UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

GENERAL MILLS, INC., a Delaware corporation, Plaintiff, v. CHOBANI, LLC, a Delaware limited liability company, Defendant.	Civil Action No. 0:16-cv-00052-RHK-BRT

CHOBANI, LLC'S OPPOSITION TO GENERAL MILLS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Dated: January 14, 2016

TABLE OF CONTENTS

Defendant Chobani, LLC ("Chobani") respectfully submits this Opposition to Plaintiff General Mills, Inc.'s (General Mills or "GM") Motion for a Temporary Restraining Order and Preliminary Injunction. Chobani further relies on the Declarations of Peter McGuiness, Dr. Robert C. Post, and Anthony Rufo, Esq., filed herewith.

I. PRELIMINARY STATEMENT

Chobani and GM have very different philosophies about the type of information that should be provided to consumers. Chobani's opinion is that highlighting the difference between natural and artificial ingredients, specifically here sweeteners and preservatives, is important and allows consumers to make informed choices about what food they buy. GM's opinion, expressed in its motion papers here, is that too much information -- even accurate information -- may confuse, alarm and mislead consumers. This difference of opinion is at the heart of this case. GM has brought the present motion in order to impose its "less information is better" philosophy on the public, and to eliminate Chobani's attempts to provide information that Chobani believes is helpful to consumers who are trying to make informed choices for themselves and their families.

GM paints the information Chobani provides to consumers as indicating that GM's products are "unhealthy" or "unsafe." To be clear, Chobani has not used either word in its Simply 100 Campaign. Chobani's message is that consumers have a choice; they can choose the product that contains artificial ingredients, specifically, artificial preservatives or artificial sweeteners, or they can choose Chobani Simply 100, which is

made without preservatives and with natural sweeteners. Contrary to GM's straw-man arguments, the presentation of this choice neither states nor necessarily implies that GM products are "unhealthy" or "unsafe." Eating yogurt is almost always a good choice, but in Chobani's opinion, and as expressed in its advertisements, "not all yogurts are equally good for you."

Even if GM's approach to consumer information had merit, GM is not entitled to injunctive relief. Chobani has stated that it will voluntarily remove from circulation the language to which GM most strenuously objects (*i.e.*, "that stuff is used to kill bugs"), thus rendering moot the principal grounds for relief. Moreover, GM is not likely to prevail on the merits in any event. The statements to which GM objects are either literally true (*e.g.*, potassium sorbate is in fact an active ingredient in pesticides and is used to kills bugs), or are not susceptible to being proven true or false because they are statements of opinion or they qualify as "puffery" under the Lanham Act (*e.g.*, "good," "healthy" and "bad"). The remaining statements complained of by GM simply were not made (*e.g.*, Chobani did not use the words "unsafe" or "unhealthy"). None of these statements constitute the literal falsity or necessarily implied falsity required for a showing of likelihood of success.

GM also must prove irreparable harm, and it has not done so. GM invokes a presumption of irreparable harm that is not available to it, and its evidence of irreparable harm is speculative and inadequate. Moreover, GM's arguments with respect to the

public interest and the balance of hardships are without merit, and in fact more consumer information -- not less -- is in the public's interest.

II. BACKGROUND

A. CHOBANI'S HISTORY AS A MANUFACTURER OF GREEK YOGURT WITH ONLY NATURAL INGREDIENTS

After moving to New York from his native Turkey, Chobani's Founder and CEO, Hamdi Ulukaya, believed that everyone deserved better food options than what he found available here. In 2005, Mr. Ulukaya purchased a yogurt factory in South Edmeston, New York, and set about making Greek Yogurt in the United States, with a commitment to donating 10% of profits to charitable causes. Chobani shipped its first order of Greek Yogurt to market in the fall of 2007. Consumers responded very positively to Chobani's Greek Yogurt. Just six years after Chobani started, it became the No. 1 Greek Yogurt brand in the United States. Chobani still makes yogurt at the South Edmeston factory. McGuinness Decl. at ¶¶ 2-5.

Chobani has always been and remains committed to making high quality, great tasting Greek Yogurt available to people in the places where they shop every day. Chobani uses "real" ingredients – those that are simple, authentic and natural – such as fresh milk obtained mostly from local farmers from cows not treated with artificial growth hormones, and real, wholesome fruit. Chobani uses a generations-old, authentic straining process, which makes its Greek Yogurt thick and creamy, without the use of thickeners, and with more protein than traditional yogurt. Chobani also strives to

implement environmental sustainability practices in its manufacturing, such as by recycling the whey that is a byproduct of the straining process as supplemental feed or fertilizer for local farms. McGuinness Decl. at ¶ 6.

