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Make Up for Lost Time and Money: Using the Lanham Act to Regulate the Cosmetic Industry

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MAKE UP FOR LOST TIME AND MONEY: USING THE LANHAM ACT TO REGULATE THE COSMETIC INDUSTRY

MARIA MONASTRA*

ABSTRACT

In recent years, the cosmetic industry has experienced an increase in litigation brought on by consumers in their efforts to protect themselves from cosmetics that are either unsafe or falsely advertised. The Supreme Court of the United States' discussion in POM Wonderful v. Coca-Cola Co. of the Lanham Act, the United States' principal false advertising statute, clarified the breadth and depth of allowable lawsuits brought under the statute in matters which also concern the Food, Drug, & Cosmetic Act (FDCA). The case centered on a detailed discussion of the issue of federal preemption. Although the decision directly involved only the food and drug manufacturing industry, the Court's holding appears to promote an expanded use of the Lanham Act generally, and conjunctively, in industries otherwise regulated by the Food and Drug Administration. This Note will examine the ways in which the cosmetic industry will be affected if its manufacturers appropriately apply the Court's holding in POM Wonderful v. Coca-Cola Co. to their own issues of false advertising and consumer dissatisfaction. Furthermore, the shortcomings of traditional consumer protection lawsuits are discussed before I argue that both consumers and manufacturers of cosmetics would fare better if the cosmetic industry's legal issues were resolved by and between those with capital interests in the cosmetics themselves.

* The author is a JD Candidate at William & Mary Law School. She owes many thanks to the *William & Mary Business Law Review* editorial board and staff for their hard work and reflective contributions. She is grateful for the constant support she receives from her family and from Bobby, and for the journalistic insight provided by her dear friend Mary throughout the drafting process.

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INTRODUCTION

Every day, American consumers purchase cosmetics from retailers across the country without knowing the extent to which those cosmetics are—or are not—regulated by the government.¹ The Food and Drug Administration (FDA) is the government agency responsible for protecting American consumers from harmful cosmetics and personal care products.² The United States government delegated the power, albeit minimal,³ to regulate the safety and proper labeling of cosmetics sold in interstate commerce to the FDA in 1938 via the Federal Food, Drug, and Cosmetic Act (FDCA).⁴ The FDCA consists of 112 pages of standards applicable to food and drug safety, but dedicates only one page to cosmetics.⁵ The FDA is neither responsible for approving cosmetic products before they are released to the goods market, nor capable of requiring product recalls or injury reports relating to cosmetics after their release.⁶ As a result, most safety standards that apply to and constrain cosmetic manufacturers are imposed by the manufacturers themselves. All this leads to an industry that is almost entirely self-regulated.⁷

Recent estimates value the cosmetic industry at \$71 billion.⁸ When compared to the industry's aggregate size and wealth, claims of injuries caused by cosmetics have been too rare and indeterminate for manufacturers and other industry representatives to find increased government oversight imperative.⁹ They argue

¹ Natasha Singer, *Skin Deep; Should You Trust Your Makeup?*, N.Y. TIMES (Feb. 15, 2007), <http://query.nytimes.com/gst/fullpage.html?res=9A02E0DF173EF936A25751C0A9619C8B63&pagewanted=all>.

² See *Cosmetics Basics*, FOOD & DRUG ADMIN. (last updated July 7, 2017), <http://wayback.archive-it.org/7993/20171114064614/https://www.fda.gov/AboutFDA/Transparency/Basics/ucm193940.htm> [<https://perma.cc/J2CT-QE6F>].

³ See *infra* Part I.

⁴ See *Cosmetics Basics*, *supra* note 2; see also Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 301 (2012).

⁵ *U.S. Laws: FDA's Lack of Authority*, CAMPAIGN FOR SAFE COSMETICS, <http://www.safecosmetics.org/get-the-facts/regulations/us-laws/> [<https://perma.cc/VL3G-39MX>] (last visited Feb. 19, 2018).

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See Singer, *supra* note 1.

instead for increased self-regulation.¹⁰ Many legal actions pursued against cosmetic manufacturers are brought by consumers who rely on theories of false or misleading advertising.¹¹ The federal statute under which claims of false or misleading promotional statements are litigated is Section 43(a) of the Lanham Act,¹² but Section 43(a) generally excludes consumers.¹³ The statute instead grants standing to commercial competitors whose business interests are infringed upon or who suffer market dilution as a result of false or misleading advertising.¹⁴ As a result, in most circumstances, consumers whose injuries are personal rather than commercial are left only with standing to pursue state court consumer fraud actions.

A recent United States Supreme Court decision, *POM Wonderful v. Coca-Cola Co.*, relaxed the prohibited uses of the Lanham Act in situations where its application coincides with the FDA's primary enforcement responsibilities.¹⁵ The decision allowed an action brought under the Lanham Act to complement the FDA's enforcement of the FDCA.¹⁶ One positive side effect of the decision is that it facilitates the statute's goals of preserving free market competition and prohibiting anticompetitive behavior through false advertising.¹⁷ This Note aims to demonstrate that use of the Lanham Act by commercial competitors in the cosmetic industry is the appropriate solution to the industry's quest for increased self-regulation and to consumers' search for protection from potentially harmful products. Expanding the Lanham Act's use in this way will effectively mend decades of insufficient federal oversight of the cosmetic industry.

Part I of this Note provides an overview of the obstacles unique to maintaining a successful cosmetic business and the

¹⁰ *Id.*

¹¹ *See infra* Sections I.A–B.

¹² *See* Harold Weinberger, Jonathan Wagner & Tobias Jacoby, *9 Key Questions About Lanham Act False Advertising Suits*, CORP. COUNS. (Mar. 26, 2012).

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *See* *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2231 (2014).

¹⁶ *Id.* at 2238 (explaining “[t]he Lanham Act and the FDCA complement each other in major respects, for each has its own scope and purpose. Although both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety”).

¹⁷ *See generally id.* at 2238–39.

common legal claims brought against cosmetics manufacturers. Part II introduces and explains the Federal FDCA; the Lanham Act; and the Supreme Court's holding in *POM Wonderful v. Coca-Cola Co.* Part III explores the application of the Lanham Act to the cosmetic industry after *POM Wonderful* and discusses the benefits that will result from such application including safer cosmetic ingredients and more profitable niche cosmetic companies. Such benefits include a more efficient marketplace where consumers are kept safe from harmful cosmetics and their expectations of honest marketing are met, and cosmetic companies offering niche products have an avenue to hold their own against their larger competitors.¹⁸

I. ISSUES UNIQUE TO THE COSMETIC INDUSTRY'S BUSINESS

A. Changing Consumer Preferences

In 2016, statisticians estimated that the revenue generated by the cosmetic industry in the United States alone would reach \$62.46 billion.¹⁹ Even more recently, a *Forbes* contributor noted that the industry's global sales amount to \$445 billion.²⁰ The reasons why Americans invest so heavily in personal care cosmetics and beauty products are outside the scope of this Note.²¹

¹⁸ See *infra* Part III.

¹⁹ See *Revenue of the Cosmetic/Beauty Industry in the United States from 2002 to 2016*, STATISTA (2017), <https://www.statista.com/statistics/243742/revenue-of-the-cosmetic-industry-in-the-us/> [<https://perma.cc/W7ST-KNPH>] [hereinafter *Revenue of the Cosmetic Industry*]; see also *Statistics and Facts on the U.S. Cosmetics and Makeup Industry*, STATISTA (2017), <https://www.statista.com/topics/1008/cosmetics-industry/> [<https://perma.cc/38XU-F5WD>] [hereinafter *Statistics & Facts*].

²⁰ Chloe Sorvino, *Why the \$445 Billion Beauty Industry is a Gold Mine for Self-Made Women*, FORBES (May 17, 2017), <https://www.forbes.com/sites/chloesorvino/2017/05/18/self-made-women-wealth-beauty-gold-mine/#744f4e092a3a> [<https://perma.cc/G97E-4ZVX>].

