UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 10-1333 JVS (MLGx)	Date	April 25, 2012
Title	FTC v. Lights of America Inc., et al.		

Present: The Honorable	James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Granting Plaintiff's Motion for Partial Summary Judgment as to Count 1 of the Amended Compliant (fld 2-13-12. #165) ;**
Denying Defendants Usman and Farooq Vakil's Motion for Summary Judgment or Alternatively for Partial Summary Judgment (Dld 2-13-12, #167, duplicated at #168) ; and
Granting in Part and Denying in Part Defendants Lights of America, Farooq Vakil and Usman Vail's Motion for Summary Judgment (fld 2-13-12, #170, corrected at #182)

The Court is presented with three cross-motions for summary judgment brought by (1) Plaintiff Federal Trade Commission ("FTC"), (2) Defendant Lights of America, Inc. ("LOA"), and (3) Defendants Usman Vakil and Farooq Vakil.

FTC charged LOA and the Vakils (collectively, "Defendants") with three violations of section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." FTC also seeks monetary relief pursuant to section 13(b) of the FTC Act, 15 U.S.C. § 53(b). (First Amended Compl. ("FAC") ¶¶ 1, 98, Docket No. 42.) FTC alleges that Defendants deceptively marketed LOA's Light Emitting Diode ("LED") lamps (the "LED Lamps") by overstating their claimed light output and lifetime, without substantiation. (FAC ¶¶ 90-95.) LOA's product packaging claimed the LED Lamps would "replace" certain wattage lamps, would last for 30,000, 20,000, or 15,000 hours, would last 15, 10, or 7 times longer than an incandescent blub, and promised consumers, "You'll never change your light bulbs again." (Id.) FTC alleges that these statements were unsubstantiated, false, and

deceptive. (Id.)

FTC moves for summary judgment on Count One, which alleges that LOA violated Section 5(a) by representing, expressly or by implication, that the LED Lamps would provide light output equivalent to particular watt incandescent light bulbs, when in fact this claim was false or unsubstantiated. (FAC ¶¶ 90-91; FTC's Notice of Mot. and MSJ, Docket No. 165; FTC's Mot. Br., Docket No. 164.) LOA opposes the Motion. (LOA's Opp'n Br., Docket No. 192.)

LOA moves for summary judgment on all three Counts. In Count Two, FTC alleges that LOA violated Section 5(a) by representing, expressly or by implication, that their LED lamps would provide a purported level of light output in lumens, when in fact the claim was false or unsubstantiated. (FAC ¶¶ 92-93; LOA's Notice of Mot. and MSJ, Docket No. 170; LOA's Mot. Br., Docket No. 184.) In Count Three, FTC alleges that LOA violated Section 5(a) by representing, expressly or by implication, that the LED Lamps would last a specified number of hours, when in fact this claim was false or unsubstantiated. (FAC ¶¶ 94-95; LOA's Notice of Mot. and MSJ; LOA's Mot. Br.) FTC opposes the Motion. (FTC's Opp'n Br., Docket No. 197.)

Defendants Usman and Farooq Vakil, the co-owners of LOA, a closely held corporation, jointly move for summary judgment on all three Counts. (Notice of Mot. and MSJ, Docket No. 167.) FTC opposes the Motion. (FTC's Vakil Opp'n Br., Docket No. 190.)

For the following reasons, the Court GRANTS FTC's Motion, GRANTS IN PART and DENIES in PART LOA's Motion, and DENIES the Vakils' Motion.[1]

I. Legal Standard

A. The FTC Act

[1] The Court has reviewed all evidentiary objections and considers only admissible evidence in deciding these Motions. To the extent that the parties move in limine to exclude evidence to which there was no evidentiary objection, the Court will address that evidence in the order regarding the motions in limine.

Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). In this case, FTC asserts that LOA's marketing of the LED Lamps was deceptive.[2] To prove deception, the FTC must show that LOA made (1) a representation, omission or practice that, (2) was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice was material. FTC v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009) (quoting FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2000)). FTC is not required to show that all consumers were deceived; rather, the FTC must show that LOA's marketing material made "misrepresentations in a manner likely to mislead reasonable consumers." Stefanchik, 559 F.3d at 929, n. 12 ("The existence of some satisfied customers does not constitute a defense under the FTCA.") (internal quotations and citations omitted); cf. Southwest Sunsites v. FTC, 785 F.2d 1431, 1436 (9th Cir. 1986) (holding that materiality in the third factor of the Section 5 violation test requires a showing that the deceptions "are likely to cause injury to a reasonable relying consumer"). The FTC need not prove consumer reliance or consumer injury to establish a Section 5 violation. FTC v. Braswell, 2005 U.S. Dist. LEXIS 42976, *12-13 (C.D. Cal. Sept. 27, 2005) (citing FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005)). Furthermore, "in cases brought under Section 5 and Section 12 of the FTC . . . 'advertising capable of being interpreted in a misleading way should be construed against the advertiser.'" FTC v. Gill, 71 F. Supp. 2d 1030, 1045-46 (C.D. Cal. 1999) (quoting Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962, 964 (9th Cir. 1974)).