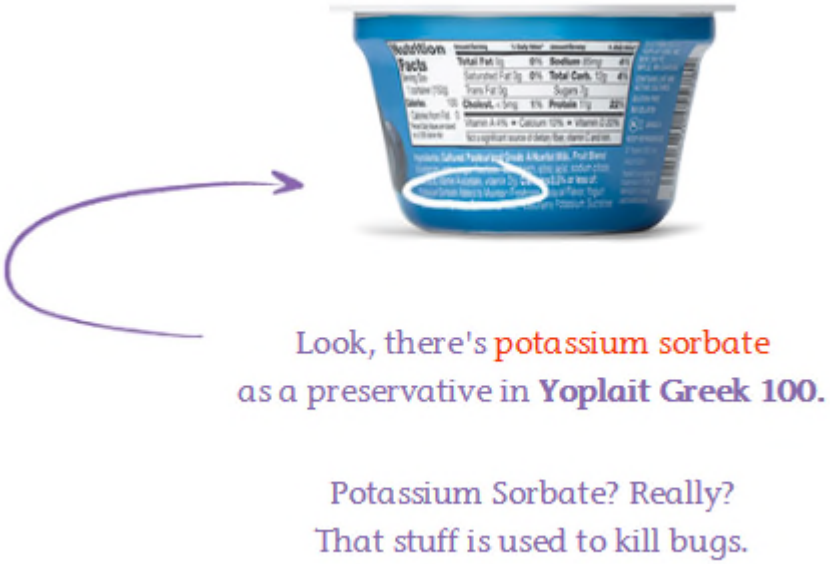
Chobani proudly differentiates itself from its competitors by pointing out that it uses only natural ingredients. Indeed, Chobani's advertising has traditionally communicated this message. For example, in 2013 Chobani launched its multi-media "Go Real Chobani" campaign to empower consumers to choose to live their lives in the same "real" and "authentic" way that Chobani makes yogurt. In 2014, Chobani launched its "How Matters" campaign to communicate the message that the way Chobani makes its yogurt is just as important as the final product. In May 2015, Chobani initiated its "To Love This Life Is to Live It Naturally" campaign, which celebrates the role that Chobani's products, made with only natural ingredients, play in consumers' lives, and encourages consumers to seek food made with the simplest ingredients possible. McGuinness Decl. at ¶ 7.

B. CHOBANI'S SIMPLY 100 CAMPAIGN AT ISSUE HERE IS AN EXTENSION OF CHOBANI'S PRIOR ADVERTISING

In the fall of 2015, Chobani began to plan its next addition to the multi-media "To Love This Life Is to Live It Naturally" campaign, to include its Chobani Simply 100 brand of Greek Yogurt, which has 100 calories per serving with no preservatives or artificial sweeteners (the "Simply 100 Campaign"). Naturally, Chobani again wished to highlight its products' natural ingredients; although it had already spent years

communicating this message, Chobani believed that consumers deserved more information to make informed choices. Chobani resolved to talk not only about the natural ingredients in its own Chobani Simply 100 yogurt, but also the artificial preservatives and artificial sweeteners that are in some of its competitors' products, as well as Chobani's opinions on the subject. McGuinness Decl. at ¶ 8.

Chobani believes that consumers have a right to know what is in their cup, and that is the central message in the Simply 100 Campaign, which places squarely before consumers the choice between natural and artificial ingredients - specifically, artificial preservatives and artificial sweeteners. Chobani's "open letter" ad, which ran in a number of periodicals on or about January 10, 2016 and which is available on Chobani's website, provides consumers with information about General Mills Yoplait Greek 100® brand of yogurt, as depicted in the below excerpt. McGuinness Decl. at ¶ ¶ 9-10.



Chobani also produced a 30-second television ad that conveys this same message. In the spot, a woman sits in an open convertible by a farm stand with a cup of Yoplait Greek 100. She reads the ingredients on the label, sees that it contains potassium sorbate, and then tosses it into a nearby fruit crate in favor of a cup of Chobani Simply 100. A commercial jingle is heard at the end in which the singer proclaims "to love this life is to live it naturally" while the woman enjoys Chobani yogurt and a child runs to the car from the farm stand carrying a bag of fresh fruit.[1] McGuinness Decl. at ¶ 11.

C. CHOBANI'S SIMPLY 100 CAMPAIGN EXPRESSES CHOBANI'S OPINION REGARDING NATURAL VS. ARTIFICIAL

Chobani Simply 100, unlike Yoplait Greek 100, contains no artificial preservatives. Post Decl. at ¶ 17. In Chobani's opinion, food made with only natural ingredients is better than food made with artificial ingredients, like artificial preservatives, which Chobani considers, colloquially speaking, "bad stuff." Chobani shares its opinions, along with certain facts about the ingredients in its competitors' products, in the Simply 100 Campaign and invites consumers to make an informed choice. McGuinness Decl. at ¶ 12.

