

## *Dorris v. Danone: A Legal Blow to Eco-Conscious Consumers*

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### I. OVERVIEW

Everyday consumers are waging a war to slow the destruction of the Earth. Utilizing their purchasing power, millions of consumers are actively choosing environmentally friendlier products.<sup>1</sup> However, their thoughtful purchases only help the planet if consumers can rely on products’ environmental impact statements. When consumers are misled to believe that activities, products, and services are more environmentally friendly than they are, the company is greenwashing.<sup>2</sup> Greenwashing litigation seeks to hold companies accountable for consumer reliance on misleading statements.

Stephanie Dorris and John Axiotakis (the Plaintiffs), representing a nationwide class of “Evian Natural Spring Water” (the Product) purchasers, sued Danone Waters of America, Inc. (the Defendant) for greenwashing.<sup>3</sup> The Plaintiffs brought consumer protection claims under the laws of three different states.<sup>4</sup> They alleged the company violated the law by labeling the Product as “carbon neutral” because it misled

1. Katherine White et al., *The Elusive Green Consumer*, HARV. BUS. REV., July-Aug. 2019, <https://hbr.org/2019/07/the-elusive-green-consumer>.

2. Peter Pears et al., *Greenwashing: Navigating the Risk*, HARVARD L. SCH. F. ON CORP. GOV., (July 24, 2023), <https://corpgov.law.harvard.edu/2023/07/24/greenwashing-navigating-the-risk/>.

3. See *Dorris v. Danone Waters of Am.*, 711 F. Supp. 3d 179 (S.D.N.Y. Jan. 10, 2024).

4. *Id.* at 183.

consumers to believe the Product's production did not emit carbon.<sup>5</sup> The Southern District of New York *held* that a reasonable consumer could interpret the term "carbon neutral" as the Product would emit no carbon throughout its lifecycle.<sup>6</sup>

The outcome of the court's decision rightfully reinforces the litigation pathway for greenwashing claims; however, its analysis faltered by applying a textualist approach.<sup>7</sup> The textualist focus on definitions reduces the lived experience of the average consumer to that of mere words on a page. Judicial decisions should move away from a textualist approach to greenwashing claims and incorporate broader consideration of the environmental challenges facing society. Part II of this Note explores the pathways for enforceability of greenwashing allegations. Part III discusses the court's decision, emphasizing the methods used to determine a reasonable consumer's perspective. In Part IV, this Note critiques the textualist approach and argues for an alternative analysis that captures the re-world context of consumer decision-making. Finally, Part V offers a brief conclusion.

## II. BACKGROUND

### A. Regulation

As the primary federal agency responsible for preventing fraudulent, deceptive, and unfair business practices,<sup>8</sup> the Federal Trade Commission (FTC) regulates greenwashing advertisements.<sup>9</sup> The FTC is empowered to initiate federal district court proceedings to stop greenwashing advertisements.<sup>10</sup>

The FTC published the Guides for the Use of Environmental Marketing Claims (Green Guides) to address environmentally deceptive acts.<sup>11</sup> The Green Guides provide general principles and specific guidance on what the FTC deems deceptive.<sup>12</sup> However, they are advisory in nature,

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5. *Id.* at 184-85.

6. *Id.* at 200.

7. *Id.* at 189.

8. Barbara Ballan & Jason J. Czarnecki, *Disclosure, Greenwashing, and the Future of ESG Litigation*, 81 WASH. & LEE L. REV. 545, 563-64 (2024).

9. *Id.* at 563.

10. 15 U.S.C. § 45.

11. *FTC Issues Revised "Green Guides": Will Help Marketers Avoid Making Misleading Environmental Claims*, FED. TRADE COMM'N (Oct. 1, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/10/ftc-issues-revised-green-guides>.

12. *Id.*

serving as warnings to companies about what the FTC deems deceptive.<sup>13</sup> Although they do not create any legal obligations,<sup>14</sup> the Green Guides have significant influence on greenwashing litigation because state laws often incorporate them.<sup>15</sup> In particular, New York,<sup>16</sup> California,<sup>17</sup> and Massachusetts<sup>18</sup> have incorporated the Green Guides into their consumer protection frameworks for greenwashing claims. Following the FTC guidance, these states apply a “reasonable consumer” test to greenwashing claims.

