

IN THE
SUPREME COURT
OF THE UNITED STATES OF AMERICA

DOCKET NO. 06-1669

ADAM'S APPLE MARKETS, INC.,
PETITIONER/CROSS-RESPONDENT,

v.

APHRODITE COSMETICS, INC.,
RESPONDENT/CROSS-PETITIONER.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE AMES CIRCUIT

JOINT APPENDIX

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- Any and all law review articles, bar journal articles, or similar publications that analyze the issues raised in this case and which are not yet publicly available through publication either in print, on Lexis or Westlaw, or on the Internet. In the event that a team or one of its members has already had access to such a publication, disclosure of the title and author of the publication and the circumstances in which it was accessed must be made to the Ames Moot Court Competition Case Writers, Julie Barton, HLS '92 (jbarton@law.harvard.edu) and Meryl Kessler, HLS '93 (mkessler@law.harvard.edu), and to the opposing team. In such circumstances, arrangements will be made to afford the opposing team access to the publication in question, and both teams will be required to treat the publication in question as confidential unless the author or copyright owner of the publication agrees otherwise. Publications by practitioners and students are included in this prohibition; however, no team member is required to disclose his or her own related scholarship.
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**UNITED STATES DISTRICT COURT
DISTRICT OF AMES**

ADAM’S APPLE MARKETS INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 06-321
)	
APHRODITE COSMETICS, INC.,)	
)	
Defendant.)	
)	

COMPLAINT

Plaintiff Adam’s Apple Markets, Inc. (“Adam’s Apple”) brings this action against Defendant Aphrodite Cosmetics, Inc. (“Aphrodite”) for violation of the Lanham Act §43(a), 15 U.S.C. §1125(a) and the Ames False Advertising Statute, 16 A.G.L. §152.

JURISDICTION AND VENUE

1. Adam’s Apple brings this action pursuant to 15 U.S.C. §1051 *et seq.* to recover from competitive injuries suffered as a result of the false or misleading commercial speech of Aphrodite.
2. This Court has jurisdiction pursuant to 28 U.S.C. §1331.
3. Venue is appropriate in this Court under 28 U.S.C. §1391(b) because a substantial part of the events giving rise to Adam’s Apple’s claims occurred within this district.
4. This Court has supplemental jurisdiction over Adam’s Apple’s state law claims under 28 U.S.C. §1367(a) because these claims are so related to Adam’s Apple’s Lanham Act claims that they form part of the same case or controversy in that they arise from the same nucleus of operative fact and amount to a single judicial proceeding.

PARTIES

5. Plaintiff Adam's Apple is a Delaware corporation having an office and principal place of business in Ames City, Ames.

6. Defendant Aphrodite is a Delaware corporation having an office and principal place of business in Ames City, Ames.

FACTUAL ALLEGATIONS

7. Adam's Apple, founded in 1992, is an organic and natural foods supermarket chain, with 21 locations in the state of Ames and 183 locations nationwide. Adam's Apple sells only food products that are certified as organic or all-natural.

8. Additionally, Adam's Apple sells some non-food items, including cosmetics and skincare products. It is the explicit policy of Adam's Apple to sell only cosmetics and skincare products that are developed and manufactured without the use of animal testing.

9. Adam's Apple is the exclusive distributor of Soleil Skincare Products ("Soleil"), a brand of "cruelty-free" cosmetics and skincare products. Soleil has never used animals in the development or testing of any of its products. Moreover, Soleil has never contracted with a third-party to test its products on animals. Finally, none of the suppliers of the ingredients used in Soleil's products perform testing on animals. Each and every Soleil product is labeled "Not Tested on Animals" and "Cruelty Free."

10. The sale of Soleil products accounts for approximately 10 percent of Adam's Apple's gross sales, which in Fiscal Year 2005 totaled \$3.8 billion.

11. Aphrodite, founded in 1965, is one of the largest cosmetics and skincare companies in the United States. Aphrodite currently produces over 20 different lines of products, including cosmetics (lipsticks, blushers, powders, eye shadows, foundations, etc.) skin cleansers, skin toners, exfoliators, bronzers and a variety of other skincare products.

12. In Fiscal Year 2005, Aphrodite's total revenue was over \$6 billion.

13. Most of Aphrodite's sales are made through retailers (department stores and boutiques), but it had \$40 million in Internet sales in Fiscal Year 2005.

14. Since the late 1970s, Aphrodite has been an aggressive marketer of its products to the public. Since 1980, Aphrodite has expended, on average, between one-quarter and one-third of its annual budget to promote, advertise and market its cosmetics and skincare products.

15. According to marketing specialists, by the mid-1990's, three times as many models and actresses were parties to working agreements with Aphrodite as with any other company. (See Kate Donaldson, *Be Beautiful, The Aphrodite Spirit in the Corporate World*, Jefferson Media Corp., Holbrook, MI., 1998, p. 25 [hereinafter, "*Be Beautiful*".].)