[1] A storyboard depicting images from the commercial is attached as Ex. A to the Declaration of Peter McGuinness.

D. CHOBANI'S SIMPLY 100 CAMPAIGN IS TRUE AND ACCURATE

As Chobani states in the Simply 100 Campaign, Yoplait Greek 100, which has 100 calories per serving, contains the artificial preservative potassium sorbate, as demonstrated in the excerpt from the Yoplait website below. Post Decl. at ¶ 17.

Potassium sorbate is an artificial preservative, which some manufacturers add to food to prevent the growth of microorganisms. The U.S. Environmental Protection Agency classifies potassium sorbate as an active ingredient in pesticides. While it may serve to kill microorganisms on plants, potassium sorbate also kills bugs and, indeed, is the only active ingredient in certain insecticides. Post Decl. at ¶¶ 7, 11-16, 18.

The statements made in Chobani's Simply 100 Campaign are true and accurate. Chobani does not misrepresent the ingredients in Yoplait Greek 100 or the other applications of potassium sorbate. Post Decl. at ¶ 19. Far from it. Chobani presents the truth about General Mills' product in an informative and entertaining way, shares its own opinions with consumers, and ultimately leaves it to consumers to decide which product

to choose. Chobani sincerely believes that consumers have the right to know what's in their cup. McGuinness Decl. at ¶ 13. General Mills disagrees, and has brought the present motion (including straw-man arguments based on language Chobani did not use) in order to stop Chobani from talking about the artificial preservative in Yoplait Greek 100.

III. ARGUMENT

As a preliminary matter, and as an answer to the Court's email request of January 13, 2016, Chobani does not believe that this matter is ripe for a decision on the motion for a preliminary injunction. Chobani has had only a few days' notice of GM's allegation since GM did not send Chobani a demand letter prior to filing suit, and it has had less than forty eight hours between receiving GM's motion and supporting papers (including multiple expert affidavits) and having to file its opposition brief. Chobani has been prejudiced by this timing and, for example, has not had time to retain outside experts on potassium sorbate or potential consumer perception. Moreover, several hours after receiving GM's papers, Chobani was copied on a proposed order from GM's counsel to the court explicitly requesting a preliminary hearing to be held sometime after tomorrow's hearing. It was not until the afternoon of January 13 that Chobani received notice that the hearing set for Friday might resolve the request for a preliminary injunction. The allegations here pertain to difficult issues of scientific opinion, federal administrative regulations and consumer perceptions, none of which is susceptible to sufficient analysis in less than forty-eight hours.

Chobani has attempted to offer a solution to stem the risk to both parties and the public, inherent in such circumstances, of a quick but improvident decision on an extraordinary injunctive remedy. Specifically, Chobani offered to discontinue and replace the strongest language in its campaign (i.e., to replace "that stuff is used to kill bugs") with "that stuff is an active ingredient in pesticides," in order to alleviate the alleged urgency and imminence of the harm GM claims to fear. This would allow the parties to proceed in the deliberate and careful manner these issues require and deserve.

For these reasons, Chobani asks that the Court not treat the present proceedings as a preliminary injunction hearing and postpone the presently scheduled hearing for one week, until January 22, 2016 (assuming that the case is not stayed pending a determination on Chobani's motion to transfer venue). If the Court considers GM's preliminary motions before that date, at the very least Chobani requests that the Court either not consider GM's declarations regarding the scientific properties of potassium sorbate and potential consumer perception, or allow Chobani additional time to retain one or more outside experts on those issues.

A. GM IS NOT ENTITLED TO INJUNCTIVE RELIEF

A party is not entitled to injunctive relief unless, on balance, the following four factors weigh in its favor: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 113 (8th Cir. 1981)

(vacating preliminary injunction where there was no finding of irreparable harm or likelihood of success). The standard is the same for a temporary restraining order. *Vopak USA, Inc. v. Hallett Dock Co.*, 2002 U.S. Dist. LEXIS 3508 at *3 (D. Minn. Feb. 22, 2002).

"The burden of demonstrating that a preliminary injunction is warranted is a heavy one where, as here, granting the preliminary injunction will give plaintiff substantially the relief it would obtain after a trial on the merits." *Dakota Indus. v. Ever Best, Ltd*., 944 F.2d 438, 440 (8th Cir. S.D. 1991) (affirming denial of preliminary injunction in trademark suit). *See also Merck Eprova AG v. Brookstone Pharms., LLC*, 2009 U.S. Dist. LEXIS 130385 at *9 (S.D.N.Y. Dec. 14, 2009*)* ("when a party seeks a mandatory preliminary injunction, that is, an injunction that alters the status quo by commanding a defendant to perform a specific act,…the plaintiff must establish a 'clear' or 'substantial' likelihood that it will prevail on the merits. In other words, a mere 'likelihood' of success on the merits no longer suffices."). A preliminary injunction is an "extraordinary remedy" that should not be routinely granted, except on a "clear showing" of both likelihood of success and irreparable harm. *Id* at *9, *citing JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79-80 (2d Cir. 1990); *see also Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir.1987) (affirming refusal of a preliminary injunction).