To show that a representation is likely to mislead consumers acting reasonably under the circumstances, the FTC must prove either that LOA lacked a reasonable basis for its claims or that the claims were false. FTC v. Medlab, 615 F. Supp. 2d 1068, 1079 (N.D. Cal. 2009); see also FTC v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994) (holding that FTC can show a statement is misleading for purposes of a Section 12 claim by proving the statement was unsubstantiated or false). For an advertiser to have a "reasonable basis" for its claim, "it must have had some recognizable substantiation for the representation prior to making it in the advertisement." FTC v. Direct Mktg. Concepts, Inc., 569 F. Supp. 2d 285, 298 (D. Mass. 2009) (emphasis supplied). Defendants have the burden of establishing what substantiation they relied on for their product claims. Id. (quoting FTC v. QT, Inc., 448 F. Supp. 2d 908, 961 (N.D. Ill. 2006)). The type of advertising claim determines what constitutes a "reasonable basis" for the

[2] FTC does not assert any unfairness claims. (FTC's Opp'n Br., p. 13.)

claim. Thompson Med. Co. v. FTC, 791 F.2d 189, 194 (D.C. Cir. 1986).[3]

Finally, to determine whether the claim at issue is material, courts consider whether the representation is likely to affect a consumer's "choice of, or conduct regarding, a product." Medlab, 615 F. Supp. 2d at 1081. Express claims are presumed to be material. Pantron I, 33 F.3d at 1096. Furthermore, a claim is material if it concerns the purpose, safety, efficacy, or cost of the product. Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000) (internal quotations omitted).

B. Summary Judgment

Summary judgment is appropriate when the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.

The moving party has the initial burden of establishing the absence of a material fact for trial. Anderson, 477 U.S. at 256. If the moving party satisfies its initial burden, the nonmoving party "may not rest upon the mere allegations or denials" of the moving party's pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Furthermore, "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 323. Thus, if the nonmoving party does not make a sufficient showing to establish the elements of its claims, the Court must grant the moving party's motion.

[3] Claims using specific figures or facts, rather than generalized descriptions of the product's capabilities, require a high level of substantiation, such as scientific or engineering tests. In re Thompson Med., 104 F.T.C. 648, at *72 (1984) (cited with approval in Pantron I, 33 F.3d at 1095-96)).

Where the parties have made cross-motions for summary judgment, as they have in this case, the Court must consider each motion on its own merits. Fair Hous. Council v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. See id. at 1137.

"In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." Local Rule 56-3.

II. Discussion

The Court first addresses FTC and LOA's Motions for Summary Judgment, discussing each Count in the civil complaint separately. Then, the Court turns to the Vakils' Motion.

A. FTC and LOA's Motions for Summary Judgment

1. COUNT ONE

In Count One, FTC alleges that LOA made false or unsubstantiated statements on its product packaging that the LED Lamps would "replace" certain wattage lamps. From sometime in 2007[4] until February 2009, LOA marketed and sold the LED Lamps with packaging that claimed a particular LED Lamps "replaces" a certain wattage bulb, e.g., "replaces 20 watts" or "replaces 45 watts." (CSUF ¶¶ 26-28.) During this time, the

[4] Although there is some dispute as to when LOA began using the "replaces" claim on its packaging, (FTC's Combined Statement of Uncontroverted Facts and Conclusions of Law in Support of MSJ ("CSUF"), ¶ 28, Docket No. 204), images of the product packaging make clear that the claims were made as early as 2007, (Declaration of Kimberly L. Nelson ("Nelson Decl."), Exs. E, Docket No. 198-1). The precise date on which the claims were first used has not been established. (See also Nelson Decl., Exs. B-D (including date-stamped product packages from 2008 and 2009); Ex. A (Mr. Halliwell's Certification of Records of Regularly Conducted Activity).)

packaging made no other claims related to the amount of light produced, other than indicating that a particular lamp would emit either "bright white light" or "warm white light." (Id. ¶¶ 27, 45.) The other claims on the package related to energy use, energy savings, efficiency, and longevity. (Id. ¶ 46.)

Both FTC and LOA move for summary judgment on this Count. The Court must consider what a reasonable consumer would understand the "replaces" wattage claim to mean, whether the claim was material, and whether LOA lacked substantiation or a reasonable basis to make the "replaces" wattage claim.

As a threshold matter, LOA argues that the "replaces" wattage claims are not actionable because they are opinions based on the products' appearance. (LOA's Mot. Br., p. 17 (citing FTC Policy Statement on Deception, Oct. 14, 1983, reprinted in In re Cliffdale Assoc., Inc., 103 F.T.C. 110, 174 (1984)).) LOA reasons that because the "replaces" wattage claim is based on lamps' appearance, it qualifies as an "appearance" claim, which is not pursued under the FTC Policy Statement. (See id.) The Court disagrees that the "replaces" wattage claim is an "appearance" claim because LOA's advertising does not merely state that the LED Lamps "may appear to be as bright as a 20 watt incandescent bulb"; rather, they state that the LED Lamp "replaces 20 watts." The latter is the type of specific, numerical claim that is actionable under the FTC Policy Statement. See In re Cliffdale Assoc., Inc., 103 F.T.C. at 174. Further, it is the type of claim that requires greater substantiation than a generalized appearance claim. See In re Thompson Med., 104 F.T.C. 648, at *72.