16. In 1995, Aphrodite paid Julia Roberts and Madonna \$20 million each to become Aphrodite spokeswomen.

17. Aphrodite's advertising and promotional campaign has been hugely successful. One *Time Magazine* story about the baby-boom generation quoted a social historian saying that the ethos of the largest American generation could be summed up in two words: "Be Beautiful." Brad Scott, an Advertising Director for Aphrodite, said, with respect to the Aphrodite slogan, "Be Beautiful," "This thing has become much more than an ad slogan. It's an idea. It's like a frame of mind." (See Donaldson, *Be Beautiful*, pp. 145-46.)

18. In the late-1990s, Aphrodite's carefully cultivated image came under attack. Various media sources and corporate watchdogs provided documentary evidence that:

- Every year, Aphrodite developed and tested its products on thousands of animals—including primates, dogs, cats, rabbits, guinea pigs, rats, and mice—in its Ames corporate laboratory. (See, e.g., Exhibit A: "All Things Considered," National Public Radio report, Transcript, November 12, 1999.)
- These animals were kept in small, dark, poorly ventilated, and overcrowded cages in the Aphrodite laboratory. (See Exhibit A.)

19. As a result of this public exposure of Aphrodite's animal testing policies and practices, Aphrodite's sales declined 14 percent between 1999 and 2000. During the same period of time, Adam's Apples sales of Soleil products increased 22 percent.

20. Aphrodite failed to disclose its animal testing policies and practices to consumers either in the promotion of its products or at the point of purchase, or in any other manner. Furthermore, as more fully described below, in response to the public exposure of Aphrodite's animal testing policies and practices, Aphrodite has misrepresented to the consuming public its policies and practices regarding animal testing.

21. In September 2002, Aphrodite ceased conducting animal testing in its own laboratory and established its own Code of Conduct, which stated that Aphrodite would not test its products on animals. (See Exhibit B.) Aphrodite displays its Code of Conduct on its website, www.aphroditecosmetics.com, and in its corporate literature, such as its Annual Report.

22. Aphrodite's decision to stop conducting its own tests on animals and adoption of the Code of Conduct were intended, among other things, to entice consumers who do not want to purchase products tested on animals to buy Aphrodite products. For example, in a press release, dated September 16, 2002, entitled "Aphrodite Responds to Animal Testing Allegations," Aphrodite represented that "animals deserve respect and dignity. Consumers have recognized that it is inhumane to sacrifice them on the altar of human beauty, and members of the cosmetics industry have a moral obligation to adjust their policies accordingly. For this reason we have adopted a Code of Conduct that pledges that we will not test our products on animals." (See Exhibit C.)

23. In a letter to the editor published in the *Amesville Chronicle* on December 14, 2002, Aphrodite's Director of Communication, Leslie Wein, wrote:

Consumers...want to support socially conscious companies with good products and practices....That is why we want consumers to know that Aphrodite has established the cosmetics industry's first code of conduct regarding animal testing. (See Exhibit D.)

24. In a February 2003 document entitled "The Aphrodite Code of Conduct: What it is, How it Works," Aphrodite represented that the "key provision of the Code is the pledge

that...Aphrodite will not test its products on animals. This pledge represents our commitment to set the standard in the cosmetics industry."

25. In an Aphrodite document that was distributed to the media entitled "Aphrodite Production Primer," dated March 2003, Aphrodite represented that ". . . Aphrodite does not test its products on animals because of its deep conviction that such testing is morally wrong."

26. At the Aphrodite Annual Shareholder Meeting on September 22, 2005, Aphrodite CEO Penelope H. Duke represented that "Aphrodite is the industry leader on the issue of animal testing.... Animals should never be the victims of human beauty." The identical representation was made by Ms. Duke in a letter dated October 1, 2005 to the *New York Times*.

27. Notwithstanding Aphrodite's adoption of its Code of Conduct and its above-mentioned representations, Aphrodite has continued to purchase ingredients from suppliers who, in fact, do perform testing on animals.

28. Reports that Aphrodite continues to purchase ingredients that have been tested on animals have recently appeared in the media. CBS News, *Financial Times*, *The New York Times*, and *The Amesville Chronicle*, have all run stories and articles that expose that Aphrodite uses ingredients that have been tested on animals. For example, a CBS "48 Hours" News report on October 17, 2004 revealed that:

- Over 500 animals are housed in cages in the laboratory operated by Cosmeti-co, Inc., one of Aphrodite's primary ingredients suppliers.
- Between January and June 2004, 12 primates died in the Cosmeti-co testing facility.
- Approximately 30 percent of the animals in the Cosmeti-co testing facility die within three weeks of their arrival.
- Aphrodite purchased over \$20 million worth of cosmetics ingredients from Cosmeti-co in 2004.

