.

3 8. When a military specification has a
4 qualification requirement, products with that military
5 specification may be purchased by the military from
6 only "qualified" manufacturers listed on the QPL.
7 Magnifico Dep. 15:10-16:18.

8 9. Anyone can access the QPL on the Internet.
9 Magnifico Dep. 50:8-51:3.

10 10. The Department of the Navy (DON) is the only
11 entity that can qualify products under the MIL-PRF-
12 81705 specification. Pretrial Conference Order 3:4-22
13 (undisputed facts).

14 11. Plaintiff's MIL-PRF-81705 Type III products
15 have been approved by the DON and were placed on the
16 DOD's QPL in February 2010. Pretrial Conference Order
17 3:4-22 (undisputed facts); Magnifico Dep. Ex. 1.

18 12. At present, Plaintiff Caltex is the only
19 manufacturer that has been qualified by the DON and
20 placed on the QPL for MIL-PRF-81705 Type III product.
21 Pretrial Conference Order 3:4-22 (undisputed facts).

22 13. There had not been a qualified manufacturer for
23 MIL 81705 Type III product for approximately ten years
24 prior to Caltex's qualification in February 2010.
25 Trial Tr. 154:7-155:2, 223:4-8, 225:3-15; Magnifico
26 Dep. 41:4-48:24, 54:12-57:5, 77:9-21, Exs. 2-3.

27 14. Mr. Magnifico of the DON sent out a problem
28 advisory, dated May 8, 2012, to the Government Industry

1 Data Exchange Program (GIDEP) to alert GIDEP members
2 that if defense contracts required qualified product
3 for MIL-PRF-81705 Type III product, such products
4 needed to be purchased only from qualified
5 manufacturers on the QPL and not from non-qualified
6 manufacturers who were claiming their product met the
7 MIL 81705 Type III requirements. Magnifico Dep. 41:4-
8 47:20, Ex. 2. Mr. Magnifico sent a similar letter,
9 dated July 23, 2012, to the DOD. Magnifico Dep. 59:3-
10 66:15, Ex. 3.

11 15. Defendant Elkay, a California corporation,
12 Def.'s Ans. ¶ 4, is a "master distributor of
13 polyethylene products" that sells its products solely
14 through distributors and has no direct sales. Trial
15 Tr. 15:18-23, 16:2-3.

16 16. Elkay advertises its products to its customer-
17 distributors via Elkay's catalogs and brochures, web
18 site, specification sheets, and Elkay-employed
19 consultants. Trial Tr. 16:1-20. Elkay has
20 approximately 4300 distributors. Id. at 36:16-37:4.

21 17. Elkay does not manufacture the StratoGrey
22 static shielding bags it sells. 5:19-20 (Trial Tr.
23 18:19-25, 21:13-16, 254:17-20). Elkay's suppliers for
24 its StratoGrey static shielding bags are Shannon
25 Packaging and Techflex. Trial Tr. 21:13-16, 48:4-9.

26 18. At least since February 2010 when Caltex was
27 placed on the QPL for MIL 81705 Type III product and
28 until October 2012 when Elkay removed any reference to

1 81705 from its marketing materials, Elkay has
2 advertised via the Elkay website, Elkay catalogs and
3 brochures, and Elkay specification sheets that Elkay's
4 StratoGrey static shielding product line "meets the
5 electrostatic requirements for MIL 81705 Type III."
6 Trial Tr. 18:5-11; Trial Ex. 4.

7 19. Elkay has no independent evidence that its
8 StratoGrey static shielding product line "meets the
9 electrostatic requirements for MIL 81705 Type III," and
10 Elkay has not tested its StratoGrey bags to see if the
11 bags pass the qualification requirements for MIL 81705
12 Type III. Trial Tr. 20:12-17, 24:20-27:14.

13 20. Elkay did not request its suppliers to prove to
14 Elkay that the StratoGrey bags met the MIL 81705 Type
15 III requirements. Id. at 73:10-74:4, 77:2-9.

