

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

GENERAL MILLS, INC., a Delaware corporation,	)	Civil No. 16-cv-0052-RHK-BRT
	)	
Plaintiff	)	
	)	
v.	)	
	)	
CHOBANI, LLC, a Delaware limited liability company,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF GENERAL MILLS, INC.'S MEMORANDUM IN SUPPORT OF  
MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION**

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## INTRODUCTION

For a food company like Plaintiff General Mills, Inc. (“General Mills”), it is hard to conceive of advertising conduct as outrageous and harmful as a competitor launching a nationwide television and print campaign that falsely claims General Mills’ products are unsafe to consume. Yet, that is precisely what Defendant Chobani, LLC (“Chobani”) has done. As part of a deliberate attack on General Mills, Chobani is running multiple advertisements designed to falsely liken Yoplait Greek 100® yogurt to harmful bug spray, to promote Chobani’s own directly competitive Simply 100 Yogurt.

Chobani’s campaign—which consists of television, print, and online advertising—unambiguously characterizes Yoplait Greek 100 as unsafe to eat. The campaign repeatedly and expressly describes Yoplait Greek 100 as containing a dangerous “pesticide” that will “kill bugs,” and features imagery encouraging consumers to treat the product like harmful garbage.

Chobani’s advertisements are utterly false. General Mills’ Yoplait Greek 100 and its ingredients are perfectly safe. The particular ingredient targeted by Chobani’s false attack ads, potassium sorbate, has been recognized by multiple federal agencies as safe, and is expressly approved by the FDA as safe for use in food. The harm caused by Chobani’s deceit is real and immediate: shortly after Chobani’s false advertisements hit the air, a “very concerned” consumer called General Mills, identified the Chobani television ad specifically, and said it caused her to believe that potassium sorbate is “very dangerous” and “basically like rat poison.” None of this is true, and it is all a direct result of Chobani’s falsehoods. Every moment Chobani’s advertisements are allowed to run



risks even more damage to General Mills and its goodwill in the Yoplait Greek 100 product and the Yoplait brand.

Chobani's advertising violates the Lanham Act's prohibition on false and misleading advertising. It also violates the Minnesota Deceptive Trade Practices Act's prohibition on product disparagement. General Mills therefore seeks an immediate temporary restraining order to enjoin the further dissemination of Chobani's false and damaging advertisements, followed by a hearing at the earliest possible date to preliminarily enjoin these advertisements pending trial.

This Application is based on the following memorandum of points and authorities, the attached Declarations of Helen Kurtz, Brian Schalk, Dr. Dominique Hanssens, Dr. F. Jay Murray, Dr. Scott Hood, the Complaint, and such further evidence and arguments as may be presented. Initial notice of this Application has been provided to Chobani as detailed in the Declaration of Randall E. Kahnke, and any required further notice will be provided promptly.

## **FACTUAL BACKGROUND**

### **A. The Parties**

General Mills is one of the world's leading food companies with some of the most recognizable brands, including Cheerios, Wheaties, Nature Valley, Bisquick, Betty Crocker, and Pillsbury. General Mills invests substantial resources each year promoting, developing and protecting its brands. Complaint ¶ 15; Declaration of Helen Kurtz ("Kurtz Decl.") ¶ 5.

Among yogurt products, General Mills' largest and most recognizable brand is Yoplait. Kurtz Decl. ¶¶ 3, 6. There is enormous consumer recognition and goodwill associated with the Yoplait brand acquired through massive investment in the development of that brand. *Id.* ¶ 5. Since 2011 alone, General Mills has spent over \$900 million in the marketing and advertising of Yoplait products. *Id.* This includes advertising for Yoplait branded products on television, radio, in newspapers, in nationally-circulated print magazines, and through dedicated Internet and social media channels (e.g., Facebook, Instagram, Twitter, and YouTube). *Id.* As a result of this enormous effort, there is substantial goodwill and national consumer recognition associated with the Yoplait brand. *Id.* ¶ 6. Yoplait yogurt products are the United States' leading and most-recognized yogurts, with annual revenues in excess of \$1 billion. *Id.*

General Mills has invested in the Yoplait brand through development and marketing of new and innovative yogurt products. *Id.* ¶ 7. One such product is Yoplait Greek 100. *Id.*<sup>1</sup> Yoplait Greek 100 is a Greek yogurt, which contains higher levels of protein than traditional yogurt. *Id.* Yoplait Greek 100 is packaged in a 100-calorie serving size (hence the "100" in the name), and comes in over twenty different flavor varieties. *Id.* General Mills launched its Yoplait Greek 100 brand in 2012. Since that time, General Mills has invested substantially in the product's marketing and advertising, including nationwide television and print campaigns, as well as marketing through digital channels.

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<sup>1</sup> General Mills holds exclusive rights to use United States Trademark Registration No. 4,416,948 for "Yoplait Greek 100" in connection with dairy products, including yogurt. Kurtz Decl. ¶ 9.

*Id.* ¶ 8. As a result of these efforts, Yoplait Greek 100 yogurt has net annual sales of approximately \$200 million since launch. *Id.* ¶ 10.

The Defendant Chobani is a principal and direct competitor of General Mills in the Greek yogurt category. *Id.* ¶ 14. Chobani manufactures and markets a product called “Chobani Simply 100,” which is sold nationwide and competes directly with Yoplait Greek 100. *Id.* Like Yoplait Greek 100, Chobani Simply 100 is a Greek yogurt packaged in a 100-calorie serving size. *Id.* Chobani Simply 100 launched in late 2013. *Id.*

### **B. Chobani’s False Attack Campaign**

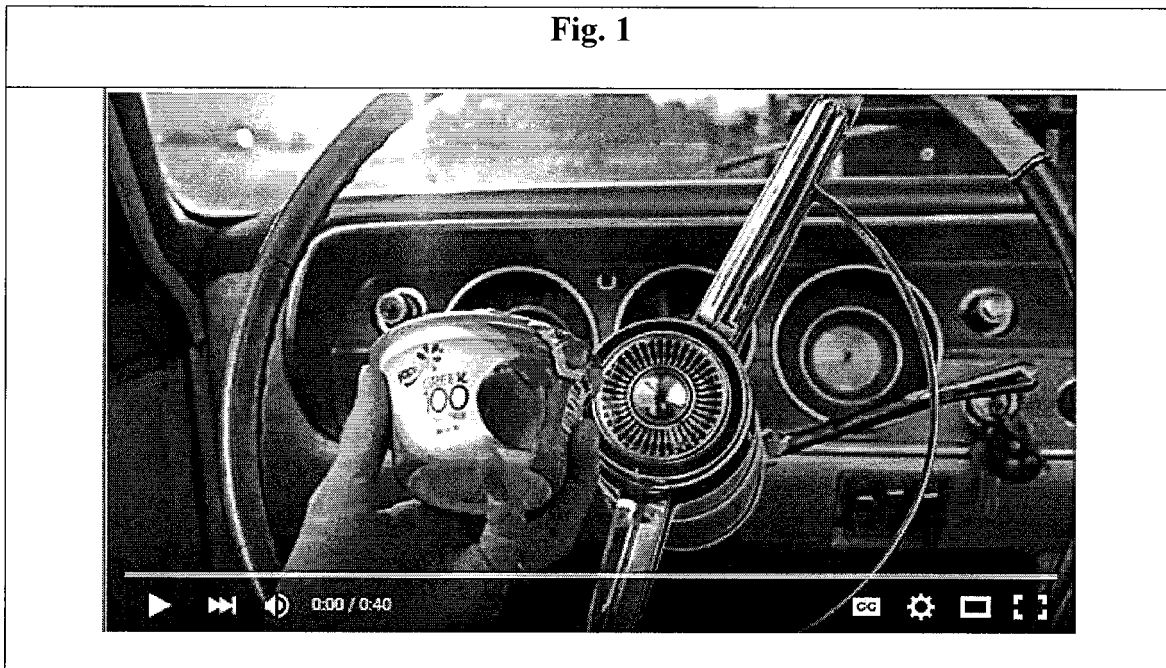
On January 6, 2016, General Mills learned of a new and disparaging national advertising campaign by Chobani directed at Yoplait Greek 100. *Id.* ¶ 15, Ex. A. An online media publication reported on a massive new advertising campaign by Chobani for its Simply 100 yogurt. *Id.* The principal feature of Chobani’s new Simply 100 Campaign is to attack competing reduced calorie Greek yogurts, and specifically General Mills’ Yoplait Greek 100 (this campaign and associated advertisements are referred to collectively herein as the “Chobani Attack Campaign”). *Id.* ¶ 16.