²¹ See, e.g., Olga Khazan, *Why Do So Many Women Wear So Much Makeup?*, ATLANTIC (Apr. 28, 2014), <http://www.theatlantic.com/health/archive/2014/04/women-wear-too-much-makeup-because-they-mistakenly-think-men-want-them-to/361264/> [<https://perma.cc/98NS-24V7>] (noting that makeup preferences may be tied to the misperceived expectancies of men); Kim Carollo, *Makeup Makes Women Seem More Competent, Study Says*, ABC NEWS (Oct. 4, 2011), <http://abcnews.go.com/Health/cosmetics-make-women-likable-competent-trustworthy>

Personal cosmetics investments are relevant only insofar as they indicate the aggregate enormity and permanence of the industry.²² The potential to capitalize on the average American's interest in beauty and personal care cannot be overstated in such a high-grossing industry.²³ As of 2015, industry leaders worldwide included Unilever (i.e., Dove's parent company), Procter & Gamble, Estée Lauder, and L'Oreal.²⁴ L'Oreal topped the list with the number one spot and the most coveted of revenues—\$29.94 billion.²⁵ It is no surprise that smaller companies are attempting to penetrate the stronghold of household names with niche products tailored to current trends of consumption in the cosmetic industry.²⁶

Consumers in today's cosmetic market increasingly care about the content of their personal care products and the practices employed to manufacture them.²⁷ They care particularly about the safety and ethical soundness of the cosmetics they purchase.²⁸ Such preferences led to what is now commonly referred to as the “natural beauty market.”²⁹ Natural beauty product manufacturers

-attractive-study/story?id=14659706 [https://perma.cc/F7HE-JMLS] (noting that cosmetics could impact how women are perceived beyond their physical attractiveness).

²² See *Revenue of the Cosmetic Industry*, *supra* note 19.

²³ *Id.*

²⁴ Soma Dutta, *Top 10 Best Cosmetic Companies in the World*, INSIDER MONKEY (Nov. 6, 2015), <http://www.insidermonkey.com/blog/top-10-best-cosmetic-companies-in-the-world-381313/> [https://perma.cc/9B6V-HRGY].

²⁵ *Id.*

²⁶ Beth Shapouri, *The Way We Buy Beauty Now*, RACKED (May 26, 2016), <http://www.racked.com/2016/5/26/11674106/buying-beauty-sephora-department> [https://perma.cc/V3MZ-CBXY] (commenting “[t]he door is opening wider to specialty, niche, and indie lines.”); see also Sorvino, *supra* note 20.

²⁷ See Meryl C. Maneker & Vickie E. Turner, *Cosmetics and Beauty Product Litigation*, PRAC. LAW. 29, 38 (2013) (noting that “[t]he natural beauty market is one of the fastest growing segments of the overall personal care products market”).

²⁸ These consumer preferences are evidenced by the existence and rising popularity of companies like Lush Cosmetics and Pacifica Beauty. Lush Cosmetics is committed to naked packaging, vegetarian manufacturing, fresh, handmade ingredients, ethical buying, and fighting animal testing. See *Our Values*, LUSH, http://www.lushusa.com/on/demandware.store/Sites-Lush-Site/en_US/Page-View?cid=our-values-2014 [https://perma.cc/4HYF-UTGT] (last visited Feb. 19, 2018). Pacifica sells only gluten-free, 100% vegan, and cruelty-free products. See PACIFICA, *Our Products*, <http://www.pacificabeauty.com/our-products> [https://perma.cc/TNJ2-9PXS] (last visited Feb. 19, 2018).

²⁹ See Maneker & Turner, *supra* note 27, at 29, 38.

aim to infiltrate the billion-dollar cosmetic industry with products that are free from harmful chemicals and manufactured with a conscience—that is, made with animal safety and other environmental concerns at the forefront of production.³⁰ Like most boutiques that offer a niche commodity or service, small, specialty cosmetic companies compete with recognizable household brands by narrowly tailoring their advertising and manufacturing practices to meet the needs of a modern, socially conscious consumer.³¹ To this end, those small, specialty cosmetic companies have to charge more for their products because their production costs are “2 to 3 times higher” than those of the industry conglomerates.³²

Consumers of cosmetics in the millennial age have also shown that they prefer products that give them a sense of individuality;³³ by extension, cosmetic retailers that carry a “selection of niche, under-the-radar brands” have been able to dramatically increase their profits, their number of overall store transactions, and the value of their transactions.³⁴ Moreover, millennial consumers tend not to show loyalty to any particular brands; they instead prefer to approach the process of purchasing cosmetics like

³⁰ See, e.g., *Our Story*, LUSH, <http://www.lushusa.com/Stories-Show?tag=our-story> [<https://perma.cc/8FLD-CWBQ>] (last visited Feb. 19, 2018); PACIFICA, <http://www.pacificabeauty.com/> [<https://perma.cc/JL5C-RSTS>] (last visited Feb. 19, 2018); see also James Russo, *Package This: Beauty Consumers Favor ‘Cruelty-Free’ and ‘Natural’ Product Claims*, NIELSEN (March 24, 2015), <http://www.nielsen.com/us/en/insights/news/2015/package-this-beauty-consumers-favor-cruelty-free-and-natural-product-claims.html> [<https://perma.cc/A3WU-ZDL2>].

³¹ The “organic channel” of cosmetics saw a twenty four percent growth rate over the past four years, and the increase is likely attributable to a “growing distrust” of chemicals. Shapouri, *supra* note 26.

³² Perry Romanowski, *Can small cosmetic companies be successful?*, CHEMISTS CORNER (2017), <http://chemistscorner.com/can-small-cosmetic-companies-be-successful/> [<https://perma.cc/HMJ2-FGHW>]. For illustration, a 4 oz. bar of soap sold by Dove costs approximately \$1.32, TARGET, *Dove White Beauty Bar—4oz/4pk*, <https://www.target.com/p/dove-white-beauty-bar-4oz-4pk/-/A-11223389> [<https://perma.cc/5KTW-7BAK>] (last visited Feb. 19, 2018) (listing a package of four bars for \$5.29); conversely, a 3.5 oz. LUSH bar of soap is priced between \$6.95–\$15.95, LUSH, *Soap*, <http://www.lushusa.com/shower/soap/> [<https://perma.cc/U2N4-VCGS>] (last visited Feb. 19, 2018).

³³ Sarah Halzack, *The Sephora effect: How the cosmetics retailer transformed the beauty industry*, WASH. POST (Mar. 9, 2015), <https://www.washingtonpost.com/news/business/wp/2015/03/09/the-sephora-effect-how-the-cosmetics-retailer-transformed-the-beauty-industry/> [<https://perma.cc/2KQP-2DQK>].

³⁴ *Id.*

a “treasure hunt,”³⁵ or a “playground for consumers,”³⁶ because this approach makes them feel independent in the decision-making process.³⁷ Modern consumers appreciate the opportunity to search the retailer’s offerings and test as many contending products as he or she likes before making the ultimate decision to purchase.³⁸

It is not only the contents of cosmetics and the possibility of experimenting with them in-store that consumers consider prior to purchasing.³⁹ Consumers use sources like online reviews, beauty blogs, and YouTube to influence their decisions to buy.⁴⁰ With consumers actively searching for product information, and internet technology available to facilitate a seemingly infinite search field, the value of honest marketing cannot be overstated.⁴¹ Consumers want those responsible for advertising and labeling their favorite products to be mindful of their health needs and other expectations.⁴² A wave of litigation targets how specific contents of cosmetics are marketed and how terms such as “natural” which are undefined by statute or common law but which are colloquially meaningful are used to describe a product quality.⁴³ Lawsuits of this kind are on the rise, and courts’ decisions are complicated by the fact that the term “natural” has not yet been defined by the FDA.⁴⁴ That the FDA has neglected to provide official guidance

³⁵ *Id.*

³⁶ Shapouri, *supra* note 26.

³⁷ *See id.*

³⁸ *Id.*

³⁹ *See* Maneker & Turner, *supra* note 27, at 38 (“[Cosmetics] are being closely examined for how they are marketed.”).

⁴⁰ Shapouri, *supra* note 26.

⁴¹ *See id.*

⁴² *See, e.g.,* Brown v. Hain Celestial Grp., Inc., 913 F. Supp. 2d 881, 884 (N.D. Cal. 2012) (plaintiffs sued cosmetic manufacturer for falsely marketing certain of their products as organic).

⁴³ *See id.* at 885; *see also* Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 756 (9th Cir. 2015) (plaintiff sued when a product that was labeled “natural” was actually chock-full of synthetic ingredients).