16 21. Plaintiff tested the Elkay bags via Senawang to
17 see if the Elkay bags met the MIL 81705 Type III
18 requirements. Trial Tr. 238:16-24.

19 22. Elkay's StratoGrey static shielding bags have
20 not been qualified by the Department of Defense,
21 including the Department of the Navy, and are not
22 listed on the QPL. Trial Tr. 18:14-15, 75:8-11.

23 23. There is no evidence that Elkay ever advertised
24 that its StratoGrey products were "qualified" by the
25 military or on the QPL list. Cf. Pl.'s Reply Br. 7:13-
26 16.

27 24. Caltex sent Elkay a letter dated October 12,
28 2012, in which Caltex demanded that Elkay withdraw its

1 representations regarding the MIL-PRF-81705
2 specifications and give written notice to its customers
3 that the Elkay products were not approved by the
4 Department of Defense. Trial Tr. 48:10-50:22; Trial
5 Ex. 220.

6 25. In response to Caltex's letter to Elkay, Elkay
7 stated in a letter dated October 31, 2012, that Elkay's
8 statements "concerning the standards met by its
9 moisture barrier bags were accurate," but Elkay
10 nevertheless agreed to remove all references to
11 "specification number 81705 from its website and
12 printed materials pertaining to the barrier bags in
13 question," and Elkay has since then refrained from
14 making any such references. Trial Tr. 50:6-54:12;
15 Trial Ex. 221; see Trial Ex. 298.

16 CONCLUSIONS OF LAW

17 Plaintiff's claims are for (1) False Advertising in
18 violation of 15 U.S.C. § 1125(a); (2) False Advertising
19 in violation of Cal. Bus. & Prof. Code § 17500; and (3)
20 Unfair, Unlawful, or Fraudulent Trade Practices in
21 violation of Cal. Bus. & Prof. Code § 17200.

22 A. False Advertising, 15 U.S.C. § 1125(a)

23 To prove a prima facie case for false advertising
24 in violation of 15 U.S.C. § 1125(a), a plaintiff must
25 show:

26 (1) the defendant made a false statement either
27 about the plaintiff's or its own product;
28

1 (2) the statement was made in a commercial
2 advertisement or promotion;

3 (3) the statement actually deceived or has the
4 tendency to deceive a substantial segment of its
5 audience;

6 (4) the deception is material, in that it is likely
7 to influence the purchasing decision;

8 (5) the defendant caused its false statement to
9 enter interstate commerce; and

10 (6) the plaintiff has been or is likely to be
11 injured as a result of the false statement, either
12 by direct diversion of sales from itself to the
13 defendant, or by a lessening of goodwill associated
14 with the plaintiff's product.

15 Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d
16 829, 835 n.4 (9th Cir. 2002) (citing Southland Sod
17 Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir.
18 1997)).

19 Plaintiff Caltex must first prove that Defendant
20 Elkay's advertisements that Elkay's StratoGrey product
21 "meets the electrostatic properties of MIL-B-81705,
22 Type III" are "false." Jarrow, 304 F.3d at 835 n.4.
23 "Falsity" can be proved by showing either that the
24 advertisement is "literally false" or, if not literally
25 false, that the representation is "likely to mislead or
26 confuse consumers," which requires proof, "by extrinsic
27 evidence," that the advertisements "tend to mislead or
28 confuse consumers." In re Century 21-RE/MAX Real

1 Estate Adver. Claims Litig., 882 F. Supp. 915, 922-23
2 (C.D. Cal. 1994); see Southland Sod Farms, 108 F.3d at
3 1139.

4 1. Literal Falsity

5 Plaintiff states that "[t]he false advertising that
6 is the subject matter of this litigation" "involves the
7 representation by Elkay that its StratoGrey line of
8 static shielding products 'meets the electrostatic
9 requirements of MIL B-81705 Type III.'" Pl.'s Reply
10 Br. 7:13-16. Plaintiff asserts that such
11 advertisements by Elkay are "literally false." Pl.'s
12 Closing Trial Br. 27:20-25. To prove that Elkay's
13 advertisements are literally false, Plaintiff bears the
14 burden of proving, by *affirmative* evidence,¹ that
15 Elkay's StratoGrey products *do not* meet the
16 requirements for MIL 81705 Type III specification.