The parties dispute what the "replaces" wattage claim means to a reasonable consumer. LOA contends that the "replaces" wattage claim indicated that the LED Lamps would fit into the same screw-in light sockets and light up using the same power source as an incandescent bulb. (LOA Mot. Br., p. 19.) This interpretation, however, ignores the wattage claim and considers the word "replaces" in a vacuum. A reasonable consumer reading the LED Lamp package purporting to "replace[] 45 watts" would expect the product to provide a comparable amount of light as a 45-watt light bulb, thereby making a suitable replacement for a 45-watt light bulb. LOA argues that because there were no standards for measuring LED light output in late 2007 when the LED Lamps were first designed, the "replaces" wattage claim could not have implied a wattage or lumen equivalence. (LOA Mot. Br., p. 19.) LOA's argument, however, presupposes that the average consumer would be sufficiently apprised of the limitations on LED lamp

testing to discredit the plain meaning of the claim. The Court cannot make this assumption. In sum, the "replaces" wattage claim expressly, or at least implicitly, connotes a comparable brightness or light output to the wattage indicated.

The Court also finds that the "replaces" wattage claim is material. Because the "replaces" wattage claim appears to be an express claim, it is per se material. Pantron I, 33 F.3d at 1096. However, even if it is an implied claim, it is material because it relates to the efficacy of the product, Novartis Corp., 223 F.3d at 786, and it concerns a central characteristic of the product that bears on a consumers choice to purchase it, Medlab, 615 F. Supp. 2d at 1081.

The central dispute regarding Count One is whether the "replaces" wattage claim lacked substantiation or a reasonable basis at the time LOA made the claim. LOA argues that even if the "replaces" claim connotes a light output or brightness equivalency, the claims were substantiated by the following evidence: (1) feedback from unidentified Wal-Mart employees regarding the relative brightness of the LED Lamps compared to fluorescent or incandescent lights; (2) naked eye comparisons of LED and incandescent lamps by Mr. Brian Halliwell, LOA's Vice President of Sales and Marketing; and (3) test results from independent testing laboratory Lighting Science, Inc. ("LSI"), which first tested LOA's products in December 2008. (LOA's Opp'n Br., pp. 10-11, Docket No. 192; LOA's Statement of Unconverted Facts and Conclusions of Law in Support of MSJ ("LOA's SUF") ¶¶ 22-24, Docket No. 187; Declaration of Dr. Ram S. Ronen ("Ronen Decl.") ¶¶ 25-27, Docket No. 174.)

First, LOA argues that the claims are substantiated by the observations of unidentified Wal-Mart employees who looked at prototypes for four candelabra-style LED Lamps. See Declaration of Brain S. Halliwell ("Halliwell Decl.") ¶ 18, Docket No. 178.) Ostensibly, the employees thought the LED lamps were brighter than the incandescent lamps to which they were compared, though there is no record of the employees' responses or the questions they were asked. (Id.) While human eye comparisons may be a factor in determining the relative brightness or light output of two lamps, ad hoc testing alone is likely insufficient to support a wattage equivalency claim.[5]

[5] Dr. Houser opines that even if the Walmart focus group had been conducted as a controlled experiment, it would be inappropriate to rely on a human factors experiment since wattage equivalency is rooted in photometric measurement. (Houser Report, Houser Decl., Ex. B ll. 1067-1070, Docket No.

See In re Thompson Med., 104 F.T.C. 648, at *72 (finding that specific, numerical claims warrant a more searching examination). Even if the Court accepted that naked eye comparisons in focus groups could be sufficient to substantiate a comparable wattage claim, LOA's testing was inadequate to substantiate its claims because (1) LOA has not established that the Walmart employees observed the LED lamps prior to LOA using the "replaces" claims on its product packaging; (2) LOA has not established that the LED Lamp prototypes observed were the same or functionally equivalent to the final products; (3) LOA has not described the testing conditions for this comparison (e.g. whether the employees looked at the lamps in a lit or unlit room, whether they viewed them once or several times); and (4) it is undisputed that the Walmart employees looked at only four of the fourteen lamps that had "replaces" claims at issue. LOA cannot extrapolate from these "test results" regarding four products to find substantiation for all fourteen of its product claims. In sum, this "testing" does not constitute a material basis for the "replaces" claims. Moreover, it became clear at oral argument that focus groups could have been conducted in a manner consistent with social science research, but this was not done.

Second, LOA argues that Mr. Halliwell's comparison of the LED and incandescent lamps substantiated the "replaces" claims; however, Mr. Halliwell does not indicate which LED Lamps he evaluated, whether the LED Lamps were prototypes or final products, or whether he tested all 14 LED Lamps at issue. (See Halliwell Decl. ¶ ¶ 18-20; LOA's Mot. Br., p. 5.) Further, Mr. Halliwell does not state when he conducted this side-by-side comparison, other than to say it was "before about February 2008,"[6] and thus there is no evidence that Mr. Halliwell compared the lamps prior to LOA making these claims on its product packages. (Notice of Errata to Halliwell 198-18.)

