No. 19-55343

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARIIX, LLC,

Plaintiff-Appellant,

– v. –

NUTRISEARCH CORPORATION ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:17-cv-00320-LAB-BGS
The Honorable Larry Alan Burns

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellant states that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

Date: July 11, 2019

BONA LAW PC

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INTRODUCTION

This appeal presents the question whether defendants should escape Lanham Act liability for commercially motivated false statements intended to influence consumer purchasing decisions when those statements masquerade as neutral, objective product reviews. The district court applied a "product review" exception to the Lanham Act, essentially holding that statements that appear to be product reviews—even if they are materially false statements bought and paid for by one of the plaintiff's competitors—cannot satisfy the commercial advertising or promotion requirement.

Appellant Ariix, LLC has alleged that Appellees Lyle MacWilliam and NutriSearch Corporation, the author and publisher of the *NutriSearch Comparative Guide to Nutritional Supplements* (the "*Guide*"), respectively, falsified ratings and qualifications of both Ariix and its chief competitor, Usana Health Sciences, Inc., for financial compensation and other benefits from Usana. Appellees touted their statements as unbiased, objective, mathematically determined scientific fact when in fact they rigged the game. The statements were widely disseminated to the purchasing public in several different ways—

including a plug for the guide and Usana on a popular "natural health" talk show—and the guide itself was and always has been intended to promote sales of Usana products. The allegations provide abundant, detailed facts establishing Lanham Act violations under this Court's precedent. But because the *Guide* presents itself as a collection of unbiased product reviews, the district court discounted Ariix's allegations and dismissed the complaint with prejudice.

The district court's overbroad "product review" exception to the Lanham Act would immunize an increasingly common deceptive promotional practice from liability: sponsored fake or falsified product reviews purporting to be neutral and independent. This Court should reverse the district court's judgment and hold either that Ariix pleaded sufficient facts to support a Lanham Act claim or that Ariix should be granted leave to amend.

JURISDICTIONAL STATEMENT

The district court had primary subject-matter jurisdiction over these actions under 28 U.S.C. §§ 1331 and 1121 because this action arose under the trademark laws of the United States, 15 U.S.C. §§ 1051 *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291. The district

court entered final orders on March 4, 2019 (Excerpts of Record ("ER") 18), and the clerk's judgment was entered on March 5, 2019. ER 1. The judgment dismissed the case in its entirety with prejudice and was therefore final. Appellant Ariix, LLC filed its notice of appeal on March 26, 2019, ER 34, which was timely under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the addendum to this brief.

ISSUES PRESENTED

1. Does the Lanham Act's prohibition on misrepresentations in commercial product promotion (15 U.S.C. § 1125(a)(1)(B)) apply to the challenged actions of NutriSearch and MacWilliam?

2. Does the *Guide* constitute commercial speech rather than simply being a consumer review?

3. Did NutriSearch and MacWilliam engage in actionable misrepresentations in the *Guide*?

4. If this Court affirms the district court, should Ariix be granted an opportunity to file a second amended complaint?

STATEMENT OF THE CASE AND FACTS

I. PARTIES

Appellant Ariix, LLC is an international health and wellness company that markets exclusively branded products through independent representatives, with its principal place of business in Bountiful, Utah. ER 40 ¶ 4. It works with world-renowned experts to promote healthy living through toxic-free products that are available through a carefully curated network of sales representatives in more than a dozen nations, including the United States. *Id.* Ariix holds trademarks for its brand name: Ariix, Registration No. 4242877 (registered Nov. 13, 2012, valid until Nov. 13, 2022); ARIIX, Registration No. 4250956 (registered Nov. 27, 2012, valid until Nov. 27, 2022). ER 51 ¶ 35.

Appellee NutriSearch Corporation is a Canadian company with its principal place of business in British Columbia, Canada. ER 40 ¶ 5. NutriSearch publishes the *NutriSearch Comparative Guide to Nutritional Supplements*. *Id.* NutriSearch sells its publications throughout the United States and the world, including in California. *Id.*

Appellee Lyle MacWilliam is a Canadian citizen and is the author of the *Guide*. ER 41 ¶ 6.

II. *NUTRISEARCH COMPARATIVE GUIDE TO NUTRITIONAL SUPPLEMENTS*

The *Guide* is a comparative guide to supplements that many people, especially sales representatives in the supplement direct marketing industry, turn to and rely upon in deciding which supplement companies to work with and which supplement products to sell out of the hundreds available on the market. ER 41 ¶ 8. The ratings, certifications, and awards in the Guide are key to the decisions that many sales representatives make. *Id.*

NutriSearch publishes two versions of its guide: a consumer edition and a professional edition. ER 42 ¶ 10. The professional edition is primarily used by sales representatives. *Id*. At the time of the filing of the complaint in this action, the professional edition was the 5th Professional Edition, ER 87 ¶ 15; NutriSearch has since published the 6th Professional Edition. ER 42 ¶ 11.

