

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

AT&T MOBILITY LLC,	§	
	§	
<i>Plaintiff,</i>	§	Civil Action No. 4:22-cv-00760
	§	Judge Mazzant
v.	§	
	§	
T-MOBILE USA INC.,	§	
	§	
<i>Defendant.</i>	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff AT&T Mobility LLC’s Application for Preliminary Injunction (Dkt. #3). Having considered the motion and the relevant pleadings, the Court finds that Plaintiff’s Application for Preliminary Injunction (Dkt. #3) should be **DENIED**.

BACKGROUND

This case involves allegations of false advertising between competitors in the wireless communication industry. Plaintiff AT&T Mobility LLC (“AT&T”) and Defendant T-Mobile USA Inc. (“T-Mobile”) are wireless service providers (Dkt. #3, Exhibit 1 ¶ 4). Both parties do extensive business nationwide, and they are engaged in a “fierce,” ongoing competition to grow their customer bases (Dkt. #1 ¶ 1).

I. T-Mobile’s “Banned Seniors” Campaign

As a part of that competition, T-Mobile launched its “Banned Seniors” advertising campaign in August 2022 (Dkt. #3 at p. 3). “Banned Seniors” is a nationwide marketing and advertising initiative intended to attract customers over the age of fifty-five (Dkt. #1 ¶ 26). It consists of a website, www.BannedSeniors.com (the “Website”), which states that AT&T “ban[s] senior discounts” outside of Florida (Dkt. #19, Exhibit C). According to the Website, “92% of

seniors in the U.S. can't get a 55+ discount from . . . AT&T because they don't live in Florida" (Dkt. #19, Exhibit C).¹ The Website includes a graphic that presents interested seniors outside of Florida with three options for obtaining a "55+ Discount": (1) Switch to T-Mobile; (2) Move to Florida; or (3) Get a Virtual Florida Mailbox (Dkt. #19, Exhibit C).

The Website also includes a comparative map of the continental United States that highlights the states in which T-Mobile and AT&T offer "discounted 55+ plans" (Dkt. #19, Exhibit C). In that map, Florida is the only state in which customers can receive AT&T's "discounted 55+ plan," while T-Mobile is shown offering discounts in each of the lower forty-eight states.

II. AT&T's Service Offerings

AT&T offers two discount programs that are relevant to this case. The first is its Unlimited 55+ plan, which AT&T markets as a "special deal for Floridians 55 and over" (Dkt. # 19, Exhibit D). As its name implies, AT&T's Unlimited 55+ plan is restricted to customers who are "55 years of age or over" and have a Florida billing address (Dkt. #19, Exhibit D). It is undisputed that the Unlimited 55+ plan is AT&T's only discount program that is age restricted (Dkt. #25 at p. 63). The second is its "member savings" program for members of the American Association of Retired Persons ("AARP") (Dkt. #19, Exhibit E). AT&T's AARP discount is available to all AARP members irrespective of their age or billing address.

III. Procedural History

On September 6, 2022, AT&T brought this case in which it alleges that T-Mobile violated § 43(a) of the Lanham Act by making false advertisements on the Website (Dkt. #1 ¶ 27). AT&T

¹ The Website's headline initially stated that "92% of seniors in the U.S. can't get a wireless discount from . . . AT&T because they don't live in Florida" (Dkt. #19, Exhibit B). After AT&T filed this case, T-Mobile modified the Website by including the term "senior" or "55+" before every reference to a "discount" (Dkt #19 at p. 9).

also filed an application for a preliminary injunction on the same day that it filed its original complaint (Dkt. #3). On September 16, 2022, T-Mobile filed its response to AT&T's application for a preliminary injunction (Dkt. #19).² On September 20, 2022, AT&T filed its reply (Dkt. #22). On September 22, 2022, T-Mobile filed its sur-reply (Dkt. #23). On September 23, 2022, the Court held a preliminary injunction hearing (Dkt. #24).

