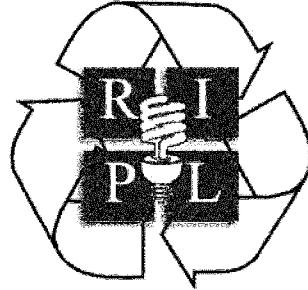


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CONSUMER PROTECTION IN THE ECO-MARK ERA: A PRELIMINARY SURVEY AND ASSESSMENT OF ANTI-GREENWASHING ACTIVITY AND ECO-MARK ENFORCEMENT

ERIC L. LANE

ABSTRACT

We stand at the dawn of the Eco-mark Era—a period in which green branding, advertising environmentally friendly products and services, and touting sustainable business practices will be pervasive and profitable. However, with the rise of green branding comes the temptation of greenwashing—making false or misleading claims regarding environmentally friendly products, services or practices. Instances of greenwashing appear to be on the rise, but we are seeing more activity to combat greenwashing by public enforcement and consumer class actions. In addition, green brand owners are protecting and enforcing their eco-marks, and trademark litigation involving green brands is becoming commonplace. How is the consumer faring amid this flurry of green marketing, greenwashing and eco-mark activity? This article attempts to answer that question through a survey of anti-greenwashing activity and eco-mark litigation and a preliminary assessment of its impact on the green consumer.

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ERIC L. LANE *

INTRODUCTION

We stand at the dawn of the Eco-mark¹ Era—a period in which green branding, advertising environmentally friendly products and services, and touting sustainable business practices will be pervasive and profitable.² The question is no longer whether businesses will highlight their sustainable practices and market environmentally friendly products and services, but how they will do so. Firms across industries are cultivating green brands and eco-marks – trademarks, service marks and certification marks that communicate environmentally friendly products, services or practices—to attract a growing segment of environmentally conscious consumers that are demanding green products and services.³

However, the rise of green branding brings with it the temptation of “greenwashing,” making false or misleading claims regarding environmentally friendly products, services or practices.⁴ Instances of greenwashing appear to be on the rise, and may already be a widespread problem.⁵ Fortunately, anti-greenwashing activity is becoming more common and effective as both public entities and private citizens take on the transgressors that engage in this behavior and hold them accountable.⁶

In addition the prevalence of green brands and eco-marks has led to a spike in trademark litigation between clean tech companies and green organizations.⁷ In

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¹ See GLEN A. GUNDERSON, 2008 DECHERT LLP ANNUAL REPORT ON TRENDS IN TRADEMARKS 1–2, (2008), http://www.dechert.com/library/Trends_in_Trademarks_2008.pdf (offering examples of “eco-marks”—trademarks, service marks and certification marks that are intended to communicate environmentally friendly products, services or business practices).

² JOHN GRANT, THE GREEN MARKETING MANIFESTO 10 (John Wiley & Sons 2007) (describing green marketing as “a creative opportunity, to innovate in ways that make a difference and at the same time achieve business success.”).

³ See *id.* at 33–34 (detailing the growing market interested in green products).

⁴ CHRISTINE MACDONALD, GREEN, INC. 70 (Lyons Press 2008) (“As green marketing took off, greenwashing claims have skyrocketed.”).

⁵ See *id.*

⁶ See *id.* at 70–71 (explaining that the Federal Trade Commission initiated a review of green marketing practices in response to corporate environmental marketing “abuses,” as well as detailing consumer backlash to a green marketing initiative that General Motors initiated, and then quickly abandoned, in 2008).

⁷ See, e.g., Complaint ¶¶ 20–26, Green Bldg. Initiative, Inc. v. Green Globe Int’l, Inc., No. 09-cv-01167-KI (D. Or. Oct. 2, 2009).

such cases, one party typically accuses another of trademark infringement by using a similar mark or some other false indication of source or sponsorship to create consumer confusion.⁸ While these lawsuits are nominally between two non-consumer entities,⁹ consumers nonetheless are affected by the outcomes of such disputes.

At the center of this storm of green branding, greenwashing and eco-mark activity stands the green consumer, whose purchasing decisions are motivated by a desire to preserve the environment.¹⁰ How is the green consumer faring in the Eco-mark Era? After all, although green branding is big business for the brand owners, it is the consumer whom trademark law is intended to protect.¹¹ Whether a consumer is motivated by a particular level of quality, certain product features, safety concerns, or just a desire to use the same iPhone app as all of his friends, trademark law allows that consumer to be confident that the product or service he chooses is the one he wants, not a cheap imitation.¹²

In the eco-mark context, the green consumer is motivated by a desire to consume responsibly, preserve the environment and factor the well being of our planet into her purchasing decisions. Whether one calls it morality, social activism or something else, the collective purchasing decisions of the growing number of green consumers could affect all of us as the behavior of society as a whole shifts in an attempt to curb global warming. Thus, the green consumer protection context is arguably more critical than consumer protection generally and attempts to deceive the green consumer may have a disproportionate effect on society.

This article begins with an overview of the salient features of the Eco-mark Era, including a brief explanation of the characteristics and importance of the green consumer. Next, the article provides an introduction to the concept of greenwashing by defining the term and laying out some of its common manifestations. The article then turns to anti-greenwashing activity and provides a survey of notable enforcement actions and legal challenges to false or misleading environmental claims, including public and private actions. Finally, this article discusses significant eco-mark lawsuits and the impact of this litigation on green consumers. Throughout the article, the author analyzes actual and potential results of significant anti-greenwashing legal activity and eco-mark litigation and from a green consumer protection standpoint. The article concludes that public anti-greenwashing enforcement achieves better results for green consumers and more certainty than private consumer actions, and certification mark infringement litigation yields better results for consumers than private eco-mark enforcement.

⁸ See *id.* ¶¶ 20–24.

⁹ See, e.g., Complaint ¶¶ 5–9, Koh v. S.C. Johnson & Son, Inc., No. 09-cv-00927-HRL (N.D. Cal. Mar. 2, 2009) [hereinafter Koh Complaint] (alleging that defendant engaged in “greenwashing” in marketing its Windex cleaner).

¹⁰ See GRANT, *supra* note 2, at 40 (“[T]here were definite signs that brands that have invested in communicating substantial news in green products and practices are starting to see some rewards in consumer interest and recognition.”).

¹¹ 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:25 (4th ed. 2004).

¹² See *id.*

I. THE DAWN OF THE ECO-MARK ERA

By at least one measure, 2007 marked the start of the Eco-mark Era, the period when green marketing, green branding, advertising environmentally friendly products and services and implementing sustainable business practices really took off. Each year, the Dechert law firm conducts a survey of U.S. trademark filings and examines the data for hints of nascent branding trends. Dechert's 2008 study revealed that the number of trademark applications filed in the U.S. Patent and Trademark Office ("PTO") for marks that contain the term "GREEN" more than doubled in just one year from 1,100 in 2006 to over 2,400 in 2007.¹³ The instances of the terms "CLEAN," "ECO", and "ENVIRONMENT" also rose dramatically in 2007.¹⁴ Despite a drop in overall trademark filings, Dechert's 2009 report showed that the upward trend for eco-marks continued in 2008.¹⁵ From 2007 to 2008 the number of applications for marks containing "GREEN" rose another 32% to more than 3,200, with instances of other common eco-mark elements like "CLEAN," "ECO", and "ENVIRO" also seeing substantial increases.¹⁶ This sharp increase in eco-mark applications in a relatively short period of time indicates that businesses have begun investing heavily in green brands.

The heightened eco-mark activity is a response to a growing demand for sustainable products.¹⁷ The market for environmentally friendly products and services was estimated to be about \$230 billion in 2009.¹⁸ Some marketing consultants predict that this market will double or triple in size in the next several years.¹⁹ This is a particularly important market because the green consumer is not paying attention to trademarks and branding out of a desire to enjoy certain product features or to use the same cell phone as all of his friends.²⁰ Rather, the green consumer embodies a lifestyle.²¹ According to one green marketing expert, green consumers are not a demographic group, but a psychographic one for whom lifestyle, values and emotional desires drive purchasing decisions.²² Marketers even have a new acronym for this market – LOHAS consumers, which stands for lifestyles of

¹³ GUNDERSON, *supra* note 1, at 2.

¹⁴ *Id.*

¹⁵ See GLEN A. GUNDERSON, 2009 DECHERT LLP ANNUAL REPORT ON TRENDS IN TRADEMARKS 4, (2009), http://www.dechert.com/library/Trends_in_Trademarks_2009.pdf.

¹⁶ *Id.*

¹⁷ See GRANT, *supra* note 2, at 42 (citing a 2007 survey that showed that 80 percent of U.S. consumers are interested in purchasing products from environmentally friendly companies).

¹⁸ See Heidi Tolliver-Nigro, *Green Market to Grow 267 Percent by 2015*, MATTER NETWORK, June 29, 2009, <http://www.matternetwork.com/2009/6/green-market-grow-267-percent.cfm> ("The market [for] products and services meeting the needs [of green] consumers is currently estimated at \$230 billion . . . and is predicted to grow to \$845 billion by 2015.").

¹⁹ *See id.*

²⁰ See Press Release, Landor Associates, *Despite Global Economic Meltdown, Consumers Have Increased Appetite for Green* (July 21, 2009) (on file with The John Marshall Review of Intellectual Property Law), *available at* <http://landor.com/index.cfm?do=news.pressrelease&storyid=719&r=2009> (showing that many consumers are making purchasing decisions based upon a company's dedication to producing environmentally friendly products in an environmentally friendly manner).

²¹ *See id.*

²² RICHARD SEIRENI, *THE GORT CLOUD: THE INVISIBLE FORCE POWERING TODAY'S MOST VISIBLE GREEN BRANDS* 288–89 (Chelsea Green Publ'g 2008) (describing the shift in analyzing green consumers from a demographic to a psychographic analysis).

health and sustainability.²³ The green, or LOHAS, consumer is motivated by a desire to consume responsibly, preserve the environment and factor the well being of our planet into her purchasing decisions.²⁴

Green branding, therefore, is more than just the latest marketing ploy to get people to buy products.²⁵ The collective purchasing decisions of the growing number of green consumers have an increasingly significant effect on our planet.²⁶ Toyota Motor Corporation (“TMC”), led by the Prius, a spectacularly successful green brand and product, is a powerful example of this type of effect.²⁷ As of September 2009, Toyota had sold more than two million hybrid vehicles worldwide,²⁸ many to LOHAS consumers. TMC estimates that the two million hybrid vehicles on the road have resulted in a reduction of approximately 11 million tons of carbon dioxide emissions since 1997.²⁹ We will almost certainly need many more examples of this type of consumer shift to greener products if we are to effectively combat global warming.³⁰ Thus, the green consumer protection context is arguably more critical than it is with other types of products, and attempts to deceive green consumers and subvert consumer protection laws likewise affect all of us.

II. THE RISE OF GREENWASHING

Greenwashing, a term created by fusing “green” with “whitewash,” means making false or misleading claims regarding environmentally friendly products, services or practices.³¹ As the dangers of climate change settle into the public consciousness and the number of consumers demanding environmentally friendly products and sustainable practices continues to grow, more brand owners become tempted to make lazy, unsubstantiated green claims, try to deceive green-leaning consumers or engage in other forms of eco-mark abuse to profit from this market. Instances of greenwashing appear to be on the rise, with some reports indicating it is already a widespread problem.³² TerraChoice Environmental Marketing Inc. (“TerraChoice”), a marketing agency, published a report initially called the “Six Sins

²³ *Id.* at 27 (describing the origin of the LOHAS movement).

²⁴ *See id.*

²⁵ *See* Press Release, Landor Associates, *supra* note 20 (detailing that despite the global economic recession, consumers are willing to spend more money on green products).

²⁶ *See* Press Release, Toyota, Worldwide Prius Sales of TMC Hybrids Top 2 Million Units (Sept. 4, 2009) (on file with The John Marshall Review of Intellectual Property Law), *available at* <http://www2.toyota.co.jp/en/news/09/09/0904.html> (showing the environmental impact that the use of Toyota hybrid vehicles has had on the environment).

²⁷ *See id.*

²⁸ *Id.*

²⁹ *Id.* (“As of August 31, 2009, TMC calculates that TMC hybrid vehicles, since 1997, have led to approximately 11 million fewer tons of CO₂ emissions—considered to be a cause of global warming—than would have been emitted by gasoline-powered vehicles of similar size and driving performance”).