29. In an environmental audit of the laboratory operated by ICD, Inc., another Aphrodite supplier, Ernst & Young found the following:

- The problem of overcrowding of laboratory animals needs more attention.
- Small cages, lack of ventilation, and poor lighting have contributed to deaths of mammals used for testing.

- More than half of the laboratory animals live in unsanitary conditions. (*See* Exhibit E: ICD document entitled, "Ernst & Young Environmental Audit of ICD Laboratory," January 13, 2005; this document was released by the Cosmetics Resource Action Center.)

30. In sum, because Aphrodite continues to purchase ingredients that have been tested on animals, its representations that it opposes animal testing are false or misleading.

31. As a result of said false or misleading representations, consumers who oppose animal testing have been misled into buying Aphrodite products. Since Aphrodite announced its Code of Conduct in 2002, sales of its products have risen 12 percent. During the same time, Adam's Apple's sales of Soleil products have decreased 20 percent.

32. As a further result of said false or misleading representations, Adam's Apple's well-established goodwill as a purveyor of only cruelty-free cosmetics and skincare products has been diverted to Aphrodite.

FIRST CLAIM FOR RELIEF (LANHAM ACT §43(a), 15 U.S.C. §1125(a))

33. Adam's Apple realleges and incorporates by reference paragraphs 1 through 32 as if set forth herein in full.

34. In order to maintain and/or increase its sales and profits, Aphrodite, through its advertising, promotional campaigns, public statements and marketing, has made false or misleading descriptions or representations of fact, including but not limited to the following:

- (a) claims that Aphrodite is morally opposed to animal testing, despite the fact that it continues to purchase ingredients from suppliers who do perform tests on animals;
- (b) claims that Aphrodite will not engage in abusive or inhumane treatment of animals, despite the fact that it continues to purchase ingredients from suppliers who engage in abusive or inhumane treatment of animals; and,
- (c) claims that Aphrodite is an industry leader on the issue of animal testing.

35. Aphrodite's claims regarding animal testing were made in furtherance of its business interest in selling their products, which compete in the same markets as Soleil's and caused Adam's Apple, as the exclusive distributor of Soleil products, to suffer a competitive business

injury through lost sales, potential sales and goodwill.

36. Aphrodite's actions, as set forth in this complaint, constitute false or misleading descriptions or representations of fact in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

37. As a direct and proximate result of Aphrodite's conduct as set forth in this count, Adam's Apple has suffered irreparable and ongoing injury, in an amount to be proven at trial. Adam's Apple has lost sales, and Aphrodite has enriched itself unjustly at Adam's Apple's expense.

**SECOND CLAIM FOR RELIEF
(AMES FALSE ADVERTISING STATUTE, 16 A.G.L. §152)**

38. Adam's Apple realleges and incorporates by reference paragraphs 1 through 37 as if set forth herein in full.

39. Aphrodite's above described activities constitute deceptive trade practices and false advertising under §152 of the Ames False Advertising Statute.

REQUEST FOR RELIEF

WHEREFORE, Adam's Apple respectfully asks this Court to grant judgment in favor of Adam's Apple and against Aphrodite as follows:

- a. Granting injunctive relief sufficient to terminate all of Aphrodite's actionable conduct;
- b. Awarding Adam's Apple damages in an amount to be determined by this Court to compensate for the financial losses suffered by Adam's Apple as a result of Defendants' false or misleading conduct;
- c. Ordering the trebling of these compensatory damages, pursuant to 15 U.S.C. §1117;
- d. Awarding Adam's Apple reasonable attorneys' fees and costs in accordance with 15 U.S.C. §1117; and,

e. Granting such other relief as the Court may deem just and proper.

ADAM'S APPLE MARKETS, INC.,

By: Harold Chu

Harold Chu, Esq.
Attorney for the Plaintiff

Dated: January 31, 2006

EXHIBIT A

NPR Transcript

All Things Considered, National Public Radio

November 12, 1999

Profile: Betty Bursey of the animal-rights group Labwatch, which has been protesting outside of the corporate headquarters of Aphrodite Cosmetics, Inc.

Edition: 9:00-10:00 PM
Estimated printed pages: 3

Article Text:

MELANIE BLICK, host:

What price beauty? This is the question that many consumers of cosmetics should be asking themselves as increasing attention is focused on the use of animal testing by the cosmetics industry. Labwatch, an animal-rights advocacy group, recently staged a protest outside the corporate headquarters of Aphrodite Cosmetics, one of the nation's largest cosmetics companies, to protest Aphrodite's testing of its products on animals. NPR's Aaron Hui reports.