GM cannot meet the applicable standard, as its requested injunction would grant it the same relief it would seek after a trial on the merits, and its showing on likelihood of success is not strong. Additionally, there is no presumption of irreparable harm

applicable to this case, and GM has not provided competent, non-speculative evidence of such harm. Moreover, GM will suffer no irreparable harm in the absence of an injunction, and it is in the public interest to allow Chobani to continue to educate consumers about the presence of natural and artificial ingredients in their cup.

B. GM IS UNLIKELY TO SUCCEED ON THE MERITS BECAUSE CHOBANI DID NOT MAKE A FALSE STATEMENT OF FACT

GM's request for injunctive relief is based principally on its false advertising claim pursuant to Section 43(a) of the Lanham Act.[2] In order to succeed on this claim, GM must show either that the advertising in question is (1) literally false or (2) literally true, but -- given the particular context -- likely to mislead. *United Industries Corporation v. Clorox Co.*, 140 F.3d 1175, 1180-1181 (8th Cir. 1998) (affirming denial of preliminary injunction); *Johnson & Johnson v. GAC Inter.*, 862 F.2d 975, 978-79 (2d Cir. 1988). To prove literal falsity, GM must show that the words of the advertisement are false on their face (*i.e.*, the false claim is literally stated *in haec verba*), or that the advertisement conveys by necessary implication a false message through a combination

[2] GM has also brought state law claims, which are barely addressed in the present motion. In any event, GM points to no cases suggesting that courts reviewing such state law analogues to the Lanham Act, in conjunction with actual Lanham Act claims, have different definitions and standards for such concepts as falsity, consumer confusion and puffery. On the contrary, "claims based on the common law and the MDTPA are 'coextensive' with the federal claims under the Lanham Act, and, for that reason, the Court analyzes all the claims together, using the same standards." *Fair Isaac Corp. v. Experian Info. Solutions, Inc.*, 645 F. Supp. 2d 734, 756 (D. Minn. 2009) (dismissing false advertising/deceptive practices claim as statements were puffery) Chobani reserves the right to brief any specific state law issue in dispute upon the Court's request.

of images and words. *United Industries*, 140 F.3d at 1180-1181; *SmithKline Beecham Consumer Healthcare L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 2001 U.S. Dist. LEXIS 7061 (S.D.N.Y. June 1 2001). In either case, whether an allegation of "literal falsity" is based on the words alone or a "necessary implication," the alleged false message must be "unambiguous." *Time Warner v. DirectTV, Inc.*, 497 F. 3d 144, 158 (2d. Cir. 2007). If an advertisement "is susceptible to more than one reasonable interpretation, it cannot be literally false." *Id*. *See also United Industries*, 140 F.3d at 1181 ("The greater the degree to which a message relies upon the viewer or consumer to integrate its components and draw the apparent conclusion, however, the less likely it is that a finding of literal falsity will be supported. Commercial claims that are implicit, attenuated, or merely suggestive usually cannot fairly be characterized as literally false.").

The difference between literal falsity and "likely to mislead" is critical in the context of a motion for preliminary injunction. In the case of alleged literal falsity (including necessary implication), the Court may consider the evidence and make its own assessment of whether the statement is false, relying on its own "common sense and logic in interpreting the message." *Hertz Corp. v. Avis, Inc.*, 867 F.Supp. 208, 212 (S.D.N.Y. 1994). However, where the alleged statement is not literally false but instead "likely to mislead," injunctive relief may be granted "only if the court can determine that the ad is confusing or deceiving as tested by extrinsic evidence of public reaction." *SmithKline*, 2001 U.S. Dist. LEXIS 7061 at *19*; see also Coca-Cola Co. v. Tropicana Prods.*, 690 F. 2d

312, 317 (2d Cir. 1982); *Reckitt Benckiser v. Motomco Ltd.*, 760 F.Supp. 2d 446, 454 (S.D.N.Y. 2011) (language that is not literally false "is actionable under the Lanham Act only upon a showing of actual consumer confusion").