³⁰ *See* John M. Broder, *Past Decade Warmest on Record, NASA Data Shows*, N.Y. TIMES, Jan. 21, 2010, at A8 (reporting on data that supports that global warming is a reality).

³¹ *See* TERRACHOICE ENVIRONMENTAL MARKETING, THE SEVEN SINS OF GREENWASHING: ENVIRONMENTAL CLAIMS IN CONSUMER MARKETS 1 (2009) [hereinafter THE SEVEN SINS], *available at* <http://sinsofgreenwashing.org/findings/greenwashing-report-2009/>.

³² *See id.* at i.

of Greenwashing” and later revised to include a seventh sin.³³ The original TerraChoice report found that, of over 1,000 self-declared “green” products reviewed, all but one engaged in some form of greenwash by committing at least one of the sins.³⁴ A British government agency, the Advertising Standards Authority (“ASA”), has seen complaints about U.K. advertisements making environmental claims nearly quadruple in a recent one-year period.³⁵

But what exactly does greenwashing comprise? What is it that consumers and groups like TerraChoice are seeing in the marketplace that concerns them, and in connection with which products is it occurring? Instances of greenwashing typically involve products for which energy efficiency or fuel consumption are big selling points and product differentiators.³⁶ These include products such as energy zapping home appliances, laptop batteries, gas guzzling automobiles and car tires.³⁷ Another area subject to greenwash is products that many consumers fear contain dangerous chemicals or toxins, such as household cleaning products, paint or personal care items.³⁸

The TerraChoice report provides a definition of greenwashing sins and a useful breakdown of the common forms of greenwash.³⁹ Broadly speaking, committing a sin consists of making an environmental claim that is either “demonstrably false” or misleading.⁴⁰ The report breaks the sins into categories: (1) the sin of the hidden trade-off, (2) the sin of no proof of an environmental claim, (3) the sin of a vague environmental claim, (4) the sin of an irrelevant environmental claim, (5) the sin of the lesser of two evils and (6) the sin of fibbing.⁴¹

The sin of the hidden trade-off consists of promoting one particular green attribute of a product while ignoring other aspects of the product or its life cycle that may not benefit, or actually harm, the environment.⁴² The sin of no proof occurs when a claim of environmental benefit cannot be substantiated by the consumer through easily accessible information.⁴³ A vague environmental claim is either ill-

³³ Compare THE SEVEN SINS, *supra* note 31 (identifying seven sins), with TERRACHOICE ENVIRONMENTAL MARKETING, THE SIX SINS OF GREENWASHING: A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS (2007) [hereinafter THE SIX SINS], available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2007/> (identifying six sins).

³⁴ THE SIX SINS, *supra* note 33, at 1.

³⁵ See ADVERTISING STANDARDS AUTHORITY, COMPLIANCE REPORT: ENVIRONMENTAL CLAIMS SURVEY 2008 5 (2008), available at <http://www.asa.org.uk/Resource-Centre/Reports-and-surveys.aspx> (“In 2006, the ASA received 117 complaints about 83 ads making environmental claims. During 2007 we received 561 complaints about 410 ads and, by the end of June, the ASA had received 218 complaints about 160 ads in 2008.”).

³⁶ See, e.g., David Shepardson, GM addresses energy activists; New Web site tackles environmental issues, but bloggers use forum to attack automaker, THE DETROIT NEWS, Feb. 7, 2008, at 2C (detailing General Motors’ efforts to change its image as an not environmentally friendly company). However, many environmental bloggers believed that GM’s actions constitute greenwashing. *Id.*

³⁷ See Complaint ¶1, Mendez v. Intel Corp., No. 09-cv-02889-JW (N.D. Cal. June 26, 2009); ADVERTISING STANDARDS AUTHORITY, *supra* note 35, at 8–9; THE SIX SINS, *supra* note 33, at 9.

³⁸ See THE SIX SINS, *supra* note 33, at 9.

³⁹ *Id.* at 1.

⁴⁰ *Id.* at 1–2.

⁴¹ *Id.* at 1.

⁴² *Id.* at 2.

⁴³ *Id.* at 3.

defined or overly broad such that consumers cannot understand what it means, e.g., “natural” or “chemical free” products.⁴⁴ An irrelevant environmental claim may be true but is unimportant or unhelpful, such as the claim that a product does not contain chlorofluorocarbons (“CFCs”), which were banned almost 30 years ago.⁴⁵ The sin of the lesser of two evils arises when a green claim may be true, but is made about a category of product that has an adverse environmental impact.⁴⁶ Examples are organic cigarettes or “green” herbicides.⁴⁷ The sin of fibbing simply means that the claim is false and cannot be confirmed.⁴⁸

The U.S. Federal Trade Commission (“FTC”) writes and publishes “Green Guides,”⁴⁹ which are instructive for both brand owners and consumers in assessing claims of environmental benefits. The Green Guides provide that such a claim “should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product’s packaging, a service or to a portion or component of the product, package or service.”⁵⁰ Claims should not overstate the environmental benefit, either expressly or by implication.⁵¹ The relative specificity or generalization is a critical factor in determining the deceptiveness of an environmental claim, and the Green Guides warn against claims of general environmental benefits:

“It is deceptive to misrepresent, directly or by implication, that a product, package or service offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package or service has specific and far-reaching environmental benefits [when that is not the case].”⁵²

Encouragingly, the recent rise in greenwashing has created a flood of green skepticism, and anti-greenwashing activity is increasingly visible and effective.⁵³ In addition to the TerraChoice report and the FTC Green Guides, other detailed information about sustainable products, services and business practices is increasingly available to the public.⁵⁴ There are many resources consumers can use to research and verify green claims.⁵⁵ Web sites such as ecolabelling.org provide

⁴⁴ *Id.*

⁴⁵ *See id.* at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See* Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1 (2010).

⁵⁰ *Id.* § 260.6(b).

⁵¹ *Id.* § 260.6(c).

⁵² *Id.* § 260.7(a).

⁵³ *See* Shepardson, *supra* note 36.

⁵⁴ *See* Tresa Baldas, *Consumers to Manufacturers: Show Me the Chemicals ‘Greenwashing’ Claims Spawn Increase in Lawsuits*, 83 MIAMI DAILY BUS. REV. 253, 253 (2009) (stating that blogs are another medium to obtain information to verify green claims).

⁵⁵ *See id.*

independent verification and analysis of logos and labels that purport to communicate that products have met environmental standards.⁵⁶

Moreover, anti-greenwashing forces are well-informed, highly mobilized and very vocal.⁵⁷ Notable transgressions and false claims instantly reach millions of concerned consumers through the green blogosphere.⁵⁸ Green marketing expert Richard Seireeni has coined a term for this phenomenon, which is reflected in the title of his recent book, *The Gort Cloud*. In *The Gort Cloud*, Seireeni describes the “unorganized but interconnected network” that forms a community of like-minded eco-savvy individuals and organizations.⁵⁹ This community comprises, *e.g.*, providers of green products and services, government agencies, non-governmental organizations, certifying organizations, green news organizations, green search engines, social networks, “trendspotter” web sites such as TreeHugger, advocacy groups, bloggers and green lifestyle movements.⁶⁰ The Gort Cloud can make or break a company’s green branding efforts; messages spread through the network can create a public relations nightmare for a company that engages in greenwashing and attach a long-lasting stigma to a transgressor.⁶¹

In the legal arena, both public entities and private citizens are taking on greenwashing, and companies that engage in this behavior are increasingly being held accountable by consumers and governments acting on behalf of their green citizen consumers.⁶² The FTC uses its “Green Guides” to decide whether marketing claims regarding green products are valid or are deemed false advertising and may pursue transgressors.⁶³ Government agencies around the world are using their investigative and enforcement powers to expose and punish greenwashers.⁶⁴ These public enforcement actions tend to involve the “sins” of greenwashing including environmental claims that are misleading or cannot be substantiated.⁶⁵ In addition, some governmental agencies run environmental or energy efficiency certification programs and police them to ensure their standards continue to be met by businesses that participate in the programs.⁶⁶

Courts are more aware of greenwashing and are allowing private lawsuits that target such transgressors to go forward.⁶⁷ In the courtroom, greenwashing is most appropriately classified, and typically litigated, as a species of false advertising.

⁵⁶ Lawrence R. Robins, United States: *It Ain't Easy Being Green*, MONDAQ, Feb. 10, 2009, <http://www.mondaq.com/unitedstates/article.asp?articleid=73976>.

⁵⁷ See SEIREENI, *supra* note 22, at 20–31 (detailing the structure of anti-greenwashing forces).

⁵⁸ See *id.* at 6–7.

⁵⁹ See *id.* at 1.

⁶⁰ See *id.* at 22–31.

⁶¹ See, *e.g.*, *id.* at 6–7 (detailing public relation issues encountered by companies such as, Nestlé, Proctor & Gamble, and BP).

⁶² See Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1 (2010).

⁶³ See *id.*

⁶⁴ Brooks Beard & Bob Falk, *Green Marketing: “Greenwashing,” and False Advertising*, QUARTERLY CLEANTECH UPDATE 3 (Morrison & Foerster LLP 2d Quarter 2008).

⁶⁵ See *id.* at 1–2; see also THE SEVEN SINS, *supra* note 31, at 3, 5 (identifying the seven sins of greenwashing).

⁶⁶ See Energy Conservation Program for Consumer Products, 10 C.F.R. § 430 (2010).

⁶⁷ See, *e.g.*, *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW, 2010 WL 94265, at *3 (N.D. Cal. Jan. 6, 2010) (denying a corporate defendant’s motion to dismiss in a greenwashing case brought by consumers).

Greenwashing claims include federal causes of action under the Lanham Act, such as unfair competition claims under Section 43(a) and, in particular, Section 43(a)(1)(B) false advertising claims.⁶⁸ Greenwashing is also prosecuted under state consumer protection statutes and unfair competition and unfair business practices laws, as well as breach of warranty and unjust enrichment.⁶⁹ Typically, these cases are consumer class actions where the class members bought a product allegedly because of false or misleading advertising of an environmental benefit.⁷⁰ One consistent theme of private consumer greenwashing cases is the accusation that the performance levels or environmental benefits advertised cannot be achieved under normal operating conditions.⁷¹ Another common thread is the charge that a brand owner misrepresents its own green certification program as that of an independent, objective third party.⁷²

III. COMBATING GREENWASHERS

A. *The Public Option*

Government agencies are paying more attention to green advertising claims. Examples include the FTC in the U.S., the ASA in the U.K. and the Australian Competition and Consumer Commission (“ACCC”).⁷³ These consumer watchdogs provide a valuable notice function by setting guidelines – such as the FTC’s Green Guides – that advertisers can review to stay informed of the parameters of

⁶⁸ See 15 U.S.C. § 1125(a) (2006).

(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.

Id.

⁶⁹ E. Howard Barnett, *Green with Envy: The FTC, The EPA, The States and the Regulation of Environmental Marketing*, 1 ENVTL. LAW. 491, 504–06 (1995) (explaining state involvement in the regulation of greenwashing).

⁷⁰ See, e.g., Koh Complaint, *supra* note 9, ¶ 1 (challenging the environmental safety of the cleaning product Windex in a class action lawsuit).

⁷¹ See, e.g., Complaint ¶ 2, *Bernstein v. Toyota Motor Sales, U.S.A., Inc.*, No. 09-cv-03472-MHP (N.D. Cal. July 28, 2009) (alleging that Toyota misrepresented the fuel economy of the Prius under normal driving conditions).

⁷² See THE SEVEN SINS, *supra* note 31, at 5 (“As concern around greenwashing has grown, many consumers and experts have pointed to the important role that third-party certification can play in legitimate green marketing.”).

