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Deceptive Advertising or Evolving Science? How "Barefoot Running" Demonstrates Novel Strategies for Defending False Advertising Lawsuits Under State Deceptive Trade Practices Acts

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Comments

DECEPTIVE ADVERTISING OR EVOLVING SCIENCE? HOW "BAREFOOT RUNNING" DEMONSTRATES NOVEL STRATEGIES FOR DEFENDING FALSE ADVERTISING LAWSUITS UNDER STATE DECEPTIVE TRADE PRACTICES ACTS

"*In a sufficiently novel area of research, propositions of empirical 'fact' advanced in the literature may be highly controversial and subject to rigorous debate by qualified experts. Needless to say, courts are ill-equipped to undertake to referee such controversies.*"[1]

I. Introduction

In 2006, Vibram, Inc. introduced "FiveFingers" to the United States market.[2] In 2009, Vibram hit the jackpot, as FiveFingers became the preferred accessory for one of the most popular fitness trends to emerge in recent years: barefoot running.[3] Three years later, however, Vibram's momentum was interrupted by a series of consumer-initiated false advertising lawsuits.[4]

FiveFingers, a style of "ultra-light" or "minimalist" shoes that are frequently analogized to a glove, were originally conceived as "a water shoe designed for performance water sports."[5] Nevertheless,

1. ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 497 (2d Cir. 2013).

2. *See* Ira Boudway, *FiveFingers*, Bloomberg Bus. (Aug. 11, 2011), http://www.businessweek.com/magazine/fivefingers-08112011.html (noting that "Vibram officially launched the FiveFingers at the 2006 Boston Marathon"). Vibram, Inc. is an Italian-based company that since 1937 has specialized in manufacturing rubber outsoles for "high-end hiking boots." *See* Jennifer Alsever, *Barefoot Shoes Try to Outrace the Black Market*, CNN Money (Aug. 13, 2010, 5:25 AM), http://money.cnn.com/2010/08/13/smallbusiness/vibram_fivefingers/# (discussing Vibram's background); *History*, Vibram, http://vibram.com/history (last visited May 20, 2015) (providing company timeline).

3. *See* Boudway, *supra* note 2 (reporting that revenue generated by FiveFingers skyrocketed to $11 million in 2009 as result of emerging barefoot running trend).

4. *See* Lisa Sokolowski, *"Barefoot" Running Shoes May Pose Problems for Manufacturers*, Weil Product Liability Monitor (Oct. 30, 2012), http://product-liability.weil.com/consumer-fraud-false-advertising/barefoot-running-shoes-may-pose-problems-for-manufacturers/ (discussing significance of lawsuits filed against Vibram in light of "skyrocketing growth of barefoot running").

5. *See* Bob Parks, *Is Less More?*, Runner's World, Nov. 2010, at 76, *available at* http://www.runnersworld.com/running-shoe-reviews/less-more (discussing "minimalist" shoes, and describing FiveFingers as "ultralight" and "foot gloves"); Jen-

these peculiar looking shoes created an immediate buzz within a discrete community of runners who practiced "barefoot running."[6] Soon thereafter, both FiveFingers and barefoot running garnered mainstream interest after a barefoot running enthusiast ran the 2006 Boston Marathon in FiveFingers.[7] As a result of the ensuing publicity, FiveFingers quickly became synonymous with the practice of barefoot running.[8]

In 2009, barefoot running was popularized by Christopher McDougal's New York Times Best Seller, *Born to Run: A Hidden Tribe, Superathletes, and the Greatest Race the World Has Never Seen* ("*Born to*

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nifer Carofano, *High Five*, FOOTWEAR NEWS: FN, Oct. 10 2005, 25, 25 (reporting observations in 2005 by Tony Post, Vibram USA President, that FiveFingers were "designed to simulate being barefoot," and were originally intended "to be worn for water sports, such as surfing, sailing and kayaking"). By design, FiveFingers "feature[ ] a proprietary sole that is designed around the shape of the foot, from heel to each individual toe." *See* Carofano, *supra*. Conceptually, the shoe was conceived from a proposal for a "lightweight shoe . . . that would mimic the experience of going barefoot while protecting the wearer from dirt and abrasions." *See id.* Today, FiveFingers are encompassed within the broad category of "minimalist" style athletic shoes, which are generally "lightweight, have little padding on the sole, have a minimal heel rise[,] . . . are highly flexible," and "[u]nlike a standard running shoe, a minimalist shoe offers little or no support." *See* Michael Brent, *What is Minimalist Running?*, LIVESTRONG.COM (Mar. 13, 2014), http://www.livestrong.com/article/549692-what-is-minimalist-running/ (last visited May 20, 2015) (describing "minimalist" shoes). *But see* Boudway, *supra* note 2 ("At the moment, no one can agree on what makes a shoe barefoot or minimal in the first place."). For further background on FiveFingers and "minimalist" style shoes, see generally Scott Douglas, *Minimalism in The Long Run*, RUNNING TIMES, Apr. 2013, *available at* http://www.runnersworld.com/barefoot-running-minimalism/minimalism-long-run?page=single.

6. *See* Boudway, *supra* note 2 (discussing FiveFingers' initial appeal with barefoot running enthusiasts).

7. *See id.* (describing how well-known barefoot running proponent ran 2006 Boston Marathon in FiveFingers); Anna Baskin, *Vibram USA*, ADVERTISING AGE, Nov. 15 2010, 16, 16 (explaining that after FiveFingers debuted at Boston Marathon, "[n]ews of the shoes began to spread quickly online; and by June 2006, Vibram was sold out of the product"); Tara Parker-Pope, *Is Barefoot Better*, WALL ST. J. (June 6, 2006), http://online.wsj.com/articles/SB114955290339472060 (reporting in 2006 on popular running and fitness programs that endorsed running in minimalist-style shoes).

8. To illustrate, in 2006 and 2007, a number of prominent media outlets published articles highlighting proponents of barefoot running, and discussed FiveFingers in connection with the practice. *See, e.g.*, Joseph Pereira, *Baring Their Soles: Pain Doesn't Defeat Unshod Marathoners*, WALL ST. J. (Dec. 27, 2006), http://online.wsj.com/articles/SB116718675522360186 (describing marathoners who run barefoot and in shoes, such as FiveFingers, that "mimic the barefoot experience"); Parker-Pope, *supra* note 7 (discussing doctors, trainers, and coaches who advocated barefoot running, and describing minimalist shoes such as FiveFingers). In addition, in 2007, FiveFingers were recognized by *Time* magazine as "one of the year's best health inventions." Alsever, *supra* note 2.

Run"),[9] and contemporaneously, it emerged as one of the hottest fitness trends in recent years.[10] The barefoot running craze was bolstered in 2010, when a Harvard professor of evolutionary biology published a scientific study touting the existence of unique health benefits associated with barefoot running.[11] As a result, demand for FiveFingers skyrocketed as Vibram's annual revenues jumped to nearly $50 million in 2010—an increase from just $430,000 in 2006.[12]

By late 2010, as prominent athletic footwear manufacturers began to develop competing lines of minimalist-style shoes, Vibram launched its first national marketing campaign to promote FiveFingers.[13] Over the next few years, Vibram's marketing efforts focused on three themes: (1) promoting the practice of barefoot running; (2) touting FiveFingers as a barefoot running accessory; and (3) distinguishing Vibram as "a leader in the barefoot running movement," with a "strong commitment to research and innovation."[14] In that regard, Vibram widely promoted the unique health benefits ascribed to barefoot running.[15]

In light of its widespread popularity, certain groups within the scientific community began to question the existence of barefoot

9. CHRISTOPHER MCDOUGALL, BORN TO RUN: A HIDDEN TRIBE, SUPERATHLETES, AND THE GREATEST RACE THE WORLD HAS NEVER SEEN (2011).

10. *See* Boudway, *supra* note 2 (noting that *Born to Run* "widely regarded as catalyst for barefoot boom").

11. Daniel E. Lieberman et al., *Foot Strike Patterns and Collision Forces in Habitual Barefoot Versus Shod Runners*, 463 NATURE 531 (2010); *see* Ashley Fantz, *Running Debate: Bare or In Shoes?*, CNN (Feb. 12, 2010, 11:28 AM), http://www.cnn.com/2010/HEALTH/02/12/barefoot.running/ (stating in 2010 that Lieberman's study was "stirring the most buzz"); Richard A. Lovett, *Daniel Lieberman, 10 Years After "Born to Run"*, RUNNING TIMES (Aug. 29, 2014), http://www.runnersworld.com/barefoot-running/daniel-lieberman-10-years-after-born-to-run (contending that Lieberman "helped inspire the barefoot running movement"). For a discussion of Lieberman's 2010 study, see *infra* notes 53-60 and accompanying text.

12. *See* Alsever, *supra* note 2 (reporting that FiveFingers' sales generated revenue of $430,000 in 2006, and $11 million in 2009); Brian Metzler, *The 8 Essentials of Barefoot Running*, OUTSIDE (Jan. 19, 2011), http://www.outsideonline.com/1871911/8-essentials-barefoot-running (reporting that FiveFingers' sales generated revenue of $50 million in 2010).

13. *See* Baskin, *supra* note 7 (reporting that in November 2010, Vibram would launch its first traditional advertising campaign to promote FiveFingers). By 2010, Nike was already selling a "lightweight shoe called Nike Free . . . . [while] as many as six more competitors, including Merrell and New Balance," were preparing to "enter the market with so-called 'barefoot' shoes.'" *See* Alsever, *supra* note 2 (discussing how athletic footwear manufacturers began introducing competing lines of minimalist shoes in 2010).

14. *See infra* notes 70-84 and accompanying text (discussing FiveFingers marketing campaign).

15. *See infra* notes 80-84 and accompanying text (discussing how Vibram promoted health benefits ascribed to barefoot running).

running's purported health benefits.[16] In that connection, in 2012, several consumers brought false advertising lawsuits against Vibram under state deceptive trade practices acts ("DTPAs").[17] These putative class actions broadly alleged that Vibram's FiveFingers marketing campaign touted the existence of health benefits associated with barefoot running that did not exist or were otherwise unsubstantiated by scientific evidence.[18] Vibram moved to dismiss the claims against it, contending, *inter alia*, that the factual allegations in support of these claims did not establish instances of false or unsubstantiated advertising, but merely suggested "that there is . . . a dispute in the scientific community regarding the potential health benefits" associated with barefoot running.[19] In *Bezdek v. Vibram USA, Inc.*[20] and *De Falco v. Vibram USA, Inc.*[21] (collectively, "Vibram Lawsuits"), two federal district courts rejected that argument and respectively denied Vibram's motions to dismiss.[22] Subsequently,

16. *See infra* notes 65-68 and accompanying text (discussing criticisms of barefoot running in scientific literature).

17. *See* sources cited *infra* note 18 (complaints filed against Vibram); *infra* notes 85-106 and accompanying text (discussing allegations against Vibram); *see also* Sokolowski, *supra* note 4 ("Despite the skyrocketing growth of barefoot running, all new fads have their detractors, and several lawsuits have already been filed against companies that produce and market these shoes.").

18. *See* Amended Complaint paras. 68, 73, Bezdek v. Vibram USA, Inc., No. 12-10513, 2012 WL 2398011 (D. Mass. June 25, 2012) [hereinafter Amended Complaint, *Bezdek*] (alleging that Vibram made false or deceptive advertising statements regarding health benefits associated with FiveFingers and barefoot running); Complaint paras. 83-84, Safavi v. Vibram USA, Inc., No. 12-5900 (C.D. Cal. filed July 9, 2012) (same); Complaint paras. 78-79, De Falco v. Vibram USA, Inc., No. 12 C 7238 (N.D. Ill. Sept. 11, 2012) [hereinafter Complaint, *De Falco*] (same).

19. De Falco v. Vibram USA, Inc., No. 12 C 7238, 2013 WL 1122825, at *7 (N.D. Ill. Mar. 18, 2013); *see* Bezdek v. Vibram USA, Inc., No. 12-10513, 2013 WL 639145, at *9 (D. Mass. Feb. 20, 2013) ("Defendants also argue that the allegations reflect merely a difference in opinion in the scientific community as to barefoot running, and that Vibram has scientific support for its advertising."); Defendants Vibram USA Inc. and Vibram FiveFingers LLC's Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Support of Motions to Dismiss at 9, Safavi v. Vibram USA, Inc., No. 2:12-cv-05900 (C.D. Cal. filed Aug. 30, 2012) [hereinafter Defendant's Motion to Dismiss, *Safavi*] ("Taken as a whole, Plaintiff's accusations here are no more than his side of a difference of opinion about the benefits of barefoot running . . . . In fact, Plaintiff does not dispute that there are studies touting the benefits of barefoot running, and his Complaint even acknowledges those studies.").

20. No. 12-10513, 2013 WL 639145 (D. Mass Feb. 20, 2013).

21. No. 12 C 7238, 2013 WL 1122825 (N.D. Ill. Mar. 18, 2013).

22. *See Bezdek*, 2013 WL 639145, at *10 (denying Vibram's motion to dismiss); *De Falco*, 2013 WL 1122825, at *7 (denying Vibram's motion to dismiss). In Safavi v. Vibram USA, Inc., No. 12-5900 (C.D. Cal. filed July 9, 2012), Vibram also moved to dismiss the claims against it. *See* Defendant's Motion to Dismiss, *Safavi*, *supra* note 19. However, during the pendency of Vibram's motion, the parties stipulated to stay the *Safavi* action pending a ruling on class certification in the *Bezdek* action, and subsequently stipulated to dismiss the lawsuit after the *Safavi* plaintiff was in-

the company agreed to settle the lawsuits against it for $3.75 million, citing the "burden and expense of continued litigation."[23]

Taken together, the Vibram Lawsuits and the surrounding circumstances raise a number of novel issues that pose unique challenges for companies such as Vibram. First, it is unclear how evolving scientific research informs a manufacturer's advertising responsibilities in connection with innovative products or industries.[24] Moreover, the law is ambiguous regarding the extent to which a defendant manufacturer may be held liable for affirmative product claims when the truthfulness of such claims is a matter of scientific debate.[25] Second, class action lawsuits under state DTPAs are increasingly prevalent, and commentators predict that producers of consumer goods will continue to be targeted by such lawsuits.[26] In that regard, due to the nominal requirements to bring

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corporated into Vibram's proposed settlement agreement. *See* Settlement Agreement at 1, Bezdek v. Vibram USA, Inc., No. 12-10513 (D. Mass. filed Apr. 30, 2014) (detailing proposed settlement agreement between Vibram and *Bezdek*, *De Falco*, and *Safavi* plaintiffs). Accordingly, for purposes of this Comment's analysis, general references to the "Vibram Lawsuits" will refer only to the *Bezdek* and *De Falco* actions.

23. *Vibram to Pay $3.75 Million to Settle Class Action Over 'Toed' Running Shoes*, 25 NO. 5 WESTLAW J. PRODUCT LIABILITY 2, June 10, 2014, at *1, *available at* 2014 WL 2586891 (recounting terms and conditions of proposed settlement agreement); *see* Second Amended Settlement Agreement, Bezdek v. Vibram USA, Inc., No. 12-10513 (D. Mass. May 12, 2014); *see also* Bezdek v. Vibram USA, Inc., —- F. Supp. 3d. —-, Nos. 12-10513, 13-10764, 2015 WL 223786 (D. Mass. Jan. 16, 2015) (allowing plaintiffs' motion for final approval of proposed class settlement).

24. *See* Sokolowski, *supra* note 4 ("To what extent . . . should the evolution of scientific knowledge about barefoot running shoes impact the manufacturer's advertising responsibilities?"). For an interesting discussion of related issues connected with FTC enforcement of advertising substantiation requirements against fitness equipment manufacturers, generally see Heather M. Mandelkehr, Comment, *When Toning Shoes Strengthen Nothing More Than Likelihood of Lawsuit: Why The Federal Trade Commission Needs Guidelines Regarding Proper Substantiation of Fitness Advertisements*, 20 MOORAD SPORTS L.J. 297 (2013). Mandelkehr highlights, among other things, the challenges caused by the lack of concrete standards regarding the required level of substantiation for "fitness claims" in advertisements. *See id.* at 327-30.

25. *See* Sokolowski, *supra* note 4 (observing that Vibram Lawsuits "raise an interesting question: to what extent can a defendant be liable for claims made about a product when the truthfulness of those claims is a matter of scientific debate?").

26. *See, e.g.*, Theodora McCormick, *The Rise and Possible Fall of Class Actions in False-Advertising Litigation*, 23 No. 10 WESTLAW J. PRODUCT LIABILITY 11, Nov. 12, 2012, at *1-2, *available at* 2012 WL 5497383 (noting recent influx of false advertising class actions against consumer product manufacturers). At least one commentator has specifically noted that the Vibram Lawsuits may represent "a larger trend" of lawsuits concerning advertising practices within the athletic footwear industry. *See* Sokolowski, *supra* note 4 (contending that fitness industry becoming frequent target of consumer class actions). Indeed, both private lawsuits and FTC investigations have targeted a number of athletic footwear manufacturers in recent years. *See Sketchers Agrees to Pay $40 Million in 'Toning Shoe Suit':* FTC v. Sketchers U.S.A.,

consumer fraud claims in many states, as well as the lack of uniform compliance standards, even diligent companies may face substantial discovery, litigation, and settlement costs associated with defending such claims.[27] Consequently, in addition to providing their clients with ex-ante counseling regarding compliance with advertising laws, defense attorneys must consider novel strategies to combat such claims that do arise at the early stages of litigation.[28]

This Comment contends that the allegations against Vibram provide a useful platform to demonstrate how two emerging legal theories may provide viable strategies to efficiently defend against comparable future lawsuits. Specifically, where consumer false advertising claims under state DTPAs rely on a lack of substantiation theory of liability, or such claims involve matters of scientific debate, defendants may successfully argue: (1) private plaintiffs lack standing to bring claims based on unsubstantiated advertising;[29] and (2) as a matter of law, advertising claims cannot form the basis of a false advertising lawsuit where the truthfulness of such claims is the subject of an evolving debate in the scientific community.[30]

Part II of this Comment provides background on the barefoot running trend, the associated debate in the scientific community, and the FiveFingers marketing campaign.[31] Part III examines the Vibram Lawsuits, assessing the Plaintiffs' allegations, Vibram's arguments, and the courts' analysis in connection with Vibram's motions to dismiss.[32] Part IV discusses the sources of false advertising law and the enforcement thereof, focusing on the distinct roles of

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23 No. 5 WESTLAW J. PRODUCT LIABILITY 1, Jun. 11, 2012, *available at* 2012 WL 2090420 (discussing settlement of FTC deceptive advertising lawsuit against Sketchers); *Trade Regulation Reports Letter No. 1224*, TRADE REG. REP. (CCH), Oct. 5, 2011, *available at* 2011 WL 9381760 (discussing settlement of FTC deceptive advertising lawsuit against Reebok); Complaint, Rocco v. Adidas Am., Inc., No. 1:12-03015 (E.D.N.Y. filed June 15, 2012) (alleging that Adidas' advertisements for adiPURE line of minimalist shoes were deceptive in violation of Pennsylvania and Oregon DTPAs).

27. *See* McCormick, *supra* note 26, at *3-4 (describing difficult choice of whether to litigate or settle false advertising class actions).

28. *See infra* notes 308-315 (suggesting that practitioners pursue strategies to resolve false advertising claims at early stages of litigation).

29. For background and analysis of the "unsubstantiated advertising" defense theory, see *infra* notes 176-242 and accompanying text.

30. For background and analysis of the "matters of scientific debate" defense theory, see *infra* notes 243-307 and accompanying text.

31. For a discussion of the barefoot running trend, the corresponding debate in the scientific community, and Vibram's efforts to market FiveFingers, see *infra* notes 37-83 and accompanying text.

32. For a discussion of the Vibram Lawsuits, see *infra* notes 84-116 and accompanying text.

administrative enforcement under federal law, and private enforcement through consumer lawsuits under state law.[33] Part V utilizes the Vibram Lawsuits to analyze two emerging legal theories as strategies to defend against similar claims.[34] Part VI discusses the broader legal trends surrounding the Vibram Lawsuits, and suggests ways for companies to address emerging challenges both before and after litigation arises.[35] Finally, part VII briefly concludes by emphasizing the broader significance of the novel issues associated with the Vibram Lawsuits, and correspondingly, the importance of exploring new strategies to defend against comparable future claims.[36]

II. "STRONG COMMITMENT TO RESEARCH AND INNOVATION": VIBRAM FIVEFINGERS, THE BAREFOOT RUNNING CRAZE, AND THE SCIENTIFIC DEBATE

A. The Emergence of Barefoot Running

Although the practice of barefoot running is "newly popular," it is not a novel concept.[37] Sneakers were not developed until the early 1900s, "and running shoes only came into widespread use in the 1970s."[38] Before then, runners generally wore shoes with minimal cushioning and low heels or, in some instances, ran barefoot.[39]

33. For an assessment of advertising regulation and enforcement under state and federal law, see *infra* notes 117-164 and accompanying text.

34. For background and analysis of the "unsubstantiated advertising" and "matters of scientific debate" defense theories, see *infra* notes 165-307 and accompanying text.

35. For suggested strategies for practitioners, see *infra* notes 308-336 and accompanying text.

36. For concluding observations addressing the recent influx of false advertising lawsuits under state DTPAs, see *infra* notes 337-339 and accompanying text.

37. *See* Katie Thomas, *Running Shoes. Singlet. Shoes?*, N.Y. TIMES (Nov. 2, 2010), http://www.nytimes.com/2010/11/03/sports/03barefoot.html (quoting *Runner's World* magazine editor-in-chief David Wiley's 2010 observation that "[t]his barefooting thing isn't new, but it is newly popular").

38. Kelly Murphy et al., *Barefoot Running: Does It Prevent Injuries?*, 43 SPORTS MEDICINE 1131, 1131 (Nov. 2013) (providing historic overview of runners and athletic footwear); *see* JASON ROBILLARD, THE BAREFOOT RUNNING BOOK 19-20 (Dirk Wierenga ed., 2d ed. 2010) (discussing emergence of "sports shoes" in early twentieth century).

39. *See* Murphy et al., *supra* note 38, at 1131-32 (describing footwear worn by runners before development of modern running shoes); *Running Barefoot: Running Before the Modern Running Shoe*, RUNNING BAREFOOT (HARVARD UNIVERSITY SKELETAL BIOLOGY LAB), http://www.barefootrunning.fas.harvard.edu/3RunningBeforeTheModernShoe.html (last visited May 21, 2015) ("Before [the 1970s], running shoes were just simple running flats that had little cushioning, no arch support, and no built-up heel. Humans were running for millions of years . . . in running flats, in thin sandals or moccasins, or in no shoes at all."). More recent examples include Australian middle distance runner Herb Elliott, who was pictured running bare-

Nevertheless, when Vibram introduced FiveFingers to the U.S. market in 2005, the practice of barefoot running was largely constrained to a discrete sect of avid runners.[40]

Barefoot running's popular reemergence is widely attributed to Christopher McDougal's 2009 book, *Born to Run*, which spent more than four years on the New York Times Best Seller List.[41] In *Born to Run*, McDougal, an award winning journalist and avid runner, tells the story of the Tarahumara tribe of Mexico, and describes the Tarahumara's ability to run extraordinarily long distances through rough terrain, barefoot or wearing only homemade sandals.[42] McDougal attributed this ability to the fact that the Tarahumara landed on their feet in a "forefoot strike."[43] Contemporaneously, the emergent trend was bolstered by a highly publicized study in which Daniel E. Lieberman, a Harvard Professor of Evolutionary Biology, suggested the existence of unique health benefits associated with barefoot running.[44]

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foot on the cover of *Sports Illustrated* in 1958, as well as Ethiopian marathoner Abebe Bikila, who famously won the marathon gold medal while running barefoot at the 1960 Olympics. C.S., *Bare Facts*, THE ECONOMIST (Sept. 16, 2011), http://www.economist.com/blogs/gametheory/2011/09/running-fads (providing examples of barefoot runners who predated the recent fitness trend).