NutriSearch bills itself as an independent company that presents only objective data and analyses to the purchasing public to separate the good from the bad in an industry with sporadic regulation. ER 41–

42 ¶ 9. Prior to the filing of this lawsuit, each edition of the *Guide*, including the 5th Professional Edition, contained the following statement:

> This guide is intended to assist in sorting through the maze of nutritional supplements available in the marketplace today. It is not a product endorsement and does not make any health claim. It simply documents recent findings in the scientific literature.
>
> This guide was not commissioned by any public sector or private sector interest, or by any company whose products may be represented herein. The research, development, and findings are the sole creative effort of the author and NutriSearch Corporation, neither of whom is associated with any manufacturer or product represented in this guide.

ER 87–88 ¶ 16. Since the filing of this lawsuit, NutriSearch has removed the final portion of the disclaimer—which stated that neither the author (MacWilliam) nor NutriSearch is associated with any manufacturer or product represented in the *Guide*. ER 43 ¶ 12, n.1.

III. NUTRISEARCH AND MACWILLIAM'S TIES WITH USANA HEALTH SCIENCES, INC.

Despite the *Guide*'s disclaimer stating the independence of NutriSearch and MacWilliam from any manufacturer or product represented in the *Guide*, both NutriSearch and MacWilliam have close ties with a producer of supplements that the *Guide* regularly awards its

highest ratings. ER 46 ¶ 20. That company—Usana Health Sciences, Inc.—is one of the fiercest competitors of Ariix. ER 51 ¶¶ 33–34, 36.

The ties between Usana, on the one hand, and NutriSearch and MacWilliam, on the other hand, which the *Guide* does not disclose, include the following:

- MacWilliam, the *Guide*'s author and former CEO of NutriSearch, is a former Usana sales representative and originally designed the guide as a tool to sell Usana products himself. ER 46 ¶ 20. MacWilliam was also a member of Usana's scientific advisory board, until another supplement company exposed his affiliation and bias. ER 46 ¶ 21.
- MacWilliam has had regular speaking engagements at Usana's global and regional sales representative meetings. ER 46 ¶ 20. After NutriSearch gave Usana the Editor's Choice award, MacWilliam asked Usana to send him on a speaking tour, which Usana did, paying him $90,000. ER 48 ¶¶ 25–26. The bulk of MacWilliam's income and a substantial portion of NutriSearch's revenue comes from

Usana or Usana-derivative work; Usana directly pays NutriSearch and MacWilliam hundreds of thousands of dollars per year, much of it in speaking and promotion fees. ER 46–47 ¶ 22.

- NutriSearch's current CEO, Gregg Gies, is also a former Usana representative. ER 46 ¶ 20.
- Over the years, NutriSearch and MacWilliam changed the criteria for medals so that Usana could earn medals and so that Ariix—Usana's competitor—would be denied them. ER 48–49, 53–57 ¶¶ 28, 43–54. As award criteria changed, NutriSearch grandfathered Usana into less-intensive standards than those that applied to other supplement companies, including Ariix. ER 56 ¶ 53.

IV. THE *GUIDE*'S MISREPRESENTATIONS ABOUT ARIIX

As noted above, one of the *Guide*'s most-used attributes is its set of ratings, certifications, and awards to help distinguish supplements from each other. ER 41 ¶ 8. Although the *Guide* expressly presents its ratings, certifications, and awards as neutral, objective and scientifically based, they are actually based (contrary to NutriSearch's

representations) on NutriSearch's own, subjective, and ever-changing criteria, rather than any peer-reviewed scientific process. ER 69–70 ¶ 72.

As one of Usana's chief competitors, Ariix, has suffered from the *Guide*'s refusal to rate accurately Ariix's supplements and from the *Guide*'s repeated denial of its top ratings (including the "Gold Medal") to Ariix. ER 55–56 ¶ 50. NutriSearch and MacWilliam repeatedly changed procedures and criteria to deny Ariix the *Guide*'s top ratings, while grandfathering in Ariix's competitor Usana as procedures and criteria changed. ER 53–57 ¶¶ 43–54. The *Guide*'s repeated exclusion of Ariix from top ratings constituted a serious and damaging set of misrepresentations. ER 71–72 ¶ 74.

Indeed, although denying Ariix the NutriSearch Gold Medal, NutriSearch later acknowledged that Ariix—by "diligently work[ing] with [National Science Foundation] scientists to develop" new testing protocols and procedures—had performed "pioneering" work that would "'up the game' for all future contenders of the NutriSearch GOLD Medal." ER 55 ¶¶ 48–49. NutriSearch told Ariix that it would receive the Gold Medal in the next printing of the 5th edition of the *Guide*, but

then NutriSearch never published another printing of the 5th edition and changed the criteria for the Gold Medal for the 6th edition and once again excluded Ariix from the top award. ER 55–56 ¶¶ 49–51.

In light of the serious harm that the *Guide*'s misrepresentations had caused and were continuing to cause Ariix, Ariix filed this action alleging violations of the Lanham Act's prohibition on misrepresentations, 15 U.S.C. § 1125(a). ER 83.