⁷³ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.7 (2010); AUSTRALIAN COMPETITION & CONSUMER COMMISSION, GREEN MARKETING AND THE TRADE PRACTICES ACT 2 (2008) [hereinafter ACCC ACT], available at <http://www.accc.gov.au/content/item.phtml?itemId=815763&nodeId=69646a6d15e7958a41b40ab5848c6968&fn=Green%20marketing%20and%20the%20Trade%20Practices%20Act.pdf>; Advertising Standards Authority, *ASA Gets Tough on Advertising Green Claims* (June 26, 2007), <http://www.asa.org.uk/Media-Centre/2007/ASA-gets-tough-on-advertising-green-claims.aspx>.

permissible activity and adjust their marketing messages to stay in compliance.⁷⁴ They also serve an investigative and enforcement function.⁷⁵ Agencies such as these have pursued many advertisers and ruled against several purportedly green advertisements.⁷⁶

The ASA, in particular, has made some notable rulings in recent years. In 2007 the British consumer watchdog required that the automaker Lexus pull an ad claiming that its hybrid SUV was “the world’s first high performance hybrid SUV . . . [having] category-leading low CO2 emissions.”⁷⁷ The ad also included the phrase “High Performance. Low Emissions. Zero Guilt.”⁷⁸ The ASA found the ad misleading because it falsely implied that “the car caused little or no harm to the environment.”⁷⁹ The ASA also found that the ad’s fine print was not prominent enough for consumers to read.⁸⁰ This public enforcement action was a victory for LOHAS and any other consumer considering buying the Lexus hybrid SUV for its purportedly environmentally friendly features.

Similarly, an ACCC probe forced Goodyear to admit that its Eagle LS2000 tire does not live up to claims made on the company’s Australian web site that the tire is “environmentally-friendly,” has “minimal environmental impact,” improves fuel economy, and is produced by a process that results in reduced carbon dioxide emissions.⁸¹ As a result of the ACCC investigation, Goodyear admitted that it could not substantiate these claims and deemed them false and misleading.⁸² The company is offering a partial refund to anyone who purchased the tire during the time period these claims were on its web site.⁸³

In the U.S., a deal between the federal government and LG Electronics is another anti-greenwashing success story and a good example of how certification marks are supposed to work for the consumer.⁸⁴ The case involved the U.S.

⁷⁴ See 16 C.F.R. § 260.

⁷⁵ See ACCC ACT, *supra* note 73, at 15 (describing the enforcement powers and remedies available under the ACCC Act).

⁷⁶ *E.g.*, Press Release, Fed. Trade Comm’n, FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive ‘Biodegradable’ Claims (June 9, 2009) (on file with The John Marshall Review of Intellectual Property Law), *available at* <http://www.ftc.gov/opa/2009/06/kmart.shtm>.

⁷⁷ ADVERTISING STANDARDS AUTHORITY, ASA ADJUDICATIONS ON LEXUS (GB) LTD (May 23, 2007), http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42574.htm.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

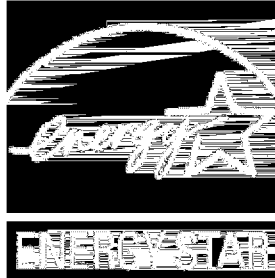
⁸¹ Press Release, Austl. Competition & Consumer Comm’n, Goodyear Tyres Apologises, Offers Compensation for Unsubstantiated Environmental Claims (June 26, 2008) (on file with The John Marshall Review of Intellectual Property Law), *available at* <http://www.accc.gov.au/content/index.phtml?itemId=833219>.

⁸² See *id.* (“Goodyear Tyres has acknowledged that the environment benefits claimed could not be substantiated and has withdrawn all material containing the representations”).

⁸³ *Id.*

⁸⁴ See LG Electronics U.S.A., Inc., v. U.S. Dep’t of Energy, No. 09-2297 (JDB), 2010 WL 151983, *5, *15 (D.D.C. Jan. 18, 2010). A certification mark is different from an ordinary trademark or service mark. See *generally* CRAIG ALLEN NARD ET AL., THE LAW OF INTELLECTUAL PROPERTY 122 (2d ed. 2008) (explaining that instead of indicating the commercial source of a product or service, certification marks communicate that goods or services meet certain quality or manufacturing standards). Certification marks are owned not by the individual businesses, but by the organizations that set the standards. *Id.* A business, in turn, contacts the certifying organization to request evaluation of its goods, services or practices if the business wants to use the

government's Energy Star program, which seeks to aid investment in energy efficient products by providing information that consumers and investors can use to research and compare green product or project choices.⁸⁵ The program communicates product approval to consumers via the ENERGY STAR certification mark:



The U.S. Environmental Protection Agency (“EPA”) owns a U.S. certification mark registration for its Energy Star design⁸⁶ and works with the U.S. Department of Energy (“DOE”) and manufacturers to award the Energy Star certification to products that meet particular energy savings standards.⁸⁷

Many of LG’s refrigerator models are Energy Star certified.⁸⁸ However, ten of the models that had received the ENERGY STAR certification evidently listed erroneous energy usage measurements on their labels.⁸⁹ As it turned out, the refrigerators used more energy than advertised and did not actually meet the efficiency standards required to earn the certification.⁹⁰ Clearly, consumer remedies were in order. The DOE and LG reached a settlement agreement to effect appropriate remedies.⁹¹ As an initial measure, LG voluntarily withdrew the subject models from the ENERGY STAR program.⁹² Moreover, under the terms of the agreement, LG is offering consumers free in-home modifications to improve the

certification mark. *Id.* The certifying organizations permit businesses to use the certification marks only if they satisfy the appropriate standards. *Id.*

⁸⁵ See About ENERGY STAR, http://www.energystar.gov/index.cfm?c=about.ab_index (last visited Mar. 18, 2010).

⁸⁶ U.S. Trademark No. 2,817,628 (filed Mar. 17, 1998).

⁸⁷ See Press Release, U.S. Env’t Protection Agency, EPA Announces Energy Star Label for Computer Servers (May 18, 2009) (on file with The John Marshall Review of Intellectual Property Law), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/3829e1ce26d173e7852575ba004d9518!OpenDocument>.

⁸⁸ *But see* Press Release, LG Electronics USA, Inc., LG Electronics to Temporarily Remove Energy Star Label from Certain French Door Refrigerators (Jan. 19, 2010) (on file with The John Marshall Review of Intellectual Property Law), *available at* <http://www.lge.com/us/press-release/article/lg-electronics-to-temporarily-remove-energy-star-label-from-certain-french-door-refrigerators.jsp>.

⁸⁹ *Id.*

⁹⁰ LG Electronics U.S.A., Inc., v. U.S. Dep’t of Energy, No. 09-2297 (JDB), 2010 WL 151983, *2-3 (D.D.C. Jan. 18, 2010).

⁹¹ Agreement Between the U.S. Dep’t of Energy and LG Electronics, U.S. Dep’t of Energy-LG Electronics U.S.A., Inc., Jan. 14, 2008, (on file with The John Marshall Review of Intellectual Property Law), *available at* http://www.energystar.gov/ia/partners/manuf_res/DOE_LG_SettlementAgreement.pdf.

⁹² *Id.* at 3.

energy efficiency of the products.⁹³ LG also is offering a one-time payment to consumers to cover the energy cost difference between the actual energy use of the product and the amount stated on the original label.⁹⁴ Finally, because the modifications to the refrigerators will not bring them up to ENERGY STAR efficiency levels, going forward LG will make payments to consumers each year over the expected life of the product to make up the difference between the energy use as modified and the listed use on the original label.⁹⁵

This is a good example of a certification program functioning to protect the consumer and combat greenwashing. The certifying organization, in this case the U.S. government, actively policed the companies using the mark and demanded remedial measures when those companies' products were not up to snuff.⁹⁶ Public investigation of and enforcement against greenwashing, of which abuse of certification marks is a part, is making a difference because government agencies have the authority and the resources to shut down and alter the offending activity.

B. Private Actions Against Greenwashers

A second avenue for combating greenwashing is the private court action.⁹⁷ These lawsuits sometimes are prosecuted by individuals but more often take the form of class actions whereby a class of consumers who purchased a particular product or class of products seeks recovery for alleged economic damages.⁹⁸ In the greenwashing context, those damages are allegedly a result of the defendant's deceptive advertising of an environmental benefit of the product or class of products.⁹⁹ Greenwashing legal claims, then, are a particular subset of false advertising that comprise claims under various state and federal U.S. consumer protection statutes, unfair competition and business practices laws and traditional theories of recovery such as breach of warranty and unjust enrichment.¹⁰⁰

1. Fueling False Hopes: The Honda Civic Hybrid

Two lawsuits targeting the Honda Civic Hybrid, an individual action in state court and a federal class action, have achieved some success in combating allegedly deceptive advertising claims and forcing remedial action by the advertiser.¹⁰¹ Both cases highlight the disparities between the EPA's estimated automobile mileage data

⁹³ *Id.*

⁹⁴ *Id.* at 4.

⁹⁵ *Id.*

⁹⁶ *See, e.g.,* LG Electronics U.S.A., Inc., v. U.S. Dep't of Energy, No. 09-2297 (JDB), 2010 WL 151983, *3 (D.D.C. Jan. 18, 2010).

⁹⁷ *See, e.g.,* Paduano v. Am. Honda Motor Co., 169 Cal. App. 4th 1453, 1460 (Cal. Ct. App. 2009) (stating that plaintiff relied on the defendant's advertisements about the vehicle's fuel economy when purchasing the hybrid vehicle).

⁹⁸ *See, e.g.,* Koh Complaint, *supra* note 9, ¶¶ 1, 3.

⁹⁹ *See, e.g.,* Paduano, 169 Cal. App. 4th at 1469–70.

¹⁰⁰ *See, e.g., id.* at 1461.

¹⁰¹ *See* True v. Am. Honda Motor Co., 520 F. Supp. 2d 1175, 1183 (C.D. Cal. 2007); Paduano, 169 Cal. App. 4th at 1487.

and the actual road figures and the question of whether car owners can adjust their driving habits to bridge the gap.¹⁰²

A currently pending lawsuit in California state court involving allegations of false advertising and deceptive claims about the Honda Civic Hybrid is going forward after a state appellate court reversed a trial court decision to dismiss the case.¹⁰³ The plaintiff, Gaetano Paduano, sued American Honda Motor Company (“Honda”) in San Diego County Superior Court in 2005 after becoming disappointed with the gas mileage of his 2004 Civic Hybrid.¹⁰⁴ Specifically, Paduano claimed the vehicle was achieving less than half the miles per gallon (“mpg”) of the EPA number of 48 mpg on the highway.¹⁰⁵

In response to his inquiries, a Honda employee told him he would have to drive the vehicle in a specialized manner to boost the mpg.¹⁰⁶ However, the employee said, “it is very difficult to get MPG on [the] highway and to drive with traffic in a safe manner” and further indicated that the requisite specialized driving “would create a driving hazard.”¹⁰⁷ Paduano was also told that “you cannot drive in a normal manner in order to get the mileage” - the “normal manner” being accelerating and stopping with the flow of traffic and “accelerating as by law you’re supposed to [do] to get on the highway.”¹⁰⁸ The record showed that one Honda employee had concluded that “you can’t do any of those [usual] things” if you want to “obtain better gas mileage.”¹⁰⁹

Paduano brought state and federal warranty claims and California state false advertising and deceptive practices claims relating to statements in Honda’s Civic Hybrid brochures that diverge sharply from what Paduano was told about driving habits and fuel efficiency.¹¹⁰ The brochure tells drivers that they do not have to do “anything special” to get “terrific gas mileage”¹¹¹ and instructs them to “[j]ust drive the Hybrid like [one] would a conventional car and save on fuel bills.”¹¹²

In 2006, the trial court ruled that Honda was entitled to summary judgment and dismissed all of Paduano’s claims.¹¹³ However, California’s 4th District Court of Appeal reversed in part, ruling that Paduano could go forward on the deceptive practices and misleading advertising claims.¹¹⁴ In a 2-1 opinion, the appeals court held that Paduano had put forth enough evidence (and Honda had presented no

¹⁰² See *True*, 520 F. Supp. 2d at 1178; *Paduano*, 169 Cal. App. 4th at 1458.

¹⁰³ See *Paduano*, 169 Cal. App. 4th at 1487.

¹⁰⁴ See *Paduano*, 169 Cal. App. 4th at 1461.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1471.

¹⁰⁷ *Id.* at 1460.

¹⁰⁸ *Id.* at 1472

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1461.

¹¹¹ *Id.* at 1472.

¹¹² *Id.* at 1471.

¹¹³ *Paduano v. Am. Honda Motor Co.*, No. GIC 842441, 2006 WL 6331969, (Super. Ct. of Cal. San Diego Cty. Oct. 31, 2006) (“After full consideration of the evidence, and the written and oral submissions by the parties . . . the Court finds that there is no triable issue of material fact, and that defendant American Honda Motor Co., Inc. is entitled to judgment as a matter of law”).

