The Dirty Truth of Clean Beauty: Words Matter for Cosmetics Manufacturers Seeking to Avoid False Advertising Litigation

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I. INTRODUCTION 179
II. THE CURRENT LEGAL FRAMEWORK 180
    A. *The Role of Regulatory Agencies* 181
    B. *Private Causes of Action* 185
III. OTHER INDUSTRIES 186
    A. *Cleanwashing in the Beauty Industry* 186
    B. *Greenwashing in the Fashion Industry* 189
    C. *Looking to "Natural"* 194
IV. TAKEAWAYS 196

I. INTRODUCTION

Thanks to TikTok and other social media platforms, the latest beauty fad can blow up overnight only to fizzle out just as quickly.[1] Some trends, however, have stuck—with big profits for those who can get in on the action. One of the most salient examples is the "clean" beauty craze that has taken shape over the last few years.[2] The market for clean beauty was valued at $7.22 billion in 2022 and is projected to nearly double by 2028,

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1. AnnaChiara Bondi, *How Gen Z is Changing Beauty*, VOGUE BUS. (July 2, 2021), https://www.voguebusiness.com/beauty/gen-z-changing-beauty [https://perma.cc/95Y4-V4X2].

2. A 2021 survey found that among participants, forty-six percent of those belonging to Gen Z and forty-five percent of millennials were "interested in trying clean beauty products." The same survey found that sixty-six percent of those in this group were more likely to buy a beauty product labeled "clean." *How Young Consumers Feel About Clean Beauty,* YPULSE (Mar. 3, 2022), https://www.ypulse.com/article/2022/03/03/how-young-consumers-feel-about-clean-beauty-in-2-stats/ [https://perma.cc/X528-LXRQ].

suggesting that as Gen Z grows, so does their purchasing power.[3] The increased market participation of the younger generations also reflects the force of social media marketing, particularly when driven by megastars whose devoted fans can help sell out a product within hours of their favorite influencer's public stamp of approval.[4] But amid a legal landscape that leaves brands with plenty of creative license, the concept of "clean" often gets messy. This Comment (1) explores the existing legal landscape of cosmetics marketing, (2) discusses the rise in clean beauty consumer class action lawsuits, and (3) analyzes similar actions in other industries to identify the practical steps that cosmetics manufacturers should take to limit their liability.

II. THE CURRENT LEGAL FRAMEWORK

Little has changed since federal law first addressed regulation of cosmetic products in 1938 with the Federal Food, Drug, and Cosmetic Act (FDCA), which defines cosmetics as "articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body . . . for cleansing, beautifying, promoting attractiveness, or altering the appearance," including various products such as makeup and skin and hair care products.[5] Once these products enter interstate commerce, the law requires that they be safe under industry standards and not "misbranded" or "adulterated."[6] Under the law, a cosmetic is "misbranded" if its label is "false or misleading in any way."[7] The Federal Trade Commission (FTC) regulates advertising for cosmetics products and may enjoin brands from using these "unfair or deceptive" tactics to market cosmetic products.[8]

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3. "The global clean beauty market was valued at US$7.22 billion in 2022. The market value is expected to reach US$14.36 billion by 2028." *The Worldwide Clean Beauty Industry is Expected to Reach $14.36 Billion by 2028*, BUS. WIRE (Feb. 14, 2023, 4:58 AM), https://www.businesswire.com/news/home/20230214005504/en/The-Worldwide-Clean-Beauty-Industry-is-Expected-to-Reach-14.36-Billion-by-2028-ResearchAndMarkets.com.

4. Dominic-Madori Davis, *Gen Zers Have a Spending Power of Over $140 Billion, and It's Driving the Frenzy of Retailers and Brands Trying to Win their Dollars*, Bus. INSIDER (Jan. 28, 2020, 10:31 AM), https://www.businessinsider.com/retail-courts-gen-z-spending-power-over-140-billion-2020-1.

5. 21 U.S.C. § 321(i).

6. 21 U.S.C. §§ 361-362.

7. 21 U.S.C. § 362(a).

8. 15 U.S.C. § 1456(a)-(b).

A. *The Role of Regulatory Agencies*

Neither the FTC nor the Food and Drug Administration (FDA) have promulgated a definition of "clean" for use in cosmetics labeling or marketing.[9] The FDCA, which authorizes the FDA to regulate cosmetics, only defines "adulterated" cosmetics and "misbranded" cosmetics but is frustratingly silent on seemingly inverse "clean" cosmetics.[10] A similar lack of statutory clarification for words like "natural" and "organic" has proven troublesome for manufacturers using these terms to label and market their products.[11] To make matters even murkier, many states—in developing laws and deceptive business practices—have borrowed from the FTC's 1983 Policy Statement on Deception, which states that for a practice to be "deceptive," it "must be likely to mislead consumers acting reasonably under the circumstances."[12] Some examples of states that apply a reasonable consumer standard to their deceptive business practice statutes include California, New York, Missouri, and the District of Columbia.[13] Consumer protection laws in California and Missouri explicitly require that the plaintiff-consumer was "reasonable" in having been misled by a product's marketing or labeling,[14] while courts applying the law of the District of Columbia and New York use a common law reasonable consumer standard.[15] A reasonable consumer standard, while

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9. Alecsandra Dragus, *Detoxing from Clean Claims: Bridging the Gap Between "Clean" and "Dirty" Beauty*, 13 WM. & MARY BUS. L. REV. 895, 915-16 (2021) (discussing that the lack of statutory definitions of "clean" terminology has caused uncertainty in the cosmetics industry).

10. *Id.* at 905 (pointing out that a "definition is provided of what one could argue as the opposite of 'clean' cosmetic products in Section 361 of the FDCA" while "clean" itself remains undefined.).

11. *See*, *e.g*., Complaint, Gruen v. Clorox Co., No. 3:22-cv-00935 (N.D. Cal. Feb. 18, 2022) [hereinafter *Gruen Complaint*] (plaintiff alleged that she and those similarly situated to her paid a higher price for a "natural" product and suffered economic harm because it was not actually natural); de Lacour v. Colgate-Palmolive Co., 338 F.R.D. 324, 330 (S.D.N.Y. 2021) (plaintiffs alleged that defendant's products were falsely labeled "natural" because they contained "synthetic and highly chemically processed ingredients.") (internal citations omitted).

12. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 3:6, WESTLAW CONPROT (database updated Nov. 2023).

13. *See id.* at nn.5, 10, 15 & 30. Michigan, Ohio, West Virginia, Wisconsin, and Illinois also employ a reasonable consumer standard in their deceptive advertising statutes. *Id.* at nn.2, 3, 4, 39 & 45.

14. *See* CAL. BUS. & PROF. CODE § 17580 (West 2023); *see also* MO. ANN. STAT. § 407.025 (West 2023).

15. *See* PRIDGEN & ALDERMAN, *supra* note 12, at § 3:28, nn.10, 15 & 19. *See also*, Ctr. for Inquiry Inc. v. Walmart, Inc., 283 A.3d 109, 120 (D.C. 2022) (explaining that under D.C. law, "[t]o determine whether a complaint states a plausible claim under the CPPA, we must 'consider an alleged unfair practice in terms of how the practice would be viewed and understood by a

offering some guidance, still leaves room for inconsistent results and significant confusion.

