IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FMC CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 14-51-LPS
	)	
SUMMIT AGRO USA, LLC and SUMMIT AGRO NORTH AMERICA HOLDING CORPORATION,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Presently before the Court is Plaintiff FMC Corporation's ("Plaintiff" or "FMC") Motion for Preliminary Injunction, (D.I. 16), and Defendants Summit Agro USA, LLC ("Summit USA") and Summit Agro North America Holding Corporation's ("Summit Holding," and collectively with Summit USA, "Defendants" or "Summit Agro") Partial Motion to Dismiss Plaintiff FMC Corporation's Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) ("Motion to Dismiss"), (D.I. 27). With the Motion for Preliminary Injunction, FMC seeks to enjoin Defendants and related entities from continuing alleged "unlawful and misleading labeling" of Defendants' Blanket® 4F and SFZ-4SC herbicide products (referred collectively to hereinafter as "Blanket 4F" or the "Blanket 4F product(s)") regarding the country in which the products' key ingredient was manufactured. (D.I. 17 at 3-4; D.I. 28 at 3; D.I. 71 at 2) In the Motion to Dismiss, Defendants now request dismissal of Counts II, III, and IV of FMC's Complaint. (D.I. 27) For the reasons set out below, the Court recommends that the Motion for Preliminary Injunction be DENIED and the Motion to Dismiss be GRANTED.

I. BACKGROUND

A. Factual Background

1. The Parties

FMC is in the business of developing, manufacturing, marketing, and distributing a variety of products in the United States for agricultural applications (such as for use on food and feed crops for human and animal consumption) and non-agricultural applications (such as for use on ornamental plants, turf, and golf courses). (D.I. 1 at ¶ 2) Among these are products containing sulfentrazone, a herbicidal active ingredient useful for controlling certain weeds in various agricultural crops and in non-crops. (*Id.* at ¶¶ 9-10) Among the many sulfentrazone-containing products that FMC sells for ultimate use by farmers and others are herbicides, such as those among FMC's Spartan® branded products and Authority® branded products. (*Id.* at ¶¶ 13-15) FMC is also the owner by assignment of United States Patent No. 7,169,952 (the "'952 patent"), which relates to a process for manufacturing sulfentrazone. (*Id.* at ¶¶ 11-12)

Summit Argo is engaged in the design, manufacture, importation, and sale in the United States of agricultural products. (*Id.* at ¶ 5) Summit USA and Summit Holding each own a registration issued by the United States Environmental Protection Agency ("EPA") regarding sulfentrazone; the registration held by Summit Holding is that for a formulated sulfentrazone end-use product (i.e., a product that is actually sold to farmers). (D.I. 72, Declaration of Susan Hill ("Hill Decl."), at ¶ 5) Summit Holding sublicenses this registration to Summit USA and a third-party distributor, Tenkoz Inc. ("Tenkoz"), a Georgia-based company. (*Id.* at ¶ 5 & ex. 1)

2. Distribution and Sale of Herbicides in the United States

Herbicide manufacturers sell their herbicides via a three-tier distribution system.

(Corrected Declaration of John Kasper ("Kasper Decl."), D.I. 63 at ¶ 31; Deposition of John Kasper ("Kasper Tr."), D.I. 71, ex. A at 23-25) That is, by and large, the manufacturers sell the products to distributors, who in turn sell those products to retailers, who in turn sell the products to farmers (who are also commonly referred to as "growers"). (Kasper Decl. at ¶¶ 31-33; Kasper Tr. at 23-25)

According to a declaration submitted by Defendants' expert Robert L. Fowler ("Fowler"), the sale of agricultural supplies (including herbicides) from a retailer to a grower does not typically occur in the same manner as one might shop for groceries—whereby a consumer walks through and picks products off of a shelf. (Declaration of Robert L. Fowler ("Fowler Decl."), D.I. 73 at ¶ 6) Instead, growers tend to work one-on-one with salespeople employed by retailers, or with independent agricultural consultants, in order to obtain recommendations for products that meet the grower's agricultural needs. (*Id.*) Due to the interpersonal nature of the herbicide sales process, Fowler states that growers rarely view a product's packaging or labeling before making a purchasing decision. (*Id.* at ¶ 7)

There is some evidence, however, that farmers do at times read herbicide product labels (on boxes in which the product is shipped, or on the individual jugs in which the product is contained) when shopping for the product at a retailer. FMC's Commercial Director for North America, John Kasper ("Kasper"), testified to this effect; Kasper also states that because farmers are required to be familiar with the EPA's requirements for use of the products (which can "only be determined by reading the product labeling"), they "necessarily read the label and become aware of the place of manufacture if the product is accurately labeled[.]" (Kasper Decl. at ¶ 54; Deposition of John Kasper ("Kasper Tr. II"), D.I. 79, ex. B at 160-61) According to Fowler,

however, in those situations where a grower does make a purchasing decision at a retail store (or at a grower meeting where a box or container of a product is displayed), the grower has typically learned about the product and made the purchasing decision through conversations with the retailer or by reading product literature provided by the retailer—not by comparing boxes and containers. (Fowler Decl. at ¶ 7) Fowler will acknowledge only that for some growers, what is written on a herbicide product label "can be" a "factor[,]" but that this is in "different proportion for different people." (Deposition of Robert L. Fowler ("Fowler Tr."), D.I. 79, ex. C at 161)

Growers also select the application method of the herbicide—they may decide to apply the product themselves or to contract with a third party applicator. (Fowler Decl. at ¶ 12) In either case, the herbicidal product is usually purchased and then delivered to a grower's farm or directly to the fields where it will be applied, which is often the first time that a grower will have an opportunity to view a product's packaging. (*Id.*) In those instances where a third-party contractor is hired to apply the product, the grower will often not ever see the delivered product or its packaging. (*Id.*)

According to a declaration submitted by Defendants' expert Fowler, "where and how the active ingredient [in a herbicide product] was made is irrelevant to a grower's purchasing decisions." (*Id.* at ¶ 11) Instead, he asserts that before growers make a purchasing decision regarding herbicides, they want to know "whether a product will address their specific agricultural issues, not whether the ingredients came from another country or whether the seller used an innovative manufacturing process to make the active ingredient." (*Id.*) Fowler cited a number of factors that growers do consider in selecting a particular herbicide, including price, expected crop value, spectrum and duration of weed control, method and timing of application,

ease of use, volatility, product safety and product reliability. (*Id.* at ¶¶ 10-11) He noted that any two herbicidal products are "rarely, if ever, equal on every count[.]" (*Id.* at ¶ 10)