¹¹⁴ *Paduano*, 169 Cal. App. 4th at 1487 (“[W]e conclude that there exists a genuine issue of material fact as to whether Honda’s advertising statements that suggest that a consumer can drive a Civic Hybrid in the same manner as a conventional vehicle and achieve the superior fuel economy in the EPA estimates, are deceptive and/or misleading.”). The court affirmed the portion of the summary judgment ruling regarding Paduano’s breach of warranty claims. *Id.* at 1467–68.

evidence to the contrary) that a jury could find that the statements in the Honda brochure could mislead a reasonable consumer.¹¹⁵

The court found the evidence of record contradicted the statements in the brochure that a driver need not do “anything special” to achieve superior gas mileage and called into question Honda’s claim that a consumer just has to drive the Hybrid like he would a conventional car.¹¹⁶ The court focused on the Honda representative’s statements to Paduano, particularly those explaining that one cannot drive “in a normal manner” to get the EPA estimated gas mileage.¹¹⁷ According to the court, “[t]here is thus evidence that ‘getting terrific gas mileage’ might not be accomplished as easily as Honda suggests to consumers in its brochure.”¹¹⁸

The court found that Honda had not met its burden of demonstrating that a reasonable person could not find it more likely than not that the claims in its brochure are false and/or misleading.¹¹⁹ Accordingly, the case was remanded to the trial court for further proceedings on Paduano’s claims under the California Consumer Legal Remedies Act and California Unfair Competition Law, the two causes of action relating to deceptive advertising.¹²⁰

The Paduano case is pending as of this writing, so its effectiveness in combating alleged greenwashing remains to be seen. However, the court of appeals decision is a positive one for the green consumer. By remanding the false advertising causes of action—the core greenwashing claims—the court of appeals has, for the time being, prevented Honda from escaping potential liability for statements that may have duped consumers and could mislead prospective future purchasers of the Civic Hybrid.¹²¹ More importantly, with the case going forward corrective action for the allegedly misleading advertising remains a possibility.¹²² Perhaps Paduano’s state court action will achieve specific injunctions regarding some of Honda’s allegedly deceptive statements touting the Civic Hybrid’s fuel economy. Such a result would fill a gap left by a class action settlement in a similar case against Honda in federal court.¹²³

In 2007 John True filed a class action complaint against Honda in the U.S. District Court for the Central District of California alleging that Honda made false and misleading statements regarding the fuel efficiency of the Civic Hybrid.¹²⁴ Specifically, True alleged that Honda advertised that the Civic Hybrid achieved overall fuel efficiency of 49-50 miles per gallon of gasoline when Honda knew or should have known that the actual performance of the vehicle was up to 53% below the advertised fuel efficiency.¹²⁵ The First Amended Complaint cited a road test

¹¹⁵ *Id.* at 1470 (“A fact finder could determine . . . that other statements Honda made in its brochure constitute misrepresentations or are misleading to the public.”).

¹¹⁶ *Id.* at 1470–71.

¹¹⁷ *Id.* at 1472.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1461, 1487.

¹²¹ *See id.* at 1487.

¹²² *See id.*

¹²³ *See* David Shepardson, *26 States Object to Honda Settlement*, THE DETROIT NEWS, Dec. 17, 2009, at B8.

¹²⁴ First Am. Complaint ¶¶ 3–6, True v. Am. Honda Motor Co., Case No. 07-cv-00287-VAP-OP (C.D. Cal. Nov. 19, 2007).

¹²⁵ *Id.* ¶ 4.

performed by Consumer Reports in 2005 that indicated the Civic Hybrid achieved only 26 miles per gallon in city driving.¹²⁶ Some of the specific advertising statements alleged to be deceptive included:

“[w]ith up to 650 miles to every tank of gas, it’s America’s fuel-economy marvel.”¹²⁷

“The most fuel-efficient auto company in America . . . like the 2006 50 MPG Civic Hybrid.”¹²⁸

“[y]ou’ll feel the benefits of the refined gasoline electric powertrain on the Civic Hybrid right there in your wallet at fill up time.”¹²⁹

The suit also contested Honda’s representations as to the fuel savings and resulting cost savings consumers would enjoy by driving a Civic Hybrid.¹³⁰ According to the First Amended Complaint Honda’s web site invites prospective purchasers to use a fuel calculator to “Calculate the Fuel Savings” the consumer would obtain by substituting the Civic Hybrid for his or her current car.¹³¹ The fuel calculator provides precise dollar figures, according to True, without any caveat or disclaimer.¹³²

Finally, True accused Honda of altering federally mandated disclaimer language regarding fuel efficiency estimates that appears on the Monroney Sticker affixed to new automobiles.¹³³ According to the First Amended Complaint, Honda changed the disclaimer language from “[a]ctual mileage will vary” to “[a]ctual mileage may vary” and in some cases omitted the language altogether.¹³⁴ The First Amended Complaint contained four counts, for violations of California state unfair competition law, California state fair advertising law, the California Consumer Legal Remedies Act and for unjust enrichment.¹³⁵

Within a year the case went to mediation, and the parties had reached a settlement in principle.¹³⁶ In August 2009, the court issued a Preliminary Approval Order endorsing the terms of settlement.¹³⁷ The settlement class comprised all persons who purchased or leased a new Honda Civic Hybrid model years 2003 through 2008 in the U.S.¹³⁸ Under the terms of the agreement, Honda is required to produce and disseminate, at its expense, a DVD to all of the class members that demonstrates how to operate and maintain the Civic Hybrid to “maximize and

¹²⁶ *Id.*

¹²⁷ *Id.* ¶ 20.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* ¶ 19.

¹³⁴ *Id.*

¹³⁵ *Id.* ¶ 33–51.

¹³⁶ See Class Action Settlement Agreement and Release at 1, *True v. Am. Honda Motor Co.*, No. 07-cv-00287-VAP-OP (C.D. Cal. Mar. 2, 2009).

¹³⁷ See 2d Revised Prelim. Approval Order, *True v. Am. Honda Motor Co.*, No. 07-cv-00287-VAP-OP (C.D. Cal. Aug. 27, 2009).

¹³⁸ Class Action Settlement Agreement and Release, *supra* note 136, at 9.

optimize” fuel economy.¹³⁹ In addition, each class member gets a choice of three options for monetary payment: a \$1,000 cash rebate for class members who sell or trade in their Civic Hybrid and purchase an eligible Honda vehicle; a \$500 cash rebate for class members who retain their Civic Hybrid and purchase an eligible Honda vehicle; or a \$100 cash payment for class members who made a documented complaint regarding the fuel economy of their Civic Hybrid to Honda or to class counsel.¹⁴⁰

The settlement agreement also includes injunctive relief in the form of corrective measures directed to the deceptive advertising.¹⁴¹ Specifically, Honda agreed to promptly review all of its fuel economy advertising for the Civic Hybrid to modify the disputed disclaimer language.¹⁴² The agreement requires that Honda at least change the language from “actual mileage may vary” to “actual mileage will vary” and use the unequivocal language for at least two years.¹⁴³ Honda further agreed to pay \$2.95 million for attorneys’ fees and expenses.¹⁴⁴ In exchange, the class plaintiffs released Honda from all claims and potential claims relating to the advertising or marketing of the fuel economy of the Civic Hybrid.¹⁴⁵

From the standpoint of the green consumer, this settlement agreement is only a moderate success. The corrective measures required of Honda may, to some extent, better inform consumer decisions as to purchase and use of the Civic Hybrid.¹⁴⁶ Class members who wish to stick with the Civic Hybrid and optimize its fuel economy performance can watch the DVD and adjust their driving behavior accordingly.¹⁴⁷ Prospective future purchasers of the Civic Hybrid will not be victim to the deceptively altered disclaimer language.¹⁴⁸ Of course, the settlement agreement could have been stronger.¹⁴⁹ One improvement would have been to require Honda to include the performance optimization DVD in the materials that accompany the sale

¹³⁹ *Id.* at 5.

¹⁴⁰ *Id.* at 11–13.

¹⁴¹ *Id.* at 14.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 20.

¹⁴⁵ *Id.* at 6–8, 26.

¹⁴⁶ *See generally* Class Action Settlement Agreement and Release, *supra* note 136 (identifying steps to provide information regarding more appropriate advertisements for the Hybrid Civic).

¹⁴⁷ *See id.* at 10.

¹⁴⁸ *See id.* at 14.

¹⁴⁹ *See* State of Tex. Resp. to Pl.’s Supp. Mot. in Supp. of Mot. Prelim. Approval Order at 2–3, True v. Am. Honda Motor Co., No. 07-cv-00287-VAP-OP (C.D. Cal. June 26, 2009). Some parties, including the State of Texas (“State”) and Paduano, filed papers in the case that expressed concern with the settlement terms. *Id.* Specifically, the State argued that the primary monetary relief is suspect because it is premised on the purchase of a new vehicle from Honda, and therefore, is contingent on the Defendant’s future profits. *Id.* The State also pointed out that the DVD does not address the central issue of Honda’s false advertising, but only a perceived lack of knowledge of the class members in optimizing the fuel efficiency of their automobiles. *See Id.* at 3. “[T]he State remains concerned about the adequacy of this element of the settlement . . . the issue in this case is not fuel efficiency: the issue is the allegation that Defendant Honda made false or misleading statements . . .” *Id.* Paduano supported the position of the State, echoing its concerns about the terms of the settlement and noting that, in identifying the strengths and weakness of the case, the parties did not inform the court of the California Court of Appeals decision reversing the summary judgment ruling for Honda. *See* Mem. Gaetano Paduano in Resp. to Supp. Mot. Prelim. Approval at 2, True v. Am. Honda Motor Co., Case No. 07-CV-287 (C.D. Cal. May 28, 2009).

of each Civic Hybrid going forward so not only past purchasers in the settlement class, but all future purchasers enjoy the benefit of the vehicle's full potential. Another would have been specific injunctions regarding some of the other allegedly deceptive advertising that highlighted the Civic Hybrid's fuel economy. A requirement that Honda include a disclaimer in its fuel calculator might also benefit green consumers. Overall, though, this class action slightly improved matters for past and future consumers seeking to reduce their environmental impact by purchasing and driving the Civic Hybrid.¹⁵⁰

2. *Classic Cleaner Class Action*

Turning from cars to cleaning supplies, another green consumer class action has targeted the classic household cleaner, Windex, for alleged deceptive advertising. In March 2009, Wayne Koh filed a class action suit in federal court in U.S. District Court for the Northern District of California against SC Johnson & Son, Inc. ("SC Johnson"), accusing the maker of Windex of misleading consumers about the "environmental safety and soundness" of the cleaning product.¹⁵¹ The complaint states several California state law claims relating to unfair competition, false advertising, unlawful business practices and consumer protection violations.¹⁵²

At issue is the company's use of its GREENLIST trademark¹⁵³ (pictured below), and in particular, its placement of the mark on the Windex product labels.¹⁵⁴



According to the complaint, the reverse side of the product label states, "Greenlist is a rating system that promotes the use of environmentally responsible ingredients."¹⁵⁵

The complaint alleges that the GREENLIST mark and accompanying statement falsely imply that the Greenlist designation is administered by a neutral third party

¹⁵⁰ See Class Action Settlement Agreement and Release, *supra* note 136, at 10–15.

¹⁵¹ See Koh Complaint, *supra* note 9, ¶ 1.

¹⁵² *Id.* ¶¶ 39, 50, 58, 64, 71.

¹⁵³ *Id.* ¶ 3; U.S. Trademark No. 3,518,048 (filed Nov. 8, 2006); U.S. Trademark No. 3,522,370 (filed Mar. 28, 2007). S.C. Johnson owns two U.S. trademark registrations and two pending applications, one each for the word mark GREENLIST and the GREENLIST design mark for various cleaning products: the '048 Trademark; the '370 Trademark. It is perhaps significant that none of the registrations or applications is for a certification mark, which confirms that the marks do not reflect third party certification of S.C. Johnson's products. U.S. PAT. & TRADEMARK OFFICE, U.S. DEPT OF COMMERCE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1306.1 (b) (6th ed., 1st rev. 2009) [hereinafter TMEP].

¹⁵⁴ See Koh Complaint, *supra* note 9, ¶ 3.