[6] At the hearing, LOA presented a slide that stated "Deposition confirms that [Mr. Halliwell's] initial visual comparisons occurred in 2007 before lamps for [sic] reviewed by Wal-Mart associates. –Halliwell Decl. [sic], Dkt. No 166-13, 125:1-146:8." (Slide 16) (emphasis in original). However, Mr. Halliwell's deposition testimony merely establishes that Mr. Halliwell compared the LED Lamps before he sent them to the Walmart focus group. Mr. Halliwell did not state that he compared the lights in 2007, nor does did he assert that he compared the lights prior to making the product claims.

Decl., p. 1, Docket No. 232.)[7] Thus, even if human eye comparisons were sufficient to substantiate LOA's claims, LOA has not established that Mr. Halliwell or the Walmart focus group observed all fourteen LED Lamps prior to LOA using the "replaces" wattage claims on its product packaging. Accordingly, neither of these comparative observations meet the substantiation requirement under Section 5(a).

Third, LOA argues that Mr. Halliwell's "qualitative" study of the brightness of the LED Lamps was confirmed by quantitative testing, both in the CALiPER[8] and LSI tests. Importantly, the CALiPER and LSI test results were not available before LOA began using the "replaces" wattage claims, and thus neither of these tests show that LOA had a "reasonable basis" for its claims prior to making them.[9]

Further, during the hearing, FTC urged the Court to reject evidence regarding the relative lumen levels of the LED Lamps and incandescent bulbs. To be sure, the Court's tentative and final orders are not predicated on comparative lumen analysis. Rather, the Court examined the relative Center Beam Candle Power ("CBCP") measurements, which FTC and LOA's experts agree is a helpful comparison in determining the relative brightness of an LED and incandescent bulb. (Ronen Decl. ¶¶ 25-26; Declaration of Dr.

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[7] LOA also argues that pictures of the LED and incandescent lamps compared show "there is no reasonable disagreement that LOA's LEDs are as bright or brighter than the incandescent bulbs to which the LEDs were compared." (LOA's Mot. Br., p. 5 (citing Declaration of Ashish Dudheker ("Dudheker Decl."), Exs. 1-21, Docket No. 171).) However, LOA does not specify to which photo it is referring, and the only photo seeming to compare LED and incandescent lamps is void of any labeling. Thus, the Court is in the dark as to which lamp is which. Moreover, from these photos it is not evident that the two lamps have equivalent brightness or light emission. In fact, this photo highlights the fact that an ad hoc comparison by a lay person is insufficient to substantiate a wattage equivalency claim.

[8] Although LOA claims that the CALiPER test results corroborate its claims, LOA also moves in limine to preclude introduction of this evidence. (Mot. in Limine, Docket No. 220.) This Motion is set for May 7, 2012. The Court considers the CALiPER test results in the cross-motions for summary judgment but notes that FTC is entitled to summary judgment on Count One independent of this evidence. Further, if LOA sought to raise admissibility issues at the summary judgment phase, it should have filed an evidentiary objection.

[9] The earliest CALiPER tests were completed on August 28, 2008, (Halliwell Decl., Ex. 7), while the earliest LSI test results were prepared for LOA on December 17, 2008, (Halliwell Decl., Ex. 6).

Kevin Houser ("Houser Decl.") ¶ 15, Docket No. 198-16.) LOA's expert witness Dr. Ronen opines that for directional lighting, as opposed to general purpose lighting, the Center Beam Candle Power ("CBCP") measurement of a lamp is a more accurate measure that the total lumens for purposes of determining whether an LED Lamp "replaces" a certain wattage incandescent bulb. (Ronen Decl. ¶¶ 25-26.) The DOE defines CBCP as "the luminous intensity at the center of a beam, expressed in candelas." (CALiPER Report, Ronen Decl., Ex. B.)[10] Dr. Ronen asserts that the CBCP measures the "brightness" of a lamp at the center of its beam of light.[11] (Id. ¶ 26.) Dr. Ronen states that the LSI and CALiPER tests indicate that the brightness of the LED Lamps is greater than their purported incandescent equivalents because the CBCP of the LED Lamps was "in all cases greater" than the CBCP measurement of the same wattage incandescent lamps. (Id. ¶¶ 22-27 (citing excerpts of the CALiPER and LSI tests at Exs. B-D.) Dr. Ronen opines that flood lamps such as those tested in the CALiPER and LSI tests are "clearly directional," and he concludes that the CBCP results support a finding that the LED Lamps "are brighter in the direction pointed than the incandescent bulbs with which they were compared." (Ronen Decl. ¶¶ 17, 27.) However, Dr. Ronen does not explain how, if at all, he accounted for the differing beam angles in the LED flood Lamps and incandescent flood lamps that he compared.