17
18 ¹ See Hansen Beverage Co. v. Vital Pharm., Inc., No. 08-cv-
19 1545-IEG, 2010 WL 1734960, at *4-*5 (S.D. Cal. Apr. 27, 2010)
20 (stating that "[b]ecause [the defendant] does not expressly
21 represent" that its advertising claim "is based on product
22 testing, or implicitly make that claim through visual
23 representations, [the plaintiff] must affirmatively prove that
24 the claim is false"). In this case, Elkay did not "expressly
25 represent" that it tested its Elkay bags or implicitly make a
26 claim of testing based on graphs or any sort of visual
27 representation; thus, Elkay's advertisement is less like an
28 "establishment claim" and more like a statement that "lacks
substantiation." See Fraker v. Bayer Corp., No. 08-1564, 2009 WL
5865687, at *7-*9 (E.D. Cal. Oct. 6, 2009) (noting that in a case
for false advertising under the Lanham Act, the burden of proof
does not shift to the defendant to prove substantiation of
advertising claims because otherwise, a plaintiff could use a
false advertising claims to "shoehorn an allegation of violation
of the Federal Trade Commission Act," which does not allow
private causes of action).

1 Plaintiff proffers the following evidence to
2 support its claim of "literal falsity": (1) only the
3 Government can *qualify* a product as being a MIL SPEC
4 81705 Type III product approved for defense contracts,
5 and (2) Elkay has no independent evidence that its
6 StratoGrey bags meet the MIL 81705 Type III
7 requirements. Pl.'s Closing Trial Br. 27:20-31:19;
8 Pl.'s Reply 2:8-4:19.

9 a. No Self-Qualification Argument

10 Plaintiff first argues that Defendant's
11 advertisements that its StratoGrey product "meets" the
12 requirements of MIL 81705 Type III are "literally
13 false" "since only the Department of the Navy can make
14 that determination and Elkay's products were never
15 qualified thereby." Pl.'s Closing Trial Br. 27:20-25.

16 Plaintiff's argument is conflated and flawed: the
17 fact that Elkay's products were not *qualified* by the
18 DON does not prove that Elkay's StratoGrey products do
19 not *meet* the testing requirements for MIL 81705 Type
20 III specification. Plaintiff's claim that "only the
21 Department of the Navy" can determine whether a product
22 meets the requirements for a military specification is
23 unfounded and unsupported by any law, regulation, or
24 evidence.

25 Plaintiff is essentially arguing that only
26 "qualified" products (products tested by the government
27 and placed on the DOD's QPL) can, in fact, "meet" MIL
28 81705 Type III qualification requirements. See Pl.'s

1 Closing Trial Br. 27:20-25. But the evidence at trial
2 proved otherwise: a product can "meet" the
3 qualification requirements of a military specification
4 without ever having been tested by the military. See
5 Magnifico Dep. 12:6-14:11, 21:2-14, Ex. 2; Trial Tr.
6 153:19-154:6. The only time the military must be
7 involved is to *qualify* a product.²

8 To "meet" the MIL-PRF-81705 Type III qualification
9 requirements, a product must merely successfully
10 *perform* the required tests for the qualification, and
11 non-military entities can and do test products to see
12 if they pass the qualification tests.³ Trial Tr.
13 238:16-24, 154:4-6; Magnifico Dep. 22:4-23:1, 27:5-
14 28:15. Thus, a product that has not been tested or
15 qualified by the military could very well still "meet"
16 the qualification requirements for a military
17 specification such as MIL-PRF-81705 Type III.

19 ² Defendant Elkay did not advertise that its products were
20 "qualified" by the military or on the QPL, but only that its
21 StratoGrey static shielding bags met the requirements for MIL
22 81705 Type III.