¹⁵⁵ Koh Complaint, *supra* note 9, ¶ 4.

when, in fact, it is owned by SC Johnson.¹⁵⁶ Koh states that the use of the term “Greenlist” by environmental groups to designate environmentally friendly products and programs suggests that SC Johnson chose the term with the intent to convey third party approval.¹⁵⁷ Moreover, SC Johnson is representing that Windex is made with natural and environmentally safe ingredients, the complaint states, while the company has not changed the ingredients of the cleaning product.¹⁵⁸ According to the complaint, those ingredients include ethylene glycol n-hexyl ether, which is “not naturally derived and poses serious danger, including death, if ingested by wildlife and small children.”¹⁵⁹ The complaint further alleges that products bearing the GREENLIST mark contain some of the same “non-natural toxic chemicals harmful to the environment and animals” as SC Johnson products without the label.¹⁶⁰

Whether SC Johnson truly is greening its cleaning products remains to be seen. In July of 2009, the company filed a motion to dismiss the First Amended Complaint based on lack of injury to Plaintiff and failure to plead facts sufficient to demonstrate fraud.¹⁶¹ In January 2010 the court denied the motion and held that Mr. Koh’s allegations were sufficient to create a question of fact as to whether the Greenlist label was deceptive.¹⁶² As to the accusations about the Greenlist label, the brief explanation of the Greenlist program on the product label seems to be at least literally true.¹⁶³ Greenlist is indeed a “rating system” to promote the use of “environmentally responsible ingredients.”¹⁶⁴ It just happens that the system was developed and implemented by the maker of the product, not the government or a third party organization.¹⁶⁵ Indeed, SC Johnson’s Greenlist web pages stated that SC Johnson developed the ratings system and that the company itself is screening its ingredients.¹⁶⁶ If the case goes to trial, the key question may be whether those

¹⁵⁶ *Id.* ¶ 6–7 (“[B]y making these representations on Windex packaging, SC Johnson conveys to Plaintiff and other consumers that Windex has been subjected to a neutral, third party’s testing regime that had determined that Windex is environmentally friendly [T]he truth is that the Greenlist ‘seal of approval’ is not the product of a neutral, third party **but instead the work of Defendant SC Johnson itself.**”).

¹⁵⁷ *Id.* ¶ 6.

¹⁵⁸ *Id.* ¶ 8 (“[I]ngredients that constitute Windex are not environmentally sound nor natural, but rather pose a real risk to the environment. Despite the statement that Windex contains ‘Greenlist ingredients,’ Defendant has not changed the ingredients of Windex to remove all environmentally harmful chemicals.”).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* ¶ 39. Koh subsequently filed an amended complaint that added Shout stain remover as a second product bearing the allegedly misleading GREENLIST mark and label. First Am. Complaint ¶ 5, Koh v. S.C. Johnson & Son Inc., No. 09-cv-00927, 2009 WL 94265 (N.D. Cal. May 1, 2009). The First Amended Complaint also sought to bolster plaintiff’s case by providing a brief discussion of the “Seven Sins of Greenwashing” report and the FTC Green Guides. *Id.* ¶ 18.

¹⁶¹ Mot. to Dismiss, Koh v. S.C. Johnson & Son Inc., No. 09-cv-00927, 2009 WL 2701040 (N.D. Cal. July. 7, 2009).

¹⁶² Koh v. S.C. Johnson & Son, Inc., No. C-09-00927 RMW, 2010 WL 94265, at *1 (N.D. Cal. Jan. 6, 2010) (denying S.C. Johnson’s motion to dismiss).

¹⁶³ See Koh Complaint, *supra* note 9, ¶ 4.

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* ¶ 7; U.S. Trademark No. 3,518,048 (filed Nov. 8, 2006); U.S. Trademark No. 3,522,370 (filed Mar. 28, 2007).

¹⁶⁶ S.C. Johnson, Greenlist™ Fact Sheet, <http://www.scjohnson.com/en/press-room/fact-sheets/09-10-2009/Greenlist-Fact-Sheet.aspx> (last visited Mar. 15, 2010).

ingredients truly are “environmentally responsible.”¹⁶⁷ If they are not, the Greenlist label may constitute greenwash.¹⁶⁸

3. *Intel Accused of Inflating Battery Life Claims*

A recent lawsuit accusing Intel of using deceptive practices to inflate figures for laptop battery life echoes ties together a couple of common themes of greenwashing claims, in particular echoing the salient accusations of the Civic Hybrid cases and the Windex suit. In June of 2009, Intel Corporation (“Intel”) was sued in U.S. District Court for the Northern District of California in a proposed class action accusing the computer and chip maker of inflating battery life measurements for laptop computers.¹⁶⁹ Similar to the accusations that the Civic Hybrid fails to achieve the advertised fuel efficiency when driven in an ordinary manner, the named Plaintiff Esmeralda Mendez alleges that Intel battery life falls short of the company’s claimed measurements during normal use of a laptop computer.¹⁷⁰ In addition, as with SC Johnson’s Greenlist label, Mendez’s complaint alleges that Intel’s MobileMark 2007 program falsely implies neutral third party evaluation of battery life.¹⁷¹

According to the complaint, Intel designed a program called MobileMark 2007 that employs flawed testing methodology to inflate battery life measurements.¹⁷²

Mendez alleged that the program tests a laptop computer’s battery life under contrived conditions that differ from how consumers actually use their computers, yielding artificially high battery life measurements.¹⁷³ Specifically, Intel allegedly measures battery life with the processor running at about 7.5% capacity, the screen dimmed to about 20% capacity and the wireless network card turned off.¹⁷⁴ Due to these contrived conditions, Mendez alleges that MobileMark 2007 measured her laptop’s battery life at approximately 2 hours and 45 minutes when her actual life under “reasonable, real-world conditions” is less than an hour.¹⁷⁵

Mendez also has accused Intel of misrepresenting the MobileMark2007 program as being objective and independently run.¹⁷⁶ In particular, the complaint alleges that Intel is using an entity called Business Application Performance Corporation (“BAPCo.”) as a “front” for Intel-developed benchmark programs.¹⁷⁷ According to the

¹⁶⁷ See Koh Complaint, *supra* note 9, ¶ 7 (identifying arguably environmentally irresponsible ingredients of Windex).

¹⁶⁸ See *id.*

¹⁶⁹ Complaint ¶¶ 2–3, Mendez v. Intel Corp., No. 09-cv-02889-JW (N.D. Cal. June 26, 2009) [hereinafter Mendez Complaint].

¹⁷⁰ *Id.* ¶ 11 (“MobileMark 2007 yields battery life measurements that are markedly higher than the actual battery life obtainable by consumers under reasonable, real-life conditions.”).

¹⁷¹ *Id.* ¶ 2 (“Defendant Intel Corporation . . . wrongly present[s] MobileMark 2007 to the public as an objective measure of battery life developed by a supposedly independent entity called BAPCo.”).

¹⁷² *Id.*

¹⁷³ *Id.* ¶ 10.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* ¶¶ 16–17.

¹⁷⁶ *Id.* ¶¶ 2–3, 13–14.

¹⁷⁷ *Id.* ¶ 13.

complaint, Intel concealed the fact that it developed MobileMark 2007 and presented it as an objective independent program by “donating” it to BAPCo. for public release.¹⁷⁸ Indeed, a search of the U.S. Patent and Trademark Office trademark databases reveals that BAPCo. is the owner of record of U.S. Trademark Registration No. 2,733,482 for the MOBILEMARK trademark for “[c]omputer programs that measure the speed, performance and/or battery life of portable computers” in Class 9.¹⁷⁹

Mendez has requested an injunction prohibiting Intel from using third parties such as BAPCo. as a “front” for Intel-developed programs.¹⁸⁰ The complaint also asks for restitution and disgorgement of allegedly wrongfully-obtained profits.¹⁸¹ As of November 2009, the case was still pending and the parties appeared to be discussing alternative dispute resolution options.¹⁸² It is too early to assess the merits of the allegations or the impact of any potential remedies on green consumers. However, if the allegations are true, Intel should undertake remedial measures to change the way the MobileMark 2007 program is internally run and presented to consumers. Unlike Honda, which at least relies on the EPA for mpg assessments, it is Intel that appears to be generating the advertised battery life measurements and has the ability to change them if necessary.¹⁸³ In addition, if Intel is using BAPCo. as a shell entity to imply neutrality, it is worse than SC Johnson, which at least was forthright on its web site about running its certification program.¹⁸⁴

IV. THE RISE OF ECO-MARK LITIGATION

We have seen how companies that engage in greenwashing may be challenged and held accountable by consumers and the government acting on behalf of its citizen consumers.¹⁸⁵ Though trademarks’ (and, necessarily, eco-marks’) original and core purpose is to protect consumers,¹⁸⁶ they are, of course, very important to the companies and organizations that own the marks and build valuable brands in and around them. Accordingly, it is no surprise that the rise of green branding in the Eco-mark Era has spawned a contemporaneous increase in trademark litigation between clean tech companies and organizations. While these lawsuits are

Intel has concealed its development of MobileMark 2007 by positioning it as an objective program for measuring battery life developed by an independent entity called Business Applications Performance Corporation, or BAPCo. Intel has long employed similar practices, developing programs designed to make its products look good and then ‘donating’ them to BAPCO for public release.

Id.

¹⁷⁸ *Id.* ¶¶ 2–3.

¹⁷⁹ U.S. Trademark No. 2,733,482 (filed Mar. 5, 2002).

¹⁸⁰ Mendez Complaint, *supra* note 169, ¶¶ 3, 26.

¹⁸¹ *Id.* ¶ 32.

¹⁸² *See* ADR Certification by Parties and Counsel, No. 09-cv-02889-JW (N.D. Cal. Nov. 30, 2009).

¹⁸³ *See* Mendez Complaint, *supra* note 169, ¶¶ 2–3, 13.

¹⁸⁴ *See* S.C. Johnson, Greenlist™ Fact Sheet, *supra* note 166.

¹⁸⁵ *See* discussion *supra* Part III.

¹⁸⁶ MCCARTHY, *supra* note 11, § 2:33.

nominally between two non-consumer entities, the green consumer nonetheless is affected by such disputes.

A. Suntech Fights Eco-mark Outlaws

Suntech Power Holdings (“Suntech”) is a Chinese solar module manufacturer specializing in building-integrated photovoltaics.¹⁸⁷ Measured by production output of solar modules, Suntech is the world’s leading manufacturer of photovoltaic modules.¹⁸⁸ Suntech has significant operations in the United States and markets and sells its products to U.S. consumers through its U.S. subsidiary, Suntech America, Inc. Sales of Suntech’s products reached approximately \$125 million in 2007, and the company’s promotional expenses for 2006 and 2007 exceeded \$300,000.¹⁸⁹ Suntech owns U.S. Trademark Registration No. 3,111,705 (“705 Registration”) for its SUNTECH design mark (pictured below).¹⁹⁰



The ’705 Registration lists the goods sold under the SUNTECH design mark as, “Solar batteries; electric accumulators for vehicles; accumulator boxes; battery boxes; plates for batteries; batteries for lighting; batteries; battery chargers; galvanic batteries; electric batteries.”¹⁹¹

Suntech also held common law trademark rights in the SUNTECH word mark used in connection with other solar energy products.¹⁹²

In August 2008, Suntech sued its competitor Shenzhen Xintian Solar Technology Co. and its subsidiary Sun Tech Solar (collectively “Sun Tech Solar”) in federal court in San Diego for alleged infringement of the ’705 Registration and its then unregistered SUNTECH word mark.¹⁹³ Suntech did not file an application for registration of its SUNTECH word mark until August 29, 2008, one day after it filed

¹⁸⁷ See SUNTECH, SUNTECH CORPORATE BROCHURE ENGLISH VERSION 12 (2009), available at http://www.suntech-power.com/images/stories/datasheets/Brochures/Suntech_corpbrochure_Final_lo-res_27Apr09.pdf.

¹⁸⁸ Press Release, Suntech, Suntech Achieves World Record Conversion Efficiency for a Multi-Crystalline Module (Aug. 19, 2009) (on file with The John Marshall Review of Intellectual Property Law), available at <http://ir.suntech-power.com/phoenix.zhtml?c=192654&p=irol-newsArticle&ID=1322319&highlight=>.

¹⁸⁹ See Order Granting Plaintiffs’ Mot. for Prelim. Inj. at 2–3, Suntech Power Holdings Co. v. Shenzhen Xintian Solar Tech. Co., No. 08-CV-01582 H (NLS) (S.D. Cal. Oct. 6, 2008).

¹⁹⁰ U.S. Trademark No. 3,111,705 (filed June 6, 2005).

¹⁹¹ *Id.*

¹⁹² See U.S. Trademark No. 3,662,906 (filed Aug. 29, 2008).