AARON HUI reporting:

The multi-billion dollar cosmetics industry is in the middle of controversy these days regarding the use of animals for the testing of cosmetics and skincare products. Cosmetics companies argue that consumer safety requires that products be tested before usage to determine the level of allergic reaction and irritation. Animal-rights activists argue that animal testing is both inhumane and unnecessary and have targeted some of the largest offenders with protests, petitions, and letter-writing campaigns. Betty Bursey, an organizer with the animal-rights group Labwatch, led a 500-person protest outside the corporate headquarters of Aphrodite Cosmetics last week.

Ms. BETTY BURSEY (Labwatch): Labwatch exists to monitor the testing of animals by industry. Our goal is to use public opinion to put pressure on companies to stop the use of animal testing, which is an inhumane and immoral practice. We've targeted the cosmetics industry—and Aphrodite in particular—because of their extensive and largely unregulated use of animals for testing in the production process.

HUI: Bursey says that cosmetics companies like Aphrodite use a

variety of different tests on animals, such as the Draize eye test, in which shampoos, mascaras, and soaps are applied to the eyes of conscious rabbits to test for irritancy.

Ms. BURSEY: The tests these companies use, such as the Draize test, are not only cruel to animals, but also largely irrelevant, since there are major differences between a rabbit's eye and a human's. In another test, the LD50, rabbits, dogs, cats, and guinea pigs are used to test lipsticks, skincare products, shampoos, and moisturizers. The test is conducted by introducing the product under investigation into the animal either intravenously or by the mouth. The animal is fed up to 50 percent of its body weight and the aim is to find the dose that will kill half the animal sample.

HUI: Bursesey says Aphrodite is one of the most egregious users of animal testing in the cosmetics industry, with thousands of animals—primates, dogs, cats, rabbits, guinea pigs, rats, and mice—in its Ames laboratory.

Ms. BURSEY: The problem with companies like Aphrodite, which keep thousands of animals in their lab, is not only that they administer painful and deadly tests on their lab animals, but also that the animals are housed in inhumane conditions. In the Aphrodite lab, the animals are kept in small, dark, poorly ventilated, and overcrowded conditions....

.....

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EXHIBIT B

APHRODITE CODE OF CONDUCT



Aphrodite Cosmetics, Inc. was founded on a promise

Implicit in that act was the determination that we would build a relationship with our customers based on trust, honesty, and shared values.

Aphrodite creates, manufactures and markets beauty products. At every step in that process, we are driven to do not only what produces the best product for our customers, but also what is ethical and humane. Our customers care about these values, and so do we.

At the core of the **Aphrodite** corporate ethic is the belief that all forms of life deserve respect. Aphrodite does not believe that animals should be sacrificed for the sake of beauty. Although our products are produced for humans, humans are not our only concern.

THE FACTS

It is estimated that over 35,000 animals are used in cosmetic tests every year throughout the European Union alone.

In other countries such as the United States and Japan, where testing is extensive, such information is not publicly available.

This is despite extensive public opposition and the development of 'non-animal' alternative tests.

The most common tests involve dripping a material into rabbits' eyes or applying it to the shaved backs of rabbits or guinea pigs and studying the resulting irritation or damage.

Animals are also force-fed or dosed with substances to assess affects. The tests can cause great suffering and in some cases death.

OUR PLEDGE

Because **Aphrodite** believes cosmetics testing on animals is unethical and unnecessary, **Aphrodite pledges that we will no longer test our products on animals.** We recognize that this change is not only right for business, but just plain right.

What will stay the same at **Aphrodite** is what we believe in – Profits With Principles. We at **Aphrodite** will continue to challenge ourselves, our industry, and our customers.

We promise: We will promote animal protection throughout our business activities. We are against animal testing in the cosmetics and toiletries industry. We will not test our products on animals.

September 2002

EXHIBIT C

FOR IMMEDIATE RELEASE

Contact:

Joseph A. Stotz

Aphrodite Cosmetics, Inc.

2809 Magnolia Drive

Ames City, Ames 00101

Phone: 111-242-4990

<http://www.aphroditecosmetics.com>

info@aphroditecosmetics.com

Aphrodite Responds to Animal Testing Allegations

Ames City, Ames – September 16, 2002 – Aphrodite Cosmetics, Inc. announced today that it has adopted a Code of Conduct regarding animal testing and will immediately cease testing its products on animals. This announcement establishes Aphrodite as an industry leader on the important issue of animal testing.

According to the Code of Conduct, thousands of animals are tested yearly despite public opposition and the availability of “non-animal” alternative tests. Because it believes that animal testing is both unethical and unnecessary, Aphrodite has committed to discontinue its own testing and advocate for animal protection within the cosmetics business.

“Cosmetics manufacturers must recognize animals deserve respect and dignity,” said Aphrodite CEO Penelope H. Duke. “Consumers have recognized that it is inhumane to sacrifice them on the altar of human beauty, and members of the cosmetics industry have a moral obligation to adjust their policies accordingly. For this reason we have adopted a Code of Conduct that pledges that we will not test our products on animals.”