40. *See* Boudway, *supra* note 2 (describing practice of barefoot running prior to 2009 as "[a] subculture of distance runners who considered the average shoe to be an affront to the human foot").

41. *See id.* (describing how *Born to Run* is "widely regarded as the catalyst for the barefoot boom"); Brian Metzler, *Five Years Later: The Legacy of 'Born to Run'*, COMPETITOR.COM (last updated May 4, 2014), http://running.competitor.com/2014/05/news/the-legacy-of-born-to-run_72044 (noting that *Born to Run* "remained on the *New York Times* bestseller list for more than four years").

42. *See generally* MCDOUGAL, *supra* note 9; *see also* Dan Zak, *Book Review: 'Born to Run' by Christopher McDougall*, WASH. POST (June 21, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/19/AR2009061901078.html (recounting that *Born to Run* describes how Tarahumara's basic "diet . . . and racing method (upright posture, flicking heels, clear-headedness) would place them among elite runners of the developed world even though their society and technology are 500 years behind it").

43. *See* MCDOUGAL, *supra* note 9, at 101-03 (describing Tarahumara's running style). McDougal utilized his discussion of the Tarahumara as a basis for contending that modern running shoes are detrimental to runners with regard to efficiency and running-related injuries. *See generally id.* at 161-282 (criticizing modern running shoes, and advancing benefits of running barefoot or in minimalist shoes); *see also id.* at 168 (asserting that "running shoes may be the most destructive force to ever hit the human foot").

44. *See* Alsever, *supra* note 2 (describing Lieberman's 2010 study as significant factor in popular emergence of barefoot running). Commentators have also attributed the initial revival of barefoot running among ardent practitioners to Lieberman's 2004 study, *Endurance Running and the Evolution of Homo*, 432 NATURE 345 (2004). *See, e.g.*, *Bare Facts*, *supra* note 39 ("The recent renaissance began when Daniel Lieberman, an evolutionary biologist at Harvard University, published a study of barefoot runners in *Nature*, a science journal, in 2004."). For a discussion

In light of this publicity, barefoot running quickly gained a following.[45] By way of illustration, in 2009, a small group of barefoot running enthusiasts formed the Barefoot Runners Society to "connect with others who share the same passion."[46] Between 2009 and 2015, the society grew to encompass over ninety chapters, while popular media outlets consistently touted barefoot running (and minimalist shoes such as FiveFingers) as a "top fitness trend."[47]

In addition to becoming a trendy alternative to the gym, the barefoot running craze created a thriving market for so-called "minimalist shoes."[48] Beginning in 2009, Vibram's profits skyrocketed as demand for FiveFingers escalated.[49] By 2010, prominent athletic footwear manufacturers hustled to capitalize on the lucrative market by developing their own lines of minimalist shoes.[50] Thus, over the course of 2011, Vibram responded to increasing consumer demand for FiveFingers and heightened competition for its market-share by expanding from one to five factories, tripling the size of its

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of recent studies of barefoot running by Lieberman and others, see *infra* notes 52-68 and accompanying text.

45. *See* Alsever, *supra* note 2 (describing barefoot running's emergence as popular fitness trend).

46. ROBILLARD, *supra* note 38, at 180.

47. *See Chapters*, BAREFOOT RUNNERS SOCIETY, http://www.thebarefootrunners.org/social-categories/chapters.113/ (listing ninety-four chapters by geographic location) (last visited May 21, 2015); Barbi Lieberman, *The Best Summer Workout Trends & 3 Strong & Sexy Moves*, SELF MAG. (June 23, 2011), http://www.self.com/flash/fitness-blog/2011/06/best-summer-workout-trends/ (listing barefoot running as among top fitness trends for summer 2011); Caitlin McCarthy et al., *Like Barefoot, Only Better?*, AM. COUNCIL ON EXERCISE CERTIFIED NEWS (Sept. 2011), http://www.acefitness.org/certifiednewsarticle/1641/like-barefoot-only-better/ (describing minimalist shoes as among "hottest" footwear trends in recent years); *see also* Thomas, *supra* note 37 (reporting in 2010 that Barefoot Runners Society's membership more than doubled from 680 to 1,345 in previous year).

48. *See* Cynthia Billhartz Gregorian, *Barefoot Running: Sales Grow, But So Does Debate About Benefits, Safety*, ST. LOUIS POST-DISPATCH (Dec. 29, 2011, 12:10 AM), http://www.stltoday.com/lifestyles/health-med-fit/fitness/barefoot-running-sales-grow-but-so-does-debate-about-benefits/article_160a8a80-16eb-55c9-97cc-063b480b3ada.html (reporting that minimalist-style running shoes grew to become $1.7 billion industry in 2010); Kent Youngblood, *Minimal Sole, but Maximum Results for Runners*, SEATTLE TIMES (July 1, 2012, 7:31 AM) (reporting that monthly revenues generated by minimalist shoe sales more than doubled from previous year); *see also* Boudaway, *supra* note 2 (describing how minimalist shoes constituted nominal share of running shoe market in 2008, but accounted for nine percent of same market by 2011).

49. *See supra* note 12 and accompanying text (citing FiveFingers' sales revenue generated by FiveFingers between 2006-2010).

50. *See supra*, note 13 and accompanying text (discussing Vibram's emerging competition in 2010).

Boston warehouse and office, and launching its first traditional print advertising campaign.[51]

B. Evolving Scientific Knowledge: The Debate Over Barefoot Running

In January 2010, Lieberman published a study in the international scientific journal *Nature*, containing evidence that the practice of barefoot running was associated with unique health benefits and a decreased rate of running related injuries.[52] Entitled *Foot Strike Patterns and Collision Forces in Habitually Barefoot Versus Shod Runners*,[53] Lieberman's study compared the foot strike mechanics of habitually barefoot runners with runners who have worn shoes their entire lives.[54]

Lieberman contended that many running related injuries are connected with the impact of the foot striking the ground.[55] In light of his findings, Lieberman further concluded that the majority of endurance runners who wear modern running shoes strike the ground with their heel, whereas habitually barefoot runners typically strike with their fore-foot or mid-foot.[56] In that regard, Lieber-

51. *See* Alsever, *supra* note 2 (reporting 2010 statement by Tony Post, Vibram CEO, that "Vibram must expand quickly enough to keep from losing shelf space to competitors"); Baskin, *supra* note 7 (reporting that Vibram would begin its first print advertising campaign in November 2010).

52. *See generally*, Lieberman et al., *supra* note 11.

53. Lieberman et al., *supra* note 11.

54. *See id.* at 534 (describing methodology of Lieberman's study). In the course of his study, Lieberman evaluated "five subject groups, both indoors and outdoors at endurance speed between 4 to 6 meters per second." *See* Michael Sandler, *New Study by Dr. Daniel Lieberman on Barefoot Running Makes Cover Story in* Nature *Journal*, RUNBARE, http://runbare.com/389/new-study-by-dr-daniel-lieberman-on-barefoot-running-makes-cover-story-in-nature-journal (last visited May 21, 2015).

> The groups included three adult groups, first habitually barefoot runners from the US, runners from the Rift Valley Province of Kenya who grew up barefoot but now run primarily in cushioned shoes . . . and US runners who grew up in shoes but now run primarily barefoot or in minimalist footwear.

Id. The subject groups also included two groups of Kenyan teenagers, "the first who have never worn shoes and the second who have worn shoes their entire lives." *Id.* The purpose of Lieberman's study was evaluate differences in the "foot strike mechanics" – essentially how the foot lands on the ground, and the amount of impact that results – between those who run barefoot and those who run in cushioned shoes. *See* Lieberman et al., *supra* note 11, at 531 ("We wondered how runners coped with the impact caused by the foot colliding with the ground before the invention of the modern running shoe.").

55. *See* Lieberman et al., *supra* note 11, at 531 ("Running can be most injurious at the moment the foot collides with the ground.").

56. *See id.* (discussing findings with regard to differences in "foot strike mechanics" between those who run barefoot and those who run in cushioned

man submitted that habitual barefoot runners strike the ground with one-third of the impact of those who run in cushioned shoes with a rear-foot strike.[57] Correspondingly, Lieberman, as well as others in the scientific community, has presented evidence that running in cushioned shoes weakens foot muscles and reduces arch strength, whereas running barefoot with a forefoot strike strengthens foot muscles and increases arch strength.[58] Accordingly, he proposed that barefoot runners would likely experience lower rates of stress related injuries.[59]

After *Born to Run* caught the national spotlight in 2009, Lieberman's study garnered considerable publicity, and was widely touted

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shoes). Lieberman's study assumed that foot "collision" with the ground can occur in three ways: "a rear-foot strike . . . in which the heel lands first; a mid-foot strike . . . in which the heel and the ball of the foot land simultaneously; and a fore-foot strike . . . in which the ball of the foot lands before the heel." *See id.* Based on his study, Lieberman concluded, "habitually barefoot endurance runners often land on the fore-foot . . . before bringing down the heel, but they sometimes land with a flat foot . . . or, less often, on the heel." *See id.* By contrast, runners who habitually run in cushioned shoes "mostly rear foot strike," which Lieberman suggests is because "shoes with elevated, cushioned heels facilitate [rear-foot strike] running." *See id.*

57. *See id.* at 532 ("At similar speeds, magnitudes of peak vertical force during the impact period . . . are approximately three times lower in habitual barefoot runners who [fore-foot strike] than in habitually shod runners who [rear-foot strike] either barefoot or in shoes."). Lieberman suggested that the reason for the distinction is that modern running shoes encourage runners to rear-foot strike. *See id.* at 534 ("Although cushioned, high-heeled running shoes are comfortable, they . . . make it easier for runners to land on their heels.").

58. For example, Lieberman noted that modern running shoes "have arch support and stiffened soles that may lead to weaker foot muscles, reducing arch strength." *See id.* Lieberman argues that "[t]his weakness contributes to excessive pronation and places greater demands on the plantar fascia, which may cause planter fasciitis." *See id.* Conversely, Lieberman and others have found that barefoot running may strengthen foot muscles and increase arch strength, leading to reduced rates of running-related injuries. *See Running Barefoot: Training Tips*, RUNNING BAREFOOT (HARVARD UNIVERSITY SKELETAL BIOLOGY LAB), http://barefoot-running.fas.harvard.edu/5BarefootRunning&TrainingTips.html (last visited May 21, 2015) (asserting that running barefoot with forefoot strike "strengthens the muscles in your foot, especially the arch"); Elizabeth E. Miller et al., *The Effect of Minimal Shoes on Arch Structure and Intrinsic Foot Muscle Strength*, J. SPORT & HEALTH SCI., June 2014, 74, 74 (concluding based on comparative study with runners wearing "traditional running footwear," that "endurance running in minimal support footwear . . . strengthen[s] the foot").

59. *See* Lieberman et al., *supra* note 11, at 532 (contending that running with a fore-foot or mid-foot strike "may protect the feet and lower limbs from some of the impact related injuries now experienced by a high percentage of runners," and that rates of impact associated with rear-foot striking "may contribute to the high incidence of running-related injuries"); *id.* at 534 (citing "anecdotal reports of reduced injuries in barefoot populations"); *see also id.* at 534 ("Evidence that barefoot and minimally shod runners avoid [rear foot] strikes with high-impact collisions may have public health implications.").

by supporters of the barefoot running movement.[60] While Lieberman's publication was novel insofar as it derived evidence from a comparative study of barefoot runners, several academics explored similar hypotheses in the preceding decades.[61] Between 1987 and 2010, scientific journals published several studies that rejected the assumption that modern running shoes decrease the rate of running-related injuries.[62] Other studies concluded that performing high-impact activities in running shoes could create a higher risk of injury, or could be less efficient than performing the same activities barefoot.[63]

By contrast, critical assessments of barefoot running largely emerged in scholarly literature only after the practice gained a popular following.[64] In that regard, certain members of the scientific community critiqued Lieberman's findings and cautioned that barefoot running may encompass unique health risks.[65] Others rejected the notion that certain health benefits, such as strengthening the foot's intrinsic muscles, were associated with barefoot running.[66] Nevertheless, the apparent majority within the scientific community has declined to take a firm stance on the efficacies of

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60. *See* sources cited *supra* note 11.

61. *See generally* Alex Hutchinson, *The Biomechanical Case for Minimalist Running*, SWEAT SCI. — RUNNER'S WORLD (May 13, 2013), http://www.runnersworld.com/barefoot-running-minimalism/the-biomechanical-case-for-minimalist-running (summarizing studies of barefoot running).

62. *See, e.g.*, Steven E. Robbins & Gerard J. Gouw, *Athletic Footwear: Unsafe Due to Perceptual Illusions*, MED. & SCI. SPORTS & EXERCISE, Feb. 1991, at 217, 223 (concluding that "people who perform activities involving high impact while wearing footwear currently promoted as offering protection in this environment are at high risk for injury").

63. *See, e.g.*, Steven E. Robbins & Adel M. Hanna, *Running-Related Injury Prevention Through Barefoot Adaptations*, MED. & SCI. SPORTS & EXERCISE, Apr. 1987, at 148, 155 ("The solution to the problem of running-related injuries could be as simple as promoting barefoot activity."); Michael Warburton, *Barefoot Running*, SPORTSSCIENCE, Dec. 2001, at 1, 6 (asserting that "[r]unning in shoes appears to increase the risk of ankle sprains[,] . . . . plantar fasciitis and other chronic injuries of the lower limb").

64. *See, e.g.*, Roger Collier, *The Rise of Barefoot Running*, 183 CMAJ NO. 1 (Dec. 6, 2010), *available at* http://www.cmaj.ca/content/183/1/E37 (quoting Craig Payne, senior podiatry lecturer at Australian university, as stating "[t]he barefoot running community . . . misinterpret[s], misuse[s] and misquote[s] research").

65. *See, e.g.*, Jeffery A. Rixe et al., *The Barefoot Debate. Can Minimalist Shoes Reduce Running-Related Injuries?*, CURRENT SPORTS MED. REP., May/Jun. 2012, at 160, 162 (summarizing that "[o]pponents of 'barefoot' running maintain that the 'minimalist' style may alter the type not incidence of running injuries").

66. *See, e.g.*, Brian J. Krabak et al., *Barefoot Running*, PM&R, Dec. 2011, at 1142, 1148-49 (asserting that "[i]t should be obvious that foot intrinsic muscle strengthening cannot be a potential benefit from barefoot running").

barefoot running, at least until further studies are conducted.[67] Indeed, the American Podiatric Medical Association has taken the official position that, "research has not yet adequately shed light on the immediate and long-term effects of [the] practice."[68]

C. Vibram and the FiveFingers Marketing Campaign

Although FiveFingers were originally designed as an accessory for boating and performance watersports, Vibram USA President Tony Post soon realized that FiveFingers could appeal to a broader audience.[69] Prior to the American release of FiveFingers in 2005, Post described the shoes as "innovative," and revealed that Vibram was "searching for progressive retailers."[70] He noted, for example, that FiveFingers had "garnered interest from yoga professionals, climbers and campers looking for a comfortable shoe."[71]

In 2005, Vibram hired Tommasi PR, a small public relations firm, to promote FiveFingers.[72] Like Post, Tommasi believed that beyond watersports, FiveFingers "offered potential for other applications including fitness training and running."[73] Accordingly, Tommasi arranged for mainstream running publications to review FiveFingers, "secured testing and placement in the top running and fitness blogs," and took further steps to "put Vibram on the forefront of the barefoot/minimalist running trend."[74] Similarly, be-

67. *See, e.g.*, Benno Nigg, *Biomechanical Considerations on Barefoot Movement and Barefoot Shoe Concepts*, FOOTWEAR SCI., June 2009, at 73 ("We suggest that nobody knows at this point in time whether or not people running barefoot have more or less injuries than people running with conventional running shoes."); Rixe et al., *supra* note 65, at 164 ("The continued controversy over the efficacy of barefoot versus shod running and the associated impact on injury rates necessitates more outcomes-based research.").

68. *See APMA Position Statement on Barefoot Running*, APMA, http://www.apma.org/Media/position.cfm?ItemNumber=995 (last visited May 21, 2015) [hereinafter *APMA Position Statement*] (stating that "[r]esearch is ongoing in regards to the risks and benefits of barefoot running").

69. *See* Carofano, *supra* note 5, at 25 (describing Post's 2005 vision for FiveFingers in U.S. market).

70. *Id.*

71. *Id.*

72. *See Case Study: Vibram FiveFingers*, TOMMASI PUB. REL., http://tommasipr.com/case-study/ (last visited May 21, 2015) [hereinafter *Tommasi Case Study*] (recounting assignment to promote FiveFingers).

73. *See id.* Because FiveFingers were "initially designed as watersports and boating footwear," Tommasi's strategy was to first, hit the "water sports market hard," and then to "[p]ursue the emerging running and fitness market." *See id.*

74. *Id.* For example, Tommasi attempted to associate FiveFingers with the emerging barefoot running movement by "[p]ositioning CEO and President Tony Post as a leader in key spokesmen for the natural running and training movement," and sponsoring "Barefoot Ted" – a popular blogger and barefoot running enthusiast who ran the 2006 Boston Marathon in FiveFingers. *See id.* (describing

tween 2006 and 2009, after FiveFingers had gained notoriety among barefoot running enthusiasts, Vibram focused its marketing efforts on developing FiveFingers' "brand look and personality" as an extension of barefoot running.[75] As a result, when McDougal's best-selling book ignited the barefoot running craze, FiveFingers were effectively perceived as synonymous with the practice.[76]

By 2010, Vibram faced emerging competition for its stake in the minimalist shoe market, and accordingly launched its first traditional advertising campaign.[77] Previously, Vibram's marketing efforts were limited to word of mouth, product placement, and other non-traditional advertising techniques.[78] Correspondingly, its for-

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how Tommasi "worked diligently and creatively to put Vibram on the forefront of the barefoot/minimalist running trend"); Boudway, *supra* note 2 (discussing sponsorship of "Barefoot Ted").

75. *Vibram FiveFingers Brand Image Development*, TOMLINSON LLC, http://www.tomlinson-llc.com/wp-content/uploads/2011/03/Vibram-Tomlinson-Case-Study.pdf (last visited May 21, 2015) ("In 2006 Tomlinson was asked to help create the brand look and feel for Vibram FiveFingers and to develop a distinctive personality for this offbeat, unconventional footwear."); *see* Judy Leand, *Pushing the Limits*, SGB, June 2007, at 32, 32 (reporting in 2007 that FiveFingers was "gaining popularity among barefoot runners (as well as sailors, climbers, hikers and other athletes)," and that "barefoot running proponents believe that the [practice] improves performance and helps reduce injuries"). Post recounted in 2010, "We knew we needed to develop a positioning and decided on fitness training." Baskin, *supra* note 7 (discussing development of FiveFingers marketing strategy). In 2006, Vibram also hired Tomlinson LLC, a Massachusetts-based marketing agency, to help develop a distinctive "image" for the FiveFingers brand. *See Vibram FiveFingers Brand Image Development*, *supra* (describing assignment to promote FiveFingers). Tomlinson explains that the "core brand promise was . . . [to] provide the sensation and benefits of being barefoot with the protection and superior grip of a Vibram sole." *See id.* Accordingly, Tomlinson utilized the Vibram website, in-store displays, and print and digital brochures to portray FiveFingers as an "alternative to conventional footwear" for running, fitness and other outdoor activities. *See id.* (providing portfolio of FiveFingers marketing materials).

76. *See Brand Development*, NZ MARKETING MAG., May/Jun. 2011, at 62 (observing in 2011 that after *Born to Run* "became a best-seller and sparked a massive worldwide craze in barefoot running . . . . Vibram has been careful to keep [FiveFingers] close to the mystery of the book"); *see also* Morgan Campbell, *Minimalist Running Shoes: Slumping Sales, Lasting Legacy*, TORONTO STAR (June 5, 2013), http://www.thestar.com/business/2013/06/05/minimalist_running_shoes_slumping_sales_lasting_legacy.html ("When the 2009 book *Born to Run* made a compelling case that long-distance running without shoes provided a long list of health benefits, new converts boosted sales of [FiveFingers].").

77. *See* sources cited *supra*, note 13 and accompanying text (discussing Vibram's emerging competition in 2010); Baskin, *supra* note 7 (reporting that Vibram would launch its first traditional advertising campaign to promote FiveFingers in November 2010).

78. *See Baskin*, *supra* note 7 (stating in 2010 that Vibram "to date" had not utilized "traditional advertising"); *see also* Jennifer Alsever, *Fighting Fake FiveFingers*, INC. (Feb. 28, 2012), http://www.inc.com/magazine/201203/jennifer-alsever/fighting-fake-fivefingers.html (reporting statement by Tony Post that "we hit $50 million in sales without a single advertisement").

mal marketing efforts largely focused on promoting the practice of barefoot running as well its purported health benefits.[79] Moreover, Vibram made efforts through its marketing campaign to distinguish itself as "a leader in the barefoot running movement," and to educate the public with regard to the practice.[80] Notably, Vibram's initial print advertisements were intended to promote its microsite, youarethetechnology.com, which demonstrated "how the human body is built for running."[81] In 2012, Vibram also added educational resources to its official website, which Post ascribed to Vibram's "strong commitment to research and innovation."[82] Post explained, "[w]ith all the vital health benefits in utilizing a minimalist fitness routine, we felt a resource with informational articles,

79. *See* David Gianatasio, *Vibram Enlists Nail for FiveFingers Launch*, ADWEEK (Jan. 8, 2010, 12:00 AM), http://www.adweek.com/news/advertising-branding/vibram-enlists-nail-fivefingers-launch-101251 (reporting in 2010 that Vibram enlisted ad agency to develop campaign "to promote the concept of 'barefoot running'"); *Vibram FiveFingers Brand Image Development*, *supra* note 75 (describing how Tomlinson's marketing strategy included "branding" FiveFingers as an "alternative to conventional footwear [that] delivers a number of health benefits including improved balance and agility, a more natural walking motion, and less back pain").