### B. Litigation

In the United States, litigation surrounding greenwashing follows two legal paths: consumer protection laws, largely influenced by the Green Guides, and Securities and Exchange Commission (SEC) laws.<sup>19</sup> Under SEC laws, investors must demonstrate that a company made false or misleading statements about its environmental, social, and governance (ESG) performance, which in turn affected the stock’s value.<sup>20</sup> Greenwashing litigation from consumer protection laws arises when product purchasers argue that a company’s environmental marketing misled them into buying a product they otherwise would not have purchased if not for the advertisement of exaggerated environmental benefit.<sup>21</sup>

For greenwashing claims to prevail, plaintiffs must satisfy the reasonable consumer test, a standard derived from the FTC and adopted

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13. *Id.*

14. *Id.*

15. Ballan & Czarnecki, *supra* note 7, at 566.

16. *See, e.g.,* Duchimaza v. Niagara Bottling, LLC, 619 F. Supp. 3d 395, 411 (S.D.N.Y. 2022) (stating that GBL §§ 349 and 350 incorporates the Federal Trade Commission’s Green Guides); Natale v. 9199-4467 Quebec Inc., No. 21-CV-6775 (JS)(SIL), 2023 U.S. Dist. LEXIS 131012, at \*15-16 (E.D.N.Y. July 28, 2023) (pointing out that both GBL §§ 349 and 350 explicitly give deference to FTC interpretation).

17. *See, e.g.,* CAL. BUS. & PROF. CODE § 17580.5 (West 2023) (“It shall be a defense to any suit or complaint brought under this section that the person’s environmental marketing claims conform to the standards or are consistent with the examples contained in the [Green Guides]”).

18. *See, e.g.,* MASS. GEN. LAWS ch. 93A, § 2(b) (2023) (applying specified laws, “the courts will be guided by the interpretations given by the Federal Trade Commission).

19. Barbara Ballan & Jason J. Czarnecki, *Disclosure, Greenwashing, and the Future of ESG Litigation*, CLS BLUE SKY BLOG (Oct. 18, 2024), <https://clsbluesky.law.columbia.edu/2024/10/18/disclosure-greenwashing-and-the-future-of-esg-litigation/?noamp=mobile#respond>.

20. *Id.*

21. *Id.*

by state consumer protection laws.<sup>22</sup> This test assesses whether an ordinary consumer, based on the content of the advertisement in question, could reasonably reach the same misleading conclusion as the plaintiff.<sup>23</sup> Courts in the Second Circuit are divided over the proper method to interpret a reasonable consumer as a matter of law. Some decisions take a textualist approach that focuses on specific, often dictionary-based definitions.<sup>24</sup> For example, in the consumer protection case of *Warren v. Whole Foods Market Group, Inc.*, the court found that the dictionary definition precluded a reasonable consumer from interpreting “juice” in the manner the plaintiff alleged.<sup>25</sup> By contrast, at this stage in the litigation, the majority approach rejects reliance on such textualist jargon.<sup>26</sup>

### III. COURT’S DECISION

In the noted case, the U.S District Court for the Southern District of New York analyzed uniformly the substance of the consumer protection claims.<sup>27</sup> In doing so, the court acknowledged the significant similarities among state consumer protection laws.<sup>28</sup> The court *held* that it could not conclude, as a matter of law, that a reasonable consumer would be unable to interpret “carbon neutral” as meaning the Product’s lifecycle emitted no carbon.<sup>29</sup> The court assessed the reasonable consumer perspective through a textual approach, the FTC’s guidance, and real-world data.<sup>30</sup>

22. See *What Cos. Can Expect from FTC’s Green Guides Updates*, LAW360 (Jan. 11, 2023, 5:51 PM), <https://www.law360.com/articles/1559820>.

23. *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015).

24. *E.g.*, *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019) (ruling the dictionary defines “diet” in the soft drink in a way that precludes the plaintiff’s interpretation); *Warren v. Whole Foods Mkt. Grp., Inc.*, 574 F. Supp. 3d 102, 115 (E.D.N.Y. 2021) (finding the dictionary definition of “juice” is the reasonable consumer’s interpretation); *Kelly v. Beliv L.L.C.*, 640 F. Supp. 3d 286, 298 (S.D.N.Y. 2022) (addressing the definition of “preservative” to fit the court’s determination of how a reasonable consumer may interpret it).

25. *Warren*, 574 F. Supp. 3d at 115.

26. *E.g.*, *Grossman v. Simply Nourish Pet Food Co.*, 516 F. Supp. 3d 261, 280 (E.D.N.Y. 2021); *Ault v. J.M. Smucker Co.*, No. 13-cv-3409 (PAC), 2014 WL 1998235, at \*5 (S.D.N.Y. May 15, 2014); *Petrosino v. Stearn’s Prod., Inc.*, No. 16-CV-7735 (NSR), 2018 WL 1614349, at \*7 (S.D.N.Y. Mar. 30, 2018); *In re Frito-Lay N. Am., Inc. All Natural Litig.*, No. 12-md-2413, 2013 WL 4647512, at \*8 (E.D.N.Y. Aug. 29, 2013) (“[T]he Court need not find whether Defendant’s products are “natural” within any given definition.”).