In 2016, many in the personal-care products industry hoped that the FTC would offer some guidance when it announced settlement enforcement actions against four companies that had labeled their personal care products as "all-natural" or "100% natural" if the products were formulated with synthetic ingredients.[16] The FTC based its decision to issue these orders on the likelihood that the manufacturers' claims that its product was natural would mislead a reasonable consumer as to the presence of synthetic ingredients in said product.[17] While this delineation provided something of a line for brands to toe, the reasonableness standard has not appeared to quell the wave of lawsuits over "natural" claims.[18]

The FTC's silence is even more frustrating in the context of primary jurisdiction, a judicially-created doctrine through which a court may stay proceedings that involve questions of matters that are within the domain of a federal regulatory agency.[19] Primary jurisdiction is "flexible" and

reasonable consumer.'" (quoting Saucier v. Countrywide Home Loans, 64 A.3d 428, 442 (D.C. 2013)); Chen v. Dunkin' Brands, Inc., 954 F.3d 492, 500 (2d Cir. 2020)(holding that the "reasonable consumer" standard applies to New York's law prohibiting false and deceptive advertising, and "'[i]t is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer.'" (quoting Fink v. Time Warner Cable, 714 F.3d 739, 741 (2d Cir. 2013))).

16. "Among other things, the final orders require the companies to have competent and reliable evidence to support any "All Natural" or "100% Natural" claims. They also bar the companies from making unsubstantiated or misleading claims about the extent to which their products contain natural or synthetic ingredients and the environmental or health benefits of their products." Ronie M. Schmelz & Amanda Villalobos, *FTC Distinguishes Between "Natural" and "All Natural,"* LEXOLOGY (July 21, 2016), https://www.lexology.com/library/detail.aspx?g=be526df3-bdee-45ae-99ed-434c3d332708 [https://perma.cc/UEL8-7A99].

17. "For example, if an advertisement states that a product is 'natural,' and if reasonable consumers would interpret the advertisement as a whole to imply that the product is 'all natural,' this claim would violate the order unless it is true and not misleading." *Id.*

18. For example, a class-action lawsuit was filed against cosmetics brand Tarte for its use of the phrase "high-performance naturals" in marketing its products, which plaintiffs alleged was misleading because the products contained synthetic ingredients. Class Action Complaint at 1, Patora v. Tarte, Inc., No. 7:18-cv-11760 (S.D.N.Y. Dec. 14, 2018) [hereinafter *Patora Complaint*]. *See also*, Class Action Complaint at 4, Lott v. S.C. Johnson & Son, Inc., No. 2:22-at-00555 (E.D. Cal. June 1, 2022) [hereinafter *Lott Complaint*] (a consumer class action in which plaintiffs assert that defendants' product being labeled as "natural" is misleading because a "reasonable consumer" would understand the term "natural" to mean that a product does not contain any synthetic ingredients and the product in question does contain such ingredients).

19. Lauren Kostman, *The "Natural" Response for Adjudicating Current Litigation when the Creation of a Related Agency Rule Is Simultaneously Underway*, 41 CARDOZO L. REV. 353, 375-76 (2019).

discretionary, and is most often invoked in lawsuits requiring technical or specialized knowledge of issues within a "heavily regulated industry."[20] One central purpose behind the application of the doctrine is to allow a decision of the agency to direct the court in how to decide a case involving a matter that is "unique to an agency's regulatory purview and technical expertise."[21] In practice, the flexible nature of primary jurisdiction yields inconsistent results across jurisdictions in class action litigation over "natural" labeling on food products after the FDA published a request for public comment on the matter in 2015.[22] In some of those cases, judges granted defendants' motions to stay until the FDA officially defined "natural," while in other cases courts "ordered stays sua sponte."[23] In other cases, courts put a hold on "natural" litigation either indefinitely or for a fixed period.[24] This example illustrates that if it is applied in clean beauty litigation, the flexibility of the doctrine could seriously frustrate the success of plaintiffs' claims.

With the explosion of consumer interest in "clean" products, the uncertainty around the true requirements for proper use of the term has led to lawsuits over some marketing that consumers have found misleading.[25] These matters overwhelmingly arise as class actions under state consumer protection false and deceptive advertising statutes.[26] These lawsuits have been most common in New York, California, Missouri, and

20. *Id.* "It is not merely the presence of expertness, but the wide-reaching and systematic character of agency regulation which tends to choke out the normal jurisdiction of the courts" *Id.* at 376, n.129 (citing Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1040-41 (1964)).

21. *Id.* at 379. Kostman explains that when deciding whether to issue a stay under primary jurisdiction, courts also consider "whether the particular issue has been subjected to agency review . . . and what effect, if any, an agency's determination might have on the court's resolution of the claim." *Id.*

22. *Id.* at 368, 380.

23. *Id.* at 380.

24. *Id.*

25. Dana Wood, *Clean is Under Siege*, ROBIN REPORT (Jan. 25, 2023), https://www.therobinreport.com/clean-is-under-siege/ [https://perma.cc/Q9QN-HVHZ].

26. *See*, *e.g.*, Class Action Complaint at 47, Onaka v. Shiseido Americas Co., No. 1:21-cv-10665 (S.D.N.Y. Dec. 14, 2021) [hereinafter *Onaka Complaint*] (plaintiffs alleged that marketing defendant's product as "clean" is false or misleading because of the presence of PFAS in the product); Class Action Complaint at 3, Finster v. Sephora USA, Inc., No. 6:22-cv-01187 (N.D.N.Y. Nov. 11, 2022) [hereinafter *Finster Complaint*] (plaintiff alleged that defendant's marketing of certain products as "clean" constitutes false advertising because those products are made with ingredients that are "inconsistent with how consumers understand" the word "clean").

the District of Columbia, whose state statutes mirror the FTC's reasonable consumer language.[27]

A frequent sticking point for consumer plaintiffs in these actions has been the presence of a group of thousands of chemicals called perfluoroalkyl and polyfluoroalkyl substances (PFAS).[28] Litigation over products containing these chemicals is on the rise as concern over their long-term environmental effects grow.[29] PFAS are found in a variety of products, including cosmetics and are commonly referred to as "forever chemicals" because they do not naturally break down,.[30] Some PFAS have been found to damage the metabolism, immune system, and reproductive system, as well as increase the risk of cancer.[31] Twenty-seven states have introduced or enacted legislation regulating the use of PFAS in production, with some states striving to ban them altogether.[32]

In December 2022, President Biden signed the Modernization of Cosmetics Regulation Act of 2022 (MoCRA) into law as part of the 2023 omnibus spending bill, marking the first significant amendment to FDA cosmetics regulation since 1938.[33] Among other things, MoCRA directs

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27. Every lawsuit referred to in this Comment is premised on the state laws of New York, California, the District of Columbia, or Missouri. *See generally* PRIDGEN & ALDERMAN, *supra* note 12, at nn.5-7, 9-10, 12-17, 19, 22-25 & 27-33 (describing the relation of the FTC's reasonable consumer standard to the statutory and case law in these states).