¹⁹³ See Complaint ¶¶ 12, 15, Suntech Power Holdings Co. v. Shenzhen Xintian Solar Tech. Co., No. 08-CV-01582 H NLS (S.D. Cal. Aug. 28, 2008) [hereinafter Suntech Complaint]. See also U.S. Trademark No. 3,662,906 (maturing from U.S. Trademark Application No. 77/55,9361, filed August 29, 2008, one day after the complaint was filed). The first use in commerce on the application was listed as 2004. *Id.* The mark subsequently registered August 4, 2009 as U.S. Trademark and Service Mark Registration No. 3,662,906. *Id.*

the complaint.¹⁹⁴ Surely Suntech would have preferred to have the word mark registration to assert against Sun Tech Solar, but the design mark still provided a strong case because the word portion of a design mark is often deemed the dominant feature of the mark for consumer recognition purposes.¹⁹⁵

According to the complaint, Sun Tech Solar's infringing activity included use of the confusingly similar trademarks SUN TECH and SUN TECH SOLAR in connection with the sale of solar modules similar to Suntech's products.¹⁹⁶ In addition, Sun Tech Solar was operating a web site at the address www.solarsuntech.com, which Suntech alleged was confusingly similar to its web site (www.suntech-power.com) and used its SUNTECH mark in the domain name.¹⁹⁷ According to Suntech's court filings, the company became aware of Sun Tech Solar when Suntech's president began to receive phone calls from consumers seeking information about "Sun Tech" branded products not sold by Suntech.¹⁹⁸ After Suntech's counsel's cease and desist demands proved unsuccessful, Suntech filed the lawsuit.¹⁹⁹

Perhaps the most salient allegation, which also apparently dictated the timing of the suit, was that Sun Tech Solar would be exhibiting and advertising using the allegedly infringing trademarks at the Solar Power Conference & Expo - probably the largest international solar power conference - in San Diego on October 13-16, 2008.²⁰⁰ The complaint requested an injunction prohibiting Sun Tech Solar from using the allegedly infringing marks and asked for treble damages and punitive damages.²⁰¹ Shortly after the complaint was filed, Suntech moved for a preliminary injunction asking the court to enjoin Sun Tech Solar's allegedly infringing activity and shut down its booth at the Expo.²⁰²

The court granted the preliminary injunction after finding that Suntech had demonstrated a probability of success on the merits of the case,²⁰³ which, as in most trademark infringement suits, centered on the issue of likelihood of consumer confusion.²⁰⁴ The court noted that the products sold by the parties were closely related if not equivalent, the marks were similar and the parties used similar marketing channels, such as the internet and trade shows, to market their goods.²⁰⁵ Furthermore, there was evidence of actual consumer confusion in the form of the

¹⁹⁴ U.S. Trademark No. 3,662,906 (filed Aug. 29, 2008).

¹⁹⁵ Eric Lane, *Suntech Power Accuses Rival of Trademark Infringement, Asks Court to Nix Expo Booth*, GREEN PATENT BLOG® (Sept. 30, 2008) <http://greenpatentblog.com/2008/09/30/suntech-power-accuses-rival-of-trademark-infringement-asks-court-to-nix-expo-booth>.

¹⁹⁶ See Suntech Complaint, *supra* note 193, ¶ 15.

¹⁹⁷ *Id.* ¶ 16.

¹⁹⁸ See Suntech Power Holdings Co. v. Shenzhen Xintian Solar Tech. Co., No. 08-CV-01582 H (NLS) (S.D. Cal. Oct. 6, 2008) [hereinafter Suntech Prelim. Inj. Order].

¹⁹⁹ See *id.*

²⁰⁰ See Suntech Complaint, *supra* note 193, ¶¶ 18-20.

²⁰¹ *Id.* at 7-8.

²⁰² Mem. of Points and Authorities in Supp. of Pl's. Mot. for Prelim. Inj. at 1, 15, Suntech Power Holdings Co. v. Shenzhen Xintian Solar Tech. Co., No. 08-CV-01582 H NLS (S.D. Cal. Sep. 5, 2008) [hereinafter Suntech Prelim. Inj. Memol].

²⁰³ Suntech Prelim. Inj. Order, *supra* note 198, at 1-2, 4-5.

²⁰⁴ See *id.* at 4-5.

²⁰⁵ See *id.* at 5.

phone calls to Suntech inquiring about Sun Tech's products.²⁰⁶ Accordingly, the court granted Suntech's motion for a preliminary injunction, ordering Sun Tech Solar to cease all use of the SUN TECH and SUN TECH SOLAR marks, as well as any other confusingly similar marks, in connection with solar modules in the U.S.²⁰⁷ The company was specifically ordered to cease operating its www.solarsuntech.com website.²⁰⁸ The injunction order came less than a week before Sun Tech Solar was to show its wares at the Solar Power International 2008 Trade Show in San Diego.²⁰⁹

Oddly, Sun Tech Solar did not oppose the motion for preliminary injunction and never even appeared in the case.²¹⁰ And despite the injunction order, the company displayed its SUN TECH SOLAR mark on signs and promotional material at the Solar Power Expo.²¹¹ The Eco-mark outlaw thumbed its nose at the court and its rival by refusing to cease the infringing activity at the Expo even after being served with a copy of the preliminary injunction.²¹² As a result, the court found Sun Tech Solar in civil contempt and ordered the seizure of the infringing materials.²¹³ The lawsuit ultimately resulted in a default judgment and a permanent injunction against Sun Tech Solar because of the company's continuing infringement and refusal to even show up in court.²¹⁴ The default order stated:

The Defendant has made it clear that it does not intend to cease infringing Plaintiffs trademarks and refuses to acknowledge this litigation.²¹⁵

Suntech also took action against a solar module counterfeiter in Europe.²¹⁶ In February 2009, the company announced that it had been granted preliminary injunctions against the nearly identically-named but unrelated Suntech Power Holding (Hongkong) Co., Limited and two distributors.²¹⁷ The preliminary injunctions prohibited the Hong Kong company and its distributors from selling SUNTECH branded products.²¹⁸ According to Suntech's press release, there were

²⁰⁶ *Id.* at 3.

²⁰⁷ *Id.* at 6–7.

²⁰⁸ *Id.* at 6.

²⁰⁹ *See id.* at 3, 7 (granting the preliminary injunction on October 6 when the Defendant was scheduled to display the SUNTECH mark at a conference and trade show from October 13–16 in San Diego).

²¹⁰ *Id.* at 1.

²¹¹ *See* Order Regarding Seizure of Infringing Materials and Civil Contempt Hearing at 2, Suntech Power Holdings Co. v. Shenzhen Xintian Solar Tech. Co., No. 08-CV-01582 H (NLS) (S.D. Cal. Oct. 16, 2008) [hereinafter Suntech Seizure Order] (noting that the Defendants had displayed the SUNTECH mark at the conference and trade show).

²¹² *See id.*

²¹³ *Id.*

²¹⁴ Order at 5–6, Suntech Power Holdings Co. v. Shenzhen Xintian Solar Tech. Co., No. 08-CV-01582 H (NLS) (S.D. Cal. Jan. 29, 2009) [hereinafter Suntech Default Order].

²¹⁵ *Id.* at 3.

²¹⁶ Press Release, Suntech, Suntech Granted Preliminary Injunctions Against Trademark Infringers (Feb. 6, 2009) (on file with The John Marshal Review of Intellectual Property Law), available at http://phx.corporateir.net/phoenix.zhtml?c=192654&p=irolnewsArticle_pf&ID=1253039&highlight=.

²¹⁷ *Id.*

²¹⁸ *Id.*

only “isolated cases” of imitation products sold, but the company is “determined to proactively protect our customers’ interests and the integrity of the Suntech brand.”²¹⁹

As is typical in counterfeiting situations, the biggest concern from a consumer protection standpoint is the potential quality gap between the products of the known brand and the ripoffs.²²⁰ Dr. Zhengrong Shi, Suntech’s Chairman and CEO, emphasized the high quality and performance of his company’s products:

Due to our stringent quality control programs, Suntech solar products offer industry leading power output guarantees and frequently exceed project performance targets. They have also been utilized in many of the world’s largest and highest profile PV solar projects.²²¹

The obvious concerns with counterfeit solar modules is that they will produce less energy than the genuine articles or won’t last as long.²²² The eco-mark enforcement in Germany should prevent such problems by precluding sales of the knockoff modules going forward.²²³ For consumers who may have been previously duped, Suntech suggests that knockoffs can be identified by a close comparison of the logos and product names on the products sold with the genuine logos and names on the Suntech website, or by contacting the company or an authorized dealer.²²⁴

B. Nordic Battles an Ill Wind

In another case in which the interests of the green consumer appear to align with those of the eco-mark owner, Nordic Windpower (“Nordic”), a Berkeley, California company that designs, manufactures and sells utility-scale wind turbines, has begun to enforce its increasingly valuable trademark.²²⁵ Nordic owns U.S. Trademark Registration No. 3,536,392 for the NORDIC WINDPOWER mark for “wind turbines; wind-powered electricity generators” in Class 7 (“392 Registration”).²²⁶

Nordic’s turbines have a two-blade design rather than the more traditional three-blade rotor common in utility-scale wind.²²⁷ The company’s two-bladed wind

²¹⁹ Press Release, Suntech, *supra* note 216.

²²⁰ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE ECONOMIC IMPACT OF COUNTERFEITING 4 (1998) (“The ultimate victims of unfair competition are the consumers. They receive poor-quality goods at an excessive price and are sometimes exposed to health and safety dangers.”).

²²¹ Press Release, Suntech, *supra* note 216.

²²² See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 220, at 4.

²²³ See Suntech Default Order, *supra* note 214, at 2, 6; Press Release, Suntech, *supra* note 216.

²²⁴ Press Release, Suntech, *supra* note 216.

²²⁵ See, e.g., Complaint ¶¶ 20, 25–26, Nordic Windpower USA, Inc. v. Nordic Turbines, Inc., No. 09-cv-03672-EDL (N.D. Cal. Aug. 11, 2009) [hereinafter Nordic Complaint] (alleging trademark infringement of the Plaintiff’s NORDIC WINDPOWER mark).

²²⁶ U.S. Trademark No. 3,536,392 (filed Feb. 22, 2008).

²²⁷ Nordic Complaint, *supra* note 225, ¶ 12.

turbines utilize its patent pending flexible “teeter hub” technology.²²⁸ The two-blade design minimizes the costs associated with providing blades and simplifies assembly, and the teeter hub technology reduces instances of damage to the turbine assembly by dissipating high winds before they can reach or damage the turbine drive train.²²⁹ Nordic recently received a \$16 million loan guarantee offer from the U.S. Department of Energy that it will use to expand its Idaho assembly plant.²³⁰ The company’s innovations and success have raised the visibility and stature of its NORDIC WINDPOWER eco-mark, and enforcement of the eco-mark recently became a necessity.

In August of 2009, Nordic sued Nordic Turbines, Inc. (“NTI”), a wind turbine manufacturing venture, alleging that NTI’s use of the term “Nordic” to market and sell wind turbines and raise investment capital for the manufacture of wind turbines infringed the ’392 Registration.²³¹ According to the complaint, filed in U.S. District Court for the Northern District of California, NTI changed its name in June 2009 from Vista Dorada Corp. to Nordic Turbines to benefit from Nordic’s goodwill and market presence.²³² In addition to trademark infringement, the complaint alleges that NTI misappropriated text and images from a Nordic confidential management presentation that includes details about Nordic’s patent pending technology.²³³ Nordic also asserts trade dress protection for a blue and orange color scheme the company uses in its advertisements and promotional material (trade dress refers to the visual look and feel of a product or its packaging).²³⁴ The complaint alleges that NTI is using an identical blue and orange color scheme.²³⁵

Nordic has requested a preliminary and permanent injunction with respect to the alleged trademark and trade dress infringement and requests that the court order NTI to do corrective advertising to dispel any consumer confusion.²³⁶ Though more facts may come out as the case develops, the allegations in the complaint paint a disturbing picture for potential purchasers of Nordic Windpower’s wind turbines. As in the Suntech dispute, the products are the same and eco-marks at issue here are effectively identical. Therefore, the likelihood of consumer confusion could be fairly high, and purchasers could end up with products materially different and of inferior

²²⁸ See *id.* ¶ 40; U.S. Patent Application No. 2009/0,317,250 (filed Mar. 24, 2009) (claiming priority to U.S. Provisional Patent Application No. 61/039,003 (filed Mar. 24, 2008)).