80. *See Minimalist Footwear Company, Vibram FiveFingers® Debuts New Educational Resources*, BUSINESSWIRE (Feb. 8, 2012 9:00 AM), http://www.businesswire.com/news/home/20120208005352/en/Minimalist-Footwear-Company-Vibram-FiveFingers® -Debuts-Educational [hereinafter *FiveFingers Debuts New Educational Resources*] (describing Vibram as "a leader in the barefoot running movement," and "dedicated to educating its consumers on the best practices for the minimalist fitness revolution"); *see also Brand Development*, *supra* note 76 (explaining in 2011 that Vibram was "striving to prove that its people love their product more, are committed to it and the community around it, and are innovating like crazy to increase the product range ahead of the competition").

81. *See Baskin*, *supra* note 7 (reporting that Vibram would begin print advertising campaign to promote microsite that "demonstrates how the human body is built for running"). Brian Gross, creative partner at the firm "Nail Communications," explained that the initial FiveFingers print advertising campaign and corresponding microsite "came out of the core belief behind barefoot running, which is, 'you are really all you need to run.'" Vibram FiveFingers, *The Making of Vibram FiveFingers 'You are the Technology' Microsite*, YOUTUBE (Jan. 6, 2011), https://www.youtube.com/watch?v=eFwgupPvzdg (discussing concepts behind "You are the Technology" microsite); *see also Vibram – Nail Communications*, MEDIAPOST (Jan. 11, 2010 3:15 PM), http://www.mediapost.com/publications/article/120285/vibram-nail-communications.html?edition= (describing microsite as "dedicated to the concept of barefoot running").

82. *FiveFingers Debuts New Educational Resources*, *supra* note 80 (reporting that Vibram "recently announced the launch of their new educational fitness resource portal"). According to a 2012 report, Vibram's "educational fitness resource portal" contained "new and exciting educational tools and information for consumers looking to transition to barefoot fitness." *Id.* The report further explained, "[f]ollowing a proprietary study to understand consumer motivation behind implementing minimalist fitness practices, [Vibram] developed several resources," which were "the first of several in a series of new content with topics and insight in to the revolutionary barefoot fitness category." *See id.*

tools and videos for consumers is a key way to inform those already started, and for new users to transition."[83]

III. THE VIBRAM LAWSUITS

In 2012, separate plaintiffs brought putative class action lawsuits against Vibram in the federal district courts for the District of Massachusetts and the Northern District of Illinois.[84] The nearly identical complaints alleged that Vibram's FiveFingers marketing campaign was false or deceptive in violation of DTPAs under Florida, Massachusetts, and Illinois law.[85]

To state a claim under the respective statutes, a plaintiff must establish that a deceptive act or practice by the defendants caused an injury or loss suffered by the plaintiff.[86] In other words, a plaintiff must establish three elements: (1) a false or deceptive act by the defendant; (2) an injury to the plaintiff; and (3) a causal link between the defendant's unlawful conduct and the plaintiff's injury.[87] Furthermore, in federal courts, claims alleging fraud must satisfy the heightened pleading standard pursuant to Federal Rule of Civil

83. *Id.*

84. *See* Amended Complaint, *Bezdek*, *supra* note 18; Complaint, *De Falco*, *supra* note 18. The Complaint in *De Falco* was initially filed in Illinois state court, *see* Complaint, De Falco v. Vibram USA, Inc., No. 2012L602 (Ill. 12th Cir. Ct. filed Aug. 13, 2012), but was removed by Vibram to the Federal District Court for the District of Northern Illinois under diversity of citizenship jurisdiction. *See* Notice of Removal, De Falco v. Vibram USA, Inc., No. 12 C 7238 (N.D. Ill. Sept. 11, 2012).

85. *See* Amended Complaint, *Bezdek*, *supra* note 18, paras. 72-80 (alleging unfair and deceptive conduct in violation of Mass. Gen. Laws. Ch. 93A § 2); *id.* paras. 81-89 (alleging violation of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. 501.201 *et. seq.*); Complaint, *De Falco*, *supra* note 18, paras. 67-80 (alleging violation of Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Compl. Stat. 505/2).

86. *See* Bezdek v. Vibram USA Inc., No. 12-10513, 2013 WL 639145, at *1 (D. Mass. Feb. 20, 2013) (describing requirements for plaintiff to prevail on false advertising claims under Florida and Massachusetts law); De Falco v. Vibram USA, Inc., No. 12 C 7238, 2013 WL 1122825, at *6 (N.D. Ill. Mar. 18, 2013) (describing requirements for plaintiff to prevail on false advertising claims under Illinois law).

87. *See Bezdek*, 2013 WL 639145, at *3 (quoting Casavant v. Norwegian Cruise Line, Ltd., 919 N.E. 2d 165, 196 (Mass. App. Ct. 2009)) (describing elements required to establish claim under Massachusetts law); *id.* (quoting Smith v. Wm. Wrigley Jr. Co., 663 F.Supp.2d 1336, 1339 (S.D. Fla. 2009)) (describing elements required to establish claim under Florida law); *De Falco*, 2013 WL 1122825, at *6 (citing De Bouse v. Bayer AG, 922 N.E. 2d. 309, 314 (Ill. 2009)) (describing elements required to establish claim under Illinois law). While certain states require plaintiffs to establish additional elements to state a claim under their respective DTPA (e.g., scienter), common elements under the Florida, Massachusetts, and Illinois statutes are (1) a false or deceptive act, (2) injury, and (3) causation. These are also the elements relevant to this Comment's analysis. Accordingly, in analyzing private false advertising claims under state DTPAs, this Comment will focus its discussion on these three elements.

Procedure 9(b), which provides the following: "In alleging fraud or mistake a party must state *with particularity* the circumstances constituting the fraud or mistake."[88]

A. Allegations

In the Vibram Lawsuits, the plaintiffs averred that Vibram promoted FiveFingers through an "extensive, comprehensive, and uniform nationwide marketing campaign."[89] Vibram's marketing efforts included in-store displays, promotional material on its website, brochures accompanying FiveFingers, as well as various print and online advertisements.[90] Throughout its campaign, Vibram made "uniform representations" that running in FiveFingers provides "numerous 'health benefits' that conventional running shoes do not provide."[91] Such benefits include: "improv[ing] posture and foot health, reduc[ing] risk of injury, strengthen[ing] muscles in feet and lower legs, and promot[ing] spine alignment."[92]

88. Fed. R. Civ. P. 9(b) (emphasis added).

89. Amended Complaint, *Bezdek*, *supra* note 18, para. 2; Complaint, *De Falco*, *supra* note 18, para. 2 (same). Because the plaintiffs' allegations, the relevant legal issues, and Vibram's corresponding arguments in support of its motions to dismiss were nearly identical in *Bezdek* and *De Falco*, this Comment discusses the two lawsuits collectively as the "Vibram Lawsuits." Unless otherwise noted, this Comment's discussion and analysis of the Vibram Lawsuits focuses on common aspects of the two lawsuits. If any aspects of *Bezdek* or *De Falco* diverge from generalized statements in the text of this Comment, such distinctions will be highlighted in the corresponding footnote.

90. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 22 (describing FiveFingers advertisements); Complaint, *De Falco*, *supra* note 18, para. 23 (same).

91. Amended Complaint, *Bezdek*, *supra* note 18, para. 20; Complaint, *De Falco*, *supra* note 18, para. 21 (same). The plaintiffs further asserted that Vibram's "uniform" health benefit claims "are repeated and reinforced to such an extent . . . that anyone purchasing the shoes would necessarily be exposed to them." Amended Complaint, *Bezdek*, *supra* note 18, para. 23; Complaint, *De Falco*, *supra* note 18, para. 24 (same).The plaintiffs' Complaints specifically connected FiveFingers with barefoot running, asserting that FiveFingers are "minimalist" shoes, which are intended to mimic "barefoot" running. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 3; Complaint, *De Falco*, *supra* note 18, para. 3 (same). Moreover, the plaintiffs' allegations specified that Vibram's health benefit claims refer to the health benefits purportedly associated with barefoot running. For example, the plaintiffs asserted that "[b]arefoot running has been touted as improving strength and balance, while promoting a more natural running style." Amended Complaint, *Bezdek*, *supra* note 18, para. 4; Complaint, *De Falco*, *supra* note 18, para. 3 (same). In turn, the plaintiffs alleged that Vibram marketed FiveFingers as providing "all the health benefits of barefoot running combined" with Vibram's patented sole. Amended Complaint, *Bezdek*, *supra* note 18, para. 17; Complaint, *De Falco*, *supra* note 18, para. 18 (same).

92. Amended Complaint, *Bezdek*, *supra* note 18, para. 3; Complaint, *De Falco*, *supra* note 18, para. 3 (same).

According to the plaintiffs, Vibram's "health benefit claims [were] false and deceptive" because they were "not substantiated or proven to exist through accepted scientific research."[93] The complaints further alleged that there was "no reliable scientific proof demonstrating FiveFingers actually provide" such health benefits.[94] Nevertheless, Vibram "implicitly and explicitly" claimed their representations were, in fact, supported by "reliable scientific proof."[95] In other words, Vibram's "advertising campaign was false because it misrepresented not only the health benefits of FiveFingers, but also the extent to which such health benefits [had] been scientifically corroborated."[96] In support of these assertions, the plaintiffs pointed to statements by the American Podiatric Medical Association, as well as various academic articles.[97] According to the plaintiffs, these articles supported the propositions that (1) Vibram's "health-benefit representations [were] false and deceptive";[98] (2) at

93. Amended Complaint, *Bezdek*, *supra* note 18, para. 3; Complaint, *De Falco*, *supra* note 18, para. 3 (same). More broadly, the plaintiffs also alleged that FiveFingers were "not proven to provide any of the health benefits beyond what conventional running shoes provide." Amended Complaint, *Bezdek*, *supra* note 18, para. 3; Complaint, *De Falco*, *supra* note 18, para. 3 (same).

94. Amended Complaint, *Bezdek*, *supra* note 18, para. 3 (alleging that "[u]nbeknownst to consumers, Defendants' health benefit claims are false and deceptive because FiveFingers are not proven to provide any of the health benefits beyond what conventional running shoes provide," and that "there are no well-designed scientific studies that support Defendants' health claims regarding FiveFingers"); Complaint, *De Falco*, *supra* note 18, para. 3 (same).

95. Amended Complaint, *Bezdek*, *supra* note 18, para. 3; Complaint, *De Falco*, *supra* note 18, para. 3 (same). For example, the plaintiffs' pointed to FiveFingers brochures that stated: "[t]he benefits of running barefoot have long been supported by scientific research," Amended Complaint, *Bezdek*, *supra* note 18, para. 26; Complaint, *De Falco*, *supra* note 18, para. 27 (same), as well as in-store displays that allegedly gave "the impression to reasonable consumers that there [was] scientific evidence supporting the specific health-benefit representations," Amended Complaint, *Bezdek*, *supra* note 18, para. 5; Complaint, *De Falco*, *supra* note 18, para. 25 (same).

96. *See* Bezdek v. Vibram USA Inc., No. 12-10513, 2013 WL 639145, at *1 (D. Mass. Feb. 20, 2013) ("Bezdek now claims, however, that defendants' advertising campaign was false and misleading because it misrepresented not only the health benefits of FiveFingers, but also the extent to which such health benefits have been scientifically corroborated."); *see also* De Falco v. Vibram USA, Inc., No. 12 C 7238, 2013 WL 1122825, at *1 (N.D. Ill. Mar. 18, 2013) (noting that plaintiffs alleged Vibram's health benefit "representations are false" because Vibram "claimed that there was scientific support for their assertions," but "there is no adequate scientific proof" to support such claims).

97. *See* Amended Complaint, *Bezdek*, *supra* note 18, paras. 4, 45-47, 49 (citing, *e.g.*, APMA position statement on barefoot running, article published by APMA, and article published by Professor of Kinesiology at Calgary University); Complaint, *De Falco*, *supra* note 18, paras. 4, 45-47, 49 (same).

98. Amended Complaint, *Bezdek*, *supra* note 18, para. 41; Complaint, *De Falco*, *supra* note 18, para. 41 (same).

the time Vibram made such representations, there was "no scientific support for the various representations of health benefits";[99] and (3) running in FiveFingers may, in fact, "increase injury risk as compared to running in conventional running shoes."[100]

As alleged, the named plaintiffs were consumers who purchased FiveFingers after learning of the associated health benefits through Vibram's marketing campaign.[101] Purportedly, the plaintiffs "would not have purchased . . . FiveFingers" but for Vibram's affirmative health benefit claims.[102] Moreover, the complaints broadly averred that reasonable consumers "would only purchase FiveFingers . . . in reliance" on Vibram's health claims.[103] On that basis, the plaintiffs contended that Vibram's "false and misleading ad campaign allowed them to reap millions of dollars of profit," because "[r]easonable consumers would not have paid the amounts charged for FiveFingers, or would not have purchased [them] at all, had they known . . . there [was] no scientific evidence supporting [Vibram's] major health benefit claims."[104] Thus, by consequence,

99. *Bezdek*, 2013 WL 639145, at *4 (noting that plaintiff alleges "that there is, as yet, no scientific support for the various representations of health benefits made by defendants"); *see also* Amended Complaint, *Bezdek*, *supra* note 18, para. 56 (alleging that "there is no scientific evidence supporting Defendants' major health benefit claims"); Complaint, *De Falco*, *supra* note 18, para. 56 (same).

100. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 3 ("Indeed, running in FiveFingers may increase injury risk as compared to running in conventional running shoes, and even when compared to barefoot running."); Complaint, *De Falco*, *supra* note 18, para. 3 (same).

101. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 11 ("In reliance on the misleading health benefit claims about FiveFingers on Defendants' website, Plaintiff purchased a pair of FiveFingers."); Complaint, *De Falco*, *supra* note 18, para. 12 ("Plaintiff received Defendants' deceptive and misleading statements in print advertisements, through Defendants' website, and Defendants' in-store display. In reliance on these deceptive and misleading health benefit claims about FiveFingers, Plaintiff purchased three pairs of FiveFingers.").

102. Amended Complaint, *Bezdek*, *supra* note 18, para. 11 ("Had Plaintiff known the truth about Defendants' representations, she would not have purchased the FiveFingers."); Complaint, *De Falco*, *supra* note 18, para. 12 (same).

103. Amended Complaint, *Bezdek*, *supra* note 18, para. 6; Complaint, *De Falco*, *supra* note 18, para. 6 (same). In support of this assertion, the Complaints allege that barefoot running requires individuals to transition from a "heel-strike" technique (associated with conventional running shoes) to a "forefoot strike" technique, which can be "long and painful, and even lead to injuries." *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 5 (discussing process necessary to transition to barefoot running technique); Complaint, *De Falco*, *supra* note 18, para. 5 (same). In that regard, the complaints infer that consumers "would only purchase FiveFingers . . . in reliance on" Vibram's health-benefits claims, because they require consumers to change his or her running technique, which "may involve a long, painful, and injury fraught regimen." Amended Complaint, *Bezdek*, *supra* note 18, para. 6; Complaint, *De Falco*, *supra* note 18, para. 6 (same).

104. Amended Complaint, *Bezdek*, *supra* note 18, para. 56; Complaint, *De Falco*, *supra* note 18, para. 56 (same). Furthermore, according to the plaintiffs,

the plaintiffs ostensibly claimed to have purchased "product[s] that [had] not been proven to perform as advertised," and therefore, were "worth less than [they] paid for [them]."[105]

B. Vibram's Motions to Dismiss

In response, Vibram moved to dismiss the false advertising claims against it, contending: (1) the plaintiffs failed to establish a false or deceptive act by the defendants; (2) the plaintiffs failed to satisfy the heightened pleading standard for allegations of fraud; and (3) the plaintiffs failed to establish an injury in fact.[106] However, in both lawsuits, the respective courts denied Vibram's motions to dismiss on similar grounds.[107]

Vibram utilized these health benefit claims "to charge prices for FiveFingers that consumers readily paid, believing FiveFingers would confer upon them significant advertised health benefits." Amended Complaint, *Bezdek*, *supra* note 18, para. 3; *cf.* Complaint, *De Falco*, *supra* note 18, para. 56 (alleging that "[d]efendants have reaped millions of dollars in profits by leading consumers to believe that there is reliable scientific data backing up their claims," and that "[r]easonable consumers would not have paid the amounts charged for FiveFingers . . . had they known" that Vibram lacked such scientific support).

105. De Falco v. Vibram USA, Inc., No. 12 C 7238, 2013 WL 1122825, at *7 (N.D. Ill. Mar. 18, 2013) ("In other words, Plaintiff alleges that Vibram's misrepresentations regarding health benefits caused him to purchase shoes that were worth less than what he paid for them."); *see also* Amended Complaint, *Bezdek*, *supra* note 18, para. 74 (alleging that "[p]laintiff . . . paid more for the falsely advertised product [she] purchased than [it was] worth at the time of purchase"); Complaint, *De Falco*, *supra* note 18, para. 56 (alleging that plaintiff "would not have paid the amounts charged for FiveFingers" except for Vibram's health benefit representations).

106. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 5-8, Bezdek v. Vibram USA, Inc., No. 12-10513 (D. Mass. June 4, 2012), 2012 WL 2117878 [hereinafter Defendant's Motion to Dismiss, *Bezdek*] (providing arguments in support of Vibram's motion to dismiss); Memorandum in Support of Defendants' Motion to Dismiss, Transfer. Or Stay at 5-9, De Falco v. Vibram USA, Inc., No. 12 C 07238 (N.D. Ill. Oct. 11, 2012) [hereinafter Defendant's Motion to Dismiss, *De Falco*] (same).

107. *See* Bezdek v. Vibram USA, Inc., No. 12-10513, 2013 WL 639145, at *8-9 (D. Mass Feb. 20, 2013) (denying Vibram's Motion to dismiss); *De Falco*, 2013 WL 1122825, at *7 (same). For purposes of a 12(b)(6) motion to dismiss, "all of the [plaintiff's] factual allegations" are accepted as true. § 1216 Statement of the Claim—Significance of "Claim for Relief", 5 FED. PRAC. & PROC. CIV. § 1216 (3d ed.) However, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). Thus, as the Supreme Court has explained, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to satisfy the pleading requirements to state a cause of action. *Ashcroft*, 556 U.S. at 678.

First, Vibram broadly asserted in both cases that the plaintiffs failed to allege a false or deceptive act or practice.[108] More specifically, Vibram contended that the allegations merely suggested that the plaintiffs themselves disagreed with Vibram's health benefit claims, and that there was a dispute in the scientific community concerning barefoot running's health benefits.[109] Both courts rejected this argument, however, on the basis that the plaintiffs did not merely challenge the truth of Vibram's product claims, but also the existence of scientific support for such representations.[110] Consequently, the courts found that this argument was effectively a challenge to the merits of the plaintiffs' claims, which could not be resolved through a motion on the pleadings.[111] Second, the courts similarly rejected Vibram's argument that the plaintiffs failed to plead, with particularity, the allegations of fraud.[112] Both courts interpreted Federal Rule of Civil Procedure 9(b) as requiring factual allegations as to the "who," "what," "when," and "where," and found that the plaintiffs satisfied this standard by identifying Vibram as the party that committed the fraud, the health benefit claims as the

108. *See* Defendant's Motion to Dismiss, *Bezdek*, *supra* note 106, at 5-7 (arguing that plaintiff failed to allege false or deceptive act or practice); Defendant's Motion to Dismiss, *De Falco*, *supra* note 106, at 6-7 (same).

109. *See Bezdek*, 2013 WL 639145, at *4 ("Defendants also argue that the allegations reflect merely a difference in opinion in the scientific community as to barefoot running, and that Vibram has scientific support for its advertising."); *De Falco*, 2013 WL 1122825, at *7 ("Defendants contend that Plaintiff has not established that these statements are fraudulent; rather, that there is only a dispute in the scientific community regarding the potential health benefits that may be conferred by FiveFingers shoes."); *see also* Defendant's Motion to Dismiss, *Bezdek*, *supra* note 106, at 6 ("The miscellaneous studies, positions, and undifferentiated comments cherry-picked and cited by Plaintiff at most suggest a difference of opinion respecting the efficacy of barefoot running."); Defendant's Motion to Dismiss, *De Falco*, *supra* note 106, at 6-7 (contending that although "comments from various articles, position papers, and public statements" cited by plaintiff "suggest there may be a difference of opinion in the scientific community regarding some aspects of barefoot running, they do not make out a claim for fraud").

110. *See Bezdek*, 2013 WL 639145, at *1 (explaining that complaint both alleges that Vibram's health benefit claims were false and deceptive, and challenges "the extent to which" its health benefit claims "have been scientifically corroborated"); *De Falco*, 2013 WL 1122825, at *7 (explaining that "[c]omplaint alleges 'how' these statements are allegedly false by showing that there is no scientific support for the statements").

111. *See Bezdek*, 2013 WL 639145, at *4 (finding that Vibram raised "fact-based argument" that could not be resolved on a motion on the pleadings); *De Falco*, 2013 WL 1122825, at *7 (concluding that Vibram's arguments "[do] not identify a pleading deficiency," but rather raise "a defense to the merits" that cannot be addressed on a motion to dismiss).

112. *See Bezdek*, 2013 WL 639145, at *4-5 (holding that complaint satisfied heightened pleading standard pursuant to Fed. R. Civ. P. 9(b)); *De Falco*, 2013 WL 1122825, at *7 (same).

basis of the fraud, as well as the time and place they were exposed to the fraud.[113]

Finally, Vibram argued that the plaintiffs failed to plead a cognizable injury because, in essence, they received what they paid for, and did not otherwise allege dissatisfaction with the FiveFingers or that they received defective products.[114] The courts held that Massachusetts, Illinois, and Florida law recognize "price premium" injuries—essentially economic losses incurred by a consumer-plaintiff who paid more for a product than its actual worth due to a defendant's misrepresentations—for lawsuits under the States' respective DTPAs.[115] Furthermore, because the plaintiffs alleged that Vibram's misrepresentations allowed them to charge a higher price for FiveFingers than they are actually worth, both courts found that the plaintiffs' allegations were sufficient to survive a motion to dismiss under this theory.[116]

IV. STATE AND FEDERAL REGULATION OF ADVERTISING

At both the state and federal level, advertising is predominantly regulated under consumer protection statutes that target "unfair or deceptive acts or practices in commerce."[117] In that re-

113. *See Bezdek*, 2013 WL 639145, at *4 (finding that complaint specifies "several allegedly misleading statements," lack of "scientific support" for such representations, placement of such statements on Vibram website, and details regarding "the particular statements that influenced [plaintiff] to purchase FiveFingers"); *De Falco*, 2013 WL 1122825, at *7 (finding complaint details "false statements" at issue, that "Vibram made [the] false statements," how statements were false based on lack of "scientific support," and the date and location plaintiff was exposed to such statements).

114. *See* Defendant's Motion to Dismiss, *Bezdek*, *supra* note 106, at 7-8 (arguing that plaintiff failed to plead actionable injury); Defendant's Motion to Dismiss, *De Falco*, *supra* note 106, at 6-7 (arguing that plaintiff failed to allege injury in fact).

115. *See Bezdek*, 2013 WL 639145, at *4-8 (holding that Florida and Illinois recognize "price premium" injury); *De Falco*, 2013 WL 1122825, at *7 n.8 ("Illinois law allows a consumer who has been injured by fraud to recover under [its consumer fraud act] for the loss of the benefit of the bargain."); *see also Bezdek*, 2013 WL 639145, at *5 n.8 (explaining that "price premium" injury corresponds with the "'benefit of the bargain' rule, whereby 'plaintiff is entitled to recover the difference between the value of what he has received and the actual value of what he would have received if the representations had been true" (citations omitted)).