28. *See*, *e.g.*, *Gruen Complaint*, *supra* note 11, at 31 (alleging that products are not "natural" as described because they contain PFAS); *Onaka Complaint*, *supra* note 26, at 31; Complaint at 1, GMO Free USA v. Cover Girl Cosmetics, No. 2021 CA 004786B (D.C. Super. Ct. Dec. 20, 2021) (alleging that marketing cosmetics as "sustainable" was false and misleading because the products contained PFAS).

29. Shannon E. McClure, Jennifer A. Smokelin & Casey J. Snyder, *Litigation Over "Forever Chemicals" Is Growing: Is Your Company the Next Defendant?*, REUTERS (Dec. 7, 2022, 11:06 AM), https://www.reuters.com/legal/legalindustry/litigation-over-forever-chemicals-is-growing-is-your-company-next-defendant-2022-12-07/.

30. Heather D. Whitehead et al., *Fluorinated Compounds in North American Cosmetics*, ENV'T SCI. TECH. LETTERS 538 (June 15, 2021) (surveying over 200 cosmetic products purchased in the U.S. and Canada and finding that many of them contained PFAS, despite few of the products' labels including the chemicals).

31. Alex Brown, *States Take on PFAS "Forever Chemicals" with Bans, Lawsuits*, PEW RESCH. CTR. (Sept. 22, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/22/states-take-on-pfas-forever-chemicals-with-bans-lawsuits [https://perma.cc/UTA5-J35Y].

32. *Id.* California, Colorado, Maine, and Maryland have already banned the sale of products containing PFAS, and thirty-two states are considering restricting production using PFAS in some way. *Map of Current PFAS Policies by State*, SAFER STATES, https://www.saferstates.org/bill-tracker/ [https://perma.cc/TLJ4-WHQ4] (last visited Feb. 18, 2024).

33. Steven Shapiro, *Modernization of Cosmetics Regulation Act of 2022*, JD SUPRA (Apr. 3, 2023), https://www.jdsupra.com/legalnews/modernization-of-cosmetics-regulation-7019283/ [https://perma.cc/UH94-YHT7].

the FDA to promulgate regulations establishing and requiring standardized testing designed to identify asbestos in cosmetics products that contain talc.[34] The new law also requires the FDA to evaluate the safety implications and risks associated with PFAS in cosmetics and preempts any state or local laws that differ from MoCRA on these issues.[35] Notably, the aforementioned directive on PFAS conflicts with a California state statute that bans the use of PFAS in cosmetics products entirely.[36] While this act of Congress is a considerable development in a field that has been dormant for the better part of the last century, the real implications for brands and consumers will not be known until the FDA sets out and enforces its requirements as directed.

B. *Private Causes of Action*

Changes to regulatory enforcement, the effects of which will not be realized for some time, do not paint the full legal picture. In addition to the Lanham Act, which provides a federal private cause of action for false advertising,[37] many states allow consumers who are eligible for a private cause of action to bring a class action on behalf of others similarly situated against individuals or businesses that commit an unfair or deceptive business practice.[38] The class action is an attractive avenue because it is generally seen as a legal mechanism that compensates deserving plaintiffs and penalizes blameworthy defendants.[39] American jurisprudence holds the principle of res judicata in high esteem in the interest of preserving judicial efficiency and producing coherent legal rules for a particular set

34. Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong. § 3505 (2022) (enacted) (codified as amended in 21 U.S.C. § 364(d)).

35. H.R. 2617, § 3506. The FDA is required to publicly publish these findings by December 2025.

36. H.R. 2617, § 614; *cf.* CAL. HEALTH & SAFETY CODE § 2771 (West 2023) (prohibits the manufacture, distribution, or sale of cosmetics products containing "intentionally added . . . PFAS," and takes effect in 2025).

37. The law states in relevant part that any person who makes a false or misleading description or representation of fact in advertising a product that misrepresents the nature, characteristics, or qualities of the product is liable in a civil action for false advertising. 15 U.S.C. § 1125.

38. DECEPTIVE TRADE PRACTICES AND FALSE ADVERTISING STATE LAW SURVEY, Lexis+ (database updated Oct. 19, 2023).

39. Broader conceptions surrounding class actions have been aptly condensed into "a taxonomy of four goals: The two efficiency goals are increasing compensation to plaintiffs and increasing monetary deterrence against misbehavior; the two representation goals are providing access to justice to plaintiffs and shaping laws and norms against misbehavior." Andrew Faisman, *The Goals of Class Actions*, 121 COLUM. L. REV. 2157, 2170 (2021).

of circumstances.[40] With that being said, the legal system recognizes the class action as a limited exception to the general rules of claim preclusion and issue preclusion, available when necessary to uphold the equally entrenched ideal of due process.[41] Every state has consumer protection laws of some kind in place, and some are broader than others, but the overwhelmingly "generous remedial provisions of most state consumer protection laws" make this a popular "framework" for many litigants to present their case under.[42] This is certainly true in the arena of "clean" litigation thus far. [43] The next Part of this Comment discusses recent litigation in depth and looks to other industries to attempt to produce a discernible standard.

III. OTHER INDUSTRIES

A. *Cleanwashing in the Beauty Industry*

In arguably the most important action of its kind to date, cosmetics retailer Sephora is the latest to be hit with a class action lawsuit for false or misleading claims over its "clean" cosmetics labeling, otherwise known as "cleanwashing."[44] In November 2022, plaintiff Lindsey Finster filed a complaint in the District Court of the Northern District of New York accusing Sephora of engaging in false and misleading business

40. *See*, *e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (noting that the legal principles of claim preclusion and issue preclusion "protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'"(quoting Montana v. United States, 440 U.S. 147, 153-54 (1979))).

41. "The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.' Indicating the strength of that tradition, we have often repeated the general rule that 'one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Id.* at 892-93 (first quoting Richards v. Jefferson, 517 U.S. 793, 798 (1996); then quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

42. PRIDGEN & ALDERMAN, *supra* note 12, at § 3:28.

43. *See*, *e.g.*, *Finster Complaint*, *supra* note 26; Class Action Complaint at 2, 4, Anderson v. Almay Inc., No. 1:22-CV-02722 (S.D.N.Y. Apr. 1, 2022) [hereinafter *Anderson Complaint*] (class action in which plaintiff alleged that a cosmetic company's marketing of itself as a clean makeup brand and its products as formulated using only "safe, effective ingredients and smarter formulas" is misleading because the products contain "potentially harmful chemicals that are in no way clean or healthy", namely PFAS).

44. *Sephora Faces "Clean" Beauty Lawsuit Amid Cosmetics "Regulatory Vacuum*,*"* THE FASHION LAW (Jan. 4, 2023), https://www.thefashionlaw.com/sephora-faces-lawsuit-over-clean-beauty-amid-cosmetics-regulatory-vacuum/ [https://perma.cc/76C8-5NZM]; Wood, *supra* note 25.

practices and breaching warranties it made with its consumers.[45] Sephora has employed a marketing campaign called "Clean at Sephora" in stores and online for the last several years, through which certain products are marked with a green seal containing a leaf and checkmark symbol.[46] On its website, the beauty giant answers the question "What is Clean at Sephora?" by assuring that brands and products with this designation constitute "the beauty you want, minus the ingredients you might not."[47] The blurb then goes on to list the ingredients that the products deemed "clean" do not contain.[48] In the complaint, Finster alleges that Sephora's marketing of certain products as "clean" is false and misleading because those products are made with ingredients that are "inconsistent with how consumers understand" the word "clean."[49] The complaint hinges on the plaintiff's position that through this allegedly misleading advertising, Sephora is able to charge higher prices for these products than "similar products represented in a non-misleading way, and higher than [they] would be sold" if not for the misleading advertising.[50] Finster argues that as a result, she and others similarly situated have suffered economic harm because they would not have paid more for the products had they known they were misrepresented as "clean."[51] Finster also blames the "regulatory vacuum."[52] Because of this lack of authority,[53] the case's potentially

45. *Finster Complaint*, *supra* note 26, at 3.

46. *Sephora Faces "Clean" Beauty Lawsuit Amid Cosmetics "Regulatory Vacuum*,*" supra* note 44.

47. What is Clean at Sephora?, Sephora, https://www.sephora.com/beauty/clean-beauty-products?icid2=clean+_lp_bottombanner_072022_image_ufe_cleanpp0722 [https://perma.cc/X6CJ-VQ5H](last visited Feb. 18, 2024).

48. "Clean at Sephora" brands must formulate their products without parabens, sulfates SLS and SLES, phthalates, mineral oils, formaldehydes or formaldehyde-releasing agents, retinyl palmitate, oxybenzone, coal tar, hydroquinone, triclosan, and triclocarban. *Id.*

49. The plaintiff alleges that many of these so-sealed Sephora "clean" products, including a particular Saie Mascara, in fact contain numerous "synthetic ingredients" which "have been reported to cause possible harms." *Finster Complaint*, *supra* note 26, at 3.

50. *Id.* at 5. This assertion is similar to the arguments made by plaintiffs in previously-cited class actions over "natural" labeling, in which plaintiffs claimed to have suffered economic harm due to the price premium that they paid because the products were supposedly natural and that they would not have done so had they known otherwise. *See Onaka Complaint*, *supra* note 26, at 41.

51. *Id.* at 6.

52. *Id.* at 2.

53. *Sephora Faces "Clean" Beauty Lawsuit Amid Cosmetics "Regulatory Vacuum*,*" supra* note 44.

significant implications received immediate attention from across the industry.[54]

Sephora responded with a motion to dismiss for failure to state a claim, asserting that reasonable consumers cannot plausibly be misled or confused by the language of the "Clean at Sephora" campaign.[55] Sephora argued that the plaintiff is attempting to change the term "clean" into the term "natural," which it says does not create a claim for false or misleading advertising, especially because the company defines "in plain terms" what "Clean at Sephora" means.[56] Further, it argued that Finster did not assert any plausible claim that the advertising would be "misleading to a significant portion of reasonable consumers" as required to succeed on an unfair or deceptive advertising claim under New York General Business law, maintaining that the reasonable consumer would not interpret "Clean at Sephora" to mean "all-natural."[57] The motion emphasizes that the campaign is about what is "excluded" from the products, not included.[58] Because of the existing legal void in clean cosmetics, this matter is of great interest to those at the intersection of beauty and the law, and the matter has been spotlighted as a chance to gain clarity on what impressions particular marketing language might have on a reasonable consumer.[59] While some are confident that Sephora covered its bases through its explicit explanation as to its meaning of "clean," many other industry experts have warned that this matter is just one of many legal assaults that will confront manufacturers in the near future.[60] The Sephora lawsuit is the buzziest example yet, but it is just one

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54. *See*, *e.g*., *"Clean at Sephora" Label*, TRUTH IN ADVERTISING (Jan. 5, 2023), https://truthinadvertising.org/articles/clean-at-sephora/ [https://perma.cc/V3EX-3NSZ]; Kati Chitrakorn, *Customers Are Confused About "Clean" Beauty. What Can Brands Do?*, VOGUE BUS. (Feb. 7, 2023), https://www.voguebusiness.com/beauty/customers-are-confused-about-clean-beauty-what-can-brands-do [https://perma.cc/QF8G-KVV2]; Alexandra Pauly, *Next Up for the Great Greenwashing Crackdown: "Clean" Beauty*, HIGH SNOBIETY (Jan. 8, 2023), https://www.highsnobiety.com/p/clean-beauty-greenwashing-crackdown/ [https://perma.cc/LMS5-HQBF].

55. Memorandum of Law in Support of Motion to Dismiss of Sephora USA, Inc. at 1, Finster v. Sephora USA, Inc., No. 6:22-cv-01187 (N.D.N.Y. Feb. 2, 2023).

56. *Id.*

57. *Id.* at 5.

58. *Id.* at 8.

59. Some have posited that the case constitutes "a litmus test for the 'reasonable consumer' standard." Cristina Ferretti & Kristi Wolff, *"Clean at Sephora" Motion to Dismiss a Test for the Reasonable Consumer Standard in Food + Personal Care Product Litigation and Regulatory Highlights—February 2023*, JD SUPRA (Mar. 6, 2023), https://www.jdsupra.com/legalnews/food-personal-care-product-litigation-9830851/ [https://perma.cc/P4SG-3W3X].

60. Ferretti and Wolff go on to warn that "[i]f the court finds that Sephora's disclosure was not sufficient, the litigation risks could ripple across 'clean' brands everywhere." *Id. See also* Eileen Francis, *Sephora Well-Positioned to Defend "Clean Beauty" Case, Attorney Says,*

of several suits over the term "clean" brought in federal court in the last two years.[61] In any event, it will remain unclear for at least the next few years whether brands rely on the effects of recent legislation for marketing guidance, and companies in the clean beauty sphere must look elsewhere if they hope to fend off the threat of costly litigation. While MoCRA directs the FDA to create new requirements regarding certain ingredients like talc and PFAS, the statute does not address marketing or labeling explicitly, and the law's effects on these areas will take more time to accurately assess.[62]

B. Greenwashing in the Fashion Industry

With a lack of clear precedent to help predict the outcome of these matters, it may be helpful to look to another area of class action litigation—namely, greenwashing. Like cleanwashing, greenwashing is concerned with brands' representations to consumers, but instead of claims about the non-toxicity of ingredients, greenwashing pertains to claims about the environmental impact of a product.[63] While the calamity over "clean" is relatively recent, brands have long attempted to capitalize on increasing consumer interest in eco-friendly and sustainable products.[64] Much like the legal free-for-all for claims of "clean" and

HBW INSIGHT (Feb. 12, 2023), https://hbw.citeline.com/RS153370/Sephora-WellPositioned-To-Defend-Clean-Beauty-Case-Attorney-Says [https://perma.cc/U8FR-VS7W] (arguing that Sephora's "transparency" weighs in its favor when it comes to reasonableness, and pointing out that California's law on unfair business practice is similar to The New York General Business Law); Kathryn Hopkins, *Why Beauty Lawsuits Are Set to Increase,* WOMEN'S WEAR DAILY (Mar. 3, 2023, 3:24 PM), https://wwd.com/beauty-industry-news/beauty-features/beauty-lawsuits-are-set-to-increase-experts-say-1235556389/ [https://perma.cc/4SJQ-NG7L] (attributing the recent onslaught of litigation against cosmetic companies in part to the far-reaching and quick dissemination of information made possible by social media and predicting that the trend will continue).

61. *See generally Anderson Complaint*, *supra* note 43, at 29; *Onaka Complaint*, *supra* note 26, at 31.

62. *See generally* Heidi Forster Gertner, Sally Gu & David Horowitz, *Modernization of Cosmetic Regulation Will Be Phased in Over Time: A Detailed Overview and Preliminary Analysis of the New Cosmetics Legislation*, JD SUPRA (Jan. 6, 2023), https://www.jdsupra.com/legalnews/modernization-of-u-s-cosmetics-9453476/ [https://perma.cc/YDG3-N3HW].

63. Kaley Roshitsh, *The Top 5 Greenwashing Trends to Look Out for in Fashion*, WOMEN'S WEAR DAILY (Oct. 6, 2021, 12:01 AM), https://wwd.com/sustainability/business/how-to-spot-greenwashing-in-fashion-consumer-industry-guide-trends-1234959327/ [https://perma.cc/B979-JXZN].

64. Sherry Frey et al., *Consumers Care About Sustainability—And Back it Up With Their Wallets*, MCKINSEY & CO. (Feb. 6, 2023), https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets [https://perma.cc/5M7J-BFXM].

"natural" in the cosmetics industry, there is very little statutory regulation over manufacturers' use of terms like "sustainable" and "eco-friendly" in labeling and marketing products.[65]

Every ten years, the FTC releases a new version of its Green Guides, which offers guidance on general principles and explanations of acceptable terms in environmental marketing.[66] Several states have already codified the Green Guides into their law, meaning that in these jurisdictions, a violation of the regulations set out in the guides can serve as the basis of a state unfair and deceptive advertising claim.[67] While some states, including New York, only "reference FTC regulations in general," other states have "explicitly incorporated" the Green Guides into their law, either "in part" or "in whole."[68] California is unique in that it explicitly codifies the Green Guides as a whole in addition to "impos[ing] restrictions beyond the Green Guides."[69] With that being said, the FTC's choice not to define "sustainable" in its 2012 revision of the Green Guides has given rise to many class action lawsuits premised on allegations accusing companies of false, misleading, or deceptive advertising because their products are not actually sustainable.[70] If the 2022 revisions, which

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65. Bruce Ratain, Olivia Adendorff & Ross Weisman, *What Cos. Can Expect from FTC's Green Guides Updates*, LAW360 (Jan. 11, 2023, 5:51 PM), https://www.law360.com/articles/1559820.

66. *Id.*

67. "A number of states have beat the FTC to the punch, codifying the Green Guides within their laws and regulations and imbuing [the Guides] with the force of law for state law-based claims of unfair and deceptive advertising." Paul Davies et al., *Anticipated Changes to FTC Green Guides Portend New Areas of Potential Litigation*, JD SUPRA (Feb. 7, 2023), https://www.jdsupra.com/legalnews/anticipated-changes-to-ftc-green-guides-9854136/ [https://perma.cc/73ZG-GCWN].

68. *Id.* (citing 815 ILL. COMP. STAT. 505/2; MASS. GEN. LAWS ch. 93A, § 2; N.Y. GEN. BUS. LAW § 350(d)(2023)). New York's consumer protection statute states that a defendant's showing that its advertising "complies with the rules and regulations" of the FTC is a "complete defense" to a claim of deceptive advertising. N.Y. GEN. BUS. LAW § 350(d)(2023). Illinois and Massachusetts similarly mention adherence to FTC regulations in their laws on unfair and deceptive business practices. In Alabama, Indiana, Maryland, and Michigan, "[a] violation of a specific part of the Green Guides is a violation of state law." *Id.* (citing ALA. CODE § 22-27A(1); IND. CODE § 24-5-17-2; MD. CODE ANN., ENV'T § 9-2102(b)(1)(ii); and MICH. COMP. LAWS § 445.903(dd)). In California, Maine, Minnesota, and Rhode Island, "[a] violation of any part of the Green Guides is a violation of state law." *Id.* (citing CAL. BUS. & PROF. CODE § 17580.5; ME. STAT. tit. 38, § 2142; MINN. STAT. § 325E.41; and 6 R.I. GEN. LAWS § 6-13.3-1).

69. An example of such additional requirements under California law is the "documentation required to support an environmental claim." *Id.* (citing CAL. BUS. & PROF. CODE § 17580).

70. For example, in *Earth Island Institute v. Coca-Cola Co.*, a non-profit sued Coca-Cola for false advertising based on campaigns where the company marketed itself as "sustainable" and "committed to reducing plastic pollution," even though it is "one of the largest contributors of

have yet to be released, do define "sustainable" and other currently ambiguous terms, they could provide guidance on how the FTC might one day define and enforce standards for cosmetics marketing.

An analysis of case law could help fill in some gaps, as the fashion industry has begrudgingly found itself at the epicenter of greenwashing litigation.[71] One example is *Dwyer v. Allbirds, Inc.*, a class action in which the defendant, a shoe company, was granted summary judgment in a false advertising lawsuit over the words "sustainable" and "responsible" used in its description of its manufacturing practices, which the plaintiff asserted it did not actually undertake.[72] Specifically, the plaintiff took issue with Allbirds' reliance on the Higg Material Sustainability Index (Higg MSI) to support its claims about the environmental impact of its products' materials because the Higg MSI only has standards for "raw materials" and not different types of materials.[73] Ultimately, the judge found for Allbirds because the plaintiff did not allege that Allbirds' statements about the environmental impact of its products would mislead a reasonable consumer as required to make a claim for false advertising under New York General Business Law.[74] Critically, the judge reached this conclusion because the complaint failed to "allege that a reasonable consumer would expect [Allbirds] to use another method of calculation or would be misled by [its] use of the LCA tool or the Higg MSI."[75] This case seems to point toward the boundaries of the reasonableness standard, and in doing so, it draws an important parallel with *Finster v. Sephora*. The court found that the plaintiff did not adequately assert that Allbirds was "not calculating the carbon footprint as advertised." It determined that Allbirds "does not mislead the reasonable consumer because it makes clear what *is* included in the carbon footprint calculation, and does not

plastic pollution in the world." Complaint at 1, 6, Earth Island Inst. v. Coca-Cola Co., No. 2021-CA-001846 (D.C. Super. Ct. June 8, 2021) [hereinafter *Earth Island Complaint*].

71. *See, e.g.,* Kasey A. West, *Goodbye to Greenwashing in the Fashion Industry: Greater Enforcement and Guidelines*, 101 N.C. L. REV. 841, 857 (2023) (discussing the results in recent greenwashing litigation within the fashion industry).

72. Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137, 149 (S.D.N.Y. 2022). The plaintiff claimed that Allbirds did not actually practice the "sustainable" and "responsible" manufacturing methods that it advertised, and that its "eco-friendly" marketing was not consistent with its production methods, making the ads "false, deceptive, and misleading". *Id.*

73. *Id.* at 145. Dwyer also claimed that the life cycle assessment tool that Allbirds used to market the carbon footprint of its products only measured the impact of manufacturing the shoe itself, not of the material (namely wool) used to make them. She argued that this significantly skewed the data and made the carbon footprint look much smaller, resulting in misleading environmental claims.

74. *Id.* at 150.

75. *Id.*

suggest that any factors are included that really are not."[76] This sort of analysis applied to Sephora would result in an inquiry into whether Sephora really does only designate those products as "Clean at Sephora" that are formulated without the ingredients it lists in the description of the initiative.[77]

The *Dwyer* court found that the plaintiff's complaint was based not in the company's description of its shoes but rather in a "criticism of the [Higg MSI's] methodology."[78] Even acknowledging that "there may well be room for improvement in the Higg MSI," the court did not find the company's reliance on it to be deceptive or misleading to a reasonable consumer.[79] This case suggests a high standard for plaintiffs, requiring that they be extremely specific in what exactly they allege is misleading or false.[80] The court seemed to defer to the defendant's choice in the language and sustainability metrics it chose to employ in marketing its products.[81] An extension of such deference to the beauty industry would be a good sign for concerned cosmetics manufacturers.

Dwyer is not the only plaintiff to take issue with the tools widely used by brands in support of their environmental and sustainability claims.[82] In 2022, a class action consumer protection lawsuit was filed against one of the biggest names in fast fashion, H&M.[83] The plaintiff in *Commodore v. H&M* alleged in her complaint to have purchased H&M's products because of H&M's marketing of its products as a "conscious choice," asserting that such marketing misled her and other consumers like her to believe the products were sustainable or environmentally friendly when in fact they were not.[84] Much like many cleanwashing plaintiffs, Commodore emphasized in her complaint the "price premium" that consumers are willing to pay for products that they believe are sustainable and accused H&M of "taking advantage of" this fact.[85] Like

76. *Id.*

77. This sort of analysis would be favorable to Sephora and other defendants that disclose that their meaning of "clean" focuses on the exclusion of certain ingredients.

78. *Dwyer*, 598 F. Supp. 3d at 149.

79. *Id.* at 151.

80. *See id.*

81. Like New York and California, under the District of Columbia Consumer Protection Procedures Act, "[t]he representation or misrepresentation is evaluated in the eyes of a reasonable D.C. consumer." Order Granting Motion to Dismiss at 2, Earth Island Inst. v. Coca-Cola Company, No. 2021-001846B, (D.C. Super. Ct. Nov. 10, 2022).

82. West, *supra* note 71, at 862.

83. *Id.* (citing Class Action Complaint, Commodore v. H&M, No. 7:22-cv-06247 (S.D.N.Y. July 22, 2022)) [hereinafter *Commodore Complaint*].

84. *Commodore Complaint*, *supra* note 83, at 2.

85. *Id.*

the plaintiff in *Dwyer*, Commodore took issue with H&M's use of data from the Higg MSI, specifically with using it to create "Higg Sustainability Profiles," which gave H&M's products an environmental rating on its website.[86] Commodore did not merely take issue with H&M's use of the Higg MSI, but rather alleged that the sustainability profiles contained "falsified information" at odds with "underlying data" on the Higg Index's own website.[87] These cases are ones to watch for the beauty industry, as the results could draw a boundary for manufacturers in self-certifying their products as sustainable, which would likely be applicable to clean marketing.[88]

Another example of fashion brands coming under fire for self-certification is the consumer class action lawsuit against outerwear retailer Canada Goose, filed in the District Court for Southern District of New York in 2020.[89] In *Lee v. Canada Goose US, Inc.*, the plaintiff alleged that he purchased a jacket made with animal fur from the defendant because of the company's representation that the jacket was made with fur obtained through "ethical and humane trapping methods," which he asserted was a ploy "to cultivate an image that its fur products are sourced using humane, sustainable, and ethical practices, when in fact they are not."[90] The tag attached to the jacket claimed that "The Canada Goose Fur Transparency Standard™ is our commitment to support the ethical, responsible, and sustainable sourcing and use of real fur."[91] The plaintiff took issue with the defendant's inclusion of the words "ethical" and "sustainable," alleging that this was misleading because "Canada Goose's

86. *Id.* at 3.

87. Commodore alleged that the sustainability profiles on H&M's website blatantly "misrepresented" the data for the same products on the Higg Index's website. In one example, Commodore alleged that H&M claimed on its website that certain products used "less" water to manufacture, while the Higg Index website said that the products actually used "more" water. *Id.* at 3-4.

88. Commodore alleged that the products in H&M's "Conscious Collection" are falsely or misleadingly labeled because they are described as being made from "at least 50% sustainable materials, such as organic cotton and recycled polyester," when the clothes are actually "comprised of indisputably unsustainable materials, like polyester," which are "not sustainable, as polyester does not biodegrade, sheds toxic microfibers, and is not recyclable." *Id.* at 5. Products that are part of the store's Conscious Collection have special tags that include claims about the manufacturing components and process of the garments.

89. Complaint at 1, Lee v. Canada Goose US, Inc., No. 1:20-cv-09809 (S.D.N.Y. Nov. 20, 2020) [hereinafter *Lee Complaint*].

90. West, *supra* note 71, at 858 (citing Joint Stipulation Requesting Dismissal, Lee v. Canada Goose US, Inc., No. 1:20-cv-09809 (S.D.N.Y. Apr. 27, 2022)). Lee alleged that in doing so, the company violated the District of Columbia Consumer Protection Procedures Act.

91. *Id.*

suppliers use cruel methods" in trapping.[92] Specifically, Lee made the now-familiar price premium argument, asserting that the retailer was aware of and exploited the fact that consumers will pay more for sustainable products.[93]

Although the plaintiff dropped the case, it nevertheless survived a motion to dismiss, implying that at least this court is open to hearing out ESG-related claims.[94] Most notably, Canada Goose argued in support of its motion to dismiss that Lee's "subjective views" on fur-trapping practices "[did] not render [its] statements misleading or deceptive."[95] Despite acknowledging that Lee's assertions were "thin," the court refused to dismiss Lee's claim regarding Canada Goose's representation of its commitment to "ethical, responsible, and sustainable sourcing" because Lee had "plausibly alleged that this statement has the tendency to mislead a reasonable consumer."[96] This is extremely relevant to the *Finster Complaint* and others like it because Sephora's key defense is that Finster's complaints are based on her own standard of "clean" and not on Sephora's.[97] Even for brands with liability-reducing measures in place, the fashion cases impart a lesson that ESG claims must be substantiated.

C. Looking to "Natural"

An examination of litigation over "natural" marketing may help predict the result in at least some of the current battles over "clean" marketing. One example is *Balser v. Hain Celestial Group, Inc.*, a class action where plaintiff consumers sued manufacturer Hain for deceptive advertising over its use of the word "natural" on its cosmetics products.[98] In 2016, the district court dismissed the action, holding that "no

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92. Decision and Order at 4-5, Lee v. Canada Goose US, Inc., No. 1:20-cv-09809 (S.D.N.Y. June 29, 2021) [hereinafter *Lee Decision*].

93. *Id.* at 4.

94. *See* West, *supra* note 71, at 858.

95. *Lee Decision*, *supra* note 92, at 9.

96. *Id.* at 12, 18. Because Lee "contended that animal welfare was an important consideration for a consumer determining whether a product is 'ethically sourced,' and given that research on consumer perception indicated terms like 'sustainably produced' signal 'higher animal welfare standards,' the court found that Canada Goose's statements regarding its sourcing could unduly influence an unsophisticated consumer." West, *supra* note 71, at 859 (quoting *Lee Decision*, *supra* note 92, at 19).

97. Memorandum of Law in Support of Motion to Dismiss of Sephora USA, Inc. at 3, Finster v. Sephora USA, Inc., No. 6:22-cv-01187 (N.D.N.Y. Feb. 2, 2023).

98. Balser v. Hain Celestial Grp., Inc., 640 F. App'x 694, 696 (9th Cir. 2016).

reasonable consumer would be misled by the label 'natural.'"[99] In an unpublished opinion, the Ninth Circuit reversed the district court's grant of dismissal and remanded, finding the plaintiff's definition of "natural" as "free of synthetic ingredients" sufficient to establish a reasonable consumer's understanding of the meaning of "natural" under California law.[100] While the ruling is not binding, the case demonstrates that a court may in fact be willing to find merit in a plaintiff's definition of seemingly inscrutable terms.[101] Notably, the same objective "reasonable consumer" standard is required under the New York, California, Missouri, and District of Columbia consumer protection statutes that the litigation addressed in this Comment is predicated on.[102]

While litigation over "natural" has yielded little in the way of precedent, it has led to settlements that have lessons for the clean beauty sphere. In 2013, cosmetics manufacturer Neutrogena settled a false advertising class action in California federal court over its products containing "chemically derived, synthetic fragrances" touted as "natural," shelling out $1.3 million in addition to attorneys' fees.[103] As part of the settlement, the company also had to walk back its ingredient claims and re-package and re-label some of its products to reflect "the exact percentage of the product that is naturally derived."[104] In 2019, another cosmetic company settled a false advertising lawsuit (over a mascara it had marketed as made with "natural fibers" that in fact was made of nylon) for $3.25 million.[105] In 2018, a class-action lawsuit was filed against beauty giant Tarte Cosmetics, alleging that the marketing of its

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99. Balser v. Hain Celestial Grp., Inc., No. 2:13-cv-05604, 2013 WL 6673617, at *1 (C.D. Cal. Dec. 18, 2013).

100. *Balser*, 640 F. App'x at 696.*Id.*

101. "[I]t is undisputed that 'natural' is a vague and ambiguous term. Plaintiffs aver that 'natural' means: 'existing in or produced by nature; not artificial.' This definition is implausible as applied to the products at issue: shampoos and lotions do not exist in nature, there are no shampoo trees, cosmetics are manufactured. Thus Plaintiffs cannot plausibly allege they were deceived to believe shampoo was 'existing in or produced by nature.'" *Balser*, 2013 WL 6673617. *Id.* at *1.

102. The standard is objective and "thus is not contingent on the particular experiences of the named plaintiffs." de Lacour v. Colgate-Palmolive Co., 338 F.R.D. 324, 338 (S.D.N.Y. 2021).

103. Manatt Phelps & Phillips LLP, *Neutrogena Settles "Natural" Suit for $1.8 Million*, LEXOLOGY (Jan. 18, 2013), https://www.lexology.com/library/detail.aspx?g=5ed42ccd-4fc0-4bfa-b034-835424e6c259 [https://perma.cc/L97F-956P].

104. *Id.*

105. Elizabeth DiNardo, *Cosmetic Company Agrees to $3.3M Settlement in False Advertising Suit*, COUNSEL FIN., https://blog.counselfinancial.com/cosmetic-company-agrees-to-3.3m-settlement-in-false-advertising-suit [https://perma.cc/ZX7N-GCMD] (last visited May 31, 2024) (citing *Schmitt v. Younique LLC,* No. 8:17-cv-01397 (C.D. Cal. Aug. 14, 2017)).

products as "high-performance naturals" was misleading because the products contained synthetic ingredients.[106] Tarte settled the lawsuit in 2020 for $1.7 million.[107] Both Neutrogena and Tarte offered refunds to customers with and without proof of purchase as part of their settlement agreements.[108] Notably, these actions all began in California district court.

IV. TAKEAWAYS

Considering the preceding analysis, this Part discusses practical approaches cosmetics manufacturers can implement while awaiting legal and regulatory guidance.

The results of the greenwashing cases should serve as a warning to cosmetics manufacturers to tighten up their marketing claims by basing them on more standardized tools and terminology. In *Lee v. Canada Goose*, the absence of any concrete sustainability metrics in the defendant's marketing and labeling made the plaintiff's arguments of reasonable interpretation sufficiently plausible for the court to deny dismissal.[109] That is not to say that the system of measurement would have to be widely accepted or free from criticism, as illustrated by *Dwyer v. Allbirds*.[110] There, the same court found the company's use of sustainability metrics, namely the Higg MSI, not sufficiently likely to mislead a reasonable consumer, because Allbirds explicitly disclosed exactly what went into its calculations.[111] The result of *Commodore v. H&M* will provide more guidance on the amount of leeway courts are willing to give brands in their internally-developed sustainability metrics.[112] If a lesson may be gleaned from the available case law, it is that at least some courts see explicit disclosure of third-party, external standards as sufficient substantiation of ESG claims, whereas unverified descriptions of brands' policies are much harder to defend.[113] Since many of these cases interpreted the same laws at issue in the named clean beauty cases, cosmetics manufacturers would benefit from ensuring their marketing is corroborated by specific data, preferably developed by an

106. *Patora Complaint*, *supra* note 18, at 1-2.

107. Final Approval Order and Judgment at 7, Patora v. Tarte, Inc., No. 7:18-cv-11760 (S.D.N.Y. Jan. 29, 2020).

108. *Tarte High Performance Naturals*, TRUTH IN ADVERTISING https://truthinadvertising.org/class-action/tarte-high-performance-naturals/ [https://perma.cc/4BEZ-VSF4].

109. *Lee Decision*, *supra* note 92, at 18.

110. Dwyer v. Allbirds, Inc., 598 F. Supp. 3d 137, 151 (S.D.N.Y. 2022).

111. *Id.* at 150-51. The court did not find a likelihood of a consumer being misled because Allbirds "does not suggest that any factors are included" in its metrics "that really are not."

112. *See generally Commodore Complaint*, *supra* note 83, at 2-3.

