No. 19-55343

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

ARIIX, LLC,

Plaintiff-Appellant,

– v. –

NUTRISEARCH CORPORATION ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

No. 3:17-cv-00320-LAB-BGS
The Honorable Larry Alan Burns

APPELLANT'S REPLY BRIEF

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INTRODUCTION AND SUMMARY

Ariix's allegations describe a straightforward scheme whereby NutriSearch and Lyle MacWilliam (together, "NutriSearch") accepted hundreds of thousands of dollars from Usana Health Sciences, Inc. ("Usana"), a competitor of Ariix, in exchange for providing more favorable ratings and classifications of Usana's products. This favorable treatment stated that Usana's products were superior in certain objective ways to Ariix's—an assertion that is false. NutriSearch did not disclose the fact that it was receiving these substantial payments from the seller of some of the products it discussed in its *NutriSearch Comparative Guide to Nutritional Supplements* (the "*Guide*"). This created the false impression that caused consumers to reasonably believe the statements were unbiased statements of objective, scientific fact when, in reality, Usana was paying NutriSearch for this most favorable treatment. This conduct is squarely actionable under the Lanham Act, and there are no legitimate First Amendment concerns raised by such liability.

Largely, NutriSearch simply tries to downplay its connections to Usana and offers an alternative version of events, or at least a different

explanation for them. Many of NutriSearch's arguments may be appropriate for summary judgment—should it have the evidence to support it—but it all falls outside of Ariix's complaint and is, thus, irrelevant to consider at this stage. Ariix alleges that NutriSearch is a paid shill—that NutriSearch has received hundreds of thousands of dollars from Usana, a direct competitor of Ariix, so that NutriSearch will classify Usana's products as superior to Ariix's, even though this is false and misleading.

The district court inexplicably accepted many of the alternative explanations offered by NutriSearch and prematurely resolved factual dispute in NutriSearch's favor, even though the court should have construed all allegations in favor of Ariix and withheld resolution of any factual disputes. The district court also accepted the remarkably broad rule proposed by NutriSearch: that anything resembling a product review is immune from Lanham Act liability. This is not the law. To the contrary, the law is nimble enough to address more sophisticated, and perhaps subtle, forms of false and misleading commercial speech, such as that engaged in by NutriSearch.

ARGUMENT

I. NUTRISEARCH ENGAGED IN FALSE ADVERTISING IN VIOLATION OF THE LANHAM ACT

A. NutriSearch Invites This Court to Make the Same Errors Made by the District Court: To Construe the Well-Pleaded Allegations against Ariix and Prematurely Resolve Factual Questions

Ariix's opening brief called attention to several of the repeated instances where the district court failed to construe allegations in a light most favorable to Ariix, improperly drew inferences against Ariix, and prematurely resolved factual disputes at the motion-to-dismiss stage. *Johnson v. Lucent Techs.*, Inc., 653 F.3d 1000, 1010 (9th Cir. 2011) ("On a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.").

NutriSearch does not dispute this or offer any justification for the district court's errors, nor can it do so. Instead, NutriSearch repeats many of the same mistakes, offering not only alternative explanations to Ariix's allegations but also new facts outside the four corners of

Ariix's complaint.[1] And NutriSearch invites this Court to make the same mistakes as well.

On a motion to dismiss, it is not enough that the defendant (or the district court) may be able to suggest an alternative explanation or interpretation of the plaintiff's allegations; if both are plausible, then the plaintiff's allegations should survive. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)."). Indeed, a complaint "may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *implausible*." *Id.*

NutriSearch may, of course, be able to pursue and prove its alternative explanations at summary judgment or later, should the evidence support it. But it is premature and improper to consider those alternative explanations at this stage, and it was legal error for the

1. Ariix objects to NutriSearch's improper inclusion of "facts" not included in Ariix's Amended Complaint, particularly those included in pages 8–13 of NutriSearch's Answering Brief.

district court to accept those alternative explanations in dismissing Ariix's amended complaint.

B. NutriSearch's Challenged Statements Constitute Commercial Speech Ill-Suited for Resolution on a Motion to Dismiss

The statements challenged by Ariix constitute commercial speech, which leads to a fact-intensive inquiry generally not appropriate for resolution on a motion to dismiss.

NutriSearch devotes the bulk of its brief to arguing that its statements in the *Guide* are not commercial speech. Yet NutriSearch itself concedes that defining commercial speech is a complex endeavor. (Answering Br. 22–23) ("[A]pplying these factors in any kind of consistent way or to reach consistent outcomes has proven elusive."). This Court has previously recognized this difficulty as well. *Nordyke v. Santa Clara Cty.*, 110 F.3d 707, 712 (9th Cir. 1997) ("[T]he *Central Hudson* test is not easy to apply and the cases summarized above might suggest it is *sufficiently flexible* to accommodate 'good' commercial speech and to suppress that which is 'not so good.'") (emphasis added). Indeed, the inquiry requires the analysis of several fact-intensive elements: "[C]ommercial speech is found where the speech is an

advertisement, the speech refers to a particular product, and the speaker has an economic motivation." *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)).

Of course, the complex, fact-intensive nature of commercial speech highlights the very reason the district court should not have been so quick to dismiss Ariix's complaint at the pleading stage. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council Balt.*, 721 F.3d 264, 284 (4th Cir. 2013) (holding that the question of whether speech is commercial is a "fact-driven" inquiry).

NutriSearch invites the Court to make the same error made by the district court: to conclude that because this is not the garden variety form of commercial speech seen in the typical case then it must fall outside the scope of the Lanham Act. As this Court has recognized, however, the definition of commercial speech needs to be "sufficiently flexible" to catch more sophisticated, insidious types of commercial speech, such as that alleged here. *See Nordyke*, 110 F.3d at 712.

NutriSearch's proposed rule is simultaneously simplistic and breathtakingly broad. According to NutriSearch, nothing remotely

resembling a product review is actionable under the Lanham Act, and anything it said in the *Guide* is merely a product review. This does not accurately reflect the state of the law or settle the matter, yet that was the essence of the district court's holding. This was legal error, as no court has ever held that Lanham Act broadly immunizes product reviews.

Ariix does not dispute that, in certain contexts, the Lanham Act does not apply to reviews of consumer products, "but if a review contains commercial product promotion, they may fall under the Lanham Act." *GOLO, LLC v. Higher Health Network, LLC*, No. 3:18-cv-2434-GPC-MSB, 2019 U.S. Dist. LEXIS 18506, at *23–25 (S.D. Cal. Feb. 5, 2019). For example, in *GOLO*, the district court denied a motion to dismiss a false advertising claim under the Lanham Act, holding that "Plaintiff has alleged the speech is an advertisement of competing GOLO products, and Defendants' GOLO Review containing false representations are meant to discourage use of GOLO products and turn to products promoted by Defendants to economically benefit them." *Id.*; *see also Interlink Prods. Int'l, Inc. v. F & W Trading LLC*, No. 15cv1340 (MAS)(DEA), 2016 U.S. Dist. LEXIS 44256, at *25 (D.N.J.

Mar. 31, 2016) (denying motion to dismiss based on allegations the defendants manipulated product reviews by enlisting biased professional reviewers intended for consumers to rely on them when selecting a product to purchase).

These examples demonstrate that product reviews that falsely promote certain products as superior or other products as inferior are not only fact-intensive inquiries but also actionable under the Lanham Act.

C. NutriSearch's Direct Economic Ties to Usana and Resulting Hidden Bias Are Relevant to the Question of Lanham Act Liability

A key aspect of Ariix's allegations involves the extensive relationship between NutriSearch and Usana, including its significant financial component, and the fact that that relationship—and NutriSearch's resulting hidden bias—is not disclosed to consumers (indeed, the *Guide* disclaims such relationships). Yet, both NutriSearch and the district court suggest that a defendant's potential bias should not impact the inquiry. This is flatly incorrect. Not only does that argument run counter to the clear precedent of this Court confirming that a speaker's economic motive is an important component of the

commercial speech inquiry, *see Hunt*, 638 F.3d at 715, but it also misapprehends the essence of Ariix's allegations.

Ariix has not simply alleged that NutriSearch had an economic motive in making the statements that it made in the *Guide*. Instead, what made NutriSearch's campaign so insidious is that it led consumers to believe it was an impartial arbiter of and unbiased source for objective information. By hiding its partiality, NutriSearch was able to mask its commercial speech as if they were, in fact, statements of fact evaluated by rigorous, and unbiased, scientific analysis. This is what transformed NutriSearch's statements into actionable commercial speech.

NutriSearch's "opinions" are only valuable if they are perceived as unbiased and objective fact. But, as alleged, NutriSearch took hundreds of thousands of dollars from a manufacturer whose products it "reviewed." (ER 10–11, 58, 60–61, 65–67.) And it failed to disclose that affiliation or conflict of interest. (ER 54, 60–62, 69–70.) If NutriSearch's conflict had been fairly and fully disclosed to consumers, they would have been much less likely to view the *Guide* as a neutral source of unbiased information, and, thus, the *Guide*'s value would have been

greatly diminished. Indeed, as even the district court recognized, "the disclaimer was *intended to promote trust* in the *Guide*." (ER 10) (emphasis added). Without trust, NutriSearch's *Guide* is not valuable to consumers, and, more importantly, it is not valuable to Usana, who has paid hundreds of thousands of dollars to NutriSearch.

NutriSearch devotes significant time discussing *Oxycal Labs. v. Jeffers*, 909 F. Supp. 719 (S.D. Cal. 1995), but that decision is unavailing. (ER 25–28.) There, the court considered, on a preliminary injunction motion, a book entitled *The Cure for All Cancers* that, among other things, briefly suggested that a certain mineral caused cancer—a mineral that was contained in some of the plaintiffs' products. 909 F. Supp. at 720. In concluding that the challenged statements were not commercial speech, the court focused on the defendant's economic motivation: "The key seems to be a determination of whether the speech is primarily motivated by commercial concerns, or whether there is sufficient non-commercial motivations." *Id.* at 725. The court could find no meaningful motivation of commercial concerns, and there was no showing that the defendant had a commercial motivation to favor certain products over those of the plaintiffs. *Id.* at 724–26.

Oxycal Labs actually supports reversal because here, by contrast, Ariix has expressly alleged that NutriSearch was primarily motivated by commercial concerns: it promoted (with favorable ratings and classifications) certain Usana products over other non-Usana products, such as Ariix's, because NutriSearch was paid substantial sums of money by Usana to do so. If NutriSearch did not devise ratings and classifications satisfactory to Usana, Usana would not have paid hundreds of thousands of dollars to NutriSearch.

This conclusion is confirmed by NutriSearch's tepid attempt to distinguish *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 193 F. Supp. 3d 556 (E.D. Va. 2016). The best response NutriSearch can muster is that "commercial and economic factors" present in *Handsome Brook*—that the defendant had a direct financial incentive to promote competitors' products—are not present here. (*See* Answering Br. 28–29 n.6.) That is flatly incorrect. As the *Handsome Brook* court recognized, the financial relationships between the defendant and the competitors whose products were promoted "are similarly dependent on the value producers believe consumers will attribute to eggs labeled Certified Humane®." 193 F. Supp. 3d at 568–

69. The same is true here. NutriSearch enjoys a lucrative arrangement with Usana precisely because consumers attribute value to NutriSearch's ratings and classifications. If consumers begin to doubt NutriSearch's objectivity—instead recognizing that it is a paid shill masking its ads as objective fact—the *Guide* will no longer be useful to consumers because it will not be perceived as a trustworthy source of information, and the relationship will no longer be valuable to Usana.

NutriSearch's failure to disclose these conflicts is not academic: "a failure to disclose bias can be actionable under the Lanham Act 'where that failure renders some other affirmative statement false or misleading.'" *Grasshopper House, LLC v. Clean*, No. 2:18-cv-00923-SVW-RAO, 2018 U.S. Dist. LEXIS 228190, at *20 (C.D. Cal. July 18, 2018) (quoting *Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 638 (S.D.N.Y. 2016)). Additionally, FTC regulations "requir[e] the disclosure of financial connections between advertisers . . . and endorsers." *Grasshopper House,* 2018 U.S. Dist. LEXIS 228190, at *20 (citing 16 C.F.R. § 255.5). And courts have recognized that a "plaintiff may and should rely on FTC guidelines as a basis for asserting false advertising under the Lanham Act." *Manning Int'l Inc. v. Home Shopping Network,*

Inc., 152 F. Supp. 2d 432, 437 (S.D.N.Y. 2001). Here, Ariix has alleged that NutriSearch failed to disclose its direct and substantial financial relationship with Usana, which was intentionally done to misrepresent NutriSearch's favorable ratings and classifications of Usana's products as unbiased and objective statements of fact. This is actionable conduct under the Lanham Act.

The district court also improperly downplayed Ariix's allegations of NutriSearch's improper ties with Usana. Instead, it construed inferences against Ariix's allegations and proposed an alternative interpretation: according to the district court, the "obvious explanation" for the payments from Usana to NutriSearch "is that the two realized a knowledgeable author who had a favorable view of a company would work well as a spokesman" and that this suggests that NutriSearch "was paid for [the speaking tour] rather than for a review." (ER 15–16.) Yet, the court did not explain why this is the "obvious explanation," nor would that matter. Both NutriSearch and the district court ignore Ariix's allegations that NutriSearch had a *direct* financial relationship with Usana whereby NutriSearch received hundreds of thousands of

dollars in payments in exchange for favorable ratings and classifications of Usana's products. (ER 45, 58, 65–70, 73–75.)

Similarly, in addressing Ariix's allegation that NutriSearch removed the neutrality statement from the *Guide* after Ariix filed suit—which supports the other allegations that the *Guide* was misleading—the district court speculates that "the omission could be due to any number of other innocent reasons, including the obvious fact that the remark was cited in this lawsuit." (ER 10–11.) Not only does it not make sense for the district court to have construed these allegations in this manner, as it finds no support in Ariix's amended complaint, but, more importantly, it was simply improper for the district court to have speculated in this way.

Ariix has offered plausible allegations that NutriSearch has received hundreds of thousands of dollars from a company whose products it promotes in exchange for favorable ratings and classifications. NutriSearch and the district court's suggestion that the payments NutriSearch received from Usana were for other, legitimate purposes unrelated to statements made in the *Guide* was simply speculation untethered to Ariix's allegations. Ariix' allegations should

have been accepted at the motion to dismiss stage, regardless of whether NutriSearch or the district court could think up an alternative explanation. *See Starr*, 652 F.3d at 1216.

D. The *Guide* need not be presented in a traditional "advertising format" to constitute commercial speech

NutriSearch argues that the challenged statements in the *Guide* are not commercial speech because they are not in an "advertising format." (ER 31.) But the definition offered by NutriSearch (and accepted by the district court) viewed the definition of advertising format too narrowly.[2] In essence, NutriSearch's position is that anything that resembles a product review is immune from Lanham Act

2. Notably, NutriSearch does not challenge or even address Ariix's argument that the *Guide* was sufficiently "disseminated" for purposes of Lanham Act liability. Thus, it has waived any argument to the contrary. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("on appeal, arguments not raised by a party in its opening brief are deemed waived"). Moreover, the question of whether the publication has been widely disseminated is a question of fact ill-suited for resolution at this stage. *See PQ Elec. Controls v. Johnson Controls*, C.A. No. 97-7457, 1998 U.S. Dist. LEXIS 19191, at *2–*3 (E.D. Pa. Nov. 25, 1998); *VIP Prods., LLC v. Kong Co.*, No. CV10-0998-PHX-DGC, 2011 U.S. Dist. LEXIS 3158, at *8–*9 (D. Ariz. Jan. 12, 2011) ("The issues that remain, including the breadth of dissemination and Defendant's purpose, are fact-intensive inquiries not suitable for resolution in a motion to dismiss."). Thus, it was erroneous for the district court to find to the contrary.

liability. This narrow, formulistic approach is incorrect, as the inquiry requires a more holistic assessment of the nature and context of the challenged statements.

The purpose of the *Guide* is to facilitate commercial transactions. In fact, Ariix alleged that NutriSearch designed the *Guide* specifically to promote Usana's products. (ER 46.) NutriSearch knows that its *Guide* is being distributed to sales representatives and consumers, and it knows that recommendations and sales decisions are being made in reliance on the statements contained therein. (ER 41–42, 46–47, 52–53, 57, 67–71.) This is what makes it particularly valuable to manufacturers such as Usana—and why Usana was willing to pay hundreds of thousands of dollars to NutriSearch. The purpose of the *Guide* is to promote commercial transactions, especially for Usana's products.

All the *Guide*'s components interact to create the illusion that NutriSearch is making scientifically valid, unbiased statements of fact when, in reality, the reviews are essentially product placements paid for by certain companies. Yet none of this is disclosed.

NutriSearch insists that there is no "reason to believe" that the *Guide* contains "pages upon pages of health- and nutrition-related noncommercial speech 'as a mere sham to convert a pure advertising leaflet into noncommercial speech.'" (Answering Br. 37) (quoting *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 960 (9th Cir. 2012)). Yet that is exactly what Ariix has alleged. According to the amended complaint, NutriSearch has utilized a variety of tactics to masquerade as a purely informational publication when, in reality, it is used to promote commercial transactions of certain products, such as Usana's. These tactics include a section discussing health- and nutrition-related information that is, on its own, noncommercial speech. (*See* ER 42.) Yet the very purpose of that section is to create the illusion that the remainder of the *Guide*, including its commercial speech relating to different products, is unbiased, objective fact. (ER 42–43, 45–46, 61–62, 69–70.)

Further, the purely informational, noncommercial speech of the *Guide* is entirely separate from its commercial components and clearly not inextricably intertwined. As even NutriSearch implicitly acknowledges, the two sections are completely distinct and could easily

be split into two different publications. (ER 42.) NutriSearch does not get to so easily evade liability under the Lanham Act simply by juxtaposing its commercial speech with noncommercial speech, especially where the noncommercial speech is, as alleged, designed to mask the true nature of the *Guide*'s contents. The Supreme Court has already addressed this point:

> By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Bd. of Trs. v. Fox, 492 U.S. 469, 474 (1989). Similarly, here, nothing prevents NutriSearch from publishing its noncommercial informational components. And nothing requires NutriSearch to combine these pieces with its commercial messages (but for its desire to mask the true nature and origins of its commercial speech in order to continue to reap substantial financial payments from Usana).

Moreover, NutriSearch's reliance on *Dex* is misplaced. That case is not as broad as NutriSearch suggests and involves facts clearly

distinguishable from the present matter. *Dex* involved a municipal regulation aimed at restricting the publication and distribution of Yellow Pages telephone directories in Seattle. 696 F.3d at 954–55. The contents of the directories fell into three categories: (1) business white pages sections, which provide names, addresses, and phone numbers of local businesses and professionals; (2) traditional yellow pages, which list businesses by category of product or service; and (3) public interest material, which includes community information, maps, and government listings. *Id.* at 954. Although portions of the directory, such as the business advertisements, were "obviously commercial in nature," the ordinance applied broadly to all components of the directory, not simply the commercial advertisements but the noncommercial speech as well. *Id.* The Court found this overbreadth to run afoul of the First Amendment.

Here, by contrast, there is no risk of an overbroad reading that would create liability for noncommercial speech or run afoul of the First Amendment. Multiple courts have distinguished *Dex* where the ordinances or regulations were more narrowly tailored. *See S. Cal. Inst. of Law v. Biggers*, No. SACV 13-00193 JVS (RNBx), 2013 U.S. Dist.

LEXIS 190349, at *12 (C.D. Cal. Aug. 19, 2013) (distinguishing *Dex* and noting that "the ordinance at issue regulated the book 'as a whole, not simply the individual advertisements contained therein'"); *Kelley Blue Book Co. v. La. Motor Vehicle Comm'n*, 204 So. 3d 1139, 1149 n.5 (5th Cir. 2016) (noting that *Dex* "involved a statute regulating yellow pages books in their entirety, not simply the individual advertisements contained within the book").

The same is true here. Ariix is not seeking to regulate or establish liability for any legitimate noncommercial speech. Instead, it simply seeks to hold NutriSearch accountable for its misleading commercial speech, speech that is separate and distinct from any noncommercial elements. Thus, *Dex* is inapposite and, indeed, underscores the point Ariix seeks to emphasize.[3]

NutriSearch also quotes a portion of *United States v. Alvarez*, 567 U.S. 709, 727 (2012), which simply serves to highlight just how radical its position is. (Answering Br. 32.) There, the Court stated—in a

3. Moreover, *Dex* was decided on summary judgment, not a motion to dismiss, providing further support for Ariix's position that many of these questions were prematurely and inappropriately resolved at this stage.

criminal matter in which the defendant was accused of violating the Stolen Valor Act by falsely claiming that he was awarded the Congressional Medal of Honor—that the "remedy for speech that is false is speech that is true." NutriSearch is insisting that the Court accept a rule that would virtually end Lanham Act liability—that there is no problem with NutriSearch's speech because Ariix is free to offer its own true speech to correct the record. Of course, this is not what the Supreme Court meant—it was not considering the Lanham Act at all, and it has never contemplated striking down the Lanham Act in its entirety.

Simply put, the Lanham Act creates liability for false or misleading commercial speech. This is what Ariix has alleged, and, thus, its amended complaint should not have been dismissed by the district court.

E. NutriSearch's challenged statements are not mere opinion because they are reasonably interpreted by consumers as statements of objective fact

As is clear from the amended complaint and from its opening brief, Ariix is not contesting that typical product reviews by disinterested parties are generally not actionable under the Lanham

Act. As alleged, however, NutriSearch's statements and classifications in the *Guide* are not product reviews because they are not mere opinions. They are, instead, statements reasonably interpreted as statements of objective fact.

This Court has interpreted statements or descriptions of fact to mean "specific and measurable" claims that are "capable of being proved false or of being *reasonably interpreted as a statement of objective fact*." *Coastal Abstract Serv. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999) (emphasis added). By presenting the *Guide* as a neutral, unbiased presentation of information, NutriSearch has misled consumers into "reasonably interpret[ing]" the statements and claims made as statements of objective fact.

The district court committed multiple errors in this regard, going out of its way to construe challenged statements as mere words of opinion, despite being required to accept Ariix's allegations as true and draw all inferences in its favor. For example, in addressing the Gold Medal classification and the "Editor's Choice" award, the district court construed the allegations against Ariix, stating that the "very name

suggests the award is at least in part subjective." (ER 11–12.) Not only does this contradict Ariix's allegations, it is also rank speculation.

Further, in addressing Ariix's allegations about NutriSearch's implication that Ariix had not complied with the FDA's "good manufacturing practices," the district court again rejected this as a subjective opinion, reasoning that it "implies that some value judgments are inherently part of the process." (ER 14.) Not only is this flatly incorrect—the good manufacturing practices are set forth in detailed FDA regulations, *see* 21 C.F.R. Part 111.1, *et seq.*—but it also represents another instance of the court construing allegations against Ariix and resolving fact disputes at the motion to dismiss stage. The district court had no factual basis for reaching this conclusion nor any legal authority for doing so.

Ariix repeatedly alleged that "NutriSearch bills itself as an independent company that presents only objective data and analyses to the purchasing public." (*See* ER 41–42, 44–45, 49–50, 64.) Indeed, during his appearance on the Dr. Oz show, NutriSearch's MacWilliam promoted the *Guide* as an "evidence-based scientifically based [sic] system to separate the wheat from the chaff" that is specifically

designed to eliminate any bias or subjectivity. (ER 43–44.) In fact, he went so far as to state:

> [W]hat we've done in the book is we've taken a scientific discipline to evaluate the product. First of all, we developed an analysis model based upon the published recommendations of 12 other nutritional authorities. *We didn't want to put our particular bias into it* so we relied on—we stood on the shoulders of others so to speak—and developed this criteria and then we applied it to 18 different health support . . . criteria.

(ER 43.)

These comments demonstrate that the challenged portions of the *Guide* are not mere statements of opinion, and despite NutriSearch's efforts to find alternative explanations for the allegations, they should have been accepted as true at the motion to dismiss stage.

Moreover, even if the challenged statements are construed as statements of opinion, that does not immunize Usana from liability. "Companies violate the Lanham Act whenever they offer misleading 'opinions' to promote their own financial interests." *Grasshopper House*, 2018 U.S. Dist. LEXIS 228190, at *17. For example, in *Vitamins Online, Inc. v. Heartwise, Inc.*, No. 2:13-CV-982-DAK, 2016 U.S. Dist. LEXIS 16355, at *4–*5 (D. Utah Feb. 9, 2016), the defendant instructed its employees to "vote" on Amazon.com that positive reviews of its product

were "helpful," while negative reviews were "unhelpful." While the defendants argued that "helpful" and "unhelpful" were mere opinions, the court held that "the Lanham Act is broad enough to cover a wide range of deceptive practices, potentially including voting on and incentivizing online reviews." *Id.* at *19–*20; *see also iYogi Holding Pvt. Ltd. v. Secure Remote Support, Inc.*, No. C-11-0592 CW, 2011 LEXIS 144425, at *43 (N.D. Cal. Oct. 24, 2011) (holding that the posting of "shill reviews . . . on consumer websites" constituted sufficient allegations of false advertising to survive a motion to dismiss), *report and recommendation adopted*, 2011 U.S. District LEXIS 144413 (N.D. Cal. Dec. 15, 2011).

Here, due to NutriSearch's misrepresentations and failure to disclose material information, consumers reasonably interpreted NutriSearch's challenged statements, including its ratings and classifications as ones of objective fact. This distinguishes NutriSearch's statements from garden-variety product reviews.

F. That the *Guide* tangentially addresses issues of public concern does not immunize NutriSearch from Lanham Act liability

NutriSearch leans heavily on the argument that it should be able to avoid Lanham Act liability because some of the *Guide*'s contents address matters of "public concern." But that the *Guide* may touch upon matters of public concern—an incredibly broad term, as defined by NutriSearch—does not end the inquiry. In fact, it does little to move the needle, at least in this context.

Supreme Court precedent makes clear that NutriSearch is not able to immunize its tangential commercial speech in its *Guide* simply by including a section of health- and nutrition-related information in another section. Indeed, consumers are not well served if they are misinformed.

Importantly, the Supreme Court has repeatedly confirmed that commercial speech's mere reference to a matter of public concern does not serve as an escape hatch from liability. "[M]any, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 n.5 (1980). Thus,

neither an advertisement's relation to topics of current public debate nor the inclusion of factual information within it carry such commercial speech beyond the limited constitutional protection already afforded it. *Bolger*, 463 U.S. at 67–68 ("advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech") (quoting *Cent. Hudson*, 447 U.S. at 563 n.5). "A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Bolger*, 463 U.S. at 68.

Here, NutriSearch suggests it can escape liability because its *Guide* contains noncommercial speech that "dwarfs" any suggestion of a commercial purpose. (Answering Br. 33.) But NutriSearch also concedes that its *Guide* is separated into "two parts": the "first part is informational" while the second part is specific to "different nutritional supplements." (*Id.* 18–19.) It may be true that the first part of the *Guide* represents NutriSearch's "direct comments on public issues," which enjoy the "full panoply of First Amendment protections." *See*

Bolger, 463 U.S. at 68. The second part, specific to different nutritional supplements and the ratings and classifications for them, is not entitled to those same protections.

An important policy consideration is, of course, ensuring a better-informed consuming public. But consumers are not well informed if they are misled, including if they do not know the true source of statements they believe to be ones of unbiased, scientific fact. Here, consumers have been led to believe that NutriSearch's statements in the *Guide* are objective facts when, in reality, the authors are receiving hundreds of thousands of dollars from companies whose products are being showcased. These serious conflicts of interest have not been disclosed and, indeed, readers of the *Guide* have been told the opposite: that there are no conflicts. This, in turn, has caused consumers to have been misled to believe that Usana's products are superior to other similar products, such as Ariix's, even though that is not true.

Courts do exclude some types of speech from the reach of the Lanham Act because they "enable[] citizens to make better informed purchasing decisions." *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3d Cir. 1980). But, as alleged, that is not the case here. Consumers

are not better informed and, thus, unable to make better purchasing decisions if they are led to believe that the *Guide*'s statements are unbiased, scientific fact when a company whose products are being reviewed is paying hundreds of thousands of dollars to NutriSearch. To allow citizens to be better informed and to enable them to make better purchasing decisions, the *Guide* must cease masquerading as objective fact and, instead, disclose NutriSearch's significant connection to the very manufacturers whose products are included in the *Guide*.

Therefore, NutriSearch "should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S. at 68.

G. NutriSearch's Statements Promoting the *Guide* Support Lanham Act Liability

NutriSearch briefly argues that its statements promoting the *Guide* do not subject it to Lanham Act liability, largely by suggesting that those statements could not have proximately caused injury to Ariix. This is incorrect.

First, notably, NutriSearch *does not* challenge Ariix's allegations that the statements in the *Guide* proximately caused its injury. NutriSearch's argument in this respect is solely limited to its

statements promoting the *Guide*. *Second*, NutriSearch is simply offering an alternative narrative to Ariix's allegations which is another example of NutriSearch improperly seeking to have the Court resolve factual questions in its favor on a motion to dismiss. NutriSearch is entitled to test its alternative explanation at summary judgment (or later) but these alternative factual assertions should have no bearing on a motion to dismiss.

Questions of causation often involve factual disputes, which cannot be resolved by the court on a motion to dismiss or even on a motion for summary judgment. *See Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753, 756 (9th Cir. 1994) ("[A] question of causation is preeminently a question of fact, to be decided after trial."). This is particularly true of the proximate cause analysis. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003) ("Whether an act is the proximate cause of injury is generally a question of fact.").

Further, the Supreme Court has already confirmed that a direct relationship between the plaintiff's injury and the defendant's misrepresentations is not necessary to bring a claim under the Lanham

Act. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 139–40 (2014). Other courts have found Lanham Act claims brought by indirect competitors viable on facts that differ from those in *Lexmark*. *See, e.g., Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 641 (S.D.N.Y. 2016) (finding a Lanham claim viable brought by an online retailer of mattresses against an online reviewer of mattresses); *Handsome Brook*, 193 F. Supp. 3d at 569, *aff'd*, 700 F. App'x 251 (4th Cir. 2017) ("As a legal matter, a direct-competitor relationship is not necessary to sustain a false advertising claim under the Lanham Act.").

This same logic applies to NutriSearch's statements. NutriSearch offers no explanation for its assertion that it is "simply implausible" to suggest that Ariix's "lost sales" directly resulted from NutriSearch's statements promoting the *Guide* as neutral. (Answering Br. 43.) NutriSearch promotional statements served to legitimize the *Guide* as a whole, including the challenged ratings and classifications, and enabled it to masquerade as a collection of unbiased, objective statements of scientific fact all while promoting Usana's products.

For example, in *Plan P2 Promotions, LLC v. Wright Bros.*, No. 16-CV-2795 JLS (AGS), 2017 U.S. Dist. LEXIS 70101, at *14–*15 (S.D.

Cal. May 8, 2017), the plaintiff argued that "if one product is the 'official' product, every other product is unofficial and therefore inferior. Consumers in the market are likely to choose the official product over the unofficial one and thus Defendants, through their false advertising campaign, have diverted sales from the Plaintiff." The court found that such allegations "might be sufficient to bridge the gap between Defendants' alleged false advertising and Plaintiff's alleged damages, thus plausibly alleging proximate cause at the pleading stage." *Id.*

That is the essence of Ariix's allegations here: NutriSearch's ratings and classifications falsely suggested that Usana's products were superior to Ariix's, which were bolstered by NutriSearch's accompanying statements, including promotional statements, that created the façade of objective statements of fact. This is actionable under the Lanham Act.

II. NUTRISEARCH DOES NOT HAVE A FIRST AMENDMENT RIGHT TO SERVE AS A PAID SHILL FOR USANA WHILE FALSELY REPRESENTING ARIIX'S PRODUCTS

NutriSearch does not have a First Amendment right to be a paid shill that accepts hundreds of thousands of dollars from certain manufacturers in exchange for favorable ratings and classifications for

certain products, all while pretending to provide objective and unbiased information to the public.

Despite NutriSearch's suggestion to the contrary, this analysis is not impacted by the fact that the *Guide* may touch upon "matters of public interest and public concern." (Answering Br. 45.) Ariix would agree, of course, that the Lanham Act should not be construed in such a manner as to bring it into conflict with the First Amendment. But, as discussed more extensively above, there is no concern of such a conflict here. The "First Amendment's concern for commercial speech is based on the informational function of advertising," and, "[c]onsequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Cent. Hudson*, 447 U.S. at 563; *Cincinnati v. Discovery Network*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) (Commercial speech that is found to be false or misleading is afforded no First Amendment Protection at all.). "The government may ban forms of communication more likely to deceive the public than to inform it." *Cent. Hudson*, 447 U.S. at 563. This is because a listener "has little

interest in receiving false, misleading, or deceptive commercial information." *Discovery Network*, 507 U.S. at 432.

Accordingly, NutriSearch's professed concern that the Lanham Act's strict liability standard could chill speech on public concern (Answering Br. 45–49) is a moot one, and irrelevant to the matter at hand. Not only does the challenged speech constitute false commercial speech, but there is also no worry that NutriSearch will be improperly held liable due to the strict liability standard. NutriSearch was not confused or mistaken about the content of its commercial speech; NutriSearch intentionally made the challenged statements and, as alleged, did so at the behest of Usana. The First Amendment does not serve as a shield to Lanham Act liability for such conduct.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ARIIX LEAVE TO FILE AN AMENDED COMPLAINT

Ultimately, Ariix submits that the district court committed multiple legal errors in dismissing Ariix's amended complaint. But, at the very least, the district court abused its discretion in denying Ariix leave to amend its complaint a second time, especially considering the numerous inferences that the court construed against Ariix's allegations

and the factual issues the court prematurely resolved. NutriSearch makes no meaningful effort to rebut this point, but simply reiterates the substantive arguments it made throughout the brief and insists those arguments demonstrate that amendment would be futile.

The Federal Rules make clear that leave to amend a deficient complaint shall be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). Ariix recognizes that leave may be denied if amendment of the complaint would be futile, *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988), and that such a decision is reviewed for an abuse of discretion. *Smith v. Pac. Props. & Dev. Co.*, 358 F.3d 1097, 1100 (9th Cir. 2004). Importantly, whether such "denial rests on an inaccurate view of law and is therefore an abuse of discretion," requires *de novo* review of the underlying legal determination. And, of course, all allegations of material fact made in the complaint are taken as true and construed in the light most favorable to the plaintiff. *Gordon v. City of Oakland*, 627 F.3d 1092, 1094–95 (9th Cir. 2010).

Accordingly, due to the numerous material instances where the district court ignored well-pleaded allegations, construed allegations against Ariix, prematurely resolved factual disputes, and rested on

inaccurate views of the law, its denial of Ariix's request for leave to amend was an abuse of discretion.

CONCLUSION

For the foregoing reasons and those stated in Ariix's opening brief, the Court should reverse the district court's order granting the motion to dismiss and remand the case for further proceedings.

Date: October 31, 2019

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/s/ Jarod Bona
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,725 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word 2016, Century Schoolbook 14-point font.

Date: October 31, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 31, 2019

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No. 19-55343

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

ARIIX, LLC,

Plaintiff-Appellant,

– v. –

NUTRISEARCH CORPORATION ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:17-cv-00320-LAB-BGS
The Honorable Larry Alan Burns

ADDENDUM TO APPELLANT'S REPLY BRIEF

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CODE OF FEDERAL REGULATIONS

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

Example 1:

A drug company commissions research on its product by an outside organization. The drug company determines the overall subject

of the research (*e.g.*, to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the "findings" of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement.

Example 2:

A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star's compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

Example 3:

During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this

endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery - mentioning the clinic by name - on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company's clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No

disclosure is required because no representation is being made about the clothes in this context.

Example 4:

An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

Example 5:

An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons

would be interviewed by the advertiser as part of its TV promotion of its new soy protein "steak." This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the "hidden camera" only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6:

An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as "extras" in commercials and identifies several who are

interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer's infomercial, they will receive a small payment. Viewers would not expect that these "consumer endorsers" are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

Example 7:

A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video

game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8:

An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously

disclose her relationship to the manufacturer to members and readers of the message board.

Example 9:

A young man signs up to be part of a "street team" program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.