⁴⁴ FOOD & DRUG ADMIN., SMALL BUSINESSES & HOMEMADE COSMETICS: FACT SHEET (last updated Oct. 5, 2016), <http://www.fda.gov/Cosmetics/Resources/ForYou/Industry/ucm388736.htm> [<https://perma.cc/U2N4-VCGS>] (“FDA has not defined the term ‘natural’ and has not established a regulatory definition for this term in cosmetic labeling. FDA also does not have regulations for the term ‘organic’ for cosmetics.”).

on the term's meaning is one example of the agency's minimal involvement in the cosmetic industry's regulatory efforts.⁴⁵ If an industry conglomerate falsely markets ingredients without much risk that a court will administer an injunction against it, that company will presumably be able to sell low-grade products at a low price, all while consumers rely on the product's purported quality when making their purchases.⁴⁶ Those injured by the largely self-regulated cosmetic industry ought to have the benefit of a legal scheme which grants bona fide manufacturers an opportunity to compete for a portion of the industry's billion-dollar revenues.⁴⁷ If less harmful products made without synthetic ingredients are what consumers want, these products should be easily discernible in the marketplace.⁴⁸

B. Claims Asserted Against Beauty Product Manufacturers

1. Products Liability

In any products liability action, the plaintiff bringing the claim of defect has the burden of proving “that the injury-causing product was defective, that the defect existed at the time the product left the control of the defendant, and that such defect [was] the proximate cause of the plaintiff's injury.”⁴⁹ Consumers harmed by cosmetics, beauty products, and other personal care products have brought legal claims under traditional product liability theories in order to recover from negligent cosmetic manufacturers.⁵⁰ In 2007, a plaintiff purchaser sued the manufacturer

⁴⁵ *Id.* (“The law does not require cosmetic products and ingredients, except for color additives, to be approved by FDA before they go on the market.”); see *U.S. Laws: FDA's Lack of Authority*, CAMPAIGN FOR SAFE COSMETICS, <http://www.safecosmetics.org/get-the-facts/regulations/us-laws/> [<https://perma.cc/VL3G-39MX>] (last visited Feb. 19, 2018) (FDA cannot require product recalls, require manufacturers to register their cosmetic establishments, or require manufacturers to report cosmetic-related injuries).

⁴⁶ See *infra* Section I.B.2.

⁴⁷ See *Revenue of the Cosmetic Industry*, *supra* note 19.

⁴⁸ See generally Russo, *supra* note 30.

⁴⁹ AM. L. PROD. LIAB. 3D, *Elements of actions involving defect*, § 3:1, Westlaw (database updated Nov. 2017).

⁵⁰ See, e.g., *Koronthaly v. L'Oreal USA, Inc.*, No. 08-4625, 2010 WL 1169958, at *1–2 (3d Cir. Mar. 26, 2010); *Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954,

of the hair texturizer in question on a failure-to-warn theory, alleging that the product had negatively affected her scalp.⁵¹ The plaintiff claimed that the staph infection she suffered after using the “Soft and Beautiful Botanicals Texturizer” manufactured by the defendant was a result of the defendant’s failure to instruct users to conduct a scalp test prior to using its product.⁵² The Supreme Court of Louisiana overturned lower courts’ rulings for the plaintiff and found instead that the plaintiff did not satisfy her burden of proving that “the manufacturer failed to use reasonable care to provide an adequate warning of such a [dangerous] characteristic to users and handlers of the product.”⁵³

A year later, an individual consumer brought a putative class action against L’Oreal on behalf of herself and others similarly situated for the presence of lead in her lipstick.⁵⁴ In that case, the plaintiff’s inability to prove any actual injury made the harm she suffered merely theoretical, and the court found irrelevant the fact that she would not have purchased the lipstick if she had known it contained lead.⁵⁵ The court noted that the plaintiff needed to allege “observable economic consequences” from the presence of lead in her L’Oreal Colour Riche lipstick in order to establish and recover any damages.⁵⁶ Another class action plaintiff filed a similar complaint in 2010, claiming both that her lipstick was unacceptable and unsafe because of the amount of lead it contained, and that she was misled into purchasing it by the defendants, L’Oreal and Proctor & Gamble.⁵⁷ The plaintiff was unable to show liability on the part of the defendants because she asserted nothing more than “subjective allegation[s]”⁵⁸ and failed to show an “injury-in-fact sufficient to confer Article III standing.”⁵⁹ Article III

958–59 (N.D. Ill. 2008); *Jack v. Alberto-Culver USA, Inc.*, 949 So. 2d 1256, 1259 (La. 2007).

⁵¹ *Alberto-Culver USA, Inc.*, 949 So. 2d at 1256–57.

⁵² *Id.* at 1257.

⁵³ *Id.* at 1259 (quoting LA. STAT. ANN. § 9:2800.57 (1988)) (brackets in original).

⁵⁴ *Frye*, 583 F. Supp. 2d at 956–57.

⁵⁵ *Id.* at 957–58.

⁵⁶ *Id.*

⁵⁷ *Koronthaly v. L’Oreal USA, Inc.*, No. 08-4625, 2010 WL 1169958, at *1–2 (3d Cir. Mar. 26, 2010).

⁵⁸ *Id.*

⁵⁹ *Id.*

standing is the constitutional requirement that a party seeking to sue must have “personally suffered some actual or threatened injury that can fairly be traced” to the defendant’s actions and show “that the injury is likely to be redressed by a favorable decision.”⁶⁰ The court elaborated that a proper demonstration of factual injury in this case would have required an allegation from the plaintiff that “she received a product that failed to work for its intended purpose or was worth objectively less than what one could reasonably expect[.]”⁶¹ In both cases, the plaintiffs’ allegations of injuries resulting from lead in their lipstick fell short of convincing the courts to award damages.⁶²

The cases explored above provide a glimpse into the myriad challenges consumers face when they attempt to sue a large cosmetic manufacturer, whether as an individual litigant or as a representative of a larger putative class.⁶³ The primary hurdle consumers face in these cases varies from a lack of standing to a lack of evidence, but the moral of each case is the same: consumers do not want to purchase defective cosmetics and obtaining redress for their alleged injuries when they do is nearly impossible.⁶⁴ These cases suggest that the problems unique to the cosmetic industry are better addressed outside of the sphere of consumer protection, in which alleged injuries are perceived as too insignificant or unsubstantiated to matter.⁶⁵

Richard Levick has characterized the rise in cosmetic-related lawsuits in recent years as a “litigation albatross.”⁶⁶ At the

⁶⁰ Legal Information Institute, *Constitutional Standards, Injury-in-Fact, Causation and Redressability*, CORNELL U.L. SCH., https://www.law.cornell.edu/anncon/html/art3frag17_user.html [<https://perma.cc/P2JM-EYDV>] (last visited Feb. 19, 2018).

⁶¹ *Koronthaly*, 2010 WL 1169958 at *2.

⁶² *Id.* at *1–2; *Frye v. L’Oreal USA, Inc.*, 583 F. Supp. 2d 954, 959 (N.D. Ill. 2008).

⁶³ See *Koronthaly*, 2010 WL 1169958 at *2; *Frye*, 583 F. Supp. 2d at 958–59; *Jack v. Alberto-Culver USA, Inc.*, 949 So.2d 1256, 1259 (La. 2007).

⁶⁴ See *Koronthaly*, 2010 WL 1169958 at *2; *Frye*, 583 F. Supp. 2d at 958–59; *Alberto-Culver*, 949 So.2d at 1259.

⁶⁵ See *Koronthaly*, 2010 WL 1169958 at *2; *Frye*, 583 F. Supp. 2d at 958–59; *Alberto-Culver*, 949 So.2d at 1259.

⁶⁶ Richard Levick, *‘Nailed’: The Cosmetics Industry Is Next on the Firing Line*, FORBES (May 15, 2015), <http://www.forbes.com/sites/Richardlevick/2015>

same time, he acknowledges certain allegations linking cosmetic ingredients to “cancer, miscarriages, birth defects, skin diseases, [and] other dangers.”⁶⁷ Between the increased litigation and heightened awareness of potential risks, it is easy to see how public opinion might vary on the importance of a cosmetic industry that manufactures high-quality, safe products.⁶⁸ Some of the public perceives cosmetic-related lawsuits as indicative of nothing more than an unbridled distrust of chemicals in the traditionally litigious consumer base of the American marketplace.⁶⁹ Others have concerns that the issues raised by recent consumer claimants are legitimate.⁷⁰ Still others, as this Note suggests, believe that the solution to an industry riddled with misleading products is to shift the burden of obtaining judicial redress to commercial plaintiffs, namely cosmetic companies who have standing to sue under the Lanham Act and who have greater resources available to pursue a legal remedy than the average consumer.⁷¹

2. *Misleading Marketing*

It should come as no surprise that consumers of cosmetic commodities, like consumers of most other commodities, look to the price of a good as a significant metric for predicting quality, which

/05/19/nailed-the-cosmetics-industry-is-next-on-the-firing-line/#11cee8ba5f11 [https://perma.cc/V9QV-M8NS]. By referring to cosmetic litigation as a “litigation albatross,” Levick intends to communicate the annoying burden these lawsuits impose on defendants. *See Albatross Around One’s Neck*, DICTIONARY.COM, <http://www.dictionary.com/browse/albatross-around-one-s-neck> [https://perma.cc/XHE7-2759?type=image] (last visited Feb. 19, 2018).