In a deposition, Kasper was also asked what factors growers consider in making purchasing decisions as to herbicidal products (particularly FMC's products). (Kasper Tr. at 102) In response, he cited as factors the biological activity of the product, the ease of its use, its safety, the price of the product, and marketing programs relating to pricing, as well as other specific product characteristics. (*Id.*) He did not specifically mention the product's country of origin as such a factor. (*Id.*)

3. FMC's Evidence Regarding "Consumer Ethnocentrism"

FMC also put forward evidence regarding the concept of "'consumer ethnocentrism'" by way of a declaration from its expert, Professor Naveen Donthu. (Declaration of Professor Naveen Donthu, Ph.D. ("Donthu Decl."), D.I. 20) This term refers to the tendency of consumers to prefer to purchase domestically-manufactured products, in order to assist the domestic economy, increase domestic jobs and further a sense of patriotism. (*Id.* at ¶ 18)

Professor Donthu notes that according to Kasper, the largest market for herbicide products in the United States are Midwestern farmers. (*Id.* at ¶¶ 15, 27; *see also* Kasper Decl. at ¶ 52) Professor Donthu goes on to describe a study that he oversaw of U.S. citizen adult consumers in the American Midwest, in which he found that consumers who exhibited each of three cultural variables (collectivism, masculinity and uncertainty avoidance) reacted negatively to the perceived quality of Japanese products, exhibited less intention to purchase such products and owned fewer such products. (Donthu Decl. at ¶¶ 23-26) Professor Donthu also references source materials that provide data supporting certain generalizations, including that: (1) rural

American Midwesterners tend to embrace a collectivist culture (i.e., a culture that shows love and concern for the societal "in-group"); (2) Midwestern males typically run a very high percentage of Midwestern American farms, and male domination of this industry will result in increased consumer ethnocentrism; and (3) Midwestern American farmers tend to avoid uncertainty. (*Id.* at ¶¶ 28-31)

From all of this, Professor Donthu concludes that "Midwestern American farmers are more likely to exhibit consumer ethnocentric variables that would result in a selection of domestically made goods over foreign made goods all things being equal." (*Id.* at ¶ 32) He therefore opines that "when presented with a choice between a product believed to have been manufactured in the United States (such as [the Blanket 4F product], which has no China-origin statement and the label for which indicates a Georgia, USA location) and a product manufactured in China (such as FMC's [products]), Midwestern American farmers will purchase the product they believe to have been manufactured in the United States." (*Id.*) Professor Donthu states that it is his belief that "a competitive product label falsely indicating or implying that Defendants' product is manufactured in the United States will result in consumer confusion creating sales and, thus, market share, at the expense of a product, such as FMC's product, accurately labeling the foreign country of origin." (*Id.*)

4. History of Manufacture, Sale, Distribution and Labeling of Blanket 4F Product

Summit USA imports sulfentrazone from China and formulates and packages Blanket 4F, which contains sulfentrazone as its active ingredient, and which is used in large agricultural applications. (D.I. 1 at ¶ 20; Hill Decl. at ¶ 6) Summit USA then sells and delivers the formulated and packaged Blanket 4F product to Tenkoz, the distributor of the product. (Hill

Decl. at ¶ 6) In packaging the product for delivery to Tenkoz, Summit USA places the Blanket 4F product into 2.5-gallon jugs, which are then placed in boxes (with two jugs to a box), for shipment on pallets. (*Id.* at ¶ 7)

Summit USA first shipped the Blanket 4F product to Tenkoz in August 2013 for sale in the Fall 2013 herbicide application season; Tenkoz began selling the product in that month. (*Id.* at ¶ 9) During the time period from August 2013 through October 28, 2013, the boxes containing the gallon jugs of the product included exterior labeling, but those labels did not indicate that the Blanket 4F product or any component of it was manufactured in China. (*Id.*; D.I. 26, ex. 12) After October 28, 2013, Summit USA revised this labeling, such that every Blanket 4F product it shipped to Tenkoz thereafter came in a box with labeling marked "Product of China[.]" (Hill Decl. at ¶ 9 & ex. 1) However, the actual jugs containing the Blanket 4F product have never been (neither prior to nor after October 28, 2013) labeled in such a way as to indicate that any part of the product therein was manufactured in China. (D.I. 79 at 1) FMC's Motion for Preliminary Injunction, as its stands now, is focused primarily on remedying alleged harm caused by the content of the Blanket 4F jugs, not the boxes enclosing those jugs. (D.I. 79 at 1)[1]

FMC's and Summit Agro's products are part of the same field of herbicides and are both

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[1] In its Motion for Preliminary Injunction, FMC originally sought relief regarding Count II in the form of an order enjoining Summit Agro and other related entities: (1) "from marketing, selling, offering for sale, distributing, or advertising Blanket 4F, SAUSX-01 and SFZ-4SC" without "clearly marking China as the country of origin of the active ingredient on the product packaging and labeling" and (2) to "recall from the marketplace all SAUSX-01 and SFZ-4SC products that have been placed in the stream of commerce" that were not clearly marked with China as the country of origin of the active ingredient. (D.I. 16 at 2) However, subsequently, FMC has confirmed that its request as to Count II no longer includes the second requested form of injunctive relief—the proposed recall of certain products. (D.I. 79 at 10)

made "for large agricultural applications, including use on food and feed crops for human and animal consumption." (D.I. 1 at ¶¶ 13-14, 20)

B. Procedural Background

On January 16, 2014, FMC filed its Complaint in this Court against Defendants, relating to Summit Agro's sulfentrazone-containing herbicide products (including Blanket 4F). (D.I. 1) The four-Count Complaint included an allegation of infringement of the '952 patent (Count I); a "false designation of origin" claim under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) ("Section 43(a)"), (Count II); a state law deceptive trade practices claim (Count III); and a common law unfair competition claim (Count IV). Counts II, III, and IV are all said to be based on FMC's allegation that when Defendants' Blanket 4F product was sold and shipped in 2013, it did not contain sufficient labeling designating China as the country of origin of the sulfentrazone contained therein. (*Id.* at ¶¶ 42-67).