V. DISTRICT COURT ORDER DISMISSING ORIGINAL COMPLAINT WITHOUT PREJUDICE

Acting upon a motion to dismiss filed by NutriSearch and MacWilliam, the district court issued an order that, in relevant part, granted the motion to dismiss without prejudice for failure to state a claim and gave Ariix leave to file an amended complaint. ER 33. Central to the district court's analysis was its view that the misrepresentations that Ariix alleged in its original complaint were publicly made only in the *Guide* itself, and the district court regarded such allegations to raise First Amendment concerns. ER 22. With respect to the Lanham Act, the district court decided that the *Guide* was a set of consumer product reviews and concluded that the Lanham Act did not apply. ER 24. The district court also concluded that the

statements in the *Guide* were not commercial speech, in part because the alleged misrepresentations of which Ariix complained were not alleged to have been made outside the *Guide* itself; therefore, the district court concluded, the complaint did not satisfy the fourth element of the Ninth Circuit's commercial advertising or promotion test under the Lanham Act—the requirement that commercial speech "be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." ER 29; *see also* ER 25 (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003)). The district court also concluded that the allegations of the original complaint "d[id] not plausibly suggest that the *Guide* is engaged in commercial advertising or promotion." ER 30.

VI. ARIIX'S FIRST AMENDED COMPLAINT

Following the district court's order dismissing the action with leave to amend, Ariix filed an amended complaint. Among the new allegations were the following:

- Whereas the district court in its order dismissing the original complaint emphasized that the statements challenged by Ariix were part of the *Guide* itself, ER 29, the

amended complaint alleged that many of the key statements in the *Guide* are reproduced on Amazon.com, including the neutrality disclaimer; representations that the *Guide* uses "a scientifically-based approach . . . representing thousands of hours of research"; and representations that Medals of Achievement are based on "proof of manufacturing and product quality, including independent laboratory analysis that assures what is on the label is really in the bottle." ER 61–62 ¶ 64.

- In 2011, Usana misappropriated Ariix's confidential information and draft marketing materials before Ariix launched its first product (Ariix Optimal), ER 52 ¶ 38; Usana then provided that material to NutriSearch and instructed NutriSearch to run a new printing of the *Guide* to give Ariix Optimal a sub-par rating (which, following public criticism and evidence, NutriSearch later revised to a top rating of five stars). ER 52 ¶¶ 38–40.
- The 6th Edition of the *Guide*, published after this litigation began, removed the neutrality portion of the disclaimer,

which had formerly disclaimed any association between NutriSearch and MacWilliam with any manufacturer or product discussed in the *Guide*. ER 43 ¶ 12, n.1.

- In 2009, after NutriSearch gave Usana the Editor's Choice award, MacWilliam asked Usana to send him on a speaking tour, which Usana did, paying him $90,000. ER 48 ¶¶ 25–26.
- The amended complaint includes multiple allegations that over the years, NutriSearch and MacWilliam changed the criteria for certifications and medals so that Usana could earn medals and so that Ariix would be denied them. ER 48–49, 53–57 ¶¶ 28, 43–54.

VII. DISTRICT COURT ORDER DISMISSING ACTION WITH PREJUDICE

Acting upon a second motion to dismiss, the district court granted an order dismissing the entire action with prejudice, concluding that further amendment would be futile. ER 18. In its order, the court treated as law of the case the conclusions it had drawn in its first order, ER 3, and concluded that the new allegations in the amended complaint were insufficient to establish plausible, as opposed to possible claims.

ER 17. The district court rejected numerous allegations by Ariix that the *Guide*'s awards were not objective and were likely rigged; the district court regarded the awards as "at least in part subjective," ER 11–12; and the district court concluded that allegations of unfairness in the *Guide*'s product evaluation process were simply criticisms of a product review. ER 13. The district court also rejected Ariix's allegations that the direct economic motive behind the numerous statements of NutriSearch and MacWilliam was sufficient to render such statements commercial speech. ER 17.

The clerk entered judgment dismissing the action with prejudice on March 5, 2019. ER 1. Ariix timely filed its notice of appeal on March 26, 2019. ER 34.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's judgment dismissing the action with prejudice for the following reasons:

1. Ariix challenges statements in the *Guide* that constitute misleading commercial advertising and promotion under the Lanham Act. Although in other contexts, publications that include consumer product reviews do not advertise or promote products and therefore are

not commercial speech that would be covered by the Lanham Act, not all publications that include product reviews are exempt from the Lanham Act. The amended complaint contains many allegations pointing to the real purpose of the *Guide*: to promote the products and financial interests of one producer of supplements—Usana—which in turn provides financial benefits to NutriSearch and MacWilliam. The fact that the *Guide* includes information about other products described as inferior to Usana's products does not exempt the challenged statements in the *Guide* from being commercial speech.

2. All of the statements that Ariix challenges are actionable under the Lanham Act as false or misleading statements of fact. First, the disclaimer at the beginning of the *Guide*—which states that neither NutriSearch nor MacWilliam "is associated with any manufacturer or product represented in this guide"—is a statement of fact, not opinion, and it is false. Both NutriSearch and MacWilliam have numerous financial and other ties with Usana—a manufacturer represented in the *Guide* and consistently given the highest ratings and certifications in the *Guide*. The *Guide* is, in fact, an elaborate commercial promotion of Usana's products. Second, the *Guide*'s star rating system is actionable

under the Lanham Act. Although in many contexts consumer ratings are simply opinions, NutriSearch and MacWilliam consistently describe the *Guide*'s star rating system as evidence-based and mathematically determined based on 16 potency determinations that are combined to provide a raw score for each supplement that is then translated into a star rating between 0 and 5. Although Ariix has alleged that those claims are not true, the appellee's description of the star ratings as mathematically determined render them actionable as purported facts—not opinions. Third, the Medal of Achievement certifications that the *Guide* includes are based not on opinion, but on satisfaction of specified criteria, such as verified compliance with the Food and Drug Administration's good manufacturing practices and testing of label claims by one of two NutriSearch-approved laboratories. Identifying a product as meeting those requirements is not a statement of opinion, but of fact, and Ariix has alleged that NutriSearch repeatedly and misleadingly changed criteria to prevent Ariix from obtaining the highest certification while ensuring that Usana would always obtain the highest certification.