⁶⁷ Levick, *supra* note 66.

⁶⁸ *See id.*

⁶⁹ *See* Cheryl Wischhover, *Your Beauty Products Are Not Killing You*, RACKED (May 5, 2016), <http://www.racked.com/2016/5/5/11591300/natural-skincare-clean-beauty-toxins> [https://perma.cc/AWM7-KL7V].

⁷⁰ *See* CAMPAIGN FOR SAFE COSMETICS, ANTI-AGING SECRETS EXPOSED: CHEMICAL LINKED TO BREAST CANCER IN SKIN CARE at 5–6 (Oct. 2015), <http://www.safecosmetics.org/wp-content/uploads/2015/10/Anti-aging-secrets-exposed-report.pdf> [https://perma.cc/R6GA-XKNY]; CAMPAIGN FOR SAFE COSMETICS, PRETTY SCARY 2: UNMASKING TOXIC CHEMICALS IN KIDS’ MAKEUP at 6–7 (Oct. 2016), http://www.safecosmetics.org/wp-content/uploads/2016/10/Pretty-Scary_2016.pdf [https://perma.cc/N2ZW-BNFP].

⁷¹ *See infra* Part II.

guides the decision to purchase.⁷² Cosmetics are often offered at a premium based on the promises their labels purport to consumers. Consumers have litigated individually and as members of putative classes in an effort to combat the unreasonable and reckless use of misleading terms on cosmetic product packaging.⁷³

In 2016, two California plaintiffs filed a class action alleging that a cosmetic manufacturer's "use of the word 'Natural' on some of its products' packaging [was] misleading because the products contain[ed] synthetic ingredients."⁷⁴ The Ninth Circuit found that the plaintiffs satisfied the requirements of pleading fraud with "particularity"⁷⁵ to such extent that they were entitled to proceed with their claims.⁷⁶

Around the same time that the Ninth Circuit made their decision in *Balser*, a Legal News Line contributor observed that claims against cosmetic manufacturers for the use of words such as "natural" or "organic" on their products were on the rise.⁷⁷ He added that the increase in this type of litigation may be attributed partly to the ambiguity surrounding such words.⁷⁸

In a subsequent Ninth Circuit opinion, the plaintiff sued a cosmetic company for a "label, tube design, and packaging" that were "deceptive and misleading."⁷⁹ Specifically, the plaintiff's allegations were that the cosmetic manufacturer's lip product was

⁷² Anneli Rufus, *The Cosmetics Racket: Why the Beauty Industry Can Get Away with Charging a Fortune for Makeup*, ALTERNET (Sept. 10, 2010), http://www.alternet.org/story/148140/the_cosmetics_racket%3A_why_the_beauty_industry_can_get_away_with_charging_a_fortune_for_makeup [<https://perma.cc/ECR2-9T3Q>].

⁷³ See *Balser v. Hain Celestial Grp., Inc.*, 640 F. App'x. 694, 695–96 (2016); *Ebner v. Fresh, Inc.*, 838 F.3d 958, 961 (9th Cir. 2016); *Elkind v. Revlon Consumer Prod. Corp.*, No. 14-CV-2484(JS)(AKT), 2015 WL 2344134, at *9 (E.D.N.Y. May 14, 2015).

⁷⁴ *Balser*, 640 F. App'x. at 695.

⁷⁵ FED. R. CIV. P. 9(b).

⁷⁶ *Balser*, 640 F. App'x. at 695–96.

⁷⁷ Jacob Bielanski, *Attorney: Guidance needed for cosmetic industry to avoid litigation*, LEGAL NEWS LINE (Mar. 17, 2016), <http://legalnewsline.com/stories/510699065-attorney-guidance-needed-for-cosmetics-industry-to-avoid-litigation> [<https://perma.cc/7JSQ-NAR5>].

⁷⁸ *Id.* Bielanski briefly discusses that legal questions concerning cosmetic products and how they are marketed require courts and juries to address what the "reasonable consumer" would interpret." *Id.*

⁷⁹ *Ebner v. Fresh, Inc.*, 838 F.3d 958, 961 (9th Cir. 2016).

sold in “vastly oversized tubes,” which created the impression that consumers would receive a greater quantity of the lip product than they actually did.⁸⁰ The amount of lip product that was “reasonably accessible to the consumer” was allegedly only 75% of the container’s total volume.⁸¹ Despite these allegations, the Ninth Circuit affirmed the district court’s dismissal of the plaintiff’s claims for misleading or deceptive marketing.⁸²

Misleading marketing claims of this type have their share of procedural limitations,⁸³ including issues of primary jurisdiction and federal preemption.⁸⁴ In 2015, two plaintiffs sued Revlon for deceiving consumers via its use of the phrase “Age-Defying with DNA Advantage” on certain foundation, powder, and concealer products.⁸⁵ The United States District Court for the Eastern District of New York found that plaintiffs’ mislabeling claims did not “squeak through the ‘narrow gap through which a plaintiff’s state-law claim must fit if it is to escape express or implied preemption.’”⁸⁶ Rather, the claims arose “because Plaintiffs allege[d] that the Powder and the Concealer violate[d] the FDCA, and prosecuting that violation lies squarely within the province of the FDA.”⁸⁷

Having found the plaintiffs’ claims of mislabeling federally preempted, the court dismissed two counts of the complaint with prejudice.⁸⁸ The court, however, declined to apply the doctrine of primary jurisdiction, “a matter of judicial prudence which provides that the courts should not meddle in claims where the enforcement

⁸⁰ *Id.* at 962.

⁸¹ *Id.*

⁸² *Id.* at 968.

⁸³ See James Muehlberger, Jennifer Stevenson & Madeleine McDonough, *The Rise of Consumer Fraud Class Action Lawsuits Against Cosmetic Companies and Tips for Defending Them*, WHO’S WHO LEGAL (June 2015), <http://whoswho.legal.com/news/features/article/32352/rise-consumer-fraud-class-action-lawsuits-against-cosmetic-companies-tips-defending-them> [<https://perma.cc/X9BR-GSB9>].

⁸⁴ See *id.* (discussing how primary jurisdiction doctrine and federal preemption may be used by defendants in cosmetic lawsuits to debunk plaintiffs’ claims).

⁸⁵ *Elkind v. Revlon Consumer Prod. Corp.*, No. 14-CV-2484(JS)(AKT), 2015 WL 2344134, at *1 (E.D.N.Y. May 14, 2015).

⁸⁶ *Id.* at *9 (quoting *In re Medtronic, Inc.*, 623 F.3d 1200, 1204 (8th Cir. 2010)).

⁸⁷ *Id.*; see also 21 U.S.C. § 371 (granting regulatory enforcement of the FDCA to the FDA).

⁸⁸ *Elkind*, 2015 WL 2344134 at *9.

requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”⁸⁹ The court moved to the merits of the plaintiffs’ deceptive advertising claims, reasoning that quick and inexpensive dispute resolution was more important than staying the proceedings in order to allow the FDA to look at the contested phrase.⁹⁰

This overview of recent suits brought in federal courts against cosmetic manufacturers for deceptive marketing demonstrates the uncertainty surrounding such claims and the need for a more effective method of resolution.⁹¹ To create more consistent law on which lawyers may rely in the fields of cosmetic and beauty product litigation and to provide consumers with sufficient remedies, consumer fraud actions brought against cosmetic manufacturers ought to be primarily replaced with Lanham Act lawsuits. The latter would be properly litigated by commercial competitors in the cosmetic industry for the purposes of increasing competition, diversifying suppliers, and ultimately benefitting consumers with transparency in the cosmetics market.

II. LEGAL FRAMEWORK IN PLAY IN COSMETIC AND BEAUTY PRODUCT LITIGATION PRESENTLY APPLICABLE LAW

A. *Federal Food, Drug, & Cosmetic Act (FDCA)*

When someone enters a retail shop with an intent to purchase cosmetics, that consumer most likely assumes that the product he or she seeks is regulated and held to certain standards of health and safety in production.⁹² Apart from this general assumption, the consumer probably knows very little about how cosmetics are regulated, particularly in terms of whose responsibility it

⁸⁹ *Id.* (internal quotation marks and citation omitted).

⁹⁰ *Id.* *But see* *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (affirming application of primary jurisdiction doctrine and staying a proceeding involving claims against cosmetic companies for fraudulent marketing and use of the word “natural”).