The Chobani Attack Campaign is extensive and has multiple elements: (a) a 30-second television advertisement attacking Yoplait Greek 100 (“Simply 100 TV Ad”); (b) a print advertisement attacking Yoplait Greek 100 (“Simply 100 Print Ad”); (c) a dedicated website for Chobani Simply 100 available at <http://www.thelightthatright.com/> (“Simply 100 Website”); and (d) distribution of the aforementioned ads through associated digital and social media channels. *Id.* ¶ 17. The unifying theme of the Chobani Attack Campaign is the communication of an

unambiguous false message that Yoplait Greek 100 contains a toxic pesticide used to “kill bugs,” and that as a result the Yoplait Greek 100 product is not fit to eat, and should be thrown away by consumers. *Id.* ¶ 18.

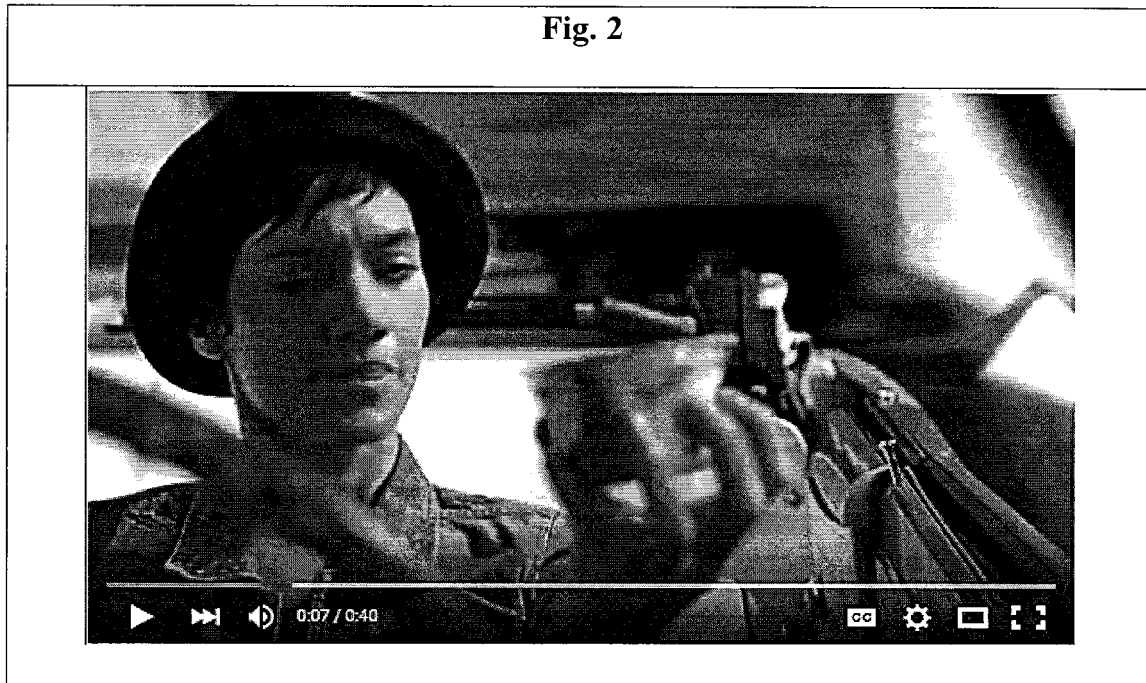
### 1. Chobani’s False Simply 100 TV Ad

The dominant aspect of the Chobani Attack Campaign is the Simply 100 TV Ad. *Id.* ¶¶ 19-25, Ex. B. The Simply 100 TV Ad opens with a young woman examining a container of peach Yoplait Greek 100 yogurt. General Mills’ Yoplait Greek 100 is featured prominently on the screen, as reflected in the screen capture from the Simply 100 TV Ad depicted below in Figure 1:



The young woman’s examination of the package is accompanied by voiceover narration that states, “Yoplait Greek 100 actually uses preservatives like potassium sorbate.” *Id.* ¶ 20. The narration then intones “Really?! That stuff is used to kill bugs!” *Id.*

Just as this “kill bugs!” narration takes place, the young woman’s face is pinched in a look of disgust as she further examines the Yoplait Greek 100 container, as reflected in the screen capture from the Simply 100 TV Ad depicted below in Figure 2.



Next, the young woman flings the container of Yoplait Greek 100 into the air, discarding it as garbage. *Id.* ¶ 21. The Simply 100 TV Ad then cuts to a shot of the container of Yoplait Greek 100 flying through the air and landing in crates that have been left in a dirty patch of roadside as trash bins, depicted below in Figure 3:

**Fig. 3**

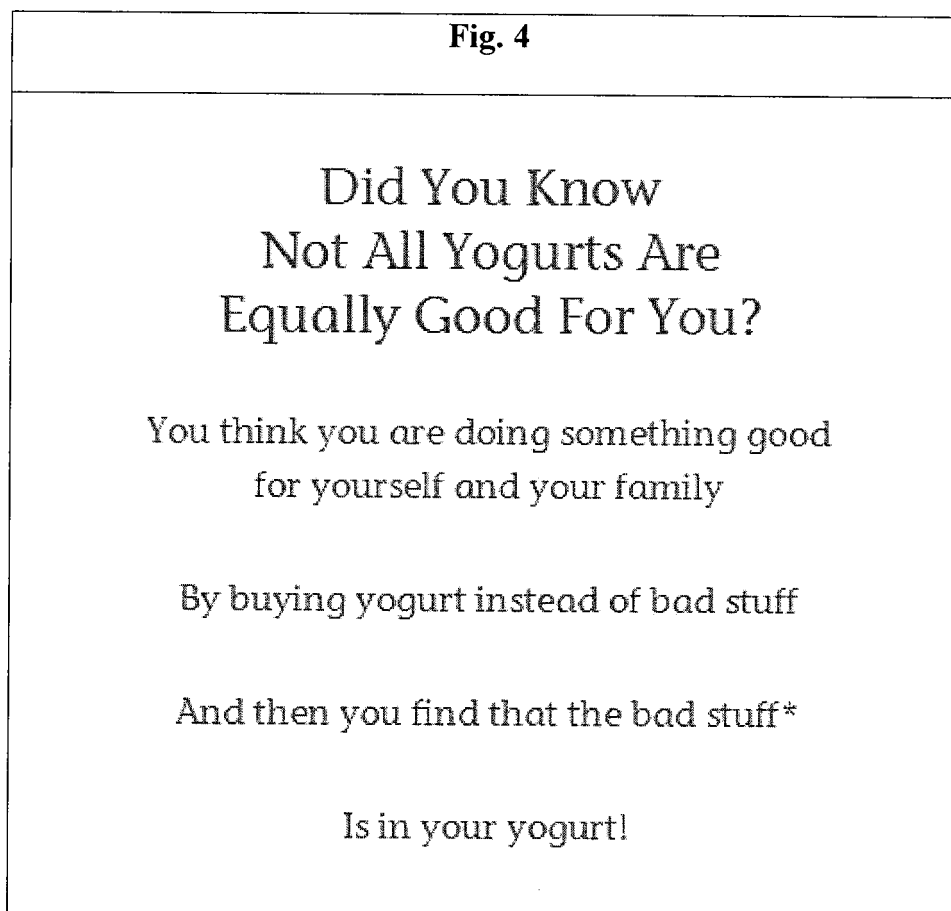
Finally, the Simply 100 TV Ad has voiceover narration that says, “Now there is Chobani Simply 100. It’s the only 100-calorie light Greek Yogurt with zero preservatives.” *Id.* ¶ 22. The ad then concludes with the same young woman examining a container of peach Chobani Simply 100, and opening and eating the yogurt with a look of contentment. *Id.* At the end of the Simply 100 TV Ad, the term #NOBADSTUFF appears prominently on the screen. *Id.*

## 2. Chobani’s False Simply 100 Print Ad

The second element of the Chobani Attack Campaign is the Simply 100 Print Ad; it likewise prominently depicts and attacks General Mills’ Yoplait Greek 100 product with false assertions that Yoplait Greek 100 is “bad” because of the presence of potassium sorbate, which is used to “kill bugs.” *Id.* ¶ 26.