23 ³ Mr. Frank James Magnifico, Jr., Materials Engineer for the
24 Naval Air Warfare Center, Magnifico Dep. 4:17-5:5, testified in
25 his deposition that "if a company wants to make product X, and
26 product X has a military specification qualification requirement,
27 [the company] should at least have a copy of that specification.
28 [The specification] will detail all the requirements that [the
product] has to meet. . . . And you would have the - the
procedure would be in those - those test methods and then the
manufacturer, before submitting that product to us, would have to
have done all those tests and successfully passed them before we
would even begin testing a product." Magnifico Dep. 22:4-21.

1 For example, a company must choose to submit its
2 product to the DOD for testing in order for its product
3 to be "qualified." Magnifico Dep. 12:6-14:11, 21:2-14.
4 A company that chooses not to submit its product to the
5 DOD for testing may still manufacture or sell a product
6 that does, in fact, "meet" the qualification
7 requirements for a military specification, even if that
8 product has not been tested by the military. Plaintiff
9 itself has proved that this can be so: Plaintiff
10 admitted that it had the Elkay bags tested by Senawang
11 to see if the Elkay bags, and other competitors'
12 products, "met" the MIL 81705 Type III requirements.
13 Trial Tr. 238:16-24; see also id. at 154:4-6; Magnifico
14 Dep. 22:4-23:1, 27:5-28:15. Thus, the Court rejects
15 Plaintiff's argument that Elkay's advertisements are
16 "literally false" because "only the Department of the
17 Navy" can say when a product "meets" the testing
18 requirements for MIL 81705 Type III specification.

19 b. No Independent Evidence Argument

20 Plaintiff argues that Elkay's advertisements are
21 "literally false" because Elkay has "no independent
22 evidence" that its StratoGrey bags meet the MIL 81705
23 Type III requirements. Pl.'s Reply 3:15-18.
24 Plaintiff's argument cannot prevail because it is a
25 "lack of substantiation" argument, and a false
26 advertising claim cannot be proved on "lack of
27
28

1 substantiation" grounds.⁴ Fraker v. Bayer Corp., No.
2 08-1564, 2009 WL 5865687, at *7-*9 (E.D. Cal. Oct. 6,
3 2009) (noting that, in a case for false advertising
4 under the Lanham Act, the burden of proof does not
5 shift to the defendant to prove substantiation of
6 advertising claims; otherwise, a plaintiff could use a
7 false advertising claim to "shoehorn an allegation of
8 violation of the Federal Trade Commission Act," which
9 does not allow private causes of action).

10 Defendant has maintained that its advertisements
11 were true. Def.'s Closing Trial Br. 5:21-6:12, 8:2-8.
12 It is irrelevant that Defendant failed to test its own
13 bags; Defendant does not have the burden of proof and
14

15 ⁴ Fraker v. Bayer Corp., No. 08-1564, 2009 WL 5865687, at *8
16 (E.D. Cal. Oct. 6, 2009) ("Plaintiff has provided no authority
17 for the proposition that the absence of substantiation of an
18 advertising claim is, itself, falsity or somehow misleading. . .
19 . [T]he court is unwilling to make that leap. If Plaintiff is
20 going to maintain an action against Defendant for false or
21 misleading advertising, then Plaintiff will be required to adduce
22 evidence sufficient . . . to show that Defendant's advertising
23 claims with respect to Product are actually false; not simply
24 that they are not backed up by scientific evidence."); see Eckler
25 v. Wal-Mart Stores, Inc., No. 12-cv-727-LAB-MDD, 2012 WL 5382218,
26 at *3 n.3 (S.D. Cal. Nov. 1, 2012) (noting that "lack of
27 substantiation" claims are "distinguishable from a case, like
28 this one, in which plaintiffs point to studies that they claim
actually disprove a product's claims"); Dabish v. Infinitelabs,
LLC, No. 13-cv-2048, 2014 WL 4658754, at *2 (S.D. Cal. Sept. 17,
2014) (listing Ninth Circuit courts that have considered "lack of
substantiation" allegations in the context of false advertising
claims); Hughes v. Ester C Co., 930 F. Supp. 2d 439, 456-59
(E.D.N.Y. 2013) (discussing California district courts'
consideration of "lack of substantiation" arguments in false
advertising cases and concluding that "'merely because a fact is
unsupported by clinical tests does not make it untrue'").

