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**AN AMERICAN DREAM GONE GREEN: A DISCUSSION OF
EXISTING ENVIRONMENTAL MARKETING REGULATIONS
AND THE NEED FOR STRICTER LEGISLATION**

*Christian Robledo**

ABSTRACT

Many consumers seek to purchase environmentally friendly products and companies have responded with “green” marketing, which includes claims of environmental benefits and sustainability with respect to what is being sold. Unfortunately, these claims often overstate their impact on the environment or are presented in a way to mislead consumers. This practice is referred to as greenwashing. Not only does it harm consumers, but it potentially harms the reputation of truly eco-friendly companies that are viewed with skepticism or outright distrust due to the deceitfulness of companies that do engage in greenwashing.

This Note discusses the lack of legislation that currently exists to properly punish and deter greenwashing through an examination of the Lanham Act, the Better Business Bureau’s National Advertising Division, and the Federal Trade Commission’s Guides for the Use of Environmental Marketing Claims. Furthermore, it argues that the Federal Trade Commission’s Guides for the Use of Environmental Marketing Claims—while nonbinding—are actually written like legislative rules, and thus should be promulgated as such to make a difference in the fight against greenwashing in the United States.

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I. INTRODUCTION

Now more than ever, the United States is making strides toward sustainability and true environmental responsibility. The country's current focus on these issues has enhanced American citizens' environmental awareness as well as their sense of accountability, particularly when making purchases. Many consumers are willing to open their wallets and pay more—sometimes substantially more—for a product or service that makes them feel like they are making an impact, no matter how small. After all, that is how individuals can effect major global change: with small positive impacts aggregately. Or perhaps consumers want (or need) their products made a certain way for health reasons. In truth, there are likely countless reasons why the demand for sustainable products and services is rising.

From a business perspective, companies recognize that production expenses for sustainable products are higher than production expenses for products made with no regard for the environment or for the health of consumers. As such, for many years, corporate brand managers have falsely alleged that consumers merely claim to purchase sustainable products, but do not actually do so.¹ Several studies, however, paint a different picture.²

A study analyzing sales of consumer-packaged goods (“CPG”) from 2013-2018 revealed that in more than 90% of CPG categories, sustainability-marketed product sales increased faster than their conventional counterparts, delivering nearly \$114 billion in sales (approximately 20% of the market).³ Furthermore, nearly 80% of consumers are altering purchasing habits based on environmental

¹ Tensie Whelan & Randi Kronthal-Sacco, *Research: Actually, Consumers Do Buy Sustainable Products*, HARV. BUS. REV. (June 19, 2019), <https://hbr.org/2019/06/research-actually-consumers-do-buy-sustainable-products> (stating that due to this common misconception, many brands do not make their products more sustainable).

² *Id.*; Eric Reicin, *Businesses Should Be Held Accountable For Their ESG Claims*, FORBES (Mar. 23, 2021), <https://www.forbes.com/sites/forbesnonprofitcouncil/2021/03/23/businesses-should-be-held-accountable-for-their-esg-claims/?sh=5c6e1cc55679>.

³ Whelan & Kronthal-Sacco, *supra* note 1. This study was conducted by NYU Stern's Center for Sustainable Business using data provided by IRI (a market research firm). *Id.* The data was collected from over 36 categories, comprised of over 71,000 SKUs from retail establishments' bar scan codes (accounting for 40% of CPG sales during the five-year period examined). *Id.*

impact or social responsibility,⁴ and more than 50% of Americans say they are willing to pay more for a sustainable wearable product.⁵ Despite these findings, some companies will continue to resist embracing sustainability. How long such companies can survive in a world where environmental, social, and governance (“ESG”) factors are increasingly important to investors is beyond the scope of this Note.

Conversely, a growing number of companies and corporations are acutely aware of these environmentally conscious consumers and are making sustainability a priority. For some, the sustainable products they market are the same products they sell to their consumers. Yet, and this may come as no surprise, there are just as many companies that advertise one thing but deliver another. Undoubtedly, this often happens unintentionally. Businesses navigating through the ever-expanding world of sustainability—a world full of new trends and novel technologies—are bound to make honest mistakes in how they advertise a product.

But this Note is not concerned with those well-intentioned companies. Rather, this Note focuses on the companies attempting to capitalize on the ever-increasing demand for environmentally sound products by engaging in a deceitful practice called greenwashing.⁶

A. Background on Greenwashing

Although the term “greenwashing” originated in the mid 1980s,⁷ many people are unfamiliar with its meaning. Greenwashing occurs when a company provides deceptive information or conveys a false impression with respect to its products being environmentally sound.⁸ It derives from a similar term, “whitewashing,” which refers to glossing over negative behavior with the use of misleading

⁴ Reicin, *supra* note 2 (referencing a 2020 Capgemini report).

⁵ *Id.* (referencing a 2020 CGS Retail and Fashion Sustainability Survey).

⁶ Will Kenton, *Greenwashing*, INVESTOPEDIA (last updated Jan. 23, 2021), <https://www.investopedia.com/terms/g/greenwashing.asp>.

⁷ Jenna Tsui, *The Negative Effects of Corporate Greenwashing*, SEA GOING GREEN (Feb. 26, 2020), <https://www.seagoinggreen.org/blog/the-negative-effects-of-corporate-greenwashing> (“Environmental activist Jay Westerveld coined the term in 1986 in response to the perceived hypocrisy from a beach resort. The hotel posted notices about reusing towels to protect nearby reefs while it was in the middle of expanding into those very waters.”).

⁸ Kenton, *supra* note 6.

information.⁹ Greenwashing can be practiced in various ways, sometimes even unintentionally, and it can range in scope from a small company's ambiguous "green" packaging information to a vast eco-friendly claim made by a fossil fuel company.¹⁰ The various forms of deceitful environmental marketing have been categorized into the "seven sins of greenwashing."¹¹

The "sin of the hidden trade-off" occurs when a product is presented as "green" based on unreasonably narrow attributes that ignore other relevant environmental factors.¹² The "sin of no proof" is committed when no reliable third-party certification or other supporting information can be easily accessed to substantiate an environmental claim.¹³ The "sin of vagueness" occurs when a claim is so broad that the likelihood of consumer misunderstanding is high.¹⁴ The "sin of irrelevance" is committed when a claim is true but is irrelevant, or unimportant, to a consumer seeking eco-friendly products.¹⁵ The "sin of lesser of two evils" occurs when a claim is true but distracts the consumer from a greater environmental or health concern.¹⁶ The "sin of fibbing" simply occurs by making false environmental claims.¹⁷ Finally, the "sin of false labels" exploits

⁹ *Id.*

¹⁰ Deena Robinson, *10 Companies and Corporations Called Out For Greenwashing*, EARTH.ORG (Aug. 2, 2021), <https://earth.org/greenwashing-companies-corporations/>.

¹¹ See Richard Dahl, *Green Washing: Do You Know What You're Buying?*, ENV'T HEALTH PERSP. (June 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2898878/> (referencing a TerraChoice environmental marketing report from 2009); Nicole D'Alessandro, *7 Sins of Greenwashing (And 5 Ways to Keep It Out of Your Life)*, ECOWATCH, (Apr. 23, 2014, 12:59 PM), <https://www.ecowatch.com/7-sins-of-greenwashing-and-5-ways-to-keep-it-out-of-your-life-1881898598.html>.

¹² D'Alessandro, *supra* note 11 (providing an example where paper produced from a forest that is sustainably harvested will still yield high energy and significant pollution costs).

¹³ *Id.* (providing an example of a paper product claiming certain percentages of recycled content without supporting evidence).

¹⁴ *Id.* (providing an example with the use of the term "all natural").

¹⁵ *Id.* (providing an example with the use of the term "CFC-free," where chlorofluorocarbons have already been declared illegal, thus making the claim meaningless).

¹⁶ *Id.* (providing an example with the use of the term "organic cigarettes").

¹⁷ *Id.* (providing an example where products falsely claim "to be Energy Star certified").

consumers' demand for certifications by third parties and is committed when products are falsely labeled or claim third-party endorsement.¹⁸

While greenwashing has been around for decades, its practice has increased greatly in recent years.¹⁹ Notable companies that have been caught greenwashing include Volkswagen, BP, ExxonMobil, Nestlé, Coca-Cola, Starbucks, IKEA, Evian, and H&M.²⁰

Volkswagen “admitted to . . . fitting various vehicles with a ‘defect’ device, with software which could detect when it was undergoing an emissions test and altering the performance to reduce the emissions level,” thus enabling the corporate giant to market its vehicles as eco-friendly and trick its customers.²¹ More than 96% of BP’s spending is on oil and gas, yet it advertised its products as using low-carbon energy.²² ExxonMobil released emission reduction targets for 2025 which omitted “the vast majority of emissions resulting from its products.”²³ Nestlé’s 2018 statement regarding its ambitions for 100% recyclable or reusable packaging by 2025 was exposed as pure speculation.²⁴

¹⁸ *Id.* (providing an example where a product label contains certification-like images containing “green” jargon such as “eco-preferred”).