116. *Bezdek*, 2013 WL 639145, at *4 (holding that plaintiff adequately plead price premium injury by alleging "economic loss, resulting from the fact that she . . . paid more for the shoes than they were worth" by relying on alleged misrepresentations); *De Falco*, 2013 WL 1122825, at *7 (holding that plaintiff alleged cognizable injury by pleading that "Vibram's misrepresentations regarding health benefits caused him to purchase shoes that were worth less than what he paid for them").

117. *See* Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK.

spect, state and federal regulatory schemes are similar insofar as neither comprehensively defines the scope of unlawful advertising practices.[118] Nevertheless, with regard to enforcement, states diverge substantially from their federal counterpart.[119] Most notably, federal advertising regulations concerning consumer protection are enforced exclusively by administrative agencies.[120] Conversely, in addition to government enforcement, "nearly every state provides consumers with a private right of action" under its respective consumer protection statute.[121]

LITTLE ROCK L. REV. 283, 316-19 (2007) (explaining that advertising is regulated under Federal Trade Commission Act ("FTC Act"), which prohibits "unfair or deceptive practices in or affecting commerce," and that states regulate advertising under statutes modeled after FTC Act). As one law review comment summarizes: "There are three main sources of false advertising law in the United States. Two of these, the Federal Trade Commission Act and the Lanham Act, are found in federal statutes. The remaining is a composite of state consumer fraud statutes generally referred to as Little FTC Acts." Jon Mize, Comment, *Fencing Off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 TENN. L. REV. 653, 654 (2005) (describing elements, defenses to liability, and examples of false advertising claims against commercial manufacturers under three legal theories). The Lanham Act allows private parties to bring false advertising claims "to protect commercial interests that have been harmed by a competitor's false advertising" and to protect their commercial reputation and competitive business advantage. *See* Marie K. Pesando, *False, Defamatory, Obscene, or Otherwise Objectionable Advertising—Under Lanham Act*, 3 AM. JUR. 2D ADVERTISING § 4 (2015) (describing Lanham Act). "The purpose of the Lanham Act's prohibition against misleading advertising . . . is to protect persons engaged in commerce . . . against unfair competition." *Id.* (citing POM Wonderful LLC v. Coca-Cola, 134 S. Ct. 2228 (2014)). As such, the Lanham Act only governs advertising with respect to competition between businesses. *See POM Wonderful*, 134 S. Ct. at 2234 (holding that Lanham Act causes of action for misleading advertising are available to "competitors, not consumers"). Thus, as it pertains to consumers, advertising is regulated under the FTC Act and analogous state consumer protection acts. *See* Lemley, *supra*, at 316-19 (describing false advertising regulation under FTC Act and analogous state law statutes).

118. *See* Lemley, *supra* note 117, at 319 (explaining that state DTPAs, like their "federal counterpart . . . do not define what constitutes a deceptive trade practice").

119. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 16 (2005) (discussing significant differences between enforcement of advertising regulations under state and federal law).

120. *See id.* (explaining that FTC Act "provides for enforcement only by [government] agencies").

121. *Id.*

A. Historical Foundations of False Advertising Law

1. *Consumer Protection and the Common Law*

Consumer protection legislation is largely a product of the twentieth century.[122] However, the foundational principles of false advertising law are rooted in the common law, dating back to the year 1201.[123] Historically, common law tort and contract actions were available to consumers who were harmed by deceptive business practices.[124] By the early twentieth century, legislatures perceived the inadequacy of common law remedies in certain situations.[125] On that basis, throughout the twentieth century, state and federal legislatures developed broad regulatory schemes to protect consumers by combating unfair and deceptive business practices.[126]

2. *The Development of Federal Regulation and Enforcement*

In 1914, Congress enacted the Federal Trade Commission Act ("FTC Act") to address its concerns regarding the escalating size and power of businesses, as well as the inadequacy of common law

122. *See id.* at 7 (explaining that legislatures began enacting consumer protection laws by beginning of twentieth century).

123. *See id.* at 5 (describing how state and federal consumer protection laws "have their origin in common law fraud and misrepresentation claims"). Specifically, Victor E. Schwartz and Cary Silverman explain that "[t]he present tort of misrepresentation evolved from the 'Writ of Deceit,' which dates back to the year 1201." *See id.* at 6 (citing DAN B. DOBBS ET AL., PROSSER & KEETON ON TORTS § 105, at 727 (5th ed. 1984)).

124. *See id.* at 6-7 (discussing historical development of common law tort actions regarding deceptive business practices).

125. *See id.* at 7 (recounting that "inadequacy of common law tools with which a consumer could address false advertising and deceitful commercial schemes in some circumstances" led Congress to pass consumer protection legislation in early twentieth century); *see also* LOUIS ALTMAN & MALLA POLLACK, 1A CALLMAN ON UNFAIR COM., TR. & MONO. § 5:2 (4th ed. 2014) [hereinafter CALLMAN] ("Before federal legislation intervened, the courts had not evolved a concept of unfair competition consistent with the understanding of the honest tradesman."); Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 439 (1991) ("The common law rules applicable to deceptive trade—founded principally on the law of fraud and contract—are not particularly good vehicles for consumers.").

126. *See* sources cited *infra* notes 127-148 and accompanying text (discussing development of state and federal consumer protection legislation with focus on false advertising regulation). Today, the common law still provides causes of action by which consumers can obtain remedies for harm caused by unfair or deceptive business practices; additionally, however, the federal government, all fifty states, and the District of Columbia have enacted broad legislation to specifically address such practices. *See* CALLMAN, *supra* note 125, at § 5:1 ("False advertising may be litigated pursuant to the common law and numerous federal or state statutes.").

tools "with which a consumer could address false advertising and deceitful commercial schemes."[127] Most notably, the FTC Act established the Federal Trade Commission ("FTC"), and empowered it to regulate "unfair methods of competition."[128]

In 1931, the United States Supreme Court held that the FTC lacked authority under its enabling statute to regulate commercial activities, such as advertising, that had no effect on competition between businesses.[129] In light of that holding, Congress amended the FTC Act in 1938 to expand "the FTC's jurisdiction by granting it power to regulate 'unfair or deceptive acts or practices in commerce' in addition to 'unfair methods of competition in commerce.'"[130] In that respect, the 1938 Amendment provided the contemporary foundation for federal regulation of advertising.[131]

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127. Schwartz & Silverman, *supra* note 119, at 7-8 (discussing purpose of FTC Act). Congress sought to promote fair business practices by addressing both monopolistic behavior and consumer protection concerns. *See id.* Regarding consumer protection, in the words of one federal district court, the FTC Act "was intended to protect not just the sophisticated, but rather that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but are governed by appearances and general impressions." Floersheim v. Weinburger, 346 F. Supp. 950, 957 (D.D.C. 1972) (citations omitted) (internal quotation marks omitted).

128. *See* Schwartz & Silverman, *supra* note 119, at 7-8 (describing FTC Act of 1914).

129. *See id.* at 8 (citing FTC v. Raladam Co., 283 U.S. 643, 654 (1931)). In *FTC v. Raladam Co.*, the FTC alleged that a defendant drug manufacturer violated the FTC Act's prohibition against "unfair methods of competition in interstate commerce." *See* 283 U.S. at 644-45. In support of these charges, the FTC asserted that the manufacturer's advertisements were "calculated to mislead and deceive the purchasing public" that its drugs were "safe, effective, dependable, and without danger of harmful results," when in fact, the drugs could be harmful to the health of consumers. *See id.* at 645. The Supreme Court held that the FTC lacked jurisdiction over this matter, concluding that the statutory term "competition" connoted the existence of "present or potential competitors." *See id.* at 649-54. Thus, the Court held that under the original version of the FTC Act, the FTC lacked authority to regulate business practices that were merely unfair to consumers rather than competitors. *See id.* (holding that "unfair methods must be such as injuriously affect . . . business" of competitors); *see also* FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 313 (1934) (holding that the FTC lacked authority under 1914 act to regulate trade practices aimed at encouraging gambling among children, but noting that such practices were indisputably "unfair" and "contrary to public policy").

130. United States v. St. Regis Paper Co., 355 F.2d 688, 692 (2d Cir. 1966) (holding that 1938 Amendments were "aimed primarily at broadening the FTC's jurisdiction"); *see also* Schwartz & Silverman, *supra* note 119, at 8 (describing how Congress amended FTC Act in 1938 to provide FTC broad authority to "prohibit unfair or deceptive acts").

131. *See* CORP. COUNSEL'S ANTITRUST DESKBOOK § 13:1 (William M. Hannay ed., 2014-15 ed. 2014) (stating that FTC Act's prohibition against "unfair or deceptive acts or practices . . . . refers to the FTC's consumer protection authority").

The FTC Act's legislative history provides valuable evidence of Congress' outlook on the regulation of advertising.[132] When Congress debated the 1914 Act, several members were apprehensive about including a blanket prohibition of "unfair" practices without defining the term.[133] However, as one scholarly article recounts, "[o]ne significant factor in calming the concerns of Congress" was that "the power to determine unfair practices" would be limited to the FTC, a body of nonpartisan experts, who would "be able to determine justly whether [a] practice is contrary to good morals or not."[134] Moreover, "[a]n additional factor ameliorating Congress's concern at the time of the 1938 expansion of the act to include consumer protection was that the FTC's power was 'merely preventative and cooperative rather than penal.'"[135]

Undoubtedly, a defining characteristic of federal advertising regulation is exclusive enforcement by administrative agencies.[136] In 1914, Congress debated, and subsequently rejected, a proposal to provide a private right of action under the FTC Act because several members believed that private enforcement would be incompatible with the FTC Act's remedial purpose.[137] One senator, for example, expressed that private actions could be retroactive and punitive in light of the ambiguous scope of "unfair practices."[138]

132. *See infra* notes 133-140 and accompanying text (discussing FTC Act's legislative history).

133. *See* Schwartz & Silverman, *supra* note 119, at 11 (citing 51 CONG. REC. 11,084-109, 11,112-16 (1914)) (recounting that many members of Congress were concerned that "such a broad provision . . . would allow for arbitrary and abusive enforcement").

134. *Id.* (citing 51 CONG. REC. 11,108-09 (1914) (statement of Sen. Newlands)) (discussing safeguards of vesting FTC with sole power to enforce FTC Act, and reasons Congress declined to provide private right of action under FTC Act).

135. *Id.* (citing S. REP. NO. 74-2, at 1 (1936)) (describing congressional debates surrounding the 1938 amendment to FTC Act).

136. *See id.* at 11-15 (discussing "why Congress placed enforcement solely with the government and not with private lawyers under the FTC Act"); *cf.* Lemley, *supra* note 117, at 320 ("The key difference between the FTC Act and little FTC acts is that enforcement of little FTC acts is free from the restraints imposed on the FTC Act.").

137. *See generally* Schwartz & Silverman, *supra* note 119, at 12-15 (evaluating why Congress considered but rejected proposal to provide private right of action under FTC Act).

138. Senator Porter McCumber urged that "if no man on earth can know whether he is obeying the law and tells him that he is disobeying the law, does not the Senator think that mulcting him in treble damages is a little bit harsh?" *Id.* at 13 (quoting 51 CONG. REC. 13,114 (1914) (statement of Sen. McCumber)). In that connection, Senator John Sharp Williams noted that the provision "might be retroactive in a rather oppressive manner." *Id.* at 13 n.51 (quoting 51 CONG. REC. 13,118 (1914) (statement of Sen. Williams)). Some members further suggested that it was unnecessary to provide a private action under the FTC because "citizens injured by an unfair act could already exercise their rights at common law to bring

Other members of Congress similarly "thought [that] opening two forums for deciding violations under the Act, the [FTC] and federal courts, could lead to confusion and conflict."[139] Perhaps most notably, however, "Congress feared [that] courts might allow consumers to go directly to court without prior FTC action, which would have allowed judges rather than commissioners to decide whether conduct was fair."[140]

3. *"Little-FTC Acts": The Development of State Regulation and Enforcement*

The contemporary brand of state consumer protection laws can be traced to the 1960s and 70s—"a period when sweeping consumer rights laws were in vogue."[141] During that period, many states enacted uniform consumer protection acts that were modeled after the FTC Act.[142] Today, every state and the District of Columbia have adopted such laws, which are commonly referred to as "little-FTC Acts."[143]

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an action for recovery." *Id.* at 14 (citing CONG. REC. 11,112 (1914) (statement of Sen. Newlands); CONG. REC. 13,151 (1914) (statement of Sen. Cummins)).

139. *Id.* at 13 (citing CONG. REC. 13,120 (1914) (statements of Sens. Stone and Reed)).

140. *Id.* (citing CONG. REC. 13,114-15 (colloquy between Sens. McCumber and Clapp); CONG. REC. 13,115 (1914) (colloquy between Sens. Brandegee and Clapp)). Furthermore, as suggested by Victor E. Schwartz and Cary Silverman, some members of Congress were concerned that a private right of action would give rise to "a certain class of lawyers" who would attempt to make careers of "hunting up and working up" lawsuits under the broad and ambiguous scope of "unfair conduct." *Id.* at 14 (quoting CONG. REC. 13,120 (1914) (statement of Sen. Stone)).

141. *Id.* at 15; *see also* Lemley, *supra* note 117, at 319 (asserting that many states adopted "deceptive trade practices law[s] based on the FTC Act . . . . during the 'heyday of consumerism' in the 1960s and 1970s"). Like Congress, individual states also began to adopt legislation targeting false advertising and other deceptive business practices in the early twentieth century. *See* Albert Norman Shelden & Stephen Gardner, *A Truncated Overview of State Consumer Protection Laws*, C888 ALI-ABA 375, 378 (1994) (describing early state consumer protection laws). However, these early statutes generally proved difficult to enforce, and "did not have the deterrent effect anticipated." *Id.*

142. *See id.* at 380-84 (describing nature of consumer protection laws that states began enacting in 1960s); *see also* Catherine M. Sharkey, *Drug Advertising Claims: Preemption's New Frontier*, 41 LOY. L.A. L. REV. 1625, 1633 (2008) ("Consumer fraud statutes have their origin in common law fraud and the Federal Trade Commission Act.").

143. Schwartz & Silverman, *supra* note 119, at 16 ("All fifty states and the District of Columbia now have adopted little-FTC Acts." (citing Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts" Should Federal Standards Control?*, 94 DICK. L. REV. 373, 373-74 n.2 (1990)).

At their inception, "[t]he federal and state laws were meant to complement each other."[144] Indeed, during the "'heyday of consumerism,' the FTC urged states to adopt their own little-FTC Acts as a way of combining resources to target unfair and deceptive practices at both the local and national levels."[145] While the intricacies of these statutes vary from state to state, "each broadly prohibits unfair or deceptive acts, as does the [FTC] Act."[146] Nevertheless, regulation and enforcement under little-FTC acts fundamentally differs from the FTC Act insofar as little-FTC Acts provide for both private and administrative enforcement.[147] Furthermore, in contrast to the FTC Act's "preventative and cooperative" policy objectives, many little-FTC acts incorporate retroactive and punitive components by allowing private litigants to recover statutory damages and attorneys' fees.[148]

B. Contemporary Sources of False Advertising Laws: Regulation and Enforcement under the FTC Act and "Little FTC Acts"

1. *FTC Enforcement Authority Under the FTC Act*

Under the FTC Act, it is unlawful for "any person, partnership, or corporation to disseminate, or cause to be disseminated," any false, deceptive, or unfair advertisements.[149] Section 5 of the FTC Act further provides the FTC with a wide range of regulatory and enforcement powers in connection with the statute's substantive provisions.[150] The FTC, for example, may promulgate regulations

144. *Id.*; *see also* Shelden & Gardner, *supra* note 141, at 390 (stating that "regulation of business activity by the FTC and the states has a history of co-existence").

145. Schwartz & Silverman, *supra* 119, at 16 (describing intended roles for FTC Act and corresponding state laws).

146. *Id.* at 15 (describing that while state DTPAs "take various forms, each broadly prohibits unfair or deceptive acts, as does the FTC[ ] Act"); *see generally* Shelden & Gardner, *supra* note 141, at 380-84 (describing different model consumer protection statutes adopted by states).

147. *See* Schwartz & Silverman, *supra* note 119, at 15-16 (contending that "crucial difference" between FTC Act and little FTC Acts is that "almost all state [acts] provide consumers with a private right of action to enforce their provisions").

148. *See id.* at 22-27 (discussing available remedies and availability of attorneys' fees and costs under state DTPAs).

149. *See* 15 U.S.C. § 52 (defining "false, deceptive, or unfair advertis[ing]" as unfair or deceptive act or practice). Generally, the FTC Act's prohibition of "deceptive acts or practices" has been interpreted as referring to "the FTC's consumer protection activities regarding advertising." *See* CORP. COUNSEL'S ANTITRUST DESKBOOK, *supra* note 131, § 13:1 (stating that "unfair or deceptive acts or practices" refers to FTC's consumer protection authority).

150. *See infra* notes 151-155 and accompanying text (discussing FTC's regulatory and enforcement powers under Section 5 of FTC Act).

and policies interpreting the FTC Act's prohibition on false, deceptive, or unfair advertising.[151] Additionally, the FTC may prohibit specific acts or practices, and prescribe general standards or requirements.[152]

With respect to its enforcement authority, the FTC may conduct internal investigations and hold administrative hearings concerning apparent instances of unlawful advertising.[153] Moreover, the Commission can enforce advertising regulations through direct actions in federal district court, through which it may prosecute violations, or seek preliminary injunctions or temporary restraining orders upon belief that a party "is engaged in, or is about to engage in" unlawful conduct.[154] To establish unlawful advertising practices, the FTC is required to demonstrate (1) "probable not possible, deception ('*likely* to mislead,' not '*tendency and capacity*' to mislead)"; (2) "potential deception of 'consumers acting reasonably in the circumstances,' not just any consumers"; and (3) "deceptions that are likely to cause injury to reasonable relying consumers."[155]

2. *Private Enforcement Authority Under State Deceptive Trade Practices Acts*

Under little-FTC Acts, false or deceptive advertising is generally encompassed under a broad prohibition of unfair and deceptive trade practices.[156] While "[m]ost of the state laws" enumerate spe-

151. *See* Mandelkehr, *supra* note 24, at 312 (citing 15 U.S.C. § 57(a)) (describing FTC authority to interpret statutory provisions on false and deceptive advertising).

152. *See id.* (citing 15 U.S.C. § 45(a)) (explaining that FTC may exercise its "Section 5 powers" to "prohibit advertisements that are likely to deceive consumers"); *see also* 15 U.S.C. § 57a(1)(A)-(B) (dictating FTC's rulemaking authority and procedures); § 54 (prescribing penalties for violations of FTC Act's false advertising provision, § 52).

153. *See* Mandelkehr, *supra* note 24, at 312-13 (citing 15 U.S.C. § 45(b)-(c)) (outlining FTC internal process for bringing complaint against advertiser and conducting administrative hearing); *see also* § 57a(c) (dictating FTC's informal hearing procedure).

154. *See* Mandelkehr, *supra* note 24, at 313 (citing 15 U.S.C. § 53(a)-(b)) (describing FTC's proscribed authority and procedural requirement for bringing lawsuits in federal court to enforce FTC Act).

155. Sw. Sunsites, Inc. v. F.T.C., 785 F.2d 1431, 1436 (9th Cir. 1986); *accord* F.T.C. v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988); F.T.C. v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003); F.T.C. v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005). The federal courts have adopted this standard for analyzing FTC allegations of "deceptive trade practices," which is "essentially . . . a cost-benefit analysis" known as the "reasonable consumer test." *See* Lemley, *supra* note 117, at 318.

156. *See* Schwartz & Silverman, *supra* note 119, at 15 (explaining that state consumer protection laws generally prohibit broad scope of "unfair or deceptive

cific unlawful practices, these lists are typically non-exhaustive.[157] Accordingly, many little-FTC Acts empower the state attorney general to promulgate interpretive guidelines and administrative rules, conduct investigations, and prosecute unlawful conduct.[158] However, the "crucial difference" between the FTC Act and little-FTC Acts "is that almost all [little-FTC Acts] provide consumers with a private right of action to enforce their provisions."[159]

A further distinction is that, in contrast with the FTC Act's remedial policy objectives, many states allow private plaintiffs to recover civil penalties in the forum of double or treble damages.[160] Likewise, to incentivize private attorneys to bring consumer claims, some states have imposed minimum damages awards and allow prevailing consumers to recover attorneys' fees and costs.[161] The elements necessary to bring private lawsuits under little-FTC Acts vary

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acts"); *see also* Lemley, *supra* note 117, 316-21 (discussing nature of state deceptive practices acts with regard to false advertising).

157. Lemley, *supra* note 117, at 319.

158. *See* Schwartz & Silverman, *supra* note 119, at 16 ("Most state laws include a provision directing state regulators to look to the FTC for guidance in terms of substantive law, encouraging state regulators to emphasize enforcement and remedies, rather than focus on policymaking."); Shelden & Gardner, *supra* note 141, at 386-91 (surveying government enforcement authority and procedures under state DTPAs); *see also* Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 658 (1985) ("Virtually everyone agrees that deceptive advertising is bad. Few, however, agree about how best to tell whether an advertisement is deceptive.").

159. Schwartz & Silverman, *supra* note 119, at 16; *see generally* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163 (2011) (discussing studies that "suggest private litigation under Little-FTC Acts tends to pursue a different consumer protection mission than the Bureau of Consumer Protection at the Federal Trade Commission"). For an illustration of the practical distinctions between government enforcement under the FTC Act and private enforcement under state DTPAs, compare Sovern, *supra* note 125, at 440-45 (describing practical constraints on FTC enforcement), with Lemley, *supra* note 117, at 316-27 (discussing "relationship of false advertising law and state deceptive trade practices laws"), and Schwartz & Silverman, *supra* 119, at 15-45 (discussing scope and abuse of private enforcement authority under state DTPAs).

160. *See* Shelden & Gardner, *supra* note 141, at 392 (describing how "[a]pproximately 20 states provide for double or treble damages"); *see also* Schwartz & Silverman, *supra* note 119, at 68-69 (contending that unlike FTC enforcement which is remedial and injunctive, "[p]rivate lawsuits are retrospective and often impose damages in excess of actual damages").