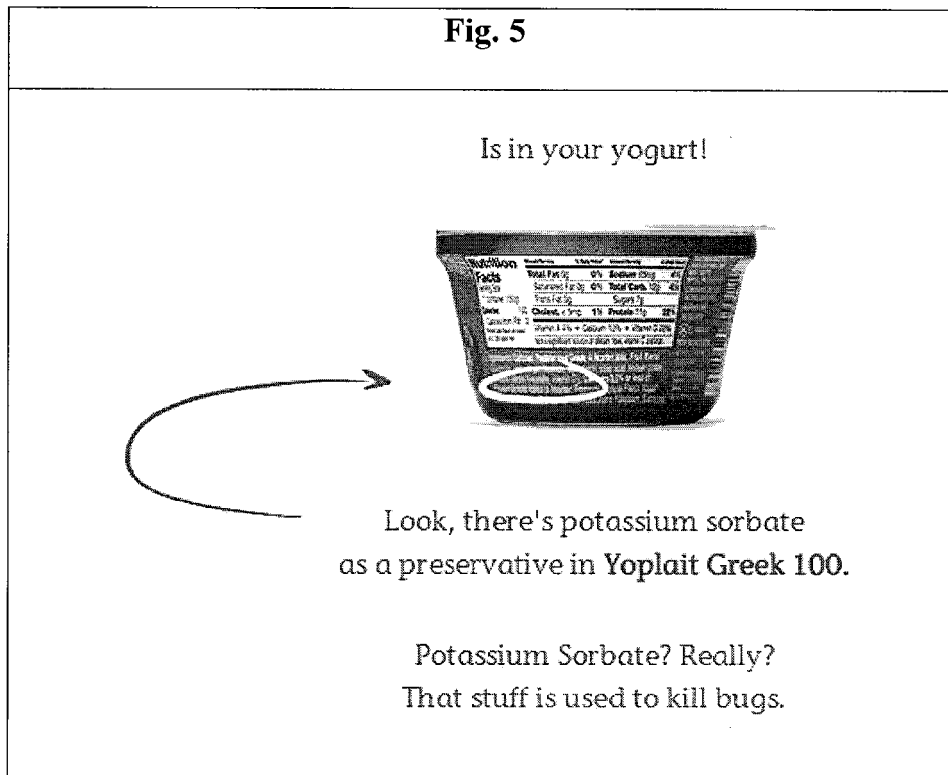
The Simply 100 Print Ad opens with the question “Did You Know Not All Yogurts Are Equally Good for You?” *Id.* ¶ 27. It then goes on to state, “You think you

are doing something good for yourself and your family...By buying yogurt instead of bad stuff...And then you find that the bad stuff\*...Is in your yogurt!” *Id.* The asterisk next to the second use of the “bad stuff” language leads to a small print disclaimer at the bottom of the ad, approximately one-eighth the size of the other text in the ad, that states “Artificial Ingredients.” *Id.* These elements of the Simply 100 Print Ad are excerpted and depicted below in Figure 4 below:



Next, the Simply 100 Print Ad depicts the back panel of a container of Yoplait Greek 100 with the ingredient list circled, immediately followed by the text “Look, there’s potassium sorbate as a preservative in Yoplait Greek 100. Potassium Sorbate?”

Really? That stuff is used to kill bugs.” *Id.* ¶ 28. These elements of the Simply 100 Print Ad are excerpted and depicted below in Figure 5:



The Simply 100 Print Ad then has intervening text attacking the ingredients of another competitor of Chobani's, Dannon Light & Fit Greek, and concludes with the statement “If you want to do healthy things, know what's in your cup.” *Id.* ¶ 29. The message thus communicated by the Simply 100 Print Ad is that Yoplait Greek 100, because it purportedly contains an ingredient that is used to “kill bugs,” should be considered by consumers as containing “bad stuff” that is not “healthy,” and that by eating Yoplait Greek 100 you are not “doing something good for yourself and your family.” *Id.* ¶ 30.

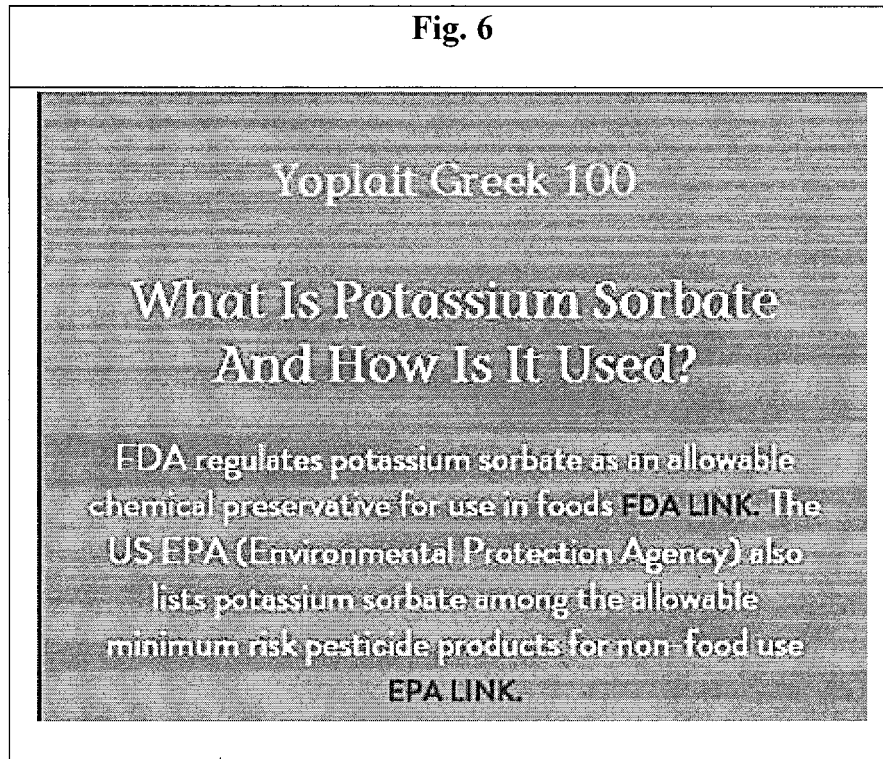


### 3. Chobani's False Simply 100 Website

A third element of the Chobani Attack Campaign is the Simply 100 Website, which is dedicated exclusively to Chobani Simply 100 (and is entirely separate from the broader Chobani.com website), and can be accessed at the web address: [www.thelightthat'sright.com](http://www.thelightthat'sright.com).<sup>2</sup> *Id.* ¶ 33. The Simply 100 Website contains a series of interactive links that invites and allows visitors to the website to “Compare Ingredients” between Chobani Simply 100 and Yoplait Greek 100. *Id.* ¶ 34. The Simply 100 Website depicts an image of blueberry Yoplait Greek 100, and once again points to the presence of potassium sorbate. *Id.* Directly beneath the picture of the Yoplait Greek 100 container is warning language regarding potassium sorbate that describes it as a “pesticide product” and contains a link to an EPA website entitled, “Active Ingredients Eligible for Minimum Risk Pesticide Products.” *Id.* ¶ 35. This element of the Simply 100 Website is depicted below in Figure 6:

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<sup>2</sup> The Simply 100 Website also incorporates a link that displays the false Simply 100 Print Ad described in above. Kurtz Decl. ¶ 33.