1 is thus not required to show that its advertisements
2 are substantiated by testing. Id. As Fraker points
3 out, "the government, representing the Federal Trade
4 Commission, can sue an advertiser for making
5 unsubstantiated advertising claims; a private plaintiff
6 cannot." Fraker, 2009 WL 5865687, at *8. A private
7 litigant asserting false or misleading advertising "has
8 the burden to plead and prove facts that show" that the
9 defendant's advertising claims "are *false or*
10 *misleading*," not merely unsubstantiated. Id.; see
11 Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d
12 222 (3d Cir. 1990) ("[A] Lanham Act plaintiff 'bears
13 the burden of showing that a challenged advertisement
14 is false or misleading, not merely that it is
15 unsubstantiated by acceptable tests or other proof.'").

16 In sum, because Plaintiff has not provided
17 affirmative evidence that Defendant's StratoGrey bags
18 do not meet the testing requirements of MIL 81705 Type
19 III, Plaintiff's allegation of "literal falsity" fails.
20 Thus, to prevail on its false advertising claim,
21 Plaintiff must show that Defendant's advertisements
22 were "misleading."

23 2. Misleading

24 Falsity "can be established . . . by showing that
25 although the statement was 'literally true[,] it was
26 nonetheless 'likely to mislead or confuse consumers' as
27 evidenced by consumer surveys." Mutual Pharm. Co. v.
28 Ivax Pharm., Inc., 459 F. Supp. 2d 925, 932 (C.D. Cal.

1 2006); Southland Sod Farms, 108 F.3d at 1139; see
2 CytoSport, 894 F. Supp. 2d at 1295 (E.D. Cal. 2012).
3 Extrinsic proof of consumer deception is required for a
4 "true but misleading" false advertising claim because
5 "whether a representation is impliedly misleading is
6 not something that is readily susceptible to being
7 evaluated absent 'evidence [showing] actual consumer
8 deception.'" Mutual Pharm., 459 F. Supp. 2d at 932;
9 see William H. Morris Co. v. Grp. W, Inc., 66 F.3d 255,
10 258 (9th Cir. 1995) ("Where a statement is not
11 literally false and is only misleading in context, . . .
12 . proof that the advertising actually conveyed the
13 implied message and thereby deceived a significant
14 portion of the recipients becomes critical."); Zeltig
15 Aesthetics, Inc. v. BTL Indus., Inc., No. 13-cv-05473-
16 JCS, 2014 WL 1245222, at *8 (N.D. Cal. Mar. 25, 2014).

17 Here, Defendant's representations that its
18 StratoGrey bags met the MIL 81705 requirements could
19 mislead consumers to believe that the Elkay StratoGrey
20 bags were actually qualified by the military; but it is
21 Plaintiff's burden to show proof of customer deception.
22 Mutual Pharm., 459 F. Supp. 2d at 932. The only
23 arguable evidence of consumer deception provided by
24 Plaintiff is the testimony of Caltex's witness, Mr. Jim
25 Higgs, that Caltex "was told numerous times that
26 [customers] already were getting material that meets
27 the requirements and, you know, 'Why am I going to pay
28 you 40 percent or more for a product that we're already

1 being told that already meets the requirement?" Trial
2 Tr. 156:24-157:9. However, this testimony does not
3 prove consumer deception because the statement does not
4 show that customers believed that Elkay's products were
5 "qualified" by the military or were on the QPL list,
6 but only that there were other, cheaper products on the
7 market that "met" the MIL 81705 testing requirements,
8 and Plaintiff has not shown such a belief to be false.

9 Plaintiff does provide evidence of confusion among
10 the defense community regarding the DOD's qualification
11 requirements for MIL 81705 Type III product once Caltex
12 was qualified in February 2010. Trial Tr. 223:4-8.