161. *See* Shelden & Gardner, *supra* note 141, at 392 (describing that some state DTPAs "provide that the prevailing consumer will recover either the actual damages or a minimum damage award, whichever is greater"); *see also* Lemley, *supra* note 117, at 320 (stating that enhanced damages provide incentives for plaintiffs' attorneys to bring lawsuits under state DTPAs); Shelden & Gardner, *supra* note 141, at 391 (noting how increasing number of state DTPAs provide for prevailing consumers to recover attorney's fees and costs, but these statutes vary insofar as some "make it mandatory . . . while others make it discretionary").

from state to state.[162] However, the requirements are generally more lenient than the analogous cause of action for common law fraud.[163] The practical consequence of such variations is the extent to which little-FTC Acts provide for private enforcement as opposed to private remedies.[164]

V. EVOLVING THEORIES FOR EVOLVING MATTERS: WHY THE CLAIMS AGAINST VIBRAM SHOULD FAIL AS A MATTER OF LAW

The false advertising claims against Vibram were premised on allegations that Vibram "misrepresented not only the health benefits of FiveFingers, but also the extent to which such health benefits [had] been scientifically corroborated."[165] Moreover, the health claims at issue represented novel and developing areas of research in the scientific community.[166] In that regard, these lawsuits raise a number of unique legal questions – most notably concerning the extent to which manufacturers may be held liable for advertising

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162. *See* Schwartz & Silverman, *supra* note 119, at 17-21 (analyzing distinctions in elements required to bring private claims under state DTPAs). Noteworthy distinctions include the need to show reliance, the requisite intent by the defendant, and the need (or the extent of a private plaintiff's obligation) to show injury in fact and damages. *See id.* (enumerating distinctions). In some states, the requisite elements are expressly prescribed by statute, while in others, the elements have been established by judicial interpretation of the statutes. *See id.* at 17 (discussing source of requisite elements for private causes of action under state DTPAs).

163. *See* Sharkey, *supra* note 142, at 1633 ("Consumer protection statutes often relax one or more of the common law fraud elements, for example, by liberalizing standing requirements, or by relieving plaintiffs of the burden of demonstrating causation or injury.").

164. *See* Shelden & Gardner, *supra* note 141, at 391 (explaining that some state DTPAs "allow actions under the theory of 'private attorney general'"); Schwartz & Silverman, *supra* note 119, at 24 (contending that states with enhanced damages provisions view them "as a way to encourage private enforcement of their [DTPAs] by providing an economic incentive to sue in cases where actual damages may be very small"). Schwartz and Silverman explain that the majority of states "do not require a showing of reliance" by private plaintiffs, and contend that courts in such states utilize a standard similar to the "reasonable consumer test" employed by federal courts in evaluating FTC allegations of "deceptive trade practices" – an assessment of "whether the act has the *tendency or capacity* to mislead consumers, regardless of whether the plaintiff actually and reasonably relied on the misrepresentation." *Id.* at 19; *see supra* note 155 and accompanying text (describing "reasonable consumer test").

165. *See* Bezdek v. Vibram USA, Inc., No. 12-10513, 2013 WL 639145, at *1. For a description of the allegations against Vibram, see *supra* notes 89-105 and accompanying text.

166. *See supra* notes 52-68 and accompanying text (describing scientific community's research and evaluation of barefoot running).

claims where the falsity or deceptiveness of such claims is the subject of an evolving debate in the scientific community.[167]

A number of recent decisions by federal courts have revealed emerging legal trends that may provide innovative strategies for defending false advertising claims under similar circumstances.[168] Specifically, these decisions indicate that: (1) private plaintiffs cannot sustain false advertising actions based on allegations that a defendant's product claims are unsubstantiated;[169] and (2) matters concerning ongoing debates in the scientific community cannot form the basis of false advertising actions.[170] These propositions provide advantageous defense strategies, allowing defendants to efficiently challenge the legal sufficiency of false advertising claims at the early stages of litigation.[171] This section uses the Vibram lawsuits as a platform for providing the legal background of these theories, and demonstrating how they can be utilized as powerful defense tools in future cases.[172]

A. The Claims Against Vibram Should Fail as a Matter of Law Because Private Plaintiffs Lack Standing to Bring Unsubstantiated Advertising Claims, and the Allegations Fail to Demonstrate That Vibram's Health Benefit Claims Were False or Deceptive

1. *Private Plaintiffs Lack Standing to Bring Unsubstantiated Advertising Claims under State Deceptive Trade Practices Acts*

In recent years, numerous federal courts applying state DTPAs have, without controversy, tendered the proposition that administrative agencies "and not private plaintiffs retain exclusive authority to prosecute claims of unsubstantiation."[173] In a series of "decisions

167. *See supra* notes 24-25 and accompanying text (describing unique legal issues pertaining to matters of scientific debate).

168. *See infra* notes 173-307 and accompanying text (describing and analyzing these legal theories).

169. *See infra* notes 173-242 and accompanying text (describing and analyzing "unsubstantiated advertising" legal theory).

170. *See infra* notes 243-307 and accompanying text (describing and analyzing "matters of scientific debate" legal theory).

171. For a hypothetical application of these legal theories, see *infra* notes 193-242 and accompanying text (unsubstantiated advertising), and 280-207 and accompanying text (matters of scientific debate).

172. *See infra* notes 173-307 and accompanying text.

173. *See* Dana Rosenfeld & Daniel Blynn, *The 'Prior Substantiation' Doctrine: An Important Check On the Piggyback Class Action*, 26 ANTITRUST 68, 68-69 (Fall 2011). ("Over the past few years, courts have held that the FTC and FDA—and not private plaintiffs—retain exclusive authority to prosecute claims of unsubstantiation"); William C. MacLeod & Daniel S. Blynn, *Substantiation in the Courts: Is Unsubstantiated Advertising Deceptive?*, KELLEY, DRYE & WARREN (Apr. 10, 2013), at 1, http://www.kelleydrye.com/publications/articles/1708/_res/id=Files/index=0/04-

in a number of key jurisdictions," these courts have dismissed false advertising claims (or granted summary judgment to the defendant) that were premised on allegations that the defendant advertised unsubstantiated product claims.[174] Underlying each holding is the cohesive reasoning that state DTPAs do not recognize an "unsubstantiated advertising" theory of liability in connection with private lawsuits.[175]

"The modern doctrine of advertising substantiation is based on the theory that unsubstantiated advertising is deceptive under Section 5 of the [FTC] Act."[176] On that basis, the FTC exercises its regulatory authority to investigate claims it believes are unsubstantiated.[177] Likewise, pursuant to its Section 5 authority, the FTC established its "Advertising Substantiation Program" in 1971, through which the FTC may require advertisers to "submit on FTC demand tests, studies, or other data that purport to substantiate advertised

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174. *See* Kenneth A. Plevan, Gregory S. Bailey & Limor Robinson, *Consumer Fraud Class Actions: What Does a Plaintiff Need To Plead and Prove to Challenge 'Here's Proof' Claims?*, 41 PRODUCT SAFETY & LIABILITY REP., No. 42 (Oct. 28, 2013) ("It is now generally well-accepted, based on decisions in a number of key jurisdictions, that a private party challenging advertising under state consumer protection/fraud statutes does not state a legally sufficient cause of action by simply alleging that the challenged advertising lacks proper substantiation."); *e.g.*, Fraker v. Bayer Corp., No. 08-1564, 2009 WL 5865687 (E.D. Cal. Oct. 6, 2009); Franulovic v. Coca Cola Co., 390 Fed. App'x 125 (3d Cir. 2010); Pelkey v. McNeil Consumer Healthcare, Civ. No. 10-61853, 2011 WL 677424 (S.D. Fla. Feb. 16, 2011); Chavez v. Nestle USA, Inc., No. 09-9192, 2011 WL 2150128 (C.D. Cal. May 19, 2011); Precision IBC, Inc. v. PCM Capital, LLC, No. 10-0682, 2011 WL 2728467 (S.D. Ala. July 12, 2011); Stanley v. Bayer Healthcare, LLC, No. 11-862, 2012 WL 1132920 (S.D. Cal. Apr. 3, 2012); Scheuerman v. Nestle Healthcare Nutrition, Inc., Nos. 10-3684, 10-5628, 2012 WL 2916827 (D.N.J. July 17, 2012); Eckler v. Wal-Mart Stores, Inc., No. 12-727, 2012 WL 5382218 (S.D. Cal. Nov. 1, 2012); Gaul v. Bayer Healthcare, LLC, No. 12-5110, 2013 U.S. Dist. LEXIS 22637 (D.N.J. Feb. 11, 2013); Hughes v. Ester C Co., 930 F. Supp. 2d 439 (E.D.N.Y. 2013); Johns v. Bayer Corp., No. 09-1935, 2013 WL 1498965 (S.D. Cal. Apr. 10, 2013); McCray v. The Elations Co., No. EDCV 13-0242 JGB (OPx), 2013 WL 6403073, at * (C.D. Cal. July 12, 2013); Greifenstein v. Estee Lauder Corp., No. 12-cv-09235, 2013 WL 3874073 (N.D. Ill. July 26, 2013).

175. *See* MacLeod & Blynn, *supra* note 173, at 1 ("Underlying each decision is a common theme: plaintiffs cannot simply argue that a defendant's advertising claims are unsubstantiated and, thus, necessarily false under state law.").

176. *Id.* at 2.

177. *See* Mandelkehr, *supra* note 24, at 300 (citing *In re Pfizer Inc.*, 81 F.T.C. 23, 26 (1972)) ("The FTC has the regulatory authority to prohibit advertisers from making false or deceptive claims, including claims that are not properly substantiated by scientific evidence."); *supra* notes 150-155 and accompanying text (describing FTC's regulatory and enforcement authority).

claims regarding a product's safety, performance, efficacy, quality, or comparative price."[178]

The FTC's 1972 decision in *In re Pfizer, Inc.*[179] established the prevailing requirement that advertisers must possess a "reasonable basis for affirmative product claims" in advertisements.[180] The FTC subsequently specified that affirmative product claims will violate the FTC Act if the advertiser lacks "prior substantiation," in other words, "a reasonable basis for [such] claims *before they are disseminated*."[181] In general, the FTC has declined to promulgate bright-line standards for complying with the "prior substantiation" requirement.[182] However, when advertisements contain express statements "regarding the amount of support the advertiser has for the product claim . . . (e.g., 'tests prove', 'doctors recommend', and 'studies show'), the [FTC] expects the firm to have at least the advertised level of substantiation."[183] Similarly, "claims relating to

178. *See* Dorothy Cohen, *The FTC's Advertising Substantiation Program*, J. MARKETING, Winter 1980, at 26, 26 (discussing origins and features of FTC advertising substantiation program, and describing it as "designed to 'assist consumers to make rational choices'"); Federal Trade Commission, Policy Statement Regarding Advertising Substantiation Program, FTC, 49 FR 30999-03, at *31000 (Aug. 2, 1984), *appended to*, *In re* Thomson Med. Co., Inc., 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987) [hereinafter FTC Policy Statement] (describing enforcement procedures under advertising substantiation program).

179. 81 F.T.C. 23, 1972 WL 127465 (1972).

180. *See Pfizer*, 1972 WL 127465, at *1 ("Opinion of the Commission resolves the general issue that the failure to possess a reasonable basis for affirmative product claims constitutes an unfair practice in violation of the Federal Trade Commission Act."); *see also* Randal Shaheen & Amy Ralph Mudge, *Has the FTC Changed the Game on Advertising Substantiation?*, 25 ANTITRUST 65, 65-66 (Fall, 2010) (explaining that *Pfizer* established "baseline requirements for substantiation").

181. *See* FTC Policy Statement, *supra* note 178, at *31000 (emphasis added) (describing prior substantiation requirement); *see also In re* Pom Wonderful, LLC, F.T.C., No. 9344, 2013 WL 268926 (Jan. 16, 2013) (reaffirming reasonable basis standard).

182. *See* Shaheen & Mudge, *supra* note 180, at 65 (explaining that FTC Policy Statement "made clear" that reasonable basis standard "was intended to be quite flexible"). The FTC Policy Statement "suggested that the FTC would essentially conduct a cost/benefit analysis to determine what constituted required substantiation." *Id.* Specifically, the FTC explained that its "determination of what constitutes a reasonable basis depends . . . on a number of factors relevant to the benefits and costs of substantiating a particular claim." FTC Policy Statement, *supra* note 178, at *31000 (describing requisite standards for prior substantiation). "These factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable." *Id.*

183. FTC Policy Statement, *supra* note 178, at *31000 (describing requirements for "express" substantiation claims).

health and safety" must be substantiated by "competent and reliable scientific evidence."[184]

By contrast, a line of recent federal court decisions has made abundantly clear that, unlike the FTC, private plaintiffs lack authority to bring false advertising claims based on a lack of substantiation theory of liability.[185] These decisions do not suggest that an unsubstantiated product claim *cannot* be false or deceptive under state law, but rather that private plaintiffs may not rely on allegations that a defendant's advertising claims are unsubstantiated.[186] Instead, a plaintiff must affirmatively plead and prove that such claims are demonstratively false or deceptive, and not merely unsubstantiated.[187]

These federal courts have similarly held that a private plaintiff may not establish falsity or deception by "piggybacking" on FTC actions for unsubstantiated advertising.[188] In that regard, the under-

184. *See* Shaheen & Mudge, *supra* note 180, at 66 (citing *In re* Novartis Corp., 127 F.T.C. 580, 580 (1999)) (describing FTC's substantiation requirements for health and safety claims).

185. *See* Rosenfeld & Blynn, *supra* note 173, at 68 (discussing line of recent cases finding private plaintiffs lack authority to bring unsubstantiated advertising claims); *e.g.*, Franulovic v. Coca Cola Co., 390 Fed. App'x 125, 128 (3rd Cir. 2010) (concluding that "[n]o New Jersey or Third Circuit decision has applied the prior substantiation theory to the New Jersey Consumer Fraud Act," and that "the District Court correctly held that a New Jersey Consumer Fraud Act claim cannot be premised on a prior substantiation theory of liability"); Chavez v. Nestle USA, Inc., Civ. No. 09-9192, 2011 WL 2150128, at *6 (C.D. Cal. Feb. 12, 2013) ("In short, the government, representing the Federal Trade Commission, can sue an advertiser for making unsubstantiated advertising claims; a private plaintiff cannot." (citations omitted)), *rev'd in part on other grounds*, 511 Fed. App'x 606 (9th Cir. 2013). For a detailed list of similar holdings, see cases cited *supra* note 174.

186. *See, e.g.*, Hughes v. Ester C Co., 930 F. Supp. 2d 439, 458-59 (E.D.N.Y. 2013) (noting that "[*m*]*erely* because a fact is unsupported by clinical tests *does not make it untrue*" (emphasis added) (quoting Gredell v. Wyeth Labs, Inc., 854 N.E. 2d. 752, 757 (Ill. App. Ct. 2006))).

187. *See id.* at 456-57 (" [B]ecause there is no remedy for 'unsubstantiated advertising,' private litigants are limited to claims for false or misleading advertising, which require supporting factual bases for such allegations."). As one court explained, a plaintiff may not sustain false advertising claims based on allegations that an advertising claim is unsubstantiated, but instead must plead sufficient facts to "lend 'facial plausibility' " to allegations that an advertising claim is, in fact, false or misleading. *See* Eckler v. Wal-Mart Stores, Inc., No. 12-727, 2012 WL 5382218, at *3, *7 (S.D. Cal. Nov. 1, 2012) (describing plaintiff's burden in pleading false advertising claim).

188. *See, e.g.*, Fracker v. Bayer Corp., No. 08-1564, 2009 WL 5865687, at *8 (holding that plaintiff cannot "successfully allege a claim for false advertising" without providing factual basis that advertisement is false or deceptive "apart from what is alleged in or inferred by" consent decree with the FTC or FTC Order); *see also* Rosenfeld & Blynn, *supra* note 173, at 69 (contending that "unifying basis" for recent line of cases dismissing false advertising claims is "courts' refusal to apply the 'prior substantiation doctrine' in private class actions").

lying rationale is that the FTC exercises its investigative and remedial enforcement powers in prosecuting unsubstantiated advertising.[189] Private litigants, conversely, have no authority to require advertisers to provide substantiation or to bring subsequent lack of substantiation claims.[190] To the contrary, private plaintiffs alone bear the burden of independently establishing that the advertisement is demonstrably false or deceptive.[191] Accordingly, these courts have reasoned that allowing private plaintiffs to bring unsubstantiated advertising claims "would inappropriately shift the burden from plaintiffs (to affirmatively prove falsity or deception) to defendants (to demonstrate that the challenged claims were true and substantiated)."[192]

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189. *See, e.g.*, *Fracker*, 2009 WL 5865687, at *7 (holding that plaintiff could not rely on FTC allegations to support false advertising claims). In *Fracker*, the court reasoned that the FTC is "empowered to determine whether a business practice is unfair or deceptive" under its authority "granted by the FTC [Act]." *See id.* In that connection, the FTC Act "vests remedial power *solely* in the [FTC]," which provides the FTC's basis for bringing unsubstantiated advertising claims without otherwise showing that the respective advertisement is false or misleading. *See id.* at *8 (emphasis added). Thus, where the plaintiff sought to support a private false advertising claim by citing the FTC's unsubstantiated advertising allegations against the defendant, the *Fracker* court dismissed the plaintiff's claim, concluding that it was essentially an "attempt to shoehorn a violation of the [FTC Act] . . . into a private cause of action." *See id.* at *7.

190. *See, e.g.*, *id.* at *8 ("In short, the government . . . can sue an advertiser for making unsubstantiated advertising claims; a private plaintiff cannot." (citing Nat'l Council Against Health Fraud, Inc. v. King Bio Pharms., 133 Cal. Rptr. 2d 207, 216-17 (Cal. Ct. App. 2003)).

191. *See, e.g.*, Hughes v. Ester C Co., 930 F. Supp. 2d 439, 456-57 (E.D.N.Y. 2013) ("Thus, because there is no private remedy for 'unsubstantiated advertising,' private litigants are limited to claims for false or misleading advertising, which requires supporting factual bases for such allegations." (citing *Fraker*, 2009 WL 5865687, at * 8)).

192. MacLeod & Blynn, *supra* note 173, at 1 (asserting that "[t]he courts have reasoned that recognition of such a theory of liability would inappropriately shift the burden from plaintiffs (to affirmatively prove falsity or deception) to defendants (to demonstrate that the challenged claims were true and substantiated."); *see, e.g.*, Chavez v. Nestle USA, Inc., Civ. No. 09-9192, 2011 WL 2150128, at *6 (C.D. Cal. Feb. 12, 2013) (noting that California Court of Appeals has "declined to shift the burden of proof to the defendant to prove the veracity of its claim"), *rev'd in part on other grounds*, 511 Fed. App'x 606 (9th Cir. 2013); McCray v. The Elations Co., No. EDCV 13-0242 JGB (OPx), 2013 WL 6403073, at * (C.D. Cal. July 12, 2013) (holding that allegations that defendant lacked substantiation for health benefit claims "improperly 'shift[ ] the burden of production to defendants' to prove that studies exist which substantiate its claim" (quoting *King Bio Pharms.*, 133 Cal. Rptr. 2d at 214); *see also* Defendant's Motion to Dismiss, *Safavi*, *supra* note 19, at 7 (citations omitted) (arguing that allowing prior substantiation doctrine "to be used by individuals would impermissibly shift the burden of proof to defendants in false advertising cases to show that their advertising claims, in fact, are substantiated").

2. *The Plaintiffs Alleged Improper Lack of Substantiation Claims*

The claims against Vibram should fail as a matter of law because the plaintiffs' allegations, on their face, relied solely on an unsubstantiated advertising theory of liability.[193] Indeed, the plaintiffs alleged that Vibram "claimed that wearing FiveFingers" would confer "significant advertised health benefits."[194] In turn, the plaintiffs contended that Vibram's "health benefit claims [were] false and deceptive because FiveFingers *are not proven* to provide any of the health benefits beyond what conventional running shoes provide," and that "there [were] no well-designed scientific studies that support [Vibram's] health benefit claims regarding FiveFingers."[195]

To state a false advertising claim, a plaintiff must allege facts that affirmatively demonstrate a false or deceptive act by the defendant.[196] Moreover, private plaintiffs have no authority under state DTPAs to bring unsubstantiated advertising claims.[197] Correspondingly, a private plaintiff may not establish that a defendant's affirmative product claim is false or deceptive by merely showing that it is unsubstantiated.[198] Thus, to the extent that the plaintiffs rely on the allegation that Vibram's health benefit claims were unsup-

193. *See infra* notes 194-221 and accompanying text.

194. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 3; Complaint, *De Falco*, *supra* note 18, para. 3 (same).

195. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 3 (emphasis added); Complaint, *De Falco*, *supra* note 18, para. 3 (same).

196. *See, e.g.*, Fraker v. Bayer Corp., No. 08-1564, 2009 WL 5865687 (E.D. Cal. Oct. 6, 2009) ("To successfully allege a claim for false advertising, [the] [p]laintiff has the burden to plead and prove facts that show that the claims that [the] [d]efendant made in connection with the product are false or misleading.").

197. *See, e.g.*, *id.* at *8 ("In short, the government . . . can sue an advertiser for making unsubstantiated advertising claims; a private plaintiff cannot."); *see also* Bronson v. Johnson & Johnson, Inc., No. C 12-04184, 2013 WL 1629191, at *8 (N.D. Cal. Apr. 16, 2013) ("Challenges based on a lack of substantiation are left to the Attorney General and other prosecuting authorities; private plaintiffs, in contrast, have the burden of proving that advertising is *actually* false or misleading." (citing *King Bio Pharms*, 133 Cal. Rptr. 2d at 214)).

198. *See, e.g.*, Johns v. Bayer Corp., Civ. No. 09-1935, 2013 WL 1498965, at *40 (S.D. Cal. Apr. 10, 2013) (stating that where plaintiff's false advertising claims "are based on 'lack of substantiation' rather than proof of falsity," strength of defendant's evidence in support of its product claims "is irrelevant"); *cf. Bronson*, 2013 WL 1629191, at *8 ("A claim can survive a lack of substantiation challenge by, for example, alleging studies showing that a defendant's statement is false."); *see also* MacLeod & Blynn, *supra* note 173, at 1 (describing how federal courts in California, New Jersey, and Florida "have found that the theory that a claim is false because the defendant has not offered substantiation to prove it is true simply is not cognizable under state consumer protection and false advertising laws" (citing Franulovic v. Coca Cola Co., 390 Fed. App'x. 145, 127-28 (3d Cir. 2010); Pelkey v. McNeil Consumer Healthcare, No. 10-61853, 2011 WL 677424, at *4 (S.D. Fla. Feb. 16, 2011); Chavez v. Nestle USA, Inc., No. 09-9192, 2011 WL 2150128, at *5 (C.D. Cal. May 19, 2011)).

ported by scientific evidence, their false advertising claims must fail as a matter of law.[199]

Independent of their lack of substantiation allegations, the plaintiffs failed to plead facts that satisfied their burden to affirmatively demonstrate that Vibram's health benefit claims are false or deceptive.[200] By comparison, in *Scheuerman v. Nestle Healthcare Nutrition, Inc.*,[201] the plaintiffs took issue with advertisements that touted "a number of health benefits" associated with the defendant manufacturer's nutritional supplement.[202] Specifically, the plaintiffs alleged that the advertisements represented that the existence of such health benefits was "clinically shown."[203] According to the plaintiffs, these advertisements were false because the defendant did not possess adequate support for its "clinically shown" claims.[204]

At summary judgment, the *Scheuerman* court observed, the plaintiffs' "attempt to transform what is essentially a prior substantiation claim into a consumer fraud claim by arguing that [the defendant's] use of the words 'clinically shown' constitutes a false or misleading statement."[205] "In order to demonstrate this," the court explained, the plaintiffs "must plead and prove that [the defendant] lacked clinical support for the health benefits it attributed" to the product.[206] In evaluating the record before it, the court found that the plaintiffs, "at best," could prove that the defendant's "sup-

199. *See, e.g.*, Hughes v. Ester C Co., 930 F. Supp. 2d 439, 456-57 (E.D.N.Y. 2013) ("Thus, because there is no private remedy for 'unsubstantiated advertising,' private litigants are limited to claims for false or misleading advertising, which requires supporting factual bases for such allegations" (citing *Fraker*, 2009 WL 5865687, at * 8)).