113. *See discussion* subpart III.B.

outside source.[114] Additionally, if the FTC does choose to define "sustainable" in its 2022 Green Guides, greenwashing litigation will be especially important to keep an eye on.[115]

Beauty brands should also take heed of the limited guidance that actions over "natural" marketing has yielded. If the courts in clean beauty litigation find certain plaintiffs' definitions of "clean" sufficient—like when the Ninth Circuit found that a plaintiff's proffered definition of "natural" is sufficiently plausible to establish a reasonable consumer's understanding of the word—then companies will be sent scrambling to ensure their marketing is in compliance.[116] The 2016 FTC enforcement actions that set requirements for "natural" versus "all-natural" claims strengthen the suggestion that manufacturers might benefit from only marketing their cosmetics as "clean" if they do not contain any ingredients that have been disputed.[117] By taking cues from these areas of the law, manufacturers can preemptively limit their liability, a prudent choice in the existing legal void.

Perhaps the most important effects of legal and regulatory changes that the cosmetics industry will soon face will follow from the enforcement of MoCRA. The law directs the FDA to issue a rule for detecting asbestos in cosmetics made with talc and to publicly publish a report on its research into the safety and potential risks of the use of PFAS in cosmetics.[118] The scrutiny of these two ingredients is less than ideal for brands whose products contain PFAS or talc, and regardless of the result, they will likely have a much harder time being able to market these products as "clean" or "natural" in the meantime.[119] If the findings are especially damning, it may be in their best interests not to formulate their products with these ingredients at all.[120]

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114. *See id.*

115. Ratain et al., *supra* note 61.

116. Balser v. Hain Celestial Grp., Inc., 640 F. App'x 694, 696 (9th Cir. 2016). Granted, this is arguably less likely, as clean is comparatively more difficult to define than natural in terms of cosmetic ingredients.

117. Schmelz & Villalobos, *supra* note 16.

118. 21 U.S.C. § 364.

119. This is especially true considering the fact that many states have taken efforts to ban or limit the use of PFAS in production of certain products.

120. "The combination of MOCRA's express charge to the FDA to investigate and propose rules regarding the use and safety of PFAS and talc in cosmetics products, as well as the FDA's own statements that such investigation is necessary and ongoing, strongly suggests that such guidance and rulemaking is forthcoming." Joshua Kipnees, Thomas Kurland & Hannah Brudney, *Pending FDA Cosmetics Review Allows Class Action Defense*, LAW 360 (Feb. 3, 2023, 5:03 PM), https://pbwt2.gjassets.com/content/uploads/2023/02/Pending-FDA-Cosmetics-Review-Allows-Class-Action-Defense.pdf [https://perma.cc/E3AR-PSG9].

Despite the unprecedented probe into ingredients used by many manufacturers, some experts have pointed out that the new law actually gives way to a class action defense through the doctrine of primary jurisdiction.[121] As discussed in depth in subpart II.A, food manufacturers have been successful in courts on their motions to stay consumer fraud lawsuits against them after the FDA announced its intention to promulgate a definition of "natural" for use in food labeling and marketing in 2015, and defendants in other consumer class actions have been granted stays when the FDA had announced an intention to regulate the products at issue.[122] The FDA is required to propose its rule regarding talc by December 2023 and promulgate a final rule following a public comment period, and the report on PFAS must be published by December 2025.[123] This gives cosmetics manufacturers some time to develop defenses as is common for agencies to extend public comment periods.[124]

Moreover, once the FDA does issue its findings, manufacturers will have a strengthened defense in that the FDA rulings will preempt claims where PFAS or talc are at issue.[125] This is not to suggest that the defense is iron-clad as courts have significant discretion in deciding whether to grant a stay based on primary jurisdiction.[126] Additionally, the Ninth and Second Circuits, which would have appellate jurisdiction over the bulk of current cleanwashing litigation, are at odds over the test used to determine when to stay a proceeding under the doctrine.[127] The Ninth Circuit, prioritizing efficiency, requires courts to consider whether a stay of proceedings based on primary jurisdiction "would needlessly delay the resolution of claims."[128] Conversely, the Second Circuit warns against weighing potential delay too heavily because it does not view the doctrine as "grounded in principles of judicial economy."[129] Thus, defendants in New York law-based actions would likely be better poised than those in

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121. *Id.*

122. *Id.*

123. *Id.*

124. For example, the public comment period for the Green Guides updates has been extended multiple times.

125. "[O]nce FDA guidance and regulations are released, defendants will likely be well-positioned to defeat PFAS- or talc-related consumer class actions on preemption grounds given FDA's pronouncements on these exact issues." Kipnees et al., *supra* note 120.

126. Kostman points out that "the decision to stay proceedings on primary jurisdiction grounds is determined on a case-by-case basis." Kostman, *supra* note 19, at 379-80 (citing U.S. v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956) ("No fixed formula exists for applying the doctrine of primary jurisdiction.")).

127. *Id.* at 380-81.

128. *Id.* at 379 (citing Reid v. Johnson & Johnson, 780 F.3d 952, 967 (9th Cir. 2015)).

129. *Id.*

California to move for a stay under the doctrine of primary jurisdiction.[130] However, the federal law directing forthcoming agency action in cosmetics regulation distinguishes cleanwashing lawsuits from past examples and provides manufacturers with a stronger defense in any jurisdiction.[131]

Even if courts in clean beauty litigation do not rule in favor of plaintiffs, manufacturer-defendants will suffer in a variety of ways. In addition to expensive litigation and huge settlements involving refunds and changes to marketing and labeling, these lawsuits pose a threat of significant reputational costs for defendants.[132] Some scholars suggest that this reputational harm can begin at the first filing of a class action and is compounded as litigation draws on.[133] Because of the media attention that class actions typically receive, in some situations defendants might offer to settle to fend off bad press, despite having the stronger case.[134] The omnipresence of social media in information sharing means this negative attention can be all the more damaging to brands embroiled in class action suits.[135] Thus, the reputational risk that manufacturers run by making lofty "clean" claims in marketing their products cannot be overstated. The legal and regulatory attention the cosmetics industry is receiving underscores the necessity that any marketing suggesting that a product is "clean" be substantiated in some way. While comprehensive guidelines remain far off, one thing is certain: cosmetics manufacturers must be mindful of the inherent risk imposed by clean marketing and choose their words cautiously to limit their liability.

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130. "The Ninth Circuit's approach is preferable to plaintiffs because it allows their claims to be heard before and evaluated by their chosen forum—namely, the court—without undue delay." *Id.* at 380-81.

131. MoCRA specifically directs FDA action in cosmetics regulation, adding a degree of certainty that guidance is imminent. *See* Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong. §§ 3505-3707 (2022) (enacted). By contrast, there has not been a comparable initiative in federal law to push agency definition of natural or sustainable marketing.

132. *See generally* Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 2007 (2016) ("[L]itigation can and frequently does inflict nonlegal harms on defendants such as harm to their reputations.").

133. *Id.* at 2015-17.

134. *Id.* at 2018 ("[R]educing reputational harm is so important to defendants that it is worth settling very winnable cases.").

135. *Id.* at 2020-21.