3. The statements in the *Guide* that Ariix challenges satisfy the requirement that, to be actionable as commercial advertising or promotion, statements must be sufficiently disseminated to the purchasing public. Statements in the *Guide* that Ariix challenges are not simply contained in the *Guide*, but are reproduced on NutriSearch's own website and on Amazon.com. NutriSearch and MacWilliam also offer "licensing opportunities" for the *Guide*'s statements to be used promotionally in press releases, and, for example, each time that NutriSearch awards Usana a Medal of Achievement or other accolade, Usana issues a worldwide press release quoting the *Guide*. In addition, MacWilliam has appeared on the *Dr. Oz Show*—of which Usana is a sponsor—to promote the *Guide* as evidence-based, science-based, and bias-free and to state on the air that in every edition of the *Guide* Usana has earned a top rating.

4. If the Court affirms the district court's dismissal of the action, then Ariix should be granted leave to amend its complaint. The district court abused its discretion in denying leave to amend on the ground that amendment would be futile. Ariix has previously amended its complaint only once and should have an opportunity to add pertinent

allegations that would counter the negative inferences that the district court drew from certain allegations in Ariix's first amended complaint.

STANDARD OF REVIEW

In an appeal from an order granting a motion to dismiss for failure to state a claim, this Court's review is *de novo*. *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1205 (9th Cir. 2016). In conducting *de novo* review, this Court does not defer to the lower court's ruling, but independently considers the matter anew, as if no decision had been rendered on the matter below. *Voigt v. Savell,* 70 F.3d 1552, 1564 (9th Cir. 1995); *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 970 (9th Cir. 2003) (explaining that "no form of appellate deference is acceptable").

A complaint must contain sufficient factual allegations to state a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court assumes the truth of all factual allegations of the complaint and construes them in the light most favorable to the non-moving party. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007). All reasonable inferences from the facts alleged are drawn in plaintiff's favor in

determining whether the complaint states a valid claim. *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1100 (9th Cir. 2018); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) ("[*Bell Atl. Corp. v.] Twombly*[, 550 U.S. 544 (2007)] and *Iqbal* did not change this fundamental tenet of Rule 12(b)(6) practice."). The Court does not need to accept as true conclusions of law stated in a complaint. *See Iqbal*, 556 U.S. at 678.

Courts view motions to dismiss under Rule 12(b)(6) with "disfavor" because of the lesser role pleadings play in federal practice and because of the liberal policy concerning amendment. *Lormand v. US Unwired, Inc.* 565 F.3d 228, 232 (5th Cir. 2009) (Rule 12(b)(6) motions are "viewed with disfavor and rarely granted.") (citation omitted).

This Court reviews the district court's denial of leave to amend for abuse of discretion. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). Despite application of the abuse of discretion standard, because of the strong policy favoring leave to amend, denials of leave to amend are nonetheless "strictly" reviewed. *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996); *see* Fed. R. Civ. P. 15 ("The court should freely give leave when justice

so requires."). Indeed, dismissals without leave to amend for failure to state a claim generally will be affirmed only if it is clear that the complaint cannot be saved by further amendment. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 871 (9th Cir. 2016).

ARGUMENT

I. THE LANHAM ACT APPLIES TO THE FALSE STATEMENTS BY NUTRISEARCH AND MACWILLIAM

Ariix challenges two sets of statements as false and actionable under the Lanham Act as impermissible commercial advertising or promotion. First, Ariix challenges statements by NutriSearch and MacWilliam—both in the *Guide* and disseminated broadly elsewhere—that promote the *Guide* itself as scientifically based and disclaims financial affiliation with a particular producer of supplements when, in fact, NutriSearch and MacWilliam are affiliated with and paid by Usana, which is one of Ariix's fiercest competitors. Second, Ariix challenges statements indicating that Usana's products are superior to Ariix's supplements. The district court—incorrectly drawing inferences ***adverse to*** rather than ***in favor of*** Ariix's allegations—concluded that the statements that Ariix challenges do not constitute commercial advertising or promotion. The district court focused particularly on its

characterization of the challenged statements as "reviews of consumer products" that it concluded are largely excluded from coverage under the Lanham Act. ER 24. As explained below, there is no absolute exception for "product reviews" under the Lanham Act, and the statements that Ariix challenges fall squarely within the prohibitions of the Lanham Act and are not exempted by any "product review" exception even if this Court were to recognize such an exception.

Under Ninth Circuit case law, representations constitute commercial advertising or promotion under the Lanham Act if they are:

> 1) commercial speech; 2) by a defendant who is in commercial competition with plaintiff; 3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations 4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Rice, 330 F.3d at 1181 (quoting *Coastal Abstract Serv. v. First Am. Title Ins. Co.,* 173 F.3d 725, 735 (9th Cir.1999)).