The Simply 100 Website thus falsely communicates that the potassium sorbate should be considered a “pesticide” by consumers as used in Yoplait Greek 100. *Id.* ¶ 36. Specifically, the Simply 100 Website features the Yoplait Greek 100 product name with the question “What is Potassium Sorbate And How Is It Used?” *Id.* Directly underneath that, the Simply 100 Website refers to potassium sorbate’s use as a “pesticide product.” *Id.*

#### **4. Chobani’s Attack Campaign Has Been Rolled Out Nationwide**

Since its rollout on January 6, Chobani has deployed its Attack Campaign on broadcast television, in national print media, on the Internet, and through multiple social media channels. Kurtz Decl. ¶ 41. The Chobani Simply 100 TV Ad is already being broadcast on NBC nationwide in primetime, and General Mills is informed that Chobani

intends to air the advertisement on other networks including the Cooking Channel, the Food Network, HLN, Lifetime, TLC, the ID Network, Bravo, E!, and the USA Network. *See* Complaint ¶ 32; Kurtz Decl. ¶ 42. Similarly the Chobani Print Ad is set to appear in publications with nationwide circulation, including People magazine. Complaint ¶ 38; Kurtz Decl. ¶ 41. The Simply 100 Print Ad has already appeared in the Sunday, January, 10, 2016, edition of the New York Times (which has national distribution) and in the Sunday, January, 10, 2016, edition of the Minneapolis Star-Tribune. Complaint ¶ 38; Kurtz Decl. ¶ 43. And finally, the Simply 100 Website is available nationwide, as are the various social media and digital channels (YouTube, Instagram and Twitter) that deploy aspects of the Chobani Attack Campaign. Kurtz Decl. ¶ 40.<sup>3</sup>

### **C. Potassium Sorbate And Yoplait Greek 100 Are Entirely Safe**

Contrary to the message communicated by the Chobani Attack Campaign, Yoplait Greek 100 is entirely safe, as is the specific ingredient that the Campaign targets potassium sorbate. *See* Declaration of F. Jay Murray (“Murray Decl.”) ¶¶ 9, 11-12; Declaration of Scott Hood (“Hood Decl.”) ¶¶ 4, 5, 7; Kurtz Decl. ¶ 37. As explained in the expert report of Dr. Murray, a toxicologist with over thirty years of experience, potassium sorbate is safe for humans; it breaks down in the body into water and carbon dioxide. Murray Decl. ¶¶ 9, 11. Its safety is well-known and documented. *Id.* It is used as a preservative in foods and to prevent bacteria contamination, thus *aiding* food safety. *Id.* ¶ 12. It performs this function in Yoplait Greek 100, and there is nothing whatsoever

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<sup>3</sup> Additionally, this campaign was launched at the beginning of the “diet season” when consumers are more focused on weight loss products. Hanssens Decl. ¶ 10. According to Chobani, one third of all light yogurt is sold in the first quarter of the year. *Id.*

about the presence of potassium sorbate in Yoplait Greek 100 that renders the product unsafe in any way. *Id.*

The Food & Drug Administration (“FDA”) expressly recognizes potassium sorbate as a substance that the FDA classifies as “GRAS,” which is an acronym for “generally recognized as safe” for human consumption. 21 C.F.R. § 582.3640. Murray Decl. ¶ 10; Hood Decl. ¶ 4. Likewise, according to a report available with the Agricultural Marketing Service arm of the USDA, “*few substances have had the kind of extensive, rigorous, long-term testing that sorbic acid and its salts [like potassium sorbate] have had.* It has been found to be non-toxic even when taken in large quantities, and breaks down in the body into water and carbon dioxide . . . .” *Id.* ¶ 8 (emphasis added) (quoting Technical Advisory Panel’s report on Potassium Sorbate (available at <http://www.ams.usda.gov/sites/default/files/media/P%20Sor%20technical%20advisory%20panel%20report.pdf>)); *id.* ¶¶ 11-13.

#### **D. Chobani’s Attack Campaign Harms General Mills**

Shortly after Chobani’s Attack Campaign hit the airwaves, General Mills received a consumer contact that identifies the Chobani Attack Campaign (the Simply 100 TV Ad specifically) and expresses alarm that Yoplait Greek 100 contains “rat poison.” Declaration of Brian Schalk (“Schalk Decl.”) ¶¶ 3-4. That consumer contacted General Mills’ consumer hotline the morning of January 11, 2016, said, in material part:

*Yeah, the potassium sorbate, because that is a very dangerous, dangerous thing. I didn’t even realize it and I didn’t even know it was in here and -- I’ll be honest with ya I’ll tell you what happened. I saw a commercial for Chobani and they said what it does and what it is and I’m like oh my*

*god are you kidding me, because I ate this every day sometimes I have two a day. So I'm very, very concerned about it...there's gotta be something else that's much safer that they could do with that. And I've been eating Yoplait yogurts for many, many, many years...And, you know, I'm very concerned about that being in there because it's basically like rat poison...There's gonna probably be more phone calls I would guess with people calling in because, you know, I'm sure I'm not the only one that's concerned about it.*

*Id.* Ex. A (emphases added).

This immediate consumer alarm is not surprising given the consumer base for Yoplait Greek 100. The market for Greek yogurt—and in particular reduced-calorie Greek yogurt—is driven heavily by consumers for whom the product's health benefits are very important. Kurtz Decl. ¶ 11. This is particularly true of the Yoplait Greek 100 brand, which is marketed in large part on a message that the product is healthy and nutritious (because it is, in fact, healthy and nutritious). *Id.* Moreover, the market for Greek yogurt is highly-competitive, and as a result brand loyalty and brand trust are important to consumers of this product. *Id.* ¶ 13. So, brand development and associated brand goodwill are immensely valuable to General Mills for its Yoplait Greek 100 products. Thus, false statements that Yoplait Greek 100 is somehow unhealthy or non-nutritious—let alone unsafe to consume—are highly damaging to the brand that General Mills has cultivated for Yoplait Greek 100, to the accompanying goodwill associated with that brand, and to associated sales of the product. *Id.* ¶ 12.

Moreover, as explained in the Expert Declaration of Professor Dominique Hanssens (“Hanssens Decl.”) the Chobani Attack Campaign is a “comparative”

advertisement that explicitly compares competing products in a certain product category (here, light Greek yogurt) and is much more likely to affect consumers and their intent to purchase. Hanssens Decl. ¶ 12. Academic literature bears out the impact of comparative advertising like that in the Chobani Attack Campaign. *Id.* The false nature of the Chobani Attack Campaign will thus likely harm the Yoplait brand, as it leaves consumers with the false impression that Yoplait contains harmful ingredients. *Id.* Thus, Chobani’s statement that Yoplait Greek 100 contains a “bug killer” ingredient in the various elements of its advertising campaign will likely have a negative impact on sales of the Yoplait 100 product itself. *Id.* As Dr. Hanssens further explains, these harmful impacts are likely to extend to other Yoplait products, due to “spillover effects” that cause consumers to attribute a negative connotation for one branded product to other products marketed under the same brand—here, Yoplait. *Id.* ¶¶ 18-19. Accordingly, there is a risk of irreparable harm not just to Yoplait Greek 100, but to the Yoplait brand at large. *Id.* ¶ 21; Kurtz Decl. ¶¶ 44-45.

### ARGUMENT

In determining whether to grant the requested temporary restraining order (“TRO”) and preliminary injunction, the Court weighs four factors:

- (1) General Mills’ probability of success on the merits;
- (2) the threat to General Mills of irreparable harm if the relief is not granted;
- (3) a comparison of that harm with the effect on Chobani if the relief is granted; and
- (4) the public interest.

*Select Comfort Corp. v. Tempur Sealy Int'l, Inc.*, 988 F. Supp. 2d 1047, 1052 (D. Minn. 2013) (citing *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)); *Vopak USA, Inc. v. Hallet Dock Co.*, 2002 WL 334415, at \*1 (D. Minn. Feb. 22, 2002) (requirements for obtaining TRO are the same as those for obtaining preliminary injunction). The Eighth Circuit has cautioned against a “wooden application” of the factors, stating that “at base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” *Dataphase*, 640 F.2d at 113; *see also Select Comfort Corp.*, 988 F. Supp. 2d at 1052. The balance of equities here favors General Mills, and Chobani should be enjoined from continuing its Attack Campaign until the merits can be determined. Each of the four factors weighs in favor of the requested TRO.

#### **I. GENERAL MILLS IS LIKELY TO PREVAIL ON THE MERITS**

General Mills is not required to prove a “greater than fifty percent” probability of success on the merits. *Heartland Academy Community Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003). General Mills need show only that it has a “fair chance of prevailing,” *id.*, and making that showing for only one of its two claims is a sufficient basis for the relief requested. *Life Time Fitness, Inc. v. DeCelles*, 854 F. Supp. 2d 690, 695-96 (D. Minn. 2012) (citing *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 742-43 (8th Cir. 2002)). As demonstrated below, General Mills is likely to prevail on at least two claims.