13 However, the evidence clearly shows that this consumer
14 confusion was not caused by Elkay's advertising, but by
15 the DOD's failure to inform the defense-related
16 community of the qualification requirements for MIL
17 81705 Type III product.⁵ Plaintiff's evidence does not

18
19 ⁵ See Trial Tr. 154:7-156:3; 217:11-228:10; see id. at
20 223:4-8 ("We are hearing that folks will continue using the
21 commercial static shielding materials and don't believe they need
22 to use the approved film. It's been ten years since the Type III
23 has been on the approved list, so they've been using commercial
24 materials that weren't approved."); see id. at 239:15-240:1
25 (When asked why Caltex filed the lawsuit against Elkay, Mr.
26 Higgs, testified that Caltex wanted "to basically set the record
27 straight so people understand that they need to use a qualified
28 product that meets all the specifications" and agreed that the
lawsuit was "part of Caltex's overall effort to advise the
defense contractor industry that they need to use qualified
product"); see id. at 225:3-15 (Mr. Higgs testifying that he
emailed Mr. Magnifico of the DON on April 27, 2010, "asking him
[if] there [is] anything [Mr. Magnifico] can do to help get the
word out that Caltex is the approved MIL SPEC for 81705 III").

Mr. Magnifico testified that in the Government Industry Data

1 show that consumers thought Elkay's products were
2 qualified or on the QPL, or that consumers were led to
3 believe any other falsity due to Elkay's
4 advertisements.

5 Not necessary but further convincing, the following
6 evidence lessens the likelihood of consumer deception:

7 (1) anyone can access the QPL online to check if a
8 product is qualified, Magnifico Dep. 30:11-14, 50:8-
9 51:3; and (2) consumers purchasing static shielding

10 products are arguably sophisticated and thus less
11 likely to be deceived, especially in light of the
12 publicly accessible QPL, see Trial Tr. 219:3-9;

13 Magnifico Dep. 13:12-14:11. See, e.g., Bober v. Glaxo
14 Wellcome PLC, 246 F.3d 934, 939 (7th Cir. 2001) (when
15 considering a similar lack-of-substantiation claim,
16 noting that not only was there no evidence of falsity,

17 _____
18 Exchange Program (GIDEP) problem advisory of May 8, 2012, he
19 sought to clarify that a product that merely "meets the
20 requirements of MIL-PRF-81705" is not necessarily a "qualified"
21 product on the QPL and that "qualified manufacturers are detailed
22 on the qualified products list." Magnifico Dep. 41:4-47:20.
23 There was a "misconception" about the qualification requirements
24 for MIL 81705, and the GIDEP problem advisory was sent "to get
25 people a little bit more calibrated into what they really need to
26 know." Id. The problem advisory requested "that industry and
27 government material buyers verify manufacturers listing on the
28 QP," "that industry and government QA personnel rereview contract
packaging and ESD control program requirements," and that
"[r]eceiving personnel . . . verify materials received and convey
noncompliance immediately." Id. at 54:12-57:5; see also id. at
77:9-21 ("Existing contracts may still allow use of the non-mil
spec material. Folks have to be educated in their buying habits.
I continually stress the use of qualified products at all
meetings and conferences that I attend.").

1 but "there was significant information available to
2 consumers . . . providing accurate information . . . ,"
3 thereby dispelling "any tendency to deceive that the
4 statements at issue might otherwise have had").

5 The Court finds that Plaintiff has failed to prove
6 falsity, the first element of a false advertising claim
7 under 15 U.S.C. § 1125(a), and therefore cannot prevail
8 on its federal false advertising claim.