²²⁹ Press Release, Nordic Windpower, Nordic Windpower Offered \$16 Million DOE Loan Guarantee to Expand its US Wind Turbine Production (July 2, 2009) (on file with The John Marshall Review of Intellectual Property Law), available at <http://www.nordicwindpower.com/news/releases/NordicDOE070209.pdf> (“Nordic’s technology advance is a proprietary, flexible teeter-hub, which enables a two-rather than three-bladed one mega-watt design, reducing weight and load, and thus, the cost of manufacturing, transportation, installation, and maintenance.”).

²³⁰ Press Release, Nordic, *supra* note 229.

²³¹ Nordic Complaint, *supra* note 225, ¶¶ 71–73.

²³² *Id.* ¶¶ 46–48.

²³³ *Id.* ¶¶ 53–56.

²³⁴ *Id.* ¶¶ 58–59.

²³⁵ *Id.* ¶ 63.

²³⁶ *Id.* at 15, 18.

quality than the ones they intended to buy.²³⁷ Of course, it is too early to adjudge the merits of this case or its impact on green consumers.

As the Suntech and Nordic disputes demonstrate, eco-mark actions between businesses have the potential to benefit consumers.²³⁸ The interests of green brand owners and their consumers are likely to align in cases involving a late comer attempting to benefit from recognition of an established brand or a counterfeiter offering knockoff goods. Similarly, consumer protection typically is a priority in cases such as the next example where the subject eco-marks are certification marks.²³⁹ This is so because certification marks often are not big money brands owned by for-profit corporations, but instead owned and actively policed by organizations or governments for the purpose of educating or raising consumer awareness.²⁴⁰ They are not source identifiers, but signals that the products or services that bear the marks meet certain quality or manufacturing standards.²⁴¹

C. COMPOSTABLE Certification Mark Infringement and Counterfeiting

The Biodegradable Products Institute (BPI) is a New York-based organization that promotes the use and recycling of biodegradable polymeric materials.²⁴² BPI has a labeling program to certify plastic products that will safely and completely biodegrade and compost in accordance with the organization's standards.²⁴³ As with other certification marks, companies apply to BPI to have their products reviewed and, if the products pass muster, the companies can affix BPI's label to them.²⁴⁴ In 2003, BPI got a federal registration for its COMPOSTABLE certification mark (pictured below) for polymeric products.²⁴⁵



According to the certificate of registration, BPI's mark certifies that "the plastic products will compost quickly, completely and safely."²⁴⁶

²³⁷ Nordic Complaint, *supra* note 225, ¶¶ 70–71, 73 (stating that the sight, sound and meaning of NORDIC versus NORDIC WINDPOWER makes the prior mark, the Defendant's mark, infringing).

²³⁸ See discussion *supra* Part IV.A–B.

²³⁹ See discussion *infra* Part IV.A–B.

²⁴⁰ See, e.g., U.S. Trademark No. 3,732,903 (filed Sept. 6, 2005) (declaring Transfair USA, a non-profit organization, the owner of the widely seen FAIR TRADE CERTIFIED mark).

²⁴¹ See NARD ET AL., *supra* note 84, at 122 ("Certification marks may be used by all whose goods or services meet the certification criteria.").

²⁴² Complaint ¶¶ 2–3, Biodegradable Prod. Inst. v. Le, No. 08-cv-03661-FMC-VBK (June 4, 2008) [hereinafter BPI Complaint].

²⁴³ See *id.* ¶ 3.

²⁴⁴ See *id.*

²⁴⁵ U.S. Trademark No. 2,783,960 (filed Sept. 19, 2002).

²⁴⁶ *Id.*

In June of 2008, BPI sued several individuals operating EcoVision Alternatives (EcoVision), a Burlingame, California company that makes biodegradable bags and food containers, in federal court in Los Angeles for federal and state trademark infringement, counterfeiting and unfair competition.²⁴⁷ The complaint alleged that EcoVision infringed BPI's certification mark by selling bags and containers that display the COMPOSTABLE mark and by stating on its web site that its products are "BPI certified" when EcoVision never applied to BPI's labeling program and the products were not certified.²⁴⁸

According to the complaint, this was not the first instance of infringement by the EcoVision crowd. The complaint stated that EcoVision wrongfully used BPI's certification mark previously when the company was operating under the name Biosphere Alternatives (Biosphere).²⁴⁹ At the time, BPI contacted Biosphere to ask them to stop using the mark and subsequently sent a cease and desist letter.²⁵⁰ BPI alleged that EcoVision was acting with full knowledge of its wrongdoing and malicious intent and therefore accused the company of willful infringement.²⁵¹ The counterfeiting claim was a bit unusual for a certification mark infringement suit; counterfeiting is more typical where the infringing goods are high end consumer products like Rolex watches or Gucci handbags (or, as we have seen, solar modules).²⁵² But BPI's motivation for bringing that claim is clear - in the case of willful use of a counterfeit mark, the federal trademark statute provides for a substantial damages award.²⁵³

Happily for green consumers, as in the Suntech cases, this action, too, ended in an injunction. In December of 2008, the case was dismissed subject to the terms of a stipulated permanent injunction order.²⁵⁴ The order prohibited EcoVision, Biosphere and the individual defendants from using BPI's COMPOSTABLE mark or any similar design, placing BPI's name or any similar name on any goods, or suggesting any affiliation with or sponsorship by BPI.²⁵⁵ This result helps to ensure that consumers can rely on the COMPOSTABLE certification mark and BPI's approval in choosing products that truly are biodegradable and compostable.

²⁴⁷ BPI Complaint, *supra* note 242, ¶¶ 4, 6, 22, 27, 32, 35, 41.

²⁴⁸ *Id.* ¶ 14.

²⁴⁹ *Id.* ¶ 18.

²⁵⁰ *Id.*

²⁵¹ *Id.* ¶ 19.

²⁵² *See, e.g.*, *Rolex Watch U.S.A., Inc. v. Brown*, No. 01 CIV.9155 JGK AJP, 2002 WL 1226863, at *1 (S.D.N.Y. June 5, 2002) (finding that counterfeit Rolex watches constituted trademark infringement).

²⁵³ *See* 15 U.S.C. § 1117(c) (2006) ("Statutory damages for use of counterfeit marks. . . . (2) if the court finds that the use of the counterfeit mark was willful, not more than \$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.")

²⁵⁴ Dismissal Order ¶ 1, *Biodegradable Prod. Inst. v. Le*, No. 08-cv-03661-FMC-VBK (C.D. Cal. Dec. 11, 2008).

²⁵⁵ Stipulated Permanent Inj. Order ¶¶ 1-2, *Biodegradable Prod. Inst. v. Le*, No. 08-cv-03661-FMC-VBK (C.D. Cal. Dec. 11, 2008).

D. Voltaix v. NanoVoltaix: Descriptive Marks Head to Head

However, litigation involving green brands in the Eco-mark Era unfortunately does not always bode well for consumers, and the interests of consumers may be threatened or compromised by eco-mark litigation. These disputes sometimes reveal or exacerbate weaknesses in the U.S. intellectual property system. They also have the potential to damage channels of communication between clean tech companies and their consumers or extinguish nascent green brands. Take the case of *Voltaix, LLC v. NanoVoltaix, Inc.*²⁵⁶ Voltaix, LLC (“Voltaix”) is a New Jersey company that manufactures chemicals for the semiconductor and solar energy industries.²⁵⁷ Voltaix owns two U.S. Trademark Registrations, Nos. 2,954,404 (‘404 Registration)²⁵⁸ for the mark VOLTAIX, INC., and 2,992,964 (‘964 Registration),²⁵⁹ for VOLTAIX. Both registrations are for “chemicals used in the manufacture of semiconductors and photovoltaic devices” in Class 1.²⁶⁰



As we will see, the problems with the *Voltaix* suit stem from the suspect validity of the subject trademark registrations. It seems to me the U.S. Patent and Trademark Office (PTO) didn’t get it quite right with respect to Voltaix’s trademark registrations. Section 2(e) of the Lanham Act provides a “descriptiveness” bar to federal registration of trademarks and service marks.²⁶¹ In particular, a trademark applicant cannot get a federal registration for a mark that is “merely descriptive” of the applied-for goods or services.²⁶² The rationale is that registration for such a mark would hamper competitors from communicating to consumers about their goods or services.²⁶³

The mark VOLTAIX as used by Voltaix is arguably merely descriptive of the goods sold under the mark. Consider that the definition of “voltaic” (per Merriam-Webster.com) is “of, relating to, or producing direct electric current by chemical action . . .”²⁶⁴ and that the goods listing for Voltaix’s registered marks is “chemicals

²⁵⁶ 2009 WL 3230887 (D.N.J. Oct. 1, 2009).

²⁵⁷ See Complaint ¶ 12, *Voltaix, LLC v. NanoVoltaix, Inc.*, No. 09-cv-00142-AET-DEA (D.N.J. Jan. 12, 2009) [hereinafter *Voltaix Complaint*].

²⁵⁸ U.S. Trademark No. 2,954,404 (filed Jan. 8, 2004).

²⁵⁹ U.S. Trademark No. 2,992,964 (filed Jan. 9, 2004).

²⁶⁰ See U.S. Trademark No. 2,954,404 (filed Jan. 8, 2004); U.S. Trademark No. 2,992,964 (filed Jan. 9, 2004).

²⁶¹ 15 U.S.C. § 1052(e) (2006).

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) [c]onsists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them.

Id.

²⁶² *Id.*

²⁶³ See *id.*; MCARTHY, *supra* note 11, § 3:6.

²⁶⁴ MERRIAM-WEBSTER, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/voltaic>.

used in the manufacture of semiconductors and photovoltaic devices.”²⁶⁵ One could make a credible argument that the ’404 and ’964 Registrations never should have issued because the marks VOLTAIX and VOLTAIX, INC. describe the goods and their use. But the PTO never raised descriptiveness in the prosecution of the marks and allowed them to be registered.

Armed with two U.S. trademark registrations, Voltaix sued NanoVoltaix, Inc. (“NanoVoltaix”) in federal court in New Jersey in January 2009, accusing the Tempe, Arizona photovoltaics (PV) equipment and technology company of willfully infringing its registered marks. The complaint included claims for federal trademark infringement, false designation of origin under the Lanham Act, unfair competition, state trademark infringement, misappropriation and dilution and a count for cancellation of NanoVoltaix’s U.S. Service Mark Registration No. 3,208,703 (’703 registration).²⁶⁶

The ’703 registration is for the word mark NANOVOLTAIX for “management and business consulting services in the field of nanotechnology” in Class 35.²⁶⁷ NanoVoltaix also owns U.S. Trademark Application No. 77/542,413 (’413 application), filed in August 2008 for the word mark NANOVOLTAIX for PV solar cells and PV and silicon manufacturing equipment in Class 9, installation, repair and maintenance of PV and silicon manufacturing equipment in Class 37, and solar cell and PV system design in Class 42.²⁶⁸

Voltaix asked the court to enjoin the defendant from using the NANOVOLTAIX mark and from further prosecuting the ’413 application.²⁶⁹ The complaint also requested payment of NanoVoltaix’s profits through use of the allegedly infringing mark along with treble damages, punitive damages and attorneys’ fees.²⁷⁰ On willful infringement, the complaint alleged that NanoVoltaix ignored plaintiff’s cease and desist demand.²⁷¹ Voltaix further alleged that one of the principals of NanoVoltaix became aware of plaintiff’s VOLTAIX mark through doing business with Voltaix while working for a previous employer.²⁷² According to the complaint, this principal was involved in selecting the name and mark NANOVOLTAIX.²⁷³

In October of 2009, the court dismissed the case for lack of personal jurisdiction over NanoVoltaix,²⁷⁴ at least temporarily averting precisely the kind of damage the descriptiveness rule is designed to prevent. As of the date of this writing, Voltaix has not yet re-filed the suit in another forum. If it does, this dispute could lead to mixed results for green consumers. If NanoVoltaix is enjoined from using its mark, it would be precluded from using an effective means of communicating to consumers the nature of its goods and services.²⁷⁵ From a consumer communication standpoint, it

²⁶⁵ See U.S. Trademark No. 2,954,404 (filed Jan. 8, 2004); U.S. Trademark No. 2,992,964 (filed Jan. 9, 2004).