**A. General Mills Is Likely To Prevail on the Merits of its False Advertising Claim**

The purpose of the Lanham Act is “to protect persons engaged in commerce against false advertising and unfair competition.” *MSP Corp. v. Westech Instruments, Inc.*, 500 F. Supp. 2d 1198, 1215 (D. Minn. 2007). Thus, “[a]ny person who, . . . in connection with any goods . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of . . . another person’s goods . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.” 15 U.S.C. § 1125(a)(1)(B). Because the statements made in the Chobani Attack Campaign are false and misleading, General Mills immediately requires and is entitled to the protections of the Lanham Act.

To succeed on its claim for false advertising, General Mills must establish that (1) Chobani made a false or misleading statement of fact, (2) Chobani’s statement actually deceived or had a tendency to deceive a substantial segment of the audience, (3) the deception was material, (4) Chobani has caused the false statements to enter interstate commerce, and (5) General Mills has been injured or is likely to be injured because of Chobani’s false advertisements. *Buetow v. A.L.S. Enterprises, Inc.*, 650 F.3d 1178, 1182 (8th Cir. 2011); *United Industries Corp. v. Clorox Company*, 140 F.3d 1175, 1180 (8th Cir. 1998); *MSP Corp.*, 500 F. Supp. 2d at 1215 (D. Minn. 2007) (internal quotations and citations omitted); 15 U.S.C. § 1125(a)(1)(B). All five elements are met here.



### **1. The Chobani Advertisements Are False and Misleading**

An advertising “statement is false if it is either (1) literally false, or (2) literally true or ambiguous, but renders a false impression when viewed in context.” *MSP Corp.*, 500 F. Supp. at 1215. A statement is literally false if it is either (a) false on its face, or (b) false by necessary implication. *Id.* The court can issue an injunction without evidence that consumers were actually deceived. *Id.* at 1215-1217. The Chobani Attack Campaign contains both types of literally false statements. It includes the false statement Yoplait Greek 100 is unsafe because of potassium sorbate. It also contains statements that are false by necessary implication, such as its unambiguous assertion in its TV Ad and Print Ad that Yoplait Greek 100 is unhealthy, unsafe, and unfit for human consumption because it contains an ingredient that “is used to kills bugs.” Finally, the Chobani Attack Campaign is misleading insofar as it attempts to portray Yoplait Greek 100 as unsafe, or having harmful ingredients, both of which are untrue.

#### **a. The Chobani Advertisements Are Literally False**

The Chobani advertisements convey the explicit false message that Yoplait Greek 100 is unsafe for human consumption. *See* Kurtz Decl. ¶ 18. This is literally false. *See id.* ¶¶ 24, 31, 38; Murray Decl. ¶¶ 7, 9, 12-13. When in the Simply 100 TV Ad the actress tosses her cup of Yoplait Greek 100 cup into trash bin on the side the road accompanied by the narration that “this stuff is used to kill bugs!,” the message communicated is that the product is unsafe. But potassium sorbate is not, as Chobani claims, harmful. Like other producers of foods such as cheese, dips, wine, and dried fruit, among many other examples, General Mills uses potassium sorbate as a preservative in Yoplait Greek 100.

See Murray Decl. ¶ 12. Such usage is well-recognized and approved by government regulators. *Id.* ¶¶ 9-11. The FDA says that potassium sorbate is safe for consumption, *see generally* 21 C.F.R. § 582.3640; *see also* 21 C.F.R. §§ 133.118, 133.123, 133.124, 133.169, 133.173, 133.179, 133.187, 133.188, 150.141, 150.161, 166.110, & 182.90, and “few substances have had the kind of extensive, rigorous, long- term testing that sorbic acid and its salts have had. It has been found to be non-toxic even when taken in large quantities, and breaks down in the body into water and carbon dioxide...” <http://www.ams.usda.gov/sites/default/files/media/P%20Sor%20technical%20advisory%20panel%20report.pdf> (emphasis added); Murray Decl. ¶ 11, Ex. A; Hood Decl. ¶ 5. It is beyond dispute that potassium sorbate is safe for human consumption. Thus, the Simply 100 TV Ad is literally false.<sup>4</sup>

**b. The Chobani Advertisements Are Literally False by Necessary Implication**

Even if the court does not find that the above-described statement in the Chobani Attack Campaign is false on its face, the unmistakable and necessary implication of a consumer throwing a container of Yoplait Greek 100 in the garbage after hearing that it contains ingredients “used to kill bugs” is that Yoplait Greek 100 is unhealthy and unsafe for human consumption. *See* Kurtz Decl. ¶ 23; Schalk Decl. ¶ 4. That is a false implication.

“Under the doctrine of ‘falsity by necessary implication,’ a company’s claims about particular aspects of its product may necessarily imply more sweeping claims about

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<sup>4</sup> It is equally untrue and likewise literally false to assert that potassium sorbate “kills bugs,” because there is no evidence it is effective for that purpose. Murray Decl. ¶¶ 7, 13.

that product, and these implied claims may be ‘literally false’ within the meaning of the Lanham Act.” *Church & Dwight*, 840 F. Supp. 2d at 721. Thus, “[a]lthough an advertisement may be literally true, a Court may deem it false by necessary implication if it is susceptible to no more than one interpretation.” *Johnson & Johnson-Merck Consumer Pharm. Co. v. Proctor & Gamble Co.*, 285 F. Supp. 2d 389, 391 (S.D.N.Y. 2003); *see also MSP Corp.*, 500 F. Supp. 2d at 1216 (“A statement is literally false by implication if the intended audience would recognize the claim as readily as if it had been explicitly stated.”) (internal quotations and citation omitted).

For example, where Polar, a Coke competitor, produced an advertisement in which an animated polar bear “throw[s] the can of Coke into a trash bin labeled ‘Keep the Arctic Pure,’” the Court concluded that Polar had “implied that Coke is not pure.” *Polar Corp. v. Coca-Cola Co.*, 871 F. Supp. 1520, 1521 (D. Mass. 1994). “Because there is no evidence suggesting that Coke is not pure,” the Court concluded that the Polar advertisement misrepresented the Coke product and preliminarily enjoined Polar from disseminating the false advertisement. *Id.* Similarly, in *Church & Dwight Co., Inc. v. Clorox Co.*, the court considered the alleged falsity of implied advertising claims related to the efficacy of certain cat litter ingredients at eliminating odors. 840 F. Supp. 2d 717, 721-22 (S.D.N.Y. 2012). Because the defendant Clorox supported the implied claims by citing odor-reduction testing conducted in “unrealistic conditions” that would not be “relevant to a reasonable consumer”—jars rather than litter boxes—the Court concluded that Clorox’s claims were false by necessary implication and preliminarily enjoined Clorox’s false cat litter commercials. *Id.* at 721-23; *see also MSP Corp.*, 500 F. Supp. 2d

at 1216-17 (claims false by necessary implication where defendant cites to sources that do not support the implied claims related to impactor performance).

Here, when considered in the full context, as the court must, *see, e.g., Church & Dwight*, 840 F. Supp. 2d at 721 (citations and quotations omitted); *MSP Corp.*, 500 F. Supp. 2d at 1216-17 (considering the challenged advertisement “as a whole”), the necessary implication of each of the Chobani advertisements at issue is that Yoplait Greek 100 contains a dangerous ingredient that is unsafe for human consumption. Kurtz Decl. ¶¶ 23-24; Schalk Decl. ¶ 4. In the Simply 100 TV Ad, for example, the combination of the actress’s consideration of the Yoplait Greek 100 ingredients, with the voiceover warnings about potassium sorbate being “used to kill bugs” and her then tossing the yogurt cup into a representative trash heap, unambiguously conveys the message that Yoplait Greek 100 is unfit or unsafe for human consumption because it includes potassium sorbate. Kurtz Decl. ¶¶ 23-24.