FTC's expert witness Dr. Kevin Houser opines that a CBCP measurement is only a reliable measure of brightness if one takes into account the geometric distribution of the emitted light, e.g., the beam spread, beam angle, and beam lumens.[12] (Houser Decl. ¶ 15.) Dr. Houser asserts that Dr. Ronen's analysis of the CBCP measurement is fundamentally deficient because it fails to account for differing beam angles among the lamps. (Id. ¶¶ 7-8, 15-23, 57.) Indeed, Dr. Houser notes, incandescent lamps with the same wattage and same initial lumens can generate dramatically different CBCPs

[10] CBCP values in the CALiPER report are based on intensity at nadir (0-degree angle).

[11] Dr. Houser disputes this. As discussed infra, the CBCP does not measure "brightness" in a vacuum; one must consider the beam angle of a lamp or bulb to determine the relative "brightness" of two lamps.

[12] LOA objects generally to Dr. Houser's opinions. (LOA's Evidentiary Objections, Docket No. 214.) At least to the extent the Court relies on Dr. Houser's opinions, he is adequately credentialed and has the ability to express opinions under Rule 702 of the Federal Rules of Evidence. The Court overrules the objections to that extent.

depending on the beam angle. (Id. ¶ 16.) Thus, a CBCP measurement is meaningless without accounting for the geometric distribution of the emitted light. (Id. ¶¶ 15-16.) Dr. Houser asserts that Dr. Ronen incorrectly compared LOA Lamps, which have beam angles ranging from 12.6 degrees to 25 degree, to a GE flood lamp that has a beam angle of approximately 55 degrees, and thus Dr. Ronen's comparative CBCP ratings were flawed and misleading. (See id. ¶¶ 18-19.) Dr. Houser posits that one attains more meaningful results by comparing lamps with comparable beam angles. For example, Dr. Houser compared one LED Lamp purporting to "replace[] 45 watts," which has a beam angle of 12.6 degrees, to a 45-watt GE PAR38 lamp, which has a beam angle of 12 degrees. (Id. ¶ 22.) The LED Lamp had a CBCP that was 88.7 percent less than the CBCP of the 45-watt incandescent lamp. (Id.) Thus, LOA's wattage equivalence claims are not supported by the CALiPER or LSI[13] testing or by objective photometric comparison using CBCP. (Houser Decl. ¶¶ 7-8, 15-23.)[14] Dr. Ronen's opinions do not meet the requirement of Federal Rule of Evidence 702, and they do not amount to evidence sufficient to create a material issue of fact. Before conflicting expert opinions can create a material issue of fact, there must be an admissible opinion. Claar v. Burlington N. R.R., 29 F.3d 499, 502, 504-505 (9th Cir. 1994); Major League Baseball Props. v. Salvino, 542 F.3d 290, 310-312 (2d Cir. 2008).

The Court has authority to grant equitable monetary relief for Section 5 violations pursuant to section 13(b) of the FTC Act. Pantron I Corp., 33 at 1102 (finding that Section 13(b) confers to courts the power to order restitution or any ancillary relief necessary to accomplish complete justice for FTC Act violations); see Stefanchik, 559

[13] Dr. Ronen does not explicitly discuss the LSI testing other than to list results a table he prepared in his expert report. However, comparing the CBCP measurement for the LED Lamps to incandescent lamps at a comparable beam angle, it is evident that the CBCP measurement of the incandescent lamps greatly exceed the LED lamps. (See LSI Test, Ronen Decl., Ex. C; Houser Decl. ¶¶ 20-21.)

[14] Mr. Halliwell's analysis of the CALiPER and LSI test results is similarly flawed because it does not account for the beam angles of the lamps. (Halliwell Decl. ¶ 27; Houser Decl. ¶ 57.) Furthermore, Mr. Halliwell does not purport to be an expert in the field of lighting and LED technology, and thus he is unqualified to present expert opinions regarding the comparative CBCP measurements of the LED and incandescent lamps. Indeed, Mr. Halliwell has specifically disclaimed expertise in the field. (See Halliwell Depo. 219:14-25, Declaration of Kimberly Nelson ("Nelson Decl."), Ex. H, Docket No. 198-1.)

F.3d at 931 (reviewing the district court's granting of equitable monetary relief under the FTC Act for an abuse of discretion). To the extent that FTC seeks equitable monetary relief under Count I, there are multiple issues of fact which preclude summary judgment or summary adjudication on the issue. These include the appropriate period of recovery, the products covered (such as flood lamps), and the amount and appropriateness of any offset for actual consumer benefit afforded by the LEDs consumers purchased.[15]

2. COUNT TWO

In Count Two, FTC alleges that LOA made false or unsubstantiated statements regarding the light output in lumens generated by the LED Lamps. (FAC ¶¶ 92-93.) It is undisputed that LOA based all of its claims regarding the light output emitted by its LED Lamps on the testing reports it obtained by LSI and OnSpex. (FTC's SDF ¶ 79; Halliwell Decl. ¶¶ 32-34.) The FTC has not challenged the reliability of these tests, nor has it argued that these tests are insufficient to substantiate LOA's lumen claims. Accordingly, LOA is entitled to judgment on this Count as a matter of law.