On March 5, 2014, FMC filed a complaint with the United States International Trade Commission ("ITC"), alleging, *inter alia*, Defendants' infringement of the '952 patent relating to the process for manufacturing sulfentrazone. (D.I. 84 at 1 & exs. A-C) FMC accompanied its ITC complaint with a Motion for Temporary Relief, in which it sought to enjoin Summit Agro from importing sulfentrazone into the United States and from engaging in any commercial activity pertaining to sulfentrazone-containing products.[2] (*Id.*) Within a week thereafter, FMC filed the Motion for Preliminary Injunction in this Court. (D.I. 16) Four days later, Defendants filed the Motion to Dismiss. (D.I. 27)

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[2] In August 2014, an Administrative Law Judge in the ITC matter denied FMC's Motion for Temporary Relief. (D.I. 111)

On April 9, 2014, the ITC instituted an investigation. (D.I. 52) Thereafter, and pursuant to 28 U.S.C. § 1659 ("Section 1659"), the parties stipulated to a stay of the patent infringement portion of this case (Count I), (*id.*; D.I. 84 at 1); Chief Judge Leonard P. Stark subsequently granted that stipulation. In light of that stipulation, there is no dispute that FMC's request for a preliminary injunction in this Court now relates only to the allegations in Count II of the Complaint. (D.I. 71 at 1; D.I. 79 at 1) Similarly, Defendants' Motion to Dismiss now only relates to Counts II through IV. (D.I. 52)

On May 20, 2014, Chief Judge Stark referred the Motion for Preliminary Injunction and Motion to Dismiss to the Court for resolution. (D.I. 82) The Court held oral argument on certain pending motions, including those two motions, on July 9, 2014. The parties thereafter filed notices of subsequent authority and responses thereto with the Court regarding the Motion for Preliminary Injunction, which the Court has reviewed along with the pertinent briefing. (D.I. 111-114)

II. FMC'S MOTION FOR PRELIMINARY INJUNCTION

A. Standard of Review

Preliminary injunctive relief is an "'extraordinary remedy, which should be granted only in limited circumstances.'" *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (quoting *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 586 (3d Cir. 2002)). "'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Id.* (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555

U.S. 7, 20 (2008)). The failure to make a clear showing establishing any of these four elements renders a preliminary injunction inappropriate. *Id.* at 210, 217 (citing *Winter*, 555 U.S. at 22); *see also NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). The movant bears the burden of showing that these four factors weigh in favor of granting the injunction. *Ferring Pharms., Inc.*, 2014 WL 4194094, at *4 (citing *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 192 (3d Cir. 1990)).

B. Discussion

Having carefully reviewed the materials of record, the Court concludes that FMC has not demonstrated that it is likely to succeed on the merits with regard to Count II's "false designation of origin" claim under the Lanham Act. Because FMC was required to meet this burden in order to succeed on its request for a preliminary injunction, the Court recommends that FMC's Motion for Preliminary Injunction be denied. Below, the Court sets out the reasons leading to this conclusion. In doing so, it will not address the evidence as to the other three necessary requirements for a preliminary injunction—whether FMC is likely to suffer irreparable harm, whether the balance of equities tip in FMC's favor, and whether an injunction is in the public interest—since FMC's failure to demonstrate a likelihood of success on the merits is fatal to its motion. *See, e.g., Keurig, Inc. v. Strum Foods, Inc.*, 769 F. Supp. 2d 699, 713 (D. Del. 2011) (addressing only the lack of a likelihood of success on the merits in denying plaintiff's motion for a preliminary injunction as to, *inter alia*, a Lanham Act Section 43(a) claim).

1. What Must FMC Demonstrate to Make Out a Section 43(a) Claim?

FMC first argues that it is likely to succeed on the merits as to Count II because Defendants' labeling for the Blanket 4F product violated the Tariff Act, 19 U.S.C. § 1304(a)

("Section 1304(a)"), and thus, in its view, the Blanket 4F label necessarily "violates [Section 43(a)] of the Lanham Act as well." (D.I. 17 at 14-16) The Tariff Act requires that:

> [E]very article of foreign origin (or its container . . .) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

19 U.S.C. § 1304(a). Section 43(a) of the Lanham Act's proscription against false advertising (the type of Section 43(a) claim at issue here), (D.I. 1 at 48; D.I. 17 at 15), prohibits:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce . . . *any false designation of origin* . . . 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)(1) (emphasis added). The United States Court of Appeals for the Third Circuit has, in turn, set out a five-element test that a plaintiff is required to meet by a preponderance of the evidence in order to prove a Section 43(a) "false designation of origin" claim:

> 1) that the defendant has made false or misleading statements as to his own product [or another's]; 2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; 3) that the deception is material in that it is likely to influence purchasing decisions; 4) that the advertised goods travel[]ed in interstate commerce; and 5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc., 19 F.3d 125, 129 (3d Cir. 1994) (citation omitted); *see also U.S. Healthcare, Inc. v. Blue Cross of*

Greater Phila., 898 F.2d 914, 922-23 (3d Cir. 1990) (citation omitted).

FMC argues that the Blanket 4F label in question amounted to a violation of Section 1304(a) of the Tariff Act, and that such a violation, "without more[,]" is a *per se* violation of Section 43(a) of the Lanham Act. (D.I. 17 at 16) It draws support for this theory from a line of cases in the area, including *Alto Prods. Corp. v. Ratek Indus. Ltd.*, No. 95 Civ. 3314 (LMM), 1996 WL 497027 (S.D.N.Y. Sept. 3, 1996). In *Alto Prods. Corp.*, the United States District Court for the Southern District of New York found that if a defendant's goods are labeled with no marking as to the true country of origin of an article, then that omission of fact (violative of Section 1304(a) of the Tariff Act), without more, amounts to a *per se* violation of Section 43(a) of the Lanham Act. 1996 WL 497027, at *5. The *Alto Prods. Corp.* Court reasoned that this was so because: (1) the omission necessarily equates to the type of false or misleading statement required by the Lanham Act; (2) "[l]ogic dictates" that a consumer viewing such a label will necessarily "assume that [the goods] are American-made, thus creating a likelihood of confusion with goods which are, in fact, American-made"; and (3) the omission necessarily is a material one for the consumer. *Id.*; *see also Bohsei Enters. Co., U.S.A. v. Porteous Fastener Co.*, 441 F. Supp. 162, 164-65 (C.D. Cal. 1977).