²⁶⁶ Voltaix Complaint, *supra* note 257, ¶¶ 41, 46, 52, 55, 58, 62, 65, 68.

²⁶⁷ U.S. Trademark No. 3,208,703 (filed Apr. 15, 2006).

²⁶⁸ U.S. Trademark Application No. 77/542,413 (filed Aug. 8, 2008).

²⁶⁹ Voltaix Complaint, *supra* note 257, at 13–14.

²⁷⁰ *Id.* at 14.

²⁷¹ *Id.* ¶ 32.

²⁷² *Id.* ¶ 30.

²⁷³ *Id.*

²⁷⁴ Voltaix, LLC v. NanoVoltaix, Inc., Civ. No. 09-142 (AET), 2009 WL 3230887, at *1 (D.N.J. Oct. 1, 2009).

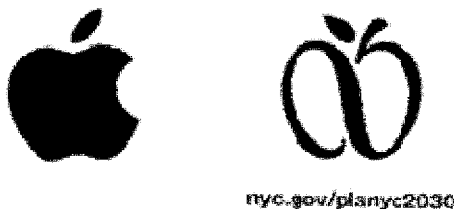
²⁷⁵ See Voltaix Complaint, *supra* note 257, at 13–14.

seems that both Voltaix and NanoVoltaix, and as many other companies in the photovoltaics products and services space as wish to do so, ought to be at liberty to use marks like VOLTAIX and NANOVOLTAIX without the threat of injunction. If the court enjoins NanoVoltaix, as requested by Voltaix, the clear line of communication between NanoVoltaix and its prospective consumers will be at least temporarily or partially blocked.

Other companies in the future may hesitate to use trademarks that contain a “Voltaix” component as well. Though such an outcome might prevent consumer confusion between different sources of products branded under similar “Voltaix” marks, it would, at the same time, restrict the commercial availability of a term that describes a fundamental clean technology application.²⁷⁶ It appears, too, that the PTO will not let Voltaix stand in the way of NanoVoltaix’s trademark application, which was approved for publication in June 2009 despite Voltaix’s prior registrations.²⁷⁷ Such a result could exacerbate this problem if NanoVoltaix gets its eponymous trademark registration and enforces it against its competitors, in turn, removing another descriptive term from the green marketing lexicon.

V. COMPARING APPLES AND APPLES: A CITY’S ECO-MARK IS THREATENED

Another scenario in which eco-mark litigation has the potential to injure green consumers is where eco-marks bump up against established trademarks from outside the clean tech and sustainability sectors. In one such example, computer, iPod and iPhone giant Apple Inc. (“Apple”) decided to fight the Big Apple’s attempt to get federal trademark registrations for its “green” apple logo (below right) for various goods and services, including promoting environmentally-friendly policies and practices and sustainable growth.²⁷⁸



In May of 2007, NYC & Company (“NYC”), New York City’s marketing and tourism organization, filed several applications with the PTO for registration of its apple design alone and in combination with the words “greenyc” and

²⁷⁶ See MERRIAM-WEBSTER, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/voltaic>.

²⁷⁷ U.S. Trademark Application No. 77/542,413 (filed Aug. 8, 2008).

²⁷⁸ Notice of Opp’n, Apple Inc. v. NYC & Co., Opp’n No. 91181984 (Jan. 16, 2008) [hereinafter Apple’s Notice of Opp’n].

“nyc.gov/planyc2030.”²⁷⁹ NYC sought the registrations in several classes for various goods and services ranging from publications for promoting environmentally friendly policies and practices in business, tourism and economic development and public service announcements on sustainable growth to sweatshirts, t-shirts, caps, beverage glassware, dishes and plates.²⁸⁰

In January of 2008, Apple filed a Notice of Opposition²⁸¹ to two of NYC’s trademark applications with the PTO Trademark Trial and Appeal Board. Apple contended that the City’s apple was too similar to its own apple design in “appearance and commercial impression” and would cause consumer confusion and erode the distinctiveness of its iconic apple.²⁸² According to Apple’s Notice of Opposition, both NYC’s design and its own “consist of an apple shaped logo with a stylized detached and convex leaf element angled upwards.”²⁸³ Apple claimed that its trademarks (twelve of which were cited in the Notice of Opposition) enjoy priority dating back to the late 1970’s.²⁸⁴

NYC filed an Answer and a counterclaim for cancellation of Apple’s trademark Registration No. 1,401,237 for mugs, dishes, drinking glasses, beer steins and wine glasses (“’237 Registration”) on the basis that Apple was not using the mark for those goods at the time of its trademark application and that its declaration of use and application for renewal of the ’237 Registration was therefore fraudulent.²⁸⁵ The ’237 Registration was the only mark cited in Apple’s complaint that consists of a traced apple rather than the more prevalent solid apple pictured above on the left.²⁸⁶ NYC’s strategy seemed to be first to knock out the traced apple trademark, which is closer in appearance to its own traced design than Apple’s solid apple logo. Had the traced apple mark been dismissed from the case, NYC would have been up against only the solid apple. Then it could have argued that its design is not similar in overall appearance and commercial impression due to significant differences such as the traced outline and the two internal white spaces (as well as other distinctions, such as Apple’s bite and NYC’s stem).

Though this battle of the apples threatened to rob New York City consumers of an eco-mark, as it turned out, the parties resolved the dispute with a creative solution. The settlement involved an amendment to NYC’s mark, by which NYC deleted the leaf element from its apple design,²⁸⁷ leaving only the stem at the top of the apple (amended design pictured below):

²⁷⁹ U.S. Trademark Application Nos. 77/179,942 (filed May 14, 2007); 77/179,968 (filed May 14, 2007), 77/975,167 (filed May 14, 2007); 77/179,887 (filed May 14, 2007).

²⁸⁰ *E.g.*, U.S. Trademark Application No. 77/179,887 (filed May 14, 2007).

²⁸¹ Apple’s Notice of Opp’n, *supra* note 278. *See* 37 C.F.R. § 2.101 (2009). When the PTO has decided that a trademark application can be registered, the mark and related information is published, and parties who believe they would be damaged by the registration have a prescribed period to oppose registration. *Id.*

²⁸² Apple’s Notice of Opp’n, *supra* note 278, ¶ 12, 13.

²⁸³ *Id.* ¶ 12.

²⁸⁴ *Id.* ¶ 2.

²⁸⁵ Answer to Consolidated Notice of Opp’n and Countercl. for Cancellation ¶¶ 6–8, 10, Apple Inc. v. NYC & Co., Opp’n No. 91181984 (Feb. 26, 2008).

²⁸⁶ Apple’s Notice of Opp’n, *supra* note 278, ¶ 7.

²⁸⁷ Post-Publication Amendment of Application and Conditional Stipulation of Dismissal Without Prejudice at 2, Apple Inc. v. NYC & Co., Opp’n No. 91181984 (June 26, 2008).



Apple apparently believed removal of the “convex leaf element angled upwards” rendered the marks sufficiently distinct that its iconic apple would not be threatened by NYC’s green brand.²⁸⁸

CONCLUSION

As green branding surges in the Eco-mark Era, a growing psychographic group of environmentally conscious consumers faces a barrage of environmental claims from many corners of the market.²⁸⁹ Unfortunately, many of those environmental claims are deceptive, misleading or simply false and increase circulation of products that do not confer the advertised benefits.²⁹⁰ The collective purchasing decisions of green consumers, which represent a shift to sustainable products and services, are increasingly critical to the global effort to combat climate change. Therefore, the multi-faceted response to greenwashing is encouraging. This includes the amorphous network of eco-savvy individuals and organizations now known as the Gort Cloud, informational resources such as TerraChoice, and both public and private legal enforcement activity by government agencies and consumers.

Legal action against accused greenwashers has achieved mixed results. Public enforcement, on the one hand, has been quite effective in combating greenwashers.²⁹¹ Consumer watchdogs such as government agencies have begun to investigate advertising claims suspected to be misleading and police green certification marks.²⁹² As demonstrated in the ASA Lexus case, the ACC probe of Goodyear and the U.S. government’s settlement with LG, these public actions tend to succeed in getting offenders to pull their advertisements and often lead to effective consumer remedies.²⁹³ However, at this early stage in the Eco-mark Era the private consumer action is an as yet unproven mechanism for achieving consistently favorable results for the green consumer. In *True*, the one greenwashing consumer class action to be resolved, the settlement agreement only addressed some of the salient issues and arguably did not rectify Honda’s deceptive advertising claims and methods in the

²⁸⁸ See *id.*; Apple’s Notice of Opp’n, *supra* note 278, ¶ 12.

²⁸⁹ See SEIREENI, *supra* note 22, at 288–89; Press Release, Environmental Leader, 82% of Survey Respondents Plan to Increase Spending on Green Marketing (Jan. 7, 2010) (on file with The John Marshall Review of Intellectual Property Law) (detailing results of a survey that showed an intent by marketers to increase their green marketing).

²⁹⁰ See MACDONALD, *supra* note 4, at 70.

²⁹¹ See, e.g., Agreement Between the U.S. Dep’t of Energy and LG Electronics, *supra* note 91, at 3–4.

²⁹² See *id.*

²⁹³ See, e.g., *id.*

most beneficial manner for green consumers.²⁹⁴ Individual and class actions by green consumers are starting to make some headway against accused greenwashers, but it is too early to fully assess the impact of these cases.

While consumer protection is the primary goal driving greenwashing actions, that is not always the case in eco-mark actions between clean tech companies.²⁹⁵ In these disputes, the parties' motivations derive from the valuable brands in the subject eco-marks.²⁹⁶ In some instances, the green consumer may benefit from the mark owner's enforcement action. The Suntech case, where counterfeit solar modules were removed from the stream of commerce, is an example.²⁹⁷ Also, actions involving certification marks, such as the BPI lawsuit enforcing its standards for biodegradable and compostable products, usually inure to the benefit of green consumers.²⁹⁸

However, eco-mark litigation has the potential to hurt consumers as well. One obvious area where green consumers' interests may be threatened are enforcement actions by owners of trademarks that are outside the clean tech and sustainability sectors. The Apple trademark opposition is an example.²⁹⁹ Less obvious are the eco-mark actions involving suspect eco-mark registrations. The *Voltaix* case demonstrates how lapses in PTO examination of eco-mark applications relating to descriptiveness of the marks can provide fodder for counterproductive suits and threaten clear channels of communication between clean tech companies and their consumers.³⁰⁰

As green consumers continue to make purchasing decisions based on environmental considerations, it is important that they be able to do so based on complete and accurate product information. To that end, public and private organizations should continue to monitor and expose green brands owners that engage in greenwashing and other eco-mark abuse, and legal action should be taken against transgressors when necessary. Government agency investigations and certification mark enforcement litigation appear to be the most successful mechanisms for protecting the interests of green consumers,³⁰¹ and these avenues ought to be used more. Through a combination of vigilance and selective enforcement, we can achieve effective consumer protection in the Eco-mark Era.

²⁹⁴ See *True v. Am. Honda Motor Co., Inc.*, No. EDCV 07-287-VAP (OPx), 2009 WL 838284, at *2 (C.D. Cal. Mar. 25, 2009) (detailing Honda's obligations under the settlement agreement).

²⁹⁵ See, e.g., Order at 8, *Suntech Power Holdings Co., Ltd. v. Shenzhen Xintian Solar Tech. Co., Ltd.*, No. 08-cv-01582 H (NLS) (S.D. Cal. Jan. 29, 2009) (offering an example of a trademark infringement case between two competing companies). The order granted the Plaintiff's motions for default judgment, permanent injunction, and attorneys' fees. *Id.*

²⁹⁶ See *id.* at 2.

²⁹⁷ See *id.*

²⁹⁸ See Order ¶ 1, *Biodegradable Prods. Inst. v. Le*, No. 08-cv-03661-FMC-VBKx (C.D. Cal. Dec. 11, 2008).

²⁹⁹ See Apple's Notice of Opp'n, *supra* note 278, ¶ 1 (showing an example of a trademark opposition that forced the applicant to alter its proposed mark).

³⁰⁰ *Voltaix, LLC v. NanoVoltaix, Inc.*, No. 09-142, 2009 WL 3230887 (D.N.J. Oct. 1, 2009) (dismissing the case for lack of personal jurisdiction).

³⁰¹ See, e.g., Agreement Between the U.S. Dep't of Energy and LG Elec's, USA, Inc., *supra* note 91, at 3-4.