LEGAL STANDARD

A party seeking a preliminary injunction must establish the following elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiffs will suffer irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). “A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements.” *Id.* Nevertheless, a movant “is not required to prove its case in full at a preliminary injunction hearing.” *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1985) (quoting *Univ. of Tex. v. Comenisch*, 451 U.S. 390, 395 (1981)). The decision whether to grant a preliminary injunction lies within the sound discretion of the district court. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

ANALYSIS

AT&T asks the Court to enjoin T-Mobile from continuing its “Banned Seniors” advertising campaign. For the reasons set forth below, the Court denies AT&T's request because it concludes

² On September 16, 2022, T-Mobile also filed its Motion to Dismiss the Complaint Pursuant to Rule 12(b)(2) (Dkt. #18). Before turning to the merits of AT&T's request for injunctive relief, the Court had to decide the threshold issue of personal jurisdiction. *See, e.g., Enter. In'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 470–71 (5th Cir. 1985) (“As we stated long ago in reviewing the injunctive power of the district court: The question of jurisdiction is always vital. A court must have jurisdiction as a prerequisite to the exercise of discretion.”) (cleaned up). On January 13, 2023, the Court issued its Memorandum Opinion and Order denying T-Mobile's motion to dismiss (Dkt. #35).

that AT&T has failed to carry its burden of demonstrating a substantial likelihood of success on the merits.

I. Substantial Likelihood of Success on the Merits

A plaintiff seeking a preliminary injunction must present a *prima facie* case of its substantial likelihood to succeed on the merits but need not prove that it is conclusively entitled to summary judgment. *See Daniels Health Scis., LLC v. Vascular Health Scis.*, 710 F.3d 579, 582 (5th Cir. 2013). That said, the existence of significant factual conflicts “may create sufficient doubt about the probability of plaintiff’s success to justify denying a preliminary injunction.” 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.3 (3d ed. 1998); *Marshall Durbin Farms, Inc. v. Nat’l Farmers Org., Inc.*, 446 F.2d 353, 358 (5th Cir. 1971) (“[U]nderstandably, the courts are more cautious about invoking the extraordinary remedy of the preliminary injunction where critical facts are in dispute.”). In assessing the likelihood of the plaintiff’s success on the merits, the Court looks to “the standards provided by substantive law.” *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011).

Here, AT&T asserts a single claim for false advertising under § 43(a) of the Lanham Act. *See* 15 U.S.C. § 1125(a)(1)(B). To prevail on a claim for false advertising under § 43(a), AT&T must establish the following elements:

- (1) A false or misleading statement of fact about a product;
- (2) Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers;
- (3) The deception is material, in that it is likely to influence the consumer’s purchasing decision;
- (4) The product is in interstate commerce; and
- (5) The plaintiff has been or is likely to be injured as a result of the statement at issue.

Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 495 (5th Cir. 2000) (citing 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:24 (4th ed. 1996)). “The failure to prove the existence of any element of the *prima facie* case is fatal to the plaintiff’s claim.” *Id.* at 495.

AT&T’s ability to establish a substantial likelihood of the merits of its false advertising claim rises and falls on the first element, which requires it show that T-Mobile’s advertising is false. *IQ Prods. Co. v. Pennzoil Prod. Co.*, 305 F.3d 368, 375 (5th Cir. 2002). There are two types of actionable false advertisements—those that are literally false and those that are not literally false but likely to “mislead and confuse consumers.” *Pizza Hut*, 227 F.3d at 495. “If the statement is shown to be literally false, the court must assume that it actually misled consumers, without requiring any evidence of such deception from the plaintiff.” *IQ Prods. Co.*, 305 F.3d at 375. On the other hand, if the statement is misleading or ambiguous, the plaintiff must demonstrate actual deception. *Id.* Here, AT&T argues that the statements at issue are literally false rather than merely misleading, and, therefore, that it need not present evidence of deception to meet its burden on the first element (Dkt. #3 at p. 6). Thus, the threshold question for the Court is whether AT&T has carried its burden of establishing that T-Mobile’s advertisements are literally false.

A. Literal Falsity

The standard for proving literal falsity is rigorous. *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670, 699 (S.D. Tex. 2015) (citing *Buetow v. A.L.S. Enters., Inc.*, 650 F.3d 1178, 1185 (8th Cir. 2011)). “For a statement to be literally false, the statement must be false on its face.” *Boltex Mfg. Co., L.P. v. Ulma Piping USA Corp.*, 389 F. Supp. 3d 507, 511 (S.D. Tex. 2019) (internal citations omitted). A literally false statement is one that is “bald-faced, egregious, undeniable, [and] over the top.” *Schering-Plough Healthcare Prod., Inc. v. Schwarz*

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