Aphrodite’s new policy ensures that Aphrodite will continue to combine the best business practices with the highest moral principles. It is Aphrodite’s hope that this new policy will also raise awareness regarding animal welfare throughout the cosmetics industry. The Code of Conduct will therefore be available to or communicated to any interested parties, including visitors to our sites, shareholders and customers.

EXHIBIT D

Letter to the Editor from Aphrodite's Director of Communications, Leslie Wein, published in the *Amesville Chronicle* on December 14, 2002:

To the Editor:

Every year, 35,000 animals are used to test cosmetics in Europe. Here, in the United States, thousands of animals are also used in testing, but the exact numbers are not known because cosmetics companies do not make this information known to the public.

This use of animal testing by cosmetics companies is both inhumane and unnecessary. It is inhumane because animals—including primates, dogs, cats, rabbits, and other mammals—are forced to endure painful and often lethal tests, including the application of cosmetics and toiletries directly to their eyes and the force-feeding of substances to determine toxicity. It is unnecessary, because other methods exist to assess the safety of cosmetics.

Aphrodite Cosmetics—one of the nation's largest cosmetics companies—cannot sit by while these abuses continue to take place. Recognizing that it is a leader in the cosmetics industry, Aphrodite feels compelled to speak out on this important matter of public concern. Earlier this year, Aphrodite adopted a Code of Conduct in which we pledged to cease all testing of our cosmetics on animals—a pledge we have kept.

By taking this stand, Aphrodite hopes that it can set an example for other members of the cosmetics industry. We hope that other cosmetics companies will recognize, as we have, that renouncing animal testing is not just the right thing to do—it is also right for business. Consumers of cosmetics want to support socially conscious companies with good products and practices. We believe that companies must respond when consumers call for ethical action. That is why we want consumers to know that Aphrodite has established the cosmetics industry's first code of conduct regarding animal testing.

Leslie Wein
Director of Communications
Aphrodite Cosmetics, Inc.

EXHIBIT E

Environmental Audit of ICD Laboratory (Extract)



I. Laboratory compliance and waste tracking system

Generally, both the laboratory and waste tracking system comply with ICD's requirements and state and federal regulations. However, improvements can be made with respect to the following points:

Ventilation

In mixing chemical warehouse, ventilation system (cyclones) does not work efficiently and requires repair to reduce dust of potentially harmful chemical powders that can affect workers' health.

Chemical storage

In general, the storage houses are located in isolated position away from the laboratory. They are well ventilated. All materials are stored in labeled drums. However, within the laboratory, harmful chemicals are stored near the working place.

Protective equipment (PE)

In some instances, workers do not wear protective equipment (gloves, masks) for reasons cited by the workers as follows:

1. Protective equipment is inconvenient in performance of their work.
2. Absence of strict implementation of PE's usage.

Black smoke

Firing non-reusable garbage in combustors caused exhaustion of black smoke into the air. The company should consider that matter and accelerate measures to reduce black smoke.

Laboratory Animals

Laboratory animals are overcrowded. During course of audit, small cages, lack of ventilation, and poor lighting contributed to deaths of mammals and especially primates. More than half the laboratory animals live in unsanitary conditions.

Harmful use of chemicals

Measures should be taken.

**UNITED STATES DISTRICT COURT
DISTRICT OF AMES**

ADAM’S APPLE MARKETS INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 06-321
)	
APHRODITE COSMETICS, INC.,)	
)	
Defendant.)	
)	

DEFENDANT’S MOTION FOR DISMISSAL

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Aphrodite Cosmetics, Inc. moves for dismissal of Count I in the above-captioned action. The grounds for this motion are that Plaintiff has failed to state a claim as a matter of law under the Lanham Act §43(a), 15 U.S.C. §1125(a) because:

1. Congress did not intend parties in Plaintiff’s position to have standing to sue under §43(a) and Plaintiff therefore lacks prudential standing; and,
2. Defendant’s alleged speech does not give rise to a claim under §43(a) of the Lanham Act because it is not “commercial” speech.

Dated: February 14, 2006

By: **Karen Kuhlman**

Karen Kuhlman, Esq.
Attorney for the Defendant

**UNITED STATES DISTRICT COURT
DISTRICT OF AMES**

ADAM’S APPLE MARKETS INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 06-321
)	
APHRODITE COSMETICS, INC.)	
)	
Defendant.)	
)	

DECISION AND ORDER ON DEFENDANT’S MOTION FOR DISMISSAL

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Aphrodite Cosmetics, Inc. (“Aphrodite”) has moved to dismiss Count I of Plaintiff Adam’s Apple Markets, Inc.’s (“Adam’s Apple”) Complaint, which alleges that Defendant has violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). For the reasons discussed below, we find the Plaintiff has prudential standing to sue under the Lanham Act, but conclude that the Defendant’s speech was noncommercial speech not subject to a Lanham Act claim. The court therefore grants Defendant’s motion to dismiss Plaintiff’s Lanham Act claim with prejudice. The court also dismisses without prejudice Plaintiff’s claim under 16 A.G.L. §152 for lack of subject matter jurisdiction.