9 **B. False Advertising, Cal. Bus. & Prof. Code § 17500**

10 Section 17500 of the California Business &
11 Professions Code is California's false advertising law
12 and prohibits any advertising that is "untrue or
13 misleading" to the "reasonable consumer." People v.
14 Forest E. Olson, Inc., 186 Cal. Rptr. 804, 806 (Cal.
15 Ct. App. 1982); Cal. Bus. & Prof. Code § 17500; see
16 Consumer Advocates v. Echostar Satellite Corp., 8 Cal.
17 Rptr. 3d 22, 29 (Cal. Ct. App. 2003). Under the
18 "reasonable consumer" standard, a plaintiff must "show
19 that members of the public are likely to be deceived."⁶
20 Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th

21
22 ⁶ While Section 17500 "prohibits negligent as well as
23 intentional dissemination of misleading advertising" and thus
24 "imposes a duty of [reasonable] investigation," the duty of
25 investigation is imposed *only if* the advertising is first proven
26 to be false or misleading. See People v. Forest E. Olson, Inc.,
27 186 cal. Rptr. 804, 807 (Cal. Ct. App. 1982); People v. Lynam, 61
28 Cal. Rptr. 800 (Cal. Ct. App. 1967) (stating a plaintiff must
allege: "(1) statements in the advertising are untrue or
misleading, and (2) defendant knew, or by the exercise of
reasonable care should have known, that the statements were
untrue or misleading.").

1 Cir. 2008) (internal quotation marks omitted); Bank of
2 West v. Sup. Ct., 833 P.2d 545 (Cal. 1992); In re
3 Tobacco II Cases, 207 P.3d 20 (Cal. 2009).

4 "In an action for false advertising under
5 [California law], the plaintiff 'bears the burden of
6 proving the defendant's advertising claim is false or
7 misleading.'" Stanley, 2012 WL 1132920, at *3 (citing
8 Nat'l Council Against Health Fraud, Inc. v. King Bio
9 Pharm., Inc., 133 Cal. Rptr. 2d 207 (Cal. Ct. App.
10 2003)). California courts have held that "lack-of-
11 substantiation arguments" are "insufficient, on their
12 own, to support a false or misleading advertising
13 claim." Hughes v. Ester C Co., 930 F. Supp. 2d 439
14 (E.D.N.Y. 2013); see In re Clorox Consumer Litig., 894
15 F. Supp. 2d 1224, 1231-32 (N.D. Cal. 2012); Stanley v.
16 Bayer Healthcare LLC, No. 11-cv-862-IEG, 2012 WL
17 1132920, at *3 (S.D. Cal. Apr. 3, 2012); King, 133 Cal.
18 Rptr. 2d 207, 214-16 (Cal. Ct. App. 2003).

19 In Fraker, the district court dismissed the
20 plaintiff's claims for false or misleading advertising
21 under Cal. Bus. & Prof. Code §§ 17500 and 17200 because
22 the plaintiff had failed to "prove facts that show that
23 the claims that Defendant made in connection with
24 product are false or misleading," as the plaintiff's
25 lack of substantiation claim was not sufficient to
26 prove falsity or deception. Fraker, 2009 WL 5865687,
27 at *8-*9. Similarly, in Stanley, the district court
28 rejected the plaintiff's false advertising-related

1 claims under Cal. Bus. & Prof. Code §§ 17200 and 17500
2 even though it was "undisputed that [the] Defendant did
3 not independently conduct clinical studies" of its
4 product. 2012 WL 1132920, at *5 n.4. The plaintiff in
5 Stanley failed to provide evidence showing that the
6 defendant's advertisements were "actually false" or
7 would "mislead a reasonable consumer." Id. at *5.

8 As in Stanley, and as discussed above, Plaintiff
9 has not proved that Defendant's advertisements of its
10 StratoGrey bags were false or were likely to "mislead a
11 reasonable consumer" into believing that the StratoGrey
12 bags were qualified by the military or any other false
13 belief. Thus, Plaintiff cannot prevail on its state-
14 law false advertising claim under Cal. Bus. & Prof.
15 Code § 17500.

16 **C. Unfair Trade Practices, Cal. Bus. & Prof. Code §**
17 **17200.**

18 "California's Unfair Competition Law ("UCL")
19 prohibits any 'unlawful, unfair or fraudulent business
20 act or practice.'" Williams v. Gerber Prods. Co., 552
21 F.3d 934, 938 (9th Cir. 2008); Cal. Bus. & Prof. Code §
22 17200. To state a cause of action under the UCL, the
23 plaintiff must allege either an unlawful act, an
24 "unfair" act, or a fraudulent act. See Williams, 552
25 F.3d 934, 938; VP Racing Fuels, Inc. v. Gen. Petroleum
26 Corp., 673 F. Supp. 2d 1073, 1086-88 (E.D. Cal. 2009).