The Court, however, finds the other line of decisions in this area, cited by Defendants, (D.I. 71 at 6-7), to be much more persuasive. These cases note that the language of Section 43(a) has been read by many courts to impose no affirmative duty of disclosure; instead, its language, which speaks in terms of "false designation of origin" that amounts to a "misrepresent[ation]" appears to require that a defendant make an actionable affirmative statement in order to have violated the statute. *See, e.g.*, *Milso Indus. Corp. v. Nazzaro*, Civ. No. 3:08CV1026(AWT), 2012

WL 3778978, at *18-20 (D. Conn. Aug. 30, 2012) (citing cases). Indeed, although the Third Circuit has not addressed this particular split in the case law, what is has said about the Lanham Act's requirements—including that a plaintiff must show that a defendant made "false and misleading *statements*"—makes clear that it would agree with Defendants' position. *Johnson & Johnson-Merck Consumer Pharms.*, 19 F.3d at 129 (emphasis added); *see also U.S. Healthcare*, 898 F.2d at 921-23 ("'While it has been stated that a failure to disclose facts is not actionable under [Section] 43(a), it is equally true that a *statement* is actionable [under the statute] if it is affirmatively misleading, partially incorrect, or untrue as a result of failure to disclose a material fact.'") (quoting 2 J. McCarthy, *Trademarks and Unfair Competition* § 27:7B (2d ed. 1984)) (emphasis added). Thus, while an key omission of fact might contribute to a Section 43(a) claim's efficacy, in and of itself an omission is insufficient; the plaintiff must also point to an actionable affirmative statement in order to breathe life into such a claim.[3]

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[3] Additionally, the Court does not agree with the *Alto Prods. Corp.* Court's assertion that "[l]ogic dictates" that a consumer viewing a label with no marking as to country of origin will necessarily "assume that [the goods] are American-made, thus creating a likelihood of confusion with goods which are, in fact, American-made[.]" *Alto Prods. Corp.*, 1996 WL 497027, at *5. It is not clear to the Court why logic would necessarily dictate that conclusion in all circumstances, particularly in an era where foreign-manufactured goods are sold with some frequency in this country. Moreover, the Third Circuit's five-element test for a Section 43(a) Lanham Act claim, as explained below, requires that in the absence of a literally false claim, a plaintiff must put forward evidentiary proof that a statement has actually deceived the intended audience or has a tendency to deceive a substantial portion of that audience. *Novartis*, 290 F.3d at 588; *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993). Thereafter, a "factfinder" reviews this evidence, and determines whether customers were, "in fact, mislead" by the statements at issue. *Johnson & Johnson-Merck Consumer Pharms.*, 19 F.3d at 129-30. Yet the *Alto Prods. Corp.* Court's conclusion seems in conflict with the Third Circuit's approach. That is because the *Alto Prods. Corp.* Court *assumes* in all cases, without any requirement of evidentiary proof, that omission of the manufacturing country of origin deceives consumers into thinking that the product at issue was in fact manufactured in the United States. *Cf. Milso Indus. Corp.*, 2012 WL 3778978, at *19.

The Court also finds persuasive the point raised in *York Grp., Inc. v. Horizon Casket Grp., Inc.*, 459 F. Supp. 2d 567, 577-80 (S.D. Tex. 2006): that were a Tariff Act violation to constitute a *per se* violation of Section 43(a), this would "allow a party under the guise of the Lanham Act to create a private right of action where none exists under the regulatory or statutory scheme." *York Grp., Inc.*, 459 F. Supp. 2d at 580 (citing *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 373-74 (5th Cir. 2002)); *see also Mugworld, Inc. v. G.G. Marck & Assocs., Inc.*, 563 F. Supp. 2d 659, 666 (E.D. Tex. 2007). That is, Congress explicitly did not create a private right of action under Section 1304(a) of the Tariff Act, *see Potter v. Toei Animation Inc.*, 839 F. Supp. 2d 49, 53-54 (D.D.C. 2012); *Mugworld, Inc.*, 563 F. Supp. 2d at 666, and yet were a court to rule that every Tariff Act violation is in turn an automatic violation of the Lanham Act (violations that may be litigated by private citizens), the court would in effect be permitting all Tariff Act violations to be pursued privately. It is difficult to believe that the Third Circuit would interpret the law in a manner that would produce this outcome. *Cf. Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 231 (3d Cir. 1990) (finding that where the Food, Drug and Cosmetic Act or Federal Trade Commission Act did not create an express or implied private right of action, then "what [those Acts] do not create directly, the Lanham Act does not create indirectly, at least not in cases requiring original interpretation of [those] Acts or their accompanying regulations").

Ultimately, then, in order to determine if FMC is likely to succeed on the merits, the Court must assess whether FMC has clearly shown that the requirements for a claim under the

Lanham Act, not the Tariff Act, have been satisfied.[4] A plaintiff must establish all five elements of a Section 43(a) Lanham Act claim set out by the Third Circuit. *See Johnson & Johnson-Merck Consumer Pharms.*, 19 F.3d at 129; *U.S. Healthcare*, 898 F.2d at 922-23. In this case, at a minimum, FMC fails to demonstrate a likelihood of success on each of the first three elements. The parties did not brief the last two elements, (*see* D.I. 71 at 6), and they are not necessary for the Court to reach.

2. False or Misleading Statements/Actual Deception or a Tendency to Deceive

As an initial matter, FMC has not demonstrated that Defendants made the requisite false or misleading statements as to Blanket 4F products (nor that, where required, such statements caused actual deception or had the tendency to deceive a substantial number of consumers).

Liability under Section 43(a) arises if the message or statement at issue is either: (1) literally false; or (2) literally true or ambiguous, but has the tendency to deceive customers. *See Novartis*, 290 F.3d at 586-87; *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993). If a plaintiff proves that a challenged claim is literally false, a court may grant relief without considering whether the buying public was misled. *Novartis*, 290 F.3d at 586; *Johnson & Johnson-Merck Consumer Pharms.*, 19 F.3d at 129. However, if the statement at issue is not literally false, then a plaintiff bears the burden of proof to demonstrate that consumers were actually deceived by the statement at issue and the surrounding circumstances. *Castrol*, 987 F.2d at 943 (noting that in a Section 43(a) case a "plaintiff must prove *either* literally falsity *or*

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[4] For this reason, FMC's argument regarding what constitutes the "outermost packaging" under the meaning of Tariff Act-related regulations, (D.I. 79 at 2-4), is not addressed in this Report & Recommendation.

consumer confusion, but not both") (emphasis in original).[5]

a. Literal Falsity

The Blanket 4F label at issue does not include a literally false statement regarding the origin of sulfentrazone. With regard to literally falsity, the Third Circuit has said the following:

> In analyzing whether an advertisement or product name is literally false, a court must determine, first, the unambiguous claims made by the advertisement or product name, and second, whether those claims are false. . . . A "literally false" message may be either explicit or "conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated." . . . Regardless, only an *unambiguous* message can be literally false. "The greater the degree to which a message relies upon the viewer or consumer to integrate its components and draw the apparent conclusion, however, the less likely it is that a finding of literal falsity will be supported."