12(b)(6) Standard

Rule 12(b)(6) permits dismissal of a lawsuit for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). The Rule “requires the Court to construe the complaint in the light most favorable to the plaintiff, accept all the complaint’s factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief.” *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998). “The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957). However, “[t]o avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations

with respect to all the material elements of the claim.” *Wittsock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003).

Conclusions of Law

In Count I of the complaint, the Plaintiff alleges that the Defendant violated Section 43(a)(1)(B) of the Lanham Act, which provides that:

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

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.” 15 U.S.C. §1125(a).

Plaintiff alleges that certain statements made by the Defendant were false or misleading so as to misrepresent its policies and practices regarding the testing of its cosmetic and skincare products on animals. Plaintiff further alleges that as a result of Defendant’s statements it has suffered a competitive business injury through lost sales, potential sales and goodwill.

The Defendant in this case raises two challenges to Plaintiff’s Lanham Act claim in its motion to dismiss. First, the Defendant argues that the Plaintiff lacks prudential standing to sue under Section 43(a) of the Lanham Act because it is not the type of plaintiff intended by Congress to pursue an unfair competition claim under 43(a). The Defendant further contends that even if the Court finds that the Plaintiff has standing to sue under the Lanham Act, Defendant’s speech was noncommercial and therefore not subject to the Lanham Act. Based on the lack of standing or, in the alternative, the noncommercial nature of its speech, the Defendant contends that the complaint must be dismissed. The Court considers each of the Defendant’s two grounds for dismissal separately below:

I. Standing

The initial issue before the court today—one that is a question of first impression in the Ames Circuit—is whether a Lanham Act plaintiff alleging competitive injury due to the false or

misleading statements of the defendant has the requisite prudential standing to bring a suit under Section 43(a) of the Lanham Act. 15 U.S.C. 1125(a). As a preliminary matter, it is the opinion of the court that the Plaintiff has Article III, or constitutional standing. In order to bring an action in federal court, a plaintiff must show (1) injury in fact (2) that is fairly traceable to the actions of the defendant and (3) that likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiff alleges that as the exclusive distributor of Soleil skincare products, it has lost sales, potential sales and goodwill due to the Defendant's false and misleading statements about its treatment of animals in the development and testing of its products. Plaintiff further alleges that it will continue to lose sales and Defendant will continue to be unjustly enriched at Plaintiff's expense if relief is not forthcoming. Thus, Plaintiff has satisfied the requirements for Article III standing.

The more challenging question for the court today is whether Adam's Apple has prudential standing. Prudential standing is an "integral part of judicial self-government." *Lujan*, 504 U.S. at 560. The object of this self-governance by the courts is to ensure the plaintiff "is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 91, 99-100 (1986). Federal courts impose prudential limits to avoid making broad-ranging decisions with social impact that do not otherwise vindicate any individual rights. The courts also invoke prudential standing requirements to limit access to the federal courts to plaintiffs best suited to assert a particular claim. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985).

Our sister courts have developed different approaches to determine whether a plaintiff has prudential standing under the Lanham Act.¹ The Seventh, Ninth and Tenth Circuits have

¹ The question of whether Congress abrogated the prudential standing requirements in the Lanham Act has been addressed by a number of federal courts. See, e.g., *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 229 (3rd Cir. 1998); *Procter & Gamble Co., et al. v. Amway Corp.*, 242 F.3d 539, 562 (5th Cir. 2001). Rather than conduct a separate inquiry into Congress' intentions, we will join those courts in concluding that Congress did not intend to abrogate prudential standing limitations in the Lanham Act. Therefore, we may legitimately consider whether the Plaintiff has prudential standing.

adopted a categorical approach which requires a Lanham Act plaintiff to be a competitor of the defendant who alleges a competitive injury. See *Stanfield v. Osborne Industries, Inc.*, 52 F.3d 867, 873 (10th Cir. 1995); *The Jack Russell Terrier Network of Northern California v. American Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005); *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561, 575 (7th Cir. 1993). The Fifth and the Third circuits have adopted the less clear-cut test set forth in *Conte Bros.*, which evaluates the following factors: (1) the nature of the plaintiff's alleged injury; (2) the directness or indirectness of the asserted injury; (3) the proximity or remoteness of the party to the alleged injurious conduct; (4) the speculativeness of the damages claim; and (5) the risk of duplicative damages or complexity in apportioning damages. *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 234 (3rd Cir. 1998); *Proctor & Gamble Co. v. Amway Corporation, et al.*, 242 F.3d 539, 563 (5th Cir. 2001). We will follow the approach laid out in *Conte*.