27 To claim a violation of the UCL based on an
28 "unlawful" act, a plaintiff must prove the defendant

1 violated some underlying law. VP Racing, 673 F. Supp.
2 2d at 1086-88. Plaintiff's false advertising claims
3 under the Lanham Act and Cal. Bus. & Prof. Code § 17500
4 fail, and Plaintiff asserts no other legal violation to
5 support its UCL claim under the "unlawful" prong.

6 There is at least a three-way split among
7 California appellate courts as to the proper standard
8 for an "unfair" act under the UCL. Graham v. Bank of
9 Am., N.A., 172 Cal. Rptr. 3d 218, 233 (Cal. Ct. App.
10 2014). Upon review of the various tests, the Court
11 finds that Plaintiff has not proved an "unfair"
12 business act. See id.

13 A "fraudulent act" under the UCL "may include a
14 false statement, or one which, though strictly
15 accurate, nonetheless has the likely effect of
16 misleading or deceiving the public." Zeltiq
17 Aesthetics, Inc. v. BTL Indus., Inc., No. 13-cv-05473-
18 JCS, 2014 WL 1245222, at *9 (N.D. Cal. Mar. 25, 2014)
19 (citing Garcia v. Sony Computer Entm't Am., LLC, 859 F.
20 Supp. 2d 1056, 1062 (N.D. Cal. 2012)). Because
21 Plaintiff has not provided sufficient evidence to show
22 that customers were actually deceived by Elkay's
23 advertisements, Plaintiff cannot prevail under the
24 fraudulent prong of the UCL.⁷

25
26 ⁷ Zeltiq Aesthetics, 2014 WL 1245222, at *10 (noting that
27 though the plaintiff provided evidence showing that the
28 defendant's advertising could mislead customers to think the
product was FDA cleared, the plaintiff could not prevail because
it had failed to submit any evidence showing that customers were

1 **D. Attorney Fees & Costs**

2 Section 1117(a) of the Lanham Act states that the
3 "court in exceptional cases may award reasonable
4 attorney fees to the prevailing party." 15 U.S.C. §
5 1117(a). An "exceptional" case warranting an award of
6 attorney fees is one in which the non-prevailing
7 party's actions were "'groundless, unreasonable,
8 vexatious, or pursued in bad faith.'" Gracie v.
9 Gracie, 217 F.3d 1060, 1071 (9th Cir. 2000).

10 Defendant requests an award of attorney fees and
11 costs pursuant to 15 U.S.C. § 1117(a), arguing that
12 this case is "exceptional" in that "Caltex acted in bad
13 faith by filing suit against Elkay even though Elkay
14 ceased the alleged wrongful conduct" and "attempt[ed]
15 to hold Elkay liable for claims that Caltex knew were
16 true and which were released pursuant to Caltex's
17 previous settlement with 3M Company." Def.'s Closing
18 Trial Br. 27:1-14. The Court does not find that
19 Plaintiff's claims against Defendant were "groundless,
20 unreasonable, vexatious, or pursued in bad faith."
21 Thus, Defendant's request for attorney fees and costs
22 under 15 U.S.C. § 1117(a) is **DENIED**.

23 _____
24 *actually* deceived by the defendant's advertisements, and
25 rejecting "a general claim of deceptive impact" when the
26 plaintiff's evidence showed only that customers in general would
27 presume the product was FDA cleared and when the plaintiff did
28 not present evidence that the customers "who actually purchase[d]
the [product] . . . believed it was FDA cleared"; also stating
that the sophistication of the customers made it unlikely that
the customers would be deceived).

CONCLUSION

1
2 Because Plaintiff has failed to prove its three
3 claims against Defendant, Judgment is entered in favor
4 of Defendant. The parties shall bear their own costs
5 and fees.

6
7 **IT IS SO ORDERED.**

8 DATED: February 4, 2015

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge

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