IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-51087

United States Court of Appeals
Fifth Circuit
FILED
December 22, 2014
Lyle W. Cayce
Clerk

EASTMAN CHEMICAL COMPANY,

Plaintiff – Appellee,

v.

PLASTIPURE, INCORPORATED; CERTICHEM, INCORPORATED,

Defendants – Appellants.

Appeal from the United States District Court
for the Western District of Texas

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

After a jury found that PlastiPure, Inc. and CertiChem, Inc. violated the Lanham Act by making false statements of fact about their competitor's product, the district court entered an injunction against both companies. On appeal, PlastiPure and CertiChem challenge the jury verdict and the injunction on various grounds, including that their statements constituted non-actionable scientific opinions rather than actionable statements of fact. Because the Lanham Act prohibits false commercial speech even when that speech makes scientific claims, and because Appellants' other contentions lack merit, we AFFIRM.

I.

Eastman Chemical Company (Eastman) manufactures a plastic resin called Tritan and sells it to manufacturers of water bottles, baby bottles, food containers, and other consumer products. Eastman launched Tritan commercially in 2007 as an alternative to polycarbonate, which at that point was the primary plastic used in food contact applications. Shortly after Tritan's launch, consumers became concerned that an ingredient in polycarbonate, bisphenol A (BPA), could be harmful to humans. The concerns about BPA were premised on scientific studies purporting to show that BPA could activate estrogen receptors in the human body. Chemicals that mimic estrogen are said to possess estrogenic activity (EA), and they can trigger hormone-dependent cancers, reproductive abnormalities, and other negative health conditions. Eastman recognized that consumer fears about polycarbonate could be a boon to its sales of Tritan, provided that it could assure potential clients that Tritan does not exhibit EA. To that end, Eastman conducted a battery of tests on Tritan which, according to Eastman, showed that Tritan does not exhibit EA.

PlastiPure and CertiChem also hoped to seize on the opportunity created by the public's desire for BPA-free plastics. PlastiPure and CertiChem are companies founded by Dr. George Bittner, a professor of neurobiology at the University of Texas at Austin. PlastiPure developed a plastic resin that it claims does not exhibit EA and, like Eastman, PlastiPure sells its plastic resin to product manufacturers. CertiChem's primary focus is on testing materials for various sorts of hormonal activity.

In 2011, CertiChem published an article summarizing the results of its testing of more than 500 commercially available plastic products. The article was published in *Environmental Health Perspectives*, a peer-reviewed journal published by the National Institutes of Health. Although products made with

Tritan were among the products tested, Tritan was not mentioned by name in the article.

After research on the article was completed, but prior to the article's publication, PlastiPure published a three-page sales brochure entitled "EA-Free Plastic Products: Beyond BPA-Free" and distributed the brochure at trade shows and directly to potential customers. The brochure contains a chart that depicts products containing "Eastman's Tritan" as having significant levels of EA. The caption to the chart states: "Examples of test results of products claiming to be EA-free or made from materials claiming to be EA-free are given in the figure to the right. Most examples are made from Eastman's Tritan™ resin."

Based on the sales brochure and other marketing materials, Eastman filed suit against PlastiPure and CertiChem, alleging false advertising under the Lanham Act, business disparagement, tortious interference, unfair competition, and conspiracy. At trial, both sides offered expert testimony about the proper definition of EA, the proper way to test for EA, and whether Tritan exhibits EA. After a jury verdict in favor of Eastman, the district court entered judgment against PlastiPure and CertiChem, ruling that both companies willfully violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), engaged in unfair competition under Texas common law, and conspired with one another in connection with these violations. The district court, after denying their motion for judgment as a matter of law, enjoined PlastiPure and CertiChem from distributing the above-referenced sales brochure and from:

> making any verbal or written statement, expressly or by implication, to any third party in connection with any advertising, promotion, offering for sale, or sale of goods or services or in any other commercial manner that:

> (1) Tritan resins and products leach chemicals having significant estrogenic activity; (2) Tritan, or products made with Tritan, are dangerous to human health because they exhibit estrogenic activity; or (3) Tritan resins and products leach chemicals having significant estrogenic activity after common-use stresses.

PlastiPure and CertiChem make three arguments on appeal. First, they argue that the district court's injunction is improper because their statements were scientific opinions rather than actionable facts. Second, they argue that the jury verdict is based on legally insufficient evidence. Third, they argue that the district court's jury instructions and verdict form contain errors warranting reversal.

II.

Appellants contend that the district court should not have entered its injunction because Appellants' statements about Tritan are not actionable statements of fact under the Lanham Act. We review the grant of a permanent injunction for abuse of discretion. *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 620 (5th Cir. 2013). An abuse of discretion may be found where the trial court "(1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction, (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief." *Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distribution Co.*, 520 F.3d 393, 402 (5th Cir. 2008) (internal quotation marks omitted).

Section 43(a) of the Lanham Act prohibits false advertising. 15 U.S.C. § 1125(a). It provides a civil cause of action against any person who, in connection with goods or services, uses any "false or misleading description of fact, or false or misleading representation of fact . . . ." *Id.* § 1125(a)(1). "Essential to any claim under section 43(a) of the Lanham Act is a

determination of whether the challenged statement is one of fact—actionable under section 43(a)—or one of general opinion—not actionable under section 43(a)." *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495–96 (5th Cir. 2000).

We have held that "[a] statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification." *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986). Similarly, we have said that the challenged statement must make a "'specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.'" *Pizza Hut*, 227 F.3d at 496 (quoting *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999)); *see also Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (stating that a statement of fact is one that makes "a specific and measurable advertisement claim of product superiority"). In contrast, "[b]ald assertions of superiority" and "exaggerated, blustering, and boasting statement[s]" are non-actionable opinions. *Pizza Hut*, 227 F.3d at 496–97. Predictions of future events are also non-actionable expressions of opinion. *Presidio Enters.*, 784 F.2d at 680.

Appellants argue that commercial statements relating to live scientific controversies should be treated as opinions for Lanham Act purposes. According to Appellants, enjoining statements that embrace one side of an open scientific debate would stifle academic freedom and inhibit the free flow of scientific ideas, contrary to the principles undergirding the First Amendment. Accordingly, they urge us to classify their statements about Tritan's EA content as opinions rather than actionable facts.

As primary support for their argument, Appellants offer the Second Circuit's opinion in *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490 (2d Cir. 2013). In *ONY*, the parties were rival producers of non-human

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