Under the *Conte* test, we first consider the nature of the plaintiff's alleged injury. The Lanham Act was enacted to provide protection against anti-competitive conduct in a commercial context. Plaintiff alleges that the Defendant has used false and misleading statements to entice customers to buy Aphrodite products who might otherwise not do so causing Adam's Apple's sales of Soleil products to decline. Plaintiff further alleges that its goodwill with customers who want to buy only natural and cruelty free products has been diverted to Aphrodite as a result of its claims that it does not conduct animal testing. We conclude that Adam's Apple's alleged injury is the type of injury Congress was seeking to prevent. The second factor—directness of the alleged injury—further supports standing. As an exclusive distributor of Soleil products, Adam's Apple has allegedly lost sales as a result of Aphrodite's misleading statements. Moreover, Aphrodite allegedly competes directly with Adam's Apple when it sells its products to consumers over the Internet. Because not all other retailers of cosmetics that compete with Aphrodite can legitimately allege that they have lost goodwill and been injured directly as Adam's Apple can, the third factor suggests standing. Although Adam's Apple has not yet submitted proof of exact

damages, it is ready to do so at trial and therefore the damages are not speculative. Finally, the risk of duplicative damages and apportionment complexity is low because Adam's Apple's alleged damages are measurable and its injury distinguishes it from other potential plaintiffs.

Our analysis leads to the conclusion that Plaintiff has prudential standing to sue under the Lanham Act.

II. Commercial or Noncommercial Speech

The second question before the court is whether, as Defendant asserts, its speech is noncommercial and therefore immune from a claim under the Lanham Act. Aphrodite argues that its speech about treatment of animals in its laboratories is not “commercial advertising or promotion” within the meaning of Section 43(a)(1)(B). To be “commercial advertising or promotion” speech must be: “(1) commercial speech, (2) by a defendant who is a commercial competitor of the plaintiff, (3) for the purpose of inducing customers to buy defendant’s goods or services, and (4) disseminated sufficiently to the relevant purchasing public to constitute “advertising” or “promotion” within the industry.” *Coastal Abstract Service, Inc. v. First American Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999). Defendant contends that Plaintiff cannot establish the threshold element of the test because the speech at issue was not commercial. The speech, therefore, according to Defendant, is not actionable under Section 43(a). The crucial factor for the court to decide is whether Defendant’s speech was commercial or noncommercial.

In *Bigelow v. Virginia*, 421 U.S. 809 (1975) and *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976), the Supreme Court extended First Amendment protection to commercial speech. Commercial speech differs from speech at the core of the First Amendment, though, and the Court has articulated a method of distinguishing between commercial and noncommercial speech. To make this determination, we must consider the following factors in combination: (1) is the speech an advertisement? (2) does the speech refer to a specific product

or service? and (3) did the speaker act out of economic motivation? *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).²

The speech at issue here should be understood as part of a dialogue on a matter of public concern, not advertising or promotional materials intended to direct consumers toward certain products. Indeed, none of the statements made by Aphrodite makes reference to particular products or services. Aphrodite's speech is inseparable from dialogue about an issue that consumers care about. As one Aphrodite executive explained in a letter to the editor of the *Amesville Chronicle*: "Consumers...want to support socially conscious companies with good products and practices.... That is why we want consumers to know that Aphrodite has established the cosmetics industry's first code of conduct regarding animal testing." Complaint at ¶23. Under the *Bolger* test, Aphrodite's allegedly violative speech is clearly removed from two of the three elements of commercial speech: Aphrodite's statements are neither in an advertising format nor do they refer to any specific products.

The final part of the *Bolger* test addresses the commercial motivation of the speaker. The Defendant was undoubtedly economically motivated to defend its corporate image from criticism about its treatment of laboratory animals. But as the Fifth Circuit has noted "[w]e can well imagine cases in which a speaker's primary motivation is economic, but the speech nonetheless is protected." *Proctor & Gamble Co.*, *supra*, 242 F.3d at 553. We do not find this to be a case of commercial speech linked artificially to noncommercial speech in order to shoehorn the former into greater First Amendment protection. See *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, *supra*, 447 U.S. at 563, n. 5; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 n. 7 (1985). Instead, these statements by Aphrodite are noncommercial speech intended to

² The Court has announced more than one test for commercial speech. See e.g., *Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, 425 U.S. at 762 ("speech that does no more than propose a commercial transaction"); *Central Hudson Gas & Elec. V. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) ("expression related solely to the economic interests of the speaker and its audience"). We rely on the *Bolger* test.

respond to criticism and participate in a dialogue about the state of animal testing in the cosmetics industry.