⁹¹ *See* *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016); *Elkind*, 2015 WL 2344134 at *9.

⁹² *See* *Senate Personal Care Product Safety Act of 2015*, CAMPAIGN FOR SAFE COSMETICS, <http://www.safecosmetics.org/get-the-facts/regulations/us-laws/> [<https://perma.cc/34JR-2NNJ>] (last visited Feb. 19, 2018).

is to regulate them and to what extent.⁹³ The task of regulating cosmetics falls within the purview of the Food and Drug Administration, or FDA.⁹⁴ The FDA enforces laws that Congress enacts and issues its own regulations upon receipt of authorization from Congress.⁹⁵ Codified in Title 21 of the United States Code, the Federal Food, Drug, & Cosmetic Act is one of two primary statutory bases⁹⁶ under which the FDA receives the rules it must enforce and the authority to enforce them.⁹⁷ Under the FDCA, an article is a cosmetic if its purpose is to be “applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance.”⁹⁸ This definition encompasses lipsticks, perfumes, skin moisturizers, nail polishes, eye and face makeup, cleansing shampoos, deodorants, and “any substance intended for use as a component of a cosmetic product.”⁹⁹

Notably, soap is not a cosmetic.¹⁰⁰ While it would seem that soap “cleanses the appearance” and thus qualifies under the FDCA’s definition, products that meet the FDA’s definition of soap¹⁰¹ are regulated separately by the Consumer Product Safety Commission (CPSC).¹⁰²

⁹³ See *Is It a Cosmetic, a Drug, or Both? (Or Is It Soap?)*, FOOD & DRUG ADMIN., <https://www.fda.gov/Cosmetics/GuidanceRegulation/LawsRegulations/ucm074201.htm> [<https://perma.cc/JR6G-7KRC>] (last updated Nov. 3, 2017) [hereinafter *Is It a Cosmetic*].

⁹⁴ See *Cosmetics*, FOOD & DRUG ADMIN., <http://www.fda.gov/Cosmetics/default.htm> [<https://perma.cc/69CG-PM8F>] (last visited Feb. 19, 2018).

⁹⁵ See *Cosmetics: Guidance and Regulation*, FOOD & DRUG ADMIN., <http://www.fda.gov/Cosmetics/GuidanceRegulation/default.htm> [<https://perma.cc/MY7Q-LQTE>] (last visited Feb. 19, 2018).

⁹⁶ The other is the Fair Packaging and Labeling Act (FPLA). See 15 U.S.C. § 1451 (2012).

⁹⁷ See 21 U.S.C. § 321(i) (2012).

⁹⁸ *Id.*

⁹⁹ *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, FOOD & DRUG ADMIN. (2013), <https://www.fda.gov/cosmetics/guidanceregulation/lawsregulations/ucm074162.htm> [<https://perma.cc/G8NJ-9S5A>] [hereinafter *FDA Authority*].

¹⁰⁰ *Id.*

¹⁰¹ *Is It a Cosmetic*, *supra* note 93 (“FDA interprets the term ‘soap’ to apply only when the bulk of the nonvolatile matter in the product consists of an alkali salt of fatty acids and the product’s detergent properties are due to the alkali-fatty acid compounds, and the product is labeled, sold, and represented solely as soap” (quoting 21 C.F.R. § 701.20)).

¹⁰² *Id.*

The FDCA prohibits beauty product manufacturers from introducing “into interstate commerce” any cosmetic that is “adulterated or misbranded.”¹⁰³ This section of the FDCA also distinctly prohibits the act of adulterating or misbranding the cosmetic itself.¹⁰⁴ A cosmetic is considered adulterated if it “bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual”¹⁰⁵ whereas it is misbranded if “its labeling is false or misleading in any particular.”¹⁰⁶ When a cosmetic is adulterated, the violation involves the product’s composition,¹⁰⁷ and a violation involving deceptive labeling or product packaging is a misbranding violation.¹⁰⁸

Despite the above well-meaning definitions and sources of statutory authority, “regulation” and “approval” are not synonymous.¹⁰⁹ The former is an ex-post method for ensuring safety and efficiency in the marketplace.¹¹⁰ The latter is an ex-ante method of vetting a product’s suitability for use by consumers.¹¹¹ Lacking the legal authority to approve the safety of cosmetic products and ingredients before they are bought and sold in interstate commerce, the FDA has no way to forecast the potentially deleterious effects of particular cosmetics and other personal care products.¹¹²

¹⁰³ 21 U.S.C. § 331(a) (2012).

¹⁰⁴ *Id.* § 331(b).

¹⁰⁵ *Id.* § 361(a).

¹⁰⁶ *Id.* § 362(a).

¹⁰⁷ *FDA Authority*, *supra* note 99.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* In this context, a regulation is a governmental action taken to ensure a product’s suitability for consumption after it is released to the public, whereas an approval is the government’s permission granted before that product leaves the hands of its manufacturer and makes its way to the consumer. *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *See generally Cosmetics Basics*, *supra* note 2 (“It is the responsibility of cosmetic manufacturers to ensure, before marketing their products, that the products are safe when used as directed in their label or under customary conditions of use.”).

B. Fair Packaging and Labeling Act (FPLA)

This Note's principal argument is derived from the Supreme Court's recent analysis of the FDCA in conjunction with the Lanham Act.¹¹³ As a result, the FDCA is the primary statute to understand when analyzing the issues inherent in cosmetic and beauty product litigation. It would be myopic, however, to ignore the relevance and importance of the Fair Packaging and Labeling Act (FPLA) when discussing the FDA's regulation of cosmetics.¹¹⁴ The FPLA is designed "to facilitate value comparisons and to prevent unfair or deceptive packaging and labeling of many household 'consumer commodities.'"¹¹⁵ The FPLA requires all cosmetics that are directly retailed to consumers to include an ingredient list.¹¹⁶ Cosmetics that are distributed solely for professional or institutional use are excluded from the ingredient list requirement, as are cosmetics that are distributed as free samples or hotel amenities.¹¹⁷ The FDCA considers any cosmetics that are noncompliant with the FPLA misbranded.¹¹⁸

Various proposals have been submitted to Congress with the help of non-profit organizations like the Campaign for Safe Cosmetics who "pressure the cosmetics industry to make safer products."¹¹⁹ Both chambers of Congress introduced bills in 2015 that would strengthen the protections of the Food, Drug, and Cosmetic Act.¹²⁰ The latest action taken on the House's bill was

¹¹³ See *POM Wonderful LLC v. Coca-Cola, Co.*, 134 S. Ct. 2228, 2233–34 (2014).

¹¹⁴ See Fair Packaging and Labeling Act, 16 C.F.R. §§ 500–03 (2016).

¹¹⁵ *Fair Packaging and Labeling Act*, FTC, <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-packaging-labeling-act> [<https://perma.cc/C54R-RDUU>] (last visited Feb. 19, 2018).

¹¹⁶ *FDA Authority*, *supra* note 99 (citing 21 C.F.R. § 701.3).

¹¹⁷ See *id.*

¹¹⁸ *Id.* (citing FPLA, § 1456).

¹¹⁹ See *About Us*, CAMPAIGN FOR SAFE COSMETICS, <http://www.safecosmetics.org/about-us/> [<https://perma.cc/HE38-XKPJ>] (last visited Feb. 19, 2018). According to their mission statement, the Campaign for Safe Cosmetics "works to protect the health of consumers, workers and the environment through public education and engagement, corporate accountability and sustainability campaigns and legislative advocacy designed to eliminate dangerous chemicals linked to adverse health impacts from cosmetics and personal care products." *Id.*

¹²⁰ The House of Representatives introduced the Cosmetic Modernization Amendments of 2015 in November 2015. H.R. 4075, 114th Cong. (2015). The bill

a referral to the subcommittee on Health in November 2015.¹²¹ As for the Senate's bill, committee hearings were held in September 2016.¹²² Given the slow-moving nature of legislation, many believe that the recent proposals are too ambitious to survive committee and become law.¹²³ Given their repeated failure to survive committee, their feasibility remains suspect without "a monumental shift in public awareness and pressure" about the issue.¹²⁴ Presumably, the type of public awareness that is needed is general knowledge about the potential health impacts of harmful ingredients.¹²⁵ Supporters of increased cosmetic industry regulation further suggest that the public would benefit from knowing the extent to which the FDA cannot regulate cosmetics—the premise of their argument is that an agency which cannot regulate certain products necessarily lacks knowledge about

amends the FDCA to "set forth provisions governing the [FDA's] regulation of cosmetics including requiring the registration of manufacturing establishments and the submission of a cosmetic and ingredient statement for each cosmetic." *Summary: H.R. 4075—114th Cong.*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/4075?q=%7B%22search%22%3A%5B%22food+drug+and+cosmetic%22%5D%7D&resultIndex=28> [<https://perma.cc/3ZEF-UKMF>] (last visited Feb. 19, 2018). The Senate introduced a bill with similar aims, called the Personal Care Products Safety Act, in April 2015. S. 1014, 114th Cong. (2015). The bill amends the FDCA to give the FDA authority to prohibit distribution of a cosmetic if it finds that cosmetic has "a reasonable probability of causing serious adverse health consequences." *Summary: S.1014—114th Cong.*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1014?q=%7B%22search%22%3A%5B%22food+drug+and+cosmetic%22%5D%7D> [<https://perma.cc/N5P6-CZ73>] (last visited Feb. 19, 2018). Furthermore, under this bill, cosmetic companies are required to report "any serious adverse event associated with such cosmetic product" to the FDA. S. 1014, 114th Cong. § 104 (2015).