As the district court noted, ER 25 & n.3, the second element listed above—the requirement that the defendant be in commercial competition with the plaintiff—does not survive the Supreme Court's

holding in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 138 (2014), that Lanham Act relief is not limited to direct competitors, but can be afforded to protect "a commercial interest in reputation or sales," *id.* at 132. The Supreme Court explained in *Lexmark* that "a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff." *Id.* at 133. The amended complaint plainly includes plausible allegations of such injury, including that "NutriSearch . . . has caused harm by deceiving consumers in a way that causes them to withhold trade from Ariix and to instead trade with Ariix's competitors"—in particular, Ariix's fiercest competitor, Usana. ER 71–72 ¶ 74 ("The misstatements directly reduced Ariix's revenues by causing both consumers and professionals to select Usana over Ariix."). *Id.*

The district court, however, discounted Ariix's allegations that the first and fourth elements were met—that is, that the statements Ariix challenges are commercial speech and that they were sufficiently disseminated among the purchasing public. As explained below, Ariix's

allegations related to those elements are more than sufficient to survive a motion to dismiss.

A. The Challenged Statements in the *Guide* Are Commercial Speech and Are Not Exempt from the Lanham Act Under Any "Product Review" Exception

The Lanham Act does not itself define "commercial advertising or promotion," so courts have looked to the First Amendment commercial speech test to construe this statutory requirement. *See, e.g.*, *Rice*, 330 F.3d at 1181. Under that test, courts should consider (1) whether the statements are in traditional advertising format; (2) whether they refer to commercial products; and (3) whether the defendant had an economic motivation in making the statements. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983). In *Bolger*, the Supreme Court considered whether informational pamphlets about contraception mailed by a manufacturer and distributor of contraception constituted commercial speech. It explained that, although no single of these factors would necessarily render statements or advertisements commercial speech, "[t]he combination of all these characteristics . . . provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech." *Id.* at 67.

The *Bolger* Court's conclusion that documents that both contain information and yet also propose transactions can constitute commercial speech is relevant here because the district court rested its conclusion that Ariix had failed to state a claim based on the *Guide* in large part on First Amendment concerns. ER 22. The district court was of the view that "legislative history makes clear Congress did not intend the Lanham Act to 'stifle criticism' of goods or services by some means other than marketing or advertising" such as "consumer reports or consumer protection groups that review products." ER 23 (citation omitted). But that is not entirely accurate. The Sixth Circuit has observed that the legislative history indicates different interpretations of the phrase by members of the House versus members of the Senate. *See Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 111–12 (6th Cir. 1995). Whereas at least one House member expressed the view that the Lanham Act's reach would be limited "to false and misleading speech that is encompassed within the 'commercial speech' doctrine by the United States Supreme Court," *id.* at 111 (quoting 134 Cong. Rec. H10420 (daily ed. Oct. 19, 1988) (Rep. Kastenmeier)), in the Senate, the view was expressed that the Lanham Act's reach would be broader. In

particular, Senator DeConcini stated that it was "Congress' intent that it be interpreted only as excluding political speech" and "that the 'commercial' language be applicable any time there is a misrepresentation relating to goods or services." *Id.* at 111–12 (quoting 134 Cong. Rec. S16973 (daily ed. Oct. 20, 1988) (Sen. DeConcini)). Even if this Court wished to rely on legislative history to answer the question whether the Lanham Act exempts consumer product reviews, no such answer would be forthcoming.

Although the district court was certainly correct that, in many contexts, consumer product reviews—in publications such as *Consumer Reports*, for example—do not advertise or promote products and therefore are not commercial speech that would be covered by the Lanham Act, it is not the case that any form of purported consumer product review is exempt from the Lanham Act. In *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 193 F. Supp. 3d 556 (E.D. Va. 2016), *aff'd,* 700 F. App'x 251 (4th Cir. 2017), the Lanham Act defendant was a non-profit organization that reviewed and certified eggs as "Certified Humane." *Id.* at 562–63. At issue was an email in which the organization recommended against the use of an egg supplier

who did not have the "Certified Humane" label. *Id.* at 564–65. The court concluded that, notwithstanding the email's public interest objective, the email had a commercial purpose under the Lanham Act because the egg suppliers who were awarded the "Certified Humane" label paid the non-profit organization licensing fees in order to do so, and the organization sent the email "to protect the interests of her own licensees." *Id.* at 569.

Similarly here, the amended complaint is replete with allegations that point to the real commercial purpose of the *Guide*. Designed by MacWilliam to promote Usana products, ER 46 ¶ 20, the *Guide* continues to exist for the purpose of promoting and protecting the financial interests of Usana, which in turn provides financial benefits to NutriSearch and MacWilliam. The *Guide* is no *Consumer Reports*. The mere fact that the *Guide* discusses supplements other than those produced and distributed by Usana does not mean that the *Guide*'s driving economic motive is not to advertise and promote Usana's products. Ariix has alleged in detail that a central way that Usana promotes its products is by influencing NutriSearch and MacWilliam to have the *Guide* describe all the competition and announce that, on some

purportedly objective basis, Usana's products are the best—all the while failing to disclose financial ties with the *Guide*'s author. The mere fact that information is provided about other products in the *Guide* no more exempts it from being commercial speech than did the information about contraception in the pamphlets mailed in *Bolger*. *Cf. Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989) (holding that proposed "Tupperware parties" in college dormitories constituted commercial speech despite plans to include home economics lessons in the presentations); *Semco*, 52 F.3d at 112–13 (holding that article in a trade journal contained sufficient advertising content to support a Lanham Act claim and explaining that "[s]peech need not closely resemble a typical advertisement to be commercial").