¹⁹ Dahl, *supra* note 11.

²⁰ Robinson, *supra* note 10.

²¹ *Id.* In a rare occurrence, Volkswagen was held accountable for this deceptive “Clean Diesel” ad campaign and had to repay more than \$9 billion to injured consumers after reaching a settlement with the Federal Trade Commission which had filed a complaint in federal court in March 2016. FED. TRADE COMM’N, *In Final Court Summary, FTC Reports Volkswagen Repaid More than \$9.5 Billion to Car Buyers Who Were Deceived by “Clean Diesel” Ad Campaign* (July 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/07/final-court-summary-ftc-reports-volkswagen-repaid-more-than-9-billion>.

²² Robinson, *supra* note 10 (stating that a complaint was lodged against BP “[i]n December 2019 . . . [by] an environmental group called ClientEarth”).

²³ *Id.* In addition, ExxonMobil recently advertised in a way that implied “its experimental algae biofuels could one day reduce transport emissions,” yet it “has no company-wide net zero target . . .” *Id.*

²⁴ *Id.* (stating that Nestlé failed to release any clear targets or timelines to outline these ambitions, nor did it lay out efforts to facilitate recycling by its consumers). Greenpeace is a global network of organizations that exposes global environmental problems. GREENPEACE, <https://www.greenpeace.org/usa/about> (last visited Nov. 7, 2021). In a released statement in response to Nestlé’s greenwashing, Greenpeace stated:

Nestlé’s statement on plastic packaging includes more of the same greenwashing baby steps to tackle a crisis it helped to create. It will not actually move the needle toward the reduction of single-use

Coca-Cola falsely advertised its packaging as sustainable and eco-friendly despite being ranked as the number one plastic polluter in the world.²⁵ In fact, Coca-Cola produces more plastic pollution than Pepsi and Nestlé combined, which are numbers two and three in the rankings, respectively.²⁶ Starbucks' so-called sustainable "straw-less lid" contained more plastic than its previous straw and lid combination.²⁷ IKEA, long considered eco-friendly, was linked to Forest Stewardship Council, an organization known for greenwashing in the timber industry.²⁸ Evian and other notable plastic water bottle companies depict nature on their labels, yet their bottles are designed for single use and therefore contribute to the global plastic pollution crisis.²⁹ H&M launched a "green" line with alleged environmental benefits yet failed to provide any information regarding these claims of sustainability.³⁰

Nonetheless, these greenwashing antics are not exclusive to retail-based corporations.³¹ Major banks such as CitiGroup, JP Morgan Chase, and Wells Fargo, to name a few, are some of the worst

plastics in a meaningful way, and sets an incredibly low standard as the largest food and beverage company in the world.

Robinson, *supra* note 10.

²⁵ Robinson, *supra* note 10 (stating that despite its eco-friendly claims, the company announced that due to popularity with customers, it would not abandon plastic bottles).

²⁶ See Karen McVeigh, *Coca-Cola, Pepsi and Nestlé Named Top Plastic Polluters for Third Year in a Row*, THE GUARDIAN (Dec. 7, 2020), <https://www.theguardian.com/environment/2020/dec/07/coca-cola-pepsi-and-nestle-named-top-plastic-polluters-for-third-year-in-a-row> (referencing an annual audit performed by Break Free From Plastic where more than 15,000 global volunteers identify "the largest number of plastic products from global brands found in the highest number of countries").

²⁷ Robinson, *supra* note 10. Starbucks did not deny this, instead claiming the "straw-less lid" was made from a recycled plastic, polypropylene. *Id.* Be that as it may, only nine percent of the world's plastic is recycled so most of its lids will end up in the ocean. *Id.*

²⁸ *Id.* In addition, IKEA sources conflict timber, which is wood that has been traded or taxed by armed factions. *Id.*

²⁹ *Id.* (listing Poland Spring and Deer Park as the other greenwashing water bottle companies).

³⁰ *Id.* Similar companies like Zara and Uniqlo have also been caught greenwashing in recent history; moreover, all these fashion brands contribute enormously to global textile waste, where only 20% is said to be recycled. *Id.*

³¹ *Id.*

greenwashing offenders in the world.³² But how can multi-national corporations like these engage in greenwashing and face little to no legal consequences for their deceitful and immoral actions?³³ The answer to this question is not a simple one.

B. Consumer Confusion and an Introduction to Existing Regulations

Part of the problem stems from the fact that it is often impossible for consumers to recognize that a company is greenwashing because environmental claims are “credence claims” – claims that are unverifiable by a consumer – as opposed to “experience claims” which deal with individual use attributes.³⁴ For example, a consumer can purchase toilet paper and easily test the company’s claim of extreme softness (experience claim), but testing the company’s claim that the toilet paper is organic (credence claim) would prove rather difficult, if not impossible. Most consumers lack the technical and specific knowledge required to consider whether an environmental credence claim about a product is valid.³⁵

According to economic theory, purely rational consumers should “discount credence claims entirely” due to their unverifiable nature.³⁶ Given how often sustainability-related credence claims are used, it is apparent that corporations are not targeting “rational” consumers.³⁷ Interestingly, many consumers will be convinced by

³² See *id.* (stating that while these banks offer “green investment” opportunities, they also lend huge sums of money to industries highly responsible for global warming); see also Chris Skinner, *Greenwashing the System: Which Banks Are Worst?*, CHRIS SKINNER’S BLOG (May 12, 2021), <https://thefinanser.com/2021/05/greenwashing-the-system-which-banks-are-worst.html> (ranking the worst banks for the funding of fossil fuels as JP Morgan, CitiGroup, and Wells Fargo as the top three, respectively).

³³ See D’Alessandro, *supra* note 11 (stating that it comes down to consumers to let businesses know dishonesty will not be tolerated).

³⁴ Rebecca Tushnet, *A Threat to Consumer Empowerment: Greenwashing*, REBECCA TUSHNET’S 43(B)LOG (Mar. 21, 2009, 2:34 PM), <https://tushnet.blogspot.com/2009/03/hofstra-conference-on-energy-and.html>.

³⁵ Ashley Lorange, *An Assessment of U.S. Responses to Greenwashing and Proposals to Improve Enforcement*, HOFSTRA L. STUDENT WORKS, 2 (2010), https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1002&context=hofstra_law_student_works.

³⁶ Tushnet, *supra* note 34. For a brief discussion on how this theory relates to why the Lanham Act is an inefficient means for consumers seeking relief for greenwashing, see *infra* text accompanying notes 70-71.

³⁷ *Id.*

credence claims over time because they become familiarized enough to trust them; in other words, consumers will forget about considering what source or evidence companies use to make these claims, and instead will only remember that the claim was made.³⁸ Remarkably, even skeptics can eventually find credence claims credible.³⁹

The result is that consumers ultimately purchase sustainable products as “an act of symbolism and faith,” and sadly, in some cases, they narrowly focus on the credence claim to feel proud of their purchase while ignoring obvious negative environmental attributes.⁴⁰ As evidenced by these examples, companies can successfully use distracting or limited green claims to induce purchasing.⁴¹

Therefore, it is not the least bit shocking that the use of this deceptive practice leads to massive consumer confusion and sullies the entire decision-making process when making purchases.⁴² As such, state and federal governments have attempted, rather unsuccessfully, to properly regulate this type of false advertising.

And therein lies the true answer to the question posited earlier which asked: How can corporations engage in greenwashing and face little to no legal consequences for their deceitful and immoral actions?

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* A *New York Times* article from 2007 reported the number one reason Toyota Prius purchases are made is because “it shows the world that its owner cares,” and a 2010 study provided that consumers making a green purchase are motivated by elevating their social status. Robin M. Rotman et al., Article, *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 ADMIN. L. REV. 417, 419 (2020).

⁴¹ Tushnet, *supra* note 34. The amount of greenwashing in recent years has caused consumer distrust to increase in companies’ environmental claims, but its powerful effects still induce purchasing by a significant number of American consumers. Michele Koch & Zach Harris, *GreenPrint Survey Finds Consumers Want to Buy Eco-Friendly Products, but Don’t Know How to Identify Them*, BUSINESSWIRE (Mar. 22, 2021, 08:30 AM), <https://www.businesswire.com/news/home/20210322005061/en/GreenPrint-Survey-Finds-Consumers-Want-to-Buy-Eco-Friendly-Products-but-Don%E2%80%99t-Know-How-to-Identify-Them>. A 2021 GreenPrint study “found a large degree of mistrust about companies’ environmental claims. . . . with 53% of Americans never or only sometimes believing such claims.” *Id.* However, the study also provided that “78% of people are more likely to purchase a product that is clearly labeled as environmentally friendly.” *Id.* The use of green certification marks—a certification by a third party—is helpful to consumers, as “45% of Americans say they need a third-party validating source.” *Id.*

⁴² Lorance, *supra* note 35, at 3.