Novartis, 290 F.3d at 586-87 (emphasis in original) (internal citations omitted). Determining whether a statement is literally false rests on an analysis of the message in context. *Johnson & Johnson-Merck Consumer Pharms.*, 19 F.3d at 129.

FMC fails to identify a statement on the Blanket 4F label that is unambiguous and literally false. In the Complaint's recitation of Count II, for example, FMC never highlighted any *affirmative statement* at all; instead, in focusing on an alleged Tariff Act violation, it particularly called out Defendant's alleged "deliberate decision to *omit* identification of China as the country

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[5] Put another way, if a plaintiff demonstrates that the first element of the five-element test regarding a Section 43(a) violation is met by way of a literally false statement, it is not required to prove the second element (that there was actual deception or the requisite tendency to deceive). *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 248 (3d Cir. 2011). If the message conveyed is literally true or ambiguous, however, then the plaintiff does need to satisfy the second "actual deception or tendency to deceive" element and needs to present evidentiary proof to do so. *Id.*

of origin" for the Blanket 4F products. (D.I. 1 at ¶ 46 (emphasis added))

In its reply brief and with greater particularity at oral argument, (D.I. 79 at 5; Transcript of July 9, 2014 Oral Argument ("Tr.") at 18), however, FMC now points to an affirmative statement, one referenced earlier in the Complaint: the fact that the Blanket 4F product label noted that the product was "*Distributed by*: Tenkoz, Inc. 1725 Windward Concourse, Suite 1410 Alpharetta, GA 30005[.]" (D.I. 1 at ¶ 21 (emphasis added)) For the sake of completeness, the Court will consider the Motion for Preliminary Injunction as if Count II had, in fact, clearly asserted that this affirmative statement helped give rise to FMC's Section 43(a) claim. But surely, this statement is not explicitly false. If anything, the unambiguous assertion embedded in the statement is explicitly true: it is undisputed that Tenkoz was the distributor of the product, and that Tenkoz is based in Georgia.

Next, FMC argues that when Defendants' label indicates that the Blanket 4F product was distributed by Tenkoz, a Georgia company, Defendants were unambiguously conveying by necessary implication the idea that the product's active ingredient was also made in Georgia (or somewhere else in the United States). Again, the Court cannot agree. Case law in this area (and common sense) dictate that in order to draw that kind of conclusion, a consumer would need to take a number of mental leaps. In other words, the consumer would have to read the label's statement that the product was distributed by a U.S.-based company, *then* note that nothing on the label states where the product ingredients were manufactured, *and then* make the assumption that because a U.S.-based company distributes the product, a U.S.-based company or companies must also manufacture the product's ingredients (including sulfentrazone). This is not, then, a scenario where an audience would recognize the claim as readily as if it had been explicitly

stated; as a result, the statement cannot be considered literally false by necessary implication. *See, e.g.*, *Novartis*, 290 F.3d at 587-88 (noting that a statement that is literally false by necessary implication is one where the "consumer will unavoidably receive a false message from the product's name or advertising" and finding that when a consumer was required to "assume" that "a product that provides 'Night Time' relief is more effective than a product that provides 'Extra Strength' or 'Maximum' relief" this did not amount to such a statement, since the advertising at issue "do[es] not require that this inference will be made"); *Milso Indus.*, 2012 WL 3778978, at *20 (finding that evidence could not support a claim of literal falsity where the company name "Liberty Casket" and iconography of the Statue of Liberty and the American flag were found on caskets that were actually made in China, although these words and symbols "evoke clear associations with the United States of America," because they are "too general to evoke any specific geographical associations or to support an inference that there is an implied claim of domestic manufacture") (internal quotation marks omitted); *see also Keurig, Inc. v. Strum Foods, Inc.*, Civ. No. 10-841-SLR, 2012 WL 4049799, at *12 & n.13 (D. Del. Sept. 13, 2012) (determining that "For use by owners of Keurig® coffee makers" is not "literally false by implication (i.e., unambiguously false)" because while the "statement necessarily implies that [its] cartridges are functionally suitable for use with Keurig coffee makers, it does not necessarily imply that they are up to the same quality standards as the Keurig branded cartridges") (citation omitted).

b. Literally True or Ambiguous Statements that Have the Tendency to Deceive Customers

FMC next argues that even if the Blanket 4F label's statements at issue were not literally false, then they were literally true or ambiguous but still had the tendency to deceive consumers.

In such a circumstance, the Third Circuit has explained that FMC "bears the burden of proving actual deception by a preponderance of the evidence" and that it "cannot obtain relief by arguing how consumers could react; it must show how consumers actually do react." *Castrol*, 987 F.2d at 943 (internal citations omitted).

In order to meet this burden of proof, the Third Circuit has, at times, said that a plaintiff should "have been required to prove [deception] through a consumer survey[.]" *Novartis*, 290 F.3d at 588; *cf. Johnson & Johnson-Merck Consumer Pharms.*, 19 F.3d at 129-30 (noting that the success of such a claim "usually turns on the persuasiveness of a customer survey"). Despite this phraseology, some district courts have suggested that proof in the form of a consumer survey may not be absolutely required, so long as a plaintiff otherwise puts forward "'expert testimony or other evidence'" that could provide sufficient support for the requisite finding of actual deception or tendency to deceive. *QVC, Inc. v. Your Vitamins, Inc.*, 714 F. Supp. 2d 291, 299 (D. Del. 2010); *see also IDT Telecom, Inc. v. CVT Prepaid Solutions, Inc.*, Civil Action No. 07-1076 (GEB), 2009 WL 5205968, at *8 (D.N.J. Dec. 28, 2009).[6]

Here, FMC did not present consumer survey evidence on this issue. (D.I. 71 at 9) Even assuming such a survey is not absolutely required, having reviewed the evidence that FMC did put forward as to consumer confusion, the Court easily concludes that it does not demonstrate that consumers (e.g., farmers) were actually deceived by the relevant portion of the label, nor that the label had a tendency to deceive a substantial portion of farmers.