Just as Polar falsely implied that Coke was not “pure” by having its bear toss a can of Coke into a trash can, so too does Chobani falsely imply that Yoplait Greek 100 is not fit for human consumption by depicting the product being thrown into the trash while the voiceover warns about “kill[ing] bugs.” And just as Clorox could not avoid liability by pointing to misleading but authoritative-sounding sources that did not address the concerns of reasonable consumers of cat litter, Chobani’s linking to an EPA webpage that does not address the many well-documented and government-approved uses of potassium sorbate as a preservative in many foods does nothing to diminish the false impressions created in the minds of consumers.

The other Chobani advertisements are also designed to and do convey the same unambiguous message that Yoplait Greek 100 is unhealthy or dangerous. The Simply 100 Print Ad, after noting that Yoplait Greek 100 contains potassium sorbate, warns “Potassium sorbate? Really? That stuff is used to kill bugs.” Kurtz Decl. ¶ 28. And the Simply 100 Website states that potassium sorbate is a pesticide product. *Id.* ¶ 35. Just like the audience for the TV Ad, the audience for these static advertisements will be left with the impression that Yoplait Greek 100 is unhealthy or unsafe “as readily as if it had been explicitly stated.” *MSP Corp.*, 500 F. Supp. 2d at 1216 (internal quotations and citations omitted). The necessary implication of the Simply 100 Website and the Print Ad is that Yoplait Greek 100 is unfit for human consumption because it includes potassium sorbate, and that implication is literally false. Kurtz Decl. ¶¶ 31, 38.

**c. The Chobani Advertisements Are Misleading**

General Mills has already shown that the Chobani Attack Campaign contains statements that are both literally false and false by implication; however, those statements and the advertisements in which they are contained are also misleading. Statements that are literally true or ambiguous but which nevertheless have a tendency to mislead or deceive the consumer are actionable under the Lanham Act. *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1140 (9th Cir.1997); *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228–29 (3d Cir.1990); *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir.1978).

Typically, where a commercial claim is not literally false but is misleading in context, a plaintiff ordinarily must put forward proof that the advertising actually

conveyed the implied message and thereby deceived recipients. *See William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir.1995) (per curiam); *Johnson & Johnson-Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297–98 (2d Cir.1992). And if a plaintiff does not prove the claim to be literally false, he must prove that it is deceptive or misleading, which depends on the message that is conveyed to consumers. *See United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1182–83 (8th Cir. 1998).

However, it is also true that “[a]t the preliminary injunction stage, . . . full-blown consumer surveys or market research are not an absolute prerequisite, and expert testimony or other evidence may at times be sufficient to obtain preliminary injunctive relief in cases involving implicitly false or misleading claims.” *Id.* (citing *Abbott Lab. v. Mead Johnson & Co.*, 971 F.2d 6, 15 (7th Cir.1992); 3 McCarthy § 27:55 at 27-81).

Here, General Mills has established that the Chobani Attack Campaign comprises statements that are literally false. However, Chobani’s statements are also, at minimum, misleading, which is an independent ground for the Court to issue the preliminary relief General Mills seeks by way of this Application. Chobani’s Simply 100 TV Ad, which contains statements that Yoplait Greek 100 contains an ingredient that “is used to kill bugs,” in conjunction with the imagery portrayed in that video—in which the actress discards the Yoplait-brand yogurt in disgust—leaves the viewer to draw the necessary, albeit incorrect conclusion that Yoplait Greek 100 is unsafe for human consumption. And as described above, these misleading statements have led and will continue to lead to irreparable harm General Mills’ goodwill. *See* Hanssens Decl. ¶¶ 12, 21; Kurtz Decl.

¶¶ 44-45. Moreover, General Mills has—even in the short time the Attack Campaign has been on the air—received evidence that consumers are tricked by Chobani’s falsehoods into believing that the potassium sorbate in Yoplait Greek 100 is a “rat poison” and a “very dangerous thing.” Schalk Decl. ¶¶ 3-4, Ex. A.<sup>5</sup>

**2. The Statements In The Chobani Attack Campaign Will Deceive Consumers**

Because Chobani’s statements made in each of the advertisements at issue are literally false, General Mills is entitled to a presumption that they will deceive consumers. *See, e.g., Buetow* 650 F.3d at 1183; *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1335 (8th Cir. 1997); *MSP Corp.*, 500 F. Supp. 2d at 1215, 1217; *Solvay Pharm., Inc. v. Global Pharm.*, 419 F. Supp. 2d 1133, 1144 (D. Minn. 2006). Moreover, General Mills has introduced evidence, including contacts from an actual consumer and expert testimony, that consumers of Yoplait Greek 100 *are already* deceived by the Chobani Attack Campaign. *See* Hanssens Decl. ¶ 12; Kurtz Decl. ¶¶ 44-45; Schalk Decl. ¶¶ 3-4.

**3. The Chobani Advertisements Will Be Material To Consumer Purchasing Decisions**

Chobani designed the false advertisements in the Chobani Attack Campaign to influence yogurt consumer purchasing decisions, and the false advertisements are highly likely to succeed in (deceptively) doing just that. To succeed on a claim of false

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<sup>5</sup> Finally, because General Mills has provided the Court with expert testimony and consumer contact evidence tending to show consumer confusion and harm to General Mills’ goodwill, it is unnecessary at this stage to present survey evidence, and lack of survey evidence does not preclude the temporary relief General Mills seeks. *See United Indus. Corp.*, 140 F.3d at 1183.

advertising, the plaintiff must establish that “the defendant’s deception is likely to influence the purchasing decision,” (*Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1250 (11th Cir. 2002)), and a plaintiff may establish this materiality requirement by proving that “the defendants misrepresented an inherent quality or characteristic of the product.” *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir.1997) (internal quotations omitted). General Mills has done so.

With respect to materiality, because the statements of fact at issue are literally false, General Mills need not introduce evidence on the issue of the impact the statements had on consumers. *See Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 62 (2d Cir.1992); *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir.1996). In such a circumstance, there is a presumption that the statements actually misled consumers. *See Johnson & Johnson, Inc. v. GAC Int’l, Inc.*, 862 F.2d 975, 977 (2d Cir.1988); *U-Haul Inter’l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1040 (9th Cir.1986).

If the Court determines that the statements at issue in the Chobani Attack Campaign are either ambiguous or true but misleading, General Mills has met that standard as well by providing evidence of deception. *See Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000). Because General Mills seeks injunctive relief by way of this Application, it must only show that Chobani’s representations “have a tendency to deceive consumers.” *Id.* (citing *Balance Dynamics*, 204 F.3d 683 at 690); *see also Blue Dane Simmental Corp. v. American Simmental Assoc.*, 178 F.3d 1035, 1042–43 (8th Cir.1999); *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 753 (8th Cir.1980). Although this standard requires less proof than actual deception,



General Mills must still produce some evidence that the advertisement tends to deceive consumers. *See Coca-Cola Co. v. Tropicana Prod., Inc.*, 690 F.2d 312, 317 (2d Cir.1982) (noting that when seeking a preliminary injunction barring an advertisement that is implicitly false, “its tendency to violate the Lanham Act by misleading, confusing or deceiving should be tested by public reaction”).

Here, General Mills has tendered evidence of the most compelling variety in false advertising cases to prove materiality: Real-time consumer contact that evidences Chobani’s Attack Campaign has falsely communicated that Yoplait Greek 100 contains “rat poison” that makes the product “not safe.” Schalk Decl. ¶ 4. Courts frequently recognize that independent evidence of consumer deception in the marketplace, like that submitted here, is among the most persuasive form of evidence possible in false advertising cases, and tilts the scales overwhelmingly in favor of an immediate injunction.

For example, in *Bebe Stores, Inc. v. May Dep’t Stores Int’l*, 313 F.3d 1056, 1057 (8th Cir. 2002), the Eighth Circuit affirmed the issuance of a preliminary injunction, noting that “the live testimony of [its] employees and of a confused [] shopper were compelling enough to demonstrate the likelihood of actual confusion.” Other authority is in accord. *See Surdyk’s Liquor, Inc. v. MGM Liquor Stores, Inc.*, 83 F. Supp. 2d 1016, 1027 (D. Minn. 2000) (issuing preliminary injunction and finding that by providing testimony of two consumers “supports a finding that a significant portion of the buying public would have been materially misled by” defendant’s false advertising); *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 829 F. Supp. 2d 802, 814 (D. Minn. 2011)

(finding that testimony of two consumers and an expert constituted “sufficient evidence of materiality.”).

General Mills has presented further strong and incontrovertible evidence that safety and quality are material to consumer decision-making, and that Chobani’s disparaging and untrue advertisements will impact those decisions. Kurtz Decl. ¶¶ 11-12; Hanssens Decl. ¶¶ 12, 21. Chobani’s Attack Campaign will feature advertising for a twelve-week period on national networks like NBC, and in print advertising in newspapers like the New York Times and People magazine. Hanssens Decl. ¶ 10. Additionally, this campaign was launched at the beginning of the “diet season” when consumers are more focused on weight loss products. *Id.* According to Chobani, one third of all light yogurt is sold in the first quarter of the year. *Id.* Accordingly, materiality is satisfied.

#### **4. Chobani Put the False Advertisements Into Interstate Commerce**

As referenced in the Complaint at ¶¶ 4, 25-43, and explained above, Chobani has created false advertisements and distributed them widely. Kurtz Decl. ¶¶ 15-18. Since its rollout on January 6, Chobani has deployed its campaign on broadcast television, in national print media, on the Internet, and through multiple social media channels. Kurtz Decl. ¶¶ 41-43, Ex. E. The Chobani Simply 100 TV Ad is already being broadcast on NBC nationwide in primetime, and General Mills is informed that Chobani intends to air the advertisement on other networks including the Cooking Channel, the Food Network, HLN, Lifetime, TLC, the ID Network, Bravo, E!, and the USA Network. *See* Complaint

¶ 32; Kurtz Decl. ¶ 42. Similarly the Simply 100 Print Ad is set to appear in publications with nationwide circulation, including People magazine. Complaint ¶ 38; Kurtz Decl. ¶ 43. The Simply 100 Print Ad has already appeared in the Sunday, January, 10, 2016, edition of the New York Times (which has national distribution) and in the Sunday, January, 10, 2016, edition of the Minneapolis Star-Tribune. *Id.* And finally, the Simply 100 Website is available nationwide, as are the various social media and digital channels (YouTube, Instagram and Twitter) that deploy aspects of the Chobani Attack Campaign. Kurtz Decl. ¶ 40. Chobani has disseminated the false advertisements in interstate commerce.

**5. General Mills Is Suffering and Will Continue to Suffer Injury Because of the False Chobani Advertisements**

General Mills has been injured and will continue to suffer injury because the false Chobani advertisements are damaging the goodwill associated with and reputation of General Mills' valuable and well-established Yoplait brand. Yoplait is a \$1 billion-per-year brand with significant investment made in cultivating and establishing consumer goodwill; unwarranted and untruthful attacks will erode consumer trust and damage that goodwill. Kurtz Decl. ¶¶ 6, 44-45; Hanssens Decl. ¶¶ 12, 21. That erosion has already started in the very short time the Chobani Attack Campaign has run, with concern that Yoplait Greek 100 contains "rat poison." Schalk Decl. ¶¶ 3-4, Ex. A. Moreover, the negative impact caused by Chobani's attacks will likely extend beyond Yoplait Greek 100 to other Yoplait-branded products. The scientific marketing literature clearly establishes that negative associations with one product can spill over to the brand as a

whole, hence consumers may view not just Yoplait Greek 100 but other Yoplait products as containing an insecticide because of the brand association. Hanssens Decl. ¶¶ 18-20. Such injuries to intangible assets cannot be remedied at law and require immediate injunctive relief. *See, e.g., United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002) (*citing General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 625 (8th Cir. 1987)).

**B. General Mills Is Likely To Prevail on Its Claim Under The Minnesota Deceptive Trade Practices Act (“MDTPA”)**

Beyond the Lanham Act, Chobani is by the conduct described above also engaged in a deceptive trade practice under the Minnesota Deceptive Trade Practices Act. That is, Chobani is, “in the course of [Chobani’s] business, vocation or occupation,” “disparag[ing] the goods . . . of [General Mills] by false or misleading representation of fact.” Minn. Stat. 325D.44, subd. 1(8).

Under the MDTPA, injunctive relief for General Mills against Chobani’s disparagement of General Mills’ yogurt requires neither proof of actual confusion or misunderstanding (Minn. Stat. 325D.44, subd. 2) nor proof of monetary damage, loss of profits or intent to deceive (Minn. Stat. 325D.45, subd. 1). *See also McClure v. Am. Family Mut. Ins. Co.*, 29 F. Supp. 2d 1046, 1065 (D. Minn. 1998), *aff’d*, 223 F.3d 845 (8th Cir. 2000); *Claybourne v. Imsland*, 414 N.W.2d 449, 451 (Minn. Ct. App. 1987).

General Mills is therefore likely to prevail on its MDTPA claim for injunctive relief against Chobani’s deceptive trade practice. *See* Minn. Stat. 325D.45, subd. 1. *See, e.g., Minnesota Mining & Mfg. Co. v. Rauh Rubber, Inc.*, 943 F. Supp. 1117, 1132–33

(D. Minn. 1996) (granting preliminary injunction); *Mid-List Press v. Nora*, 275 F. Supp. 2d 997, 1003 (D. Minn. 2003) *aff'd* 374 F.3d 690 (8<sup>th</sup> Cir. 2004) (granting injunctive relief under the MDTPA); *Gardner v. First Am. Title Ins. Co.*, 296 F. Supp. 2d 1011, 1020 (D. Minn. 2003) (MDTPA “provides relief from future damage, not past damage”) (internal quotation marks omitted).

## **II. CHOBANI’S FALSE ADVERTISEMENTS WILL IRREPARABLY HARM GENERAL MILLS IF INJUNCTIVE RELIEF IS NOT GRANTED**

There is in the Eighth Circuit well-established precedent that, on a motion for temporary or preliminary injunctive relief, irreparable harm is presumed once the moving party establishes a likelihood that comparative advertisements in question are false. *Medtox Scientific, Inc. v. Tamarac Med., Inc.*, 2007 WL 37793, at \*4 (D. Minn. Jan. 4, 2007) (citing *United Indus.*, 140 F.3d at 1183). *See also Buetow*, 650 F.3d at 1183 n.3. Because General Mills has demonstrated a likelihood of success on the merits, General Mills is entitled to a presumption of irreparable harm. And that presumption is particularly strong where, as here, a comparative advertisement is literally false. *See, e.g., McCarthy on Trademarks and Unfair Competition* § 27:30; *Church & Dwight Co., Inc. v. Clorox Co.*, 840 F. Supp. 2d 717, 723 (S.D.N.Y. 2012); *Johnson & Johnson-Merck*, 285 F. Supp. 2d 389, 393 (S.D.N.Y. 2003).

While the Eighth Circuit appears not yet to have considered the question, some, but not all, other circuits have reasoned from Supreme Court precedent arising under the Patent Act that no presumption of irreparable harm should arise in Lanham Act cases. *Compare Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 203-06 (3d

Cir. 2014) (no presumption after *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)) with *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 627 (5th Cir.) (applying presumption after *eBay*), *cert. denied* 134 S. Ct. 88 (2013). This Court, however, need not resolve that question here because, even if no presumption comes into play, the record firmly establishes that General Mills will suffer irreparable harm in the absence of the injunctive relief it seeks.

To establish irreparable harm General Mills “need only provide a reasonable basis for the belief that it is likely to be damaged as a result of the false advertising.” *W.L. Gore & Assocs., Inc. v. Totes Inc.*, 788 F. Supp. 800, 810 (D. Del. 1992) (quotations and brackets omitted). The likely harm to General Mills from Chobani’s false and misleading advertisements is self-evident. The advertisements compare the Yoplait and Chobani products and give consumers the false impression that if they consume Yoplait Greek 100, they will consume dangerous pesticides that are unhealthy and unsafe for human consumption—but that consuming Chobani Simply 100, in contrast, is safe and healthy. Those comparative advertisements harm General Mills in at least two ways.

First, the misleading comparison to a specific competing product “necessarily diminishes that product’s value in the minds of the consumer.” *McNeilab, Inc. v. American Home Products Corp.*, 848 F.2d 34, 38 (2d Cir. 1988); *Select Comfort Corp. v. Tempur Sealy Int’l, Inc.*, 988 F. Supp. 2d 1047, 1054 (D. Minn. 2013) (“misleading comparisons can diminish a product’s value in the minds of a consumer”). Chobani’s advertisements are therefore likely to damage the goodwill and reputation that General Mills has spent many years and millions of dollars building and protecting in the Yoplait

Greek 100 brand. Hanssens Decl. ¶¶ 12, 21;<sup>6</sup> Kurtz Decl. ¶ 5. And that damage to goodwill and reputation is unlikely to be limited to Yoplait Greek 100; it is likely to extend to other Yoplait products as well. *Id.* Such “loss of goodwill and reputation” constitutes irreparable harm. *Select Comfort Corp.*, 988 F. Supp. 2d at 1054; *see also Med. Shoppe Int’l v. SBS Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) (loss of intangible assets like goodwill and reputation can constitute irreparable injury); *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002) (same).

Second, Chobani’s false and misleading statements and comparisons are likely to deter consumers from purchasing Yoplait Greek 100, resulting in lost consumer (and associated sales and revenues). Hanssens Decl. ¶ 12(c). That deterrent effect has already begun to take form, as Chobani’s Attack Campaign leads to consumers misbelieving that potassium sorbate is the same as “rat poison.” Schalk Decl. ¶ 4, Ex. A. Such losses constitute irreparable harm. *Overholt Crop Inc. Serv. v. Travis*, 941 F.2d 1361, 1371 (8th Cir. 1991) (affirming injunction to protect against “the loss of any additional customers”).

Chobani’s intent to widely run the advertisements emphasizes the immediate need for a restraining order. In a January 6, 2016 online article published by AdvertisingAge, Chobani’s Chief Marketing Officer is quoted as saying, “Chobani will invest more in

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<sup>6</sup> Expert testimony is an appropriate means of establishing irreparable harm. *Purdue Pharma LP v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368 (Fed. Cir. 2001). Surveys are not required at the preliminary injunction stage. *Bebe Stores, Inc. v. May Dept. Stores*, 313 F.3d 1056, 1057 (8th Cir. 2002) (affirming injunction even though plaintiff “did not introduce survey evidence”); *Surdyk’s Liquor, Inc. v. MGM Liquor Stores, Inc.*, 83 F. Supp. 2d 1016, 1027-28 (D. Minn. 2000) (“[a]t the preliminary injunction stage, full-blown consumer surveys or market research are not an absolute prerequisite, and other evidence may at times be sufficient to obtain preliminary injunctive relief”) (quotations and punctuation omitted).

Simply 100 than it ever has.” The article explains that a twelve-week marketing push by Chobani will commence immediately and will include “everything from TV commercials and print advertising to coupons and a promotional push at Life Time Fitness gyms.” As explained in Factual Background Section B(4), *infra*, the campaign has already rolled out in national print and television outlets, and is accessible through multiple channels on the Internet and in social media. This factor likewise favors granting injunctive relief.

### **III. THE HARM TO GENERAL MILLS OUTWEIGHS ANY EFFECT THAT INJUNCTIVE RELIEF WOULD HAVE ON CHOBANI**

The proposed restraining order concurrently filed by General Mills is narrow and does not require Chobani to stop selling its own product or to change its product. Nor does it stop Chobani from competing against Yoplait Greek 100. It merely enjoins Chobani from competing *unfairly* through advertisements that contain false statements or that create a false impression about Yoplait Greek 100. Chobani has no legitimate right to disparage Yoplait Greek 100, purvey falsities, or deceive consumers.

Complying with the requested order would not harm Chobani at all and would require only modest effort. The Simply 100 Print Ad is essentially a subset of the Simply 100 Website and could therefore similarly be brought into compliance with relative ease. And Chobani already has a shorter version of the Simply 100 TV Ad that omits the false and misleading portions, and therefore complying with the requested order “will not harm [Chobani] in any way.” *Select Comfort Corp. v. Tempur Sealy Int’l, Inc.*, 988 F. Supp. 2d 1047, 1055 (D. Minn. 2013). There is no harm in requiring Chobani to comply with the law and advertise truthfully.



To the extent Chobani would be burdened at all by the requested order, such burden is significantly outweighed by the additional injury that General Mills will suffer if the false and misleading advertisements are permitted to continue running. Further serious injury to General Mills can be limited without significant burden to Chobani, and this factor therefore weighs in favor of granting the requested injunctive relief. *Id.* (granting relief where compliance with “narrow restraining order” would “not require unreasonable efforts”); *Medtox Scientific, Inc. v. Tamarac Med., Inc.*, 2007 WL 37793, at \*4 (D. Minn. 2007) (granting injunction where it required defendant “to make relatively small changes in its advertising,” while, on the other hand, defendant’s current advertisements “have caused [plaintiff] to lose customers and good will”).

#### **IV. THE PUBLIC HAS A STRONG INTEREST IN RESTRAINING CHOBANI’S FALSE ADVERTISEMENTS**

“The consuming public must be able to accurately assess the quality of various products in accordance with their preferences. False or misleading advertising deprives the public of that information and may lead them to make purchases they might not otherwise make if they were supplied with truthful information.” *Medtox*, 2007 WL 37793, at \*4. Accordingly, “[i]t is in the public’s interest to enjoin any false advertising or comparisons.” *Select Comfort Corp.*, 988 F. Supp. 2d at 1055; *Wildlife Research Ctr. Inc. v. Robinson Outdoors, Inc.*, 409 F. Supp. 2d 1131, 1137 (D. Minn. 2005) (“The public interest favors discouraging false advertising.”). Here, the public interest in truthful advertising concerning the parties’ respective yogurts strongly favors an

immediate restraining order against Chobani's false and misleading advertisements. The Court should not allow Chobani to continue to deceive consumers.

#### **V. NO SECURITY SHOULD BE REQUIRED**

“The requirement of a security bond . . . is left to the sound discretion of the district judge” and “may be excused notwithstanding the literal language of Rule 65(c).” *Northwestern Bell Tel. Co. v. Bedco of Minn., Inc.*, 501 F. Supp. 299, 304 (D. Minn. 1980) (quotations omitted); *see also Northshor Experience, Inc. v. City of Duluth*, 442 F. Supp. 2d 713, 723 (D. Minn. 2006) (exercising discretion to waive bond requirement); *E.W. Blanch Holdings, Inc. v. Knudson*, 2001 WL 1618165 (D. Minn. May 10, 2011) (same). Where no substantial harm will accrue to the nonmoving party under the injunction, a bond will not be required. *See Northwestern Bell*, 501 F. Supp. at 304. Similarly, where the party against whom injunctive relief is sought cannot “quantify any dollar amount of harm that it may face from a wrongfully issued injunction,” but instead relies upon generalized harms it may suffer, waiver of the bond requirement is appropriate. *See Northshor Experience, Inc.*, 442 F. Supp. 2d at 723; *see also Tau, Inc. v. Alpha Omicron Pi Fraternity, Inc.*, 2013 WL 5340904, at \*16 (D. Minn. Sept. 23, 2013) (“AOII has only discussed general harms . . . . In the absence of any evidence establishing an approximation of the monetary harms AOII would suffer due to a wrongly issued injunction, the Court will exercise its discretion to waive the security requirement in this case.”).

The same reasoning applies here. General Mills' case for preliminary injunctive relief is strong, and the relief will not harm Chobani, who is free to continue competing

against General Mills. It merely must do so without ads that communicate to consumers the falsehood that Yoplait Greek 100 is not fit for consumption. In the absence of any approximation of monetary damages Chobani would suffer, no bond should be required. *See St. Jude Med. S.C., Inc. v. Saxon*, 2013 WL 6481440, at \*9 (D. Minn. Dec. 10, 2013); *Northwestern Bell*, 501 F. Supp at 303 (“since under the terms of this Order defendant is free to solicit advertisers for its yellow pages directory *without* using photocopies or copies of advertisements appearing in the Northwestern Bell directory, the hardship placed on the defendant would appear to be minimal”).

#### **RELIEF REQUESTED**

For the reasons set forth herein, General Mills respectfully requests that the Court immediately enjoin further publication of Chobani’s false and misleading advertisements by entering a temporary restraining order in the form concurrently filed with this motion.

DATED: January 12, 2016

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