It is because of the ineffectiveness and inefficiency of current federal legislation. And with respect to state legislation, it is evident that states' attempts at regulating greenwashing are fraught with problems and cannot be the solution.

Historically, statutes have been enacted that allow states to seek equitable, monetary, and criminal penalties against false advertisers, and in some circumstances even provide an avenue of relief for consumers.⁴³ The problem is that each state separately interprets and enforces its own statutes.⁴⁴ When up against the might of national and multi-national corporations with seemingly unlimited resources, this lack of state-wide uniformity creates an inefficient mess that mainly results in settlements.⁴⁵

Settlements are a mild consequence for corporations with deep pockets, and this type of remedy utterly fails at deterring greenwashing. A solution must be found within the broad scope of power that only federal legislation can provide. Unfortunately, current federal legislation is simply not cutting it.

The Federal Trade Commission ("FTC"), the Lanham Act, and to a lesser degree, the Better Business Bureau's National Advertising Division, all provide lackluster avenues for relief. Part II of this Note discusses the ineffectiveness of both the Lanham Act and the Better Business Bureau's National Advertisement Division with respect to regulating and deterring greenwashing. Part III, the focus of this Note, discusses the FTC's Guides for the Use of Environmental Marketing Claims ("Green Guides") as being ineffective in their current incarnation for the purpose of punishing and deterring greenwashing. No other body of federal legislation comes close to fully encompassing the proper means for advertising and marketing environmentally sound products as well as the Green Guides do. While they are mere guides, they appear facially to be legislative rules and thus are the closest thing this nation has to proper greenwashing laws. Developing a new set of rules would just be inefficient. As such, the Green Guides should not merely exist as interpretive guidance. They are in the perfect position to be promulgated as binding regulations that can finally deter corporate greenwashing successfully in this country.

⁴³ Glenn Israel, Comment, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENV'T AFFS. L. REV. 303, 312 (1993).

⁴⁴ *Id.* at 313.

⁴⁵ *Id.* at 314.

II. THE LANHAM ACT AND THE BETTER BUSINESS BUREAU'S NATIONAL ADVERTISEMENT DIVISION

A. The Lanham Act

The Lanham Act was passed by Congress just over seventy five years ago on July 5, 1946.⁴⁶ While Section 43(a) of the Lanham Act was originally narrowly interpreted to solely prohibit trademark infringement, its scope of power broadened over the years to also prohibit common law trademark infringement, trade dress infringement, and—as is relevant here—false advertisement, which includes “other practices falling within the rubric [of] ‘unfair competition.’”⁴⁷ In fact, by creating “a private cause of action for false advertisement,”⁴⁸ the Lanham Act provides an avenue, albeit a narrow one, to hold corporations liable for greenwashing.⁴⁹ However, the Lanham Act cannot be a truly effective means for consumers seeking to combat greenwashing due to its many shortfalls within this context.⁵⁰

First, the relevant provisions of Section 43(a) dealing with false advertisement will be discussed. Thus, Section 43(a) provides that:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device . . . or any false designation of origin, false or misleading description of fact, which . . . in commercial advertising

⁴⁶ Ethan Horwitz and Benjamin Levi, *Half a Century of Federal Trademark Protection: The Lanham Act Turns Fifty: Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, 7 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 59, 63 (1996).

⁴⁷ *Id.* at 59-60.

⁴⁸ Robert B. White, Note, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L. J. 325, 329 (2010).

⁴⁹ See Marc McAree and Gieselle Davidian, *Greenbiz and Getting to Market: What it Takes to Go Green and Limit Liability*, THE BRIEF (Apr. 25, 2019) https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2016_17/winter/greenbiz_and_getting_to_market_what_it_takes_to_go_green_and_limit_liability/#ref39.

⁵⁰ Lorange, *supra* note 35, at 13.

or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities, shall be liable in civil action by any person who believes that he or she is or is likely to be damaged by such act.⁵¹

This means that any marketing practices, whether entirely untrue, or even literally true but “misleading or deceiving to the target audience,” will create a cause of action.⁵² As such, this closely resembles the standard for bringing a false advertisement action under Section 5 of the FTC Act.⁵³ However, one major difference between the two acts with respect to greenwashing claims is that where the FTC provides guidance for environmental marketing under its Green Guides, the Lanham Act is silent.⁵⁴ Furthermore, another shortfall of the Lanham Act within the greenwashing context exists in who may have standing to bring a claim.

While Section 43(a), on its face, provides an avenue of relief for consumers, many courts have held that private consumer individuals lack standing to bring false advertisement claims under the Lanham Act.⁵⁵ As provided in *Made in the USA Found. v. Phillips*

⁵¹ 15 U.S.C.S. § 1125(a) (LexisNexis 2021). See 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:24 (5th ed. 2017) [hereinafter 5 MCCARTHY ON TRADEMARKS].

⁵² White, *supra* note 48. In a 2008 article, Rebecca Tushnet discusses how “false advertising cases can pit technical versus lay definitions.” Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 233 (2008). In a relevant example, she explains:

Sometimes advertisers have idiosyncratic—even Clintonesque—definitions of terms like “recycling,” as with Lexmark's contention that incinerating used printer cartridges constitutes “thermal recycling,” thus legitimating its ads claiming that Lexmark “recycles” cartridges. If a substantial percentage of its customers (most courts accept 15-20 percent as a substantial percentage) believe that “recycling” means something other than reducing plastic to ash, Lexmark is engaged in false advertising in violation of the Lanham Act.

Id. at 234. See *infra* text accompanying notes 61-68, for a more in-depth discussion of false and misleading statements under 43(a).

⁵³ White, *supra* note 48, at 329-30. See discussion *infra* Part III.

⁵⁴ White, *supra* note 48, at 330. For the relevance of this difference between the two acts, see *infra* text accompanying notes 69-73.

⁵⁵ 5 MCCARTHY ON TRADEMARKS, *supra* note 51, at 27:39. As the Supreme Court has stated, “A consumer who is hoodwinked into purchasing a disappointing product

Foods, Inc.,⁵⁶ many of the circuits have held, without disagreement from others, that Section 43(a) of the Lanham Act bars consumers from bringing claims under any provision of the Act.⁵⁷ As a result, typical plaintiffs for such claims under the Lanham Act are businesses.⁵⁸ That being said, it is not impossible for private consumers to bring false advertisement claims under the Lanham Act, but bringing greenwashing actions involving broad, general claims about environmental benefits is nearly impossible.⁵⁹ To explain this, the elements of a successful false advertisement claim under the Lanham Act must be analyzed.

In *Verisign Inc. v. XYZ.COM LLC*,⁶⁰ the Fourth Circuit explained that to succeed on a false advertisement claim under Section 43(a), a plaintiff must satisfy the following five elements by demonstrating that:

may well have an injury-in-fact . . . but he cannot invoke the protection of the Lanham Act.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.* 572 U.S. 118, 132 (2014).

⁵⁶ 365 F.3d 278 (4th Cir. 2004).

⁵⁷ *Id.* at 280. For relevant holdings from the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits, see *Colligan v. Activities Club of New York*, 442 F.2d 686, 692 (2d Cir. 1971) (“Congress’ purpose in enacting §43(a) was to create a[n] . . . unfair competition remedy, virtually without regard for the interests of consumers . . . and certainly without any consideration of consumer rights The Act’s purpose, as defined in §45, is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct.”); *Serbin v. Ziebart Int’l Corp., Inc.*, 11 F.3d 1163, 1179 (3d Cir. 1993) (stating that Congress “did not contemplate that federal courts should entertain claims brought by consumers” when enacting the Act); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 561 (5th Cir. 2001) (stating that § 45 of the Act provides that plaintiffs with proper standing are ones that possess commercial interests); *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989) (stating that the typical plaintiff bringing a 43(a) action must be a business competitor injured “as a result of false advertisement”); *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (“[I]n order to satisfy standing [under the Lanham Act], the plaintiff must allege commercial injury . . . and also that the injury was competitive”); *Stanfield v. Osborne Indus.*, 52 F.3d 867, 873 (10th Cir. 1995) (stating that a plaintiff with proper standing under the Lanham Act will be a competitor of the defendant and its asserted injury must be competitive in nature).

⁵⁸ *Phillips Foods*, 365 F.3d at 280.

⁵⁹ Elizabeth K. Coppolecchia, Note, *The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertisement?*, 64 U. MIA. L. REV. 1353, 1387 (2010).

⁶⁰ 848 F.3d 292 (4th Cir. 2017).