Here, there is no literal falsity. As is further set forth below, the statements complained of by GM include only one affirmative assertion of fact (which is true). Other statements constitute opinion, puffery, or are otherwise not susceptible of being "literally false." Finally, some of the statements cited by GM *(e.g.*, that its products are "unsafe" or "harmful") are outright straw-man inventions that Chobani never uttered. None of them present a literal or necessarily implied falsehood. At worst, they are one among many interpretations of certain Chobani advertisements.

Because there is no literal falsity, GM must come forward with extrinsic evidence of consumer perception in order to show that it is likely to succeed. *United Industries*, 140 F.3d at 1183 (affirming denial of preliminary injunction where "Clorox's view is unsupported at this point by expert testimony, surveys, or consumer reaction evidence of any kind"). It has presented none. GM presents evidence that one anonymous consumer had an unreasonable reaction to one of Chobani's commercials. Such a *de minimus* quantum of evidence is universally rejected as sufficient to show consumer perception for Lanham Act purposes, and the Court should be especially skeptical when presented by way of hearsay, with no opportunity for cross examination or discovery, in support of the extraordinary remedy of injunctive relief. *See Munsingwear Inc. v. Jockey Int'l, Inc.*, 1994 U.S. Dist. LEXIS 8243 at *18-19 (D. Minn. 1994) (finding two letters from

confused consumers insufficient because "[a]ctual confusion requires more than *de minimus* proof").

The only other purported evidence of consumer perception is the Declaration of Dominique Hanssens, a professor of marketing. However, on closer inspection, this declaration presents no evidence of any consumer perception of the Chobani advertisements. Although Professor Hanssens may be a "Distinguished Research Professor," she conducted no research for this affidavit. She has not conducted surveys, or tested any consumer reaction, nor has she been asked to do so. Rather, Dr. Hanssens simply recites general principles of marketing and then, based on those principles alone, makes the legal argument that the Chobani ads will likely cause confusion. In other words, it is all theory and no practice -- no more helpful to the Court in the present circumstances than if GM had attached a treatise chapter to its brief. It would not meet a Daubert reliability standard for an evidentiary hearing or trial, so it should not be considered here where GM's motion would arguably resolve the merits. This lack of practical research may be understandable given the timing of the present motion, but that is yet one more reason why injunctive relief is inappropriate at this time.

1. "Good" and "Bad" are Statements of Opinion or Puffery

As a preliminary matter, statements in an advertisement are only susceptible to a Lanham Act challenge if they contain "a false representation of fact," which "must be distinguished from mere 'puffing,' or a general expression of opinion about a product." *Groden v. Random House, Inc.*,1994 U.S. Dist. LEXIS 11794 at *17 (S.D.N.Y. Aug. 23,

1994); *see also Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004). In order for a statement to be actionable, it must contain "specific assertions of unfavorable facts reflecting on the rival product." *Groden v. Random House, Inc.*,1994 U.S. Dist. LEXIS 11794 at *17, *quoting American Express Travel Related Services Co., Inc. v. Mastercard International, Inc.*, 776 F.Supp. 787, 792 (S.D.N.Y. 1991) (assertion that product was "breathable" was a subjective statement that could mean different things to different people). This does not include "vague or highly subjective claims of product superiority, including bald assertions of superiority." *Verisign, Inc. v. XYZ.COM, LLC*, 2015 U.S. Dist. LEXIS 157471 at *7 (E.D. Va. Nov. 20, 2015). Courts have consistently found that terms such as "good," "bad," and "better" are mere puffery, because they do not contain a fact one can verify. So for example, only two months ago, the Eastern District of Virginia determined that the description of a domain name property as "good" was "opinion, not verifiable fact" because it communicated a subjective measure of value and was not capable of being proven false. *Id.* at *7-8.

Similarly, in *U.S. Healthcare Inc., v. Blue Cross of Greater Philadelphia* 898 F.2d 914, 926 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 58 (1990), the court found the descriptions of health care products as "good" and "better" were "the most innocuous kind of 'puffing,' common to advertising and presenting no danger of misleading the consuming public." *See also Marvin Lumber & Cedar Co. v. Ppg Indus.*, 223 F.3d 873, 880 (8th Cir. 2000) (statement that product is "better" was "unenforceable puffery"); *Am. Inst. for Preventive Med., Inc. v. Oakstone Publ'g, LLC*, 2010 U.S. Dist. LEXIS 19968 at

*25 (E.D. Mich. March 5, 2010) (statements that there were "no bad [franchise] locations" were mere puffery).

Chobani's statements that its products are "good," or that certain artificial ingredients are "bad stuff," is precisely the type of puffery addressed in the foregoing cases. Moreover, even if the statements did not qualify as mere puffery, they also cannot qualify as "literally false" for purposes of the preliminary injunction analysis because such vague and common terms are susceptible to countless different interpretations.