B. All of the Challenged Statements Are Actionable Under the Lanham Act as False or Misleading Statements of Fact

In this action, Ariix has challenged as misrepresentations several types of statements used in the *Guide*. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides for liability when a defendant "uses in commerce" any "false or misleading description of ***fact***, or false or misleading representation of ***fact***, which . . . in commercial advertising

or promotion, misrepresents the nature, characteristics, [or] qualities" of someone else's "goods, services, or commercial activities" (emphases added). In dismissing the action, the district court repeatedly concluded that certain types of statements that Ariix challenged—such as the *Guide*'s star-rating of supplements and the *Guide*'s awards and certifications—constituted opinions, rather than facts, and therefore are not actionable under the Lanham Act. It is correct that statements of opinion generally are not actionable under the Lanham Act. *See Coastal Abstract*, 173 F.3d at 731. As explained below, however, the amended complaint includes allegations that show that each of the statements, ratings, and certifications that Ariix challenges are not merely assertions of opinion, but are falsifiable statements of fact.

As an initial matter, there can be no question that the disclaimer contained at the beginning of the *Guide* includes statements of fact that can be shown to be false (as Ariix has alleged). That disclaimer states that neither the author (MacWilliam) nor NutriSearch "is associated with any manufacturer or product represented in this guide." ER 87–88 ¶ 16. As described in Section III of the Statement of the Case, *supra*, the ties between Usana—a manufacturer featured in the *Guide* and

indeed consistently given the highest ratings and certifications in the *Guide*—are numerous, including mutually beneficial financial arrangements and collusion with respect to the assignment of ratings and certifications in the *Guide*. Given the amended complaint's allegations that indicate that the *Guide* is not merely a set of product reviews, but rather an elaborate commercial promotion of Usana's products, the disclaimer's statement that MacWilliam and NutriSearch have no association with a manufacturer or product in the *Guide* is a fact, and a false one at that. Indeed, after this lawsuit was filed, the 6th edition of the *Guide* removed that portion of the disclaimer, ER 43 ¶ 12, n.1, and the Court can plausibly infer that its removal was in recognition of its falsity.

With respect to the *Guide*'s ratings and certifications, the amended complaint uses the appellees' own words to show that they are not mere statements of opinion, but are rather statements of fact that can be shown to be false. It is correct that rating systems may often, and perhaps usually, reflect primarily the opinions of those producing the ratings. *See, e.g., Casper Sleep, Inc. v. Derek Hales & Halesopolis LLC*, No. 16-cv-03223 (CM), 2016 WL 6561386, at *5 (S.D.N.Y. Oct. 20,

2016) (finding mattress reviews not actionable under the Lanham Act because "[i]t is simply not possible to 'objectify' a sleeper's reaction to a mattress in a way that transforms what is essentially opinion into an objectively verifiable fact"). But defendants disclaim the notion that they are offering opinions in the *Guide*: as the amended complaint alleges, the *Guide* describes its ratings system as a "comprehensive analytical model" based on 18 different "health support criteria" derived from 12 independent scientific sources, ER 43 ¶ 13, and MacWilliam claimed on the *Dr. Oz Show* that the *Guide*'s ratings were an "evidence-based scientifically based system" designed to eliminate the author's "particular bias." ER 43–44 ¶ 14. Moreover, NutriSearch's website describes the *Guide*'s ratings as mathematical potency determinations, calculated using 16 individual potency ratings that are "pooled to provide a raw score," which is then translated into star ratings between 0 and 5. ER 44 ¶ 15. Considering these allegations in the light most favorable to Ariix, and drawing inferences in favor of Ariix, this Court should conclude that Ariix has adequately alleged that the *Guide*'s star rating system conveys factual information that can be shown to be false. At the very least, Ariix adequately alleged that the *Guide* purports to

apply a mathematical system, but does not truly do so for all products. *See* ER 52 ¶¶ 39–40 (alleging that NutriSearch originally gave one of Ariix's products (Ariix Optimal) a rating of 3.5 stars, at Usana's urging, only later to admit that the product warranted 5 stars, using the *Guide*'s mathematical formula).

Finally, the Medal of Achievement certifications that the *Guide* includes (the highest of which always have gone to Usana) purport to be based, not on opinion, but on satisfaction of specified criteria. For example, as alleged in paragraphs 16 and 17 of the amended complaint, certification is obtained by verifying compliance with the Food and Drug Administration's pharmaceutical good manufacturing practices and by obtaining certification that label claims are true from one of two NutriSearch-approved laboratories. ER 44–45 ¶¶ 16–17. These are objective requirements. Identifying a product as meeting those requirements is not a statement of opinion, but rather a statement that can be verified or falsified. A product's failure to obtain such a Medal of Achievement either means that it chose not to go through the process specified to provide the public assurance about the contents of its products or it was unable to do so successfully.