¹²¹ Cosmetic Modernization Amendments of 2015, H.R. 4075, 114th Cong. (2015).

¹²² *Summary: S.1014—114th Cong.*, *supra* note 120 (noting when the latest action was taken on this bill).

¹²³ See Valerie J. Watnick, *The Missing Link: U.S. Regulation of Consumer Cosmetic Products to Protect Human Health and the Environment*, 31 PACE ENVTL. L. REV. 595, 648 (2014); see also Janet Nudelman, *Federal Personal Care Products Safety Act (S.1014)*, CAMPAIGN FOR SAFE COSMETICS (May 28, 2015), <http://www.safecosmetics.org/wp-content/uploads/2015/06/Personal-Care-Products-Safety-Act-SB-1014-factsheet.pdf> [<https://perma.cc/7XTK-LFS4>].

¹²⁴ Watnick, *supra* note 123, at 649.

¹²⁵ See *U.S. Laws: FDA's Lack of Authority*, *supra* note 5.

those products. Without knowledge, the agency cannot effectively shield consumers from potential harms the way they ordinarily would through enforcement of a regulatory scheme.¹²⁶

C. Section 43(a) of the Lanham Act

Yet another critical federal law relevant to cosmetic litigation, and litigation in all commercial industries, is the Lanham Act.¹²⁷ The Lanham Act is found under Title 15 of the United States Code—the Code’s chapter on Commerce and Trade.¹²⁸ Section 45 of the Act provides its purpose, that is, in part, “to regulate commerce within the control of Congress” and “to protect persons engaged in such commerce against unfair competition.”¹²⁹ At its inception, the Lanham Act was primarily a trademark regulation statute, later becoming useful as a safeguard for commercial competitors against unfair business practices and unfair competition.¹³⁰ Unfair competition is an umbrella term in this context which encompasses two, sub-categorical business practices: false association and false advertising.¹³¹ Of the two, false advertising is the practice relevant to the cosmetic industry and its manufacturers who can use the law to uncover and enjoin deceptive business practices employed by their competitors.¹³²

The Lanham Act imposes civil liability on any person who misrepresents the content or quality of goods or services in commercial advertising or promotion.¹³³ Of important note is the fact that consumer standing is limited under the Act; circuit courts continually conclude that § 43(a) is intended only for use by plaintiffs with a commercial interest in need of protection from injurious

¹²⁶ *See id.*

¹²⁷ *See generally* Lanham Act, 15 U.S.C. § 1051 (2012).

¹²⁸ *See id.*

¹²⁹ Lanham Act § 45(a), 15 U.S.C. § 1127 (2012).

¹³⁰ *See* James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 RUTGERS L. REV. 1085, 1091–92 (1995).

¹³¹ *See id.* at 1091 (citing *Rosenfeld v. W.B. Saunders*, 728 F. Supp. 236, 241–42 (S.D.N.Y. 1990)).

¹³² False association involves “the selling of one’s goods or services under the name of a more popular competitor.” *Rosenfeld*, 728 F. Supp., at 241. False association cosmetic litigation is not discussed in this Note.

¹³³ Lanham Act § 43(a), 15 U.S.C. § 1125(a)(1)(B) (2012).

business practices.¹³⁴ In short, the Act is best understood as a “pro-competitive measure rather than [*sic*] an all-encompassing consumer protection device.”¹³⁵ The Ninth Circuit, for example, where much of the beauty product and cosmetic litigation ensues,¹³⁶ articulated its own test for standing under the Lanham Act in the early 1990s.¹³⁷ There, plaintiffs are required to show a competitive injury when alleged liability is based on the false advertising subcategory of unfair competition.¹³⁸ That parties must be commercial competitors in order to sue under the Lanham Act in the Ninth Circuit is beneficial for niche and entrepreneurial cosmetic companies. Those companies can use the Lanham Act as a means to compete against industry behemoths whose presence in the market is inescapable, and whose ill-gotten business practices are difficult to track before products hit the shelves.¹³⁹

The trend of limiting standing under § 43(a) of the Lanham Act has continued in federal courts, most likely because judges do not want their dockets clogged with false advertising cases unless the competitive injury asserted by one business is sufficiently linked to the misrepresentations of another such that judicial intervention is warranted.¹⁴⁰ In accordance with the Ninth Circuit’s approach, courts deem a Lanham Act plaintiff’s status as a commercial competitor of the named defendant(s) the most important consideration.¹⁴¹

¹³⁴ See generally Wrona, *supra* note 130, at 1133.

¹³⁵ *Id.*

¹³⁶ See, e.g., *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 884 (N.D. Cal. 2012); *Ebner v. Fresh, Inc.*, 838 F.3d 958, 958 (9th Cir. 2016); *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 756 (9th Cir. 2015).

¹³⁷ Wrona, *supra* note 130, at 1135.

¹³⁸ *Id.* (discussing the Ninth Circuit’s treatment of Lanham Act standing in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992)).

¹³⁹ See Weinberger, Wagner & Jacoby, *supra* note 12 (“[Lanham Act] suits are an effective means not only to protect a company’s business interests, but also to compete for and maintain market share.”).

¹⁴⁰ See John E. Villafranco & Matthew D. Marcotte, *Unfair Competition in Advertising: Developments and Trends in Lanham Act Litigation*, 22 ANTITRUST 98, 99 (2008).

¹⁴¹ *Id.* (“[C]ourts are continuing to express skepticism about expansive standing under the Lanham Act, especially where customers or suppliers, rather than competitors, attempt to bring false advertising actions under Section 43(a).”).

D. Applying the Supreme Court's Holding in POM Wonderful to Cosmetic and Beauty Product Litigation

In 2014, the Supreme Court of the United States heard the case of *POM Wonderful LLC v. Coca-Cola Co.*¹⁴² The Court granted certiorari to decide whether POM Wonderful's false advertising claim against Coca-Cola Co. brought under § 43(a) of the Lanham Act was precluded by the FDCA.¹⁴³ POM Wonderful alleged that Coca-Cola's use of the words "Pomegranate Blueberry" on its labels was "false and misleading" because the product did not in fact contain juices from those fruits.¹⁴⁴ Coca-Cola responded, arguing for dismissal because its labels complied with all relevant food and beverage regulations of the FDCA.¹⁴⁵ After providing an extensive discussion of the two federal statutes, the Court reversed the Ninth Circuit's holding¹⁴⁶ and held that the FDA's enforcement of the FDCA does not preempt false advertising or unfair competition claims brought by commercial competitors under the Lanham Act.¹⁴⁷ Rather, to defend their interests, competitors may bring such claims under § 43(a) of the Lanham Act, and those claims are properly viewed as complements (not conflicts) to the FDA's enforcement of the FDCA.¹⁴⁸ Noting first that the Lanham Act and the FDCA have separate purposes,¹⁴⁹ and further that the FDA and marketplace competitors have different areas of expertise, the Court reasoned:

¹⁴² *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014).

¹⁴³ *Id.* at 2236.

¹⁴⁴ See Maia H. Harris, Fred Kelly, Jr. & Charles Dell'Anno, *Looking at Lanham Act Claims Against Drug Cos. Post-Pom*, LAW360 (Oct. 27, 2014, 4:08 PM), <https://www.law360.com/articles/590374/looking-at-lanham-act-claims-against-drug-cos-post-pom> [<https://perma.cc/AK52-NFXF>].