3. COUNT THREE

In Count Three, FTC alleges that LOA made three types of false or unsubstantiated claims regarding the lifetime of the LED Lamps: (1) that the LED Lamps would last 30,000 hours; (2) that the LED Lamp "LASTS 15 TIMES LONGER than 2,000 hour Incandescent bulbs"; and (3) that "You'll never change your light bulbs again." (LOA's Mot. Br., pp. 10-12; FTC's Opp'n Br., p. 8) (emphasis in original). LOA concedes that it made the 30,000-hour claim on its packaging until August 2009. (LOA's Statement of Undisputed Facts and Conclusions of Law ("LOA's SUF") ¶ 43, Docket No. 198.) After August 2009, LOA reduced its lifetime claims to 20,000 hours, and then further reduced them to 15,000 hours around December 2009. (Id. ¶¶ 47, 50.) LOA has the burden of identifying the substantiation for each of these claims. Only LOA moves for summary judgment on this Count.

With regard to the 30,000-, 20,000-, and 15,000-hour "lifetime" claims, there is a genuine issue of fact as to whether LOA had adequate substantiation for these claims in

[15] FTC concedes that an offset would be appropriate on its restitution claim, though FTC maintains that it would be inappropriate to offset disgorgement relief. (FTC's Reply Br., p. 15 & n. 18.)

light the LED landscape when LOA began marketing its products. It is undisputed that LOA purchased the individual LEDs used in its early generation LED Lamps from ParaLight. (FTC's Statement of Disputed Facts ("FTC's SDF") ¶ 33, Docket No. 198.) LOA alleges that ParaLight engineers, who were familiar with LOA's intended use of the LED components, told LOA that the estimated life of the LEDs was 30,000 hours, provided that the LED Lamps were made in accordance with LOA's design. (Halliwell Decl. ¶ 25; Declaration of Aijaz Taj ("Taj Decl.") ¶¶ 6-7, Ex. A at p. 1.) LOA designed the Lamps to operate at a current of no greater than 20 mA and at temperatures of no more than 65 degrees celsius. (Halliwell Decl. ¶ 25; Taj Decl. ¶¶ 6-7, Ex. A at p. 1.) However, there is a question of fact as to whether all the LED Lamps were made in conformity with the temperature and current limitations, as Mr. Taj notes it is possible that some of the lamps manufactured in ParaLight's Shanghai factor were driven beyond the current threshold, thus potentially compromising the lifetime of the lamp. (Taj Decl. ¶ 9.) Furthermore, although LOA alleges that a writing evidences ParaLight's lifetime estimate for the LEDs, the writing LOA refers to is a one-line email stating, "[w]e estimate our LED life is 30000 hr." (Taj Decl., Ex. A.) The email does not specify which LEDs it refers to, it does not mention the effect of current or temperature on the LED lifetime, and it does not define the "lifetime" of an LED. (Id.)

More fundamentally, there is little agreement on the understanding of "lifetime" at the time LOA made the 30,000-, 20,000-, and 15,000-hour claims. Neither Halliwell nor Taj stated that they discussed their understanding of LED "life" with ParaLight before relying on ParaLight's opinion to substantiate the 30,000 hour claim. (See Halliwell Depo., 215-221; Taj Depo. 193-94.) In fact, even Mr. Taj and Mr. Halliwell diverge of the meaning of (LED) "life." While Mr. Taj suggests that the "life" of the LED lamp expires when it loses 50 percent of its brightness, (Taj Depo 193:2-14), Mr. Halliwell testified that "life" of an LED lamp expires only when the light output becomes zero, or in other words, when the light goes out completely, (Halliwell Depo. 215:24-216:18; 221:16-19). Thus, under Mr. Halliwell definition, the time during which a LED lamp operates at 49% or even 1% would be considered part of the lamp's "lifetime."

According to Dr. Houser, Mr. Halliwell's understanding of "lifetime" was not reasonable even in 2007 when he began marketing the LED Lamps. (Houser Report, ll. 528-543.) Dr. Houser opines that as early as 2005, it was generally understood in the lighting industry that the operable "lifetime" of an LED lamp expired once it fell below 50 percent of its initial value. (Id.) By fall 2007, he adds, the de facto standard for

defining LED lifetime was "L70," which indicates the time in hours it takes an LED product to depreciate to 70 percent of initial light output.[16] (Houser Report, ll. 158-59.) There is also a dispute as to whether LOA properly relied on the lifetime of the LED component rather than considering the LED Lamp product as a whole. LOA's expert Dr. Cowley asserts that LOA appropriately relied on a longevity assessment of the LED rather than the lamp itself because their were no standards or tests for predicting or evaluating LED lamp life at the time. (Declaration of Michael Cowley ("Cowley Decl.") ¶¶ 11-12.) Dr. Houser disagrees. He posits that by fall 2007, it was widely recognized that LEDs should be evaluated as integrated lighting products, rather than just the component parts. (Halliwell Decl. ¶¶ 9; Houser Decl., Ex. B ll. 190-204.) Thus, he concludes that a claim based solely on the lifetime of the LED could not adequately support a lifetime claim regarding the LED Lamp. Dr. Houser concludes that the data LOA relied upon from ParaLight was not sufficient in depth or breadth to support the lifetime claim; he posits that LOA should have obtained additional test and engineering data. (Houser Decl. ¶ 32, Ex. B ll. 602-619.)