In sum, Ariix has adequately and plausibly alleged that all of the types of statements that it challenges in this lawsuit are actionable factual statements, not mere statements of opinion.

C. The Challenged Statements Were Sufficiently Disseminated to the Purchasing Public

In concluding that the statements challenged by Ariix did not constitute commercial advertising and promotion, the district court focused on the fact that both the challenged disclaimer and the awards and ratings were contained in the *Guide* itself and thus were not widely disseminated among the public. ER 10 (citing *Rice*, 330 F.3d at 1181, for the proposition that claims about a television show made within the show itself were not commercial advertising under the Lanham Act). In relying on the *Rice* example, however, the district court ignored extensive allegations by Ariix that statements in the *Guide*, including the *Guide*'s disclaimer, are not only contained in the *Guide*, but also widely disseminated elsewhere, thereby satisfying the fourth element of the Ninth Circuit's test for commercial advertising or promotion under the Lanham Act. *See Rice*, 330 F.3d at 1181 (holding that, to constitute covered commercial speech, such speech "must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising'

or 'promotion' within that industry"). As alleged in the amended complaint, such widespread dissemination to the purchasing public included the following:

- Many of the relevant statements in the *Guide* are reproduced not only in advertisements on NutriSearch's own website, but also on Amazon.com as product descriptions, as additional information, and in Amazon.com's "Look Inside" feature that enables visitors to Amazon.com to view pages from inside a publication. ER 61–62 ¶ 64. For example, the neutrality disclaimer is one of the first pages viewable through the "Look Inside" feature. *Id*. In addition, one Amazon.com product page for the guide reiterates that it uses "a scientifically-based approach . . . representing thousands of hours of research" and that Medals of Achievement are based on "proof of manufacturing and product quality, including independent laboratory analysis." *Id*.
- NutriSearch and MacWilliam offer "licensing opportunities" for the *Guide*'s statements to be used promotionally in press releases, and, accordingly, each time that NutriSearch awards Usana with a Medal of Achievement, the Editor's Choice award, or other

accolades, Usana issues a press release for worldwide distribution that quotes the *Guide*. In 2013, for example, Usana quoted the *Guide*'s purported objective, unbiased, scientific criteria for its rating and Gold Medal certification in its press release announcing its third consecutive Gold Medal award. ER 64 ¶ 66.

- In February 2016, MacWilliam appeared as a guest on the *Dr. Oz Show*, a "natural health" daytime talk show, to promote the *Guide* using scientific objectivity and neutrality statements similar to those in the *Guide*'s disclaimer. On the show, MacWilliam advertised the *Guide* as an "evidence-based scientifically based system" that is specifically designed to eliminate any bias or subjectivity, explaining: "We didn't want to put our particular bias into it . . . ." ER 43–44 ¶ 14. In addition, Usana is a sponsor of the *Dr. Oz Show*, and on the program, MacWilliam put in a plug for Usana, stating that in the entire history of the *Guide*, Usana had always earned a top rating. ER 59–60 ¶ 61. In the 2016–2017 season, the Dr. Oz Show had an average daily viewer rating of approximately 1.6 million viewers. At least 18,000 people have also viewed the YouTube clip on Dr. Oz's official YouTube channel

(The Dr. Oz Show, *Your Guide to the Best Vitamins and Supplements* (Feb. 2, 2016), https://www.youtube.com/watch?v=BSSJxAanXHQ&feature=youtu.be), and the clip is also featured on the homepage of NutriSearch's website. ER 59 ¶ 59. On the *Dr. Oz Show*, then, MacWilliam engaged in commercial promotion of both the *Guide* and Usana to large public audiences. MacWilliam made these statements promoting the 5th edition of the *Guide* after it had grandfathered Usana's Gold Medal certification following changes in certification requirements due to a lab controversy, and after MacWilliam had privately told Ariix that he "could no longer confidently assure the consumer that what is on the label is in the bottle" from the testing that had been used for Usana's certification. ER 56 ¶ 51.

Despite these numerous allegations of widespread dissemination to the purchasing public of the statements that the amended complaint challenges as misrepresentations—regarding the *Guide*'s supposed scientific objectivity, regarding the purported lack of bias based on affiliation with companies reviewed in the *Guide*, and regarding Usana—the district court found such allegations beside the point

because, drawing an inference adverse to the amended complaint rather than in favor of the amended complaint, the district court announced that "the disclaimer was intended to promote trust in the *Guide*, not to promote supplements or their manufacturers." ER 10. That inference by the district court ignores, rather than credits, the many allegations of financial and other connections between the *Guide* and Usana. The amended complaint abundantly pleads, with great plausibility, that the *Guide*, which was started in order to promote sales of Usana products, still has that primary purpose and that Ariix has been harmed. ER 46 ¶ 20.