¹⁴⁵ *Id.*

¹⁴⁶ The Ninth Circuit Court of Appeals held that POM Wonderful's Lanham Act claim against Coca-Cola was barred by the FDCA because in promulgating the FDCA, Congress intended to provide national uniformity in food and beverage labeling, enforced by the FDA. See *POM Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1178–79 (9th Cir. 2012).

¹⁴⁷ *POM Wonderful*, 134 S. Ct. at 2237–39.

¹⁴⁸ *Id.* at 2238.

¹⁴⁹ *Id.* at 2240.

Enforcement of the FDCA and the detailed prescriptions of its implementing regulations is largely committed to the FDA. The FDA, however, does not have the same perspective or expertise in assessing market dynamics that day-to-day competitors possess. Competitors who manufacture or distribute products have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies. Their awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators. Lanham Act suits draw upon this market expertise by empowering private parties to sue competitors to protect their interests on a case-by-case basis. By “serv[ing] a distinct compensatory function that may motivate injured persons to come forward,” Lanham Act suits, to the extent they touch on the same subject matter as the FDCA, “provide incentives” for manufacturers to behave well.¹⁵⁰

The Supreme Court, in recognizing the ways in which a Lanham Act lawsuit can incentivize good behavior on the part of manufacturers, focused exclusively on the product labeling choices of food and beverage manufacturers.¹⁵¹ However, at least one subsequent federal district court decision held that “POM’s general presumption in favor of the permissibility of Lanham Act claims applies to all products regulated by the FDCA.”¹⁵²

Following that district court’s reasoning, the Supreme Court’s relaxation of Lanham Act claims in *POM Wonderful* should extend to claims involving cosmetics.¹⁵³ This contention is further supported by federal district courts that have ruled, after *POM Wonderful*, that commercial “competitors may bring Lanham Act claims challenging product labels for a variety of products regulated by different federal administrative agencies.”¹⁵⁴

¹⁵⁰ *Id.* at 2238–39.

¹⁵¹ *Id.* at 2233.

¹⁵² Stephen White, *How Far Does the Apple (Pomegranate) Fall From the Tree? Preclusion of Lanham Act Claims by the Food, Drug, & Cosmetic Act and POM Wonderful LLC v. Coca-Cola Co.*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 262, 284 (2015) (discussing *JHP Pharm., LLC, v. Hospira, Inc.*, No. CV 13-07460, 2014 WL 4988016, at *5).

¹⁵³ *See id.* at 282–84.

¹⁵⁴ Matthew Busch, *POM Wonderful v. Coca-Cola and the Implications of Granting Competitors the Right to Challenge False or Misleading Food and Beverage Labels Under the Lanham Act*, 48 LOY. L.A.L. REV. 525, 534 (Winter 2014) (citing *Catheter Connections, Inc. v. Ivera Medical Corp.*, No. 2:14-CV

Assuming *POM Wonderful* applies in the context of cosmetic litigation, the next logical step is to analyze whether its use in those cases will incentivize better behavior from the industry's largest manufacturers, and thus create a path to more perfect competition in the cosmetic marketplace.

III. RESISTING THE STATUS QUO IN COSMETIC AND BEAUTY PRODUCT LITIGATION: HOW THE LANHAM ACT ACHIEVES EFFICIENCY BY PRESERVING COMMERCIAL INTEGRITY IN THE COSMETIC INDUSTRY

Small cosmetic companies, particularly those offering a specialty product(s), could benefit from using the Lanham Act to advance their business interests and to uncover a market-based intolerance for their competitors' unfair businesses practices. After the Supreme Court's decision in *POM Wonderful*, scholars speculated that litigation for deceptive labeling would increase because product labels that comply with the FDA's requirements are no longer enough to keep manufacturers insulated from liability.¹⁵⁵

A company like LUSH Cosmetics, which crafts each of its products by hand in small batches,¹⁵⁶ cannot equitably compete with an industry juggernaut that uses mostly machine manufacturing but that inattentively labels its products with words that evoke images of conscientious, LUSH-like manufacturing practices.¹⁵⁷ A small cosmetic company that uses the Lanham Act to assert a claim against a larger cosmetic company would rely on theories of false advertising or unfair competition.¹⁵⁸ The hypothetical situation is one where the plaintiff cosmetic company sues for

-70-TC, 2014 WL 3536573, at *5-7 (D. Utah July 17, 2014); *Toddy Gear, Inc. v. Navarre Corp.*, No. 13 CV 8703, 2014 WL 4271631 (N.D. Ill. Aug. 26, 2014)).

¹⁵⁵ Jennifer Thurswell Radis, *The Lanham Act's Wonderful Complement to the FDCA: POM Wonderful v. Coca-Cola Enhances Protection Against Misleading Labeling Through Integrated Regulation*, 47 LOY. U. CHI. L.J. 369, 427-28 (2015) ("FDA compliance will no longer offer a safe harbor from liability if a product's label is deceptive, despite FDA regulations that appear to permit the misleading representation.").

¹⁵⁶ See Rosy Cherrington, *Lush Factory Tour in Poole: See How the Brand's Best-Selling Products Are Really Made*, HUFFPOST STYLE (Oct. 25, 2016), http://www.huffingtonpost.co.uk/entry/lush-factory-touruk_uk_580e1c8ce4b056572d835cc3 [<https://perma.cc/9SUE-UHZJ>].

¹⁵⁷ See *id.*

¹⁵⁸ See Lanham Act § 43(a), 15 U.S.C. § 1125 (2012).

commercial injury to reputation or sales proximately caused by the defendant cosmetic company's allegedly false or misleading use of marketing terms.

One weakness with this kind of lawsuit is that it requires courts to inquire into consumers' minds to determine how they define certain, legally undefined terms when they make their cosmetic purchases.¹⁵⁹ While this type of guesswork is not ideal, it is necessary because cosmetic companies commonly use terms such as "natural," "organic," or "hypoallergenic" in their marketing, all of which are undefined by the FDA.¹⁶⁰ Proving that a defendant's marketing claim is false, misleading, and actually deceptive or likely to be deceptive appears to be an insurmountable hurdle for plaintiffs because so many of these terms lack concrete definitions.¹⁶¹

For example, the plaintiff would struggle to position itself as the superior manufacturer using uncontrived processes and ingredients without some established criteria from which it follows that the defendant's manufacturing processes and ingredients are unnatural.

This weakness, however, is not fatal.¹⁶² Despite the FDA's decision not to define the term "natural" as it is used in the marketing of cosmetics,¹⁶³ the Federal Trade Commission (FTC) has issued several orders to cosmetic companies which prohibit products containing synthetic ingredients from being misrepresented to consumers as "all-natural."¹⁶⁴ By condemning cosmetic companies that haphazardly use the FDA's undefined term, the FTC has made

¹⁵⁹ See *infra* text accompanying note 163.

¹⁶⁰ See *'Organic' Cosmetics*, FOOD & DRUG ADMIN., <http://www.fda.gov/cosmetics/labeling/claims/ucm203078.htm> [<https://perma.cc/3FYC-Y564>] (last updated Nov. 10, 2015); *Cosmetic Safety Q&A: 'Hypoallergenic'*, FOOD & DRUG ADMIN., <http://www.fda.gov/Cosmetics/ResourcesForYou/Consumers/ucm167202.htm> [<https://perma.cc/6G4A-9237>] (last updated Dec. 9, 2015); *Small Businesses & Homemade Cosmetics: Fact Sheet*, FOOD & DRUG ADMIN., <http://www.fda.gov/Cosmetics/ResourcesForYou/Industry/ucm388736.htm> [<https://perma.cc/AEX6-E7P3>] (last updated Oct. 4, 2016).

¹⁶¹ See *False Advertising*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/false_advertising [<https://perma.cc/ZNU6-4VK6>] (last visited Feb. 19, 2018).

¹⁶² See *infra* text accompanying notes 164–65.

¹⁶³ See *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 884 (N.D. Cal. 2012).

¹⁶⁴ Lesley Fair, *Are your "all natural" claims all accurate?*, FTC (Apr. 12, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2016/04/are-your-all-natural-claims-all-accurate> [<https://perma.cc/HZM4-7W7E>].

it easier for potential plaintiffs in cosmetic Lanham Act suits to satisfy the elements of a false advertising claim under § 43(a).¹⁶⁵

A trip to the drug store to purchase mascara ought not to be an esoteric experience for consumers.¹⁶⁶ Consumers are entitled to rely on words like “natural” when they see them on a cosmetic’s label.¹⁶⁷ The difficulties that may arise when it comes to proving damages in these cosmetic Lanham Act lawsuits¹⁶⁸ should not be ignored, but, given the market research that exists on consumer preferences and cosmetic revenues,¹⁶⁹ economic harms suffered by a pool of commercial litigants could likely be shown more concretely than physical harms which have previously been alleged by individual consumers and met with suspicion and inadequate redress from courts.¹⁷⁰

The Supreme Court acknowledged in *POM Wonderful* that consumers benefit from the Lanham Act’s proper enforcement.¹⁷¹ By prohibiting false and misleading advertising, the Lanham Act aims to incentivize manufacturers into producing higher quality commodities that can be marketed profitably and truthfully.¹⁷²

The pace of innovation in the cosmetic industry has rapidly increased over the last decade, fostering today’s competitive business climate.¹⁷³ There is nothing so damaging to competition as

¹⁶⁵ See *Brown*, 913 F. Supp.2d at 884.