Finally, Dr. Houser concludes that LOA's 30,000- and 20,000- hour claims were grossly inflated, pointing to a test of LOA's integrated LED Lamps that showed a rapid decline in lumen output in the first 961 hours. (Houser Decl. ¶ 33, Houser Report ll. 698-716.)[17] He posits that had LOA's products been tested for more than 961 hours, the LED Lamps would have continued to decline, making lifetime claims of more than a few thousand hours unsupportable and false. (Houser Decl. ¶ 33, Ex. C-M; Houser Report ll. 698-716.)[18] Additionally, Dr. Houser asserts that LOA improperly used data regarding particular products to support its life claims on its other product, failing to take into

[16] It is undisputed that under the L70 standard, at least one of the LED Lamps, the PAR 38, would have only had a 10,000-hour lifetime. (FTC's SDF ¶ 46; Halliwell Decl. ¶ 46, Ex. 27 at 4 (LOA-273); Ex. 28 at 1.)

[17] While Dr. Houser does not proffer any expert opinion on the 15,000-hour claim directly, his analysis demonstrates that there is at least a genuine question of fact regarding the 15,000-hour claim. LOA has not made a prima facie case regarding the 15,000-hour claim, and thus it is not entitled to summary judgment on that representation.

[18] Dr. Houser also notes that LOA's testing was inadequate because it only tested a product for 1,000 hours and extrapolated a "lifetime" claim without accounting for the exponential depreciation after the first 1000 hours.

account the specifics of the design and construction of the other products. (Houser Decl. ¶ 34.)

Thus, there is at least a genuine issue of fact as to (1) the level of substantiation attainable on the "lifetime" claims given the state of LED technology; and (2) whether LOA had adequate substantiation for any of its three "lifetime" claims. Given these genuine issues regarding the "lifetime" claims, there are necessarily genuine issues regarding the statement that the LED Lamp "LASTS 15 TIMES LONGER than 2,000 hour Incandescent bulbs," because this statement indirectly claims that the LED Lamp lasts 30,000 hours. Accordingly, the same issues regarding substantiation are implicated.

With respect to the LOA's third claim, "That you'll never change your light bulbs again," LOA argues this statement is mere puffery and therefore not actionable. LOA makes out its prima facie case that a reasonable consumer reading this statement in conjunction with the specific "lifetime" hours claim would not likely be deceived into thinking the LED Lamp would literally last a lifetime. In fact, even the highest hours claim on LOA's packaging–30,000 hours–is approximately 27 years, which plainly exceeds the remaining lifetime of many consumers. Moreover, consumers are not likely to rely on this information because it has the ring of hyperbole. See Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990) (describing puffery as vague or highly generalized claims that are "so exaggerated as to preclude reliance by consumers") (internal quotations omitted). FTC does not set forth any evidence challenging LOA's claim. Accordingly, LOA is entitled to summary judgment on Count III with respect to this statement.

In sum, for the foregoing reasons, (1) FTC is entitled to summary judgment on Count I; (2) LOA is entitled to summary judgment on Count II; and (3) there are genuine issues of material fact as to all claims under Count III, except the claim that "You'll never change your light bulb again," which LOA has established was mere puffery, and thus LOA is entitled to summary judgment on that claim.

B. The Vakils' Motion for Summary Judgment

FTC also charged LOA's co-owners, Farooq and Usman Vakil, with three counts of violating the FTC Act. (FAC ¶¶ 8-9.) The Vakils move for summary judgment as to all claims. Usman founded LOA in 1978 and he has been a senior executive with LOA

since that time. (Id. ¶ 8; Vakils' Statement of Undisputed Facts and Conclusions of Law ("Vakils' SUF") ¶ 1.) He is presently LOA's Chairman of the Board of Directors and President. (FAC ¶ 8.) Usman also has a 51 percent ownership interest in LOA. (Id.) Farooq, LOA's minority shareholder, joined LOA in 1980 and has served as Executive Vice President since 1981. (Vakils' SUF ¶ 27; Declaration of Farooq Vakil ("Farooq Decl.") ¶ 4, Docket No. 167-1.) It is undisputed that Usman is responsible for all operations of the company, oversees the company's engineering and marketing departments, and shares responsibility with his brother, Farooq, for overseeing LOA's human resources. (SUF ¶ 7; Declaration of Usman Vakil ("Usman Decl.") ¶¶ 4, 9, Docket No. 167-6.)

In this case, FTC seeks equitable injunctive relief and equitable monetary relief (or restitution) from the Vakils for their violations of Section 5(a). To prove liability for injunctive relief, FTC must show that the Vakils (1) participated in the acts in question or (2) had authority to control the activities at issue.[19] FTC v. Garvey, 383 F.3d 891, 900 (9th Cir. 2004). To prove liability for restitution, FTC must show that the Vakils had actual knowledge of the material misrepresentations, were recklessly indifferent to the truth or falsity of the misrepresentations, or were aware of a high probability of fraud and intentionally avoided knowledge of the truth. Id.