II. AT THE VERY LEAST, THIS COURT SHOULD PERMIT ARIIX TO AMEND ITS COMPLAINT

If this Court is inclined to affirm the district court's dismissal of the action, Ariix seeks leave to amend. Although Ariix did not seek leave to amend its complaint a second time in the district court, this Court can grant leave to amend because the district court "expressly contemplated whether amendment was appropriate," *Corinthian Colleges*, 655 F.3d at 995, and held that amendment would be futile as a matter of law. ER 6, 18. "Because the issue was expressly addressed

and decided by the district court, [and] raised on appeal, . . . it is subject to review by this court." *Corinthian Colleges*, 655 F.3d at 995.

Although this Court reviews the district court's denial of leave to amend for abuse of discretion, *id.* at 955, dismissal without leave to amend is improper unless "it is clear, upon *de novo* review, that the complaint would not be saved by any amendment." *Mo. ex rel. Koster v. Harris*, 847 F.3d 646, 655–56 (9th Cir. 2017).

In denying leave to amend, the district court cited to *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009). ER 6. That case is inapposite. The district court in *Zucco Partners* had given the plaintiff two opportunities to plead the factual allegations required to demonstrate scienter in a securities fraud litigation. *Id.* When the plaintiff failed to add scienter allegations for the third time, the district court dismissed the second amended complaint on the ground of futility. *Id.* Such circumstances are a far cry from the instant case in which Ariix added to its amended complaint factual allegations that it believed that the district court requested in dismissing the original complaint, only to have such new allegations construed by the

district court with negative inferences rather than inferences in favor of the allegations.

The grounds that may justify denial of leave to amend are "undue delay" (not present here); "bad faith or dilatory motive" (not present here); "repeated failure to cure deficiencies by amendments previously allowed" (not present here, as Ariix has amended its complaint only once); "undue prejudice to the opposing party" (not present here); and "futility of amendment" (not present here, for reasons discussed throughout this brief). *Foman v. Davis*, 371 U.S. 178, 182 (1962). The district court did not cite to any of the above factors other than to say that, because there had been a previous amendment, it would be futile for Ariix to add additional factual allegations. ER 18. The district court abused its discretion in so deciding.

In considering whether the district court abused its discretion, this Court should consider the many instances in which the district court, rather than drawing inferences favorable to Ariix's allegations, made it a point to draw ***negative*** inferences and to use conjecture to come up with reasons to minimize the import of Ariix's allegations. *Cf. Braden*, 588 F.3d at 595 ("The district court erred in two ways. It

ignored reasonable inferences supported by the facts alleged. It also drew inferences in appellees' favor, faulting [plaintiff] for failing to plead facts tending to contradict those inferences."). Some examples follow:

- The district court concluded that Ariix had "failed to plausibly allege false statements about Usana's or Ariix's products." *Id.* That is not a fair inference, for example, from Ariix's allegations in paragraphs 39 and 40 of the amended complaint that NutriSearch originally gave Ariix Optimal a rating of 3.5 stars, at Usana's urging, only to admit later that the product warranted 5 stars, using the *Guide*'s supposedly mathematical formula. ER 52, ¶¶ 39–40.
- Similarly, paragraph 50 of the amended complaint alleged that in 2015, NutriSearch admitted that Ariix warranted the Gold Medal but denied that designation to Ariix. The district court should have drawn an inference that that these allegations supported Ariix's claims of misleading statements in commercial promotion. ER 55–56 ¶ 50.

- In paragraph 54 of the amended complaint, Ariix alleged that NutriSearch neither informed Ariix that it was accepting new applications for the 6th edition of the *Guide* nor informed Ariix of the new criteria that NutriSearch was using for that edition. ER 57 ¶ 54. Rather than draw the plausible inference that NutriSearch was intentionally keeping such information from Ariix in order to prevent Ariix from applying for the top awards in that edition and thus to use the 6th edition to misrepresent to the public that Ariix did not meet the purportedly objective standards for such awards, the district court stated: "The [amended complaint] does not allege any facts suggesting Ariix had a right to be told about new criteria or prompted to submit an application. And it does not allege that Usana or other manufacturers were notified when the revisions were complete or prompted to submit new applications." ER 13.

In these examples, the district court ironically is highlighting that Ariix ***could*** add pertinent allegations if Ariix were permitted to amend its complaint—namely, allegations of facts consistent with the

inferences the district court should have drawn in evaluating Ariix's amended complaint on a motion to dismiss.

For all of these reasons, should this Court decide to affirm the district court's judgment dismissing the case, this Court should remand to allow Ariix to amend its complaint.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing the action with prejudice and remand for further proceedings. In the alternative, the Court should remand with instructions for the district court to grant leave to amend.

Date: July 11, 2019

BONA LAW PC

/s/ David C. Codell
DAVID C. CODELL

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STATEMENT OF RELATED CASES

Appellant is not aware of any other related case.

Date: July 11, 2019

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/s/ David C. Codell
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,649 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word 2016, Century Schoolbook 14-point font.

Date: July 11, 2019

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Ariix, LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: July 11, 2019

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No. 19-55343

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARIIX, LLC,

Plaintiff-Appellant,

– v. –

NUTRISEARCH CORPORATION ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:17-cv-00320-LAB-BGS
The Honorable Larry Alan Burns

ADDENDUM TO APPELLANT'S OPENING BRIEF

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UNITED STATES CODE

15 U.S.C. § 1125(a)

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or

instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.