2. Chobani's Statement that Potassium Sorbate Is Used to Kills Bugs is Literally True

GM principally objects to the phrase "that stuff is used to kill bugs." While the parties apparently disagree as to whether potassium sorbate is actually used to kill bugs, that phrase is not an appropriate basis for injunctive relief because Chobani has offered to replace the statement with "that stuff is an active ingredient in pesticides!" This new statement is consistent with elements already contained in Chobani's advertising campaign, stating that potassium sorbate is an "allowable minimum use pesticide product."[3]

Notwithstanding Chobani's willingness to amend its advertisements, the statement that potassium sorbate is used to kill bugs is literally true and GM's hair-splitting attempt

[3] The online campaign statements, which included links to relevant information from the FDA and EPA, are available at http://www.thelightthatsright.com/.

to distinguish pesticides from insecticides is not factually accurate. As set forth in the declaration testimony of Dr. Robert C. Post, Chobani's Senior Director for Nutrition and Regulatory Affairs, potassium sorbate is an active ingredient in products that kill bugs — sometimes the only active ingredient. Post Decl. at ¶¶ 11-17. Moreover, Chobani's online ad campaign links to an official document from the U.S. Environmental Protection Agency listing potassium sorbate as "An Active Ingredient Eligible for Minimum Risk Pesticide Products (Updated December 2015)." Although Chobani included this EPA statement in the very advertising campaign complained of by GM, the papers in support of the preliminary injunction fail to address the EPA's plain language. Indeed, in its Complaint, General Mills did not contest that potassium sorbate is an active ingredient in pesticides, but instead alleged (upon information and belief) that potassium sorbate is actually a fungicide rather than an insecticide (which is not relevant because both are "pesticides").

The affidavits presented by GM do not deny that potassium sorbate is an active ingredient in pesticides. The only food science expert affiant presented by GM fails to make the assertion that potassium is not an active ingredient in pesticide, and merely recites that it is "safe." Declaration of Scott Hood at ¶¶ 1-7. Similarly, the affidavit of GM's toxicologist never states that potassium sorbate is not a pesticide ingredient, but simply repeats several times that it is "safe for humans" (a statement that is actually supported - not contradicted - by Chobani's advertisements, as further described below in the next section). Declaration of F. Jay Murray at ¶¶1-12. In other words, there is no

evidence before the Court that potassium sorbate is not an active ingredient in pesticides. The statement that potassium sorbate is used to kill bugs is true.

3. Chobani Did Not Use the Terms "Unhealthy" or "Unsafe" but Expressed its Opinion that Consumers Should Make "Healthy" Choices

Chobani's advertisements advise consumers that "If you want to do healthy things, know what's in your cup." GM argues that, because Chobani used the word "healthy," it was necessarily implying that GM was "unhealthy" or "unsafe." In fact, the entire argument is a straw-man, because these words do not appear in Chobani's advertisements - only in GM's brief. In any event, in order for this implied statement to serve as the basis for injunctive relief, it must be the only reasonable interpretation of Chobani's use of the word "healthy," and that interpretation must be objectively false. It is neither.

First, the implication that GM yogurt is "unhealthy" -- a word Chobani did not use -- is at best an attenuated interpretation of the message "If you want to do healthy things, know what's in your cup," and certainly not the only one. Indeed, the face value interpretation of this statement is that it is a mere continuation of Chobani's efforts to promote consumer awareness about the ingredients in their food. Moreover, contrary to GM's suggestion that Chobani necessarily implied that its products are "unsafe," the literal statements by Chobani (which GM has placed before the Court) state the opposite. For example, the accused ad begins with the statement that "not all yogurts are equally good for you," indicating that all yogurts are good, just not equally so. In addition, the Chobani campaign literature cited by GM expressly states that potassium sorbate has

been determined by the FDA to be "an allowable chemical preservative for use in foods." Declaration of Helen Kurtz at Ex. D. In other words, Chobani expressly acknowledges that potassium sorbate has been deemed safe for food use. For all these reasons, the alleged statement "GM is unhealthy" is not present in the advertisements or necessarily implied by them, and in fact is expressly contradicted by them. In the absence of extrinsic evidence of consumer confusion, it cannot serve as the basis for injunctive relief.