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[6] In any event, both parties here agree that if FMC cannot show literal falsity, it must, at a minimum, provide sufficient independent proof of consumer confusion. (D.I. 17 at 16-17; D.I. 71 at 8)

In its attempt to demonstrate the requisite amount of customer confusion, FMC points exclusively to the declaration of Professor Donthu. (D.I. 17 at 17-18; D.I. 79 at 7) Yet with the exception of one statement in his final concluding paragraph, Professor Donthu's declaration literally says nothing on the topic of consumer confusion. (Donthu Decl. at ¶¶ 1-32) More specifically, it does not contain any information as to whether any Midwestern farmer (or anyone else) was actually confused by the Blanket 4F label in particular, nor does it contain information as to the likelihood that a farmer (in the American Midwest or otherwise) would be confused by a label that was similar to the Blanket 4F label. (*Id.*) Indeed, other than in that final paragraph, the declaration says nothing even about the general concept of consumer confusion; instead, nearly the entirety of its content is focused on the topic of why Midwestern American farmers would be more likely to want to purchase American-made products in favor of foreign-made products.

Despite this, Professor Donthu concludes his declaration by stating that "a competitive product label falsely indicating or implying that Defendants' product is manufactured in the United States will result in consumer confusion creating sales and, thus, market share, at the expense of a product, such as FMC's product, accurately labeling the foreign country of origin." (*Id.* at ¶ 32; *see also* D.I. 17 at 18 (FMC relying on this conclusion as its sole means of demonstrating customer confusion)) Even putting aside the question of whether such a conclusion (coming after no discernable recitation of facts or data relating to the concept of consumer confusion) could possibly survive a *Daubert* challenge, the absence of evidence to support it is plain. And just as problematically, the conclusion itself is circular—it assumes a label "falsely indicating or implying that Defendants' product is manufactured in the United States[,]" when in fact, no evidence has been put forward to demonstrate that the content of the

Blanket 4F label *actually promotes* such a false implication. For all of these reasons, Professor Donthu's declaration provides no identifiable evidentiary support on the issue of consumer confusion.

Moreover, the evidence of record on a related issue—whether farmers even see labels such as the Blanket 4F label before they make a purchasing decision—further cuts against FMC's position. Here, the evidence of record consists of statements from FMC's Kasper on the one hand, and Defendants' Fowler on the other.

Of those dueling materials, Fowler's provided greater detail. Fowler explained with some specificity how farmers tend to rely on conversations with retail salespersons or agricultural consultants in making herbicide purchasing decisions, conversations that typically take place at the farm, not at the retail location where a product and its label might be prominent. (Fowler Decl. at ¶¶ 6-7, 10) As a result, he noted, farmers "rarely" view a product's packaging or label before deciding to purchase. (*Id.*) Fowler also stated that (whether farmers apply herbicides themselves or hire a third party applicator) the herbicidal product is usually delivered to a grower's farm or directly to the fields for application, such that if farmers even see the product's label prior to application, they often do not do so until well after purchase. (*Id.* at ¶ 12) Kasper, in contrast, addressed this issue in only one paragraph of his 59-paragraph supplemental declaration; there he asserted that because farmers must be familiar with EPA product requirements (which can "only be determined by reading the product labeling"), they "necessarily read the label and become aware of the place of manufacture if the product is accurately labeled[.]" (Kasper Decl. at ¶ 54; *see also* Kasper Tr. II at 160-61)

While the evidence currently of record suggests to the Court that some farmers read product labels before purchasing herbicides like those at issue here, (*see also* Fowler Tr. at 161), it persuasively indicates that in a majority of situations, farmers do not. And so, if a majority of farmers never even see labels (like the Blanket 4F label) before they purchase, then that group of farmers obviously could not be deceived into purchasing herbicidal products (such as Blanket 4F) due to a label's content. This reality would further water down FMC's claim that the Blanket 4F label's content was likely to deceive a "substantial portion" of its intended audience, *see Johnson & Johnson-Merck Consumer Pharms.*, 19 F.3d at 129—if in fact FMC had put forward any measurable proof of such deception in the first place.

For all of the reasons stated above, FMC has not sufficiently demonstrated that it could succeed in proving either of the first two elements of the test for a Section 43(a) false designation of origin claim by a preponderance of the evidence.

3. Materiality

FMC has also not satisfied the third element: it has not sufficiently demonstrated that any deception that might occur is material. In this regard, a plaintiff must demonstrate that the "defendant's misrepresentation is material in that it is likely to influence the purchasing decision[,]" though there is no requirement that the falsification occur willfully and with intent to deceive. *U.S. Healthcare*, 898 F.2d at 922 (internal quotation marks and citations omitted).

FMC points almost exclusively to Professor Donthu's declaration to establish materiality.[7] (D.I. 17 at 17-18; *see also* D.I. 20 at ¶ 32 (Professor Donthu concluding that when

[7] Of course, to be material to a farmer's purchasing decision, the Blanket 4F label and its contents would presumably need to be viewed by a farmer prior to that decision. In this regard, FMC also does cite to portions of Kasper's testimony, referenced in the prior subsection,

presented with a choice between a product "believed to have been manufactured in the United States[,]" such as the Blanket 4F product, and "a product manufactured in China[,]" then "Midwestern American farmers will purchase the product they believe to have been manufactured in the United States.") Even setting aside whether this evidence could survive under *Daubert*, the Court concludes that it is not persuasive, for a number of reasons.

First, Professor Donthu draws significant support for his conclusions from his prior article on consumer ethnocentrism in the American Midwest—but in many respects, the subject matter of that article is far removed from the particular circumstances of this case. That article examined buying preferences of American Midwesterners generally (not American Midwestern farmers or agricultural employees, or even American Midwestern businesspersons), as to their views on purchasing televisions, cars, stereo equipment, cameras, camcorders and VCRs (not herbicides, nor even agricultural products more generally) emanating from Japan (not China), in or prior to 2005 (not in or around 2013). (Donthu Decl. at ¶¶ 22-26; D.I. 71, ex. I at 22, 25) At the extremes, the views of an unemployed urban Midwesterner about whether to purchase a Japanese automobile (instead of an American automobile) in or around 2005 appear to be fairly far afield from a Midwestern commercial farmer's view as to whether to purchase a Chinese-made (or American-made) herbicide product in or around 2013. In his deposition, Professor Donthu acknowledged that the many differences between the subject matter of his prior article

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for the proposition that some farmers "necessarily learn the country of origin of the product in the process of reading the label" before purchase. (D.I. 17 at 17 (citation omitted)) However, in the prior subsection, the Court explained why, in its view, the evidence of record persuasively indicates that a majority of farmers who buy herbicide products like Blanket 4F do not see the products' label before purchase. That reality would obviously lessen the overall degree of impact that country of origin information on the Blanket 4F label (or the lack thereof) would have on the purchasing decisions of farmers.