¹⁶⁶ This statement assumes it is more efficient to have marketing terms whose definitions track consumers’ everyday usage and understanding of them.

¹⁶⁷ See Fair, *supra* note 164.

¹⁶⁸ Hank Schultz, *Experts advise supplement companies to carefully review labels in wake of POM ruling*, NUTRA INGREDIENTS-USA (June 17, 2014), <http://www.nutraingredients-usa.com/Regulation/Experts-advise-supplement-companies-to-carefully-review-labels-in-wake-of-POM-ruling> [<https://perma.cc/MWT8-QEFH>].

¹⁶⁹ See, e.g., *Preferences for Organic/Natural in Beauty and Personal Care See Growth Space*, GLOBAL COSM. INDUSTRY (June 4, 2014), <http://www.gcimagazine.com/marketstrends/segments/natural/Preferences-for-OrganicNatural-in-Beauty-and-Personal-Care-See-Growth-Space-261828421.html> [<https://perma.cc/6UT7-FT77>] (“[C]onsumers are willing to use natural products even if they don’t think they lead to better results.”).

¹⁷⁰ See *Jack v. Alberto-Culver USA, Inc.*, 949 So.2d 1256, 1259 (La. 2007); *Frye v. L’Oreal USA, Inc.*, 583 F. Supp. 2d 954, 959 (N.D. Ill. 2008).

¹⁷¹ *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2234 (2014).

¹⁷² See *id.*

¹⁷³ Tanya Benedicto Klich, *Top 10 Innovative Beauty Products That Will Change Your Morning Beauty Routine*, ENTREPRENEUR (Apr. 4, 2014), <https://www.entrepreneur.com/slideshow/232697#0> [<https://perma.cc/8K2W-578B>].

“a competitor’s false advertising campaign.”¹⁷⁴ To illustrate unfair competition in a business market rife with false or misleading advertising, consider a simple illustration: Company A produces products by hand and concentrates its efforts on sourcing fresh ingredients of the highest quality from organic orchards.¹⁷⁵ Company B adds chemicals and other artificial ingredients to their lab-created products and yet markets them using the same words as Company A but can charge less than Company A because its product required less labor to produce.¹⁷⁶ The average consumer, relying only on what he or she knows of linguistics, will purchase Company B’s more affordable option (having no reason to know that the words on its label are virtually meaningless) and the company with false advertising practices will come out on top.¹⁷⁷ If that consumer brings a colorable claim of false advertising against Company B in the future, then Company B’s use of dishonest marketing will have supported a market inefficiency, or a “breakdown of buyer-seller communications [that] leads to gaps in publicly available demand and supply information acerbated by current prices that do not reflect [the] true situation.”¹⁷⁸

A successful Lanham Act suit provides an immediate injunction proscribing a competitor’s intrusive and misleading promotional statements.¹⁷⁹ In some cases, Lanham Act plaintiffs may obtain this equitable remedy in the lawsuit’s preliminary stages, just weeks after commencing suit.¹⁸⁰ To the contrary, remedies provided by the state consumer protection statutes that are ordinarily relied upon by cosmetic and beauty product litigation plaintiffs tend to be less immediate and less effective when it comes to deterring and redressing national harms caused by false advertising.¹⁸¹

¹⁷⁴ Weinberger, Wagner & Jacoby, *supra* note 12.

¹⁷⁵ See Cherrington, *supra* note 156.

¹⁷⁶ *Id.* See also LUSH, <http://www.lushusa.com/> [<https://perma.cc/D2YP-UABA>] (last visited Feb. 19, 2018); PACIFICA, <https://www.pacificabeauty.com/> [<https://perma.cc/DM9G-NQJ4>] (last visited Feb. 19, 2018).

¹⁷⁷ See Wrona, *supra* note 130, at 1090–92.

¹⁷⁸ See *Market Inefficiency*, LAW DICTIONARY, <http://thelawdictionary.org/market-inefficiency/> [<https://perma.cc/Z6XJ-Z6HD>] (last visited Feb. 19, 2018).

¹⁷⁹ See Weinberger, Wagner & Jacoby, *supra* note 12.

¹⁸⁰ *Id.*

¹⁸¹ See Wrona, *supra* note 130, at 1153.

The only alternative forum for commercial competitors seeking a remedy for business harms caused by false advertising is the National Advertising Division of the Council of Better Business Bureaus (NAD).¹⁸² NAD proceedings are both voluntary and non-binding, and decisions resulting therefrom are unenforceable by courts.¹⁸³ Given the severe limitations posed by NAD proceedings, a Lanham Act suit appears to be a more efficient course of action when a competitor's advertising efforts threaten a cosmetic company's bottom line.¹⁸⁴

Furthermore, cosmetic manufacturers with expertise and familiarity about their goods are better equipped than consumers to bear the costs of taking extra precautions or reducing expected harms.¹⁸⁵ Armed with the revenue capital and "know-how" necessary to make the industry safer and more efficient, manufacturers, not consumers, ought to be the plaintiffs in cases of cosmetic and beauty product litigation.¹⁸⁶

Even though consumers who are actually harmed by cosmetics are only indirectly benefitted by this proposed solution, the banding together of small cosmetic companies under the Lanham Act is the industry's most viable option for regulatory reform that will preserve industry leaders' independence while answering consumers' call for increased oversight.¹⁸⁷ Given the dearth of regulation at the administrative level,¹⁸⁸ and the trend toward dismissing consumer complaints in the judiciary,¹⁸⁹ this indirect remedy is better than no remedy at all.

CONCLUSION

It is not too much to suggest that most Americans, in their roles as consumers of beauty culture, prefer not to make independent decisions about what makes a certain appearance

¹⁸² Weinberger, Wagner & Jacoby, *supra* note 12.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See supra* text accompanying notes 8–9.

¹⁸⁶ *See supra* text accompanying notes 19–20.

¹⁸⁷ *See supra* text accompanying notes 27–29.

¹⁸⁸ *See FDA Authority, supra* note 99.

¹⁸⁹ *See Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954, 959 (N.D. Ill. 2008); *Jack v. Alberto-Culver USA, Inc.*, 949 So.2d 1256, 1259 (La. 2007).

beautiful.¹⁹⁰ Similarly, in their roles as consumers of cosmetics, Americans prefer not to make independent judgments about the potential harmfulness of a product or the legitimacy of its advertising.¹⁹¹ This is no new phenomenon.¹⁹²

Everyday consumers prefer to have those credited with experience and knowledge in the fields of health and beauty decide for them what looks good and what is good for them.¹⁹³ This delegation of decision-making power can become economically inefficient or even harmful when the decision-makers neglect their duties or, worse yet, carry out their duties dishonestly.¹⁹⁴

By using the Lanham Act to regulate the cosmetic industry, consumers of cosmetics and their counterparts who work in a manufacturing capacity can benefit from a more competitive marketplace that offers more of what consumers want—consciously manufactured cosmetics.¹⁹⁵

After the Supreme Court's decision to expand Lanham Act liabilities and uses in *POM Wonderful*, and assuming courts will continue to interpret that decision as applying outside of the food and beverage industry to cosmetic and beauty product litigation, cosmetic manufacturers who are mindful of their consumers' health and wellness demands and focused on creating sustainable products have an opportunity to contend in a market economy against their larger and more readily recognizable competitors.¹⁹⁶

¹⁹⁰ See *supra* text accompanying note 40.

¹⁹¹ See *supra* text accompanying notes 41–42.

¹⁹² See *Statistics & Facts*, *supra* note 19 (noting that a handful of multinational corporations have controlled the production of cosmetics and beauty products since the early twentieth century).

¹⁹³ See *supra* text accompanying notes 40–42.

¹⁹⁴ See Shapouri, *supra* note 26.

¹⁹⁵ See *supra* text accompanying notes 172–73.

¹⁹⁶ See generally *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2237–39 (2014).