(1) [T]he defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.⁶¹

The biggest obstacle to establishing a successful greenwashing claim involves the first two elements, which will prove troublesome to satisfy.⁶² In analyzing the falsity aspect of the first element, courts have generally categorized false statements into two categories: claims that are *literally* false, and claims that are *implicitly* false or “literally true but misleading.”⁶³ As explained in Part I of this Note, greenwashing can take many forms, including “the sin of vagueness,” which refers to overly broad environmental claims.⁶⁴ Such greenwashing claims would certainly fall into the second classification comprised of misleading or implicitly false statements, as would several of the other types of greenwashing practices included in the “seven sins of greenwashing.” This is particularly significant when examining the second element provided in *Verisign*.

The second element, which deals with consumer confusion, is automatically satisfied upon satisfaction of the first element by a

⁶¹ *Id.* at 298-99. If a plaintiff seeks monetary damages, he or she “must additionally prove that the defendant’s advertising, in violation of Section 43(a) caused the plaintiff to suffer ‘actual damages.’” Coppolecchia, *supra* note 59, at 1389.

⁶² See Coppolecchia, *supra* note 59, at 1390-91.

⁶³ *Id.* at 1390. See *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 382 (7th Cir. 2018) (citing *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999)); see also *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 940, 948 (N.D. Ill. 2009) (“Federal false advertising claims generally fall into two categories: literal falsity and implied falsity.”).

⁶⁴ See Dahl, *supra* note 11; see also *The 7 Sins of Greenwashing: A Bluedot Environmental Perspective*, BLUEDOT MARKETING (June 4, 2021), <https://bluedotmarketing.cadthe-7-sins-of-greenwashing>.

patently false advertisement claim.⁶⁵ In other words, the advertisement would need to fall within the first category of false statements: ones that are literally false. When the advertisement claim is categorized as implicitly false, however, the plaintiff will carry a stricter burden of proof.⁶⁶ Under an implicitly false scenario, the plaintiff “must produce evidence of actual consumer confusion in order to carry its burden.”⁶⁷ This difficult burden requires the plaintiff to present “sufficient evidence that the ‘advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients.’”⁶⁸ Since the majority of advertising statements at issue in greenwashing claims likely fall into this category of implicit falseness and misleading statements, they would therefore be subject to the higher standard of proof.⁶⁹ This standard is extremely difficult for a business to satisfy, and likely impossible for a private consumer to satisfy.⁷⁰

In addition, the information being conveyed in green marketing is often beyond both the consumer’s and the court’s knowledge, a major issue which presents its own challenges when attempting to prove falsity or satisfy the consumer confusion burden.⁷¹ With respect to this issue, Harvard Law professor Rebecca Tushnet has stated that courts have held “that terms that consumers do [not] understand, or only have vague expectations about, cannot be false because they do

⁶⁵ Coppolecchia, *supra* note 59, at 1390-91. *See Eli Lilly*, 893 F.3d at 382 (“A literally false statement is one that necessarily will deceive consumers, so evidence of actual consumer confusion is not required.”); *see also* Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 158 (2d Cir. 2007) (stating that a literally false advertisement requires “no extrinsic evidence of consumer confusion”).

⁶⁶ Coppolecchia, *supra* note 59, at 1391.

⁶⁷ *Eli Lilly*, 893 F.3d at 382. In this case, the Seventh Circuit affirmed a preliminary injunction to stop the defendant from making false advertisement claims that milk from cows treated with a certain artificial growth hormone was harmful to humans. *Id.* at 384-85.

⁶⁸ Coppolecchia, *supra* note 59, at 1390 (quoting *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1182-83 (8th Cir. 1998)).

⁶⁹ *See id.* at 1391 (referencing a TerraChoice study that found only one percent of greenwashing claims involve a literally false claim).

⁷⁰ *See Eli Lilly*, 893 F.3d at 382 (stating that consumer confusion is often evidenced at trial using “fullblown” consumer surveys). What individual consumer plaintiff would be able to produce such evidence? The answer is none, which is likely another reason that individual plaintiffs typically lack standing under the Lanham Act.

⁷¹ Coppolecchia, *supra* note 59, at 1392. While likely expensive, parties can certainly bring in experts to testify to the misleading nature of claims, but the consumer standing issue still exists.

[not] communicate specific enough information.”⁷² In *Procter & Gamble Co. v. Chesebrough-Pond’s, Inc.*,⁷³ the District Court stated that “[c]ourts are not always able to determine whether an advertising claim is true or false, and where this occurs, the only possible conclusion is that the moving party has failed to prove by a preponderance of the evidence that the advertising claim is false.”⁷⁴ This is an area where the FTC is in a better position than traditional courts to enforce such actions because of its expertise with advertising claims.⁷⁵ In fact, the *Procter* court agreed that the FTC is better equipped to handle such claims⁷⁶—and this was at a time before the Green Guides even existed. The argument is even stronger now.

There is simply no effective or reliable course of action under the Lanham Act for consumers to pursue greenwashing claims. If private consumer plaintiffs can somehow satisfy the standing issue (which they likely will not),⁷⁷ they will struggle tremendously to satisfy the requisite burden of proving consumer confusion.⁷⁸ Furthermore, courts may not even have the necessary level of expertise to confidently conclude that a particular claim may indeed be false or even misleading.⁷⁹ For the foregoing reasons, the Lanham Act provides a difficult avenue for businesses to bring suits against competitors for greenwashing claims, and a near impossible path for consumers that have been injured by deceptive environmental marketing.

⁷² See Tushnet, *supra* note 34.

⁷³ 588 F. Supp. 1082 (S.D.N.Y. 1984).

⁷⁴ *Id.* at 1094.

⁷⁵ Coppolecchia, *supra* note 59, at 1392.

⁷⁶ See *Procter & Gamble Co.*, 588 F. Supp. At 1094. (“Courts generally lack the expertise of the Federal Trade Commission when it comes to evaluating advertising practices.”). See also Coppolecchia, *supra* note 59, at 1092-93 (stating that the best-case scenario for courts, under the Lanham Act, is to address literally false greenwashing claims, otherwise the FTC is in a superior position to handle impliedly false greenwashing claims because of its expertise, resources, and ability to solicit public comment to make a decision on the degree of a statement’s deceptiveness).

⁷⁷ White, *supra* note 48, at 330.

⁷⁸ *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 382 (7th Cir. 2018); Coppolecchia, *supra* note 59, at 1390.

⁷⁹ *Procter & Gamble Co.*, 588 F. Supp. at 1094.

B. Self-Regulation through the Better Business Bureau's National Advertisement Division

The most prominent independent self-regulation organization for the advertising industry is the National Advertising Division (“NAD”), which follows a general mission to review national advertising for truth and accuracy.⁸⁰ Coincidentally, the birth of the NAD occurred the year following the first-ever Earth Day.⁸¹ It was, in fact, established in 1971 when the Council of Better Business Bureaus joined forces with the advertising industry’s trade associations for the purpose of its formation.⁸² In addition to the NAD, which was designed to serve an investigative function, the National Advertising Review Board (“NARB”) was formed in tandem to serve as the appeals mechanism for disputed NAD decisions.⁸³ The NAD originally used independent monitoring and consumer complaints to draw cases, and it continues to do so today, but most of its caseload is now comprised of competitor complaints.⁸⁴

Between hearing cases from consumers, competitors, and ones found through its independent monitoring, the NAD handles approximately 150 cases per year.⁸⁵ When the NAD hears competitive

⁸⁰ *Self-Regulation of Advertising in the United States: An Assessment of the National Advertising Division*, A.B.A. SEC. OF ANTITRUST L. 4 (2015), <https://fkks.com/pdfs/SelfRegulationOfAdvertising.pdf> [hereinafter NAD Report].

⁸¹ Eric Unis, *Call to Action: Improve Green Marketing and Avoid Greenwashing*, BBB NATIONAL PROGRAMS (Apr. 22, 2021), <https://bbbprograms.org/media-center/blog-details/insights/2021/04/22/green-marketing>.

⁸² NAD Report, *supra* note 80, at 2. The trade association that played the biggest role in the NAD’s inception was the American Advertising Federation. *Id.* Also involved were the Association of National Advertisers and the American Association of Advertising Agencies. *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 3.

⁸⁵ NATIONAL ADVERTISING DIVISION, <https://bbbprograms.org/programs/all-programs/national-advertising-division#> (last visited Feb. 6, 2022). Interestingly, NAD has developed three methods of review for submitted challenges for claimants to choose from: Fast-Track SWIFT, Standard Track, and Complex Track. *Id.* The Fast-Track SWIFT option is used for “[s]ingle-issue digital advertising cases” and decisions are rendered within twenty business days. *Id.* The Standard Track option is “[o]pen to a variety of case types with decisions in four to six months.” *Id.* Finally, the Complex Track option involves “[c]ases requiring complex substantiation,” and the time for a decision will be determined by the involved parties. *Id.* In addition to differences in eligibility requirements and timelines for a decision, the three options

challenges, it acts as a neutral arbiter between two parties, ultimately making a conclusion as to whether the advertising claims at issue are substantiated.⁸⁶ Depending on its determination, it may then recommend that an “advertisement be modified or discontinued.”⁸⁷ Since these are only recommendations, decisions made by the NAD are non-binding and carry no force of law. Parties are technically free to ignore any NAD recommendation, as participation in NAD proceedings are voluntary, hence the self-regulation characteristic.⁸⁸ In the event a party does choose to ignore a finding or recommendation, the NAD may elect to refer the case to the FTC for additional review and potential enforcement.⁸⁹ Because it lacks enforcement authority, as it is not a governmental regulatory body like the FTC,⁹⁰ the NAD is also unable to provide monetary relief for parties bringing claims.⁹¹

Unlike the chief shortfall of the Lanham Act, anyone may bring a greenwashing claim to the NAD; in fact, 2020 saw a significant increase in the number of deceptive environmental advertising claims, including ones related to third-party certifications, biodegradability, and non-toxic products.⁹² The NAD is actually an incredibly useful organization and will no doubt continue to provide a useful and efficient forum for companies looking to self-regulate. Furthermore, its relationship with the FTC is useful, and can become particularly effective if the FTC steps up its enforcement actions against

also differ in fee amounts, where “BBB National Program Partners receive a discount on [such] filing fees.” *Id.*

⁸⁶ NAD Report, *supra* note 80, at 4.

⁸⁷ *Id.*

⁸⁸ Terri Seligman & Hannah Taylor, *Navigating the National Advertising Division*, LANDSLIDE (Mar./Apr. 2019), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/navigating-national-advertising-division/#ref6.

⁸⁹ *Id.* (“The FTC has long provided full-throated support of self-regulation in the advertising arena and, specifically, of the work of NAD.”).

⁹⁰ Coppolecchia, *supra* note 59, at 1385.

⁹¹ Lorance, *supra* note 35, at 16. However, after policy changes made in 2015, NAD now has the authority to administratively close a case if, prior to NAD’s issuing a decision, the challenger and advertiser consent in writing to closure of the case. Seligman & Taylor, *supra* note 88. In other words, private settlements are now allowed. *Id.*

⁹² QUINN EMANUEL URQUHART & SULLIVAN, LLP, *Greenwashing Claims on the Rise: Avoiding Dirty Laundry*, JD SUPRA (Apr. 19, 2021) <https://www.jdsupra.com/legalnews/greenwashing-claims-on-the-rise-1926530>.

greenwashing claims. Unfortunately, acting on its own, the NAD is not particularly intimidating. Its proceedings are very low-stakes, as evidenced by a disclaimer frequently attached to press releases containing summaries of completed cases, which reads in part: “A recommendation by NAD to modify or discontinue a claim is not a finding of wrongdoing and an advertiser’s voluntary discontinuance or modification of claims should not be construed as an admission of impropriety.”⁹³ For well-meaning companies, this low-stakes arena for greenwashing claims is a useful alternative to traditional litigation, but for companies seeking to intentionally deceive customers, the NAD is unlikely to serve as an effective deterrent. Where state action, the Lanham Act, and the NAD have failed with respect to effectively combating greenwashing, the FTC may provide the best solution.

III. THE FTC’S GREEN GUIDES

A. Background

The FTC—an independent federal agency created under the authority of the FTC Act which President Woodrow Wilson signed into law in 1914—was tasked with the protection of consumers and ensuring a healthy competitive market in the United States of America.⁹⁴ While some of the FTC’s objectives include enforcing non-criminal antitrust laws as well as preventing and eliminating anticompetitive business practices such as coercive monopolies, this Note will focus on its duty to protect consumers from predatory or deceitful business practices with respect to environmental marketing claims.⁹⁵

In response to greenwashing in the late 1980s and early 1990s, public hearings were held in 1991 by the FTC to determine if green marketing guides were necessary and if so, how those guides should

⁹³ See Press Release, BBB NAT’L PROGRAMS ARCHIVE, *NAD Considers Jurisdictional Issue, Recommends Beech-Nut Discontinue Certain Claims, Finds Certain Claims Supported After Gerber Challenge* (Apr. 18, 2017), <https://bbbprograms.org/archive/nad-considers-jurisdictional-issue-recommends-beech-nut-discontinue-certain-claims-finds-certain-claims-supported-after-gerber-challenge>.

⁹⁴ Adam Hayes, *Federal Trade Commission (FTC)*, INVESTOPEDIA (last updated July 16, 2021), <https://www.investopedia.com/terms/f/ftc.asp>.

⁹⁵ *Id.*

be formed.⁹⁶ The following year, in 1992, the FTC issued the first iteration of its Green Guides.⁹⁷ The purpose of the Green Guides is to prevent marketers from misleading consumers with environmental claims that are deceptive or inaccurate as per Section 5 of the FTC Act.⁹⁸ Specifically, their guidance provides: “(1) general principles that apply to all environmental marketing claims; (2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and (3) how marketers can qualify their claims to avoid deceiving consumers.”⁹⁹

The Green Guides are applicable to environmental claims made on product labels, promotional materials, all types of advertising, and marketing of any kind using any medium.¹⁰⁰ The claims may be directly or impliedly asserted, whether verbally, symbolically, or through the use of logos, brand names, or depictions by any means.¹⁰¹ Furthermore, the Green Guides are also applicable to transactions between businesses.¹⁰²

The Green Guides set out examples from the FTC that provide their view of how a reasonable consumer would interpret a broadly made environmental claim.¹⁰³ Where a specific group of consumers is targeted by marketers, the FTC provides that it would examine how a reasonable member of that segment of consumers would interpret the claim.¹⁰⁴

To provide updated guidance on new environmental marketing claims as well as to respond to trends in green marketing,¹⁰⁵ the FTC’s Green Guides have undergone revisions three separate times: in 1996, 1998, and most recently, in 2012.¹⁰⁶ The 2012 revision addressed

⁹⁶ Israel, *supra* note 43, at 305.

⁹⁷ FED. TRADE COMM’N, *Green Guides*, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides>, (last visited Oct. 9, 2021).

⁹⁸ *Id.*; VINSON & ELKINS: INSIGHTS, *Is Your Green Marketing Deceptive? Look to the FTC Green Guides to Limit the Risk of an FTC Enforcement Action* (Mar. 24, 2021), <https://www.velaw.com/insights/is-your-green-marketing-deceptive-look-to-the-ftc-green-guides-to-limit-the-risk-of-an-ftc-enforcement-action> [hereinafter VINSON & ELKINS]; 16 C.F.R. § 260.1 (LEXIS 2021).

⁹⁹ FED. TRADE COMM’N, *supra* note 97.

¹⁰⁰ 16 C.F.R. § 260.1.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ VINSON & ELKINS, *supra* note 98.

¹⁰⁶ FED. TRADE COMM’N, *supra* note 97.

some specific greenwashing concerns by breaking down the FTC's standards for compostable and biodegradable claims, and presented guidance for six new environmental marketing categories.¹⁰⁷ Naturally, in the ten years since the last revision, green marketing has evolved, and the use of new terminology and practices have become prevalent. Most notably, the Green Guides lack any guidance with respect to claims using popular marketing terms such as "organic," "natural," and "sustainability."¹⁰⁸

Because of the ever-evolving business marketplace, the FTC reviews its industry guides and rules every ten years in an effort to keep them relevant.¹⁰⁹ Accordingly, the Green Guides are set to be reviewed and revised in 2022 as announced and published in the *Federal Register* in July of 2021.¹¹⁰ This notice seeks out public commentary with respect to the Green Guides, which the FTC may use to modify them in an effort to address any altered conditions or public concerns.¹¹¹

B. Enforceability

The FTC has the authority to prescribe two types of rules under the FTC Act: (1) interpretive rules; and (2) legislative rules.¹¹² Whereas legislative rules are legally binding, interpretive rules are "general statements of policy."¹¹³ In other words, they are administrative interpretations of the law that are not independently

¹⁰⁷ VINSON & ELKINS, *supra* note 98. The six new categories include: (1) green certifications and seals of approval; (2) carbon offsets; (3) free-of claims (e.g., "this product contains no volatile organic compounds"); (4) non-toxic claims, (5) made with renewable energy claims; and (6) made with renewable materials claims. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ BERGESON & CAMPBELL, *Regulatory Developments: FTC Intends to Initiate Review of Green Guides in 2022* (July 6, 2021), <https://www.lawbc.com/regulatory-developments/entry/ftc-intends-to-initiate-review-of-green-guides-in-2022>.

¹¹⁰ *Id.* Along with the Green Guides, the Guides Against Deceptive Pricing, the Guides Against Bait Advertisement, and the Guides Concerning Use of the Word "Free" and Similar Representations are set for review by the Commission in 2022. 86 FED. REG. 35239 (July 2, 2021), <https://www.federalregister.gov/documents/2021/07/02/2021-13724/regulatory-review-schedule>.