and the subject matter of this case could be significant. (Deposition of Professor Naveen Donthu ("Donthu Tr."), D.I. 71, ex. B at 36-42; *see also* D.I. 71, ex. I at 36-37 (Professor Donthu and his co-author noting in the article at issue that, were countries other than Japan to be surveyed as part of such a study, this "could result in more insightful and, possibly, different findings"))[8]

Second, in order to further buttress his conclusions, Professor Donthu, who is not an expert on farmers, (Donthu Tr. at 26), relied upon farming data presented at a high level of generality. For example, to support his conclusions as to the impact of masculine decision-making and uncertainty avoidance on the purchasing decisions at issue here, Professor Donthu used generalized data for all United States farmers—as opposed to data that might more specifically target farmers who purchase sulfentrazone (or even herbicide) products. (Donthu Decl. at ¶¶ 31-32; Donthu Tr. at 66-68) The need for data that more specifically goes to the particular herbicide purchasing decisions at issue here is magnified by the fact that Defendants' expert Fowler noted how "many different factors" (including price, expected crop value, spectrum and duration of weed control, method and timing of application, ease of use, volatility, product safety and product reliability) go into a typical farmer's herbicide purchasing decisions. (Fowler Decl. at ¶¶ 10-11)[9] It is further magnified by the fact that when Kasper, FMC's

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[8] Additionally, the record indicates that about 30% of Americans purchasing at least certain FMC sulfentrazone products hail from areas outside of the Midwestern United States. (Kasper Tr. at 225-26) In his deposition, Professor Donthu acknowledged that farmers from outside of the American Midwest could (depending on their cultural orientation) have different views as to the purchasing decisions at issue here than do Midwestern farmers. (Donthu Tr. at 57-59) Thus, to the extent the article does provide any real insight into farmers' buying decisions regarding herbicides and their country of origin, it could only be said to do so with regard to the portion of such purchases in the Midwest.

[9] Indeed, Fowler explained that in his experience, "where and how the active ingredient was made is irrelevant" to that decision. (Fowler Decl. at ¶ 11)

Commercial Director, was asked at his deposition to identify important factors going to farmers' herbicide purchasing decisions, he did not even mention country of origin as one such factor. (Kasper Tr. at 96-97, 102)

Third, even Professor Donthu's ultimate conclusion on materiality is hedged, in a potentially significant way. He concludes that "Midwestern American farmers are more likely to exhibit consumer ethnocentric cultural variables that would result in selection of domestically made goods over foreign made good[s] *all things being equal.*" (Donthu Decl. at ¶ 32 (emphasis added)) But as noted above, both Fowler and Kasper agreed that many, many factors other than manufacturing country of origin go into herbicide purchasing decisions. And the more factors there are that might swing the decision as to such a purchase, the less likely it would be that "all things [would be] equal" in any herbicide purchasing decision. (Fowler Decl. at ¶ 10 (noting that two herbicidal products are "rarely, if ever, equal on every count")) Professor Donthu's declaration does not appear to grapple with this reality, and this further dilutes the impact of his conclusion for the Court.

For all of these reasons, the Court determines that the evidence FMC has put forward as to whether any deception is material is exceedingly weak. It is insufficient to demonstrate that FMC would meet its burden to prove satisfaction of this "materiality" element at trial.

4. Conclusion

Based on all of the above, FMC has not made a clear showing that it is likely to succeed on the merits of its Section 43(a) Lanham Act claim. The evidence of record does not support the conclusion that: (1) Defendants made a false or misleading statement as to their own product; (2) any such statement Defendants did make caused actual deception or at least had the

tendency to deceive a substantial portion of the intended audience; and (3) any such deception, if it existed, was material, in that it was or is likely to influence a farmer's herbicide purchasing decisions. The Court therefore recommends that the Motion for Preliminary Injunction be denied.

III. DEFENDANTS' MOTION TO DISMISS

A. Standard of Review

The sufficiency of pleadings for non-fraud cases is governed by Federal Rule of Civil Procedure 8, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When presented with a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court conducts a two-part analysis. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the court separates the factual and legal elements of a claim, accepting "all of the complaint's well-pleaded facts as true, but [disregarding] any legal conclusions." *Id.* at 210-11. Second, the court determines "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (noting that a complaint must include "more than labels and conclusions" or the "formulaic recitation of the elements of a cause of action," but also that it need only provide "enough facts to state a claim to relief that is plausible on its face"). In assessing the plausibility of a claim, the court must "'construe the complaint in the light most favorable to the plaintiff, and determine whether, under any

reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Fowler*, 578 F.3d at 210 (quoting *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)).

B. Discussion

In the Motion to Dismiss, Defendants assert that the Complaint fails to state a plausible cause of action as to Counts II, III and IV. (D.I. 28) The Court will address each Count in turn.

1. Count II: Lanham Act Claim

As the Court set out above, *see supra* Section II.B.1., in order to make out a Section 43(a) Lanham Act claim, it is not sufficient for a plaintiff to rest its claim solely on the existence of an allegedly false or misleading omission of fact. Instead, the plaintiff must point to an affirmative statement that (in light of the surrounding circumstances) is alleged to be false or misleading and that gives rise to the claim.

A fair reading of Count II indicates that FMC was not, in setting out that claim, intending to rely on anything other than an omission of fact to give life to the alleged Section 43(a) violation. In that regard, FMC focused its assertion of wrongdoing solely on Defendants' alleged "deliberate decision to *omit* identification of China as the country of origin" on the label of the Blanket 4F products. (D.I. 1 at ¶ 46 (emphasis added); *see also id.* at ¶ 44 (asserting that the claim was focused on Defendants' failure to "designate China as the country of origin of [Defendants'] products"); *id.* at ¶ 47 (asserting that Defendants' "disregard for its labeling obligations under the Tariff Act"—i.e., its decision to omit reference to China as the country of origin—was what was asserted to "threaten[] to mislead FMC's distributors" as to this issue, assertedly giving rise to the Lanham Act claim)) FMC's failure to sufficiently identify an

allegedly false or misleading *statement* in articulating the basis for its claim renders Count II subject to dismissal.[10]

2. Count III: Deceptive Trade Practices Claim

Next, the Court concludes that FMC fails to sufficiently allege a plausible claim as to Count III, the deceptive trade practices claim.