Second, GM has made no argument that the statement, even if somehow necessarily implied by a Chobani advertisement, is false. In other words, GM cannot argue that its product is objectively "healthy" and not "unhealthy" in a way that no reasonable person could disagree, because such terms are a matter of opinion. Whether or not certain ingredients, including artificial preservatives, are healthier than others is clearly a subject of debate on which people's opinions may vary. Chobani's opinion is that it is healthier to choose a yogurt that contains no artificial preservatives. It has long been established that statements of opinion generally cannot form the basis of a Lanham Act claim, as they do not state or imply provable facts. *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995) (citing the *Restatement (Third) of Unfair Competition*); *Am. Italian Pasta Co.*, 371 F.3d at 391 ("Generally, opinions are not actionable"). Similarly, where at least "some reasonable and duly qualified scientific experts agree with a scientific proposition," a statement of that proposition cannot be literally false. *Brown v. GNC Corp.*, 789 F.3d 505, 515 (4th Cir. 2015) (interpreting state

false advertising statutes through the lens of Lanham Act jurisprudence). This is true even if many experts disbelieve the proposition. While the question at issue may one day be provable as true or false, as long as "a reasonable difference of scientific opinion exists," neither position can be said to be conclusively, or literally, true or false. *Id.*

Third, even if these statements did not constitute opinion beyond the scope of the false advertising provisions of the Lanham Act, they are not unambiguous or susceptible to only one reasonable interpretation." *Time Warner Cable, Inc.*, 497 F.3d at 158; *MSP Corp. v. Westech Instruments, Inc*., 500 F.Supp. 2d 1198, 1216 (D. Minn. 2007) ("A statement is literally false by implication if the intended audience would recognize the claim 'as readily as if it had been explicitly stated.'"). The promotion of healthy and natural ingredients does not necessarily imply that a competing product is "unsafe" (a word Chobani did not use) or "unhealthy" (another word Chobani did not use). Chobani's advertisements convey its opinion that natural ingredients are a better consumer choice than unnatural ones. Consumers may have many reasons -- health related or otherwise -- for preferring natural ingredients that have nothing to do with whether artificial substitutes for those ingredients are harmful or unsafe, such as taste, sustainability and local sourcing. Even if GM can show after discovery that Chobani somehow communicated the message that GM products are "unsafe" or "harmful," there is no evidence before the Court demonstrating that this is the only reasonable interpretation, and there is no extrinsic evidence of consumer confusion. Therefore, the

purported message (even if Chobani had stated it) is not literally false and cannot serve as the basis for an award of injunctive relief.

C. GM HAS FAILED TO SHOW IRREPARABLE HARM

1. GM is Not Entitled to a Presumption of Irreparable Harm

Irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction." *Merck Eprova AG*, 2009 U.S. Dist. LEXIS 130385 at *9-11, *citing Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999). *See also Dataphase Sys.*, 640 F.2d at 114 n.9 ("under any test the movant is required to show the threat of irreparable harm…the absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction"). Because of this, "the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Merck Eprova AG*, 2009 U.S. Dist. LEXIS 130385 at *9-11.

After the Supreme Court's decision in *eBay, Inc. v MercExchange, LLC*, 547 U.S. 388 (2006), there should be no doubt that a Court cannot simply presume irreparable harm upon a finding of likelihood of success. In that case, the Court held that such presumptions were inappropriate when determining whether to award injunctive relief in the intellectual property context. *Id.* at 394. Moreover, "*eBay* strongly indicates that the traditional principles of equity it employed are the presumptive standard for injunctions in any context." *Salinger v. Colting*, 607 F.3d 68, 78 (2d Cir. 2010) (applying *eBay* to a copyright infringement action) (emphasis added).

2. GM Has Failed to Adduce Non-Speculative Evidence that Any Harm It Alleges Is Not Readily Quantifiable

As an alternative to the presumption of irreparable harm, GM inexplicably invokes a "reasonable basis" standard borrowed from a 1992 District of Delaware case. GM points to no indication that the Eighth Circuit has adopted this outlier standard, and Chobani is aware of none. On the contrary, the Eighth Circuit requires that, "in order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Novus Franchising, Inc. v. Dawson,* 725 F. 3d 885, 895 (8th Cir. 2013). Moreover, GM is required to make a "clear showing" of irreparable harm, that is, harm that is non-speculative, actual and imminent, and that cannot be remedied by an award of monetary damages. *Merck Eprova AG,* 2009 U.S. Dist. LEXIS 130385 at *9-11, *citing JSG Trading Corp. v. Tray-Wrap, Inc.,* 917 F.2d 75, 79-80 (2d Cir. 1990); *see also Packard Elevator v. Interstate Commerce Com.*, 782 F.2d 112, 115 (8th Cir. 1986). Where the injunction is mandatory or it will provide the movant with substantially all the relief sought (both are the case here), there must be a "strong" showing of irreparable harm. *SymQuest Group, Inc. v. Canon U.S.A., Inc.*, 2015 U.S. Dist. LEXIS 114898 at *13-14 (S.D.N.Y. Aug. 7, 2015); *Dakota Indus.*, 944 F.2d at 440 (8th Cir. 1991).