¹¹¹ BERGESON & CAMPBELL, *supra* note 109.

¹¹² 15 U.S.C. § 57a.

¹¹³ *Id.*

enforceable because they lack “the force and effect of law.”¹¹⁴ To enact legislative rules, the FTC has to jump through several procedural hoops and subject the proposed legislative rules to various tedious requirements.¹¹⁵ As a result, it tends to enact interpretive rules or industry guidelines to circumnavigate the cumbersome legislative process.¹¹⁶

Much like other industry guides, the Green Guides merely consist of interpretive rules.¹¹⁷ Accordingly, neither federal, state, nor local laws are preempted by them.¹¹⁸ Rather, the Green Guides describe the types of environmental claims that the FTC may find deceptive under the FTC Act,¹¹⁹ although their interpretative status does not preclude the FTC from taking enforcement action under Section 5 of the Act.¹²⁰

When a green claim is inconsistent with the Green Guides, the FTC may take action if it is believed that all reasonable interpretations of the claim are false, misleading, or unsupported by a reasonable basis.¹²¹ The FTC may then issue orders prohibiting deceptive marketing and advertisement, and if those orders are violated, the company may be fined.¹²²

For approximately two years after the 2012 revision of the FTC Green Guides, the FTC was rather active in its enforcement actions, at least compared to the present.¹²³ In fact, the FTC filed over twenty

¹¹⁴ *Guides for the Use of Environmental Marketing Claims*, 75 FED. REG. 63,552, 63,553 (Oct. 15, 2010) [hereinafter *Guides*].

¹¹⁵ Rotman et al., *supra* note 40, at 427. Legislative rules promulgated by the FTC are subject to the procedural requirements laid out in §18(b)(1) of the FTC Act as well as the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. *Id.* In addition, the Administrative Procedure Act must also be adhered to when promulgating legislative rules. *Id.*

¹¹⁶ *Id.* at 427-28 (“[I]ndustry guidelines occupy a middle ground between being truly voluntary and legally binding.”). For further discussion on this topic as well as how the Green Guides should be promulgated as legislative rules, see *infra* Part III.D.

¹¹⁷ *Guides*, *supra* note 114.

¹¹⁸ 16 C.F.R § 260.1 (2022).

¹¹⁹ *Id.*

¹²⁰ Monica J. Stover, *Environmental Marketing Claims and the FTC’s “Revised Green Guides,”* 37 MICH. ENV’T L.J. (May 14, 2020, 9:30 AM), <https://connect.michbar.org/blogs/environmental-law-journal/2020/05/14/environmental-marketing-claims-and-the-ftcs-revise>.

¹²¹ *Id.*; VINSON & ELKINS, *supra* note 98.

¹²² FED. TRADE COMM’N, *supra* note 97.

¹²³ VINSON & ELKINS, *supra* note 98.

actions during that period.¹²⁴ Since then, however, the number of enforcement actions has, unfortunately, steadily dwindled.¹²⁵ From 2015-2019, the FTC only filed between two to five cases per year.¹²⁶ In the years 2020 and 2021, the FTC did not file a single case against corporate greenwashers.¹²⁷ Whether the change in administration in 2016 was responsible for the lack of FTC action is certainly an interesting question to ponder, but it is beyond the scope of this Note. As of May 2022, there are two pending cases (for the same offense): one against Walmart and one against Kohl's Inc.¹²⁸ The two most recently decided greenwashing cases came down in 2019: one involving Truly Organic, Inc., and the other involving Lights of America, Inc.¹²⁹

C. Enforcement Actions

For just the second time in history, the FTC brought an action for a misleading “organic” claim in *Federal Trade Commission v. Truly Organic, Inc., and Maxx Harley Appelman* in 2019.¹³⁰ Truly Organic, Inc. (“Truly Organic”) is a Florida corporation that markets its bath and beauty products across the country, selling its products—some of which it manufactures itself and some of which are purchased from wholesalers—on its website as well as on third-party sites.¹³¹ To persuade consumers to purchase its products, Truly Organic used marketing terms such as: “100% Organic Ingredients,” “certified organic,” “USDA organic,” “100% organic,” and “Truly Organic,” among others, when in actuality, its products were not organic at all.¹³²

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ FED. TRADE COMM’N, *supra* note 97.

¹²⁷ *Id.*

¹²⁸ *See Walmart, U.S. v.*, FED. TRADE COMM’N (May 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023173-walmart-us-v>; *see also Kohl’s Inc., U.S. v.*, FED. TRADE COMM’N (May 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023171-kohls-inc-us-v> (stating that the FTC sued both Kohl’s and Walmart for deceptively marketing rayon textile products as eco-friendly bamboo).

¹²⁹ FED. TRADE COMM’N, *supra* note 97.

¹³⁰ Rotman et al., *supra* note 40, at 434.

¹³¹ *Id.* at 437.

¹³² Complaint for Permanent Injunction and Other Equitable Relief at 4, *FTC v. Truly Organic Inc.*, No. 1:19-cv-23832 (S.D. Fla. Sept. 13, 2019) (stating also that Truly Organic falsely marketed products as vegan). Furthermore, these invalid claims

The investigation into Truly Organic was initially conducted in 2016 by the U.S. Department of Agriculture (“USDA”) in response to received complaints about the company’s erroneous use of the USDA Organic seal.¹³³ The CEO of Truly Organic, Maxx Appelman, claimed the error was the fault of “previous management” and that it would not happen again.¹³⁴ Later that year, after the USDA closed its investigation, Appelman electronically forged an existing company’s organic certification document by replacing the company’s name with Truly Organic’s, and subsequently providing this certificate to third parties as evidence of Truly Organic’s “certified organic” claims.¹³⁵ For the next three years, Appelman continued to make these claims, even uploading Internet influencer videos on the company’s YouTube channel promoting different organic claims as well as pictures of its product packaging also depicting the same claims.¹³⁶

The FTC informed Truly Organic of its investigation in 2019, and later filed a complaint with the United States District Court for the Southern District of Florida seeking “such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies.”¹³⁷ The case concluded just five days after the complaint was filed, with injunctive orders against the defendant, as well as a judgment of \$1.76 million.¹³⁸

The only other action taken by the FTC in 2019 was in *Federal Trade Commission v. Lights of America, Inc.*¹³⁹ Lights of America, Inc. (“LOA”) is a California corporation that markets, sells, and distributes lighting products through major national retailers.¹⁴⁰ Since 2008, LOA advertised and sold light emitting diode lamps, commonly

should have violated the false advertising provisions of Section 43(a) of the Lanham Act.

¹³³ *Id.* at 5.

¹³⁴ *Id.*

¹³⁵ *Id.* at 6.

¹³⁶ *Id.* at 6-7.

¹³⁷ *Id.* at 2, 8.

¹³⁸ Rotman et al., *supra* note 40, at 438. The order prohibits the defendants from claiming any of their products are organic in any way, as well as barring them from making any environmental or health claims about their products or services, unless non-misleading, true, and supported by reliable information. *Id.*

¹³⁹ FED. TRADE COMM’N, *supra* note 97.

¹⁴⁰ Complaint for Permanent Injunction and Other Equitable Relief at 3, *FTC v. Lights of America, Inc.*, No. SACV10-1333 JVS (MLGx) (C.D. Cal. Sept. 10, 2019).

known as LEDs.¹⁴¹ LEDs generally produce more lumens (brightness) while expending less wattage (energy use) than customary incandescent bulbs.¹⁴²

Usman Vakil, the president of LOA, and Farooq Vakil, its vice president (“Defendants”), produced various packaging and promotional materials depicting typical LED parameters in their bulbs.¹⁴³ They made claims such as “[y]ou’ll never change your bulbs again,” or “LASTS 10 TIMES LONGER than 2,000 hour incandescent bulbs.”¹⁴⁴ In truth, the Defendants’ bulbs “produced significantly less light output than a typical incandescent light bulb at the wattage” they represented.¹⁴⁵ In addition, the bulbs produced considerably fewer lumens than were represented, and also lasted substantially fewer hours than was specified in the Defendants’ promotional material.¹⁴⁶

The FTC filed its action in the United States District Court in the Central District of California and sought “to obtain a permanent injunction, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief” against LOA and the Defendants.¹⁴⁷ LOA was ordered to pay \$21 million to the FTC to provide refunds to consumers.¹⁴⁸ The FTC mailed out over 500,000 checks to consumers who purchased Lights of America bulbs, averaging \$50 each.¹⁴⁹ In addition, it was banned from misrepresenting material facts about lighting products.¹⁵⁰

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* LEDs are known to have a positive sustainable impact on the environment.

¹⁴³ *Id.* at 3-4.

¹⁴⁴ *Id.* at 4-5.

¹⁴⁵ *Id.* at 5.

¹⁴⁶ *Id.* at 5-6 (“If the lumen output decreases by more than 10% in the first 1,000 hours, it will not last 30,000 hours. Defendants represented that one of their LED recessed lamps will last 30,000 hours, but . . . this particular LED lamp lost 80% of its light output after only 1,000 hours.”).

¹⁴⁷ *Id.* at 1-2.

¹⁴⁸ FED. TRADE COMM’N, *FTC Sends \$68,000 in Refund Checks to Consumers Who Bought Lights of America LED Light Bulbs and Filed a Claim* (July 19, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-sends-68000-refund-checks-consumers-who-bought-lights-america>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* It is not mentioned whether the major national retailers the Defendants used had actual knowledge of the deceptive advertising, but none were named as parties in any matters related to this cause of action.

The cases of *Truly Organic* and *Lights of America* are rare in that the defendants were fined large sums of money; typically, the resulting remedies from FTC enforcement actions are purely injunctive.¹⁵¹ In a 2018 enforcement action against Benjamin Moore & Co., the FTC proved the paint manufacturer was making false claims regarding its products' emissions and VOC (volatile organic compound)¹⁵² levels, yet the resulting judgment was merely injunctive.¹⁵³ The same types of false environmental claims were made between 2017-2018 by three other paint manufacturers: Imperial Paints, LLC; YOLO Colorhouse, LLC; and ICP Construction Inc., and unsurprisingly, these companies were merely issued injunctive consent orders.¹⁵⁴

In *ECM Biofilms, Inc. v. FTC*,¹⁵⁵ the Sixth Circuit denied the plastic manufacturer's petition for review of the FTC's findings that ECM falsely marketed its plastics as fully biodegradable within nine months to five years.¹⁵⁶ In the underlying action by the FTC, it was proven based on survey evidence that a "significant minority of

¹⁵¹ FED. TRADE COMM'N, *supra* note 97.

¹⁵² Decision and Order: In the Matter of Benjamin Moore & Co., Inc., Docket No. C-4646, File No. 1623079 (F.T.C. Apr. 24, 2018), https://www.ftc.gov/system/files/documents/cases/1623079_benjamin_moore_decision_and_order_updated_version.pdf (defining VOCs as "any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity . . .").

¹⁵³ *Id.* For an example of one of Benjamin Moore's greenwashed commercials claiming babies can sleep in a room while it is being painted with its product, see FED. TRADE COMM'N, *Exhibit A*, https://www.ftc.gov/system/files/documents/cases/exhibit_a_video_bmftc000482_0.mp4 (last visited Nov. 27, 2021).

¹⁵⁴ FED. TRADE COMM'N, *FTC Approves Final Consent Orders Settling Charges that Four Paint Companies Misled Consumers Through Claims Their Products are Emission- and VOC-Free* (Apr. 27, 2018), <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-approves-final-consent-orders-settling-charges-four-paint>. In awarding injunctions, the FTC typically requires the losing party to self-report compliance notices and recordkeeping, as well as to be responsive to any requests for further information. Decision and Order: In the Matter of YOLO Colorhouse, LLC, Docket No. C-4649, File no. 1623082 (F.T.C. Apr. 27, 2018), https://www.ftc.gov/system/files/documents/cases/1623082_c4649_yolo_colorhouse_decision_and_order.pdf. However, the author was unable to find if such requests are often made.

¹⁵⁵ 851 F.3d 599 (6th Cir. 2017).

¹⁵⁶ *Id.* at 612.

consumers” would believe such an unqualified claim, yet once again, the consequence faced by the greenwashing offender was injunctive.¹⁵⁷

It would be folly to list every case the FTC has ever brought against greenwashing offenders that resulted in injunctive penalties; instead, the focus will be limited specifically to 2016. Of the five greenwashing companies the FTC brought actions against that year,¹⁵⁸ these are the offenders that received injunctive penalties: (1) Trans-India Products, Inc.;¹⁵⁹ (2) The Erikson Marketing Group, Inc.;¹⁶⁰ (3) ABS Consumer Products, LLC;¹⁶¹ (4) Beyond Coastal;¹⁶² and (5) California Naturel, Inc.¹⁶³ In case that was not clear enough, all five of the actions brought in 2016 resulted in injunctive relief—a punishment not even amounting to a slap on the wrist. In fact, these

¹⁵⁷ *Id.* at 607-09. Dr. Shane Frederick conducted a survey on behalf of the FTC which found that “adding a ‘biodegradable’ label to a plastic bottle increased the percentage of respondents who believed the bottle would fully decompose within five years from 13% to between 44% and 49%.” *Id.* at 606. The results from this “data led the Commission to conclude that adding the biodegradable label leads ‘a significant minority of reasonable consumers to believe that the plastic product will degrade within five years.’” *Id.* at 607.

¹⁵⁸ FED. TRADE COMM’N, *Four Companies Agree to Stop Falsely Promoting Their Personal-Care Products as “All Natural” or “100% Natural”; Fifth is Charged in Commission Complaint* (Apr. 12, 2016), <https://www.ftc.gov/news-events/press-releases/2016/04/four-companies-agree-stop-falsely-promoting-their-personal-care>.

¹⁵⁹ Trans-India Products, Inc. (doing business as ShiKai) is a California-based company that marketed its lotion and gel products as “all natural” on various websites even though the products contained the following synthetic ingredients: Dimethicone, Ethylhexyl Glycerin, and Phenoxyethanol. *Id.*

¹⁶⁰ Erickson Marketing Group (doing business as Rocky Mountain Sunscreen) is a Colorado company that promoted its products on its website as “all natural,” including its popular “Natural Face Stick” which contained the synthetic ingredients Dimethicone and Polyethylene, among others. *Id.*

¹⁶¹ ABS Consumer Products (doing business as EDEN BodyWorks) is a Tennessee company that marketed its hair products on different websites as “all natural,” including its “Coconut Shea All Natural Styling Elixir” and “Jojoba Monoi All Natural Shampoo” which contained several synthetic ingredients including Phenoxyethanol, Caprylyl Glycol, and Polyquaternium-7. *Id.*

¹⁶² Beyond Coastal is a Utah company that sold its “Natural Sunscreen SPF 30” on its website, describing it as “100% natural” even though it contained Dimethicone. *Id.*

¹⁶³ California Naturel, Inc. is a California company that sold “all natural sunscreen” on its website even though the product contained Dimethicone. *See id.*; *see also* Opinion of the Commission: In the Matter of California Naturel Inc., Docket No. 9370 (F.T.C. Dec. 5, 2016), https://www.ftc.gov/system/files/documents/cases/161212_docket_no_9370_california_naturel_opinion_of_the_commission.pdf.

injunctive FTC consent orders are as effective as a small child's promise to a parent not to be naughty every again.

In a public statement, former FTC Commissioner Rohit Chopra voiced his surprised pleasure with the *Truly Organic* judgment since it was not a result he was used to seeing: “[i]n particular, this resolution contrasts with those in similar cases involving blatant deception that harmed both consumers and honest competitors.”¹⁶⁴ The former Commissioner correctly believes that injunctive relief is not a sufficient punishment to truly deter companies from greenwashing.¹⁶⁵ With respect to the approach taken in *Truly Organic*, he stated:

I believe it would be helpful for the Commission to codify this approach in a Policy Statement addressing unlawful conduct that is dishonest or fraudulent. In cases involving such conduct, no-money settlements are inadequate, and the Commission should commit itself to exercising its full authority to protect consumers and honest businesses.¹⁶⁶

The Green Guides are inefficient and insufficiently deterrable in their current existence as a nonbinding roadmap for companies and their marketing departments to prevent greenwashing. Mr. Chopra is correct in his assessment, and the best way for the Commission, as he stated, to “exercis[e] its full authority to protect consumers and honest businesses”¹⁶⁷ is to enact the Green Guides as binding legislation which can lead to the proper awarding of damages.

D. From Nonbinding Interpretive Guidance to Binding Legislative Enforcement

The FTC uses trade regulation rules to tackle commonly occurring deceptive practices.¹⁶⁸ Originally, the FTC issued such rules

¹⁶⁴ FED. TRADE COMM’N, *Statement of Commissioner Rohit Chopra* (Sept. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544655/commissioner_rohit_chopra_statement_on_truly_organic_sept_19_2019.pdf.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rule Making Authority*, FED. TRADE COMM’N (May 2021), <https://www.ftc.gov/about-ftc/mission/enforcement-authority> [hereinafter *A Brief Overview*].

through its power under Section 6(g) of Title 15 of the U.S. Code.¹⁶⁹ After the Magnuson-Moss Warranty Federal Trade Commission Improvement Act (“FTC Improvement Act”) was passed in 1975, Section 6(g) was only used “to authorize rules concerning unfair methods of competition,” and the FTC Improvement Act became the FTC’s “exclusive authority for issuing rules with respect to unfair or deceptive acts or practices.”¹⁷⁰ Under the FTC Improvement Act, the FTC has the authority to enact both interpretive rules—like the Green Guides—and legislative rules.¹⁷¹ Specifically, it provides that:

[T]he Commission may prescribe—(A) interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . . and (B) rules which define with specificity acts or practices which are unfair or deceptive acts of practices in or affecting commerce . . .

. . .¹⁷²

Because creating interpretative rules involves significantly fewer procedural requirements than legislative rules, the FTC issues fewer binding rules than it used to prior to the passage of the FTC Improvement Act, but such interpretive rules—specifically the Green Guides—lack effectiveness for various reasons.¹⁷³

Importantly, the Green Guides cannot preempt federal, state, or local laws.¹⁷⁴ Furthermore, since violating the Green Guides technically does not violate a legally binding rule, the FTC needs to prove every individual greenwashing offense violates Section 5 of the FTC Act, as the FTC Act is the exclusive legislative source of the FTC’s enforcement power over greenwashing claims.¹⁷⁵ This is extremely inefficient, not to mention cumbersome. And it is particularly frustrating because the Green Guides actually read like legislative rules.

The Green Guides—as interpretative rules—are supposed to be “general statements of policy with respect to unfair or deceptive acts

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ 15 U.S.C. § 57a(a)(1); *see also supra* text accompanying note 112.

¹⁷² *Id.*

¹⁷³ Rotman et al., *supra* note 40, at 427-28; *see supra* notes 114–116 and accompanying text.

¹⁷⁴ 16 C.F.R. § 260.1 (2022).

¹⁷⁵ Rotman et al., *supra* note 40, at 429.

or practices in or affecting commerce.”¹⁷⁶ However, they explicitly and specifically lay out what marketers are and are not allowed to do to remain within the purview of the FTC Act.¹⁷⁷ The Green Guides, by definition of what legislative rules are under the FTC Improvement Act, “define with specificity acts or practices which are unfair or deceptive acts of practices in or affecting commerce.”¹⁷⁸ These blurred lines between interpretative and legislative rules were even pointed out in a formal statement by former FTC Commissioner, Mary L. Azcuenaga.¹⁷⁹ When the Green Guides were released in 1992, she “question[ed] whether the Green Guides were legislative rules masquerading as interpretative guidance.”¹⁸⁰ Once again, the Green Guides are in the perfect position to be enacted as binding regulations.

The Administrative Procedure Act (“APA”) provides the general procedures required for federal agencies to enact legislative rules.¹⁸¹ The rulemaking process for the FTC, specifically, also incorporates the procedural requirements of The FTC Improvement Act.¹⁸² Federal agencies are required to publish a notice of proposed rulemaking (“NPRM”).¹⁸³ However, prior to issuing an NPRM, the FTC must also publish an advanced notice of proposed rulemaking (“ANPRM”) in the *Federal Register* so that interested persons may submit commentary through “written data, views, or arguments,” and the ANPRM must also be submitted to specific committees in the Senate and House of Representatives for review.¹⁸⁴ In addition:

[T]he agency must “make a determination that unfair or deceptive acts or practices are prevalent,” and the FTC

¹⁷⁶ 15 U.S.C.S. § 57a(a)(1) (LEXIS through Pub. L. No. 117-157).

¹⁷⁷ Rotman et al., *supra* note 40, at 428.

¹⁷⁸ 15 U.S.C.S. § 57a(a)(1) (LEXIS through Pub. L. No. 117-157).

¹⁷⁹ Rotman et al., *supra* note 40, at 428. Mary L. Azcuenaga was the FTC Commissioner from 1984-1998. *Mary L. Azcuenaga: Biography*, FTC, <https://www.ftc.gov/about-ftc/commissioners-staff/mary-l-azcuenaga> (last visited July 2, 2022).

¹⁸⁰ Rotman et al., *supra* note 40, at 428.

¹⁸¹ See 5 U.S.C. § 553; see also TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (2017), <https://crsreports.congress.gov/product/pdf/R/R41546> (reporting on the methods by which federal agencies may enact rules including “formal rulemaking, informal (notice-and-comment or § 553) rulemaking, hybrid rulemaking, direct final rulemaking, and negotiated rulemaking”).

¹⁸² 15 U.S.C. § 57a.

¹⁸³ *Id.*

¹⁸⁴ *Id.*; 5 U.S.C. § 553(b)–(c).

can only make that determination under either of two specified conditions: (1) “it has issued cease and desist orders regarding such acts or practices” or (2) “any other information available to the FTC indicates a widespread pattern of unfair or deceptive acts or practices.” Finally, 30 days before the FTC publishes its NPRM, the agency must submit the NPRM to the same congressional committees.¹⁸⁵

Furthermore, the FTC is required to “provide an opportunity for informal hearing[s].”¹⁸⁶ After the period for public commentary closes, “the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”¹⁸⁷ The final rule must then be published, together with the general statement, at least 30 days before the rule comes into effect.¹⁸⁸

Is this a lengthy and arduous process? Absolutely. It is obvious why the FTC has enacted the Green Guides as interpretative rules: it is easier. After all, the aforementioned procedures do not apply “to interpretive rules [or] general statements of policy.”¹⁸⁹ However, the importance of properly deterring greenwashing is worth the procedural hoops that must be jumped through by the FTC. In addition, the FTC *already* complies with some of these procedures even though it does not need to. As noted, the FTC updates the Green Guides approximately every ten years and publishes a notice in the *Federal Register* seeking public commentary.¹⁹⁰ Thus, the notice requirement has already been partially met in addition to the Green Guides already being written like binding legislative rules. It is not unreasonable for the FTC to complete the procedural requirements, given the benefits that doing so would provide. Violators of legislative rules would be liable for civil penalties and “any person who [would] violate[] a rule (irrespective of the state of knowledge) [would be] liable for injury caused to consumers.”¹⁹¹ Damages for greenwashing offenses could

¹⁸⁵ GARVEY, *supra* note 180, at 4 n.26 (quoting 15 U.S.C. § 57a(b)). Inviting comments and alternative suggestions can certainly lead to a massive rulemaking record as any information may be submitted for agency consideration. *Id.* at 2.

¹⁸⁶ 15 U.S.C. § 57a(b)(1)(C).

¹⁸⁷ 5 U.S.C. § 553(c).

¹⁸⁸ *Id.*

¹⁸⁹ 5 U.S.C. § 553 (b)(A).

¹⁹⁰ BERGESON & CAMPBELL, *supra* note 109.

¹⁹¹ *A Brief Overview*, *supra* note 168.

be enforced without the need to prove a violation of Section 5 of the FTC Act every single time a deceptive environmental offense claim is filed.

IV. CONCLUSION

Lina Khan, the new chairperson of the FTC, was sworn in in June 2021 and has been “expected to pursue an aggressive enforcement policy for consumer protection, including advertisement and marketing conduct.”¹⁹² Yet there have only been two cases filed since that time and they are essentially the same case as each one involves the same exact charge.¹⁹³ Ms. Khan has an ambitious agenda as chairperson of the FTC and battling greenwashing is only a fraction of the agency’s legislative purpose. Since bringing and enforcing a greenwashing claim through Section 5 of the FTC is a complicated procedure, some may find the lack of claims brought understandable. But protecting American consumers—particularly ones trying to be environmentally responsible—should be a priority.

Corporations are taking advantage of the reputational advantages that greenwashing affords them. Whether through the Lanham Act, the NAD, or the current incarnation of the Green Guides, consistent and effective enforcement of greenwashing claims, not to mention proper deterrence, is simply not occurring. The Lanham Act and the NAD are not in the best position to remedy the situation, but the Green Guides are. Being promulgated as legislative rules by the FTC is certainly not a simple nor easy feat, but these industry guides already read like legislative “rules which define with specificity . . . deceptive acts of practices in or affecting commerce.”¹⁹⁴ Furthermore, with the announcement of the Green Guides’ revision and seeking of public commentary in the *Federal Register*, the FTC already satisfies part of the notice requirement for enacting legislative rules. Now is the time for the FTC to use its power to make a difference in the fight against greenwashing and effectively protect American consumers.

¹⁹² Robb Roby, *Environmental Advertising for Your Brand: Three Things You Need to Know*, LAW.COM (Aug. 27, 2021, 02:30 PM), <https://www.law.com/newyorklawjournal/2021/08/27/environmental-advertising-for-your-brand-three-things-you-need-to-know/?kw=Environmental%20Advertising%20for%20Your%20Brand:%20Three%20Things%20You%20Need%20To%20Know&slreturn=20220603223107>.

¹⁹³ FED. TRADE COMM’N, *supra* note 128 and accompanying text.

¹⁹⁴ 15 U.S.C. § 57a(a)(1).

There is no time to waste before the opportunity to save the future of an American Dream gone green will be lost.