

Butcher has not convinced me that they are incorrect.

Odorite's motion for summary judgment on Butcher's remaining false advertising claims is **GRANTED**. Odorite's statements that its products Looking Good and Powerball are comparable in quality to Butcher's Look® and Speedball® are puffery. "Puffery" is exaggerated advertising or unspecified boasting, characterized by vague and subjective statements, upon which no reasonable buyer would rely. Clorox Co. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 38-39 (1st Cir. 2000); accord 4 McCarthy on Trademarks and Unfair Competition 27:38 (4th ed. 1996); Nikkal Indus., Ltd. v. Salton, Inc., 735 F. Supp. 1227, 1234 n.3 (S.D.N.Y. 1990) (stating that a claim that a product was "better" was puffing) (dicta). Specific and measurable claims, on the other hand, are not puffery. Clorox, 228 F.3d at 38-39. Odorite's statements that its products are "comparable" to Butcher's are vague and subjective, not specific and measurable, and they are therefore not actionable.

Even if Odorite's statements are not puffery, Odorite is entitled to summary judgment at the close of discovery because the evidence Butcher has presented simply does not establish that the statements are false or misleading. "Comparable" means "capable of or suitable for comparison" and "similar, like <fabrics of ~ quality>." Merriam Webster's Collegiate Dictionary 234 (10th ed. 1993).¹ Thus, for Odorite's statements to be false or misleading, its products must

¹ The Merriam Webster definition of "comparable" is representative of other dictionaries' definitions. See, e.g., Oxford Encyclopedic English Dictionary 294 (2nd ed. 1995) ("1 . . . able to be (continued next page)

be so inferior that they cannot be considered similar to, or like, Butcher's products. With respect to Odorite's statement that Looking Good is comparable to Look®, Butcher's evidence—the affidavit of Michael Atwater—actually states that the products are “similar in performance.” Atwater Aff. ¶ 4. Atwater's subsequent conclusion that the products are not comparable is apparently based on Look's superior performance in removing aged greasy food soils in tests that he conducted, and Atwater's expectation of Look's superior performance in removing aged fingerprint soils. Atwater Aff. ¶¶ 4-5, 7. I cannot discern any meaningful difference between Odorite's assertion that the products are “comparable in quality” and Atwater's assessment that the products are “similar in performance,” notwithstanding his later conclusion, based on the difference in performance on two types of soils, that the products are not comparable. I therefore conclude that Butcher has not presented evidence that Odorite's statement (that Looking Good is comparable in quality to Look®) is false or misleading.

With respect to Odorite's statement that Powerball is comparable in quality to Speedball®, Atwater's opinion that the products are not comparable is based on his conclusion that Speedball® is superior. Powerball could, however, be inferior but nonetheless “comparable” to—that is, similar to or like—Speedball®. And in fact, the tests that Atwater performed indicate that Powerball and Speedball® both

compared. 2 . . . fit to be compared; worth comparing.”); American Heritage Dictionary of the English Language 384 (3rd ed. 1992) (“1. Admitting of comparison with another or others 2. Similar or equivalent.”); Random House Unabridged Dictionary of the English Language 416 (2nd ed. 1987) (“1. capable of being compared; having features in common with something else to permit or suggest comparison 2. worthy of comparison 3. usable for comparison; similar.”).

received perfect scores on a ten point scale for cutting food grease from kitchen fan blades; that Powerball was within two points on the ten point scale in removing road soil from a placard (Powerball scored eight to Speedball®'s ten) and in removing pencil from an enamel paint (again, eight to ten); and within three points on a ten point scale in removing oily particulate soils from a warehouse floor (six to nine) and from ceramic tile (three to six). While Powerball's performance was significantly more inferior on other types of soil—specifically crayons, pens, magic markers, and shoe polish—I conclude that no reasonable jury could find on that account that it is false or misleading to state that Powerball is “comparable” to Speedball®: the products simply are not so dissimilar. Accordingly, the defendants' motion for summary judgment is **GRANTED**.²

² In its supplemental memorandum Butcher asserts for the first time that Odorite has falsely advertised that its products are “better” than Butcher's. I do not address that assertion because it does not appear in the Complaint, it was not argued in the summary judgment memoranda, and it is unsupported by any record evidence properly cited under Local Rule 56. Also in its supplemental memorandum, Butcher reasserts two allegations that I addressed in the Order on Odorite's Motion for Summary Judgment: that Odorite falsely advertises an “Odorite Dilution Control Unit” for sale, and that it falsely advertises nineteen products for sale. I granted Odorite's motion for summary judgment on the first allegation, Butcher, 124 F. Supp. 2d at 761, and I expressly did not consider the second because it was not adequately pleaded in the Complaint. Id. at 763 n.9. I construe Butcher's supplemental memorandum as moving for reconsideration of those conclusions, and I **DENY** the motion.

So ORDERED.

DATED THIS 16TH DAY OF MARCH, 2001.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
District of Maine (Portland)
Civil Docket For Case #: 00-CV-139

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