200. *See generally* Amended Complaint, *Bezdek*, 2012 WL 2398011(failing to allege facts to demonstrate falsity of Vibram's health claims); Complaint, *De Falco*, No. 12-07238 (same).

201. Nos. 10-3684, 10-5628, 2012 WL 2916827 (D.N.J. July 17, 2012).

202. *See id.* at *1-2 (providing factual background).

203. *See id.* at *1 (internal quotation marks omitted) (explaining that plaintiffs alleged defendant's "clinically shown health benefit claims were deceptive because they were made without any reasonable basis for doing so and without substantiating them").

204. *See id.* (noting specifically that plaintiff alleged defendant "did not possess or rely upon any reasonable basis that substantiated these purported health benefits"); *id.* at *7 (noting plaintiff alleged that "studies cited" by defendant in support of its "clinically shown" claims "were not as conclusive" as defendant represented in its advertisements).

205. *Id.* at *7 (assessing plaintiff's arguments in support of false advertising claims).

206. *Id.* (asserting requirements for plaintiff to sustain false advertising claims). The court further explained, it is the "[p]laintiffs' burden to affirmatively prove that the 'clinically shown' . . . advertising claim is a false or misleading statement and not merely one that is unsubstantiated." *Id.*

port underlying its claims of 'clinically shown' health benefits [was] not as strong as it should be and do not substantiate those claims."[207] On that basis, the court granted summary judgment for the defendant, explaining that the evidentiary record was insufficient to "affirmatively prove that the 'clinically shown' . . . advertising claim [was] a false or misleading statement and not merely one that is unsubstantiated."[208]

Similarly, in *Stanley v. Bayer Healthcare LLC*,[209] the plaintiff brought false advertising claims based on allegations that the defendant made deceptive advertising statements that probiotics in its nutritional supplement "improve digestive and immune system health."[210] In support of these assertions, the plaintiff contended that the challenged health benefit claims were in conflict with "the vast majority of generally accepted scientific literature."[211] There, the court also granted summary judgment for the defendant.[212] The *Stanley* court explained that the plaintiff's claims were based entirely on an alleged failure to substantiate.[213] In any event, the court concluded that the plaintiff failed to otherwise establish that the health claims were "actually false" or might otherwise "mislead a reasonable consumer."[214]

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207. *Id.* (evaluating whether plaintiff satisfied requirements for false advertising claims).

208. *See id.* at *8 (granting summary judgment for defendant). The court elaborated:

> Plaintiffs do not present evidence that Nestle actually lacks scientific support for its 'clinically shown' claims or that such support does not exist; they argue that this support should have been stronger. This is insufficient to satisfy Plaintiffs' burden to demonstrate that Nestle's 'clinically shown' advertising claims 'are actually false or misleading.'

Id. The court emphasized that even if the plaintiffs could prove that the defendant's studies were not "sufficiently strong" to support the defendant's affirmative representations, the plaintiff could not establish a sufficient basis for relief under New Jersey's DTPA. *See id.* at *7.

209. No. 11-862, 2012 WL 1132920 (S.D. Cal. Apr. 3, 2012).

210. *See id.* at *2 (summarizing plaintiff's allegations).

211. *See id.* (explaining that plaintiffs alleged "[d]efendant's claims about the benefits of the Products 'are not substantiated by the vast majority of generally accepted scientific literature currently available relating to probiotics' ").

212. *See id.* at *10 (granting summary judgment for defendant).

213. *See id.* at *4 (holding that alleged "lack [of] proper scientific substantiation . . . . does not render claims false and misleading" under state DTPA).

214. *See id.* at *5 ("[N]one of [p]laintiff's experts . . . . explain how those statements might mislead a reasonable consumer. Instead, [p]laintiff's experts repeatedly assert the statements are rendered false or misleading due to a lack of substantiation."). In *Stanley*, the plaintiff also presented evidence that the defendants failed to comply with the substantiation requirements set forth by the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(r)(6)(A). *See id.* at *6. However, the court held that the defendant's compliance with the FDCA had no bearing on the sufficiency of the plaintiff's false advertising claims, not only because the re-

In the Vibram lawsuits, the plaintiffs alleged not only that Vibram's health benefit claims were unsubstantiated, but also that Vibram misrepresented the extent to which those claims were supported by scientific evidence.[215] In support of these averments, the plaintiffs' complaints cited to scientific literature that purportedly contradicts the veracity of Vibram's health benefit representations.[216] However, as alleged, the articles merely suggest that certain members of the scientific community believed that existing studies were insufficient to fully understand the benefits and risks associated with barefoot running.[217] Furthermore, the plaintiffs expressly stated, "there is no *adequate scientific proof* supporting [d]efendants' representations."[218] Thus, like in *Scheuerman* and *Stanley*, the plaintiffs failed to affirmatively demonstrate that Vibram's health claims *were not* supported by scientific evidence.[219] Instead, the allegations establish, at most, that the evidence in support of Vibram's health benefit claims was not as strong as it should be, or that its claims were "unsubstantiated."[220] Accordingly, the plaintiffs failed to carry their burden of demonstrating that Vibram

cord failed to create a genuine issue of material fact as to whether defendant violated such regulations, *see id.* at *7, but also because the plaintiff lacked authority to prosecute violations of FDA regulations, s*ee id.* at *6 (citing *King*, 133 Cal. Rptr. 2d at 212); *see also King*, 133 Cal. Rptr. 2d at 212 ("[P]rosecuting authorities, but not private plaintiffs, have the administrative power to request advertisers to substantiate advertising claims before bringing actions for false advertisement . . . .").

215. *See* Amended Complaint,, *Bezdek*, *supra* note 18, para. 20 ("Although there is no reliable scientific proof demonstrating that FiveFingers actually provide those health benefits, Defendants' marketing and advertising conveys that there is such reliable scientific proof."); Complaint, *De Falco*, *supra* note 18, para. 21 (same).

216. *See* Amended Complaint, *Bezdek*, *supra* note 18, paras. 40-56 (citing scientific studies and literature); Complaint, *De Falco*, *supra* note 18, paras. 40-56 (same).

217. The studies cited by the Plaintiffs indicated, for example, that "[r]esearch is ongoing," and that "professional organizations and many clinicians . . . are going to be reluctant to support or oppose barefoot running until more definitive research and evidence are available." Amended Complaint, *Bezdek*, *supra* note 18, paras. 42-43; Complaint, *De Falco*, *supra* note 18, paras. 42-43 (same).

218. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 41 (emphasis added); Complaint, *De Falco*, *supra* note 18, para. 41 (same).

219. *See* Scheuerman v. Nestle Healthcare Nutrition, Inc., Nos. 10-3684, 10-5628, 2012 WL 2916827, at *7 (D.N.J. July 17, 2012) (holding that plaintiffs' showing that scientific evidence contradicted defendant's "clinically shown" health benefit claims failed to establish that defendant's advertising claims were false); *Stanley*, 2012 WL 1132920, at *2-4 (granting summary judgment for defendant where plaintiff alleged that defendant's health benefit claims were not substantiated by "the vast majority of generally accepted scientific literature" because such substantiation was not required).

220. *See Scheuerman*, 2012 WL 2916827, at *7 (holding that plaintiffs could not carry burden of showing false or deceptive advertising claim by demonstrating that scientific evidence in support of "clinically shown" health benefit claims was "not as strong as it should be" and did not "substantiate those claims").

made representations that were actually false or misleading, and not merely unsubstantiated.[221]

3. *The Plaintiffs' Claims Inappropriately Shift the Burden to Vibram to Establish That Their Advertisements Were True and Substantiated*

The claims against Vibram should similarly fail because the allegations seek to relieve the plaintiffs of their burden to affirmatively show that Vibram's advertisements are false or deceptive, and correspondingly, would require Vibram to demonstrate that its advertisements are true and substantiated.[222] Even drawing the inference that Vibram represented that its health benefit claims were supported by "competent and reliable" scientific evidence, the plaintiffs failed to plead factual allegations that, if true, would disprove the existence of such scientific evidence.[223] Accordingly, if the plaintiffs were permitted to sustain their false advertising claims on these allegations, Vibram would be required to affirmatively set forth supporting evidence in order to avoid liability.[224]

Recent case law illustrates why the Vibram plaintiffs' allegations are insufficient to sustain their false advertising claims.[225] In

221. *See id.*; *Stanley*, 2012 WL 1132920, at *3-4. The plaintiffs effectively attempted to import the FTC's "competent and reliable scientific evidence" standard for health claim substantiation. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 3 (alleging there are no "well-designed" studies to support Vibram's health claims); Complaint, *De Falco*, *supra* note 18, para. 3 (same). However, the plaintiffs failed to plead any facts to support an inference that Vibram claimed to rely on "competent and reliable scientific evidence," let alone "well-designed scientific studies subject to traditional scientific scrutiny, including being performed by impartial parties who conducted appropriately powered double-blinded, placebo-controlled studies, which were subjected to peer review or other methods traditionally used by the scientific community to ensure accurate results." *See* Amended Complaint, *Bezdek*, *supra* note 18, para.39 (asserting that Vibram lacked support for health claims); Complaint, *De Falco*, *supra* note 18, para. 39 (same). *See* Fracker v. Bayer Corp., 2009 WL 5865687, at *8-9 (C.D. Cal. Oct. 6, 2009) (dismissing plaintiff's claim for false advertising because plaintiff alleged only that defendant had "no reasonable basis, consisting of competent and reliable scientific evidence to substantiate" its health-benefit advertising claim).

222. *See* sources cited *infra* notes 223-242 and accompanying text (arguing that allegations would improperly shift burden of proof to Vibram).

223. The plaintiffs' allegations merely purport to show that Vibram's health benefit claims were not supported by *adequate* scientific evidence. *See generally* Amended Complaint, *Bezdek*, *supra* note 18, paras. 40-56 (alleging that Vibram lacked "adequate support" for its health-benefit representations); Complaint, *De Falco*, *supra* note 18, paras. 40-56 (same).

224. *See, e.g.*, Chavez v. Nestle USA, Inc., Civ. No. 09-9192, 2011 WL 2150128, at *6 (C.D. Cal. Feb. 12, 2013) ("[T]he California Court of Appeal . . . [has] declined to shift the burden of proof to the defendant to prove the veracity of its claim."), *rev'd in part on other grounds*, 511 Fed. App'x 606 (9th Cir. 2013).

225. *See infra* notes 226-235 and accompanying text.

Eckler v. Wal-Mart Stores, Inc.,[226] the plaintiff alleged that the defendant made false or deceptive advertising claims that that its dietary supplement contained ingredients that were "good for the health and comfort of joints."[227] In support of her assertions, the plaintiff alleged that scientific studies *confirmed* the ingredients, in fact, were not associated with the claimed health benefits.[228] Specifically, the plaintiff cited to a National Institute of Health study, which allegedly concluded that the ingredients did not promote joint health and comfort.[229] Under those circumstances, the court held that the plaintiff's allegations could not be classified as a lack of substantiation claim.[230]

There, the *Eckler* court explained, "[t]here's really no denying . . . that [the plaintiff's] claims are based almost exclusively on her allegations that the purported benefits . . . either: (1) are completely unsubstantiated by [the defendant]; or (2) have been *disproved* by the scientific community."[231] However, the court reasoned that "(1) and (2) aren't necessarily the same thing."[232] According to the court, "[t]here is a difference, intuitively, between a claim that has *no evidentiary support* one way or the other and a claim *that's actually been disproved*."[233] Therefore, the court distinguished respectively between claims "about a product that [have] been disproved (which [are] closer to an affirmative misrepresentation) *and* [claims] about a product for which there's no proof at all (which is closer to an unsubstantiated claim)."[234] Thus, the court concluded, "[t]o the extent [plaintiff] points to studies that allegedly debunk" the claimed benefits, the plaintiff isn't just alleging "those benefits are unsubstantiated[,]" she is alleging they "are positively false."[235]

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226. No. 12-CV-727, 2012 WL 5382218 (S.D. Cal. Nov. 1, 2012).

227. *See id.* at *1 (providing factual background).

228. *See id.* at *2 (explaining that plaintiff alleged "[s]cientific studies confirm" ingredients are inefficacious).

229. *See id.* (citing study that found "[g]lucosamine and chondroitin sulfate alone or in combination did not reduce pain effectively in the overall group of patients with osteoarthritis of the knee").

230. *See id.* at *3. ("[T]he Court simply doesn't see this as a 'lack of substantiation' case.").

231. *Id.* (emphasis added).

232. *Id.*

233. *Id.* (emphasis added).

234. *See id.*

235. *See id.* For a further illustration of the distinction between lack of substantiation allegations and affirmative misrepresentation allegations, compare *id.* at *3-4 (finding that plaintiff alleged affirmative misrepresentation), and Hughes v. Ester C Co., 930 F. Supp. 2d. 439, 459 (E.D.N.Y. 2013) (finding that plaintiff alleged affirmative misrepresentation), with Chavez v. Nestle USA, Inc., No. CV 09-

Unlike in *Eckler*, the factual allegations by the Vibram plaintiffs, if true, would not *disprove* the existence of barefoot running's purported health benefits, nor would they *disprove* the existence of scientific evidence to support those benefits.[236] Notably, the plaintiffs' complaints plainly asserted: "[p]laintiff cannot, without discovery, know the details of the bases for [d]efendants' deceptive claims . . . [h]owever, the above-mentioned health benefits claims *were not and are not based* on well-designed scientific studies."[237] Furthermore, while the plaintiffs' allegations purport to deny the existence of *competent and reliable* support for Vibram's health benefit claims, the factual allegations do not support such an inference.[238] To the contrary, the articles cited by the plaintiffs merely suggest, for example, there is a need for "more definitive research and evidence,"[239] and that Vibram's statements were not *based on* adequate scientific evidence.[240] Accordingly, as exemplified by *Eckler*, the plaintiffs' allegations effectively amount to lack of substantiation claims rather than affirmative misrepresentation claims.[241] As a result, the plaintiffs' claims would inappropriately shift the burden to

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9192, 2011 WL 2150128, at *1 (C.D. Cal. Feb. 12, 2013) (finding that plaintiff alleged improper lack of substantiation claim).

236. *See generally* Amended Complaint, *Bezdek*, *supra* note 18, paras. 40-56 (failing to allege facts to disprove existence of evidence supporting health benefits); Complaint, *De Falco*, *supra* note 18, paras. 40-56 (same); *cf.* Scheuerman v. Nestle Healthcare Nutrition, Inc., Nos. 10-3684, 10-5628, 2012 WL 2916827, at *7 (D.N.J. July 17, 2012) (granting summary judgment for defendant where plaintiffs only proved that support for "clinically shown" claims was "not as strong as it should be").

237. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 39 (emphasis added); Complaint, *De Falco*, *supra* note 18, para. 39 (same).

238. *See supra* note 221.

239. For example, the Plaintiffs cited to the *APMA Position Statement*, *supra* note 68, which indicates that "[r]esearch is ongoing," and "professional organizations and many clinicians . . . are going to be reluctant to support or oppose barefoot running until more definitive research and evidence are available. *See* Amended Complaint, *Bezdek*, *supra* note 18, paras. 42-43; Complaint, *De Falco*, *supra* note 18, paras. 42-43 (same).

240. For example, the Plaintiffs alleged that Vibram's health benefit claims, "were not and are not based on well-designed scientific studies." *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 39; Complaint, *De Falco*, *supra* note 18, para. 39 (same).

241. *Compare* Stanley v. Bayer Healthcare LLC, No. 11-862, 2012 WL 1132920, at *2 (S.D. Cal. Apr. 3, 2012) (finding that plaintiff plead improper lack of substantiation claim where allegations showed defendant's health benefit claims conflicted with "the vast majority of generally accepted scientific literature"), *with Eckler*, 2012 WL 5382218, at *3-4 (finding that plaintiff plead facts that constituted allegations of affirmative misrepresentation).

Vibram to affirmatively demonstrate that their advertisements were true and substantiated.[242]

B. The Claims Against Vibram Should Fail as a Matter of Law Because the Truthfulness of Vibram's Health Benefit Claims is a Matter of Scientific Judgment, and Vibram Can Demonstrate Scientific Support for Its Health Benefit Claims

1. *Matters of Scientific Debate Cannot Form the Basis of a False Advertising Claim*

False advertising laws "proscribe[ ] conduct that, but for its false or misleading character, would be protected by the First Amendment."[243] Accordingly, courts must be vigilant "not to permit" false advertising claims "to intrude on First Amendment values."[244] Moreover, the First Amendment is particularly concerned with safeguarding academic freedom,[245] preserving an "uninhibited marketplace of ideas,"[246] and permitting "the free flow of commercial information."[247] Thus, false advertising claims raise particular

242. *See, e.g.*, *Stanley*, 2012 WL 1132920, at *3 (citations omitted) (internal quotation marks omitted) ("The purpose of allowing only prosecuting authorities, and not private persons, to seek substantiation of advertising claims . . . is to prevent undue harassment of advertisers and provide the least burdensome method of obtaining substantiation for advertising claims."); *see also* Gaul v. Bayer Healthcare LLC, No. 12-5110, 2013 U.S. Dist. LEXIS 22637, at *2, 8-9 (D.N.J. Feb. 11, 2013) (holding that plaintiff failed to satisfy burden of establishing falsity or deception where plaintiff alleged that decision by National Advertising Division found that sole study supporting the defendant's advertising claims "was unreliable").

243. *See* ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 496 (2d Cir. 2013) ("Because the [Lanham] Act proscribes conduct that, but for its false or misleading character, would be protected by the First Amendment, free speech principles inform our interpretation of the Act.").

244. *See id.* (affirming that "'we have been careful not to permit overextension [of false advertising laws] to intrude on First Amendment values'" (quoting Boule v. Hutton, 328 F.3d 84, 91 (2d Cir. 2003))); *see also Boule*, 328 F.3d at 91 (citations omitted) ("As always with the public expression of opinion, 'we have been careful not to permit overextension of the Lanham Act to intrude on First Amendment values.'").

245. *See* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (declaring that "[o]ur Nation is deeply committed to safeguarding academic freedom," and "[t]hat freedom is . . . a special concern of the First Amendment").

246. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (observing "First Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail'" (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984))).

247. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763-64 (1976) (holding that both individual consumers and society have strong First Amendment interests in "free flow of commercial information").

First Amendment concerns where they turn on commercial information regarding a matter of scientific debate.[248]

The United States Supreme Court's First Amendment jurisprudence recognizes that both individual consumers and society have substantial interests in "the free dissemination of information about commercial choices in a market economy."[249] Indeed, the Court has held that where advertisements convey "truthful information" on matters of public interest, "the First Amendment interest served by such speech [is] paramount."[250] Therefore, false advertising claims may not be utilized to "suppress truthful, nondeceptive, [or] noncoercive speech."[251]

Conversely, in recognition of the "greater potential for deception or confusion in the context of certain advertising messages," the Court has held that advertisements may be subject to greater

248. *See ONY*, 720 F.3d at 496-99 (observing that false advertising claims raise numerous First Amendment concerns where they challenge statements made in connection with ongoing scientific discourse); *see also* Arthur v. Offit, No. 01:09-cv-1398, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010) (noting that courts have "justifiable reticence about venturing into the thicket of scientific debate").

249. 44 Liquormart, Inc. v. R.I., 517 U.S. 484 520 (1996) (Scalia, J., concurring in part and concurring in judgment) (declaring that in "case after case following *Virginia. Bd. of Pharmacy*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy"). In *Virginia Bd. of Pharmacy*, the Supreme Court held that in light of the nation's "free enterprise economy," both individuals and society have strong First Amendment interests in the "free flow of commercial information." *See* 425 U.S. at 765. The Court explained that individual consumers have an economic interest in maintaining access to a wide range of commercial information for purposes of making informed transactional decisions. *See id.* at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."). Moreover, according to the Court, society's interest in assuring informed participation in the market economy is tantamount. *See id.* at 765 (describing how "allocation of our resources in large measure . . . [is] made through private economic decisions," and it is matter of public interest that such decisions "in the aggregate, be intelligent and well informed"). In that respect, the Court explained that "even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of [commercial] information does not serve that goal." *Id.* (footnote omitted).

250. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983) (holding that commercial speech is "clearly protected by the First Amendment" where it "convey[s] truthful information relevant to important social issues").

251. *See* Cent. Hudson Gas Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (holding that government may only restrict commercial speech that "is neither misleading nor related to unlawful activity" in order to further substantial government interest); *see also Va. Bd. of Pharmacy*, 425 U.S. at 774 (holding that states may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity" based on fear "of that information's effect upon its disseminators and its recipients").

regulation than other forms of noncommercial speech.[252] The Court has repeatedly emphasized, however:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.[253]

Likewise, in *Sorrell v. IMS Health Inc.*,[254] the Court recently elaborated that government regulations may not be used to "burden

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252. *See Bolger*, 463 U.S. at 65 ("In light of the greater potential for deception or confusion in the context of certain advertising messages . . . content-based restrictions may be permissible." (citing *In re* R.M.J., 455 U.S. 191, 200 (1982); Friedman v. Rogers, 440 U.S. 1, 99 (1979)); *cf.* Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2672 (2011) ("It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech. Indeed the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech." (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993))); *see also Bolger*, 463 U.S. at 64-65 (noting "'commonsense' distinction between speech proposing a commercial transaction . . . and other varieties of speech"). The Supreme Court has prescribed a four-part test for analyzing government restrictions of commercial speech. *See Cent. Hudson*, 447 U.S. at 566 (establishing commercial speech framework). First, courts evaluate whether the commercial speech is false, misleading, or related to unlawful activity. *See id.* "For commercial speech to receive [First Amendment] protection, 'it must at least concern lawful activity and not be misleading.'" *See Bolger*, 463 U.S. at 68 (quoting *Cent. Hudson*, 447 U.S. at 566). Second, the restriction must be justified by a substantial government interest. *See Cent. Hudson*, 477 U.S. at 566. Third, the regulation must "directly advance the governmental interest asserted." *See id.* Fourth, the restriction must be "narrowly drawn" to "directly advance" the asserted government interest. *See id.* at 565-66 (directing courts to evaluate whether restriction "is not more extensive than is necessary to serve" asserted interest); *c.f.* Greater New Orleans Broad. Ass'n Inc. v. United States, 527 U.S. 173, 188 (1999) (interpreting the third and fourth prongs as requiring restrictions to be narrowly tailored and "carefully calculated" to directly advance the government interest in consideration of "costs and benefits associated with the burden on speech" (citations omitted) (internal quotation marks omitted)). Additionally, in *44 Liquormart*, a plurality held that complete bans of commercial speech are "particularly dangerous" and warrant more careful constitutional scrutiny. *See* 517 U.S. at 501.