27. *Dorris*, 711 F. Supp. 3d at 192.

28. *Id.*

29. *Dorris*, 711 F. Supp. 3d at 193.

30. See *id.*

*A. Textualist Interpretation*

The court first took a textualist approach to how the reasonable consumer would have interpreted the Product advertisement's "carbon neutral" claim.<sup>31</sup> The court looked to the Merriam-Webster dictionary and found two definitions for the term.<sup>32</sup> One defined "carbon neutral" as "having or resulting in no net addition of carbon dioxide to the atmosphere," which is how the Plaintiffs interpreted the word.<sup>33</sup> The second definition is "counterbalancing the emission of carbon dioxide with carbon offsets."<sup>34</sup> The court concluded both terms "lack[ed] specificity and may be difficult to comprehend."<sup>35</sup> Furthermore, the court found that the second definition of "carbon neutral"—the one the Defendant claims to rely upon<sup>36</sup>—increasingly ambiguous and more able to be confusing for the layman since it contains undefined scientific terms.<sup>37</sup> The court ruled it should be a question of fact for the jury to determine whether a reasonable consumer could believe the definition of carbon neutral is the one proposed by the Plaintiffs.<sup>38</sup>

*B. FTC Interpretation*

Next, the court considered the FTC's perspective on whether "carbon neutral" is a misleading term.<sup>39</sup> Specifically, it focused on the Green Guides section addressing unqualified general environmental benefit claims.<sup>40</sup> The FTC explains that statements "difficult to interpret and likely [to] convey a wide range of meanings" fall within the category.<sup>41</sup> The FTC Green Guides singled out advertisements that imply an "item or service has no negative environmental impact" as potentially misleading.<sup>42</sup> The court concluded that the phrase "carbon neutral" fits within the category of terms the FTC would caution against. As a result, the court found a reasonable consumer could be misled by this term.<sup>43</sup>

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31. *Id.* at 189.

32. *Id.*

33. *Dorris*, 711 F. Supp. 3d at 190 (citing MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/carbon-neutral> (last visited Nov. 20, 2024)).

34. *Id.*

35. *Id.* at 190.

36. *Dorris*, 711 F. Supp. 3d at 189-90.

37. *Id.* at 190.

38. *Id.*

39. *Id.* at 190.

40. *Id.* at 190-91 (referencing 16 C.F.R. § 260.4(b)).

41. *Id.* at 190 (referring to 16 C.F.R. § 260.4(b)).

42. *Id.*

43. *Id.*

*C. Practical Understanding*

Finally, the court considered the evidence on how the public understands the term “carbon neutral.” The Plaintiffs provided evidence that “the average American consumer does not know the term’s [textualist] definition, ‘as nearly sixty percent . . . do not understand what the term ‘carbon neutral’ means.’”<sup>44</sup> Furthermore, the court ruled that the imprecise usage of “carbon neutral” by the industry and companies means that even consumers who understand the term’s definition may still be uncertain how it is being applied in practice.<sup>45</sup> For these reasons, the court found the Plaintiffs’ factual allegations were sufficient to survive a motion to dismiss the greenwashing claims.<sup>46</sup>

## IV. ANALYSIS

The U.S. District Court for the Southern District of New York rightfully found the Plaintiffs had pled sufficient facts for their claims to survive a motion to dismiss. Nevertheless, the court’s analysis of the greenwashing claims is troubling. The court persistently yearned for a textualist, concrete definition of “carbon neutral” to contrast with the Plaintiffs’ proposed reasonable consumer interpretation.<sup>47</sup> In doing so, the court moved away from the majority jurisprudence. It also deepened a disconnect between judicial decisions and the goal of protecting consumers from greenwashing claims.

In *Grossman v. Simply Nourish Pet Company, L.L.C.*, the court discarded the search for a textualist definition because the mere existence of a definition does not dictate how a reasonable person would interpret the term.<sup>48</sup> Even if a textualist definition exists, society at large may interpret the word differently.<sup>49</sup> Inherent in this approach is the idea that there could be multiple reasonable interpretations of “carbon neutral.” The Plaintiffs only need to prove their interpretation could be inferred by a reasonable consumer.<sup>50</sup> When the court in the noted case explicitly searched for a dictionary or industry definition, it supported the contrary approach that assumes the definition is the only reasonable interpretation consumers rely on when purchasing a product. This approach bakes in the

44. *Id.* at 191 (internal citation to the court record).