GM has not met this burden. As noted above, irreparable harm cannot be proven by evidence of one anonymous and apparently unreasonable consumer, coupled with theoretical statements from a marketing expert. The only other purported evidence of irreparable harm appears in the declaration of a GM employee, who bases her assertion of

irreparable harm on nothing more than the observation that Chobani's advertising campaign has already launched and reached its target audience, but is not over yet. Declaration of Helen Kurtz at ¶¶ 40-43. That is not competent evidence of imminent irreparable harm or evidence of any harm which would actually be prevented by injunctive relief.

D. THE PUBLIC INTEREST FAVORS CHOBANI'S CONTINUED FREE SPEECH AND DISSEMINATION OF CONSUMER INFORMATION

The public interest is a factor in deciding a motion for a preliminary injunction, as GM suggests. However, GM's further assertion that the public has a "strong interest in restraining" speech is off base. In fact, the keystone principle stated in the case relied on by GM is that the public interest requires that the "consuming public must be able to accurately assess the quality of various products in accordance with their preferences." *Medtox Scientific v. Tamarac Med., Inc.,* 2007 U.S. Dist. LEXIS 314 at *12-13 (D. Minn. 2007); *c.f. Expressions Hair Design v. Schneiderman,* 975 F. Supp. 2d 430, 450 (S.D.N.Y. 2013) (holding "as to the public interest, the public has an undeniable interest in having access to full and accurate information" and that advertising, "though entirely commercial, may often carry information of import to significant issues of the day") (quoting *Bates v. State Bar of Arizona,* 433 U.S. 350, 364 (1997). Yet, the allowance of GM's motion will accomplish the opposite goal. GM, pointing to one example, claims that too much accurate information (such as further knowledge about potassium sorbate) will confuse and scare consumers. Chobani feels that consumers are entitled to this information, and it is not the place of GM to prevent them from receiving it, even if GM

finds that accurate information to be uncomfortable and inconsistent with its own messaging.

E. THE BALANCE OF EQUITIES FAVORS CHOBANI AND THE STATUS QUO

The balance of equities does not favor an injunction. The Court must decide whether the harm to the movant in the absence of an injunction outweighs the potential harm to the non-movant and the public interest. GM cites *Select Comfort Corp. v. Tempur Sealy Int'l, Inc.*, 988 F. Supp. 2d 1047, 1055 (D. Minn. 2013) for the proposition that Chobani will not be harmed in any way by having its commercial speech enjoined. In fact, *Select Comfort* is inapposite. In that case, the limited order granted required the defendant merely to send "a letter or e-mail to its [own] stores" to confirm that they were not to do something they already claimed they were not doing. *Id.* Here, GM asks this Court to interrupt the status quo and force Chobani to halt and withdraw a major public advertising campaign, thereby preventing certain information -- which has not been shown to be literally false -- from reaching the public. As such, the balance of harms favor the Court's forbearance, particularly where the ultimate harm alleged -- lost sales -- is readily quantifiable.

An injunction will cause a risk of serious harm to Chobani. Chobani has coordinated a multi-faceted advertising campaign with factually accurate assertions now partly underway and involving multiple third parties, including advertising agencies and television networks. Chobani has expended significant time, effort and financial resources in the creation of the Simply 100 Campaign, in a deliberate effort to educate the

consuming public by providing truthful information that will allow them to make informed choices about the food they buy for themselves and their families. McGuinness Decl. at ¶¶ 14-15. An injunction against Chobani will restrain its speech, preventing it from communicating accurate messages to its customers and from sharing information with the consuming public. Moreover, an injunction will risk harm to Chobani's reputation by placing the Court's imprimatur on GM's claims of falsity and impropriety, causing the incorrect impression among the public that Chobani has done something wrong or, even worse, that a company or individual can get into trouble simply by talking about artificial ingredients. The risk of this harm to Chobani and the public clearly outweighs the speculative harm GM asserts. Such adverse consequences are the reason for imposing an added burden on applications seeking mandatory injunctive relief, and they establish that, on a record lacking any consumer survey, granting the requested relief generates more of a hardship for Chobani than GM might suffer in its absence.

F. A BOND SHOULD BE REQUIRED

Chobani agrees with the Court that, in the event injunctive relief is granted, a security bond should be required pending the outcome of the litigation and will be prepared to address that issue at oral argument. Fed. R. Civ. P. 65(c) provides that a temporary restraining order or preliminary injunction may issue "only" if the movant gives security. The amount of the bond rests with the discretion of the judge. *3M v. Rauh Rubber, Inc.*, 130 F.3d 1305, 1309 (8th Cir. 1997).

IV. CONCLUSION

For the foregoing reasons, neither a temporary restraining order nor a preliminary injunction is appropriate at this time, and the motion should be denied in its entirety.

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Respectfully submitted

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