253. *Sorrell*, 131 S. Ct. at 2671-72 (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)); *accord* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002); *44 Liquormart*, 517 U.S. 484, 503-04; United States v. United Foods, 533 U.S. 405, 411 (2001).

254. 131 S. Ct. 2653 (2011).

the speech of others in order to tilt public debate in a preferred direction."[255]

These competing principles illustrate that allowing private plaintiffs to bring false advertising lawsuits is uniquely problematic where, as here, the purportedly false statements reflect one side of an evolving debate in the scientific community.[256] In that respect, unlike false commercial speech, "statements of pure opinion—that is, statements incapable of being proven false—are [generally] protected by the First Amendment."[257] Supreme Court precedent demonstrates, however, that "the line between fact and opinion is not always a clear one."[258] Consequently, there is little doubt that the fact-opinion distinction is particularly problematic in connection with statements concerning a matter of scientific debate.[259]

255. *Id.* at 2671 ("The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

256. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2672 (holding that restrictions on prescription drug advertisements violated First Amendment where state could not establish restrictions "[would] prevent false or misleading speech" and "[s]tate's interest in burdening the speech . . . turn[ed] on nothing more than a difference of opinion"); *Bolger*, 463 U.S. at 67-75 (holding that First Amendment barred state from prohibiting unsolicited mailing of contraceptive advertisements containing truthful information on "important public issues such as venereal disease and family planning" based on asserted interests in "(1) shield[ing] recipients of mail from materials that they are likely to find offensive and (2) aid[ing] parents' efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control"); *see also 44 Liquormart*, 527 U.S. at 510 (holding that states "[do] not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes").

257. *See* ONY Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 496 (2d Cir. 2013) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990)).

258. *See id.* (evaluating Supreme Court's holding in Milkovich v. Lorain Journal Co., 479 U.S. 1 (1990), regarding First Amendment distinction between statements of fact and opinion).

259. *See id.* at 497 ("Where, as here, a statement is made as part of an ongoing scientific discourse about which there is considerable disagreement, the traditional dividing line between fact and opinion is not entirely helpful."); *see also* Arthur v. Offit, No. 01:09-1398, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010) (citing *Milkovich*, 497 U.S. at 21) ("Plaintiff's claim . . . threatens to ensnare the Court in the thorny and extremely contentious debate over the perceived risks of certain vaccines, their theoretical association with particular diseases or syndromes, and, at bottom, which side of this debate has 'truth' on their side. That is hardly the sort of issue that would be subject to verification based upon a 'core of objective evidence.'"). In *ONY*, the Second Circuit explained that statements made in the course of scientific academic discourse – and specifically, conclusions contained in scientific journal articles – are, "in principle, 'capable of verification or refutation by means of objective proof.'" *See* 720 F.3d at 496 (quoting Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724, 728 n.7 (1st Cir. 1992)). However, in consideration of the realities of the "scientific method" and the nature of scientific academic discourse, the court observed that courts are "ill-equipped" to evaluate such conclusions as statements of empirical fact for purposes of the First Amendment. *See id.* at 496-97 ("Needless to say, courts are ill-equipped to undertake to referee such controversies. Instead, the trial of ideas plays out in the pages of peer-reviewed

For such reasons, judicial opinions of the lower federal courts have recently suggested that courts should avoid consideration of legal questions that turn on the veracity of particular viewpoints concerning debates in the scientific community.[260] In other words, these decisions suggest, where the truthfulness or falsity of advertising claims is a matter of scientific debate, such claims should be considered non-actionable.[261]

Most notably, in *ONY, Inc. v. Cornerstone Therapeutics, Inc.*,[262] the Second Circuit applied comparable reasoning to false advertising claims.[263] The plaintiff in *ONY* was a pharmaceutical company that

journals, and the scientific public sits as the jury."). Hence, the court held that statements made "as part of an ongoing scientific discourse about which there is considerable disagreement" are "more closely akin to matters of opinion" for purposes of the First Amendment. *See id.* at 497.

260. *See, e.g., id.* at 496-97 (declaring that "courts are ill-equipped to . . . referee" matters pertaining to scientific academic discourse); *cf.* United States ex rel. Jones v. Brigham and Women's Hospital, 678 F.3d 72, 87 (1st Cir. 2012) ("We agree with the district court that '[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." (quoting United States ex rel. Roby v. Boeing Co., 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000)); Underwager v. Salter, 22 F.3d 730, 736 (7th Cir. 1994) ("Scientific controversies must be settled by the methods of science rather than by the methods of litigation. More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path toward superior understanding of the world around us." (citations omitted)); *Arthur*, 2010 WL 883745, at *6 ("Courts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context."); Padnes v. Scios Nova, Inc., No. 95-1693, 1996 WL 539711, at *5 (N.D. Cal. Sept. 18, 1996) ("Medical researchers may well differ with respect to what constitutes acceptable testing procedures, as well as how best to interpret data garnered under various protocols."); Faltas v. State Newspaper, 928 F. Supp. 637, 649 (D.S.C. 1996) (noting that an editorial on homosexuality involved highly controversial topic "not . . . easily susceptible (if at all) to 'proof' one way or the other"); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2564 (2012) (Alito, J., dissenting) (observing that "there are broad areas" such as the vast annals of philosophy "in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech").

261. *See, e.g., ONY*, 720 F.3d at 497-99 (holding that conclusions advanced in scientific journals regarding novel areas of research are non-actionable as matter of law); *Arthur*, 2010 WL 883745, at *5-6 (holding that statements made in course of highly publicized scientific debate are non-actionable as matter of law).

262. 720 F.3d 490 (2d Cir. 2013).

263. *See id.* at 498 (holding advertisements touting conclusions advanced in scientific journals concerning novel areas of research non-actionable under both Lanham Act and New York's DTPA). *But see* Eastman Chem. Co. v. Plastipure, Inc., 775 F.3d 230, 235-37 (5th Cir. 2014) (holding that First Amendment does not create *per se* bar on false advertising claims concerning "commercial statements relating to live scientific controversies" made in "commercial advertisements . . . directed at consumers"); *cf.* Adv. Tech. Corp., Inc. v. Instron, Inc., —- F. Supp. 3d. —-, No. 1:12-cv-10171, 2014 WL 7236336 (D. Mass Dec. 18, 2014) (citing *Brigham & Women's Hosp.*, 678 F.3d at 88 (holding that First Amendment did not bar commercial disparagement claim where statements in industry magazine concerned matter of "ongoing scientific debate," but did not present "questions of scientific

took issue with a competitor's marketing campaign, which allegedly touted "scientific findings that were intentionally deceptive and misleading" with respect to the relative effectiveness of their competing products.[264] The statements at issue were based on a comparative study of the two products, which was funded by the defendant company for promotional purposes.[265] The scientific study concluded that the defendant's product was comparatively more effective than the plaintiff's, and its findings were subsequently published in a peer-reviewed scientific journal.[266] Shortly thereafter, the defendant company "issued a press release touting [the article's] conclusions and distributed promotional materials that cited [its] findings."[267]

The *ONY* plaintiff brought false advertising claims in connection with the defendant's efforts to promote the comparative study's conclusions.[268] In support of its claims, the plaintiff alleged that the article contained "five distinct incorrect statements of fact about the relative effectiveness" of the two products.[269] There, the Second Circuit affirmed the district court's judgment granting the defendant's motion to dismiss, concluding that the article's content and findings could not form the basis of a false advertising claim.[270] The court explained, "[in] a sufficiently novel areas of research,"

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judgment"). For a discussion of the Fifth Circuit's holding in *Eastman* and its interpretation of *ONY*, see *infra* notes 275 & 279.

264. *See ONY*, 720 F.3d at 496, 499 (describing plaintiff's allegations that defendant's promotional materials contained "intentionally deceptive and misleading" scientific findings).

265. *See id.* at 493 (discussing allegations concerning comparative product study).

266. *See id.* at 493-94 (discussing study's findings and subsequent publication).

267. *See id.* at 495 (explaining allegations concerning defendant's subsequent touting of scientific findings for promotional purposes).

268. *See id.* at 496 (explaining that plaintiff alleged defendant's "touting and distributing the article's findings for promotional purposes" gives rise to false advertising claim). The plaintiff brought false advertising claims against the authors of the study in addition to the defendant pharmaceutical company under both the Lanham Act and New York's DTPA. *See id.* at 496 (discussing claims arising out of article's publication), 498-99 (discussing claims arising out of subsequent touting and distribution of article's conclusions). With regard to the scientific findings and the subsequent publication thereof, the plaintiff contended that the authors of the study deliberately compiled selective data and omitted factors from the calculations to support a "favorable conclusion." *See* ONY v. Cornerstone Therapeutics, Inc., No. 11-1027, 2012 WL 1835671 (W.D.N.Y. May 18, 2012) (detailing allegations concerning defendant's payment for study), *aff'd* 720 F.3d 490 (2d Cir. 2013).

269. *See ONY*, 720 F.3d at 494 (discussing plaintiff's allegations that article contained false statements of fact).

270. *See id.* at 498 (granting defendant pharmaceutical company's motion to dismiss false advertising claims against it).

conclusions "presented in publications directed to the relevant scientific community . . . . may be highly controversial and subject to rigorous debate by qualified experts."[271] Consequently, the court held "that publication of a controversial scientific article qualified as protected academic speech, the accuracy of which should not be adjudicated by the courts."[272]

The holding in *ONY* is particularly noteworthy, however, because the court extended this reasoning to the defendant company's subsequent touting and dissemination of the article's findings for marketing purposes.[273] In that respect, the court indicated that the plaintiff's claims would necessarily turn on the content of the scientific study itself.[274] Therefore, the court believed it would be inappropriate to evaluate the related tortious interference allegations, because the truthfulness of the challenged advertising claims was effectively a matter of scientific judgment.[275]

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271. *See id.* at 497 (providing underlying reasoning for conclusion that allegedly false or deceptive advertising claims were non-actionable as matter of law).

272. *See* Recent Case, *First Amendment—False Advertising—Second Circuit Affirms That Dissemination of Scientific Publications Cannot Be False Advertising Under The Lanham Act.*—ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490 (2d Cir. 2013), 127 HARV. L. REV. 1815, 1815 (2014) [hereinafter *Second Circuit Affirms That Dissemination of Scientific Publications Cannot Be False Advertising Under The Lanham Act*) (analyzing Second Circuit's holding in *ONY*); *see also ONY*, 720 F.3d at 498 (holding that article's conclusions were non-actionable under either Lanham Act or New York's DTPA).

273. *See ONY*, 720 F.3d at 498 (holding that subsequent dissemination of protected academic speech for marketing purpose could not form basis of connected tortious interference claim).

274. *See ONY*, 720 F.3d at 498-99 (evaluating plaintiff's claims arising out of subsequent touting and distribution of article's findings for promotional purposes). The court noted that the "plaintiff's objection" was not that the defendant "distorted the articles findings," but rather, the plaintiff's theory of liability was that the defendant "present[ed] accurately the article's allegedly inaccurate conclusions." *See id.* at 499.

275. *See id.* at 499 (dismissing claims arising out of subsequent touting and distribution where plaintiff's theory was that defendants accurately presented allegedly inaccurate conclusions contained in non-actionable article). The court affirmed the district court's dismissal of claims arising out of the subsequent touting and distribution of the article's allegedly false conclusions based on its "correct conclusions that (a) the article itself was non actionable and (b) the tortious interference claim did not separately allege any additional misleading statements." *Id.* The court noted: "We are therefore presented with a much easier case than we would be if a plaintiff alleged that a defendant distorted an article's findings in its promotional materials. *Id.*Conversely, in *Eastman Chem. Co. v. Plastipure, Inc.*, the Fifth Circuit recently diverged from *ONY* in rejecting a First Amendment challenge to false advertising claims premised on "commercial statements relating to live scientific controversies." *See* 775 F.3d 230, 235 (5th Cir. 2014). In *Eastman*, a plastic manufacturer brought a false advertising lawsuit under the Lanham Act against a competing company. *Id.* At issue were statements contained in the defendant's marketing materials, which were "distributed . . . at trade shows and directly to potential customers," and purported to show the plaintiff's products "could be

The First Amendment has a strong interest in protecting the free flow of truthful commercial information.[276] As such, recent decisions such as *ONY* support the proposition that advertising statements cannot form the basis of false advertising claims where the challenged statements regard a matter of evolving scientific debate.[277] This assumption is particularly strong where the challenged statements are supported by opinions reflected in scholarly journals, and involve novel issues of public concern.[278] Accordingly, under such circumstances, claims in advertisements should only be actionable to the extent that they distort or manipulate the scientific findings on which they rely.[279]

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harmful for humans." *Id.* The allegedly false statements were premised on the findings of a scientific study published in a peer-reviewed journal; however, the materials did not provide "the full context of the scientific paper." Eastman Chem. Co. v. Plastipure, Inc., 969 F. Supp. 2d. 756, 761 (W.D. Tex. 2013), *affd.* 775 F.3d 230 (5th Cir. 2014); *see Eastman*, 775 F.3d at 232.On appeal, the defendant cited to *ONY* in contending that the First Amendment precluded the jury's finding of liability because "commercial statements relating to live scientific controversies should be treated as [opinions] protected by the First Amendment." *Id.* at 235. There, the court upheld the jury's findings, concluding that although the commercial statements concerned the subject of an evolving debate in the scientific community, the statements at issue were "made in commercial advertisements and directed at customers," as distinguished from *ONY* which addressed "statements made *within academic literature* and *directed at the scientific community*." *See id.* at 235-36 (emphasis added); *see also Eastman*, 969 F. Supp. 2d at 761 (explaining that unlike in *ONY*, the "scientific debate" at issue in *Eastman*, "moved from the pages of academic journals to commercial advertisements targeted at consumers"). In that respect, citing to the Supreme Court's commercial speech jurisprudence, the Fifth Circuit concluded, "it is of no monument that the commercial speech in this case concerned a topic of scientific debate," reasoning that "commercial claims" are not entitled to the level of First Amendment protection afforded "discourse in the pages of academic journals." *See id.* at 236-37.

276. *See supra* note 249 (describing First Amendment interest in free flow of commercial information).

277. *See ONY*, 720 F.3d at 496-98 (discussing principles underlying conclusion that courts should not evaluate truth or falsity of statements connected with "ongoing scientific discourse"); *cf. Arthur*, 2010 WL 883745, at *4 (holding that statements made in connection with highly publicized public debate on vaccine safety constituted "speech about important matters of public concern," and could not form basis of defamation claim).

278. *See id.* at 496-97 ("Importantly, those conclusions are presented in publications directed to the relevant scientific community, ideally in peer-reviewed academic journals that warrant that research approved for publication demonstrates at least some degree of basic scientific competence."); *Arthur*, 2010 WL 883745, at *3 (explaining that "both the nature of [a] statement—including that it was quoting an advocate with a particular scientific viewpoint and policy position—and the statement's context—a very brief passage in a lengthy description of an ongoing, heated public health controversy—confirmed that this [was] a protected expression of opinion").

279. *See ONY*, 720 F.3d at 498 (concluding that dissemination of marketing materials that accurately conveyed scientific findings could not form basis of a false advertising action, but noting that a more difficult case would arise "if a plaintiff alleged that a defendant distorted [such] findings in its promotional materials");

2. *Vibram's Health Benefit Claims are Non-Actionable Because They Accurately Promote Studies and Opinions Reflected in Scientific Journals Concerning the Subject of an Evolving Debate in the Scientific Community*

In the Vibram Lawsuits, the plaintiffs alleged that Vibram's health benefit claims were false or deceptive because they were unsupported by reliable scientific evidence.[280] However, several members of the scientific community have reached similar conclusions regarding the efficacy of barefoot running.[281] Furthermore, the precise health benefit claims at issue are the subject of ongoing research and debate within the scientific community.[282]

In response to the plaintiffs' allegations, Vibram could present evidence that its health benefit claims reflect opinions expressed in scholarly journals by members of the scientific community.[283] Consequently, the plaintiffs' false advertising claims would necessarily require a fact finder to evaluate the adequacy and validity of the scientific evidence supporting Vibram's health benefit claims.[284]

cf. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (internal citations omitted) (affirming that commercial speech "at least must concern lawful activity and not be misleading" to receive Constitutional protection). *But see Eastman*, 775 F.3d at 237 (rejecting argument that First Amendment bars false advertising claims where underlying statements "embrac[e] one side of a scientific debate"). In *Eastman*, the Fifth Circuit appears to interpret the Second Circuit's holding in *ONY* with regard to protected scientific opinions as limited to "statements made within the academic literature and directed at the scientific community." 775 F.3d at 236. However, the Fifth Circuit did not fully address the First Amendment issues related to the *ONY* defendant's secondary distribution of scientific findings for promotional purposes. *See id.* at 237 (distinguishing *ONY* on basis that nature of defendant's secondary distribution was "dissimilar," claims addressing secondary distribution in *ONY* did not arise under Lanham Act, and noting that court was not bound by *ONY*); *see also Eastman*, 969 F. Supp. at 761 & n.3 (asserting that *ONY* is not binding and discussing factual distinctions, but noting that *ONY* Court concluded that "secondary distribution of excerpts of such an article cannot give rise to liability" so long as it is not misleading" (quoting *ONY*, 720 F.3d at 492)); *Second Circuit Affirms That Dissemination of Scientific Publications Cannot Be False Advertising Under The Lanham Act.*, *supra* note 272, at 1816 (noting that *ONY* court did not conclude that secondary dissemination of findings constituted a "secondary act of speech").

280. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 3 ("Defendants' health benefit claims are false and deceptive because FiveFingers are not proven to provide any of the health benefits beyond what conventional running shoes provide."); Complaint, *De Falco*, *supra* note 18, para. 3 (same).

281. *See supra* note 52-63 and accompanying text (discussing scientific literature supporting Vibram's health benefit claims),

282. *See supra* notes 52-68 and accompanying text (discussing ongoing debate in scientific community regarding health benefits of barefoot running).

283. *See supra* note 52-63 and accompanying text (discussing scientific literature supporting Vibram's health benefit claims).

284. *Cf. ONY*, 720 F.3d at 496-98 (concluding that courts should not undertake to evaluate content of promotional materials that accurately conveys scientific

Accordingly, to the extent that Vibram can demonstrate that their statements regarding the health benefits of barefoot running are supported by scientific studies, and that it did not distort or misrepresent the findings of such studies, Vibram should be entitled to judgment as a matter of law because the health benefit claims constitute non-actionable matters of scientific judgment.[285]

Under this legal theory, it appears that Vibram could set forth evidence that would strongly support a summary judgment verdict.[286] First, the plaintiffs alleged that Vibram "implicitly and explicitly" claimed that the health benefits of barefoot running were supported by reliable scientific research.[287] In support these assertions, the plaintiffs only pointed to statements by Vibram reflecting that the health benefits were supported by "ample evidence," and "have long been supported by scientific research."[288]

In response, Vibram could demonstrate that since 1987, numerous articles in peer-reviewed scientific journals have hypothesized that barefoot running was associated with greater health benefits and lower injury rates than running in cushioned shoes.[289] Furthermore, Vibram's specific health benefit claims are directly linked to the findings of Daniel E. Lieberman's study of barefoot running, which were published in a peer-reviewed scientific journal.[290] Lieberman's findings were derived from a comparative study of habitual barefoot runners and runners who have worn

findings published in academic journal in connection with ongoing scientific debate).

285. *See id.* at 492, 498 (holding that secondary distribution of "statements of scientific conclusions about unsettled matters of scientific debate" for marketing purposes cannot create basis for tortious interference claim at least insofar as defendant did not distort such conclusions).

286. *See supra* note 52-63 and accompanying text (discussing scientific conclusions supporting Vibram's health benefit claims).

287. *See* Amended Complaint, *Bezdek*, *supra* note 18, para. 3 ("Defendants claim implicitly and explicitly that scientific research shows that their expensive FiveFingers . . . will provide certain 'health benefits' that traditional running shoes do not provide."); Complaint, *De Falco*, *supra* note 18, para. 3 (same).

288. *See* Amended Complaint, *Bezdek*, *supra* note 18, paras. 26, 33 (citing advertising statements by Vibram that health benefits of barefoot running are supported by scientific evidence); Complaint, *De Falco*, *supra* note 18, para. 27, 33 (same). Although the plaintiffs inferred that Vibram represented the existence of "well-designed scientific studies," *see* Amended Complaint, *Bezdek*, *supra* note 18, para. 39; Complaint, *De Falco*, *supra* note 18, para. 39 (same), no factual allegations supported such an inference, *see supra* notes 216-218 and accompanying text (describing lack of supporting factual allegations).

289. *See supra* notes 61-63 and accompanying text (discussing pre-2010 scholarly articles that support Vibram's health benefit claims).

290. *See supra* notes 52-59 and accompanying text (discussing Lieberman's findings).

cushioned shoes their entire lives, which evaluated five subject groups in a variety of conditions.[291] Without evaluating the veracity of these scientific opinions, it does not appear that Vibram distorted their findings, nor does it appear that Vibram misrepresented the extent to which its health benefit claims were supported by scientific evidence.[292]

Second, the plaintiffs contended that Vibram's health benefit claims were deceptive because they misrepresented the existence of countervailing health risks associated with barefoot running.[293] However, this assertion is not supported by the plaintiffs' factual allegations, and could be affirmatively disproven by Vibram.[294] Vibram's marketing efforts disseminated substantial information concerning the injury risks associated with barefoot running, and how to minimize such risks.[295] Moreover, the qualified manner in which Vibram's marketing efforts contrasted the health benefits of barefoot running with the potential injury risks reflects the position of experts such as Lieberman.[296] Consequently, in this respect, Vibram's health benefit claims are also supported by scientific evidence.[297]

Finally, the plaintiffs broadly contended that as a whole, Vibram's "uniform nationwide marketing campaign" misrepresented the extent to which scientific evidence supports the existence of barefoot running's unique health benefits.[298] However,

291. *See supra* note 54 and accompanying text (discussing methodology utilized in Lieberman's 2010 study).

292. *Compare supra* notes 52-59 and accompanying text (discussing Lieberman's study and findings), *with supra* notes 69-83 and accompanying text (discussing FiveFingers marketing campaign).

293. *See* Amended Complaint, *Bezdek*, *supra* note 18, paras. 46-56 (citing sources that allegedly contradict Vibram's representation of health risks associated with barefoot running); Complaint, *De Falco*, *supra* note 18, para. 46-56 (same).

294. *See generally* Amended Complaint, *Bezdek*, *supra* note 18 (demonstrating there are no factual allegations to support plaintiffs' claims that Vibram misrepresented injury risks associated with FiveFingers and barefoot running); Complaint, *De Falco*, *supra* note 18 (same).

295. *See* Defendant's Motion to Dismiss, *Bezdek*, *supra* note 106, at 5-6 (discussing Vibram's marketing representations regarding injury risks associated with barefoot running).

296. *Compare Running Barefoot: Running Before the Modern Running Shoe*, *supra* note 39 (describing Lieberman's position concerning potential injury risks associated with transition to barefoot running and providing instructions on making gradual transition); *with* Defendant's Motion to Dismiss, *Bezdek*, *supra* note 106, at 5-6 (detailing aspects of Vibram's marketing campaign that provided information regarding injury risks associated with barefoot running and how to safely transition).