45. *Id.*

46. *Id.*

47. *Dorris*, 711 F. Supp. 3d at 188-91.

48. *Grossman*, 516 F. Supp. 3d at 280 (“[A]t this stage in the litigation, the court need not determine whether defendants’ products are ‘natural’ within any given definition.”).

49. *Id.*

50. *In re Frito-Lay*, 2013 WL 4647512, at \*4.

assumption that society interprets terms solely based on one formal definition, disregarding practical, real-world interpretations. Such assumptions run afoul of the reasoning provided by the majority jurisprudence, which suggests that a reasonable consumer base can hold multiple interpretations of one term.

While in the noted case, the greenwashing litigation rightfully proceeded.<sup>51</sup> However, the success came mostly from the textualist definitions supporting the Plaintiffs' proposed reasonable interpretation of "carbon neutral."<sup>52</sup> This decision underscores how a textualist approach creates a harmful disconnect. It overlooks the reality that society is grappling with profound and far-reaching climate harms, including more severe natural disasters, rising sea levels that displace communities, food and water insecurity, and health crises from worsening air quality and heatwaves.<sup>53</sup> In an era marked by these challenges, consumers' real-world understanding of environmental issues is increasingly outpaced by the sophistication of corporate marketing strategies that exploit this gap for profit.<sup>54</sup> Companies that commit greenwashing often dedicate substantial resources to carefully crafting deceptive statements, leveraging textualist terms and finesse to exploit consumers' limited ability to verify environmental claims while they hurriedly purchase products.<sup>55</sup> Any adequate examination of a reasonable consumer in an environmental claim must account for the sophistication gap by considering the environmental harms and dangers we collectively face.

The court's rigid focus on terminology raises significant concerns for future cases.<sup>56</sup> First, it allows courts to apply definitions post hoc of the transaction; this is particularly troublesome in greenwashing claims where consumers are attempting to make conscious decisions to support sustainability while purchasing. A focus on definitions ignores the actual consumers' conscious interpretation of the claim. The proper focus should address the connection between a company's sustainability claims and the consumer's reliance on those claims when making purchasing decisions. Additionally, if companies only need to point to a textualist definition

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51. *Dorris*, 711 F. Supp. 3d at 200.

52. *Id.* at 189.

53. Diarmid Campbell-Lendrum et al., *Climate Change and Health: Three Grand Challenges*, 29 NAT. MED. 1631 (2023).

54. Alison Borochoff-Porte & John Cooper, *Applying Consumer Protection Basics to Greenwashing "Recyclability" Cases*, HARV. ENV'T L. REV. ONLINE, 7 (Apr. 10, 2023), <https://journals.law.harvard.edu/clr/2023/04/10/applying-consumer-protection-basics-to-greenwashing-recyclability-cases/>.

55. *Id.*

56. *Dorris*, 711 F. Supp. 3d at 189.

uniformly applied, the door is opened to industries, particularly non-green industries, to craft sophisticated definitions that dilute the meaning of sustainability claims that will reduce accountability. None of this furthers the consensus among states to protect the public through their consumer protection laws.<sup>57</sup>

To better align with state consumer protection laws, the court should have focused more on the facts alleged by the Plaintiff. While the court utilized some practical evidence proposed by the Plaintiff, their facts should have been the starting and ending point of the analysis.<sup>58</sup> Doing so would have more accurately assessed how the reasonable consumer understands the term. This perspective would have also better captured the nexus between why consumers buy a product and why marketers advertise a product a certain way. Therefore, a factual approach will bridge the gap between terminology used in the law and the thought process of the public.

#### V. CONCLUSION

The Southern District of New York's decision raises concerns about how courts analyze consumer protection claims for greenwashing cases. By focusing on a textualist approach, the court misses the larger context of consumer behavior. A reasonable consumer is both aware of and influenced by environmental concerns. This awareness is reflected in their behavior and decision-making, which is why environmental concerns should be considered when evaluating greenwashing advertising practices. This case highlights the need for clearer standards in green advertising and underscores the potential legal consequences for companies that use ambiguous environmental claims.

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57. See *Int'l Union of Operating Eng'rs Loc. No. 68 Welfare Fund v. Merck & Co.*, No. ATL-L-3015-03, 2005 WL 2205341 (N.J. Super. Ct. Law Div. July 29, 2005) (laying out all the consumer protection policies of each state).

58. *Dorris*, 711 F. Supp. 3d at 190.

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