1. INJUNCTIVE RELIEF

FTC has presented sufficient evidence to show that there is at least a genuine dispute of material fact as to whether Usman and Farooq Vakil had the ability to control the activities in question.

"Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." FTC v. Am. Standard Credit Sys., 874 F. Supp. 1080, 1089 (C.D. Cal.

[19] The Vakils incorrectly argue that FTC must show actual knowledge of the deceptive claims to establish their individual liability for equitable injunctive relief. (Vakils' Mot. Br., pp. 3-4, 10-11.) As the Court discussed previously in its order denying the Vakils' Motion to Dismiss, FTC need not show the Vakils had knowledge of the deceptive acts to show liability for injunctive relief. (Order, Docket No. 87 (discussing FTC v. Garvey, 383 F.3d 891, 900 (9th Cir. 2004); FTC v. Network Servs. Depot, Inc., 617 F.3d 1127, 1138 n. 9 (9th Cir. 2010)).)

1994). In this case, both individuals served as corporate officers. Usman, the majority shareholder and President of LOA, concedes that he made the decision to enter the LED lamp market, set the prices for the LED Lamps, oversaw the marketing and engineering departments, oversaw the daily operations of LOA, and exercised authority in ordering changes to the LED Lamp packaging. (Vakils' SUF ¶¶ 7-9, 17, 19.) Farooq, the minority shareholder and Executive Vice President of LOA, oversaw at least some aspects of LOA's marketing of the LED Lamps. For example, Farooq sought verification of the LED Lamp's compatibility with the LEDs furnished by LOA's suppliers. (FTC's Statement of Genuine Disputes of Fact ("FTC Vakil SGD"), ¶ 31; Exs. 22-24.) Farooq also exercised control in accepting the 20,000-hour lifetime claims on the LED Lamp product packaging, deciding to discontinue certain claims, and directing the production of new product packaging to reflect the modified claims. (FTC Vakil SGD, Ex. 30.) Accordingly, there is at least a genuine dispute as to whether Usman and Farooq exercised control over the activities at issue.

2. RESTITUTION

FTC has presented sufficient evidence to show that a trier of fact could reasonably infer that Usman and Farooq Vakil had actual knowledge of the material misrepresentations in the claims, that they were recklessly indifferent to the truth or falsity of the claims, or that they were aware of a high probability of fraud in the claims and purposefully avoid knowledge of their falsity.

Although the Vakils argue that the knowledge requirement looks at the defendant's subjective state of mind, (Vakils' Mot. Br., p. 9), "reckless indifference" is analyzed objectively. That is, a defendant is recklessly indifferent to the truth or falsity of a statement if the defendant knew or should have known that there was an unjustifiably high risk that the statement was untrue. Network Servs. Depot, 617 F.3d 1140, n. 12. Moreover, a defendant's degree of participation in the affairs of the company is probative of the defendant's knowledge. FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 574 (7th Cir. 1989).

In this case, there is evidence suggesting that Usman and Farooq may have been recklessly indifferent to the veracity of the product claims. For example, LOA's engineer Aijaz Taj testified that Usman was at the LOA facility every day and spoke with Mr. Taj nearly every day. (FTC's Vakil SDF, Ex. 3 at 25:4-12, 40:18-25, 41:25-42, 110:16-17.)

Mr. Taj testified that he frequently spoke with Usman about problems with the LED Lamps and "the pricing or the performance of the LED's and the reports, if they were negative." (Id. at 103:23-104:1, 157:9-14.) Furthermore, both Usman and Farooq received emails from three of its largest clients, Costco, Sam's Club, and Walmart, complaining that the LED Lamps were failing prematurely. (FTC's SDF ¶ 16(e), Exs. 17, 18 (Usman only), 19 (Usman only), 31.) In December 2008, Farooq forwarded Usman an email from Unity Microelectronics ("Unity"), which had conducted "burn in testing" and had prepared an LOA bulb life testing report. (FTC's SDF ¶ 6.) The test results undermined LOA's 30,000-hour lifetime claim, showing that in just 961 hours, the intensity of the light had decayed by 47%, 48%, and 32% for three of the LED Lamps. (Id. at LOA-00031611_00016.) These test results and complaints from LOA's biggest retail customers likely put the Vakils on notice of at least a potential falsity in LOA's claims. That Usman and Farooq claim to have never read these emails or Unity's test results does not vitiate the knowledge link; indeed, it may show that Usman and Farooq were recklessly indifferent to the veracity of LOA's claims.

In sum, FTC has marshaled sufficient evidence to show that Usman and Farooq Vakil may be liable for equitable injunctive and monetary relief under section 5(a) of the FTC Act. The Vakils have failed to show that there is no genuine dispute of material fact as to their ability to control the activities at issue or their knowledge of the misrepresentations.

III. Conclusion

For the foregoing reasons, FTC's Motion is GRANTED. LOA's Motion is GRANTED with respect to Count II and DENIED with respect to Count I and Count III, except regarding the claim that "You'll never change your light bulb again," on which LOA's Motion is GRANTED. The Vakils' Motion is DENIED.

IT IS SO ORDERED.

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