297. *See supra* notes 293-296 and accompanying text.

298. *See* Amended Complaint, *Bezdek*, *supra* note 18, paras. 2-3 (alleging that Vibram's "extensive, comprehensive, and uniform nationwide marketing cam-

there is strong evidence to demonstrate that the FiveFingers marketing campaign, as a whole, was largely informational, and conveyed truthful information reflecting the scientific community's evolving knowledge of barefoot running.[299] Most notably, Vibram launched an "educational fitness resource portal" that provided access to emerging research on barefoot running.[300] Moreover, the vast majority of Vibram's promotional efforts were accomplished through word of mouth and its association with the barefoot running movement.[301] Indeed, Vibram deliberately developed the FiveFingers "brand," for example, through product reviews, rather than advertisements, in major newspapers and running publications.[302]

In light of these factors, Vibram's health benefit claims should constitute non-actionable matters of scientific opinion.[303] Upon presentation of the evidence discussed above, the claims could only be resolved by evaluating the veracity of the scientific evidence that supports Vibram's health benefit claims.[304] Furthermore, to the ex-

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paign" made "false and misleading" representations regarding scientific support for health benefit claims); Complaint, *De Falco*, *supra* note 18, paras. 2-3 (same); *see also* Bezdek v. Vibram USA, Inc., No. 12-10513, 2013 WL 639145, at *1 (D. Mass Feb. 20, 2013) (explaining plaintiff alleges that Vibram's "advertising campaign was false and misleading because it misrepresented not only the health benefits of FiveFingers, but also the extent to which such health benefits have been scientifically corroborated").

299. *Compare supra* notes 52-63 and accompanying text (detailing scientific evidence supporting Vibram's health benefit claims), *with supra* notes 69-83 and accompanying text (discussing FiveFingers marketing campaign); *see also supra* notes 80-83 and accompanying text (discussing Vibram's efforts to become "leader in the barefoot running movement" and informational components of Vibram's marketing campaign).

300. *See supra* notes 82-83 and accompanying text (discussing Vibram's "educational fitness resource portal").

301. *See supra* notes 69-83 and accompanying text (discussing various aspects of Vibram's marketing efforts).

302. *See supra* notes 72-76 and accompanying text (discussing Vibram's efforts to develop FiveFingers "brand").

303. *See* ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 496-99 (2d Cir. 2013) (holding that product manufacturer cannot be held liable for false advertising based on defendant's touting conclusions advanced in scientific journals concerning ongoing scientific debate, at least to extent that defendant did not distort the scientific evidence); Arthur v. Offit, Civ. No. 01:09-1398, 2010 WL 883745, at *4-6 (E.D. Va. Mar. 10, 2010) (holding that defamation claims fail as matter of law where they would require court to determine truth or falsity of statements made in course of highly publicized scientific debate); *see also* Bolger v. Youngs Drug Prods. Corp., 463 US 60, 73-74 (finding that consumers have strong First Amendment interest in having access to truthful commercial information on matters of public debate, which enables them to make "informed decisions in [the] area").

304. *See ONY*, 720 F.3d at 498-99 (indicating that false advertising claims should fail as matter of law where resolving such claims would require court to

tent that Vibram's health benefit claims are valid, the FiveFingers marketing campaign substantially contributed to the marketplace of commercial information.[305] In that regard, allowing judges or juries to consider these claims would create an unacceptable risk of suppressing truthful information concerning an ongoing debate in the scientific community.[306] Accordingly, Vibram should be entitled to judgment as a matter of law.[307]

VI. BEYOND BAREFOOT RUNNING: PRACTICAL TAKEAWAYS FROM THE VIBRAM LAWSUITS

The Vibram Lawsuits highlight a number of concerning trends for consumer product manufacturers.[308] First, and most important, is the escalating prevalence of private false advertising claims under state DTPAs.[309] In that regard, such lawsuits have increasingly targeted producers of consumer goods, and have attacked non-traditional forms of advertising such as social media marketing.[310]

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evaluate veracity of matters of scientific judgment concerning ongoing debate in scientific community).

305. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 782-83 (1976) (holding that First Amendment protects consumers' right to receive commercial information regarding drug prices from pharmacy).

306. *See ONY*, 720 F.3d at 497 (declaring that "courts are ill-equipped to undertake to referee" the veracity of statements that are the subject of ongoing debates in the scientific community"); *see also* 44 Liquormart, Inc. v. R.I., 517 U.S. 484, 503 (1996) (holding that "the First Amendment directs us to be especially skeptical of . . . attempts to deprive consumers of accurate information about their chosen products").

307. *See ONY*, 720 F.3d at 498 (indicating that false advertising claims fail as matter of law where cause of action turns on whether statement concerning matter of scientific debate is false or deceptive).

308. *See infra* notes 309-315 and accompanying text (discussing trends highlighted by Vibram Lawsuits).

309. *See* Theodora McCormick, *Food Advertising and Labeling Trends Spark Concerns About Compliance and Litigation*, ASPATORE, Sept. 2013, 2013 WL 5760775, at *1 ("False advertising class actions have been on the rise, with many trial lawyers hoping that they would replace tobacco litigation as the next cash cow."); *see also* Van H. Beckwith, *Litigating Food and Beverage Labeling Cases: Some Strategies and Trends*, ASPATORE, Aug. 2013, 2013 WL 5293057, at *1 (asserting that consumer fraud claims are "one of the most explosive trends in our court system").

310. *See* McCormick, *supra* note 26, at *1 (explaining that combination of poor economy, legal developments making it more difficult to establish consumer fraud claims against securities and financial products industries, and increasing FTC and FDA scrutiny of "advertisers of commercial goods," have led "many class-action lawyers to seize on false advertising suits as the 'next big thing'"); Vanessa C. Hew, *Managing Advertising Law in the Modern World*, ASPATORE, July 2013, 2013 WL 4188244, at *2 (describing how "the evolving landscape of the Internet and social media advertising has led to the emergence of novel issues in advertising law"); *see also* Christie Grymes Thompson, *Applying the Advertising Regulation and Litigation Framework Within the Context of New Technologies*, ASPATORE, Jul. 2013, 2013 WL

Consequently, companies such as Vibram must take affirmative steps to scrutinize their own advertising practices in order to limit the scope of potential liability.[311]

Second, there is a considerable cost disparity between bringing and defending these types of claims.[312] Indeed, these cases are inexpensive for plaintiffs to prepare and file, however, "they can be extremely expensive to defend."[313] Thus, while plaintiffs "have been largely unsuccessful" in litigating such claims on the merits, many defendants, such as Vibram, have elected to enter early settlement agreements in light of the "significant legal costs in defending these suits as well as the risk of a substantial damages award."[314] As a result, it is imperative for defense attorneys to pursue legal strategies that allow defendants to combat false advertising claims at the early stages of litigation.[315]

A. Suggested Strategies Before Litigation Arises

Companies should take a number of ex-ante steps to diminish the probability of false advertising lawsuits, and to maximize the availability of efficient defense strategies in the event that such lawsuits do arise. First, recent trends indicate that false advertising lawsuits target specific industries in waves, and correlate with FTC (or Food and Drug Administration) scrutiny of the advertising practices within such industries.[316] Accordingly, companies should pay

4188240, at *10 (predicting that "we will continue to see great emphasis on mobile marketing and privacy issues in the area of advertising law").

311. *See infra* notes 316-325 and accompanying text (discussing possible ways to minimize risk of false advertising liability before litigation arises).

312. *See The Possible Rise and Fall*, *supra* note 26, at *3-4 (explaining how cost of litigating false advertising claims is substantially more burdensome for defendants than plaintiffs).

313. *See id.* at *3 ("Attorneys can find plaintiffs easily and the cases are inexpensive to prepare and file, but they can be extremely expensive to defend.").

314. *See id.* at *4 (explaining that "[d]espite the limited success plaintiffs' lawyers have had actually litigating these cases . . . . many companies are electing to . . . settle these suits early on" because of "significant legal costs in defending these suits as well as the risk of a substantial damages award").

315. *See* Beckwith, *supra* note 309, at *13 (noting that consumer class actions under state DTPAs "continue to generate a significant volume of opinions," and suggesting that defense attorneys utilize emerging strategies in efforts to defeat or narrow lawsuits early in litigation).

316. *See* Sokolowski, *supra* note 4 (noting trend of lawsuits against athletic footwear manufacturers arising after FTC's heightened scrutiny of industry and enforcement of advertising laws against several manufacturers); McCormick, *supra* note 26, at *1 (contending that "stepped up enforcement by the FTC and FDA" has led to increase in consumer false advertising claims); *see also* Rosenfeld & Blynn, *supra* note 173, at 68 (discussing increased prevalence of "piggyback" lawsuits).

close attention to the FTC's investigation and enforcement trends, and take prudent measures to comply with prevailing compliance standards.[317]

Second, companies should evaluate any affirmative product claims to ensure that they adhere to relevant FTC substantiation requirements.[318] Doing so will not only diminish the risk of FTC scrutiny, but also increase the likelihood that private claims will amount to improper lack of substantiation allegations.[319] Moreover, any advertisements touting scientific support for performance, health, or nutritional benefits should receive exceptional scrutiny.[320] In that regard, the Second Circuit's recent decision in *ONY* represents a powerful precedent in support of the proposition that false advertising claims may not challenge the merits of scientific evidence. Nevertheless, the court left open the question of the extent to which courts should consider allegations that a defendant distorted or manipulated such evidence.[321] Thus, companies should confirm that any scientific evidence claims accurately represent the relevant findings, and do not exaggerate or distort the extent to which their product claims are supported by scientific evidence.[322]

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317. *See* McCormick, *supra* note 26, at *4 (detailing importance of taking steps to comply with prevailing substantiation requirements); *see also* Thompson, *supra* note 310, at *9-10 (explaining that FTC increasingly investigates online advertising practices, and noting importance of staying "on top of what is happening at the FTC").

318. *See* McCormick, *supra* note 26, at *4 (advising that advertisers should scrutinize their advertising claims to ensure compliance with substantiation requirements).

319. *See, e.g.*, Eckler v. Wal-Mart Stores, Inc., No. 12-717, 2012 WL 5382218, at *2 (S.D. Cal. Nov. 1, 2012) (declaring that consumer false advertising claims must be supported by factual allegations showing advertiser's product claims or scientific evidence claims are demonstrably false to avoid constituting improper lack of substantiation claim).

320. *See* McCormick, *supra* note 26, at *4 (advising that advertisers should give "additional scrutiny" to any product claims "touting performance, health or nutritional benefits").

321. *See* ONY v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 498 (2d Cir. 2013) (holding that promotional materials touting scientific findings concerning ongoing debate in scientific community cannot form basis of false advertising claims); *supra* notes 262-273 and accompanying text (analyzing *ONY*). *But see ONY*, 720 F.3d at 498 (explaining that court was "presented with a much easier case than . . . if a plaintiff alleged that a defendant distorted an article's findings in its promotional material"); *supra* notes 275, 279 (describing how Fifth Circuit distinguished *ONY* in Eastman Chem. Co. v. Plastipure, Inc., 775 F.3d 230 (5th Cir. 2014).

322. *See* McCormick, *supra* note 26, at *4 (encouraging advertisers to enact "appropriate vetting process" to ensure that any advertising claims touting "performance, health or nutritional benefits . . . do not exaggerate the truth").

Third, companies must diligently monitor their online and social media marketing practices.[323] As exemplified by the FiveFingers marketing campaign, companies increasingly utilize social media and non-traditional forms of online marketing to promote their products. While this can be "both highly effective . . . and, in today's culture, crucial to most companies' sales and marketing efforts," it also poses unique compliance challenges.[324] Consequently, it is increasingly necessary for companies to develop uniform strategies and policies for their marketing campaigns, and to implement regimented procedures to ensure across the board compliance with such standards.[325]

B. Suggested Strategies for After Litigation Arises

Despite the recent influx of consumer false advertising claims, the Vibram Lawsuits provide a useful platform to evaluate a number of promising strategies for defending these types of lawsuits. First, whenever prudent, defendants should argue at the motion to dismiss stage that the plaintiff alleged an improper lack of substantiation claim.[326] In recent years, a large number of private false advertising claims have relied on lack of substantiation theories of liability. At the same time, however, courts have increasingly rejected plaintiffs' attempts to disguise what are effectively unsubstantiated advertising allegations. Notably, in *Johns v. Bayer Corp.*,[327] the federal district court for the Southern District of California recently held that where a plaintiff's claims are based on " 'lack of substantiation' rather than proof of falsity," "the strength of [the defendant's] evidence is irrelevant."[328]

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323. Thompson, *supra* note 310, at *7 (encouraging companies to enact procedures to monitor their online advertising content).

324. *See* Emily Neisloss Roisman & Brian Socolow, *Social Media Marketing: Caging the Un-Caged Tweeter*, ACC DOCKET, Nov. 2013, at 82, 88 ("Despite the myriad risks – legal and reputational – social media marketing is both highly effective and, in today's culture, crucial to most companies' sales and marketing efforts."); *see also id.* at 84 ("It is easy to forget that social media is really a form of advertising, and therefore, subject not only to the terms of use under the specific platform . . . but also to federal and state laws and regulations, as well as industry self-regulatory guidelines.").

325. *See id.* at 88 (suggesting that implementing "well-drafted social media policy" and "comprehensive monitoring and compliance program can help minimize the risks" associated with non-traditional forms of marketing).

326. *See* Beckwith, *supra* note 309, at *10 (encouraging defense attorneys to utilize lack of substantiation arguments as efficient strategy for defending consumer false advertising claims).

327. No. 09-1935, 2013 WL 1498965 (S.D. Cal. Apr. 10, 2013)

328. *Id.* at *40 ("Accordingly, in the absence of affirmative scientific evidence available during the Class Period that lycopene does not support prostate health,

Second, defendants should attempt to remove false advertising claims to federal court in order to avail themselves of the heightened pleading requirements of Federal Rule of Civil Procedure 9(b).[329] Under those circumstances, where false advertising claims challenge the veracity of affirmative advertising claims, plaintiffs must clear two pleading hurdles – plaintiffs must: (1) place their claims "outside of the 'lack of substantiation' category"; and (2) plead sufficient facts to the pleading requirements under [Federal Rules of Civil Procedure] 8, 9(b), and 12(b)(6) with regard to showing that a defendant's advertising claims are demonstratively false or misleading.[330] Accordingly, in recent cases, defendants have succeeded on motions to dismiss by arguing that the plaintiff failed to satisfy Rule 9(b), even where the allegations were sufficient to avoid the "lack of substantiation category."[331]

Finally, attorneys should explore developing legal trends to defend these types of lawsuits. As discussed above, the proposition

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the strength of Bayer's evidence is irrelevant and Plaintiffs' claims are based on 'lack of substantiation' rather than proof of falsity.").

329. FED. R. CIV. P. 9(b) (requiring plaintiffs "alleging fraud or mistake . . . [to] state with particularity the circumstances constituting fraud or mistake"); *see, e.g.*, Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007) (holding that "stringent pleading restrictions of Rule 9(b)" apply to state consumer protection act claims in federal district court).

330. *See* Hughes v. Ester C Co., 930 F. Supp. 2d 439, 458 (E.D.N.Y. 2013) (explaining where claims fall "outside the 'lack of substantiation' category . . . a different legal analysis [comes] into play, namely, sufficiency of the pleadings under Rules 8, 9(b), or 12(b)(6) of the Federal Rules of Civil Procedure" (internal citations omitted)); *see also* Eckler v. Wal-Mart Stores, Inc., No. 12-717, 2012 WL 5382218, at *7 (S.D. Cal Nov. 1, 2012) (explaining that although plaintiff's claims fell outside lack of substantiation category, plaintiff's allegations failed to "lend 'facial plausibility' to her claims that [defendant's] representations were "false or misleading"); *Hughes*, 930 F. Supp. 2d at 465 (considering "whether plaintiffs' claims pass muster under Rule 9(b)'s heightened pleading requirement" after determining that plaintiffs allegations did not amount to "stand-alone lack of substantiation claims").

331. *See, e.g.*, *Eckler*, 2012 WL 5382218, at *5-7 (holding that although allegations were sufficient to avoid dismissal as improper lack of substantiation claims, plaintiff's false advertising claim failed to satisfy the heightened pleading standard under Fed. R. Civ. P. 9(b)); *see also* Tomasino v. Estee Lauder Cos.,—F. Supp. 2d. —, No. 13-4692, 2014 WL 4244329, at *4-5 & n.4 (E.D.N.Y. Aug. 26, 2014) (holding that although plaintiff did "not merely allege[ ] a non-actionable 'lack of substantiation' claim," plaintiff failed to satisfy Fed. R. Civ. P. 8 by pleading "with the requisite 'plausibility'" to support allegations that defendant's health benefit advertising claims were "affirmatively misleading" (citations omitted)). *But see Ester*, 930 F. Supp. 2d at 464-47 (holding that plaintiff did not bring "stand-alone lack of substantiation claims," and allegations in support of false advertising claims satisfied Fed. R. Civ. P. 9(b)); Rikos v. Procter & Gamble Co., 782 F. Supp. 2d 522, 528, 536-38 (S.D. Ohio 2011) (holding that plaintiff's allegations in support of false advertising claims did not amount to "'lack of scientific substantiation' theory," and satisfied Fed. R. Civ. P. 9(b)).

that "matters of scientific judgment cannot form the basis of a false advertising claim" appears to be a promising legal theory for defendants.[332] Another noteworthy example (which arose in connection with Vibram's motion to dismiss the *Bezdek* action) is the question of whether a private plaintiff can satisfy the injury element of a false advertising claim by relying on a "price premium" theory of injury.[333] In *Bezdek*, the court held that a "price premium" injury was cognizable under the respective statutes, and that the plaintiff "adequately plead such injury."[334] However, the court directly acknowledged that the theory of a "price premium" injury itself involves an underdeveloped area of law, and "has been the subject of much dispute."[335] Consequently, under different factual circumstances, or in other jurisdictions, defendants could potentially succeed in arguing that a plaintiff fails to state a cognizable injury by merely alleging that he or she paid a "premium" as a result of a defendant's deceptive advertising claims.[336]

VII. CLOSING REMARKS

By the early twentieth century, legislatures recognized that the increasing size and power of businesses had rendered common law

332. *See supra* notes 243-307 (analyzing "matters of scientific judgment" theory as potential defense strategy).

333. *See* Bezdek v. Vibram USA, Inc., No. 12-10513, 2013 WL 639145, at *5-8 (D. Mass. Feb. 20, 2013) (analyzing price premium theory of injury under Florida and Massachusetts law); *see also supra* note 115 and accompanying text (defining "price premium" injury).

334. *See Bezdek*, 2013 WL 639145, at *6 (holding that "price premium" theory of injury is cognizable under Massachusetts and Florida law, and plaintiff alleged such injury).

335. *See id.* at *5 ("This so-called 'price premium' theory of injury has been the subject of much dispute."); *see generally id.* at *5-6 (surveying small scope of cases addressing "price premium" theory of injury).

336. For example, in *Rule v. Fort Dodge Animal Hosp.*, the First Circuit held, as a matter of law, that a plaintiff could not establish a price-premium injury where the plaintiff allegedly purchased and previously administered to her dog, defective heartworm pills. *See* 607 F.3d 250, 253 (1st Cir. 2010). The court observed that the pills protected the plaintiff's dog from heartworms, and the defect did not manifest itself in injury to her or her dog. *See id.* On that basis, the court concluded that the plaintiff "received the full benefit of the bargain she anticipated when she purchased" the heartworm pills. *See* Rule v. Fort Dodge Animal Hosp., 604 F. Supp. 2d 288, 296 (D. Mass. 2009), *aff'd* 607 F.3d 250 (1st Cir. 2010). Conversely, in *Bezdek*, the court concluded that the plaintiff established a price premium injury because she was a "current owner of FiveFingers shoes," and allegedly would not have purchased the FiveFingers had she known that they would not convey the anticipated health benefits touted by Vibram. *See Bezdek*, 2013 WL 639145, at *6 (holding that plaintiff's allegations established price-premium injury under Massachusetts law); *see also* Bezdek v. Vibram USA, Inc., — F. Supp. 3d —, Nos. 12-10513, 13-10764, 2015 WL 223786, at *7-8, 10-12, 14-15 (D. Mass. Jan. 16, 2015) (discussing "price-premium" injury in connection with Vibram Lawsuits settlement).

remedies and traditional principles of *caveat emptor* inadequate to protect consumers from unfair and deceptive business practices. Despite their common origins, and the analogous language contained in contemporary state and federal consumer protection laws, the provision of private actions under state DTPAs has enabled private enforcement under "little-FTC Acts" to extend far beyond the forward-looking and remedial policy objectives embodied in the FTC Act of 1914.[337] Indeed, many of the precise reasons that Congress refused to provide for private enforcement of the FTC Act are exemplified by the recent influx of private false advertising lawsuits.[338]

As demonstrated by the Vibram Lawsuits, the increasing prevalence of private false advertising lawsuits under state DTPAs poses novel challenges for product manufacturers such as Vibram. Correspondingly, however, such lawsuits also raise serious concerns for increasingly sophisticated consumers by deterring companies from promoting innovative products, and restricting novel research and evolving scientific discoveries from the marketplace of commercial information.[339]

The Vibram Lawsuits provided a useful platform for evaluating new strategies to address this changing legal climate. This Comment proposed that two emerging legal theories could be utilized as viable defense strategies for the quick and efficient resolution of comparable false advertising claims. It also demonstrated, however, that the escalating prevalence of consumer false advertising claims

337. *Cf.* Schwartz & Silverman, *supra* note 119, at 5 ("[W]hen states adopted [consumer protection acts] . . . . [they] failed to fully appreciate Congress's concerns with creating a private right of action for such a broad range of conduct."); Sovern, *supra* note 125, at 437 (arguing "one significant difference" that results from providing private consumers "the same unfettered discretion accorded the FTC and state agencies . . . [is] individual consumers exercise that discretion in favor of their own concerns, rather than for the public welfare").

338. *See* Schwartz & Silverman, *supra* note 119 at 15 (arguing that all concerns raised during congressional debates surrounding passage of FTC Act of 1914 "ring true as we consider how private rights of action should be interpreted under state [DTPAs]").

339. *See* Lemley, *supra* note 117, at 325-26 ("The internet has caused a significant change in the amount of information available to consumers. With greater information access has come greater sophistication, as consumers are able to better research firms and their goods and services. More importantly, the internet provides a speech forum for dissatisfied consumers to discuss their experience with other potential consumers, so the dissatisfied consumer has much more power today to induce corrective action than the consumer of the 1960s or 1970s. . . . Now that consumers are less vulnerable and more sophisticated, consumers are engaging in opportunistic behavior by applying [little FTC acts] beyond their intended scope. If courts support this opportunistic behavior through literal interpretations of little FTC acts, it will cause destructive market effects.").

has generated a rapidly evolving field of law. Consequently, as this area continues to develop, it is critical for practitioners to be aware of potential emerging challenges, and to continue seeking new strategies to avoid litigation and successfully defend claims when they do arise.

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