Participation by a corporation in a dialogue on a matter of public concern must be afforded more protection than an advertisement page in a magazine. In fact “[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940). In *Thornhill*, the Court considered First Amendment protection of speech about labor disputes. Similarly, our contemporary “area of free discussion” should include debate about animal rights. *Id.* at 103. The press releases, letters and public communications serve the public by informing it about Aphrodite’s practice of animal testing. Having read those statements, a member of the public may choose to boycott Aphrodite’s products as a result and/or play a larger role in the national debate about animal rights through activism. This is exactly the type of participation in public debate that the First Amendment was intended to foster.

III. Conclusion

For the foregoing reasons, the court GRANTS Defendant’s Motion to Dismiss Count I of the Complaint because its speech was noncommercial and therefore not subject to action under §43(a) of the Lanham Act. The court dismisses Count II of the Complaint without prejudice for lack of subject matter jurisdiction.

SO ORDERED

Dated: June 6, 2006

Eileen Cole

Eileen Cole
United States District Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF AMES**

ADAM'S APPLE MARKETS INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 06-321
)	
APHRODITE COSMETICS, INC.)	
)	
Defendant.)	
)	

NOTICE OF APPEAL

Notice is hereby given that Adam's Apple Markets, Inc., Plaintiff in the above-captioned matter, appeals to the United States Court of Appeals for the Ames Circuit from a final judgment entered in this action on June 6, 2006. The ground for appeal is that, in its Decision and Order on Defendant's Motion to Dismiss, the District Court erred by finding that the Defendant's statements about its animal testing practices and policies constituted noncommercial speech and therefore were not subject to a claim pursuant to Lanham Act §43(a), 15 U.S.C. §1125(a).

Dated: June 15, 2006

By: Harold Chu

Harold Chu, Esq.
Attorney for the Plaintiff

**UNITED STATES DISTRICT COURT
DISTRICT OF AMES**

ADAM'S APPLE MARKETS INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 06-321
)	
APHRODITE COSMETICS, INC.)	
)	
Defendant.)	
)	

NOTICE OF CROSS-APPEAL

Notice is hereby given that Aphrodite Cosmetics, Inc., Defendant in the above-captioned matter, hereby cross-appeals to the United States Court of Appeals for the Ames Circuit from a final judgment entered in this action on June 6, 2006. The ground for appeal is that, in its Decision and Order on Defendant's Motion to Dismiss, the District Court erred by finding that the Plaintiff had prudential standing to bring a claim under Lanham Act §43(a), 15 U.S.C. §1125(a).

Dated: June 20, 2006

By: **Karen Kuhlman**
Karen Kuhlman, Esq.
Attorney for the Defendant

**UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT**

ADAM’S APPLE MARKETS INC.,)	
)	
Appellant/Cross-Appellee,)	
)	
v.)	Civ. No. 06-705
)	
APHRODITE COSMETICS, INC.,)	
)	
Appellee/Cross-Appellant.)	
)	

DECISION ON APPEAL

Appellant appeals from the order of the United States District Court for the District of Ames granting Appellee’s motion to dismiss. Appellant contends that the District Court erred by finding that the Appellee’s statements about its animal testing practices and policies constituted noncommercial speech and therefore were not subject to a claim pursuant to the Lanham Act §43(a), 15 U.S.C. §1125(a). Appellee cross-appeals, contending that the District Court erred by finding that the Appellant had prudential standing to bring a claim under the Lanham Act §43(a), 15 U.S.C. §1125(a).

For the reasons set forth in the opinion of the District Court, we ***AFFIRM***.

DATED: July 17, 2006

Katharine White
Katharine White
Judge
U.S. Court of Appeal for the Ames Circuit

**IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA**

ADAM'S APPLE MARKETS INC.,)	
)	
Petitioner/Cross-Respondent,)	
)	
v.)	Civ. No. 06-1669
)	
APHRODITE COSMETICS, INC.,)	
)	
Respondent/Cross-Petitioner.)	
)	

**ORDER GRANTING PETITION AND CROSS-PETITION
FOR WRIT OF CERTIORARI**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE THAT the Petition and Cross-Petition for Writ of Certiorari to the Ames Circuit in the above-captioned matter are hereby granted. Review is limited to the following two questions: (1) whether Petitioner has prudential standing to bring an unfair competition claim under the Lanham Act §43(a), 15 U.S.C. §1125(a); (2) whether Respondent's statements about its animal testing practices and policies constitute noncommercial speech such that they are not subject to a claim under the Lanham Act §43(a), 15 U.S.C. §1125(a).

The parties are directed to timely submit their briefs in accordance with the schedule they have received.

IT IS SO ORDERED.

DATED: September 7, 2006