In arguing to the contrary, FMC links Count III to the substance of its Lanham Act claim in Count II. That is, it cites to case law for the proposition that "[p]roof of a claim under [Section] 43(a) of the Lanham Act necessarily meets the requirements for a claim under the [Delaware Deceptive Trade Practices Act, or ("DTPA")]." (D.I. 44 at 16 (citing *Deston Therapeutics LLC v. Trigen Labs., Inc.*, 723 F. Supp. 2d 665, 676 (D. Del. 2010))) Again, however, for the reasons set out above, the facts pleaded as to Count II do not, in fact, make out a plausible Section 43(a) claim (due, at a minimum, to FMC's identification of an omission, but not an actionable affirmative statement, made by Defendants).

More problematically, Count III does not actually make clear that it is premised on an alleged violation of the DTPA. Instead, it states that the Count is focused on a "violat[ion of] the common law and/or statutory deceptive trade practices laws of one or more states, including without limitation [the DTPA]." (D.I. 1 at ¶ 55; *see also id.* at ¶ 61) Our Court has ruled that

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[10] In assessing FMC's Motion for Preliminary Injunction, the Court considered whether FMC had sufficiently demonstrated a likelihood of success on the merits as to Count II. In doing so, for the sake of completeness, the Court considered FMC's arguments as to Count II as if FMC had sufficiently identified in the Complaint an affirmative statement that was said to give rise to the claim. Specifically, the Court focused on the reference in paragraph 21 of the Complaint—that the Blanket 4F label stated that Tenkoz "Distributed" the product. *See supra* Section II.B.2.a. The Court's ruling here as to the Motion to Dismiss, however, is that, in fact, Count II *cannot* be fairly read to point to this affirmative statement as giving rise to FMC's Lanham Act claim and that, at a minimum, FMC should amend Count II to correct for that.

this method of pleading a deceptive trade practices claim is insufficient to give a defendant clear notice of plaintiff's claim, and it has ruled that an appropriately pleaded claim "ought to assert, at a minimum, a violation of a particular state's deceptive trade practices act, including allegations of which subsection is violated." *Kimberly-Clark Worldwide, Inc. v. Cardinal Health 200, LLC*, Civil Action No. 11-1228-RGA, 2012 WL 3063974, at *4 (D. Del. July 27, 2012). The Court agrees, and recommends that Count III be dismissed on this ground. To the extent that FMC seeks to amend its Complaint as to Count III, it should, at a minimum: (1) clearly assert in that Count that the claim is brought pursuant to a particular state's deceptive trade practices act (e.g., the DTPA); (2) clearly assert which of the subsections of that act are alleged to be violated, *see* 6 Del. C. § 2532; and (3) more clearly identify the facts pleaded that are said to make out a plausible claim as to the requirements of those particular subsections. *Cf. Deston Therapeutics LLC*, 723 F. Supp. 2d at 676 n.11; *Enzo Life Scis., Inc. v. Digene Corp.*, 295 F. Supp. 2d 424, 428-29 (D. Del. 2003).

3. Count IV: Common Law Unfair Competition Claim

Lastly, the Court concludes that Count IV, the common law unfair competition claim, should also be dismissed.

FMC's Complaint asserts that Count IV is brought pursuant to the "common law of one or more states, including without limitation the common law of Delaware[.]" (D.I. 1 at ¶ 63) It argues that, at a minimum, it has set out a claim under Delaware's common law, (Tr. at 148), which requires that "'the plaintiff has a reasonable expectancy of entering a valid business relationship, with which the defendant wrongfully interferes, and thereby defeats the plaintiff's legitimate expectancy and causes him harm.'" *Ethypharm S.A. v. Abbott Labs.*, 598 F. Supp. 2d

611, 618 (D. Del. 2009) (quoting *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1057 (Del. Super. Ct. 2001)). "Only wrongful interferences will satisfy the tort, as some interferences are seen as justified or privileged under the aegis of competition . . . . Unfair competition, which is not privileged, includes fraud, intimidation, or disparagement." *Int'l Bus. Machs. Corp. v. Comdisco, Inc.*, 1993 WL 259102, at *21 (Del. Super. Ct. June 30, 1993) (internal quotation marks and citations omitted); *see also Del. Solid Waste Auth. v. E. Shore Envtl., Inc.*, No. CIV.A. 1472-K., 2002 WL 537691, at *6 (Del. Ch. Mar. 28, 2002).

The allegations in Count IV do not track the requirements for a Delaware unfair competition claim, as set out above. There is no reference in Count IV to any particular "valid business relationship" of FMC that Defendants are alleged to have interfered with (whether that be with individual FMC distributors or FMC's end-use consumers). Nor is there any articulation of exactly how it is that Defendants' activity is asserted to have wrongfully interfered with the particular FMC business relationship at issue. (*See, e.g.*, Tr. at 143) Defendants are left to guess as to what is being asserted and what facts are alleged to support the particular unfair competition claim set out in Count IV. Ultimately, in that regard, FMC's claim amounts to "an unadorned, the-defendant-unlawfully-harmed me accusation[,]" *Iqbal*, 556 U.S. at 678, and must be dismissed.

III. CONCLUSION

For the reasons set out above, the Court recommends that FMC's Motion for Preliminary Injunction be DENIED and Defendants' Motion to Dismiss be GRANTED.[11] As to the Motion

[11] In light of the nature of the Court's resolution of the Motion for Preliminary Injunction, the Court hereby ORDERS that Defendants' subsequent Emergency Motion for Discovery in Connection with Plaintiff's Motion for Preliminary Injunction, (D.I. 95), which the

to Dismiss, because amendment should be allowed "when justice so requires[,]" Fed. R. Civ. P. 15(a)(2), and because it is not clear that amendment would cause undue prejudice or would be futile (indeed, Defendants do not specifically argue that it would), the Court recommends that FMC be given leave to file an amended complaint addressing the deficiencies outlined above. *See, e.g., Pragmatus AV, LLC v. Yahoo! Inc.*, C.A. No. 11-902-LPS-CJB, 2013 WL 2295344, at *2 (D. Del. May 24, 2013).

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The failure of a party to object to legal conclusions may result in the loss of the right to *de novo* review in the district court. *See Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878–79 (3d Cir. 1987).

The parties are directed to the Court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the District Court's website, located at http://www.ded.uscourts.gov.

Because this Report and Recommendation may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Report and Recommendation. Any such redacted version shall be submitted no later than **November 21, 2014** for review by the Court, along with a clear, factually detailed explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough*

Court had taken under advisement, be DENIED AS MOOT.

of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted).

The Court will subsequently issue a publicly-available version of its Report and Recommendation.

Dated: November 14, 2014

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE