UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASPER SLEEP, INC. Plaintiff, v. DEREK HALES and HALESPOLIS LLC, Defendants.	Case No. 16-cv-03223

DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO FED. R. CIV. P 12(b)(6)

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Defendants Derek Hales and Halesopolis LLC (collectively, "Hales") respectfully submit this reply memorandum of law in further support of Hales' motion to dismiss, with prejudice, all claims asserted by plaintiff Casper Sleep, Inc. ("Casper"), pursuant to Fed. R. Civ. P. 12(b)(6).

ARGUMENT

I. CASPER HAS FAILED TO STATE A CLAIM FOR FALSE ADVERTISING UNDER SECTION 43(A) OF THE LANHAM ACT

A. Casper Has Failed To Identify Any Statement Made By Hales That Could Give Rise to Lanham Act Liability

As demonstrated in Hales' opening brief, Casper's Amended Complaint fails to state a false advertising claim under Section 43(a) of the Lanham Act. In response, Casper argues an undisputed point, that (of course) materially false online reviews can form the basis of Lanham Act liability. Each of Casper's online review cases, however, contains a key element that Casper's own claim lacks: an allegation that the defendant made a materially false statement or comparison *about the plaintiff's product.* Neither Casper's Amended Complaint nor its brief contends that Hales made *any* false statements when he described the prices and relative features of the mattresses he reviewed. The disclosures Casper challenges concern only the separate matter of Hales' receipt of referral fees from mattress companies. Casper cites to no authority — because none exists — holding or even suggesting that it can bring a Lanham Act claim in the absence of a false or misleading statement about its own product or a competitor's product.

Casper's opposition brief relies heavily on *Enigma Software Group USA, LLC v. Bleeping Computer LLC*, No. 16 Civ. 57 (PAE), 2016 WL 3773394 (S.D.N.Y. July 8, 2016). *Enigma* is of no help to Casper, however, because — as in every other case on which it relies — the plaintiff sufficiently pleaded that the defendant made false statements of fact about the plaintiff's product. The defendant, a computer security blog that received commissions from anti-virus companies in competition with the plaintiff, denigrated the plaintiff's software as "malware" and a "rogue"

program that is "dubious" and "ineffective," and it accused the plaintiff of having "engage[d] in aggressive and deceptive advertising" and running "a deliberate scam." *Id.* at *3, *12, *14. The defendant even told consumers to "remove [the plaintiff's] program and *replace it with a trustworthy alternative.*" *Id.* at 22 (emphasis in original). Judge Engelmayer held that the plaintiff stated a Section 43(a) claim because the defendant "made false statements about [the plaintiff] and [its software]." *Id.* at *25; *see also id.* at *21. That critical element is missing here.

All of the cases on which Casper relies feature a false statement about the plaintiff's product. In *American Bullion, Inc. v. Regal Assets, LLC*, No. CV 14-01873 DDP (ASx), 2014 WL 6453783 (C.D. Cal. Nov. 17, 2014), the defendant's website falsely stated that the plaintiff had been found guilty of fraud. The defendant also used false links on its website, purporting to be to the plaintiff's site, but which actually directed traffic to one of the defendant's affiliates. *Id.* at *1. In *Vitamins Online, Inc. v. Heartwise, Inc.*, No. 2:13-CV-982-DAK, 2016 WL 538458 (D. Utah Feb. 9, 2016), the defendant made false representations about the ingredients and effectiveness of its own products, surreptitiously compensated customers for providing positive reviews on Amazon.com about its products, and had its own employees pose as ordinary consumers who rated those positive reviews as "helpful" (and any negative reviews as "unhelpful"). *See id.* at *6-*7.[1] Finally, in *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, No. 1:16-cv-592 (JCC/MSN), 2016 WL 3348431 (E.D. Va. June 15, 2016), the defendant caused large supermarket chains, including Whole Foods, to stop purchasing plaintiff's eggs by sending an email falsely contending that the plaintiff's eggs were not organic and came from chickens that were not humanely raised. *Id.* at *3-*4, *10. None of this bears any resemblance to Hales' *disclosed* receipt

[1] The court in *Vitamins Online* also expressed considerable doubt that the consumers' reviews themselves, as opposed to the defendant's own false statements about the ingredients in its product, could show "actual consumer deception." 2016 WL 538458 at *7.

of commissions when readers used his affiliate links or coupon codes to purchase mattresses. It therefore remains true, as Hales stated in his opening brief, that this case would be the first ever "to use the Lanham Act to squelch *truthful* criticism of [a] product." Opening Br. at 8.[2]

Casper's brief, like its Amended Complaint, fails to identify any allegedly false statements by Hales about Casper's mattress or any competitor's mattress. The best Casper could do was point to one comparative review in which Hales said that "Brooklyn Bedding's design, performance, materials and price point simply knock it out of the park," and that Brooklyn Bedding "simply [makes] a more supportive, cooler, and higher performance mattress than the Casper." *Id.* at 16. Casper then tries to portray this statement as one of fact, requiring prior substantiation, rather than opinion. But in *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144 (2d Cir. 2007), the case Casper cites for this proposition, DIRECTV did not merely assert that its picture quality was superior to Time Warner Cable's. Instead, DIRECTV used false demonstratives in its advertisements that portrayed Time Warner's picture as being of much poorer quality than it actually was. *Id.* at 150-51. It was those bogus demonstratives that rendered the ads "literally false." Hales, by contrast, merely stated his opinion that one mattress was better.

Even were it not clear, as it is, that expressions of pure opinion like Hales' are immunized from Lanham Act liability, statements that one product is "better" than another are not actionable under the Lanham Act even when *not* presented as opinions. *See* Opening Br. at 12, *citing Cablevision Sys. Corp. v. Verizon N.Y., Inc.*, 119 F. Supp. 3d 39, 53 (E.D.N.Y. 2015). None of the

[2] *iYogi Holding Pvt. Ltd. v. Secure Remote Support, Inc.*, No. C-11-592 CW, 2011 WL 6291793 (N.D. Cal. Oct. 25, 2011), involved a motion for default judgment, so little can be gleaned from it. Even so, the plaintiff in *iYogi*, too, alleged that the defendant's website "contain[ed] false, misleading and defamatory statements about Plaintiff's business," including that the business "has a Better Business Bureau 'F' rating." *Id.* at *1. The "reviews" on the site were, allegedly, fabrications attributed to fictitious persons.

statements Casper challenges references a "study" or any other objective substantiation into which Casper may inquire; they represent only Hales himself saying he preferred one mattress's feel over another's. Casper's citations to *Nat'l Ass'n of Pharmaceutical Manuf. v. Ayerst Labs.*, 850 F.2d 904 (2d Cir. 1988) (name-brand drug manufacturer sent a letter to pharmacies making allegedly unsubstantiated claims about the relative advantages of its drug to a generic substitute); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2d Cir. 1981) (challenge to advertised claims about the results of a "study" of over 900 women); and *Software AG, Inc. v. Consist Software Solutions, Inc.*, No. 08 Civ. 389 (CM) (FM), 2008 WL 563449 (S.D.N.Y. 2008) (challenge to false statements about the defendant's ability to service the plaintiff's products) are therefore inapposite.

Further, when Casper tries to latch onto statements by Hales about matters *other than* mattresses, it makes assertions that the Amended Complaint and the materials referenced therein do not support. For example, Casper challenges the statement on Hales' blog that "all content you find on Sleepopolis is my genuine, honest, and full editorial opinion." Opp. Br. at 5, *citing* Compl. ¶ 29. Leaving aside that Casper's pursuing a claim about this statement belies its assertion that it "is not attacking the substance of [Hales'] opinions" (*id.* at 2), Casper badly misrepresents the online "case study" about Casper's competitor Leesa, written by a research firm, "Marketing Sherpa," that it contends casts doubt that Hales' opinions are "genuine[ly]" his.

Casper alleges this case study "highlight[s] how connected Sleepopolis is with . . . Leesa," and somehow proves that Leesa, rather than Hales, wrote Hales' review of Leesa's mattress. *See* Opp. Br. at 6, *citing* Compl. Ex. D. The triple hearsay in this case study, however, said no such thing. In fact, the case study did not even mention Hales or Sleepopolis at all. It noted Leesa's view that "'unboxing' videos that documented the process of taking the mattress from box to the bedroom" were particularly meaningful to consumers, Compl. Ex. D at 3, and (without naming

Hales or Sleepopolis) identified Hales' independently-produced "unboxing" video of a Leesa mattress as one that Leesa pushed out onto its own "social channels." *Id.* at 5. The case study noted that Leesa provided free mattresses to some bloggers — which Hales discloses on his site[3]— and provided "talking points" that Leesa itself believed favorably distinguished its mattresses. It made clear, however, that Leesa never attempted to control what the recipients of free mattresses wrote about the mattresses. *Id.* at 4. The case study, in fact, said that Leesa wanted "unbiased" reviews, *id.* at 3, and further noted that some bloggers posted negative reviews. *See id.* at 4.

This leaves the case where it started: with Casper's contention that the statement "[a]ll companies pay Sleepopolis nearly the same amount per referral" is false, and that Casper has standing to challenge this claim under the Lanham Act. As Casper acknowledges, this statement is part of a longer disclosure in which Hales makes clear that he profits when consumers use the referral links or coupon codes on his site. Opp. Br. at 7. But Casper's brief fails to note that the "all companies" sentence follows one in which Hales makes clear that only "[m]any" of the links on his site are "affiliate links," and precedes a longer description of what "affiliate links" are and how they work, including that [i]f you click one of these links, and purchase a mattress, Sleepopolis will receive a small monetary commission." Compl. Ex. B. (Dkt. No. 17-2) at 1.

The statement "all companies" applies only to the statement that "many" links on his site that operate as referral links. But even if a consumer would have read the statement to believe that Hales received referral fees from sales of Casper mattresses, too, Casper does not seriously dispute that this, too, is true: Hales receives income when his readers purchase Casper mattresses from Sleepopolis' link to Casper's Amazon.com page. Casper contends only (and, as it happens,

[3] Hales discloses to consumers that "Most products reviewed on Sleepopolis were given to me for free from the respective manufacturer." Compl. Ex. B (Dkt. No. 17-2) at 2.

incorrectly) that Hales' commissions from Amazon.com are lower than those he receives from Casper's competitors. *See* Opp. Br. at 5 n.1. Therefore, even if a reader construed "all" to include Casper, the statement still cannot form the basis of Lanham Act liability.[4]

B. Casper Has Failed to Plead Materiality

Casper had no meaningful answer, either, to its failure to plead the alleged materiality to consumers of the placement and wording of Hales' disclosures about his receipt of referral fees. The *facts* Hales recited about Casper's mattress and competing mattresses are not under challenge here, and those facts — indeed, even just the price differences between Casper's mattress and several competing mattresses — suffice as a reason why Casper has been losing sales to these competitors. Casper had the burden here to plead facts demonstrating that a reasonable consumer, after learning these *true* comparative facts, actually (1) would have been swayed primarily by Hales' statement of opinion, and not just by the true facts on which the opinion was based; (2) would have viewed Hales' persuasive opinion more skeptically had Hales stated expressly that he was receiving referral fees respecting Casper mattresses from Amazon.com but not directly from Casper; and (3) most importantly, *because of* looking at that opinion differently, would have ended up purchasing a Casper mattress. Casper pleaded no such facts, because the scenario is simply too far-fetched. Casper's brief therefore simply begs for the right to take discovery on the issue, *see* Opp. Br. at 19-20, notwithstanding that Hales, as a reviewer and not a seller of mattresses, has no information about what mattresses his readers ultimately considered or rejected, and why.

[4] Casper's brief also mentions social media posts by Hales that do not include disclosures about referral fees. *See* Opp. Br. at 7. Notably, however, in the two social media posts that Casper appended to its complaint — Compl. Ex. I (Dkt. No. 17-22) at 1-2 — Hales did not include any referral links or coupon codes that could cause him to receive compensation. He linked only to his Sleepopolis website, where his disclosures appear.

The cases Casper cites do not support their argument that they have pleaded materiality sufficiently to survive dismissal. In *Conopco Inc. v. Wells Enters., Inc.*, No. 14 Civ. 2223 (NRB), 2015 WL 2330115 (S.D.N.Y. May 14, 2015), two companies were selling nearly identical "rocket ice pops." The second market entrant called its rocket pop "The Original," even though the first product had been on the market for 30 years prior. *See id.* at *1. Judge Buchwald held that the materiality to consumers of the "original" claim, given that the popsicles themselves were basically identical, could not be resolved at the pleading stage. *Id.* at 5. There is no such disputed factual claim in this case. In *Student Advantage v. CollegeClub.com*, No. 99 Civ. 8604 (JSR), 1999 WL 1095601, at *1 (S.D.N.Y. Dec. 3, 1999), the defendant grossly overstated the number of students to which merchants would have had access if those merchants signed exclusive discount agreements with the defendant instead of the plaintiff. Judge Rakoff found that misrepresentation to be obviously material, given the merchants' binary choice between the two discount programs. Neither case involved a statement tangential to the factual comparison between one product and another, and in neither did the plaintiff simply say "believe me" that a tangential statement was material, without any support. Because Casper has failed to demonstrate that any of the statements it challenges impacted consumers' purchasing behavior in a material way, the Court should dismiss Casper's false advertising claim.

C. Casper Has Failed to Demonstrate Proximate Cause Sufficient To Satisfy The Supreme Court's *Lexmark* Standard

Hales' opening brief also demonstrated that Casper falls well short of the proximate cause pleading the Supreme Court required in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), because Casper has failed to demonstrate that its alleged harm flowed directly from the challenged statements on Hales' blog. *See* Opening Br. at 19-22; Casper's brief ignores the clear directive of *Lexmark* and erroneously contends it need only allege that Hales

steered consumers towards other mattress brands based on insufficiently-disclosed compensation from those brands. But that is not what *Lexmark* held. Instead, *Lexmark* is clear that in order to maintain a Section 43(a) claim, Casper must plead facts sufficient to prove that its alleged injury (declining sales of its mattresses, in the face of cheaper and/or better competition) was ***proximately caused*** by the Hales' alleged misrepresentation (the placement and wording of Hales' disclosures about referral fee compensation, and his alleged failure to emphasize that he was not receiving it directly from Casper). *See id*. at 1395. Casper has failed to make this requisite showing.

Even had Casper pleaded that consumers were less inclined to purchase Casper mattresses because of a visit to Hales' website, this alone would not satisfy *Lexmark*. Even if Casper could take the next step and show that consumers were swayed more by Hales' bottom-line opinion that a competitive mattress was better, and not by the unchallenged facts that preceded that opinion, this *still* would not satisfy *Lexmark*. Indeed, even if Casper could show that some consumer *might* have discounted Hales' opinion had the consumer known more about mattress companies' referral compensation, it would continue to fall short of *Lexmark*, because its Complaint cannot allege that these hypothetical consumers would have ended up buying a (more expensive, less fully-featured) Casper mattress, but for Hales' allegedly incomplete disclosures. There are simply too many alternate causes for Casper to tie its alleged losses to Hales.

It is clear that, as in the *Better Business Bureau* case Hales relied upon in his opening brief (at 21-22), Casper's alleged injury is too far removed from the causal chain to demonstrate proximate causation. The *Enigma* case cited by Casper further confirms this. There, the plaintiff demonstrated proximate cause only because the defendant conceded its ability to influence purchasing decisions and the complaint cited at least one instance in which a consumer purchased a competing product because of these false statements. *Enigma*, 2016 WL 3773394 at *25. Here,

the Amended Complaint merely states that Casper has lost sales, without any supporting facts at all. Therefore, the Amended Complaint should be dismissed for lack of standing.

II. CASPER HAS FAILED TO STATE A CLAIM FOR FALSE ADVERTISING UNDER NEW YORK GENERAL BUSINESS LAW § 349

Casper's claim under New York Gen. Bus. Law § 349 fails for the same reason as its Lanham Act claim — a failure to allege a materially false statement by Hales. Casper's state law claim also fails because Casper has failed to plead harm to consumers, which the statute requires. Hales cited three cases on point in his opening brief (at 23-24), all decided by highly respected judges of this Court within the past three years. *See, e.g., Conopco*, 2015 WL 2330115, at *6-*7 ("courts addressing the question of harm under [§ 349] have drawn a distinction between false advertising claims that pose a danger to the consumer and those that merely encourage customers to buy an inferior product or buy a product from one company where they may have preferred to buy it from another"). Casper does not dispute that those cases are on point and exactly as Hales portrayed them, but argues that they were wrongly decided. Yet, while Casper promised to show that these recent decisions are at odds with "the requirements set forth by the Second Circuit and the New York State appellate courts," Opp. Br. at 3, it failed to do so and cannot do so.

The Second Circuit case on which Casper relies, *Orlander v. Staples, Inc.*, 802 F.3d 289 (2d Cir. 2015), was not a dispute between two businesses. A consumer plaintiff bought a computer and an extended warranty, and he contended that the defendant did not honor its commitment under the warranty. *Orlander* did not disagree with or even address the pleading standard applicable to false advertising disputes between *businesses*. In *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995), by contrast, the Second Circuit said that "corporate competitors . . . have standing to bring a claim under [§ 349]," but with an important caveat: "so long as some harm to the public at large is at issue." The Second Circuit found public harm in *Securitron*

Magnalock because a competitor provided false information to regulators suggesting Securitron's products were unsafe when they were not. *Id.* at 258. No such claim is at issue here.

In the other case Casper relies upon, *North State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 953 N.Y.S.2d 96 (2d Dep't 2012), the defendant made two arguments that Hales has not made: It argued that, pursuant to the Court of Appeals' decision in *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20 (1995), businesses can *never* be § 349 plaintiffs unless those businesses were acting as consumers, and also that the challenged conduct was not consumer-oriented. The Second Department rejected the defendant's argument that businesses may sue only when they are injured as consumers, 953 N.Y.S.2d at 105-107, and held that a business may sue "a competing business," *id.* at 105. It then rejected the defendant's alternate argument that the plaintiff must have identified "specific consumers who suffered pecuniary harm as a result of the allegedly deceptive conduct" in order for a court to find that the conduct was sufficiently consumer-oriented to serve as the basis for a § 349 claim.

North Autobahn did not further opine on the pleading standard a business must satisfy to bring a claim, and the defendant made no arguments in that regard. The court certainly did not countenance a § 349 claim proceeding when, as here, there is no argument that *any* consumer has suffered "pecuniary harm." Because Casper has failed to plead the necessary elements under Section 349, its state law claim should also be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Hales respectfully requests that the Court dismissed the Amended Complaint, in full, and with prejudice.

Respectfully submitted,

Dated: August 12, 2016
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